



[2024] IEHC 248

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2022.0000458]

BETWEEN

AN TAISCE - THE NATIONAL TRUST FOR IRELAND

APPLICANT

AND

THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE, IRELAND AND THE
ATTORNEY GENERAL

RESPONDENTS

AND

THE MINISTER FOR AGRICULTURE FOOD AND THE MARINE, FEIRMEOIRÍ AONTUITHE NA
HÉIREANN IONTAOBAITHE TEORANTA AS TRUSTEE OF THE IRISH FARMERS'
ASSOCIATION AND FRANCIE GORMAN, TOM O'CONNOR, PATRICK MURPHY, JOHN
MURPHY AND FRANK ALLEN AS TRUSTEES OF THE IRISH CREAMERY MILK SUPPLIERS
ASSOCIATION (BY ORDER)

NOTICE PARTIES

(No. 2)

JUDGMENT of Humphreys J. delivered on Wednesday the 1st day of May, 2024

1. Before an applicant gets to the merits of any given case, she must firstly plead her claims adequately, and secondly establish the factual groundwork for such claims. In Module I of An Taisce's challenge the validity of Ireland's Fifth Nitrates Action Programme (NAP) and related matters, the applicant came through the pleading-type objections relatively intact. We now come to Module II on the evidential-type controversies. The sheer number of issues brings the total judgment word-count in this case so far to 157,693 words (92,375 + 65,318) – the combined length of two PhD theses and counting. The essential issue we are now dealing with is - has the applicant has shown that its legal points properly arise on the facts?

Judgment history

2. In *An Taisce v. Minister for Housing (No. 1)* [2024] IEHC 129, [2024] 3 JIC 0603 I decided the preliminary pleading-type objections in Module I of the proceedings, and set out a revised issue paper for Module II.

Legal context

3. Broadly, the legal context is set out in the No. 1 judgment. The four relevant directives are:
(i) 91/676 – nitrates directive;
(ii) 92/43 – habitats directive;
(iii) 2000/60 – water framework directive; and
(iv) 2001/42 – SEA directive.

4. Of particular relevance is the fact that the nitrates directive 91/676/EEC in Annex III provides that for each farm or livestock unit, the amount of livestock manure applied to the land each year, including by the animals themselves, shall not exceed the amount of manure containing 170 kg N. With Commission approval, Member States may fix higher amounts on certain conditions.

Facts

5. The facts are broadly outlined in the No. 1 judgment. Further relevant findings of fact are arrived at in the present judgment.

6. To recapitulate, the Fifth NAP was adopted after several rounds of consultation. Approximately 700 submissions were received during the three consultation periods.

7. The first consultation occurred when the first respondent initiated a Fourth Review of Ireland's Nitrates Action Programme – Stage 1 on 25th November, 2020. The applicant made a submission on 14th January, 2021.

8. The first respondent initiated a second public consultation on Ireland's Nitrates Action Programme on 9th August, 2021 with a deadline of 20th September, 2021 for public submissions.

9. The applicant made a submission on 20th September, 2021.

10. A third consultation period focused on the draft Natura Impact Statement and draft Strategic Environmental Assessment for the Programme then took place. The first respondent published a Natura Impact Statement and Strategic Environmental Impact Assessment for the Draft Fifth Nitrates Action Programme on 14th December, 2021 and invited further public submissions by 26th January, 2022. The applicant made a submission on 26th January, 2022.

11. An NIS was prepared by RPS dated 25th February, 2022 (<https://www.gov.ie/pdf/?file=https://assets.gov.ie/218455/0ba5a7df-50dd-431e-a036-03218b30bdc2.pdf#page=null>).

12. A Determination on Appropriate Assessment was made on 4th March, 2022 by the Ecological Assessment Unit (<https://www.gov.ie/pdf/?file=https://assets.gov.ie/218456/47a7d9ee-a69d-4fbf-9c0d-3d8af3c6f7eb.pdf#page=null>).

13. On 9th March, 2022, the Minister for Housing, Local Government and Heritage approved the Fifth Nitrates Action Programme. On the same date, the Minister signed the GAP Regulations.

14. On 22nd April, 2022, the applicant says that the EPA engaged in a global categorisation of hitherto unclassified water bodies in the State.

15. On 29th April, 2022, the Commission extended the derogation previously granted to Ireland for the purposes of Paragraph 2 of Annex III to the Nitrates Directive.

16. The decision was recited in the amending GAP regulations in 2022 (SI No. 393 of 2022) which amend the European Union (Good Agricultural Practice for the Protection of Waters) Regulations 2022 (S.I. No. 113 of 2022). This includes a new art. 35 which allows the occupier of a holding to make application in respect of a given year to the Minister for Agriculture, Food and the Marine for authorisation of a derogation from the requirement that the application to land, on a holding in any year of livestock manure shall not exceed the amount specified in art. 20(1) of S.I. No. 113 of 2022.

17. Separately, the current River Basin Management plan was published in 2018 for the period 2018-2021 – <https://www.gov.ie/en/publication/429a79-river-basin-management-plan-2018-2021/> . It was subject to AA and SEA.

18. The Government has prepared a draft River Basin Management Plan 2022 to 2027 (<https://www.gov.ie/pdf/?file=https://assets.gov.ie/199144/7f9320da-ff2e-4a7d-b238-2e179e3bd98a.pdf#page=null>).

Procedural history

19. The procedural history up to 6th March, 2024 is set out in the No. 1 judgment.

20. To recapitulate, the proceedings were initiated on 31st May, 2022.

21. A motion to admit the case to what is now the Planning and Environment List was issued, returnable for 7th November, 2022, and was granted on that date. Liberty to file an amended statement of grounds was also granted having regard to the pleading requirements in the List.

22. On 21st November, 2022, representatives of the Irish Farmers Association were added as notice parties on the basis of being represented by a single legal team. The second named respondent (Ecological Assessment Unit) was struck out on the grounds of not being a legal entity and as being already covered by having named the relevant Minister. Relief 4 (*certiorari* of the appropriate assessment as distinct from the actual plan) was struck out on the basis that it was unnecessary to be claimed as a separate relief and would be deemed included in the overall claim for *certiorari*. The approach to be taken with the main relief was that a declaration of invalidity would normally be the appropriate relief for a measure of general application (like a statute, statutory instrument, or policy document), but *certiorari* could be claimed as a fall-back (this principle is now reflected in statutory Practice Direction HC124.)

23. On 5th December, 2022, I granted leave on the basis of allowing a further minor amendment to the statement of grounds. The Irish Creamery Milk Suppliers Association was also added as a notice party through its trustees.

24. The substantive notice of motion was returnable for 19th December, 2022, at which point directions were made for exchange of papers. The State's opposition was directed to be filed by 20th February, 2023, but in fact was not filed until 8th March, 2023. Opposition by the notice parties was filed on 31st March, 2023 and 27th April, 2023, and there were then further exchanges of affidavits which went on until 17th July, 2023.

25. A first Module on pleading-type issues was held on 12th to 15th and 18th December, 2023, followed by receipt of further written submissions up to 19th February, 2024, and the No. 1 judgment was delivered on 6th March, 2024.

26. As envisaged in the No. 1 judgment, written submissions on Module II were invited from all parties on the issues in the updated issue paper. An oral hearing was then held on 9th April, 2024 when judgment was reserved.

Relief sought and grounds of challenge

27. The reliefs sought and grounds therefor are set out in the No. 1 judgment. In terms of substantive relief the applicant challenges:

- (i) the Fifth Nitrates Action Programme;
- (ii) the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2022; and
- (iii) Commission Implementing Decision (EU) 2022/696 granting a derogation requested by Ireland pursuant to Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ L 129, 3.5.2022, p. 37–45) [determining the validity of this is a matter for the CJEU if that arises].

Preliminary issues in Module II

28. The State raised a preliminary issue as to whether the factual issues should be determined at this stage at all or whether the EU law issues should be determined first. But it is inappropriate to decide potentially novel issues of EU law if in fact those issues don't properly arise on the facts. The downside from the State's point of view is that one is therefore making factual decisions on what is in effect an assumption that such decisions are necessary (or, phrased alternatively, on the assumption that the applicant might have a point in relation to the substantive legal issues). Taken in isolation from everything else, that gives rise to something approximating to a cry of complaint from the State, although obviously they are too diplomatic to put it quite like that.

29. This illustrates a broader philosophical issue. Virtually any proposition can be made to seem reasonable, provide that one defines the problem narrowly enough. The hellish, character-limited world of social media represents the *reductio ad absurdum* of that approach. The critical insight is the immortal aphorism of Thomas Sowell – there are no solutions, only trade-offs. Whether a particular approach is appropriate can only be judged, not against some imaginary standard of perfection, but in the light of the reasonably available alternative approaches, each of which has its own advantages and disadvantages.

30. So when the State mutters foul to the effect that determining the factual issues means acting "on the assumption that the applicant will make out its case ... without first determining whether those issue[s] in fact require determination in these proce[e]dings" (submissions p. 3), that sounds reasonable in the abstract. But one has to ask what is the alternative. The choice is not between deciding factual issues as proposed versus some mythically perfect Olympian form of procedure that has no downsides and no costs. The choice is between my proposed approach of deciding the potential factual issues first and then turning to decide the law versus the State's suggestion of deciding complex and novel legal issues in a complete factual vacuum. Deciding contested facts first is not just orthodox and conventional but also vastly preferable when judged against the concrete alternative option.

31. For another context where this principle is relevant, a case should not be struck out as meritless at the motion stage if the legal issues would be more appropriately determined after findings of fact: *Glenveagh Homes Ltd v. Lynch* [2024] IEHC 157.

32. Apart from anything else, it makes sense to determine the facts first and then the law (if such arises following the determination of fact) if for no other reason than that legal decisions have potential precedential implications in a way that factual decisions don't. Hence a court should not normally rush into making formal decisions on legal issues that may not in fact arise on the facts of the given case.

33. A second preliminary issue was the complaint that some of the applicant's further submissions were said to go beyond the pleadings. My view on that is that such submissions can generally be construed as only applying within the scope of the issues pleaded, as reflected in the issue paper, and I have attempted to read them in that manner.

34. A final issue was that it was envisaged that the present evidential Module would involve reference to any relevant averments, the applicant majored on the exhibited documents rather than on any averments as such. The opposing parties, predictably, complained about that. But exhibited documents can be of evidential value just as more narrative averments are, especially in a public law context where actors exercising State power must assist the court in accessing the relevant materials and facts. Whether such documents are of sufficient evidential value is explicitly or implicitly dealt with in my conclusions later in this judgment.

35. Insofar as for example the State's deponents, who can be presumed to have appropriate knowledge and experience, in affidavits characterised the assessments as complete, that is not automatically decisive on all issues. An evaluative assertion that AA was completely adequate is in effect an attempt to make a legal submission or posit the ultimate issue in evidential form, which is not automatically admissible evidence or something that has to be accepted unless contradicted by cross-examination.

36. Reliance was placed on the judgment of Holland J. in *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IEHC 146, [2022] 3 JIC 1603:

"278. In *Reid #2* [[2021] IEHC 362], Humphreys J. identified the test as 'whether the applicant has demonstrated that a 'reasonable expert' (a reasonable person with the relevant sufficient expertise and aware of, and in a position to fully understand and properly evaluate, all the material before the decisionmaker) could have a reasonable scientific doubt as to whether there could be an effect on a European site.' This passage, first, reflects the position that in impugning AA, as in all other areas of judicial review of presumptively valid decisions, the onus to demonstrate error lies on the Applicant. The legal burden rests with the Applicant. While the 'reasonable expert' standard may not, strictly, require expert evidence, or any evidence, of the applicant in judicial review, it is easy to see how in practice and in most cases, it could most obviously be met by such evidence.

279. It seems to me that to resolve the foregoing authorities is to acknowledge, that, as Humphreys J. says, the validity of the AA is in general to be judged in judicial review on the basis of the evidence which was before the Board. And an Applicant for judicial review generally may not adduce new factual evidence as to scientific doubt. But an Applicant for judicial review may adduce expert opinion evidence that, on the basis of the material which was before the Board, the Board ought to have had a reasonable scientific doubt as to adverse effect. But even to this limitation on adducing new factual evidence there must be exceptions. For example, if the allegation is that the Board failed to have regard to best scientific knowledge, presumably the Applicant can place before the Court what it alleges is in fact the best scientific knowledge, thereby to demonstrate that the Board failed to take it into account.

280. And where, as here, the allegation is that the AA contained a *lacuna*, not in the evaluation or analysis of a risk recognised in the AA, but by way of a failure to recognise a specific risk at all, it presumably must be incumbent on the Applicant to persuade the court that the putative risk is not merely 'hypothetical' or 'conceivable' but is one with which the Board should have 'bothered'. That may be a light burden but, being a burden nonetheless, presumably must involve at least some consideration of the questions of the 'conservation objectives' of the site 'the characteristics and specific environmental conditions' of either site, 'the likelihood of harm occurring and the extent and nature of the anticipated harm'. An applicant is entitled to attempt to make such cases on the basis of legal argument alone but, given the essentially scientific nature of the inquiry as to doubt, is likely to run an appreciably higher risk of failure than if (s)he does adduce expert evidence."

37. A distinction can be drawn here between the applicant's complaints as to the merits of the AA in terms of scientific certainty (which is definitely an evidential issue) versus methodological shortcomings which can legitimately be argued for on the basis of issues on the face of the material. So the preliminary objection has a certain validity but not as a complete answer to all of the applicant's points.

Overarching issue for Module III

38. The overarching issue which affects many of the points that may arise in Module III is whether the habitats, WFD or SEA directives require that a NAP be assessed by reference to the protective measures it includes and those alone, or whether such assessment should include reference to impacts of the underlying agricultural activities, in particular where those are not prevented by the terms of the NAP. Many of the other issues may or may not arise depending on that basic question. That has assumed such a central importance that it seems worthwhile to isolate that as a first question in the issue paper by way of a reworded issue 8.

39. The factual background to the issue is the simple one that the applicant condemns the State's analysis for failure to consider the effects of the Nitrogen-emitting agricultural activities permitted under the derogation, whereas the State says that what is to be assessed and what was assessed is the suite of protective measures. For example, the NIS provides under the heading of "elements of the NAP assessed in the NIS" that what is assessed is the effect of the control measures, not of the underlying agricultural activities being regulated, which are only referred to in terms of implementation of the Commission decision and thus effectively attributed to that rather than to the NAP itself:

"Table 3.1: Elements of the NAP assessed in the NIS

Part/Schedule Assessed within this NIS

Part 1 Preliminary

No. Factual information setting out the purposes and interpretation of the NAP.

Part 2 Farmyard Management

Yes. This part of the NAP specifies a number of specific measures for farmyard management that have potential for LSEs on European Sites and this part is considered further in this NIS.

Part 3 Nutrient Management

Yes. This part of the NAP specifies a number of specific measures for nutrient management that have potential for LSEs on European Sites and this part is considered further in this NIS.

Part 4 Prevention of Water Pollution from Fertilisers and Certain Activities

Yes. This part of the NAP includes for general provisions including the enforcement of the NAP and therefore there are potential for indirect LSEs on European Sites and this part is considered further in this NIS.

Part 5 General

Yes. This part of the NAP specifies a number of specific measures for farmyard management that have potential for LSEs on European Sites and this part is considered further in this NIS.

Part 6 Functions of Public Authorities

Yes. While this part of the NAP contains more administrative provisions it does include for monitoring functions and in this regard, this part is considered further in this NIS.

Part 7 Implementation of Commission Decision

Yes. This part of the NAP contains the specific requirements relating to derogations on the application of livestock manure. While it is not certain that the EU will grant Ireland such a derogation, the continued facilitation of the increased application of nitrogen against the current baseline has potential for LSEs on European Sites and this part is considered further in this NIS.

Schedule 1 Soil Test

No. Factual information.

Schedule 2 Criteria as to Storage Capacity and Nutrient Management

No. Factual information.

Schedule 3 Storage Periods for Livestock Manure

No. Factual information.

Schedule 4 Periods when application of fertilisers to land is prohibited

No. Factual information.

Schedule 5 Conditions applying in relation to Derogation

No. Factual information.

Proposed Non-GAP Regulation Measures

Yes. Potential new control measures to be included which will sit outside of the Regulation but which have potential for likely significant effect."

40. While we are on the subject of the next Module I can also mention that I have tried to reword the issues that will remain for Module III in a more precise fashion, where possible and subject to contrary submission. In particular, issues 65(a) and 67(a) do not seem to me to require any further submissions at the moment, because it is likely that this will be addressed by the CJEU in due course so submissions would be premature in that context.

41. With those anticipations noted, I can now turn to the specifics of the evidential-type issues now arising in Module II. All general comments were considered and were of assistance although these are not quoted below. Not all issues were individually addressed by all parties, and, as before, it can be noted that generally the IFA and ICMSA associated themselves with the State's responses. Certain points are being postponed for a later Module as discussed further below. I can also note that the IFA submission was framed in terms of high level analysis so I have not quoted it in the point by point discussion below. Nonetheless it, like the other submissions, was of great assistance.

Core Ground 1 – habitats directive

Issue 3(b)

42. Issue 3(b) is as follows:

"(b) Has the applicant established that insofar as a site-specific analysis in the AA was possible, such an analysis of the NAP was not carried out (on the assumption that the effects of the underlying agricultural activities should be considered)."

43. The applicant submitted:

"1. A site-specific analysis in the AA was possible, but was not carried out.

2. The NIS 1.6 (Exhibits p.795) records the EPA consultation response including 'There is a strong regional pattern in all waters that have excess nitrogen concentrations and increasing trends. The areas of greatest concern are the south and south east of the country, which is also the area where the highest levels of intensive farming takes place.'

3. The NIS at section 2.5 Water Quality Trends (Exhibits p.801) refers to an EPA report June 2021 on the assessment of the catchments that need reductions in nitrogen concentrations to achieve water quality objectives. It identifies one of the main findings of the report as 'There are a number of key catchments of concern with elevated nitrogen concentrations along the south, south east and east coasts including the Maigne/Deel, Bandon, Lee, Blackwater, Suir, Nore, Barrow, Slaney, Tolka/Liffey and the Boyne river catchments'. It clarifies 'The data show that in the predominantly rural catchments, more than 85% of the sources of nitrogen in the catchment are from agriculture, from chemical and organic fertilisers. In contrast, the majority of the nitrogen in Liffey/Tolka catchment, which incorporates Dublin City, is from urban wastewater'.

4. It goes on to state:

a. 'In particular, nitrogen pollution in the south and south-east of the country is damaging the ecological health of many estuaries and nearshore coastal waters. In these areas, which have freely draining soils, nitrate seeps rapidly into groundwater, and losses are closely correlated with the intensiveness of farming. The higher the rate of application of nitrogen, the higher the nitrate concentrations in waters. Figure 2-1 shows the average nitrate concentrations in rivers with a clear spatial trend showing elevated levels in the south and south-east of the country'.

5. The NIS at section 3.6.2 (Exhibits p.810) says:
 - a. 'The Appropriate Assessment included the following steps:
 - Identification of the information required, including details of the NAP, linkages to QIs/SCIs of European sites;
 - Examination of the conservation objectives of QIs/SCIs of European sites; and
 - Prediction of any adverse effect of the NAP on the integrity of any European sites, including in combination effects.'
6. In terms of the 'Zone of Influence', NIS 4.1 (Exhibits p.811) says 'The AA Screening Report considered that since the NAP was a national programme that all the European Sites within the Republic of Ireland and relevant sites and receptors in Northern Ireland were considered. For consistency, the ZoI for this NIS adopts the same approach.'
7. Appendix B of the NIS lists all the SACs and their QIs; and Appendix C lists all the SPAs and their QIs. Appendix D and Appendix E do the same exercise for sites in the North. Appendix F gives a 'Summary Conservation Status of QI Habitats and Species in the Republic of Ireland' followed by a 'Summary Status Description (based on 2019 NPWS Article 17 report)'
8. However, NIS 6.4 (Exhibits p.827) moves towards a greater degree of specificity says (emphasis added) 'While it is noted that a large proportion of European Sites within Ireland and Northern Ireland will be potentially affected by measures within the NAP, in order to address the specific vulnerability of such sites to these potential impacts it is considered that further consideration of the qualifying features of the sites, their conservation objectives and their relative sensitivity is required... Of the qualifying features for which all SACs and SPAs in the Republic of Ireland and Northern Ireland, some are considered to be particularly sensitive to the inputs potentially arising as a result of the NAP, namely elevated nitrogen concentrations within surface and groundwater and airborne deposition of ammonia. Previous studies have identified 23 of the Annex I Habitats and Annex II Species within Ireland which are noted as being water dependant. In addition to these identified water dependant QIs a further two habitats were added to consideration within this assessment, namely the Annex I Habitats: Rivers with muddy banks with *Chenopodium rubri* p.p. and *Bidention* p.p. vegetation and Water courses of plain to montane levels with the *Ranunculus fluitantis* and *Callitriche-Batrachion* vegetation. These habitats and species and the number of SACs for which they represent qualifying features are set out in Table 6.3.'
9. Table 6.3 (Exhibits p.828) is entitled 'Water Dependent QIs and European Sites'. It identifies the Water Dependent QIs and then identifies the number of sites in the Republic and the North where such QI is to be found. Obviously those sites are known, as they are included in the total.
10. At Exhibits p.834 it then states 'On the basis of the information presented in Table 6.3, it is considered that the following water dependant habitats are those which have the most potential to be subject to adverse effects as a result of impacts arising *via* the NAP' – it then lists 14 habitats/species.
11. At Exhibits p.834 it continues 'Each of these habitats or species has a specific target for nitrate concentration in addition to other nutrient compounds as part of its conservation objective, for each respective European site for which they form a qualifying feature and as such are extremely vulnerable to the nutrient inputs from agriculture.' It then gives details by way of 'Table 6.4: Highly Nutrient Sensitive QIs Article 17 Reporting Information'.
12. After further analysis, at Exhibits p.836 it concludes (emphasis added) 'On the basis of the above information, and on a precautionary basis, it is considered that no specific SAC or SPA in Ireland can be discounted in respect of the potential adverse effects arising *via* agricultural activity which would be associated with the measures set out in the NAP, or the inadequate enforcement of this Plan. However, certain SACs are known to be particularly sensitive to these potential adverse effects, already subject to deteriorating conditions associated with such effects and in unfavourable conservation condition. It is in this context that the assessment of the NAP measures on their implications for European sites is undertaken, as set out below.'
13. Thus it is clear that the NIS was able to identify sites of particular relevance.
14. However, this may be contrasted with section 6.3.3 in the Exhibits at p.822 – 'It is acknowledged that the NAP is a high-level document and as such prediction of effects at individual European sites is not practical as the NAP lacks the necessary spatial detail to give context to the extent or significance of any potential effects. As such, the potential for effects is raised within the confines of the NAP with a view to appropriately informing lower levels of planning where the necessary spatial detail is available and identifying the mitigation

measures that must be in place for lower tier plans and projects to ensure the protection of the European sites.’

15. Thus it is clear from Exhibits p.822 that the NIS did not attempt to assess individual sites, even though it acknowledged at Exhibits p.836 that ‘certain SACs are known to be particularly sensitive to these potential adverse effects, already subject to deteriorating conditions associated with such effects and in unfavourable conservation condition.’

16. The ‘Mitigation Measures’ column of the EAU assessment of Regulation 18(1) of the GAP Regulations indicates – ‘DAFM will engage with the NPWS to identify European sites that may require a site-specific Nitrogen Action Plan. This will include further scoping (if required) prior to the *interim* review. Following the identification of these European sites, DAFM will undertake a study to assess the risk of ammonia deposition above critical levels and advise of any relevant localised restrictions or set back distances that may be required on a site-by-site basis. It is noted that all measures considered will have co-benefits for biodiversity and air quality in addition to the intended protection of water quality’.

17. It is clearly envisaged that such sites are capable of identification – they just have not been identified yet.

18. Accordingly, a site-specific analysis in the AA was possible, but was not carried out.”

44. The State submitted:

“Question 3(b) identifies two issues that must be established by the applicant: (i) that a site-specific analysis in the AA was possible; and (ii) that a site-specific analysis of the NAP was not carried out (on the assumption that the effects of the underlying agricultural activities should be considered).

(i) Was site-specific analysis in the AA possible

The burden of proof is on the Applicant to demonstrate to the Court that it has evidentially established that site-specific assessment of the NAP was possible, which it has failed to do. The affidavits filed by the Applicant contain no averment to that effect. Nor has the Applicant adduced any expert evidence to the effect that the NIS was incorrect in its conclusion that site-specific assessment was not practicable in the context of the NAP. The Applicant’s Response to this question identifies no supportive averment in its affidavit evidence.

The Applicant’s Response now seeks to remedy this difficulty by relying on various sections of the Natura Impact Statement (‘NIS’).

The sections in the NIS relied on by the Applicant – which go no further than to identify locations and sites with particular vulnerability to nitrogen – fail to establish that a site-specific analysis of the NAP was possible. With respect to paragraph 16 of the Applicant’s Response, the fact that it is envisaged that site-specific Nitrogen Action Plans might be possible, does not mean that a site-specific assessment of the national NAP is possible.

In any event, if the Applicant wished to make the case that those sections did evidence that site-specific assessment of the NAP was possible, it would have been required to adduce expert evidence to that effect. The failure to adduce relevant expert evidence, or any evidence, on this point means that it must be rejected. It is further noted that this failure has deprived the Respondents of an opportunity to contest that position, if necessary by way of expert evidence.

(ii) Was site-specific analysis conducted

The NIS, at section 6.3.3, makes clear that the AA carried out did not involve an assessment of potential effects of the NAP on a site-specific basis. The Respondents have consistently taken the position that it is not possible to conduct a site-specific assessment of the Fifth Nitrates Action Plan (the ‘NAP’) given its geographical scope and nature (see e.g.: Respondents’ Written Submissions dated 26 November 2023, §§122–129). The Respondents do not contend, in those circumstances, that the Applicant is required to adduce evidence to establish that site-specific analysis was not conducted.”

45. The ICMSA submitted:

“18. The Applicant’s Response here is correct in one respect – it recognises and accepts an onus upon the Applicant to :

- o demonstrate that such a site-specific analysis was in fact possible, and
- o that it was not carried out.

19. It is noted that the State’s Response (at p.7) does not require evidence from An Taisce on the second of these points. Accordingly, Issue 3(b), in effect, condenses to the first point.

20. The entirety of the points made in An Taisce’s Response under Issue 3(b) – or certainly the entirety of §2 to §15 inclusive thereof – are concerned with the NIS, and with quoting aspects of it. (The sole exception is §16, which is a reference to the EAU Assessment. The relevant passage is to be found at p.782 of the Exhibits, even though a page number was not provided by An Taisce.)

21. As a matter of first principle, this approach – of seeking to establish a proposition by the quotations in question – is deficient and insufficient. ICMSA agrees with the State Respondents’ submission (at p.7 of their Response) that if An Taisce wished to make the case that a site-specific assessment was possible it ought to have adduced expert evidence to that effect. It has neither done that, nor pointed to any averments on Affidavit.
22. Without prejudice to the above point, it is instructive to engage *arguendo* with various of the points which An Taisce does seek to derive from the NIS.
23. An Taisce faces the initial difficulty that no aspect of the NIS actually states that a ‘site specific analysis was possible’. If that had been stated, it would have been quoted in its Response. Instead, An Taisce seeks to infer this from other statements made.
24. Even then, however, it is submitted that the statements which An Taisce does point to do not support this proposition. For example, §2 to §4 of its Response quote different parts of the NIS including Sections 1.6 and 2.5 thereof. However:-
- o The passages quoted at §2 and §4 refer to ‘the south and south-east of the country’ – a level of generality manifestly far-removed from anything approach a site-specific analysis.
 - o The same is true of the passage quoted at §3 referring to ‘a number of key catchments’.
25. Later at §13 An Taisce asserts that it is ‘clear’ that the NIS ‘was able to identify sites of particular relevance’. Yet the basis for this supposed clarity is not an identification of any named sites, but merely a single (and rather general) sentence from the NIS quotes at §12 to the effect that ‘... certain SACs are known to be particularly sensitive to these potential adverse effects ...’.
26. An Taisce then seeks to use against the NIS its own statement that it is a ‘high level’ document (§14). Yet it is submitted that that is directly in tension with the logically prior and anterior proposition which An Taisce seeks to derive from the same document – namely that it somehow demonstrates that a site-specific assessment is possible.
27. In truth, it is artificial and incorrect for An Taisce to criticise the NIS by reference to something which it never set out to do (i.e. engage in a site-specific analysis).
28. Regarding whether a site-specific analysis was possible or not, it is submitted that (strictly without prejudice to the lack of evidence) considerations of practicality cannot be jettisoned or ignored. ICMSA continues to rely upon the Supreme Court’s judgment in *An Taisce v An Bord Pleanála* [2022] IESC 8 (quoted at §63(b) of ICMSA’s December 2023 Submissions). There, dismissing an appeal by An Taisce from a judgment of Humphreys J. in a case concerning a cheese factory in Kilkenny, Hogan J. stated (§103):
- ‘Such an open-ended interpretation of these words leads, however, to conclusions which are not practicable or feasible. In the present case, for instance, it is simply not possible to audit or assess the 4,500 Glanbia farms – which, it may be useful to remind ourselves, are all independently owned and operated ...’
29. An Taisce’s Response has elected not to address this Judgment, and the valid practical concern it reflects and illustrates. Rather, An Taisce has instead persisted in making its case merely by reference to isolated statements in the NIS.
30. Despite quoting from p.45 of the NIS (p.836, Exhibits) An Taisce omits to note (although ICMSA makes no criticism of that omission) what the NIS states at the same page under §6.5:-
- ‘As stated previously, it is noted that the NAP, as a high-level plan, does not deal with location specific elements associated with individual farms or agricultural activities within sub-areas, such as catchments, within Ireland. As such, it is not achievable at this level of assessment to undertake a detailed appraisal of the predicted effects of the NAP at the level of individual Natura 2000 sites.’
31. It is submitted that this resonates directly with the passage from Hogan J’s judgment above, and undermines An Taisce’s case. Of course, An Taisce never sought to cross-examine the authors of the NIS on the above statement regarding what was ‘not achievable’.
32. Penultimately, under Issue 3(b), it is noted that Table 6.5 entitled ‘Assessment of NAP Measures’ (Exhibits pp.837 onwards) is replete with findings/statements that ‘This is a positive measure ...’. This is relevant because, An Taisce’s approach of cherry-picking not only ignores this, but actually presents a skewed and ultimately incorrect impression of the NIS.
33. Finally, while quoting discrete aspects of the NIS (which it seems to apprehend supports its arguments) An Taisce’s Response omits to deal with the NIS’s ‘Conclusions on the NAP’. These are set out at Section 8 thereof (p.894, Exhibits) and state, *inter alia*, as follows:

'In light of the conclusions of the assessment contained in this NIS, the authors are of the view that the adoption of the NAP alone, or in combination with other plans and programmes, will not adversely affect the integrity of any European site.'

34. Again, it is submitted that it not easy to see how the Applicant can properly take issue with a conclusion, such as that stated above, which it has (in effect) not properly challenged through the avenue of cross-examination."

46. My decision is as follows. The question involves two sub-questions – was site-specific analysis of the impacts of the regulated activities possible, and if so was it carried out.

47. As regards the first issue, the NIS purports to examine site-specific issues, not least by setting out details of all of the relevant sites. It includes the following:

"Appendices

Appendix A Report to Inform AA Screening

Appendix B List of SACs in the Republic of Ireland

Appendix C List of SPAs in the Republic of Ireland

Appendix D List of SPAs in Northern Ireland

Appendix E List of SPAs in Northern Ireland

Appendix F Conservation Status of EU Habitats and Species

Appendix G Threats and Pressures to EU Protected Habitats and Species"

48. The NIS goes on to say that all European sites were considered – but that doesn't necessarily mean considered in relation to site-specific impacts:

"4.1 Identification of European Sites and Zone of Influence

In the Republic of Ireland, sites within the Natura 2000 Network are referred to as European sites and comprise SAC and SPA sites. SACs are concerned with the protection of specific Qualifying interests (QIs) and SPAs are concerned with the protection of specific Special Conservation Interests (SCIs).

In identifying the Zone of Influence (ZoI) for the NIS of the NAP, a number of considerations were considered, notably the national and strategic nature of the NAP; the relationship of listed QIs and SCIs for Ireland; and European sites understood to have connectivity.

The AA Screening Report considered that since the NAP was a national programme that all the European Sites within the Republic of Ireland and relevant sites and receptors in Northern Ireland were considered. For consistency, the ZoI for this NIS adopts the same approach.

In the Republic of Ireland, there are 439 SACs which are designated for one or more of 59 habitat types (Annex I of the Directive), 16 of which are designated as 'priority' habitats, owing to their ecological vulnerability, and 26 species (Annex II of the Directive), of which one or more are included as qualifying interests. These are mostly onshore, but a small number of reef sites lie far offshore. In addition to the marine mammals listed on Annex II of the Habitats Directive, there are further 22 cetacean species and the leatherback turtle listed on Annex IV. These species require strict protection and, like species on Annex II, require monitoring. There are 58 SACs designated in Northern Ireland.

Through the Birds Directive, SPA are designated for the protection of endangered species of wild birds including listed rare and vulnerable species, regularly occurring migratory species as well as wetland habitats that support such species. Currently there are 16518 SPAs designated within the Republic of Ireland and 16 SPAs designated in Northern Ireland.

Table 4.1 provides a summary breakdown of the European sites in the Republic of Ireland and Northern Ireland. While many are obvious based on their location, other links are more circumspect. The SAC and SPA designated sites within the ZoI are listed in Appendix B to Appendix E. Figure 4-1 illustrates the distribution of the Irish SAC and SPA in relation to the NAP study area. It is acknowledged that the number of European sites designated, and their boundaries, are subject to change over time and must therefore be verified on an ongoing basis."

49. Section 6.4 identifies 25 habitats and species (not sites) of more specific relevance:

"Of the qualifying features for which all SACs and SPAs in the Republic of Ireland and Northern Ireland, some are considered to be particularly sensitive to the inputs potentially arising as a result of the NAP, namely elevated nitrogen concentrations within surface and groundwater and airborne deposition of ammonia.

Previous studies have identified 23 of the Annex I Habitats and Annex II Species within Ireland which are noted as being water dependant³⁵. In addition to these identified water dependant QIs a further two habitats were added to consideration within this assessment, namely the Annex I Habitats: Rivers with muddy banks with *Chenopodium rubri* p.p. and *Bidention* p.p. vegetation and Water courses of plain to montane levels with the *Ranunculus fluitantis* and *Callitriche-Batrachion* vegetation. These habitats and species and the number of SACs for which they represent qualifying features are set out in Table 6.3."

- 50.** The most definitive statement of what is intended by the NIS is at section 6.5:
 “6.5 Assessment of the NAP Measures
 The NAP measures assessed include for both the six relevant parts of the European Union (Good Agricultural Practice for Protection of Waters) (Amendment) Regulations 2020, those being Parts 2-7, as set out in Table 6.1, in addition to non-legislative measures proposed within the NAP, which include additional good agricultural practice measures and the implementation of a chemical fertiliser register, among others.
 As stated previously, it is noted that the NAP, as a high-level plan, does not deal with location specific elements associated with individual farms or agricultural activities within sub-areas, such as catchments, within Ireland. As such, it is not achievable at this level of assessment to undertake a detailed appraisal of the predicted effects of the proposed NAP at the level of individual Natura 2000 sites. This assessment will therefore focus upon the overall effects upon Natura 2000 sites which would be predicted to occur as a result of the NAP measures, in the context of historical trends in water quality, the known condition and threats to qualifying features of Natura 2000 sites across Ireland and the material changes to be implemented as a result of the latest version of the NAP, as they compare to previous versions. This assessment is undertaken in the context of the Natura 2000 site network and relevant conservation objectives, as discussed in Section 6.4, particularly in regard to those sites which support qualifying features known to be vulnerable to nutrient inputs from farming.
 Table 6.5 assesses the measures presented within the NAP in the context of potential for adverse impacts on the integrity of relevant European sites in view of the conservation objectives of those sites.”
- 51.** In essence, the ICMSA have the right of it when they say that the applicant is on a hiding to nothing in trying to use occasional fragments of the NIS to nullify its express conclusion. Sure, on occasion, that can be a legitimate approach, but there has to be some basis to find a clear contradiction. Here, such a basis is lacking. The ICMSA compare it to reconfiguring a mosaic:
 “7. First, ICMSA’s December 2023 submissions called out cherry-picking of documentation on An Taisce’s part, submitting (at §51) that An Taisce: ‘... cannot anchor its case upon statements in documents, but then cherry-pick and repudiate the same document when it doesn’t suit its case. Rather the reports and assessments should be taken as a whole, including by reference to their conclusions.’
 8. Despite a lone protest by An Taisce at §134 of its latest Response (‘The Applicant is not cherry-picking ...’), this point has been entirely ignored. Not only that, but the cherry-picking has become even worse in An Taisce’s latest Response. This is no mere point of form. Rather it is fundamental to whether An Taisce can discharge its onus of proof. An Taisce has chosen in its Response to anchor its evidential case, not on any averments, but entirely on isolated statements in documentation such as the Natura Impact Assessment (‘NIS’), the SEA Statement and the SEA Environmental Report etc. What it purports to derive from its analysis in that regard will be the subject of more specific submissions under various of the Issues which follow below.
 9. An Taisce’s approach is akin to removing all of the dark pieces from a colourful mosaic, bringing them together as a separate mosaic, and then asserting that the first mosaic was dark and gloomy.”
- 52.** To put it simply, the NIS says that site specific analysis was not possible. The fact that there are references in the NIS to geographical matters or to the need to conduct more focused approaches in relation to particular locations and sites with particular vulnerability to nitrogen, does not inherently contradict that.
- 53.** In such circumstances, as the State naturally emphasises, the burden of proof is on the applicant to demonstrate to the Court that it has evidentially established that site-specific assessment of the NAP was possible. The snippets quoted are all that the applicant has got – it hasn’t got expert or any evidence to that effect.
- 54.** As with *An Taisce v. An Bord Pleanála* [2022] IESC 8, [2022] 2 I.R. 173, [2022] 1 I.L.R.M. 281, [2022] 2 JIC 1602 per Hogan J. at §103, a farm-by-farm examination does not appear to have been feasible and certainly that hasn’t been evidentially established.
- 55.** The impracticality of attempting to examine the impacts on a farm-by-farm basis and applying that to each European sites does have a certain symmetry with my view in the No. 1 judgment that it would not have been practicable for the applicant to have challenged the individual derogations on a farm-by-farm basis.
- 56.** The implication therefore is that any legal issues arising from a failure to conduct a site-specific examination do not arise.
- 57.** A consequential conclusion, subject to any contrary argument, is that arguments based on an alleged duty to conduct water-body-by-water-body analysis for the purposes of the WFD are

equally impractical. Those questions can be effectively greyed out in the revised issue paper in Schedule II.

Issue 3(c)

58. Issue 3(c) is as follows:

"(c) Has the applicant established that insofar as a site-specific analysis in the AA was possible, such an analysis of the NAP was not carried out (on the assumption that only the effects of the mitigating measures in the plan itself should be considered)."

59. The applicant submitted:

"19. The points made above in response to question (b) are relied on here."

60. The State submitted:

"The Respondent's position on this issue is the same as its position on Question 3(b)."

61. The ICMSA submitted:

"35. An Taisce notes (§19) that the points made above regarding Issue 3(b) are relied upon here. ICMSA also relies upon its points under Issue 3(b) above here."

62. My decision is that this question doesn't arise in view of the impracticality of site-specific assessment in the AA of the NAP as set out above.

Issue 3(e)

63. Issue 3(e) is as follows:

"(e) Has the applicant established that in this case the AA was not carried out prior to the approval of the NAP (the applicant's case being that the Appropriate Assessment determination of 4th March 2022 post-dates the approval of the NAP which, per the SEA Statement was therein stated to have been approved on 1st March 2022)."

64. The applicant submitted:

"21. This point is not being pursued in the light of §152-157 of David Flynn's affidavit, asserting that the reference in the SEA statement to the NAP coming into effect on 1st March 2022 is erroneous; and that it was in fact approved on 9th March 2022 and came into effect on 11th March 2022.

22. See para 7 of the Applicant's submissions and the Transcript from Day 1 of Hearing at p 143 - 'But Mr. Flynn has clarified, and we do not dispute, that that is in fact an error in the, I think in the NAP, that the AA Determination of the EAU was in fact available to the Minister before he approved the NAP.'"

65. The State submitted:

"The Applicant has now confirmed that it has abandoned this plea; further submissions are not required."

66. The ICMSA submitted:

"36. It is noted (from §21 of An Taisce's Response) that this point is no longer being pursued by the Applicant. Accordingly, ICMSA has no observation to make."

67. My decision, if such be required, is that it follows that the issue related to this point does not arise.

Issue 26

68. Issue 26 is as follows:

"26. Has the applicant established that the AA determination was inadequate to remove all scientific doubt as to the effects of the NAP (leaving aside the question of a site-specific analysis), on the assumption that only the effects of the mitigating measures in the plan itself should be considered, having regard in particular to the lack of a plea of breach of the nitrates directive."

69. The applicant submitted:

"1. Yes.

2. The key document here is 'DETERMINATION ON APPROPRIATE ASSESSMENT FOR IRELAND'S FIFTH NITRATES ACTION PROGRAMME' issued by the EAU (Ecological Assessment Unit) of the Department of Housing, Local Government and Heritage in accordance with Regulation 42A(11) of SI 477/2011, at Exhibits p.775, Tab 11.

3. It references:

a. the AA Screening by the EAU (Appendix A, p.787)

b. the NIS prepared by RPS (Appendix B, P788, which includes the AA Screening by RPS at p.895)

c. NAP Overview (Appendix C, p.1046)

d. draft GAP Regulations (Appendix D, p.1084)

e. Additional information sought - Appendix E (p.1139) identifies the information sought but not the responses furnished.

4. The reasons for the determination are listed at p780 and include - 'Mitigation measures outlined in the NIS and amendments to same following public consultation.'

5. The EAU Determination contains (p.777) a Table headed 'Mitigation Measures', which explains (emphasis added) 'Measures have been proposed to mitigate the potential for adverse effects on the integrity of European sites as a result of implementation of Fifth Nitrates Action Programme (2022 – 2025) and the GAP Regulations (2022). The following table outlines mitigation taken from the NIS and accounts for further information received following request by the EAU to assist in making the determination'.

6. This table indicates that in a number of instances the measures adopted in SI 113/2022 to give effect to the NAP are not sufficient to rule out such adverse effects. However, the competent authority, rather than approving a suite of measures on the basis of the requisite scientific certainty as to their efficacy, in fact acknowledges that the measures are insufficient and essentially commits to reviewing them, carrying out further investigations and in some cases devising appropriate mitigation following the authorisation of the NAP. This approach is inconsistent with Article 6(3) Habitats Directive and the caselaw on its interpretation. The Applicant relies on the written submissions already made on this issue which are not repeated here.

7. The individual 'Mitigation Measures' are addressed in detail below. Before doing so, it will be seen that the EAU 'Mitigation Measures' table (p.777) consists of 3 columns – headed 'Measure', 'Assessment of Effects' and 'Mitigation Measures'. This arrangement mirrors Table 7.1 'Mitigation Measures outlined for the NAP' in the NIS by RPS at p.889; and the content of the 'Mitigation Measures' table in the EAU determination is similar, though not identical to RPS Table 7.1 The EAU mitigation is said to be 'taken from the NIS'.

8. Also noteworthy are Table 6.1 in the NIS 'Main Ecological Impacts that could potentially arise from the measures outlined in the NAP' (P.822-824); Table 6.5 'Assessment of NAP Measures' in the NIS (P.837-879) and Table 6.6 'Assessment of In-combination Effects' in the NIS (P.881-893). These RPS Tables provide further context for the EAU Determination.

9. The observation in 6.3.4 of the NIS explains the approach taken to the assessment – 'At its core, the NAP is a mechanism for the protection of waters under the WFD but the assessment of the NAP also needs to be cognisant of the emerging agri-food policy within the State and the proposed intensification of the sector.' In the Applicant's submission, being 'cognisant' of such matters could not justify any departure from the requirements of the Habitats Directive.

10. It would be redundant to set out Table 6.1 in the NIS 'Main Ecological Impacts that could potentially arise from the measures outlined in the NAP' (P.822-824) in full here - but it is important in terms of 'Impact Source', 'Impact Identification' and 'Impact Prediction'.

11. In each case of 'Impact Source' in RPS Table 6.1 – i.e. Farmyard Management, Nutrient Management, Prevention of Water Pollution from Fertilizers and Certain Activities, General, Functions of Public Authorities and Implementation of Commission Decision (which relates to the derogation) - the corresponding 'Impact Prediction' identifies that 'all impacts associated with' the relevant impact source 'would have potential to give rise to significant continued decline in the conservation status of surface and groundwater dependent Annex I habitats which lie downstream of agricultural activities, or other sensitive Annex I habitats within proximity to sources of airborne ammonia if the proposed programme of measures is insufficient or inadequately implemented or enforced. The identified impacts would have potential to give rise to significant continued decline in the conservation status of Annex II species which are dependent upon aquatic habitats if the proposed programme of measures is insufficient or inadequately implemented or enforced.'

12. In the case of 'Implementation of Commission Decision', the 'Impact Prediction' identifies that 'particularly conditions related to derogation' have the 'potential' referred to. Measure 1 EAU Determination – 'All (GAP and non-GAP) with exception of procedural measures'.

13. The 'Assessment of Effects' column refers to 'Increased levels of inspection and enforcement – required to achieve compliance with measures.' The 'Mitigation Measures' column refers to a number of 'commitments' - including a review which has yet to be completed, a commitment to deliver a central database at some unspecified point in the future and to strengthen enforcement. The mitigation also includes 'consideration' of various measures with no indication of whether they will be adopted or not and if so, how they will mitigate adverse effects on European Sites. Certain matters are to be 'examined'. These 'commitments' have no identified legal force; they refer to things which are not currently in place. Accordingly the requisite degree of scientific certainty is not achieved. While improvements in enforcement are crucial to even assess the NAP, the details of the requisite improvements were not available at the time of the EAU assessment.

14. Further context can be derived from item 1 in the RPS Table 7.1 (p.889) which under 'Assessment of Effects' states (emphasis added) 'This is an overall concern regarding inspection and enforcement of all aspects of the NAP, which given the widespread nature of agricultural activities across Ireland, remains a difficult issue for both the assessment of potential impacts arising as a result of the NAP and the effectiveness of the NAP itself. Given that the NAP has been in place in some form since 2017, and during this period water quality in Ireland and the condition of freshwater European sites has continued to decline significantly, it is considered that compliance, which is recorded as being low, is a key issue which needs to be addressed to ensure that the draft NAP realises the required improvements to water and air quality which are required for the identified range of European sites to achieve favourable conservation status.' This identifies that enforcement is relevant to the assessment of the 'potential impacts arising as a result of the NAP' but is a 'difficult issue'.

Measure 2 EAU Determination – 'All'

15. The 'Assessment of Effects' column refers to 'Interim review - assessment of the effectiveness of 'this action programme''. The 'Mitigation Measures' column indicates inter alia 'Following consultation with the Minister for Agriculture, Food and the Marine, the Minister shall initiate an interim review of this action programme in 2023. The purpose of the interim review is to undertake an assessment of the effectiveness of the Nitrates Action Programme measures and introduce any new measures that may be needed to reflect water quality data, significant changes to the agricultural sector...'.

16. While an interim review is not objectionable in itself, it cannot, by definition, constitute a mitigation measure since it takes place after the NAP has been authorised and even after there has been an adverse effect on the integrity of a European Site. Article 6(3) of the Habitats Directive requires that scientific doubt be eliminated in advance of authorising a plan or a project. Where doubt already exists at the time of adoption, it must be excluded before adoption. By definition, a subsequent review does not suffice to achieve this.

17. The State's Statement of Opposition at §38 asserts that the 'the AA Determination confirms that the purpose of the proposed interim review is not to address recognised inadequacies of the NAP or any identified risk that the measures under the NAP may have adverse effects on European Sites. Rather it is to 'allow for changes to be made where further information becomes available to strengthen measures'. The same is the case with respect to mitigation measures involving a commitment to investigate certain scientific and technical issues further.'

18. In fact what the AA Determination says is 'Interim review of the local authority GAP agricultural inspection programme will allow for changes to be made where further information becomes available to strengthen measures. The EU Commission have signalled that they may seek a reduction in derogation threshold of 250 kg N/ha where there are worsening trends in N concentrations. However, negotiations are still ongoing. This would provide additional incentive to achieve high levels of compliance, in addition to increasing inspections and enforcement using a risk-based approach.'

19. So in the Determination, the quoted extract is confined to 'Interim review of the local authority GAP agricultural inspection programme...'. The Determination does not say this in relation to any other aspect of the Interim Review; and, despite what is suggested in the Opposition papers, the Determination does not say 'The same is the case with respect to mitigation measures involving a commitment to investigate certain scientific and technical issues further.' That is hardly surprising – as per the CJEU in Case C 323/17 People Over Wind at §36, 'a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out ... at the stage of the appropriate assessment.'

20. As will be seen in more detail below, what has been left over for the Review is -

21. 'As part of the interim review, a review of the Article 17 setback distances from natural waters in EPA Catchments of Concern (increasing nutrient levels) will be undertaken and investigation and identification of any requirement to increase these distances in the NAP will be carried out to provide evidence to support potential change. The prescribed 2 m setback distance will remain in place until the suitability review is undertaken.' This is in circumstances where it is acknowledged that 'Prescribed 2 m setback distance is considered to be unsupported by scientific evidence'.

22. 'Commitment to investigate the suitability of Morgan's P for the interim review, in order to provide time to gather best available knowledge.'

23. Regarding restrictions on access for livestock to watercourses (which are only applied to holdings which have a stocking rate of 170 kg nitrogen per hectare or more) where it is acknowledged that not applying that restriction holdings below 170 kg N/ha 'could

give rise to adverse effect'– 'Commitment to investigate expansion of restrictions on access to watercourses by livestock for holdings below 170 kg N/ha'.

24. 'Commitment prior to interim review stage, to the development of more detailed storage requirements for silage bales to supplement the 20 m setback distance specified in the regulation.'

25. 'DAFM will engage with the NPWS to identify European sites that may require a site-specific Nitrogen Action Plan. This will include further scoping (if required) prior to the interim review. Following the identification of these European sites, DAFM will undertake a study to assess the risk of ammonia deposition above critical levels and advise of any relevant localised restrictions or set back distances that may be required on a site-by-site basis....'.

26. Startlingly, where it is accepted that the limit on the amount of livestock manure to be applied/deposited in non-derogation holdings (170 kg of nitrogen per hectare) is not supported by an evidence base and as such has potential to give rise to adverse effects on water quality', there is a 'Commitment to undertake further research as part of the interim review stage to provide an evidence base with respect to nitrogen limits required to avoid adverse effects on water quality. This research will be used to inform future measures/amendments.'

27. All these indicate an intention to proceed in the absence of certainty and best scientific evidence – which cannot be mitigated by seeking certainty scientific evidence after the determination. This is not about reacting to 'new' scientific developments – it is about acting without scientific evidence in the first place.

28. The State (§48) seeks to pray in aid the Commission Article 6 Guidance at p.54-55, and asserts that the Guidance envisages and even requires that 'monitoring measures be included as mitigation'. In fact, the Guidance clearly states at p.54 'The effectiveness of mitigation measures must be demonstrated before the plan or project is approved.' The Guidance certainly envisages that the effectiveness of mitigation measures be monitored – but does not identify such monitoring as constituting 'mitigation' in itself; or as a substitute for properly assessed mitigation measures.

Measure 3 EAU Determination – '14(3) Reduced storage capacity in certain circumstances'

29. Regulation 14(2) permits lower capacity for storage of live-stock manure than specified in Article 12 or 13 if the 5 conditions in Regulation 14(3) are met, including 'severe damage to the surface of the land by poaching does not occur'. ('Poaching' is the term used to describe the loss of soils or vegetation by the damaging action of hooves of livestock using land over a period of wet weather, which may affect water pollution through increased run-off, as well as the productivity of the land and the welfare of livestock.') The 'Assessment of Effects' column refers to 'Concerns identified in respect of subjectivity in relation to enforcement of poaching and its relevance to reduced storage capacity'. The 'Mitigation Measures' column refers back to the Inspections discussed under Measure 1; and also refers to "Commitment for DHLGH/DAFM to consider inclusion of a clear definition of poaching causing severe damage to land within the farm holding, and application of the definition against the provisions of 14(3)'. This points to an awareness that there may be adverse effects on the integrity of European sites and that there is uncertainty in relation to what actually constitutes poaching causing severe damage to land. It will be seen that the 'commitment' was not even to introduce a clear definition, but only to consider doing so. Neither of these mitigation measures meet the requisite standard to eliminate scientific doubt.

30. It is noted that a definition of poaching was introduced on 30 December 2022 by the GAP (Amendment) No 2 Regulations; however, clearly this definition was not considered by the EAU before making its determination.

31. Further context can be derived from the RPS Table 6.5 (p.842) which under 'Assessment of Effects' states 'Enforcement of these conditions remains a potential concern however, such as in the case of poaching, which may present difficulties during inspection.'

Measure 4 EAU Determination – '15(8)'

32. Not in issue

Measure 5 EAU Determination – '16(3) Duty of the occupier in relation to nutrient management'

33. Regulation 16(3) relates to the duty under Regulation 16(1) – 'An occupier of a holding shall take as far as is practicable all such steps for the purposes of preventing the application to land of fertilisers in excess of crop requirement on the holding.'

34. The 'Assessment of Effects' says 'It is assumed that Morgan's P is suitable for determining environmental risk from soil P.''. However the 'Mitigation Measures' column indicates *inter alia* 'Commitment to investigate the suitability of Morgan's P for the interim review, in order to provide time to gather best available knowledge.' This is a frank admission

that the Determination was not carried out on the basis of best available knowledge. It is also stated that 'requiring all farms with higher stocking rates to assume P index 4 (unless subject to soil testing) and mandatory soil testing of arable land, will substantially reduce the potential risk.' However, reducing the risk does not equate to eliminating the risk (i.e. all reasonable scientific doubt) as required by Article 6(3) of the Habitats Directive.

35. The following explanation of Morgan's P testing is taken from the EPA website - 'Soil test P is a typical parameter often used in risk assessment and catchment modelling and although originally designed as an agronomic indicator of P requirements for crop growth, it is often used to indicate risk of P loss from agricultural areas. Soil P testing in Ireland uses the Morgan's P test to extract plant-available P as an indicator of crop requirements for fertiliser advice. This test uses an acidic extract on soils sampled to 10 cm and has been used in the context of potential losses of P from soil to water.'

Measure 6 EAU Determination - '16(5) Duty of occupier in relation to nutrient management'

36. Regulation 16(5) sets out conditions for 'Increased phosphorus build-up on grassland on farms with grassland stocking rates of 130 kg nitrogen per hectare and above', including submission of a detailed farm nutrient plan for the holding. The 'Assessment of Effects' says 'Concerns remain in relation to the risk-based nature of proposed NMP requirements.'. The 'Mitigation Measures' column indicates inter alia 'commitment to investigate' the rolling out of a risk-based model for generation of Nutrient Management Plans (NMPs) to account for sensitive receptors. This fails to meet the standard required by the Habitats Directive since the investigation and the implementation of mitigation measures must take place in advance of the authorisation of the plan and not during it as is proposed in the AA Determination.

Measure 7 EAU Determination - 'Prevention of water pollution from Fertilisers and Certain Activities: Distances from a water body and other issues: 17(1)'

37. By Regulation 17(1) - 'Chemical fertiliser shall not be applied to land within 2m of any surface waters.'

38. The 'Assessment of Effects' contains the devastating admission 'Prescribed 2 m setback distance is considered to be unsupported by scientific evidence and unlikely to be suitable to mitigate potential impacts to water quality.'

39. The 'Mitigation Measures' column indicates 'As part of the interim review, a review of the Article 17 setback distances from natural waters in EPA Catchments of Concern (increasing nutrient levels) will be undertaken and investigation and identification of any requirement to increase these distances in the NAP will be carried out to provide evidence to support potential change. The prescribed 2 m setback distance will remain in place until the suitability review is undertaken.'

40. Clearly the setback is not based on any scientific evidence, let alone the best available scientific knowledge, and failed to remove scientific doubt. It is contrary to Article 6(3) of the Habitats Directive to devise mitigation measures after the plan has been prepared and published.

41. Further context may be derived from RPS Table 6.5 p850 (footnotes omitted, emphasis added) - 'Whilst a mandatory setback distance of 2m from any surface water for the application of chemical fertilisers will have a positive effect on water quality through minimising the potential for nutrient loss to waters, and as a consequence to any European Site that may be hydrologically connected to the holding, it is not considered to be a sufficient distance in certain circumstances, to adequately minimise contamination of surface waters. Consideration must be given to increasing this distance in line with recommendations from scientific research. Research has shown that there is significant variation in the effectiveness of riparian buffer zones, with a removal rate range of 50-95% for N and P reported in the available literature for approximately 9m buffer zones. Furthermore, in the new Environmental Requirements for Afforestation (Forest Service, 2016), it is recommended that the 10m buffer zone that was previously specified in the Forest and Water Quality Guidelines (Forest Service, 2000) be extended up to 25m in areas of peat soils or in high status water bodies (slope dependent). However it should be acknowledged that forestry conditions are vastly different than those encountered in agriculture. The extent of buffer zone required will vary based on a number of factors such as soil type, topography and average rainfall in addition to proximity to a watercourse or series of land drains. Cognisance must be taken of the specific environmental characteristics in the determination of required buffer size, and a one size fits all approach is not sufficient.'

42. See also RPS Table 7.1 p891 - 'While the risk of nutrient migration overland and through soils may be low based on the current conditions, the EPA monitoring data indicates a number of catchments of concern in the south and east of the county whereby current nutrient levels within the water are high and increasing. These higher levels are attributed

to the free draining soils within these catchments and within this migration pathway, the risk of failing to achieve WFD objectives in these areas is heightened. There is a commitment to consider or investigate at the Interim Review stage that DAFM undertakes a review of the Article 17 set-back distances from natural waters in these catchments and more generally to identify the requirement for any increase of these distances in the NAP.'

43. It is noted that 2 metres was changed to 3 metres on 30 December 2022 by the GAP (Amendment) No 2 Regulations; however, clearly this amendment, or its adequacy, or whether a one size fits all was now appropriate, was not considered by the EAU before making its determination.

Measure 8 EAU Determination – 'Prevention of water pollution from Fertilisers and Certain Activities: Distances from a water body and other issues: 17(8), (18) and (19)'

44. Regulations 17 (18) and (19) address access to watercourses by livestock on holdings with grassland stocking rates of 170 kg nitrogen per hectare from livestock manure or above prior to export of livestock manure.

45. The 'Assessment of Effects' says 'Concerns remain in respect of access to watercourses by livestock on holdings which have a stocking rate below 170 kg nitrogen per hectare which could give rise to adverse effect'.

46. The 'Mitigation Measures' column indicates 'The measures proposed are inherently positive measures but are not universal. Commitment to investigate expansion of these measures at *interim* review stage and review their applicability for holdings below 170 kg N/ha'.

47. Further context may be derived from RPS Table 6.5 p855-56 (footnotes omitted, emphasis added) – - This is a positive measure which is intended to restrict direct access to watercourses by cattle on holdings with stocking rates above the threshold. These measures will reduce the potential for poaching of watercourse banks. Bilotta et. al., (2007) discusses the effects on surface waters that are associated with grazing animals in intensively managed grasslands. The authors note that in the context of intensively managed grasslands there is little quantitative data in support of its effects. Soil erosion and sedimentation can cause a negative effect in terms of biodiversity and water quality. For example a direct effect can be caused by impacting fish spawning through sediment intrusion of spawning gravels; direct damage to freshwater pearl mussel habitat and populations through sedimentation and crushing respectively, and indirect effects can occur as the sediment particles can adsorb contaminants such as pesticides and transport them to a watercourse. Most commonly in an agricultural context, the sediment can transport P and lead to eutrophication. In addition to nutrient loss to waters, there is also a risk caused by pathogenic contamination caused by livestock waste. Whilst this can occur through leakage of wastes or runoff from landspreading, allowing livestock to access watercourses increases the likelihood of defecation directly into the watercourse. A study by Conroy et. al., (2016) as part of the SILTFLUX project funded by the EPA, acknowledges that bovine access to watercourses can limit the potential of some sites to achieve at least good status as is required under WFD. It is anticipated therefore that this measure will achieve significant benefits for any downstream European sites. It is noted however that these requirements apply only to holdings with higher stocking rates and as such there is potential for smaller holdings to continue to give rise to adverse effects in this regard'.

48. See also RPS Table 7.1 p892 – 'There is a commitment to consider or investigate at the *Interim* Review stage that a review is undertaken to establish the presence and proportion of farms within catchments showing declining water quality and which support watercourses designated as part of a Natura 2000 site, which are under the 170kg nitrogen per hectare stocking rates. This review should also address the potential for implementing the measures at Article 17 (8), (18) and (19) to all farms within such catchments and more generally. Given the declining baseline, this review should be undertaken as a matter of urgency within six months of the NAP implementation.'

49. The underlined comments emphasises the importance of the matter. There was no basis on which the EAU could conclude that the exclusion of certain farms from the measure was warranted or justified; looking at the matter after the determination is not a legitimate mitigation matter.

Measure 9 EAU Determination – 'Prevention of water pollution from Fertilisers and Certain Activities: Requirements for storage of silage bales 17(15)'

50. By Regulation 17(15) 'Silage bales shall not be stored outside of farmyards within 20m of surface waters or a drinking water abstraction point in the absence of adequate facilities for the collection and storage of any effluent arising.'

51. The 'Assessment of Effects' says 'Need for clarity on the storage requirements for silage bales to prevent uncontrolled leakage losses to water/ground'.

52. The 'Mitigation Measures' column indicates 'Commitment prior to *interim* review stage, to the development of more detailed storage requirements for silage bales to supplement the 20 m setback distance specified in the regulation. Additional restrictions may include, *inter alia*, prohibiting the storage of unsealed bales in unpaved areas and bale storage height restrictions will be considered for adoption.'

53. Clearly the lack of clarity as to what are 'adequate facilities' was a source of concern. Further context may be derived from RPS Table 6.5 p855 (emphasis added) – 'This is positive in terms of providing a buffer against effluent runoff reaching watercourses. However, it is specified that this is in the absence of adequate facilities for the collection and storage of such effluent. This specification could give rise to a potentially negative effect should the silage bales give rise to leakage and overland flow to water bodies which are downslope of the bales, or via subsurface pathways to groundwaters.'

54. It is contrary to Article 6(3) Habitats Directive to develop mitigation measures after the plan has been prepared and published. The potentially negative effect was not excluded by the EAU in advance of its determination, and it did not know what if any additional restrictions would actually apply, or when.

Measure 10 EAU Determination – '18 (1) Requirements as to manner of application of fertilisers, soiled water etc.'

55. By Regulation 18(1)(a) – 'Livestock manure, other organic fertilisers, effluents, soiled water and chemical fertilisers shall be applied to land in as accurate and uniform a manner as is practically possible'. Regulation 18(1)(b) requires that 'Low emission slurry spreading equipment must be used for the application of slurry on holdings with' specified grassland stocking rates.

56. The 'Assessment of Effects' column says 'Measures to introduce Low Emission Slurry Spreading (LESS) will be positive – however there remains concern in relation to dry deposition of ammonia within SAC habitats'.

57. The 'Mitigation Measures' column indicates – 'DAFM will engage with the NPWS to identify European sites that may require a site-specific Nitrogen Action Plan. This will include further scoping (if required) prior to the interim review. Following the identification of these European sites, DAFM will undertake a study to assess the risk of ammonia deposition above critical levels and advise of any relevant localised restrictions or set back distances that may be required on a site-by-site basis. It is noted that all measures considered will have co-benefits for biodiversity and air quality in addition to the intended protection of water quality'.

58. The Determination acknowledges scientific doubt over dry deposition of ammonia and therefore adverse effects on the integrity of SAC habitats (which had not even been identified at that stage) could not be ruled out in advance. Engaging with the NPWS after the Determination to identify relevant sites is utterly inconsistent with the requirements of the Habitats Directive.

Measure 11 EAU Determination – '18(2)(d)) Requirements as to manner of application of fertilisers, soiled water etc.'

59. By Regulation 18(2)(d) 'Organic and chemical fertilisers or soiled water shall not be applied to land in any of the following circumstances—...(d) heavy rain is forecast within 48 hours'.

60. The 'Assessment of Effects' column says 'Concerns remain as to the subjectivity of the definition heavy rain and the potential for misapplication giving rise to detrimental effects on water quality through run-off.'

61. The 'Mitigation Measures' column indicates - Commitment to establish within 6 months, a clear and applicable definition of the term 'heavy rain', which can be easily applied to forecasts and enforceable, will be prescribed by the Minister'.

62. Further context may be derived from RPS Table 6.5 p857 (emphasis added) – 'The measure is positive in its design, as it mitigates for excess nutrient loss to water during adverse weather conditions. However there is a level of ambiguity in the language used in some instances, for example 'heavy rain is forecast within 48 hours'. In this instance it should be specified as to what constitutes heavy rain thereby avoiding subjectivity in its interpretation. The terminology should be more specific in this regard. Part (e) is particularly important as it takes a risk-based approach to the prevention of pollution by incorporating the physical setting of the farm e.g. slopes, land drains, soil condition etc'.

63. See also RPS Table 7.1 p892 (emphasis added) – 'There is a commitment to consider or investigate prior to the Interim Review stage that a review is undertaken to establish a clear and applicable definition of the term 'heavy rain', which is easily applied to weather forecasts and enforceable. Given the declining baseline, this review should be undertaken as a matter of urgency to inform the Interim Review of the NAP implementation.

64. Establishing an objective definition after the authorisation of the plan is contrary to the requirements of Article 6(3) of the Habitats Directive. The issue was identified in the NIS as urgent.

65. It is noted that a definition of 'heavy rain' was introduced in August 2022 – 'rainfall meeting the criteria for yellow, orange or red rainfall warnings issued by Met Eireann'; however, clearly this amendment, or its adequacy, was not considered by the EAU before making its determination.

Measure 12 EAU Determination – '20(1) Limits on amount of livestock manure to be applied'

66. By Regulation 20(1) – 'The amount of livestock manure applied in any year to land on a holding, together with that deposited to land by livestock, shall not exceed an amount containing 170 kg of nitrogen per hectare. The amount considered to be applied to commonage shall not exceed 50 kg of nitrogen per hectare'.

67. (By Regulation 35(1) inserted in August 2022 this does not apply to compliant 'derogation' holdings).

68. Strikingly, the 'Assessment of Effects' column candidly accepts – 'Concerns remain as to the scientific basis of the proposed limit of 170 kg N/ha/yr. This is not supported by an evidence base and as such has potential to give rise to adverse effects on water quality'.

69. The 'Mitigation Measures' column indicates – 'Commitment to undertake further research as part of the interim review stage to provide an evidence base with respect to nitrogen limits required to avoid adverse effects on water quality. This research will be used to inform future measures/amendments.'

70. So the solution to the absence of an evidential basis is to press on without an evidential basis – and to carry out more research later in the hope of finding one. That is the antithesis of excluding scientific doubt.

71. Further context may be derived from RPS Table 6.5 p859 (emphasis added) – 'This measure outlines limitations for the application of livestock manure on a holding, therefore, is a positive measure. However use of the previous year's stocking rate may lead to over application in scenarios where the stocking rate of the current year may have decreased. There is also a biohazard and nutrient runoff risk associated with the use of livestock manure as a fertiliser. Recycling of nutrients ensures efficient use of scarce resources and limits over application. However, there is always a pollution risk associated with landspreading organic fertilisers. It is also noted that there is no scientific evidence to support whether 170 kg of nitrogen per hectare allows for the maintenance of high-status water quality where it is required relative to environmental objectives set under the River Basin Management Plan or is an environmental target set as part of site-specific conservation objectives for SACs e.g. for the freshwater pearl mussel, or oligotrophic or hard water lakes. Further research is required in this regard.'

72. See also RPS Table 7.1 p892. The RPS 'Assessment of Effects' column (emphasis added) says – 'Concerns remain as to the scientific basis of the proposed limit of 170kg nitrogen per hectare per year. This is not supported by an evidential basis and as such has potential to give rise to detrimental effects upon water quality.' The RPS 'Mitigation Measures' column indicates – 'There is a commitment to consider or investigate at the Interim Review stage that further research is undertaken to establish whether the proposed 170kg nitrogen limit is sufficient to avoid or mitigate for adverse effects upon water quality arising as a result of farming practices within catchments with declining water quality, those supporting watercourses designated as part of a Natura 2000 site or more widely. Given the declining baseline, this review should be undertaken as a matter of urgency within one year of the NAP implementation.'

73. The urgency of the matter does not appear to have had any effect on the EAU. Indeed it omitted the reference to urgency.

74. These concerns clearly apply also to holdings which do avail of a derogation and thus exceed the (unscientifically based) threshold of 170 kg.

Measure 13 EAU Determination – '(General) Ploughing and the use of non-selective herbicides'

75. The 'Assessment of Effects' column says 'Further consultation has highlighted that some uncultivated cover must be retained through the winter period to support seed-eating birds and mitigate against any potential adverse effects on biodiversity.'

76. The 'Mitigation Measures' column indicates – 'Any measure(s) introduced must seek to avoid any adverse effects on either water quality or biodiversity. The National Expert Group will review practices and advise the Minister on the most appropriate measure(s) to support seed-eating birds during the winter period while also mitigating any potential adverse impacts on water quality, in this instance. The measure(s) will be published by the

Minister, after consultation with the Minister for Agriculture, Food and the Marine, within four months of the commencement of the new NAP and shall be applicable from 1st July 2022.’
77. It is apparent that the adverse effects are to be avoided through measures yet to be introduced – such measures were clearly incapable of assessment by the EAU.

Other

78. The EAU Determination does not expressly provide any mitigation measures in respect of the Derogation. Indeed ‘Information on negotiations with the EU Commission in relation to potential Commission derogation and associated measures’ was one of the additional items of information requested. The derogation was addressed in the NIS which is one of the documents which the EAU ‘evaluated and analysed’. Page 82 of the NIS states ‘In making the decision as to whether a derogation is to be granted in respect of a farm the minister should have due regard to the potential for this decision to effect upon European sites which may be linked or in proximity to the farm holding.’ However, it is clear from the description of the derogation application process as set out in the affidavit of Edward Massey that this does not in fact happen; it is not part of the decision-making process.

79. The lack of a plea of breach of the nitrates directive is irrelevant – the issue is the adequacy of the AA.”

70. The State submitted:

“The Applicant answers this question in 79 paragraphs. Yet, there are two striking omissions from that answer.

First, the Applicant does not identify any evidence, expert or otherwise, supportive of this proposition. It does not engage with the averments in the affidavit evidence at all. Instead, it advances its claim based on an analysis of the AA Determination and the NIS, in a manner that closely echoes the relevant paragraphs of the Statement of Grounds.

Second, this question expressly states that it should be answered ‘on the assumption that only the effects of the mitigation measures in the plan itself should be considered’. This is in contradistinction to Question 33, which is to be answered ‘on the assumption that the effects of the underlying agricultural activities should be considered’. This question is therefore clearly aimed at determining whether the Applicant has evidenced a breach of the AA Directive if the Court accepts the Respondents’ position, that what requires assessment for the purposes of the AA is the environmental effects of the protective measures included in the NAP, rather than the environmental effects of agricultural activities.

Despite this, the Applicant proceeds to identify the same series of alleged frailties with the AA, already identified in the Statement of Grounds, none of which relate to the environmental effects of the measures adopted by the NAP. Rather, all of those points are aimed at establishing that the Respondents have not established that those measures are sufficient to ensure that agricultural activities will not have an adverse effect on any site.

The Applicant’s reply therefore fails to address question 26, at all. Rather, the matters relied on by the Applicant here are relevant only if the Court accepts the Applicant’s position as to what must be assessed under the Nitrates Directive, which is what is to be addressed under question 33.

For completeness, it is noted that the basis for the Respondents’ position, that the Applicant’s case as pleaded is dependent on its (incorrect) assumption that the AA of the NAP requires the assessment of the environmental effects of agricultural activities, and is in any event misconceived on a range of other grounds, has already been set out in the Statement of Opposition, and the affidavit evidence. However, the relevant provisions are summarised below.

The Respondents denied (SoO, §52) the allegation at §12 of Section E(b) of the Statement of Grounds that the AA Determination is invalid because the conclusion that there would be no adverse effects on a European Site depends on mitigation measures the efficacy of which has not been established with scientific certainty.

Moreover, the Respondents denied (SoO, §52) that the AA Determination does not contain complete, precise and definitive findings and conclusions that would allow the EAU to determine that no reasonable scientific doubt remains as to the absence of the identified potential effects of the NAP on European Sites.

In this regard, Mr Flynn averred that (DF1, §103) the claim that the AA did not ensure that there was no reasonable scientific doubt as to the absence of adverse effects on the integrity of European Sites that are likely to be affected by the NAP is unfounded.

Moreover, Mr Flynn averred that there are a number of misconceptions that (DF1, §104) underlie the Applicant’s claim both with respect to the Habitats Directive and more generally:

- (1) the claim as pleaded in the Amended Statement of Grounds fails to have any proper regard to the nature of the NAP as a strategic national plan, or to its role as an action programme required to be established by Ireland under the Nitrates

Directive and in compliance with the framework established by the Nitrates Directive (DF1, §§105–109);

(2) the claim as pleaded in the Amended Statement of Grounds fails to recognise that the measures under the NAP are inherently protective, and aimed at reducing adverse effects on water quality (DF1, §§111–112);

(3) the Amended Statement of Grounds appears to have mischaracterised the assessment to be carried out as being an assessment of the environmental effects of the agricultural activities in Ireland, rather than an assessment of the environmental effects of the measure provided for under the NAP (DF1, §§112–115);

(4) the Applicant appears to proceed on the assumption that the NAP can be approved only if it is demonstrated that the NAP alone will prevent any future adverse effects on water quality or European sites (DF1, §§116–117).

As to the Applicant's pleas (ASoG, §§10–11) regarding the Table contained in the AA Determination entitled 'Mitigation Measures', the Affidavit of Mr Flynn continues to aver that this plea is unfounded (DF1, §121).

Mr Flynn avers that (DF1, §§122–126) a commitment to monitor the effectiveness of the NAP, investigate technical and/or scientific matters further and, if appropriate, consider introducing additional and/or reinforced measures, cannot be interpreted as a concession by the Department that the protective measures already included in the NAP are inadequate.

Mr Flynn avers that (DF1, §§127–134) that it cannot be the case that a competent authority when conducting appropriate assessment of strategic plans aimed at environmental protection is precluded from approving such plans where there is an intention to engage in further monitoring, research and investigation and if appropriate consider implementing additional or reinforced measures.

Mr Flynn further avers that he does not accept that a competent authority when concluding appropriate assessment of strategic plans aimed at environmental protection is not entitled to consider, as mitigation, commitments to monitoring the effectiveness of protective measures with a view to strengthening those protective measures if necessary (DF1, §135). Mr Flynn avers that (DF1, §136) he does not accept that the inclusion of compliance measures as mitigation (i) necessarily involves a concession that the protective measures in the NAP are inadequate, and/or (ii) is inconsistent with Article 6(3) of the Habitats Directive. Mr Flynn avers at §137 that:

'I say that compliance with a plan or programme can never be assured prior to the implementation of that plan or programme. There is always a risk that a developer will not comply with a permission as granted, or that there will be non-compliance with protective measures in a plan, resulting in damage to a site that would have been protected if conditions were complied with. This is not a reason to refuse authorisation for a plan or project, nor does addressing that risk equate to a concession that protective measures in the plan are inadequate. Again, I say that it is illogical, and will damage rather than improve environmental protection, to assume that a commitment to enhance compliance with measures in a plan equates to a concession that those measures are inadequate.'

Mr Flynn continues to aver at §138 that:

'With respect to compliance measures contributing towards mitigation, I emphasise that noncompliance with the measures in previous NAPs has been identified as a significant contributing factor in the deterioration in water quality in Ireland, and the NIS of the NAP emphasises that ensuring compliance with the measures in the 5th NAP is essential to avoiding deterioration in water quality. As I have emphasised above, and as detailed in the Affidavit of Edward Massey, this resulted in increasing compliance being a significant focus of the 5th NAP. I say and believe that those enhanced measures with respect to compliance were appropriate measures to include as mitigation and the EAU was entitled to have regard to those measures in the AA Determination.'

Mr Flynn avers that (DF1, §139), on the basis of the foregoing, he believes that the Applicant's plea at §12 of Section E(b) of the Amended Statement of Grounds is unfounded and that he believes that the allegation that the AA Determination does not contain complete, precise and definitive findings and conclusions that would allow the EAU to determine that no reasonable scientific doubt remains as to the absence of the identified potential effects of the NAP on European Sites is unfounded.

Finally, Mr Flynn at §§140–151 replies to the specific allegations at §§13–24 of Section E(b) of the Amended Statement of Grounds and concludes that (DF1, §151) the allegation at §26 that the AA Determination is contrary to Article 6(3) of the Habitats Directive and must be quashed is unfounded.

It is accepted that these averments by Mr Flynn do not relate to contested factual matters per se, or contested expert evidence, where the Applicant failed to ground its case with respect to the AA Directive on expert evidence. Rather, those averments are identified in ease of the Court, in identifying the Respondents' position on the arguments pleaded by the Applicant on this point, and rehearsed at length in the Reply.

The Court further asks that the lack of a challenge to the compliance of the NAP with the AA Directive be addressed in the context of question 26. For the avoidance of doubt, the Respondents allege that this point is relevant in the context of 33, not in the context of question 26. The relevance of that lacuna is that where there is no plea of breach of the Nitrates Directive, it must be taken that the level of ambition of the NAP with respect to preventing environmental harm from agricultural activities meets Ireland's obligations under the nitrates directive. That point arises in the context of Core Ground 1 only if the Court accepts the Applicant's position that the AA requires assessment of the environmental effects of agricultural activities. If the Court accepts that what requires assessment for the purposes of the AA is the environmental effects of the protective measures included in the NAP, rather than the environmental effects of agricultural activities, it is therefore not asserted that the lack of a plea of breach of the Nitrates Directive is relevant.

The Respondents submit, in all of those circumstances, that the Applicant has not demonstrated an evidential basis in uncontradicted averments to satisfy its burden of proof that the AA determination was inadequate to remove all scientific doubt as to the effects of the NAP."

71. The ICMSA submitted:

"37. ICMSA submits that An Taisce has certainly not established this. The State Respondents' submissions (pp.9-13) are adopted and ICMSA makes the following further points.

38. In this section of its Response, An Taisce asserts (§2, p.7) that the 'key document' here is 'DETERMINATION ON APPROPRIATE ASSESSMENT FOR IRELAND'S FIFTH NITRATES ACTION PROGRAMME' issued by the EAU (Ecological Assessment Unit) of the First Named Respondent's Department. Again, the omission to refer to any affidavit evidence is striking. ICMSA's points below are strictly without prejudice to the consequences for the Applicant which flow from the absence of any such evidence.

39. An Taisce's Response proceeds to make various submissions under the sub-headings of 13 'Measures' in this EAU Determination.

40. However, the isolated quotations, when read in the context of the whole, do not really support the conclusions which An Taisce seeks to derive from them. Taking just one example, in the final sentence of §34 (at p.14) An Taisce submits that '... reducing the risk does not equate to eliminating the risk ...'. This does not properly acknowledge that the passage from the EAU Determination quoted in the very preceding sentence notes that the measures referred to, including mandatory soli testing, 'will substantially reduce the potential risk'. Both of the underlined words are, effectively, 'airbrushed out' of An Taisce's conclusion at §34.

41. In common with the approach which its Response took (under Issue 3(b)) to the NIS, An Taisce proceeds to quote selectively from the EAU Determination, while ignoring its actual conclusion.

42. The conclusion is stated at p.784 of the Exhibits as follows:

'Following Appropriate Assessment by the EAU, it has been concluded that the proposed Nitrates Action Programme 2022-2025 (given effect by the GAP Regulations 2022) will not adversely affect the integrity of any European site(s) within the Natura 2000 network, for the following reasons ...'

43. The conclusion continues (p.785, Exhibits):

'The EAU has determined ... pursuant to Article 6(3) of the Habitats Directive, that the proposed Nitrates Action Programme 2022-2025, either individually or in combination with any other plans or projects, will not adversely affect the integrity of any European site(s).'

44. Of course, An Taisce will presumably say that the very case it is making is that it does not agree with the conclusions in either the NIS or the EAU determination, and that such conclusions are not supported. Nonetheless, for present purposes, what is notable is how An Taisce has chosen to make out that case. It has chosen to do so not by way of cross-examination nor even by pointing to any affidavit evidence at all. Rather, its project is to attack the documents merely by atomizing particular statements within them.

45. ICMSA respectfully submits that that is neither appropriate nor probative. Even if the lack of proper evidence could somehow be overlooked (and it is submitted that it cannot be) the documents themselves which An Taisce points to should be read holistically.

46. In passing, it is noted that An Taisce does not assert, and correctly not, that anyone who has compiled any of the documents, or the conclusions therein, has acted otherwise than in good faith. As such, it must be presumed that the above conclusions were indeed arrived at in good faith (in addition to same enjoying the presumption of validity). Indeed, that also reflects the law. Thus, the Court of Appeal, in *Jackson Way v Information Commissioner* [2022] IECA 213, stated at §46:

'As the trial judge held, public bodies are required to act in good faith in complying with their statutory obligations, and it would not be appropriate for a court to assume that they would deliberately circumvent the provisions of the FOI Act in the manner suggested.'

72. My decision is that to a large extent the State are correct that the applicant has misread the question. The premise of this particular question is an assumption that the State is correct that what is to be assessed is only a suite of protective measures, rather than for example the introduction of nitrogen to the receiving environment in the course of agricultural activities. By and large the applicant hasn't taken that assumption on board. The "devastating" admission regarding reg. 17(1) for example falls into that category because that relates to the effects of the agricultural activities (or relatedly to the NAP not being more rigorous), as distinct from assessment of the protections of the NAP insofar as they go.

73. If we focus on the specific question for now, any claim that the protective measures have not been properly assessed is essentially an evidential issue. The AA is inadequate if it fails to remove all scientific doubt as to effects on European sites in accordance with best scientific knowledge. That is a matter of evidence, the onus being on the applicant. Dislodging a conclusion in the AA as to the lack of effect on European sites generally requires one of two things, either evidence (which could include a conclusion that is available on the exhibited documentary evidence) that the material before the decision-maker did not exclude doubt, or evidence that a reasonable and informed expert would have seen such a conclusion as being flawed on the face of the materials, even in the absence of contrary scientific information before the decision-maker at the relevant time.

74. This applicant hasn't come forward with sufficient evidence under either heading bearing in mind the overarching assumption in favour of the State (for the purposes of the question only) to which I have alluded. The failure to demonstrate doubt evidentially replicates the problem that previously occurred in *Reid v. An Bord Pleanála* (No. 2) [2021] IEHC 362, [2021] 5 JIC 2705 (see *Heather Hill Management Company CLG v. An Bord Pleanála and Ors* [2022] IEHC 146, [2022] 3 JIC 1603 (Holland J.)).

75. I don't think that the passages of the NIS relied on by the applicant are so contradictory of the conclusion as to create doubt about that conclusion, if we consider the question on its own terms namely on the assumption that only the protections need to be assessed and not the underlying agricultural activities.

76. I do accept the applicant's point that the AA determination is replete with issues where the only commitment is to examine and consider matters, for example:

"Consideration to be given to inclusion of detailed analysis and quantification of existing storage capacity for livestock manure, other organic fertilisers, soiled water and effluents on farms in accordance with the required capacities outlined in Schedule 2 of the draft GAP Regulations 2022 as part of these inspections (from March 2022)." (p. 778 of Book of Exhibits)

"Consideration will be given to the collation of inspection data to track current capacity at farm and national level to inform future incentives/enforcement and increase compliance." (p. 779)

"Following consultation with the Minister for Agriculture, Food and the Marine, the Minister shall initiate an interim review of this action programme in 2023. The purpose of the interim review is to undertake an assessment of the effectiveness of the Nitrates Action Programme measures and introduce any new measures that may be needed to reflect water quality data, significant changes to the agricultural sector and/or any other data considered relevant. This will entail an examination of the local authority GAP agricultural inspection programme. Aspects to be examined include: the rates of inspections, levels of non-compliances, rates of cross reporting, and the levels of implementation of enforcement notices and prosecutions. The EU Commission have signalled that they will seek a reduction in derogation threshold of 250 kg N/ha where there are worsening trends in N concentrations. However, negotiations are still ongoing." (p. 779)

"Commitment for DHLGH/DAFM to consider inclusion of a clear definition of poaching causing severe damage to land within the farm holding, and application of the definition against the provisions of 14(3)." (p. 780)

"Commitment to investigate the suitability of Morgan's P for the interim review, in order to provide time to gather best available knowledge." (p. 780)

"Consideration to be given to advisers developing Nutrient Management Plans (NMP) for farm holdings to be agri-environmental specialists with suitable training. □ Commitment to investigate the rolling out of a risk-based model for generation of NMPs to account for sensitive receptors." (p. 781)

"As part of the interim review, a review of the Article 17 setback distances from natural waters in EPA Catchments of Concern (increasing nutrient levels) will be undertaken and investigation and identification of any requirement to increase these distances in the NAP will be carried out to provide evidence to support potential change. The prescribed 2 m setback distance will remain in place until the suitability review is undertaken." (p. 781)

"Commitment to investigate expansion of these measures at interim review stage and review their applicability for holdings below 170 kg N/ha." (p. 781)

"Commitment prior to interim review stage, to the development of more detailed storage requirements for silage bales to supplement the 20 m setback distance specified in the regulation. Additional restrictions may include, inter alia, prohibiting the storage of unsealed bales in unpaved areas and bale storage height restrictions will be considered for adoption." (p. 781)

"DAFM will engage with the NPWS to identify European sites that may require a site-specific Nitrogen Action Plan. This will include further scoping (if required) prior to the interim review. Following the identification of these European sites, DAFM will undertake a study to assess the risk of ammonia deposition above critical levels and advise of any relevant localised restrictions or set back distances that may be required on a site-by-site basis. It is noted that all measures considered will have co-benefits for biodiversity and air quality in addition to the intended protection of water quality." (p. 782)

"Commitment to establish within 6 months, a clear and applicable definition of the term 'heavy rain', which can be easily applied to forecasts and enforceable, will be prescribed by the Minister." (p. 782)

"Commitment to undertake further research as part of the interim review stage to provide an evidence base with respect to nitrogen limits required to avoid adverse effects on water quality. This research will be used to inform future measures/amendments." (p. 782)

"Any measure(s) introduced must seek to avoid any adverse effects on either water quality or biodiversity. The National Expert Group will review practices and advise the Minister on the most appropriate measure(s) to support seed-eating birds during the winter period while also mitigating any potential adverse impacts on water quality, in this instance. The measure(s) will be published by the Minister, after consultation with the Minister for Agriculture, Food and the Marine, within four months of the commencement of the new NAP and shall be applicable from 1st July 2022." (pp. 782-3)

77. But these points have much more relevance under the heading of the next question. Leaving over that significant issue as to assessing the effects of the agricultural activities themselves, the mere fact that certain matters are to be considered, reviewed, examined further and so on does not in itself have the automatic consequence that the definite matters that are proposed would not exclude doubt as to effect on European sites in accordance with best scientific knowledge at the present time. That might seem a small step but logically it is an inference too far.

78. The fact that further studies are to be carried out does not mean that one is not applying current best knowledge. Science is a never-ending journey that will continue for as long as there are humans. The cry that "further research is needed" generally falls flat. Dr Dean Burnett in "More research is needed': empty cliché or words to live by?", *The Guardian*, 16th March, 2016 (<https://www.theguardian.com/science/brain-flapping/2016/mar/16/more-research-needed-cliche-science-higher-education>) explains:

"Countless science students end up using this pseudo-insightful conclusion this at some point, often for good reason. Firstly, it's invariably correct: you seldom get any scientific study which is both completely comprehensive and conclusive, so there's always scope for more research. Even something as familiar and established as Einstein's General Theory of Relativity is still being researched a century later.

Secondly, it implies the student is aware of limitations and the wider gaps in the field, and is also willing/able to criticise more established scientists, but without being specific (or directly insulting) in any way.

The problem is that it's essentially meaningless. Unless a paper or study claims to answer a specific question once and for all and with absolute certainty, more research will *always* be needed."

Issue 33(a)

79. Issue 33(a) is as follows:

"(a) Has the applicant established that the AA determination was inadequate to remove all scientific doubt as to the effects of the NAP (leaving aside the question of the need for a

site-specific analysis within the AA itself), on the assumption that the effects of the underlying agricultural activities should be considered, having regard in particular to:

- (i) The lack of a plea of breach of the nitrates directive;
- (ii) the fact that the NAP envisages farm-level derogations in a context that will require AA where they may affect European sites and State has made it clear that they do not intend to carry out site specific assessments in the context of a derogation application as set out in the responses in the SEA;
- (iii) the fact that the individual derogations do not adequately or at all seek information from farmers as to whether the individual farms are in or near European sites or as to whether agricultural activities on such farms could affect such sites or impose requirements that would follow from such information; and
- (iv) the fact that there is no general provision otherwise for site-specific assessment of impacts of farming on European sites.”

80. The applicant submitted:

“Yes.

81. The lack of a plea of breach of the Nitrates Directive - Items (i) - is irrelevant – the issue is the adequacy of the AA.

82. Items (ii), (iii) and (iv) in 33(a) all support the contention that the AA Determination was inadequate. Page 82 of the NIS (Exhibits p.873) states ‘In making the decision as to whether a derogation is to be granted in respect of a farm the minister should have due regard to the potential for this decision to effect upon European sites which may be linked or in proximity to the farm holding.’

83. The Natura Impact Statement which accompanies Ireland’s latest draft River Basin Management Plan, clearly outlines (Exhibits p.5509) the requirement for a farm level assessment on foot of an application for a derogation in order to safeguard the objectives of the Habitats Directive and WFD:

84. ‘In the context of nitrates derogations, it is noted that where a farm has a derogation and has an eco-hydrological pathway to a European site, there is potential risk to the favourable conservation status objective of those European sites. The derogations will be decided as part of the NAP process. However, it is estimated that over 5,000 farms within the state would seek to avail of the derogation status, covering significant land areas. The list of farms and /or their location is not available. From a precautionary perspective it is assumed that some of these farms and their activities have ecohydrological pathways to European sites and that some of these European sites are within the landholding. Therefore, there is significant potential for adverse effects on maintaining and achieving conservation objectives and therefore integrity of European Sites with respect to these derogations both individually and in combination with other derogations, plans and projects. Given the scale of derogations under previous cycles of the NAP, the potential for in-combination effects is significant. It will therefore be vital that any derogations which emerge from the NAP will be subject to AA; which should include a robust assessment of in-combination adverse effects.’

85. However, it is clear from the description of the derogation application process as set out in the affidavit of Edward Massey that this does not in fact happen; it is not part of the decision-making process.

86. The point made about the absence of a farm-level permitting system is that this absence supports the contention that the requisite scientific certainty as to the absence of significant effects must necessarily be contained in the AA of the NAP. The NAP inter alia regulates the conditions under which the cultivation of grassland for the sustenance of cattle for agricultural production is facilitated through the application of fertilisers on the surface of land or below its surface across the territory of Ireland, including in the vicinity of, and by way of hydrological connectivity to, Natura 2000 sites. That Plan therefore determines the conditions under which farm-level projects for the grazing of cattle and the application of fertilisers on the surface of land or below its surface may be carried out.”

81. The State submitted:

“At the outset, the Respondents emphasise that a distinction must be drawn between: (i) a conclusion by the Court that the AA of the NAP should have assessed the environmental effects of nitrates produced by agricultural activities generally, rather than only the environmental effects of the measures adopted; and (ii) a conclusion that the AA of the NAP should have included an assessment of farm-level activities. The latter does not follow automatically from the former.

In other words, even if the Court accepted the former contention, that would mean only that the AA of the NAP would be required to consider the environmental effects of nitrates production by agricultural activities at a national level. The contention that the AA of the NAP, a national plan, should somehow involve an AA of individual farm-level activities goes

significantly further, and cannot be considered to follow automatically from the former proposition.

Where we understand that the Court will invite submissions in the context of module 3 on whether either of those propositions is correct, or whether the issue actually arising is that identified in question 26, we do not address this further. Rather, we address whether, if each of those propositions is accepted, the Applicant has met its evidential burden of proof. With respect to the former proposition, the Respondents submit that the Applicant has still failed to meet its burden of proof to evidentially establish that the AA determination was inadequate to remove all scientific doubt as to the effects of the NAP, even on the assumption that the effects of the underlying agricultural activities should be considered.

First, the points relied on by the Respondents and summarised in response to Question 26, other than the point with respect to assessment being confined to the effects of the measures adopted under the NAP, will apply equally here.

Second, it is in this context that the Respondents submit that the failure to challenge compliance with the Nitrates Directive is of relevance. The grav[a]men of the Applicant's case – although it is not expressed in such a matter – is that the Nitrates Directive does not demonstrate sufficient ambition to protect water bodies. As has already been addressed at length in submissions, the Respondents' position is that this claim must be determined on the assumption that the NAP does meet the requirements of the Nitrates Directive. However, it is accepted that the Court held in the Judgment that (§86):

'... the case must proceed on the basis that the NAP is in accordance with the nitrates directive, save to the extent that provisions of the nitrates directive overlap with other pleaded points such as the AA requirements of the habitats directive'.

Having regard to those factors, it is respectfully submitted that the Applicant has not sufficiently evidenced its case. It has pointed to a broad range of discrete criticisms of the AA, but has not adduced expert evidence to establish any of those criticisms. It is accepted that expert evidence is not always required to make out a breach of the Habitats Directive. However, in light of the factors set out above, and the nature of the claim made here by the Applicant, it is respectfully submitted that expert evidence would be required here.

In this regard, it is recalled that the Court in *Thomas Reid v an Bord Pleanála* (No. 2) stated that (§45) the test of unreasonableness in the Habitats Directive context:

'... is not whether the applicant has demonstrated that no reasonable decision-maker could have concluded that there was no scientific doubt. The test is whether the applicant has demonstrated that a 'reasonable expert' (a reasonable person with the relevant sufficient expertise and aware of, and in a position to fully understand and properly evaluate, all the material before the decision maker) could have a reasonable scientific doubt as to whether there could be an effect on a European site.' (Emphasis added).

This dictum was applied in *Heather Hill Management Company ... v. An Bord Pleanála and Ors* [2022] IEHC 146 where Holland J stated that (§278):

'This passage, first, reflects the position that in impugning AA, as in all other areas of judicial review of presumptively valid decisions, the onus to demonstrate error lies on the Applicant. The legal burden rests with the Applicant. While the 'reasonable expert' standard may not, strictly, require expert evidence, or any evidence, of the applicant in judicial review, it is easy to see how in practice and in most cases, it could most obviously be met by such evidence.' (Emphasis added)."

82. The ICMSA submitted:

"47. At §80, An Taisce's Response notes: 'The answer to question 26 is relevant here also but is not repeated.' ICMSA takes the same approach – the points above under Issue 26 are again relied upon here as and if necessary.

48. ICMSA proposes to take Issues 33(a) and (b) together. The State Respondents' submissions (pp.14-16) are adopted, including (but not limited to) the submission at p.16 that any claim that an AA is required at farm level could only go to the implementation of the NAP and of the derogation decision and not their validity.

49. ICMSA makes the following further observations.

50. The core point – indeed seemingly the only point – which An Taisce's Response makes under Issue 33(a) is to quote (at §84, p.26) from a passage at p.5509 of the Exhibits regarding a farm-level assessment in the context of derogation assessments. To assist the Court, it is noted that the relevant quotation in fact appears at p.5510 of the Exhibits.

51. ICMSA would question what weight falls to be attached to this isolated statement plucked by An Taisce out of literally thousands of pages of Exhibits. An Taisce's response does not properly address what weight ought to be attached to the statement, although it does characterise it as demonstrating a 'requirement' (§83) for a farm-level assessment on

foot of derogations. If, however, that were indeed a 'requirement' one would expect An Taisce to be able to point to something more concrete to that effect, beyond an isolated statement in a lengthy report.

52. The report in question is the Natura Impact Statement for the Draft 3rd Cycle River Basin Management Plan (September 2021). It predates the Fifth NAP – something which (it is respectfully submitted) has at least some bearing on the weight to be attributed to the passage on which An Taisce now relies. Indeed, the sentence at p.5510 immediately before the passage quoted by An Taisce arguably underscores this latter point regarding the questionable weight to be attached to the passage in circumstances where matters may have now moved on. That preceding sentence reads:

'The new NAP will be subject to AA and SEA in its own right and the new NAP will be required to be cognisant of the RBMP ; including the mitigations identified within this NIS for the RBMP.'"

83. My decision is as follows. Let's neutralise one issue at the outset, which is why there isn't a system in practice for AA of individual derogations.

84. The State's original submissions state as follows:

"76. The Applicant is correct that there is no specific or tailored permitting system for farm-level agricultural activities in Ireland. However, it is incorrect in assuming that this means that there is no legislative framework relevant to that issue.

77. As detailed above, it is not the function of the Court, or the Respondent, to conduct a review of the legislative framework so as to make the Applicant's case for it. However, to provide context to the Court, and to put beyond doubt that: (i) the Applicant's characterisation of the NAP as an authorisation or programmatic appropriate assessment of agricultural activities is incorrect, and (ii) the procedural basis on which this issue is raised is therefore manifestly deficient, certain key legislative provisions relevant to the concerns raised by the Applicant are summarised below.

78. First, that there is typically no permitting obligation for the use of land for the purposes of relevant agricultural activities is not, as the Applicant appears to infer, because the NAP acts as a blanket authorisation for those activities. Rather, it is because section 4(1)(a) of the Planning and Development Act 2000 ('the 2000 Act') provides that 'development consisting of the use of any land for the purpose of agriculture' is exempted development.

79. Section 2 of the 2000 Act defines 'agriculture' as including: 'horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the training of horses and the rearing of bloodstock, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, ...'

80. These provisions therefore clearly apply to the type of agricultural activity with which the Applicant is concerned.

81. Section 4(1)(a) will be subject to the provisions of section 4(4), which provides: '(4) Notwithstanding paragraphs (a), (i), (ia), and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an AA of the development is required'.

82. If the Applicant believes that any specific agricultural land use falls under section 4(4) on the basis that it requires AA, so that it is not exempted development, it is entitled to litigate that matter in the normal manner. It has not done so.

83. Second, a farmer cannot rely on the Derogation without authorisation from the Minister for Agriculture, Food and the Marine under regulation 35(1)(a) of the GAP Regulations, as amended. It is the case that section 7 of the GAP Regulations does not reference AA. However, if the Applicant believes that any specific authorisation for a derogation requires AA, it could have sought to challenge that authorisation, and to argue inter alia that the Minister was required to carry out an AA:

i. having regard to its obligations under Regulation 27(2) of the 2011 Regulations to exercise its functions so as to secure compliance with the requirements of the Habitats Directive, and/or

ii. under section 42 of the 2011 Regulations, on the basis that the activities at issue were a 'project' for which the Minister for Agriculture received an application for consent and that required AA.

84. Again, the Applicant has not taken this course of action.

85. Third, insofar as there is any agricultural activity that concerns the Applicant and that falls outside the foregoing provisions, it is open to the Applicant to bring that activity to

the attention of the Minister and ask the Minister to exercise its statutory power under Regulation 28 of the 2011 Act, which provides:

'28. (1) Where the Minister has reason to believe that any activity, either individually or in combination with other activities, plans or projects, is of a type that may—

(a) have a significant effect on a European Site,

(b) have an adverse effect on the integrity of a European Site, or

(c) cause the deterioration of natural habitats or the habitats of species or the disturbance of the species for which the European Site may be or has been designated pursuant to the Habitats Directive or has been classified pursuant to the Birds Directive, in so far as such disturbance could be significant in relation to the objectives of the Habitats Directive, the Minister shall, where he or she considers appropriate, direct that, subject to paragraph (2), the activity shall not be carried out, caused or permitted to be carried out or continued to be carried out by any person in the European Site or part thereof or at any other specified land except with, and in accordance with, consent given by the Minister under Regulation 30. ...'

86. If the Minister were satisfied that the particular agricultural activity did require AA screening or AA, it could make a direction under Regulation 28(1) to the effect that the activity must cease unless consent is granted under Regulation 30, which requires AA screening and where appropriate AA. Alternatively, it could make a direction regulating the activity under Regulation 29(1).

87. Regulation 28(2) sets out certain exceptions to the Minister's power, where the activity has been granted a consent and is carried out in compliance with that consent. However, if that were the case the Applicant would have had an opportunity to challenge the consent, if it believed AA was necessary but not carried out.

88. However, again, the Applicant has not taken that course of action, or asked the Minister to exercise its powers under Regulations 28 to 30, or even identified in these proceedings any specific agricultural activity where it alleges that there is 'reason to believe' it is having a significant effect on a specific European Site within the meaning of Regulation 28.

89. Finally, if the Applicant also wished to challenge any systemic deficiency it contends arises in the legislative framework governing the AA of agricultural activities, it was open to it to bring a non-transposition claim, identifying with precision how it alleges the Irish system fails to properly transpose EU law, in accordance with the requirements detailed above. Again, it did not do so.

90. It is emphasised that this is not intended to constitute a full summary of the legislative framework relevant to the AA of agricultural activities. Rather, it is intended to highlight some of the key provisions, to demonstrate that the assumptions underlying the Applicant's approach to the NAP and the GAP Regulations are without any question incorrect, and that the procedural avenue by which the Applicant seeks to ventilate these issues is manifestly inappropriate.

91. Finally, for the avoidance of doubt, the Respondents fully reserve their position should any claim based on the foregoing provisions arise. This section should not be taken as an acceptance that any such claim is maintainable, nor should it be taken as an acceptance of the Applicant's interpretation of the Dutch Nitrates Case [Joined Cases C-293/17 and 294/17 *Coöperatie Mobilisation for the Environment UA*], which is a complex judgement that requires a fact-based consideration and application on a case-by-case basis. However, even if the Applicant were correct with respect to its interpretation of that case, it is clear that these proceedings are not the correct forum to ventilate those concerns."

85. Without intending any massive oversimplification of the State's argument, I think their position is best summarised by saying that they don't feel called on to explain why there are no farm-level AAs of individual derogations, since the applicant hasn't pleaded anything requiring the respondents to give such an explanation.

86. That I think is an argument that could satisfy lawyers, albeit perhaps not necessarily everyone else. However I think we can take that answer for now.

87. Like the previous question, we have to take this one on its own premise, which is the assumption that the AA of the NAP should assess the effects of the underlying agricultural activities.

88. On that assumption one comes inescapably to the factual conclusion that the AA would be defective. That is for two very basic reasons. Firstly the AA does not purport to conduct the assessment required by the assumption. If an administrative process doesn't address questions it is meant to consider then one can draw the conclusion that the process is flawed – and in principle flawed to the point of *certiorari*, as in *Sherwin v. An Bord Pleanála* [2024] IESC 13 per Woulfe J. at para. 115.

89. Relatedly, if one has to exclude doubt as to the effect of the underlying agricultural activities, the AA doesn't attempt to do that and indeed acknowledges, for example, that there is no scientific basis to the 2m set-back. While the applicant calls that a "devastating admission", it really just makes clear what is the position anyway which is that the AA didn't set itself the job of excluding doubt on the basis postulated in the assumption underlying this question.

90. Secondly and reinforcingly, we have the lack in practice of an AA process in relation to derogations. I accept the State's point that a requirement to consider the effect of agricultural activities when making the NAP does not necessarily imply a requirement to consider those effects for that purpose in relation to specific European sites, and I also accept the proposition that the applicant hasn't shown that a site-specific AA in the NAP context would have been practicable. But the fact that there isn't in practice a site-specific AA process (whatever about the law theoretically on the books) in relation to derogations reinforces the adverse consequences on European sites of any shortcomings in the AA process of the plan itself.

91. It is of note that the AA process in the WFD context includes the statement that "It will therefore be vital that any derogations which emerge from the NAP will be subject to AA; which should include a robust assessment of in-combination adverse effects": Natura Impact Statement of draft River Basin Management Plan 2022-2027, p. 45. Not just reasonable or even desirable – "vital". Even if time passes, as the ICMSA points out, or if hypothetically some contrary view is articulated by the executive or another expert later in the process or in some other process, there's your scientific doubt right there.

92. The failure to dispel such doubt by not having in practice a process of derogation-specific AA doesn't mean that the NAP should have assessed every farm impacting on a European site individually. But it does mean that any shortcoming in plan-level AA, if there is any such shortcoming, could be more significant due to the lack of a farm-level safety net.

93. Lest anybody misunderstand, that doesn't mean that the AA of the NAP was actually defective. The applicant will have to prove the assumption of the discussion, which will be an agenda item for Module III.

94. The secondary factual conclusion I have referred to above suggests that, in the interests of clarity, a more tailored sub-question relating to that aspect specifically should be articulated in the issue paper, so I have attempted to do that in issue 8(b) in Schedule II.

Issue 33(b)

95. Issue 33(b) is as follows:

"(b) Has the applicant established that there is no effective system in practice for farm level AA (despite the theoretical relevance of the 2000 Act and 2011 regulations), insofar as this alleged fact may be relevant to the adequacy of the AA of the NAP."

96. The applicant submitted:

"87. Yes.

88. At para 169 of the 1st judgment [2024] IEHC 129 the Court said the following – 'My decision on this issue is that it is overly simplistic to say categorically that failures at farm level assessment can't go to the validity of the NAP. If there is no effective system in practice for farm level assessment (despite the theoretical relevance of the 2000 Act and 2011 regulations), that may (or may not – to be decided) have implications for AA requirements at NAP level, which in turn could have implications for the validity of the NAP. So this is an issue of substantive EU law, not a knock-out pleading point.'

89. In terms of the PDA 2000, the starting point is that development consists of the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land.

90. Thus many agricultural activities are (quite legitimately) outside the scope of the Act, because they do not represent development in the first place – they do not constitute a change of use post October 1964; or do not constitute works, where 'works' includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

91. While the application of nitrogen may be a project for the purposes of the Habitats Directive or even the EIA Directive (Joined Cases C-293/17 and 294/17 *Coöperatie*) that does not of itself make it development for the purposes of the 2000 Act.

92. The harvesting of kelp was found not to be development in *Casey v BioAtlantis* [2022] IECA 222 because it did not come within either works or material change in use.

93. Further, by s. 4(1)(a) PDA2000 'development consisting of the use of any land for the purpose of agriculture and development consisting of the use for that purpose of any building occupied together with land so used' is exempted development for the purposes of the Act.

94. While Section 4(4) PDA2000 indicates that 'Notwithstanding paragraphs a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required', that is only relevant if the activity concerned is development in the first place. (As to the agricultural activities covered by the EIA Directive, see Annex 1.17 and Annex 2.1).

95. Regarding the 2011 Regulations, Article 42 applies where consent is required. Many agricultural activities do not require such consent. Even where consent is required, such as a derogation application, the fact that the 2011 regulations have theoretical relevance only is amply demonstrated by the affidavit of Mr Massey – the Minister simply does not ask himself or the applicant for a derogation whether the Habitats Directive is engaged. The Court addressed the non-publication of derogation decisions and the consequences of non-publication at §102 and §106-108 [2024] IEHC 129.

96. Note the SEA Statement (Exhibits p.234) records a point made by An Taisce – 'Requirement for site specific assessments for the granting of derogation licences at a national level in order to comply with Article 6(3) and Article 6(4) of the Habitats Directive. Recent ECJ cases C-293/17 and C-294/1720 are cited.'

97. The response under the heading 'How this has been addressed in the NAP' is 'As outlined above, all other Member States undertake a plan level AA of the NAP and there is no requirement for a derogation level assessment. To promote compliance of these farms, the DAFM have committed to a doubling of the mandatory 5% farm inspections to 0% [sic] of derogation farms inspected in this NAP.' (Presumably '0%' should read '10%').

98. Regarding Ministerial Directions under Regulation 28 or 29 of the 2011 Regulations, these are subject to the caveat that they are issued where the Minister 'considers appropriate'. In other words, the Minister may have reason to believe that an activity is of a type that may have a significant effect on a European Site, or an adverse effect on the integrity of a European Site, or cause the deterioration of natural habitats or the habitats of species etc – but may also take the view that it is not 'appropriate' to issue a direction. The State have not identified any Directions issued relating to agricultural activities of the type relevant to the Nitrates Directive.

99. It appears that the offence is breaching the Ministerial Direction rather than carrying out activity likely to effect a European site without consent simpliciter."

97. The State submitted:

"The Respondents respectfully submit that this is not the correct order in which to address these issues. It is not appropriate for the Court to determine whether the Applicant has established that there is no system in place in Ireland for farm-level AA, unless that issue properly is relevant to the adequacy of the AA of the NAP. The Respondents repeat its submission on the preliminary issue above.

Without prejudice to that position, the Applicant's key contention appears to be that the Minister should be carrying out AAs of individual applications for derogations.

It is accepted that the Minister does not carry out AAs of individual applications for derogations in practice. The Respondents are not asserting that the Applicant should be required to adduce evidence to prove that negative.

However, if the Minister is required as a matter of EU law to conduct AA when determining individual applications for derogations, then he is required as a matter of domestic law to do so under Article 42 of the 2011 Regulations. There is therefore a system in place in domestic law for the conduct of farm-level AAs with respect to individual derogation decisions, should it be established that such an obligation arises.

Any claim that such AA is required, and there has therefore been a systemic failure to comply with obligations in that respect, goes to the Minister's application of the relevant domestic provisions that establish that system. No such claim is pleaded. Moreover, even if the Court is satisfied that it should nevertheless determine that issue, it could only ever go to declaratory relief, where it goes only to the implementation of the NAP and the derogation, not the validity of the NAP or the derogation decision. The Respondents maintain that this distinct issue has no bearing on the AA of the NAP."

98. The ICMSA submission is included under question 33(1).

99. My decision is as follows. I appreciate the State's point of view regarding its preliminary objection and I can see that the desire to determine the law first and then the facts could have a certain apparent tactical value for it here. But it just can't be correct to determine such complex EU law issues in a factual vacuum. I have tried to explain that further above. Anyway, what are we arguing about? The State says, with refreshing candour, "It is accepted that the Minister does not carry out AAs of individual applications for derogations in practice". So really I don't think there is anything much for me to decide under this heading.

100. Maybe I should clarify what I am not saying, which is that I am not saying that such a policy is unlawful. That's because we are not dealing with whether that policy is unlawful. So I'm not saying it's lawful either. All we need to deal with for the purposes of this sub-discussion is whether no AA of individual derogations is what happens in practice - and everyone is agreed on that. In other words, even if the 2000 Act or 2011 regulations or both could permit AA of such derogations, such provisions are not in practice operated in this context. Maybe they should be, maybe not, but if the former, one might comment in passing that, even in the absence of domestic litigation or of Commission enforcement action, while the rule of law most certainly does not require an abandonment of any legal risk (a recipe for a death spiral of conservatism, gridlock and fossilisation of jurisprudence if ever there was one), it does require legal actors, including the State, on the basis of the best advice to be of the view that what they are doing is lawful. The rule of law thus encompasses what relevant actors do when the only active scrutiny is their own. But the Attorney's Office is familiar with that basic principle already. So shall we move on to the next issue?

Implications of the foregoing for Core Ground 1

101. In the light of the foregoing, while certain substantive legal issues under Core Ground 1 fall away, other issues remain for the proposed Module III and should be addressed at that stage.

Core Ground 2 – Water Framework Directive

Issue 45(a)

102. Issue 45(a) is as follows:

"45. (a) Has the applicant established that the particular protections afforded by the NAP either alone or together with other binding measures adopted by the member state are insufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive (on the assumption that such rigour is required)."

103. The applicant submitted:

"100. Yes

101. The key issue here is the absence of a lawful assessment of the NAP under Article 4 WFD. As is clear from Article 11 WFD, the purpose of the programme of measures (which includes the NAP) is 'to achieve the objectives established under Article 4'. If the NAP was not assessed against those objectives in the first place, the measures within it cannot be regarded as sufficiently rigorous to achieve the 'Environmental Objectives' set out in Art 4 WFD (as interpreted by the CJEU in Case C 461/13 Weser) and reflected in the question. (It is noted that this question proceeds on the assumption that such rigour is required).

102. The State contends at §84 Statement of Opposition 'Insofar as any formal assessment as to whether the NAP will result in the deterioration of the status of any water bodies is required by the Water Framework Directive prior to its authorisation (which is denied), the environmental assessment carried out under the SEA and the AA of the NAP are sufficient to meet that requirement. The Department has applied the appropriate statutory assessments to the NAP to ensure that the measures in the NAP will not cause adverse effects on water quality.'

103. The objectives for surface water; and of course the water bodies protected by the environmental objectives for surface water are not confined to Natura 2000 sites.

104. In any event, the points made in response to Question 26 about the flaws in the Habitats Directive assessment mean it cannot be relied on to meet the requirements of an assessment for the purposes of Article 4 WFD in this case, even if (which is denied) a Habitats Directive assessment could in principle be relied on for the purposes of Article 4 WFD.

105. It will be recalled that in response to Question 26, the applicant addressed Measure 8 in the EAU Determination, ie restriction on access to watercourses by livestock on holdings with grassland stocking rates of 170 kg nitrogen per hectare or above, but not below 170 kg. The applicant quoted from RPS Table 6.5 – 'A study by Conroy et. al., (2016) as part of the SILTFLUX project funded by the EPA, acknowledges that bovine access to watercourses can limit the potential of some sites to achieve at least good status as is required under WFD.'

106. Regarding the SEA Directive, two documents are relevant – the SEA Report and the SEA Statement. The SEA Report of December 2021 is at Exhibits p283; various amendments were made by Chapter 8 of the SEA Statement of March 2022. The SEA Statement is at Exhibits p197 and the amendments to the SEA Report are at Exhibits p278 et seq.

107. If the Applicants are correct that assessment of the NAP under Article 4 WFD is required, simply referencing the WFD is not sufficient - it must be clear whether the relevant environmental objectives will or will not be met. The State do not identify where such an assessment is to be found.

108. The point made in §36-42 of the Statement of Grounds is that 'The Environmental Report must ..contain the data that is necessary in order to assess the effects of the NAP on the status of the bodies of water concerned in the light of the criteria and requirements laid down in, inter alia, Article 4(1) of the WFD. The documents in the file that are made available to the relevant public must make it possible for the public to obtain an accurate impression of the impact that the NAP will have on the status of the bodies of water concerned in order for the public to be able to verify compliance with the obligations arising from, inter alia, Article 4 of Directive 2000/60. In particular, the data provided must be such as to show whether, having regard to the criteria established by the WFD, the NAP is liable to result in a deterioration of a body of water. This includes Protected Areas which includes Natura 2000 sites vulnerable to nitrates pollution, and all water bodies in the State which have been designated as a Nitrate Vulnerable Zone under the Nitrates Directive. In the present case it is the Applicant's case that the First Respondent has failed to satisfy this requirement since the documents that have been made available to the public do not contain the necessary information for members of the public to verify compliance with the obligations arising from Article 4 of the WFD.'

109. In this regard, in Case C 727/22 Friends of the Irish Environment CLG (NPF Case) Adv-Gen Kokott observed (emphasis added) §57 - 'One of the most important criteria in relation to the contents of the environmental report is missing, however: the presentation of the effects on the environment must in particular show that the plan or programme is compatible with the applicable substantive requirements of environmental law.'

110. The Environmental Report is addressed in §88-99 of the Opposition.

111. Again the Applicant's point is that simply referencing the WFD is not sufficient - it must be clear whether the relevant environmental objectives will or will not be met. The State do not identify where such an assessment is to be found.

112. The State also deny at §97 'that the Minister was not in a position to verify the compliance of the NAP with the obligations arising under Article 4 of the Water Framework, in particular when the SEA Environmental Report is read together with the SEA Statement, the NIS and the AA Conclusion Statement.' However, the State do not identify where such verification is to be found.

113. The State also rely at §85 on Recital 17 of the Commission decision relating to the Derogation - contending 'Recital 17 confirms that the conditions established as well as the monitoring and control systems should be sufficient to ensure that the derogation is coherent with the legally binding targets of the Water Framework Directive. That conclusion was reached by the Commission following an independent assessment of the relevant data'. What Recital 17 says is 'In the light of the data referred to in recitals 11 to 13, the conditions provided for in this Decision should be strengthened compared to those provided for in Decision 2018/209/EU. The conditions established as well as the monitoring and control systems should be sufficient to ensure that this derogation is coherent with the legally binding targets of the Water Framework Directive'. It is clear that 'should be sufficient' is about identifying the threshold to be met by the conditions, monitoring and control systems contained in the Derogation decision itself - it is not a 'conclusion' in respect of the NAP as adopted.

114. Further, the recital is clearly confined to the Derogation and does not purport to be a wider assessment of the NAP's Compliance with the environmental objectives of the WFD."

104. The State submitted:

"In circumstances in which the Court's direction was that (§396(ii)) 'the applicant will need to be very precise on identifying the specific averments supporting the proposition in question', the Respondents submit that the Applicant's Response has failed to comply with the Court's direction and has, in fact, failed to identify any averment supporting the propositions in question.

Accordingly, in light of the Applicant's failure to do so, the Respondents identify below the relevant pleadings between the parties.

With respect to the Applicant's pleas at §§28-35 of the Amended Statement of Grounds (which were denied by the Respondents: SoO, §81), Mr Flynn averred that (DF1, §§162) insofar as the Applicant intends to allege that the Respondents did not ensure that the NAP would not cause a deterioration of the status of a water body or otherwise jeopardise the objectives of the Water Framework Directive prior to its authorisation, that allegation is unfounded.

Mr Flynn further avers that (DF1, §163) the Applicant has adduced 'no evidence' that the NAP is not coherent vis-à-vis the legally binding targets of the Water Framework Directive, nor has it particularised how it is alleged that the NAP - a measure aimed at preventing

deterioration of water bodies — will itself result in a deterioration in the status of any water body or otherwise compromise the objectives of the Water Framework Directive.

Mr Flynn averred that (DF1, §164) the assessments carried out on the NAP in the AA and SEA considered in detail the effect of the NAP on water quality in the context of the objectives of the Nitrates Directive and Water Framework Directive. Mr Flynn further averred that the SEA and AA of the NAP and the River Basin Management Plan concluded that the measures in the NAP are protective measures that subject to mitigation will not have any significant adverse effects on the environment including with respect to the deterioration of the status of water bodies.

Mr Flynn continued to aver that (DF1, §165) the Department of Housing, Local Government and Heritage applied the appropriate statutory assessments to the NAP to ensure that the measures in the NAP will not cause adverse effects on water quality.

The Applicant in response 'draw[s] attention' to §164 of Mr Flynn's Affidavit and stated that (EM2, §6):

'Mr Flynn seems to be suggesting that the current second cycle River Basin Management Plan has considered the NAP impugned in these proceedings and concluded that the measures in the NAP are protective measures that subject to mitigation will not have any significant adverse effects on the environment including with respect to the deterioration of the status of water bodies. This simply could not be the case, as the second cycle River Basin Management Plan was published in April 2018, long predating the NAP impugned in these proceedings, and it could not have possibly considered same.'

The Applicant further avers that (EM2, §7):

'... the second issue which I would take issue with in relation to paragraph 164 of Mr Flynn's affidavit is the imputation that the draft River Basin Management Plan also supports the view of the NAP measures as 'protective measures'. Similarly, this is factually incorrect.'

To this end, the Applicant referred (EM2, §7) to Table 6.4.5.1 of the Natura Impact Statement.

In response, the Second Affidavit of Mr Flynn sworn on 7 June 2023 averred that (§§5-6):

'In response to paragraph 6 of that Affidavit, for the avoidance of any doubt, it is confirmed that the reference to the NAP considered in the SEA and AA of the second cycle River Basin Management Plan was intended as a reference to the 4th NAP.

In response to paragraph 7 of that Affidavit, and again for the avoidance of any doubt, the Respondents do not accept the implication that the draft River Basin Management Plan and/or the Natura Impact Statement with respect to that Plan suggest that the NAP measures are not protective measures. The Respondents will rely on the full content and context of those documents at the hearing of these proceedings.'

In circumstances in which the appropriate interpretation of the draft River Basin Management Plan and/or the Natura Impact Statement with respect to that plan are contested, it is submitted that the Applicant has failed to meet its onus of proof.

Significantly, the Applicant fails to contradict the remainder of Mr Flynn's averments and Ms McGoff averred that (EM2, §9) '[t]he rest of Mr Flynn's affidavit can be dealt with more appropriately through legal submissions.'"

105. The ICMSA submitted:

"53. ICMSA proposes to take Issues 45(a) and 45(b) together. The State's submissions (pp.17-20) are adopted, and the following further observations are made.

54. Under Issue 45(a), An Taisce's Response makes reference to the SEA Statement and Report, noting at §106, p.31:

'Regarding the SEA Directive, two documents are relevant – the SEA Report and the SEA Statement. The SEA Report of December 2021 is at Exhibits p283; various amendments were made by Chapter 8 of the SEA Statement of March 2022. The SEA Statement is at Exhibits p197 and the amendments to the SEA Report are at Exhibits p278 *et seq.*'

55. Again, and in keeping with the approach taken to the NIS and the EAU Determination, the Applicant seeks to gloss over important aspects of the SEA Statement, including conclusions or views stated therein.

56. Thus, for example, the SEA Statement notes at p.5 (Exhibits, p.204):

'At a broad level, implementation of the NAP is expected to protect surface and ground water quality and, as such, outlines measures to provide better control and management of agricultural practices. These measures, when implemented correctly, will have significant positive effects on water quality, biodiversity and

public health. However, the Environmental Report identified a number of measures that, as prescribed in the draft NAP, were not considered adequate to provide protection to the environment. In these instances, further measures were proposed to strengthen or provide additional support to measures outlined in the draft NAP.'

57. Under Issue 45(b), the only point made in the Applicant's Response is to quote one sentence at p.35 of the SEA Statement (p.234, Exhibits) regarding a 'plan level' AA and SEA having been undertaken, rather than 'site level Article 4 WFD assessments'. (This is also the only point An Taisce makes under Issue 52(d) – see §132, pp.36-37 of its Response).

58. However, ICMSA would also draw attention to the immediately preceding bullet point on the same p.234 of the Exhibits, which gives some context to the objection An Taisce is mounting in this respect:

'As outlined above, all other Member States undertake a plan level AA of the NAP and there is no requirement for a derogation level assessment.'

59. In passing, it is noted that An Taisce states at §104 (p.31) that it denies that '... a Habitats Directive could in principle be relied upon for the purposes of Article 4 WFD.' As well as §84 of the State Respondents' Statement of Opposition joining issue with An Taisce in that regard, ICMSA continues to rely on Case C-197/18 Wasserleitungsverband Nördliches Burgenland ECLI:EU:C:2019:824, holding at §54 that '... Member States have a certain latitude as regards the precise methods of implementing the requirements of Directive 91/676.' It is not easy to see why a similar latitude ought not to apply with respect to the Water Framework Directive, as it applies to the Nitrates Directive."

106. My decision is as follows. Firstly, for context, the State's statement of opposition addresses the issue as follows:

(Core Ground 2, Paragraphs 36-42)

"88. The allegation at §§36-42 that there was a failure to include in the SEA Environmental Report any assessment or data required by the SEA Directive is denied.

89. Insofar as the Applicant at §36 intends to allege that the SEA Environmental Report must include a formal assessment under Article 4 of the Water Framework Directive as to whether a plan or programme may cause deterioration of the status of a body of water or otherwise jeopardise the attainment of the requirements of Article 4 of the Water Framework Directive, that allegation is denied. There is no such requirement in the SEA Directive, whether in Annex I or at all.

90. The plea at §38 that the SEA Environmental Report is required under Annex I of the SEA Directive to contain the data that is necessary in order to assess the effects of the NAP on the status of the bodies of water concerned in the light of the criteria and requirements laid down in Article 4(1) of the WFD is further denied. Annex 1 includes no such requirement. Without prejudice to that position, it is denied that the SEA Environmental Report did not contain sufficient data to assess the effects of the NAP on the status of bodies of water.

91. The SEA Environmental Report sets out the framework under which the NAP is adopted, and in particular the role of the NAP in ensuring that the objectives of the Water Framework Directive are achieved (see inter alia sections 2.1, 4.4, 4.5, and 4.6).

92. The analysis of the current state of the environment in Section 5 of the SEA Environmental Report has regard throughout to the objectives of the Water Framework Directive, and in particular to the EPA's assessment of the extent to which those objectives are being met in Ireland. Section 5.3.4 provides maps and details of the water quality baseline including WFD Status. In addition, a detailed baseline analysis of nitrates and water quality is provided based on the latest EPA data sets published in June 2021, and all baseline sources are referenced and linked.

93. In that respect the EPA's 'State of the Environment Report 2020' and its June 2021 Report on the 'Assessment of the catchments that need reductions in nitrogen concentrations to achieve water quality objectives' were key inputs into the development and environmental assessment of the NAP.

94. The assessment of alternatives in Chapter 7 and the assessment of the environmental effects of the NAP in Chapter 8 similarly have regard throughout to the Water Framework Directive objectives. In particular, the assessment of alternatives in Chapter 7 and of the environmental effects of the preferred alternative in Chapter 8 have regard to water quality objectives. Water quality is assigned a specific Strategic Environmental Objective in the SEA Environmental Report as Objective 4: 'Protect, restore and enhance water quality (surface waters, groundwater and marine waters)'. The monitoring requirements in the SEA Environmental Report and the SEA Statement also have regard inter alia to the requirement to monitor the effect of the NAP in the context of achieving the objectives of the Water Framework Directive.

95. The allegation at §39 that the documents made available to the public do not contain the necessary information for members of the public to verify compliance with the obligations arising from Article 4 of the WFD is therefore denied.

96. The plea at §40 that the measures identified in the SEA Statement are required to meet a standard of scientific certainty either individually or collectively for the purposes of Article 4 of the Water Framework Directive is denied. Strictly without prejudice to that position, it is denied that the measures identified in the SEA Statement do not meet any such standard of scientific certainty with respect to the coherence of the NAP with the objectives of the Water Framework Directive that may apply. In that respect, the Respondents repeat the relevant pleas in response to Core Ground 1.

97. The plea at §40 that the SEA Statement is required to evaluate or assess the measures identified in the SEA Statement to allow the Minister to verify compliance with the obligations arising from Article 4 of the Water Framework Directive is also denied. There is no such obligation arising under the SEA Directive. Strictly without prejudice to that position, it is denied that the Minister was not in a position to verify the compliance of the NAP with the obligations arising under Article 4 of the Water Framework, in particular when the SEA Environmental Report is read together with the SEA Statement, the NIS and the AA Conclusion Statement.

98. The allegation at §41 that the Minister has breached Article 5 of the SEA Directive by compiling an inadequate environmental report that fails to provide the necessary data to assess the effects of the NAP on the status of the bodies of water concerned in the light of the criteria and requirements laid down in, inter alia, Article 4(1) of the WFD is denied. It is denied that there is reliance on unidentified mitigation measures in the SEA. All SEA and AA mitigation measures to be adopted are clearly defined and set out in Chapter 9 of the Environmental Report, as updated in the SEA Statement, and Chapter 6 of the Natura Impact Statement. It is denied that the reliance on mitigation measures or scientific analysis intended to be carried out after the adoption of the NAP makes this assessment impossible, for inter alia the reasons set out above in response to Core Ground I .

99. Having regard to the foregoing, the allegation at §42 that the Minister is precluded from authorising the NAP is denied. The Respondents complied with all obligations arising with respect to the environmental assessment of the measures contained in the NAP."

107. It seems to me that the critical inflection point is, yet again, the issue of what needs to be assessed. If the requirement is to assess the NAP against the WFD by reference to the protective measures in the NAP alone, then the applicant hasn't evidentially or otherwise shown the SEA and/or AA to be inadequate, especially given the context that, as the State points out, those measures themselves are designed to protect rather than cause a deterioration in the status of relevant water bodies.

108. Admittedly one could theoretically posit a scenario of technical breach whereby (contrary to the State's submission) the law might turn out to be that a more express engagement with the WFD would have been required in the text of the SEA/AA, but if (as the State submits) the law is that only the limited assessment of the protective measures themselves is required, then in the absence of any evidential basis to say that the protective measures themselves will cause a deterioration in the status of water bodies, any technical error in the lack of express wording is essentially harmless and does not warrant further detailed consideration or specifically the grant of substantive relief: see the judgement of 7 November 2013, *Altrip and Others*, C-72/12, ECLI:EU:C:2013:712.

109. If on the other hand the SEA and/or AA was required to consider compliance with the WFD in terms of whether the underlying agricultural activities would not cause a deterioration in the status of relevant water bodies, then clearly that exercise was not conducted as a matter of fact. That is apparent on the face of the material.

110. For clarity, the question as framed involves an assumption that the rigour referred to in the issue is in fact required. That presupposes a need for a more explicit substantive law question as to whether such rigour is indeed so required. I have reformulated the relevant question in Schedule II accordingly to bring out that point as a separate sub-issue. That can incorporate the essence of what was issue 52(a). I appreciate that where questions straddle the interaction between two or more directives, one can argue either way about which heading to consider them under, and I have not found that to be an exercise that inspires an immediate and settled conclusion as to classification. But the parties' enthusiastic and helpful embrace of the modularisation process has enabled an iterative process whereby whatever arrangement appears most helpful at a given time can be adopted. My current thinking is that it will be helpful to amalgamate 52(a) with the assumption expressly referred to in issue 45(a) as a preliminary to the balance of issue 45(a).

111. Finally, one could not dismiss as irrelevant *in limine* to this issue the applicant's general complaint as to the absence of farm-level AA, so I think that the question should also be worded to refer to that factual wrinkle, and have so provided in Schedule II below.

Issue 45(b)

112. Issue 45(b) is as follows:

"(b) Has the applicant established that the NAP as a proposed measure to be adopted for the purposes of art. 11 of the WFD was not individually assessed to ensure individual compliance with art. 4 as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure (assuming such to be required)."

113. The applicant submitted:

"115. Yes

116. The points made above are also relevant to this question. No such assessment of the NAP as a proposed measure to be adopted for the purposes of art. 11 of the WFD appears from the materials.

117. Water bodies were not assessed individually as part of the process. Page 35 (Exhibits p234) of the SEA Statement confirms '...the assessment undertaken was a plan level AA and SEA and the Water Framework Directive requirements have been accounted for within this analysis. Site level Article 4 WFD assessments have not been undertaken and it is not proposed to undertake same.' It is understood that 'site level' here refers to the site of the activity rather than the site of the water body – nevertheless such site level assessment would be central to assessment of impacts on individual water bodies, and the effect on their WFD status."

114. The State submitted:

"In circumstances in which the Court's direction was that (§396(ii)) 'the applicant will need to be very precise on identifying the specific averments supporting the proposition in question', the Respondents submit that the Applicant's Response has failed to comply with the Court's direction and has, in fact, failed to identify any averment supporting the propositions in question.

With respect to the Applicant's pleas at §§28–35 of the Amended Statement of Grounds (which were denied by the Respondents: SoO, §81), Mr Flynn averred that (DF1, §§162) insofar as the Applicant intends to allege that the Respondents did not ensure that the NAP would not cause a deterioration of the status of a water body or otherwise jeopardise the objectives of the Water Framework Directive prior to its authorisation, that allegation is unfounded.

The Respondents' position (DF1, §§159–160) is that this is largely a matter for legal submission and that, having regard to the legal framework established by the Water Framework Directive, a separate assessment of the NAP for compliance with Article 4(1) of the Water Framework Directive is not required, either under the Water Framework Directive, the SEA Directive or otherwise.

Notwithstanding the foregoing, Mr Flynn avers (DF1, §165) that:

'Insofar as any formal assessment as to whether the NAP will result in the deterioration of the status of any water bodies is required by the Water Framework Directive prior to its authorisation (and I say and am advised that such an assessment is not required), the environmental assessment carried out under the SEA and the AA of the NAP are sufficient to meet that requirement. I say that the Department has applied the appropriate statutory assessments to the NAP to ensure that the measures in the NAP will not cause adverse effects on water quality.'

Significantly, the Applicant fails to contradict this averment and Mr McGoff avers that (EM2, §9) '[t]he rest of Mr Flynn's affidavit can be dealt with more appropriately through legal submissions.'

Accordingly, the Respondents submit that the Applicant has not evidentially established the subject matter of Question 45(b) and reiterate that the burden of proof is on the Applicant to demonstrate to the Court that it has evidentially established the subject matter of Question 45(b)."

115. The ICMSA submission is set out under 45(a).

116. My decision is that the complaint of lack of water-body-by-water-body assessment fails evidentially in parallel with the failure of the lack of European-site-by-European-site assessment argument, on the simple basis that it has not been shown to have been a practicable exercise. As the State submits, "the Applicant's Response ... has, in fact, failed to identify any averment supporting the propositions in question" and specifically supporting the essential implicit underlying proposition that the suggested analysis was practicable in the specific context here. To be as clear as I can be, the opposing cry of lack of evidential support only has traction for the specific points that fail in the absence of evidential support. Where the point arises from the face of the material itself, for example, then the lack of an expert affidavit or other adequate evidence from the applicant

is not fatal. But the practicability of the suggested body-by-body analysis here is not something that one can be satisfied about on the face of the material.

Implications of the foregoing for Core Ground 2

117. In the light of the foregoing and specifically of the point addressed earlier regarding the impracticability of site-by-site analysis, and therefore of water-body-by-water-body analysis, while certain substantive legal issues under Core Ground 2 fall away, other issues remain for the proposed Module III and should be addressed at that stage.

Core Ground 3 – SEA

Issue 52(c)

118. Issue 52(c) is as follows:

“(c) Has the applicant established that the particular protections afforded by the NAP either alone or together with other binding measures adopted by the member state were not assessed in the SEA report by reference to the question as to whether they are insufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the WFD (on the assumption that such rigour is required).”

119. The applicant submitted:

“120. Yes

121. The key issue here is the absence of a lawful assessment of the NAP under Article 4 WFD. As is clear from Article 11 WFD, the purpose of the programme of measures (which includes the NAP) is ‘to achieve the objectives established under Article 4’. If the NAP was not assessed against those objectives in the first place, the measures within it cannot be regarded as sufficiently rigorous to achieve the ‘Environmental Objectives’ set out in Art 4 WFD (as interpreted by the CJEU in Case C 461/13 Weser) and reflected in the question. (It is noted that this question proceeds on the assumption that such rigour is required).

122. The State contends at §84 Statement of Opposition ‘Insofar as any formal assessment as to whether the NAP will result in the deterioration of the status of any water bodies is required by the Water Framework Directive prior to its authorisation (which is denied), the environmental assessment carried out under the SEA and the AA of the NAP are sufficient to meet that requirement. The Department has applied the appropriate statutory assessments to the NAP to ensure that the measures in the NAP will not cause adverse effects on water quality.’

123. Regarding the SEA Directive, two documents are relevant – the SEA Report and the SEA Statement. The SEA Report of December 2021 is at Exhibits p283; various amendments were made by Chapter 8 of the SEA Statement of March 2022. The SEA Statement is at Exhibits p197 and the amendments to the SEA Report are at Exhibits p278 et seq.

124. If the Applicants are correct that assessment of the NAP under Article 4 WFD is required, simply referencing the WFD is not sufficient - it must be clear whether the relevant environmental objectives will or will not be met. The State do not identify where such an assessment is to be found.

125. The point made in §36-42 of the Grounds is that ‘The Environmental Report must ..contain the data that is necessary in order to assess the effects of the NAP on the status of the bodies of water concerned in the light of the criteria and requirements laid down in, inter alia, Article 4(1) of the WFD. The documents in the file that are made available to the relevant public must make it possible for the public to obtain an accurate impression of the impact that the NAP will have on the status of the bodies of water concerned in order for the public to be able to verify compliance with the obligations arising from, inter alia, Article 4 of Directive 2000/60. In particular, the data provided must be such as to show whether, having regard to the criteria established by the WFD, the NAP is liable to result in a deterioration of a body of water. This includes Protected Areas which includes Natura 2000 sites vulnerable to nitrates pollution, and all water bodies in the State which have been designated as a Nitrate Vulnerable Zone under the Nitrates Directive. In the present case it is the Applicant's case that the First Respondent has failed to satisfy this requirement since the documents that have been made available to the public do not contain the necessary information for members of the public to verify compliance with the obligations arising from Article 4 of the WFD.’

126. In this regard, in Case C 727/22 Friends of the Irish Environment CLG (NPF Case) Adv-Gen Kokott observed (emphasis added) §57 – ‘One of the most important criteria in relation to the contents of the environmental report is missing, however: the presentation of the effects on the environment must in particular show that the plan or programme is compatible with the applicable substantive requirements of environmental law.’

127. The Environmental Report is addressed in §88-99 of the Opposition.

128. Again the Applicant's point is that simply referencing the WFD is not sufficient - it must be clear whether the relevant environmental objectives will or will not be met. The State do not identify where such an assessment is to be found.

129. The State also deny at §97 'that the Minister was not in a position to verify the compliance of the NAP with the obligations arising under Article 4 of the Water Framework, in particular when the SEA Environmental Report is read together with the SEA Statement, the NIS and the AA Conclusion Statement.' However, the State do not identify where such verification is to be found."

120. The State submitted:

"The Applicant pleads that the Minister breached Article 5 of the SEA Directive by compiling an inadequate environmental report that fails to provide the necessary data to assess the effects of the NAP on the status of the bodies of water concerned in the light of the criteria and requirements laid down in, inter alia, Article 4(1) of the WFD (ASoG, §§36-41) are denied by the Respondents (SoO, §88).

In this regard, Mr Flynn avers that (DF1, §169) the allegation that there was a failure to include in the SEA Environmental Report any assessment or any data required by the SEA Directive is unfounded.

Moreover, Mr Flynn avers that (DF1, §171) notwithstanding that the Applicant's plea that the SEA Environmental Report is required under Annex I of the SEA Directive to contain the data that is necessary in order to assess the effects of the NAP on the status of the bodies of water concerned in the light of the criteria and requirements laid down in Article 4(1) of the WFD is unfounded, Mr Flynn averred that '[i]n any event, I say that the Applicant is incorrect to contend that the SEA Environmental Report did not contain sufficient data to assess the effects of the NAP on the status of bodies of water'.

Mr Flynn avers that (DF1, §172) the SEA Environmental Report sets out the framework under which the NAP is adopted, and in particular the role of the NAP in ensuring that the objectives of the Water Framework Directive are achieved (see , e.g. sections 2.1, 4.4, 4.5 and 4.6). Mr Flynn further avers that (DF1, §173) the analysis of the current state of the environment in Section 5 of the SEA Environmental Report has regard throughout to the objectives of the Water Framework Directive, and in particular to the EPA's assessment of the extent to which those objectives are being met in Ireland. Mr Flynn further avers that section 5.3.4 provides maps and details of the water quality baseline including WFD Status and, in addition, a detailed baseline analysis of nitrates and water quality is provided based on the latest EPA data sets published in June 2021, and all baseline sources are referenced and linked.

Mr Flynn avers that (DF1, §174) the EPA's 'State of the Environment Report 2020' and its June 2021 Report on the 'Assessment of the catchments that need reductions in nitrogen concentrations to achieve water quality objectives' were key inputs into the development and environmental assessment of the NAP.

Mr Flynn avers that (DF1, §175) the assessment of alternatives in Chapter 7 and the assessment of the environmental effects of the NAP in Chapter 8 similarly have regard throughout to the Water Framework Directive objectives and that the monitoring requirements in the SEA Environmental Report and SEA Statement also have regard to inter alia the requirement to monitor the effect of the NAP in the context of achieving the objectives of the Water Framework Directive.

Accordingly, Mr Flynn avers that (DF1, §176) the allegation that the documents made available to the public do not contain the necessary information for members of the public to verify compliance with the obligations arising from Article 4 of the WFD is therefore unfounded.

Mr Flynn stated that (DF1, §179) the Respondents denied the allegation at §41 of the Statement of Grounds that the Minister breached Article 5 of the SEA Directive by compiling an inadequate environmental report that fails to provide the necessary data to assess the effects of the NAP on the status of the bodies of water concerned in the light of the criteria and requirements laid down in, inter alia, Article 4(1) of the WFD.

Significantly, the Applicant fails to contradict these averments in its replying affidavit and, to this end, Ms McGoff averred that (EM2, §9) '[t]he rest of Mr Flynn's affidavit can be dealt with more appropriately through legal submissions.'

Accordingly, the Respondents submit that the Applicant has not evidentially established the subject matter of Question 52(c) and reiterate that the burden of proof is on the Applicant to demonstrate to the Court that it has evidentially established the subject matter of Question 52(c)."

121. The ICMSA submitted:

"60. ICMSA adopts the State's Response in respect of Issue 52(c) (pp.21-23) and Issue 52(d) (pp.23-25)."

122. My decision is as follows. The distinction between issue 52(c) and issue 45(a) is that issue 52(c) refers expressly to the requirements regarding the SEA report. But having regard to the issues discussed under issue 45(a) above I think that that issue is now adequately covered in the reformulated questions for Module III under issue 45. So in view of the extensive submissions made in respect of issue 45 I don't now think any separate further issue needs to be decided under the present heading. The submissions made under this heading have been taken into account in addressing issue 45 as it stands and as proposed to be reworded.

Issue 52(d)

123. Issue 52(d) is as follows:

"(d) Has the applicant established that the NAP as a proposed measure to be adopted for the purposes of art. 11 of the WFD was not individually assessed in the SEA report to establish its effects (by reference to the standards in art. 4 WFD) as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure."

124. The applicant submitted:

"130. Yes

131. The points made above are also relevant to this question. No such assessment of the NAP as a proposed measure to be adopted for the purposes of art. 11 of the WFD appears from the SEA materials.

132. Water bodies were not assessed individually as part of the process. Page 35 (Exhibits p234) of the SEA Statement confirms '...the assessment undertaken was a plan level AA and SEA and the Water Framework Directive requirements have been accounted for within this analysis. Site level Article 4 WFD assessments have not been undertaken and it is not proposed to undertake same.' It is understood that 'site level' here refers to the site of the activity rather than the site of the water body – nevertheless such site level assessment would be central to assessment of impacts on individual water bodies, and the effect on their WFD status."

125. The State submitted:

"The Applicant pleads that the Minister breached Article 5 of the SEA Directive by compiling an inadequate environmental report that fails to provide the necessary data to assess the effects of the NAP on the status of the bodies of water concerned in the light of the criteria and requirements laid down in, inter alia, Article 4(1) of the WFD (ASoG, §§36–41) are denied by the Respondents (SoO, §88).

To this end, Mr Flynn avers that (DF1, §169) the allegation that there was a failure to include in the SEA Environmental Report any assessment or any data required by the SEA Directive is unfounded.

Moreover, Mr Flynn avers that (DF1, §170) insofar as the Applicant intends to allege at §36 of the Statement of Grounds that the SEA Environmental Report must include a formal assessment under Article 4 of the Water Framework Directive as to whether a plan or programme may cause deterioration of the status of a body of water or otherwise jeopardise the attainment of the requirements of Article 4 of the Water Framework Directive, that allegation is unfounded.

Moreover, Mr Flynn avers that (DF1, §171) notwithstanding the Applicant's plea that the SEA Environmental Report is required under Annex I of the SEA Directive to contain the data that is necessary in order to assess the effects of the NAP on the status of the bodies of water concerned in the light of the criteria and requirements laid down in Article 4(1) of the WFD is unfounded, Mr Flynn averred that '[i]n any event, I say that the Applicant is incorrect to contend that the SEA Environmental Report did not contain sufficient data to assess the effects of the NAP on the status of bodies of water'.

Mr Flynn avers that (DF1, §172) the SEA Environmental Report sets out the framework under which the NAP is adopted, and in particular the role of the NAP in ensuring that the objectives of the Water Framework Directive are achieved (see, e.g. sections 2.1, 4.4, 4.5 and 4.6).

Mr Flynn further avers at §173 that the analysis of the current state of the environment in Section 5 of the SEA Environmental Report has regard throughout to the objectives of the Water Framework Directive, and in particular to the EPA's assessment of the extent to which those objectives are being met in Ireland. Mr Flynn further avers that Section 5.3.4 provides maps and details of the water quality baseline including WFD Status and, in addition, a detailed baseline analysis of nitrates and water quality is provided based on the latest EPA data sets published in June 2021, and all baseline sources are referenced and linked.

Mr Flynn avers that (DF1, §174) the EPA's 'State of the Environment Report 2020' and its June 2021 Report on the 'Assessment of the catchments that need reductions in nitrogen concentrations to achieve water quality objectives' were key inputs into the development and environmental assessment of the NAP.

Mr Flynn avers that (DF1, §175) the assessment of alternatives in Chapter 7 and the assessment of the environmental effects of the NAP in Chapter 8 similarly have regard throughout to the Water Framework Directive objectives and that the monitoring requirements in the SEA Environmental Report and SEA Statement also have regard to inter alia the requirement to monitor the effect of the NAP in the context of achieving the objectives of the Water Framework Directive.

Accordingly, Mr Flynn avers that (DF1, §176) the allegation that the documents made available to the public do not contain the necessary information for members of the public to verify compliance with the obligations arising from Article 4 of the WFD is therefore unfounded.

Mr Flynn stated that (DF1, §179) the Respondents denied the allegation at §41 of the Statement of Grounds that the Minister breached Article 5 of the SEA Directive by compiling an inadequate environmental report that fails to provide the necessary data to assess the effects of the NAP on the status of the bodies of water concerned in light of the criteria and requirements laid down in, inter alia, Article 4(1) of the WFD.

Significantly, the Applicant fails to contradict these averments in its replying affidavit and, to this end, Ms McGoff averred that (EM2, §9) '[t]he rest of Mr Flynn's affidavit can be dealt with more appropriately through legal submissions.'

Accordingly, the Respondents submit that the Applicant has not evidentially established the subject matter of Question 52(d) and reiterate that the burden of proof is on the Applicant to demonstrate to the Court that it has evidentially established the subject matter of Question 52(d)."

126. The ICMSA submitted:

"60. ICMSA adopts the State's Response in respect of Issue 52(c) (pp.21-23) and Issue 52(d) (pp.23-25)."

127. My decision is as follows. One has to return to the question of what is practicable. As noted above, it was not practicable for a plan of this nature to be assessed on a site-by-site basis. The applicant certainly hasn't shown that it would have been practicable to assess it on a water body-by-water body basis either. So any issues premised on such an argument must fall away.

Issue 59

128. Issue 59 is as follows:

"59. Has the applicant established that the Environmental Report does not contain an assessment of the preferred option on the 'likely significant effects on the environment' including 'secondary, cumulative, synergistic, short, medium and long-term, permanent and temporary, positive and negative effects' as required by Annex I."

129. The applicant submitted:

"133. Applicants response: There is no consideration of the likely significant effects on the environment in including 'secondary, cumulative, synergistic, short, medium and long-term, permanent and temporary, positive and negative effects' as required by Annex I. The only assessment of the preferred alternative is contained in Chapter 8 where each of the measures in the preferred alternative are given a binary +/-0 score as against each of the environmental factors. It is impossible to understand that matrix either in its own terms or by reference to the accompanying text which provides, for example, in relation to Article 8:

'Article 8 – General obligations as to capacity of storage facilities: While Article 7 relates to the general provision of storage systems, Article 8 sets out the general obligations to ensure that these systems have the requisite capacity. DAFM have reported that there is a slurry storage deficit of approximately 40% on Irish dairy farms and this is a likely result of the significant increase in the dairy herd over the past decade under Food Harvest, Food Wise and the abolition of the milk quotas. The storage infrastructure on farms has not kept pace with the growth in the herd resulting in this deficit. The absence of adequate capacity to store slurry on these farms potentially leads to inappropriate slurry storage and/or siting, potential for over spreading or spreading at inappropriate times. Each of these poses a potential for significant risk to the environment and it is imperative that farmers supply and maintain the necessary capacity to store these materials without posing a risk to the environment. DAFM report that inspection statistics indicate that one of the primary non-compliances identified through enforcement activity is inadequate slurry storage on farms. Farmers who wish to apply for the higher stocking rate under the derogation (refer Part 7) must have the legal minimum slurry storage capacity in place in order to be eligible. For farmers that operate at a lower stocking rate, the requirement is to retain at least minimum legal capacity. Reduced storage through overwintering is only to be allowed on farms with stocking rate less than 100 kg N/ha. The measures listed in Article 8 (1) to 8 (5) place general obligations on farmers on

the capacity of storage facilities and have not changed since the 4th NAP. Schedule 2 of the 2017 Regulations remains unchanged and sets out the storage capacity requirement for various livestock, e.g. for each dairy cow a farmer must have capacity for 0.33m³ /week of slurry. By maintaining these slurry storage requirements, the risk of unscheduled emissions or losses from inappropriate storage is minimised. Where fully implemented and enforced the measures in Articles 8 (1) to 8 (5) will have a long-term positive impact on W, PHH, BFF and LS. As these Articles do not directly refer to the construction of the facility but just the required capacity, these measures will have a neutral impact on CF, CH and Lands. The new measures in Articles 8 (6) and (7) have been added to the draft NAP and place obligations on farmers to apply all slurry by a set date in the autumn (8th October in 2022 to one week earlier from 2023). This measure will help to maximise the slurry storage capacity available to the farmer in early autumn in advance on the closed period and will aid in maximising the suitable storage capacity and reducing the environmental risk of improper storage/spreading. This measure will further strengthen the existing Article 8 measures on storage capacity with positive impacts for W, PHH, BFF and LS. As noted, the current baseline points to a slurry storage deficit of approximately 40% on Irish dairy farms and it is unclear to what extent the capacity measures outlined in Article 8 (6) will reduce this deficit. Should this deficit remain, or increase, then the current risk to the environment from these capacity issues will continue. In this regard, mitigation measures are proposed to provide for greater reporting and enforcement of this capacity on Irish farms.'

134. This is not an assessment. It is a recognition of a profound slurry storage deficit followed by no more than an expression of hope that some of the measures in the NAP may improve the situation in some unspecified fashion. There is no identification of a baseline, no assessment of efficacy and no assessment of the anticipated position after application of the measures. Still less does it take into account secondary or cumulative effects. The Applicant is not cherry-picking – the same observation applies in respect of all the measures contained in the preferred alternative. The application of mitigation measures is meaningless unless there is an assessment of the receiving environment, an assessment of the measure, its proliferation, its efficacy and a calculation or quantification of its environmental effect in terms of mitigating the pollution source either in isolation or cumulatively. None of that is present and instead all the Environmental Report contains is meaningless statements such as (in relation to Article 5) 'Therefore if suitably implemented, these retained control measures will have a direct and positive effect on W, BFF and LS by reducing the environmental risk to receptors through reducing the soil water source generation on farm holdings.'

135. There is a cumulative impact section but this does not include any assessment of efficacy, identification of a baseline or cumulation of impacts. For example it observes in relation to Water:

'Water: The focus on the NAP relates to the protection of water quality from agricultural sources and the measures, both individually and cumulatively retain the focus on water project for a broadly positive W outcome. However, as noted, the current baseline is poor and deteriorating so this positive W impact will only be realised if the combined NAP measures are successfully implemented at holding level and rigorously enforced by the local authorities. If the implementation is not successful then the potential for W impact is more mixed. These impacts are particularly true for areas designated as nutrient sensitive waters under the WFD and within the catchments of concern for nitrates as identified by the EPA in the south and east of the country.'

136. It is respectfully submitted this is a cumulative impact assessment in name only. It correctly acknowledges the baseline is poor but does not identify how poor, the origins of the nitrates pollution, an identification of the cumulative impacts or an assessment of the same."

130. The State submitted:

"The Respondents (SoO, §106) denied the Applicant's plea (ASoG, §50) that the Environmental Report does not contain an assessment of the preferred option on the 'likely significant effects on the environment' and plead that (SoO, §105) the assessment of the likely significant environmental effects of the preferred option is detailed in inter alia Chapter 8 of the Environmental Report.

To this end, Mr Flynn avers that (DF1, §184-185):

(1) a detailed assessment of the potential environmental effects of the preferred option is contained in Chapter 8 of the SEA Environmental Report;

(2) secondary impacts are assessed and noted in detail through the assessment of alternatives in Chapter 7 and the assessment of the preferred alternative in Chapter 8;

(3) cumulative impacts are addressed in full in a dedicated Section 8.4 of the Environmental Report and mitigation has been prescribed to mitigate the potential for adverse impacts; and

(4) similarly, synergistic, short, medium and long-term, permanent and temporary, positive and negative effects are noted throughout the assessment as required under Article 2(5) and Annex II of the SEA Directive.

Accordingly, Mr Flynn avers that (DF1, §186) the assessment of the likely significant environmental effects of the measures in the NAP in the SEA Environmental Report therefore satisfies the obligations arising under the SEA Directive.

Significantly, the Applicant fails to contradict these averments in its replying affidavit and, to this end, Ms McGoff averred that (EM2, §9) '[t]he rest of Mr Flynn's affidavit can be dealt with more appropriately through legal submissions.'

The Applicant now seeks to resile from this position and attempts to make fresh submissions in its response. The Respondents take issue with this and note that the Applicant's approach has deprived the Respondents of an opportunity to contest their position.

Accordingly, the Respondents submit that the Applicant has not evidentially established the subject matter of Question 59 and reiterate that the burden of proof is on the Applicant to demonstrate to the Court that it has evidentially established the subject matter of Question 59."

131. The ICMSA submitted:

"61. ICMSA adopts the State's Response in respect of this Issue (pp.25-26), including the objection (p.26) to An Taisce's fresh submissions in circumstances where it failed to contradict averments made. Strictly without prejudice to that, ICMSA makes the following further observations.

62. The (first) point which An Taisce makes here is (at §133, p.38): 'It is impossible to understand that matrix either in its own terms or by reference to the accompanying text...'

63. However, even if one took An Taisce's case at its height in this regard, the proper remedy for this may well be to direct more detailed or clearer reasons (see e.g. Krupecki).

64. It is recognised that this may well be an issue for any 'Remedy' module (should the case get that far, which ICMSA respectfully submits it ought not to). Nonetheless, the relevance of the observation is not necessarily confined to the question of remedy alone. That is because a failure by An Taisce to understand one particular aspect of the Environmental Report does not mean that An Taisce has 'established that the Environmental Report does not contain an assessment ...' for the purposes of Issue 59.

65. Beyond that, in keeping with its general approach, the Applicant advances its case under Issue 59 by quoting very specific aspects of the SEA Environmental Report, and then subjecting them to criticism. Thus, at the end of §134 one sentence from p.125 (p.433 Exhibits) is quoted and criticised as being an example of a 'meaningless statement'.

66. Indeed, in total, the Applicant's Response under Issue 59 seems to merely refer to four pages of the SEA Environmental Report (at pp.433, 435, 470, and, although not cited directly in the Applicant's footnotes, p.434). From that cursory glance on An Taisce's part, it then proceeds confidently, but incorrectly, towards the strident conclusion that the SEA Environmental Report is, seemingly, an assessment 'in name only' (§136).

67. ICMSA would merely observe that the SEA Environmental Report spans pages 283 to 517 in Book 1 of the Book of Exhibits – in other words some 234 pages. The Environmental Report falls to be considered holistically. It must be highly questionable whether an approach of quoting isolated aspects, and only a handful of them at that, can really be sufficient for the purpose of discharging the onus which rests with the Applicant in these proceedings, including for the purpose of Issue 59."

132. My decision is as follows. Insofar as we have the overarching dispute about what is to be assessed, then, sure, the applicant can argue that the underlying agricultural activities were not duly assessed in the environmental report as it stands, which doesn't purport to constitute a full assessment of such matters. But that issue has already been catered for in the revised issue 8.

133. Insofar as one works on an assumption that the State is correct that only the protective measures should be assessed in the environmental report, then this issue is essentially a merits-based complaint about the content of the SEA material, and to the extent that it may constitute a legal complaint, the basis for it has not been made out evidentially.

Issue 60

134. Issue 60 is as follows:

"60. Has the applicant established that the environmental report does not include an assessment of the efficacy of the proposed mitigation measures (assuming such is necessary)."

135. The applicant submitted:

"137. The Applicant repeats the answer above. Nowhere is there an assessment of the efficacy of any of the mitigation measures at all or against an environmental baseline. The response in relation to Article 9 is typical:

138. 'Article 9 – Capacity of storage facilities for effluents and soiled water: Sub-article 9(b) has been added to the current NAP to ensure that all holdings producing soiled water must have a minimum of 4 weeks' storage in place by 31st December 2024. Mandating a minimum storage capacity reduces the risk from inappropriate storage and spreading of soiled water on holdings. This requirement is positive in terms of protection of the natural environment (i.e. W, BFF and LS) and human health (PHH) but potentially negative for MA given the initial capital costs that face the farmers to retrofit such stems over the next two years.'

139. This is manifestly not an assessment of efficacy. It is a statement that an undefined source of nitrate pollution will be reduced by an undefined amount if the mitigation measures are in fact applied. There is no assessment of how many farmers will incorporate the measure, where those farmers are or any assessment of the extent to which the application of the mitigation measure will in fact reduce the levels of nitrate pollution. Nor is there any global such assessment and the sum total of the assessment is an expression of hope that the measures in the preferred option will have an entirely unquantified environmental benefit. That is the antithesis of an assessment of efficacy.

140. Many of the Articles themselves recognise ambiguity inherent in the measures:

141. 'Article 16 (1) states that the occupier of a holding shall take reasonable steps in preventing or minimising overuse of fertiliser. Problems that are caused from overusing fertilisers include runoff and erosion, the contamination of water supplies, and disruptions to aquatic life. Without this article, fertilisers could be overused, and the over application can result in negative impacts on LS, W, BFF, PHH, and CF. The implementation of this measure has potential for a positive impact on PHH, BFF, LS, W, AQ and CF by ensuring correct application rates of N and P and minimising risk of environmental pollution. It will have a neutral impact on CH, AQ and Lands and a positive effect for MA by ensuring that limited resources, namely N and P, are used efficiently. However, this Article is dependent on the interpretation by the occupier of the word 'reasonable' which places some uncertainty in the application rates. Article 26 (1) cites that a person who contravenes a provision of Parts 2 to 5 of the Regulations is guilty of an offence. However, determining whether a person contravenes Article 16(1) is difficult with this current wording and that may assist in greater enforcement and higher associated compliance rates.'

142. Other Articles are assessed as having both unquantified positive and unquantified negative effects but without any assessment whatsoever – for example Article 20 says:

143. 'Article 20 will have both a positive and negative impact on W, PHH, BFF, LS and MA. On one hand recycling of organic nutrients ensures efficient use of scarce resources and limits over application and reduces the volumes of chemical fertiliser required. However, there is always a risk to the environment associated with land spreading organic fertilisers even at the EU stocking rate. This Article will have a potentially negative impact on AQ and CF as it relates to the deposition of organic manures and possible release of nitrogenous compounds through volatilisation. It has potential positive and negative impacts on MA where measures, such as those listed above, are undertaken to comply with the Regulations.'

144. Again this is not an assessment of efficacy. It is difficult to classify it as anything other than a rumination on potential effects of an element of the preferred option which does not engage with any of the elements in Schedule 2B of the SEA Regulations."

136. The State submitted:

"The Applicant stated in its response that (§137) it reiterates its response to Question 59. Accordingly, the Respondents similarly rely on their response to Question 59 above.

Moreover, the Applicant's Response fails to identify any averment supporting the propositions in question. Accordingly, the Respondents set out the relevant pleas below.

The Respondents denied (SoO, §109) the Applicant's plea that (ASoG, §§52–53) the SEA of the NAP did not comply with the requirements of the SEA Directive by reason of a failure to assess the efficacy of the proposed mitigation measures.

To this end, Mr Flynn avers that (DF1, §189) in making these allegations, the Applicant has again conflated the measures under the NAP — i.e. the measures under assessment — with the mitigation measures. Mr Flynn avers that (DF1, §190):

'At §52, the Applicant alleges a failure to assess the efficacy of 'Article 10, 11, 12 and 13 of the mitigation measures'. The Applicant in §52 in fact refers to Articles 10, 11, 12 and 13 of the GAP Regulations, which are the measures set out in the draft programme that were the subject of the environmental assessment. They are not mitigation measures prescribed to address the potential significant environmental effects of the draft programme under assessment, they are the draft programme under assessment.'

Mr Flynn refers (DF1, §191) to the section of Chapter 8 of the SEA Statement identified by the Applicant at §52 of the Amended Statement of Grounds and continues to aver that (DF1, §192):

'I say that the SEA Environmental Report therefore concludes that the measures proposed in Articles 10, 11, 12, and 13 of the draft programme will have a positive effect on the environment, provided they are fully implemented and successfully enforced. It raises, however, a concern that there has previously been non-compliance with the equivalent measures in previous NAPs, and concludes that if those measures are not complied with the unknown actions taken by farmers who are non-compliant, so as to manage the excess material, has the potential to result in adverse effects. I say that in order to mitigate that risk of adverse effects that would arise as a result of non-compliance with the proposed measures in the draft programme, the SEA Environmental Report proposes mitigation, specifically with respect to ensuring compliance.'

Mr Flynn further avers (DF1, §193) that the Applicant fails to reference that proposed mitigation, which is detailed at page 128 of the SEA Environmental Report as follows:

'Proposed SEA Mitigation Measures:

- General Mitigation: Articles 8 and 10 on the general and specific obligations on capacity of storage facilities should be updated to include to account for the following mitigation:
 - From January 2022, Cross Compliance Inspections should include a specific detailed analysis and quantification of existing storage capacity for livestock manure, other organic fertilisers, soiled water and effluents on farms versus the required capacities as stated in Schedule 2;
 - These inspections should be focussed on dairy farms which pose the greatest risk of reduced storage capacity.
 - This inspection data should be collated to track the current levels of capacity available at both farm and national level to inform future incentives and/or enforcement that may be implemented to increase compliance on storage capacity;
 - This inspection regime should be repeated annually to track the capacity shortfall and the effect of the measures proposed to reduce the shortfall; and
 - DHLGH and DAFM should consider additional incentives through TAMS or otherwise to promote awareness and uptake of measures to improve both infrastructure and operations on holdings to maximise the storage capacity for organic fertilisers.'

Mr Flynn avers that (DF1, §194) page 12 of the SEA Statement confirms that this mitigation is to be implemented, and he confirmed that it has been implemented.

Accordingly, Mr Flynn avers that (DF1, §195):

'I say and believe that the assessment of Articles 10, 11, 12, and 13 of the NAP therefore proceeded precisely as required by the SEA Directive. The environmental effects of those measures were determined to be positive, subject to a risk of significant adverse effects if there were to be non-compliance. Mitigation measures to reduce the risk of non-compliance were therefore proposed, adopted and implemented.'

Finally, with respect to the Applicant's plea at §53 of the Amended Statement of Grounds in respect of Article 7, Mr Flynn avers at that (DF1, §200):

'No specific mitigation measures were recommended for Article 7 in the SEA Environmental Report, where it was concluded that Article 7(1), which applies to all storage facilities, 'will have an indirect positive impact on PHH, BFF, LS, W and MA' and where it was further determined that Article 7(2), which applies to storage facilities constructed on or after 31 March 2009, 'provides a high degree of protection' and where implemented will 'have a long term and direct positive effect'. These measures were therefore determined to be protective measures that would have positive effects. No mitigation was required.'

Significantly, the Applicant fails to contradict these averments in its replying affidavit and, to this end, Ms McGoff averred that (EM2, §9) '[t]he rest of Mr Flynn's affidavit can be dealt with more appropriately through legal submissions.'

The Applicant now attempts to resile from this position and seeks (§138) to make fresh submissions in respect of Article 9: Capacity of storage facilities for effluents and soiled water. The Respondents take issue with this and note that the Applicant's approach has deprived the Respondents of an opportunity to contest this position.

Accordingly, the Respondents submit that the Applicant has not evidentially established the subject matter of Question 60 and reiterate that the burden of proof is on the Applicant to demonstrate to the Court that it has evidentially established the subject matter of Question 60."

137. The ICMSA submitted:

"68. ICMSA adopts the State's Response (pp.26-29) in respect of this Issue."

138. My decision is as follows. As pointed out by the State, the SEA report states at p. 128:

"Proposed SEA Mitigation Measures:

- General Mitigation: Articles 8 and 10 on the general and specific obligations on capacity of storage facilities should be updated to include to account for the following mitigation:

- From January 2022, Cross Compliance Inspections should include a specific detailed analysis and quantification of existing storage capacity for livestock manure, other organic fertilisers, soiled water and effluents on farms versus the required capacities as stated in Schedule 2;

- These inspections should be focussed on dairy farms which pose the greatest risk of reduced storage capacity.

- This inspection data should be collated to track the current levels of capacity available at both farm and national level to inform future incentives and/or enforcement that may be implemented to increase compliance on storage capacity;

- This inspection regime should be repeated annually to track the capacity shortfall and the effect of the measures proposed to reduce the shortfall; and

- DHLGH and DAFM should consider additional incentives through TAMS or otherwise to promote awareness and uptake of measures to improve both infrastructure and operations on holdings to maximise the storage capacity for organic fertilisers."

139. Section 9.1 of the SEA environmental report draft includes the following:

"9.1 Mitigation

The Environmental Report has highlighted the more significant potential positive and negative environmental impacts from the implementation of the draft NAP (including cumulative impacts). It has also had regard to the assessment work carried out to inform the Appropriate Assessment of the draft NAP. The mitigation measures presented in Table 9.1 (SEA mitigation) and Table 9.2 (AA mitigation) have been identified to reduce the negative impacts identified. A number of the mitigation measures have been included in the draft NAP and the remaining are for discussion during the consultation period. Chapters 7 and 8 of this Environmental Report have highlighted the reasonable alternatives considered and the significant environmental impacts from the implementation of the draft NAP. It has also had regard to the assessment work carried out to inform the AA. In line with Annex I(g) of the SEA Directive, this chapter presents the measures envisaged to prevent, reduce and as fully as possible offset and significant adverse effects on the environment of implementing the draft NAP."

140. The State raises the question as to whether the measures are capable of being assessed in terms of their efficacy. In broad terms, the measures in the SEA report under the heading of mitigation are more in the nature of proposals in the right direction. The conceptual terms of reference which the State set itself involve the approach that what is being assessed is in essence the suite of protective measures.

141. Taking that concept as an assumption, it is up to the applicant to show evidentially that a more searching assessment of their efficacy as protective measures would have been possible. That hasn't been done.

142. Insofar as one considers the alternative assumption, that the agricultural activities need to be assessed, that is catered for in issue 8. So no further separate consideration of the "efficacy" argument appears to be required.

Issue 61(b)

143. Issue 61(b) is as follows:

"(b) Assuming [a positive answer to para. (a)], has the applicant established that the SEA for the NAP inadequate in that regard."

144. The relevant issue in (a) is:

"61. (a) Does the SEA directive have the effect that 'material assets' means 'critical infrastructure essential for the functioning of society' (see EPA SEA Pack of resources to guide the implementation of the SEA Directive)"

145. The applicant submitted:

145. It is first appropriate to recall the role that 'material assets' play in the SEA process.
146. Article 5(1) SEA Directive provides 'Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.'
147. Annex 1 provides 'The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:
'...(f) the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors; ...'
148. In considering 'material assets' in the EIA Directive, the CJEU stated in Case C-420/11 Leth (emphasis added)
29 Consequently, it is necessary to take into account only those effects on material assets which, by their very nature, are also likely to have an impact on the environment. Accordingly, pursuant to Article 3 of that directive, an environmental impact assessment carried out in accordance with that article is one which identifies, describes and assesses the direct and indirect effects of noise on human beings in the event of use of a property affected by a project such as that at issue in the main proceedings.
30 It must therefore be held that the environmental impact assessment, as provided for in Article 3 of Directive 85/337, does not include the assessment of the effects which the project under examination has on the value of material assets.
149. This is important - if the SEA process has been carried out on the basis of an incorrect understanding of 'material assets' or the way in which they are to be assessed, then the assessment is indeed inadequate in this regard.
150. The SEA Report did not in fact expressly adopt or refer to the 'critical infrastructure essential for the functioning of society' definition. The Environmental Report states
a. '5.3.6 Material Assets There is no clear definition of material assets under the SEA Directive, or indeed the EIA Directive. Material assets primarily relate to the infrastructural assets that enable an area or a state to function as a place to live and work and can be taken to be infrastructure including settlements (towns and villages etc.), transport and utilities. It typically overlaps with other areas such as population, climate, land and soils etc. Natural resources such as land use and soils also have material asset value and are covered in Section 5.3.3.'
151. The Environmental Report also identified at §5.3.6.3 the potential impacts from the NAP on wastewater infrastructure etc.
152. However it is readily apparent that 'material assets' was in fact used in the Environmental Report and Statement as a short-hand for identifying economic implications for individual farmers or aggregated farmers in the form of the agri-food industry entirely divorced from any concern for 'critical infrastructure'.
153. Thus:
'On balance, the marginal gains offered by the reduced stocking rate would have more significant adverse material asset impacts as presented for the alternative assessment...As above, the consideration of the alternative derogation strategies (Alternatives S3, S4 and S5) is based on a multi-criteria balance of impacts between the natural environment and material assets.'
154. In relation to SEA Monitoring section the target for 'Material Assets' is 'Losses to farm incomes and rural employment'
155. In the SEA Environmental Report Summary the potential impact on Material Assets is as follows:
'Material Assets In the absence of the NAP, agricultural assets such as dairy may benefit through increased productivity from greater grass growth. Other assets such as drinking water supplies may be impacted to a greater degree through this unregulated increased nitrogen application.'
156. In the Report itself it states:
'In addition, organic fertilisers are generally readily available on farms and reduce the costs and dependency on chemical fertilisers as a positive for MA.'
'However, if not fully implemented any such positives would not be realised and the unknown measures adopted to manage the excess material has potential for adverse impact and mitigation is proposed in this regard. As with other storage measures,

the initial capital cost to farmers is negative for MA but over the longer term this infrastructure will improve the asset value of the farm holding, secure the maximum retention of organic manures for reuse and reduce any reliance on chemical fertiliser' 'The storage of organic fertiliser will reduce the requirement for chemical fertilisers in the following land spreading period; however, the farmer must ensure adequate storage, as prescribed in Part 2 of the GAP Regulations, is available in the closed period, this may incur additional costs and have short-term negative impacts to MA.' 'However, the variation on setback distances to provide sufficient safety are dependent on the size of population or volumes associated with the abstraction rather than the need to ensure all receptors are protected. It has potential for negative impacts to MA, whereby the farmers will incur additional costs for example to erect fencing as set out in 17 (8).'

'Article 17 (16) prohibits cultivation within 2m of a watercourse and the objective of this measure is to protect the river by creating linear buffer zones/ riparian margin whereby no agricultural activity will take place. The buffer zone will intercept nutrients, stabilise the river bank and provide a linear corridor for biodiversity. This area facilitates the uptake of carbon by providing essential ecosystem services. This measure has positive and direct effect for PHH, BFF, W, S, AQ and CF by minimising nutrient enrichment to watercourses, increasing bankside biodiversity and providing ecosystem services. It will have a short-term negative impact on MA by reducing the area of land available for cultivation and subsequent food production'

'It is important to note that in terms of MA, the requirement for Ireland to have a derogation is important for the Irish agrifood sector both at holding level (for the circa 7,000 holdings that avail of the derogation) and nationally as the derogation allows farmers to maximise outputs and increase incomes. If a derogation is not granted by the EU, there would likely be some downturn in farm outputs and incomes for the farmers affected.'

'From a farm holding perspective, the derogation is positive for MA by helping to maximise farming outputs but this may be in contrast to other assets (such as drinking water infrastructure or water based tourism) which may be negatively impacted.'

157. This is not how 'Material Assets' are meant to be understood or assessed. In the particular context of the Directive, it is drinking water infrastructure that is the 'Material Asset' rather than farm incomes.

'In addition, the full implementation of the 'Code of Good Agricultural Practice for reducing Ammonia Emissions from Agriculture' (in draft) (DAFM) will also help to facilitate compliance with the 2030 ceiling for ammonia. There is a significant capital cost with the purchase of LESS equipment with direct impacts to MA for farmers but there are TAMS grants available to facilitate the purchasing of this equipment'

158. At §8.4 Cumulative Impacts it addresses Material Assets as follows
Material Assets: Potential for cumulative impacts will be mixed for MA. For non-agricultural MA, drinking water supplies, tourism, etc., the effect will be broadly positive in that with effective implementation the measures are largely designed to protect water quality from agriculture. As such, there is a potential for improvements in the asset quality for these MA in the future if the NAP can be successfully implemented. Conversely, for MA the impacts may be more negative in the short term as greater investment in storage and infrastructure will not be balanced by potential losses in output by reduced grass growth. There is potential for a net long term positive given that investments in the current infrastructure will increase the asset value of the holding.'

159. The SEA Statement in 'Table 5.3: Other Responses from Public Consultation', in response to the An Taisce submission states:

'Economic interests were addressed under the criteria Material Assets (MA) in the SEA as part of a multi criteria analysis of all environmental objectives including water (W), air quality (AQ), etc. All objectives were treated as equal and only where the impact to one objective over another was in conflict and assessment of net benefit was undertaken.'

160. In assessing Option S4 the SEA report explains at 7.4
'The greatest difficulty for this alternative relates to MA at the holding level and the equity and fairness of allowing the higher stocking rates on this basis. This spatial approach may permit one holding to seek a higher stocking rate but restrict a neighbouring holding where located in a different catchment. Such an approach would be anti-competitive and may disrupt the current collective model within the agri-food sector.'

161. This logic has nothing to do with environmental considerations. Non-environmental considerations should not be used to influence the outcome of the environmental assessment.

162. It is submitted that although the definition provided in 5.3.6 of the SEA Environmental Report is itself reasonably accurate, as "Material Assets" was actually interpreted or applied or assessed, it was in the context of a positive or negative effect on farm incomes (e.g. loss of buffer strips to productivity) or imposition of costs on farms (e.g. storage construction or the erection of fencing for example) or as 'Economic interests'.

163. If that is the case then the whole basis of the Respondents' assessment of Material Assets must be inadequate. If, as seems clearly the case the Respondents have misunderstood what Material Assets means for the purposes of the SEA Directive or how Material Assets are to be assessed, then it cannot have correctly assessed the potential environmental impacts from the NAP for the purposes of the Directive. As the Applicant put it in its submissions (§146):

'There is no evidence in the SEA Statement or the Report that material assets were considered from an environmental perspective. Rather, contrary to the requirements of Annex 1 and the whole purpose of the Directive as identified in the Recitals and Article 1, material assets appear to have been treated as a proxy for economic interests and those economic interests were relied upon by the Respondents for the purposes of selecting an alternative that was the worst performing of all the reasonable alternatives when judged against the SEA Objectives...'

146. The State submitted:

"The Applicant pleads that (ASoG, §§54–55) the Environmental Report (for the purposes of Article 13N) and the SEA Statement (for the purposes of Article 16 of the Regulations) misunderstood the rubric of 'material assets', which is denied by the Respondents (SoO, §131).

To this end, Mr Flynn averred that (DF1, §208) the agri-food sector is Ireland's largest indigenous exporting sector and in 2020 the sector accounted for over 6% of GNI, 9% of exports and employed 163,600 people. Mr Flynn further avers that the sector is essential for the functioning of society, and for rural communities in particular. In that context, Mr Flynn avers that the SEA of the NAP correctly interpreted 'material assets' in line with the EPA guidance to cover agricultural assets as critical infrastructure essential for the functioning of society.

Significantly, the Applicant fails to contradict these averments in its replying affidavit and, to this end, Ms McGoff averred that (EM2, §9) '[t]he rest of Mr Flynn's affidavit can be dealt with more appropriately through legal submissions.'

The Applicant now attempts to resile from this position and attempts to make fresh submissions in its response, contrary to the Court's direction at §392 of the Judgment for the Applicant to 'switch to offence by demonstrating that its various legal points are properly factually grounded in uncontradicted averments'. Accordingly, the Respondents take issue with the Applicant's response to Question 61(b).

Therefore, the Respondents submit that the Applicant has not evidentially established the subject matter of Question 61(b) and reiterate that the burden of proof is on the Applicant to demonstrate to the Court that it has evidentially established the subject matter of Question 61(b)."

147. The ICMSA submitted:

"69. ICMSA adopts the State's submissions in respect of this Issue (pp.29-30), including the objection (p.30) to fresh submissions by An Taisce. Strictly without prejudice to that, and to any position that legal argument may be a matter for a further Module, ICMSA makes the following further observations.

70. It is noted that only Issue 61(b) arises for present purposes. Nonetheless, for An Taisce to succeed under this Issue it must, in effect, demonstrate two things:-

- o First, that the Strategy Environmental Assessment is affirmatively prohibited (and not merely not obliged) to have any regard to economic interests, in particular under the rubric of 'Material Assets'; and
- o Second, if An Taisce makes out the first proposition, that the SEA evidences (not merely) an error in this regard, but an error that is so fundamental as to, in effect, vitiate the SEA.

71. Turning to the second of these points first, An Taisce's argument does not really rise above the level of bald assertion. Thus, for example, §163 (p.50) submits:

'If, as seems clearly the case the Respondents have misunderstood what Material Assets means for the purposes of the SEA Directive or how Material Assets are to be

assessed, then it cannot have correctly assessed the potential environmental impacts from the NAP for the purposes of the Directive.'

72. (Similar assertions surface elsewhere – e.g. at §167 under Issue 63(b) and §172 under Issue 64(b)).

73. ICMSA does not accept that there was in fact any 'misunderstanding' on this point at all – but, even if there were, the above sentence, and in particular the underlined words, is a non-sequitur, or at least it is an assertion that does not necessarily follow through. It would be possible to have made an error in one particular respect, but for other aspects of one's conclusions to be sufficiently robust, such that the overall assessment can stand.

74. Indeed, that has been repeatedly emphasised in the (admittedly different) context of statutory appeals. The Court of Appeal has repeatedly underscored the requirement that an error be 'material' if it is to warrant setting decisions of the Information Commissioner aside (*Grange v Information Commissioner* [2022] IECA 153 at §52 and §97). Similarly, with respect to the Financial Services and Pensions Ombudsman, the Court of Appeal requires that an appellant show that

'taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors.'

(See, in that regard, *Ulster Bank v Financial Services Ombudsman* [2006] IEHC 323, approved in *Millar v Financial Services Ombudsman* [2015] IECA 127, per Kelly at e.g. §33 of his judgment).

75. It is anticipated that An Taisce may seek to assert the 'materiality' of a particular definition of 'material asserts' by reference to the SEA Statement's consideration of different derogation and non-derogation scenarios at §6.4.2 thereof (pp.268-271, Exhibits). That is indeed the point which the Applicant's Response makes later under Issue 65(b) (§174-§182). However, it is submitted that any point which An Taisce raises in that regard is answered by the fact that the case law clearly holds that there is not a requirement to select the most environmentally friendly option. This is apparent from *C-420/11 Leth* (cited by An Taisce) where the CJEU stated at §46:

'To that end, the nature of the rule breached must be taken into account. In the present case, that rule prescribes an assessment of the environmental impact of a public or private project, but does not lay down the substantive rules in relation to the balancing of the environmental effects with other factors or prohibit the completion of projects which are liable to have negative effects on the environment. Those characteristics suggest that the breach of Article 3 of Directive 85/337, that is to say, in the present case, the failure to carry out the assessment prescribed by that article, does not, in principle, by itself constitute the reason for the decrease in the value of a property.'

76. It is accepted that this whole area may stray away from Module II towards substantive EU law. However, in circumstances where An Taisce's Response – repeatedly, albeit duplicatively – refers to *Case C-420/11 Leth*, it may be appropriate to consider what commentators have to say about that judgment.

77. Kingston, Heyvaert and Cavoski, *European Environmental Law* (Cambridge, 2017), citing to *Leth*, comment at p.388:

'The assessment under Article 3 of the directive need not include an assessment of the effects of the project on the financial value of assets. Nevertheless, the CJEU has recognised that a decrease in the financial value of an asset (in that case, a decrease in the value of a house from noise pollution) is covered by the objective of the Directive in cases where it is a direct economic consequence of the environmental effects identified in the assessment. [LETH, §35-36]

Crucially however Article 3 does not lay down substantive rules on the balancing of the environmental effects of a project with other factors, or prohibit the completion of projects which are liable to have negative effects on the environment.'

78. Browne, *Simons on Planning Law* (3rd ed., 2021) notes at §14-18:

'The EIA Directive is not prescriptive in relation to the manner in which an EIA is to be conducted but merely requires that certain matters are assessed in an appropriate manner, in light of each individual case. As the Advocate General noted in *Leth*, the EIA Directive does not preclude the implementation of a project even in the case where the EIA establishes that there are significant negative effects on the environment. In *Balz v An Bord Pleanála* [2018] IEHC 309 Haughton J. stated that the reference to 'in an appropriate manner' in article 3 means that the assessment required will vary and will depend on the subject matter and level of direct or indirect effect.'

79. Ultimately, An Taisce seeks to derive from *Leth* a proposition which *Leth* does not hold. The CJEU' stated at §29 that '...It is necessary to take into account only those effects

upon material assets which, by their very nature, are also likely to have an impact on the environment.'

80. An Taisce seeks to transform that into a proposition that matters which (An Taisce says) are not necessary to take into account must not be taken into account.

81. Leth nowhere so holds. Indeed, that is unsurprising when one considers that this was not one of the Questions referred in that case. Those are listed at §18 of the judgment as follows:

'Is Article 3 of Directive 85/337 ..., as amended by Directive 97/11 ... and by Directive 2003/35 ..., to be interpreted as meaning that:

1. the term 'material assets' covers only their substance or also their value;
2. the environmental impact assessment serves also to protect an individual against pecuniary damage as a result of a decrease in the value of his property?'

82. Also noteworthy is Leth's statement at §25 that:

'Pursuant to Article 3 of Directive 85/337, it is necessary to examine the direct and indirect effects of a project on, inter alia, human beings and material assets and, in accordance with the fourth indent of that article, it is also necessary to examine such effects on the interaction between those two factors. Therefore, it is necessary to examine, in particular, the effects of a project on the use of material assets by human beings.'

83. While recognising that Leth was a case under the EIA Directive, it is submitted that there is no evident reason why 'direct and indirect effects ... on ... human beings and material assets' could not extend to effects upon farmers, including (if necessary) incomes of farming families.

84. Finally under Issue 61(b), while An Taisce states at §159 that a quotation from the SEA Statement concerning 'Economic interests ...' emanates from p.237 of the Exhibits, for the assistance of the Court it is noted that most of the quotation in question appears at p.236. ICMSA rejects any contention by An Taisce that it was somehow improper or unlawful to have regard to economic interests, including the interests of its members. If necessary, ICMSA's original written and oral submissions, on the importance of a holistic approach under EU law (EU law being inter-fused with the principle of proportionality, and the need to have regard to rights under the Charter) are relied on again here."

148. My decision is that no deficiency has been established as postulated. Assuming for the sake of argument that, as proposed by the applicant, perhaps implausibly, material assets are confined to critical infrastructure, the food supply chain and the farming sector overall constitute such critical infrastructure. Therefore even on the hypothesised restrictive interpretation of "material assets", which for transparency I very much doubt but of course I could be wrong, the State hasn't gone outside that for SEA purposes.

Issue 63(b)

149. Issue 63(b) is as follows:

"(b) Assuming [a positive answer to para. (a)], has the applicant established that the SEA for the NAP inadequate in that regard because it considered whether the value of agricultural assets would be affected by the programme."

150. Paragraph (a) relates to the following:

"63. (a) Does the SEA directive have the effect that, by analogy with the judgment of 14 March 2013, Leth, C-420/11, ECLI:EU:C:2013:166 (an EIA case), the value of assets does not form part of the assessment, and that this applies not just to individual assets but to the broad societal impacts of agricultural activities, the impact of the NAP on the agricultural industry, and in particular on the output and income of farmers, the sustainability of the agricultural industry in Ireland, the food supply chain and the employment of a significant portion of the population."

151. The applicant submitted:

"164. The Applicant repeats the answer above. Material Assets properly understood refers to the potential impacts on critical infrastructure, and in any event does not include impacts on value. Assessment of Material Assets should take into account only those effects on material assets which, by their very nature, are also likely to have an impact on the environment. Assessment of Material Assets does not encompass measures that impose a cost on farmers (such as fencing). The approach followed by the Respondent is, it is respectfully submitted, inconsistent with the correct interpretation and assessment of Material Assets for the purposes of the Directive.

165. As applied by the Respondents it appears to encompass direct economic impacts for farmers whether through additional cost of production, reduced productivity or capital outlay. For example in relation to Article 9 the Report states:

'Sub-article 9(b) has been added to the current NAP to ensure that all holdings producing soiled water must have a minimum of 4 weeks' storage in place by 31st December 2024. Mandating a minimum storage capacity reduces the risk from inappropriate storage and spreading of soiled water on holdings. This requirement is positive in terms of protection of the natural environment (i.e. W, BFF and LS) and human health (PHH) but potentially negative for MA given the initial capital costs that face the farmers to retrofit such stems over the next two years.'

166. It is not possible to reconcile that statement (and similar statement throughout the Report) with the definition of Material Assets as 'Material assets primarily relate to the infrastructural assets that enable an area or a state to function as a place to live and work'.

167. The SEA process has acted on the basis of an incorrect understanding of 'material assets' or the way in which they are to be assessed, so the assessment is indeed inadequate in this regard."

152. The State submitted:

"The Applicant's Response to Question 63(b) reiterates its response to Question 61(b). Accordingly, the Respondents reiterate their response to Question 61(b) above.

The Applicant's Response again fails to identify any averment supporting the propositions in question contrary to the Court's direction at §392 of the Judgment for the Applicant to 'switch to offence by demonstrating that its various legal points are properly factually grounded in uncontradicted averments'."

153. The ICMSA submitted:

"85. ICMSA refers to its submissions under Issue 61(b) above and also adopts the State's point at p.31 regarding An Taisce's failure to identify any averment supporting its proposition here."

154. My decision is as follows. Let's start with what was decided in the judgment of 14 March 2013, *Leth*, C-420/11, ECLI:EU:C:2013:166:

"Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997 and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that the environmental impact assessment, as provided for in that article, does not include the assessment of the effects which the project under examination has on the value of material assets. However, pecuniary damage, in so far as it is the direct economic consequence of the effects on the environment of a public or private project, is covered by the objective of protection pursued by Directive 85/337.

The fact that an environmental impact assessment has not been carried out, in breach of the requirements of that directive, does not, in principle, by itself, according to European Union law, and without prejudice to rules of national law which are less restrictive as regards State liability, confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of the environmental effects of that project. However, it is for the national court to determine whether the requirements of European Union law applicable to the right to compensation, including the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied."

155. The court explained the rationale for the first finding as follows:

"As regards the term 'material assets' within the meaning of Article 3 of Directive 85/337, it must be recalled that, according to settled case-law, it follows from the need for a uniform application of European Union law that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (see Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43, and Case C-497/10 *PPU Mercredi* [2010] ECR I-14309, paragraph 45).

25 Pursuant to Article 3 of Directive 85/337, it is necessary to examine the direct and indirect effects of a project on, inter alia, human beings and material assets and, in accordance with the fourth indent of that article, it is also necessary to examine such effects on the interaction between those two factors. Therefore, it is necessary to examine, in particular, the effects of a project on the use of material assets by human beings.

26 It follows that, in the assessment of projects such as those at issue in the main proceedings, which are liable to result in increased aircraft noise, it is necessary to assess the effects of the latter on the use of buildings by human beings.

27 However, as has correctly been pointed out by Land Niederösterreich and by several of the governments which have submitted observations to the Court, an extension of the

environmental assessment to the pecuniary value of material assets cannot be inferred from the wording of Article 3 of Directive 85/337 and would also not be in accordance with the purpose of that directive.

28 It follows from Article 1(1) of, and from the first, third, fifth and sixth recitals in the preamble to, Directive 85/337 that the purpose of that directive is an assessment of the effects of public and private projects on the environment in order to attain one of the Community's objectives in the sphere of the protection of the environment and the quality of life. The information which must be supplied by the developer in accordance with Article 5(1) of, and Annex IV to, Directive 85/337, as well as the criteria which enable Member States to determine whether small-scale projects, meeting the characteristics laid down in Annex III to that directive, require ... environmental assessment, also relate to that purpose.

29 Consequently, it is necessary to take into account only those effects on material assets which, by their very nature, are also likely to have an impact on the environment. Accordingly, pursuant to Article 3 of that directive, an environmental impact assessment carried out in accordance with that article is one which identifies, describes and assesses the direct and indirect effects of noise on human beings in the event of use of a property affected by a project such as that at issue in the main proceedings.

30 It must therefore be held that the environmental impact assessment, as provided for in Article 3 of Directive 85/337, does not include the assessment of the effects which the project under examination has on the value of material assets."

156. So *Leth* in essence provides that the assessment of material assets for EIA purposes must have a uniform meaning throughout the EU and that this does not include the value of such assets, other than "pecuniary damage" which is a "direct economic consequence" of the effects on the environment of a project.

157. But *Leth* is about the minimum as to what needs to be assessed, not the maximum, in the sense that the EIA, AA and SEA directives don't on their own terms preclude a State from assessing other matters (such as the effect of a plan on the economy). We can consider whether there is an implicit preclusion in due course. But in fairness to the applicant and sticking to the question here, assuming for the sake of argument that there is such a preclusion, the applicant has done enough to show that the State did consider such broader economic factors in the SEA process. Whether that has any legal implications can be considered in Module III.

Issue 64(b)

158. Issue 64(b) is as follows:

"(b) Assuming [a positive answer to para. (a)], has the applicant established that the SEA for the NAP inadequate in that regard."

159. Paragraph (a) refers to the following:

"64. (a) Does the SEA directive have the effect that material assets are not to be treated as a separate factor but as an aspect of the environment as required by Annex I."

160. The applicant submitted (notes omitted):

"168. The structure of Annex 1 of the SEA Directive (as reproduced in Schedule 2B of the SEA Regulations) is that:

'The following information shall be included in an environmental report...the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors'.

169. It is respectfully submitted that both the plain and ordinary meaning of the language and the placing of material assets as a co-equal factor along with (for example) flora and water means that it is impossible to avoid a conclusion that material assets are not a separate factor but one of the environmental factors in respect of which information must be provided and ultimately assessed by the competent authority.

170. This is reinforced by Case C-420/11 *Leth* - in considering 'material assets' in the EIA Directive, the CJEU stated in (emphasis added)

'29 Consequently, it is necessary to take into account only those effects on material assets which, by their very nature, are also likely to have an impact on the environment. Accordingly, pursuant to Article 3 of that directive, an environmental impact assessment carried out in accordance with that article is one which identifies, describes and assesses the direct and indirect effects of noise on human beings in the event of use of a property affected by a project such as that at issue in the main proceedings.

30 It must therefore be held that the environmental impact assessment, as provided for in Article 3 of Directive 85/337, does not include the assessment of the effects which the project under examination has on the value of material assets.'

171. There is no support in the Directive or any case law that the Applicant is aware of that interprets Material Assets, as the Respondent has done throughout the Environmental Report, a short-hand for assessing whether the NAP will have an effect on the incomes or values of individual farms or the agri-food industry more generally.

172. The SEA process has acted on the basis of an incorrect understanding of 'material assets' or the way in which they are to be assessed, so the assessment is indeed inadequate in this regard."

161. The State submitted:

"The Applicant's Response fails to identify any averment supporting the propositions in question. Accordingly, the Respondent set out the relevant pleas below.

To this end, the Respondents plead that (SoO, §131) the allegation of the Applicant that (ASoG, §§54–55) the SEA Environmental Report and the SEA Statement misunderstood the rubric of 'material assets' is denied.

Moreover, Mr Flynn avers that (DF1, §§207–208) while the allegation that the SEA Environmental Report and the SEA Statement misunderstood the rubric of "material assets" is largely a matter for legal argument and is addressed in the Statement of Opposition, Mr Flynn avers that:

'... for completeness, I say that the agri-food sector is Ireland's largest indigenous exporting sector and in 2020, the sector accounted for over 6% of GNI, 9% of exports and employed 163,600 people. The sector is essential for the functioning of society, and for rural communities in particular. In that context, I say and am advised that the SEA of the NAP correctly interpreted 'material assets' in line with the EPA guidance to cover agricultural assets as critical infrastructure essential for the functioning of society.'

The Applicant attempts to make fresh submissions in its response, contrary to the Court's direction at §392 of the Judgment for the Applicant to 'switch to offence by demonstrating that its various legal points are properly factually grounded in uncontradicted averments'.

Accordingly, the Respondents take issue with the Applicant's response to Question 64(b). Accordingly, the Respondents submit that the Applicant has not evidentially established the subject matter of Question 64(b) and reiterate that the burden of proof is on the Applicant to demonstrate to the Court that it has evidentially established the subject matter of Question 64(b)."

162. The ICMSA submitted:

"86. ICMSA refers to its submissions under Issue 61(b) above and also adopts the State's Response (pp.31-32) in respect of this Issue."

163. My decision is that it hasn't been established as a matter of interpretation of the SEA that the State was labouring under some fundamental misunderstanding of the directive as postulated in the question in some way that is not covered by issue 63(a). That doesn't mean that only some aspects of material assets were relevant – that issue is covered by the previous question.

Issue 65(b)

164. Issue 65(b) is as follows:

"(b) Has the applicant established that in the SEA for the NAP, material assets were treated as an outweighing factor and/or that the most environmentally friendly option was not selected."

165. The applicant submitted:

"173. It is noted that Question (a) is not under consideration at this point.

174. In Chapter 6 the reasonable alternatives are identified. These are split into Strategic Alternatives and Modal Alternatives. The same +/-/0 scoring was applied at Table 6.4.2 where the following alternatives were considered. These are:

Strategic Alternative 1 (S1): Continuation of the current suite of measures implemented in the fourth NAP with no new or additional measures proposed.

Strategic Alternative 2 (S2): Implementation of new and/or enhanced measures to build on the fourth NAP.

Strategic Alternative 3 (S3): Ireland to seek a derogation for grassland farms.

Strategic Alternative 4 (S4): Ireland to seek a derogation only for designated low risk catchments within the State.

Strategic Alternative 5 (S5): Ireland not to seek a derogation from the EU under this NAP.

175. S1 was given 7 +/- scores and 2 neutral scores. S2 was given 6 positive, 1 +/- and 1 neutral score.

176. S3 was given 6 negative, 1 positive and two neutral scores. S4 was given 5 negative, 2 neutral and 2 positive/negative scores. S5 was given 6 positive, 1 negative and two neutral scores. In relation to S5 it was judged positively as against Population and Human

Health, Biodiversity, Land and Soils, Water, Air Quality and Climatic Factors. It was judged negatively as against Material Assets. S3 was, in effect, the reciprocal of this. S3 was judged positively as against Material Assets and negatively against all of the other environmental factors.

177. The narrative discussion identified that although the seeking of a derogation will lead to increased environmental damage across all of the environmental factors because the two other reasonable alternatives will lead to a negative impact on material assets, these alternatives were not brought forward.

178. Without prejudice to the incomprehensibility of the assessment matrix, S4 and S5 are clearly the more environmentally friendly of the reasonable alternatives, over S3 (Ireland to seek a derogation). However, notwithstanding that it is S3 that was preferred as identified in the SEA Statement –

'Alternative brought forward within the NAP: Within the Environmental Report the potential negative impact to the natural environment of alternative S3 (Ireland to seek a derogation) was cited relative to alternatives S4 and S5 (Ireland to seek a reduced or no derogation). The converse material assets impact was also identified whereby S3 was preferred. Overall, the S3 scenario was brought forward and Section 8 of the Environmental Report (and the NIS) considered in greater detail the potential impacts from Alternative S3. Both documents have prescribed a suite of mitigation measures to ensure that any significant adverse impacts to the natural environment may be suitably mitigated.

179. The SEA Report also has a section on 'Alternative brought forward in the draft NAP' which includes an interesting comment which does not feature in the SEA Statement

'Alternative brought forward in the draft NAP: Alternative S5 offers the greatest levels of protection for the natural environment and is most aligned with Article 1 of the Nitrates Directive and the principle of water quality protection. From a purely environmental perspective Alternative S5 would be the preferred alternative but, notwithstanding this preference, Alternative S3 presents the lowest economic barrier for the agri-food sector and is the alternative brought forward in the draft NAP. Alternative S4 offers a lower level of protection relative to Alternative S5 but retains some economic barriers so is not considered further. While Alternative S3 is included in the draft NAP, this assessment recommends that despite the economic aspects, Alternative S5 offers the greatest level of environmental protection and represents the minimum ambition that should be considered within the draft NAP.'

180. It is a clear that the choice between alternatives was made on the basis of impact on material assets, wrongly interpreted and applied by the Respondents to include economic aspects/interests. There is no other explanation provided by the Respondents, either in the SEA Statement or (even if relevant) on Affidavit.

181. It is clear that the alternative selected will have significant environmental effects (properly understood) over and above the other reasonable alternatives:

'In this regard, Alternative S3 is considered to pose a potential negative impact for W and the secondary impacts to LS and BFF. In addition, potential for impact to human health (PHH) are also potentially negative. The additional land spreading of manures would also have negative impacts for AQ (through ammonia releases) and CF (through nitrous oxide releases) but these are known to be lower using the LESS technology required on holdings who secure the higher stocking rate'

182. Without prejudice to the other flaws in the assessment matrix addressed in other questions, if the scores in the Matrix were wrongly assigned because of an incorrect understanding or assessment of material assets, the outcome is flawed."

166. The State submitted:

"The Applicant's Response fails to identify any averment supporting the propositions in question. Accordingly, the Respondent set out the relevant pleas below.

The Applicant's plea that (ASoG, §56) the assessment criteria used to select the preferred alternative are irrational and/or were applied irrationally in the decision to select the preferred alternative is denied by the Respondents: SoO, §138.

To this end, Mr Flynn avers that (DF1, §218) insofar as the allegation pleaded at §56 of the Statement of Grounds seeks to imply that the Respondents were obliged to select the reasonable alternative that scored the highest when judged against the Strategic Environmental Objectives ("SEOs"), or that was the most environmentally friendly, that allegation is incorrect as a matter of law and ignores that the SEA Directive contains procedural obligations only.

Mr Flynn avers that (DF1, §§219) while this allegation is largely a matter for legal argument and is addressed in the Statement of Opposition, he observes that (DF1, 220–221):

'... if the Applicant were correct that the most environmentally friendly alternative must be adopted, it would never in practice be possible for a Member State to adopt an action programme under the Nitrates Directive that included a derogation. That cannot be correct.

Second, I say and am advised that insofar as the Applicant intends, at §56, to assert that the Respondents were not entitled to have regard to policy or economic considerations when selecting the preferred alternative, or that policy or economic considerations were irrelevant considerations when reaching that determination, there is no basis for that assertion. I say that the security of the agri-food sector is self-evidently a matter to which the Respondents were entitled, and indeed obliged, to have regard when determining whether the reasonable alternatives were realistic and viable alternatives, and when selecting the preferred alternative.'

Mr Flynn further avers that (DF1, §§223–225):

'I note that the analysis of alternatives presented in the Environmental Report and updated in the SEA Statement initially provides a basic "scoring" of each parameter (as '+' or '-'). This basic scoring identifies potential direct impacts as well as secondary or indirect impacts.

However, I say that this scoring is followed by a detailed narrative which provides a more nuanced analysis of the potential positive and negative impacts to supplement the basic scoring identified in the tables. The narrative provides details on the level of potential impact and the potential for these impacts to be mitigated to reduce or eliminate significant effects. On the balance of the identified impacts, a consideration of the intercomparison of the overall impact of each alternative scenario is derived. I say that it is the case that all environmental parameters listed under Article 5(1) and Annex 1 of the SEA Directive are assessed equally with no formal weighting applied to any parameter. However, the Applicant's contention that this means that the strategic option that performs worst has been selected in this instance is a simplistic interpretation based on the scoring outlined above only. It ignores the relevance of the extent and nature of the potential positive or negative impact, and the relevance of the extent to which such impacts can be mitigated, as well as the complexity of the policy decisions frequently reflected in plans and programmes subject to the SEA Directive. The weight given to a particular factor will depend on all of the foregoing, as well as any other relevant considerations. An analysis of the supplemental narrative clearly sets out the basis on which the preferred alternative was selected.' (Emphasis added).

Mr Flynn avers that (DF1, §§226–227) the Applicant's claim that the preferred alternative was selected by reference to a weighting scheme or extrinsic consideration that was neither identified in the SEA Environmental Report nor otherwise explained is unfounded and that the basis on which the Respondents selected strategic alternative 3 ('S3') is clear from the SEA Environmental Report and the SEA Statement. To this end, Mr Flynn says that the decision was made *inter alia*:

- (1) having regard to the significant impact of removing or limiting the derogation on material assets, and in particular the security of the agri-food sector, and in light of the importance of the agri-food sector to Irish society and the economy;
- (2) having regard to the fact that the additional environmental benefits that would potentially arise if the derogation were removed or limited would be at least partially offset by the absence of the strict conditions that currently apply to derogation farms; and
- (3) having regard to the risk that if the derogation were not extended, farms could still intensify and export manure off farm, and where such farms can have the same herd as a derogation farmer but spread the manure above 170kg N/ha per annum, at alternative locations which is more difficult to enforce.

Mr Flynn additionally avers that (DF1, §228):

'[T]he ultimate conclusion of the SEA Statement, following the consideration of the mitigation measures to be introduced, to the effect that any significant environmental effects of extending the derogation could be suitably mitigated by the mitigation measures to be adopted, was also a significant factor in that decision.'

Significantly, the Applicant fails to contradict these averments in its replying affidavit and Ms McGoff avers that (EM2, §9) '[t]he rest of Mr Flynn's affidavit can be dealt with more appropriately through legal submissions.'

The Applicant now seeks to resile from this position and attempts to make fresh submissions in its response, contrary to the Court's direction at §392 of the Judgment for the Applicant to 'switch to offence by demonstrating that its various legal points are properly factually

grounded in uncontradicted averments'. Accordingly, the Respondents take issue with the Applicant's response to Question 65(b).

The Respondents submit that the Applicant has not evidentially established the subject matter of Question 65(b) and reiterate that the burden of proof is on the Applicant to demonstrate to the Court that it has evidentially established the subject matter of Question 65(b).

For completeness, the Respondents draw the Court's attention to the recent Opinion in Case C-727/22 Opinion of Advocate General Kokott EU:C:2024:266, delivered on 21 March 2024 where she stated that (§59):

'Conversely, the SEA Directive does not itself lay down any substantive criteria for selecting alternatives. It does not therefore require the competent authorities to select the option which has the least adverse effects on the environment. As has already been stated, the environmental assessment is intended only to ensure that the selection is made taking into account possible significant effects on the environment.' (Emphasis added)."

167. The ICMSA submitted:

"87. ICMSA refers adopts the State's Response in respect of this Issue (pp.32-35) and, if necessary, also refers to its submissions under Issue 61(b) above."

168. My decision is as follows. Much of the submission here anticipates the substantive legal issue – the question is focused merely on whether the most environmentally friendly option was selected. That is clearly not the case.

169. Mr Flynn for the State avers as follows:

"222. Third, I say that the Applicant's contention as to the correct method of assessment under the SEA Directive is simplistic and misconceived. A policy decision with respect to the adoption of a plan that is vital both with respect to environmental and economic considerations cannot be a box-ticking exercise. I say that the Applicant's argument, that if all factors are weighted equally, the factor with the greatest number of '+'s must be adopted is an unworkable approach with respect to policy decisions of this complexity.

223. I note that the analysis of alternatives presented in the Environmental Report and updated in the SEA Statement initially provides a basic 'scoring' of each parameter (as '+' or '-'). This basic scoring identifies potential direct impacts as well as secondary or indirect impacts.

224. However, I say that this scoring is followed by a detailed narrative which provides a more nuanced analysis of the potential positive and negative impacts to supplement the basic scoring identified in the tables. The narrative provides details on the level of potential impact and the potential for these impacts to be mitigated to reduce or eliminate significant effects. On the balance of the identified impacts, a consideration of the intercomparison of the overall impact of each alternative scenario is derived.

225. I say that it is the case that all environmental parameters listed under Article 5(1) and Annex 1 of the SEA Directive are assessed equally with no formal weighting applied to any parameter. However, the Applicant's contention that this means that the strategic option that performs worst has been selected in this instance is a simplistic interpretation based on the scoring outlined above only. It ignores the relevance of the extent and nature of the potential positive or negative impact, and the relevance of the extent to which such impacts can be mitigated, as well as the complexity of the policy decisions frequently reflected in plans and programmes subject to the SEA Directive. The weight given to a particular factor will depend on all of the foregoing, as well as any other relevant considerations. An analysis of the supplemental narrative clearly sets out the basis on which the preferred alternative was selected.

226. Fourth, and related to the foregoing, I say that the Applicant's claim that the preferred alternative was selected by reference to a weighting scheme or extrinsic consideration that was neither identified in the SEA Environmental Report nor otherwise explained is unfounded.

227. I say that the basis on which the Respondents selected alternative S3 is clear from the SEA Environmental Report and the SEA Statement, and Counsel for the Respondents shall rely on the entirety of those documents at the hearing of the action. As has already been detailed above, however, by way of summary, I say that decision was made inter alia:

iv. having regard to the significant impact of removing or limiting the derogation on material assets, and in particular the security of the agri-food sector, and in light of the importance of the agri-food sector to Irish society and the economy,

v. having regard to the fact that the additional environmental benefits that would potentially arise if the derogation were removed or limited would be at least partially offset by the absence of the strict conditions that currently apply to derogation farms, and

vi. having regard to the risk that if the derogation were not extended, farms could still intensify and export manure off farm, and where such farms can have the same herd as a derogation farmer but spread the manure above 170kg N/ha per annum, at alternative locations which is more difficult to enforce.

228. The ultimate conclusion of the SEA Statement, following the consideration of the mitigation measures to be introduced, to the effect that any significant environmental effects of extending the derogation could be suitably mitigated by the mitigation measures to be adopted, was also a significant factor in that decision.

229. I say and believe that the selection of the preferred alternative in the foregoing circumstances, and where competing policy objectives arise, is quintessentially a matter for the discretion of the Respondents, subject to compliance with the requirements of the Nitrates Directive, the Water Framework Directive, the SEA Directive and the Habitats Directive. The Respondents were entitled to select alternative S3 as the preferred alternative in those circumstances and they were entitled to have regard to policy and/or economic considerations when reaching that decision.

230. In that respect, it is noted that the Commission Decision, based on its own consideration of the relevant data, determined that Ireland's application for the derogation was both: (i) objectively justified; and (ii) consistent with its obligations under the Nitrates Directive and the Water Framework Directive.

231. Having regard to the foregoing, I say and believe that the selection of the preferred alternative did not take account of irrelevant considerations and/or did take account of all relevant considerations and was not irrational or unreasonable so that no reasonable decision could have arrived at it."

170. The critical discussion of alternatives is set out in the SEA report as follows (pp. 71-72, notes omitted):

"Under the fifth NAP, Ireland has sought to renew this derogation (Alternative S3) and continue the practice that has been in place since the original derogation was granted in 2007. Such an approach would retain the status quo and potentially increase the number of holdings which seek a derogation within the lifetime of this NAP. A reasonable alternative to this strategy would be for Ireland not to seek a continuation of this derogation under the fifth NAP or for the Commission to refuse the derogation application for the State (Alternative S5). Under this scenario, the maximum stocking rate available within the State would be 170kg/ha/yr. However, it should be noted that under Alternative S5 farms could still intensify and export manure off farm without having to comply with the very strict rules that apply to holdings that avail of the derogation. These farms can have the same herd as a derogation farmer but spread the manure above 170kg/ha/yr at alternative locations which is more difficult to enforce. Therefore, for intensive farms it can be more beneficial for regulation and compliance with the NAP to allow these farms to operate through the structured derogation regime rather than allowing for the exporting of manure and the less stringent requirements outside of the derogation rules. A third alternative is a middle ground whereby the derogation is sought but only permitted for specific areas within the State (Alternative S4). This spatial alternative would be risk based and restrict the higher stocking rates in area such as the catchments of concern as identified by the EPA. Discussion: As noted in the baseline analysis of the Environmental Report, baseline water quality has continued to decrease in recent years and the EPA report that nearly half (47%) of river sites within the State have unsatisfactory nitrate concentrations, over a fifth (22%) of estuarine and coastal water bodies have unsatisfactory dissolved inorganic nitrogen (DIN) concentrations and almost one quarter (24%) of groundwater monitoring sites have high (>25mg/l NO₃) nitrate concentrations. The EPA analysis recommends the need to reduce the nitrogen loading to the environment to reduce these trends. It is important to note that these trends are not simply attributable to the holdings under derogation alone and the wider argi-food sector is identified as the primary source of these trends in rural areas. As such, citing the farm holdings with a derogation as the driver for this trend in water quality would be inaccurate but the additional nitrogen loading on these holdings is considered to add to this pressure. In this regard, Alternative S3 is considered to pose a potential negative impact for W and the secondary impacts to LS and BFF. In addition, potential for impact to human health (PHH) are also potentially negative. The additional land spreading of manures would also have negative impacts for AQ (through ammonia releases) and CF (through nitrous oxide releases) but these are known to be lower using the LESS technology required on holdings who secure the higher stocking rate. In short, alternative M3 has potential for adverse impact to the natural environment without additional mitigation and greater compliance with the GAP Regs. MA impacts are positive as the derogations allow for greater outputs and incomes for farmers who avail of the higher stocking rates. On a national scale, neighbouring Member

States such as Northern Ireland, the UK as well as the Netherlands and Denmark have availed of the derogation and by retaining the derogation the State can remain competitive internationally on farming prices. It is important to note that the EU granting of any derogation is not certain and is conditional with a key condition being that the derogation should not hinder the achievement of the objectives specified in Article 1 of the Directive (i.e. reducing water pollution caused or induced by nitrates from agricultural sources and preventing further such pollution). In this regard, given the recent trends in water quality, the EU may cite this as a reason to refuse a derogation for the State or may seek the State to implement a stronger set of measures within the NAP to improve the existing baseline. Regardless of EU refusal, the environmental impacts of Alternative S5 may be positive for W over the baseline by reducing the permissions to circa 7,000 farms to increase the stocking rates on these holdings and the N loading to the environment. But as noted above, removing the derogation is likely to have a more mixed outcome for W, as this scenario may still facilitate intensification of farming and export of manure to other farms but without the controls and regulation offered by the derogation in Alternative S3. The extent of any reduction in N loading from Alternative S5 has not been quantified but this would include for a circa 32% reduction in N loading at circa 5% of farm holdings within the State (typically larger farms so likely more than 5% of agricultural lands). However, the derogation does require these farmers to implement supplemental measures (such as LESS and other measures as listed above) which would no longer apply with the removal of the derogation. As such, these additional protections may somewhat reduce the wider benefits offered by Alternative S5. In short, Alternative S5 offers potential positives for W through reduced N loading with potential for associated indirect effects for BFF, LS and PHH. Impacts for AQ and CF would also be positive as reduced loading would reduce ammonia and nitrous oxide emissions relative to the current baseline. The third alternative (S4) is based on a more nuanced derogation whereby Ireland maintains the derogation (if granted by the EU) but that holdings in particular areas/catchments are not permitted to avail of the higher stocking rate permitted by the derogation. The EPA June 2021 report identified a number of key catchments of concern with elevated nitrogen concentrations along the south, southeast and east coasts. Alternative S4 would require DAFM to prohibit any holding within the above areas (possibly all catchments but as a minimum the Slaney and Barrow catchments) from availing of any future derogation. Such an approach would help to reduce the N loading within these catchments of concern and potentially reverse the trends identified by the EPA. It is noted that the high N levels detected in these catchments are not as a direct result of any variation in farming practices in these areas or levels of NAP compliance, but the free draining soils in these areas provide naturally lower levels of protection for the environment. This alternative would require greater administration from DAFM but would offer benefits to the natural environment but it is not without difficulties for farming. Alternative S4 would be positive for W, BFF, LS and PHH relative to the baseline (Alternative S3) by reducing the N loading at holding level and therefore the losses to the environment. These benefits would be lower than those offered by Alternative S5. Potential positives from AQ and CF would be more modest as these factors are not spatially driven and would only be realised if there was a wider reduction in fertiliser use within the State. The greatest difficulty for this alternative relates to MA at the holding level and the equity and fairness of allowing the higher stocking rates on this basis. This spatial approach may permit one holding to seek a higher stocking rate but restrict a neighbouring holding where located in a different catchment. Such an approach would be anti-competitive and may disrupt the current collective model within the agri-food sector. For this reason, Alternative S4 would be more negative for MA relative to S3 and would have a similar competition concern to S5 albeit at a more regional rather than national scale. Alternative brought forward in the NAP: Within the Environmental Report the potential negative impact to the natural environment of alternative S3 (Ireland to seek a derogation) was cited relative to alternatives S4 and S5 (Ireland to seek a reduced or no derogation). The converse material assets impact was also identified whereby S3 was preferred. Overall, the S3 scenario was brought forward and Section 8 of the Environmental Report (and the NIS) considered in greater detail the potential impacts from Alternative S3. Both documents have prescribed a suite of mitigation measures to ensure that any significant adverse impacts to the natural environment may be suitably mitigated."

171. So there were two clearly more environmentally friendly options than the one selected. Firstly there was the option (S5) of not seeking a derogation. The SEA determination did not say that this would have adverse environmental effects due to farmers spreading manure elsewhere. It only raised that as a possibility. Of course, anything is possible, but (assuming that laws are enforced) there is nothing to suggest that the effect of that would be anywhere near the effects of

granting 5,000 derogations. Indeed the SEA analysis doesn't say that or really rely on environmental conclusion as decisive – it refers to things like ease of enforcement. The conceit seems to be much like the repeal of prohibition by the 21st amendment to the US constitution in 1933 – better to permit the interstate transportation of alcohol subject to regulation than to unenforceably purport to prohibit it. The Department seems to envisage that if farmers were limited to 170 kg N/ha as opposed to 220/250 kg N/ha, we would have something loosely akin to a black market in bootlegged manure as the equivalent in fertiliser terms to the speakeasys of 1920s America. How sincere or realistic such protestations are will have to be for the court of public opinion as it is somewhat beyond the competence of the court, confined as one is to the pleadings and evidence.

172. The alternative option (S4) is even more clear cut – not granting derogations in highly sensitive areas. That was rejected not for environmental reasons but on grounds that it would be “anti-competitive and may disrupt the current collective model”. Anti-competitive? To have stricter pollution control in highly sensitive receiving environments than in less sensitive ones? Hard to see immediately who is going to be convinced by that excuse, but the potential implausibility of that doesn't seem to arise now in a way that requires any specific finding, although I am open to argument otherwise. If it arises, maybe there is a logical rationale.

173. It follows from the terms of the SEA and indeed as somewhat reinforced by the respondent's affidavit that the most environmentally friendly option was not selected. Phrased alternatively, material assets broadly construed in the sense of economic considerations were expressly taken into account, and taken into account in a decisive way in that they were taken to have outweighed other options. Whether this has any legal implications can be determined in the light of the judgment of the CJEU in Case C-727/22 *Friends of the Irish Environment*.

Issue 66

174. Issue 66 is as follows:

“66. Has the applicant established that the SEA for the NAP was inadequate because assessment criteria used to select the preferred alternative are irrational and/or were applied irrationally in the decision to select the preferred alternative, especially where the assessment provides that each objective has been given equal weight.”

175. The applicant submitted:

“184. The Applicant relies on the answer above in addressing this question.

185. The SEA Statement recorded:

‘Economic interests were addressed under the criteria Material Assets (MA) in the SEA as part of a multi criteria analysis of all environmental objectives including water (W), air quality (AQ), etc. All objectives were treated as equal and only where the impact to one objective over another was in conflict and assessment of net benefit was undertaken.’

186. However, if this is correct then the Statement has selected the Strategic Option that performs worst, and significantly worst, across each of the Objectives.

187. In other words, if each of the Objectives is accorded equal weight as the Statement says, the preferred alternative could not rationally have been selected as it was the worst performing alternative judged against the equally weighted criteria. If on the other hand the Objectives are not accorded equal weight then the preferred alternative was selected by reference to a weighting scheme or extrinsic consideration that was neither identified in the Report or otherwise explained and still, respectfully, has not been explained.

188. The Applicant cannot do more than demonstrate that clearly each Objective was not given equal weight. If it was then the preferred alternative could not have been selected. The Applicant has also demonstrated that there is no other assessment criteria contained in the SEA Statement that ranked the Objectives or allowed the selection and promotion of Material Assets over all other criteria.

189. The methodology that the SEA Statement says it applied (equal weighting) was not in fact applied - and the SEA Statement/Report does not identify any alternative mechanism based on legitimate SEA factors for the selection of the preferred alternative. The ‘assessment of net benefit’ referred to above, or its relation to the factors relevant to SEA, is not identified. Non-environmental considerations should not be used to influence the outcome of the environmental assessment towards the desired result.”

176. The State submitted:

“The Applicant's Response to Question 66 reiterates its response to Question 65(b). Accordingly, the Respondents reiterate their response to Question 65(b) above.

In circumstances in which the Applicant's Response fails to identify any averment supporting the propositions in question, the Respondents set out the relevant pleas below.

The Applicant's plea that (ASoG, §56) the assessment criteria used to select the preferred alternative are irrational and/or were applied irrationally in the decision to select the preferred alternative is denied by the Respondents: SoO, §138.

To this end, Mr Flynn avers that (DF1, §210) the assessment criteria used to select the preferred alternative were not irrational, were not applied irrationally and that the preferred alternative could be, and was, selected on a proper application of the SEA Directive.

Mr Flynn avers that (DF1, §211) both strategic and modal alternatives were considered and Mr Flynn describes the strategic and modal alternatives that were considered at §§212–215. In this regard, Mr Flynn avers that (DF1, §§212–215):

'First, the following strategic alternatives were considered. Ultimately, alternative S2 was adopted:

- i. Strategic Alternative 1 (S1): Continuation of the current suite of measures implemented in the fourth NAP with no new or additional measures proposed.
- ii. Strategic Alternative 2 (S2): Implementation of new and/or enhanced measures to build on the fourth NAP.

Second, the following three strategic alternatives were considered. Ultimately, for the reasons detailed above, alternative S3 was adopted:

- iii. Strategic Alternative 3 (S3): Ireland to seek a derogation for grassland farms.
- iv. Strategic Alternative 4 (S4): Ireland to seek a derogation only for designated low risk areas and catchments within the State.
- v. Strategic Alternative 5 (S5): Ireland not to seek a derogation from the EU under this NAP.

Third, the following modal alternatives were considered. Ultimately, alternative M2 was adopted:

- vi. Modal Alternative 1 (M1): Retention of the existing closed periods as specified in Schedule 4 of the 2017 Regulations.
- vii. Modal Alternative 2 (M2): Extension of the existing closed periods.

Fourth, the following modal alternatives were considered. Ultimately, alternative M4 was adopted:

- viii. Modal Alternative 3 (M3): Maintain the current stocking rates as presented in the fourth NAP
- ix. Modal Alternative 4 (M4): Establish lower stocking rates under the fifth NAP'

Mr Flynn avers that (DF1, §216) that the reasonable alternative selected was therefore a combination of strategic alternatives S2 and S3 and modal alternatives M2 and M4 and that the Applicant takes issue in these proceedings only with the selection of S3, over strategic alternatives S4 and S5.

Mr Flynn avers that the Applicant's case in this respect is misconceived for inter alia the following reasons:

(1) insofar as the allegation pleaded at §56 of the Amended Statement of Grounds seeks to imply that the Respondents were obliged to select the reasonable alternative that scored the highest when judged against the Strategic Environmental Objectives, or that was the most environmentally friendly, that allegation is incorrect as a matter of law and ignores that the SEA Directive contains procedural obligations only (DF1, §218);

(2) insofar as the Applicant intends, at §56 of the Amended Statement of Grounds, to assert that the Respondents were not entitled to have regard to policy or economic considerations when selecting the preferred alternative, or that policy or economic considerations were irrelevant considerations when reaching that determination, there is no basis for that assertion (DF1, §221);

(3) the Applicant's contention as to the correct method of assessment under the SEA Directive is simplistic and misconceived and that a policy decision with respect to the adoption of a plan that is vital both with respect to environmental and economic considerations cannot be a box-ticking exercise (DF1, §222).

Mr Flynn avers at §224 that:

'... this scoring is followed by a detailed narrative which provides a more nuanced analysis of the potential positive and negative impacts to supplement the basic scoring identified in the tables. The narrative provides details on the level of potential impact and the potential for these impacts to be mitigated to reduce or eliminate significant effects. On the balance of the identified impacts, a consideration of the intercomparison of the overall impact of each alternative scenario is derived.'

Mr Flynn further avers that (DF1, §225):

'... all environmental parameters listed under Article 5(1) and Annex 1 of the SEA Directive are assessed equally with no formal weighting applied to any parameter. However, the Applicant's contention that this means that the strategic option that performs worst has been selected in this instance is a simplistic interpretation based

on the scoring outlined above only. It ignores the relevance of the extent and nature of the potential positive or negative impact, and the relevance of the extent to which such impacts can be mitigated, as well as the complexity of the policy decisions frequently reflected in plans and programmes subject to the SEA Directive. The weight given to a particular factor will depend on all of the foregoing, as well as any other relevant considerations. An analysis of the supplemental narrative clearly sets out the basis on which the preferred alternative was selected.'

My Flynn avers inter alia that (DF1, 227) the basis on which the Respondents selected S3 is clear from the SEA Environmental Report and the SEA Statement. Mr Flynn further avers that the decision was made inter alia:

- (1) having regard to the significant impact of removing or limiting the derogation on material assets, and in particular the security of the agri-food sector, and in light of the importance of the agri-food sector to Irish society and the economy,
- (2) having regard to the fact that the additional environmental benefits that would potentially arise if the derogation were removed or limited would be at least partially offset by the absence of the strict conditions that currently apply to derogation farms, and
- (3) having regard to the risk that if the derogation were not extended, farms could still intensify and export manure off farm, and where such farms can have the same herd as a derogation farmer but spread the manure above 170kg N/ha per annum, at alternative locations which is more difficult to enforce.

Finally, Mr Flynn avers that (DF1, §228) the ultimate conclusion of the SEA Statement, following the consideration of the mitigation measures to be introduced, to the effect that any significant environmental effects of extending the derogation could be suitably mitigated by the mitigation measures to be adopted, was also a significant factor in that decision.

Accordingly, the Respondents submit that the Applicant has (The Judgment, §392) failed to demonstrate that 'its various legal points are properly factually grounded in uncontradicted averments' and reiterate that the burden of proof is on the Applicant to demonstrate to the Court that it has evidentially established the subject matter of Question 66.

For completeness, the Respondents draw the Court's attention to the recent Opinion in Case C-727/22 Opinion of Advocate General Kokott EU:C:2024:266, delivered on 21 March 2024 where she stated that (§§60–63):

'In so far as the choice between different alternatives does not depend on substantive legal requirements under other rules, two further factors are therefore relevant, above all, in determining the information that may reasonably be required, in addition to the indications in Article 5(2) of the SEA Directive. First, that information must allow a comparison to be made between the preferred option and the alternatives in the light of the arguments that are relevant to the decision. Second, the information must allow the relevant environmental concerns to be taken into account in that comparison.

If the choice between the alternatives is based primarily on cost considerations, for example, the costs of all reasonable alternatives must therefore be identified and described at least to the extent that it is clear how the costs of the different options relate to one another. However, it must also be clear whether those cost advantages are associated with adverse effects on the environment which would be avoided with other options. Otherwise these environmental concerns might not be taken into account adequately in choosing between the alternatives dealt with.

These requirements do not prevent the environmental assessment of the preferred option being more detailed than the environmental assessment of the other alternatives dealt with. This is to be expected, in particular, where the advantages of the preferred option clearly outweigh those of the alternatives dealt with, even taking into account the effects on the environment. In that case, detailed information on the alternatives dealt with would have no intrinsic function, whereas information on the effects on the environment of the preferred option is important for the subsequent implementation of the plan or programme.

If, however, the advantages and disadvantages of the different options have similar weight, it becomes more difficult to justify the selection. In that case, it may become necessary to provide more detailed information on the reasonable alternatives in the environmental report, even if this involves considerable effort.' (Emphasis added)."

177. The ICMSA submitted:

"88. When analysed, the core of An Taisce's objection here seems to approximate to a 'reasoning' type complaint – namely an assertion that it cannot understand particular aspects

of the SEA Statement or why they arrived at the view which they did. (See, for example, An Taisce's assertion at §187 that certain matters have 'not been explained').

89. Accordingly, and even taking An Taisce's arguments (which ICMSA does not accept) at their height, this may be another area where the Krupecki course of action may be relevant.

90. Beyond that observation, ICMSA again adopts the State's Response in respect of this Issue (pp.35-40)."

178. My decision is that bearing in mind that this question addresses only the issue of alleged irrationality, which is a high bar, the applicant has not made out that complaint on the evidence. It's one thing to say that the State took into account broad economic implications – that seems clear. One can also say that such considerations were outweighing and decisive – that is a natural interpretation of the material. One can even say that the non-preferred options are not discussed in comparable detail – that is dealt with below. But to go beyond that and say that the assessment was irrational has not been demonstrated. Reasons were provided. Whether one agrees with them is another thing.

Issue 67(b)

179. Issue 67(b) is as follows:

"(b) Has the applicant established that the SEA Statement failed to consider, adequately or at all, the alternatives to the strategic alternative option selected and to subject each of the alternatives to a commensurate level of analysis and/or failed to include detailed description or evaluation of the likely significant environmental effects of the alternative strategies in the Environmental Report and/or failed to ensure that the alternatives were identified, described and evaluated in a comparable way."

180. The applicant submitted:

"190. This precise issue is before the Supreme Court in *FIE v Government of Ireland*. The legal issues in both cases are exactly the same and the Applicant does not understand how the Respondents can seriously contend that this Honourable Court should proceed to give judgement prior to the decision of the CJEU.

191. The Advocate General in *FIE* gave her Opinion on 21st March 2024 in the following terms:

'61. If the choice between the alternatives is based primarily on cost considerations, for example, the costs of all reasonable alternatives must therefore be identified and described at least to the extent that it is clear how the costs of the different options relate to one another. However, it must also be clear whether those cost advantages are associated with adverse effects on the environment which would be avoided with other options. Otherwise these environmental concerns might not be taken into account adequately in choosing between the alternatives dealt with.

62. These requirements do not prevent the environmental assessment of the preferred option being more detailed than the environmental assessment of the other alternatives dealt with. This is to be expected, in particular, where the advantages of the preferred option clearly outweigh those of the alternatives dealt with, even taking into account the effects on the environment. In that case, detailed information on the alternatives dealt with would have no intrinsic function, whereas information on the effects on the environment of the preferred option is important for the subsequent implementation of the plan or programme.

63. If, however, the advantages and disadvantages of the different options have similar weight, it becomes more difficult to justify the selection. In that case, it may become necessary to provide more detailed information on the reasonable alternatives in the environmental report, even if this involves considerable effort.

64. As far as the information in the contested environmental report is concerned, it is not clear whether substantive requirements under other rules were taken into account or were even relevant to the decision. Furthermore, it appears that, while the chapter of the environmental report concerning alternatives explains the alternatives dealt with and the decision to select the preferred option and contains information on their effects on the environment, this is essentially limited to a matrix with plus and minus indicators. (29) It is not explained how these indicators were derived or to what extent they were taken into account in making the selection.

65. The reason for taking this approach might be that the NPF is highly abstract and does not provide for any specific projects or that the public concerned already has prior knowledge.

66. It is for the national courts, however, to determine whether against this background – and contrary to the submission made by Friends of the Irish Environment – the reasons for selecting the preferred option and the effects on the

environment of the alternatives dealt with were presented in a comprehensible manner.

67. The answer to the third question should therefore be that under Article 5(1) and (2) of the SEA Directive the environmental report must contain the information on the reasonable alternatives to the adopted plan or programme dealt with which is necessary

– to determine compliance with the requirements under other rules relating to the assessment of alternatives and

– to be able to understand how the effects on the environment have been taken into account in the decision to select the adopted plan or programme in comparison with the alternatives dealt with.'

192. The Applicant accepts that the Advocate General's Opinion is nuanced but submits that it supports the Applicants contention. In these proceedings as in NPF the reasonable alternatives were subject to cursory assessment and identical matrices of which the Advocate General is very critical.

193. It is submitted that it is not possible to understand the basis for the selection of the preferred alternative and that no comprehensible information has been provided that demonstrates 'how the effects on the environment have been taken into account in the decision to select the adopted plan or programme in comparison with the alternatives dealt with'. There are references to S3 being negative for BFF and W but the opposite for S5. However, this simply begs the question as to what is meant by negative and positive – where will those positive/negative effects occur? When? Why? How profoundly will they occur? What change (positive or negative) from the baseline is apprehended?

194. Sentences such as 'In this regard, Alternative S3 is considered to pose a potential negative impact for W and the secondary impacts to LS and BFF' are literally meaningless for understanding how effects on Water were taken into account in the selection of the preferred alternative, particularly where that effect is anticipated to be adverse on that Objective."

181. The State submitted:

"In circumstances in which the Applicant's Response fails to identify any averment supporting the propositions in question, the Respondents set out the relevant pleas below. The Applicant's plea (ASoG, §57) that the SEA Statement failed to consider, adequately or at all, the alternatives to the strategic alternative option selected and to subject each of the alternatives to a commensurate level of analysis is denied by the Respondents (SoO, §155). The Applicant relies on the Commission Guidance on the 'Implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment' for the proposition that (ASoG, §57) '... the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives and the alternatives must be identified, described and evaluated in a comparable way', which the Respondents deny (SoO, §156) that the passage from the Commission Guidance cited at §57 of the Amended Statement of Grounds has the effect alleged by the Applicant.

The Respondents plead that (SoO, §159):

'... the assessment of the reasonable alternatives to the NAP complies with any comparable assessment obligation that arises under the SEA Directive. Reasonable alternatives were identified in Chapter 7 of the SEA Environmental Report. Following comparable assessment of those reasonable alternatives under Chapter 7, the preferred option was selected, developed into a draft strategy and subjected to detailed assessment under Chapter 8. That iterative approach is fully compliant with the requirements of the SEA Directive.'

The Affidavit of Mr Flynn avers that (DF1, §§233–234) the allegation at §57 of the Statement of Grounds that the Respondents failed to consider, adequately or at all, the reasonable alternatives to the NAP is unfounded and that this is largely a matter for legal argument.

For completeness, the Respondents draw the Court's attention to the recent Opinion in Case C-727/22 Opinion of Advocate General Kokott EU:C:2024:266, delivered on 21 March 2024 where she stated that (§§60–63):

'In so far as the choice between different alternatives does not depend on substantive legal requirements under other rules, two further factors are therefore relevant, above all, in determining the information that may reasonably be required, in addition to the indications in Article 5(2) of the SEA Directive. First, that information must allow a comparison to be made between the preferred option and the alternatives in the light of the arguments that are relevant to the decision.

Second, the information must allow the relevant environmental concerns to be taken into account in that comparison.

If the choice between the alternatives is based primarily on cost considerations, for example, the costs of all reasonable alternatives must therefore be identified and described at least to the extent that it is clear how the costs of the different options relate to one another. However, it must also be clear whether those cost advantages are associated with adverse effects on the environment which would be avoided with other options. Otherwise these environmental concerns might not be taken into account adequately in choosing between the alternatives dealt with.

These requirements do not prevent the environmental assessment of the preferred option being more detailed than the environmental assessment of the other alternatives dealt with. This is to be expected, in particular, where the advantages of the preferred option clearly outweigh those of the alternatives dealt with, even taking into account the effects on the environment. In that case, detailed information on the alternatives dealt with would have no intrinsic function, whereas information on the effects on the environment of the preferred option is important for the subsequent implementation of the plan or programme.

If, however, the advantages and disadvantages of the different options have similar weight, it becomes more difficult to justify the selection. In that case, it may become necessary to provide more detailed information on the reasonable alternatives in the environmental report, even if this involves considerable effort.' (Emphasis added)."

182. The ICMSA submitted:

"91. It is noted that at §192, the Applicant characterises Advocate General Kokott's Opinion as 'nuanced'. Of itself, that tends to undermine at least somewhat the assertion which then immediately follows – namely the submission that the Opinion supports the Applicant's position.

92. At §193, An Taisce asserts that 'it is not possible to understand' certain matters, and that there is allegedly a lack of 'comprehensible information'. While ICMSA does not agree with those criticisms, they again seem to be of a 'reasoning' nature, meaning that Krupecki may again be possibly relevant.

93. Beyond those observations, ICMSA again adopts the State's Response in respect of this Issue (pp.40-42)."

183. My decision is that the level of detail of consideration of the alternatives flows from the terms of the SEA itself. It is clear that the alternatives were not considered in precisely comparable detail, if that is the standard, which it may or may not be. Whether this has any legal implications can be determined in the light of the judgment of the CJEU in *Friends of the Irish Environment CLG v Government of Ireland and others*, C-727/22.

Issue 68

184. Issue 68 is as follows:

"68. Has the applicant established that, assuming art. 5(1) of and Annex I para. (i) to the SEA directive have the effect that the SEA report itself must include details of an adequate monitoring process in compliance with art. 10 of the directive, the SEA for the NAP fails to do this because it includes no adequate provision for monitoring of the significant environmental effects of its implementation and therefore contains no or no adequate provision for the identification at an early stage of unforeseen adverse effects or when appropriate remedial action might be required. This issue is addressed at Chapter 7 of the SEA Statement; no details of how this monitoring will occur, who will do it, when it will be done, how the monitoring will be used, and how any identified unforeseen adverse environmental effects will be addressed; and/or most of what the Chapter identifies as indicators for monitoring significant environmental effects do not in fact measure environmental effects."

185. The applicant submitted:

"195. This issue is before the Supreme Court, although not subject to the reference to the Court of Justice and the Court should wait the Supreme Courts determination in a case that is identical to that made in NPF.

196. No details of how this monitoring will occur, who will do it, when it will be done, how the monitoring will be used, and how any identified unforeseen adverse environmental effects will be addressed.

197. The monitoring effort identified at Section 7 of the SEA Statement contains no actual monitoring of the significant environmental effects of the implementation of the NAP. Most of what the Chapter identifies as indicators for monitoring significant environmental effects do not in fact measure environmental effects at all. For example, in relation to Water, which

is the objective most critically affected by excessive Nitrates, the monitoring requirement is identified as:

'Status of water bodies – compliance with the environmental objective under WFD and MSFD as appropriate. [data source: EPA and Marine Institute].

% of river sites have unsatisfactory (above 8 mg/l NO₃) nitrate concentrations [data source: EPA].

% of estuarine and coastal water bodies have unsatisfactory dissolved inorganic nitrogen (DIN) concentrations [data source: EPA].

% of groundwater monitoring sites that have high (>25mg/l NO₃) nitrate concentrations [data source: EPA].

198. The 'Remedial Actions' are identified as:

'The EPA report on the assessment of the catchments that need reductions in nitrogen concentrations to achieve water quality objectives shows the load reductions needed in each catchment to achieve the Environmental Water Quality Standard of 2.6 mg/l N in the downstream estuary. This information should be used as a priority to focus the most urgent needs for additional measures.

Increased frequency, focus and detail in NAP farm inspections to drive greater compliance with NAP measures.

Increased enforcement of the NAP measures at farm holding level to incentivise compliance with the NAP.'

199. There is no explanation how these indicators are to be measured – i.e. what is to be done with the percentage of groundwaters bodies that have high nitrates concentrations or at what point these unidentified actions are to be taken, how reductions are to be achieved, and who is supposed to verify progress in relation to those indicators or what effect any monitoring (even if it does occur) will have to mitigate or ameliorate those effects.

200. The same observation as to inadequacy applies to a greater or lesser extent to the balance of the Strategic Environmental Objectives. The monitoring envisaged (such as it is) is not monitoring designed to monitor the significant environmental impacts of the implementation of the NAP and to identify at an early stage unforeseen adverse effects and to be able to undertake appropriate remedial action."

186. The State submitted:

"In circumstances in which the Applicant's Response fails to identify any averment supporting the propositions in question, the Respondents set out the relevant pleas below. The Applicant pleads that (ASoG, §59) the NAP 'includes no adequate provision for monitoring of the significant environmental effects of its implementation and therefore contains no or no adequate provision for the identification at an early stage of unforeseen adverse effects or when appropriate remedial action might be required' and that 'the monitoring program set out in Chapter 7 of the SEA statement does not discharge the Respondent's obligations under section 13J of the Regulations and Article 10 of the SEA Directive'.

The Respondents deny that (SoO, §162) the allegation that the monitoring measures prescribed by the NAP are inadequate.

Mr Flynn avers that (DF1, §236) the allegation at §§58–63 of the Amended Statement of Grounds that the proposed monitoring of the NAP does not comply with section 13J of the SEA Regulation and Article 10 of the SEA Directive is unfounded.

Mr Flynn avers (DF1, §237) that the NAP is subject to detailed and prescriptive monitoring, as required by the Nitrates Directive, and implemented by inter alia Articles 27, 29, and 30 of the GAP Regulations.

In addition to the foregoing, Mr Flynn avers that an interim review of the NAP is required to be carried out by the Minister under Article 28 of the GAP Regulations and additional monitoring with respect to the derogation in particular is required by Articles 10, 11 and 13 of the Commission Decision, and is implemented in Articles 36, 37, 38, 39 and 40 of Part 7 the GAP Regulations as inserted by the GAP (Amendment) (No 1) Regulations.

Mr Flynn further avers (DF1, §238) that the measures envisaged for the monitoring of the NAP are outlined in Chapter 9 of the SEA Environmental Report and Chapter 6 of the SEA Statement, in a manner that complies fully with the requirements of Article 10 of the SEA Directive. Mr Flynn further avers that Table 9.3 of the SEA Environmental Report sets out in detail the proposed monitoring programme for the NAP and the sources of information for monitoring. Mr Flynn avers that clear lines of responsibility, frequency and parameters are identified and it is the obligation of the Department to manage and track that monitoring regime.

Mr Flynn avers that (DF1, §239) the Respondents will rely on all of the aforementioned legislative provisions and documents at hearing to demonstrate that this represents a

comprehensive monitoring regime that is focused on water quality and other environmental indicators that will be used to track the NAP implementation and to provide identification, at an early stage, of unforeseen adverse effects or the need for remedial actions.

With respect to the allegation at §59 of the Amended Statement of Grounds that the SEA Statement provides no details of how monitoring of the NAP will occur, who will do it, when it will be done, how the monitoring will be used, and how any identified unforeseen adverse environmental effects will be addressed is denied, Mr Flynn avers (DF1, §241) that these matters are expressly delineated in the detailed monitoring framework established by the Nitrates Directive and the GAP Regulations, and summarised in Chapter 9 of the SEA Environmental Report.

Finally, Mr Flynn avers that (DF1, §244) the monitoring regime and the division of responsibilities for monitoring water quality are delineated in the GAP Regulations and summarised in Chapter 9 of the SEA Environmental Report. Mr Flynn further avers that water quality monitoring is used to track environmental performance, and poor performance triggers the need for remedial actions, as required by Article 5(5) of the Nitrates Directive. Mr Flynn avers that these remedial actions may be activated at any time by the Department, which has further committed to an interim review of the NAP in 2023 as detailed in Article 28 of the GAP Regulations. Mr Flynn avers that the role of inspections and enforcement in monitoring is also set out in the Environmental Report and the GAP Regulations.

Significantly, the Applicant fails to contradict these averments in its replying affidavit and Ms McGoff avers that (EM2, §9) '[t]he rest of Mr Flynn's affidavit can be dealt with more appropriately through legal submissions.'

Accordingly, the Respondents submit that the Applicant has not evidentially established the subject matter of Question 68 and reiterate that the burden of proof is on the Applicant to demonstrate to the Court that it has evidentially established the subject matter of Question 68."

187. The ICMSA submitted:

"94. At §199 An Taisce asserts there is 'no explanation' of how certain indicators are to be measured.

95. Once again, this seems to be a criticism of a 'reasoning' nature, meaning that Krupecki may again be possibly relevant.

96. Beyond those observations, ICMSA again adopts the State's Response in respect of this Issue (pp.43-45)."

188. My decision is as follows. Chapter 7 of the SEA statement includes the following:

"7 MEASURES TO MONITOR SIGNIFICANT ENVIRONMENTAL EFFECTS OF THE IMPLEMENTATION OF THE ADOPTED NAP

7.1 Introduction

Article 10 of the SEA Directive requires that monitoring should be carried out in order to identify at an early stage any unforeseen adverse effects due to implementation of the NAP, with the view to taking remedial action where adverse effects are identified through monitoring. A monitoring programme is developed based on the indicators selected to track progress towards achieving strategic environmental objectives and reaching targets, enabling positive and negative impacts on the environment to be measured. The environmental indicators have been developed to show changes that would, as far as possible, be attributable to implementation of the NAP.

7.2 Responsibility for Monitoring

The Minister for Agriculture, Food and the Marine is responsible for the monitoring of the NAP. This responsibility is prescribed in the NAP in Article 27(1) where it states that: The Minister for Agriculture, Food and the Marine shall carry out, or cause to be carried out, such monitoring and evaluation programmes in relation to farm practices as may be necessary to determine the effectiveness of measures being taken in accordance with these Regulations.

7.3 Sources of Information for Monitoring

Monitoring will focus on aspects of the environment that are likely to be significantly impacted by the NAP. Where possible indicators have been chosen based on the availability of the necessary information and the degree to which the data will allow the target to be linked directly with the implementation of the NAP. Table 7.1 presents the Environmental Monitoring Programme to track progress towards achieving strategic environmental objectives and reaching targets and includes sources of relevant information. From Table 7.1 the majority of information required is already being actively collected (e.g., under the River Basin Management Plan and other programmes), but not all of this is being gathered and reported on at a national level."

189. In that light one can look at the complaints made by the applicant:

- (i) it includes no adequate provision for monitoring of the significant environmental effects of its implementation and therefore contains no or no adequate provision for the identification at an early stage of unforeseen adverse effects or when appropriate remedial action might be required – this is a complaint as to the merits of the SEA which has not been made out evidentially;
- (ii) no details of how this monitoring will occur – this has some validity in that the monitoring measures are of a general nature;
- (iii) who will do it – it seems to be implicit in Chapter 7 that the Minister will be responsible overall for monitoring with specific steps taken by relevant actors;
- (iv) when it will be done – time lines are generally absent from the monitoring measures;
- (v) how the monitoring will be used, and how any identified unforeseen adverse environmental effects will be addressed – this is also absent; and
- (vi) most of what the Chapter identifies as indicators for monitoring significant environmental effects do not in fact measure environmental effects – this criticism has not been made out evidentially.

190. In short, in the respects referred to at (ii), (iv) and (v), the factual basis for the interpretative point appears to have been duly laid. Insofar as one comes to the issue of whether the interpretative point should await the consideration of the Supreme Court in *Friends*, the issue in that case was represented as an issue “of the application of the provisions of the directive” and not as an “interpretative” matter (para. 224). That presumably is a fact-specific judgment from case to case depending on what the precise issues are, how they are argued and presented, how they are characterised by the court in the particular context, and how they interact with the facts of the given proceedings. In the present case by contrast the question emerges as an issue of interpretation of directive 2001/42, which takes the form of issue 57 in the issue paper, which can be addressed in due course.

Implications of the foregoing for Core Ground 3

191. In the light of the foregoing, while certain substantive legal issues under Core Ground 3 fall away, other issues remain for the proposed module III and should be addressed at that stage.

Summary

192. In very outline summary, without taking from the specific terms of the judgment, some of the highlights include:

- (i) the applicant hasn’t shown that European-site-specific analysis (or of water-body-specific analysis) in the NAP AA was practicable - any argument based on a lack of such analysis therefore falls;
- (ii) it is not disputed that no AA of farm-level derogations is carried out in practice;
- (iii) if AA of the NAP was required to address the impacts of the underlying agricultural activities (an assumption which remains to be decided), then the AA of the NAP did not do this, an issue which is possibly reinforced by the lack of farm-level AA at the derogation stage;
- (iv) if SEA/AA of the NAP is in general required to address compliance with the WFD expressly, and is also required to do so in terms of the impacts of the underlying agricultural activities (assumptions which remain to be decided), then the SEA/AA of the NAP did not do this, an issue which is also possibly reinforced by the lack of farm-level AA at the derogation stage;
- (v) on the assumption that the State’s argument for a more limited scope of assessment is correct, the criticisms of the adequacy of SEA are largely merits-based and have not been made out;
- (vi) if the applicant is correct that material assets are confined to material infrastructure (which is a contestable proposition), the material assets considered by the State in SEA constitute such infrastructure so no issue arises in that respect;
- (vii) the economic implications for such assets were considered in the SEA process, and indeed this was treated as outweighing of what might otherwise have been more environmentally friendly options, and whether this has any legal implications can be considered in the next Module;
- (viii) the applicant has not established that the State treated material assets as separate from environmental factors in some way that creates an issue separate from the economic value issue just referred to;
- (ix) irrationality in the SEA process has not been demonstrated;
- (x) the alternatives were not considered in comparable detail, and whether this has legal implications can be considered in due course; and
- (xi) full details of monitoring were not included in the environmental report, and whether this has legal implications can be considered in the next Module.

193. The digested digested read is that part of the applicant's case fails at the evidential stage, and the balance proceeds to the next Module which will deal with substantive EU law questions.

Next steps

194. Schedule I to this judgment records the issue paper as of the commencement of Module II.

195. I now set out in Schedule II a revised issue paper for Module III incorporating what appear to be the remaining issues, subject to any further or contrary submissions. Where appropriate I have effectively "greyed out" issues that have been dealt with or are redundant and also amended the wording of the questions where that will help identify the real issues.

196. Subject to any contrary submission, the sequence in which I would now propose to address the remaining issues would be in accordance with the following algorithm:

- (i) Module III will deal with the substantive EU law issues, so I will invite the parties to make written submissions on those matters, identified in Schedule II as the issues that are both bold and underlined. Issues that are in bold but not underlined will not be addressed just yet. No overall word limit will apply (although see below as to the first part of any answer) and parties can use their own judgement on that.
- (ii) While general comments not specific to any issue can be made, submissions that wish to comment on any issues in particular (or all issues) should address those issues on a question-by-question basis with appropriate headings. Where questions are divided into sub-parts (e.g., (a), (b), (i), (ii) and so on) that form a distinct question (as opposed to being a grammatical part of a single long question in sentence form), each distinct question within a sub-part should be given a separate and distinct heading in the written submissions.
- (iii) I would request the parties to provide responses for each individual issue under three sub-headings: firstly a concise summary of the answer to the question, in the order of 200 words or less, secondly as to whether the answer is *acte clair* (insofar as that issue arises), and thirdly as to the more detailed submission in favour of the party's position on the issue.
- (iv) As with the previous module, while there is no problem with parts of such submissions referring to the answers in other parts of the same document rather than setting them out *in extenso*, it would be more convenient for the court if the submission did not merely reference submissions made at earlier stages of the case but set out the full legal submission (relevant to the particular issue concerned) *in extenso* within the forthcoming submission itself. The notice parties are more than welcome to merely adopt some or all of the State's submission either summarily or on the basis of general comments, as they have done before and are not obliged to comment further, but if they wish to make issue-specific comments they might do so with appropriate headings.
- (v) The applicant will have 10 days from the date of this judgment to deliver written submissions on such issues, with the State having a further 10 days to reply and the notice parties having a further 7 days thereafter to make their submissions.
- (vi) Again, in the interests of making progress in this case any further proposals for agreed extensions must be submitted for advance approval by the court.
- (vii) An oral hearing will be required for Module III and it might be prudent to allow 2 days for that.
- (viii) The matter will be listed for mention shortly to fix a reasonably proximate date for such a hearing and the parties might suggest dates in that regard.
- (ix) Hypothetically there could be a final Module IV on remedies and remaining issues in due course if it becomes necessary. However one of the remedy sub-questions (reworded) appears to be one of EU law which might more usefully be considered in Module III.

Order

197. For the foregoing reasons, it is now ordered that:

- (i) the factual-type issues be disposed of as set out in the judgment;
- (ii) the issue paper for Module III and subsequently be reworded as set out in Schedule II to this judgment, with liberty to make any contrary proposal on the mention date referred to below;
- (iii) the parties be directed to make written submissions on the Module III issues as set out in, and by the timelines set out in, the judgment;
- (iv) the parties be directed to liaise with the List Registrar to set up a ShareFile folder for Module III papers;
- (v) the matter be listed for mention on Monday 13th May, 2024, for the purpose of fixing a date for the oral hearing of Module III (in which regard the parties are invited to suggest proximate dates for consideration); and
- (vi) costs of the proceedings to date be reserved, subject to liberty to apply.

SCHEDULE I – ISSUE PAPER AS OF MODULE II

Issues already dealt with or that no longer arise, or that are superseded by a substantive issue, in italics

Issues to be dealt with in Module II in bold and underlined

Issues potentially for Modules III & IV – bold with no underlining

CG1 – HABITATS DIRECTIVE

1. *Is a nitrates action programme under article 5 of the nitrates directive a "plan" for the purposes of art. 6(3) of the habitats directive? APPEARS AGREED*

2. *Alternatively, is the NAP subject to art. 6(3) because of the fact that the NAP underwent AA which engages the Aarhus Convention per the judgement of 8 November 2016, Lesoochránárske zoskupenie VLK, C-243/15 LZ II §47? APPEARS AGREED (insofar as it may be agreed that this does not arise because of previous question)*

3. **(a) Does art. 6(3) of the habitats directive have the effect that, if a site-specific analysis of effects of the NAP is possible for the purposes of AA of the NAP, such an analysis is required.**

(b) Has the applicant established that insofar as a site-specific analysis in the AA was possible, such an analysis of the NAP was not carried out (on the assumption that the effects of the underlying agricultural activities should be considered).

(c) Has the applicant established that insofar as a site-specific analysis in the AA was possible, such an analysis of the NAP was not carried out (on the assumption that only the effects of the mitigating measures in the plan itself should be considered).

(d) Does art. 6(3) of the habitats directive (transposed by Regulation 42A(11) of the Birds and Natural Habitats Regulations) have the effect that a NAP cannot lawfully be approved unless an AA is carried out prior to such approval.

(e) Has the applicant established that in this case the AA was not carried out prior to the approval of the NAP (the applicant's case being that the Appropriate Assessment determination of 4th March 2022 post-dates the approval of the NAP which, per the SEA Statement was therein stated to have been approved on 1st March 2022).

[reworded]

4. *If site-specific analysis of the plan under art. 6(3) is not possible, must there still be an appropriate assessment of the plan in general terms? APPEARS AGREED*

5. *Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an impermissible merits-based challenge to the compliance of the NAP with the requirements of the Nitrates Directive? PLEADING-TYPE ISSUE*

6. *Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an unpleaded challenge to the compliance of the NAP with the requirements of the Nitrates Directive? PLEADING-TYPE ISSUE*

7. *Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an unpleaded challenge to the compliance of the Respondents' programme of measures with Article 11 of the WFD? PLEADING-TYPE ISSUE*

8. Does art. 6(3) of the habitats directive have the effect that it is a requirement that AA of the NAP must include the question of whether the particular measures characterised by the State as protections afforded by the plan and/or measures described as mitigation measures therein either alone or together with other binding measures adopted by the member state are sufficiently rigorous to remove all scientific doubt as to adverse effects on European sites caused by the agricultural activities the subject of provisions contained in the programme.

[reworded]

9. *Are individual derogation decisions published? APPEARS AGREED*
10. *If individual derogation decisions are not published, does the objection that the applicant could have pursued challenges to individual derogations arise at all for consideration? PLEADING-TYPE ISSUE*
11. *Even if the option of challenges to individual derogations falls for consideration, is the applicant precluded from bringing a challenge at a general systemic level by reason of the existence of the theoretical possibility of challenging individual derogations or individual agricultural activities carried on without AA on a site-by-site basis or by the possibility of calling on the Minister either on a site-by-site basis or generally to exercise powers to require AA under domestic law (art. 28(1) of the 2011 regulations)? PLEADING-TYPE ISSUE*
12. *Alternatively, is the applicant precluded from bringing such a claim by reason of its failure to do so by way of a transposition challenge? PLEADING-TYPE ISSUE*
13. *Alternatively, is the applicant precluded from bringing such a claim by reason of its failure, if the Applicant believes derogations should be published as a matter of EU law, to bring a challenge to the failure to publish those decisions? PLEADING-TYPE ISSUE*
14. *Is the applicant precluded from any claim of environmental consequences arising from the manner of implementation of, or a failure to properly implement, the NAP, having regard to the presumption of legality? PLEADING-TYPE ISSUE*
15. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not pleaded any relief seeking to quash any specific derogation decision, or agricultural activity? PLEADING-TYPE ISSUE*
16. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not sought any declaratory relief to the effect that any specific derogation decision or agricultural activity, requires appropriate assessment? PLEADING-TYPE ISSUE*
17. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not sought any declaratory relief to the effect that derogation decisions or agricultural activities generally, require appropriate assessment? PLEADING-TYPE ISSUE*
18. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not identified any derogation decision or agricultural activity that it alleges required appropriate assessment? PLEADING-TYPE ISSUE*
19. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not identified any protected site alleged to be affected by any derogation decision or agricultural activity? PLEADING-TYPE ISSUE*
20. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not pleaded any non-transposition claim? PLEADING-TYPE ISSUE*
21. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not engaged, at all, with the legislative framework governing agricultural activities? PLEADING-TYPE ISSUE*
22. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has therefore neither pleaded nor made out either a specific or systemic challenge with respect to the appropriate assessment of farm level agricultural activities? PLEADING-TYPE ISSUE*
23. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous if the Applicant's conclusion that the NAP "authorises" farm-level activities is incorrect? PLEADING-TYPE ISSUE*
24. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because a challenge based on an alleged failure to carry out appropriate assessment on derogation decisions or agricultural activities could never be pursued through a challenge to the NAP? PLEADING-TYPE ISSUE*

25. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because any failure with respect to any farm-level activity could not go to the validity of the NAP? PLEADING-TYPE ISSUE*

26. Has the applicant established that the AA determination was inadequate to remove all scientific doubt as to the effects of the NAP (leaving aside the question of a site-specific analysis), on the assumption that only the effects of the mitigating measures in the plan itself should be considered, having regard in particular to the lack of a plea of breach of the nitrates directive.

[reformulated combination of 26 and 33]

27. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not challenged the compliance of the measures in the NAP with the requirements of the Nitrates Directive? PLEADING-TYPE ISSUE*

28. *Is the applicant precluded from maintaining the challenge in particular as to the likelihood of adverse environmental effects as a result of the impugned decisions by reason of the applicant's failure to contest the evidence of the opposing parties by means of cross-examination? PLEADING-TYPE ISSUE*

29. *Are the proceedings misconceived because the Applicant's real complaint is that the State is able to avail of a derogation at all and indeed has obtained such a derogation from the European Commission and because these proceedings are no more than a Trojan horse and an impermissible collateral attack on the decision to grant Ireland a derogation from the 170kg limit of livestock manure per hectare, available under Annex III2(b) of the Nitrates Directive (Directive 91/676/EEC) as is said to be manifest from the pleadings (see Affidavit of Elaine McGoff, §§14-19)? PLEADING-TYPE ISSUE*

30. *Is the applicant precluded from raising issues that flow from the Government's decision to seek a derogation by reason of its failure to challenge that decision? PLEADING-TYPE ISSUE*

31. *Is the applicant precluded from relying on any ultimate site-specific impacts because there is a failure by the Applicant to adduce any evidence or identify any specific project, on any given protected site, by reference to evidence relevant to the conservation objectives of any particular site, in respect of which it might be contended that the 5th NAP has unlawfully authorised an intervention to a protected site and because the EPA reports exhibited by the Applicant cannot be relied upon because in no manner can they be considered or construed as evidencing the authorisation of any project-specific intervention capable of having a significant adverse impact on a European Site? PLEADING-TYPE ISSUE*

32. *Is the applicant precluded from relying on any ultimate site-specific impacts because an allegation that the 5th NAP has authorised or is unlawfully authorising interventions into any and/or all protected European Sites is not pleaded with necessary specificity and particularity? PLEADING-TYPE ISSUE*

33. (a) Has the applicant established that the AA determination was inadequate to remove all scientific doubt as to the effects of the NAP (leaving aside the question of the need for a site-specific analysis within the AA itself), on the assumption that the effects of the underlying agricultural activities should be considered, having regard in particular to:

- (i) The lack of a plea of breach of the nitrates directive;**
- (ii) the fact that the NAP envisages farm-level derogations in a context that will require AA where they may affect European sites and State has made it clear that they do not intend to carry out site specific assessments in the context of a derogation application as set out in the responses in the SEA;**
- (iii) the fact that the individual derogations do not adequately or at all seek information from farmers as to whether the individual farms are in or near European sites or as to whether agricultural activities on such farms could affect such sites or impose requirements that would follow from such information; and**
- (iv) the fact that there is no general provision otherwise for site-specific assessment of impacts of farming on European sites.**

(b) Has the applicant established that there is no effective system in practice for farm level AA (despite the theoretical relevance of the 2000 Act and 2011 regulations), insofar as this alleged fact may be relevant to the adequacy of the AA of the NAP.

[reformulated combination of 26 and 33]

34. *Is the applicant's challenge precluded by the principle that environmental protection and economic activity are incommensurable values and the choice of by how much one might be limited to advance the other cannot be assessed by reference to legal standards and accordingly, it is an inherently political question, not a justiciable one?*

CG2 – WFD

35. *Is the applicant precluded from obtaining relief in relation to the WFD by reason of the lack of any pleaded relief in that regard (the claim being set out in the grounds only)? PLEADING-TYPE ISSUE*

36. *Does Article 4(1) of the WFD have the effect that Member States are required – unless a derogation is granted – to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive – as laid down in the judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland*, C-461/13, ECLI:EU:C:2015:433 ? APPEARS AGREED*

37. **(a) Does Article 4(1) of the WFD (as interpreted in the light of the principle that Member States are required – unless a derogation is granted – to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive – as laid down in the judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland*, C-461/13, ECLI:EU:C:2015:433) have the effect that member states must also refuse to adopt a plan if the particular protections afforded by the plan either alone or together with other binding measures adopted by the member state are insufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive, either generally or in the specific case of the proposed adoption of a basic measure as defined by art. 11(3) of the WFD and in particular a nitrates action programme under article 5 of the nitrates directive (as referred to in Annex VI part A para (ix) of the WFD as referenced in art. 11(3)(a) of the directive).**

(b) Does Article 4(1) of the WFD have the effect that each proposed measure to be adopted for the purposes of art. 11 of the WFD must be individually assessed to ensure individual compliance with art. 4 as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure.

[reformulated to ensure all issues addressed – see body of judgment - also SEA issues moved to under CG3 for simplicity]

38. *Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance a merits-based challenge to the compliance of Ireland's programme of measures with Article 11 WFD? PLEADING-TYPE ISSUE*

39. *Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded challenge to the compliance of Ireland's programme of measures with Article 11 WFD? PLEADING-TYPE ISSUE*

40. *Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded challenge to the compliance of the NAP with Article 5(5) of the Nitrates Directive? PLEADING-TYPE ISSUE*

41. *Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded argument that farm-level activities require assessment under Article 4(1)? PLEADING-TYPE ISSUE*

42. *Should it be presumed in the absence of any challenge to the compliance of the NAP with the nitrates directive that the NAP complies with that directive? PLEADING-TYPE ISSUE*

43. *Is the applicant precluded from challenging an NAP that (on the foregoing hypothesis) complies with the requirements of the Nitrates Directive on the basis that such an NAP could never cause a deterioration in the status of a water body? PLEADING-TYPE ISSUE*

44. *Even if in general terms the requirement to refuse to adopt a plan referred to above applies, does this requirement apply in the specific case of the proposed adoption of a basic measure as defined by art. 11(3) of the WFD and in particular a nitrates action programme under article 5 of the nitrates directive (as referred to in Annex VI part A para (ix) of the WFD as referenced in art. 11(3)(a) of the directive)?*

[combined with Issue 37(a) and (b)]

45. (a) Has the applicant established that the particular protections afforded by the NAP either alone or together with other binding measures adopted by the member state are insufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive (on the assumption that such rigour is required).

(b) Has the applicant established that the NAP as a proposed measure to be adopted for the purposes of art. 11 of the WFD was not individually assessed to ensure individual compliance with art. 4 as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure (assuming such to be required).

[reworded - SEA issues moved to under CG3 for simplicity]

46. Does art. 4 WFD have the effect that:

(i) an NAP cannot be adopted unless all water bodies in the member state concerned have been assigned a status, because in the absence of that it cannot be ascertained as to whether a deterioration in such status would be caused by the activities the subject of provisions contained in the NAP; or

(ii) in the absence of the assignment of status to all water bodies, the NAP cannot be adopted without an (*ad hoc*) determination that the plan (and if required the activities the subject of provisions contained in the plan) will not cause a deterioration of the status of any body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive.

[reworded - overlaps with the preliminary reference in C-301/22 *Sweetman*]

47. (a) Are the measures in the NAP insufficiently rigorous in that regard because they fail to ensure that the agricultural activities the subject of provisions in the NAP will not cause the deterioration of the status of any water body or will not jeopardise the attainment of good surface water status or good ecological potential and good surface water chemical status and the attainment of good groundwater status?

(b) Is it the case that any consideration of art. 4 in the context of an NAP (if such be required) should only relate to the allegedly protective measures in the NAP rather than to the underlying agricultural activities thereby regulated.

[combined with Issue 37]

48. If art. 4(1) of the WFD has the effect contended for by the applicant and if the NAP is insufficiently rigorous in that regard as contended for by the applicant, is the validity or otherwise of the GAP Regulations SI 113 of 2022 essentially consequential on the validity or otherwise of the NAP and/or Commission decision (and hence is this a remedy issue).

[validity of GAP regulations issue moved to the remedy section as issue 69(b)]

CG3 – SEA

49. *Is the applicant precluded from obtaining relief in relation to SEA by reason of the lack of any pleaded relief in that regard (the claim being set out in the grounds only)? PLEADING-TYPE ISSUE*

50. *Is the NAP a plan or programme for the purposes of the SEA directive? APPEARS AGREED*

51. *Does the NAP therefore require SEA? APPEARS AGREED*

52. **(a) Does Article 5(1) of the SEA directive have the effect that a plan or programme must be assessed by reference to the question of whether (by reference to the standards in art. 4 WFD) the particular protections afforded by the plan either alone or together with other binding measures adopted by the member state are insufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the WFD, either generally or in the specific case of the proposed adoption of a basic measure as defined by art. 11(3) of the WFD and in particular a nitrates action programme under article 5 of the nitrates directive (as referred to in Annex VI part A para (ix) of the WFD as referenced in art. 11(3)(a) of the directive).**

(b) Does Article 5(1) of the SEA directive have the effect that each proposed measure to be adopted for the purposes of art. 11 of the WFD must be individually assessed to establish its effects (by reference to the standards in art. 4 WFD) as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure.

(c) Has the applicant established that the particular protections afforded by the NAP either alone or together with other binding measures adopted by the member state were not assessed in the SEA report by reference to the question as to whether they are insufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the WFD (on the assumption that such rigour is required).

(d) Has the applicant established that the NAP as a proposed measure to be adopted for the purposes of art. 11 of the WFD was not individually assessed in the SEA report to establish its effects (by reference to the standards in art. 4 WFD) as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure.

(e) Does the SEA directive require that such SEA must assess the environmental effects of the NAP in terms of its adequacy or efficiency in addressing the environmental effects of the activities the subject of provisions contained in the NAP (as opposed to the mitigation measures within the NAP)? [SEA issues moved here from CG2 for simplicity, previous 52 now incorporated in Issue 37(b)]

53. *Does the SEA directive require that such SEA must assess the environmental effects of the NAP in terms of the adequacy or efficiency of mitigation measures within the NAP? [now incorporated in Issue 37(b)]*

54. *Is the applicant precluded from advancing the overall complaint under the SEA Directive because it is inadequately pleaded? PLEADING-TYPE ISSUE*

55. *Is the applicant precluded from challenging the particular complaint regarding the assessment of alternatives by the SEA because that claim is inadequately pleaded? PLEADING-TYPE ISSUE*

56. *Is the applicant precluded from challenging the particular complaint regarding the monitoring provision of the SEA because that claim is inadequately pleaded? PLEADING-TYPE ISSUE*

57. **Do art. 5(1) of and Annex I para. (i) to the SEA directive have the effect that the SEA report itself must include details of an adequate monitoring process in compliance with art. 10 of the directive.**

[reworded]

58. *Is the applicant precluded from advancing the SEA complaint because on a proper analysis what the Applicant is in effect inviting the Court to engage in a merits-based review of the decision challenged and a review of matters of policy and policy implementation and because the Court cannot review the impugned decision in the manner sought by the Applicant and because to do so would offend against the core principle of the separation of powers and settled case-law? PLEADING-TYPE ISSUE*

59. Has the applicant established that the Environmental Report does not contain an assessment of the preferred option on the "likely significant effects on the environment" including "secondary, cumulative, synergistic, short, medium and long-term, permanent and temporary, positive and negative effects" as required by Annex I.

[reworded, this is a factual question – State response is that the Environmental Report does contain a proper assessment of the preferred option on the "likely significant effects on the environment", including as claimed above, in particular (but not limited) to the assessment at Chapter 8 of the Environmental Report]

60. Has the applicant established that the environmental report does not include an assessment of the efficacy of the proposed mitigation measures (assuming such is necessary).

[reworded– State response is that there is such an assessment in the SEA Environmental Report and the SEA Statement even though such was not required in the State's submission]

61. (a) **Does the SEA directive have the effect that "material assets" means "critical infrastructure essential for the functioning of society" (see EPA SEA Pack of resources to guide the implementation of the SEA Directive)**

(b) Assuming so, has the applicant established that the SEA for the NAP inadequate in that regard.

[reworded]

62. Does the SEA directive have the effect that agricultural assets or the food supply chain do not amount to a critical infrastructure essential for the functioning of society.

[reworded]

63. (a) Does the SEA directive have the effect that, by analogy with the judgment of 14 March 2013, *Leth*, C-420/11, ECLI:EU:C:2013:166 (an EIA case), the value of assets does not form part of the assessment, and that this applies not just to individual assets but to the broad societal impacts of agricultural activities, the impact of the NAP on the agricultural industry, and in particular on the output and income of farmers, the sustainability of the agricultural industry in Ireland, the food supply chain and the employment of a significant portion of the population.

(b) Assuming so, has the applicant established that the SEA for the NAP inadequate in that regard because it considered whether the value of agricultural assets would be affected by the programme.

[reworded]

64. (a) Does the SEA directive have the effect that material assets are not to be treated as a separate factor but as an aspect of the environment as required by Annex I.

(b) Assuming so, has the applicant established that the SEA for the NAP inadequate in that regard.

[Note: this is a question of how the SEA is to be interpreted – State response is that the Environmental Report evidences that, at the least, "material assets" were treated as an aspect of the environmental assessment as required by Annex I of the SEA Directive]

65. (a) Does the SEA directive have the effect that material assets cannot be treated as an outweighing factor and/or that the most environmentally friendly option must be selected.

(b) Has the applicant established that in the SEA for the NAP, material assets were treated as an outweighing factor and/or that the most environmentally friendly option was not selected.

[reworded]

[Note: State response is that the Applicant confuses the obligation to assess environmental effects of reasonable alternatives with the obligation when selecting the preferred alternative - There is no obligation under the SEA Directive to select the alternative that is the most environmentally friendly.

The Respondents were entitled to have regard to policy considerations when selecting the preferred alternative.]

66. Has the applicant established that the SEA for the NAP was inadequate because assessment criteria used to select the preferred alternative are irrational and/or were applied irrationally in the decision to select the preferred alternative, especially where the assessment provides that each objective has been given equal weight.

[Note: this may be a matter of interpretation of the SEA) State response is that the reason for the selection of the preferred option is clear from *inter alia* the Environmental Report. The Respondents had an evidential basis for reaching the decision that they did. This is a merits-based challenge and the Respondents rely on the decision of the Court of Appeal in *Friends of the Irish Environment CLG v. Government of Ireland* [2021] IECA 317, [2021] 11 JIC 2603 (Costello J.).]

67. (a) Does art. 5(1) of the SEA directive have the effect that alternatives must be identified, described and evaluated in a comparable way (see Commission Guidance (2003) (at §5.12) to the effect that the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives).

(b) Has the applicant established that the SEA Statement failed to consider, adequately or at all, the alternatives to the strategic alternative option selected and to subject each of the alternatives to a commensurate level of analysis and/or failed to include detailed description or evaluation of the likely significant environmental effects of the alternative strategies in the Environmental Report and/or failed to ensure that the alternatives were identified, described and evaluated in a comparable way.

[Note: reformulated. This potentially overlaps with the issue before the CJEU in *Friends of the Irish Environment v. Government of Ireland*) (this may be a question of interpretation of the SEA. State response is that the alternatives were properly assessed and, so far as required under the SEA Directive, subject to a commensurate level of analysis in the iterative procedure under that Directive, including by way of detailed description and evaluation in *inter alia* Chapter 7 of the Environmental Report. The Commission Guidance is not binding. The Respondents rely on the decision of the Court of Appeal in *Friends of the Irish Environment CLG v. Government of Ireland* [2021] IECA 317, [2021] 11 JIC 2603 (Costello J.) and submit that the Court is not required to await the decision of the CJEU in *Friends of the Irish Environment v. Government of Ireland* in order to determine this issue.]

68. Has the applicant established that, assuming art. 5(1) of and Annex I para. (i) to the SEA directive have the effect that the SEA report itself must include details of an adequate monitoring process in compliance with art. 10 of the directive, the SEA for the NAP fails to do this because it includes no adequate provision for monitoring of the significant environmental effects of its implementation and therefore contains no or no adequate provision for the identification at an early stage of unforeseen adverse effects or when appropriate remedial action might be required. This issue is addressed at Chapter 7 of the SEA Statement; no details of how this monitoring will occur, who will do it, when it will be done, how the monitoring will be used, and how any identified unforeseen adverse environmental effects will be addressed; and/or most of what the Chapter identifies as indicators for monitoring significant environmental effects do not in fact measure environmental effects.

[Note: reformulated - this potentially overlaps with the issue to be considered by the Supreme Court following the judgment of the CJEU in *Friends of the Irish Environment v Government of Ireland*). This may be a matter of interpretation of the SEA. State response includes - the monitoring measures in the NAP, which reflect the requirements of the Nitrates Directive and the Commission Decision, are clearly adequate (see, for example but not limited to the summary at Section 9.2 and table at 9.3 of the Environmental Report). The Respondents rely on the decision of the Court of Appeal in *Friends of the Irish Environment CLG v Government of Ireland* [2021] IECA 317, [2021] 11 JIC 2603 (Costello J.). On the other hand the monitoring issue is one that the Supreme Court has reserved its position on.]

REMEDY

69. (a) If any error was committed in the decision-making process, should the court decline to grant relief at all or alternatively should it decline to make any order that affects the validity of the NAP/ GAP, for example by instead directing further reasons or assessments as opposed to impugning such measures, in the exercise of the Court's discretion on judicial review, taking into account the general principle (as a matter of EU

law) of proportionality, and prejudice to third parties including by reference to any applicable rights and interests of others, including under the Charter of Fundamental Rights, in particular the right to work under art. 15, to conduct a business under art. 16, and to property under art. 17, and the corresponding constitutional right under Art. 40.3, as well as Union policies generally including the CAP under art. 39 TFEU and Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021?

(b) If art. 4(1) of the WFD has the effect contended for by the applicant and if the NAP is insufficiently rigorous in that regard as contended for by the applicant, is the validity or otherwise of the GAP Regulations SI 113 of 2022 essentially consequential on the validity or otherwise of the NAP and/or Commission decision (and hence is this a remedy issue).

[Note this issue in some form is not going to arise in the short term]

70. *If the Court determines that an order of certiorari or a declaration of invalidity is required, should a stayed or suspensive order be made pending remedial measures to address the Court's findings having regard to the risks of reduced environmental protection in the short term, or a breach of EU law, or adverse consequences to other stakeholders? APPEARS AGREED*

CG4 – REFERENCE REGARDING VALIDITY OF COMMISSION DECISION

71. *Is the Commission derogation decision unchallengeable in these proceedings and therefore does it follow that the applicant is precluded from challenging the findings therein and the court must proceed on the basis that such findings are valid and correct?*

72. *Alternatively, if the Commission findings cannot be directly differed from by the court, can the court nonetheless refer a question to the CJEU as to the correctness in fact or in law of such findings?*

73. *Even if the Commission derogation decision is binding for the purposes of the proceedings, is the statement in recitals that it is without prejudice to the habitats directive sufficient to enable the applicant to advance arguments related to that issue?*

74. *Is the applicant precluded from asking the court to refer to the CJEU a question as to the validity of the Commission Decision because the appropriate legal route is an Article 263 TFEU action for annulment before the General Court of the EU under art. 256(1) TFEU?*

75. (a) If the answers to the previous issues clearly have the consequence (or the national court in applying the answers to such questions determines) that the NAP is legally defective as a result of a breach of the habitats, WFD and/or SEA directives, is Commission decision 2022/696 also invalid (as a question for the CJEU on reference, rather than the domestic court, if it arises).

(b) Should the court seek any information from EU institutions under the *Eurobolt* jurisdiction prior to deciding on whether this issue should be referred?

[reworded]

76. *Even if such a reference is available and is in principle not precluded, is such a reference appropriate on a discretionary basis because of the absence of any direct action for annulment?*

77. *Even if such a reference is available and is in principle not precluded, is the applicant correct that that the postulated invalidity of the NAP would have an impact on the validity of the Commission decision.*

[incorporated into issue 75]

78. *Even if so, does the postulated proposal to suspend any order of certiorari impact on the answer to the previous question?*

[if relevant this can be addressed in issue 75 but in practice the issue of a remedy might not arise prior to the issue at issue 75, rendering this point effectively moot]

SCHEDULE II – ISSUE PAPER AS OF MODULE III

Issues already dealt with or that no longer arise, or that are superseded by a later issue, in italics
 Issues to be dealt with in Module III in bold and underlined
 Issues potentially for Module IV – bold with no underlining

CG1 – HABITATS DIRECTIVE

1. *Is a nitrates action programme under article 5 of the nitrates directive a "plan" for the purposes of art. 6(3) of the habitats directive?*

2. *Alternatively, is the NAP subject to art. 6(3) because of the fact that the NAP underwent AA which engages the Aarhus Convention per the judgement of 8 November 2016, Lesoochranárske zoskupenie VLK, C-243/15 LZ II §47?*

3. (a) *Does art. 6(3) of the habitats directive have the effect that, if a site-specific analysis of effects of the NAP is possible for the purposes of AA of the NAP, such an analysis is required.*

(b) *Has the applicant established that insofar as a site-specific analysis in the AA was possible, such an analysis of the NAP was not carried out (on the assumption that the effects of the underlying agricultural activities should be considered).*

(c) *Has the applicant established that insofar as a site-specific analysis in the AA was possible, such an analysis of the NAP was not carried out (on the assumption that only the effects of the mitigating measures in the plan itself should be considered).*

(d) *Does art. 6(3) of the habitats directive (transposed by Regulation 42A(11) of the Birds and Natural Habitats Regulations) have the effect that a NAP cannot lawfully be approved unless an AA is carried out prior to such approval.*

(e) *Has the applicant established that in this case the AA was not carried out prior to the approval of the NAP (the applicant's case being that the Appropriate Assessment determination of 4th March 2022 post-dates the approval of the NAP which, per the SEA Statement was therein stated to have been approved on 1st March 2022).*

4. *If site-specific analysis of the plan under art. 6(3) is not possible, must there still be an appropriate assessment of the plan in general terms?*

5. *Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an impermissible merits-based challenge to the compliance of the NAP with the requirements of the Nitrates Directive?*

6. *Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an unpleaded challenge to the compliance of the NAP with the requirements of the Nitrates Directive?*

7. *Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an unpleaded challenge to the compliance of the Respondents' programme of measures with Article 11 of the WFD?*

8. (a) Does art. 6(3) of directive 92/43, art. 4(1) of directive 2000/60 and/or art. 3(1) of directive 2001/42 have the effect that an action programme under art. 5 of directive 91/676 that is assessed under or by reference to such directives is required to be assessed in relation to the effects on the environment of the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan, either generally or insofar as such effects are indirectly contributed to by the absence of more rigorous protective measures in the plan, as opposed to being assessed by reference to the protective measures the plan positively includes and those alone?

(b) If the answer to the foregoing question in general is No, do the provisions referred to have that effect where provisions in the domestic law of the member state concerned for assessment of individual derogations granted consequent on a national action plan under directive 91/676 are not operated in practice in that context so that there is in practice

no assessment carried out under directive 92/43 of individual derogations granted consequent on the plan in terms of the effect on European sites of Nitrate-emitting agricultural activities which will be carried out on foot of such derogations?

9. *Are individual derogation decisions published?*
10. *If individual derogation decisions are not published, does the objection that the applicant could have pursued challenges to individual derogations arise at all for consideration?*
11. *Even if the option of challenges to individual derogations falls for consideration, is the applicant precluded from bringing a challenge at a general systemic level by reason of the existence of the theoretical possibility of challenging individual derogations or individual agricultural activities carried on without AA on a site-by-site basis or by the possibility of calling on the Minister either on a site-by-site basis or generally to exercise powers to require AA under domestic law (art. 28(1) of the 2011 regulations)?*
12. *Alternatively, is the applicant precluded from bringing such a claim by reason of its failure to do so by way of a transposition challenge?*
13. *Alternatively, is the applicant precluded from bringing such a claim by reason of its failure, if the Applicant believes derogations should be published as a matter of EU law, to bring a challenge to the failure to publish those decisions?*
14. *Is the applicant precluded from any claim of environmental consequences arising from the manner of implementation of, or a failure to properly implement, the NAP, having regard to the presumption of legality?*
15. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not pleaded any relief seeking to quash any specific derogation decision, or agricultural activity?*
16. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not sought any declaratory relief to the effect that any specific derogation decision or agricultural activity, requires appropriate assessment?*
17. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not sought any declaratory relief to the effect that derogation decisions or agricultural activities generally, require appropriate assessment?*
18. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not identified any derogation decision or agricultural activity that it alleges required appropriate assessment?*
19. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not identified any protected site alleged to be affected by any derogation decision or agricultural activity?*
20. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not pleaded any non-transposition claim?*
21. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not engaged, at all, with the legislative framework governing agricultural activities?*
22. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has therefore neither pleaded nor made out either a specific or systemic challenge with respect to the appropriate assessment of farm level agricultural activities?*
23. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous if the Applicant's conclusion that the NAP "authorises" farm-level activities is incorrect?*
24. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because a challenge based on an alleged failure to carry out appropriate assessment on derogation decisions or agricultural activities could never be pursued through a challenge to the NAP?*

25. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because any failure with respect to any farm-level activity could not go to the validity of the NAP?*

26. *Has the applicant established that the AA determination was inadequate to remove all scientific doubt as to the effects of the NAP (leaving aside the question of a site-specific analysis), on the assumption that only the effects of the mitigating measures in the plan itself should be considered, having regard in particular to the lack of a plea of breach of the nitrates directive.*

27. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not challenged the compliance of the measures in the NAP with the requirements of the Nitrates Directive?*

28. *Is the applicant precluded from maintaining the challenge in particular as to the likelihood of adverse environmental effects as a result of the impugned decisions by reason of the applicant's failure to contest the evidence of the opposing parties by means of cross-examination?*

29. *Are the proceedings misconceived because the Applicant's real complaint is that the State is able to avail of a derogation at all and indeed has obtained such a derogation from the European Commission and because these proceedings are no more than a Trojan horse and an impermissible collateral attack on the decision to grant Ireland a derogation from the 170kg limit of livestock manure per hectare, available under Annex III2(b) of the Nitrates Directive (Directive 91/676/EEC) as is said to be manifest from the pleadings (see Affidavit of Elaine McGoff, §§14-19)?*

30. *Is the applicant precluded from raising issues that flow from the Government's decision to seek a derogation by reason of its failure to challenge that decision?*

31. *Is the applicant precluded from relying on any ultimate site-specific impacts because there is a failure by the Applicant to adduce any evidence or identify any specific project, on any given protected site, by reference to evidence relevant to the conservation objectives of any particular site, in respect of which it might be contended that the 5th NAP has unlawfully authorised an intervention to a protected site and because the EPA reports exhibited by the Applicant cannot be relied upon because in no manner can they be considered or construed as evidencing the authorisation of any project-specific intervention capable of having a significant adverse impact on a European Site?*

32. *Is the applicant precluded from relying on any ultimate site-specific impacts because an allegation that the 5th NAP has authorised or is unlawfully authorising interventions into any and/or all protected European Sites is not pleaded with necessary specificity and particularity?*

33. (a) *Has the applicant established that the AA determination was inadequate to remove all scientific doubt as to the effects of the NAP (leaving aside the question of the need for a site-specific analysis within the AA itself), on the assumption that the effects of the underlying agricultural activities should be considered, having regard in particular to:*

- (i) *The lack of a plea of breach of the nitrates directive;*
- (ii) *the fact that the NAP envisages farm-level derogations in a context that will require AA where they may affect European sites and State has made it clear that they do not intend to carry out site specific assessments in the context of a derogation application as set out in the responses in the SEA;*
- (iii) *the fact that the individual derogations do not adequately or at all seek information from farmers as to whether the individual farms are in or near European sites or as to whether agricultural activities on such farms could affect such sites or impose requirements that would follow from such information; and*
- (iv) *the fact that there is no general provision otherwise for site-specific assessment of impacts of farming on European sites.*

(b) *Has the applicant established that there is no effective system in practice for farm level AA (despite the theoretical relevance of the 2000 Act and 2011 regulations), insofar as this alleged fact may be relevant to the adequacy of the AA of the NAP.*

34. *Is the applicant's challenge precluded by the principle that environmental protection and economic activity are incommensurable values and the choice of by how much one might be limited*

to advance the other cannot be assessed by reference to legal standards and accordingly, it is an inherently political question, not a justiciable one?

CG2 – WFD

35. Is the applicant precluded from obtaining relief in relation to the WFD by reason of the lack of any pleaded relief in that regard (the claim being set out in the grounds only)?

36. Does Article 4(1) of the WFD have the effect that Member States are required – unless a derogation is granted – to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive – as laid down in the judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland*, C-461/13, ECLI:EU:C:2015:433 ?

37. **(a) (i)**

Does

(I) art. 6(3) of directive 92/43 and/or

(II) art. 3(1) and/or 5(1) and/or 11(2) of directive 2001/42

have the effect that

assessment of a plan or programme that is subject to those articles and that is capable of having environmental effects on a water body must include assessment by reference to art. 4 of directive 2000/60 either alone or together with other binding measures adopted by the member state are sufficiently rigorous to ensure that the plan or programme will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by directive 2000/60,

and if so,

do those provisions or either of them require such an assessment to state in express and/or clearly ascertainable terms whether the relevant environmental objectives of directive 2000/60 will be met following adoption of the plan or programme;

either generally or in the specific case of the proposed adoption of a basic measure as defined by art. 11(3) of directive 2000/60 and in particular a nitrates action programme under art. 5 of directive 91/676 (as referred to in Annex VI part A para (ix) of directive 2000/60 as referenced in art. 11(3)(a) of that directive)?

(ii) If:

(A) the answer to issue (a)(i) is such that that assessment of a plan or programme that is subject to art. 6(3) of directive 92/43 and/or art. 3(1) of directive 2001/42 and that is capable of having environmental effects on a water body must include assessment by reference to art. 4 of directive 2000/60 and

(B) the answer to issue 8 is such that assessment for the purposes of directive 2001/42 in terms of compliance with directive 2000/60 is required to include an assessment of the effects on the environment of the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan and/or in particular the omission of more rigorous provisions in a plan,

does art. 4(1) of directive 2000/60

(and specifically the principle that Member States are required, unless a derogation is granted, to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive – as laid down in the judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland*, C-461/13, ECLI:EU:C:2015:433)

have the effect that

(I) member states must also refuse to adopt a plan if the particular protections afforded by the plan either alone or together with other binding measures adopted by the member state are insufficiently rigorous to ensure that the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good

ecological potential and good surface water chemical status by the date laid down by directive 2000/60,

(II) either generally or in the specific case of the proposed adoption of a basic measure as defined by art. 11(3) of directive 2000/60 and in particular a nitrates action programme under art. 5 of directive 91/676 (as referred to in Annex VI part A para (ix) of directive 2000/60 as referenced in art. 11(3)(a) of that directive)?

(iii) If the answer to question (i) and/or (ii) in general is No, do the provisions referred to have the effect referred to where provisions in the domestic law of the member state concerned for assessment of individual derogations granted consequent on a national action plan under directive 91/676 are not operated in practice in that context so that there is in practice no assessment carried out under directive 92/43 (whether by reference to art. 4 of directive 2000/60 or otherwise) of individual derogations granted consequent on the plan in terms of the effect on water bodies in the member state of Nitrate-emitting agricultural activities which will be carried out on foot of such derogations?

(b) Does Article 4(1) of the WFD have the effect that each proposed measure to be adopted for the purposes of art. 11 of the WFD must be individually assessed to ensure individual compliance with art. 4 as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure?

38. *Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance a merits-based challenge to the compliance of Ireland's programme of measures with Article 11 WFD?*

39. *Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded challenge to the compliance of Ireland's programme of measures with Article 11 WFD?*

40. *Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded challenge to the compliance of the NAP with Article 5(5) of the Nitrates Directive?*

41. *Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded argument that farm-level activities require assessment under Article 4(1)?*

42. *Should it be presumed in the absence of any challenge to the compliance of the NAP with the nitrates directive that the NAP complies with that directive?*

43. *Is the applicant precluded from challenging an NAP that (on the foregoing hypothesis) complies with the requirements of the Nitrates Directive on the basis that such an NAP could never cause a deterioration in the status of a water body?*

44. *Even if in general terms the requirement to refuse to adopt a plan referred to above applies, does this requirement apply in the specific case of the proposed adoption of a basic measure as defined by art. 11(3) of the WFD and in particular a nitrates action programme under article 5 of the nitrates directive (as referred to in Annex VI part A para (ix) of the WFD as referenced in art. 11(3)(a) of the directive)?*

45. *(a) Has the applicant established that the particular protections afforded by the NAP either alone or together with other binding measures adopted by the member state are insufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive (on the assumption that such rigour is required).*

(b) Has the applicant established that the NAP as a proposed measure to be adopted for the purposes of art. 11 of the WFD was not individually assessed to ensure individual compliance with art. 4 as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure (assuming such to be required).

46. **(a) Does art. 4 of directive 2000/60 have the effect that a plan or programme (in particular an NAP) with the potential to affect the status of any relevant water body cannot be adopted by the competent authority of a Member State unless:**

(i) all water bodies potentially affected with a surface area of 0.5 km² or more have been assigned type-specific reference conditions or by the obligation to establish programmes for the monitoring of water status, because in the absence of that it cannot be ascertained as to whether a deterioration in such status would be caused by the activities the subject of provisions contained in the plan; and/or

(ii) the competent authority is required to satisfy itself,

(I) first, that the adoption of the plan or programme is not liable to cause a deterioration of the status of any surface water body which has been or ought to have been identified by that Member State as constituting a surface water body 'type', nor is it liable to compromise the attainment of good surface water status or of good ecological potential and good chemical status of such a surface water body and,

(II) second, that the adoption of the plan or programme is compatible with the measures implemented pursuant to the programme under directive 2000/60 established, in accordance with Article 11 of that directive, for the river basin district concerned

(b) If the answer to either or both limbs of the foregoing is Yes, does this affect the NAP on the facts here?

[Wording narrowed in the light of ECLI:EU:C:2024:347 Judgment of 25 April 2024 C-301/22, Sweetman v An Bord Pleanála and also to avoid a suggestion of a postulated need for a body-by-body analysis.]

47. (a) *Are the measures in the NAP insufficiently rigorous in that regard because they fail to ensure that the agricultural activities the subject of provisions in the NAP will not cause the deterioration of the status of any water body or will not jeopardise the attainment of good surface water status or good ecological potential and good surface water chemical status and the attainment of good groundwater status?*

(b) *Is it the case that any consideration of art. 4 in the context of an NAP (if such be required) should only relate to the allegedly protective measures in the NAP rather than to the underlying agricultural activities thereby regulated.*

48. *If art. 4(1) of the WFD has the effect contended for by the applicant and if the NAP is insufficiently rigorous in that regard as contended for by the applicant, is the validity or otherwise of the GAP Regulations SI 113 of 2022 essentially consequential on the validity or otherwise of the NAP and/or Commission decision (and hence is this a remedy issue).*

[validity of GAP regulations issue moved to the remedy section as issue 69(b)]

CG3 – SEA

49. *Is the applicant precluded from obtaining relief in relation to SEA by reason of the lack of any pleaded relief in that regard (the claim being set out in the grounds only)?*

50. *Is the NAP a plan or programme for the purposes of the SEA directive?*

51. *Does the NAP therefore require SEA?*

52. (a) *Does art. 3(1) and/or 5(1) and/or 11(2) of directive 2001/42 have the effect that, where a plan is assessed under that directive, but not separately under directive 2000/60, the plan must be assessed by reference to the question of whether, by reference to the standards in art. 4 of directive 2000/60, the particular protections afforded by the plan either alone or together with other binding measures adopted by the member state are sufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by directive 2000/60, either generally or in the specific case of the proposed adoption of a basic measure as defined by art. 11(3) of directive 2000/60 and in particular a nitrates action programme under article 5 of directive 91/676 (as referred to in Annex VI part A para (ix) of directive 2000/60 as referenced in art. 11(3)(a) of that directive)?*

(b) Does Article 5(1) of directive 2001/42 have the effect that each proposed measure to be adopted for the purposes of art. 11 of the WFD must be individually assessed to establish its effects (by reference to the standards in art. 4 WFD) as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure?

(c) Has the applicant established that the particular protections afforded by the NAP either alone or together with other binding measures adopted by the member state were not assessed in the SEA report by reference to the question as to whether they are insufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the WFD (on the assumption that such rigour is required).

(d) Has the applicant established that the NAP as a proposed measure to be adopted for the purposes of art. 11 of the WFD was not individually assessed in the SEA report to establish its effects (by reference to the standards in art. 4 WFD) as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure.

(e) Does the SEA directive require that such SEA must assess the environmental effects of the NAP in terms of its adequacy or efficiency in addressing the environmental effects of the activities the subject of provisions contained in the NAP (as opposed to the mitigation measures within the NAP)?

53. Does the SEA directive require that such SEA must assess the environmental effects of the NAP in terms of the adequacy or efficiency of mitigation measures within the NAP?

54. Is the applicant precluded from advancing the overall complaint under the SEA Directive because it is inadequately pleaded?

55. Is the applicant precluded from challenging the particular complaint regarding the assessment of alternatives by the SEA because that claim is inadequately pleaded?

56. Is the applicant precluded from challenging the particular complaint regarding the monitoring provision of the SEA because that claim is inadequately pleaded?

57. Do art. 5(1) of and Annex I para. (i) to directive 2001/42 have the effect that the environmental report itself must include a description of the measures envisaged concerning monitoring in accordance with art. 10 in sufficient detail to demonstrate that art. 10 will be complied with, including details of:

(i) how this monitoring will occur;

(ii) when it will be done; and/or

(iii) how the monitoring will be used and how any identified unforeseen adverse environmental effects will be addressed?

58. Is the applicant precluded from advancing the SEA complaint because on a proper analysis what the Applicant is in effect inviting the Court to engage in a merits-based review of the decision challenged and a review of matters of policy and policy implementation and because the Court cannot review the impugned decision in the manner sought by the Applicant and because to do so would offend against the core principle of the separation of powers and settled case-law?

59. Has the applicant established that the Environmental Report does not contain an assessment of the preferred option on the "likely significant effects on the environment" including "secondary, cumulative, synergistic, short, medium and long-term, permanent and temporary, positive and negative effects" as required by Annex I.

60. (a) Does the SEA directive have the effect that inclusion of proposed mitigation measures must be accompanied by an assessment of the efficacy of such measures?

(b) Has the applicant established that the environmental report does not include an assessment of the efficacy of the proposed mitigation measures (assuming such is necessary).

61. (a) Does the SEA directive have the effect that "material assets" means "critical infrastructure essential for the functioning of society" (see EPA SEA Pack of resources to guide the implementation of the SEA Directive)

(b) Assuming so, has the applicant established that the SEA for the NAP inadequate in that regard.

62. Does the SEA directive have the effect that agricultural assets or the food supply chain do not amount to a critical infrastructure essential for the functioning of society.

63. (a) If the term "material assets" in para. (f) of annex I of directive 2001/42 exclude the value of such assets and/or in particular in the case of an action plan under directive 91/676 excludes the broad societal impacts of agricultural activities, the impact of the plan or project on the agricultural industry, and on the output and income of farmers, the sustainability of the agricultural industry in the member state concerned, the food supply chain and the employment of a significant portion of the population, does directive 2001/42 have the effect that consideration of such matters is unlawful in assessing the effects of the plan.

[This raises the issue of whether *Leth* has the effect of precluding the consideration of matters that fall outside the definition of material assets, assuming that applies to SEA]

(b) Assuming so, has the applicant established that the SEA for the NAP inadequate in that regard because it considered whether the value of agricultural assets would be affected by the programme.

64. (a) Does the SEA directive have the effect that material assets are not to be treated as a separate factor but as an aspect of the environment as required by Annex I.

(b) Assuming so, has the applicant established that the SEA for the NAP inadequate in that regard.

65. (a) Does directive 2001/42 have the effect that material assets cannot be treated as an outweighing factor and/or that the most environmentally friendly option must be selected?

[This question appears to arise from the question referred to the CJEU by the Supreme Court in *Friends of the Irish Environment v. Government of Ireland* [2022] IESC 42, which became C-727/22 - *Friends of the Irish Environment (Projet Ireland 2040)*: it is addressed in the Opinion of Advocate General Kokott 21 March 2024 ECLI:EU:C:2024:266. This point should await the delivery of judgment by the CJEU.]

(b) Has the applicant established that in the SEA for the NAP, material assets were treated as an outweighing factor and/or that the most environmentally friendly option was not selected.

66. Has the applicant established that the SEA for the NAP was inadequate because assessment criteria used to select the preferred alternative are irrational and/or were applied irrationally in the decision to select the preferred alternative, especially where the assessment provides that each objective has been given equal weight.

67. (a) Does art. 5(1) of directive 2001/42 have the effect that alternatives must be identified, described and evaluated in a comparable way (see Commission Guidance (2003) (at §5.12) to the effect that the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives)?

[This question has already been referred to the CJEU by the Supreme Court in *Friends of the Irish Environment v. Government of Ireland* [2022] IESC 42, which became C-727/22 - *Friends of the Irish Environment (Projet Ireland 2040)*: see Opinion of Advocate General Kokott 21 March 2024 ECLI:EU:C:2024:266. This point should await the delivery of judgment by the CJEU.]

(b) Has the applicant established that the SEA Statement failed to consider, adequately or at all, the alternatives to the strategic alternative option selected and to subject each of the alternatives to a commensurate level of analysis and/or failed to include detailed description or evaluation of the likely significant environmental effects of the alternative strategies in the Environmental Report and/or failed to ensure that the alternatives were identified, described and evaluated in a comparable way.

68. Has the applicant established that, assuming art. 5(1) of and Annex I para. (i) to the SEA directive have the effect that the SEA report itself must include details of an adequate monitoring

process in compliance with art. 10 of the directive, the SEA for the NAP fails to do this because it includes no adequate provision for monitoring of the significant environmental effects of its implementation and therefore contains no or no adequate provision for the identification at an early stage of unforeseen adverse effects or when appropriate remedial action might be required. This issue is addressed at Chapter 7 of the SEA Statement; no details of how this monitoring will occur, who will do it, when it will be done, how the monitoring will be used, and how any identified unforeseen adverse environmental effects will be addressed; and/or most of what the Chapter identifies as indicators for monitoring significant environmental effects do not in fact measure environmental effects.

REMEDY

69. (a) Does art. 4(3) TEU have the effect that a domestic court does not enjoy a general discretion, in the event of a breach of EU law by or on behalf of a member state being established in relation to the making of a national action plan under Annex III to directive 91/676, to decline to grant relief at all or alternatively to decline to make any order that affects the validity of the plan or implementing regulations, in the exercise of the Court's discretion on judicial review, taking into account the general principle (as a matter of EU law) of proportionality, and prejudice to third parties including by reference to any applicable rights and interests of others, including under the Charter of Fundamental Rights, in particular the right to work under art. 15, to conduct a business under art. 16, and to property under art. 17, as well as Union policies generally including the CAP under art. 39 TFEU and Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, and/or by reference to domestic law considerations?

(b) Subject to the foregoing, if any error was committed in the decision-making process, should the court decline to grant relief at all or alternatively should it decline to make any order that affects the validity of the NAP/ GAP, for example by instead directing further reasons or assessments as opposed to impugning such measures, in the exercise of the Court's discretion on judicial review, taking into account domestic law issues of proportionality, and prejudice to third parties including by reference to any applicable rights and interests of others, including constitutional rights under Art. 40.3, and/or the EU law considerations referred to above?

(c) If art. 4(1) of the WFD has the effect contended for by the applicant and if the NAP is insufficiently rigorous in that regard as contended for by the applicant, is the validity or otherwise of the GAP Regulations SI 113 of 2022 essentially consequential on the validity or otherwise of the NAP and/or Commission decision?

70. If the Court determines that an order of certiorari or a declaration of invalidity is required, should a stayed or suspensive order be made pending remedial measures to address the Court's findings having regard to the risks of reduced environmental protection in the short term, or a breach of EU law, or adverse consequences to other stakeholders?

CG4 – REFERENCE REGARDING VALIDITY OF COMMISSION DECISION

71. Is the Commission derogation decision unchallengeable in these proceedings and therefore does it follow that the applicant is precluded from challenging the findings therein and the court must proceed on the basis that such findings are valid and correct?

72. Alternatively, if the Commission findings cannot be directly differed from by the court, can the court nonetheless refer a question to the CJEU as to the correctness in fact or in law of such findings?

73. Even if the Commission derogation decision is binding for the purposes of the proceedings, is the statement in recitals that it is without prejudice to the habitats directive sufficient to enable the applicant to advance arguments related to that issue?

74. Is the applicant precluded from asking the court to refer to the CJEU a question as to the validity of the Commission Decision because the appropriate legal route is an Article 263 TFEU action for annulment before the General Court of the EU under art. 256(1) TFEU?

75. (a) If the answers to the previous issues have the consequence that the adoption of the NAP involved a breach of directives 92/43, 2000/60 and/or 2001/42, is Commission decision 2022/696 invalid?

[A matter for the CJEU if it arises]

(b) Should the court seek any information from the Commission (and/or other EU institutions) under the Eurobolt jurisdiction (judgment of 3 July 2019, Eurobolt BV, C-644/17, ECLI:EU:C:2019:555) prior to deciding on whether the issue of the validity of Commission decision 2022/696 should be referred?

[Note if any party suggests an affirmative answer to this, their submission should set out an outline of the nature of the questions to be posed, bearing in mind that this would ultimately be a matter for the court if this option were to be pursued]

76. *Even if such a reference is available and is in principle not precluded, is such a reference appropriate on a discretionary basis because of the absence of any direct action for annulment?*

77. *Even if such a reference is available and is in principle not precluded, is the applicant correct that that the postulated invalidity of the NAP would have an impact on the validity of the Commission decision.*

78. *Even if so, does the postulated proposal to suspend any order of certiorari impact on the answer to the previous question?*