THE HIGH COURT

[2021] IEHC 16

RECORD NUMBER: 2018 740 JR

BETWEEN

PETER SWEETMAN

APPLICANT

AND

AN BORD PLEANALA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

BRADÁN BEO TEORANTA, GALWAY COUNTY COUNCIL

NOTICE PARTIES

JUDGMENT of Ms. Justice Niamh Hyland delivered on 15 January 2021

Summary of Judgment

1. In this judicial review Mr Sweetman ("the applicant") seeks to challenge the decision of An Bord Pleanála ("the Board") dated 20 July 2018 which granted Bradán Beo ("the notice party") planning permission for a development consisting of the abstraction of freshwater from Loch an Mhuilinn, Gorumna Island, Co. Galway and associated works, including a temporary pipe in the lake, for the purpose of bathing salmon in fish farms off the coast in that freshwater to rid them of various diseases ("the proposed development"). Initially, the applicant also sought reliefs against the second named respondent in respect of the way various EU directives relevant to these proceedings had been transposed but that aspect of the case was no longer live by the time the matter came on for hearing.

2. The first argument raised was that there was insufficient consent to satisfy the requirements of Regulation 22(2)(g) of S.I. 600/2001 (Planning and Development Regulations 2001) ("PDR 2001") since no consent had been provided from certain persons whose land lay under Loch an Mhuilinn. But insofar as the temporary pipe running under the lake is concerned, (a) it does not rest on the lakebed, (b) there is no evidence that it traverses the parts of the lakebed in the ownership of persons whose consent is absent, and (c) there is no complaint from such persons that the pipeline will touch upon or otherwise impact their land. According, there is no requirement for their consent.

3. Nor do I agree their consent is needed because their riparian rights are potentially affected by the development due to the abstraction of water from the lake. Regulation 22(2)(g) requires consent from persons who are the owner of the land "concerned" by the application. The fact that water is taken from a lake where persons own certain portions of the land under the lake does not mean that their land is necessarily "concerned" by the application from a planning point of view, even if their riparian rights may potentially be affected by the proposed abstraction. Land cannot be equated to mean the water that flows over that land.

4. Nor can I agree with the second argument made, to the effect that the Board erred in law in screening out the Connemara Bog SAC for the purposes of an appropriate assessment. Applying the relevant test, i.e. whether the development might have a significant effect on the Connemara SAC, I am satisfied that there was sufficient evidence before the Board for it to conclude that the development would not have a significant effect on same.

5. The third argument is innovative but flawed. The applicant argues that since no valid EIA was ever carried out for the four fish farms this development is intended to service, and because this development and the fish farms are "connected", then, following Case C-275/09, in the absence of a valid EIA, the Board is obliged to carry out an EIA not only of this development (which otherwise would not require one) but also of the fish farms. I find this argument was not pleaded and is inadmissible but go on to address it for the sake of completeness. Case C-275/09 only imposes an obligation to carry out an EIA where the development is one stage in a multi-stage consent process and previous stages were impermissibly not the subject of an EIA. It does not require an EIA of a development and previous developments not the subject of an EIA simply because those developments are "connected". Here, a connection is asserted because this development will provide freshwater in which the salmon from the fish farms can be bathed to cure disease. But the fish farms can function without such a service. In any case, EU law does not impose an obligation to carry out an EIA of a development simply because of a "connection" with other developments that lack an EIA.

6. Finally, the applicant argues that the Board breached its obligation under Article 4(1) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy – the Water Framework Directive ("WFD") - to ensure non-deterioration and the achievement of good surface water status when granting approval for a development affecting a surface water body. The proposed development will affect Loch an Mhuilinn, a surface water body. However, the lake had not been granted a status by the EPA following precise evaluation and monitoring, as required by the WFD and Ireland's implementing legislation. The concepts of deterioration and good surface water status are inextricably tied to the complex evaluation framework identified in the WFD. Given the failure by the EPA to assign a status to Loch an Mhuilinn, it was impossible for the Board to evaluate whether the proposed works were compliant with Article 4(1) of the WFD. The reliance by the Inspector and the Board on some type of proxy evaluation that referred to concepts said to stem from the WFD were not sufficient to establish compliance with the WFD.

Background

7. The planning application sought permission to abstract a maximum of 4,680m3 of freshwater per week from Loch an Mhuilinn, a privately owned non-tidal inland lake (characterised as a body of surface water under the WFD) for up to 22 weeks annually from May-September. The abstraction would take place 4 hours a day for a maximum of 4 days a week. The abstracted freshwater would be used to bathe diseased salmon to rid them of Amoebic Gill Disease and sea lice. These salmon are located in 4 licenced sites operated by the notice party in Kilkieran Bay, Co. Galway. The freshwater would be pumped from the lake via a pipeline to a proposed headwall at the coast road where another pipeline would convey the freshwater to tarpaulins which will be towed by boat to the sites where the fish would be treated.

8. The initial application was made to Galway County Council ("the second notice party") who refused planning permission.

Arguments of the Applicant

9. Although a significant number of arguments were identified in the pleadings and legal submissions, at hearing the applicant confined himself to four points. First, the applicant argued the application before the Board was invalid as it did not contain letters of consent from certain owners of the lake bed, was therefore in breach of Article 22(2)(g) of PDR 2001 and that the Board had no jurisdiction to grant the application. In oral submissions the applicant pointed to the fact that although a condition was attached to the planning permission granted relating to maintenance of the water at a certain level, this condition did not bind the owners of the private lake but only the notice party. Other owners retain the right to abstract water from the lake and could therefore reduce its level.

10. Second, the applicant identified a potential breach of Article 6(3) of the Habitats Directive 92/43/EEC [Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora] due to an alleged error in screening out the likelihood of significant effects on Connemara Bog SAC. The applicant argued the Board had failed to properly conduct an appropriate assessment ("AA"). The applicant submitted that the Inspector misunderstood aspects of the test he was to apply, such as "likely" (although he conceded that the Inspector's use of the word "potential" probably covered that aspect of the test), and the phrase "significant effect" which the applicant defined as somewhere above no appreciable effect.

11. Third, the applicant submitted that the Board's decision breached the EIA Directive (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) as no environmental impact assessment ("EIA") had been carried out, despite it being accepted that the proposed development does not come within the thresholds that would mean it would require an EIA. Nonetheless, it was contended in the pleadings that an EIA was required of the combined developments on the fact that the lake water abstraction and bathing of salmon was an intrinsic element of the sea farming operation and was not severable or was not ancillary or a minor element of the overall fish farming development. However, at the hearing, a different rationale for the necessity for an EIA was adopted, being that the Board ought to have required an EIA to be carried out of the entirety of the four fish farms that the development is intended to service, as well as of the proposed development itself, because the fish farms had not had an EIA carried out (or in any case, not one compliant with EU law) and because the development is essential to the activities of the fish farms and is connected and should be treated as part of the same project. Accordingly, any application for development consent for the abstraction development should be used as an opportunity to remedy the lack of development consent for the fish farms. I deal with the issues caused by this change of tack below.

12. Finally, the applicant argued that the Board erred in making a risk characterisation of the lake when this ought to have been done by the Environmental Protection Agency ("EPA") and had breached the Water Framework Directive ("WFD"). I describe this argument in detail in the section of this judgment dealing with the WFD.

Arguments of the Respondent

13. As an introductory point, the Board observed that none of the points now made by the applicant were made in his submission to the Board on the proposed development and that no other person had raised them either, and that the arguments now raised should be looked at in that context.

14. Regarding the question of the various owners' consent to the development, the Board maintains that Article 22(2)(g) of the PDR 2001 was satisfied. The purpose of the provision of consent is twofold – to protect the owners of land, and to protect planning authorities from vexatious applications. The Board noted that there was no evidence before the Court of any owner or alleged owner raising an objection to the making of the planning application without their consent, that the applicant's arguments are entirely hypothetical and that he had not established any basis to impugn the validity of the Board's decision on this ground.

15. The Board disputes that there was any breach of the Habitats Directive, noting that the onus of proving any alleged error lies on the applicant. The Board submits that it is insufficient for the applicant simply to raise a bald assertion. On the material before it, there was nothing to put the Board on inquiry as to whether there was potential impact on the Connemara Bog SAC 10km away. In oral submissions, the Board emphasised that there was nothing in the evidence supporting the assertion that the proposed development was likely to have a significant effect on the salmon and otter from the Connemara Bog SAC. The Board submitted that the Inspector had expressly addressed concerns about the reduction in the water level from the lake to the sea and the potential impact that might have on the otter and harbour seal species in Kilkieran Bay SAC.

16. Regarding the EIA the Board noted that a different case was being made out at the hearing than the one pleaded, and that the applicant's argument was that, because there was no EIA conducted on the fish farms that this development was intended to service, the Board had an obligation to carry out one when considering the planning application. The Board submitted that here, it was not dealing with an application for planning permission for the fish farms, and that the proposed development was not an intrinsic element of the fish farm operations but an ancillary activity. The proposed development did not fall into the types of projects coming within the scope of the EIA Directive.

17. The Board's arguments in respect of the WFD are identified and addressed below, as are those of the notice party.

Arguments of the notice party

18. The notice party, having adopted the submissions of the Board, made the following additional points. In respect of consent, it identified the relevant consent letters that had been submitted and emphasised that Galway County Council had considered and accepted the application as valid.

19. In respect of the appropriate assessment, the notice party stated that the Inspector in his stage one screening exercise had considered various European Sites in proximity to the proposed development and noted that there was a hydrological link via the sea to a

number of these sites but by virtue of the nature of the project and distance to the sites, the only European Site having the potential to be impacted was the Kilkieran Bay and Islands SAC (consistent with the Natura Impact Statement). It submitted that while the lake is connected to the Connemara Bog Complex SAC by the sea, this connection did not mean that the Connemara Bog Complex SAC must be screened in for the purposes of an AA. In this case, due to the scale of the proposed development and its distance from the Connemara Bog Complex SAC, it did not warrant screening in of the Connemara Bog Complex SAC for otter or salmon.

20. The notice party argued that the proposed development is not a project listed in Annex I or II of the EIA Directive or Schedule 5 of the 2001 Regulations and therefore does not require to be the subject of an environmental impact assessment under the EIA Directive. It maintains that the fish farm operations were not the subject of the planning application before the Board in the instant case and are subject to a separate licensing regime. The Board was only required to assess the proposed development the subject matter of the application and there was no requirement to carry out an EIA.

Argument 1 – lack of adequate consent

21. The applicant makes the case that the Board acted *ultra vires* in accepting the planning appeal of the notice party without the consent of all landowners having been submitted to Galway County Council. At paragraphs 12, 14 and 15 of the Amended Statement of Grounds it is variously pleaded that the names and addresses of all landowners and owners of lake rights had not been submitted to the County Council; that no reference is made in the planning application to the individual owners of the right to abstract lake water and that the names and addresses of the lake owners and owners of fishing and water abstraction rights were not furnished to either the Board or Galway County Council; and that the effects of the development in conjunction with the existing water abstraction rights of the landowners and riparian rights holders have not been considered. It is alleged that same is a fundamental error that should have resulted in the planning application being invalidated.

22. The applicant relies upon Article 22(2)(g) of the PDR 2001 which requires that where the applicant is not the legal owner of the land concerned, the written consent of the owner of the land concerned is necessary to make the application.

23. Reference is also made to the definitions of land and owner in the Planning and Development Act 2000. The applicant maintains that where the development includes abstraction of water from a lake, the "*land concerned*" includes lands to which there is attached common law rights to abstract water. It is submitted that there has been no consent for water abstraction from registered owners of the lake bed and the tidal inlet. In his written submissions, the applicant refers to the restrictions on a riparian owner of a natural stream, whereby water may be used for ordinary purposes such as drinking washing or watering cattle, and extraordinary purposes including irrigation, provided that use for extraordinary purposes does not interfere with the lawful use of the water by upper and lower riparian proprietors. Reference is made to the cases *of Cullen v. Dublin Corporation* Unreported (Supreme Court, 22 July 1960, Kingsmill Moore J.) and

McCartney v. Londonderry and Lough Swilly Railway Company [1904] A.C. 301, both concerned with riparian rights.

24. In response, the Board pleads that no complaint was made to Galway County Council at first instance or the Board on appeal to the effect that the planning application was invalid on the basis that the owners of the lake and/or rights had not given their consent. It accepts that it should consider whether it has jurisdiction to adjudicate on an appeal where the application on its face was one which would be considered invalid, despite the fact that the primary duty of vetting a planning application lies with the planning authority. However, the Board asserts the arguments in this respect are entirely hypothetical given the absence of any person complaining about lack of consent. In the circumstances the Board asserts that the applicant has not established any breach of Article 22 of PDR 2001. Similarly, the notice party pleads that the applicant has not identified any person whose consent was required but not obtained and has not established a breach of Article 22.

Standing of applicant to make consent argument

25. At paragraph 57 of the affidavit of Mr Sweetman grounding the application, he avers there are at least 14 registered owners of the wider lake bed and other unidentified owners of a significant unregistered part of the lake. At the hearing, counsel for the applicant took me to the exhibits to Mr Sweetman's affidavit where this matter was addressed. Eight different consents were provided to Galway County Council for the construction of a pumphouse and pipeline on land situated at Mill, Co. Galway, comprised within Folio GY4118, some of which subtended the lake. Also contained in the exhibits were maps printed out from *www.landdirect.ie* and land registry entries. From those exhibits, the case was made that there were two persons who owned land covered by Loch an Mhuilinn and who had not submitted a consent – Mr Thomas Lafferty of Mill, Lettermullen, Galway Folio GY24043 and Sarah O'Toole of Maureem who owns Folio 40714F, which includes one interest that covers land under the lake.

26. It is true that the applicant did not raise this argument in his submission to the Board. However, given the jurisdictional nature of this argument and the fact that in certain circumstances, even persons who have not made any submission to a decision maker are nonetheless entitled to challenge the decision, (see *M28 Steering Group v. An Bord Pleanala* [2019] IEHC 929). I am satisfied the applicant has a sufficient interest to advance this argument.

27. Next, in respect of the argument that this is a hypothetical argument given that no landowner or any other person has complained about their lack of consent, the requirements of Article 22(2)(g) of the PDR in my view go to the jurisdiction of the Board to deal with the application. Section 34 of the 2000 Act provides, that where an application is made to a planning authority in accordance with permission regulations (my emphasis) for development of land, and all requirements of the regulations are complied with, the authority may decide to grant the permission, subject to or without conditions, or may refuse it. Section 37(1)(b) provides that where an appeal is brought against a decision of a planning authority, the Board shall determine it as if it had been made to the

Board in the first instance and s. 34(1) shall apply in relation to the determination of an application by the Board on appeal. Therefore the Board must satisfy itself that the application has been made in accordance with permission regulations. The cases of *Hynes v. An Bord Pleanála & Ors* [1998], (Unreported, High Court, 10 December 1997, McGuinness J.) and *McCallig v. An Bord Pleanála and Others* [2013] IEHC 60 make it clear that the Board should consider whether it has jurisdiction to adjudicate on an appeal where the application on its face is one that would be considered invalid.

28. Regulation 26 of the PDR 2001 provides that "*on receipt of a planning application, a planning authority shall … consider whether the applicant has complied with the requirements of Articles 18,19(1)(a) and 22…"*

29. Regulation 26(3) makes it clear that where, following consideration of an application under sub-article (1), a planning authority considers that any of the requirements of, *inter alia,* Articles 18, 19(1)(a) or 22 have not been complied with, the planning application shall be invalid.

30. Because the consequences of a planning application submitted in breach of Article 22(g) are that the application is invalid, and because those provisions are fully applicable to a consideration of an appeal by the Board, this is not a case where a complaint about lack of consent is hypothetical absent a complaint by an affected landowner. The question of consent goes to the heart of the Board's jurisdiction to consider the application. Therefore, if any issue is raised about the existence of that jurisdiction, as has been done here by the applicant, I am satisfied that the issue is not hypothetical and should be determined. I am reinforced in that conclusion by the fact that the requirement to obtain consent is a mandatory rather than a directory requirement.

Discussion

31. Regulation 22(2) provides that:

> *"A planning application referred to in sub-article (1) shall be accompanied by-*
>
> *(g) where the applicant is not the legal owner of the land or structure concerned, the written consent of the owner to make the application."*

32. It is in somewhat oblique wording, in that it refers to the situation where applicant is not the legal owner of the "*land or structure concerned*". By implication, that suggests that what is required is consent to an application in respect of the land or structure the subject of the application. In this case, the application is for works both within Loch an Mhuilinn and without it, on dry land. It has been identified by the applicant that there are two persons, both of whom have an interest in land covered by Loch an Mhuilinn, from whom consent has not been obtained and this is not controverted by the Board or notice party. There is no question but that land below water comes within the definition of land, since s. 1 of the 2000 Act defines land as *"including any structure and any land covered with water (whether inland or coastal)".*

33. But what I must consider is the nature of the consent required by Regulation 22(2)(g). No case law was cited to me on this specific issue. Reference was made to *Frascati Estates v. Walker* [1975] I.R. 177, where Henchy J. held that:

> *"An application for development permission, to be valid, must be made either by or with the approval of a person who is able to assert sufficient legal estate or interest to enable him to carry out the proposed development, or so much of the proposed development as relates to the property in question."*

34. Although the regulations at issue in that case requiring that sufficient interest in land be provided to justify a planning application were differently worded to Regulation 22(2)(g), nonetheless the clear import of the quote above is that the planning authority must be satisfied of sufficient interest in respect of the property the subject, either in whole or part, of the proposed development. In my view, the reference to the "*land or structure concerned"* carries with it an implication that consent is required for the lands and structure the subject of the planning application.

35. I cannot assume that simply because there are two people whose land is covered in part by Loch an Mhuilinn, that the entirety of the lake is the "land concerned". There is no evidence to that effect. In the affidavit of Liam Roach of the notice party, sworn 16 July 2019, he avers as follows:

> *"I am satisfied that all landowners who own land over/under which the pipe will traverse and where the pumphouse will be located have given their consent for the planning application to be made".*

36. Thus there is uncontradicted evidence that consent has been obtained from the owners of land, whether covered with water or not, that is traversed by the pipeline or pumping station the subject of this application. The Natura Impact Statement of January 2017 prepared on behalf of the notice party describes the proposed intake pipe as follows:

> *"A temporary 250 mm diameter intake pipe approximately 40m long (20m on land and 20m into the lake). The pipe inlet in the lake section will be fitted with screens and will be placed to ensure at least 0.5m clearance above the lake bed and below the lake surface. The intake pipe will be connected to a diesel-powered pump over ground (paragraph 3.2)."*

37. In Mr. Roach's affidavit it is explained that:

> *"the proposed marine based temporary pumped pipe (which will be 150mm in diameter) will be connected to the end of the permanent pipeline. The marine based pipeline will have floats attached so as it will rest on top of the water during abstraction at high to moderate tides. The marine based pipe will be installed temporarily (at the beginning of May to end of September) and will be removed from site when not in ongoing use" (paragraph 13).*

38. It is clear from the evidence that the marine pipe will not rest on the lakebed. Nor is there any evidence that the marine pipe will traverse those parts of the lakebed that are in the ownership of either Mr Faherty or Ms McDonnell. Counsel for the applicant identified in fairly general terms where the land of Mr Faherty and Ms McDonnell was under the lake but did not attempt to match that up with the location of the temporary pipeline. There is of course no evidence from Mr Faherty or Ms McDonnell that the pipeline will touch upon or otherwise impact upon their land under the lake. That is a fatal evidential gap from the applicant's point of view. I cannot assume that the pipeline will run over their lands and therefore that they are owners of land "concerned" by the planning application.

39. Even if such evidence had been put forward, it is in my view questionable whether their land would be "concerned" by the planning application within the meaning of Regulation 22(2)(g) given that the pipe does not rest on the lakebed. The applicant bears the burden of proof. If he wishes to persuade me that the consent of Mr Faherty and Ms McDonnell is required, he must demonstrate that their land is "concerned" by the application i.e. that the temporary pipe will impact upon the land owned by them under the lake water. He has not done that.

40. A different submission was also made by the applicant, to the effect that because Mr Faherty and Ms McDonnell, as persons whose land was covered by lake water, had riparian rights to take water both for ordinary and extraordinary reasons, then the developer was not entitled to extract water from the lake without obtaining their consent. It may well be that Mr Faherty and Ms McDonnell could make an argument that, under riparian law, they are entitled to recompense if their riparian rights are interfered with, although there is no evidence of such interference before me. However, this case is not the place to decide any such question and moreover the applicant would not have standing to advance any such claim. This is exclusively a planning case and what I must decide is whether there is a breach of Regulation 22(2)(g).

41. On the wording of the Regulation, what is required is consent to development works that concern land or a structure. The argument that interference with water over land owned by a person means that their consent is required is unconvincing. Water does not observe any land boundaries and is not owned by the owner of land beneath the water. Regulation 22(2)(g) does not refer to water but only to "*the legal owner of the land or structure concerned"*. In the circumstances of this case, Regulation 22(2)(g) does not require consent from persons enjoying riparian rights. It requires consent exclusively from persons whose land is concerned. Land cannot be equated to mean the water that flows over that land. People cannot own a designated body of water. Impact upon water due to abstraction does not mean that the reference to land must be read as a reference to water. Here, there is no evidence of interference with the land of Mr Faherty and Ms McDonnell situated below the lake. There is no evidence suggesting the proposed development would prevent the exercise of whatever riparian rights Mr Faherty and Ms McDonnell might have. There is no basis to conclude that the works concern their land within the meaning of Regulation 22(2)(g). Therefore, their consent is not required to the proposed development.

Argument 2: Appropriate Assessment

42. In this case, when considering the appeal from the point of view of the Habitats Directive, the Board followed the approach of its Inspector and screened in Kilkieran Bay and Islands SAC in Co. Galway but no other Natura 2000 sites. An appropriate assessment was therefore carried out only in respect of the effects of the development on Kilkieran Bay. The applicant makes two arguments, the first with considerably more emphasis than the second. The first argument contends that the Connemara Bog complex ought not to have been screened out. The second argument is that the Inspector applied the wrong test when carrying out the appropriate assessment.

43. The applicant made a short submission to the Board received on 11 August 2017. He submitted that the application was invalid as it did not seek retention of the unauthorised works that he alleged the notice party had been carrying on between 2012 and 2015, i.e. the abstraction of water from Loch an Mhuilinn. He argued that the development was partly located in Kilkieran Bay and Islands SAC and that any grant of permission would circumvent the rules of the Habitats directive. No complaint was made about the effects of the development on the Connemara Bog complex and it was not argued it ought to be screened in.

44. There was some debate as to whether the applicant was entitled to raise the point about the lack of an adequate assessment and the screening out of the Connemara Bog SAC given that he had not raised it in his submission to the Board. Since, for the reasons I set out below, I have concluded that there is no merit in this argument, I will assume for the purposes of this decision that the applicant had standing to make these points without deciding it.

Legal test for "screening out"

45. The relevant legal test in respect of the screening stage of appropriate assessment has been comprehensively set out in *Kelly v. An Bord Pleanala* [2014] IEHC 400 where Finlay Geoghegan J. referred to the findings of Advocate General Sharpston in *Case C–258/11 Sweetman v. An Bord Pleanala* ECLI:EU:C:2012:743 at paragraph 47 to 49 as follows:

> *"47. It follows that the possibility of there being significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6 (3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to establish such an effect; it is as Ireland observes, merely necessary to determine that there may be such an effect.*
>
> *48. The requirement that the effects in question will be "significant" exists in order to lay down the de minimus threshold. Plans or projects that have no appreciable effect on the size are thereby excluded. If all plans or projects capable of having any effect whatsoever on the site were to be caught by Article 6 (3), activities on or near the site would risk being a possible by reason of legislative overkill.*
>
> *49. The threshold at the first stage of Article 6 (3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must*

be undertaken on the implications of the plan or project for the conservation objectives of the site…"

46. Therefore, the test I must apply is whether the applicant has established a possibility that the development would have a significant effect on the Connemara SAC. If this is the case, then the decision of the Inspector and the Board to screen out the Connemara SAC was a failure to comply with the Habitats directive. The onus of proving an error in screening lies on the applicant (see for example *M28 Steering Group v. An Bord Pleanala* [2019] IEHC 929 and *Rushe v. An Bord Pleanala* [2020] IEHC 122). To discharge the onus of proof it is not sufficient to make a bald assertion as to the likelihood or significance of an effect (see for example *Friends of the Irish Environment v. An Bord Pleanala* [2017] IESCDET 135).

Application of test: first ground of complaint

47. The Inspector noted in his report that the appeal site is located in proximity to and partly within the boundaries of the Kilkieran Bay SAC. He observed that the other Natura 2000 sites within a 15 km radius of the subject site including the Connemara Bog SPA, being 13.4 km north-east of the site and the Connemara Bog complex SAC, being 10.7 km. He noted that the Kilkieran Bay SAC joined the boundaries of the Connemara Bog SPA. At paragraph 7.9.8 he observed that while there was a hydrological link via the sea to the Connemara bog SPA, given the nature of the project and the distance from the appeal site to the Natura sites, the only Natura site that had the potential to be impacted was the Kilkieran Bay SAC.

48. I consider that there was sufficient evidence to support the Inspector's view that the only Natura 2000 site that had the potential to be impacted was the Kilkieran Bay SAC. Insofar as the Connemara Bog SAC is concerned, that evidence included the following:

- the Connemara Bog SAC is 10.7 km away;
- the development site does not form part of the Connemara Bog SAC; the lake from which freshwater is to be abstracted and the two lakes upstream of that lake and to which it is hydrologically connected, namely Loch Hirbirt and Loch an Bhalla, are not within the Connemara Bog SAC;
- the scale of the proposed development is small and the zone of influence of the development is the immediate area around the lake and the hydrological link to Kilkieran Bay SAC;
- there are no source receptor pathways between the proposed development and the Connemara Bog complex;
- the only hydrological connection between the lake to be abstracted and the Connemara Bog complex is through the sea;
- neither the submission of the Department of Arts, Heritage and the Gaeltacht, nor that of Inland Fisheries nor that of the applicant, suggested a concern that the

proposed development would be likely to have significant effects on the Connemara Bog SAC.

49. The only evidence identified by the applicant to justify its argument that the Connemara Bog SAC ought to have been screened in is the Report of the Marine Institute of November 2015 entitled "*Report supporting Appropriate Assessment of Aquaculture and Risk Assessment of Fisheries in Kilkieran Bay and Islands SAC*". The scope of the report was to:

> *"determine if the ongoing and proposed aquaculture and fisheries activities are consistent with the Conservation Objectives for the Natura site or if such activities will lead to deterioration in the attributes of the habitats and species over time and in relation to the scale, frequency and intensity of the activities".*

That report was assessing all the large-scale aquaculture activities in the marine environment in Kilkieran Bay and Islands SAC and screened in the Connemara Bog complex SAC for that reason. But it is important to remember what the Marine Institute were looking at in that report. They were considering the impact of all of the fish farming in Kilkieran Bay and assessing the extent to which that would have an impact on other Natura sites.

50. Counsel for the applicant took me to the part of the Marine Institute Report where the potential for aquaculture and fisheries in Kilkieran Bay to affect otters and salmon from the Connemara Bog complex was acknowledged. In respect of otters, it was noted they could migrate into Kilkieran Bay and could interact with aquaculture and fisheries activities and in respect of migrating salmon passing through Kilkieran Bay it was noted they could interact with aquaculture and fisheries activities.

51. However, simply because qualifying interests of the Connemara Bog SAC were found by the Marine Institute in 2015 to be potentially be affected by the totality of fish farming activities in Kilkieran Bay, this cannot inescapably lead to the conclusion that they will potentially be affected by an entirely different type of operation i.e. water extraction from one lake more than 10km distant from the Connemara Bog SAC. It is still necessary to consider the distance between the proposed development and the SAC and the nature of the proposed development and the qualifying interest of the SAC to determine if the proposed development is likely to have a significant effect on the qualifying interests of the Connemara Bog SAC.

52. Having regard to the factors identified above, the evidence before the Inspector and the Board was in my view sufficient to allow them to reach the conclusion that there was no such effect. The applicant has not identified any evidence to the contrary to show that any qualifying interests from the Connemara Bog SAC, including but not limited to otter and salmon, would be potentially significantly affected by the proposed development. For those reasons, I find the applicant's argument in this case without substance.

Application of test: second ground of complaint

53. The second aspect of the complaint is that the appropriate assessment was not carried out correctly as the Inspector applied the wrong test, being whether the development would have a significant effect on the European site, instead of analysing whether it would adversely affect the integrity of the European site. This point was not pressed at hearing, rightly so in my view. The Board concluded in its decision that the proposed development would not adversely affect the integrity of the European site, thus applying the correct test. It is true that the Inspector at paragraph 7.9.26 of his report concluded that the proposed development in combination with other aquaculture activities within the SAC would not have a significant impact on habitats and species of qualifying interest. However, he concluded at paragraph 7.9.27 that the proposed development would not adversely affect Kilkieran Bay and Islands SAC. Moreover, throughout his consideration of the issue, he referred to adverse impact (see paragraphs 7.9.21 and 7.9.22). Having regard to the totality of the discussion, the evidence does not support a conclusion that the wrong test was applied and so I reject this point.

Argument 3: Lack of an EIA

54. The applicant strongly contends that the Board failed in not carrying out an EIA. However, it is accepted that the development the subject of the application did not require an EIA, not coming within either Annex I or Annex II of the EIA Directive. Rather, what is contended is the radical proposition that the Board ought to have required an EIA to be carried out of the entirety of the four fish farms that the development is intended to service, as well as of the development itself. The basis for this argument derives from a decision of the CJEU, Case C–275/09 *Brussels Hoofdstedeliljk Gewest* ECLI:EU:C:2011:154. For convenience I will describe it as the "Brussels airport argument".

55. In short, the argument goes as follows: because the fish farms have not had an EIA carried out (or in any case, not one compliant with EU law) and because the development is essential to the activities of the fish farms and should be treated as part of the same project, any application for development consent for the abstraction development should be used as an opportunity to remedy the lack of development consent for the fish farms. Accordingly, an EIA should now be required for the combined developments.

56. The applicant relies in particular on paragraphs 36 and 37 of the decision of the CJEU in Case C–275/09, cited in full below.

Admissibility of argument

57. The first response of the Board and notice party is that this argument has not been pleaded. Paragraph 4 of the Amended Statement of Grounds, under the heading "Factual background", is in the following terms:

> *"The First Named Notice Party operates at least 3 fish farms in the vicinity, having a combined licensed capacity of 475 tonnes per annum. This activity has been granted aquaculture and foreshore licences but has never had an Environmental Impact Assessment, notwithstanding the obligation in EU law and national law to do so…."*

58. Under the heading *"Failure to conduct an environmental impact assessment"* Schedule 5(2) of the PDR 2001 is identified as requiring an EIA for seawater fish breeding installations. At paragraph 38 it is pleaded as follows:

> *"The sea farming enterprise operated by the Second Named Notice Party is of a scale that requires an Environmental Impact Assessment. The lake water abstraction and bathing of contaminated fish in the water is very clearly an intrinsic element of the sea farming operation, albeit one where the abstraction from Loch an Mhuilinn remains unlicensed. The freshwater abstraction and fish bathing is not severable and is not ancillary to or a minor element of the overall fish farming development. Splitting the project to avoid having to carry out an EIA is contrary to EU and Irish law".*

59. In response, the Board pleaded in its Statement of Opposition at paragraph 44 that the developer's entire fish farm operations were not the subject of the planning application before the Board and were the subject of separate licensing regimes that included provision for the carrying out of an EIA when required. At paragraph 45, 46 and 47 it was pleaded as follows:

> *"45. Further or in the alternative, the lake water abstraction and associated works is not an intrinsic element of the fish farm operations at sea, as alleged, but is an ancillary development required to be carried out as a result of farmed fish being susceptible to certain diseases.*
>
> *46. In this regard, there is a distinction to be made between upstream and downstream effects (in the metaphorical sense). The proposed development the subject matter of these proceedings is a direct or indirect, downstream effect of the operation of the off-shore fish farms and any EIA of the operation of the fish farms may therefore require to include an assessment of the effects of the proposed development. However, the operation of the off-shore fish farms is not a direct or indirect, downstream effect of the abstraction and transportation of fresh water from the lake. Rather it is the upstream activity which gives rise to the necessity to carry out the proposed development…*
>
> *47. In deciding whether the proposed development required to be the subject of EIA, the Board was not therefore required to consider the proposed development and the operation of the developer's fish farms as a single project."*

60. The notice party pleaded that the proposed development related to the abstraction of water from Loch an Mhuilinn and associated works and did not require to be the subject of an EIA, that the Board was not required to carry out an EIA in respect of the notice party's fish farm operations (paragraph 28), that the abstraction of water for the purposes of making it available to the operations at the licensed sites is an ancillary development carried out as a result of fish being susceptible to certain diseases (paragraph 29) and that there had been no project splitting as alleged or at all.

61. It is clear from the pleadings that the applicant had undoubtedly made it clear that, on his case, the Board failed in not carrying out an EIA of the combined developments. But the issue is whether the applicant had sufficiently explained why that obligation arose.

62. Counsel for the applicant maintains that when the factual and legal pleas are read together, it is clear that it was being asserted that an EIA of all the fish farms and the abstraction project (which I will describe as the "combined developments" for the sake of convenience) was required and that this was, *inter alia,* because the fish farms had never been the subject of an EIA. Moreover, he noted that the plea about a lack of an EIA for the fish farms had never been traversed, in particular by the notice party.

63. Counsel for the Board and notice party said that there was simply no identification of the point in the pleadings and the mere reference to the lack of an EIA of the fish farms did not disclose the argument made orally. They pointed to the fact that the *Brussels airport* case, which forms the cornerstone of the applicant's argument, had not even been identified in the applicant's written legal submissions.

64. I am very conscious that because these are judicial review proceedings under s. 50A of the Planning and Development Act 2000, there is a strict time limit in place for the issuing of proceedings, designed to ensure that all parties know within a short time period whether there will be a challenge to the planning decision and if so, the nature of the challenge. Equally, if proceedings are brought and sought to be amended, relevant case law makes it clear that that there is no possibility of circumventing the time limits by amendments to the pleadings.

65. That scheme would be entirely undermined if an applicant could decide not to seek to amend their pleadings where they wished to add a new argument but rather make that argument at the hearing without notice to the other side. In substance, that is what has happened here. The Brussels airport argument was neither pleaded nor identified in the legal submissions.

66. It is certainly true that the notice party did not reply to the factual plea in the Amended Statement of Grounds as to the alleged lack of an EIA of the fish farms. Had it done so, it would have avoided what happened at the hearing, whereby I was obliged to request the notice party to put in an affidavit on the second day of the hearing to set out the position in relation to the EIA of the fish farms so that any decision on this point would be made on a correct factual basis. However, in circumstances where no legal implication was drawn as to the consequences of the lack of an EIA of the fish farms, it was not unreasonable to decide not to plead to this issue. In other words, on the face of the pleadings, from the point of view of the notice party, even if the court had proceeded on the uncontested plea that the fish farms had not had the benefit of an EIA, it could make no difference to the outcome of the case since the alleged lack of an EIA did not go to any of the arguments raised.

67. The lack of a pleaded case in this respect also meant that the argument evolved over the course of the hearing, such that it was only on the last day of the hearing, in reply, that

counsel for the applicant identified that the legal test was whether the original development was "connected" with the abstraction development.

68. EU environmental law is complex and subtle and is developing incrementally through the case law of the CJEU, as well as through legislation. If an argument is to be made based exclusively on case law of the CJEU, as was the case here, it is necessary to identify that argument with sufficient particularity in advance so that respondents and notice parties know the case they will meet and can put any relevant evidence before the court. That obligation of course equally applies to respondents and notice parties where they wish to advance positive defences.

69. Here, in my view, it would not have been possible to anticipate this argument was going to be made, particularly in light of paragraph 38 of the Amended Statement of Grounds which firmly pitched the reason that an EIA was required of the combined developments on the fact that the lake water abstraction and bathing of salmon was an intrinsic element of the sea farming operation and was not severable or was not ancillary or a minor element of the overall fish farming development. As I understand it, the core of that argument is that the water abstraction development is an intrinsic part of the fish farm development, cannot be severed from it and that the decision not to seek an EIA for it therefore constitutes project splitting. I should point out that this argument does not depend upon the fish farms not having been the subject of an EIA: even if they had been, on the applicant's case as pleaded there would still be a requirement to carry out an EIA of the water abstraction development on the basis that, taken with the fish farms, it exceeded the size threshold and pushed it into the category of developments requiring an EIA.

70. In my view, the project splitting argument as pleaded cannot be considered sufficiently similar to encompass the *Brussels airport* argument i.e. that an EIA of two connected developments is required where a development that itself does not require an EIA is connected to one that requires an EIA but has not had one.

71. Therefore, I find that the applicant is not entitled to introduce the *Brussels airport* argument at oral hearing stage and I exclude same. However, in case I am wrong in this conclusion, I will go on to consider the substantive argument.

Discussion

72. First, the question of whether a satisfactory EIA of the fish farms has taken place in this case is a difficult one. The farms require foreshore licences and aquaculture licences. In 2002, when the aquaculture licences were granted, an EIS was submitted with the licences. It is not clear whether in fact an EIA was carried out either at first instance or by ALAB, the appeals board, to whom an appeal was made, and who ultimately granted the licences. It is true that at that time, Irish legislation only required that an EIS be submitted and did not place a direct obligation on the relevant authority to carry out an EIA. It is also true that in Case C-50/09 *Commission v. Ireland* ECLI:EU:C:2011:109, the CJEU held in infringement proceedings against Ireland that this was an inadequate method of implementation of the EIA Directive and held Ireland in breach. Both the Board

and the notice party say the CJEU in that judgment recognised that, in practice, EIAs were being carried out but that the problem was that Irish legislation did not expressly require this.

73. In any case, those licences expired in 2012 as they were for a 10-year period and a new application was made by the notice party in 2012, who by then ownership of the four fish farms. Initially no EIS was submitted along with the application for licences but, having consulted with the Department, it was decided that an EIAR should be submitted. It was identified to me that this would be done in December 2020.

74. Counsel for the applicant was rightly deeply critical of the Department of Agriculture, Food and the Marine for the extraordinary eight-year delay in adjudicating upon the application for aquaculture licences intended to last ten years. The legislation provides that once an application for a licence is made, an applicant can operate the activity. Assuming that licences are granted in 2021, that means that the fish farms in question will effectively have been treated as being licensed for a period of nine years without any regulatory body considering the terms of the licence and imposing any necessary controls. That is a wholly unacceptable situation and one which undermines the very purpose of a ten-year licence. It could potentially have very adverse environmental consequences in that it allows fish farms to operate on the basis that they are licensed but without any appropriate controls. However, the failure by the Department to carry out an EIA in a timely fashion does not mean that the Board can step into its shoes and itself carry out an EIA of the fish farms unless there is a legal basis for imposing such an obligation on the Board.

75. Given the above history, it seems that (a) there is a question mark over the adequacy of the previous assessment and (b) a new EIA is to be carried out in the context of the extant licensing application. Those factors lead me to conclude that the fish farms cannot be treated at this point in time as having been the subject of a satisfactory EIA.

76. On that working assumption, it is necessary to consider the requirements imposed upon me by Case C–275/09. That case raised a simple question: did the renewal of a permit to operate Brussels airport require an EIA? The Court of Justice held it did not, given that the consent to operate the airport did not entail works or interventions altering the physical aspect of the site. The Court was clear that the term "project" in Article 1(2) of the EIA Directive refers to works or physical interventions and that in the case referred, no construction was being carried out. (I should observe that, although the parties did not refer to it, the CJEU gave judgment on 29 July 2019 in Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* ECLI:EU:C:2019:622 where the question of the definition of project was further considered, including whether a physical intervention was always needed. However, in this case, there is no issue about whether the concept of a project involves physical interventions and therefore I need not further consider that decision).

77. However, there was a complicating factor as previous works altering the infrastructure of Brussels airport had taken place without an EIA. The Court recalled its previous decisions

in Case C-2/07 *Abraham* ECLI:EU:C:2008:133, where it held that in a case involving a permit:

> *"which does not formally concern an activity subject to an environmental impact assessment for the purposes of Annexes I and II to Directive 85/337, it may nevertheless be necessary for such an assessment to be carried out where that measure constitutes a stage in a procedure the ultimate purpose of which is to grant the right to proceed with an activity which constitutes a project within the meaning of Article 2(1) of the directive"(paragraph 32).*

78. Citing established case law, the Court noted at paragraph 33 that where national law provides that the consent procedure is to be carried out in several stages, the EIA must in principle be carried out as soon as it is to identify and assess all the effects which the project may have on the environment. A national measure which provides that an EIA may be carried out only at the initial stage of the consent procedure and not at a later stage would be incompatible with the EIA directive.

79. Paragraphs 34, 36 and 37 are of considerable importance given the reliance placed upon them by the applicant on this case and so I quote them in full:

> *"34. In the present case, it is therefore necessary to point out to the Raad van Stat that it is for it to determine, in the light of the case-law cited at paragraphs 27, 32 and 33 above and on the basis of the national legislation applicable, whether a decision such as that at issue in the main proceedings can be regarded as a stage in a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the relevant provisions of Directive 85/337 to be carried out.*
>
> …
>
> *36. The Court has also stated that the objective of the European Union legislation cannot be circumvented by the splitting of projects and that failure to take account of their cumulative effect must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of Directive 85/377 (Abraham and Others, paragraph 27).*
>
> *37. If it should prove to be the case that, since the entry into force of Directive 85/337, works or physical interventions which are to be regarded as a project within the meaning of the directive were carried out on the airport site without any assessments of their effects on the environment having been carried out at an earlier stage in the consent procedure, the national court would have to take account of the stage at which the operating permit was granted and ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at that stage of the procedure."*

80. In my view neither paragraph 36 nor 37 are relevant to this case since the situations they describe do not arise here. This is not a case of project splitting. The fish farms and the water extraction development are not all part of the same development. The water extraction project is not an intrinsic part of the fish farms and therefore should not be assessed with them to determine whether it exceeds the thresholds dictating whether an EIA is required or not.

81. Nor is this a situation such as that described at paragraph 37 where works that ought to have been the subject of an EIA (but were not) were subsequently the subject of an application for a permit to operate those works. Case 275/09 concerned a multi-stage consent process. In such a situation, it was necessary to carry out an EIA at the time when the operating permit was being granted in the absence of an EIA having been carried out at an earlier stage of the development.

82. Paragraph 34 of Case C–275/09 identifies the test that I must apply. I must ask myself whether the decision on planning for the water extraction project can be regarded as a stage in a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project to be carried out.

83. The answer to that is a resounding no. The permission sought for the extraction development is not part of the consent process for the operation of the fish farms. Those are completely different operations which require different consents, namely aquaculture and foreshore licences. Those consents are not granted by the Board. The grant of permission for the water extraction development cannot in any way authorise or affect the process in respect of the authorisation of the fish farms and is not a stage in the consent procedure for the fish farms. Whether this consent is granted or not has no bearing on whether the fish farms receive aquaculture and foreshore licences. There are no stages in this consent procedure – this is a one-off application for the water extraction project. To seek to characterise this permission as one stage in a multi-stage consent process when there is an entirely different licencing regime for the fish farms is clearly wrong.

84. Moreover, the evidence makes it clear that the fish farms have been carrying on their activities without water being provided from Loch an Mhuilinn while they are seeking permission. Although is undoubtedly advantageous for the notice party to obtain permission for the current water extraction works so that the salmon may be bathed in freshwater brought to the relevant fish farm sites by means of a floating tarpaulin, it is possible for the notice party to continue its activities without such a facility. Therefore, the ultimate purpose of the application for consent cannot be said to enable the fish farms to continue to operate.

85. I should conclude this section of the judgement by commenting briefly on the case of C-348/15 *Stadt Wiener Neustadt* ECLI:EU:C:2016:882, as the applicant relied upon it to submit that even if the ruling in Case C-275/09 was limited to multi-stage consents, the principle had been extended to cases where the developments in question were "connected" even if there was no multi-stage consent. In *Stadt Wiener*, the consent had

been granted for a fuel processing plants which treats plastic waste. The processing capacity was circa 10,000 tonnes per annum. A consent was granted authorising an increase in the capacity to 34,000 tonnes per annum. The consent was granted without the extension project having been subject to an EIA. The project benefited from a provision of Austrian law whereby a project that required an EIA but had not been the subject of an EIA could no longer be annulled as a result of the expiry of the relevant time limit and therefore was regarded as approved under Austrian law. The Court of Justice held that EU law precludes such a legislative provision insofar as it provides that a prior EIA must be deemed to have been carried out for such a project. At paragraph 44, the CJEU referred to the Advocate General's opinion and cited Case C-275/09 in support of the proposition that there is an obligation on competent authorities to ensure an EIA is carried out "*where works or physical interventions connected with that project [i.e. a project where there has been a failure to carry out an EIA] require subsequent consent*". However, in my view, the CJEU were there simply referring to the finding in Case C-275/09 and were not intending to expand its ambit. Had they intended to do so, they would have discussed the case and explained why they were extending its reach into new factual situations. The fact that they did not use the exact form of words used by the court in that judgment cannot be taken to reflect a decision by the CJEU to expand the ruling in that case.

Argument 4: Breach of Water Framework Directive

86. The applicant makes one core point here – that the Board was not able to evaluate the proposed extraction from Loch an Mhuilinn by reference to the criteria identified in the WFD due to the failure by the EPA to evaluate the status of Loch an Mhuilinn. The WFD requires that the status of each water body in the Member States be evaluated. Certain consequences follow from that evaluation, including a classification of the water body. As noted by the Inspector in his report, the status of Loch an Mhuilinn has not been assigned by the EPA, the body given responsibility for this task under Irish implementing legislation. In those circumstances the applicant says that it was not possible to evaluate the impacts upon the lake by reference to the requirements of the WFD and therefore the Board's decision that the proposed development was compatible with the WFD was fatally flawed.

Admissibility of argument

87. The Board argues that this argument has not been pleaded and should not be permitted. However, in contradistinction to the position relating to the Brussels airport argument, an examination of the pleadings discloses that the thrust of this argument was identified in the Amended Statement of Grounds and was fully articulated in the legal submissions filed by the applicant. In the Amended Statement of Grounds, the applicant sought a declaration that the Board acted *ultra vires* the WFD in conducting a risk characterisation of a water body. At paragraph 40 it is pleaded that the Board acted *ultra vires* the WFD in approving a development that would put a water body at risk of not complying with WFD objectives. At paragraph 41 it is pleaded that the European Communities (Water Policy) Regulations 2003 delegates the role of characterisation of river basin districts to the EPA, and that the Board has no delegated power to characterise waterbodies or otherwise

decide if they are at risk of not complying with the objectives of the WFD and has no skills or experience to do so.

88. In his legal submissions, the applicant argues that the Board acted *ultra vires* in conducting a risk characterisation of a water body when a classification should have been made by the competent authority, being the EPA and in approving a development that would put a waterbody at risk of not complying with WFD objectives (paragraph 51). He identifies provisions of Irish implementing legislation referred to in the discussion below.

89. The applicant refers to the conclusion of the Inspector that the WFD status of Loch an Mhuilinn is "not known" and refers to his conclusions that the lake ecology would "probably be at risk" due to water abstraction on one classification methodology and "probably not at risk" using a different classification methodology. He argues that neither of the classifications were made by the EPA and neither were compared to a classification of the lake pre-abstraction and that the consequence of this was that the Board had no information before it to tell if the water abstraction would cause a deterioration of the status of a body of surface water or otherwise jeopardise the attainment of good surface water status as required under the WFD. Reference was made to Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland* ECLI:EU:C:2015:433 (the *Weser* case).

90. In my view, having regard to the above, there is a sufficient identification of the argument in respect of the WFD and for that reason I reject the submission of the Board that this argument ought to be rejected as insufficiently pleaded.

The Weser case

91. In order to evaluate this argument, it is necessary to consider the terms of the WFD and the small number of cases discussing same. In *Weser*, the Court of Justice described the WFD as establishing:

> *"a complex process involving a number of extensively regulated stages, for the purpose of enabling the Member States to implement the necessary measures, on the basis of the specific features and the characteristics of the bodies of water identified in their territories".*

92. The Advocate General in that case set out in some detail the various steps required to be put in place by the Member States implementing the Directive. Rather than duplicating that careful description, I set out below his analysis. The description is lengthy but it is necessary to set it out in full since it allows the reader to understand the complexity and detail of the regime of analysis put in place by the WFD:

> *"43. In order to be able to achieve the environmental objectives, Member States must have a comprehensive overview of the characteristics of the bodies of water concerned.*
>
> *44. In accordance with Article 3 of the WFD, Member States are therefore to identify the individual river basins, assign them to districts and identify the competent authorities.*

45. Next, they are to characterise the bodies of water as provided for in Article 5 of the WFD, in conjunction with Annex II thereto. To that end, for each river basin district they must carry out an analysis of its specific features, including a review of the impact of human activity. (19) An important stage from the point of view of any future determination of the environmental objectives concerns identifying the anthropogenic pressure to which the bodies of water may be subject (20) and assessing the likelihood of the bodies of water failing to comply with the environmental quality objectives laid down in Article 4 of the WFD. (21)

46. In parallel, Member States are required, in accordance with Article 8 of the WFD, to establish the necessary monitoring system, (22) which, by way of a continuing obligation, constitutes the principal tool for determining the status of each body of water. (23) That system must be designed so as to provide a coherent and comprehensive overview of ecological and chemical status within each district. (24) In that regard, I therefore agree with the analysis of the German Government, which points out that the obligation to analyse the trend and reverse it is applicable before the prohibition of deterioration comes into play.

47. The ecological status of a body of surface water is derived from assessment of the structure and functioning of aquatic ecosystems associated with that body of water. It is determined using a scientific mechanism based on quality elements, namely biological (plant and animal species), hydromorphological and physico-chemical elements, which are assessed on the basis of indicators (for example the presence of invertebrates or fish in a water course). For each type of body of water, the ecological status is expressed in the system of classes laid down in Annex V to the WFD, to which I will return in detail as part of the analysis of the second and third questions.

48. After having established the classes in accordance with Annex V to the WFD, the Member States have the task of determining how to achieve good status or, at the very least, good ecological potential, and of preventing deterioration, in accordance with Article 4 of the WFD, for the bodies of water concerned.

49. For that purpose, in accordance with Article 11 of the WFD, the Member States must establish programmes of measures, drawn up for each river basin district or for part of the district. The programme is a tool for responding to the identified pressures, thus enabling the river basin or body of water to reach good status. (25) Such programmes of measures may make reference to measures following from legislation adopted at national level and covering the whole of the territory of a Member State. (26) Those programmes include 'basic measures', as minimum requirements to be complied with, and, where necessary, 'supplementary measures'. (27) The basic measures include, in particular, the measures adopted under specific directives for the purposes of Article 11(3)(a) of the WFD, (28) as well as, in the event of a significant adverse impact on the water status, the measures referred to in Article 11(3)(i) of that directive, which seek to ensure that

the hydromorphological conditions of the body of water allow the required ecological status to be achieved.

50. For any adverse impact, controls may take the form of a requirement for prior authorisation or registration, which seems to me to be crucial from the point of view of the scope of Article 4(1)(a)(i) of the WFD. As is clear from Article 11(3)(c) of that directive, the basic measures include measures promoting water use such as to avoid compromising the achievement of the objectives as provided for in Article 4. The supplementary measures also include those designed with the aim of achieving the environmental objectives, as laid down in Article 11(4) of the WFD.

51. The programmes of measures are drawn up by the Member States in several stages. Thus, those States are required to identify the pressures and the impacts (29) in such a way as to define the major problems of the river basin district concerned. Under Article 11(5) of the WFD, the Member States must also specifically determine the cases in which there is a risk that the environmental quality objectives may not be achieved. In that connection, they also take into account heavily modified bodies and the necessity or the probability of applying derogations within the meaning of Article 4 of the WFD. The first version of a programme of measures is subject to an economic analysis, in accordance with the conditions laid down in Annex III to the WFD, on the basis of which the Member States must determine the costs and timescales for their implementation. The economically adapted plans of measures are then subject to the requirement for public information and consultation in accordance with Article 14 of the WFD.

52. Next, the programmes of measures are incorporated into the management plans within the meaning of Article 13 of the WFD. The management plans include the elements laid down in Annex VII thereto. The WFD provides that the programmes of measures and management plans are to be regularly reviewed and updated. (30) The management plan is both a descriptive document of the status of the river basin district and an action plan in so far as it refers to new measures designed to achieve the objectives of the WFD. On the basis of the estimation of all existing impacts and the outlook for change, a Member State determines the necessary measures for achieving the environmental objectives laid down under Article 4 of the WFD. That is clear from points 5 and 7 of Annex VII to that directive, which state that a management plan is to include a list of environmental objectives and also a summary of the programmes of measures, including the way in which those objectives are thereby to be achieved. At the end of that laborious process, Member States are required to implement the measures laid down."

93. The only thing that is missing from that description is the detailed process to be followed under Article 5 of the WFD as identified in Annex II. I explain that part of the process below.

94. Article 2(17) of the WFD defines surface water status as "*the general expression of the status of a body of surface water, determined by the poor of its ecological status and its*

chemical status". Article 2 (18) defines "good surface water status" as meaning "*the status achieved by a surface water body when both its ecological status and its chemical status are at least 'good'"*. Article 2 (22) defines good ecological status as classified in accordance with Annex V. Good surface water chemical status is defined at Article 2(24).

95. As may be seen from the above extract, it is only once the classes have been established in accordance with Annex V that the Member States are in a position to commence the task of determining how to achieve good status or good ecological potential and the separate task of preventing deterioration in accordance with Article 4 of the WFD.

96. Article 4 (1)(a) provides, *inter alia,* that for surface waters:

    (i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water…"

    (ii) Member States shall protect, enhance and restore all bodies of surface water… with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V …

97. The legal effect of the obligations in Article 4 were considered in the case of *Weser*. This case concerned a scheme to deepen various parts of the river of Acer in the north of Germany to enable larger container vessels to call at the German ports of Bramerhaven, Break and Bremen. The German court referred certain questions to the CJEU, in particular whether Article 4 meant that Member States were required (unless a derogation was granted) to refuse authorisation for a 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 WFD. Certain Member States were arguing that the Directive was simply an expression of planning objectives and did not involve binding obligations of this type.

98. Considering the WFD, the court observed that it was a framework directive establishing common principles and an overall framework for action in relation to water protection and developed the overall principles and the structure for protection and sustainable use of water in the European union. The ultimate objective was to achieve good status of all EU surface waters by 2015.

99. The Court observed that Article 4 (1) (a) imposed two objectives that were separate although intrinsically linked. First, there was the obligation to prevent deterioration. Second, there was the obligation to enhance with the aim of achieving good status by the end of 2015. Those obligations were designed to attain the qualitative objectives pursued by the EU legislature, namely the preservation or restoration of good status, good ecological potential and good chemical status of surface waters.

100. The Court observed that Article 4 (1) (a) did not merely set out management planning objectives but had binding effects once the ecological status of the body of water concerned had been determined at each stage of the procedure prescribed by this directive (paragraph 43). This paragraph is of great significance since it makes clear that the obligations imposed by Article 4 cannot take effect until the ecological status of the body of water has been determined. As acknowledged by the Inspector, this has not taken place in respect of Loch an Mhuilinn.

101. The Court arrived at its core conclusion at paragraph 50 as follows:

> *"It follows that, unless a derogation is granted, any deterioration of the status of a body of water must be prevented, irrespective of the longer term planning provided for by management plans and programmes of measures. The obligation to prevent deterioration of the status of bodies of surface water remains binding at each stage of implementation of Directive 2000/60 and is applicable to every surface water body type and status for which a management plan has or should have been adopted. The Member State concerned is consequently required to refuse authorisation for a project where it is such as to result in deterioration of the status of the body of water concerned or to jeopardise the attainment of good surface water status, unless the view is taken that the project is covered by a derogation under Article 4 (7) of the directive."*

102. The Court in its answer to the first and fourth questions concluded that Member States are required to refuse authorisation for an individual project where it may cause a deterioration of the status of the 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.

103. The second and third questions referred had addressed the concept of "deterioration of the status" of a body of surface water. The Court recalled that, as per the definition in Article 2(17), surface water status is the general expression of the status of a body of surface water determined by the poorer of its ecological status and chemical status. The Court noted that the assessment of surface water status is based on an analysis of the ecological status which covers five classes. It concluded that there is deterioration as soon as the status of at least one of the quality elements, within the meaning of Annex V to the directive, falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole. However, if the quality element concerned, within the meaning of that Annex, is already the lowest class, any deterioration of that element constitutes a 'deterioration of the status' of a body of surface water, within the meaning of Article 4 (1)(a)(i). This part of the judgment is of significance as it makes it crystal clear that the concept of deterioration is not an abstract one, to be measured by an analysis before and after the proposed development but rather a question about the precise impact of an activity on the assigned status of a surface water body.

104. A similar approach can be seen in the opinion of the Advocate General. He considered the scope of the requirement for improvement in relation to an individual body of water. He

observed that *"the starting point should be the current status of the body of water concerned"* and went on to say that where an individual project or the planning measures were neutral in that they resulted in neither an improvement nor deterioration of the status of a body of water, such an approach was permitted by the legislature only where the current status of the body of water was at least 'good'. He contrasted this with the situation where the requirement for improvement takes full effect where the current status of the body of water concerned is less than 'good'. He noted that the provision of deterioration was binding at each stage of implementation of the WFD and applied to each type and status of surface water body.

105. In deciding that the prevention of deterioration was not simply a non-binding aim of the WFD, the Advocate General referred to Case C–43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias* ECLI:EU:C:2012:560 which involved the assessment of a project transferring water from one river basin to another when the management plans had not yet been drawn up. The Court was required to consider, *inter alia,* the temporal effect of the WFD. The Court excluded, given the phase of implementation, the application of Article 4 of WFD. However, the court referred to the obligation to refrain from taking any measure liable to compromise the attainment of the results prescribed by the WFD which is applicable both during the period of transposition and during the transitional period. That, in the view of the Advocate General, proved the extent of the significance which the court attached to the attainment of the objectives of article 4 of the WFD and the preservation of their binding force.

Implementation by Ireland of the WFD

106. The details of the steps necessary to implement the Directive are identified in the Irish implementing regulations. Article 7 of the European Communities (Water Policy) Regulations 2003 S.I. 722/2003 places an obligation on the EPA to map the location and boundaries of groundwater and surface water bodies no later than 22 December 2004 for the purposes of Article 5, to identify each surface water body as belonging to a specific category, to provide the typology for differentiating all surface waters within a river basin district and to establish the type specific reference conditions for each surface water body.

107. Regulation 24 of the European Communities Environmental Objectives (Surface Waters) Regulations 2009 S.I. No. 272 of 2009 ("S.I. 272/99") imposes an obligation on the EPA no later than 22 June 2011 to classify in accordance with those Regulations each surface water body identified for the purposes of Article 7 of the 2003 Regulations according to its ecological status or its ecological potential as the case may be and its chemical status. Regulation 26 provides that the EPA shall on completion of the classification, provide a map for each river basin district illustrating the classification of the ecological status and chemical status for each body of water. Such classification is to be based on the results of the monitoring programme prepared by the EPA. Regulation 35 provides that the ecological status or potential of a body of surface water shall be assigned by the EPA and shall be based on the results of the monitoring systems established for the relevant biological quality elements, expressed as ecological quality ratios, the monitoring results for the general quality elements and specific pollutants supporting the biological quality

elements and where relevant for classification purposes, the monitoring results for the hydromorphological quality elements. Regulations 35 to 51 are taken up with identifying in some considerable detail how the ecological and chemical status of the surface water body is to be evaluated along with related issues.

108.

Discussion

109. The Directive has erected a complex and nuanced approach to the treatment of surface water bodies. Annex V requires an analysis is required to be carried out of catchment and sub- catchments areas of a river basin district according to the technical specifications set out in Annexes II and III. Annex II in particular requires Member States to identify the location and boundaries of bodies of surface water and carry out an initial characterisation of all such bodies in accordance with detailed methodology set out in the Annex. At paragraph 1.5 of Annex II it is identified that Member States shall carry out an assessment of the susceptibility of the surface water status of water bodies to various pressures identified including pressures arising from water abstraction. Such information and other relevant information including existing environmental monitoring data is to be used to carry out an assessment of the likelihood that surface water bodies will fail to meet the environmental quality objectives set for the bodies under Article 4.

110. Each step required must be put in place to allow the analysis required by Article 4 to be carried out, inter alia when permission is sought for a project that will impact on the surface water body. The requirements identified by Article 4 i.e. whether the proposal affects the good surface water status and, separately, whether it causes a deterioration of the status of the body of water, may only be answered if the previous steps required by the WFD have already been carried out in respect of the surface water body in question. It is not possible to decide whether a proposed project will jeopardise the attainment of good surface water status or good ecological potential and good chemical status and/or will cause deterioration to the status of a surface water body unless the status of that water body has been determined in accordance with the detailed criteria set out in the annexes.

111. Given the prescriptive nature of the obligations imposed upon the Member States in this regard, it appears clear that a Member State is not at large in deciding in any given case whether a project impacting upon a surface water body will cause a deterioration of its status or jeopardise the attainment of good surface water status/ecological potential/water chemical status. Rather, what it must do is apply the tests identified in Article 4 (1)(a) by reference to the status of the water body as already determined through an application of the detailed requirements of the directive.

Approach of the Inspector

112. Having identified the obligations of a Member State in this regard (and of course the Board is in the shoes of the Member State in this instance) I turn now to consider the approach of the Board. It is necessary to consider first the Inspector's report, which was followed in its entirety in respect of water extraction by the Board. Under the heading

"*planning assessments*" the Inspector considered inter alia the ecology aspects of the proposed development and in this context looked at the impact of the abstraction. He noted that the main potential ecological impacts of the proposed development were the impacts on the ecology of the lake including the impact on fish and eel movements as a result of the extraction of water with a resultant change in water levels and a change in lake residence time i.e. the average time water stays within the lake body.

113. He considered the reports submitted to the Board, including a number of hydrological feasibility assessments submitted by Ryan Hanley consulting engineers on behalf of the notice party, a report on water abstraction prepared by Triturus Environmental Services for Ryan Hanley, and surveys on trout spawning in Loch an Mhuilinn provided in submissions by Inland Fisheries Ireland ("IFI") that considered the impact of water abstraction on movements and spawning of migratory fish into Loch an Mhuilinn. He noted that impact on lake spawning fish were not considered likely and impacts were thus restricted to the associated migratory movements of fish in and out of the system within the adjoining tributaries. He referred to the hydrological assessment supplementary report submitted to the Board on 9 February 2018, which set out mitigation measures to ensure that flow requirements for the outlet from Loch an Mhuilinn were met to allow for movement of salmonids. He referred to the proposed mitigation measures in those reports including that abstraction should only be undertaken when lake levels upstream of the outlet are equal to or greater than 2.34m OD which gives flow greater than 34l/s to satisfy fish passage requirements.

114. At paragraph 7.5.12 he notes that the hydrological feasibility assessment report of 12 July 2017 submitted by Ryan Hanley on the behalf of the notice party considers water quality and habitat deterioration in the context of the water framework directive as does the supplementary report of 9 February 2018. At paragraph 7.5.13 he observes as follows:

> *"Loch an Mhuilinn lies within the 'Furnace_SC_010 Subcatchment' and is part of the 'Galway Bay North" Catchment. A Sub-Catchment Assessment is not available for this Subcatchment (www.catchments.ie accessed 16th May 2018) and as such a WFD Status is not known".*

115. Because of the importance of the Inspector's report in this respect, given that the Board followed it in its totality, I set out in full his analysis of the WFP implications:

> *"7.5.14 The Hydrological Feasibility Assessment attempts to examine the likely WFD implications in terms of the ratio of abstraction to the existing water inflow rates into the lake in the lake. The WFD has developed risk categories for ecological impact and thresholds for surface water abstraction based on the net abstraction to the 95%-ile flow rate (the 95%-ile is the flow rate into a watercourse which is exceeded 95% of the time. It is also termed the low flow rate). This is set out in the table below:*

Risk	Risk Classification	Ratio of net abstraction to 95%-ile

Category		flow
2b	Not at risk	<5%
2a	Probably not at risk	5 to 10%
1b	Probably at risk	10 to 40%
1a	At risk	>40%

7.5.21 The annual proposed abstraction rate (year round average) is 3.3 l/s and the 95%-ile flow rate for Loch an Mhuilin is 11 l/s. Based on the ratio of the proposed abstraction to the low flow rate (i.e. the 95%-ile), this would result in Loch an Mhuilin being categorised as a 1b 'Probably at Risk'.

7.5.22 However, the report refers to an alternative methodology as set out in a report entitled 'Revised Risk Assessment Methodology for Surface Water Abstractions', utilised by Eastern River Basin District (ERBD) Project, which assesses impact in terms of the ratio of the proposed abstraction to the 50%-ile flow (i.e. the median inflow into the lake). I have had regard to this report in my assessment. This median flow rate is considered to be more ecologically relevant, given that changes to low flow rate (i.e. the 95%-ile) will not have a material impact on the changes that affect lake ecology i.e. lake level fluctuation and change in residence time.

7.5.23 Considering the ratio of the proposed abstraction rate (year round average) with the more ecologically relevant 50%-ile, Loch an Mhuilin can be reclassified as '2a – Probably not at significant risk' of ecological impact, having regard to the table above.

7.5.24 Having regard to the significant volume of information submitted with the appeal, and having had due regard to same, it is my view that the key issue relating to the ecology is requirement to maintain the minimum lake level of 2.34m OD, as recommended in the Hydrological Assessment Supplementary Report in order to facilitate migratory passage of salmonids and in order to maintain water quality. If this minimum level is breached, water abstraction should cease and the lake should be allowed to recharge and the water level should be allowed to reach 2.44m OD. It is possible to ensure an exact water level by the use of a water level gauge, and to restrict water abstraction should the water level by the use of a water level gauge, and to restrict water abstraction should the water level of the lake fall below this level, and to require that the lake should be allowed to recharge to a water level of 2.44m OD before the resumption of abstraction. Should the Board be minded to grant permission relevant conditions should be imposed in this regard."

116. A number of comments may be made about this analysis. First, he is referring to the implications of the proposed development as identified in the feasibility assessment using two different methods of measurement. Those methods of measurement were not part of the material submitted to the Board. Rather they were referred to in the reports submitted on behalf of the notice party. Under the first method of measurement, the proposed abstraction put the surface water body into a category of "probably at risk". Under the second which is described as revised risk assessment methodology for surface water abstraction used by the Eastern River Basin District project, the proposed abstraction would mean that Loch an Mhuilinn could be reclassified as probably not at significant risk of ecological impact. The Ryan Hanley report describes the first methodology as being one prepared in 2009 as part of the WFD project for Ireland. It then makes reference to the revised methodology whereby the Eastern River Basin District project reviewed the initial methodology and concluded that the 95th percentile flow was not an ecologically relevant metric for looking at abstraction pressures from lakes and they therefore devised a modified methodology using the medium flow which they concluded was relevant. Using the second methodology the report noted that the proposed Loch an Mhuilinn abstraction could be considered screened out for further consideration and reclassified as probably not at significant risk.

117. What is quite striking about the report and the reliance upon it by the Inspector is that it is impossible for me to understand the relationship between either the first or second methodology of screening the proposed abstraction, and the detailed framework and structure of the WFD described above. Nor is there any way of understanding by reference to the WFD why the initial approach is considered no longer an ecologically relevant metric. In the Ryan Hanley report a Table 5 is included headed up "WFD abstraction risk categories". But these do not appear to derive from the Directive. The guidelines employed by the Ryan Hanley report are said to be part of an effort to evaluate projects having regard to the WFD but their precise relationship with the Directive and their application to a surface body of water where no status has been assigned is not explained in any way.

118. Moreover, as accepted by the Inspector early on in his consideration of the WFD, the status of Loch an Mhuilinn has not been identified by the body charged with that task in Ireland i.e. the EPA. The Inspector does not address how the evaluation techniques identified by the Ryan Hanley report can be said to be an implementation of the WFD in this case where the status of the lake has not been assigned following an assessment. When one considers the steps required by Annex II to Article V of the WFD, it is not possible to equate the analysis described in the Ryan Hanley reports with the analysis required by the WFD.

119. The decision of *Weser* considered above makes it clear that when authorisation is sought for a project that will impact upon a surface water body, authorisation must be refused if the project will cause a deterioration of the status of the body of surface water or if it would jeopardise the attainment of good surface water status, having regard to the existing status of the water body as designated in accordance with the Directive. It is

impossible to treat the approach of the Inspector in the extract from his report cited above as reflecting such an analysis. Loch an Mhuilinn does not have an existing status. There can be no analysis of deterioration having regard to the benchmark set by the status analysis. Still less can there be an analysis of the impact of the proposed extraction on the good surface water status/ecological potential/chemical status.

120. Rather, what the Inspector is forced to do is to carry out some kind of proxy evaluation which makes reference to the WFD but does not in fact employ the architecture of the WFD. In truth, the Inspector is simply reciting the conclusions of the Ryan Hanley report without carrying out any independent evaluation of the conclusions of those reports by reference to the criteria set out in the WFD.

121. In the absence of a status evaluation by the EPA he was not in a position to consider compliance with the WFD. But my obligation under EU law is to ensure that the provisions of the WFD, in particular Article 4(1), were observed by the Board. Where no status had been assigned to the lake, the Board was not able to ensure compliance with Article 4(1).

Response to arguments of the Board/notice party

122. The Board argued that there was nothing in the WFD that suggested that no development that might have an impact upon a water body could take place pending classification of a water body. Counsel accepted that permission had to be refused if it would cause deterioration of the water body but that the question of deterioration could be addressed by assessing the impact of the proposed development on the water body and determining if there was an impact or not. Both the Board and the notice party argued that the applicant had not put forward any evidence that the extraction water from Loch an Mhuilinn would cause a deterioration in the lake, that the onus was on him to do so and in the absence of any such evidence, there was no evidence of a breach of the WFD. Counsel for the Board argued that the mitigation measures identified by the Inspector and adopted by the Board set out how any adverse effect could be avoided, thus allowing the Board to satisfy itself of compliance with the WFD.

123. Counsel for the notice party referred to the various studies submitted, and to the alternate methodologies identified by the Inspector. She identified the submission made by Inland Fisheries Ireland, who focused upon the importance of maintaining the water levels in the lake. She referred to the 2018 supplemental report from Ryan Hanley and the Triturus report, which further assessed potential water quality impacts despite it having been "screened out" by the application of the 2009 methodology. That assessment concluded that the lake would be representative of the good to high status according to the WFD.

124. In respect of the mitigation measures, she noted that the readings of the lake levels were to be submitted to Galway County Council and the IFI and not just to the planning authority, as would normally be the case, demonstrating the commitment to ensuring an appropriate level at all times. Finally, it was submitted that the conclusion urged upon me by the applicant would mean that any application for permission affecting a water body where its status had not been determined could not be proceeded with.

125. In substance the arguments made in opposition to the applicant's argument fall into three categories –(a) that the aim of the WFD is not to prevent permission being granted where a water body has not been assigned a status, (b) that there is no evidence of deterioration to Loch an Mhuilinn once the mitigation measures are applied with the result the applicant has failed to establish deterioration, and (c) that the consequences of such an approach would inhibit development.

126. As identified above, the *Weser* case identifies that a Member State must refuse authorisation for a project that will impact upon a surface water body if either (a) it will cause a deterioration of the status of the body and/or (b) it will jeopardise the attainment of good surface water status or good ecological potential and good surface water chemical status. It is clear both from the very precise wording of the answer given by the CJEU – and indeed the entirety of the decision in *Weser* – and from the detailed provisions of the WFD itself that the concepts of deterioration and good surface water status are inextricably tied to the complex evaluation framework identified in the WFD.

127. Taking deterioration first, the obligation is to avoid a deterioration in the "status" of the body. Given the extent to which the assignment of status is regulated by the WFD, status cannot be interpreted, as the Board and notice party seek to do, as meaning simply the existing base line of the water body measured in whatever way the body who grants authorisation deems appropriate. The Board was presented with reports that sought to evaluate the existing status of the lake, including in respect of fish, by reference to certain concepts said to emanate from the WFD, and then to compare that status with the status of the lake post-permission. But there is an insurmountable difficulty in that the status in question was not one assigned following the application of the very precise and detailed methodology of the WFD by the EPA. That is the only method of determining status meeting the requirements of the WFD as implemented in Ireland. Thus, without a status as determined in accordance with the WFD, it is not possible to evaluate whether there has been a deterioration in that status. The response of the CJEU to the second and third questions in *Weser* indicates the extent to which deterioration in status is bound up with the assignment of status.

128. Further, to say that no evidence of deterioration was presented is to misunderstand the scheme of the WFD. The Board, as an emanation of the State, has an obligation under EU law to refuse permission if either a deterioration in status or a jeopardization of the attainment of good water status will occur as required by Article 4(1). Where the status has not been determined, a red light ought to have gone off for the Board, and it ought to have realised that it could not evaluate compliance with the requirements of Article 4 (1) until the EPA assigned the water body a status.

129. Moreover, both the Board and the notice party confined their argument to lack of deterioration. But neither addressed the impossibility of the Board confirming that the proposed development would not jeopardise the attainment of good water status, good ecological potential and good surface water chemical status in circumstances where the status of Loch an Mhuilinn had not been evaluated.

130. Accordingly, the arguments based on a lack of evidence of detriment to the lake cannot succeed. Equally, having regard to the analysis above, I must reject the argument that the aim of the WFD is not to prevent permission being granted where a water body has not been assigned a status. The WFD, as interpreted by the CJEU, requires a Member State to ensure that the requirements of Article 4 are met before permission is granted. It cannot be so satisfied in respect of development affecting a water body whose status has (in breach of the WFD and the implementing regulations in Ireland) not been assigned by the EPA.

131. In respect of the consequences of my ruling, I agree that it is highly undesirable that the failure to assign a status to a surface water body may impact upon applications for development that impact upon the water body in question. However, those consequences cannot lead me to ignore the requirements of the WFD. The EPA as the relevant authority in Ireland have an obligation to carry out the analysis required by Article V of the WFD in respect of surface water bodies and determining their status. If, as in the instant case, it does not fulfil its obligation in respect of any given surface water body, its failure to do so unfortunately has implications for any application for permission that potentially affects that water body.

132. In this case, the Board did not make any attempt to contact the EPA and to ascertain whether the analysis of the status of Loch an Mhuilinn was in progress and might be provided in time to allow the Board to proceed on that basis. It simply sought to evaluate the project without obtaining the status of Loch an Mhuilinn.

Conclusions on the WFD

133. Finally, I should acknowledge that considerable effort on the part of the notice party went into carrying out the studies that I have referred to above, analysing the impact of the proposed abstraction upon the lake, and devising mitigation measures that would ensure that the abstraction would not adversely impact upon it. It was proposed by Ryan Hanley on behalf of the notice party and accepted by the Inspector and the Board that once levels went to 2.34m OD then no further abstraction could take place until the lake recharged its levels and was back at a level of 2.44m OD. The Board and the notice party argued that the principal risk of the water abstraction lay in bringing the lake depth below a certain level but that this had been addressed due to the mitigation measures suggested and adopted.

134. But I cannot evaluate the efficacy or appropriateness of those mitigation measures by reference to the WFD for the reasons set out above. If I were to accept the appropriateness of the Board's approach to the mitigation measures, I would be doing so without reference to the WFD. This would be to ignore my obligations under the Directive.

135. In conclusion, following *Weser*, I must approach the matter on the basis that the Board were obliged to ensure that test articulated by Article 4(1)(a) was fully applied in individual authorisation decisions using the detailed and complex framework of the WFD. Given the failure by the EPA to provide a status for Loch an Mhuilinn, it was impossible for the Board to evaluate the proposed works by reference to the requirements of the WFD.

The reliance by the Inspector and the Board on some type of proxy evaluation referring to concepts said to stem from the WFD but which did not follow the steps identified by the WFD, does not constitute compliance with the WFD.

Conclusion

136. For the reasons set out above, I will quash the decision of the Board granting permission to the proposed development solely on the basis of its failure to comply with the requirements of the WFD.