

**THE HIGH COURT
JUDICIAL REVIEW**

[2013 No. 356 J.R.]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

**PETER SWEETMAN AND
THE SWANS AND THE SNAILS LTD**

APPLICANTS

AND

**AN BORD PLEANÁLA AND
IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

AND

CLARE COUNTY COUNCIL

NOTICE PARTY

AND

NORTH TIPPERARY COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice McDermott delivered on the 4th day of May, 2016

1. The applicant seeks an order of *certiorari* of the decision of An Bord Pleanála (the Board) made on 25th March, 2013 to grant permission to Clare County Council under s. 51 of the Roads Act, 1993 (as amended) in respect of the "Killaloe By-Pass", a development comprising of:

- (a) The construction of a by-pass of Killaloe, Co. Clare of approximately 2km of Type 2 Single Carriageway;
- (b) The construction of a bridge crossing the River Shannon approximately 170m long including 0.9km of Type 2 Single Carriageway between the R494 regional road and the R463 regional road;
- (c) The upgrade and realignment of approximately 3.3km of the existing R494 road to Type 3 Single Carriageway;
- (d) The provision of cycling and pedestrian facilities along the length of the proposed road development;
- (e) The construction of two new bridges along the R494 regional road over the Kilmastulla River and the Limerick to Nenagh railway line;
- (f) The construction of three roundabout junctions where the proposed road development intersects existing regional roads;
- (g) The construction of two major/minor priority staggered junctions along the by-pass section of the proposed road development;
- (h) The upgrading and realignment of some sections of existing regional and local roads; and
- (i) Associated ancillary and consequential works.

2. The applicants also seek two declarations that:-

- (1) Habitats which can be classified as Annex I priority natural habitats on the basis of their ecological characteristics are entitled to de facto protection under Council Directive 94/43/EEC of 21st May, 1992 on the Conservation of natural habitats and of wild fauna and flora (The Habitats Directive) in particular under Article 2 thereof;
- (2) Any permanent and irreversible loss of habitat within the Special Area of Conservation (SAC) necessarily adversely affects the integrity of the site having regard to its conservation objectives and the constitutive characteristics of the site.

3. Leave was granted to apply for judicial review (Peart J.) on 13th May, 2013 in respect of a wide range of reliefs on 55 separate grounds. This was reduced at the hearing of the action to the relief set out above based on a more limited number of grounds. The applicants now rely upon grounds 1, 2, 3, 4, 8, 9, 10, 11, 12, 15, 16, 17, 18, 24, 25, 27, 33 and 34 in respect of the application for

certiorari and grounds (iv) 1 and 2 in respect of the first declaration at para. d(5) of the statement of grounds and grounds (v) 1, 2 and 3 in respect of the declarations sought at para. d(6).

History of events

4. An application was lodged by Clare County Council with An Bord Pleanála in respect of this development on 7th February, 2012. At the same time an Environmental Impact Statement (EIS) and a Natura Impact Statement (NIS) were submitted by the Council to the Board. Further information was sought by the Board from the Council on 4th May, 2012 and a response was furnished on 25th May. An oral hearing was convened and held by an Inspector appointed for that purpose in October, 2012. On 6th March, 2013, the Board considered the application, the objections made in respect of the proposed development, the report of the Inspector who conducted the oral hearing and all documents and submissions on file, and decided to approve the proposed development subject to stipulated modifications and conditions. A Board Directive issued confirming this decision on 21st March, 2013 and a development consent was granted to the County Council approving the application with conditions on 25th May. The applicant claims that an area of alluvial wet willow/alder situated on the western side of the proposed bridge will be subjected to permanent and irreversible destruction even though it is a priority natural habitat as described in Annex I of the Habitats Directive.

Summary of the applicant's main grounds

5. Counsel on behalf of the applicant identified the main issues in the case under three broad headings namely:-

(a) The failure by the respondents to identify or deal adequately with a site hosting an alluvial woodland habitat which qualifies as an Annex I priority natural habitat located on the western side of the proposed development as a Site of Community Importance under the Habitats Directive.

(b) An Environmental Impact Assessment (EIA) carried out by the Board was deficient and did not comply with the provisions of Article 3 of Directive 2011/92/EU (The EIA Directive) or s. 171A of the Planning and Development Act 2000, as amended;

(c) The Board erred in law by attaching a condition to the material development consent, authorising the management of construction of the development without assessing a construction management plan and all relevant mitigation measures to be implemented thereunder, contrary to the EIA Directive.

It is necessary because of the wide ranging nature of the submissions made on behalf of the applicant to set out in some detail the provisions of the relevant Directive, regulations and statutory provisions concerning protected natural habitats.

Council Directive 92/43/EC of 21st May 1992 (The Habitats Directive)

6. The main aim of the Directive was expressed in its Preamble to be the promotion and maintenance of biodiversity, taking account of economic, social, cultural and regional requirements. It states that measures are necessary at community level to conserve natural habitats which are continuing to deteriorate and to define them as requiring priority in order to favour the early implementation of conservation measures. The object is to ensure the restoration or maintenance of natural habitats "at a favourable conservation status". Land-use, planning and development policies should encourage the management of features of the landscape which are of major importance for wild fauna and flora. The provisions of the Directive set out the procedures whereby Member States are required in cooperation with the European Commission to designate geographical areas containing priority natural habitats as Special Areas of Conservation (SACs) and protect them.

7. Article 1 of the Directive contains the following relevant definitions:-

"(a) *conservation* means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);

(b) *natural habitats* means terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural;

(c) *natural habitat types of community interest* means those which, within the territory referred to in Article 2:

(i) are in danger of disappearance in their natural range; or

(ii) have a small natural range following their regression or by reason of their intrinsically restricted area; or

(iii) present outstanding examples of typical characteristics of one or more of the nine following biogeographical regions: Alpine, Atlantic, Black Sea, Boreal, Continental, Macaronesian, Mediterranean, Pannonian and Steppic.

Such habitat types are listed or may be listed in Annex I;

(d) *priority natural habitat types* means natural habitat types in danger of disappearance, which are present on the territory referred to in Article 2 and for the conservation of which the community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority natural habitat types are indicated by an asterisk (*) in Annex I;

(e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservation status of a natural habitat will be taken as 'favourable' when:

— its natural range and areas it covers within that range are stable or increasing, and

— the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and

— the conservation status of its typical species is favourable as defined in (i)...

(j) site means a geographically defined area whose extent is clearly delineated;

(k) *site of Community importance* (SCI) means a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned...

(l) *special area of conservation* (SAC) means a site of Community importance (SCI) designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated..."

8. Article 2 sets out the aim of the Directive which is to contribute towards ensuring biodiversity through the conservation of natural habitats and wild fauna and flora in the European territory of the Member States. Measures taken pursuant to the Directive should be designed to maintain or restore at favourable conservation status natural habitats and species of wild fauna and flora of community interest and should take account of economic, social, cultural requirements and regional and local characteristics. The mechanism whereby the Member States contribute to the conservation of natural habitats is set out in Articles 3 to 11 of the Directive.

Designation of Sites under Natura 2000

9. Article 3 provides for the establishment of a network of Special Areas of Conservation (SACs) under the title "Natura 2000" composed of sites hosting the natural habitat types listed in Annex I and habitat species listed in Annex II of the Directive. Article 3(2) provides that:

"2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1.

3. Where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10."

10. The procedure for the designation of habitats is set out in Article 4. Three steps are required. Firstly, Member States must establish a national list of sites which are important for the conservation of habitat types of flora or fauna. Secondly, the European Commission must establish a list of Sites of Community Importance (SCIs) from these national lists. Thirdly, the Member States will designate the sites on that list as Special Areas of Conservation (SACs) which together form "a coherent European ecological network known as Natura 2000". Article 4 provides:-

1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host... Where appropriate, Member States shall propose adaptation of the list in the light of the results of the surveillance referred to in Article 11.

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. That information shall include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission in accordance with the procedure laid down in Article 21.

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the nine biogeographical regions referred to in Article 1 (c) (iii) and of the whole of the territory referred to in Article 2 (1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5 % of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedures laid down in Article 21.

3. The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4. Once a site of Community importance (SCI) has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation (SAC) as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6 (2), (3) and (4)."

11. If a national list compiled under Article 4(1) fails to mention a site hosting a priority natural habitat type or priority species, the Commission may in exceptional cases if, on the basis of relevant and reliable scientific information, it considers it essential for the maintenance of that priority natural habitat type or the survival of the priority species, enter into a bilateral consultation procedure with the Member State for the purpose of comparing scientific data used by each. Article 5(1) provides for this consultation process but if, on the expiration of the consultation period, the dispute remains unresolved, the Commission, under Article 5(2) shall forward to the Council a proposal relating to the selection of the site as a site of Community importance (SCI) and the Council may then acting unanimously take a decision within three months of the date of referral. Article 5(4) provides that during that period the particular site shall be subject to Article 6(2) protections.

12. Article 6(2) provides that Member States shall take appropriate steps in special areas of conservation (SAC) to avoid the deterioration of natural habitats and the habitats of species as well the disturbance of the species for which the areas have been designated, insofar as such disturbance could be significant in relation to the objectives of the Directive.

13. Further obligations are imposed under Article 6 as follows:-

"1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites."

14. Article 6(2) also provides that the Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats as referred to above.

15. Article 6 (3) provides that:-

"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

16. Article 6 (4) provides that if in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out "for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected." It is obliged to inform the Commission of the compensatory measures adopted.

17. Article 10 obliges Member States to endeavour "where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the management of features of the landscape which are of major importance for wild fauna and flora." Article 11 provides that Member States "shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species."

Alluvial Woodland

18. Amongst the natural habitats of community interest whose conservation requires designation as Special Areas of Conservation (SACs) contained in Annex I are:-

"Forests" which are:-

"(Sub)natural woodland vegetation comprising native species forming forests of tall trees, with typical undergrowth, and meeting the following criteria: rare or residual, and/or hosting species of Community interest" including at, "91EO
*Alluvial Forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*)."

This includes alluvial wet willow/alder (*Alnus glutinosa*) woodland.

19. The applicant claims that a section of alluvial wet willow/alder woodland situate on the western side of the proposed bridge crossing included in the development at chainage 0+520S to 0+620S situate on a property subject to Compulsory Purchase Order Number 133, issued in the course of the development, will be the subject of direct permanent and irreversible destruction notwithstanding that it is an Annex I priority natural habitat. This area was found during the planning process not to constitute alluvial woodland under Annex I, as was a further area of 0.25 ha. An additional area of 0.15 ha was found to constitute alluvial woodland but was not part of the cSAC of the lower River Shannon or a protected "European site" as defined by Part XAB of the Planning and Development Act 2000.

Selection of Sites

20. Annex III of the Directive sets out the criteria for selecting sites eligible for identification as SCIs and designation as SACs at community and national level. Stage 1 A. deals with the assessment at national level and sets out the site assessment criteria for a given natural habitat type in Annex I as follows:-

"(a) Degree of representativity of the natural habitat type on the site.

(b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory.

(c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities.

(d) Global assessment of the value of the site for conservation of the natural habitat type concerned."

21. Under Annex III Member States must classify the sites which they propose to place on the national list as sites eligible for identification as SCIs according to their relative value for the conservation of each natural habitat type in Annex I. It states (*inter alia*):-

" D. That list will show the sites containing the priority natural habitat types and priority species selected by the Member States on the basis of the criteria in A...above."

22. It is only following the adoption by the Commission of a site or sites included on the national list as "sites of community importance (SCIs)" that the Member State must designate the site as a "special area of conservation" (SAC) under Article 4(4).

European Communities (Birds and Habitats) Regulations 2011 S.I. No. 477 of 2011

23. These Regulations transpose the provisions of the Habitats Directive and provide for the preparation of the list to be forwarded to

the Commission under Article 4(1) of the Habitats Directive for consideration for designation as a "candidate site of community importance". They update the European Communities (Natural Habitats) Regulations 1997. Part 3 deals in detail with the preparation of a list of candidate sites of Community importance and its transmission to the Commission following extensive public consultation. Regulations 10 to 13 inclusive set out an extensive procedure whereby notice of the proposed listing is given to a number of public authorities and individuals whose lands may be affected. An opportunity is afforded to raise objections or make submissions in respect of the proposed listing. When a site on the transmitted list is adopted by the Commission under Articles 4(2) or 5(2) of the Habitats Directive, the Minister must designate the site as a "special area of conservation" (SAC). Its designation is then published in Iris Oifigiúil. The protection of designated sites is further regulated and protected under the provisions of Part X and Part XAB of the Planning and Development Act 2000.

Environmental Impact Assessment Directive 2011/92/EU and Parts X and XAB

24. The Environmental Impact Assessment (EIA) Directive applies to the assessment of the environmental effects of public and private projects likely to have an effect on the environment. Under Annex I(7) and Annex II(10)(e), the Directive applies to road developments in respect of which planning consent is required. Member States must take all measures necessary to ensure that before consent is given for projects likely to have a significant effect on the environment because of their nature, size or location, they are subject to an Environmental Impact Assessment (EIA). Article 2 provides that the EIA may be integrated into the existing procedures for the procurement of consent for development projects. Article 3 requires that the EIA shall identify describe and assess in an appropriate manner the direct and indirect effect of a proposal on wild fauna and flora in accordance with the provisions of Articles 4 to 12 (inclusive). These include extensive procedures for public notification and consultation concerning the project. The provisions impose significant obligations on the developer to provide detailed information to the relevant competent authority, in this case An Bord Pleanála.) Article 8 requires that the results of the consultation and other information gathered pursuant to Articles 5, 6 and 7 are to be taken into consideration in the development consent procedure. Article 9 requires that when a decision to grant or refuse consent has been made, the competent authorities must inform and make available to the public the contents of the decision and any conditions attached thereto and how those results have been incorporated or otherwise addressed".

25. Part X of the Planning and Development Act 2000 (as amended) specifically makes the granting of consent for road development by An Bord Pleanála under s.51 of the Roads Act 1993 subject to the requirements of an EIA under s.171A. The board must carry out an EIA when consent for a relevant road development is sought.

26. The applicant for consent must furnish an Environmental Impact Statement (EIS) as was done in this case. If the board determines that the EIS submitted does not adequately describe the direct and indirect effects on the environment of the proposed development, it will require the applicant to furnish such further information as it considers necessary to remedy that defect under s.172 subsection (1D) or "any further information" which it considers necessary to enable it to carry out the EIA under subsection (1E).

27. In carrying out the EIA the Board is obliged under subsection (1G) to consider:

- "(a) the Environmental Impact Statement;
- (b) any further information furnished to the Planning Authority or the Board pursuant subsections (1D) or (1E);
- (c) any submissions or observations validly made in relation to the environmental effects of the proposed development;..."

28. Section 172 subsection (1H) provides:

"In carrying out an Environmental Impact Assessment under this section... the Board... may have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers".

Subsection (1I) provides that if the Board decides to grant consent it may attach such conditions to the grant "as it considers necessary to avoid, reduce and if possible offset the major adverse effects on the environment (if any) of the proposed development."

29. If the Board grants consent it must inform the applicant and public of the decision and make certain information available as set out in subsection (1J) including;

- "(a) the content of the decision and any conditions attached thereto;
- (b) an evaluation of the direct and indirect effects of the proposed development on the matters set out in s.171A;
- (c) having examined any submission or observation validly made,
- (i) the main reasons and considerations on which the decision is based, and
- (ii) the main reasons and considerations for the attachment of conditions including reasons and conditions arising from or relating to submissions or observations made by a member of the public;
- (d) where relevant, a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects;
- (e) any report referred to in subsection (1H);...

30. The applicant claims that the EIA carried out by the Board in this case was deficient and did not comply with the provisions of Article 3 of the Directive or s.171A and 172 of the Planning and Development Act 2000 (as amended).

31. The further implementation of the Directive and the protection of habitats is dealt with, *inter alia*, under Part XAB of the Planning and Development Act 2000 which applies to a "European site". It applies to road developments in respect of which consents are required from An Bord Pleanála which is designated as the competent responsible authority under s. 177S, concerning proposed developments under s. 51 of the Roads Act 1993, as amended. The Board when considering a planning application is obliged to take appropriate steps to avoid the deterioration or disturbance of protected natural habitats in any designated "European site". It is also obliged under s. 177U to carry out a screening and "appropriate assessment" of any application for consent to determine, in view of best scientific knowledge, if it is likely to have a significant effect on a "European site". In carrying out this function the Board may request such information from the applicant as it considers necessary. It "shall determine" that an appropriate assessment of the

proposed development is required "if it cannot be excluded on the basis of objective information that (the) proposed development...will have a significant effect on a European site". Where an appropriate assessment is required, the Board may direct that a "Natura Impact Statement" (NIS) be furnished. This is not required (as in this case) when the application for consent was accompanied by an NIS.

32. The definition of the sites protected under Part XAB is wider than those specifically defined by the Directive. Section 177R provides that:-

"'European site' means –

- (a) a candidate site of community importance,
- (b) a site of community importance,
- (ba) a candidate special area of conservation,
- (c) a special area of conservation,
- (d) a candidate special protection area,
- (e) a special protection area."

This definition includes all sites designated as requiring protection under the provisions of the Habitats Directive (and the jurisprudence of the CJEU) in accordance with the procedures prescribed therein and the domestic Regulations already quoted.

33. Section 177V provides that "an appropriate assessment" shall include a determination by the competent authority under Article 6.3 of the Habitats Directive as to whether or not the proposed development would adversely affect the integrity of the "European site". This assessment must be carried out before consent is given. Section 177V(2) provides that the assessment must take into account the NIS, any supplemental information furnished in relation to any such report or statement, any additional information sought by the authority and furnished by the applicant in relation to the NIS, and any written submissions or observations made in relation to the proposed development. Section 177V(3) provides that consent shall not be given for a proposed development unless it is determined that it "shall not adversely affect the integrity of a European site". Section 177V(4) provides that consent for a proposed development may be given where conditions have been attached or modifications directed because the authority is satisfied to do so "having determined that the proposed development would not adversely affect the integrity of the European site if it is carried out in accordance with the consent and the modifications or conditions attaching thereto".

34. The NIS is defined by s. 177T(b) as "a statement, for the purposes of Article 6 of the Habitats Directive, of the implications of a proposed development on its own or in combination with other plans or projects for one or more than one European site in view of the conservation objectives of the site or sites". It must include a report of a scientific examination of evidence and data carried out by competent persons to identify and classify any implications for one or more "European site(s)" in view of the conservation objectives of the site or sites.

35. The applicant submits that the "appropriate assessment" purportedly carried out by the Board does not comply with the requirements of Article 6 of the Habitats Directive or s.177V of the Planning and Development Act 2000 and consequently, it did not have jurisdiction to grant the consent in the absence of an appropriate assessment made in accordance with law. This submission is linked to the submission that notwithstanding the unlawful failure of Ireland to propose the site in issue for inclusion on a list of proposed SCIs, the site is entitled to the same protective measures under Article 6. It is important to set out a summary of the very detailed and extensive scientific and other evidence submitted and considered during the planning process including the Environmental Impact Statement (EIS) and the Natura Impact Statement (NIS) which formed the basis for the Environmental Impact Assessment (EIA), the "appropriate assessment" and planning decision made by the Board which are the subject of challenge.

Evidence

36. The following is a summary of the relevant evidence adduced concerning the existence and extent of protected alluvial woodland in the area which is the subject matter of the proceedings, and how it was addressed and considered in the course of the planning process. A habitat map of the proposed area of development said to contain areas of alluvial wet willow/alder ash woodland (WN6) which are in issue in these proceedings was exhibited (and is appended to this judgment). It is clear that the existence, nature and extent of areas of alluvial woodland were considered in the two reports submitted to the Board at the time of the initial development application in the Environmental Impact Statement (EIS) and the Natura Impact Statement (NIS).

Environmental Impact Statement (EIS) and the Natura Impact Statement (NIS)

37. The EIS described the distribution of habitats and stated in respect of "wet woodland" that:-

"A plantation of alder (*Alnus glutinosa*) occurs to the east of the R463 opposite Ballyvally Estate. The woodland has some natural regeneration of willow and occasional birch (*Betula pubescens*) and appears to be developing towards wet willow-alder-ash woodland (WN6), which would have been the natural woodland type associated with prevailing conditions and currently existing to the south and further east. The understorey includes abundant briar along with frequent sedges (*Carex* sp.), ferns (*Dryopteris* sp.), opposite-leaved golden saxifrage (*Chrysosplenium oppositifolium*), angelica (*Angelica sylvestris*), horsetail (*Equisetum* sp.), meadowsweet (*Filipendula ulmaria*) and mosses (including *Calliergon cordifolium*). A block of wet woodland (WN6) comprised of alder with some willow occurs on the western side of the River Shannon (chainage 0+520S to 0+620S). This is not within the SAC and does not conform to the Annex I Habitat type Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*. The woodland along the line of the proposed road is heavily infested with cherry laurel (*Prunus laurocerasus*) extending to c12m in height and resultantly has virtually no understorey vegetation. The woodland is separated from the canal by an elevated ridge which supports a tree-line of mature beech, with a small number of isolated alder and willow occurring along the canal bank in association with occasional sycamore and pheasant berry (*Leycesteria formosa*). The woodland extends to the south of the proposed road line where it is not infested by cherry laurel and supports a rich and typical ground flora for wet woodland including sedges, lady fern (*Dryopteris felix-femina*), creeping buttercup (*Ranunculus repens*), marsh bedstraw (*Galium palustre*), forget-me-not (*Myosotis* sp.), etc.

On the eastern side of the Shannon between chainage 0+250S and 0+330S an area of woodland occurs on sloping ground between the R494 and the river. The woodland is ash dominated with frequent alder and willow (WN6) in the lower and

wetter part of the woodland with a fern dominated understorey.

Wet woodland (WN6) also occurs in the narrow fringe along either side of the Kilnastulla River (chainage 2+600 or – 2+630R)."

38. On 4th May, 2012, the Board requested additional information in accordance with s. 51(4) of the Road Act 1993 in relation to the likely effects on the environment of the proposed road development because it was considered that the information provided by the applicant was not sufficiently detailed to support the conclusion reached that the woodland referred to did not comprise Annex 1 habitat:-

"Nine areas of Wet Willow Alder Ash woodland (Ref. WN6 on drawings) are recorded at a number of locations along the proposed route and...the EIS/NIS determine that these areas do not comprise habitat that would come within the scope of Annex I priority alluvial woodland habitat. Full justification for the conclusion that the woodland does not comprise Annex I habitat has not been provided and in this regard the applicant is required to provide botanical and ecological information to support the determination made in relation to the woodland type present."

39. The relevant extract from the response made by the Council on 25th May, 2012, is as follows:-

"9.2 Western side of the Shannon (chainage 0+520S to 0+620S):-

The extent of this Wet Woodland (WN6) in the vicinity of the scheme at CH. 0+520S to 0+620S is shown in Plate 9.1 below. As described within s. 7.2.3 of the EIS this woodland is separated from the canal by an elevated ridge which supports a tree lined mature Beech (*Fagus Sylvatica*) with a small number of isolated Alder (*Alnus Glutinosa*) and Willow (*Salix* sp.) occurring along the canal bank in association with occasional Sycamore (*Acer Pseudoplatanus*) and Pheasant Berry (*Leycesteria Formosa*). The woodland strip effectively corresponds to mixed broad leaf woodland (WDI).

To the west of the bank the ground drops and a block of Wet Woodland extends westwards along the line of the proposed route for approximately 80m to the rear of a garden. In the vicinity of the proposed road the canopy is dominated by Alder with some Willow, but is heavily infested with Cherry Laurel (*Prunus Laurocerasus*) extending to C 12m in height and resultantly has virtually no under storey vegetation (see plate 9.2). Due to the heavily modified structure and composition of the woodland along the line of the proposed route, this woodland does not conform to the Annex I habitat type Alluvial Woodland and is not within the cSAC.

To the south of the proposed road alignment the woodland is not infested by Cherry or Laurel and supports a rich and typical ground flora for wet woodland (see plate 9.3). The canopy is dominated by Alder and there are numerous pools. The ground flora is diverse and includes remote Sedge (*Carex Remota*), Creeping Bent (*Agrostis Stolonifera*), Branched Bur-Reed (*Sparganium Erectum*), Common Reed (*Phragmites Australis*), Ladyfern (*Dryopteris Felix-Femina*), Angelica (*Angelica Sylvestris*), Mint (*Mentha Aquatica*), Creeping Buttercup (*Ranunculus Repens*), Marsh Bed Straw (*Galium Palustre*), Forget-me-Not (*Myosotis* sp.), Nettle (*Urtica Dioica*) and occasional Briar (*Rubus Fruticosus aggr*). While this habitat does not occur on alluvial soils subject to periodic inundation from the river, it is subject to seasonal flooding and is therefore considered to conform to the Annex I priority habitat Alluvial Woodland."

The land to the south of the proposed road alignment is not part of the land take.

40. The NIS examined the effect of the proposed scheme on the lower River Shannon which, at the time, was a candidate Special Area of Conservation (cSAC). The area of wet woodland on the western side of the Shannon at chainage 0+520S and 0+620S was assessed, but it was considered as "not within the SAC and does not conform to the Annex I habitat type alluvial forest with *Alnus Glutinosa* and *Fraxinus Excelsior*". It was concluded that the proposed development would not have any adverse effect on the integrity of any Natura 2000 sites listed.

41. A written submission from Mr. Michael Murphy on behalf of the Department of Arts, Heritage and the Gaeltacht, was furnished at the oral hearing on 9th October, 2012. It stated that there was insufficient information on the likely direct and indirect effects of the road scheme on areas of Annex I primary habitat, namely alluvial forest, beside the cSAC. The area of concern was west of the Shannon and it was unclear how and where the modification would be implemented to protect the habitat within and adjacent to the land take and whether protective and avoidance measures could be achieved.

42. As noted in the EIS the block of alder with some willow occurring on the western side of the Shannon at the designated chainage was not within the cSAC and did not conform to Annex I habitat type alluvial forest. This was confirmed at the oral hearing by Mr. Paul Murphy (the Project Ecologist engaged by the Council) on 10th October, 2012, as part of his response to Mr. Michael Murphy's submission. He stated that the full extent of the wet woodland affected included an area which did not conform to priority habitat in the line of the proposed road and embankment covering an area of 0.25 hectares. The area of woodland which was assumed in part to conform to priority habitat and would be temporarily affected during the construction phase covered 0.15 hectares. That area and a further area of 0.076 hectares would be reinstated following construction, resulting in no effective loss of wet woodland habitat. He outlined in detail the protection and reinstatement strategy that would be followed.

43. Mr. Jervis Goode, of the National Parks and Wildlife Service, together with the notice parties submitted agreed mitigation measures for the protection and reinstatement of the wet woodland at the oral hearing on 10th October. This included the provision of robust fencing, the isolation of the construction site from the adjacent habitats, the salvage of topsoil and the replanting of native locally sourced alder and willow species with ash on elevated ground to the west of the reinstatement area. Annual monitoring and maintenance was recommended for three years post completion. The oral hearing was also informed that the proposed measures for the reinstatement and establishment of alluvial wet woodland had proved successful in a number of other projects throughout the country.

44. An allegation was made that Mr. Paul Murphy could not offer any conclusions in relation to the areas in question because he had never visited them. It was alleged that the lands in question were not the property of a Mr. and Mrs. O'Toole to which he had access but were situated on a neighbour's land to which he could not have had access. The allegation was found to be incorrect. On 12th October, the Board was presented with a submission at the oral hearing by Mr. Murphy entitled "Synopsis of Field Surveys undertaken by Eir ECO Environmental Consultants in relation to the Killaloe by-pass, Shannon Crossing and R494 Improvement" which detailed his site visits.

The Inspector's Report

45. The Inspector's 184 page report was produced following a hearing held between 8th and 18th October, 2012. The inspector sets out in detail the various submissions and reports submitted on behalf of the parties and specifically examined the ecology and impact of the proposal on habitats, including wet alluvial woodland (priority habitat) outside the SAC. The matter was addressed in detail in paras. 9.3.2.3. to 9.3.2.3.16 at pp. 125 to 132 of the report. The Inspector noted that significant time was taken at the hearing in discussing the status and impact of the proposed scheme on the area of wet woodland habitat located on the western side of the river Shannon, but outside the boundary line of the Lower River Shannon cSAC. He referred to the map of the area in issue. He noted:-

"The map submitted by the applicants indicates an area of 0.2 ha along the line of the road that will be permanently lost, an area of 0.15 ha to the south of the alignment that will be temporarily impacted during the construction and reinstated afterwards in line with the schedule submitted and a further area of 0.076 ha located to the south of the bridge that would be created as new habitat. There is an area of 0.22ha located to the south of the proposed CPO line that will not be impacted upon."

The Inspector dealt with each of the areas marked on the map submitted.

46. Evidence was adduced that the 0.25ha area located along the alignment of the proposed bridge including the embankment did not conform to a priority habitat on the basis that it had been significantly inundated with Laurel and other species. As already noted, it was suggested that Mr. Murphy made his assessment without visiting the land and based on observations made from an adjacent site. The Inspector was satisfied on the evidence that the area in issue was on the property visited by Mr. Murphy, that there was no basis to contradict this evidence and that he undertook an assessment of the lands in question such as enabled him to verify that the area did not conform to that of a priority habitat. That is a finding of fact which the Inspector was entitled to make.

47. The Inspector then considered the lands identified as areas of 0.15ha and 0.076ha on the map submitted. Mr. Murphy identified the 0.15ha block at the southern end of the property as conforming to priority habitat and put forward proposals to be followed to ensure this area together with the 0.076ha area on the north west of the strip were reinstated in a satisfactory manner on completion of the construction work. There was no evidence adduced at the hearing contradicting the scientific conclusions reached by Mr. Murphy which the Inspector was happy to adopt.

48. The Inspector noted the measures proposed to ensure the protection and reinstatement of the wet woodland habitat at the southern end of the property and the proposals to compensate any impact on the adjoining habitat. He considered that these proposals were acceptable subject to the works being executed under the supervision of an ecologist and annual monitoring and maintenance to be undertaken in accordance with the proposal. He was satisfied that the site in question was located outside any identified or designated cSAC/SAC. He also noted that the area of wet woodland referred to by the objectors which would be lost as a result of the scheme was degraded by the presence of species which meant that it did not conform with the requirements of a priority habitat.

49. The Inspector concluded that the 0.15ha of wet woodland habitat on the western bank of the river complied with priority habitat but it was not included in a SAC or cSAC.

50. The Inspector noted the case made by the objectors, and the applicant, that the area in issue was not known and identified as a priority habitat and that there was an onus on the relevant authorities to commence the process of designation. However, he did not agree with the submission that such a site had de facto the same protection under the Habitats Directive as a site which has been designated as a SAC or included on the list of such proposed designations.

51. He concluded at para. 9.3.2.3.16:-

"...it is my opinion that the area in question is outside of and separated from any identified cSAC or SAC. The question for the Board is one as to whether the area of wet woodland habitat on the western side of the river is afforded protection under the Habitats Directive and in this I would agree with the interpretation of the applicant (the Council) that this is not the case. In the event that the Board does not agree with this interpretation and considers that the area on the western side of the river is covered by the Directive, I would note the fact that the area directly impacted does not conform to a priority habitat and that the area of priority habitat potentially impacted would be done so on a temporary basis. In terms of the impact of the proposed development on the area of woodland on the western side of the river, the mitigation measures proposed for this area have been discussed and agreed as appropriate by the Development Applications Unit of the Department. Subject to monitoring of the works by an ecologist, I am satisfied that the proposals are acceptable."

It is also clear that in reaching his conclusions the Inspector considered in detail the EIS and NIS concerning Natura 2000 sites. He noted that the main conclusions arising from these assessments were, inter alia, as follows:

"Due to the scale and design of the works, the avoidance measures to be employed and the significant range of mitigation measures proposed, notably with regard to road drainage and mitigation at a construction stage, the scheme can be developed such that there will be no significant impacts affecting the conservation objectives of the cSAC (Lower River Shannon cSAC) in the vicinity of the scheme. The integrity of this and other Natura 2000 sites will not be adversely affected and the proposed development, in itself or in combination with other plans or projects, will not be likely to have a significant effect on a European site, having regard to the conservation objectives of these sites..."

Those areas of sensitive ecological value beyond the designated cSACs and along the route corridor will not be significantly adversely affected by way of long term substantial loss, fragmentation of, or disturbance to habitats or protected species. This includes the area of wet alluvial woodland located on the western banks of the Shannon in the vicinity of the proposed river crossing and it is not considered that the works proposed will result in the long term substantial loss, fragmentation of, or disturbance to this habitat which is located outside of any SAC or cSAC. For these reasons the arguments made by objectors regarding works in this area being contrary to the Habitats Directive are noted but not agreed with."

The Inspector recommended that approval be granted under s. 51 of the Roads Act 1993, as amended, in accordance with the documentation submitted including the EIS and the response to further information requested. He considered that the proposed scheme would not have significant negative environmental effects on the residential, farming and business community in the vicinity. It would not adversely affect the integrity of the lower River Shannon cSAC through which the scheme partially crossed or other Natura 2000 sites in the vicinity. It would not have a significant long term impact on other ecologically important sites along the route or on flora or fauna identified for protection. The approval was recommended subject to the conditions set out at 1- 5 of the report

which included the mitigation measures and commitments set out in the EIS as clarified in a schedule of environmental commitments submitted by the local authority to the oral hearing on 18th October, 2012, to be implemented as part of the proposed development. Condition 3 provided that the works proposed in the wet woodland area on the western side of the Shannon would be overseen by a qualified ecologist in addition to the mitigation measures set out in a schedule.

52. Though this Court is concerned with whether the decision challenged was reached in accordance with law and is not in any sense a *de novo* hearing of the consent application, I am satisfied that, notwithstanding the arguments advanced by the applicant and others, there was ample evidence upon which the Inspector was entitled to rely in reaching his conclusions including those concerning whether the site in issue corresponded to a priority habitat under Annex I and/or was within a cSAC/SAC.

53. It should also be noted that the only European site on which the proposed road development and compulsory purchase could possibly have significant effects was the Lower Shannon River candidate special area of conservation (cSAC). The effect of the proposed development was the subject of a full "appropriate assessment" concerning the potential impact of the development on that area. It was concluded that there would be no significant impact because of (inter alia) the avoidance measures which would be employed and the significant range of mitigation measures proposed. It was concluded that areas of sensitive ecological value beyond the designated cSAC and along the route corridor would not suffer adverse effects by way of long term substantial loss or disturbance to habitats. This included the area of wet alluvial woodland located on the western bank of the Shannon in the vicinity of the proposed river crossing which lay outside any designated cSAC.

54. It is clear from the evidence that the documents and submissions on the planning file, including the objections made, and the inspector's report on the proposed road development, were considered at Board meetings on 26th February and 6th and 11th March, 2013. The Board decided to approve the proposed road development and compulsory purchase. This decision was made at its final meeting and recorded in the Board's direction dated 21st March, 2013. The order recording the approval is dated 25th March, 2013.

Designation of Site as a Special Area of Conservation – Shadow Protection

55. It is important to recall that the process of designation of a site under the Habitats Directive as a special area of conservation (SAC) provides for detailed engagement between the Member States and the Commission. The applicant claims that the State has failed in its obligation to include this site on the national list of proposed candidate sites submitted to the Commission. It is claimed that pending fulfilment by the State of its obligation to do so, the site is entitled to "shadow protection".

56. The procedures for designating special conservations areas (SACs) established under the Directive require the Member States to engage with the Commission. Firstly, a list must be prepared. This is based on scientific data establishing that particular areas described in the Annex exist. The duty lies upon the Member State to compile a national list of candidate sites of community importance (SCIs) on the basis of the criteria set out in Annex III (Stage 1) and the relevant scientific knowledge available. This list does not have to be exhaustive of the sites in existence. In *Commission v. Ireland* (Case C-67/99) 11th September 2001, the CJEU made clear that there was a margin of discretion vested in Member States when selecting sites for inclusion in the list subject to compliance with these conditions:-

(i) the scientific criteria must guide the choice of sites proposed;

(ii) the sites proposed must provide a geographical cover that is homogeneous and representative of the entire territories of each Member State, to ensure "the coherence and balance of the resulting network"; and

(iii) the list must be complete insofar as each Member State must propose a number of sites which will ensure sufficient representation of all the natural and species' habitat types listed in Annexes I and II which exist in its territory.

57. It is then open to the Commission to adopt, in cooperation with the Member State, the sites on the proposed list as sites of community importance (SCIs). Once the Commission has adopted a site on the list as an SCI, a Member State must designate that site as a special area of conservation (SAC). The site, the subject matter of these proceedings, was not included in the national list of proposed sites compiled by Ireland. It is clear, therefore, that the site has never been designated as a candidate SCI, an SCI, a candidate SAC or SAC nor does it qualify for the extensive protection available as a "European site" pursuant to domestic legislation.

58. If the Commission is dissatisfied with a list of proposed SCIs furnished by a Member State, it must initiate "a bilateral consultation procedure" with the Member State under Article 5 of The Habitats Directive. This applies only in exceptional circumstances when the Commission finds that the list fails to mention a priority natural habitat type or species, and if on the basis of "relevant and reliable scientific information", it considers it "to be essential for the maintenance of that priority natural habitat type" or its survival. The consultation is initiated "for the purpose of comparing the scientific data used by each". If no agreement is reached on the site between the Commission and the Member State, the Commission may forward a proposal to the Council relating to the selection of the site and the Council acting unanimously, must make a decision within three months in respect of the site. During that period, the site is subject to the protections of Article 6(2) of the Directive.

59. It is clear, therefore, that not every site must be included in the list. The omission of a site is clearly a matter within the discretion of the Member State exercised in accordance with the provisions of the Directive (Annex III) as interpreted by the CJEU. The Commission has not invoked the consultation process under Article 5 in respect of this or any other alluvial woodland site. The evidence is that Ireland is compliant with its obligations in respect of alluvial woodland sites under Annex I. It is important to stress that the inclusion of a site in the list follows an assessment which establishes both "the relative importance" of the site for the habitat concerned, how representative it is of the relevant habitat, the area of the site covered by it in relation to the total area covered by the natural habitat within the national territory, the degree of conservation of the structure and functions of the natural habitat concerned and its restoration possibilities and a global assessment of the value of the site for conservation of the natural habitat concerned.

60. The Directive and the 2011 Regulations contain extensive provisions governing notification and consultation with designated parties, including the owners of lands which it is proposed to consider for inclusion on the proposed list of SCIs. The court is satisfied that the submission that the applicant could, in the course of the planning process, seek to confer the same protection on lands not designated a "European site", not included on the national list of candidate SCIs and not designated as an SAC is inconsistent with the provisions of the Regulations and the Directive. The consultation and notification process provided acknowledge and respect the rights of landowners and other interested parties. The suggested existence of a satellite process is, in the court's view, contrary to these legal provisions. It postulates an unregulated procedure whereby the protections of the Directive are declared to apply to a site by a planning inspector or the Board which has no lawful authority to do so: that authority is vested solely in the Minister following the elaborate procedures and engagement with the Commission set out in the Directive and the Regulations.

61. The obligations assumed by a Member State following the designation of a site as an SAC are set out in Article 6 of the Directive. Article 6(1) requires the Member State to establish the necessary conservation measures, including appropriate management plans specifically designed for the sites or integrated into other development plans which correspond to the ecological requirements of the natural habitat types in Annex I. Article 6(2) requires Member State to take appropriate steps to avoid, in special areas of conservation, the deterioration of natural habitats and the habitats of species insofar as such disturbance could be significant in relation to the objectives of the Directive. In particular, Article 6(3) requires an "appropriate assessment" to be made in respect of any planning project likely to have a significant impact upon a site.

62. It is clear that the legal protection of the site is triggered under the Directive and CJEU case law, once it is placed on a national list of candidate sites of community importance (SCIs) furnished to the Commission under Article 4(1). A somewhat wider form of protection is available domestically under Part XAB to a site which qualifies as a "European site" under sections 177R and 177S. An Bord Pleanála is the "competent authority" which bears responsibility to ensure the protection of a "European site" within the legislative framework provided, when an application for consent is sought for a road development. It is against the background of this legislative framework that the claim of "shadow protection" is made.

Shadow Protection

63. The applicant contends that sites which host Annex I Priority One Natural Habitats are entitled to "shadow protection" if not yet proposed by Ireland for listing as an SCI or an SAC and that "appropriate protective measures" contemplated in the Directive must be taken in respect of such sites. It is submitted that even though the site in these proceedings has not been designated a "European site" or proposed to the Commission as a SCI, it is entitled to the same protection as that to which a "European site" is entitled until such time as a determination is made as to whether it should be so listed or designated. It is submitted that the protection of the Directive under article 6 is not limited to sites included in the National list or the SCI list but also applies to those sites which should be included but are not. The "shadow protection" must be applied to such sites until an "exhaustive list" is drawn up by the relevant authority and the procedural and substantive requirements of article 4 are satisfied. Consequently, the Board was not entitled to grant consent for a road development which involved the permanent destruction of a site which hosts a primary natural habitat even though it is not a "European site". Furthermore, it is submitted that if an Annex I site is identified during the planning process by a developer or an objector, this should precipitate an administrative process whereby such sites are considered for potential identification and addition to the national list.

64. It is clear from the evidence that the present system for designation of a site as a SAC requires an extensive engagement between the Member State and the Commission pursuant to an agreed administrative process. The national list of European sites is assessed at a bio-geographical regional level by applying agreed criteria in co-operation with the European Topic Centre on Biological Diversity. The criteria which justify inclusion upon the list are agreed following an assessment of each species and habitat type in the Member State and the bio-geographical region. A bio-geographical seminar organised by the European Commission discusses the results of the assessment made. As a Member State reaches an agreed level of site designation for a particular habitat in the course of this process, it is deemed to have reached a sufficient level of designation for that habitat. This achievement is notified to the Commission. Ireland was deemed "sufficient for alluvial forests in accordance with the Natura Code 91 EO" in April, 2010 as evidenced by a letter from the European Commission dated 19th July, 2010. This sets out the draft conclusions of the European Commission concerning the sufficiency of the network of proposed protection set out in the SCI list. Though further correspondence from the Commission indicates its view that there is an insufficiency of sites proposed in respect of other habitat types and species, the habitat type in issue "alluvial forest" has not been the subject of such criticism, though the Commission, at the time of hearing, had yet to issue its final determination.

65. At the inquiry the objectors submitted to the inspector that though the site had not been notified to the Commission in the draft national list, it should now be so assessed and that part of the site which is an Annex I priority natural habitat should now be adopted for inclusion in the list. It was submitted that pending the fulfilment of that obligation to include the site in the list and completion of the process of designation as a cSAC, the site had *de facto* protection. The inspector stated that the most significant feature of the claim was that the area in issue was located outside any identified or designated cSAC. The area that would be permanently lost (0.25 ha) did not conform with the requirements of priority habitat. The inspector was satisfied that the wet woodlands habitat on the western bank of the river did not form part of the area identified as a cSAC and was not located within a Natura 2000 site. He did not agree that this area had *de facto* protection under the Directive. The small area which conformed with priority habitat would only be affected on a temporary basis but would be subject to re-colonisation and mitigation measures. An additional area of land would be developed as a priority habitat. The applicant contends that this approach is fundamentally flawed because the inspector failed to confer the area of alluvial woodland with the same protection as that to which a "European site" is entitled. I am not satisfied that this is so.

66. In *Harrington v. An Bord Pleanála* [2014] IEHC 232, O'Neill J. was invited to address the issue of "shadow protection", but on the facts of the case held that the applicant failed to adduce evidence to support the claim that the site in question was an Annex I priority natural habitat. The learned judge stated:

"43. The making of a bald assertion without any evidence to support it could not be said to give rise to "a scientific doubt" which would require, in the case of a site potentially qualifying as a priority habitat, the respondents to do, by way of enquiry, whatever was necessary to eliminate that doubt. Thus, in my view, the applicant's reliance upon the extensive line of authority open to the court relating to the obligations of public authority, when confronted with a situation of "scientific doubt" relating to the status of either a "European site" or a site in the process of consideration for such status, is misconceived."

No evidence was adduced in that case to support the contention that the site in question was a priority habitat.

67. Though it is accepted that the *Harrington* case did not determine the issue now raised in respect of "shadow protection" reliance is also placed on the decision of Charleton J. in *Sandymount and Merrion Residents Association v. An Bord Pleanála* [2013] IEHC 542. The learned judge considered the question whether "shadow protection" could be applied to a designated site retrospectively despite the fact that a relevant permission in respect of that site has already been given.

68. Charleton J. considered that two propositions had been established by the jurisprudence of the CJEU.

"5.1 ... Firstly, that where a site is notified to the Commission, national authorities are not entitled to undermine the integrity of the site or the protection of flora and fauna for which notification is made, through authorising works which strike against that protection. This principle is applicable whether or not the issue is concerned with priority sites or priority flora and fauna. Secondly, where a site is central to the protection and maintenance of a priority species, and where there is no scientific disagreement between the Commission and the Member State, the procedure in article 5 of

the Directive of bilateral consultation and decision by the Council becomes unnecessary due to the absence of a dispute, and protection of the site of priority natural habitat or priority species will arise and be enforceable for that reason alone. The first principle may be regarded as the application of logic; that no one is entitled to destroy the object for which one proposes legal protection. The second principle may be part of the general maxim that in failing to designate an area or a species which are listed in the annexes to the Directive as requiring priority protection, there can be no reliance on failure to comply with the law."

69. The three cases considered by the learned judge were C-117/03 *Società Italiana Dragaggi SpA and Others v. Ministero delle Infrastrutture e dei Trasporti* [2005] ECR I-167, case C-244/05 *Bund Naturschutz in Bayern eV and Others v. Freistaat Bayern* [2006] ECR I-8445 and case C-103/10 *Commission v. Hellenic Republic* [2012] ECR I-1 147.

70. These cases concern the protection of sites identified by Member States and notified to the Commission during a period prior to their formal designation as SACs or, in the case of *Commission v. Hellenic Republic*, an infringement action taken by the Commission against Greece for a failure to designate a site where there was no dispute between the Member State and the Commission concerning the requirement that it should be so designated.

71. A Member State has an obligation to compile a national list of all sites which host a relevant habitat in accordance with the criteria set out in Annex III and submitted to the Commission (*Commission v. Ireland* case C-67/99). In *Dragaggi* the CJEU rejected the proposition that when a Member State has identified a site as hosting a priority habitat and included it in the list proposed to the Commission under Article 4(1), that site must be considered to be of community importance and therefore subject to the protections of Articles 6(2)(3) and (4) by reason of Article 4(5). However, it was made clear that Member States are required to provide a form of interim protection in respect of sites included on the national list once they have been proposed under Article 4(1) pending the completion of the decision making process. Furthermore, the Commission may determine that a site included in the national list should not be designated as a site of Community Importance. However, the State may not authorise intervention on the site which may give rise to a risk of seriously compromising the ecological characteristics defined by the criteria under which the site was chosen pending determination of its designation (*Bund Naturschutz in Bayern* Case C-244/05 above). These cases are concerned with the protection conferred by the Habitats Directive once a Member State includes a site on its list of proposed SCIs. In Ireland, the statutory protection clearly complies with this jurisprudence in that it extends to a site which qualifies as a "European site".

72. In the course of the designation process under the Directive, if there is a disagreement concerning the scientific evidence concerning a site between the Commission and the Member State, the procedure under article 5(1) for consultation must be invoked. Where no disagreement exists, such a consultation process is unnecessary and the Commission may seek direct enforcement of a Member State's obligations (see *European Commission v. Republic of Cyprus*, case C-340/10).

73. Charleton J. summarised the position as follows:

"6.0 It is clear that the underlying objectives of the Directive must be upheld and that the duty of effective cooperation on Member States is not to be diminished or dissolved through either self serving conduct such as inappropriate development or through ignoring the fundamental objective of seeking out and notifying sites that require conservation to the Commission."

He concluded that the Minister was not guilty of such conduct in the *Sandymount Residents* case and had followed a time-scale and a procedure that was consistent with effective co-operation and did so with the guidance of the Commission. I do not accept that this judgment is authority for the existence of a parallel scheme of "shadow protection" outside the provisions of the statutory framework and the Directive. It is framed on the basis that protection is dependent upon designation of a site as a "European site" pursuant to the regulations and Directive and the jurisprudence of the CJEU.

74. It is clear that Ireland engaged and co-operated with the Commission in accordance with the procedures laid down in the Habitats Directive for the designation of sites under Annex I and in particular those relating to "alluvial forests". The proper procedures have been followed in accordance with the Directive and the Regulations and involved a prolonged consultation process. Having regard to the compilation of the national list of proposed SCIs under article 3 in accordance with the criteria set out in Annex III, the margin of appreciation afforded to Member States and the history of engagement by Ireland with the Commission, I am not satisfied that there is any evidential basis for the submission that Ireland has defaulted in its obligations under the Directive. On the contrary, the evidence is that the Commission is satisfied that the State has advanced a sufficient list of "alluvial woodland" sites relevant to the preservation of the named species for designation as SCIs. I am therefore satisfied that this case cannot be regarded as one in which the State has ignored its obligations under the Directive in respect of Annex I alluvial woodland habitats or that it has failed in its obligation to identify areas suitable for conservation or inclusion on the SCI list for notification to the Commission. It cannot be compared with the facts of *Commission v. Hellenic Republic*, in which the Member State acted in a manner calculated to undermine its own prior legal declaration concerning a priority site. The process of designation engaged in by the State with the Commission has been entirely open and transparent and any breach of its obligations by the State are subject to enforcement procedures by the Commission. That is a matter between the Member State and the Commission and is not the subject of challenge in these proceedings.

75. I am not satisfied, therefore, that the State has failed in its obligation to properly select eligible sites for identification as sites of community importance or that the decisions of the Board in relation to the proposed development, failed to comply with Ireland's obligations under the Directive or the Regulations. I am not satisfied that the Board has any lawful authority to grant or withhold consent for a road development in order to confer "shadow protection" on the site. The site in issue does not attract protection as a "European site" pursuant to the statutory framework or the Directive.

76. I am therefore satisfied that the applicant is not entitled to an order of certiorari on the grounds set out at (e) 1, 2, 3, 4, 9, 12 and 17 or the declaration claimed at (d) (5) that the site in issue and/or part thereof is entitled to "de facto protection" under Council Directive 92/43/EEC on the grounds set out at (iv) 1 and 2. Furthermore, I am not satisfied that there is any factual or legal basis upon which to grant the declaration claimed at (d) (6) on grounds (v) 1 to 3 inclusive that there is any alleged permanent or irreversible loss of habitat within a special area of conservation which necessarily adversely affects the integrity of the site or a SAC.

Environmental Impact Assessment and Appropriate Assessment

77. Grounds 8, 10, 11, 15, 16, 18, 24, 25, 33 and 34 raise various complaints concerning the alleged failure by the first named respondent to carry out an independent environmental impact assessment or appropriate assessment of the development plan under Article 3 of Directive 2011/92/EU and Article 6(3) of the Habitats Directive. Ground 18 alleges that the respondent erred in law by including a condition in its final determination and order that the construction of the proposed road development should be managed in accordance with a construction management plan to be prepared prior to the commencement of development.

78. These grounds appear to be based on the following propositions:-

- (i) The Board failed to conduct its own assessment or evaluation of the habitats contained on the site.
- (ii) It failed to carry out an adequate Environmental Impact Assessment as required by Article 3 and ss. 171A and 172 of the 2000 Act.
- (iii) It failed to carry out an appropriate assessment as a competent authority as to whether the integrity of a "European site" might be adversely affected or an assessment which was capable of being reviewed under ss. 177V and 177AE.
- (iv) It failed to carry out an Environmental Impact Assessment or an appropriate assessment on all of the information before it but chose to rely only upon:-
 - (a) the Environmental Impact Statement (EIS) submitted by the developer; and/or
 - (b) the assessments conducted by the inspector and set out in his report, rather than the Board's own assessment.
- (v) The Board imposed a condition that the construction of the proposed road development shall be managed in accordance with a construction management plan which was to be agreed prior to the commencement of the development.

79. Directive 2011/92/EU provides for the assessment of the effects of certain public projects which are likely to have significant effects on the environment. Article 2 requires that Environmental Impact Assessments should be integrated into existing procedures for consent to projects in the Member States established for that purpose.

80. Article 3 (as quoted earlier) defines the effects of a project that must be identified and assessed

81. The roadway, the subject of this development, is subject to an Environmental Impact Assessment in accordance with Articles 3 and 4 of Directive 2011/92/EU. A developer is obliged under Article 5 and Annex IV to provide detailed information concerning the project. A competent authority may seek further information before giving its opinion in respect of the proposal. In this regard, the information to be provided by the developer under Article 5(3) includes a description of the measures envisaged in order to avoid, reduce or provide a possible remedy for significant adverse effects. An extensive process of consultation with the public and environmental agencies is provided for in Article 6. No issue arises in this case concerning compliance with the procedure outlined in these provisions. Article 8 provides that the results of consultation and the information gathered pursuant to Articles 5 and 6 should be taken into consideration in the development consent procedure. Article 9 provides that when a decision is taken to grant development consent, the competent authority must inform the public in accordance with the appropriate procedures and make available to it detailed information concerning "the content of the decision and any conditions attached thereto". It must also contain "a description where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects".

82. Article 6(3) of the Habitats Directive provides that any plan which is not directly connected with or necessary to the management of a site of community importance or a special area of conservation, but is likely to have a significant effect on it individually or in combination with other plans, shall be subject to an "appropriate assessment" concerning its implication for that site in view of its conservation objectives. This was extended by section 177(V) of the 2000 Act and applies to a "European site" as defined under the Act. A competent national authority may only agree to the plan having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, having obtained the opinion of the general public. This is subject to the provisions of Article 6(4) which provides that if there is a negative assessment of the implications for the site of the plan but in the absence of alternative solutions, it must nevertheless be carried out for "imperative reasons of overriding public interest", Member States must take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. The overriding reality in this case is that the sites in issue are not sites of community interest, or proposed as such, or special areas of conservation: they do not constitute a "European site". It is clear from the documents and evidence submitted to the Board and to the Court that it was ascertained that the proposed development might impinge upon the cSAC of the lower river Shannon. However the sites in issue in this case are outside the curtilage of that cSAC.

83. It is also clear from the documents and evidence submitted in the course of the planning process that a detailed "appropriate assessment" was carried out under Part XAB of the Planning and Development Act 2000 because of this potential impingement. As required under s. 177T(b) the Board received a Natura Impact Statement (NIS) carried out by a competent person and including a report of a scientific examination of the evidence and data to identify and classify the implications for any European sites that might be affected by the proposed development. The Board was obliged to carry out a screening for an appropriate assessment to assess "in view of best scientific knowledge" if the proposed development was likely to have a significant effect on the European site under s. 177V. As already noted under s. 177V, an appropriate assessment under Part XAB must include a determination by the Board under Article 6.3 of the Directive as to whether the proposed development would adversely affect the integrity of the European site. Consent for the proposed development may only be given if the Board has determined that the proposed development will not adversely affect the integrity of the European site. It was satisfied that it would not to the requisite standard of proof.

84. The Board approved the proposed road development "in accordance with documentation, including an Environmental Impact Statement and a Natura Impact Statement" for reasons and considerations which were set out in the decision which had regard *inter alia*, to the following:-

- "(d) the design, layout and alignment of the proposed road development minimising the impact of the proposed road development on the lower River Shannon special area of conservation,
- (e) the range of mitigation measures as set out in the Environmental Impact Statement received by An Bord Pleanála on 7th February, 2012, and the response to additional information received by An Bord Pleanála on 25th May, 2012, and
- (f) the submissions on file and the report of the Inspector who held the oral hearing."

85. The decision also contained the "reasons and considerations" relied upon as follows:-

"Having regard to the nature, scale, design and location of the proposed road development, the Environmental Impact Statement submitted with the application, the submissions on file and the Inspector's assessment of environmental impacts, which is noted and adopted, the Board completed an Environmental Impact Assessment and concluded that the

proposed road development would not be likely to have significant adverse effects on the environment.

Having regard to the nature, scale and design of the proposed road development, the Natura Impact Statement submitted with the application, the submissions on file and the Inspector's assessment, which it noted, the Board completed an appropriate assessment of the impacts of the proposed road development on the lower River Shannon candidate Special Area of Conservation. The Board concluded that the proposed road development, in itself or in combination with other parts of projects, would not adversely affect the integrity of the European site in view of the conservation objectives for that site.

It is considered that, subject to compliance with the conditions set out below, the proposed road development would not have significant negative effects on the farming and business community in the vicinity, would not have a significant negative long term impact on ecologically important sites along the route or on flora and fauna which are identified for protection, would not give rise to risk of pollution, would not have a detrimental impact on archaeological heritage, would be acceptable in terms of its impacts on archaeological heritage, on the character and setting of protected structures and on the amenities of the area and of residential property in the vicinity and would be acceptable in terms of the resulting visual and landscape impacts. The proposed road development would, therefore, be in accordance with the proper planning and sustainable development of the area."

86. The consent was granted subject to eleven conditions. The following conditions are of particular relevance:-

(i) the proposed road development should be carried out in accordance with the plans, drawings and documentation submitted with the application, as amended by the further information submitted to the Board on 25th May, 2012, and at the oral hearing, including the Environmental Impact Statement and Natura Impact Statement and supporting documentation, except as being otherwise required in order to comply with the conditions set out below.

Reason:

In the interest of clarity.

(ii) The proposals, mitigation measures and commitments set out in the Environmental Impact Statement and Natura Impact Statement received by An Bord Pleanála on 7th February, 2012 and in the response to additional information received by An Bord Pleanála received on 25th May, 2012, and as further stated and clarified in the Schedule of Mitigation submitted by the road authority to the oral hearing on 18th October, 2012, shall be implemented as part of the proposed road development.

Reason:

In the interest of clarity and to mitigate the environmental impacts of the proposed road development and to protect the amenities of the area and properties in the vicinity...

(iv) The works proposed in the wet woodland area on the western side of the River Shannon shall be overseen by a qualified ecologist and this shall be additional to the mitigation measures set out at s. 4.1 of the Schedule of Mitigation submitted by the road authority to the oral hearing on 18th October, 2012.

Reason:

In the interest of clarity and to mitigate the environmental effects of the proposed road development...

(xi) The construction of the proposed road development shall be managed in accordance with a construction management plan, which shall be prepared prior to commencement of development. This plan shall provide details of intended construction practice for the proposed road development as set out in the Environmental Impact Statement, including:-

- (a) construction stage method statements for the proposed road development;
- (b) location of the site and materials compound(s) including area(s) identified for the storage of construction refuse;
- (c) location of areas for construction site offices and staff facilities;
- (d) details of site security fencing and hoardings;
- (e) details of onsite car parking facilities for site workers during the course of construction;
- (f) details of the timing and routing of construction traffic...
- (j) details of appropriate mitigation measures for noise, dust and vibration and monitoring of such levels;...
- (k) a record of daily checks that the works are being undertaken in accordance with the construction management plan should be kept for inspection by the road authority.

Reason:

In the interest of amenities, public health and safety.

87. The decision, and the documents relied upon by the Board together with the condition pursuant to which consent was granted were all published in accordance with the legal requirements and I am satisfied that the reasons for the decision, the evidence underpinning those reasons and the conditions attaching to the consent and the reasons for their attachment are manifestly clear from a reading of the decision.

88. The court is satisfied that in carrying out the Environmental Impact Assessment, the Board in this case considered the Environmental Impact Statement, the further information furnished on request, and the submissions and observations made in relation to the environmental effects of the proposed development as stated in the decision. In doing so, the Board noted and adopted the Environmental Impact Assessment and concluded that the proposed road development would not be likely to have significant adverse effects on the environment. I am satisfied that a reading of the EIS and the Inspector's report gives a complete understanding of the Board's decision and the reasons for the relevant findings concerning the effect of the development on the environment. The Inspector's conclusions were reached after an extensive review of the scientific and other information, submissions and evidence furnished to him.

89. The Board also states that it completed an appropriate assessment of the impacts of the proposed road development on the lower river Shannon candidate special area of conservation. It concluded that the proposed development in itself or in combination with other parts of the project would not adversely affect the integrity of the European site in view of the conservation objectives for that site. It considered in detail conditions advanced which it applied to the granting of consent and concluded that the development would not have significant negative effects if those conditions were applied. The conditions attached to the consent are clearly set out as are the reasons for their attachment and are based on what is obviously a comprehensive consideration of all relevant matters.

90. I am satisfied on the evidence that the documents and submissions on the file including the objections made and the Inspector's report on the proposed road development were considered at Board meetings on the 26th February and 6th and 11th March, 2013. The Board decided to approve the proposed road development. Its final meeting is recorded on the 21st March, 2013. The Board's order recording the approval is dated 25th March. There is no evidence of any divergence between the conclusions reached by the Board and those reached by the Inspector in respect of this development. It is therefore appropriate to infer that the reasoning of the Board was the same as the reasoning of the Inspector (per Clarke J. in *Maxol Ltd. v. An Bord Pleanála* unreported High Court 21st December, 2011).

91. The Inspector was appointed under statute by the Board to report to it in respect of the development. The Board is entitled and obliged to consider the Inspector's report and his/her recommendations before making a decision. It is abundantly clear from the Board's decision that it agreed with the Inspector in his conclusions, assessments and recommendations. I am satisfied that the reasons for the Board's conclusions and the attachment of the conditions are clear from a reading of the Board's decision and direction when considered in conjunction with the Inspector's report. There is no disagreement between the Inspector and the Board in respect of any aspect of the appropriate assessment carried out in this case. The Board was entitled to rely upon and adopt in whole or in part the Inspector's report or the evidence offered in reports furnished by other consultants or experts under s. 172(1H) of the Act.

92. The Board, in the quoted extract from the decision, clearly considered the entire files including the EIS, all submissions, including the Inspector's assessment of environmental impacts which "is noted and adopted". The Board completed an Environmental Impact Assessment (EIA) and concluded that the proposed road development would not be likely to have significant adverse effects on the environment. The Board considered the Natura Impact Statement (NIS) submitted with the application and the submissions on file together with the Inspector's assessment which was noted and then proceeded to complete its own "appropriate assessment of the impacts of the proposed road development on the lower river Shannon candidate special area of conservation". This was a significant undertaking by the Board and it concluded that the proposed road development would not adversely affect the integrity of the European site in view of the conservation objectives for that site. The materials considered by the Board were comprehensive and included the extensive hearings carried out by the Inspector and the extremely lengthy and detailed reports submitted in the course of those hearings and contained in the file. It also, of course, included the very detailed and comprehensive report by the Inspector. This incorporated the recommendations on the conditions which ought to be included if consent were to be granted. I do not consider that there is any evidence that the Board "delegated" its decision or the carrying out of the "appropriate assessment" to the Inspector or any other party. On the contrary, it specifically states that it made its own assessment appropriate to the "European site" in question.

93. The applicant in this case bears the onus of establishing that the Board's decision is fundamentally flawed because of an error of law. The Board is a specialist decision maker and in the absence of evidence to the contrary, the court will assume that it has exercised its powers and functions in a lawful and proper manner. If the Board made the decision on the basis of material or evidence before it, which was reasonably capable of supporting its view, the decision must stand and is not to be regarded as unreasonable or irrational.

94. In *Weston Ltd. v. An Bord Pleanála* [2010] IEHC 255, Charleton J. concluded that the applicant bore the burden of establishing that An Bord Pleanála did not consider the question of an Environmental Impact Assessment, thereby rebutting the presumption of validity of the Board's decision but held that the burden of proof had not been fully discharged. Charleton J. stated:-

"The burden of proof of any error of law, or fundamental question of fact, leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on Weston the applicant in these proceedings. Once there is any reasonable basis upon which the planning authority or An Bord Pleanála can make a decision in favour of, or against, a planning application or appeal, or can attach a condition thereto, the court has no jurisdiction to interfere. Furthermore, where, as a colourable device, a reason is chosen for refusing permission which does not give rise to an entitlement to compensation under the legislation, the burden of proving that a decision choosing such an incorrect reason for that improper purpose rests on the applicant. The presence in the planning file, including the report to the manager, or in the case of An Bord Pleanála, the report of the inspector, of any material which could rationally justify a refusal on a non-compensatory ground is sufficient to support the lawfulness of a decision. Of course, in an appropriate case, it might be possible to prove that a decision was made for an improper purpose or that a conclusion or recommendation in an inspector's report was not arrived at in good faith. That burden, however, rests on the applicant for judicial review who seeks to impugn such a decision."

95. The issue in this case is the legality of the decision not its correctness. The Directive and Part XAB of the 2000 Act clearly require that projects likely to have a significant impact or affect on a special area of conservation or under Irish domestic law a "European site" must be the subject of an appropriate assessment. That is what happened in this case. The Board's assessment and decision is an exercise by it of its specialist planning expertise. Absent any other fundamental procedural defect the Board's decision on these matters may only be challengeable on grounds of unreasonableness (which do not arise in this case) (per Hedigan J. in *Sweetman v. An Bord Pleanála* [2010] IEHC 53, *Craig v. An Bord Pleanála* [2013] IEHC 402, and *O'Keefe v. An Bord Pleanála* [1992] 1 I.R. 39).

96. The applicant also claims that the Board failed to comply with the provisions of Article 3 of Directive 2011/92/EU in carrying out the Environmental Impact Assessment in respect of this development and Part X of the 2000 Act. It is submitted that the Board simultaneously delegated the task of carrying out the EIA to the Inspector in purporting to have conducted its own EIA by having regard to the Inspector's assessment and his submissions on file. The applicant claims that if the relevant EIA is that which is

contained in the Board's direction of the 21st March, 2013 and the Board decision, that this fails to comply with the requirements of s. 171A of the Planning and Development Act 2000 and Article 3 of the Directive. In particular it is submitted that the provision in the grant of planning permission which permits the approval of a construction management plan which will include details of the construction phase is contrary to the EIA directive. It is said that condition 11 quoted above, which requires the preparation of a construction management plan was not the subject of proper public participation by way of consultation or public notification prior to its imposition and was prepared and finalised after the Environmental Impact Assessment was carried out by the Board. It is therefore submitted that the attachment of this condition occurred contrary to the process envisaged under Article 3 of the EIA directive because, in deciding to impose their condition, which the Board had not seen and therefore could not have assessed, there was an impermissible delegation of the Board's functions and authority. It was submitted that as a result there would be no further assessment of the detailed environmental mitigation measures and arrangements which was contingent upon agreement between the planning authority and the developer after the granting of consent.

97. I am satisfied that Condition 11 must be read having regard to the reality that the development consent is also conditional on implementing all proposals and mitigation measures and commitments that were proposed, as set out in a detailed Schedule of Mitigation which contains an extensive series of mitigation measures which had already been canvassed publicly in the EIS, the NIS and emerged during the hearings and public consultation before the Inspector. It is clear that Condition 11 can only operate within the limits of Condition 2. The conditions were imposed following a very detailed consideration by experts, the Inspector, and the Board of the various issues that arose in respect of the road development and its potential to affect the areas in issue. Condition 2 requires that all mitigation measures be implemented. This includes those measures and commitments set out in the Environmental Impact Statement and the Natura Impact Statement received by the Board on the 7th February, 2012 and the response to additional information received on the 25th May, 2012 which were further clarified in the Schedule of Mitigation submitted by the Road Authority to the oral hearing on the 18th October. This condition was imposed "in the interest of clarity and to mitigate the environmental effects of the proposed road development and to protect the amenities of the areas and properties in the vicinity". The process by which these conditions were imposed and consent was granted was entirely transparent and open to public scrutiny and comment. Condition 11 was not imposed as an uncanvassed and unanticipated afterthought. It must be viewed and interpreted and can only be understood in the context of the overall planning process whereby the initial reports were supplemented in an information gathering process by further expert reports and additional information which clarified the issues surrounding the project and provided the evidential basis upon which the Board determined that the conditions required to mitigate the environmental effects of the proposed road development were necessary to protect the amenities of the area and properties in the vicinity of the development. The likely significant environmental effects of the proposed developments were fully set out and assessed in the various reports submitted as a result of which the detailed mitigation was proposed (see chapter 12 of the EIS). The Schedule of Mitigation measures runs to 35 pages.

98. I am satisfied that the Board received comprehensive, technical and factual information in the EIS and the NIS supplemented by further information submitted in response to requests made by the Board all of which was subject to extensive exploration at the hearing before the Inspector. It was thereafter subject to extensive and intensive review by the Inspector in his report which was submitted to the Board. The Board then carried out its own Environmental Impact Assessment on this comprehensive body of information and had ample information before it when reaching its decision to grant consent subject to the conditions set out. It identified the appropriate mitigation measures which formed part of the development consent. The imposition of the measures set out in the conditions was within the technical judgment of the Inspector and thereafter An Bord Pleanála when it came to consider all of the information including the Inspector's report. The Inspector's report had plainly identified the main environmental risks presented by the proposed development and the measures taken to reduce those risks and had also advanced conditions whereby those risks might be further reduced. I am satisfied that the imposition of these conditions as part of the consent granted in this case is entirely within the jurisdiction of the Board and was carried out in accordance with its obligations under the Directive and the Act.

Conclusion

99. For all of the above reasons the application is refused.