

THE HIGH COURT

JUDICIAL REVIEW

2017 No. 664 J.R.

BETWEEN

PETER SWEETMAN

APPLICANT

AND

ENVIRONMENTAL PROTECTION AGENCY

RESPONDENT

IRISH WATER

NOTICE PARTY

JUDGMENT of Mr Justice Garrett Simons delivered on 15 February 2019

Abbreviations

CJEU Court of Justice of the European Union

EIA Directive Environmental Impact Assessment Directive

EPA Environmental Protection Agency

WWTP Waste Water Treatment Plant

2007 Regulations Waste Water Discharge (Authorisation) Regulations 2007

OVERVIEW

1. These judicial review proceedings present a net issue of law in respect of the Environmental Protection Agency's jurisdiction to amend a waste water discharge licence. The dispute between the parties centres on whether it was lawful for the EPA to amend the licence by way of a technical amendment, or, alternatively, whether the EPA was required to comply with the procedure for the revision of a licence. Relevantly, only the latter procedure triggers any requirement for public participation.

2. For the reasons set out below, I have concluded that the EPA acted *ultra vires* in purporting to amend the licence by way of a technical amendment.

3. A separate issue arises as to whether the EPA complied with its obligations under the Habitats Directive (as implemented by the Birds and Natural Habitats Regulations 2011 (S.I. No. 477 of 2011)). In circumstances where my findings in respect of the first ground of challenge, namely that in relation to the EPA's jurisdiction under regulation 33 of the Waste Water Discharge (Authorisation) Regulations 2007, are sufficient to dispose of the judicial review proceedings, I do not propose to make any determination in relation to the Habitats Directive issue. I set out my rationale for this approach at paragraph 90 below.

FACTUAL BACKGROUND

4. These proceedings concern the regulation of the discharge of waste water from the combined sewer network of Youghal, County Cork.

5. The Waste Water Discharge (Authorisation) Regulations 2007 (S.I. No. 684 of 2007) ("*the 2007 Regulations*") obliged local authorities to apply for a waste water discharge licence. This obligation extended to existing discharges, i.e. the 2007 Regulations were not confined to new establishments. The prescribed deadline for the making of an application in the case of agglomerations, such as Youghal, with a population equivalent of between 2,001 and 10,000 was 22 September 2008. It appears from regulation 5 of the 2007 Regulations that once a local authority had made an application prior to the prescribed deadline, then the authority was entitled to continue to discharge waste water pending the determination of the licence application.

6. Cork County Council (Southern Division) applied for a waste water discharge licence in respect of Youghal in or about 22 September 2008. At the time of the making of the application, there was no waste water treatment plant ("*WWTP*") serving the town's population. There was, however, a proposal to develop a new WWTP at Mudlands, immediately north of Youghal's town centre. The development of the WWTP required a number of other development consents, including certification pursuant to article 123 of the Local Government (Planning & Development) Regulations 1994. This certificate issued in March 2002. An environmental impact statement ("EIS") had been submitted to An Bord Pleanála as part of the planning certification process. A copy of the EIS was subsequently furnished to the EPA in 2008 in accordance with regulation 17 of the 2007 Regulations.

7. (The provisions of the 2007 Regulations in respect of environmental impact assessment have since been amended by the Waste Water Discharge (Authorisation) (Environmental Impact Assessment) Regulations 2016 (S.I. No. 652 of 2016) in order to comply with the judgment of the CJEU in Case C 50/09 *Commission v. Ireland*).

8. The licence application was subject to a Stage 2 appropriate assessment for the purposes of the Habitats Directive. The developer submitted a document entitled "Appropriate Assessment under Article 6(3) of the 'Habitats Directive'" ("*the 2011 AA report*"). It appears that the AA report may have been revised in November 2011 following a request for further information pursuant to regulation 18 of the 2007 Regulations. See §1.2 of the report.

(i) Waste Water Treatment Plant

9. One of the principal issues in the proceedings concerns the timing of the provision of the waste water treatment plant ("*WWTP*"). When the licence application was made in 2008, the intention was that the WWTP would be completed by 31 December 2015. In the event, the WWTP was not, in fact, completed and operational until early December 2017. The current status of the WWTP is explained in detail in the affidavit of Mr Paul Fallon filed on behalf of Irish Water on 25 April 2018. See paragraph 34 below.

10. As discussed presently, one of the arguments advanced on behalf of the EPA is to the effect that the purpose of the 2012 licence was to authorise discharges subject to certain emission limit values, and that there was no express requirement to cease the discharge of untreated water as of 31 December 2015.

11. The following passages from the EPA's inspector's report of 17 May 2012 are relevant to the appraisal of this argument.

12. The proposed WWTP was addressed as follows in the inspector's report (at page 8 of 19).

"7. Discharges where no treatment or insufficient treatment is in place

As there is currently no municipal WWTP in Youghal, the principal requirement is to eliminate the untreated waste water discharges to the receiving transitional/coastal waters and to provide a WWTP that treats the waste waters to a standard that complies with National and EU legislation. A WWTP and network upgrade works are required by 31st December 2015. Condition 3.1 requires that, where discharges are required to comply with emission limits by a specified date, the licensee shall, prior to this date; take measures to ensure that environmental pollution is not caused as a result of the discharges.

The overall aim under the Water Framework Directive is for waters to achieve 'Good' water quality status by a specified date. The River Blackwater M Estuary/Youghal Harbour is at 'Moderate' status and has the objective to 'restore by 2021' to 'Good' status. The planned improvement works in the Youghal agglomeration, as set out in Section 2 of this report, will contribute significantly to achieving this aim."

13. The requirement for the WWTP is also addressed as part of the discussion of the Urban Waste Water Treatment Directive, at page 9 of 19 of the inspector's report, as follows.

"9.5 Urban Waste Water Treatment Directive [91/271/EEC]

Youghal does not comply with the requirements of the Urban Waste Water Treatment (UWWT) Directive in terms of the level of treatment provided, i.e, there is currently no waste water treatment and the p.e. of the agglomeration is >2,000. The UWWT Directive required the Water Services Authority to provide for secondary treatment or an equivalent treatment by 31st December 2005 in respect of the Youghal agglomeration. The RL, as drafted, has regard to the requirements of the UWWT Directive and requires the licensee to provide a WWTP in the Youghal agglomeration by 31st December 2015. Monitoring of the primary discharge from the new WWTP is specified in the RL in accordance with requirements of the UWWT Directive, i.e., monthly."

(ii) Primary discharge point

14. As of the date of the making of the application in 2008, untreated waste water was being discharged directly into the estuary from a number of points. It was proposed that once the WWTP was completed, there would then be a new primary discharge point to be located at Ferry Point (referred to as "SW001").

15. It should be noted that, in addition to primary discharge points, the discharge of waste water also requires that there be storm water overflows and emergency overflows. It was intended that these would also be subject to rationalisation and reorganisation following the completion of the WWTP, i.e. discharges from certain points were to cease, and other points were to change their status.

16. As discussed presently, one of the principal changes authorised by the technical amendment in 2017 was to allow a different discharge point to be used as the primary discharge point from the newly commissioned WWTP on a temporary basis. It is necessary, therefore, to examine how the (original) primary discharge point at Ferry Point came to be chosen at the time of the grant of the licence in 2012.

17. The choice of the location of the proposed new primary outfall at Ferry Point is explained as follows in the 2001 EIS.

"2.4.1 Recommended Scheme option

It is recommended that the wastewater treatment works be located in the Mudlands to the north of the town. Secondary treatment is proposed with nutrient reduction for nitrogen only as nitrogen is assumed to be the limiting nutrient with a discharge to the estuary at Ferry Point. Provision will be made for phosphorus removal should it be required at a future date if studies indicate that it would be beneficial. This option is considered to be the most environmentally and economically suitable location for the proposed works and outfall discharge location. Figure 2.3 indicates the WWTP site location and outfall discharge location.

2.4.2 Estuarine discharge standards

The estuarine discharge would be located in the vicinity of Ferry Point. There is a large trench in the area of Ferry Point and extends for some distance down stream. This is likely to be as a result of the narrowing of the estuary due to the spit at Ferry Point. Discharging to this location would provide significant volumes of water to dilute the effluent, even at low tide, and due to increased currents at this location would provide good mixing and dispersion in the receiving waters. The recommended launching point and discharge locations are selected to minimise disruption to activities along the quays and are sufficiently remote from public areas. As of the date of the application for the licence, it was anticipated that the new WWTP and network upgrade would be completed on or before 31 December 2015."

18. The 2011 AA report states as follows at §3.8.

"3.8 Currently, sewage is discharged untreated into Youghal Harbour from a number of locations. Following completion of works, effluent will be treated effectively prior to discharge at a single subtidal outfall likely to be located opposite Ferry Point. Thus, the proposed WWTP will reduce emissions into the Natura 2000 sites."

19. The 2012 licence was structured in such a way as to regulate the position both before and after the completion of the proposed WWTP. The position is set out as follows in the "Introduction" to the 2012 licence.

"This introduction is not part of the licence and does not purport to be a legal interpretation of the licence.

This licence relates to the Youghal agglomeration. Waste water is collected in a predominantly combined sewer network. There is no waste water treatment plant (WWTP) servicing the agglomeration's 12,070 population equivalent (p.e.). This licence relates to the maximum design capacity of a proposed new WWTP, i.e., 16,000 p.e., which will be located at Mudlands, immediately north of the Youghal town centre.

There are ten discharges from the waste water works: the current primary discharge at Dunn's Park (SW000), two secondary discharges (located at Paxe's Lane and Foxhole), six storm water overflows (SWOs) and one emergency overflow which may operate in the event of prolonged pump failure. The Blackwater Estuary/Youghal Harbour is the receiving water for: (i) the primary discharge; (ii) two secondary discharges; and (iii) three SWOs.

Following the development of a WWTP in Youghal and waste water network upgrade, there will be: a new primary discharge point (SW001); no secondary discharges; three SWOs; and four emergency overflows. The discharge from the Youghal WWTP will be pumped 280 metres north east of the plant to the primary discharge point (SW001) located adjacent to Ferry Point in the Blackwater Estuary Lower.

Upgrade works for the Youghal agglomeration (comprising of a WWTP and sewer network upgrade) were included within the 2010-2012 Water Services Investment Programme as 'Contracts to start 2010-2012'. These upgrade works are due to be completed by 31st December 2015.

The licence sets out in detail the conditions under which Cork County Council (Southern Division) will control and manage the waste water discharges from the agglomeration covered by this licence.

The licence requires appropriate remedial action, within specified timeframes, to be undertaken in order to address each of the discharge locations within the agglomeration. This remedial action will ensure that appropriate protection is afforded to the receiving water environment.

The legislation governing this licence relates specifically to, and is restricted to, the regulation and control of waste water discharges from the agglomeration. Therefore any odour or noise issue that may be associated with the waste water works including the treatment plant cannot be addressed by this licence."

20. Clause 3 of the 2012 licence provides as follows.

"3.1 Where discharges from the waste water works are required to comply with Emission Limit Values by a date specified in Schedule A: Discharges, of this licence, the Water Services Authority shall, prior to this date, take such measures as are necessary to ensure that environmental pollution is not caused as a result of the discharges.

3.2 No discharges from the waste water works is permitted save under and in accordance with this licence.

3.3 No specified discharge from the waste water works shall exceed the emission limit values set out in Schedule A: Discharges, of this licence, subject to the requirements of Condition 2 above.

3.4 The Water Services Authority shall take such measures as are necessary to ensure that no deterioration in the quality of the receiving waters shall occur as a result of the discharge.

3.5 There shall be no discharge from the discharge points specified in Schedule A.3: Discharges to be Discontinued, of this licence, from the dates specified therein."

21. Schedule A of the 2012 licence sets out the requirements in respect of discharges. The structure of the schedule of the licence reflects the expectation that the new WWTP would be completed on or before 31 December 2015. Thus, for example, the primary waste water discharge point is initially to be at Dunn's Park (SW000) until 31 December 2015 or until completion of the proposed WWTP (whichever is sooner). The new primary discharge point is to be at Ferry Point (SW001).

22. A similar rationalisation of the secondary waste water discharge points is provided for under Schedule A.2. Schedule A.3 sets out a table indicating the discharges to be discontinued.

23. The 2012 licence required that the WWTP be completed by 31 December 2015. This is provided for under §5.4 of the 2012 licence as follows.

"5.4 The licensee shall complete the improvements as set out in Schedule C: Specified Improvement Programme, of this licence, by 31st December 2015 in order to ensure compliance with the emission limit values as set out in Schedule A: Discharges, of this licence."

24. Schedule C.1 "Improvement programme for primary discharge" identifies the following improvements as the first item.

"New waste water treatment plant (with the nitrification) and ancillary works. A completion date of 31 December 2015 is specified."

2017 APPLICATION FOR THE TECHNICAL AMENDMENT

25. By way of letter dated 28 February 2017, Irish Water applied to the EPA for a technical amendment to the 2012 licence.

26. The rationale for the proposed technical amendment is summarised as follows in the said letter.

"Currently there is no wastewater treatment plant servicing the Youghal agglomeration and wastewater is discharged to the lower Blackwater Estuary via three main outfalls. (SW000, SW002 and SW003). A new wastewater treatment plant is due to be commissioned and operational by the 30th November 2017. The construction of the proposed primary discharge

outfall at 210852E, 078125N (SW001) has been delayed due to legal issues. Irish Water is therefore applying to the Agency to seek authorisation for the discharge of treated wastewater via the existing discharge point SW000 in order to permit the operation of the new WwTP and cease discharge of untreated wastewater.

Irish Water plan to construct and make operational the proposed primary discharge point SW001 once the legal issues are concluded.”

27. The application also sought authorisation to extend the long stop dates by which (i) the secondary discharges (SW002 and SW003), and (ii) the storm water overflows (SW007, SW008, SW009 and SW010) were to cease.

28. The application was successful, and the technical amendment was issued under the seal of the EPA on 22 May 2017. This is the decision impugned in these judicial review proceedings.

29. The reasons for granting the technical amendment are set out as follows.

“Reasons for Decision

The Environmental Protection Agency (the Agency) is satisfied, on the basis of the information available, that subject to compliance with the conditions of Licence Reg. No. D0139-01 granted on the 13 June 2012, as well as any amendments noted herein any discharge from the activity will comply with and not contravene any of the requirements of Regulation 6(3) of the Waste Water Discharge (Authorisation) Regulations, 2007, as amended.

A screening for Appropriate Assessment was undertaken to assess, in view of best scientific knowledge and the conservation objectives of the site, if the activity, individually or in combination with other plans or projects is likely to have a significant effect on any European Site. In this context, particular attention was paid to the European Site(s) at Blackwater River (Cork / Waterford) SAC and Blackwater Estuary SPA.

The activity is not directly connected with or necessary to the management of any European Site and the Agency considered, for the reasons set out below, that it can be excluded, on the basis of objective information, that the activity, individually or in combination with other plans or projects, will have a significant effect on any European Site and accordingly determined that an Appropriate Assessment of the activity was not required.

This determination is based on the fact that updated water quality modelling confirms that the relocation of the discharge point to SW000 will not result in deterioration of water quality in the estuary.”

30. The two principal effects of the technical amendment were as follows. First, it allowed for a continuation—until 30 November 2017—of what was to have been the 31 December 2015 position. Relevantly, this involved an amendment to Schedule C.1 of the 2012 licence, which, it will be recalled, had specified a completion date of 31 December 2015 for the new waste water treatment plant (with the nitrification) and ancillary works. One consequence of the amendment, therefore, was that Irish Water was authorised to continue the discharge of *untreated* waste water into the estuary for an extended period of almost two years. The technical amendment did not alter the relevant emission limit values applicable.

31. The second principal effect of the amendment is that the use of SW000 as the primary outfall would continue on a *temporary* basis until the construction and commissioning of the new outfall pipe SW001.

32. The proposed change in respect of the use of a temporary primary outfall is set out as follows in the 2017 AA screening report submitted as part of the application for the technical amendment.

“Project description

The Project under consideration in this Appropriate Assessment Screening is the relocation of the primary discharge point from the proposed Ferry Point outfall (SW001) to Dunn’s Park outfall (SW000).

The Ferry Point outfall is currently listed as the primary discharge point in the Waste Water Discharge Licence for Youghal. While the WwTP is under construction, the construction of the outfall at Ferry Point (SW001), which was due to operate from 31/12/2015, has been delayed due to a legal case. In order to ensure that the WwTP can start operating once construction is complete, it will be necessary to use one of the existing discharge points on an interim basis to discharge the treated effluent. Due to the location of the network, the only option is to use the existing Dunn’s Park outfall (SW000) to discharge the treated effluent. Currently, untreated effluent from the agglomeration is discharged primarily from the Dunn’s Park and Paxe’s Lane (SW002) outfalls, with 60% through the former and 40% through the latter. It is anticipated that once the legal case is concluded, that the proposed Ferry Point discharge point will be constructed and used as the primary discharge point (for 100% of the treated effluent) as planned.

In order to inform this Screening for Appropriate Assessment, revised water quality modelling was undertaken to determine the implications for water quality of discharging 100% of treated effluent from the Dunn’s Park outfall relative to the existing scenario, and the proposed Ferry Point outfall (SW001 in current licence).”

33. It is acknowledged in the 2017 AA screening report (at page 18) that the optimal discharge point is the proposed discharge point at Ferry Point.

“The relevant habitats have maintained favourable conservation status despite untreated waste being discharged into the estuary. The current proposal, which involves the use of one of the current outfalls to discharge highly-treated effluent, is therefore considered to have no potential to result in adverse effects to the conservation status of these habitats. While it is acknowledged that the optimal discharge point is the proposed discharge point at Ferry Point (SW001), it has been demonstrated through updated modelling that discharging the treated effluent at Dunn’s Park outfall (SW000) will not cause any deterioration in water quality in the estuary relative to the proposed discharge point. This further strengthens the conclusion that the conservation objectives of the relevant habitats will be maintained.

Considering the objective information provided above, it is concluded that the discharge is not likely to significantly affect the qualifying interests of the River Blackwater (Cork/Waterford) SAC or the Blackwater Estuary SPA.”

CURRENT STATUS OF WWTP

34. The current status of the WWTP is explained as follows in an affidavit filed by Mr Paul Fallon on behalf of Irish Water on 25 April 2018.

3. The [EPA] correctly states that the Youghal Waste Water Treatment Plant ('Youghal WWTP') commenced operation on or about 8 December 2017. However, due to a fault with a rising main pipe, the Paxe's Lane catchment was only connected to the Youghal WWTP on 17 January 2018. The issue with the rising main pipeline was referred to in the letter of 8 December 2017 from Irish Water to the [EPA], exhibited at Tab 20 of the Exhibit 'YE1' to the affidavit of Yvonne English, sworn on 4 January 2018.

4. As of 17 January 2018, the Paxe's Lane catchment, as connected to the Youghal WWTP, ceased to discharge untreated wastewater via SW002. However, there are still 4no. houses that are connected to an existing public sewer that continue to discharge untreated wastewater via SW002. These 4no. houses are not connected to the Youghal WWTP. This was discovered during the course of recent commissioning works for the Youghal WWTP and associated sewerage network. The Agency have been advised of this issue by Irish Water on 23 April 2018."

35. The Applicant makes no complaint in relation to the four houses referred to above. The position, therefore, is that as of the date of the hearing of these proceedings in the last week of January 2019, the requirement to provide a WWTP had (belatedly) been substantially complied with. The issue in relation to the temporary primary discharge point remains a live issue in the proceedings.

EPA GUIDANCE NOTE

36. It is necessary to refer briefly to a guidance note issued by the EPA in September 2016. The guidance note is entitled "EPA Guidance for Irish Water on Requests for Alterations to a Waste Water Discharge Licence or Certificate of Authorisation". Insofar as relevant to these proceedings, the guidance suggests that a technical/clerical amendment may be appropriate in the following circumstances. These take the form of a series of questions, with a positive answer indicating that a technical amendment may be appropriate.

"As per Regulation 33(1) of Waste Water Discharge (Authorisation) Regulations 2007 as amended the following:

- Correct any clerical error therein (typographical error) (i.e. *Clerical amendment*)?
- Facilitate the operation of the WWDL/CoA and the making of the amendment does not result in the relevant environmental requirements ceasing to be satisfied?
- Facilitate the doing of anything pursuant to a condition attached to the WWDL/CoA where the doing of that thing may reasonably be regarded as having been contemplated by the terms of the condition or the terms of the WWDL/CoA taken as a whole but which was not expressly provided for in the condition, i.e., allows matters in the WWDL/CoA to be clarified to the extent that no greater or lesser obligation is placed on Irish Water than was placed upon Irish Water by the original WWDL/CoA, but the matter at issue is more easily understood (i.e., technical amendment)?"

37. The Applicant appears to make reference to the existence of this guidance note to suggest that the judicial review proceedings have a wider relevance. This suggestion seems to be made in anticipation of an argument that the proceedings may be moot now that the WWPT has been completed and—save for the four houses referred to earlier—is fully operational.

WASTE WATER DISCHARGE (AUTHORISATION) REGULATIONS

38. The dispute between the parties centres on the fact that there are, in principle at least, two procedural routes by which a licensee might seek to modify—to use a neutral term—the conditions of an existing licence. First, there is provision made under regulation 14 whereby a licensee can apply to the EPA to revise its licence. Secondly, provision is made under regulation 33 whereby a licensee can apply for a clerical or technical amendment to a licence. One of the principal distinctions between the two procedures is that an application for a clerical or technical amendment is not subject to public participation or consultation with prescribed bodies. It seems, however, that an application for a clerical or technical amendment is subject to the possibility of screening for the purposes of the Habitats Directive. Certainly, on the facts of this case, a screening exercise was carried out and a determination is recorded as part of the impugned decision of May 2017.

39. The resolution of the dispute between the parties will require careful consideration of the provisions of regulation 33. Before turning to that task, however, it is necessary to refer briefly to a number of other provisions of the 2007 Regulations which were relied upon by the Applicant in argument.

40. One of the purposes of the Waste Water Discharge (Authorisation) Regulations is to give effect to certain provisions of the Water Framework Directive. See regulation 2(2) as follows.

"(2) The Regulations have the purpose of giving effect, in relation to discharges, losses and emissions of pollutants from waste water works, to the obligation under Article 11(3)(g) of the Water Framework Directive requiring prior regulation of point source discharges liable to cause pollution.

41. To this end, the 2007 Regulations introduced a requirement for local authorities to apply for a waste water discharge licence. As noted above, the deadline for the making of an application in the case of a town the size of Youghal was 22 September 2008.

42. Counsel for the Applicant, Mr James Devlin, SC, placed some emphasis on the EPA's jurisdiction to review a licence. Mr Devlin noted that a licensee can apply for a review of a licence at any time. Moreover, the EPA is required to review a licence at least every six years, but may do so earlier in other circumstances. In particular, the EPA can review a licence where it has reason to believe that the licensee is not in compliance with one or more conditions attaching to the licence.

43. The jurisdiction to review is provide for under regulation 14 as follows.

14. (1) The Agency shall review a licence—

(a) at a time not exceeding 6 years from the date on which the licence or revised licence was granted, or

(b) upon an application in that behalf being made by the licensee.

(2) Notwithstanding paragraph (1), the Agency may review a licence—

(a) if any of the grounds specified in paragraph (6) arise,

(b) with the consent of the licensee, or

(c) at any time not less than 3 years from the date on which the licence or revised licence was granted.

[...]

(6) The grounds referred to in paragraph (2)(a) are—

(a) there has been a material change in the content or extent of the discharge to which the licence relates or in the location in which the said discharge takes place,

(b) there has been a material change, which could not reasonably have been foreseen when the licence was granted, in relation to the receiving waters or in the condition of the environment in the area in which the discharge to which the licence relates takes place,

(c) the Agency has reason to believe that the licensee is not in compliance with one or more conditions attaching to the licence,

(d) evidence, which was not available when the licence was granted and which would have materially affected the decision of the Agency to grant the licence subject to the conditions to which it was granted, has become available, or

(e) new standards or requirements relating to the discharge to which the licence relates or to the content or extent of any discharge concerned, or its effects on the environment, are prescribed under a provision of any enactment or a Community Act.”

44. The type of conditions which can be attached to a licence are set out as follows at regulation 29.

“Conditions attaching to licences, including those necessary to give effect to certain provisions of Community Acts

29.(1) The Agency shall attach to any licence or revised licence that may be granted by it such conditions as are, in the opinion of the Agency, necessary to give effect to the requirements of existing environmental legislation in the field of water policy.

(2) In particular, conditions attached to a licence or revised licence shall—

(a) specify the emission limits and, where appropriate, controls that must not be exceeded in the case of pollutants discharged,

(b) contribute to the attainment of any environmental quality objectives for the time being in force for the receiving waters to which the discharge is made and not be inconsistent with any other environmental quality standards prescribed in regulations for the purpose of giving effect to the requirements of the Dangerous Substances Directive or the Water Framework Directive and Daughter Directives for the time being in force,

(c) be such as not to allow any deterioration to occur in the status of the waters receiving the discharge concerned,

(d) be consistent with the requirements imposed by the Directives referred to in Regulation 2(3) and, in particular, ensure that the discharge concerned will not adversely affect the integrity of a European site,

(e) require, where necessary, the undertaking of specified works within specified periods, and

(f) stipulate the monitoring requirements applying to the discharge or each of the discharges that must be met by the licensee in order to verify, to the satisfaction of the Agency, compliance with the terms of the licence concerned.

(3) A licensee who fails to comply with any condition attaching to a licence or revised licence granted by the Agency commits an offence.

(4) The Agency shall take all such steps as are open to it to ensure compliance with all conditions attaching to a licence or revised licence granted by it, including initiating prosecution proceedings for the offence of contravening paragraph (3).”

45. As appears, licence conditions may specify “*emission limits*”, and may require the undertaking of specified works within specified periods. On the facts of the present case, the 2012 licence has both of these types of condition: (i) emission limit values are set under Schedule A; and (ii) specified works, including relevantly the WWTP, are to be undertaken within specified periods in accordance with §5.4 and Schedule C.1.

46. As discussed presently, Mr Devlin, SC attaches particular importance to subparagraphs (3) and (4) of regulation 29 above in the

context of his analysis of regulation 33.

REGULATION 33 / TECHNICAL AMENDMENT

47. Regulation 33 provides as follows.

“Clerical or technical amendments to licences and certificates

33. (1) The Agency may amend a licence or certificate or revised licence or revised certificate for the purposes of—

(a) correcting any clerical error therein,

(b) facilitating the doing of any thing pursuant to a condition attached to the licence or certificate where the doing of that thing may reasonably be regarded as having been contemplated by the terms of the condition or the terms of the licence or certificate taken as a whole but which was not expressly provided for in the condition, or

(c) otherwise facilitating the operation of the licence or certificate where the making of the amendment does not result in the relevant environmental requirements ceasing to be satisfied.

(2) The Agency shall, where appropriate, consult with the licensee or certificate holder before amending a licence or certificate or revised licence or revised certificate under paragraph (1).”

48. There are strong similarities between regulation 33 of the 2007 Regulations and section 146A of the PDA 2000 as inserted by the Planning and Development (Strategic Infrastructure) Act 2006 as follows.

“146A. —

(1) Subject to subsection (2) —

(a) a planning authority or the Board, as may be appropriate, may amend a planning permission granted by it, or

(b) the Board may amend any decision made by it in performance of a function under or transferred by this Act or under any other enactment,

for the purposes of —

(i) correcting any clerical error therein,

(ii) facilitating the doing of any thing pursuant to the permission or decision where the doing of that thing may reasonably be regarded as having been contemplated by a particular provision of the permission or decision or the terms of the permission or decision taken as a whole but which was not expressly provided for in the permission or decision, or

(iii) otherwise facilitating the operation of the permission or decision.

(2) A planning authority or the Board shall not exercise the powers under subsection (1) if to do so would, in its opinion, result in a material alteration of the terms of the development, the subject of the permission or decision concerned.

(3) A planning authority or the Board, before it decides whether to exercise the powers under subsection (1) in a particular case, may invite submissions in relation to the matter to be made to it by any person who made submissions or observations to the planning authority or the Board in relation to the permission or other matter concerned, and shall have regard to any submissions made to it on foot of that invitation.

(4) In this section ‘term’ includes a condition.”

49. Mr Devlin, SC also referred me to a commentary on the equivalent provision under the Waste Management Act 1996 (as amended) in Scannell, *Environmental and Land Use Law* (Round Hall Press, 2005), at §8–251. Again, as in the case of regulation 33 and section 146A of the PDA 2000 (above), there are qualifying words which constrain the decision-maker’s jurisdiction to make a technical amendment. Interestingly, the Waste Management Act 1996 requires that the amendment not result in the “*relevant requirements of section 40(4) ceasing to be satisfied*”, i.e. the Waste Management Act 1996 forges a direct link between the power of amendment and the statutory criteria governing a decision to grant a waste management licence. As discussed presently, the fact that there is no such organic link under the 2007 Regulations is significant.

SUBMISSIONS OF THE PARTIES ON REGULATION 33

50. On behalf of the Applicant, Mr Devlin, SC submits that an amendment which seeks to authorise an ongoing *breach* of a licence cannot be said to be *facilitating* the operation of the licence. In this regard, it will be recalled that the licence conditions required *inter alia* that (i) the WWTP be completed by 31 December 2015, and (ii) the discharges from certain points cease as of 31 December 2015. The licensee complied with neither of these deadlines, and had been in breach of the licence conditions for more than a year before it applied for the technical amendment in February 2017. Counsel cites regulation 29(3) which provides that a failure to comply with any condition attaching to a licence is an offence, and regulation 29(4) which imposes a duty on the EPA to take all such steps as are open to it to ensure compliance with all conditions attaching to a licence. Counsel also attaches some significance to the use of the *present* tense in the phrase “*ceasing to be satisfied*”. This is said to indicate that a licensee must still be in compliance with the “*relevant environmental requirements*” as of the date of the application for a technical amendment.

51. On behalf of the EPA, Ms Nuala Butler, SC, submits that the “*relevant environmental standards*” are the standards that are set either (i) in the licence itself, or (ii) in legislation with which the discharges must comply. They are objectively defined measurable standards. In this case, these are reflected in the emission limit values in the licence, which in turn reflect the legislation. More specifically, the emission limit values set out in Schedule A.1 and A.2 of the 2012 licence reflect those prescribed under the Second Schedule, Part 1 of the Urban Waste Water Treatment Regulations 2001 (S.I. No. 254 of 2001). On this interpretation, the 2017

amendment does not involve any change to the “*relevant environmental standards*”. The emission limit values have not been changed, and must be complied with. There is no suggestion in the Applicant’s case that these emission limit values will cease to be satisfied because the transition date for the change and rationalisation of discharge points will be pushed back, or that a temporary primary discharge point will be used.

52. Counsel also makes an overarching submission to the effect that the 2012 licence does not in fact distinguish between treated and untreated discharges. Rather, it authorises discharges subject to certain parameters, and changes the points at which the discharges are to be made once the WWTP is commissioned. There is no requirement to cease the discharge of untreated water as of 31 December 2015.

53. The emission limit values under Schedule A remain the same both before and after the completion and commissioning of the WWTP. Reference was made in this regard to the content of the introductory section of the licence. (This has been set out in full at paragraph 19 above). It is said that it is clear that the *purpose* of the 2012 licence is to regulate the ongoing management and control of the waste water discharges. This is the “*operation*” of the licence which the technical amendment is intended to facilitate.

54. In response to the argument that an amendment cannot be made in respect of a breach of a licence, Ms Butler, SC characterises the Applicant’s case as amounting to an argument that all the terms of the licence are “*relevant environmental requirements*”. Given that the express purpose of regulation 33 is to allow for an amendment to a licence, counsel submits that it would be meaningless and actually absurd to say that one cannot amend a licence if it involves changing the terms of a licence. This is precisely the point of an amendment.

55. More generally, counsel for the EPA submits that when confronted with two rival interpretations of a piece of legislation, each of which involves some anomaly or inconvenience, the court should balance the effect of each construction and determine how best such an unsatisfactory result can be ameliorated. Counsel cited the judgment of the Supreme Court in *Meagher v. Minister for Social Protection* [2015] IESC 4; [2015] 2 I.R. 633.

“[56] This begs the question as to whether the conclusion reached should be reassessed in light of both the common law and statutory presumption against absurdity. At common law in this context ‘absurd’ means contrary to sense and reason. Both *Bennion on Statutory Interpretation* (5th ed., Lexis Nexis, 2008), from p. 969 onwards and *Halsbury’s Laws of England*, (5th ed., Lexis Nexis, 2008, vol. 96), at para. 1179 onwards, set out six types of undesirable consequences which come within this meaning: these are an unworkable or impracticable result; an inconvenient result; an anomalous or illogical result; a futile or pointless result; an artificial result and a disproportionate counter-mischief. As with all interpretive presumptions, the same are rebuttable but even if applicable, the disputed consequences must stand if the legislature really intended the result in issue.

[57] It seems to me that each of the constructions contended for involved some measure of anomaly or inconvenience. In holding as I have, it becomes logically impossible for Mr. Meagher ever to have qualified for a pension. By accepting Mr. Meagher’s view it would mean that s. 21(1)(d) of the Act of 2005 would be given a substantive meaning when in fact I am satisfied that this is not so. In such circumstances Bennion suggests that one should balance the effect of each construction and determine how best such an unsatisfactory result can be ameliorated. (pp. 985 and 998). I am satisfied that the balance rests in upholding the submission of the Minister so that the integrity of the underlying scheme is kept intact. To do otherwise would be to seriously undermine the overall structure of the scheme, even if there are but a limited number, in the same situation as Mr. Meagher. In addition, I cannot find a legally valid justification for judicially compounding a statutory mishap by adopting the alternative interpretive version which, when the Act is considered as a whole, is not open.”

56. The position was put as follows in the written legal submissions filed by the EPA on 22 January 2019.

“35. The question might rhetorically be asked, what else would the Applicant have the Agency do? The alternative to amending the Licence so as [to] maintain the status quo pending delivery of the necessary infrastructure would be to refuse to entertain the application, thereby effectively rendering the discharges from Youghal unlawful and unregulated (though possibly subject to lengthy enforcement action) pending the completion of the lengthier procedure of consideration of an application for a new or revised licence. Moreover, any decision on such an application for a new or revised licence would have to address the practical reality that, save an evacuation of the town, untreated waste water would have to continue to be discharged until the WWTP came on stream. As Ms English puts it in her Affidavit, “[I]n the interim, the waste water from Youghal has to be discharged somewhere: it cannot simply vanish as the Applicant seems to wish.”

57. (For the sake of completeness, I should record that there was some discussion at the hearing before me of the judgment of the High Court in *Madden v. Minister for the Marine* [1993] 1 I.R. 567. The facts of that case were extreme: the High Court (Johnson J.) found that the Minister had acted in such a way as to avoid the jurisdiction of the courts and to avoid all public inquiries. The case was ultimately resolved on narrower grounds by the Supreme Court: *Madden v. Minister for the Marine* [1997] 1 I.L.R.M. 136. In all the circumstances, I do not think that *Madden* is relevant to the case before me).

DISCUSSION

58. Both parties accept that regulation 33 must be interpreted in context, and by reference to the overall objectives of the 2007 Regulations. The 2007 Regulations are expressly intended to give effect to a number of EU Directives. In particular, they are intended to give effect to the Water Framework Directive and the Habitats Directive.

59. The CJEU has recently emphasised the importance of public participation in respect of both the Water Framework Directive and the Habitats Directive. In particular, the CJEU has indicated that the Directives should be read in the light of the Aarhus Convention on public access to information, public participation in decision-making, and access to justice in environmental matters (“*the Aarhus Convention*”).

60. Relevantly, article 6(10) of the Aarhus Convention provides as follows.

“10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.”

61. The Applicant relies on the judgment of the Supreme Court in *Conway v. Ireland* [2017] IESC 13; [2017] 1 I.R. 53.

"[24] However, it does need to be noted that the particular provisions of the Aarhus Convention which were under consideration in *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* (Case C-240/09) [2011] E.C.R. I-1255 were found by the CJEU not to be directly effective. Nonetheless the court did rule that there remained obligations on the courts of member states. The court said at p. 1307:-

"52 Article 9(3) of the Aarhus Convention does not have direct effect in EU law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the [Lesoochranárske] zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law."

[25] It seems to follow, therefore, that it is at least possible in principle that provisions of the Aarhus Convention may be directly effective in member states or be required to be implemented as far as practicable by a conforming interpretation of national procedural rules but it is also clear that not every provision of the Convention is directly effective or capable of such implementation. Thus, in respect of any particular provision sought to be relied on, it will be necessary to determine whether it met the relevant criteria. That could well raise important questions not least in the context of the 'not prohibitively expensive' requirements to be found in article 9.4 of the Convention."

62. In Case C 664/15 *Protect Natur*, the CJEU held that a decision under article 4 of the Water Framework Directive attracted the provisions of article 9(3) of the Aarhus Convention even in circumstances where the project at issue triggered neither the provisions of the Habitats Directive nor of the EIA Directive. In *Brown Bear II* (Case C 243/15 *Lesoochranárske zoskupenie*), the CJEU held that the various stages of decision-making under article 6(3) of the Habitats Directive engage article 9(2) of the Aarhus Convention. On one reading of the judgment, it goes even further and suggests that there is a right of public participation at the administrative stage under article 6(1)(b) of the Aarhus Convention and under article 6(3) of the Habitats Directive.

63. As discussed at paragraph 90 below, there is a separate issue in these proceedings as to whether the EPA complied with the requirements of the Habitats Directive. For the purposes of interpreting regulation 33, however, it is not necessary for me to resolve this dispute. It is sufficient to note that the context of regulation 33 indicates that one of the matters which the court should have regard to is public participation. More specifically, as regulation 33 represents an *exception* to the general principle that decision-making in respect of the authorisation of waste water discharges should be subject to public participation, it should be construed strictly. This is especially so where, as on the facts of the present case, the underlying project is one which was subject to assessment under both the EIA Directive and the Habitats Directive prior to the grant of the licence in 2012. It would undermine public participation if a development consent could be materially altered by way of a *subsequent* application for a technical amendment, which procedure does not mandate any public participation. As discussed presently, the EPA's jurisdiction to make a technical amendment is constrained by the qualifying words "*relevant environmental requirements*". In interpreting this phrase, it is necessary to bear in mind that if it is given too wide an interpretation, this would allow for the material alteration of a licence without public participation. This would be inconsistent with the requirements of the EIA Directive and the Habitats Directive, especially when those Directives are read in the light of the aims and objectives of the Aarhus Convention.

64. The structure of the 2007 Regulations is such that—at least at the level of general principle—an amendment of the type sought by Irish Water in this case could have been made pursuant to a different procedural route. More specifically, Irish Water, as licensee, could have applied to revise the licence. It is arguable that a court faced with two potential procedural routes, either of which could achieve the result sought, should give some weight to the fact that only one of the procedures provides for public participation.

65. With these principles in mind, I turn now to the precise wording of regulation 33.

DECISION ON REGULATION 33

66. Regulation 33 allows for an amendment to be made in three contingencies. The first is to correct any clerical error. The EPA does not rely on this subparagraph. It is nevertheless of some limited relevance to the question of statutory interpretation as being indicative of the very narrow ambit of regulation 33. A "*technical*" amendment is treated as being of a similar order of magnitude as a "*clerical*" error.

67. The second contingency, under subparagraph (b) of regulation 33(1), is an amendment facilitating the doing of anything that may reasonably be regarded as having been contemplated by the licence. This allows for the making *express* of something which was *implicit* at the time of the decision to grant a licence.

68. The EPA in its guidance notes, set out at paragraph 36 above, suggests that subparagraph (b) allows matters in a licence to be clarified to the extent that no greater or lesser obligation is placed on Irish Water than was placed upon Irish Water by the original licence. The amendment is intended to ensure that the matter at issue is more easily understood. Whereas the guidance note has no legal standing, it seems to me that the foregoing represents a fair description of the effect of subparagraph (b).

69. In deciding whether an amendment falls within subparagraph (b), it is necessary to consider the understanding of the parties *at the time* when the licence was granted. In this regard, it might be useful to borrow the concept of the "*officious bystander*" from the law of contract. In effect, the question then becomes whether if, at the time that the licence was granted, the proverbial officious bystander had asked what is the position in relation to a particular matter, both parties would have testily replied that the answer was obvious. For the reasons explained at paragraph 86, I cannot accept that the officious bystander would have been told in June 2012 that a failure to comply with the long stop date of 31 December 2015 would be treated as immaterial.

70. The third contingency, under subparagraph (c) of regulation 33(1), is subject to the prerequisite that the amendment must, first, facilitate the operation of the licence, and secondly, must not result in the "*relevant environmental requirements*" ceasing to be satisfied.

71. The qualifying words "*relevant environmental standards*" are key to the interpretation of regulation 33. As in the case of the analogous provisions of the PDA 2000 ("*material alteration of the terms of the development*"), this term delimits the jurisdiction to amend. It is not an open-ended jurisdiction.

72. I have concluded that the term refers to the environmental requirements under the licence itself. It is not synonymous with or equivalent to emission limit values. Rather, the concept of "*relevant environmental requirements*" is much wider. It encompasses conditions imposed under the licence for the purposes of protecting the environment.

73. Had the Minister wished to endow the EPA with a broader power to amend, subject only to the qualification that the amendment did not affect emission limit values, then the qualifying words under regulation 33 would have expressly referred to "*emission limits*". This is a term of art, and is used elsewhere in the 2007 Regulations. For example, regulation 6, which sets out the "*Duties of the Agency*", provides that in deciding on an application, the EPA shall set "*emission limits*" for pollutants likely to be present in the waste water concerned, and the timeframe or timeframes within which these are to be achieved with the aim of achieving good surface water status. Similarly, regulation 29, which sets out the type of conditions which can be attached to a licence, refers to "*environmental quality objectives*" and "*environmental quality standards*". These are also terms of art.

74. Regulation 33 employs a different phrase, namely "*relevant environmental requirements*". This difference in statutory language must be taken as deliberate, and as intended to introduce qualifying criteria which are wider than "*emission limits*", "*environmental quality objectives*" or "*environmental quality standards*" alone.

75. The approach adopted under the 2007 Regulations can be contrasted with that under the Waste Management Act 1996 (as amended). As discussed at paragraph 49 above, under the waste management legislation, a technical amendment cannot result in the "*relevant requirements of section 40(4) ceasing to be satisfied*", i.e. the Waste Management Act 1996 forges a direct link between the power of amendment and the statutory criteria governing a decision to grant a waste management licence. Had the Minister intended that a technical amendment under the 2007 Regulations would similarly be constrained only by a requirement to ensure compliance with emission limits or environmental standards, then an express reference to regulation 6 would have been included under regulation 33.

76. On the facts of the present case, the term "*relevant environmental requirements*" encompasses both the requirement to provide the WWTP, and the requirement to cease the discharge of waste water from certain points.

77. It was an express requirement of the 2012 licence that the WWTP be completed by 31 December 2015 at the latest. This would have ensured that, from that date onwards, waste water would be properly treated prior to its discharge. I do not accept the submission on behalf of the EPA that the 2012 licence did not, in fact, distinguish between treated and untreated discharges. The precise purpose of requiring the completion of the WWTP by 31 December 2015 was to ensure the treatment of the waste water. This is consistent with the passages from the inspector's report set out at paragraphs 12 and 13 above.

78. It is also clear from the procedural history of the licence application, and, in particular, the selection of Ferry Point as the optimal location for the primary discharge point, that the location of the discharge point was seen as a matter of some importance in the context of the licence application. See, in the particular, the extracts from the 2001 EIS cited at paragraph 17 above. As appears, there were features peculiar to Ferry Point which made it suitable for use as the primary discharge point, i.e. this location would provide significant volumes of water to dilute the effluent and would provide good mixing and dispersion in the receiving waters. The Appropriate Assessment Screening Report submitted with the application for the technical amendment also acknowledges that the proposed *temporary* primary outfall is not the optimal one. See paragraph 33 above.

79. Put shortly, the licence is not neutral on the question of where the discharge occurs provided that the emission limit values are met.

80. Moreover, I accept the submission on behalf of the Applicant that subparagraph (c) cannot be relied upon to regularise an *ongoing breach* of a licence condition. As Mr Devlin, SC put it, far from facilitating the operation of the licence, the amendment was sought precisely for the purposes of facilitating an ongoing breach of the conditions imposed in 2012. Whereas, in the circumstances which arose, there might well have been good grounds for seeking to *revise* the licence conditions, this result could not lawfully be achieved by way of a mere technical amendment. Rather, same should have been dealt with by way of an application to revise the licence pursuant to regulation 14.

81. The foregoing interpretation follows, in my opinion, from the literal language of regulation 33. I am also satisfied, however, that it is the interpretation which best sits with the purpose of the 2007 Regulations, and, with the EU Directives which the 2007 Regulations are expressly intended to give effect to. It would not be consistent with EU law, when read in the light of the Aarhus Convention, to allow what is more than a mere technical amendment to be made without any provision for public participation.

82. It would undermine the effectiveness of the earlier decision-making process and, in particular, the public participation in the EIA and AA process, if this amendment could be made without any public participation. It should be borne in mind that at the time the licence was granted, i.e. 13 June 2012, it was intended that a WWTP would be completed within a period of some two and a half years. The effect of the 2017 amendment was to extend this period for a *further* two years, i.e. to November 2017. An extension of time of this magnitude cannot be regarded as a mere technical amendment.

83. I do not accept the EPA's argument that the above interpretation of the 2007 Regulations would be unworkable or impractical. Crucially, this interpretation does not preclude a licensee from seeking to modify—to use a neutral term—licence conditions. The 2007 Regulations are flexible, and expressly envisage that an existing licence can be revised upon the application of the licensee. In any event, it is mandatory for the EPA to revise a licence at least once every six years.

84. The EPA, and in particular, the deponent swearing an affidavit on its behalf, has sought to conjure up a doomsday scenario whereby—but for the technical amendment—the continued discharge of waste water from Youghal might have had to be discontinued and the town evacuated. With respect, the difficulties in terms of the completion of the WWTP and the establishment of the outfall discharge at Ferry's Point were not issues which emerged without any prior warning. Irish Water, and prior to that Cork County Council, must have been aware for some time that the long stop date of 31 December 2015 could not be met because of delays in construction of the WWTP and the legal proceedings in respect of the Ferry Point discharge point. The correct response would have been to make an application to revise the licence pursuant to regulation 14. Whereas this may well have taken longer than the three months involved in the processing of the application for a technical amendment, the timeframe can hardly have been so lengthy as to make this option unworkable or impractical.

85. Finally, for the sake of completeness I should address the interpretation of subparagraph (b) of regulation 33. Notwithstanding that subparagraph (b) was not invoked by the EPA in the impugned decision, counsel for the EPA nevertheless maintains that it can be relied upon to justify the proposed decision. With respect, this argument is untenable. The EPA is required to provide reasons for its decision to amend a licence. At the very least, the EPA is required to identify the legal basis for its decision. It is clear from the terms of the decision document of 2017 that the EPA relied solely on subparagraph (c). It is not open to the EPA to invoke any other statutory power *ex post facto*.

86. In any event, the facts of this case do not come within subparagraph (b). The 2012 licence contemplated that the WWTP would

be completed on or before 31 December 2015. There can be no other explanation for the imposition of the long stop date of 31 December 2015. If the officious bystander had asked at the time of the grant of the licence in 2012 what was to happen, then the answer can only have been that it would be necessary to revise the licence. It cannot be said, by reference to the language of the licence conditions, that the parties *contemplated* that the long stop date would not be complied with. There is no flexibility in the language used. Indeed, if and insofar as the EPA had given any consideration to a different lead time for the WWTP, it seems to have been to the effect that the WWTP might have been completed *earlier* than 31 December 2015. The language refers on a number of occasions to the emission limits applying until 31 December 2015 or until the completion of the proposed WWTP *whichever is sooner*.

87. Finally, none of this is to say that the 2007 Regulations cannot accommodate a contingency whereby a licensee wishes to extend a long stop date. Rather, the question is which *procedure* must be followed to achieve this result. Given that the delay in completing the WWTP is not contemplated by the licence, then regulation 33(1)(b) is not available.

DISCRETION IN JUDICIAL REVIEW

88. For the reasons set out above, I have concluded that the purported amendment to the licence under regulation 33 was *ultra vires* the EPA. The matter should have been dealt with instead either by way of the licensee applying for a revised licence, or by the EPA invoking the revision procedure in accordance with regulation 14 because of the breach of condition. As it happens, the delay in these judicial review proceedings coming on for hearing meant that by the time the case came to trial, the six-year period on the mandatory review of the 2012 licence had already lapsed. The delay also meant that in relation to one of the principal complaints, namely the completion of the WWTP, the licence conditions have belatedly been complied with. The WWTP is completed and was commissioned early in December 2017.

89. Against this updated background, I do not propose to grant an order of *certiorari* setting aside the decision of May 2017 (at least not at this time). It seems preferable instead that the EPA now carry out the statutory review pursuant to regulation 14, and make such revisions as it considers necessary to the licence having complied with the public participation requirements. The parties will have liberty to apply for such further relief, if any, as may be required following the completion of the statutory review of the licence.

HABITATS DIRECTIVE

90. The Applicant's second ground of challenge arises under the Habitats Directive. It is alleged that the application for the technical amendment was not properly screened for the purposes of the Habitats Directive. More specifically, the Applicant contends that the EPA were required to consider the entirety of the proposed change, i.e. the environmental impacts likely to follow from the extended timeframe for the discharge of untreated water and the use of the temporary primary discharge point. The Applicant drew attention to the screening decision as recorded in the inspector's report. It is suggested that same was improperly confined to a consideration of the temporary relocation of the primary discharge point from the proposed Ferry Point outfall (SW001) to Dunn's Park (SW000).

91. In response, the EPA contends that it was not required to re-assess the effects of all of the discharges permitted under the licence, which were said to have already been the subject of appropriate assessment prior to the grant of the licence in 2012.

92. The resolution of these issues would have required consideration of a novel point of EU law, namely whether the extension of the duration of the period for which a particular activity can be carried out engages article 6(3) of the Habitats Directive. The very recent opinion of Advocate General Kokott in Case C 411/17 *Inter-Environnement Wallonie ASBL* suggests that an extension of duration is capable of triggering the Habitats Directive. This issue has yet to be ruled upon by the CJEU.

93. In circumstances where my findings in respect of the first ground of challenge, namely that in relation to the EPA's jurisdiction under regulation 33 of the 2007 Regulations, are sufficient to dispose of the judicial review proceedings, I do not propose to make any determination in relation to the Habitats Directive issues. It is not necessary for me to do so, and were I to decide the point, it would almost certainly be necessary for me to make a reference to the CJEU for a preliminary ruling pursuant to Article 267 of the TFEU. The principle of judicial self-restraint indicates that I should avoid doing this when—as is the position here—it is possible to resolve the case on narrower grounds, based primarily on the interpretation of national legislation in the light of EU law.

PROPOSED ORDER

94. I propose, therefore, to make a declaration in accordance with paragraph (D) 2 of the Statement of Grounds as follows.

"A Declaration that the decision of the [Environmental Protection Agency] of the 22 May 2017 was *ultra vires* the powers of [the EPA] having regard to the statutory provisions in Article 33 of the Waste Water Discharge (Authorisation) Regulations 2007, as amended."

95. I will hear the parties on the issue of legal costs, and I will then make an order in that regard. I will give the parties liberty to apply, following the completion of the statutory review of the licence, for any further order that may be required at that stage.