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4th December 2024

RE: Public Consultation on Proposed Additional Measures for the Fifth Nitrates Action Programme

A Chara,

An Taisce welcomes the opportunity to comment on the Public Consultation on Ireland's interim review of the Fifth Nitrates Action Programme, and has the following comments to make.

1. Evidence base and public participation

Having reviewed all of the documentation provided for this review, we would highlight, in the strongest possible terms, that the evidence base provided to explain what benefit the additional measures will have for water quality is almost entirely absent. Indeed, we note that the Natura Impact Statement (NIS) has very clearly highlighted the same. Section 8(3)(c) of the NIS clearly articulates this:

> *"c. **There is no scientific basis presented for the quantified measures** identified within the draft Policy Document, in particular those relating to stocking rate, reliance on chemical fertilisers and over-stocking, to demonstrate that those quantifications and the thresholds set are at the level necessary to restore and maintain water quality to achieve the favourable conservation status of QI habitats and species and therefore of European sites. A number of measures in the wider Nitrates Action Programme are not determined based on what is scientifically and ecologically necessary to restore and maintain favourable conservation status of European sites and their QIs; particularly those dependent on water quality to achieve favourable conservation status."* [Our emphasis]

This is problematic for multiple reasons, but in the first instance, this is problematic for public participation. Irish water quality has been in decline for over a decade now, and it is consistently

listed as a top priority for the Irish public. The stated premise of the interim review is outlined as follows in the Background of the consultation document:

> *"These measures were developed in the context that the interim review identified that water quality improvements are not yet evident. This was based on EPA reports highlighting that nitrogen concentrations in some waters are too high especially in the south and southeast and are not improving over the long term. Therefore, there is a need for strengthened measures."*

It follows, that the public needs to be able to gauge how much additional protection these measures will provide. The main new measures proposed include a reduction in stocking rate for derogation farms which are indicated by the EPA Targeting Agricultural Measures Map; a further 5% reduction in the maximum allowable chemical nitrogen fertiliser application rates for grassland will apply from 1 January 2025 on farms over 170kg/N; on farms with a nitrates derogation the maximum stocking rate will be limited to 170 kg N/ha for land more than 30km from the main farm holding from the 1st January 2025. However, at no point in the document does it give an indication of what quantum of nutrient leaching this is expected to remedy. The public are expected to take it at face value that this is a positive thing, with no clear indication of what outcome these measures are expected to achieve. This lack of transparency for why these specific measures were chosen and what they are expected to achieve does not amount to adequate public participation, and removes the ability of the public and interested bodies such as specialist eNGOs like An Taisce from critiquing these additional measures.

Given that water quality has been declining for over a decade, it is unreasonable for the Department to expect the public to give them the benefit of the doubt. The very purpose of this review is to strengthen the measures provided for the protection of water quality, and the one thing this documentation does not provide, is an estimate of how much water quality will benefit from these proposed measures, or indeed evidence that the measures will work at all. Without an evidence base and rationale provided for why these measures are being proposed, this cannot be considered to be a meaningful public consultation.

2. Derogation Assessments

The recently approved RBMP addressed the need for farm specific assessments for derogations, and indicated that these would be provided for in the interim NAP. Specifically, in Table 6.4.5.1 of the NIS for the recent RBMP, under the heading 'Assessment of Effects and Requirement for Mitigation', the following risk from derogation farms was outlined:

> *"Therefore, there is significant potential for adverse effects on maintaining and achieving conservation objectives and therefore integrity of European sites with respect to these derogations both individually and in combination with other derogations, plans and projects. Given the scale of derogations under previous cycles of the NAP, the potential for in-combination effects is significant.* ***It will therefore be vital that any derogations which emerge from the NAP will be subject to AA; which should***

include a robust assessment of in-combination adverse effects." [Our emphasis]

An Taisce raised this issue in our submission on the original consultation on the RBMP with the Department response listed as follows in the updated NIS:

> *"Ireland's Nitrates Action Programme (NAP) is given effect by the European Communities (Good Agricultural Practice for Protection of Waters) Regulations 2022 (S.I. No. 113 of 2022). The regulations contain specific measures to protect surface waters and groundwater from nutrient pollution arising from agricultural sources. The Regulations transpose the requirements of the Nitrates Directive. The Nitrates Directive has a separate legal process for review of the NAP. While the recommendation is noted,* ***the specific recommendation from An Taisce is appropriate to the NAP review process****, not the RBMP review process."* [Our emphasis]

In Section 7.2.5.2.1 the RMBP NIS outlines:

> *"The actions arising from the new NAP have potential for significant adverse effects on European sites; particularly mindful of nutrient loss to water from agriculture is one of the most significant pressures on water quality in Ireland. The 5th NAP was be subject to AA and SEA in its own right and includes mitigation measures for the avoidance of impact to European sites that must be adhered to. It is also required to be cognisant of the RBMP;* ***including the mitigations identified within this NIS for the RBMP****.*
>
> *An interim review of the 5th NAP will be undertaken and* ***any required additional measures will be implemented****. The output of this review will include a report on water quality assessment and new measure that will be given effect through amendment of the GAP Regulations."* [An Taisce emphasis]

As such, it was our interpretation that the requirement for an AA for a derogation farm would be one of the measures brought forward in the review of the NAP, given it was clearly identified as a required additional measure. The NIS of the RBMP has clearly articulated the risk posed by derogation farms to Natura 2000 sites, and outlined the necessary mitigation, namely Appropriate Assessment for '*any derogations which emerge from the NAP',* and the above quoted passages in the NIS give the commitment that any required additional measures will be implemented. Such an assessment would need to be done before any derogation was granted, and the screening decision would have to be published, with the facilitation of public participation for any derogation decisions which were screened in for Appropriate Assessment.

Despite this, there is no mention of any such assessment in the documentation as part of the consultation. We submit that the Department has a legal obligation to give effect to the measures identified in the RBMP under duty of sincere cooperation with EU law, as the RBMP identified

what measures are necessary to achieve GES by 2027. If the NAP is saying it is not necessary now, the Department must outline its rationale for same and how it is consistent with GES.

We would further highlight that the Habitats Directive and Water Framework Directive require the fastest possible action to prevent deterioration including under Art 6(2) of the Habitats Directive. As such, the delay in seeking to provide for mandatory derogation farm appropriate assessments could be considered non-compliant with those legal obligations to implement timely measures.

3. Adequacy of measures

3.1 Inadequacy of the 5th NAP

The premise of this interim review is to provide for additional measures, on foot of the realisation that the extant measures under the 5th nitrates Action Programme are ineffective:

> *"These measures were developed in the context that the interim review identified that water quality improvements are not yet evident. This was based on EPA reports highlighting that nitrogen concentrations in some waters are too high especially in the south and south east and are not improving over the long term. Therefore, there is a need for strengthened measures."*

However, this suggests that we are faced with a situation where the conclusions of the original AA have been invalidated by the evidence of the serious ongoing negative impacts which have arisen, requiring additional measures. This should prompt an assessment of the extent of failure to properly conduct an AA in the first instance, with the requirement that any breach involved needs to be remedied in the first instance, and the outstanding AA remedially assessed. Furthermore, exceptional circumstance testing needs to be established if the State is seeking to regularise this, lest it incentivise circumvention of the AA obligation more widely.

3.2 Inadequacy of Interim Measures

As outlined above, the NIS has very clearly indicated that the measures proposed do not reach the threshold necessary for the purposes of the EU Habitats Directives. In Section 7.2 of the NIS the following is outlined:

> *"The additional measures proposed in the draft Policy Document could reasonably be viewed as beneficial to water quality, however a number of the additional measures (even if they could be demonstrated to be technically effective/sufficient)* ***have the potential to perpetuate and further facilitate the continued decline in water quality which would further inhibit the ability of European sites and their water-dependent QI's to attain and then maintain favourable conservation status****."* [Our emphasis]

And:

*"given the specific assessment made with reference to the four policies above it is considered that **these policies will result in adverse effects on the integrity of European sites** and therefore would be detrimental to the coherence of the Natura 2000 network since they are insufficient to achieve a scientifically evidenced halt or sustained reversal to the water quality trend to a level necessary for favourable conservation status of water-dependent QIs to be achieved and maintained"*

We would remind the Department of the legal requirements for certainty in regard to the requirements for Appropriate Assessment. It is now very well established in law that approval can only be granted for plans and projects when it has been established beyond all reasonable scientific doubt that the subject proposal will not adversely impact the integrity of any Natura 2000 sites. In Case C-258/11, Sweetman & Others v An Bord Pleanála & Others, it was held that:

*"authorisation for a plan or project ....may therefore be given only on condition that the competent authorities ....are certain that the plan or project will not have lasting adverse effects on the integrity of the site. That is so where **no reasonable scientific doubt remains** as to the absence of such effects" [emphasis added].*

Additionally, there is a requirement for complete, precise and definitive findings. If they cannot be provided, this nullifies the Appropriate Assessment process, as per recent court rulings. In Kelly v An Bord Pleanála & Ors. [2013 No 802 J.R.], with reference to Commission v Spain c-404/09, the High Court held in para 36 that the competent authority must carry out an AA for a plan or project in light of the best scientific knowledge in the field, and that the final determination of the competent authority must include complete, precise and definitive findings. The case repeated the conclusion of CJEU at para. 44 in Case C-258/11, namely that an AA:

"*cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt.*"

The conclusion posed under Section 8 of the NIS does little to dispel the doubt which has already been articulated:

"Although there is scientific uncertainty regarding their effectiveness, the scientific basis in terms of how they have been determined and the lack of consistent and comprehensive implementation and enforcement, they are measures which move actions in generally the right direction with respect to halting, reversing and restoring water quality. Therefore, in the short period they would be implemented prior to being superseded and built upon they are unlikely to be significantly additive to the trends in water quality however, on balance, have the potential to move those trends in a generally positive direction.

.....

In light of the above and subject to the mitigations set out below being explicitly included within the draft Policy Document it is considered that adverse effects on the integrity of European sites will not occur as a result of the implementation of the draft Policy Document and the additional measures therein."

However, the mitigation measures all relate to measures to be implemented in the 6th NAP, which will not be implemented until 2026. This means that the interim measures identified and assessed as part of this review which will come into effect in 2025 will indeed pose a potential risk to water quality in the intervening period. The one factor which may somewhat mitigate for this is that they may only be in place for a short amount of time, given they will be superseded by the 6th NAP. Albeit in our experience extant measures are often kept in subsequent iterations of the NAP, so there is no concrete evidence or commitment that they would be replaced and improved in the 6th NAP. Additionally, the potential damage limitation which a short time window could provide has not been assessed for the purposes of AA, and as such cannot be considered a mitigation measure. As such, a risk has been identified, and no credible mitigation has been provided for the measures which will be in place until the 6th NAP is written and adopted, and potentially beyond.

We are of the view that the legal threshold has clearly not been met in order to allow a decision maker to conclude beyond reasonable doubt, and as such we contend that any assessment based on this NIS cannot be considered appropriate. We would remind the Department that they have a duty of sincere cooperation, and highlight Regulation 27(2) of the Birds and Natural Habitats Regulations which requires that all public authorities have to exercise their functions to ensure compliance with the Habitats Directive:

"27(2) Any public authority having or exercising functions, including consent functions, which may have implications for or effects on nature conservation shall exercise those functions in compliance with and, as appropriate, so as to secure compliance with, the requirements of the Habitats Directive and the Birds Directive and these Regulations."

4. Exempted Development

We note the following in Section 2.2.3 of the Consultation Document:

"Following enactment of the National Planning Bill 2023, as part of a review of the planning regulations, a new and separate 'exempted development' threshold will be introduced by the DHLGH, in respect of stand-alone (agriculture effluent) storage facilities."

Section 4(4) of the Planning and Development Act (Section 9(3) of 2024 Act) makes it clear that a development cannot be exempted if it requires EIA or AA. However, being exempted development does not exclude developers from the obligation to screen for appropriate assessment, but an ongoing issue in Ireland is the lack of process for the carrying out of any such

screening. Given the widespread nature and hydrological connectivity of Ireland's aquatic Natura 2000 sites and the significant risk potentially posed by effluent storage development, allowing for all effluent storage development to be deemed exempted development is problematic, both ecologically and legally speaking.

Should this exemption come into force by way of regulation, it would likely be unworkable for farmers without a clear screening process, and would leave them liable to legal challenges in lieu a statutory review/screening process. Individual installations could be challenged throughout the country on foot of their perceived risk to water quality and the integrity of Natura 2000 sites, particularly if there is no formalised process by which they can demonstrate that their particular development has been adequately screened out for AA.

Before any such exemption is implemented, the Department should give serious legal consideration to the unintended consequences which could arise on foot of this, both for the farmers in terms of unforeseen legal challenges, and to water quality on foot of insufficient screening of these effluent storage facilities. One existing mechanism which could be required is a declaration on exempted development under s.5 of the Planning and Development Act 2000 (s.10 of 2024 Act), which could be mandated to provide a clear screening process for any exempted effluent storage developments.

An additional consideration is how this exemption aligns with the legal requirements of the Water Framework Directive, and how WFD considerations will be factored into any exemption screening. The Weser judgement Case C- 461/13 found that there is a requirement to refuse authorisation where there is an impact on Article 4 WFD objectives. As such, it follows that there can be no general authorisation provided where there could be an impact on Article 4 considerations. As such, it is our considered view that there can be no exempted development for a project which could impact Article 4, and a screening for WFD will additionally be required in any exempted development scenario.

5. Water Framework Directive Assessments

It is our view that Water Framework Directive considerations are not adequately accounted for in this assessment, with the NIS obviously focusing on Natura 2000 site impacts. But clearly, where the risk to Natura 2000 sites has been articulated in the NIS, those same pressures pose a significant risk for Water Framework Directive obligations.

We are of the view that the NAP behaves, in effect, as a de facto permit for emissions into surface water bodies. The NAP and GAP regulations provide thresholds, up to which it is implicit landowners are permitted to pollute water bodies (e.g. stocking density, artificial fertiliser spreading rates, spreading dates for slurry etc). We would highlight the provision of Regulation 7 of the European Communities Environmental Objectives (Surface Waters) Regulations 2009 (S.I. No. 272/2009):

> *"Point source and diffuse source discharges liable to cause water pollution are prohibited except where subject to a system of prior authorisation or registration based on general binding rules. A public authority that authorises a discharge to waters shall lay down emission limits in the authorisation granted that satisfy the following requirements:*

(a) the emission limits shall establish the maximum concentration and the maximum quantity of a substance permissible in a discharge and shall aim to achieve the environmental objectives established in Part III of these Regulations including the environmental quality standards set out in Schedules 5 and 6 and any standards or objectives laid down for protected areas, and..."

As such, legally speaking, the NAP has to impose specific emission limits, according to strict requirements, as provided for in Regulation 7(b) of S.I. No. 272/2009:

"(b) discharges shall be controlled according to the combined approach whereby emission limits shall be established according to the stricter of the requirements which would result from the application of limits which aim to achieve the quality standards referred to in sub- paragraph (a) and, where relevant, the application of limits based on—

(i) emission controls based on best available techniques, or

(ii) relevant emission limit values, or

(iii) in the case of diffuse impacts controls including, as appropriate, best environmental practices set out in:…"

As such, the NAP should be providing for strict criteria and limits on diffuse and point source pollution from agriculture which may compromise WFD objectives outlined in Part III of S.I. No. 272/2009. It entirely fails to do this, instead providing for additional measures with no evidence base for their water quality benefits. The SEA which accompanies this NAP review is not yet publicly available, which is highly problematic from a public participation perspective, as it may shed some light on this issue, but based on the documentation which has been provided, very little consideration has been given to WFD objectives. Indeed, it is logical that given the NIS provides no certainty that aquatic Natura 2000 sites will not be adversely impacted, the same risk applies to WFD status. This is compounded by the total lack of consideration for derogation assessments, as outlined earlier.

6. Conclusion

In conclusion, we are of the view that this consultation is flawed and incomplete. The evidence base is missing, along with the rationale for the measures, and we are of the view that the legal threshold has not been met in regard to Article 6(3) of the Habitats Directive. In the midst of a water pollution crisis, on an issue which the public have repeatedly demonstrated was their primary environmental concern, this interim review does little to assuage the ever-growing public concern about Irish water quality and the impact of agriculture.

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