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RE: Designation of Ireland's Heavily Modified Water Bodies arising out of the 2024 Water Action Plan

An Taisce welcomes the opportunity to comment on this public consultation. However, at the outset we would indicate that we have significant concerns about the adequacy of the analysis and data underpinning these proposed designations, and we are of the view that **this designation process should not proceed**.

1. Designation Tests

Article 4(3) of the Water Framework Directive (WFD) provides for the designation of certain waterbodies as heavily modified, under certain strict criteria:

> *"3. Member States may designate a body of surface water as artificial or heavily modified, when:*
>
> *(a) the changes to the hydromorphological characteristics of that body which would be necessary for achieving good ecological status would have significant adverse effects on:*
>
> *(i) the wider environment;*
>
> *(ii) navigation, including port facilities, or recreation;*
>
> *(iii) activities for the purposes of which water is stored, such as drinking-water supply, power generation or irrigation;*
>
> *(iv) water regulation, flood protection, land drainage, or*
>
> *(v) other equally important sustainable human development activities;*
>
> *(b) the beneficial objectives served by the artificial or modified characteristics of the water body cannot, for reasons of technical feasibility or disproportionate costs,*

reasonably be achieved by other means, which are a significantly better environmental option."

The CIS Guidance, cited in the consultation document, states that:

> *"Information provided by the assessment methods must be sufficient to ensure that the process of decision-making associated with the Article 4(3) designation tests is* ***transparent allowing for the active participation of the public in the planning process based on the provision of necessary appropriate information."*** [Our emphasis]

The EPA carried out the characterisation tests a number of years prior to this, but it should be noted that that was solely a scientific characterisation, they did not carry out any of the necessary designation tests, and the public consultation was clear in providing a recommendation that this critical step be carried out by the Department of Housing:

> *"One of the key outcomes of the previous public consultation was a recommendation that the designation tests (steps 7-9), should be undertaken by the Department of Housing, Local Government and Heritage (DHLGH)"*

The consultation document provided a flow chart, indicating what the designation tests involved, which were partially replicated below in Figure 1.

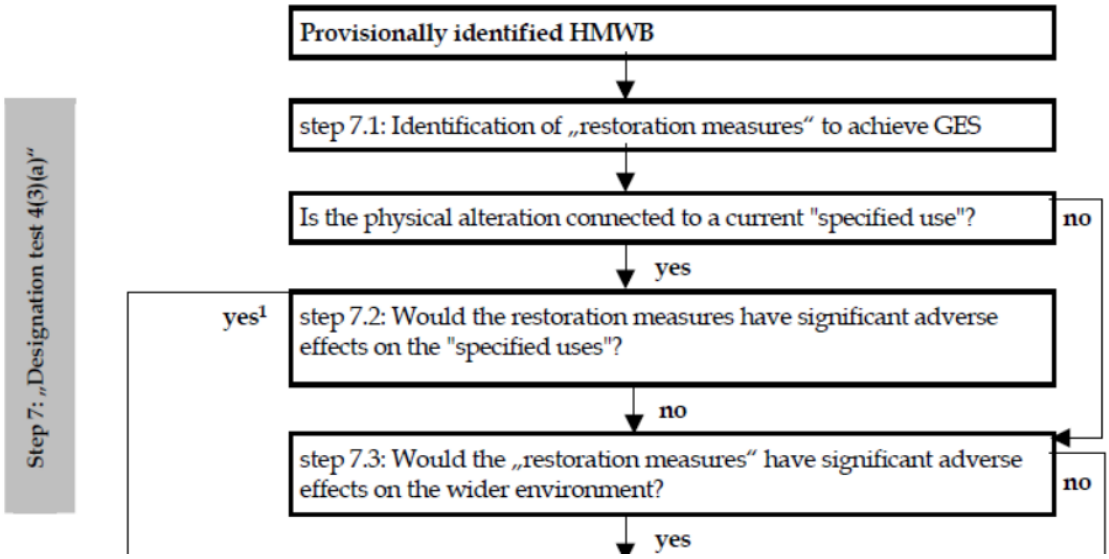


Figure 1: Designation Tests Step 7

2. Step 7.1

For step 7, the flow chart makes it clear that the first step is the identification of restoration measures which are necessary to achieve good ecological status. The Department has fundamentally failed to provide this information. The consultation document outlines the following:

> *"Building on the previous consultation…specified use owners were requested by DHLGH to provide further information on the proposed HMWBs that relate to the specified uses within their remit. This additional information complemented further assessments by DHLGH and was used to inform the designation steps."*

However, it provides no information on what those *'further assessments by DHLGH'* are. There is no explanatory narrative of what the assessments involved, nor even a setting out of the broad principles applied. The documentation refers to an Appendix, which is a multi tab excel spreadsheet which provides little in the way of detailed information.

In this excel appendix, under the column headed '*Step 7 Designation test 4 (3)(a) (Restoration measures): Identify restoration measures necessary to achieve GES. Do these measures have significant adverse effects on the wider environment or the 'specified uses"?*, every single proposed HMWB entry contains the text '*No restoration measures without impacting specified use*'. There does not appear to be any additional information provided to highlight what would be necessary on a waterbody-by-waterbody basis. The CIS guidance highlighted above underscores the importance of transparency in this designation process for the purposes of public participation. This process entirely fails in that regard, and cannot be considered to be adequate in regard to providing the evidence base for the very first step required under the designation tests.

To be clear, what is required is far more detailed analysis, on a site-by-site basis, with clear rationales, evidence and modelling to indicate what restoration measures would be necessary, and an analysis and explanation for why they cannot be implemented. What was provided is essentially a one size fits all (within each pressure category) decision that restoration would be too difficult, with no actual analysis. This is a total failure by the Department to identify the restoration measures required to achieve GES.

3. Step 7.2

The second step which is required, as outlined in the flow chart, is an assessment of whether the restoration measures would have an adverse impact on the specified use. Given that there has been no analysis of what restoration measures would be required for any of these waterbodies, it follows logically that it should be impossible for the Department to adequately answer this question. Despite that, the Appendix 1 provided simply says 'yes' in every cell, in response to this question: *'Step 7.2: Would the restoration measures have significant adverse effects on the specified uses?'.*

Again, this is an abject failure by the Department to actually provide the analysis which would be necessary to make such a judgement call. To illustrate this point, we will paste below a section from the CIS guidance in regard to the implementation of a designation test:

> *"It should be emphasised that the application of the test should consider the full range of possible restoration measures. For example, in a river, which has been modified for navigation that has artificial vertical embankments, it may be possible to create more natural banks which may allow GES to be achieved without causing significant adverse effects upon the use."*

This type of nuanced assessment is a key part of the designation tests, but the Department has utterly failed to provide the analysis which would allow that level of detail or assessment. It is clearly not adequate to simply decide that the restoration measures would have an adverse impact on the specified use without a) identifying what the necessary restoration measures are or b) determining how they would impact on the specified use on a site-by-site basis.

4. Designation Test 7.3 and Arterial Drainage Works

In regard to Designation Test 7.3, the question to be answered is '*Step 7.3: Would the "restoration measures" have significant adverse effects on the wider environment?*. For all of the arterially drained waterbodies the generic response is provided as follows: '*Yes - significant area of lands improved for agricultural production and level of flood protection provided to rural and urban areas'*

Again, no evidence base is provided to underpin this statement, which in the context of the damage which results on foot of ongoing arterial drainage is entirely questionable. The Arterial Drainage act is widely acknowledged as being legislation of a bygone era, which allows for the ongoing drainage of thousands of hectares of peat soil. The ambition evident in more current legislation clearly highlights that this type of environmental damage is no longer compatible with the needs of climate or biodiversity, with both the Climate Act and the Nature Restoration Law driving ambition for rewetting of drained peat soils. Additionally, there have long been questions over the compliance of the requirements of the Arterial Drainage Act with those of both the Habitats Directive and the Water Framework Directive.

As such, to rely on a response which indicates that the cessation of the drainage which is provided by the Arterial Drainage Act would lead to wider environmental damage, with no evidence base to support the position[1], is highly flawed. Additionally, there are a number of instances where arterial drainage allows water to move off the land far quicker than it would naturally, thereby exacerbating downstream flooding of towns and villages, which is the complete opposite of what is claimed in this generic response.

Furthermore, we would highlight that the process appeared to rely on the specified use owners to provide some of the key pieces of information for these designation tests:

> *"Building on the previous consultation with the specified use owners undertaken by the EPA, particular specified use owners were requested by DHLGH to provide further information on the proposed HMWBs that relate to the specified uses within their remit. This additional information complemented further assessments by DHLGH and was used to inform the designation steps."*

It is unclear to us if this assertion that wider environmental damage would ensue on foot of a cessation of the arterial drainage works was provided by the OPW, as the specified use owner, or by DHLGH. Clearly, this analysis needs to be independently done, as it is unreasonable to expect a specified use owner to provide an unbiased opinion in regard to their own operations.

Again, this designation step is fatally flawed at the outset by the fact that it is entirely unclear what the necessary restoration measures are, but to compound that, the assumption of wider environmental damage on foot of these unenumerated restoration measures is fundamentally flawed and no evidence base is provided.

5. Designation Step 8

The flow chart pertaining to Step 8 in the designation test is pasted below in Figure 2.

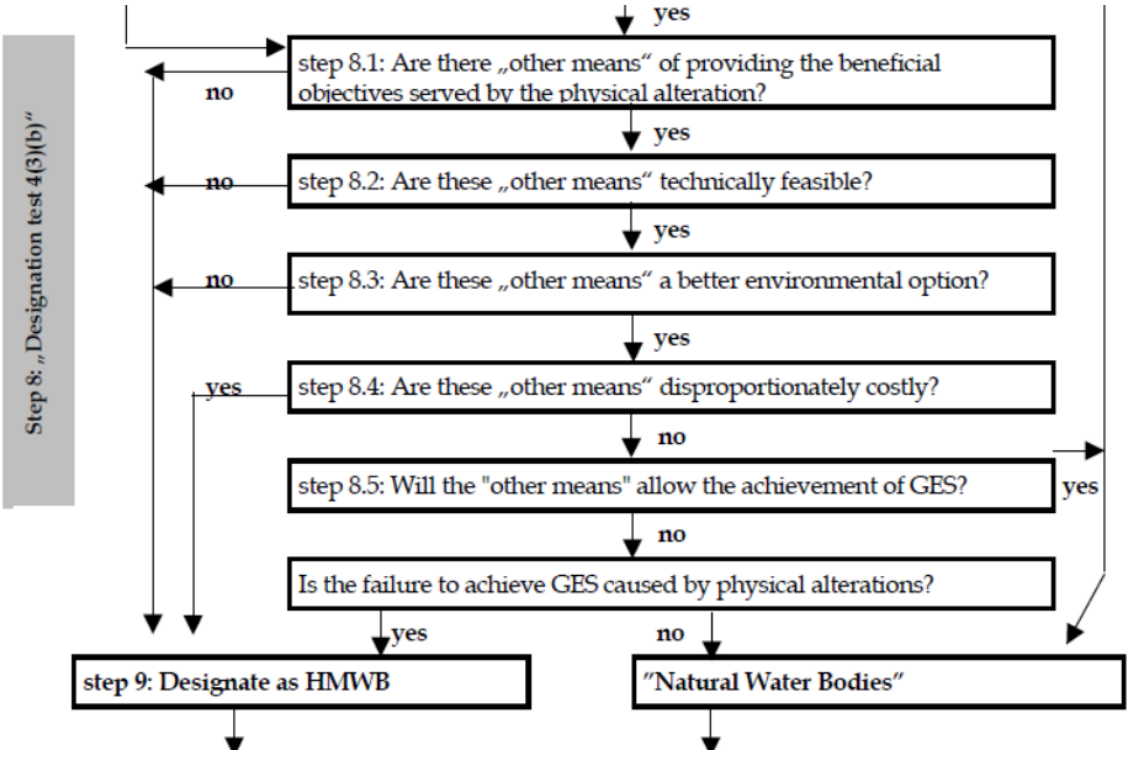


Figure 2: Step 8 of Designation Tests

The CIS guidance provides the following in regard to Step 8:

"The designation test 4(3)(b) considers whether the beneficial objectives served by the modified characteristics of the water body can reasonably be achieved by "other means" (step 8.1), which are:

- *technically feasible (cf. Section 6.5.2, step 8.2);*
- *significantly better environmental options (cf. Section 6.5.3, step 8.3);*
- *and not disproportionately costly (cf. Section 6.5.4, step 8.4)."*

And this further explanation:

"Other means may include the following options:

- *Displacement of the specified use to another water body. For example, the replacement of a hydropower station with a new one (in another water body) where it causes less environmental damage. Another example would be stopping 43 WFD CIS Guidance Document No. 4 Identification and Designation of Heavily Modified and Artificial Water Bodies navigation in one river because a canal connection would provide alternative transport links (Example in the toolbox);*
- *Replacement of the existing specified use with an alternative option to deliver the beneficial objectives. For example, replacing hydropower with other energy sources, or replacing navigation with rail and road transport at lower environmental costs, alternative flood defence strategies such as restoration of upstream flood-plains to remove flood defence hard engineering downstream, i.e. soft-engineering as opposed to hard-engineering solutions (Example in the toolbox).*

The partial replacement or displacement of the beneficial objectives of the specified use should also be considered, while not necessarily allowing the achievement of GES."

Once again, the Department relies on the Excel appendix to provide this level of detail, which involved a replication of this same statement for every single proposed HMWB to the question:

`Step 8 Designation test 4(3)(b) (Alternative options): Can the beneficial objectives served by the modifications of the HMWB be achieved by other means, which are a significantly better environmental option, technically feasible and not disproportionately costly?':

"No known alternative means"

Again, no analysis was provided, this is simply a blanket statement with no apparent analysis with which to back it up. The same applies to the question '*Step 8.1: Are there "other means" of providing the beneficial objectives served by the physical alteration*?'. For any arterially drained waterbodies the answer is '*No known alternative means*' and other specified use owners such as Uisce Éireann appear to indicate that they have carried out analysis, but this is not publicly available as part of this consultation: '*No. Alternatives have been assessed by UÉ*'.

The remainder of the designation tests under sub-step 8 are not answered, as there was no consideration of other means for any of the waterbodies proposed as HMWB.

There is clearly a failure on behalf of the Department to credibly engage with the steps necessary under this designation test, with no analysis provided to indicate why none of the waterbodies were considered. As above, the arterial drainage programme is widely acknowledged as being out of step with current environmental requirements, and as such it would be expected that this consultation would at least have provided an analysis to indicate what quantum of flood relief each proposed HMWB is providing, underpinned by modelling and field tests, and for that then to be weighed up against the greater societal good and the requirements of the Climate Act, Nature Restoration Law and wider European legislation and jurisprudence.

While flood protection for homes is clearly a public good priority, it is impossible to ascertain how big an impact a cessation of some of these arterial works would have on their catchments, or indeed what the social or economic impact might be. This information is critical to inform this discussion. Given the CIS guidance and requirements of the Directive, what the Department have provided is manifestly inadequate to provide for that type of judgement call or necessary consultation with the public.

6. Designation Timing

The guidance document highlights the fact that:

> *"The HMWB ... designation process is only one aspect of the RBMP and must be fully integrated with the key components of the* Plan, and that it is "*important to co-ordinate the designation process with the other requirements of the RBM planning process."*

The current consultation is not in line with this. Given that this did not happen as part of the 2027 cycle, it is not appropriate to conduct a rushed designation now, mid-cycle, based on inadequate assessment and a flawed public consultation. We strongly recommend that the designation decision process is halted, and more detailed analysis conducted and integrated with the next RBMP planning cycle.

7. Conclusion and Recommendations

It is our view that the Department have manifestly failed to adequately carry out any of the designation tests which this documentation purports to provide. It is wholly inadequate from a public participation perspective, and the lack of analysis and data to underpin the answers provided for each of the designation tests is entirely inadequate to fulfil the requirements of Article 4(3). It is our firm view, that to proceed with any HMWB designation based on the documentation and analysis provided would be to infringe on the meaning and proper legal interpretation of the Water Framework Directive.

We would recommend a significantly improved designation decision process, based on appropriate analysis and data for each step which should be presented, justified and integrated into the consultation on the next River Basin Management Plan. This should involve waterbody-by-waterbody analysis and data, with a clear and transparent rationale, and an analysis of trade-offs.

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