THE HIGH COURT
PLANNING AND ENVIRONMENT
JUDICIAL REVIEW
IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)
2023/1252 JR
[2025] IEHC 111

Between

TOM RYAN

Applicant

and

AN BORD PLEANÁLA
THE MINISTER FOR HOUSING LOCAL GOVERNMENT AND HERITAGE, IRELAND AND THE ATTORNEY GENERAL

Respondents

and

ANALOG DEVICES INTERNATIONAL,
LIMERICK CITY AND COUNTY COUNCIL
THE ENVIRONMENTAL PROTECTION AGENCY
and
IDA IRELAND

NOTICE PARTIES

JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 27 FEBRUARY 2025

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INTRODUCTION & BACKGROUND

1. In these proceedings the Applicant, ("Mr Ryan") a dairy farmer, of Ballynoe, Mungret, County Limerick, seeks *certiorari* quashing two decisions ("the Impugned Decisions") of the First Respondent ("the Board"), of Mr Ryan's appeals from decisions of the Second Notice Party, Limerick City and County Council ("LCCC") to grant planning permissions to the First Notice Party ("Analog") for proposed developments at its Campus at Raheen Industrial Business Park, Raheen, County Limerick ("the Business Park"). Analog, since 1976, operates a manufacturing facility on its Campus, in the north-east corner of the Business Park. There, it manufactures integrated circuits on silicon wafers.

2. The Board's Impugned Decisions are those:

- dated 7 September 2023 granting permission[1] for the "Hydrogen Development" described below, on a 5.2 hectare site (the "Hydrogen Site") which forms part of Analog's Campus.

- dated 12 September 2023 granting permission[2] for the "Fanfare Development" described below, on a 9.52 hectare site which forms part of Analog's Campus.

I will refer to the Hydrogen Development and the Fanfare Development collectively as "the Proposed Developments".

3. The 9.52ha Fanfare Site encompasses all of the 5.2ha Hydrogen Site and, the exhibited drawings suggest, also encompasses by far the greater part of Analog's Campus and by far the greater part of its manufacturing and associated facilities.[3] References below to "the Site" are to the Fanfare Site. The main substance of the intended Fanfare Development will occupy a relatively small part of the "red line"[4] Fanfare Site but the proposed Fanfare works will include works to Analog's storm water drainage in the Fanfare Site generally within the "red line".[5]

4. In reality as the case ran, Mr Ryan's fire, to the extent it was concentrated at all on the Proposed Developments (a remarkable observation in itself) was concentrated on the permission for the Fanfare Development.

[1] ABP-313740-22.
[2] ABP-314692-22.
[3] 2.28 hectares to the north-west, across a road from the Fanfare Site, comprise a car park and a building housing "Analog Devices International European Research and Development Centre" ("ERDC").
[4] i.e. the site bordered on the planning application documents by a red line encompassing the site for which planning permissions is sought.
[5] See Site plan 3560-P-0.01 dated 30 May 2022. See also Natura Impact Statement, Appendix A, Site Maps Figure A-1: Site layout and exhibited Proposed Drainage Layouts from the Fanfare Planning Application.

5. The proceedings were in substance defended by the Board and Analog. The Second, Third and Fourth Respondents ("the State") filed opposition papers but did not appear at trial. Of the Notice Parties, LCCC and the IDA did not appear to the proceedings. This was in a degree unfortunate as they have had the central roles in a statutory investigation of the alleged pollution which has prompted these proceedings. As will be seen, they could have assisted the Court as to the factual matrix underlying the proceedings – perhaps as to the redaction of certain documents. It is understandable that they did not appear, as no relief was sought against them. But it was also their choice. It may, of course, be as a result that my understanding of their investigations is incomplete, but I can only comment on the evidence before me. I make certain general comments below as to the state of those investigations but none should be understood as findings against LCCC or the IDA. The Third Notice Party ("the EPA") filed opposition papers. No relief was sought against it. It appeared by counsel at trial primarily to assist the Court – for which I am grateful. In the event, the EPA played a minor role at trial. This judgment makes no findings against the EPA.

6. The Business Park is zoned as a High Tech/Manufacturing Campus.[6] It is large - as of June 2019 it had 48 occupants, including Analog.[7] It was originally developed in the early 1970s by SFADCO[8] and is now operated by the IDA. The Business Park lies about 5km south-west of Limerick City centre. It lies adjacent the built-up suburban areas of Raheen and Dooradoyle, Limerick, to the north-west, north and east. The lands to the west, south and south-east are countryside. Mr Ryan's farm lies south-west of the Business Park.

7. Analog's facilities on its Campus have been expanded and modified repeatedly since 1976 on foot of many and various planning permissions.[9] Some such developments have included modifications to the Campus storm water drainage system.[10] As required by its IPC Licence,[11] Analog's storm water is monitored only for pH,[12] TOC[13] and electrical conductivity. It is not alleged that it has been non-compliant as to those parameters.[14] Like many, perhaps all, of the facilities in the Business Park, Analog's own storm water drainage system discharges to one, the northern, of two general storm water drainage

[6] Inspector's report §7.5.2. - the stated objective of this zoning "*to provide for office, research and development, high technology, regional distribution/ logistics, manufacturing and processing type employment in a high quality built and landscaped campus style environment*".

[7] Listed and depicted in Byrne Ó Cléirigh Report, Risk Assessment of storm water discharges June 2019 Appendix 2.

[8] Shannon Free Airport Development Company Limited.

[9] Significant works appear to have been done in 1979, 1984, 1986, 1988, 1995, 1996, 2000, 2002, 2004, 2005, 2012, 2016/17, see Baseline Report in Support of an Application for a Licence Review, March 2023, Byrne Ó Cléirigh Consulting, Table 5: Development and Operational History. Mr Ryan cites the following planning permissions (LCCC references) since 1988 as relating to the Site: 90/368, 92/1332, 93/1279, 94/640, 98/1950, 99/303, 00/2084, 00/395, 00/2332, 00/2626, 02/1656, 02/850, 04/1218, 05/1566, 06/2125, 11/585, 12/619, 15/283.

[10] See generally Byrne Ó Cléirigh Report, Risk Assessment of storm water Discharges June 2019, Table 5: Summary of planning history relevant to surface water drainage.

[11] An IPC licence is an Integrated Pollution Control Licence granted by the EPA pursuant to the Environmental Protection Agency Act 1992 as amended.

[12] i.e. for acidity/alkalinity.

[13] Total Organic Carbon.

[14] I infer that these parameters are indicators of, identified for testing and that the triggers are set to detect, effluent other than storm water or pollution generally- even if not specific pollutants. Mr Adamson deposes that the EPA's "*Guidance on the Setting of Trigger Values for Storm Water Discharges*" stipulates the required responses where triggers are exceeded.

systems of the Business Park.[15] It does so at three points.[16] However, the storm water drainage systems in the Business Park are complex. For example, some storm water of other occupiers passes through Analog's own storm water drainage system en route to the Business Park's northern general storm water drainage system.[17] A further illustrative complexity is that the storm water of some premises outside the Business Park drains to the Business Park storm water system – though these are not considered potential pollution sources.[18]

8. Broadly, Mr Ryan objects to the Proposed Developments by reference to (a deliberately vague phrase) alleged pollution of the storm water discharge of the Business Park. The northern general storm water drainage system of the Business Park serves much the greater part of the Business Park and many of its occupants.[19] It discharges via a 650m long sewer which runs roughly west/southwest from roughly the middle of the northwestern boundary of the Business Park to the eastern boundary of Loughmore Common/Turlough,[20] where it enters the Loughmore Canal.[21] That canal was built in the early 1970s by SFADCO - primarily to aid surface water drainage of the then-new Business Park. It also receives other local storm water discharges – from outside the Business Park. The canal is a partly culverted but largely open watercourse about 735 metres long. I tend to agree with Analog that the word "canal" is a misnomer, but nothing turns on the point.[22] It flows roughly west along the southern boundary of Loughmore Common/Turlough and then south-west through other lands. It ultimately extends into Mr Ryan's lands by about 100 metres, where it flows into the Barnakyle Stream. Barnakyle Stream wends through his lands to the Barnakyle River. That river in turn flows into the Maigue River which in turn, at Carrigclogher Point about 10km west of the Business Park, flows into the Shannon[23] where lie the Lower River Shannon SAC[24] and the River Shannon and Fergus Estuaries SPA.[25]

9. On 17 January 2022, Analog submitted planning application 22/38 to LCCC for permission to effect the Hydrogen Development. Mr Ryan objected to the Hydrogen Development by submission received by LCCC on 11 February 2022.[26] On 10 March 2022, LCCC sought further information from

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[15] See Figure 3-1 of a hydraulic modelling report dated 30 September 2020 by Nicholas O'Dwyer Ltd, consulting engineers, for the IDA. That report states that "*The surface water within the Business Park area currently drain to two separate surface water systems; the southern developments drain to a surface water network that discharges to an attenuation pond south of Ballycummin Avenue. The northern parts of the land banks drain to an older surface water network which discharges to the Loughmore Canal*. See also and generally Byrne Ó Cléirigh Report, Risk Assessment of storm water Discharges June 2019. It is not apparent that the O'Dwyer Report was before the Board. As exhibited it is partly redacted and the appendices are missing for reasons not apparent. It does not canvass misconnections to storm water drainage systems nor pollution via such misconnections – nor do I suggest that it should have given its purpose.

[16] Letter dated 6 February 2024, EPA (OEE) to An Bord Pleanála.

[17] EPA Site Visit Report SV28237 04/10/2023 noted that *"the site's drainage network appears to receive storm water contributions from off-site sources such as road run-off, adjacent sites and upstream connections from the IDA Estate drainage system"*.

[18] Letter LCCC to IDA undated but of August 2022.

[19] Surface Water Solution For Raheen Business Park, Limerick Hydraulic Modelling Report Nicholas O'Dwyer Ltd. 4 September 2020, **'***Figure 1-2 – Outline of catchment within IDA Land Bank which could feasibly drain to the northern surface water network and ultimately the Loughmore Canal'.*

[20] Loughmore Common was once a candidate SAC but that status was not confirmed and it is now a pNHA. It includes the locus of a turlough which is part of the flooding characteristics of the area.

[21] See Figure 1-1 – IDA Land Bank in Raheen Limerick Hydraulic Modelling report dated 30 September 2020 by Nicholas O'Dwyer Ltd. Analog's storm water drains to the discharge to the Loughmore Canal save for storm water collected in the G3 yard which is directed to the site's effluent plant. The G3 yard is the main delivery, storage and collection point for the main raw and ancillary / support materials and for wastes. However, it is not suggested that this is relevant for present purposes.

[22] Affidavit of Douglas Adamson sworn 25 June 2024 §39.

[23] As the crow flies, the Shannon estuary is about 3 km north-west of the site.

[24] Special Area of Conservation within the meaning of the Habitats Directive.

[25] Special Protection Area within the meaning of the Wild Birds Directive.

[26] Two other members of the public made submissions about the same time.

Analog, and Analog replied on 21 April 2022. On 17 May 2022, LCCC decided to grant permission for the Hydrogen Development. Analog at trial, described the Hydrogen Development as relatively minor. It essentially consists in the replacement of an existing liquid hydrogen storage tank with a larger such tank on existing hard standing and associated equipment and resultant alterations to existing equipment.[27] Analog asserts that it will have no impact whatsoever on storm water run-off or the concerns expressed in Mr Ryan's planning appeals. Despite Ground 2 as to EIA encompassing the Hydrogen Permission, to all of this at trial there was no great objection by Mr Ryan, and I accept Analog's submissions in this regard.

10. On 21 July 2022, Analog submitted planning application 22/803 to LCCC for permission for the "Fanfare Development". This involves:

- Construction of a two-storey over basement "Fanfare" extension to the existing C1 R&D[28] Pilot Line building, with proposed ground floor R&D and 1st Industrial Deployment/Manufacturing use, and basement, mezzanine and roof level plant areas;
- Construction of a two-storey extension to the existing Energy Centre with proposed service tunnel connecting to the new R&D Fanfare basement;
- Construction of a scrubber[29] deck extension, with 4 new proposed scrubbers and flues, associated mechanical discharge flues and associated generator/electrical/support rooms;
- Re-organisation of the site layout, with associated works, and the proposed relocation of 300 car park spaces from the proposed extension on Ballynoe Avenue to a landscaped car park accessed off Derrybeg Road (including the provision of new EV points, motorcycle spaces and bicycle spaces);
- Relocation of 2 existing groundwater control wells;
- Associated alterations to the existing manufacturing building and siteworks.

Of the foregoing, Mr Ryan's case before me drew particular attention to the Fanfare extension and to the associated alterations to the existing manufacturing building.

11. The Fanfare Planning Application included an "Engineering Planning Report" by Punch Engineers dated July 2022. It illustrated the existing[30] and the proposed[31] storm water drainage systems. It envisaged a new SuDS[32] surface water sewer network for the Proposed Developments - to be separate from the foul water sewer network.[33] It will include hydrocarbon interceptors,[34] hydrobrakes,[35] tanked permeable pavements and an attenuation tank,[36] all of which will both reduce storm water peak flow discharge and improve discharge quality[37] as compared to the present. The Fanfare Planning Application included a Natura Impact Statement which repeated this content[38] and concluded that there would be

[27] Transcript Day 2 p143.
[28] Research & Development.
[29] As I understand, scrubbers remove pollutants from discharges to air.
[30] §2.1 Existing storm water drainage, Figure 2-1 & Appendix A.
[31] At p4 it cited PUNCH drawings 221173-PUNCH-XX-XX-DR-C-100 and 221173-PUNCH-XX-XX-DR-C-101 for proposed drainage layouts. See also Natura Impact Statement, Appendix A, Site Maps Figures A-2 & A-3 Proposed Drainage Layouts.
[32] Sustainable Urban Drainage Systems.
[33] §2.2 Proposed storm water drainage.
[34] To remove hydrocarbons and fine sediment particles. Details in Appendix F of the Engineering Planning Report.
[35] Hydrobrakes limit peak discharge flow. Details in Appendix E of the Engineering Planning Report.
[36] These store storm water in heavy rain to reduce peak discharge flow and release it gradually thereafter. Details in Appendix D of the Engineering Planning Report.
[37] Removing and/or biodegrading hydrocarbons, solids and fine sediments.
[38] At pp 12, 13, 23 & 45.

no adverse effect on the integrity of the Lower River Shannon SAC and the River Shannon and Fergus Estuaries SPA.[39]

12. By letter dated 23 August 2022, the HSA[40] notified LCCC that the COMAH Regulations[41] applied to the Site but that it did not object on that account to the proposed Fanfare Development. It is convenient to say now that Mr Ryan did not seek to mobilise its COMAH site status against Analog in these proceedings – in my view correctly.[42]

13. On 24 August 2022, Mr Ryan objected to the Fanfare Planning Application.[43] On 13 September 2022, LCCC decided to grant permission for the Fanfare Development.

14. Mr Ryan appealed both LCCC's Fanfare Development decision and its Hydrogen Development decision to the Board. The Board appointed the same inspector to report on both appeals – which she did by separate reports.

15. Analog says that the Fanfare Development will extend and upgrade its existing manufacturing facility, including as a key R&D hub, at a cost in the region of €630 million and adding 600 jobs to the current 1,300. The Fanfare Development is, Analog says, essential to ensuring that Raheen remains a key location globally in the production of its cutting-edge technology. These assertions are not disputed. That Analog sets them out as context to the proceedings and as their view the merits of the Proposed Developments is entirely understandable. It expresses considerable and understandable frustration at these proceedings but sensibly accepts that the relevance of these matters to the legality of the Impugned Decisions is limited.[44]

PROCEEDINGS & GROUNDS PURSUED

16. These proceedings issued on 1 November 2023, seeking to quash the Impugned Decisions. On 13 November 2023, Humphreys J granted leave to seek judicial review and gave Mr Ryan liberty to amend his Statement of Grounds. On 16 November 2023, Mr Ryan issued a notice of motion seeking judicial review of the Impugned Decisions and filed an Amended Statement of Grounds. Between May 2024 and July 2024 the Board, the State, Analog and the EPA filed Statements of Opposition and affidavits, and Mr Ryan replied.

[39] p55.
[40] Health and Safety Authority.
[41] Chemicals Act (Control of Major Accident Hazards involving Dangerous Substances) Regulations 2015 (S.I. No. 209 of 2015). They implement the Seveso III Directive (2012/18/EU).
[42] Transcript Day 1 p145.
[43] Three other members of the public made submissions about the same time.
[44] Transcript Day 2 p166.

17. Of the Amended Statement of Grounds, Mr Ryan is not pursuing Grounds 1, 3 and 5 and part of Ground 4 - §E(87) and §E(97) insofar as it refers to the Board. That leaves live only

- Ground 2 as to EIA, said to arise from both Proposed Developments.
- Ground 4 as to Water Framework Directive ("WFD") issues, said to arise only from the Fanfare Development.

I will return to the pleadings in due course. Meanwhile it suffices to record the Core Grounds.

18. Ground 2 reads

> *"The Fanfare Decision and the Hydrogen Decision are invalid because*
> *the Board misdirected itself in law as to whether an EIA was required in respect of the Fanfare and Hydrogen Developments, either as*
> *an industrial estate development,*
> *an urban development,*
> *a chemicals storage development,*
> *or a groundwater abstraction development,*
> *and*
> *it failed to consider cumulative impacts of the Developer's entire installation and cumulative impacts with other development in the area,*
> *and accordingly it failed to carry out EIA screening in accordance with s.171A and s.172 PDA 2000, Article 109 PDR 2001, and Articles 2, 3, 4, Annex II and Annex III of the EIA Directive."*

19. Ground 4 reads

> *"The Fanfare Decision is invalid because*
> *the Council and the Board failed to make a determination for the purposes of Articles 2, 4, 5 and 6 of the Surface Water Regulations[45] giving effect to Article 4 of the Water Framework Directive,[46]*
> *as to whether the Fanfare Development would cause deterioration of water quality, or would prejudice the attainment of good quality for waters,*
> *and*
> *it (the Board)[47] failed to have regard to relevant material in the possession of the Council and the EPA which those bodies should have, but did not, furnish to the Board."*

TERMINOLOGY & EFFLUENT COLLECTION SYSTEMS – A NOTE

[45] European Communities Environmental Objectives (Surface Waters) Regulations 2009 (S.I. No. 272 of 2009) as amended, including by the European Union Environmental Objectives (Surface Waters) (Amendment) Regulations 2019 (S.I. No. 77 of 2019).
[46] Directive 2000/60/EC establishing a framework for Community action in the field of water policy.
[47] Text in parentheses added to clarify.

20. As it is beset by technicalities which can distract, a brief introductory word on terminology may help. Conventionally, the phrase "storm water" includes all natural precipitation on the lands and buildings of a development – not just that from storms. It is on occasion referred to as "surface water". Though that usage risks confusion with surface water bodies such as rivers and lakes, the meaning is generally clear from the context. All other effluent from a development is distinguished from storm water – by phrases such as "foul water", "waste water", "sanitary waste water", "trade effluent" and the like.

21. Ideally, storm water is purely the effluent of natural precipitation. In practice, it is polluted in greater or lesser degree by pollutants on the surfaces or in the ground on which it falls – a typical example being oils spilt and tyre residues deposited by vehicles on road and car park surfaces. Another might be local spillages by stored chemicals. As will be seen, storm water can also be polluted by waste water misconnections to storm water systems.

22. It is perhaps specifically a lawyer's observation that, in law and perhaps surprisingly, "sewer" is a confusing word.[48] Simplifying somewhat, pipes conveying both foul/waste effluents and storm water effluents within a private property are, in law, "drains" not sewers. Pipes conveying either foul/waste effluents or storm water effluents of multiple properties[49] or in a public system are "sewers". Colloquially, and indeed in this judgment, the distinction between drains and sewers is not always rigorously observed, but here that does not matter.[50] More relevant perhaps in settling and in reading affidavits is the appreciation that in referring to a "sewer" it may be wise - even important - to specify clearly the type of sewer to which one is referring, whether, foul/waste, storm water or, indeed, combined.

23. Historically, storm water and foul water were usually discharged as a single mixed effluent via a single "combined" system of drains and sewers[51]. Such systems still exist and their effluent is considered waste water and, typically and desirably, is conveyed to some form of treatment such as by a waste water treatment plant. However, for many years, new development has provided (and the Proposed Developments will provide) separate systems. All effluent other than storm water is conveyed by foul/waste water drains and sewers to treatment. Separate storm water drains and sewers receive storm water only and often convey it immediately or (as in the present case) mediately via storm water sewers serving multiple developments and/or public sewers, to natural watercourses such as streams and rivers.

24. Given the possibility of pollution described above, SuDS storm water systems are now standard and often involve not merely flow control to minimise flooding but local treatment of pollution, such as by oil interceptors. They also may involve precautions to prevent such pollution – for example bunding of

[48] See generally, Keane on Local Government, 2nd Ed'n (Butler) 2003 p102. Browne on Local Government, 2nd Ed'n 2020, §16-93 et seq. Butler states that "*It is not necessary for a pipe to carry sewage in the ordinary sense in order for it to be a sewer. Any form of artificial channel, which is designed to take away surface water, can be a sewer*." Browne cites the definition of "sewer" in s.2 of the Water Services Act 2007 as "*including storm water sewers*" where "*owned by, vested in or controlled by a water services authority, an authorised provider of water services or a person providing water services jointly with or on behalf of a water services authority or an authorised provider of water services*".

[49] I leave aside here the difficult concept of a "combined drain".

[50] The distinction is usually relevant to the question whether the pipe is privately or publicly owned – an issue not relevant in this case.

[51] Not to be confused with "combined drains" – See Browne on Local Government 2nd Ed'n §1.87 et seq.

chemical storage areas to trap spillages before they enter storm drains. In some instances, risk of pollution of storm water may be such that it is prudent to route it to the foul/waste water system for treatment.[52]

25. Finally, as the Board agreed,[53] anyone with experience of planning matters is aware of at least the possibility of misconnections by which foul/waste water finds its way into storm water drains and sewers. That may be especially so on lands incrementally developed over time in which the drains and sewers may be added to, subtracted from, re-routed and generally altered repeatedly to a condition of appreciable complexity. Such misconnections should not happen but in an imperfect world the risk is recognised. For example, the EPA Guidance invoked on affidavit by Douglas Adamson for Analog records some of the more common sources of contamination of storm water as including *"Misdirection/ incorrect connection of pipes, foul sewer pipes, pipes from hand-basins etc. into storm-drains."*[54] The alleged possibility of such misconnection to Analog's storm drains and resultant risk of pollution of the storm water discharge of the Business Park, is as a practical matter, of considerable relevance in this case.

ANALOG'S FANFARE EIA SCREENING REPORT - 8 JULY 2022 & 2019 INVESTIGATIONS

ANALOG'S FANFARE EIA SCREENING REPORT

26. As will appear below, I read the Inspector's Fanfare Report, as to EIA Screening, as adopting Analog's Fanfare EIA Screening Report.[55] That screening report includes a "*Figure 1: Screening Steps*"[56] which exhibits a correct appreciation that the first and discrete step in EIA Screening is to identify, by reference to the classes of project identified in Schedule 5, Part 2 PDR 2001,[57] whether the proposed development is of a form, nature or type which may require EIA. If not, EIA is not required and that is the end of the EIA Screening process. If so, the next question in the EIA Screening process is to determine whether the proposed development exceeds any relevant threshold or meets any relevant criterion, such that EIA is required.

27. Analog's Fanfare EIA Screening Report concludes that the Proposed Fanfare Development *"… does not fall under the definition of any of the prescribed developments listed under Schedule 5 of the Regulations, and so, in our opinion, a mandatory EIA is not required."*[58] However, it is not entirely clear from the Screening Report whether this is because the proposed Fanfare Development,

- as to its form, nature or type does not fall in any such class and so the questions of threshold, criteria or screening and, ultimately, of doing EIA simply don't arise; or

[52] That is so as to the storm drainage of part of Analog's Campus.
[53] Transcript Day 2 pp 26 & 27.
[54] Guidance on the Setting of Trigger Values for Storm Water Discharges to Off-Site Surface Waters at EPA IPPC and Waste Licensed Facilities, 2012, p8.
[55] By Byrne Ó Cléirigh dated 8 July 2022. It is misnamed a "*Screening for Environmental Impact Assessment*". Screening is done by the Board not by the Developer. Properly, it is an Environmental Impact Assessment Screening Report.
[56] Source: Figure 3.2, Guidelines on the information to be contained in Environmental Impact Assessment Reports, May 2022, EPA.
[57] Planning and Development Regulations 2001 as amended.
[58] As noted elsewhere in this judgment, all EIA is mandatory. This sentence is to be read as asserting that what I term "automatic" EIA is not required.

- does fall into such class but does not exceed a threshold or meet a criterion and so EIA is unnecessary.

28. However, while the Screening Report should have been clearer, it appears that the latter is the case as the EIA Screening Report recites[59] Class 15 of Schedule 5, Part 2, PDR 2001, as to sub-threshold development, and states *"Therefore, an EIA screening is required to determine whether an EIAR is required to be submitted with the planning application."*[60] That screening is "*required*" implies that the proposed Fanfare Development, as to its form, nature or type, does fall into a Schedule 5 Part 2 class as, otherwise, screening for Class 15 sub-threshold EIA would not be "*required*". But the Screening Report does not identify the class of form, nature or type of development in question. In practical terms, that is of course possible as, whatever the applicable class, the criterion for Class 15 sub-threshold EIA is the general one of likely significant effect on the environment. Thereafter the Report consists of a Class 15 sub-threshold EIA screening report in the form of a *"Table 1: Screening Checklist*" which includes identification and assessment of impacts. The Report concludes that the Fanfare Development Project is not likely to give rise to significant impacts on the receiving environment and so EIA is not required.[61]

29. Returning to the Table 1 Screening Checklist and as to the question whether the Fanfare Project will lead to risk of pollutant contamination of surface waters or groundwaters, the Screening Report refers to Analog's surface water drainage system as discharging to the Business Park surface water drainage system and to Analog's monthly monitoring of surface water and waste water quality to ensure compliance with their IPC licence limits and it concludes that contamination of land or water from releases associated with the project is unlikely.[62]

30. In considering the question of risk to European sites, the Screening Report[63] recognises a "*potential hydrological linkage to the Shannon Estuary in the event of an accidental release through the Raheen Business Park surface water network"* and says

> *"In compliance with COMAH regulation and IPC licence conditions, ADI[64] has completed Hazard and Risk Assessment and HazOp studies for the existing operation, including a Risk Assessment of storm water Discharges, to identify risks, and to ensure that adequate risk reduction and mitigation measures are in place to reduce risks to As Low as Reasonably Practicable (ALARP). No accidental releases of sufficient magnitude to significantly impact water quality in the River Shannon and River Fergus Estuaries SPA and lower River Shannon SAC have been identified.*
> *There will no change in the nature or scale of risks at the site as a result of the Project during its operating phase.*
> *A Natura Impact Statement completed for the Project concludes that, taking into account the proposed mitigation measures, adverse effects on any Natura 2000 site are not likely to occur from the proposed works.*

[59] §5.2.
[60] Emphasis added.
[61] §6.
[62] Table 1, §7, p13.
[63] Table 1, §11, p16.
[64] Analog.

> *In our opinion, significant impact on any areas protected under international, EU, national or local legislation due to the Project is therefore unlikely."*

31. The Screening Report considers cumulative impacts at various points. In particular, it records that the cumulative emissions from Analog's Campus as a whole are controlled by its IPC licence.[65] It lists the other three EPA licensed facilities in the Business Park and also lists[66] planning applications and permissions in the vicinity of the project of a scale to potentially result in cumulative effects with the Fanfare Project. It notes that emissions from all IPC licenced sites are monitored to ensure that there are no cumulative significant environmental impacts associated with their operation and the author's assessment is that significant cumulative impacts with other existing or planned activities are unlikely.

32. In considering the question of risk to other nearby sensitive locations, the Screening Report[67] identifies that the Raheen Business Park storm water drainage network passes through the Loughmore Common Turlough wetland to the Barnakyle River and so there is the potential for an accidental release from the project to impact the wetland. The Screening Report concludes that significant impact is unlikely, *inter alia,* as

> *"In 2019, ADI carried out a Risk Assessment of storm water Discharges in accordance with EPA guidance. The report found that there was a very low overall risk of contamination arising from ADI's site adversely impacting on the Loughmore Common Turlough. The Project will not result in any new materials on site or any change in the nature of activities carried out. Therefore there is no change in the risk profile for the site."*

33. However, the EIA Screening Report did not enclose that 2019 Risk Assessment.[68] Nor was it before the Board. That was an error as, by invoking it but not enclosing it, Analog asked the Board to accept on faith the 2019 Risk Assessment's conclusion that "*there was a very low overall risk of contamination*". It disabled the Board from bringing its duty of critical analysis to bear on that conclusion. As Humphreys J said in **Reid #2**: *"The logic that 'other people have looked at this, therefore it must be OK' is the sort of thing that leads to systems failures".* It is the Board which must screen for EIA – not the developer. However, as that error is not pleaded I need take the issue no further.

ANALOG'S RISK ASSESSMENT OF STORM WATER DISCHARGES & IDA CCTV SURVEY - 2019

34. Though it was not before the Board, the 2019 Storm Water Risk Assessment was exhibited in these proceedings by Mr Ryan. It was submitted to the EPA in support of Analog's appeal of an IPC

[65] Table 1, §10, p15.
[66] Table 1, §10, p15 & Appendix 2.
[67] Table 1, §12, p17.
[68] Byrne Ó Cléirigh, Assessment of storm water Discharges in the Context of IPC Licence Condition 3.8 (2019).

Licence condition which had required Analog to retrofit silt traps, oil separators and SuDS[69] to the entire of its pre-existing storm water drainage system. Analog had done so in part and proposed to do so in further part but wanted to be absolved as to the rest of the pre-existing system given its "*extent and complex nature*" – of which it supplied a drawing.[70] The Risk Assessment stated its purpose as *"to identify the potential sources of contamination of surface water across the site and to assess the potential impact on the environment, to determine the extent to which silt traps and oil separators[71] are appropriate". Inter alia*, it recorded that the G3 yard is the main intake, storage and collection area for bulk liquid and gas raw materials and wastes, and all G3 yard storm water is directed to the on-site effluent plant prior to discharge to the municipal sewer and is not discharged to the storm water drainage system.[72] Essentially the Risk Assessment asserts that

- Analog uses a range of chemicals - acids, etchants, oxides, adhesives, emulsions, developing solutions, activators, dopants;[73]
- no pollutants are discharged to surface water;
- the results of monitoring six discharge locations, which account for the majority of storm water collected on the Campus,[74] show that the quality of water discharged to the Business Park storm water drainage system is generally below or within licence warning and action levels for the three parameters stipulated by the IPC licence - pH,[75] TOC[76] and conductivity;[77]
- the materials that could present a significant risk of storm water contamination are hydrocarbons from vehicles;[78]
- the risk posed by such contamination is very low.[79]

35. In 2019, and as a separate exercise to Analog's, the IDA did a CCTV survey and report thereon, of the Business Park foul and storm drainage systems. It is not in evidence[80] but Dr Hall of Tetra Tech (for Mr Ryan) in 2024 describes it as

- a survey of the integrity of the drainage network and the possibility of infiltration or cross connections;
- showing the aged and poor condition of the IDA site network, with open joints in pipes, cracks, roots, grey sludge in some pipes, clear water in others notes and a mixture of plastic, concrete and asbestos pipes, with misconnections between storm and foul evident; and
- stating that the IDA were, in 2019, doing improvement works to the storm drainage network. She does not elaborate.

However, I note in particular that Dr Hall's is a criticism not of Analog's storm water network but of the Business Park storm water network.

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[69] SuDS stands for Sustainable urban Drainage System and is a series of management practices and control structures that aim to mimic natural drainage.
[70] Appendix 1: ADI Site Drainage.
[71] Also termed "*interceptors*". They are not relevant to pollution by zinc or phosphorous – Transcript Day 2 pp 152 & 153.
[72] §2.3.2. & §3.1.
[73] §2.1.
[74] §3.2.
[75] i.e. acidity/alkalinity.
[76] Total Organic Carbon.
[77] §3.4.
[78] §6.3.1.
[79] §6.5.4.
[80] See LCCC report to EPA 16/9/22 §3.4. The IDA CCTV Survey report appears to have been appended to the LCCC report to EPA but the exhibition of that report did not include its appendices.

Though both introduced to the proceedings by Mr Ryan, and taking their content as admissible *de bene esse*, I do not see that the 2019 Storm Water Risk Assessment and the information to hand as to the 2019 IDA d CCTV survey help his case against Analog's Proposed Developments.

POSSIBILITY OF MISCONNECTIONS TO THE ANALOG STORM WATER SYSTEM

36. I cannot assess the extent of any reassurance which the IPC licence monitoring results for the three stipulated parameters might give as to the absence of misconnections to the Analog storm water system, assuming (perhaps incorrectly) that those parameters are used as general indicators of pollution and as triggers for investigations to identify specific pollutants. Neither Analog's 2019 Risk Assessment nor the Fanfare EIA Screening Report considers the possibility of misconnections of pollutant effluent to the Analog storm water system. However, both preceded the Ryan objections to the Proposed Developments which objections posited, however unspecifically, the risk of pollution of the Business Park storm water discharge via such misconnections. Accordingly, the 2019 Risk Assessment and the Fanfare EIA Screening Report must be read also in light of Analog's reply to those objections – which reply I consider below.

MR RYAN'S UNDERLYING COMPLAINTS, LCCC INVESTIGATION & PLANNING PROCESS BEFORE LCCC

RYAN COMPLAINTS

37. In objecting to LCCC, and in appealing its decisions to the Board, Mr Ryan made, essentially two complaints:

- First, he complained that the Business Park storm water discharge has contaminated his farmlands and has poisoned his cattle - some of whom have had to be put down in consequence. Pollution of the Loughmore Canal has been the subject of considerable media attention[81] which has in effect stigmatised his land and stock such that he has difficulty trading. He fears that he is seen as a "*crank*" and an "*objector*". He says that LCCC and the IDA do not really dispute that the pollution is occurring and he has spent years trying to have it addressed. But, despite investigation, they have failed to identify the pollution source or the polluter. He essentially took the position that all development of and in the Business Park, including by Analog, should cease until the pollution has been stopped.

- Second, he complained that the Business Park storm water discharge to the Loughmore Canal is excessive in volume such that it contributes to and exacerbates flooding of his farmlands.[82] He said that the Barnakyle River has always flooded, backing up to the Barnakyle Stream and flooding his lands and the OPW[83] has periodically dredged the Barnakyle Stream to alleviate flooding. He said the Business Park

[81] A 'Prime Time Investigates programme' on RTÉ in December 2022, in which he was interviewed.
[82] That the Loughmore Canal floods adjacent and downstream lands is acknowledged in the Hydraulic Modelling report dated 30 September 2020 by Nicholas O'Dwyer Ltd Consulting Engineers for the IDA.
[83] The Office of Public Works.

storm water discharge volume essentially deprives him of the benefit of the OPW works and so his lands flood. However, there is no suggestion that any incremental volume of storm water discharge from the Proposed Developments will appreciably exacerbate any flooding. Indeed total precipitation on the Campus will be unaffected by the Proposed Developments. The complaint of flooding is incidentally relevant in that the floodwaters allegedly convey the pollution to Mr Ryan's lands but it is not directly in these proceedings.[84]

38. It is important to state that all parties acknowledged and sympathised that Mr Ryan has a genuine problem – though they say that both his appeals to the Board and these proceedings are misconceived. In that regard, it is disconcerting to note, without drawing any inferences as to cause or blame, that there was no suggestion at trial that a statutory investigation by LCCC pursuant to the Water Pollution Act 1977,[85] in which the IDA has co-operated, has, despite the passage of some years since its initiation on foot of a complaint made in June 2021, borne any fruit in terms of identifying the cause of the pollution. The chief executive of LCCC, as long ago as March 2022, "*assured*" local landowners of LCCC's "*intention to resolve the problem*". It is not apparent that, despite the passage of considerable time, LCCC's intention has been realised or that the investigation has ever been completed. I am sure that had the pollution source been found I would have been told – indeed, it is very possible that this litigation would never have occurred.

39. I should also say that, while I have no doubt he firmly believes it to be the case and I make no finding that he is wrong (or any finding on the issue) Mr Ryan adduced no evidence that what poisoned his lands or cattle was pollution from the Business Park, much less from Analog.

LOUGHMORE CANAL STAKEHOLDER MEETING - APRIL 2022

40. Mr Ryan's objection to LCCC and appeal to the Board in the Fanfare planning application enclosed in support of his complaints a minute of a Loughmore Canal Stakeholder Meeting of 21 April 2022. It was attended by, *inter alia*, LCCC executive team members, IDA representatives and landowners or their agents – including Mr Ryan's agent. Mr Ryan emphasised at trial that, by enclosing that minute with both his planning objection to LCCC and his appeal to the Board, he informed LCCC qua planning authority and later the Board that, in April 2022:

- LCCC were conducting a Water Pollution Act investigation of alleged pollution of the Loughmore Canal. *Inter alia*, sampling regimes were in place.
- While the source of the alleged pollution had not been established[86] (and the Business Park's is not the only storm water discharge to the canal, stream and river), the IDA were co-operating in investigating, and prioritising and resourcing the investigation of, the possibility that the alleged pollution came from the Business Park.

[84] For example, see generally Transcript Day 1 p156 et seq.
[85] Local Government (Water Pollution) Act 1977 as amended.
[86] Nor has it since been established as far as the evidence reveals.

- *Inter alia*, the IDA had retained expert advisors and was conducting and contributing its own sampling regime and had agreed to share CCTV footage of its drains. It would apply whatever resources were required to identify the pollution source and was committed to finding a solution – though it would take time.
- Abnormally high discharges were occurring during dry periods.
  - Presumably, as one would not expect storm discharges in dry weather, this suggests effluent other than storm water in the storm water system. The minute is unclear whether these were known to be from the Business Park. That seems to me the likely meaning. But in any event what is stated suffices to at least put the Board on notice of that issue.
- Monitoring results to date had shown exceedances in zinc, phosphorus and suspended solids and their sources needed to be identified.[87]
- While the IDA denied that the canal was polluted, they acknowledged "*intermittent incidences*". They preferred the word "*issue*" to "*problem*".
  - I suppose Mr Ryan would say that the choice of terminology depends on your point of view. In my view, the minute does not record any real dispute but that a pollution problem existed. Though it is not clear that its source in the Business Park storm water discharge was considered to have been established, that was at least a main hypothesis of the investigation.
- Finalising and analysing sampling and CCTV data was envisaged as being completed about six weeks after the meeting.

41. It is important to observe that the minute of 21 April 2022 does not mention Analog, or for that matter any other particular occupant of the Business Park, as a possible source of the pollution or as more or less likely to be its source. It does not mention Analog at all.

JRE TECHNICAL MEMORANDUM ON SAMPLING RESULTS - MAY 2022

42. On 10 May 2022, JRE Environmental Consulting submitted a 'Technical Memorandum'[88] to its client, LCCC, as to analysis of seven storm water samples taken from each of the input drainage pipe to Loughmore Canal and two manholes considered by LCCC to be the last storm water discharge points for the Business Park. Together they represented all storm water inputs from the Park. For reasons not explained, the copy memorandum exhibited is partly redacted, including as to the location of the manholes – which is unsatisfactory in an exhibit. The redactions do not seem explicable solely by GDPR concerns. However, it was exhibited by Mr Ryan and I infer that he exhibited it in the state in which he received it. Of the 21 samples:

- 9 samples in total, including 6 of 7 samples from a particular but unidentifiable[89] manhole, contained zinc levels exceeding the 2009 Surface Water Regulation Limit of 100 µg/l which "*may be from the industrial estate*".

[87] Amongst the exhibits.
[88] JRE Environmental Consulting – "*Sampling Results for Industrial Drains in the Raheen Area and Loughmore Canal*".
[89] Due to redactions.

- 16 samples contained elevated phosphorus levels exceeding the 2009 Surface Water Regulation Limit of 75 µg/l. The conclusion was of a "*consistent discharge*" of storm water containing elevated phosphorus levels from unit(s) in the Business Park. The results indicated that an activity in the area that drains to a particular drainage manhole may be the main source of phosphorus.
- There were ammonia exceedances also.

JRE noted the possibility that

- the phosphorous discharge may be due to the use of phosphate- and/or ammonia-containing cleaning products in cleaning and decontamination of vessels or equipment in units in the Business Park. Such activities are typical of but not exclusive to food preparation and pharma operations. JRE advised that all such wash water be discharged to foul sewers and not to the storm water system; and
- there may have been a mix up whereby certain sections of old combined drains may be draining to the storm water system by mistake. Combined drains should discharge to the foul system.

JRE advised that it would be difficult to specifically identify any activity as the source of the zinc, phosphorus and/or ammonia in storm water. But they advised assessment of facilities that carry out any of certain activities it listed to determine if they use zinc, zinc oxide, phosphate or ammonia based products, to either identify or eliminate them as potential sources. Notably, JRE specifically acknowledged the possibility of misconnections to the Business Park storm water drains.

While the unexplained redactions seem to introduce unnecessary doubt, it is important to say that this JRE memorandum did not mention, much less point to or implicate, Analog.

GARLAND REPORTS – DRAFT, JULY 2022, FINAL FEBRUARY 2023 & LCCC TO IDA AUGUST 2022

43. On 8 August 2022,[90] the IDA sent LCCC a 'Draft Report and Analysis of the 2021/2022 Surface Water Discharges to the Loughmore Canal from the Raheen Business Park' by Garland, consulting engineers, dated 7 July 2022.[91] The IDA's covering letter confirmed "*elevated concentrations of some substances (mainly Zinc & Phosphorus)*". It recorded the commencement of "*communication with the tenants in the Raheen Business Park in relation to the findings of the Draft Report*". It envisaged more sampling (including by "*devices for continuous integration of the chemicals in a water flow*") and it canvassed the possibility of a source outside the Raheen Business Park. The draft report dated 7 July 2022 also stated that monitoring of the Business Park Storm Water system had

> *"revealed a periodic pulse of flow at regular approximately 50-minute intervals, Figure 3. While the flows are not large when compared with storm flows, they do indicate an unexpected (and to date unexplained) inflow of fluid to the drainage system. The very short duration (10 – 15 minutes from start to finish) of the pulses meant that it is not clear of any of the samples analysed were of this fluid or what (if any) chemical it contributes to the storm drainage system and Loughmore Canal."*

[90] Though the letter is undated.
[91] The IDA letter mistakenly refers to it as dated 6 July 2022.

Its conclusions[92] include the following:

- Unexpected and elevated concentrations of phosphorus and zinc in the storm water manhole tests.
- These may be due to an intermittent rather than a persistent cause.[93]
- In each case "*Its source should be identified and managed*."
- Limitations of sampling to date suggest that deployment of continuous monitoring is desirable – including to detect pulsed contaminations.
- Agricultural drainage is likely contributing to phosphorous levels in the Barnakyle Stream.
- The "*IDA are committed to working with LCCC to reach a resolution on this matter as soon as possible*."

44. LCCC replied to the IDA by an unfortunately undated letter – apparently sent in August 2022. It said of the Garland draft report that

> *"… the results are consistent with our findings highlighted elevated levels of zinc and phosphorus. We would ask that the actions committed to in this report by the IDA Ireland are completed as a matter of urgency as Limerick City and County Council are anxious to progress and action the next steps of the investigation."*

The letter also stated that

- LCCC was anxious to ensure a successful outcome to this investigation and noted IDA's commitment to assist.
- LCCC was doing a CCTV survey of the surface water sewer outside of the Business Park to ascertain the integrity of this infrastructure and any possible cross connections.
- However, its investigations had identified all premises outside of the Business Park discharging to the Canal and suggested that they were not a focus of further investigation as they do not discharge phosphorus or zinc.
- LCCC had requested a copy of the IDA CCTV survey report and associated mapping but had not received it to date.
- It formally requested as follows
  > *"1. Report on the CCTV survey and associated drawings completed within the Business Park.*
  > *2. Timescale for the additional targeting sampling and a map indicating where this targeted area is within the business park.*
  > *3. With regard to your communications with some business with the Park, please provide a list of business contacted, the outcome of the meetings and the agreed actions.*
  > *4. Please update us on the dredging works planned for the Loughmore Canal for Q3 2022."*

45. Mr Ryan pleads and his written submissions assert that LCCC failed to forward to the Board a Garland report dated 15 February 2023[94] or alert the Board to its existence. But the affidavits do not record or exhibit that report. But it is clear that the February 2023 report was the finalised (and presumably updated) version of the July 2022 draft and LCCC sent neither Garland Report to the Board.

[92] pp 14 & 15.
[93] p10.
[94] See below - Tetra Tech Report Table 2 – Available Technical Reports. It confirms the title of the final Garland report of February 2023 as "*The Analysis of the 2022 surface water discharges to the Loughmore Canal from the Raheen Industrial & Business Park (Final)".*

The exhibited Tetra Tech report of July 2024[95] records having considered the 'final' Garland report of February 2023 but I find the Tetra Tech report unclear as to any incremental information in it as compared to that of July 2022.

46. It is important to say that the draft Garland Report of July 2022, which I have seen, did not mention, much less point to or implicate, Analog. Nor did Tetra Tech suggest that the Garland Report of February 2023 had done so. It is safe to infer, therefore, that it did not do so.

[95] See below - Tetra Tech Report Table 2 – Available Technical Reports.

FANFARE - RYAN OBJECTION TO LCCC - AUGUST 2022, LCCC PLANNER'S REPORT & LCCC REPORTS TO EPA, SEPTEMBER 2022 AND DECEMBER 2023

47. As I have said, on 24 August 2022, Mr Ryan objected to the Fanfare Planning Application.[96] He did so in terms which complained, *inter alia*, as follows:

- Of expert-validated concerns since 1999 of excessive volumes of discharge to the Canal and Barnakyle Stream, ignored by LCCC and flooding his land.
- That the Business Park main foul and storm lines, laid in the base build of the Business Park (i.e. in the early 1970s), had been expanded and multiple new connections made since, resulting in misconnections to the storm line and storm line discharges which are not of storm water.
- That investigations of these discharges by LCCC, IDA, EPA , OPW and NPWS[97] were ongoing for over a year, *"despite which no determinations have been made of the causes of the pollution through the storm water network and subsequently through my lands (Stakeholder minutes attached)."*
- *"My lands have been flooded due to the destruction of the Loughmore Turlough and my livestock suffered unexplained physical distortions as seen with exposure to chemical pollution."*
- *"On public health and animal welfare grounds no further development can be permitted in the Raheen Industrial Estate."*
- The discharge also posed a danger to the natural heritage of the Loughmore Turlough.

Mr Ryan's Fanfare objection to LCCC also enclosed the Stakeholder meeting minute of 21 April 2022, the contents of which I have already described.

48. In light of the terms of the Ryan objection of 24 August 2022, and not least of his complaints of pollution of his lands and poisoning of his cattle and of his invocation of the ongoing statutory investigation by LCCC itself, and notwithstanding that the decision-maker in LCCC was obliged to read not merely its planner's report in the planning process but the documents to which that planner's report refers, it is, to say no more, striking that the LCCC planner's report describes the Ryan objection in such anodyne terms. The relevant content, *verbatim*, is as follows:

> *"Loughmore canal not being maintained and extensive flooding of lands*
> *Misconnections in foul and storm lines*
> *Concerns in relation to protection of flora and fauna in area."*

49. There is, strikingly, no mention in the LCCC planner's report of the complaints of pollution of his lands and livestock, of LCCC's own statutory investigation or of the findings of zinc and phosphorous exceedances. Nor is there mention of the fact that LCCC had in its possession the JRE Memorandum of May 2022 or the Garland draft report of July 2022 or of their content (as a result, those documents did not find their way to the Board). While the planner does recommend a planning condition requiring a survey of Analog's existing storm water network and correction of any misconnections to it, there is otherwise no engagement with Mr Ryan's complaints. I make no findings in this regard and am conscious that Mr Ryan's objection provided no evidence that the proposed Fanfare Development would

[96] Three other members of the public made submissions about the same time.
[97] National Parks & Wildlife Service.

incrementally add to any existing pollution (which was, in the end, the real planning issue) or that Analog was a source of any existing pollution. I am conscious also that such reports are expected to relatively briefly summarise objections, may do so thematically rather than by name of objector and need not take a particular form.

50. Nonetheless, it seems to me appropriate to emphasise that summaries in planners' reports of objections to planning applications must be fair and adequate to convey to the reader the gravamen and true sense of each objection – even, perhaps especially, if what follows is a discounting of that gravamen as lacking substance.

51. On 13 September 2022, LCCC decided to grant permission for the Fanfare Development. Three days later, on 16 September 2022, LCCC sent an undated, unsigned, "*interim*", "*working draft*" report on its statutory investigation to the EPA.[98] It bears the LCCC logo. The copy exhibited is partly redacted for reasons not apparent and not explained. The redactions do not seem to be explicable solely by GDPR concerns. However, it was exhibited by Mr Ryan who exhibited it in the state in which he received it. Its appendices are not exhibited.[99]

52. That September 2022 report, which was not placed by LCCC before the Board, recorded LCCC informing the EPA, *inter alia*, that

- its purpose was to update the EPA on the progress of the Water Pollution Act investigation;
- the investigation ensued from a complaint in June 2021;
- its scope *"includes the examination of all businesses discharging to the IDA storm sewer from the Business Park and other businesses and connections on the R.526" (i.e. outside the Business Park);*
- the IDA was cooperating - which *"cooperation is critical in order to reach a successful outcome";*
- the JRE note of May 2022 and Garland Report of July 2022 concur in finding elevated levels of phosphorus and zinc in both the LCCC and IDA sampling and in identifying periodic pulse flows
- there were "*consistent discharges to surface water that contained exceedances in phosphorus*" from within the Business Park and exceedances also in zinc;
- sources of phosphorus include cleaning products, fertilizers, livestock and farm animals, septic tanks and WWTP[100] discharges. Zinc concentrations *"may be as a result of metal and manufacturing industry, certain washing powders and detergents, breakdown of degradation of vehicle tyres, pharmaceuticals or Fertilizers"*;
- Businesses on the R.526 road, local farms, septic tanks and WWTPs were not likely sources of the pollution. The implication seems to be a source or sources in the Business Park;
- "*The IDA results have indicated the area within the business park where more targeted sampling and flow monitoring would be of benefit to the investigation*". The investigation would focus on businesses

[98] "*Environmental Inspection of alleged pollution from storm sewer at the Loughmore Canal Case 440371 Interim Report*". For reasons unknown, the appendices are missing from the exhibit.

[99] It seems by Mr Ryan's choice (Transcript Day 1 p123) The appendices are indexed as 6.1 Land Agreement; 6.2 LCCC Sample Results; 6.3 IDA Draft Report; 6.4 LCCC CCTV Survey R526; 6.5 IDA CCTV Survey Report. It may be that Appendix 6.3 is the Garland draft report of July 2022. Appendices 6.4 and 6.5 appear to relate to the 2019 CCTV Survey of the Business Park foul and storm drainage systems.

[100] Waste Water Treatment Plant.

connected to the storm sewer to try and identify activities which may be a source of phosphorus and zinc discharge; and

- indeed, LCCC advised the EPA that the IDA had identified periodic pulse flows[101] which "*highlight a regular inflow of fluid to the storm water drainage system*". I interpret this as referring to a fluid other than storm water. LCCC say that "*further investigation is required into this"* and the IDA "*has progressed a more targeted sampling plan in areas where exceedances were identified and in the area of periodic pulse flows. This is currently ongoing with results due in the coming weeks*."

The breadth of possibilities recorded in September 2022 as to sources of zinc pollution is notable. Again, and while I note redactions in the document, there is no evidence or mention of Analog or of the Proposed Developments as a source or potential source of pollution.

53. The statutory investigation continued thereafter. Dr Hall of Tetra Tech[102] gives a general description of another LCCC Progress Report to the EPA in December 2023[103] which listed work done in 2023 and intended for 2024. Dr Hall does not record it as recording work by the IDA in 2023.

OBSERVATIONS AS TO THE EVIDENCE

54. Any possibility of misconnections of foul/industrial discharges to storm sewers must, in the end, be at the core of the practical problem allegedly underlying this case. Mr Ryan accepts that it would be incorrect to assume that there will be misconnections to any surface water system works to be done as part of the Proposed Developments and, so, the only conceivable way in which the Proposed Developments could add to the pollution would be if their foul water system was to be connected to a part of Analog's existing foul water system from which there are misconnections to the storm water system.[104]

55. As I have said, anyone with experience of planning matters, especially as to lands incrementally developed over time, is aware of at least the possibility of such misconnections. I consider that I can take judicial notice that Mr Ryan's fears as to misconnections in the Business Park generally, while they might not ultimately prove well-founded, were not implausible or unreasonable and that the Board's experts, can be expected to have appreciated that position. I do not need to rely on documents not before the Board for that conclusion. That said, it is clear that the IDA CCTV survey of 2019, the JRE memorandum of May 2022, the Garland draft report of 7 July 2022 and in the LCCC interim, working draft report sent to the EPA in September 2022 all establish that the Mr Ryan's fears as to misconnections to the Business Park storm water system are far from implausible or unreasonable.

[101] This is clearly a reference to the Garland draft report of July 2022.
[102] See below. Tetra Tech report §2.4.2.4.
[103] Not exhibited.
[104] Transcript Day 1 p154.

56. While I am not qualified to assess such technical information as is to hand, even to a layman one matter seems to stand out in the Garland draft report of 7 July 2022 and in the LCCC interim, working draft report sent to the EPA in September 2022. That is the identification of periodic pulse flows in Business Park storm sewer manholes. As will readily be appreciated, rain does not fall in 10-15 minute pulses every 50 minutes. The obvious, even if provisional, inferences are:

- first, a misconnection of an automatic periodic effluent disposal system of some kind to the Business Park storm water system; and

- second, the resulting presence of effluent other than storm water in the Business Park storm water system.

Of course, and as the draft Garland report of 7 July 2022 observes, those pulses may not be a source of pollution. But it would at least seem to be a priority to find out. And the characteristics of the pulses suggest that, assuming goodwill in all quarters, someone should be able to recognise the pattern as relating to a particular discharge, such that, determined investigation should bear fruit – if only to eliminate it as a pollution source.

57. Regardless of the outcome of this case, all accept that Mr Ryan is genuine as to his problems. I can only urge and encourage renewed urgency, effort, focus and deployment of resources to an LCCC/IDA investigation – indeed a statutory investigation - which is heading for four years' duration and yet would seem to hold out the best hope of ending what all seem to accept is unacceptable pollution. That important point made, it does not determine these proceedings.

58. It seems reasonable to infer from the LCCC report of September 2022 that the results and analysis of the IDA's targeted sampling plan were reflected in the final Garland report of February 2023 as to the *"Analysis of the 2022 surface water discharges to the Loughmore Canal from the Raheen Industrial & Business Park (Final)*" which Dr Hall of Tetra Tech[105] had but Mr Ryan does not exhibit. As Dr Hall would no doubt have said so if it did, it seems reasonable to infer also that the results and analysis of the IDA's targeted sampling plan did not implicate Analog as a pollution source. That is not a criticism of Mr Ryan - who put his case fairly and put it short of directly implicating Analog. It does, however, considerably dilute his criticism of the Impugned Decisions on the basis that LCCC had not forwarded the Garland report of February 2023 to the Board. The answer, though inferential on the information before me, seems clearly to be that the Garland report of February 2023 did nothing to impugn the Proposed Developments as a pollution risk to the storm water system.

[105] See below. Tetra Tech report Table 2 – Available Technical Reports.

LCCC CONDITION #3

59. Ignoring the reports described above which were not before the Board, I need not in any event take judicial notice that Mr Ryan's fears as to misconnections in the Business Park were not implausible or unreasonable. That was confirmed by the LCCC decision to grant permission for the Fanfare Development. It included planning Condition #3 which required that, before development started, Analog was to survey its own existing storm water network & submit the resulting information for the written agreement of planning authority. The survey was to include CCTV surveys and dye-testing where necessary. The expressly stated purpose was

- to establish the exact as-built storm network configuration; and
- so that "*Any cross-connections, faults etc to the storm network shall be highlighted*" and remedied.

60. Planning conditions must fairly reasonably relate to the permitted development and must be necessary, reasonable, precise and enforceable.[106] The concept of necessity here is not strict; it allows for prudent and precautionary planning judgement and those judgements are reviewable as to merit only for irrationality. Considered in the context of his objection, Condition #3 does imply that LCCC did not find Mr Ryan's fears entirely implausible and considered the conditioned investigation to be necessary in the sense just described. However, I hasten to say that this is far from a finding by LCCC, much less by me, that there were any such misconnections on the Analog Campus. "*No smoke without fire"* analysis of Condition #3 would be very wrong. Indeed, viewing Condition #3 against the relevant factual matrix – in particular the absence of any evidence implicating Analog specifically in the pollution at issue - it seems clear that the precautionary impulse was very considerably and properly at play in the imposition of Condition #3. No doubt also it was supplemented by the proper and general planning consideration that actual separation of the foul and storm drainage systems of factories is highly desirable for obvious reasons, that misconnections are a recognised risk and that actual separation is to be maintained reliably over time and in incremental development of factories.

61. As planning conditions impossible of compliance or unreasonable may not be imposed, it also follows by way of inference that, as a matter of its planning judgement and experience, LCCC considered that finding and remedying any misconnections in Analog's storm water system was technically feasible. Further, and importantly, it seems to me to be a necessary inference that a planning authority imposing a planning condition as a matter of its expert planning judgement considers that it will be effective adequately to meet the planning and environmental concerns to which it is addressed. Applying those inferences to the present case, LCCC clearly considered that Condition #3 would suffice to ensure that either the absence of misconnections to the Analog storm drainage network would be confirmed or any such misconnections would be found and remedied. As a general proposition and absent breach of specific statutory requirements or other forms of illegality, such judgements as to the adequacy of efficacy of a planning condition are reviewable as to merit only for irrationality.

[106] See generally, Simons on Planning Law, 3rd Ed'n (Browne) §4.228 et seq; Pyx Granite Co Ltd v Minister for Housing and Local Government [1958] 1 QB 554; Hanrahan Farms Ltd v EPA [2012] 3 IR 417; and R (Evans) v Basingstoke & Deane Borough Council [2013] EWHC 899 (Admin).

62. As will be seen, the Board imposed a similar planning condition to the Impugned Fanfare Decision.

HINGE OF MR RYAN'S CASE

63. Mr Ryan accepted that his case hinges on the proposition that there is reason to suspect misconnections to, specifically, Analog's storm water system.[107] Absent such misconnections it is difficult to see that appreciable and continuing pollution[108] from the Analog Campus could contribute to the pollution of which Mr Ryan complains. Also, and of even greater significance for the present proceedings which, to state the obvious, relate only to the Impugned Decisions, any fear of incremental or additional pollution due to the Proposed Developments must turn on evidence:

- first, that the Proposed Developments, considered discretely, are likely to generate pollutants,
- second, that those pollutants are likely to be discharged via misconnections to a storm water system, and
- third, that the disposal of those pollutants is likely to be damaging to the environment.

Even considered on a precautionary basis, there is no evidence of the factual existence of any of these conditions. In his objections to LCCC and his appeals to the Board, Mr Ryan did not even allege as much.

64. Counsel for Analog had a point when she said that if an allegation of pollution was to be made against Analog, "*it needed to be made cleanly on affidavit*" but was not.[109] The closest Mr Ryan gets to such evidence is his averment "*for the avoidance of doubt*" in his affidavit sworn 4 September 2024 that

- he does not allege that Analog's storm water discharge is the "*sole cause*" of the pollution,
- rather, he alleges, Analog's storm water discharge is "*one of a number of discharges which collectively involve the discharge of contaminated storm water.*"

These carefully crafted averments are, in a sense, crafted conscientiously in that Mr Ryan presses the matter no further than he properly can. But in truth they seek to create rather than avoid doubt and they avoid the real issue. They are, on analysis, entirely consistent with Analog not being a source of any pollution at all – whether solely or with others. All that Mr Ryan actually says is that the Business Park storm water discharge is polluted and that Analog, amongst others, contributes storm water to that discharge.

65. In that very limited sense only, Mr Ryan's affidavit merely identifies Analog as one of many possible sources of existing / historic pollution. The number of possible sources is not quantified – though it is likely to be less than the 48 occupants of the Business Park in situ in 2019. First, the southern occupants' storm water does not drain to the Canal.[110] Second, the number of occupants may have varied over time and, assuming consistent pollution by a single source, analysis of such variation would tend to reduce the number of possible sources. Third, and more generally, analysis would no doubt further reduce that number for various other reasons – for example, having regard to the activities of

[107] Transcript day 1 p147.
[108] As opposed to isolated events such as spillages.
[109] Transcript Day 2 p167.
[110] Hydraulic Modelling report dated 30 September 2020 by Nicholas O'Dwyer Ltd Consulting Engineers for the IDA. See footnote above.

particular occupants. But neither the papers which were before the Board nor those before me indicate that that analysis has been done. And even that very limited sense in which Analog is identified as a possible polluter is further and considerably limited in that it ignores,

- first, the other evidence which was before the Board as to whether Analog is the pollution source. As will be seen, Analog asserted to the Board, for reasons it set out, that it was confident that there were no misconnections to its storm water drainage system.
- second, Condition #2 of the Impugned Fanfare Permission. As will be seen, it requires considerable attention to Analog's storm water system.

66. Further again, and leaving aside the question whether Analog is the source of existing pollution, Mr Ryan's proceedings adduce no evidence whatsoever that the Proposed Developments, considered discretely from existing activities in the Business Park, are likely to generate pollutants and second that the disposal of those pollutants is likely to be via misconnections to Analog's storm water system.

67. Mr Ryan's objection to LCCC and his appeal to the Board turned ultimately on his proposition that the alleged existing pollution of the Business Park storm water system requires that all further development in the Business Park be halted until the pollution source is found. That, as a general proposition, is a logical, practical and legal *non-sequitur*. Not least, it is a legal *non-sequitur* as he seeks to use the planning permission process as to future development as a means of enforcement of historic pollution control. It confuses and conflates the relevant enforcement processes – under the planning, IPC licensing, water pollution and perhaps other codes - with the planning code permission process under which the Impugned Decisions were made.

MR RYAN'S FANFARE APPEAL, 28 SEPTEMBER 2022 & ANALOG'S REPLY, 21 OCTOBER 2022

RYAN APPEAL & COMMENT THEREON

68. What I will call Mr Ryan's "Fanfare Appeal" to the Board, dated 28 September 2022, enclosed the submission he had made to LCCC and stated seven overlapping grounds of appeal.[111] He again alleged that *"The existing main foul and storm lines are in operation since the base build of the Raheen Industrial estate. Expansions and multiple connections have resulted in misconnections in the foul and storm water network"* as confirmed by discharge content and CCTV footage which "*clearly shows discharges which are not storm water*".[112] This observation is, again, general to the Business Park and, though it encompasses Analog's Campus, is not specific to Analog or to the Proposed Fanfare Development.

69. Mr Ryan's Fanfare Appeal cited ongoing investigations by LCCC, IDA, EPA, OPW and NPWS which have "*failed to identify the causes of the pollution through the storm water network and subsequently*

[111] That they overlap is no criticism of them. §§ 1, 2, 3 relate to flooding and need not be recited here.
[112] §4.

through my lands (Stakeholder minutes attached)". Notably, his suggested conclusion is again very broad, stark and far-reaching: "*On Public Health grounds no further development can be permitted in the Raheen Industrial Estate*." He refers to lack of controls of discharges to the Loughmore Turlough and the Barnakyle River, and complains that by the flooding of his lands his *"livestock suffered unexplained physical distortions as seen with exposure to chemical pollution"* such that, for animal welfare reasons also, "*no further development should be permitted in the Raheen Industrial Estate*". [113]

As I have said, Mr Ryan's Fanfare Appeal also enclosed the minute of a Loughmore Canal Stakeholder meeting of 21 April 2022 the contents of which I have already described as putting the Board on notice of the matters set out therein – including LCCC's statutory investigation.

70. I will not record here the content of Mr Ryan's Appeal of LCCC's decision to permit the Hydrogen development – suffice it to say it was similar form to his Fanfare Appeal.

71. However, Mr Ryan's appeals to the Board make no allegations specific to the existing Analog facility as a source of the pollution of which Mr Ryan complains. And, as a distinct, and more important, matter they make no allegations specific to the Proposed Developments as a source of pollution. There is no suggestion that the Proposed Developments will contribute to or exacerbate the present situation, whatever it may be.

Indeed, and strikingly, the Ryan appeals to the Board don't mention Analog, its Raheen facility or its Proposed Developments at all.

72. The Board and Analog assert that Mr Ryan has provided no evidence, either to the Board or to the Court which links his complaints to Analog's facility or, more importantly that the Proposed Developments would make any present pollution worse. That observation is correct. Significantly to my mind, counsel for Mr Ryan ultimately accepted it was correct.[114] But he said it is beside the point. I disagree.

73. Counsel for Mr Ryan said that the absence of evidence that the Proposed Developments would make any present pollution worse is beside point because he had raised before the Board the issue of misconnections. But he raised it as to the Business Park in general and, as we will see, the only evidence before the Board specific to the Analog site was that there were no misconnections to the storm sewer on the Analog site. I find it difficult to disagree with Analog's submission that Analog is collateral damage in the crossfire of Mr Ryan's understandable efforts to solve his pollution problem.[115]

[113] §§5, 6 & 7.
[114] Transcript Day 2 pp 227 & 228.
[115] Transcript Day 2 p166.

74. In argument in reply[116] counsel for Mr Ryan raised another possibility: that a foul sewer from the Analog site may feed a foul sewer in the general Business Park foul sewer system, which sewer in turn is misconnected, off-site, to the Business Park storm sewer system. But there was no evidence of such a possibility – it was raised in an entirely theoretical way and by way of legal argument. There was no evidence that it was a risk which the Board ought to have considered. The risk of misconnections of lesser foul lines to a storm line within a particular site due to incremental development over time is recognised. But there was no evidence of, nor any reason to infer, such a risk of misconnection as arising between what one may term main sewers serving the Business Park generally. Mr Ryan bore the onus of proof (not of actual misconnection but that the risk was a real one) on this issue and he failed to meet it. And even if there was such a misconnection there was still no evidence that the Proposed Developments were likely to make any existing problem any worse. Those observations suffice to reject the argument.

75. But for what it is worth, I will say, first, that a main foul sewer in the Park's general foul system (as opposed to an occupant's foul system) could have been misconnected to a storm sewer strikes me as not impossible but as highly improbable. Second, that such a misconnection would long have escaped detection strikes me as just as improbable. I could not lend weight to propositions that the Board was obliged in law to address such risks absent at least some evidence of such risks and there was none.

ANALOG'S REPLY TO THE RYAN APPEAL - OCTOBER 2022

76. Analog's reply, dated 21 October 2022, to Mr Ryan's Fanfare Appeal is important. It

- asserts that Mr Ryan's complaints of the storm water discharge are outside its control;
- denies that that Analog's activities have affected his lands or livestock;
- briefly describes the intended surface water collection, drainage and discharge system, including interceptors, hydrobrakes and attenuation tanks;
- concludes that peak storm water discharge from the Fanfare Site will reduce by reason of the Fanfare Development;
- asserts that Analog's activities are under the strict controls of their IPC Licence and are subject to stringent EPA monitoring;
- asserts that, by Analog's IPC licence conditions, all emissions to surface water are strictly controlled;[117]
- records that, by its IPC licence, Analog must maintain, annually review and update as necessary a drainage layout of their Campus;[118]
- says that multiple site surveys have determined the existing site drainage layout on Analog's Campus; and
- states, accordingly, that it is "*confident that there are no misconnection concerns arising*" from the Site.

[116] Transcript Day 2 p229.
[117] Though it was not itself before the Board, IPC Licence Condition 5 states, *inter alia*, "*Uncontaminated storm water may be discharged to surface water*" and there shall be no emissions other than those licensed.
[118] Condition #6.11.

77. The Board observes, correctly, that this reply, as to surveys of the existing site drainage layout and the absence of misconnections, was not meaningfully contested by Mr Ryan.[119] The Board submits that it was entitled to accept Analog's assurance of the absence of misconnections to its storm water system[120] – in any event but all the more so in the absence of any allegation by or evidence tendered to it by Mr Ryan of pollution emanating from Analog. In short, Analog's was the only evidence before it as to misconnections on Analog's Campus and that evidence was that there were none.

78. Of some note, given the allegation that LCCC failed to transmit relevant documents to the Board, LCCC did not respond to the appeal.[121]

INSPECTOR'S FANFARE REPORT

79. Mr Ryan was the only appellant to the Board. It does not seem to me necessary to specifically recount the content of the Inspector's Report as to the Hydrogen Development. As to the Fanfare Development, the Inspector briefly but adequately summarised his appeal[122] (including the minute of the stakeholders' meeting of 21 April 2022 and mention of misconnections in the foul and storm water networks, discharges to the storm water network which are not storm water and chemical pollution). The Inspector briefly summarised Analog's reply to the Ryan Appeal - including mention of the IPC Licence controls and EPA monitoring and refutation of the allegations that Analog's activities had affected lands, livestock or surrounding lands).[123] Somewhat disquietingly, the Inspector did not record that Analog's reply to the Ryan Appeal had asserted confidence as to the absence of misconnections to the storm water system.

80. In considering Mr Ryan's Appeal, the Inspector addressed the issue of exacerbation of flooding.[124] Her view, which the Board emphasises,[125] that "*the Fanfare Development would have no impact on or contribute to any additional surface water to the Barnakyle Stream*"[126] is expressed in the context only of the issue of exacerbation of flooding. She did not explicitly assess the allegation of contamination of the storm water effluent by pollutants introduced by misconnections to the storm water system. Indeed, having listed it as amongst Mr Ryan's allegations, she never mentions the misconnections issue again.

81. On the other hand, though she did note that the issues raised by Mr Ryan "*primarily relate to the management of surface and storm waters arising within the wider Business Park*"[127] she did not observe

[119] Transcript Day 2 p27.
[120] Transcript Day 2 p56.
[121] Inspector's report §6.2.
[122] Inspector's report §6.1 & 7.1.1 – 7.1.3.
[123] Inspector's report §6.3.
[124] Inspector's report §7.3.
[125] Transcript Day 2 p76.
[126] Inspector's report §7.3.3.
[127] Inspector's report §7.3.1.

that Mr Ryan's Appeal, strikingly, didn't mention Analog, its Raheen facility or the Proposed Fanfare Development at all and had made no allegations specifically that:

- the existing Analog facility was a source of the pollution;
- the Proposed Fanfare Development would be a source of pollution; or
- the Proposed Fanfare Development would contribute to or exacerbate the present situation as to pollution of the Business Park storm water discharge.

82. The Inspector concluded:

> *"While I would acknowledge the concerns raised by the appellant, I do not consider that a grant of planning permission in this instance will exacerbate any potential risk of flooding. I would also accept the bone[128] fides of the storm water management proposals presented by the applicant."*[129]

83. In this passage the Inspector addresses flooding but not, at least expressly, pollution. Further, the *bona fides* of Analog's storm water management proposals are not the point. There is a real difference between bona fides on the one hand and factual reliability and accuracy on the other. The point is Analog's reliability – their factual accuracy as to the absence of misconnections to its existing storm water system and to its proposed storm water system.[130]

84. I cannot say that I find the Inspector's analysis of the appeal impressive in its consideration of Mr Ryan's appeal and his specific allegation of a risk of pollution of storm water effluent. It is at least appreciably possible that an impressive analysis would have, if no more, further reduced the scope of these proceedings.

85. Yet I must interpret the Inspector's report on pragmatic and common-sense **XJS** principles[131] as if read by an intelligent, informed, inexpert layperson and not as if it were a statute and in a manner which will tend to validate rather than invalidate[132] the Impugned Fanfare Decision. I bear in mind that the Inspector did adequately summarise Mr Ryan's appeal and did specifically advert to Analog's reply to it - even if not expressly to Analog's confidence in the absence of misconnections. Reading her report as a whole, I also read the Inspector's assessment of Mr Ryan's appeal in the context of her recommendation of Planning Condition #2 as to checking Analog's storm water system before development commences – which I consider further below. I read that condition, though it does not mention the possibility, as addressing the possibility of misconnections to the existing storm water system in that it requires a

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[128] Sic.

[129] Inspector's report §7.3.6.

[130] For this purpose, I assume a risk that any misconnections to the existing storm water system might be incorporated into the proposed storm water system. However, I also assume that no new misconnections would be introduced by the proposed storm water system as Analog may construct only that which is permitted.

[131] See, e.g. Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7 §119 et seq; Camiveo Ltd v Dunnes Stores [2019] IECA 138; Shadowmill v ABP & Lilacstone [2023] IEHC 157.

[132] For example, Pat O'Donnell & Co v Dublin City Council & Uniphar [2024] IEHC 671; O'Donnell & Ors v An Bord Pleanála [2023] IEHC 381 §54; St Margaret's Recycling v An Bord Pleanála [2024] IEHC 94 [2024] 2 JIC 2003; Mulloy v An Bord Pleanála & Knockrabo [2024] IEHC 86 §81; Friends of the Irish Environment v Minister for Housing [2024] IEHC 588 §119; Duffy v An Bord Pleanála [2024] IEHC 558 §42.

survey of that system. Accordingly, with misgivings and stretching **XJS** principles and the presumption of validity appreciably, I read the Inspector's

- reference to *bona fides* as a misnomer and her report as accepting, as representing reliable factual accuracy, Analog's reply to Mr Ryan's appeal to its conclusion, for the reasons Analog gives, that "*there are no misconnection concerns arising*";
- recommendation of Planning Condition #2 as intended and adequate to address
  - any residual risk of such misconnections, and
  - "public health" concerns, as raised by Mr Ryan; and finally,
- report, on these bases, as discounting, as to fact and as insignificant, the risk of pollution of the storm water system, including by misconnections to it – both historic and, more to the point, also prospective by reason of the Proposed Fanfare Development.

FANFARE - EIA SCREENING

86. The placing of the text as to "*EIA Screening*" in the Inspector's reports is odd.[133] It is placed under §5 "*Policy and Context*" rather than under a specific EIA heading or even in the "*Assessment*" section of her report. It is also a little unclear at points whether the Inspector is merely recording the views of others or expressing her own views – though I think she must be read as accepting the content of Analog's EIA Screening Report.

87. As to EIA Screening, the Inspector describes as "*relevant*" the following EIA Project classes identified in the PDR 2001:[134]

- Class 10 - Infrastructure Projects
  - 10(a) Industrial estate development projects, where the area would exceed 15 hectares.
  - 10(b)(iv) Urban development which would involve an area greater than 10 hectares[135]

- Class 13 - Changes, Extensions, §13(a)(ii) Any change or extension of development already authorised, executed or being executed[136] which would result in an increase in size greater than the greater of 25% of the development to be changed or extended, or 50% of the relevant threshold.

- Class 15 Any project listed in Schedule 5, Part 2 PDR 2001 which does not exceed a quantity, area or other limit specified as to such projects but which would likely have significant effect on the environment.[137]

[133] §5.3 of each report.
[134] As set out in Schedule 5 Part 2 of the Planning and Development Regulations 2001 (as amended).
[135] Applicable to a built-up area other than a business district.
[136] Not being a change or extension referred to in Part 1.
[137] Having regard to the criteria set out in Schedule 7.

Class 15 is the 'catch-all' class colloquially termed "*sub-threshold development*".[138]

88. The Inspector considered that as the Site was of 9.52 hectares and as the Fanfare project would increase the size of the pre-existing development by only 17.5%, it did not fall within Classes 10 and 13 respectively and so "*mandatory*" EIA was not required.

89. As to Class 15, sub-threshold development, the Inspector agreed with Analog's EIA Screening Report that there was "*no real likelihood*" that the Fanfare Project would have significant effect on the environment and so excluded EIA at preliminary examination.[139] In doing so, she considered that the primary areas of potential impact related to dust emissions and noise and vibration during construction and that these had been satisfactorily addressed. She did not mention risk of pollution by misconnections to the storm water system. However, reading her report as a whole, as I must, and as I have found, she discounted, as to fact and significance, the risk of pollution of the storm water system.

BOARD DECISIONS, FANFARE CONDITION #2 & THE EFFICACY AND RATIONALITY THEREOF

90. On 1 September 2023, the Board decided to grant permission in each appeal and did so fully in accordance with the Inspector's report and recommendations. It made two directions accordingly. On 7 September 2023 and 12 September 2023, the Board made orders granting permission for, respectively, the Hydrogen Development and the Fanfare Development. Condition #2 of the Impugned Fanfare Decision requires that:

> *"Prior to commencement of development, the developer shall submit to and agree in writing with the planning authority full details of the surface water disposal system plan, and all revised details as required. The plan shall include a full survey of the existing storm water network within the footprint of the subject site, and all surface water run-off from the development shall be disposed of appropriately. All resulting information from the agreed surveys shall be submitted to and agreed in writing with the planning authority.*
>
> *Reason: In the interest of public health and proper planning and orderly Development."*

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[138] Class 15 is not found in in the equivalent annex of the EIA Directive - though that Directive undoubtedly mandates sub-threshold EIA where the project would likely have significant effect on the environment. Class 15 was helpfully inserted in Schedule 5 Part 2 PDR 2001 to reflect that mandate. It was inserted by Article 19(h) of S.I. No. 454/2011 Planning and Development (Amendment) (No. 2) Regulations 2011. The equivalent obligation is found in s.172(1)(b) PDA 2000, which reads: *"(1) An environmental impact assessment shall be carried out by a planning authority or the Board, as the case may be, in respect of an application for consent for … (b) proposed development of a class specified in Schedule 5 to the Planning and Development Regulations 2001 which does not exceed a quantity, area or other limit specified in that Schedule but which the planning authority or the Board determines would be likely to have significant effects on the environment*."

[139] Article 109(2) PDR 2001 provides for Preliminary Examination of the question whether EIA is needed. It provides, in part, as follows:
"(a) Where an appeal relating to a planning application for subthreshold development is not accompanied by an EIAR, the Board shall carry (out) a preliminary examination of, at the least, the nature, size or location of the development.
(b) Where the Board concludes, based on such preliminary examination, that —
(i) there is no real likelihood of significant effects on the environment arising from the proposed development, it shall conclude that an EIA is not required …".

91. At first glance one might read the Board's Condition #2 as diluting LCCC's Condition #3. Mr Ryan made a submission to that effect. It is less detailed and explicit. However, it is not in reality a dilution.

- First, it is a pre-commencement condition.

- Second, it is clear that a "*full survey of the existing storm water network within … the subject site"* is required.

- Third, the survey is to be part of the "*surface water disposal system plan*".

- Fourth, and importantly, that plan requires LCCC's agreement. In effect, it puts LCCC in the driving seat. LCCC may, within the bounds of reasonableness, require such form of survey as it deems necessary. While mapping/updating the map of the storm water system is important, it may not of itself find misconnections. Given the terms of LCCC's Condition #3, it is entirely predictable that LCCC may require a CCTV survey and dye tests. I infer that such tests may at least assist as to finding any misconnections on the Analog campus or strengthening a view that there are none.

- Fifth, all "*information*" resulting from the survey requires also requires LCCC's "*agreement*". I am unsure what exactly and ultimately that means, but I need not decide that issue. Again, and generally, it puts LCCC in the driving seat. At very least:
  - the information must be submitted to LCCC;
  - LCCC are entitled to take a view of its comprehensiveness, accuracy, reliability and significance; and
  - Analog must engage with LCCC in seeking to agree such a view.

- Sixth, the "*subject site*" is the "*red line*" 9.52ha Fanfare Site. It encompasses by far the greater part of Analog's Campus and by far the greater part of its manufacturing/technical facilities.[140] Even so, the parties agreed that, for practical reasons, compliance with Condition #2 would necessarily involve the storm water system as it relates to the entire Analog Campus.

- Seventh, while the Board's Condition #2 omits the explicit remedial requirement of LCCC's Condition #3, that requirement seems inevitably implicit in the Board's requirement that "*all surface water run-off … shall be disposed of appropriately*." It is inconceivable that surface water run-off containing foul effluent due to a misconnection discovered in a survey could be considered "*disposed of appropriately*" via the storm water discharge. Remediation will also be required by the IPC licence's prohibition on unlicensed discharges. I agree with the Board that non-remediation would raise the prospect of enforcement pursuant to either or both of the planning and IPC licensing codes.

92. Further, I accept the Board's submission[141] that the nature of Condition #2 itself and the inclusion of "*public health*" in the reason for Condition #2, though no doubt objectively justified in any event, imply that Condition #2 is, at least partly, an acknowledgment of and response to Mr Ryan's

[140] The only exception seems to be the ERDC which, it seems, has a separate SuDS System.
[141] Transcript Day 2 p80.

appeal to the Board. That appeal had, at §4 in raising the possibility of misconnections between the foul and storm networks, invoked the concept of public health as a basis on which, in Mr Ryan's view *"no further development can be permitted in the Raheen Industrial Estate."*

93. The principles relevant to understanding LCCC's Condition #3 apply also to the Board's Condition #2. They lead to the equivalent conclusion: the Board clearly considered that Condition #2 would suffice to ensure either that the absence of misconnections in the Analog drainage networks would be confirmed or that any such misconnections would be found and remedied. And, as with LCCC's Condition #3, the Board's Condition #2 does not imply that the Board lent any credence to a view that there were any polluting misconnections to Analog storm water drainage system. Likewise, "*no smoke without fire*" analysis of the Board's Condition #2 would be very wrong.

94. It follows that whatever Mr Ryan's essentially speculative, though not entirely implausible, fears that Analog specifically is causing the pollution, Condition #2 provides the mechanism to ensure that, before the Proposed Developments are effected, no such pollution emanates from the Analog Campus.

95. The Board's judgement of the adequacy of efficacy of Condition #2 to ensure that no such pollution emanates from the Analog Campus is reviewable as to merit only for irrationality. Counsel for the Board said that, on the evidence in fact before it, it had ample evidence to support such a view and was entitled to accept it. I can only agree. I have set out above the content of Analog's reply, dated 21 October 2022, to Mr Ryan's Appeal which explains Analog's conclusion that it is "*confident that there are no misconnection concerns arising*" from the Site. I need not comment in detail but will observe that the IPC Licence obligation to review and update the drainage layouts[142] – the separate foul/industrial effluent and storm water drainage systems – necessarily implies systematic and ongoing identification, tracking and recording both of all works and activities on site likely to result in a connection or discharge to either drainage system and of all known and new connections thereto. Otherwise, the obligation to review and update the drainage layout map as necessary could not be met. While no system is perfect, the discipline of that mandatory, systematic and ongoing process no doubt minimises any risk of misconnection – or, at very least, it was not irrational of the Board to infer that it did.

96. When balancing Mr Ryan's general and plausible allegations of misconnections in the Business Park storm water system against both the absence of allegations by him specific to Analog or to the Proposed Developments and Analog's response to his appeal, and bearing in mind that the Board was made aware that Analog had a prior and continuing legal obligation to the EPA to keep its drainage layout maps up to date, it does not seem to me that the Board's

- acceptance of Analog's assurance that there were no misconnections on its Campus, or
- imposition of Condition #2 as a precautionary pre-development recourse on, in reality, an '*ar eagla na heagla*' basis,

[142] See below.

can, in either respect, be considered irrational – in the case of Condition #2 as to either its imposition or its efficacy.

For the avoidance of doubt, I have drawn the foregoing conclusion without regard to materials not before the Board.

97. Though it postdated and so was not before the Board when it made its Impugned Decisions and though I exclude it also from my assessment of the rationality of the Board's decision, I note that, by letter to the Board dated 6th February 2024,[143] the EPA[144] say that:

- *"There is no evidence of misconnections under the Analog Devices site.*
- *All the pipeline testing and inspections as described above support this and have not revealed any subsurface misconnections at their site."*

EPA LICENCING

98. None of the documents considered in this section of the judgment were before the Board when it made its Impugned Decisions. However, they were in evidence before me – many exhibited first by Mr Ryan, who attempted to rely on them. Some account of them is therefore appropriate.

IPC LICENCE

99. As already noted, Analog's emissions, including of storm water, have since 1998 been regulated by an IPC Licence granted by the EPA in relation to emissions from its "*manufacture of integrated circuits and printed circuit boards*".[145] That licence was amended and revised thereafter on various occasions to the current version, P0224-04, granted in January 2022.[146] In processing the application which resulted in IPC licence P0224-04, the EPA screened out EIA and AA[147] as unnecessary. On foot of the LCCC decision to grant permission for the Fanfare Development and before the Board made the Impugned Decisions, Analog made application P0224-05 to review IPC licence P0224-04. Mr Ryan objected but, again, not in terms specific to Analog's operations or specific to the Fanfare Development. In July 2024, that review was ongoing.

[143] Exhibited by the EPA.
[144] EPA Office of Environmental Enforcement ("OEE").
[145] IPC Licence P0224-01 was granted in 1998 to a corporate predecessor of Analog, Analog Devices BV.
[146] See generally, Affidavit of Marie O'Connor of the EPA sworn 8 July 2024. Mr Ryan has exhibited many of the documents relevant to the history of the IPC licence up to and including review P0224-05. A chronology of the licensing process is set out in the EPA's Statement of Opposition.
[147] Appropriate Assessment for the purposes of the Habitats Directive.

100. For reasons not apparent, while the front page of IPC licence P0224-04 was before the Board,[148] the attached conditions were not. But, as has been seen, its effect was cited in Analog's reply of 22 October 2022 to Mr Ryan's Appeal. Notably, IPC licence Condition #5,

- permits emissions including discharge of uncontaminated storm water (only) to surface water and
- prohibits any emissions other than those permitted.

So, the licence permits storm water discharge, but only if uncontaminated. Discharge of contaminated storm water would be in breach of the licence.

101. IPC licence Condition #13.1 requires weekly logged visual inspections of the storm water discharge and, as recorded above, analysis of storm water discharges for pH, conductivity and TOC to trigger levels ultimately controlled by the EPA.[149] I presume that these parameters are identified for testing and that the triggers are set to detect effluent other than storm water - even if not specific pollutants. Mr Adamson for Analog deposes that IPC licence Condition #11.3 requires Analog to report any trigger level exceedance to the EPA. No doubt if they suggest a problem more detailed or specific testing will ensue at the instance of the EPA.

102. IPC licence Condition #6.11 requires inspection and maintenance of the storm water drainage system and that the drainage map be reviewed annually and updated as necessary. In other words, an up-to-date storm water drainage map is annually required. Also in the papers are records of an EPA requirement in April 2023 of Storm Water Network Clarifications requiring revision of the drainage map. It appears to have been satisfactorily closed in May 2023.

PENDING LICENCE REVIEW P0224/05 & BASELINE REPORT 2023

103. As stated earlier, in March 2023, Analog sought a revised Licence from the EPA (ref. P0224/05), on which a decision was pending in July 2024 and of which I do not know the outcome, if any yet.[150] It derives, *inter alia*, from the Fanfare Development[151] but relates to the entire Analog operation. By reason of an intended "*significant ramp up in production*" and (presumably resultant) increase in the "*surface treatment of substances, objects or products using organic solvents",* Analog seeks to replace its IPC licence with an IED Licence.[152] The review application Baseline Report, by Byrne Ó Cléirigh, dated March 2023, was not before the Board in the planning process. It states that the Proposed Developments *"will not introduce any new hazards, or hazardous substances, to the site."*[153] As this is a baseline report and in

[148] As Appendix 1 of the EIA Screening report for the Fanfare Planning Application. This appears to be confirmed by the parties' agreed list of documents before and not before the Board which lists IPC Licence P0224-04 as not having been before the Board.
[149] §6.13.3.
[150] See Baseline Report in Support of an Application for a Review of Licence P0224-04, Byrne Ó Cléirigh, March 2023 and also '*Application for Review of IPC Licence P0224-04 Analog Devices International Attachment 1.1 Reason for Licence Review*' April 2003.
[151] Baseline Report §4.1. and '*Reason for Licence Review*'. Also, affidavit of Marie O'Connor of the EPA sworn 8 July 2024.
[152] See *'Application for Review of IPC Licence P0224-04 Analog Devices International Attachment 1.1 Reason for Licence Review'* April 2003, p2. IED licences are governed by the European Industrial Emissions Directive and S.86B of the Environmental Protection Agency Act, 1992 as amended.
[153] Baseline Report §7.3.

accordance with EU Guidance,[154] Stage 1 of the report lists[155] all hazardous substances already[156] used, produced or released at Analog. Of that list it discards, again in accordance with the EU Guidance and for reasons stated,[157] those incapable of contaminating soil or groundwater – identifying those remaining as "*relevant hazardous substances*". Of the initial list, phosphine is a gas[158] which enters neither the foul nor the storm system and zinc sulphate is stored only in a very small quantity.[159] Accordingly, both are discarded as not being relevant hazardous substances. The only relevant hazardous substance even possibly relevant to this case is phosphoric acid. But, remembering that the baseline described does not include the Fanfare Development, the Baseline Report records that:

- *"[T]here are … no discharges of any substances to surface water (the only discharge to surface water is of storm water run-off) …".*[160]

- Storm water is discharged to the Business Park storm water system. That is save for the storm water collected in the G3 yard, (the main delivery, storage and collection point for raw materials and ancillary/support materials and waste) which is directed to the Campus effluent plant (for partial treatment there and onward transmission to the public WWTP).[161]

- No substances are discharged to surface water which are listed in List I or List II of the Annex to Directive 2006/11/EC,[162] or in SI 394/2004,[163] or in SI 272/2009[164] (these lists include organophosphorus compounds, zinc, and metals and their compounds).[165]

- Storm water discharges are monitored at six locations and analysed for pH, TOC[166] and conductivity.[167]

- While a number of relevant hazardous substances are used and stored at the site, there are no emissions of these (or any other substances) to soil or groundwater.[168]

104. In my view, Analog correctly criticised Mr Ryan's attempts in argument to characterise the Baseline Report as identifying Analog as a possible source of zinc and phosphorus pollution.[169] The

[154] EU Guidance on Baseline Reports under Article 22(2) of Directive 2010/75/EU on industrial emissions, 2014/C 136/03. *Inter alia,* it states that a baseline report is to be drawn up before starting the operation of the installation or before a permit for the installation is updated and it will form the basis for a comparison with the state of contamination upon definitive cessation of activities. It addresses primarily soil and groundwater contamination. It records that Article 22(2) specifies that a baseline report should contain at least the following information: "*(a) information on the present use and, where available, on past uses of the site; and (b) where available, existing information on soil and groundwater measurements that reflect the state at the time the report is drawn up or, alternatively, new soil and groundwater measurements having regard to the possibility of soil and groundwater contamination by those hazardous substances to be used, produced or released by the installation concerned*."
[155] Baseline Report, Table 2: Hazardous Substances.
[156] i.e. before the Proposed Developments.
[157] Baseline Report §2.2 & Table 3. Essentially, those discarded are present in very small amounts, are gasses and one is an immobile solid.
[158] So too, phosphine in helium and phosphine in hydrogen.
[159] The table 3 entry as Zinc sulphate reads: "*Only a very small quantity of this material is stored. Materials are stored in dedicated containers in dedicated bunded storage areas, and are handled and used by trained personnel*."
[160] Baseline Report §2.1.
[161] Baseline Report §5.5.
[162] Directive 2006/11/EC on pollution caused by certain dangerous substances discharged into the aquatic environment as amended.
[163] The Environmental Protection Agency (Licensing) (Amendment) Regulations 2004.
[164] European Communities Environmental Objectives (Surface Waters) Regulations 2009 as amended.
[165] Baseline Report §5.5.
[166] Total Organic Carbon.
[167] Baseline Report §5.5.
[168] Baseline Report §9.
[169] Transcript Day 2 p168.

example of phosphine gas illustrates the dangers of basing such an argument on legal submission rather than on evidence – what appears significant to a layperson transpires not to be. While the Baseline Report does not address the possibility of misconnections in the Analog storm water system, I reject, as not established by Mr Ryan in evidence, the submission that, had it been before the Board it could have required further inquiry by the Board into any possibility that Analog was a source of zinc and phosphorus pollution.

INCIDENT OF SEPTEMBER 2022

105. Mr Ryan cites a storm water network pollution incident[170] at Analog in September 2022. During a delivery of "BioMate" - a biocide – it spilled from a non-bunded, broken, pipeline and drained to the storm water system. No misconnection to the storm water system was at issue. It is apparent that once it was discovered steps were quickly taken to confine the spillage.[171] Analog quickly notified the incident to LCCC and to IFI[172] and to the EPA the same day.[173] It prompted an EPA IPC Licence Compliance Investigation,[174] which included an unannounced site visit to Analog in September 2023 when no non-compliances were found. EPA correspondence with Mr Ryan in September 2023 – March 2024 records (and its deponent Ms O'Connor confirms in these proceedings) that:

- Bio-mate is not a source of Zinc or Phosphorous.
- Analog responded promptly to the incident and minimised any potential off-site discharge.
- The EPA is satisfied that there was no environmental impact of significance due to the limited scale of the spillage and immediate response in preventing off-site release.
- At the EPA site visit in September 2023 "*no issues were identified at the site relating to your concerns*".
- Analog is compliant with its IPC Licence storm water conditions.
- On the information available, the EPA is satisfied that Analog's wastes and emissions are being managed in accordance with its IPC Licence conditions.

The Compliance Investigation was closed in June 2024. Closure implies that Analog provided clear evidence demonstrating that they had completed the required improvements and achieved compliance as to pipeline integrity certifications and that the EPA was satisfied that the steps taken by Analog sufficiently addressed the issues raised.[175]

106. There is no suggestion that this BioMate spillage was directly relevant to the pollution of which Mr Ryan complains. Indeed, it was clearly a discrete event rather than a continuing phenomenon such as is required to explain the pollution of which Mr Ryan complains. And as Bio-mate is not a source of zinc or phosphorous the spillage could not explain zinc or phosphorous pollution. Mr Ryan cites it rather as general and contextual evidence of Analog's alleged non-compliance with the IPC licence and that "*with the best will in the world, problems can happen*".[176] However,

[170] Ref. No. INCI023971.
[171] By good fortune, a drainage contractor had a tanker on site which was used to capture the spillage.
[172] Inland Fisheries Ireland.
[173] See Timeline at Table 3, Byrne Ó Cléirigh report of 28 November 2022. The EPA assigned identifying code "INCI023971" to the spillage- see affidavit of Marie O'Connor of the EPA sworn 8 July 2024.
[174] Ref. no. CI002043.
[175] Affidavit of Marie O'Connor of the EPA sworn 8 July 2024.
[176] Transcript Day 1 p95.

- Refusals of planning permissions cannot rationally be based merely on an approach to risk that "*with the best will in the world, problems can happen*". Still less can their grant be impugned as illegal merely on the basis of such an approach.

- By letter dated 26 October 2022 in the Fanfare Appeal, the Board requested[177] the EPA's observations in its capacity as IPC Licensor. Notably, this was during the EPA investigation of the BioMate spill described above. No EPA reply is exhibited and the Inspector mentions none. I infer that there was none and that the EPA saw no reason to object to the Proposed Developments.

- This inference is confirmed, albeit during this litigation, by the letter from EPA to the Board dated 6 February 2024.[178] It states that the September 2022 spillage was:

  > *"… of medium significance. Analysis of a sample taken at SW5[179] indicated no significant impact on storm water quality. The licensee was subsequently instructed to clear the remaining spill material, which itself did not present a risk to storm water quality. … This is the only such incident since 2013 and therefore does not indicate any ongoing neglect on the licensee's behalf in relation to the protection of storm water quality at the Analog Devices site."*

  In substance, the EPA is saying the licence is working as it should. Ms O'Connor of the EPA deposes to generally the same effect – saying that the EPA "*is satisfied that the steps taken by Analog sufficiently address the issues raised as part of the compliance investigation*" of the September 2022 spillage and that it had closed its Compliance Investigation accordingly.

107. Leaving aside the fact that this information was not before the Board, it seems to me that the tentative character of Mr Ryan's presentation of it was justified. On any view, while significant in itself, the spillage is at very most a sidewind to this case.

108. Finally, I should observe that I cannot in the papers discern any factual basis for Mr Ryan's averment that *"It appears that the question of possible misconnections between the surface and foul sewer network has been a concern of the EPA for many years in relation to the Analog Devices Licence …".* Insofar as this may be a reference to the incident of September 2022, I am clear that the spillage did not occur by reason of a misconnection. Insofar as it may be a reference to the licence condition requiring annual review of the drain networks, Mr Ryan's reasoning misconstrues as evidence of active concern specific to Analog a prudent and prophylactic condition no doubt common in such licences.

MONITORING, EPA ASSISTANCE TO LCCC STATUTORY INVESTIGATION & ZINC MONITORING - SEPTEMBER 2023

[177] In accordance with section 87 of the Environmental Protection Agency Act 1992, as inserted by Article 5 (1F) of the European Union (Integrated Pollution Prevention and Control) Regulations 2012.
[178] i.e. after proceedings commenced.
[179] A manhole on the Storm Water system.

109. Mr Ryan asserts that the EPA does not monitor Analog's storm water discharge for phosphorous and zinc and that the EPA records Analog's breach of IPC Licence ELVs,[180] including by discharges to both surface and foul sewers. Whatever the accuracy of these complaints, a considerable issue arises as to their relevance to impugning the Proposed Developments.

110. As stated, the IPC Licence requires monitoring of storm water effluent for pH, conductivity and TOC only. Ms O'Connor's affidavit for the EPA[181] says clearly that the IPC Licence does not require monitoring of storm water emissions for zinc and phosphorous. But she says, less clearly, that Schedule B.3 of the IPC Licence,[182] sets ELVs for both chemicals in respect of emissions to "sewer" and requires that phosphorous is monitored and that total heavy metals, which include zinc, are monitored in emissions to "sewer". As I have said earlier, "*sewer*" can be a confusing word as to whether it be a foul/waste sewer, a storm water sewer or a combined sewer. However, reading Ms O'Connor's affidavit with the exhibited IPC Licence and Analog's 2023 Annual Environmental Report to the EPA ("AER")[183] the position becomes apparent. Cross-referencing Schedule B.3, which Ms O'Connor cites as setting the ELVs, with §§5.1, 5.2 and 5.6.1 of and the Introduction to the IPC Licence[184] and with the 2023 AER, reveals that the "*sewer*" to which Ms O'Connor refers is the foul sewer to which Analog's trade effluent/treated process waste water and sanitary waste water are discharged. The 2023 AER records that Analog's waste water discharge was

- pH neutralised on site and then discharged to a municipal wastewater treatment plant at Bunlicky.
- monitored for heavy metals (which include zinc) and for phosphorus.
- in these respects was, in 2023, 100% complaint with ELVs.[185]

On the other hand, the 2023 AER records that Analog's storm water discharges were monitored, as the licence requires, for pH,[186] conductivity and TOC via 30 samples and was 100% compliant in 2023.

111. In short, by its IPC licence, Analog's <u>waste</u> water discharge was to be, and was, monitored for heavy metals (which include zinc) and phosphorus and was compliant. But its <u>storm</u> water discharge was not required to be and was not, as a matter of IPC licence compliance, so monitored. One would have to say, therefore, that in these respects Ms O'Connor's affidavit should have been clearer and was *nihil ad rem*.

[180] Emission Limit Value.
[181] §15.
[182] In Schedules B.3 and C.3.2.
[183] Under the heading "*Purpose of this Report*" the following, *inter alia*, appears: "*Submitting an Annual Environmental Report (AER) is a requirement of all EPA licences. An AER is a public document … The AER is a summary of environmental information for a given year. … An AER does not provide detailed technical data*." The AER indicates where such data can be found.
[184] It states, *inter alia* that there is one process effluent emission point, discharging to the Bunlicky Waste Water Treatment Plant, via the Industrial Development Authority (IDA) Ireland's pipeline network for the industrial estate, and Irish Water's sewer network for the Limerick agglomeration. These emissions include treated process waste water and sanitary waste water. In addition, storm water run-off from the installation discharges to a man-made attenuation pond (The Loughmore Canal) within the business park.
[185] Emission Limit Values.
[186] i.e. acidity/alkalinity.

112. Ms O'Connor also states that "*Analog carries out biannual monitoring of zinc specifically,*[187] *although this is not required under the current licence*." This statement is unclear in its own terms whether it refers to monitoring of the waste water discharge or of the storm water discharge or, indeed, both. However, Ms O'Connor also cites an EPA Site visit of 23 May 2022. Taking her averments with the exhibited Site Visit report, it becomes apparent that

- the site visit was part of the EPA's emissions monitoring programme. It consisted of taking samples for testing. I infer that this was one of the biannual monitoring events to which Ms O'Connor had referred.
- a waste water sample was taken and found compliant in all respects. For zinc specifically, the result was 11 µg/l[188] against an ELV of ≤ 300 µg/l. The total heavy metals results (including zinc) were also below the ELV for zinc alone – indicative *"of low levels."*
- No storm water sample was taken as no storm water was available – the relevant entry reads "*no flow*".

The recorded conclusion is that *"Analog was found to be in compliance with its IPC Licence on the day of the site visit."* I observe that in context this conclusion, while correct as to waste water discharges, sheds no light relevant to the case - on Analog's general compliance with its IPC Licence as to storm water discharges or the possibility of any misconnection to the storm water system.

113. Ms O'Connor also deposes that the EPA, in the context of its assisting LCCC's statutory investigation, instructed Analog and the three other EPA-licensed facilities in the Business Park to provide it with additional information as to the storage of materials on site and additional data analysis for all Analog's storm water emissions.

114. Ms O'Connor exhibits a report of the EPA site visit to Analog on 6 September 2023.[189] It inspected Analog's "*storm water drainage network (site-wide) inspection points and layout, and storm water monitoring points (all)*", its storm water drainage network maps, inspection logs, monitoring records and laboratory certificates, pipeline integrity assessment records and incident report records. All were licence-compliant. The site visit report recorded

- that "*the site's drainage network appears to receive storm water contributions from off-site sources such as road run-off, adjacent sites and upstream connections from the IDA Estate drainage system*";
- "*No compliance issues relating to such substances was noted during the site visit*";[190] and
- the EPA instruction to the four licenses to assist the LCCC investigation.

While the site visit report does not identify these "*substances*", reading it with the EPA correspondence to Mr Ryan of September 2023,[191] it is clear that they at least included Zinc, Phosphate and Ammonia in storm water. Clearly, this EPA site visit record does not reflect any particular suspicion of Analog as the source of the pollution of which Mr Ryan complains. However as the site visit report records that it was on this visit that the instruction was given to provide data for 1 month on the storm water emissions from their sites, including testing for Zinc, Phosphate and Ammonia, it follows that the results of such

[187] I take it, as distinct from heavy metals generally.
[188] Microgrammes per litre.
[189] EPA Site Visit Report SV28237, 4 October2023.
[190] Sic.
[191] See below.

testing were not yet to hand and did not inform the observation that "*No compliance issues relating to such substances was noted during the site visit*."

115. Ms O'Connor's exhibits reveal that Mr Ryan corresponded with the EPA as to LCCC's statutory investigation.[192] By e-mail of 7 September 2023, the EPA advised him that

- the EPA had maintained communication with LCCC as to its investigation and had offered to assist its attempts to identify the potential for emissions of zinc, phosphorus or other materials from any of its licensed sites; and that
- to date, no direct link to any licensed site had been established.

However, as the relevant instruction had issued only the day before,[193] it is clear that the words "*to date*" did not include the period of testing storm water for Zinc, Phosphate and Ammonia. So the observation lacked substance.

116. By email of 27 September 2023, the EPA advised Mr Ryan that

- it had requested all four of its licensees in the Business Park, including Analog, to provide, beyond licence requirements, data for 1 month on the storm water emissions from their sites, including testing for Zinc, Phosphate and Ammonia and it would provide that information to LCCC to assist its investigation;
- as to the spill of September 2022, BioMate is not a source of zinc or phosphate and the spill had no significant environmental impact; and
- Analog was licence-compliant as to storm water.

117. Ms O'Connor for the EPA deposes[194] that zinc monitoring at Analog had not revealed exceedances but her affidavit is not clear that this refers to storm water, as opposed to waste water, monitoring. Indeed, my impression is that it does not and in my view the position should have been made clear.

118. Ultimately and by careful and time-consuming parsing and cross-referencing to exhibits, it has proved possible to more or less discern what Ms O'Connor was saying as to specifically testing Analog's storm water, as opposed to foul water, for zinc and phosphorus – namely that such testing was limited to the one month's data and was bespoken in September 2023. It is a pity that was not more directly stated - the parsing and cross-referencing should not have been necessary. Indeed, it remains not impossible that I have misunderstood.

[192] Correspondence exhibited to the Affidavit of Marie O'Connor of the EPA sworn 8 July 2024. It appears to have been ended by the EPA in April 2024 as it considered that Mr Ryan had made "*unfounded and, on occasion unacceptable comments*." I do not have Mr Ryan's side of that correspondence and I make no finding on this disagreement as I need not do so for present purposes.
[193] See above as to EPA Site visit of 6 September 2024.
[194] Affidavit of Marie O'Connor filed 16 July 2024 §15 & 16.

119. In any event, I remain unclear what became of this 1-month's testing of Analog's storm water for Zinc, Phosphate and Ammonia – when it was done and what it revealed. The data is not exhibited. Douglas Adamson, consulting engineer, makes the notably diffident averment in his affidavit[195] for Analog that *"It is my understanding that the EPA has in fact been monitoring zinc from all operators in the industrial estate, including Analog, arising out of complaints made by the Applicant and I am not aware that any such monitoring has demonstrated exceedances from Analog, as suggested by the Applicant."* The managing director of Analog makes a similar averment. Given Analog was to do the monitoring and was to supply the data to the EPA and in any event must have access to the data in the EPA's possession and given Mr Adamson is retained by Analog and is bound to the Court to make any necessary inquiries of Analog and the EPA, this diffidence is odd. That said, I do not doubt that these averments are genuine and no-one has suggested the contrary. The averments were not challenged and there is no reason to infer anything more than the oddity.

EPA LETTER 6 FEBRUARY 2024

120. I have referred above to the letter dated 6th February 2024 from the EPA to the Board which discounts the possibility of misconnections to Analog's storm water system. As I have said, it was not before the Board when it made the Impugned Decisions. It appears to relate to a submission by Mr Ryan, which I have not seen, in a planning appeal unconnected with these proceedings.[196] It includes the following, on which I comment:

- *"The EPA cannot comment on whether there are misconnections at the Raheen Industrial Estate." "This, we understand, is currently being investigated by the IDA, the owners of the Estate, and Limerick City and County Council."*

  This relates to the Business Park generally and reflects the EPA's view that it can comment only on those facilities in the Park which it licenses.

- *"… the overall discharge to the canal is from the entire industrial estate, and any contamination of the water in the canal cannot be attributed to the Analog Devices site alone or to any individual licensed or unlicensed site."*

  This is, strictly, incorrect in asserting that the entire Business Park discharges to the canal – only the northern of two estate storm water discharge systems does so – though it drains most of the Park.[197] However, that would not seem to undermine the general point made as to attribution of contamination.

- *"… overground pipelines are being visually inspected on a weekly basis as required by the EPA licence. Integrity testing of underground pipelines is being carried out as required by the EPA licence (i.e. every*

[195] Sworn 10 October 2024.
[196] Exhibit MOC1 Tab 4. Reference #2360609 applies.
[197] Hydraulic Modelling report dated 30 September 2020 by Nicholas O'Dwyer Ltd, consulting engineers for the IDA. See footnote above.

> *3 years). Following the incident described above,[198] an extra round of integrity testing was carried out on underground pipelines in the G3 yard area. In addition, storm water lines are being monitored and inspected as required by the licence.*
>
> While it does not undermine the general point and it was correct to supply the information, the reference to the integrity testing of the G3 Yard pipes seems irrelevant to the proceedings as the G3 Yard storm water drains drain to the foul, not the storm water, system.
>
> *"There is no evidence of misconnections under the Analog Devices site. All the pipeline testing and inspections as described above support this and have not revealed any subsurface misconnections at their site."*
>
> *"Dye testing is not industry standard for detecting misconnections. There is greater use of cameras, surveys and maps, and the EPA relies on these techniques to detect misconnections."*

The EPA continues to assist the LCCC investigation.

121. The EPA's letter of 6th February 2024 does not reveal the results of the one-month's testing of storm water discharges for zinc and phosphates which it had directed Analog and its three other licensees to undertake in September 2023. However, it does positively assert that the pipeline testing and inspections have revealed no evidence of misconnections under the Analog Devices site.

122. It is also apparent from the EPA's letter of 6th February 2024 that, in the planning appeal to which it relates, unlike in the appeal with which these proceedings is concerned, Mr Ryan alleged breaches by LCCC of the WFD, specifically as to Loughmore Turlough, a Groundwater Dependent Terrestrial Ecosystem (GWDTE). The EPA unsurprisingly declines to comment beyond asserting the protective effect of IPC Licences.

ADMISSIBILITY OF HALL AFFIDAVIT & TETRA TECH REPORT & MATERIALS NOT BEFORE THE BOARD

HALL EVIDENCE – AFFIDAVIT & TETRA TECH REPORT - JULY 2024

123. On 6 August 2024, Mr Ryan filed an affidavit of Dr Olivia Hall of Tetra Tech environmental consultants, exhibiting her report (the "Tetra Tech Report" and together "the Hall Evidence"). The Tetra Tech report addresses the question of historical water pollution in the Loughmore Canal, including the results of analysis done in LCCC's water pollution investigation[199] and various reports which, while they predated the Impugned Decisions, were not before the Board. It also encompassed material post-dating the Impugned Decisions.

[198] This is a reference to the incident of September 2022 addressed elsewhere in this judgment.
[199] Under the Local Government (Water Pollution) Act 1977.

124. Dr Hall's relevant expertise is clear. She did a desktop study of voluminous documentation including monitoring results from water pollution investigations by LCCC and the IDA. The materials considered largely preceded the Impugned Decisions of 7 and 12 September 2023 but included materials not before the Board when it made those decisions.

125. She did consider a later Investigation Progress Report by LCCC to the EPA dated 23 December 2023. Obviously it could not have been before the Board. Dr Hall describes it as recording a monthly sampling campaign for 10 months from March to December 2023 which found 4 phosphate exceedances at the discharge to the canal and 2 zinc exceedances at that discharge. LCCC considered that there was no consistent pattern of zinc exceedance. LCCC had also inspected 37 businesses (I am unclear whether on or off the Business Park).

126. Dr Hall also commissioned and supervised a water, soil and sediment sampling and analysis programme done on 7 May 2024 – sampling locations in the canal and soil from land adjacent to it.

127. The resultant, lengthy and detailed Tetra Tech report, *inter alia:*

- is critical in various respects of the LCCC and IDA sampling and analysis campaigns;[200]
- records that on sampling of storm water drainage system manholes in the Business Park and at the discharge to the canal in March/April 2022,[201] elevated zinc & phosphorous concentrations were recorded in ten of the fifteen sample locations;
- asserts that elevated contaminant concentrations of metals, PAH,[202] VOCs[203] and hydrocarbons detected at the Business Park drain outflow and on the nearby banks of Loughmore Canal
  - closely correlate to a Department of Environment industry profile list of anticipated contaminants when compared to activities in the Business Park,
  - indicate that the nature of the contamination is largely organic, anthropogenic and typical of trade effluent or industrial activity, and
  - were below or within the EPA ranges for trace elements for non-polluted agricultural soils used as a proxy in the absence of threshold values to determine safe levels for these substances in freshwater sediments;
- states that impacted soils on the canal bank and Loughmore Common pose a potential risk to grazing animals, farmers or people working on the canal;
- suggests that the risk may have resulted from deposition on the lands of dredged canal sediment containing accumulated contaminants; and
- recommends further investigation of the potential sources of anthropogenic hazardous substances in the discharge to the Loughmore Canal. It states that this will require understanding all connections to the storm drain including any potential misconnections to the foul drain in the Business Park.

[200] Tetra Tech report §2.4.4
[201] Misdated July to September 2022 in the Tetra Tech Report – see Garland report 7 July 2022.
[202] Total Polyaromatic Hydrocarbon – some are hazardous.
[203] Volatile Organic Compounds – some are hazardous.

ANALOG'S RESPONSE TO HALL EVIDENCE

128. As stated, consultant engineer, Douglas Adamson swore an affidavit for Analog. He did so against the possibility of admission of the Hall Evidence, and deposed, *inter alia,* to the effect that the Tetra Tech/Hall Report:

- does not evidentially demonstrate that the source of any contamination is the Business Park storm water system or Analog;
- does not mention the Fanfare Development. Nor does it consider any potential impact of the Fanfare Development on the volume and discharge of storm water or any potential impact on the Loughmore Canal;
- is entirely provisional as it recommends further testing to identify any pollution. So it does not and cannot offer an opinion whether the Proposed Development would result in pollution; and
- takes no account of the findings of the Inspector and the Board that the Fanfare Development SuDS[204] measures suffice to avoid any increase in storm water discharge as a result of the development.

129. If needs be any controversy on these issues could be resolved against Mr Ryan, in the absence of cross-examination, on a **RAS Medical**[205] basis as he bears any onus of proof. However, in my view and given the terms of her report, I think it highly unlikely that Dr Hall would dispute Mr Adamson's observations. One might alternatively say that Mr Adamson's observations do not contradict Dr Hall but merely offer an uncontroverted commentary thereon – an important one. In my view, Mr Adamson's comments are telling.

MOTIONS TO EXCLUDE THE HALL EVIDENCE

130. In August 2024, the Board and Analog respectively issued motions, grounded on affidavit, to exclude the Hall Evidence as inadmissible as based on information not before the Board when it made the Impugned Decisions. Mr Ryan filed an Affidavit sworn 4 September 2024 in reply. The parties' respective positions on those motions are as follows.

Board & Analog

131. The Board and Analog say that the Hall Evidence is inadmissible as

[204] Sustainable Drainage Systems to manage surface water runoff as to water quantity, water quality, amenity and/or biodiversity.
[205] RAS Medical Ltd t/a Park West Clinic v Royal College of Surgeons of Ireland [2019] IESC 4.

- it was not before the Board in the planning process which resulted in the Impugned Decisions and does not come within the exceptions identified in **Reid #1**[206] to the general prohibition on the admission of such evidence in judicial review of such decisions. That is especially so as the Hall Evidence concerns environmental assessments;

- it does not impugn the Board's decisions in the sense of saying that, on the evidence before the Board, the Board was bound either to conclude that the Proposed Developments were likely to pollute the storm water discharge or that the possibility of such pollution required further investigation before the Board decided the planning appeals;

- its admission would accordingly be unfairly prejudicial to the defence of these proceedings
  - by the Board, which had no opportunity to consider that evidence in its decision-making process,
  - by Analog, where the appeal was decided in its favour after full participation by Mr Ryan (one might add unfairness to Analog which should have had an opportunity of reply to such materials in the process before the Board);

- the Tetra Tech Report should be excluded under Order 39, rule 58(1) RSC as not reasonably required to enable the Court to determine the proceedings;

- the Hall Evidence does not explain either the context in which an issue arises to be determined in these proceedings or the relevance of the Tetra Tech Report to any ground advanced in the Amended Statement of Grounds; and

- if anything, the Hall Evidence impermissibly invites the Court to conduct a review of the merits of the Board's Decisions – and that on factual evidence not before the Board.

Mr Ryan

132. Mr Ryan says the Hall Evidence is relevant to Ground 4 as to the WFD. He says it establishes that

- Mr Ryan intends to establish a genuine water pollution issue which the Board could and should have examined before deciding whether to permit the Proposed Developments and whether the proposed planning conditions were adequate;

- Analog's existing storm water drains discharge, and its drains proposed for the Proposed Developments will discharge, to the IDA's storm water network in the Business Park;

- the Business Park storm water discharges to the Loughmore Canal, which in turn discharges to the Barnakyle River, which runs through Mr Ryan's lands;

[206] Reid v Bord Pleanála (#1) [2021] IEHC 230.

- the Business Park storm water is contaminated by a source as yet unidentified (I observe that these three assertions are either not disputed or not seriously disputed – at least for the purposes of these proceedings);

- the Business Park storm water also discharges to the ground beneath the Loughmore Canal – including to groundwater and the Loughmore Common Turlough;

- the Business Park storm water contamination pollutes the Loughmore Canal, the Barnakyle River, Mr Ryan's lands and the Loughmore Common Turlough and groundwater;

- Ms Hall reviews reports generated in the LCCC investigation of pollution of Loughmore Canal, commissioned by LCCC or by commissioned by the IDA and shared with LCCC (I observe that these reports were not before the Board);

- those reports were in LCCC's possession when it, and later the Board, made their decisions in respect of the Proposed Developments;

- Mr Ryan had raised that LCCC investigation in both his submission to LCCC and his appeal to the Board. To each he attached the LCCC/IDA/stakeholders' meeting minutes April 2022 (I observe that these two allegations, as to fact, are not disputed);

- LCCC and the EPA should have informed the Board of the materials held by them relevant to that issue (for reasons set out below this allegation does not avail Mr Ryan).

ADMISSIBILITY OF MATERIALS NOT BEFORE THE BOARD – GENERAL NOTE

133. As ever, questions of admissibility of evidence are not decided in the abstract – they are decided by reference to the purpose for which the evidence is adduced. It is almost always necessary to ask: what is the evidence intended to prove? An item of evidence may be admissible for one purpose of proof and inadmissible for another. The obvious example is evidence by a witness of what another person said: it may be inadmissible as to the truth of what that other person said (the hearsay rule) but admissible if relevant to prove that the other person said it.

134. The general rule is that a challenge in judicial review to the rationality of a decision must be made by reference only to the material which was before the decision-maker when it made its decision. So, material which was not before the decision-maker when it made its decision is generally inadmissible as irrelevant to the issue of irrationality. However, that does not per se imply that material which was not before the Board is inadmissible in evidence in judicial review grounded in unlawfulness other than irrationality. This can be a vexed question in individual cases.

135. For example, the interaction of that general rule with the principle that objectors are not expected to adduce expert evidence to planning decisionmakers and are entitled to expect proper engagement with, and any necessary investigation of, their objections by the planning decisionmaker can be difficult. And, remembering that planning decision-makers are primarily inquisitorial bodies, whether the planning decisionmaker had an autonomous duty, even absent objection, to identify, engage with, investigate and/or decide an issue may bear on the ability of an applicant for judicial review to adduce factual evidence which was not before the planning decisionmaker. In turn, that raises various questions. How do we identify autonomous duties (both domestic and those identified by EU Law)? In that light, can irrationality be considered by reference to material which was not, but ought to have been, before the Board? Or should that issue be framed in terms of the distinct grounds in judicial review of failure to make adequate inquiry and/or failure to have regard to relevant considerations? An issue may also arise whether an applicant for judicial review may adduce expert opinion evidence which was not before the planning decision-maker as to the true significance of factual or opinion evidence which was before the planning decision-maker. It is perhaps no surprise then that, while there is a general rule against admission in evidence in judicial review of matter not before the Board, the rule is far from hard and fast.

136. The law in this area is in considerable part stated by Humphreys J in **Reid #1**[207] and has been recently and helpfully reviewed by Phelan J in **Tumblr**.[208] In Tumblr, it was the decision-maker which proffered ex post facto expert evidence in support of and explaining its impugned decision in reliance "*on a host of new material*" that had not been before the decision-maker. Phelan J excluded it by reason of the expert's reliance on material which had not been before the decision-maker and on the basis that "*the decision should speak for itself*" and *"In the ordinary course a decision must stand or fall on its own terms, subsequent elaboration should not be required and is not permissible"*. Phelan J cited Reid #1 both for the general principle that whether a decision is irrational falls to be determined on the basis of the material before the decision-maker and for the circumstances in which new evidence is admissible in judicial review.[209] Phelan J said that

> *"There is no hard and fast rule that expert evidence, not before the decision maker at the time the decision was made, is not admissible in judicial review proceedings but the circumstances in which this may occur are limited. … Whether such evidence is admissible depends on the specific issues raised in the proceedings and the extent to which such evidence may be reasonably required to enable the Court to determine those issues."*

137. The argument as to matter which was not, but allegedly ought to have been, before the Board took a particular form at trial. Mr Ryan alleged that the Board had been put by the terms of his appeal on inquiry as to, but failed to inquire into, the *"ongoing investigation into discharges through this storm water pipe being carried out by"* LCCC, IDA, EPA, OPW and NPWS. He said, correctly, that his appeal had

[207] Reid v Bord Pleanála (No. 1) [2021] IEHC 230.
[208] Tumblr Incorporated v Coimisiún Na Meán [2024] IEHC 366, [2024] 7 ICLMD 29 §159 et seq. See also the associated decision in Reddit, supra, §173 et seq.
[209] For example, a court can receive evidence to show what material was before the decision-maker or to enable it to determine a fact on which the decisionmaker's jurisdiction depends or as to procedural error or as to alleged misconduct by the decision-maker or to explain technical matters to enable the court to understand the material before the decision-maker.

advised the Board of the investigations – at to which he attached the minutes of the Stakeholders' meeting of 21 April 2022 with LCCC and the IDA. It disclosed, *inter alia*, that the LCCC investigation was a formal one under the Water Pollution Act 1977, had involved expert consultants, had found exceedances in phosphorous and zinc, but was incomplete. Yet, he complains, the Board took no steps to ascertain anything more about that investigation.

138. As to material not before the Board, Mr Ryan says, in effect, that had the Board displayed the slightest curiosity as to the substance of his appeal, inquiry of the State agencies he had mentioned would have disclosed to the Board a wealth of relevant information of which he was not in possession at the time of his appeal (and so could not have proffered in his appeal) and which would likely have included:

- In general terms, an up-to-date account by LCCC of the progress of that investigation.
- The JRE technical note to LCCC dated 10 May 2022 on sampling results.[210]
- The draft "Garland" report to the IDA dated 7 July 2022 on analysis of Business Park Discharges,[211] the letter of 8 August 2022,[212] from the IDA sending it to LCCC and the Final "Garland" report to the IDA dated February 2023.
- The undated, draft, interim LCCC report[213] on its investigation sent to the EPA in September 2022.
- A full copy of Analog's IPC licence – including its conditions as to storm water drainage. [214]

139. I must confess to some sympathy for Mr Ryan's accusation of lack of proper curiosity on the part of the Board as to the subject-matter of his appeals. I reiterate that the Board is, as a matter of law, expected to be a far-from-passive recipient of the material placed before it - **Fernleigh**[215] and an **ALAB** case.[216] As counsel for Mr Ryan observed,[217] s.6 PDA 2000 confers on planning authorities and the Board *"all such powers of examination, investigation and survey as may be necessary for the performance of their functions in relation to this Act or to any other Act."* Holders of powers must, where occasion requires, consider and decide whether to exercise them – **Stapleton.**[218] And that powers must be exercised reasonably is trite law – **Kenny**.[219] If at the cost of tautology, it bears saying that if the Board, as an inquisitorial body, is put on inquiry it has a duty to make reasonable inquiry – **An Taisce v Ireland**.[220] Lack of proper curiosity risks engendering a damaging lack of public faith in administrative

[210] JRE Environmental Consulting – "*Sampling Results for Industrial Drains in the Raheen Area and Loughmore Canal*".
[211] "*Analysis of the 2021/ 2022 surface water discharges to the Loughmore Canal from the Raheen Industrial & Business Park*".
[212] Undated but apparently sent on 8 August 2022.
[213] "*Environmental Inspection of alleged pollution from storm sewer at the Loughmore Canal Case 440371 Interim Report"* – LCCC undated but pre-16 September 2022.
[214] Also listed was a report by Tynan Engineering to LCCC, dated 22 February 2021, as to bidirectional water movement between the Loughmore Canal and groundwater. This related to the possibility of the Loughmore Common Turlough. However this point was not pursued - Ryan Submissions §74 & Fn 1. As will be seen, the case as to the Water Framework Directive, as to possible effect on the Loughmore Common Turlough, was not pursued.
[215] Fernleigh Residents Association v An Bord Pleanála [2023] IEHC 525.
[216] SWI, IFI, Sweetman & Ors v ALAB et al [2024] IEHC 421. ALAB is the acronym for the Aquaculture Licence Appeals Board. §1036.
[217] Transcript day 2 p231.
[218] Stapleton v ABP & Savona [2024] IEHC 3 §257 – citing R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs [2014] 1 WLR 2697. Cited in R (West Berkshire District Council) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441, [2016] 1 WLR 3923; and R (Stephenson) v Secretary of State for Housing and Communities and Local Government [2019] EWHC 519 (Admin); Hogan, Morgan, Daly, Administrative Law in Ireland, 5th Ed'n 2019 §17-249; Sherwin v Minister for the Environment [2004] 4 IR 279; Whelan v Kirby [2005] 2 IR 30.
[219] Kenny v Dental Council [2009] 4 IR 321.
[220] [2010] IEHC 415. Citing Weston Ltd v An Bord Pleanála [2010] IEHC 255, in which case Charleton J said: "*Any planning application must be processed with scrupulous rigour. The inspector was right to query the figures proffered"* by the developer.

decisions. Mr Ryan was entitled to raise an issue and ask the Board to apply its expertise to deal with it - see **Balz**[221] to the effect that, *"An independent expert body carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function"*. See also **ETI**,[222] to the effect that **Balz** implies "*that objectors are not expected to have to expensively retain their own experts and may expect the Board to itself deploy all necessary expertise in the "detailed scrutiny" of planning applications – and do so to a "high standard of investigation".*" Put simply, the Board cannot complain that material mobilised against it in judicial review was not before it when it made its impugned decision if it was the Board's own fault that the material in question was not before it at that time.

140. That said, as was also said in **ETI**, Mr Ryan had to have "*raised a legitimate concern before the Board*" to impose on it a duty of inquiry. I accept the Board's submission that once that duty is raised, as to an issue raised by an objector such as Mr Ryan, the Board is entitled to examine the materials before it and consider whether the issue raised can be decided on the evidence before it or requires further inquiry and/or evidence.[223] Where the Board decides against inquiry, that hindsight may suggest that any results of such inquiry would have had limited, if any, effect on the Board's decision is not, at least initially, the point. The question is whether the Board could reasonably have taken that view in foresight. However, and lest I be thought to prescribe endless or unreasonable inquiry by decision-makers, I should record my agreement with the obiter of Phelan J in **Reddit**.[224] She said that further helpful but less than necessary investigations and getting better evidence are often possible for a decision-maker but at the cost of delay and expense, such that the perfect may be the enemy of the good. A reasonable judgement call may be made whether the parties have been adequately heard and the available evidence suffices for a decision. The duty to inquire is a discretionary one and decision-makers have appreciable margin of discretion: **Madden**.[225] A similar view is taken in England of what its courts call the "elementary" "Tameside" duty of inquiry by public law decision-makers - its exercise is reviewable as to merit only for irrationality.[226] Of the principles summarised in **Balajigari**,[227] it suffices here to record that the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority, on the materials before it, could have been satisfied that it possessed the information necessary for its decision. That is the approach taken, for example, in **Stapleton**[228] where the decision was quashed on the narrower ground of failure to properly consider the adequacy of the information before it as to adequacy of public transport - a live controversy on a main issue - in the particular circumstances in which its Inspector had advised the Board that the developer had not placed before it the relevant correspondence from Dublin Bus.

[221] [2020] 1 ILRM 367, §45.
[222] Environmental Trust Ireland v An Bord Pleanala [2022] IEHC 540, §238.
[223] Transcript Day 2 p34.
[224] Reddit Incorporated v Coimisiún Na Meán [2024] IEHC 367 §180.
[225] Madden v An Bord Pleanála [2022] IEHC 257, citing Crekav Trading v An Board Pleanála [2020] IEHC 400 §268 and East Coast Transport v An Bord Pleanála [2019] IEHC 866 at §39.
[226] This duty is said to stem from the well-known speech of Lord Diplock in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014, 1065. It was described as elementary in R v Lincolnshire County Council, ex p Atkinson [1997] JPL 65, [1995] Lexis Citation 1424, 8 Admin LR 529.
[227] R (Balajigari) v Home Secretary [2019] EWCA Civ 673, [2019] 4 All ER 998, [2019] 1 WLR 464.
[228] Stapleton v ABP & Savona [2024] IEHC 3 §263 et seq.

141. There is authority that the ease and speed (or the opposite) with which a particular inquiry might be expected to be completed is a factor in assessing the rationality of not making it.[229] It is difficult to see in this case that inquiry of LCCC, the EPA and even the IDA (all State bodies) would predictably[230] have failed to quickly throw up the documents in question. One must assume they would have been had for the asking. Inquiry by the Board of LCCC as to its statutory investigation would have thrown up at least the JRE Technical Memorandum of May 2022, the LCCC's "working draft" report of September 2022 to the EPA or an updated version thereof addressed to the Board and the final Garland Report of February 2023. However, while the foreseeable ease and speed of securing additional information is relevant to the question of fulfilment of the duty of reasonable inquiry, it is not the ultimate question. That question is whether it was irrational of the Board to consider absent further inquiry, that it had before it information adequate to allow it to safely decide the appeals.

HALL EVIDENCE - CONCLUSION

142. Whatever about its consideration of information post-dating the Impugned Decisions, the best argument for admitting the Hall Evidence is that in appreciable part it consists in the expression of her expert opinion on materials which should have been but were not before the Board and would have been there had the Board inquired into the matters raised by Mr Ryan.

143. As I have said it is striking that there is no mention in the LCCC planner's report of LCCC's own statutory water pollution investigation, of which Mr Ryan made the Board aware and which related to the subject-matter of Mr Ryan's appeal. It is a very small leap indeed to the inference that LCCC, by that investigation, must have been in possession of information as to the pollution of which Mr Ryan complained in his appeal. In hindsight we know that such an inference would have proved correct. It is also very small leap indeed to the inference that LCCC, in embarking on that investigation, must have considered the complaints of pollution at least sufficiently weighty to justify statutory investigation. I am frankly surprised that the Board did not find it equally striking and draw the same inferences.

144. However, as Humphreys J, also strikingly, said in **Holohan**[231] even if the court considers that the exercise by a decision-maker of a discretion was "*clearly wrong*" the court cannot interfere if there is material to support it. I also bear in mind the observation of Simons J in **St. Audeon's**[232] that the threshold for finding irrationality is "*extremely high and is almost never met in practice".*

145. Here, the material supportive of the Board's non-inquiry of LCCC was negative: the absence, just as striking as other aspects of this case, of any submission even, much less evidential material, proffered by Mr Ryan in his appeal that the pollution of which he complained as the basis of his appeal,

[229] R (Law Society of England and Wales) v Lord Chancellor [2024] 4 All ER 211.
[230] i.e. predictably at the point at which the Board would decide whether to make the inquiry.
[231] Holohan v An Bord Pleanála [2017] IEHC 268.
[232] Board of Management of St Audeon's National School v An Bord Pleanála [2021] IEHC 453 (Simons J).

146. had in the past emanated from Analog, or

- would in the future emanate from the Proposed Developments.

In those circumstances, while I hope I would in the same circumstances have made a different decision, I cannot say that the Board's non-inquiry as to the LCCC Water Pollution Act investigation was irrational. On that basis, I exclude the Hall Evidence. I also find that Mr Ryan cannot impugn the Impugned Decisions by relying on the proffered materials predating the Impugned Decisions.

147. However, lest I am wrong in that exclusion and considering it at its height, the Hall Evidence could not have provided a rational basis for differently deciding the Impugned Decisions. I agree with counsel for the Board in that respect. The Hall Evidence doesn't address any of Analog, the Fanfare Development, or the WFD status of any water body.[233] Mr Adamson in effect takes the Hall Evidence at its height and his observations are made accordingly. In my view, they are well made. Simply put, and adding some observations of my own, Dr Hall does not:

- assert that any of the contaminants she found emanate from the Business Park – though she clearly considers it at least possible;
- assert that any of these contaminants emanate from Analog or even any particular reason to think that they might;
- mention the Fanfare Development – much less consider its substance or whether it is likely to generate relevant pollutants;
- suggest or even consider any potential impact of the Fanfare Development on the storm water discharge from the Raheen Business Park;
- consider, much less does she impugn, the efficacy of Condition #2 of the Impugned Decisions as to ensuring the integrity of Analog's storm water system; or
- assert, though she considers WFD Groundwater and Surface Water status, that the Fanfare Development raises any issues as to, much less imperils any water body for WFD purposes.

148. Counsel for Mr Ryan said that "*Dr. Hall does not say this is all Analog's fault*".[234] More accurately, Dr Hall does not at all say this is Analog's fault. Indeed, and strikingly, counsel for Mr Ryan met the latter assertion not by denying it as a fact but by asserting that it was unnecessary to his case. All he needed Dr Hall to do, he said, was "*identify there was a problem*". I disagree. All other considerations aside, he needed Dr Hall to identify that there was a problem linked to Analog and to the Proposed Developments and she did not. In short, the Hall Evidence does not provide any evidential basis, beyond any which was before the Board, for quashing the Impugned Decisions.

MATTERS NOT BEFORE THE BOARD – THE CASE PLEADED

149. It could be a matter of great concern if the overall integrity of a planning process were materially diminished by a failure of a local authority or any State body to forward to the Board documents in its

[233] Transcript Day 2 pp 18 & 92.
[234] Transcript Day 1 p157.

possession which might tend to a decision by the Board contrary to the view of that authority or body. The Board's reliance, as a defence to the proceedings against it, on Mr Ryan's failure to seek relief against LCCC in that regard is unconvincing – but is unnecessary to its defence of the proceedings. I have in the foregoing found in the Board's favour as to its duty of inquiry. But, as the Board observed,[235] Mr Ryan has a more fundamental problem: he did not plead the Board's failure in that duty.

150. Mr Ryan pleads the Board's failure to have regard to relevant materials. But, even if relevant, those materials were not before the Board and his pleadings clearly lay the blame (correctly or not) for that eventuality on LCCC and the EPA for not sending them to the Board. His grounds seek declaratory relief in that regard but this was not pursued – correctly as LCCC and the EPA are notice parties, not respondents, to the proceedings. I dismiss Mr Ryan's complaint in this regard by reason of his non-pleading of a failure to inquire by the Board.

151. I should add however, that a failure by a local authority or State body to send relevant materials to the Board may on particular facts be, but is by no means inevitably, the correlative of a failure of inquiry by the Board. Neither necessarily implies the other and either can exist without the other – it all depends on the facts and circumstances of the particular case.

GROUND 2 – EIA - FANFARE DECISION & HYDROGEN DECISION

EIA - PLEADINGS

152. Core Ground 2 reads

> ***The Fanfare Decision and the Hydrogen Decision are invalid because the Board misdirected itself in law as to whether an EIA was required in respect of the Fanfare and Hydrogen Developments, either as***
>
> - ***an industrial estate development,*** ("Class 10a")[236]
> - ***an urban development,*** ("Class 10b")
> - ***a chemicals storage development,*** ("Class 6(c)")
> - ***or a groundwater abstraction development,*** (Class 10(l)")
>
> ***and it failed to consider cumulative impacts of the Developer's entire installation and cumulative impacts with other development in the area,***
>
> ***and accordingly it failed to carry out EIA screening in accordance with s.171A and s.172 PDA 2000, Article 109 PDR 2001, and Articles 2, 3, 4, Annex II and Annex III of the EIA Directive.***

[235] Transcript Day 2 pp 231 & 232.
[236] In this and the following 3 listed project types I have added convenient reference to the relevant project type listing in Annex II of the EIA Directive.

153. The Board and Analog plead that the Proposed Developments, as to form, nature or type,[237] do not fall in any class specified for EIA purposes and so they argue that the questions of threshold, criteria or screening and, ultimately of doing EIA, simply don't arise. Mr Ryan argues that that is not what the Inspector, and hence the Board, found and the Board cannot, as it were, rewrite its decision. Analog reply in turn that its EIA screening report and the performance of a Preliminary Examination by the Board cannot convert a development which is not of a class of EIA development that falls within Annex I or II of the EIA Directive into development within those annexes.

[237] I consider "form" "nature" and "type" to be usefully descriptive synonyms rather than distinct categories.

EIA - WHETHER IT IS REQUIRED AND THE CONCEPT OF "MANDATORY" EIA – GENERAL NOTE

154. Article 4(1) of the EIA Directive requires EIA of projects listed in Annex I of the EIA Directive. It is common case that the Proposed Developments are not so listed. Article 4(2) of the EIA Directive provides that

> *2. … for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:*
> *(a) a case-by-case examination;*
> *or*
> *(b) thresholds or criteria set by the Member State.*
> *Member States may decide to apply both procedures referred to in points (a) and (b).*

155. Member States have effected Article 4(2) in various ways. Ireland, while it approached the issue differently earlier, now effects Article 4(2) and Annex II by listing in Schedule 5, Part 2, PDR 2001 projects which require EIA if they exceed the relevant threshold or fulfil the relevant criteria set out as to each class of development. Importantly, these are inclusionary thresholds: they prescribe when EIA must be done. They do not prescribe when EIA need not be done. Projects falling into the classes listed in Annex II, but which fall below the relevant threshold or do not fulfil the relevant criteria, must be considered, on a case-by-case basis, in preliminary examination and/or EIA Screening, for "*sub-threshold*" EIA. While this was the law before its adoption, "*sub-threshold*" EIA was codified in 2011[238] in Class 15 of Schedule 5, Part 2, PDR 2001, which reads as follows:

> *"Any project listed in this Part which does not exceed a quantity, area or other limit specified in this Part in respect of the relevant class of development but which would be likely to have significant effects on the environment, having regard to the criteria set out in Schedule 7."*

So, "*sub-threshold development*" can also be referred to as "*Class 15 development*".

156. So, as the Irish transposition of the EIA Directive operates, in deciding whether EIA of a project must be done, three distinct and sequential questions may arise:

a. Does the project, by reason of its form, nature or type, fall into a class of project listed in Annexes I and II of the EIA Directive as effected in Schedule 5, Part 1 and 2 PDA 2001?

   If not, EIA is not required. That is the point made by Murray J in **Treascon**[239] when, having noted that solar farms are not referred to in either Annex I or II of the EIA Directive, he said: "*EIA arises only for EIA projects: the EIA Directive is quite clear in that respect …".* Murray J cites O'Moore J in **Kavanagh**[240] - also a solar farm case **-** to the same effect. As I understand, the phrase "*EIA*

[238] S.I. No. 454/2011 Planning and Development (Amendment) (No. 2) Regulations 2011.
[239] Concerned Residents of Treascon and Clondoolusk v An Bord Pleanala [2024] IESC 28.
[240] Kavanagh v An Bord Pleanála [2020] IEHC 259 §11. I consider Kavanagh further below.

Projects" is used here as meaning projects which, by reason of their form, nature or type, may conceivably need EIA.

b. If the answer is yes, EIA is required unless the project falls below a threshold or fails to meet a criterion set, as to that class of project, by Schedule 5, Part 1 and 2 PDA 2001. (This has been colloquially termed "*mandatory EIA*" – in my view and as I will explain, an accurate but unhelpful usage.[241])

c. If the project falls below such a threshold or fails to meet such a criterion, the final question is whether it is likely to have significant effects on the environment.

   If not, EIA is not required. If so, it falls within Class 15 and what is colloquially termed "*sub-threshold EIA*" is required.

157. Whether such a "*sub-threshold*" project requires EIA is determined, on a case-by-case basis, by EIA Screening or by Preliminary Examination. EIA Screening and Preliminary Examination ultimately address the same question and differ only as to their depth of inquiry. The function of Preliminary Examination is only to avoid the waste of resources in EIA Screening of projects which obviously do not need EIA. See **Shadowmill**.[242]

158. On occasion in practice, the first question, as to form, nature or type of project, is skipped in whole or in part. In practice it may not matter if a project falls into a listed class of project by reason of its form, nature or type if, as to any class it may arguably fall into, it is sub-threshold and also, on Preliminary Examination[243] or EIA Screening by reference to Class 15, is found unlikely to have significant effects on the environment. Indeed, skipping the first question could be thought precautionary (in the colloquial as opposed to the legalistic sense of that word) as an assumption allowing rather than excluding the possible necessity of EIA. But it is a practice adopted at some risk, as this case demonstrates.

"Mandatory" EIA – a confusing usage.

159. As has been seen, the Inspector in her Fanfare Report excluded the need for a "*mandatory*" EIA. I do not criticise the Inspector for referring to a "*mandatory*" EIA. The term is hallowed by usage to distinguish projects requiring EIA because they exceed relevant thresholds from sub-threshold projects which may or may not require EIA depending on the outcome of assessments whether they are likely have significant effects on the environment. So, in such usage, "*mandatory*" EIA is contradistinguished from "*sub-threshold*" EIA. In my view, while the underlying distinction is important, the usage is distinctly unhelpful as it obscures the true position in law. All EIA is mandatory - either because the proposed

[241] See below.
[242] Shadowmill v ABP & Lilacstone [2023] IEHC 157 §59 et seq.
[243] See Art 103 PDR 2001.

development exceeds a threshold or meets a criterion or, where it does neither, because it is nonetheless likely to have significant environmental effects. To be clear, EIA of sub-threshold development is mandatory if it is likely to have significant environmental effects. Once that likelihood is identified there is no discretion not to do an EIA. So, given the usage, it is tautologous but useful to say that all EIA required by law is mandatory.

160. While other phrases may be useful to elucidate the underlying distinction, I tentatively suggest that it would be better, where the proposed development exceeds a threshold or meets a criterion, to describe EIA as "automatic" or "over-threshold", rather than as "*mandatory*".

EIA – IMPUGNED DECISIONS & INSPECTOR'S REPORT

161. Neither Impugned Decision explicitly recorded a decision on Preliminary Examination not to do EIA. Indeed, neither even mentions the concept of EIA. It would certainly have been better had they had done so. However, the Board made both Impugned Decisions "*generally in accordance with the Inspector's recommendation*".[244] The parties therefore agreed that, even though the Board's Impugned Decisions did not record Preliminary Examination of the need for EIA, the Inspector's Preliminary Examinations are to be attributed to the Board in light of the "*landslide of jurisprudence*" to that effect cited by Humphreys J in **Reid #7**.[245]

162. I have considered above the Inspector's Fanfare Report. She describes certain classes of development specified in Schedule 5 Part 2 PDR 2001 as "*relevant*" – a somewhat ambiguous word in context as it elides the first two questions described above. Are those classes "*relevant*" because

- it is possible that, and must be decided whether, the Proposed Developments fall into those classes as to form, nature or type of development?
  or
- the Proposed Developments do fall into those classes as to form, nature or type of development but it must be decided whether they meet the thresholds or criteria set by Schedule 5 Part 2 PDR 2001 for automatic EIA?

163. As recorded above, the development classes the Inspector identifies as "*relevant*" are as follows:

[244] As recorded in the Board's Directions.
[245] Reid v Bord Pleanála [2024] IEHC 27 §70.

Class §[246]	Form/Nature/Type of Project/Development[247]	Threshold
10(a)	Industrial estate development projects	Where the area would exceed 15 ha.
10(b)(iv)	Urban development	Which would involve an area greater than • 2 ha in the case of a business district – i.e. a district within a city or town in which the predominant land use is retail or commercial. • 10 ha in other parts of a built-up area. • 20 ha elsewhere.
13(a)	Change or extension of development already authorised, executed or being executed which would result in the development being of a class listed in Schedule 5 Part 1 or Schedule 5 Part 2 §§1 to 12.	Where the change or extension would result in an increase in size greater than the greater of • 25% or • 50% of the appropriate threshold.
15	Sub-Threshold Development - Any project listed in this Part which does not exceed a threshold specified for that class of project.	Which would be likely to have significant effects on the environment.

164. The Inspector concludes that EIA is not required as "*the development does not fall within any cited class of development in the P&D Regulations and does not require mandatory EIA*."[248] However, it is clear from the context that this finding relates only to Classes 10(a), 10(b)(iv) and 13(a). Unlike the table above, the Inspector lists the classes of development, as does the PDR 2001, in terms encompassing both the form, nature or type of development and the applicable thresholds/criteria. While that is not incorrect, it means that, in her analysis, to fall into a "*class*" a project must be considered by reference to both issues.

165. Her conclusion, just stated, does not explicitly analyse the question whether the Proposed Developments are industrial estate developments or urban developments. However, it is clear that she considered them one or the other and in either case sub-threshold, as she does cite the relevant sizes[249] and considers whether the Proposed Developments fall into Classes 13 or 15. These questions only arise,

[246] Schedule 5, Part 2, PDA 2001. Though the Inspector does not, and Schedule 5, Part 2, PDA 2001 does not, I have in the table which here follows separated the Nature/Type of Development from the threshold – merely for the sake of exposition. In some respects I have paraphrased the relevant text of Schedule 5 without changing meaning.
[247] The words "Project" and "Development" are interchangeable.
[248] §5.3.3. I have explained above the limited sense in which the Inspector uses the word "*mandatory*".
[249] §5.3.2. - the floor area of the existing buildings on the site is 46,695m². The proposed development comprises an industrial building with a floor area of 8,065m2, on a site of 9.52ha.

in the case of Class 15, if the Proposed Developments are one or the other and in the case of Class 13, if the Analog Campus is one or the other. She also excludes EIA *"at preliminary examination".*

166. Ultimately, I read each Inspector's report as recommending to the Board that, on Preliminary Examination,[250] the Proposed Developments

- are one or other of Industrial Estate development or Urban development – though she does not decide which (and it is possible in law that a development may be both).
- do not exceed relevant thresholds and so do not require what she calls "mandatory", and I would call "automatic", EIA.
- are not likely to have significant effects on the environment and so do not require EIA.

167. However, the Board now argues that the Proposed Developments as to form, nature or type, do not fall in any such class and so argues that the questions of threshold, criteria or screening and, ultimately, of doing EIA simply didn't arise as they are not "EIA Projects" in the sense in which Murray J used that term in **Treascon**. Mr Ryan argues that that is not what the Inspector, and hence the Board, found and the Board cannot now, in judicial review, rewrite its decision.

EIA – PROJECT CLASSES, INTRODUCTION TO REID & ABANDONMENT OF THE ANCILLARY PURPOSE TEST

168. As I refer to them below, it is convenient here to observe that proceedings **2021/61 JR Reid v An Bord Pleanála & Intel** involved a challenge to a planning permission granted by the Board in November 2020 (described by Humphreys J as *"the third Permission"*) for development at its microchip fabrication facility near Leixlip, County Kildare. In **Reid #5**[251] and **#6**[252] Humphreys J refused leave to seek judicial review on a question whether Intel's proposed development was an "Urban Development" within Class 10(b) of Schedule 5, Part 2, PDR 2001. But he granted leave on questions whether it was

- an "Industrial Estate Development" project within Class 10(a) of Schedule 5, Part 2, PDR 2001.
- a "Chemical Storage Facility" project within Class 6(c) of Schedule 5, Part 2, PDR 2001.

Reid #7*[253]* is the decision of Humphreys J on the substantive judicial review application. As here relevant, he held that Intel's proposed development was neither an "Industrial Estate Development" nor a "Chemical Storage Facility".

169. I should also record that Mr Ryan had cited **Derrybrien #1**[254] as demonstrating the rejection of what he called an "*ancillary purpose test*" – that it had held that, as he put it, *"ancillary elements of a*

[250] Within Article 103 PDR 2001- Article 103 is not explicitly cited by the Inspector but its application is readily inferred.
[251] Reid v An Bord Pleanála [2022] IEHC 687.
[252] Reid v An Bord Pleanala [2023] IEHC 154
[253] Reid v Bord Pleanála [2024] IEHC 27.
[254] C-215/06 Commission v Ireland, Judgment of 3 July 2008, [2009] ENV LR D3.

development could trigger a requirement for EIA for the entire development". But his counsel accepted at trial that **Treascon**[255] undermined and prevented his making that argument.[256]

EIA - PROJECT CLASSES, DECISION - GROUNDWATER ABSTRACTION - CHEMICAL STORAGE - INDUSTRIAL ESTATE DEVELOPMENT

170. At trial, Mr Ryan's plea that the Proposed Developments were groundwater abstraction schemes within the Class 10(I) of Schedule 5, Part 2, PDR 2001 was all but abandoned – certainly not pursued – and in my view rightly so.[257] The abstraction involved in the Proposed Developments is a tiny fraction of the Class 10(I) threshold of 2 million m^3 annually and is entirely ancillary to the purpose of the Proposed Developments. Beyond rejecting the plea, I need say no more than that there was no factual basis for it.

171. As to Mr Ryan's plea that the Proposed Developments were a chemical storage facility within Class 6(c) of each of Annex II, EIA Directive and Schedule 5, Part 2, PDR 2001, his counsel frankly and fairly said that **Reid #7***[258]* was squarely against him, such that precedent required that I reject the plea.[259] **Reid #7** held that chemical storage facilities within Class 6(c) are *"facilities constructed for the primary purpose of such storage, not facilities in which such substances are incidentally stored for other purposes".* It is perfectly clear that the Proposed Developments are not "*facilities constructed for the primary purpose of such storage".* One might also invoke **Treascon** in its undermining the posited "*ancillary purpose test*". Mr Ryan nominally pursued the chemical storage facility issue only to allow him the option to litigate the matter elsewhere should the opportunity arise. For my part, I reject the plea.

172. As to the plea that the Proposed Developments were "Industrial Estate Development" projects within Class 10(a), the position is the same. Counsel for Mr Ryan accepted that **Reid #7** was also squarely against him on this issue, such that precedent required that I reject the plea.[260] **Reid #7** held that this class *"means the development of industrial estates, that is developments that relate to the functioning of the industrial estate as an industrial estate, not developments internal to particular undertakings within such estates that do not in themselves contribute to the operation and use of the industrial estate in its wider context as such an estate."* I add my agreement to that decision and reject the plea in this case.

173. I note in passing that **Reid #5**,[261] as to "Industrial Estate Development" projects within Class 10(a), cites the Commission's 2015 Guidance on the Interpretation of EIA project classes.[262] That Guidance was updated in 2024[263] and the parties agreed after the trial [264] that I should have regard to

[255] Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála [2024] IESC 28 §71.
[256] Transcript Day 1 p163.
[257] Transcript Day 1 p160 et seq & Day 2 p9 et seq.
[258] Reid v Bord Pleanála [2024] IEHC 27.
[259] Transcript Day 2 p9 et seq.
[260] Transcript Day 2 p9 et seq.
[261] Reid v An Bord Pleanála [2022] IEHC 687.
[262] Interpretation of Definitions of Project Categories of Annex I and II of the EIA Directive, 2015
[263] Interpretation of Definitions of Project Categories of Annex I and II of the EIA Directive, 2024.
[264] In post-trial correspondence.

the 2024 version. Such guidance is not binding or even formally authoritative and this guidance appears to be more descriptive than prescriptive of Member States' approaches to Class 10(a). But such guidance is nonetheless a valuable – even important - interpretive aid as reflecting a considered and expert view – **Coyne**.[265] As will be seen, I find that guidance useful as to the issue of urban development. As to Industrial Estate Development, it describes the scope of Class 10(a) as imprecise but as typically "*areas developed by a developer that have the required infrastructure for joint industrial or business utilisation by several companies; are characterised by spatial proximity; and form an operational or functional unit*."[266] Commonly they are intended for *"simultaneous use by several companies that are in close proximity."* It says that *"'infrastructure' is widely interpreted and includes, for example, roads, power, and other utility services, provided to facilitate the growth of industries."* Broadly – indeed in the "*normal meaning of language*"[267] the class appears to describe the infrastructural context in which multiple enterprises sit rather than the individual enterprises themselves.

174. Humphreys J in **Reid #7**[268] concludes that

> *"The board's submission comes devastatingly to the point:*
> *"80. Put simply, a facility which manufactures circuits and circuit boards is not an industrial estate development project nor is it a facility for the storage of chemicals. The argument made by the Applicant in respect of both classes of development does not require a broad interpretation of the EIA Directive, it requires a fundamental change to the meaning of the words used in the Directive."*

This passage seems to me directly applicable to Analog's case.

175. Ultimately, counsel for Mr Ryan agreed, in my view wisely, that the only class he argued with vigour was that of urban development[269] - while seeking to preserve the possibility of appeal on the chemical storage facility and industrial estate development issue.

176. Accordingly, I hold that the Proposed Developments are neither Groundwater Abstraction, Chemical Storage nor Industrial Estate Development projects for EIA project classification purposes.

EIA - INTERPRETATION OF ANNEX II CLASSES

177. The Board argued that I should not take a broad and purposive approach to the interpretation of Class 10(b) - Urban Developments. So, before I turn to the question whether the Proposed

[265] Coyne v ABP, Ireland & EngineNode [2023] IEHC 412 §121 and cases cited therein: Monkstown Road Residents' Association v An Bord Pleanála & Lulani Dalguise Lt [2022] IEHC 318; Friends of the Irish Environment CLG v Government of Ireland [2022] IESC 42.
[266] p56 et seq.
[267] Reid v An Bord Pleanála [2022] IEHC 687 §100.
[268] Reid v Bord Pleanála [2024] IEHC 27 §79.
[269] Transcript Day 2 p14.

Developments are Urban Developments within Class 10(b), it is necessary to first say something of the interpretation of Annex II classes.

178. The leading authority is **Kraaijeveld**.[270] At issue was whether modification works on Dutch dykes along navigable waterways fell within Class 10(e) of Annex II of the EIA Directive which related to "Canalization and flood-relief works".

179. First, the case held that the class descriptions are EU law concepts to be uniformly interpreted across the EU. It compared the various language versions of the Directive saying:

> *" … interpretation of a provision of Community law involves a comparison of the language versions[271]… Moreover, the need for a uniform interpretation of those versions requires, in the case of divergence between them, that the provision in question be interpreted by reference to the purpose and general scheme of the rules of which it forms part[272]."[273]*

180. In turning to the purpose and general scheme of the EIA Directive to assist in interpreting Class 10(e) the CJEU in Kraaijeveld cited Article 1(2) to the effect that the directive is aimed at "*projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location*" and Article 3 as to the content of EIA.[274] It then said:

> *"The wording of the directive indicates that it has a wide scope and a broad purpose. <u>That observation alone should suffice</u> to interpret point 10(e) of Annex II to the directive as encompassing all works for retaining water and preventing floods and therefore dyke works even if not all the linguistic versions are so precise."*

181. So, it is clear from **Kraaijeveld** that, in interpreting the meaning of an Annex II Class, one may have regard to the "*purpose and general scheme*" of the EIA Directive, to its "*wide scope and a broad purpose"* and to Article 2(1), to the effect that the directive is aimed at *"projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location".* Humphreys J was, of course, right to reject the "*totally implausible*", because impossibly wide, interpretation proposed in **Reid #7** of Class 6(c) as to Chemical Storage Facilities – he rejected a logic in which the construction of any building in which any chemicals (all substances are chemicals) are to be held for the purposes of the building's primary purpose would fall within Class 6(c). Looking at the issue from a purposive point of view he, entirely unsurprisingly, observed that no purpose is served by requiring consideration of EIA as to very minor and incidental works within an industrial estate, or in relation to works that incidentally involve storage of chemicals and the like within a project that itself is not subject to EIA. It is difficult to

[270] Case C-72/95 Aannemersbedrijf PK Kraaijeveld BV ea v Gedeputeerde Staten van Zuid-Holland, Judgment of 24 October 1996.
[271] Citing Case 283/81 CILFIT, §18.
[272] Citing case C-449/93 Rockfon [1995] ECR I-4291, §28.
[273] §28 et seq.
[274] Environmental impact assessment is to identify, describe and assess the direct and indirect effects of a project on human beings, fauna and flora, soil, water, air, climate and the landscape, material assets and the cultural heritage.

conceive of any development which would fall outside Class 6(c) on such an interpretation - a requirement of broad interpretation does not require a limitless interpretation. Indeed, limitless scope would undermine the EIA Directive by diversion of resources to assess projects to no purpose. Purposive interpretation may require breadth to the extent of the purpose of the legislative measure in question but it also countermands a breadth of interpretation beyond that purpose. Purposive analysis can limit interpretation as well as expanding it.[275] I accept the ratio of **Reid #7** and have applied the decision above.

182. However, it remains that **Kraaijeveld** is clear authority for a broad and purposive approach to such a generally described class as "*Urban development*". The Commission's 2024 Guidance[276] cites **Kraaijeveld** in identifying "*key principles*" applicable in interpreting EIA project classes. They include that

- *"In rulings related to the EIA Directive, the Court has consistently emphasised the fundamental purpose of the Directive as expressed in Article 2(1). i.e.* that those projects '*likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects'*.

- *"The wording of the EIA Directive indicates that it has a wide scope and broad purpose."*

- Uniform EU-wide interpretations of the classes are required.

183. While Ireland has in some instances simply transposed the Annex II Classes verbatim and without elaboration, it and other Member States have elaborated the classes by inserting specific subclasses or lists of projects. Yet despite the requirement of conformity of interpretation of the classes, the Commission notes that that the outcome of such exercises has varied widely between member states and descriptions of projects falling into a class differ between Member States – in part due to different local conditions.[277] For example, as to Annex II (10)(b) – Urban Development - the Commission notes that *"interpretations differ regarding the scope of this project category, although Member States have in most cases interpreted this category in a broad sense."* The Commission cites numerous other cases in support.[278] So, and unsurprisingly, in describing the project classes the Commission disavows exhaustive interpretation.

184. Also, and significantly, the Commission contemplates overlap between the project classes – they are not mutually exclusive. It observes of Annex II(10(b) – urban development – that:

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[275] Dodd on Statutory Interpretation makes this point at §14.37 citing joined Cases C-28 to 30/62, Da Costa.
[276] §2.3.
[277] For example, the Commission states at p44 that the decision as to which specific agricultural practices and which types of areas fall within Annex II (1)(b) is bound to vary between Member States, given the variety of land uses and agricultural practices in different parts of Europe. Of Class 10(a) "*Industrial estate development projects*" the Commission states at p56 that *"Member States tend to have different interpretations of this project category*".
[278] Case C-287/98, Linster and Others, §43; Case C-260/11, Edwards and Pallikaropoulous, §29; Case C-531/13, Kornhuber and Others, §21. Case C-420/11, Leth, §28.

> *"Member States may decide in their national environmental impact assessment systems that some of the above-mentioned projects (for example, sports stadiums or water supply networks,[279] drinking water treatment plants and pipes for carrying treated drinking water) fall within other Annex II project categories.*
> *Compliance with the Directive will be ensured, irrespective of which Annex II category is considered applicable, provided that those projects which give rise to significant environmental effects do not escape from the scope of application of the Directive."*[280]

185. **Case C-227/01 Commission v Spain** was concerned with interpreting an Annex I project class – but that does not differentiate it for present purposes. Annex I, Class 7 related to *'construction of … lines for long-distance railway traffic'.* The Valencia to Tarragona railway line project involved doubling the existing single track on a 13.2 km stretch of line. Spain had effected it without doing an EIA. The Commission's infringement proceedings succeeded. Spain argued that the project did not fall within Annex I, Class 7 – as *inter alia*, Class 7 referred only to the construction of a new line in the sense of a new railway connection between two towns. What is of interest here is not the specific class but the approach to interpretation of project classes. As to such interpretation, the Court cited **Kraaijeveld** for

- the need for a uniform EU-wide interpretation which requires, in the case of divergence between different language versions of a provision, that it be interpreted by reference to the purpose and general scheme of the rules of which it forms part,
- the relevance of the observation of the EIA Directive that "*its scope is wide and its purpose very broad*", and
- the relevance of the Directive's fundamental objective as stated in Article 2. It observed, *"On the basis of those considerations alone, point 7 of Annex I to Directive 85/337 must be understood to include the doubling of an already existing railway track*."

186. Of course, in the present case, there is no evidence of divergence between language versions of the Directive. But it seems to me inevitable that the same principles must apply to the interpretation of such a generally expressed category as "Urban Development". **Tromans**[281] says that "*the term Urban development project is particularly wide in its potential scope*" and gives examples – but there are limits.

187. To dissuade me from a broad purposive interpretation of Class 10(b), the Board cites O'Moore J in **Kavanagh**.[282] But, while O'Moore J did interpret Annex II Class 3 – "Energy Industry", based on a proper and close textual analysis of a class distinguished by numerous quite specific sub-classes, those sub-classes were relatively "*plain*"[283] and specific in their terms and were not at all as general as the phrase "Urban Development". As relevant here, O'Moore J was concerned[284] with a quite different and specific argument and reached an entirely orthodox conclusion. He was asked whether a solar farm

[279] The Commission notes that in at least one Member State, sewerage and water supply networks are considered to fall within Annex II(10)(j) *'Installations of long-distance aqueducts'*.
[280] p59.
[281] EIA 2nd Ed'n 2012 §3.93
[282] Kavanagh v An Bord Pleanála & Highfield Solar [2020] IEHC 259, [2020] 5 JIC 2906.
[283] §35.
[284] §34 et seq.

project, which he had found did not fall within an Annex II class, nonetheless had to be screened for EIA by reference to the general obligation imposed by Article 2 of the EIA Directive. As O'Moore J observed, Article 2(1), to the effect that the Directive is aimed at *"projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location",* ends with the sentence *"Those projects are defined in Article 4."* It is Article 4 which adopts the list of classes set out in Annex II. So, O'Moore J said that *"… it is of great importance that the Directive then goes on to require an EIA be carried out in respect of carefully defined types of projects. The obligations placed on Member States by the Directive are limited by reference to the classes of projects or developments set out in the Annexes, and do not extend beyond them. … if the development does not fall within the classes listed in the Annexes then an EIA is not required."*[285] and *"A project which could have a significant effect on the environment is nonetheless not caught by Article 2 unless it also falls within Article 4."* In this respect, O'Moore J was not concerned with interpretation of the Annex II classes or even with whether the solar farm fell within them. His premise was that it did not. I of course agree with O'Moore J that Article 2 does not imply that the mere fact that a project is likely to have significant effects on the environment triggers a requirement of EIA – the project must also fall within a Class in the Annexes stipulated by Article 4. As O'Moore J says: *"It is an illogical and circular argument to suggest that a project which does not fall within Article 4 should nonetheless be found to do so by reference back to Article 2"* And of course even purposive interpretation starts with the text. But all that does not render Article 2 irrelevant to the interpretation of those classes - **Kraaijeveld** is clear to the contrary. I do not see that **Kavanagh** militates against broad purposive interpretation of Class 10(b). Nor does **Kavanagh** purport to prohibit interpretation of Annex II classes by reference to the overall Article 2 objective of EIA of projects likely to have significant effect on the environment. Nor could it have given **Kraaijeveld.**

188. To a similar end, the Board cites McDonald J in **IGP Solar**.[286] It was also a solar farm case - indeed O'Moore J in Kavanagh considered that IGP Solar governed the case before him. Mr Sweetman in IGP Solar asserted error in that the solar farm in question fell into Annex II Class 3(a)[287] and yet had not been screened for EIA. The Board defended the allegation on the basis that the solar farm did not fall within any Annex I or Annex II class and so no question of EIA screening arose. In turn, Mr Sweetman cited **Kraaijeveld** for its invocation of the wide scope and a broad purpose of the EIA Directive as an aid in interpreting Annex II classes. McDonald J emphasised the context in **Kraaijeveld** of divergence between different language versions of the EIA Directive – though he did not, at least explicitly, draw any general or distinguishing conclusion from that emphasis. I do not read the decision as authority for what would be a surprising conclusion that purposive interpretation of EU directives is confined to instances of divergence between different language versions. I am sure McDonald J would be surprised by any such suggestion. That this is so is, I think, illustrated by what follows in the judgment – a close and proper analysis of the language of Class 3 and case law relating to Class 3 such that recourse to purposive interpretation was in the end beside the point.

189. Indeed, Dodd describes the purposive approach as "*synonymous*" with the "*fluid*" interpretation of EU law instruments and its deployment as not conditional on ambiguity in the instrument – though it

[285] §11.
[286] Sweetman v An Bord Pleanála & IGP Solar [2020] IEHC 39.
[287] "*industrial installations for the production of electricity, steam and hot water*".

by no means mandates ignoring the text of the instrument.[288] The Board's approach seemed to savour of the *"dogged adherence",* decried by Murray J in **Heather Hill**[289] as obsolete even in domestic law:

> *"to the refrain that a literal interpretation of a statutory provision is departed from so as to consider broader questions of statutory purpose and context only where the construction yielded by that literal analysis is "ambiguous or absurd". … What, in fact, the modern authorities now make clear is that … in no case can the process of ascertaining the 'legislative intent' or the 'will of the Oireachtas' be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted".*

190. For all that I disagree with the Board on this generally important issue of the approach to interpretation of Annex II project classes, as will be seen, that disagreement does not ultimately decide the issue.

EIA - URBAN DEVELOPMENT PROJECT - CLASS 10(B)

191. Class 10(b) of Annex II of the EIA Directive reads as follows: *"Urban development projects, including the construction of shopping centres and car parks."* The equivalent Class 10(b) of Schedule 5 Part 2 PDR 2001 is more elaborate. It reads

> *(b) (i) Construction of more than 500 dwelling units.*
> *(ii) Construction of a car-park providing more than 400 spaces, other than a car-park provided as part of, and incidental to the primary purpose of, a development.*
> *(iii) Construction of a shopping centre with a gross floor space exceeding 10,000 square metres.*
> *(iv) Urban development which would involve an area greater than 2 hectares in the case of a business district, 10 hectares in the case of other parts of a built-up area and 20 hectares elsewhere. (In this paragraph, "business district" means a district within a city or town in which the predominant land use is retail or commercial use).*

Class 10(b)(iv) is the catchall sub-class with which we are concerned. If nothing else, Class 10(b) of Schedule 5 Part 2 makes clear that an urban development can be a development other than of dwellings, carparks and shopping centres – though that was in any event apparent from Class 10(b) of Annex II.

192. Argument at trial concentrated on the urban or non-urban character of the location, as opposed to the urban or non-urban nature, of the Proposed Developments – perhaps understandably as the thresholds vary with location. Mr Ryan ultimately put it simply: "*The Proposed Development … is … an*

[288] Statutory interpretation, 2008, §14.31 et seq. He uses the synonymous word "*teleological*".
[289] Heather Hill Management Company CLG and Gabriel McGoldrick v An Bord Pleanála & Burkeway Homes [2022] IESC 43, [2022] 2 ILRM 313 §109.

urban development, because it is a development in an urban area."[290] He called in aid[291] the Development Plan requirement[292] of a density of 45+ dwellings per hectare in "Density Zone 2: Intermediate Urban Locations/Transport Corridors" at appropriate locations – including within 800 metres of various locations[293] including the Business Park.

193. Nonetheless, as to location, the case is difficult – each side predictably emphasising the feature of the location which suits its case. The Board submits that as to the surrounding location of the business park, the *"predominant theme is farmland and grass land with some residential development to the north-west and north-east".* If, as I think it is, the word "predominant" is excessive here and the word "some" too diminutive, the converse can be said of Mr Ryan's emphasis in the opposite sense. As to the facts, from its west around to its south-east, the Analog Campus is contiguous or close to the suburb of Dooradoyle. But that may be too narrow a focus. The aerial photo below illustrates the "*edge of town*" location of the Business Park generally – it is contiguous to the suburb of Dooradoyle from the north-west around to the east but is contiguous otherwise to farmland and countryside. Though Analog had not addressed that reality, the Board ultimately accepted at trial that the Business Park is on the very edge of the suburbs of Limerick – though still arguing that Analog's was not an urban location.[294] As to the future and save for a relatively small area to the north-east of the Business Park, no further residential zoning appears in the vicinity of the Business Park and the lands south of it are zoned either to extend the Business Park to the south-west or to remain unzoned agricultural lands.[295] So, despite the density requirement, the Business Park is not, as Mr Ryan suggested,[296] to be at the "*centre*" of residential development – the 800m is the radius not of a circle but of an arc to the north and the Park will remain an "edge of town" location.

[290] Ryan Submissions §132.
[291] Transcript Day 1 p165.
[292] Limerick Development Plan 2022-2028 Table 2.6: Density Assumptions per Settlement Hierarchy.
[293] (i) the University Hospital; (ii) Raheen Business Park; (iii) National Technology Park; (iv) University of Limerick; (v) Technological University of the Shannon; (vi) Mary Immaculate College.
[294] Transcripts Day 2, pp 120 to 124.
[295] Limerick Development Plan 2022-2028, Volume 2a, Map 3: Limerick City and Suburbs (in Limerick), including Mungret and Annacotty- Zoning Map.
[296] Transcript Day 1 p165 – perhaps erroneously prompted by me.

194. I reject the Board's and Analog's argument, based on **Reid #5**,[297] that Mr Ryan adduced no evidence that the Proposed Developments were urban development projects – at least insofar as that argument is predicated on analysing the issue from the point of view of location. The aerial photo above provides all the evidence needed – even if a conclusion is difficult to draw from it.

195. However, it appears that location is not necessarily the decisive issue bearing on whether a project is urban development – though as the Irish Regulation is drafted it is an issue as to the setting of thresholds.[298] The Commission's 2024 Guidance, which the parties invited me to consider and as to which I sought and received supplemental written submissions, says that "*In interpreting the scope of Annex II (10)(b), the 'wide scope and broad purpose' of the EIA Directive should be borne in mind*".[299] It cites **Case C-332/04 Commission v Spain**,[300] in which Spanish law required EIA of "*urban development projects*" only where situate outside urban areas.[301] The premise of that exclusion was that urban developments could exist outside urban areas – indeed, in Spanish law, only such urban developments required EIA. The CJEU held that excluding urban development projects in urban areas – in that case a cinema complex - from EIA requirements amounted to incorrect transposition of Annex II Class 10(b). The Commission describes the CJEU as holding that "an *urban development project should be seen as urban in nature regardless of its location*".[302] Accordingly, remembering that Article 2 requires EIA of "*projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location*" and accepting that location is not irrelevant, it appears that the word "*urban*" relates, at least primarily to the nature of the project rather than to its location.

196. Indeed, that the word "*urban*" relates primarily to the nature of the project rather than to its location – at least its pre-existing or surrounding location - seems to me supported by the uncontroversial observation that certain types of development can of themselves transform the character of a location from rural to urban. This seems to me recognised in the fact that the Class 10(b)(iv) thresholds for EIA for urban development include a 20ha threshold for urban development outside a business district or other built-up area – existing urban areas are, at least typically, already built up.[303] The 20ha threshold is at least consistent with the possibility of urban development in a non-urban location.

[297] Reid v An Bord Pleanála [2022] IEHC 687.
[298] Commission's 2024 Guidance, p14 citing Case C-332/04 Commission v Spain.
[299] p58.
[300] This is a judgment not available in English but which the Commission described in the Guidance at p14 . I have relied on that description. An official digest and the operative part of the judgment are available in English.
[301] The digest reads: "*Assessment limited to urban development projects outside urban areas*."
[302] p58 - This quotation is of the Commission's description of the tenor of the CJEU's judgment. The Commission cites also COM(2003) 334 final, Report from the Commission to the European Parliament and the Council on the Application and Effectiveness of the EIA Directive. P44 states: "*For example, there appeared to be a degree of concern as to whether projects outside towns and villages can be categorised as 'urban development projects'. Based upon the broad interpretation of the Directive required by the ECJ, an urban development project should be seen as a project that is urban in nature regardless of its location*."
[303] I do not think that reference to such as parks and playing fields much detracts from this observation.

197. Collins AG in **Case C-575/21 WertInvest**[304] - a recent case on which Mr Ryan relies and which is cited in the Commission's 2024 Guidance[305] – cited **Case C-332/04 Commission v Spain** and the Commission's 2015 Guidance to the effect that the *"category of urban development projects should be interpreted broadly to include projects such as bus garages or train depots, housing developments, hospitals, universities, sports stadia, cinemas, theatres, concert halls and other cultural centres. In keeping with that approach, the Court has held that building a leisure centre which includes a cinema complex is an urban development project."* In **WertInvest**, hotels were, added to that list – though arguably by the referring court rather than by the European Court.[306] However, while I accept the need for broad Interpretation, I do not think WertInvest greatly assists Mr Ryan as to the classification of specifically the types of project comprised in the Proposed Development. Analog correctly submits that **WertInvest** was concerned with the limit of discretion conferred on member states to set thresholds on Annex II projects, rather than with the correct interpretation of a relevant class.

198. On a broad view, "urban" would, in its ordinary meaning, mean development of a nature typically pertaining to a collective human residential settlement – be it village, town or city. In **Reid #5**, Humphreys J considered an argument that the Collinstown Industrial Park, in which lies the Intel campus, was the equivalent of a mini-town. Though deciding a leave application, he considered the argument *"readily capable of being decided".* He cited the Oxford Dictionary,[307] to the effect that *"the primary meaning of 'urban' is '[o]f, pertaining to, or constituting a city or town'* and a secondary meaning is *'[r]esident in a city or town'.*

199. EIA Directive Annex II, Category 10 is headed "Infrastructure". However, this does not circumscribe the definitions of the project classes in Category 10. The Commission cites[308] **Case C-66/06 Commission v Ireland**, to the effect that *"Titles of categories into which projects of Annex II are grouped do not represent a separate project category and therefore do not contribute to their definition. Therefore, they are observed as declaratory titles, with the purpose of grouping projects …".*[309]

200. Clearly the reference in Annex II Class 10(b) to "*shopping centres and car parks*" is inexhaustive of the class – as the excerpt from the opinion of Collins AG above illustrates. But it is difficult to distil a principle from these examples. In **Reid #5** Humphreys J comments, "*One can't have an urbs without residents*." The comment is both obviously correct in itself and understandable as a reaction to the submission that an industrial park was the equivalent of a mini-town. But more generally it seems to me that, just as an urbs must have residents and just as much as those residents need places to live, to shop, and to recreate (for example, the cinemas in **Case C-332/04** and see more generally the opinion of Collins AG above), they need places to work. Car parks (as developments in their own right as opposed to as annexed to other developments) are uncontroversial – they clearly facilitate the modern urbanite

[304]Case C-575/21 WertInvest Hotelbetrieb ECLI:EU:C:2023:425. Opinion of Collins AG delivered on 24 November 2022, Judgment of 25 May 2023, §42.
[305] pp 14 & 59.
[306] See the judgment at §36.
[307] The New Shorter OED, vol. II, p3527.
[308] 2024 Guidance §3.3 Box 2 p43.
[309] This may cast some doubt on the analyses of the significance of the word "*infrastructure*" in *R (Goodman) v London Borough of Lewisham* [2003] Env LR 28 and R (Crematoria Management Ltd) v Welwyn Hatfield Borough [2018] EGLR 23 – though not, perhaps on the results of those cases.

in many and varied aspects of living (typically, shopping, recreating and working) in an urban area and they are relatively easy to regard as urban developments. No-one would cavil with shopping centres as urban developments. But if foraging and leisure are part of urban life, is not working also part of urban life – indeed a very large part? And if offices are urban developments, as I think they are, why not factories? And if the urban is to be contrasted to the rural, is industry not typical of urban existence and less so of rural existence? Putting it a little crudely, people live near factories for reasons the counterpart of the reasons factories are built near where people live. Many European cities owe their size, and some their existence, to industry. And the migration of shopping centres, retail parks, the likes of cinema multiplexes and of factories from the centres to, or at least towards, the edges of towns and cities has been proceeding apace for decades for good or ill. It seems difficult to suggest that the migration has altered their nature from urban to non-urban, with those of the same nature, but staying behind in the town centre, remaining urban in nature.

201. Humphreys J in **Reid #5** continued, "*A non-residential industrial park is not an urban development unless it is located in an independently urban area …".* Here, Humphreys J is clearly adopting the locational approach to what it means to be urban. It is not apparent that **Case C-332/04** was cited to him. And, on that locational approach, edge-of-town developments such as Analog's are difficult to classify. However, that remark by Humphreys J is at least consistent with the view that, as to its nature, and unless by reason of location, "*A non-residential industrial park is not an urban development …".* And as he took the view that it was not "*located in an independently urban area"* Humphreys J is not to be taken as expressing a finalised view of the conclusion which he would have drawn had Collinstown Industrial Park been located in an independently urban area.

202. One may add as a general matter that, as the Commission has acknowledged in its 2024 Guidance, the Annex II classes overlap and have been interpreted differently in practice by the Member States - whatever the impetus to uniformity of meaning. It must also be remembered that, as a list, it is doubtless the result of perfectly proper political and complex compromise of many and varied interests reflecting the many and varied circumstances of the Member States. It may be a mistake to try to overly rigorously and logically analyse such a list. Impression may be weighty. As was said in a **Ballyboden** case,[310] citing Gulmann AG in a **Bund Naturschutz in Bayern** case,[311] Member States are not always bound to choose the environmentally optimal solution in implementing a directive which gives them choice as to its implementation. *A fortiori*, the EU is not bound to choose the environmentally optimal solution or even an entirely and rigorously logical solution, when legislating by directive. Directives, like any legal instrument, derive from political action and represent, in varying degrees, compromises between differing political views, interests and priorities, policy choices and pragmatic choices. So too, no doubt, in finalising the list of EIA project classes.

203. Nonetheless, some analysis of the list is possible in contrasting Annex II Class 10(b) with the other classes in Annexes I and II. Annex I, for example, classifies oil refineries, production and processing

[310] Ballyboden TTG v An Bord Pleanála & Ardstone [2023] IEHC 722 §213.
[311] Case C-396/92 Bund Naturschutz In Bayern v Freistaat Bayern, Opinion of Advocate General Gulmann of 3 May 1994, §§66, 67.

of metals, chemical factories, timber pulp, paper and board. Annex II classifies industrial power production, production and processing of metals, cement, asbestos, ceramic and glass manufacture, mineral smelting, chemical, pesticide and pharmaceutical production, industrial food and drink production, textile, leather, wood and paper industries and the manufacture and treatment of elastomer-based products.[312] I have described these classes roughly for brevity but adequately, I think, for present purposes. Overall, it seems to me that industry is generally catered for by Annex classes other than Class 10(b). This seems to me unsurprising: there is no doubt but that, historically and today, industrial projects are seen as having posed and as posing particular risks of environmental impact. It is also noteworthy that the Commission's 2024 Guidance, which is based on the case law, lists many examples of urban development. While some listed examples are infrastructural – for example, water treatment plants – none are industrial.

204. On the foregoing basis, I have concluded on balance that, where industrial development is to be subjected to EIA, Annexes I and II of EIA Directive identify it reasonably specifically or in a specifically industrial class. On that view, Class 10(b) Urban Development should not, at least in general, be considered to include industrial development. That conclusion turns on the non-urban nature of the development within the meaning of the Directive rather than on its location, as the Commission Guidance and **Case C-332/04** make clear that urban development in a non-urban location may require EIA as urban development – indeed, and if only in that respect, it seems that the CJEU agreed with the Spanish authorities.

205. On this view, the Proposed Developments are not Urban Developments within Class 10(b) and I so hold.

206. I take some comfort in this regard, though I do not rely upon the fact, that my conclusion that Analog's "*manufacture of integrated circuits and printed circuit boards*"[313] is not Urban Development for EIA Project classification purposes is, at least superficially, the same conclusion as that drawn in **Reid #5** as to Intel's facility for "*the manufacture of integrated circuits and circuit boards*."[314]

EIA – ANNEX II CLASS 13, CHANGE OR EXTENSION OF PROJECTS LISTED IN ANNEX I OR II

207. Class 13 does not arise as, also for the reasons set out above, there is no basis for a conclusion that the Analog facility generally falls into a Class listed in Annex I or II.

[312] Elastomers are natural or synthetic polymers having elastic properties, e.g. rubber. Polymers are substances composed of very large molecules that are multiples of simpler chemical units.

[313] IPC Licence P0224-01 was granted in 1998 to a corporate predecessor of Analog, Analog Devices BV.

[314] Reid #7 §76.

EIA – CONCLUSIONS

Nature of Development

208. I conclude therefore that the Board correctly submits that the Proposed Developments do not fall into any Annex I or Annex II Classes and so, in these proceedings, the question of their being subjected to EIA does not arise – or, more accurately, should not have arisen beyond a consideration of the form, nature or type of the Proposed Developments. Accordingly, the question of the application or non-application of Annex II thresholds or of subthreshold development requiring EIA screening does not arise. Put simply and as the Board asserts, the EIA Directive does not apply to the Proposed Developments. On this basis I reject Ground 2.

Re-Writing the Decision & Discretion

209. I am conscious that my rejection of Ground 2 may be considered to have allowed the Board to, as it were, re-write its decision in that the Inspector considered the Fanfare Development to be either industrial estate development or urban development and in either case sub-threshold and proceeded to sub-threshold screening.

210. The Board says Reid is authority in its favour on this point. In **Reid #5**,[315] Humphreys J, in deciding the leave application, recorded that

- in granting permission in 2017 the Board did an EIA and its *"only recorded basis for having done so was the submission by the developer of an environmental impact statement rather than on the basis of a finding that EIA was otherwise statutorily required"*;[316]
- in 2019 it did an EIA in granting permission because Intel had submitted an EIAR[317] and not because the development was expressly deemed to come within Schedule 5 PDR 2001;[318] and
- in granting, in 2020, the only permission with which Humphreys J was concerned, the Board had excluded EIA on Preliminary Examination.[319]

211. As I have said, Humphreys J in **Reid #5** and **#6** held that the point turned on whether Intel's proposed development in the 2020 permission could come within Schedule 5 PDR 2001[320] and he granted leave as to Mr Reid's arguments that it was Industrial Estate Development or a Chemical Storage facility and exceeded the relevant thresholds. In **Reid #7**, Humphreys J, dismissed both arguments – holding that

[315] Reid v An Bord Pleanála & Intel [2022] IEHC 687.
[316] §23.
[317] Environmental Impact Assessment Report.
[318] §26.
[319] §95 et seq.
[320] §§96 & 104

- Mr Reid's overall problem was that, for EIA to apply at all, the project has to come within one of the classes in Annex I or II of the Directive. If not, no EIA law obligations arise.[321] He cited **IGP Solar**[322] and **Kavanagh**;[323]
- a "*facility which manufactures circuits and circuit boards is not an industrial estate development project nor is it a facility for the storage of chemicals*". To hold otherwise would require not merely a broad interpretation of the EIA Directive but a fundamental change in its meaning.[324]

212. The parties have agreed that, to better understand Reid, I could have regard to the Inspector's report in the Reid case. As relevant,[325] it reads as follows:

> *"The form of development proposed, which comprises modifications to a permitted facility for the manufacture of integrated circuits and circuit boards, does not fall within any of the classes of development specified …* (and) *… is not therefore of a class and does not therefore require EIA.*
>
> *Notwithstanding this, the form of development proposed is minor with no additional production floor area or capacity proposed and is not therefore such that it would meet the provisions of Class 13 … .*
>
> *It is noted that in the case of Ref. ABP-304672-19 for the expansion of the previously permitted FAB building, that, notwithstanding the fact that the development proposed was not considered to be of a class for the purposes of EIA, an EIAR was submitted and the proposed development was the subject of EIA on the basis that the nature and scale of the proposal were considered to be such that it would have potentially significant impacts on the environment.*
>
> *In the case of the subject proposal, having regard to the limited scale and nature of the proposed development which would not result in the addition of any productive floorspace or increase in capacity or output from the development, the fact that there would not be any appreciable change in emissions from the development and to the nature of the receiving environment and separation from the nearest sensitive receptors there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required."*

213. The first paragraph of the excerpt from the Inspector's report cited above is clear that the primary conclusion is that *"The form of development proposed, … does not fall within any of the classes … and does not therefore require EIA."* Beyond this conclusion the inspector's analysis is introduced by the words *"Notwithstanding this".* It appears to me therefore that Reid does not assist the Board as to Mr Ryan's argument against allowing the Board to "*re-write*" its decision. The Board did not have to seek to do so in Reid. I reject the Board's argument in that regard.

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[321] §80.
[322] Sweetman v An Bord Pleanála & IGP Solar [2020] IEHC 39, [2020] 1 JIC 3104
[323] Kavanagh v An Bord Pleanála & Highfield Solar [2020] IEHC 259, [2020] 5 JIC 2906.
[324] §78.
[325] ABP-307806-20 §5.3 EIA Screening.

Relief Discretionary

214. However, that is not the end of the matter. If needs be, having regard to the overall justice of the case and the absence, established by my conclusion, of a purposive environmental protection need, grounded in EIA, to quash the Impugned Decisions, I would refuse relief on a discretionary basis. In all the particular circumstances of this case, including the absence of any evidence that of any risk that the Proposed Developments will be pollutant, it would be disproportionately prejudicial to Analog's interests to quash the Impugned Decisions as if the Proposed Developments were EIA projects when they are not – to quash them for failure to comply with legal obligations which did not apply. *Certiorari* and remittal to the Board merely to have it inevitably decide, in accordance with the law as I have found it, that EIA is unnecessary as the Proposed Developments do not fall into any Annex I or Annex II Classes would be formalistic and serve no useful, substantive, environmental or legal purpose.

Sub-Threshold EIA

215. Also, if I am wrong in concluding that the Proposed Developments, as to their type or nature, do not fall into a listed class such as to require at least screening/preliminary examination for sub-threshold EIA, and/or in exercising my discretion as just indicated, I hold that on the evidence before the Board, and not least in the absence of any evidence or materials adduced by Mr Ryan that any of the pollution of which he complains emanates from Analog, or, more to the point, would emanate from the Proposed Fanfare Development, the Board did and was entitled to

- accept the uncontroverted expert evidence submitted to it by Analog as to absence of risk of pollution by misconnection of Analog effluent other than storm water to the Business Park Storm water system;
- conclude that any residual risk in that regard could be adequately addressed by Planning Condition #2;
- on those bases, discount as to fact and as insignificant the risk of pollution of the storm water system, including by misconnections to it – both historic and also prospective by reason of the Proposed Fanfare Development; and
- screen out EIA on Preliminary Examination, concluding that there was "*no real likelihood of significant effects on the environment arising from the proposed development".*[326]

216. In this regard I note that in **Minoa**[327] Heslin J held that

- first, the result of a Preliminary Examination is reviewable only for irrationality as to the merit of its determination of significance, and
- second, that is so as whether a project is likely to have significant effect on the environment is a question of degree which calls for the exercise of judgement – a function for which *"the Courts are ill-equipped"*.

[326] Pursuant to Article 109(2) PDR 2001.
[327] Minoa Ltd v An Bord Pleanála [2024] IEHC 704 §§274 & 275; citing Shadowmill v An Bord Pleanála [2023] IEHC 157 §55.

217. Bearing in mind the lesser level of inquiry made in Preliminary Examination than in EIA Screening - **Shadowmill**[328] - and the applicable precautionary principle and that exclusion of EIA Screening and EIA at Preliminary Examination stage is reserved for obvious cases - **Jennings**[329] - I respectfully leave to another case consideration of how the law of irrationality may operate as to the question whether it was irrational to conclude, not merely that EIA was unnecessary, but that it was obviously unnecessary. It suffices here to say that, as to the risk posited by Mr Ryan (if, indeed he could even be said to have posited it as relating to the Proposed Developments), I accept that it was rational on the evidence before the Board to conclude in Preliminary Examination that EIA was obviously unnecessary.

218. While I have addressed these issues, I should say that I accept the Board's submission that a general challenge to the substance of the Board's exclusion of the need for EIA on Preliminary Examination was not pleaded. There was a slightly awkwardly pleaded plea of failure to screen (which I will take as including Preliminary Examination) for cumulative effect. I understand the plea to relate to the cumulative effect of the Proposed Developments with both or either of Analog's entire establishment and other development in the area, via the storm water discharge to the Canal. But cumulative effect requires effect by each of the posited contributors to the pollution. Pollution with which a proposed development is merely non-causatively associated is beside the point. The plea fails for want of any basis on which to envisage, even assuming pollution by other development in the area, any pollution by Analog's pre-existing establishment and, more to the point, by the Proposed Developments.

219. For all these reasons, I reject Ground 2 as to EIA.

GROUND 4 - WATER FRAMEWORK DIRECTIVE - FANFARE DEVELOPMENT

WFD – INTRODUCTION & STATUS OF WATER BODIES

220. The Water Framework Directive,[330] implemented in Ireland by, *inter alia*, the Surface Water Regulations,[331] creates a highly complex legal regime for the protection of natural bodies of water of various types. That regime is described in cases including, though by no means limited to, the judgments of the CJEU in **Weser**,[332] **Schwarze Sulm**,[333] **Protect Natur**,[334] **Nordrhein-Westfalen**,[335] **Association France**

[328] Shadowmill §59.
[329] Jennings & O'Connor v An Bord Pleanála & Colbeam 2023 IEHC 14 §663.
[330] Directive 2000/60/EC establishing a framework for community action in the field of water policy.
[331] European Communities Environmental Objectives (Surface Waters) Regulations 2009 (S.I. No. 272 of 2009) as amended.
[332] Case C-461/13 Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland. Opinion of Jääskinen AG of 23 October 2014; Judgment of 1 July 2015, EU:C:2015:433.
[333] Case C-346/14 (Schwarze Sulm) Commission v Austria, Judgment of 4 May 2016, EU:C:2016:322.
[334] Case C-664/15 Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd, Judgment of 20 December 2017, EU:C:2017:987.
[335] Case C-535/18 IL et al v Land Nordrhein-Westfalen, Judgment of 28 May 2020.

Nature,[336] and **Breadán Beo**[337] and Irish judgments in **Breadán Beo**,[338] **Kilkenny Cheese**,[339] and **SWI v ALAB**.[340] In the latter, the WFD was recently considered in some detail. For present purposes, it suffices to say, at least initially, admittedly incompletely and simplifying considerably, that the WFD Regime:

- requires the EPA[341] to adopt river basin management programmes to achieve the substantive objectives of the WFD;

- requires the EPA to designate, monitor and classify, in river basin management programmes, the status of surface water bodies such as rivers as high, good, moderate, poor or bad. Status is determined by the lowest class of any one of the quality elements,[342] which are monitored. As a matter of approach, the EPA also identifies water bodies the existing status of which is "*At Risk*" and identifies the pollution pressures purring them at risk;[343]

- requires the achievement of good status of all such surface water bodies – known as the "*duty to enhance*";

- prohibits "*any*" [344] deterioration of status of all such surface water bodies - known as the "*duty to prevent deterioration*";

- Requires, where WFD analysis of a project is required, that it precede a decision on development consent - **Nordrhein-Westfalen**;

- requires refusal of development consent (planning permission) for projects which "*may*" cause deterioration of water body status – **Weser**[345] and **Sweetman (Breadán Beo)**.[346]

[336] Case C-525/20 Association France Nature v Premiere Minsitre, Opinion of Rantos AG of 13 January 2022, Judgment of 5 May 2022, EU:C:2022:350
[337] Case C-301/22 Sweetman v An Bord Pleanála & Breadán Beo, Opinion of Rantos AG of 21 September 2023, Judgment of 25 April 2024.
[338] Sweetman v An Bord Pleanála & Breadán Beo [2021] IEHC 16.
[339] An Taisce An Bord Pleanála & Kilkenny Cheese [2021] IEHC 254; [2022] IESC 8, [2022] 1 ILRM 281.
[340] SWI, IFI, Sweetman & Ors v ALAB et al [2024] IEHC 421. §1092 et seq. ALAB is the acronym for the Aquaculture Licence Appeals Board. This judgment reviews the cases and attempts a reasonably comprehensive account of the regime.
[341] In fact the State but the EPA is the responsible State agency.
[342] Within the meaning of Annex V to the WFD Directive- for example nutrient conditions.
[343] EPA Report May 2024, Cycle 3 HA 24 Shannon Estuary South Catchment. 'Risk' in the WFD context means the risk of not meeting the WFD objectives, i.e. achieving Good Status, no deterioration of status (all water bodies), and reversing upward trends (groundwater only). WFD characterisation identifies water bodies At Risk so they can be prioritised for monitoring and programmes of measures. The approach also seeks to identify the critical source areas and significant pressures causing the WFD failures in the At Risk water bodies. See: An approach to characterisation as part of implementation of the Water Framework Directive, V2 Revised May 2015, EPA.
[344] Case C-461/13 Weser §50.
[345] §51 & Ruling §1 – Unless a derogation applies but that is irrelevant here.
[346] Case C-301/22 Sweetman v An Bord Pleanála & Breadán Beo, Opinion of Rantos AG of 21 September 2023, Judgment of 25 April 2024.

221. **Article 4**[347] was described by Jääskinen AG in the **Weser** case[348] as the "*fundamental*" article of the WFD – requires Member States to achieve two "*environmental objectives*":

- To protect, enhance and restore all surface water bodies with the aim of achieving "*Good*" status in accordance with Annex V, by the end of 2015 **–** known as the "*obligation to enhance*".
- To implement the necessary measures to prevent deterioration of the status of all surface water bodies – known as the "*obligation to prevent deterioration of status*".

222. The CJEU has held that the obligation to prevent deterioration is not merely a programmatic one to implement measures: it is not an obligation confined by reference to Annex V WFD classification of the status of the waterbody. Article 4 WFD imposes a general and demanding obligation to prevent surface water deterioration and is binding as to the result of actually preventing deterioration. Status deterioration includes deterioration which does not result in re-classification of the water body to a lower class. It occurs as soon as the status of one quality element falls by one class, even if that fall does not result in a fall in classification of the surface water body as a whole.[349] The obligation may require refusal of development consent – see **Weser, Schwarze Sulm, Nordrhein-Westfalen** and **SWI v ALAB**. Hogan AG in Nordrhein-Westfalen observed that Article 4(1) WFD is similar to Article 6(3) of the Habitats Directive in that both integrate the precautionary principle and both may require refusal of a development consent.[350]

[347] Art 4(1) reads in part*: In making operational the programmes of measures specified in the river basin management plans:*
(a) for surface waters
(i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;
(ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;
(iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;
(iv) Member States shall implement the necessary measures in accordance with Article 16(1) and (8), with the aim of progressively reducing pollution from priority substances and ceasing or phasing out emissions, discharges and losses of priority hazardous substances
without prejudice to the relevant international agreements referred to in Article 1 for the parties concerned;
Similar obligations are set out as to groundwaters and protected areas.

[348] Case C-461/13 (Weser) Bund für Umwelt und Naturschutz Deutschland eV v Germany.

[349] This could occur, for example, where the moderate status of the water body was determined by the status of one quality element but the status of another quality element fell from high to good.

[350] Opinion of 12 November 2019: "*45. … the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and thus seeks to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. For this reason, the competent national authorities can authorise the activity at issue only if they have established that it will not adversely affect the integrity of the site involved. This must also be the case for Article 4(1) of the Water Framework Directive since this directive is based on Article 175 TEC (now Article 192 TFEU). As such, it contributes to the achievement of the objectives of Union policy on the environment, which is based — as expressly required by Article 191(2) TFEU (ex-Article 174(2) TEC) and indicated in recital 11 of the WFD — on the precautionary principle*."

Nordrhein-Westfalen

223. **Nordrhein-Westfalen**[351] concerned permission for a road project which authorised the developer to discharge rainwater running off the road surfaces into surface water or groundwater.[352] The CJEU held that:

- Whether a project may have adverse effects on water – whether Article 4 WFD requirements to prevent status deterioration are met – must be established before the project is permitted.

- The threshold for preventing and finding water body status deterioration "*must be as low as possible*".[353]

- So, (in the case of a project requiring EIA) Article 6 of the EIA Directive requires that the information made public in the development consent process by the developer must include the data necessary to assess the effects of the project on water, in light of Article 4 WFD and within the limits of what a developer may reasonably be required to compile.

- That information must allow the public an accurate impression of the impact of the project on the status of water bodies so the public can verify compliance with, *inter alia*, Article 4 WFD.[354]

- The data must show whether, by reference to WFD criteria, the project is liable to result in a deterioration of a water body.

- Members of the public must be able to litigate a breach of the obligation to prevent water body deterioration if the breach concerns them directly.[355]

I observe that all this implies that if a project is of a type which may need EIA, EIA Screening or Preliminary Examination may need to consider WFD issues.

Sweetman v An Bord Pleanála & Breadán Beo – 2021 & 2024

224. The history and present status of **Breadán Beo** are a little complex. In her judgment of January 2021,[356] Hyland J decided to quash a planning permission for proposed works involving abstraction of water from a lake on the basis that, as the WFD status of the lake had not been classified by the EPA, the Board had been disabled from doing the necessary WFD analysis in deciding the planning appeal. The EPA had not been in the case and before the resulting order was perfected, it informed the developer of its view that it was not obliged to classify the WFD status of the lake given, primarily, its small size.[357] The

[351] Case C-535/18 IL et al v Land Nordrhein-Westfalen, Judgment of 28 May 2020.
[352] The Court held that the WFD objectives and Article 4 obligations for surface water and groundwater are largely identical.
[353] §101.
[354] An incomplete file or data that scattered incoherently, across a multitude of documents will not suffice.
[355] So, well users drawing from a groundwater body had standing as to risk of its deterioration. Hogan AG had suggested that since any requirement imposed by a member state to be 'directly concerned' restricts access to justice, it must be interpreted restrictively.
[356] Sweetman v An Bord Pleanála & Breadán Beo [2021] IEHC 16 (Hyland J, 15 January 2021).
What follows here is drawn from the judgment in SWI, IFI, Sweetman & Ors v ALAB et al [2024] IEHC 421 §1181 et seq.
[357] The EPA pointed out that there are an estimated 12,000 lakes in Ireland ranging in size from small ponds to our largest lakes. It had identified 800 lakes as WFD lake water bodies.

parties invited Hyland J to revisit the matter and in December 2021,[358] she referred questions to the CJEU on whether WFD status classification of the lake was required. In **Case C-301/22**[359] the CJEU agreed with the EPA that WFD status classification of the lake was unnecessary. But it also held[360] that in a planning application for a project which potentially affects a water body not requiring WFD classification, the decision-maker must satisfy itself that the project is

- not liable to cause, by its effects on that water body not requiring WFD classification, a deterioration of the status of, or compromise its attainment of good WFD status by, another, WFD-classified, surface water body; and
- compatible with the relevant river basin management programme.[361]

It is not apparent that final orders have yet been made in the domestic litigation.

225. So, discharges to an unclassified water body which did not require classification but which in turn discharges to a classified water body may require WFD analysis of effects on the latter. That is essentially the case Mr Ryan now makes as to effect on the Barnakyle River 020 water body via effects on the Canal and the Barnakyle Stream which flows into the Barnakyle River.[362] Mr Ryan argues that

- Case C-301/22 obliged the Board to perform a WFD analysis of risk to the Barnakyle River, and
- Hyland J's judgment of January 2021[363] remains the law as to what is required by way of such analysis in deciding a planning appeal.

226. Hyland J rejected the Board's arguments that the applicant had adduced no evidence that the water abstraction would cause a deterioration in the lake, that the onus was on him to do so and in the absence of any such evidence, there was no evidence of a breach of the WFD. She considered that those arguments misunderstood the scheme of the WFD in which the Board is obliged by EU law to refuse permission if either a deterioration in status or a jeopardization of the attainment of good water status will occur.

227. Citing Weser, Hyland J held that the Board must fully apply in planning appeals the obligations of Article 4(1)(a) WFD (to prevent status deterioration and to enhance to good status) using the detailed and complex framework and methodology of the WFD. The developer's hydrological feasibility assessment report had explicitly attempted to analyse the WFD implications of the proposed abstraction but Hyland J found it impossible to understand from it or from the Board's Inspector's report the relationship between their screening methodology and the detailed framework and structure of the WFD.*[364]* She said:

[358] See [2021] IEHC 777.
[359] Rantos AG opined on 21 September 2023 and the CJEU gave judgment on 25 April 2024.
[360] I have simplified the description of the findings somewhat. In case of doubt regard should be had to the judgment of the CJEU.
[361] Established in accordance with Article 11 WFD.
[362] Transcript Day 2 p22 et seq summarises the position.
[363] Sweetman v An Bord Pleanála Breadán Beo [2021] IEHC 16 (Hyland J, 15 January 2021). What follows here is drawn from the judgment in SWI, IFI, Sweetman & Ors v ALAB et al [2024] IEHC 421 §1181 et seq.
[364] §117.

> "*Rather, what the Inspector is forced to do is to carry out some kind of proxy evaluation which makes reference to the WFD but does not in fact employ the architecture of the WFD. In truth, the Inspector is simply reciting the conclusions of the Ryan Hanley report without carrying out any independent evaluation of the conclusions of those reports by reference to the criteria set out in the WFD."*[365]
>
> (In passing, I note the requirement of independent evaluation by the Board of reports proffered to it.)
>
> *"The reliance by the Inspector and the Board on some type of proxy evaluation referring to concepts said to stem from the WFD but which did not follow the steps identified by the WFD, does not constitute compliance with the WFD."*[366]
>
> *"But I cannot evaluate the efficacy or appropriateness of those mitigation measures by reference to the WFD for the reasons set out above. If I were to accept the appropriateness of the Board's approach to the mitigation measures, I would be doing so without reference to the WFD. This would be to ignore my obligations under the Directive."*[367]

228. Significant in Hyland J's remarks are the necessities in development consent procedures of:

- analysis methodology clearly grounded in the detailed framework and structure of the WFD;
- independent and critical evaluation by the decision-maker, by reference to WFD criteria, of the expert reports of the applicant for development consent;
- a resultant development consent decision comprehensible in its reasoning so as to permit confirmation by the reader – including the court – of the correct application of WFD requirements.

WFD – GROUNDS & PARTICULARS

229. As has been recorded above, Ground 4 reads

> ***"The Fanfare Decision is invalid because***
> ***the Council and the Board failed to make a determination for the purposes of Articles 2, 4, 5 and 6 of the Surface Water Regulations[368] giving effect to Article 4 of the Water Framework Directive,[369] as to whether the Fanfare Development would cause deterioration of water quality, or would prejudice the attainment of good quality for waters,***
> ***and***
> ***it (the Board)[370] failed to have regard to relevant material in the possession of the Council and the EPA which those bodies should have, but did not, furnish to the Board."***

[365] §120.
[366] §135.
[367] §134.
[368] European Communities Environmental Objectives (Surface Waters) Regulations 2009 (S.I. No. 272 of 2009) as amended, including by the European Union Environmental Objectives (Surface Waters) (Amendment) Regulations 2019 (S.I. No. 77 of 2019).
[369] Directive 2000/60/EC establishing a framework for Community action in the field of water policy.
[370] Text in parentheses added to clarify.

230. No doubt in light of **Breadán Beo**[371] Mr Ryan at trial confined his WFD case to the possibility of effects on the Barnakyle 020 waterbody – the stretch of the Barnakyle River downstream of the point at which the Barnakyle Stream feeds it. Mr Ryan essentially alleges breach, or the risk of breach, of WFD obligations as to the Barnakyle River by reason of all emissions, mediately via the Loughmore Canal and Barnakyle Stream, into the Barnakyle River. Those emissions are pleaded as cumulatively including those of the Fanfare Development. I will limit my account of the particulars of this plea accordingly.

231. The pleaded particulars of Ground 4 include[372] that the Board failed to have regard to material relevant to water pollution emanating from the Business Park that was in the possession of LCCC and the EPA when the Board made its Impugned Decision,[373] which LCCC failed to bring to the attention of the Board. Mr Ryan says LCCC breached Article 5 WFD by not putting before the Board the information which it had in its possession arising from its investigation of the water pollution issue. For reasons I have explained earlier, these pleas cannot avail Mr Ryan against the Impugned Decisions.

232. I have also earlier explained why it does not avail Mr Ryan to plead, as he does, that the Board failed to consider the minutes of the meeting of 21 April 2022[374] attended, *inter alia*, by LCCC as to the factual basis of water pollution of water bodies appended to Mr Ryan's appeals and LCCC''s acceptance of that factual basis. Put simply, there was no factual basis in Mr Ryan's appeal for any allegation that the Proposed Developments would cause or contribute to that pollution – nor even, for that matter, an allegation that it would.

233. The pleaded particulars of Ground 4 also include that:

- The Board failed to consider Article 4 WFD questions raised by Mr Ryan and failed to comply with Article 5 of the Surface Water Regulations 2009[375] because it had no evidence before it as to the status of the Barnakyle River and whether the Fanfare Development, with all other emissions into that river, including storm water from other developments in the Business Park, "*would cause*" deterioration of its status, or impede its achievement of good water status.

- The Business Park storm water discharge is at times contaminated with zinc and phosphorous and is in that respect not an authorised discharge, which potentially may impact the WFD status of the Barnakyle River. The determination whether a discharge is likely to affect water quality must consider all discharges, including illegal ones. Emissions from Analog's "*installation will be cumulative with these unauthorised emissions, so their consideration is crucial to determining the pollutant load on the water*

[371] Case C-301/22 Sweetman v An Bord Pleanála & Breadán Beo, Opinion of Rantos AG of 21 September 2023, Judgment of 25 April 2024.
[372] I have edited and reordered the pleas without changing meaning.
[373] Pleaded as including the JRE Technical Note, the Garland Report of February 2023, and Information relating to the September 2022 spillage. Also pleaded was the Tynan report but the case to which it could have been relevant was not pursued – as to which, see footnote above.
[374] See above.
[375] *5. A public authority shall not, in the performance of its functions, undertake those functions in a manner that knowingly causes or allows deterioration in the … status … of a body of surface water.*

bodies". The Board failed to consider the application for permission in the light of the existing unlawful discharges, regardless of their source. LCCC is investigating, but has not established, the source of that contamination, but has identified it "*as likely to be"* in the Business Park, which "*includes*" the Proposed Developments.[376]

- "*There was a failure*" to put before the public the data necessary to assess the effects of the projects on water in light of Article 4 WFD requirements.[377] **Nordrhein-Westfalen** is pleaded.

- If, the Board had regard to these matters, it failed to give any or any adequate reasons in relation thereto, contrary to s.34(10) PDA.

234. Some immediate comment on these pleas is necessary.

a. Mr Ryan did not raise Article 4 WFD issues before the Board – at least not explicitly. He did not mention the WFD. But he did raise the issue of pollution of surface water bodies, if not in explicitly WFD terms. That being so and as it is in any event very likely that the Board's WFD duties are autonomous and are not predicated on objections on WFD grounds (any more than it could ignore EIA or AA[378] obligations merely because no objector had raised such issues – **Reid #2**[379]), I am unwilling to shut out Mr Ryan from judicial review on this account. Counsel for Mr Ryan overstated matters, but perhaps not by much, when he said: *"It would be like the Board saying, 'Well no one said we had to consider the proper planning and development of the area, so therefore no one can challenge us on that'. It's an essential part of what the Board does."*[380]

b. The plea that the source of contamination has been identified as likely to be in the Business Park, which "*includes*" the Proposed Developments is clearly misconceived. It conflates past and allegedly pollutant discharges from the Business Park with future discharges from the Proposed Developments which do not yet exist. Whatever may be the source of the alleged present contamination, it cannot be the Proposed Developments.

c. The words "*regardless of their source*" and "*would cause*" are vital. Causation of pollution by the Proposed Developments, not mere association with pollution by other sources, is the issue. It is not sufficient to reason merely that the cumulative existing emissions (including the storm water discharge of the Business Park) and of the future Fanfare storm water discharge will pose a WFD risk to the river. Assuming contamination from present contributions to that discharge, that could be said even were the future Fanfare emissions pristine. The true issue is whether there is risk that specifically the future Fanfare emissions will causatively contribute to a WFD risk to the river.

[376] Amended Statement of Grounds §89.
[377] I have deleted the pleaded words "*inter alia*" here as they undermine the necessary particularity of pleading.
[378] Appropriate Assessment within the meaning of the Habitats Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.
[379] Reid v An Bord Pleanala [2021] IEHC 362 §39: "*… the board was required to apply the EIA and habitats directives whether an objector pointed out any alleged deficiency or not.*"
[380] Transcript Day 1 p49.

d. That the WFD would require refusal of permission for the Fanfare Development even if its emissions were reliably known to be pristine is, in law, a simply unstateable proposition. Yet, strikingly and even though he does not invoke the WFD, the logic of that unstateable proposition is the logic of Mr Ryan's objection to LCCC and his appeal to the Board – that all future development in the Business Park must cease until the source of present pollution is found. Counsel for Mr Ryan ultimately accepted that the logic of Mr Ryan's position is that no development anywhere in Dooradoyle that would run a storm water pipe into the canal should occur until the pollution source is found.[381] Indeed, to carry that logic to its absurd conclusion, all existing activity in the Business Park must cease until the source of present pollution is found.

e. As to the allegation, relying on **Nordrhein-Westfalen,** of failure to publicise data relevant to WFD analysis of the Proposed Development, counsel for Mr Ryan accepted that "*the obligation in respect of the WFD only arises if it is an EIA project*".[382] I have found it is not an EIA project and so will consider that issue no further.

235. It seems to me that the extensive particulars of Ground 4 as to the WFD consist of legalistic drapery attempting to camouflage the complete absence of a factual basis for the ground.

WFD - BOARD, ANALOG & EPA POSITIONS

236. I have already upheld the positions of the Board, the EPA and Analog that the Hall Evidence should be excluded as not before the Board and that even if admitted, it does not go to the legality of the Board's decision or support Mr Ryan's claims in these proceedings.

237. The Board, the EPA and Analog say:

- Mr Ryan did not make this argument before the Board and so can't make it now. I have rejected this argument above. In fairness, the Board disavowed it.[383]

- The allegation that that there was a breach of either the Surface Water Regulations or the WFD is not properly pleaded. The reasons argument made at §49-50 of Mr Ryan's submissions is not pleaded. I confess to not understanding the first argument in light of the pleading of the WFD issue (whatever else may be said about them they were extensive) and the second argument is simply incorrect.[384]

- The Inspector[385] and the Board were satisfied and were entitled to conclude, on the evidence before the Board, that the proposed SuDS measures sufficed to avoid any increase in storm water discharge as a

[381] Transcript Day 2 p230.
[382] Transcript Day 2 p21.
[383] Transcript Day 2 p28.
[384] Having regard to §106 of the Amended Statement of Grounds.
[385] Inspector's report §7.3.3.

result of the Fanfare Development - thus avoiding any exacerbation of flooding risk and, by implication, pollution, and "the Fanfare Development would have no impact on or contribute to any additional surface water to the Barnakyle Stream". They cite IGP Solar[386] as to the onus of proof on Mr Ryan in that regard.

- Mr Ryan has failed to point to any evidence before the Board or adduce any evidence to the Court that the Fanfare Development risks deterioration of the WFD status of any waterbody.

238. The arguments that the Board were entitled to conclude that SuDS would avoid any increase in storm water discharge and so avoid exacerbation of flooding risk and, by implication, pollution need teasing out.

- First, SuDS does not avoid increase in storm water discharge. Total quantum of storm water discharge is determined by the quantum of precipitation on the site. SuDS does not reduce total storm water discharge measured over the long term. It reduces peak storm water discharge, and more generally the rate of its discharge. It is by that means that it does reduce or avoid exacerbation of flooding risk. The Board was certainly entitled to so conclude but that is now irrelevant as the flooding case was not made. In fairness to Analog, its reply to the Ryan appeal framed the benefit of SuDS in terms of reduction in peak flow.

- The supposed implication that avoiding exacerbation of flooding risk would avoid exacerbation of zinc and phosphorus pollution seems to me an inference argued in these proceedings rather than drawn by the Board in the Impugned Decisions. It seems to me a *non-sequitur* as the same quantum of flow of storm water could contain a greater concentration of pollutants. In any event as the SuDS does not reduce total storm water discharge over the long term the long-term delivery of pollutant is unaffected. The significance of this would turn on expert evidence – I suspect of some sophistication.

- Nor, for that matter, is there any evidence that oil separators or other SuDS measures will reduce any zinc and phosphorus pollution.[387]

- Despite the Analog's arguments to the contrary,[388] it does seem to me that Mr Ryan's disavowal of a flooding argument did not weaken his pollution argument and SuDS is of little, if any, relevance in the case. The weakness of Mr Ryan's case lies elsewhere.

[386] Sweetman v An Bord Pleanála and IGP Solar [2020] IEHC 39.
[387] Transcript pp 152 & 154.
[388] Transcript p145 et seq.

WFD – DISCUSSION & DECISION

WFD – The Present Case - Some Facts

239. The Loughmore Canal is not a water body requiring or assigned a WFD status. Nor is the Barnakyle stream. That position is not now challenged. It is now agreed that the only relevant waterbody designated and classified for WFD purposes is the Barnakyle River 020 waterbody.[389] It has been WFD classified since at least 2010. In WFD classification based on data to 2015, its status was Poor. By classification based on data to 2018 and to 2021 its status had improved to Moderate but At Risk. The possible pressure categories include "Industry" but the only identified significant pressures on the Barnakyle 020 waterbody were agriculture and urban run-off and the only identified significant issue was nutrients.[390] It seems to me to follow that Analog's storm water effluent, as emanating from industry, had not been identified in the WFD process, as a significant pressure on the Barnakyle 020 waterbody.

WFD - Some Observations

240. Lest he was misunderstood, I should record that counsel for Mr Ryan, in stating that "*the obligation in respect of the WFD only arises if it is an EIA project*",[391] was referring only to the obligation in EIA to publish information for public participation. I did not understand him to concede that if a project does not require EIA it therefore does not require WFD analysis.

241. In a planning application for a project requiring or possibly requiring EIA, for example as sub-threshold development, and as breach of the duties to prevent status deterioration and to enhance to good status will all but invariably imply risk of significant environmental effects, EIA, EIA Screening and Preliminary Examination for EIA will be the obvious contexts in which to do any necessary WFD analysis - **Nordrhein-Westfalen**. But in a project of a form, type or nature which does not fall into a class described in Annex I or Annex II of the EIA Directive, WFD analysis in the general structure of the planning process may be required.[392]

242. However, and especially now that combined sewers flowing to waste water treatment plants are being, typically, superseded by separated systems of foul and storm water drainage, with the latter flowing, immediately or mediately (as here), to WFD-classified surface water bodies, the possible necessity of WFD analysis may, in principle, arise in a vast number of planning applications. That may be especially so as the threshold for preventing water body status deterioration "*must be as low as possible*".[393] Yet it can hardly be thought to be a legal necessity or a proper use of the scarce societal resources available for environmental protection that the cannon of the full, detailed and complex framework and methodology of the WFD (so characterised in **Breadán Beo**) be deployed to swat the fly

[389] The EPA pleaded reference to the Barnakyle 010 and Barnakyle 020 waterbodies but it was clarified at trial that we are concerned only with Barnakyle 020- see Transcript Day 2 p24. Barnakyle 010 is, apparently upstream of the discharge to the Barnakyle river.
[390] EPA Report May 2024, Cycle 3 HA 24 Shannon Estuary South Catchment.
[391] Transcript Day 2 p21.
[392] I note that the Planning and Development Act 2024 does not appear to contemplate a bespoke structure for WFD analysis of planning applications.
[393] Nordrhein-Westfalen §101.

of a merely theoretical WFD risk. By analogy with EIA and Habitats law, some form of screening for WFD analysis is clearly required.

Onus of Proof in Judicial Review & Theoretical Risk

243. **IGP Solar** was perhaps an odd choice by the Board and Analog of authority on the issue of onus of proof. It is clear but, it has to be said, laconic on the point. Its only explicit reference to the issue is that *"it is well settled that the onus lies on the applicant, in judicial review proceedings, to prove his or her case."* That observation was made as to whether a project was a Class 10(a) "Industrial Estate development project" and so required EIA.[394] That said, IGP Solar is undoubtedly generally correct on the point – which is, as the observation states, "*well settled*" and which **Sherwin**[395] identifies as "*fundamental*", "*fixed*" and as flowing from the presumption of validity of public law decisions. Whatever may be the correct understanding of the reference in the Kilkenny Cheese case to the possibility of an evidential burden on the decision-maker in AA,[396] such possible limited exceptions apart, the judgment of Denham J in **Meadows**[397] is authority that in judicial review, the onus of proof rests upon the applicant at all times. **Heather Hill #2**,[398] **Sliabh Luachra**,[399] **Reid #2**,[400] **Kilkenny Cheese,**[401] **ETI**,[402] **Duffy**[403] and **Mynydd Y Gwynt**[404] - to list only some such cases - are authority that, in impugning AA that onus applies, mere assertion of scientific doubt as to the absence of risk of adverse impact will not discharge it and decisionmakers are not concerned with merely theoretical or hypothetical environmental risks. So, *"decisions should not be made on a purely hypothetical approach to risk founded on mere suppositions"* - **Monsanto**[405] and **Sliabh Luachra.**[406] This view is consistent with the application of the precautionary principle on which, by Article 191(2) TFEU, EU environmental policy is based. For example and though in a different context, the GCEU said in **Bayer**[407] as to the precautionary principle that *"a preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified …"* – the CJEU said all but the same in Monsanto.

244. In **Carrownagowan**[408] Humphreys J cited **Crischuk**[409] for the pithy observation – consistent with the presumption of validity - that in judicial review *"There must be some evidence that casts into doubt*

[394] As to which issue in this case, see above.
[395] Sherwin v An Bord Pleanála [2023] IEHC 26 §85.
[396] Hogan J in An Taisce v An Bord Pleanála [2022] IESC 8, [2022] 1 ILRM 281- discussed in Heather Hill Management Company CLG v An Bord Pleanála [2022] IEHC 146 ("Heather Hill #2") and in Sherwin v An Bord Pleanála [2023] IEHC 26.
[397] Meadows v Minister for Justice [2010] 1 IR 701 §143.
[398] Heather Hill Management Company CLG v An Bord Pleanála [2022] IEHC 146 §257.
[399] Sliabh Luachra Against Ballydesmond Windfarm Committee v An Bord Pleanála [2019] IEHC 888, citing Case C-236/01 Monsanto [2003] ECR I-8166.
[400] Reid v An Bord Pleanála #2 [2021] IEHC 362 §50.
[401] An Taisce v An Bord Pleanála & Kilkenny Cheese [2022] IESC 8 ([2022] 1 ILRM 281) §121.
[402] Environmental Trust Ireland v An Bord Pleanála [2022] IEHC 540.
[403] Duffy v ABP & McDonagh [2024] IEHC 558 §40 et seq.
[404] R (Mynydd Y Gwynt Limited) v The Secretary of State for Business, Energy & Industrial Strategy [2016] EWHC 2581 (Admin); Upheld [2018] EWCA Civ 231 [2018] PTSR 1274.
[405] Case C-236/01 Monsanto [2003] ECR I-8166.
[406] Sliabh Luachra Against Ballydesmond Windfarm Committee v An Bord Pleanála [2019] IEHC 888.
[407] Cases T-429/13 and T-451/13, Bayer CropScience AG, & Syngenta Crop Protection AG v European Commission, GCEU Judgment 17 May 2018.
[408] Carrownagowan Concern Group v An Bord Pleanala [2024] IEHC 300.
[409] R v Crischuk 2010 BCSC 716 at paras. 36-38, affirmed 2010 BCCA 391, 2010 DTC 5141,

that which otherwise appears regular on its face". In **Reid #2**[410] Humphreys J considered the question in terms of whether *"there was any material before the board to create real doubt".* In **Reid #1**[411] Humphreys J said that if the issue in AA is whether scientific doubt as to effect on a European site precluded the grant of permission, an objector has to bring something into the process (before the decision-maker) that raises such a doubt, if doubt wouldn't otherwise arise. MacGrath J, *obiter*, in **M28**[412] *found "much merit in the submission of the notice party that the applicant appears to go no further than raise the fact of a hydrological link between the quarry and the SPA, but without advancing any evidence of any likely effects."* As Kokott AG said in **Waddenzee**[413] of both AA and AA Screening and as cited by McDonald J in **Sliabh Luachra**:

> *"… to establish whether a significant adverse effect on the site concerned is possible, account must also be taken here of the likelihood of harm occurring and the extent and nature of the anticipated harm".*

Kokott AG also said

> *"it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment".*

245. In **Heather Hill #2** it was observed that

> *"An NIS is not an encyclopaedia. An objector will almost always be able to point to some fact not recorded or alleged issue not addressed in an NIS. How is the court to discern whether such an absence (to use a neutral term) from the NIS constitutes a "lacuna" of legal significance? The absence of particular information from an NIS does not constitute a lacuna save by reference to the purpose of AA. The Applicant cannot just point to a supposed lacuna in a sense unrelated to a prospect of adverse effects on the integrity of a European Site having regard to its conservation objectives. The difference between a mere absence and a "lacuna" must turn on the question whether it is such as to raise a reasonable scientific doubt as to the absence of adverse effect on the integrity of a European site in light of its conservation objectives and of the characteristics and specific environmental conditions of the site concerned and of the likelihood of harm occurring and the extent and nature of the anticipated harm. Or, conversely, is the absence one likely to have "no appreciable effect" given "it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment"? In a sense, the question posed by an applicant in judicial review alleging a lacuna in AA in the form of an issue allegedly not addressed is an AA screening question. To paraphrase AG Sharpston in **Sweetman & Ireland**: ought the Board have bothered to check that issue?"*
>
> *"I do not think the caselaw is directed at licensing applicants to simply point to a hypothetical risk not addressed in an AA and thereby impose a "Johnson" burden on the Board. I bear in mind the observations of O'Neill J. in **Harrington**[414] - a case of allegedly inadequate AA - in which he recognised*

[410] Reid v An Bord Pleanála #2 [2021] IEHC 362 §50.
[411] Reid v An Bord Pleanála #1 [2021] IEHC 230.
[412] M28 Steering Group v An Bord Pleanála [2019] IEHC 929.
[413] Case C-127/02, §108 & 73.
[414] Harrington v An Bord Pleanála [2014] IEHC 232.

both the onus of proof of illegality is on the Applicant and the duty on the Board to conduct appropriate enquiries in AA and continued:

"But there has to be a reason for those enquiries. In my opinion, such reason must be based on credible evidence. It is not sufficient for an objector to a planning permission merely to make a bald assertion, and no more, and thereby place on the respondent a duty to carry out such enquiries as would be necessary to counter that assertion. It would be unfair to applicants for planning permission if they were put to the considerable expense in meeting an objection to their application for planning permission, in an appeal before the respondents, of having to assemble expert evidence to counter mere assertion by an objector.

I am quite satisfied that the duty of the respondent to make appropriate enquiries does not go so far as to require them to respond to assertions unsupported by any credible evidence.

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

The foregoing is a description of the process before the Board. And if a "bald assertion" does not suffice before the Board, a fortiori it should not suffice in judicial review."

246. In **ETI** it was observed that:

"Where the allegation is that the AA contained a lacuna by way of a failure to recognise a specific risk at all, it presumably must be incumbent on the applicant for judicial review to persuade the court that the putative risk is not merely "hypothetical" or "conceivable" but is one with which the Board should have "bothered". That may be a light burden but, being a burden nonetheless …".[415]

247. Mr Ryan emphasises **Breadán Beo** for its rejection of the Board's argument that the Applicant had adduced no evidence of risk of breach of WFD obligations. But that case must be understood in its context. That argument was clearly rejected in

- a judgment intended to be final in quashing the decision impugned in that case but which, in unusual circumstances, was revisited such that ultimately, the CJEU disagreed with its underlying premise – the Applicant's "one core point" - that WFD designation of the lake was required and was missing such that WFD analysis could not be done; and moreover,

[415] §247.

- a case in which the proposed development inherently involved – indeed consisted of[416] - direct effect on the water body in question in the form of abstraction from it to an extent which had prompted attempt (if inadequate) at WFD analysis by both the planning applicant (by its expert) and the Board's inspector. So both the planning applicant and the inspector had accepted the premise that the development was of such a nature that WFD analysis was required and, indeed, mitigation measures were required accordingly.

248. It seems clear to me that, as matters unusually transpired in that case, the judgment which Mr Ryan emphasises transpired not to be a final and binding judgment. Perhaps more importantly, it was clearly not a case in which Hyland J was considering an issue (even on the assumptions she made as to the necessity of WFD designation of the lake) of merely theoretical or hypothetical WFD risk or facts such as those which arise in the present case. Hyland J would be surprised to hear that she was understood to have prescribed full and formal WFD analysis in every planning application involving storm water discharge to any watercourse which is ultimately hydrologically connected (as the vast majority will be) to a WFD-designated surface water body. Much less do I think she is to be read as prescribing such WFD analysis in every such planning application in which the Board has found, as I have held it found in this case in this case, insignificant risk of pollution of the storm water discharge of the Proposed Development by misconnection to the storm water system of effluent from the Proposed Development other than storm water, such that that there was "*no real likelihood of significant effects on the environment arising from the proposed development".*[417]

249. Of course, other than **Breádan Beo**, the cases cited above, are AA cases, not WFD cases. But as good authority in the stringent context of AA (in which a decision-maker must be satisfied of absence of adverse environmental effect beyond reasonable scientific doubt), it seems to me safe to apply them by analogy in a WFD case. If *"AA is not concerned with mere assertion of merely hypothetical, conceivable or theoretical risks"* – **Power**[418] citing **Waddenzee**,[419] **Sliabh Luachra,**[420] **ETI**[421] and **Foley**[422] – neither, it seems to me, is the WFD.

250. One can frame the same point as to theoretical risks in terms of autonomous duty. Administrative decision-making and judicial review are fundamentally grounded in concepts of legality. But to the extent the concepts are opposed (and they are by no means always opposed) they are also and fundamentally practical rather than academic exercises. In theory, the autonomous duties of the Board in a field as vast as planning and environmental law are myriad. There is no obligation on the Board in its decision-making to wastefully engage in ritualistic box-ticking, explicitly acknowledging and discounting as irrelevant, lists of specific autonomous duties. An applicant in judicial review bears an

[416] Hyland J at §1 described the planning permission as "*for a development consisting of the abstraction of freshwater from Loch an Mhuilinn …*".
[417] Pursuant to Article 109(2) PDR 2001.
[418] Power v An Bord Pleanála [2024] IEHC 108. This decision is under appeal and the subject of a reference to the CJEU - but not in this regard. See [2024] IECA 295.
[419] Case C-127/02 – Opinion of Kokott AG 29/1/4.
[420] Sliabh Luachra Against Ballydesmond Windfarm Committee v An Bord Pleanála [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019) § 96 et seq.
[421] Environmental Trust Ireland v An Bord Pleanála [2022] IEHC 540.
[422] Foley v Environmental Protection Agency [2022] IEHC 470.

onus of demonstrating the relevance to the impugned decision of the duty they invoke: an onus – even if a relatively light one - of demonstrating that the particular circumstances of the case had been, before the Board, such as to activate that duty in a real and practical sense. I had arrived at this view independently of the recent decision of Humphreys J in **Ryanair**[423] but I note that he expresses essentially the same view more memorably when he says that *"Autonomous duties can't be allowed to get out of hand".* But that is not a new view. Humphreys J invoked the **ALAB** case[424] in which the following was said as to an analogous complaint described as "*entirely abstract and theoretical".*

> *"While they correctly identify matters not considered by [the decision-maker], they do not state any basis for the implied premise that those matters required consideration. They do not lay any basis in particulars or facts for any case for certiorari."*

251. Counsel for the Board also submitted that, even taking all Mr Ryan's evidence as admissible and at its height, there was nothing before the Board and is nothing before me suggestive that the Proposed Developments could have any impact on the WFD status of the Barnakyle 020 surface water body.[425] Save to allow the irrelevant possibility of a theoretical risk of such impact, I agree. To apply to this case an observation made on different facts in the **Kilkenny Cheese** case,[426] Mr Ryan's case as to the WFD is "*simply divorced from reality*". Or perhaps it is more accurate to say that, however light the burden on him, he has not shown that it has the slightest reality. Ultimately that is the conclusion which requires rejection of Ground 4.

252. I should address one other matter. The Board argues that it is important to the WFD issue that the Fanfare Planning Application NIS[427] informed its AA, which concluded that there would be no adverse effect on the integrity of the Lower River Shannon SAC and the River Shannon and Fergus Estuaries SPA.[428] The Board asserts that relevance on the basis, remembering that WFD status is usually expressed in ecological terms, that the storm water from the Proposed Developments, to reach the SAC and SPA will pass through the Barnakyle River 020 waterbody. While I accept that such considerations may, on particular facts be relevant to WFD status of a water body and superficially tempting as the Board's argument may be, on close examination it seems to me an invitation to me to weigh merits and impute them to the Board. The criterion in AA of adverse effect on a European site significant in light of its conservation objectives is not coterminous with the WFD criterion of non-deterioration of a waterbody. Also, the Barnakyle River is far upstream of the SAC and SPA and much more closely hydrologically connected to the Business Park storm water discharge. I reject the Board's argument and accept Mr Ryan's submissions to the contrary.[429] However that does not alter the result in his favour on Ground 4.

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[423] Ryanair v ABP & DAA [2025] IEHC 74.

[424] SWI, IFI, Sweetman & Ors v ALAB et al [2024] IEHC 421 §1097. He also cited An Taisce v An Bord Pleanála (No. 1) [2021] IEHC 254, [2021] 4 JIC 2003; Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála [2022] IEHC 700, [2022] 12 JIC 1609; and R (Tarian Hafren Severn Shield CYF) v Marine Management Organisation [2022] EWHC 683 (Admin), [2022] PTSR 1261, [2022] 3 WLUK 375,

[425] Transcript Day 2 pp 18 & 28.

[426] An Taisce v An Bord Pleanála & Kilkenny Cheese [2022] IESC 8, [2022] 1 ILRM 281.

[427] pp 12, 13, 23 & 45.

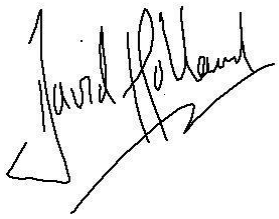
[428] p55.

[429] Transcript Day 2 p237.

CONCLUSION

253. For the reasons I have given, I dismiss these proceedings. I do so not without some sympathy for Mr Ryan's position generally. But in my view he chose, in Analog, a target against whom there was no evidence that it has caused or contributed to, or that its Proposed Developments would cause or contribute to, the pollution of which he complains. Ultimately, that the risk allegedly posed by Analog is no more than hypothetical and theoretical is the main reason for dismissal of all grounds. Indeed, Mr Ryan did not even allege that Analog's Proposed Developments would pose a risk – he did no more than speculate without evidence that they might. In respect of both grounds Mr Ryan bore a relatively light burden but failed to discharge it.

254. I provisionally consider that there should be no order as to costs. I will list this case on 10 March 2025 for consideration of final orders.



DAVID HOLLAND
27/2/25