



An Taisce

The National Trust for Ireland

5 Foster Place

Dublin 2, Ireland

D02 V0P9

24th January 2025

RE: SEA on Draft Additional Measures for the Fifth Nitrates Action Programme.

A Chara,

An Taisce welcomes the opportunity to comment on the Public Consultation on the Strategic Environmental Assessment for Ireland's interim review of the Fifth Nitrates Action Programme. These comments should be read in tandem with our earlier submission, in December of 2024, on the Natura Impact Statement for this same draft policy document.

1. Water Framework Directive

As articulated in our previous submission, it is our view that Water Framework Directive (WFD) considerations were not adequately accounted for in the NIS assessment. But clearly, where the risk to Natura 2000 sites has been articulated in the NIS, those same pressures pose a significant risk for Water Framework Directive obligations.

We would highlight that the NAP represents the authorisation of a programme or project and thus requires assessment as to whether it could affect the attainment of the Article 4 WFD objectives. In that regard, we would observe that to our knowledge, there are no site level Article 4 WFD assessments carried out for further intensification or expansion of agricultural activity, or indeed on foot of a nitrates derogation license application. As such, any measures which are not assessed as part of this current process will fail to undergo the full rigour of European environmental legal assessment at a site/project level, with the exception of built infrastructure which falls under the ambit of the planning regulations.

Article 4 (1) of the WFD provides:

"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 (ii) Member States shall protect, enhance and restore all bodies of surface water ... "

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It does not appear that such an assessment, as required under Article 4 of the WFD, has been carried out within the consultation material made available. There does not appear to be a determination on whether the implementation of the measures in the interim NAP may cause a deterioration of the status of a body of surface water or where it may jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status. Indeed, it is logical that given the NIS provides no certainty that aquatic Natura 2000 sites will not be adversely impacted, the same risk applies to WFD status.

Appendix A of the SEA clearly highlights this lack of adequate WFD assessment. In response to questions raised by the EPA in regard to catchment specific adequacy of the measures proposed, the SEA response to the questions is as follows:

EPA scoping questions:

"5. Any new measures proposed, on foot of the review process, should be assessed in terms of the specific requirements of each catchment in which the measures are to be implemented.

6. The assessment should also consider what proportion of those catchment requirements the proposed new measures would address"

SEA response:

"No location specific information has been provided in the draft Plan therefore a catchment by catchment assessment is not possible."

While we appreciate the difficulty this type of assessment may present, the NAP is the legal vehicle through which the requirements of the WFD and RBMP are implemented, in regard to agricultural pollution. It is a key measure relied upon in the RBMP to deliver water protection measures from agricultural pollution. If this specific information has not been provided, and is not being assessed at a plan level, there is simply no subordinate assessment mechanism within the current framework through which this crucial assessment could take place.

It is our interpretation of the law and jurisprudence that the SEA has to rule out a breach of Article 4 of the WFD to the same standard as the Habitats Directive does, analogous to an Article 6(3) assessment. This has clearly not been done in this case, and we are of the view that the SEA has failed to adequately assess the measures from an Article 4 WFD perspective, and as such, the Department cannot discharge their obligation as provided by Article 4(1) of the WFD. Article 5 of the Surface Water Regulations 2009 requires a public authority, in the performance of its functions, not to undertake those functions in a manner that knowingly causes or allows deterioration in the chemical or ecological status of a body of surface water. This includes DHLGH and DAFM, and is applicable to any implementation of the NAP, including a nitrates derogation. Therefore, we submit that the authorisation of the interim NAP and the measures under it is not lawfully possible, having regard to Article 4 of the WFD and Article 5 of the Surface Water Regulations.

Should the Department wish to approve this interim NAP, it would appear to us that it would legally require an Article 4(7) derogation. European case law underscores this obligation, and in Case C-529/15, the CJEU held as follows:

"It should be borne in mind that, when a project is liable to have adverse effects on water, consent may be given to it if the conditions set out in Article 4(7)(a) to (d) of that directive are satisfied (see, to that effect, judgment of 4 May 2016, Commission v Austria, C-346/14, EU:C:2016:322, paragraph 65).

In order to determine whether a project has been authorised without infringing Directive 2000/60, a court may review whether the authority which issued the authorisation complied with the conditions laid down in Article 4(7)(a) to (d) of that directive, by determining, first, whether all practicable steps were taken to mitigate the adverse impact of the activities on the status of the body of water concerned; second, whether the reasons behind those activities were specifically set out and explained; third, whether those activities serve an overriding general interest and/or the benefits to the environment and society linked to the achievement of the objectives set out in Article 4(1) are outweighed by the benefits to human health, the maintenance of human safety or the sustainable development resulting from those activities; and, fourth, whether the beneficial objectives pursued by that project cannot, for reasons of technical feasibility or disproportionate cost, be achieved by other means which are a significantly better environmental option (see, to that effect, judgment of 11 September 2012, Nomarchiaki Aftodioikisi Aitoloakarnanias and Others, C-43/10, EU:C:2012:560, paragraph 67)."

There is no jurisdiction to approve the interim NAP without the required assessment, and thereafter the appropriate consideration of the economic and social criteria which may allow for noncompliance with Article 4 objectives as provided for under the Article 4(7) process.

2. Monitoring

We note that Article 10 of the SEA Directive requires that monitoring be carried out in order to identify, at an early stage, any unforeseen adverse effects due to implementation of a Plan or Programme, and to be able to take remedial action. Given the NAP interim policy states the following:

"These measures were developed in the context that the interim review identified that water quality improvements are not yet evident."

It would appear to us that this should have been accounted for in the Article 10 reporting on the 5th NAP, and remedial action taken.

We would query the remedial action which has been taken on foot of this, if any. Table 9.1 of mitigation measures in the SEA, combined with the assessment in the NIS, clearly indicates that there is no sufficient evidence base that the new measures being proposed are adequate. How then does this satisfy the remedial action requirement of Article 10 of the SEA?

Table 9-1: Mitigation Prescribed Through the Strategic Environmental Assessment

Measure No.	Description	Proposed Mitigation
Regulatory Measures		
1	The reduction in maximum stocking rate	There will be a commitment in the Policy Document to develop the scientific evidence base for thresholds and limits to ensure this measure delivers a consistent and sustained recovery in water quality.
2	Reducing Reliance on chemical fertiliser	There will be a commitment in the Policy Document to develop the evidence base to support future thresholds and limits to ensure this measure delivers a consistent and sustained recovery in water quality into the Sixth NAP and beyond.
3	Reporting of Organic Nutrient Movements	The proposed review of automotive systems in the Sixth NAP should be informed by learnings from the new 4-day reporting approach and the effectiveness of this measure.
4	To mitigate overstocking of land areas	There will be a commitment in the Policy Document to develop the evidence base for this threshold to ensure this measure delivers a consistent and sustained recovery in water quality going forward.

Figure 1: Screenshot of Table 9-1 from the SEA demonstrating the lack of evidence base

This is particularly pertinent given this statement in the SEA, which clearly indicates the primary intention of the additional measures:

*"The draft Plan includes measures additional to those already contained in the Fifth NAP, to address water quality from nitrogen pollution from agricultural activities. The assessments recognise this but also note **the focus toward measures that have certainty around maintaining productivity more so than certainty around preventing water pollution.**" [our emphasis]*

3. Reduction in Nitrogen Fertiliser

The Fifth Nitrates Action Programme provided for a 10% reduction in the maximum allowable chemical nitrogen application rates for grassland. It stated that if water quality improvements were not evident during the interim review a further 5% reduction should be applied to further reduce the maximum allowable rate on all farms from 2024. However, this is not what is now being brought forward in the interim review, in spite of a lack of evident water quality improvement. Instead, what is committed to is that a further 5% reduction in the maximum allowable chemical nitrogen fertiliser application rates for grassland will apply only on farms which are stocked above 170kg/ha, in addition to a chemical nitrogen fertiliser limit of 90 Kg N/ha on farms with a stocking rate of less than 85 kg N/ha.

At no point in the documentation is there an assessment of the impact of this change on the potential water quality outcomes. This is undoubtedly a retraction from a previous more stringent commitment by the Department. The environmental assessments for the initial Fifth NAP were conducted based on this commitment to a further reduction, across all farm types. The implications of this more streamlined approach to the reduction needs to be rigorously assessed both within the NIS and the SEA, from a Habitats Directive and a Water Framework Directive assessment. This has not been done, and as such represents a lacuna in the data, which needs to be addressed for the purposes of the Habitats Directive and WFD.

Is mise le meas,

A handwritten signature in black ink, appearing to read 'Elaine McGoff'. The signature is fluid and cursive, with the first name 'Elaine' written in a larger, more prominent script than the last name 'McGoff'.

Elaine McGoff, PhD

Head of Advocacy, An Taisce- The National Trust for Ireland.