

**APPROVED**

[2024] IEHC 55

**THE HIGH COURT**

**JUDICIAL REVIEW**

**Record No. 2019/184JR**

**BETWEEN:**

**PETER SWEETMAN**

**APPLICANT**

**-AND-**

**THE ENVIRONMENTAL PROTECTION AGENCY, IRELAND AND**

**THE ATTORNEY GENERAL**

**RESPONDENTS**

**-AND-**

**MICHAEL NOEL O'CONNOR**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Conleth Bradley delivered on the 23<sup>rd</sup> day of January 2024**

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## INTRODUCTION

### *Preliminary*

1. The principal relief sought by Mr. Sweetman, in this application for judicial review, is an order of *certiorari* quashing the decision of the Environmental Protection Agency dated 6<sup>th</sup> February 2019 to grant an Industrial Emissions Licence<sup>1</sup> pursuant to section 83 of the Environmental Protection Agency Act, 1992<sup>2</sup> to Mr. O'Connor for an intensive agricultural enterprise involving the rearing of 74,000 broiler chickens.<sup>3</sup> Various related declarations are also sought and I address these matters later in this judgment.
2. At the commencement of the hearing, I was informed that the case as against the State parties has been discontinued and that Mr. O'Connor, the recipient of the licence (and joined by the Applicant as a notice party), has not participated in the proceedings.
3. This judicial review application dates back to 2019 and, as accepted by the parties, relied on an older format of 'pleading' and presentation which applied at a time before the innovations and more focused pleading in similar judicial review challenges which are now applied, for example, in the Planning and Environment List as per High Court Practice Direction HC 124.<sup>4</sup>

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<sup>1</sup> P1042-01 and also referred to herein as "the Licence."

<sup>2</sup> Hereafter also referred to as "the EPA Act 1992."

<sup>3</sup> A broiler chicken is a chicken that is bred specifically for meat production.

<sup>4</sup> As signed by Barniville P. on 5<sup>th</sup> December 2023. Further – and post-dating this case – in *Eco Advocacy CLG v An Bord Pleanála* (Case C-721/21, ECLI:EU:C:2023:477) (at paragraphs 23 and 24) the CJEU *inter alia* confirmed that the pleading requirements in the Rules of the Superior Courts, 1986 (as amended) were consistent

4. James Devlin SC and Margaret Heavy BL appeared for Mr. Sweetman (hereafter also referred to as “the Applicant”) and Suzanne Murray SC and Caoimhe Ruigrok BL appeared for the Environmental Protection Agency (hereafter also referred to as “the Agency”).

5. While the applicable statutory and regulatory regime is somewhat complex, the essence of the question which the Applicant seeks to argue was concisely captured by Mr. Devlin SC, in his opening comments on the first day of the hearing of this case, as follows:

*“... [t]he basic issue...here, is you can’t have chicken production on any scale, and certainly not on this scale, without also producing chicken manure. Disposing of the chicken manure is one of the key environmental issues arising from an enterprise of this sort ...”.*<sup>5</sup>

6. Intensive poultry rearing, the subject of the licence which is sought to be impugned, generates *poultry litter* and *wash water*. Mr. Devlin SC submits that the poultry litter and wash water constitute ‘emissions’ and ‘waste’ (as those terms are defined in law) and that their application on lands outside of the installation where the poultry rearing occurs should have been assessed and addressed in the Licence which was granted.

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with EU law. In *O’Donnell & Ors v An Bord Pleanála* [2023] IEHC 381 at paragraph 114, the High Court (Humphreys J.) *inter alia* observed that “... [t]he message of *Eco Advocacy* is that there is no European cavalry ready to ride to the rescue of inadequately-pleaded applications ...”.

<sup>5</sup> Mr. James Devlin SC, for the Applicant, on Tuesday, 14<sup>th</sup> November 2023.

7. If he is incorrect in that regard, Mr. Devlin SC says that you cannot separate intensive poultry rearing from its inevitable consequences, being poultry litter and wash water, and their use off-site.
  
8. Whilst he accepts that the Nitrates Regulations and the Animal By-Products Regulations (which are referred to in detail later in this judgment) “... *provide some degree of regulation ...*”, he contends that they are “... *not exclusive regulation ...*” and what is more, there is a particular obligation on the Agency, as the Environmental Protection Agency, to assess, authorise and regulate ‘the consequences of poultry rearing’ namely the use of poultry litter for land spreading as fertiliser or its disposal as waste and the disposal of the wash water (away from the installation or off-site) especially having regard to (a) the size and scale of the activity (involving 74,000 broiler chickens) and (b) the Industrial Emissions Directive, the Habitats Directive and the Water Framework Directive.
  
9. It is, however, common case that the Agency’s decision under challenge, in this application for judicial review, was that of 6<sup>th</sup> February 2019 which authorised the rearing of 74,000 broiler chickens at an installation in Newcastle West, County Limerick. In summary, the dispute which arises centres on whether *that* decision should have addressed and assessed off-site consequences of this intensive poultry rearing farming, namely the land spreading of organic fertiliser and the disposal of wash water on other lands.

10. The Licence<sup>6</sup> was granted, subject to conditions, to Michael Noel O'Connor<sup>7</sup> as part of the Agency's decision dated 6<sup>th</sup> February 2019 pursuant to section 83(1) of the EPA Act 1992 in respect of the following activity – “(6.1) *[t]he rearing of poultry in installations where the capacity exceeds 40,000 places*” – occurring in an installation located at Rathcahill West, Templeglantine, Newcastle West, County Limerick which is delineated in red on a map referred to in condition 1.3 of the Licence<sup>8</sup> and *inter alia* includes the three broiler houses containing the 74,000 poultry. The only activity that is licensed, therefore, is the rearing of poultry at the one location in an installation delineated in the map attached to the Licence.

11. Licence P1042-01 defines “organic fertiliser” as “... *any fertiliser other than that manufactured by industrial process and includes livestock manure, dung stead manure, farmyard manure, slurry, soiled water. Silage effluent, non-farm organic substances such as sewage sludge, industrial by-products and sludges and residues from fish farms.*” “Wash water” is defined as “... *water contaminated by use in the washing of yards and animal housing.*” “Waste” is defined as “... *any substance or object which the holder discards or intends or is required to discard.*”

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<sup>6</sup> Licence Register Number: P1042-01.

<sup>7</sup> The Notice Party.

<sup>8</sup> Condition 1 of the Licence deals with its scope and Condition 1.1 provides “*[f]or the purposes of this licence, the installation is the area of land outlined in red on Drawing No. 10 Rev 3, of the application. Any reference in this licence to “installation” shall mean the area thus outlined in red. The licensed activity shall be carried on only within the area outlined.*”

12. The nature of the activity, the subject of this application for judicial review, was described by Ms. Éimer Godsil, the Agency's Inspector, in her Report on an Industrial Emissions Licence Application dated 5<sup>th</sup> December 2018, as follows:

*“[t]he main activities at this installation occur during normal working hours between 06:00 and 18:00. Stock inspections are carried out every day, including weekends and bank holidays and additional essential activities may be undertaken outside of core working hours. The installation currently operates in accordance with the requirements of the Department of Agriculture, Food and the Marine (DAFM) and the Bórd Bia Poultry Products Quality Assurance Scheme (PPQAS).*

*The process involves the rearing of stock specifically bred for lean poultry meat production, from day olds delivered from the hatchery, until they are removed from the site to the processing installation (approximately 6-8 weeks). At the end of each rearing cycle the houses are destocked and the birds are sold for processing. Following a period of two weeks to allow for removal of the poultry litter (organic fertiliser) and complete drying after the cleaning process, the houses are restocked.*

*The type of broiler house used for this activity is a simple closed building of block and timber/wood construction on an impervious concrete base. The houses are thermally insulated with a forced computer controlled ventilation system and artificial lighting. Automatic feeding and ventilation systems operate on a 24-hour basis.*

*The solid flooring of each broiler house is bedded with chopped straw over its entire area immediately prior to housing each new batch bought from the hatchery.*

*The principal inputs to the operation are feed, water, veterinary medicines and energy (electricity and gas for heating). The main by-product of poultry rearing is poultry litter (organic fertiliser) ...”<sup>9</sup>*

## **THE APPLICANT’S CASE**

13. It is, I believe, helpful to categorise the Applicant’s case into the following issues.

### ***The statutory basis of the decision dated 6<sup>th</sup> February 2019***

14. On 5<sup>th</sup> July 2016 Mr. O’Connor applied for an Industrial Emissions Licence for the rearing of 74,000 broiler chickens as part of an intensive agricultural chicken rearing enterprise at an installation located at Rathcahill West, Templeglantine, Newcastle West, County Limerick and was granted the Licence (P1042-01) on 6<sup>th</sup> February 2019.

15. The Applicant claims that one of the reasons why a chicken rearing enterprise of this type requires an *Industrial Emissions Licence*, in the first place, is because the poultry litter (chicken manure) and wash water is an essential feature of, and cannot be divorced from, the chicken broiler rearing project. It is asserted, for example, that the Agency cannot disavow the ultimate destination and final treatment of the poultry litter (chicken

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<sup>9</sup> Page 2 of the Inspector’s Report.

manure) and wash water from its regulatory remit when an application is made for intensive poultry farming.

16. From a practical perspective, (as the description in the Inspector’s report, just quoted confirms), Mr. Devlin SC likewise described how the poultry litter and wash water are created, as follows: the poultry rearing generates poultry litter, which is comprised of straw bedding mixed with poultry faeces and urine; the poultry litter is cleared from the broiler sheds every six to eight weeks when the straw bedding is changed which coincides with the rotation of the poultry (the chicks are brought at one day old and are reared for six to eight weeks when they are replaced by the next rotation) and at that point the straw bedding is changed and the shed floor is then washed down with disinfectant and water resulting in wash water.

17. The central legal issue in this case, however, is the Applicant’s assertion that the Agency erred in the granting of the Licence to Mr. O’Connor in the exercise of its powers pursuant to section 83(1) of the EPA Act 1992.

***The alleged ‘screening out’ of AA<sup>10</sup> of Land Spreading as a mitigation measure***

18. The second issue which is contended for on behalf of the Applicant is that the Agency, in its decision of 6<sup>th</sup> February 2019 (incorporating the inspector’s report dated 5<sup>th</sup> December 2018) screened out at the Stage 1 Screening Stage the requirement to carry out an Appropriate Assessment of land spreading of poultry litter and disposal of the

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<sup>10</sup> The terms “AA” and “Appropriate Assessment” are used interchangeably in this judgment.

wash water on other lands because it interpreted the application of the Nitrates Regulations to land spreading and wash water as mitigation measures which was, it is submitted, contrary to the judgment of the CJEU in *People Over Wind & Sweetman v Coillte Teoranta* (Case C-323/17) ECLI:EU:C:2018:244 (“*People Over Wind & Sweetman*”),<sup>11</sup> which precludes the taking into account of mitigation matters at the screening stage (one) for AA (see also *Eco Advocacy CLG v An Bord Pleanála* (Case C- 721/21) ECLI:EU:C:2023:477 which is addressed later in this judgment).

19. The background to this central issue which the Applicant has sought to advance in this application for judicial review may be found in the Inspector’s response to a submission from the (then styled) Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs which recommended that an Appropriate Assessment Screening be carried for the site, including an assessment of the potential effect of the spread lands on any European Sites and also provide a map of the proposed spread lands. The Inspector’s report dated 5<sup>th</sup> December 2018 stated *inter alia* at pages 8-9, in response, that:

*“[a]ppropriate Assessment screening for the activity has been carried out as detailed in Section 15 below. The issue of Appropriate Assessment and the spreading of organic fertiliser is discussed therein. Organic fertiliser generated by the activity will be sent offsite for use in mushroom compost production facilities in accordance with the Nitrates Regulations and the European Animal By-Product*

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<sup>11</sup> In *People Over Wind & Sweetman*, the particular mitigation measures at the screening stage for Appropriate Assessment were the Sustainable Urban Drainage Systems (SUDS) methods which had been incorporated into the project design.

*Regulations (EC Regulation No 1069/2009 and Commission Regulation 142/2011), (Animal By-Product Regulations). The IE licence relates to the site of the activity for which the licence application is made and does not extend to the lands or facilities on which organic fertiliser may be used as fertiliser. The use of organic fertiliser as fertiliser will be carried out in accordance with the Nitrates Regulations and Animal By-Product Regulations and will be monitored and controlled by the DAFM<sup>12</sup> and Local Authorities. As outlined in Section 15 below, I consider that the use of organic fertiliser as fertiliser in accordance with the Nitrates Regulations will not cause environmental pollution and I am satisfied beyond reasonable scientific doubt that the use of organic fertiliser from the activity as fertiliser will not have a significant effect on any European sites.”*

20. Additionally, in her response to Mr. Sweetman’s first submission, which in addition to raising a point about insufficient information being provided to enable the EPA to complete an EIA<sup>13</sup> of the likely significant indirect effects on the environment in relation to the proposal to spread the manure generated by the proposed development on lands that are remote from the site, also stated that no information had “... *been provided on the potential for significant effects on European sites arising from such spreading, and in the absence of an appropriate assessment that deals with this matter, being an indirect effect of the proposed development ...*”, the Inspector stated at pages 9 to 10 of her Report that:

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<sup>12</sup> Department of Agriculture, Food and the Marine.

<sup>13</sup> Environmental Impact Assessment.

*“... I am satisfied that I have sufficient information available to complete an assessment, in an appropriate manner, regarding the effects of the project and to make a recommended determination (as accompanies this report). I have considered the information in the environmental impact statement and the application documentation, the further information provided and the information received as part of consultations both externally and internally across the EPA.*

*Section 12 of the IR outlines the options for the management of litter manure from the installation. In the application form the applicant has identified the transfer of litter manure to mushroom composters. There is also the option of land-spreading the organic fertiliser.<sup>14</sup> The organic fertiliser must be managed in accordance with appropriate National and European legislation. The RD requires the licensee to calculate/record the quantities of organic fertiliser generated and moved offsite to provide for the appropriate handling of the material and the protection of the environment.*

*The IE licence relates to the site of the activity for which the licence application is made and does not extend to the lands on which organic fertiliser may be used as fertiliser. There will be no adverse significant effects on the environment from land spreading, which is subject to the controls of the Nitrates Regulations or from the handling onsite of organic fertiliser (poultry litter/wash water) from the activity or from*

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<sup>14</sup> Emphasis/underlining added.

its use in compost production.<sup>15</sup> *If the activity is carried on in accordance with the RD and the conditions attached, the operation of the activity will not cause environmental pollution.*

I have addressed the potential for significant effects of the project arising from land spreading of organic fertiliser on European Sites in Section 15 Appropriate Assessment of this report, Appendix 1 lists the European Sites assessed, their associated qualifying interests and conservation objectives.

I have considered all of the documents submitted with the licence application and all submissions and observations made on the licence application, and having considered the processes and emissions associated with the activity (as now outlined throughout this Inspector's report), a screening for Appropriate Assessment was undertaken. The assessment<sup>16</sup> determined that the poultry activity is not directly connected with or necessary to the management of any European Site and the Agency considered, for the reasons set out in Section 15 of the IR, that it can be excluded, on the basis of objective information, that the activity, individually or in combination with other plans or projects, will have a significant effect on any European Site and accordingly determined that an Appropriate Assessment of the activity was not required...''

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<sup>15</sup> Emphasis/underlining added.

<sup>16</sup> This refers to Appropriate Assessment.

21. The Applicant contends that the above paragraph (as underlined) together with the reasons set out in section 15 of her report (for example, the reference to the Nitrates Regulations), confirms that the Inspector was screening out the requirement to carry out an Appropriate Assessment for the land spreading of organic fertiliser i.e. poultry litter and wash water, and that the reference to the Nitrates Regulations was the mitigation which is not allowed at a Stage 1 screening.
22. The Applicant further suggests that any reliance by the Agency, as an argument in the alternative, on the decision of the High Court (Humphreys J.) in *Friends of the Irish Environment v The Government of Ireland & Others* [2023] IEHC 562 is misplaced. In that case Humphreys J. suggested that the rejection of the carrying out by the State of a voluntary AA screening, which was not strictly required, would be counter-productive environmentally “... *as it would create a chilling effect that would dissuade anybody from voluntarily conducting environmental assessments because that would preclude them from relying later on the voluntary nature of the exercise. That would tend to limit environmental assessments to cases where they were seen as strictly obligatory, an approach that would not serve goals of a high level of environmental protection ...*”.<sup>17</sup>
23. Finally, in response to the fourth submission received, again from Mr. Sweetman who enclosed as copy of the judgment from the CJEU in Case C-323/17 dated 12<sup>th</sup> April 2018 and quotes the following extract: “*Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a*

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<sup>17</sup> [2023] IEHC 562 per Humphreys J. at paragraph 64.

*plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site ...”, the Inspector responded by stating as follows:*

*“In Section 15, Appropriate Assessment, I have addressed the potential for significant effects of the project on European Sites and have detailed the results of an Appropriate Assessment screening and a full Appropriate Assessment conducted as part of the licence application. There are 4 no. European Sites within 20 km of the installation. Any European Sites more than 20 km distance from the installation fall well outside of the potential zone of influence of the activity, so it was not necessary to consider them further. Qualifying interests and conservation objectives of each individual site were detailed as part of that Appropriate Assessment”.*

24. Again, in support of his argument that the above quoted paragraphs together with section 15 of the Inspector’s report constituted a *screening out* of the land spreading of the poultry litter (chicken manure) from the Appropriate Assessment, the Applicant seeks to contrast the position here with the following observations of Hogan J. contained at paragraph 142 of the judgment of the Supreme Court in *An Taisce – National Trust for Ireland v An Bord Pleanála* [2022] IESC 8 (“the Cheese Factory case”): “[w]hile it is true that the NIS, the Inspector and the Board all sought to some extent to assess the potential indirect effects of the milk production on the Natura sites, I consider that the short answer to this point is that they were not, as a matter of law, obliged to do so. To repeat, the project to be assessed for the purposes of Article 6(3) was the construction

*and operation of the cheese factory and not the 4,500 Glanbia farms or, for that matter, the thousands of other farms supplying non-Glanbia producers...”.*

25. Accordingly, Mr. Devlin SC submits that in contrast to the approximately 4,500 farms in the *Cheese Factory case* which provided *inputs*, the poultry litter and wash water are *outputs*.

26. It is contended that if the project in this case is the operation of a poultry farm of such a scale and the inevitable consequence of that operation is the generation of poultry litter, there are no circumstances in which poultry litter will not be generated if you have 74,000 broiler chickens on site. It is suggested that the poultry litter generated is not an *input* but, rather, an inevitable and certain *output* that comes within the category of polluting substances in *inter alia* the Industrial Emissions Directive and the Water Framework Directive.

27. A second argument made on behalf of the Applicant arises from the following observation by the Inspector at page 29 of her report dated 5<sup>th</sup> December 2018: “[i]n addition, the Agency notes the activities which can take place within European sites are restricted by legislation...”. It is contended that the alleged AA which was purportedly carried out applied the wrong test by looking at what happened or the activity/activities located *within* a particular European site whereas Article 6(3) of the Habitats Directive requires whether an activity or activities will have an *impact on (a)* European site(s).

## ***Waste***

28. “Waste” is defined in the Licence as “*any substance or object which the holder discards or intends or is required to discard.*”

29. It is contended, on behalf of the Applicant, that the Agency *could have* treated the poultry litter and wash water as waste and reference is made to the decision of the CJEU<sup>18</sup> in *Brady v EPA* (Case C-113/12, ECLI:EU:C:2013:627)<sup>19</sup> and the following statement at paragraph 43 of that judgment: “[i]n light of the guidance provided by the case-law as set out above, it must be held that effluent generated by an intensive pig farm, which is not the product primarily sought by the farmer and any recovery of which by spreading as fertiliser must, as is apparent in particular from the sixth recital in the preamble to Directive 91/676 and the mechanism established by that directive, involve the taking of special precautions owing to the potentially hazardous nature of its composition from an environmental point of view, is, in principle, waste (see, by analogy, Case C-194/05 Commission v Italy, paragraph 35 and the case-law cited, and Commune de Mesquer, paragraph 41)”.

30. Mr. Devlin SC submits that the Applicant’s central concern relates to the possible land spreading of the poultry litter and wash water generated from the operation of the intensive poultry farm in an area or in a manner which could impact on a protected site under the Habitats Directive. He submits that the Agency, in the granting of this Licence, is effectively allowing land spreading to happen and has not, for example, conditioned its non-use or assessed the impacts it could have on a site under the Habitats Directive.

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<sup>18</sup> Court of Justice of the European Union.

<sup>19</sup> *Donal Brady v EPA*, Case C-113/12, 3 October 2013.

31. As mentioned, it is submitted that the Agency was perfectly positioned to carry out such an assessment arising from decisions of the CJEU in *Brady v EPA* (Case C-113/12, ECLI:EU:C:2013:627<sup>20</sup> and in *Commission v Spain* (C-121/03) ECLI:EU:C:2005:512; 2005 I-07569 where at paragraph 60 of its judgment, the CJEU held that livestock effluent may fall outside of the classification as waste if it is used as soil fertiliser as part of a lawful practice of spreading on *clearly identified parcels* of land and if its storage is limited to the needs of those spreading operations.
32. It is submitted in considering whether, for example, poultry litter and wash water are or are not waste in the first place, a central element of that exercise was the process of clearly identifying the parcels of land on which the poultry litter would be spread. Mr. Devlin SC submits that the suggestion that the Agency is confined to the red line boundary of the licence application is incorrect and does not make sense in the context of an Agency that is, first and foremost, meant to be dealing with emissions, which generally do not respect land boundaries, including the red line boundary in this case.
33. The Applicant contends that the Agency could not have been certain that the poultry litter and wash water would be sent for land spreading because it did not know the location of the recipient lands and for that reason the poultry litter and wash water could not be defined as a by-product, and were, rather, waste. It is submitted that, in such circumstances, the Agency should have treated the poultry litter and wash water as waste.

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<sup>20</sup> *Donal Brady v EPA*, Case C-113/12, 3 October 2013.

### ***Water & the question of eutrophication?***

34. As with the issue in relation to waste, it is contended, on behalf of the Applicant, that if the Agency do not know the location of the ‘spread lands’, it follows that it cannot know if there will be a deterioration of a water body.

35. The Applicant states at paragraph 68 of the Statement of Grounds that “... *the location of the spreading lands for poultry litter was not made known to the [Agency] and no water quality information was provided or sought in relation to water bodies into which the spreading lands drain. The effect of the land spreading of emissions from this facility, over a considerable and unquantified acreage, on water quality objectives set under the Water Framework Directive has not been assessed.*”

36. In terms of water quality, the Applicant states that he is concerned with eutrophication – pollution caused by too many nutrients, such as phosphate and nitrate, which leads to a deterioration in water quality – and the main sources of these nutrients are agriculture slurry and chemical fertilisers<sup>21</sup> and he refers to the location of the farm relative to rivers and “... *where it appears this poultry litter and wash water has gone in the past at any rate.*”

37. The Applicant asserts that when Mr. O’Connor made his initial application for the Licence he had stated that it was intended that the poultry litter and wash water was to

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<sup>21</sup> Sewage (waste water treatment plants) are also a source of such nutrients that issue is not applicable in this case.

be used *exclusively* for mushroom composting but that the Inspector's report refers also to other possible end-uses, including land spreading.

38. This point also forms the basis for the Applicant's criticisms of a sentence (underlined below) in paragraph 9 of the Agency's Statement of Opposition. This states that "*[m]uch of the Applicant's case is premised on the assumption that the activity the subject of the licence application before the Agency included the land spreading of poultry litter on third party lands including lands at some remove from the installation. This assumption is not correct. The licence application indicated that all poultry litter produced on site would be transported to mushroom compost production facilities where it would be composted. Although the Notice Party provided information as to the historic use of poultry litter generated on the site for land-spreading, he confirmed that land spreading of poultry litter was not part of the proposal before the Agency.*"<sup>22</sup>

39. In my view, very little turns on the criticism of this plea; in her report the Inspector does say that "... *poultry litter will be sent for use in the mushroom compost production industry and may also be sent for land spreading ...*".

40. Ultimately, in addressing what the Applicant rhetorically described as a central issue in the case as to "... *what did the Licence authorise ...*", the only activity which the Licence dated 6<sup>th</sup> February 2019 regulates, in this case, is the intensive poultry rearing in an installation at a location Newcastle West, County Limerick where the capacity exceeds 40,000 places and involves 74,000 broiler chickens housed at that installation.

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<sup>22</sup> Emphasis added.

## THE RESPONSE OF THE AGENCY

41. The Agency's response, in summary, is as follows.
42. In relation to the argument made on behalf of the Applicant that the reference to the downstream application of the Nitrates Regulations regarding the use of poultry litter and wash water for land spreading on other lands constituted an unlawful application of a mitigation measure at AA stage 1 screening, the Agency makes two responses, in the alternative.
43. First, it is stated that as this was an application under the EPA Act 1992 for intensive poultry rearing at an installation, no AA was required of land spreading, and therefore, the Applicant's argument falls away *ab initio*, i.e. as Mr. O'Connor did not apply for the land spreading of poultry litter, no AA was required and no AA was carried out in relation to land spreading. It is submitted, on behalf of the Agency, that the Inspector's observations were simply a recognition that if land spreading were potentially to occur, it would be required to be done in accordance with the Nitrates Regulations and accordingly there would not be pollution or environmental effects on a site.
44. Second, in the alternative, and in the event that Ms. Murray SC was wrong on the first argument that AA was not required in relation to land spreading because it does not form part of the activity prescribed by this Licence, it is argued, by reference to some of the observations made by the Inspector (referred to above) and having regard to the gloss on the decision in *People Over Wind & Sweetman* by the CJEU's judgment in *Eco*

*Advocacy CLG v An Bord Pleanála* (Case C-721/21) ECLI:EU:C:2023:477, at paragraphs 44 to 48 of the judgment – (to the effect that where measures are incorporated into the design of a project as a typical type standard feature rather than seeking to reduce negative effects, those features could not be interpreted as indicating probable significant harm to the site) – that, if there was a requirement on the Agency to carry out an AA of land spreading, the Agency could lawfully rely on a typical standard feature such as compliance with the Nitrates Regulations (similar to the application of SUDS in the *Eco Advocacy* case) which are aimed at ensuring, through various measures, that water pollution does not arise through land spreading and this means that it is not a mitigation measure precluded by the decision in *People Over Wind & Sweetman*.

45. In relation to the Inspector’s reference at page 29 of her report dated 5<sup>th</sup> December 2018 to “[i]n addition, the Agency notes the activities which can take place within European sites are restricted by legislation...”, the Agency submit that the Inspector is simply noting that there are measures under, for example, the 2011 Habitats Regulations, in addition to the Nitrates Regulations, which apply within a European site and reference is made, for example, to the written consent from the relevant Minister before performing particular operations on or affecting particular habitats.

46. Further, Ms. Murray SC submits that the sentence referred to by Mr. Devlin SC should not be read in isolation and that the preceding paragraphs (on pages 28 and 29 of the Inspector’s report dated 5<sup>th</sup> December 2018) in fact addresses the assessment in the context of the applicable European sites and not just the impact of development taking place within a European site.

47. In relation to the Applicant's arguments that the Agency erred by not treating the poultry litter and wash water as *waste* (rather than as a by-product) because it could not have been certain as to the location of their ultimate 'land spreading' destination, Ms. Murray SC, for the Agency, responds by saying that this contention does not advance the Applicant's case for essentially three reasons:

- (i) the production of poultry litter and wash water as a consequence of the intensive poultry rearing at the installation was assessed;
- (ii) the Animal By-Products legislative and regulatory code in fact addresses the disposal of poultry litter and wash water as a category 2 material or as waste; and
- (iii) both (i) and (ii) are reflected in the Inspector's Report dated 5<sup>th</sup> December 2018 and in the decision of the Agency dated 6<sup>th</sup> February 2019.

48. The Agency submits that, on the facts of this case, the poultry litter and wash water are animal by-products and not a waste or emission and their future use and regulation off-site are governed by 'the Animal By-Products Regulations' and may also be treated as 'organic fertiliser', the use and regulation of which off-site are governed by the 'Nitrates Regulations' which implement the Nitrates Directive (91/676/EEC) and are not governed not by the Industrial Emissions Directive.<sup>23</sup>

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<sup>23</sup> The Industrial Emissions Directive defines "emission" as meaning the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land. The applicant says that the chicken manure and the wash water comes from the installation and its either a direct or an indirect

49. Likewise, in relation to water quality, the Agency’s position is that the land spreading of agricultural slurry which contains nutrients such as phosphate and nitrate is regulated by the Department of Agriculture, Food and the Marine (“DAFM”) under the Nitrates Directive and Nitrates Regulations such as the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2017 (S.I. No. 605 of 2017).

## **ASSESSMENT & DECISION**

50. The Licence dated 6<sup>th</sup> February 2019 recognises on its face that it is addressing an application for the following licensable activity: “6.1 *The rearing of poultry in installations where the capacity exceeds 40,000 places.*”

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release of the substance and it doesn't matter whether you categorise it as direct or indirect. In its Statement of Opposition, the Agency states, on a without prejudice basis, neither poultry litter nor wash water are an “emission” from the licenced activity within the meaning of section 3 of the EPA Act 1992 Act. Poultry litter does not constitute an “emission” to water or air for the purposes of Industrial Emissions Licensing. Poultry litter constitutes an animal by-product, as set out in Regulation 1069/2009 and can lawfully be dealt with as a secondary product.

51. The Applicant argues, in summary, that the Agency should have assessed the consequences of that activity – in particular the use of poultry litter and wash water for land spreading of organic fertiliser or as waste – on lands outside of the installation.
52. Section 83(1) of the EPA Act 1992 provides where an application is made to the Agency in the prescribed manner for a licence under [Part IV] it may, subject to *section 99A* [the payment of fees] and compliance with any regulations under *section 89* [ministerial regulations regarding licences], grant the licence subject to such conditions as it considers appropriate or refuse the application.
53. Section 83(5)(a)(iii) of the EPA Act 1992 provides that the Agency shall not grant a licence or revised licence for an activity *unless it is satisfied* that any emissions from the activity or any premises, plant, methods, processes, operating procedures or other factors which affect such emissions will comply with, or will not result in the contravention of, any relevant standard including any standard for an environmental medium prescribed under regulations made under the European Communities Act 1972, or under any other enactment.
54. Section 83(5)(a)(v) of the EPA 1992 provides that the Agency shall not grant a licence or revised licence for an *activity* unless it is satisfied that any emissions from the activity will not cause significant environmental pollution.
55. The reference to “*unless it is satisfied*” incorporates well-settled public law principles which governs a central decision-making function of the Agency in this context.

56. A synonymatic phrase which is used, for example, in many legislative measures is where the particular decision-making body “... *is of opinion* ...” and, in summary, when a court is required to assess the lawfulness of a decision where the legislative or regulatory underpinning code uses the phrase “... *unless it is satisfied* ...” or “... *is of the opinion* ...”, it must be satisfied that the decision is *bona fide* held, factually sustainable, and not unreasonable, namely that the opinion must otherwise be within *vires*.<sup>24</sup>

57. The essence of the inquiry, therefore, is whether the public body in question – here the Agency – has correctly defined the ambit of the statutory and regulatory power, be it one that emanates from an EU law measure, primary or secondary legislation, or all three.

58. When this is applied to the core question raised in this case on behalf of the Applicant, the central issue comes down, I believe, to the following question: *Did the Agency err, in defining the ambit of its regulatory powers under the EPA Act 1992 (including section 83), in not assessing, authorising and regulating the final end use off-site through land spreading (on other lands) of the poultry litter and wash water as organic fertiliser, or its disposal as waste, which were an inevitable consequence of the licensable activity under the EPA Act 1992 regarding the intensive rearing of 74,000 broiler chickens,*

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<sup>24</sup> See the discussion of this matter in *Waltham Abbey & Ors v An Bord Pleanála* [2022] IESC 30 per Hogan J. at paragraph 28, *Kiely v Kerry County Council & Ors* [2015] IESC 97 per McKechnie J. at paragraphs 68 to 71, *State (Lynch) v Cooney* [1982] I.R. 337 per O’Higgins C.J. at page 380, *Kiberd v Hamilton* [1992] 2 I.R. 257 per Blayney J. at 265.

*having regard to requirements of the Industrial Emissions, Habitats and Water Framework Directives?*

59. The core of Mr. Devlin SC's argument is that the Agency (a) had the power to do so (b) was obliged to do so, but (c) did not do so.
60. In assessing these matters in a judicial review application, it is important to have regard to the statutory provisions which underpin the decision as well as the nature of the decision itself.
61. As just referred to, the legal test, therefore, which the court must apply in this application for judicial review, when assessing the manner in which the Agency made its decision on 6<sup>th</sup> February 2019, is whether it correctly defined the ambit of its statutory and regulatory power *i.e.*, whether it acted within its jurisdiction.
62. I am of the view, for the following reasons, that the Agency in its decision of 6<sup>th</sup> February 2019 – (including the decision and reasons for the decision, the schedule of activities licensed, the following conditions dealing *inter alia* with (1) scope, (2) management of the installation, (3) infrastructure and operation, (4) interpretation, (5) emissions, (6) control and monitoring, (7) resource use and energy efficiency, (8) materials handling, (9) accident prevention and emergency response, (10) decommissioning and residuals management, (11) notification, records and reports, (12) financial charges and provisions and having regard to Schedule A which refers to the 74,000 broiler chickens housed at the installation, Schedule B which sets out emission limits, Schedule C which addresses Control and Monitoring, Schedule D, the Annual Environmental Report

(AER)) and its incorporation and adoption of the Report of the Inspector<sup>25</sup> on an Industrial Emissions Licence Application dated 5<sup>th</sup> December 2018 – *correctly* defined the ambit of its statutory and regulatory power and jurisdiction under the EPA Act 1992, including section 83(1) thereof, when granting an Industrial Emissions Licence to Michael Noel O’Connor to carry on the following activity – *6.1 - The rearing of poultry in an installation where the capacity exceeds 40,000 places (in this case 74,000 broilers)* – at the installation located at Rathcahill West, Templeglantine, Newcastle West, County Limerick.

63. First, insofar as the role of *this Agency* is concerned – recalling that the Applicant emphasises the importance of its functions as the Environmental Protection Agency in the context of the Industrial Emissions Directive – the Court of Appeal outlined in *Harte Peat Limited v The EPA, Ireland & The Attorney General* [2022] IECA 276, in the context of a case concerning an IPC licence and peat extraction where Class 1.4 of the First Schedule to the EPA Act 1992 identified the relevant activity which required a licence for ‘the extraction of peat in the course of business which involves an area exceeding 50 hectares’, that the invocation of the First Schedule threshold in that case represented “... *the gateway to the licensing regime under the 1992 Act and the EPA [the Agency] does not have jurisdiction to entertain a licence application for a project under that threshold.*”<sup>26</sup>

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<sup>25</sup> The Inspector was Ms. Éimear Godsil.

<sup>26</sup> *Harte Peat Limited v The EPA, Ireland & The Attorney General* [2022] IECA 276 (6<sup>th</sup> December 2022) at paragraphs 10 and 11. The judgment delivered was that of Court which was comprised of Faherty, Power and Collins JJ.

64. Some years earlier, in *Brady v The EPA* [2007] IEHC 58; [2007] 3 I.R. 232<sup>27</sup> the High Court (Charleton J.) observed that when considering an application for a licence generally under section 83 of the EPA Act 1992, the Agency was “... *limited by its functions and bound by its objectives ...*” and the court observed that “... *any activity which is scheduled under the Act must have a licence from the respondent. The licence is granted under Part IV of the Act and the First Schedule thereto provides ... the activities to which that part of the Act applies ...*”.<sup>28</sup>

65. Similarly, in this case, the *jurisdictional basis* for the Agency’s decision and determination on 6<sup>th</sup> February 2019 and *the gateway* to its jurisdiction is *inter alia* section 83(1) of the EPA Act 1992 and the First Schedule of the EPA Act 1992 which references “[a]ctivities to which Part IV applies” and paragraph 6 deals with “Intensive Agriculture” and includes at paragraph 6.1(a) “[t]he rearing of poultry in installations where the capacity exceeds 40,000 places”.<sup>29</sup>

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<sup>27</sup> This decision was appealed to the Supreme Court and the reference by the Supreme Court to the CJEU led to the decision in *Brady v EPA* (Case C-113/12, ECLI:EU:C:2013:627).

<sup>28</sup> Further, of particular relevance in that case was the requirement that the Agency must have regard to “*such other matters related to the prevention, limitation, elimination, abatement or reduction of environmental pollution*” as *it* considered necessary.

<sup>29</sup> Substituted on 23<sup>rd</sup> April 2014 by Regulations 23(g)(i), (g)(ii), (h)(i), (h)(ii), (i)(i) of the *European Union (Industrial Emissions) Regulations 2013* (S.I. No. 138 of 2013). These Regulations mainly amended the EPA Act 1992 and the Waste Management Act 1996 to transpose Chapters II and VI of Directive 2010/75/EC of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast). The Regulations apply to the industrial emissions directive activities specified in the First Schedule to the EPA Act 1992, as amended by this statutory instrument.

66. This also reflects the contents of Chapter II (Provisions for activities listed in Annex I) and Article 10 (dealing with ‘Scope’) of the Industrial Emissions Directive<sup>30</sup> which provides that Chapter II shall apply to the activities set out in Annex I and, where applicable, reaching the capacity thresholds set out therein. At Annex I (Categories of activities referred to in Article 10) paragraph 6 (“Other activities”) of the Industrial Emissions Directive at sub-paragraph 6.6 reference is made to “*[i]ntensive rearing of poultry or pigs: (a) with more than 40,000 places for poultry.*”
67. The term “*activity*” is defined in the EPA Act 1992 as meaning any process, development or operation specified in the *First Schedule* and carried out in an installation. The term “*installation*” is defined in the EPA Act 1992 as meaning a stationary technical unit or plant where the activity concerned referred to in the First Schedule is or will be carried on, and shall be deemed to include any directly associated activity, whether licensable under [Part IV] or not, which has a technical connection with the first-mentioned activity and is carried out on the site of that activity.
68. In addressing the substance of the question as to what the Licence authorised, Condition 1.6 of the Licence dated 6<sup>th</sup> February 2019 (signed by Tara Gillen as an authorised person), for example, provides that “*[t]his licence is for the purpose of IE licensing under the EPA Act 1992 as amended only and nothing in this licence shall be construed as negating the licensee’s statutory obligations or requirements under any other enactments or regulations.*”

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<sup>30</sup> Directive 2010/75/EU (24<sup>th</sup> November 2010) on industrial emissions (integrated pollution prevention and control) (Recast).

69. The jurisdiction of the Agency, in this case, related to the scheduled activity applied for and subsequently licensed, namely the rearing of poultry in an installation located at Rathcahill West, Templeglantine, Newcastle West, County Limerick where the capacity exceeded 40,000 places and comprised 74,000 broilers.
70. Second, on the first day of the hearing<sup>31</sup> before me, Mr. Devlin SC helpfully clarified what grounds were being pursued and what grounds were not being pursued. It was confirmed, on behalf of the Applicant, that there was now no ‘EIA’<sup>32</sup> challenge to the decision of the Agency of 6<sup>th</sup> February 2019 in this application for judicial review and any reference to EIA matters was merely contextual.
71. It was also confirmed that the challenge to the AA<sup>33</sup> carried out by the Agency in relation to the licensed activity of rearing 74,000 broiler chickens (in respect, for example, of air emissions and ammonia levels) was no longer being pursued.
72. As I have found that the decision-making function of the Agency in this case, *from a jurisdictional perspective*, related to the scheduled and licensed activity of the intensive poultry rearing of 74,000 broiler chickens located in an installation located at Rathcahill West, Templeglantine, Newcastle West, County Limerick and it was confirmed at the hearing that there is no EIA or AA challenge to *that* decision-making process, it is strictly unnecessary to address those matters any further. I will, however, refer to the AA which was carried out in relation to the application for the licensed activity and

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<sup>31</sup> Tuesday, 14<sup>th</sup> November 2023.

<sup>32</sup> Environmental Impact Assessment.

<sup>33</sup> Appropriate Assessment.

which is contained in the decision of 6<sup>th</sup> February 2019 (at pages 6-9) and the Section 15 Appropriate Assessment at pages 28-30 of the Inspector's Report dated 5<sup>th</sup> December 2018 as they are informative in understanding the balance of the Applicant's case.

73. The AA decision is found under the heading "*Decision & Reasons for the Decision*" at pages 6-9 of the IEL (P1042-01) dated 6<sup>th</sup> February 2019.

74. In this decision, the Agency *inter alia* stated that it had completed the Appropriate Assessment of potential impacts on European sites and "*... has made certain, based on best scientific knowledge in the field and in accordance with the European Communities (Birds and Natural Habitats) Regulations 2011 as amended, pursuant to Article 6(3) of the Habitats Directive, that the activity, individually or in combination with other plans or projects, will not adversely affect the integrity of any European Site, in particular Lower River Shannon SAC, Blackwater River (Cork/Waterford) SAC, Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA and Moanveanlagh Bog SAC, having regard to their conservation objective's and will not affect the preservation of these sites at favourable conservation status if carried out in accordance with this licence and the conditions attached hereto for the following reasons:*

- *The installation is not located within a European site.*
  
- *The only surface water pathway connecting the installation to European sites arises where the clean storm water from the site discharges to a drain through SWI which discharges into the Ballymurragh-East Stream, this then flows 500m*

*west to the Doonakenna River. The Doonakenna River flows 5.3km south westerly to join the Allaghaun River (Lower River Shannon SAC), which flows 7.5km west to join the River Feale. The River Feale continues for approximately 37km into the Mouth of the Shannon.*

- The risk of surface water or groundwater contamination as a result of accidental emissions during washing activities, or from spillage from the wash water tanks, is minimal. The provision of bunding and the protection of surface water and ground water are sufficient to ensure that accidental emissions from the activity will not impact on the qualifying interests of the European sites identified above.*
  
- The litter generated at the installation has high dry matter content and remains within the concrete-floored, covered broiler houses until all broilers are removed at the end of the batch. Therefore there is no pathway between the litter and surface water/groundwater while the houses are stocked. When the houses are destocked the litter is removed from the sheds and loaded onto lorries for transport offsite for composting and the houses are brushed and washed down. Considering the controls in place in relation to the management of organic fertiliser on site, the Agency is satisfied beyond reasonable scientific doubt that this method of handling the organic fertiliser (poultry litter) from the activity within the installation boundary will not have a significant effect on any European site.*

- *Wash water is used as a fertiliser on lands that are not within the installation boundary, in accordance with the Nitrates Regulations. Poultry litter is transported by a contractor to composting facilities or may be used as an organic fertiliser on land in accordance with the Nitrates Regulations.*
  
- *The licence relates to the site of the activity for which the licence application is made, i.e. the rearing of poultry within the installation boundary, and does not extend to the lands on which organic fertiliser may be used as fertiliser. There are regulatory controls in place in relation to the transport and use of organic fertiliser as fertiliser on land beyond the installation boundary. The Nitrates Regulations make it possible for DAFM<sup>34</sup> to know and take account of the additional input of nitrogen and phosphorous from the activity, with a view to ensuring there is no downstream environmental pollution. It is considered that the regulatory systems in place will ensure that cumulative impacts as a result of the use of organic fertiliser on land from this activity will not have a significant effect on European sites.*<sup>35</sup>
  
- *In addition, the Agency notes that the activities which can take place within European sites are restricted by legislation. All persons must obtain the written consent from the relevant Minister before performing particular operations on, or affecting, particular habitats where they occur on lands/waters within the Special Area of Conservation. Hence, further regulatory controls exist for the spreading of fertilisers within European sites. Therefore, the Agency considers*

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<sup>34</sup> Department of Agriculture, Food and the Marine.

<sup>35</sup> Emphasis (underlining added).

that the use of poultry litter and wash water as fertiliser in accordance with the Nitrates Regulations will not cause environmental pollution and the Agency is satisfied beyond reasonable scientific doubt that use of wash water and poultry litter as fertiliser from the activity will not have a significant effect on any European sites. The Agency is also satisfied that the use of the applicant's poultry litter for mushroom composting will not cause environmental pollution and the Agency is satisfied beyond reasonable scientific doubt that this method of handling the organic fertiliser (poultry litter) from the activity will not have a significant effect on any European site."<sup>36</sup>

75. In making its decision of 6<sup>th</sup> February 2019, the Agency considered documentation relating to the application and supporting documentation received on behalf of Mr. O'Connor, the submissions received (including two received from Mr. Sweetman) and the report of the Inspector dated 5<sup>th</sup> December 2018.

76. In this decision, which records the Appropriate Assessment which *was* carried out, the Agency confirms (at the sixth indent on page 8 of the decision and underlined above) that the Licence "... *relates to the site of the activity for which the licence application was made, i.e. the rearing of poultry within the installation boundary and does not extend to the lands on which organic fertiliser may be used as fertiliser.*" In this application, the Agency was not required to carry out an Appropriate Assessment (including a Stage 1 assessment) in relation to the future use of the poultry litter as an

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<sup>36</sup> Emphasis (underlining added).

organic fertiliser or the future disposal of the wash water on lands outside of the installation.

77. The Applicant submits that the reference by the Agency (again at the sixth indent on page 8 of its decision dated 6<sup>th</sup> February 2019 and underlined above) to the “... *regulatory controls in place in relation to the transport and use of organic fertiliser as fertiliser on land beyond the installation boundary. The Nitrates Regulations make it possible for DAFM to know and take account of the additional input of nitrogen and phosphorous from the activity, with a view to ensuring there is no downstream environmental pollution. It is considered that the regulatory systems in place will ensure that cumulative impacts as a result of the use of organic fertiliser on land from this activity will not have a significant effect on European sites ...*” and similar references in the Inspector’s report dated 5<sup>th</sup> December 2018 represent the unlawful (stage 1) screening out of an AA requirement to the land spreading of poultry litter and disposal of wash water by referring to the application of the Nitrates Regulations as mitigation measures contrary to the judgment of the CJEU in *People Over Wind & Sweetman v Coillte Teoranta* (Case C-323/17, ECLI:EU:C:2018:244).<sup>37</sup>

78. The Agency (at the seventh indent on pages 8 and 9 of its decision and underlined above) notes “in addition” that “... *the activities which can take place within European sites are restricted by legislation. All persons must obtain the written consent from the relevant Minister before performing particular operations on, or affecting, particular habitats where they occur on lands/waters within the Special Area of Conservation.*”

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<sup>37</sup> See also *Eco Advocacy CLG v An Bord Pleanála* (Case C - 721/21) ECLI:EU:C:2023:477.

*Hence, further regulatory controls exist for the spreading of fertilisers within European sites. Therefore, the Agency considers that the use of poultry litter and wash water as fertiliser in accordance with the Nitrates Regulations will not cause environmental pollution and the Agency is satisfied beyond reasonable scientific doubt that use of wash water and poultry litter as fertiliser from the activity will not have a significant effect on any European sites. The Agency is also satisfied that the use of the applicant's poultry litter for mushroom composting will not cause environmental pollution and the Agency is satisfied beyond reasonable scientific doubt that this method of handling the organic fertiliser (poultry litter) from the activity will not have a significant effect on any European site."*

79. Previously the Inspector, in section 15 of her report<sup>38</sup> stated that this licensed activity occurred in an installation located at Rathcahill West, Templeglantine, Newcastle West, County Limerick which was not located within a European site and, in terms of risk assessment, the Inspector found that there was no surface water or groundwater pathway from the litter generated *at the installation* when the chicken houses were stocked. Therefore, the following finding was made and is not being challenged in these proceedings: *"[a]n Inspector's Appropriate Assessment has been completed and has determined, based on best scientific knowledge in the field and in accordance with the European Communities (Birds and Natural Habitats) Regulations 2011 as amended, pursuant to Article 6(3) of the Habitats Directive, that the activity, individually or in combination with other plans or projects, will not adversely affect the integrity of any European Site."*

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<sup>38</sup> At pages 28-30 of the Inspector's Report.

80. I consider that these and other references by the Agency in its decision and Licence of 6<sup>th</sup> February 2019 or the Inspector's report dated 5<sup>th</sup> December 2018 to what may happen *if* the end-use of the poultry litter or wash water was its disposal off-site by way of land spreading as a fertiliser or disposal as waste pursuant to the regulatory process under the Nitrates Regulations or the Animal By-Product Regulations do not in any way impugn the Agency's decision which related to the authorisation of the licensed activity of rearing 74,000 broiler chickens in a farm which activity was the subject of an AA and an EIA by the Agency as the Competent Authority.

81. In her report dated 5<sup>th</sup> December 2018 (at page 22) the Inspector, for example, stated that “[t]he installation will necessarily generate organic fertiliser (poultry manure and soiled water). The operation of the poultry unit at current bird capacity (74,000 broilers) results in the production of approximately 775m<sup>3</sup> of organic fertiliser per annum. For the purposes of EIA, the environmental factors identified as potentially being directly and indirectly affected by land spreading of fertiliser materials from the activity include: human beings, flora and fauna, air, land, soil and water...”.

82. The Inspector addressed at section 12 Organic Fertiliser (and 12.1 Poultry Litter (Organic Fertiliser) at pages 22 to 24 of her report dated 5<sup>th</sup> December 2018 stating *inter alia* that “... the collection, transport, handling, treatment, transformation, processing, storage, placing on the market, distribution, and use and disposal of all animal products (ABP) including poultry litter is governed by the EU Animal By-product Regulation (EC) No. 1069 of 2009 and Regulation (EU) No. 142 of 2011 which are given legal effect by The European Communities (Animal By-Product) Regulations 2014 (SI No.

187/2014). *Poultry litter is categorised as a category 2 Animal By-Product and the options for its disposal are set out in Article 13 of Regulation 1069/2009. Poultry litter must be transported by a haulier registered with the DAFM...*, and making reference to its transport by a registered contractor MJ Kehoe Transport Limited (*“... organic fertiliser generated onsite will be removed offsite by a registered contractor to mushroom compost production facilities ...”*), the requirement under the Licence to submit to the (then) Department of Agriculture, Food and the Marine annually details in relation to the quantity of organic fertiliser (poultry litter and wash water) exported (Record 3 form) and pointing out that *“[a]s outlined above, poultry litter will be sent for use in the mushroom compost production industry and may also be sent for land spreading. It is important to note that the IE licence relates to the site of the activity for which the licence application is made and does not extend to the lands on which organic fertiliser may be used as fertiliser. The Nitrates Regulations specifies when organic fertiliser can be applied to land, the application rates etc. and are enforced by the DAFM<sup>39</sup> and Local Authorities...”*.

83. The Inspector stated at page 24 of her report dated 5<sup>th</sup> December 2018 that *“[t]here is no land spreading of organic fertiliser conducted and/or permitted within the installation boundary so nuisance from land spreading or direct impacts, on soil, water and groundwater quality and habitats in the immediate vicinity of the installation and consequential indirect effects on flora and fauna and their habitats will not occur. Therefore, while impacts could occur on or near the spread lands (nuisance, pollution of water/groundwater/soil, impacts on flora and fauna) these would be indirect effects*

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<sup>39</sup> Department of Agriculture, Food and the Marine.

*of the activity only. I consider that the transport and use of organic fertiliser as fertiliser in accordance with the Nitrates Regulations and Animal By-Product Regulations will not cause environmental pollution.”*

84. The next section of the Inspector’s report (12.2) at pages 25-26, under the sub-heading “Wash Water”, *inter alia* states that “[w]ash water will be generated by the activity every 6-8 weeks, after the poultry litter has been removed from the poultry houses. The applicant states that 90.9m<sup>3</sup> of wash water is generated by the activity per annum. Prior to washing the houses the floors are brushed to reduce the quantity of poultry litter remaining in the houses. The houses are then washed down with water and disinfectant applied. The wash water is directed to wash water storage tanks where it is contained until sent offsite for use as fertiliser. The wash water consists of water contaminated with poultry litter and small quantities of disinfectant. The wash water is considered suitable for use on land as fertiliser and such use is provided for by the Nitrates Regulation and Animal By-Product Regulations. Wash water from the activity will be collected in two wash water collection tanks with an estimated capacity of 37.6m<sup>3</sup> (net of freeboard). The wash water storage tanks provide in excess of the 26-weeks’ storage capacity requirement in the Nitrates Regulations. The applicant has identified that the wash water will be used on approximately [20ha]<sup>40</sup> of farmland, in the vicinity of the activity outside the boundary to which this licence relates...”.

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<sup>40</sup> As referenced here, the Inspector assumed incorrectly that Mr. O’Connor had identified that the wash water would be used on approximately 20 hectares of farmland when in fact his correspondence dated 5<sup>th</sup> February 2018 identified 5.8 hectares (14.3 acres).

85. This again is what the Inspector was saying when she observed: “[i]t is considered that the regulatory systems in place will ensure that cumulative impacts as a result of the use of organic fertiliser on land from this activity will not have a significant effect on any European sites”, and “[h]ence, further regulatory controls exist for the spreading of fertilisers within European sites. Therefore, the Agency considers that the use of poultry litter and wash water as fertiliser in accordance with the Nitrates Regulations will not cause environmental pollution and I am satisfied beyond reasonable scientific doubt...”.
86. In a similar vein in *Joyce Kemper v An Bord Pleanála* [2020] IEHC 601 it was common case that An Bord Pleanála in that case did not carry out a screening of the AA or an AA of the *land spreading* in that case but looked at the matter at a high level and the High Court (Allen J.) observed at paragraph 369 (page 83) of the judgment that “... *the Board’s position is that it was cognisant of and took account of the eventual use of the material in its planning assessment and in its EIA.*”
87. Further, in *An Taisce – The National Trust for Ireland v An Bord Pleanála & Ors* (“the *Kilkenny Cheese Factory* case”), the Supreme Court (Hogan J.) distinguished between the assessment (AA and EIA) carried out in the context of the construction and operation of the cheese factory, on the one hand, stating that an appropriate assessment in respect of the milk-production in the Glanbia farms and potentially the thousands of other (non-Glanbia) farms was not required, on the other hand.
88. The references and language used in parts of the Inspector’s report which incorporates “screening like” terms (for example, part of the response to ‘Submission No.3’ from Mr. Sweetman at the bottom of page 9 and the top of page 10 of the Inspector’s report dated

5<sup>th</sup> December 2018 and quoted earlier in this judgment) explains, of course, why Mr. Devlin SC, for the Applicant, seeks to point to extracts of the Inspector's Report and submit, in argument, that this looks like the language involved in a 'screening exercise' which, he argues, screens out an appropriate assessment for the land spreading of poultry litter and wash water. While I appreciate why this argument is made by reference to those somewhat confusing extracts of the Inspector's report (quoted earlier in this judgment), the legal test which I have to consider and apply is *not* this issue but is, rather, whether or not the Agency acted within its *jurisdiction* in making the decision and determination made on 6<sup>th</sup> February 2019.

89. In this regard, my finding that the Agency, when considering the application which was made to it from Mr. O'Connor, *correctly* defined the ambit of its statutory and regulatory power in the EPA Act 1992, including sections 83 to 86 thereof, as applying to the intensive rearing of poultry within the installation boundary and did not extend to the authorisation of the possible end-use of the poultry litter or wash water generated from the intensive poultry rearing as organic fertiliser or as waste on lands outside of the installation, addresses and rejects the Applicant's argument that there was an erroneous Stage 1 *screening out* of the appropriate assessment for land spreading by relying on the Nitrates Regulations as a mitigation measure.

90. This finding also makes it unnecessary for me to consider the alternative argument made by Ms. Murray SC, having regard to the gloss on the decision in *People Over Wind & Sweetman* by the CJEU's judgment in *Eco Advocacy CLG v An Bord Pleanála* (Case C-721/21) ECLI:EU:C:2023:477, and that, *if* there was a requirement on the Agency to carry out an AA of land spreading, the Agency could lawfully rely on a typical standard feature such as compliance with the Nitrates Regulations which, it is submitted, is not a

mitigation measure precluded by the decision in *People Over Wind & Sweetman* and, similarly, my finding means that it is not necessary for me to consider whether the decision of the High Court (Humphreys J.) in *Friends of the Irish Environment v The Government of Ireland & Others* [2023] IEHC 562 and the acceptance of a voluntary screening, was applicable to the facts of this case. In summary, rather, I find that jurisdictional gateway and basis for the Agency’s decision and determination on 6<sup>th</sup> February 2019 in this case is the EPA Act 1992, including section 83(1) and sections 83 to 86 and the First Schedule of the EPA Act 1992 which references “[a]ctivities to which *Part IV applies*”, and paragraph 6 which deals with “Intensive Agriculture” and includes at paragraph 6.1(a) “[t]he rearing of poultry in installations where the capacity exceeds 40,000 places” – in this case 74,000 broiler chickens.

91. Third, to recap, it is contended on behalf of the Applicant that the Agency could not have been certain that the poultry litter and wash water would be sent for land spreading because it did not know the location of the recipient lands and for that reason the poultry litter and wash water were in fact waste (and not category 2 material) and should have been assessed by the Agency as waste. This contention is also reflected in the Applicant’s Statement of Grounds which alleges that the fact that an amount of the poultry litter spread to land is likely to be wasted as runoff or wasted to air should have been within the contemplation of the Agency. Further, it is submitted on behalf of the Applicant that in order to comply with EU law, the Agency must have certainty to the destination and use of any substances emitted from the operation that are likely to be wasted to water, air or soil through overspreading or which may be discharged accidentally. It is asserted that the required certainty was not present in the decision of 6<sup>th</sup>

February 2019 decision and as a result the Agency fell into error and acted contrary to the law.

92. Again, the prism or gateway through which I must assess these matters in this judicial review application is whether the Agency has correctly defined the ambit of its statutory and regulatory power, principally under section 83(1) of the EPA Act 1992 (as amended), in making a decision of 6<sup>th</sup> February 2019 in relation to the licensable poultry rearing activity *in an installation* located at Rathcahill West, Templeglantine, Newcastle West, County Limerick involving the rearing of 74,000 broiler chickens.

93. The Inspector's report and the conditions in the Licence P1042-01 confirm that the production of poultry litter and wash water as a consequence of the intensive poultry rearing and held *at the installation* located at Rathcahill West, Templeglantine, Newcastle West, County Limerick was addressed.

94. As referred to earlier, the Inspector's report (internal page 23), for example, under the sub-heading 12. Organic Fertiliser, 12.1 Poultry Litter (Organic Fertiliser) *inter alia* states:

*“[a]s outlined above, poultry litter will be sent for use in the mushroom compost production industry and may also be sent for land-spreading. It is important to note that the IE licence relates to the site of the activity for which the licence application is made and does not extend to the lands on which organic fertiliser may be used as fertiliser. The Nitrates Regulations specifies when organic fertiliser can be applied to land,*

*the application rates etc. And are enforced by the DAFM and Local Authorities.*

*The quantity of nitrogen and phosphorus generated by the activity is 18,000kg/N and 6,750kg/P based on figures available in the Nitrates Regulations (Annual nutrient excretion rates for livestock). Aside from potential pollution and nuisance, which are negative in nature, the application of organic fertiliser to land as fertiliser is a positive effect of the development. The RD provides that organic fertiliser may be sent offsite for use as fertiliser by farmers in accordance with the Nitrates Regulations. The RD requires that records of organic fertiliser that is sent offsite for use on land are maintained in accordance with the requirements of the Nitrates Regulations. Records of organic fertiliser that is sent for compost production must also be maintained.*

*The Animal By-Product Regulations impose legal requirements on the licensee, the 'commercial hauler' (registered by DAFM) that is used to transport the organic fertiliser and the user of the organic fertiliser. These requirements include use of a 'commercial document' to record the consignor (licensee/poultry farmer), the consignee (customer farmer/mushroom compost facility operator receiving the organic fertiliser), the carrier (haulier), means of transport, the quantity the date of dispatch. The consignor is required to receive a completed copy of the 'commercial document' from the consignee confirming its final destination. There is no land-spreading of organic fertiliser conducted*

*and/or permitted within the installation boundary so nuisance from land-spreading or direct impacts, on soil, water and groundwater quality and habitats in the immediate vicinity of the installation and consequential indirect effects on flora and fauna and their habitats will not occur. Therefore, while impacts could occur on or near the spread-lands (nuisance, pollution of water/groundwater/soil, impacts on flora and fauna) these would be indirect effects of the activity only. I consider that the transport and use of organic fertiliser as fertiliser in accordance with the Nitrates Regulations and Animal By-Product Regulations will not cause environmental pollution. I am satisfied that there will be no adverse significant effects on the environment from land-spreading which is subject to the controls of the Nitrates Regulations Or from the handling onsite of organic fertiliser (poultry litter) from the activity or from its use in compost production.”*

95. The Licence did not regulate the future use *off-site* of the poultry litter or wash water as an animal by-product, as waste or as a fertiliser and does not, for example, address, authorise or regulate (a) the possession (b) transport (c) handling (d) use or (e) disposal of poultry litter and wash water.

96. Waste is defined in the Licence as “... *any substance or object which the holder discards or intends or is required to discard ...*”, (which reflects the definition in the Waste Directive).

97. Condition 8 ('Materials handling') envisages, for example, that the poultry litter *may* be disposed of as a by-product through land spreading or as a by-product through use in mushroom composting, or, alternatively, as waste. It is neutral as to whether the chicken litter *is* a waste or a by-product but does provide, in terms of record-keeping, movement, *etc.*, arising from the licensable poultry rearing activity *in the installation*.
98. By way of further example, condition 8.1 of the Licence provides that “[t]he licensee shall ensure that waste generated in the carrying on of the activity shall be prepared for re-use, recycling or recovery or, when that is not technically or economically possible, disposed of in a manner which will prevent or minimise any impact on the environment”; Condition 8.2 provides that “[a]ll waste that is not reused on site shall be sent off-site to an authorised facility for disposal or recovery or reuse”; Condition 8.3 provides that “[w]aste sent off-site for recovery or disposal shall be transported only by an authorised waste contractor or an exempted person (Waste Management (Collection Permit) Regulations 2007 as amended. The waste shall be transported from the site of the activity to the site of recovery/disposal only in a manner which will not adversely affect the environment and in accordance with the appropriate National and European legislation and protocols”; Sub-condition 8.3.1 (which does not apply to poultry litter) provides that “animal tissue or carcasses sent off site for disposal/recovery shall be transported in covered, leak-proof containers”; Sub-condition 8.3.2: provides that “[w]aste sent off-site for recovery or disposal shall be transferred only to an appropriate facility.”

99. Licence P1042-01 of 6<sup>th</sup> February 2019 also addresses how the poultry litter (as an organic fertiliser) and the wash water as by-products of the poultry rearing are to be regulated and treated at the installation.

100. For example, Condition 3 of Licence P1042-01 provides for the “Infrastructure and Operation” which includes addressing the wash water and the chicken litter as an organic fertiliser. Condition 3.6 of Licence P1042-01 provides that “[f]rom 1 December 2019, the wash water storage tanks shall be fitted with high level liquid indicators.” Condition 3.7 of Licence P1042-01 provides that “[t]he licensee shall provide a minimum of 26 weeks storage of organic fertiliser on-site or have a contract providing exclusive access to adequate alternative storage capacity located outside the installation, have a contract for the transfer of organic fertiliser to a treatment facility for livestock organic fertiliser, or have a contract for the transfer of the organic fertiliser to a person registered under and in accordance with the European Communities (Transmissible Spongiform Encephalopathies and Animal By-products) Regulations 2008 S.I. 252 of 2008 to undertake the transport of organic fertiliser.”

101. Similarly, condition 6 of Licence P1042-01 addresses control and monitoring with, for example, condition 6.8 providing that “[t]he licensee shall inspect the integrity of the floors of all deep litter houses after each wash down and shall undertake remedial actions to repair any damaged or cracked floors as necessary. The licensee shall maintain a record of all inspections and remedial actions taken.” Condition 6.9 of Licence P1042-01 provides that “[t]he licensee shall, within six months of the date of grant of licence, repair damaged concrete yards over which wash water may be directed or organic fertiliser may be moved. The licensee shall carry out measures to ensure that

*the ingress of storm/flood water from adjoining lands does not generate excess soiled water or cause the release of polluting matter to ground, groundwater or surface waters.”*<sup>41</sup> In some instances Licence P1042-01 uses the terms organic fertiliser and poultry litter synonymously. Condition 8.8 of Licence P1042-01 provides that “[o]rganic fertiliser (poultry litter) shall not be stored in the open pending its collection. Organic fertiliser (poultry litter) shall only be stored within the houses.”

102. While the regulation of the poultry litter/organic fertiliser at the installation contemplates its ultimate or future use, this does not mean that it regulates, authorises or assesses that ultimate or future use. It is a matter of good administration that one form of regulation understands the next possible stage in the process but that also does not mean that there is a gap or lacuna such as to warrant the court in a judicial review application intervening in the manner suggested on behalf of the Applicant.

103. The licence (including its conditions) in this case does not authorise or regulate either the use of poultry litter in mushroom compost or its land spreading and the Agency, by these conditions, is not purporting to so regulate its end use on other lands. The reference to ‘onsite’ and ‘off-site’ are important terms. For example, Condition 8.9 provides that “[o]rganic fertiliser shall not be discarded to ground while loading for shipment off site.

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<sup>41</sup> This second sentence of condition 6.9 does not relate to wash water *per se*, but rather addresses potential flooding from outside which would subsequently become contaminated when mixed with the material on the ground of the installation and become soiled water.

*Any organic fertiliser spilled during loading shall be collected and returned to storage or to the vehicle into which it was being loaded.”* Likewise, condition 8.10 (sub-conditions 8.10.1 to 8.10.4) addresses Organic Fertiliser Movements including the recording of all organic fertiliser movements off-site in an ‘organic fertiliser register’ on an annual basis which includes *inter alia* the customer farmer receiving the organic fertiliser and the submission of the completed records of the movement of organic fertiliser from the installation – referred to as ‘Record 3’ by the Department – to the Department of Agriculture, Food and the Marine in accordance with the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2017 (S.I. No. 605 of 2017) and in particular Article 23 thereof. I agree that the ‘Record 3’ forms are important irrespective of whether the end use is for mushroom composting or land spreading.

104. The Licence, therefore, anticipates and acknowledges, in a number of conditions, that a potential use of the poultry litter may include that as a fertiliser for the purposes of land spreading and thereby regulated by the Nitrates Regulations 2017.

105. Separately, the submission on behalf of the Agency (also reflected in the decision of the Agency dated 6<sup>th</sup> February 2019 and the Inspector’s report 5<sup>th</sup> December 2018) that the potential use off-site of the consequences of the intensive poultry rearing activity – namely poultry litter and wash water – may be as ‘animal by-products’, which use and regulation off-site are governed by ‘the Animal By-Products Regulations’ and may also be treated as ‘organic fertiliser’, which use and regulation off-site are governed by the ‘Nitrates Regulations’, is simply a recognition of those regulatory codes.

106. Dealing first with the Animal By-Products Regulations, the Code of Good Practice for End-Users of Poultry Litter sets out what it refers to as the legal obligations and good practice guidelines for *end-users* of poultry litter as an organic fertiliser/soil improver.

107. Accordingly, persons intending to land spread poultry litter (described as *end-users*) are obliged to comply with the requirements of the European Animal By-Products Regulations, *i.e.*, Regulation (EC) No 1069/2009 (21<sup>st</sup> October 2009) and Regulation (EU) No 142/2011 (25<sup>th</sup> February 2011) European Union (Animal By-Products) Regulations 2014 (S.I. 187 of 2014) and the European Union (Good Agricultural Practice for the Protection of Waters) Regulations 2017 (S.I. 605 of 2017) when it comes to use of poultry litter as an organic fertiliser.

108. Therefore, poultry litter and wash water which arise as a consequence of intensive poultry farming are ‘Category 2’ materials as defined under the Animal By-Products Regulations. Specifically, Article 9 of S.I. 187 of 2014 defines Category 2 material comprising a suite of animal by-products including (a) manure, non-mineralised guano and digestive tract content and Article 3 of S.I. 187 of 2014 defines manure as meaning “... *any excrement and/or urine of farmed animals other than farmed fish, with or without litter.*”

109. Article 3(1)(b) of the European Union (Animal By-Products) Regulations 2014 (S.I. No.187/2014) provides that a person shall not, unless the person is authorised, registered or approved under these Regulations, *possess, transport, handle, use or dispose of* an animal by-product comprising of Category 2 material except in accordance with Article 13 of the Council Regulation (No. 1069/2009) (21 October 2009) laying down health

rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No.1774/2002 (Animal by-products Regulation).

110. One of the conditions of the Licence, for example, is that the poultry litter will be *removed* by an authorised person under the (Animal By-Products) Regulations – in this case MJ Kehoe (as authorised persons or carriers).

111. The *removal* of the Category 2 material is therefore effected by an authorised person and its subsequent *use* must be in accordance with the uses specified in Article 13 of the (Animal By-Products) Regulations, which allows for Category 2 animal by-products to be used in composting and as a fertiliser. In this case, for example, the licence provides that the category 2 material, as an animal by-product, *can* be removed and moved under Article 13 for composting to Custom Compost in Wexford in accordance with Article 13 of Council Regulation (No. 1069/2009) or for use as a fertiliser.

112. Article 13 of Council Regulation (No. 1069/2009) provides for the *disposal and use* of poultry litter and wash water, as Category 2 material (as animal by-product) *as waste by incineration or co-incineration, for the manufacturing of organic fertilisers or soil improvers, composted* or transformed into biogas, subject to certain requirements applied to land without processing, used as a fuel for combustion with or without prior processing.

113. Turning to the Nitrates Directive<sup>42</sup>, since 1991 this directive has sought to protect water quality from pollution by agricultural sources and to promote the use of good farming practice. The State’s Nitrates Action Programme is designed to prevent pollution of surface waters and ground water from agricultural sources and to protect and improve water quality. The “Nitrates Regulations” or “the GAP Regulations” comprise the European Union (Good Agricultural Practice for Protection of Waters) Regulations<sup>43</sup> and give legal effect to Ireland’s Nitrates Action Programme.

114. The European Union (Good Agricultural Practice for Protection of Waters) Regulations 2017 (S.I. No. 605/2017) (“the Nitrates Regulations 2017”) give effect to Ireland’s Fourth Nitrates Action Programme.

115. Insofar as the issues in these proceedings are concerned, the Nitrates Regulation 2017 provide statutory definition for good agricultural practice to protect waters against pollution from agricultural sources and set out, for example, when, where and how *land spreading* can occur and be monitored. There is a general duty<sup>44</sup>, for example, on an

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<sup>42</sup> Directive 91/676/EEC

<sup>43</sup> See S.I. No. 605/2017 - European Union (Good Agricultural Practice for Protection of Waters) Regulations 2017 and S.I. No. 65/2018 - European Union (Good Agricultural Practice for Protection of Waters)(Amendment) Regulations 2018. The most recent Regulations are: S.I. No. 62/2023 - EU (Good Agricultural Practice for Protection of Waters)(Amendment) Regulations 2023; S.I. No. 716/2022 - European Union (Good Agricultural Practice for Protection of Waters) (Amendment)(No. 2) Regulations 2022; S.I. No. 393/2022 -European Union (Good Agricultural Practice for Protection of Waters)(Amendment) Regulations 2022; S.I. No. 113/2022 European Union (Good Agricultural Practice for Protection of Waters) Regulations 2022; S.I. No. 749/2021 European Union (Good Agricultural Practice for Protection of Waters) (Amendment) Regulations 2021

<sup>44</sup> Part 5, Articles 22 to 26, “General” in S.I. No. 605/2017.

occupier of a “holding” (in most instances this will be a farmer) to ensure compliance with the Nitrates Regulations 2017 and with any ministerial advice or guidelines or advice or guidelines from the Agency. The Nitrates Regulations 2017 define “holding” as meaning an agricultural production unit and, in relation to an occupier, means all the agricultural production units managed by that occupier.

116. The Nitrates Regulations 2017 provides for the detailed use – including the spreading on land outside of an installation – of organic fertilisers which includes poultry litter and wash water.

117. Article 4 of the Nitrates Regulations 2017 defines “organic fertiliser” as meaning any fertiliser other than that manufactured by an industrial process and includes *livestock manure*, dung-stead manure, farmyard manure, slurry, soiled water, silage effluent, spent mushroom compost, non-farm organic substances such as sewage sludge, industrial by-products and sludges and residues from fish farms.

118. “Livestock” means all animals kept for use or profit (including cattle, horses, pigs, poultry, sheep and any creature kept for the production of food, wool, skins or fur). “Livestock manure” is defined as meaning waste products excreted by livestock or a mixture of litter and waste products excreted by livestock, even in processed form. Poultry litter is, therefore, an organic fertiliser regulated by the Nitrates Regulations 2017.

119. As mentioned, Article 4 of the Nitrates Regulations 2017 states that soiled water has the meaning assigned by Article 4(2) which in turn provides per Article 4(2)(a) that

“soiled water” includes water from concreted areas, hard standing areas, holding areas for livestock and other farmyard areas where such water is contaminated by contact with any of the following substances (i) livestock faeces or urine or silage effluent (ii) chemical fertilisers, (iii) washings such as vegetable washings, milking parlour washings or washings from mushroom houses, (iv) water used in washing farm equipment.

120. Wash water or soiled water is also addressed in the Nitrates Regulations 2017 under Part 2, Articles 5-14 dealing generally with farm management, as well as under Part 4, Article 18 (setting out requirements as to the manner of application of fertilisers, soiled water) and providing generally for the prevention of water pollution from fertilisers and certain activities.

121. Article 11(1) of the Nitrates Regulations 2017 addresses, for example, the capacity of storage facilities for poultry manure and provides that “[w]ithout prejudice to the generality of Article 8<sup>45</sup>, the capacity of facilities for the storage on a holding of livestock manure produced by poultry shall, subject to sub-article (2) and Article 14, equal or exceed the capacity required to store all such livestock manure produced on the holding during a period of 26 weeks.”

122. Part 3 of the Nitrates Regulations 2017 deals with Nutrient Management and addresses, for example in Article 1 and Schedule 2 the amount of nitrogen or phosphorus depending on the fertiliser used, such as poultry litter.

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<sup>45</sup> Article 8 of the Nitrates Regulations of S.I. No.605/2017 provides for “general obligations as to capacity of storage facilities.”

123. In terms of the matters at issue in this case, Part 4 of the Nitrates Regulations 2017 (S.I. No. 605/2017) deals with the ‘Prevention of Water Pollution from Fertilisers and certain activities’. Within Part 4, Article 17 provides for the distance, for example, that chemical fertilisers and organic fertilisers can be used from water bodies. Article 18 deals with land spreading and sets out the requirements as to the manner of the application of *fertilisers, soiled water*, and so on. Article 18(1), for example, provides that “... *livestock manure, other organic fertilisers, effluents, soiled water and chemical fertilisers shall be applied to land in as accurate and uniform a manner as is practically possible.*” Article 18(2) of the Nitrates Regulations 2017 provides that *organic and chemical fertilisers or soiled water* shall not be applied to land in any of the following circumstances: (a) the land is waterlogged; (b) the land is flooded or likely to flood; (c) the land is snow-covered or frozen (d) heavy rain is forecast within 48 hours, or (e) the ground slopes steeply and there is a risk of water pollution having regard to factors such as surface runoff pathways, the presence of land drains, the absence of hedgerows to mitigate surface flow, soil condition and ground cover.

124. Article 18(4) also provides, for example, that *organic fertilisers or soiled water* shall not be applied to land (a) by use of an umbilical system with an upward-facing splash plate (b) by use of a tanker with an upward-facing splash plate, (c) by use of a sludge irrigator mounted on a tanker, or (d) from a road or passageway adjacent to the land irrespective of whether or not the road or passageway is within or outside the curtilage of the holding.

125. Article 20(1) of S.I. 605/2017 provides that the amount of livestock manure applied in any year to land on a holding, together with that deposited to land by livestock, shall not

exceed an amount containing *170kg of nitrogen per hectare*.<sup>46</sup> The Nitrates Regulations make it possible for the Department of Agriculture, Food and the Marine<sup>47</sup> to know and take account of the additional input of nitrogen and phosphorous from the activity, with a view to ensuring there is no downstream environmental pollution.

126. For completeness, given that the matter was raised by the Applicant, I agree that section 3 of the EPA Act 1992 (Interpretation) defines “emission” as meaning in relation to an activity referred to in Part IV of the 1992 Act, *any direct or indirect release of substances, heat or noise from individual or diffuse sources in the activity into the atmosphere, water or land, and includes*:<sup>48</sup>

(a) *“an emission into the atmosphere of a pollutant within the meaning of the Air Pollution Act, 1987,*

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<sup>46</sup> Article 20(1) of S.I. 605/2017 also provides that where imported livestock manure is to be applied to the land on the holding, calculations shall be based on the previous calendar year’s stocking rate. According to the Government’s website, it appears that in 2022, Ireland was granted a derogation to allow intensive farmers a higher stocking rate of livestock manure, subject to them complying with strict rules that are overseen by the Department of Agriculture, Food and the Marine. The derogation increases the application limit of 170kg/ha of livestock manure to 250kg/ha each year. It is stated on the website that the current derogation will run to the end of 2025, when the fifth programme concludes and that an interim review will include an assessment of water quality and if this water quality assessment indicates average water quality above a threshold of 50 mg/l NO<sub>3</sub>, or increasing trends, or eutrophic water bodies or water bodies that could become eutrophic, the derogation application limit of 250kg/ha will be reduced to 220kg/ha in farms in these catchment areas from 2024.

<sup>47</sup> Also referred to in this judgment as “the DAFM”.

<sup>48</sup> The definition adds *“but does not include a radioactive substance within the meaning of Council Directive 96/29/Euratom, a genetically modified micro-organism within the meaning of Council Directive 90/219/EEC or a genetically modified organism within the meaning of Directive 2001/18/EC of the European Parliament and of the Council.”*

- (b) *a discharge of polluting matter, sewage effluent or trade effluent within the meaning of the Local Government (Water Pollution) Act, 1977, to waters or sewers within the meaning of that Act,*
- (c) ***the disposal of waste,***<sup>49</sup> *or*
- (d) *noise”.*

127. Section 86(1)(a)(iii) of the EPA Act 1992 provides that without prejudice to the generality of section 83(1), conditions attached to a licence or revised licence granted under Part IV (*i.e.*, Integrated Pollution Control) *shall* if necessary, and in all cases where the licence or revised licence relates to an industrial emissions directive activity, specify requirements concerning protection of the soil and groundwater, and *the management of waste generated by an activity.*

128. Section 86(1)(b)(iv) of the EPA Act 1992 provides that without prejudice to the generality of section 83(1), conditions attached to a licence or revised licence granted under Part IV (*i.e.*, Integrated Pollution Control) may (to the extent that the matter is not provided for by a condition under paragraph (a)) specify the concentration of an environmental pollutant in an environmental medium or a deposition or discharge rate which shall not be exceeded.

129. Section 86(1)(b)(xi) of the EPA Act 1992 provides that without prejudice to the generality of section 83(1), conditions attached to a licence or revised licence granted under Part IV (*i.e.*, Integrated Pollution Control) *may* (to the extent that the matter is not provided for by a condition under paragraph (a)), *specify requirements in relation to the*

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<sup>49</sup> Emphasis added.

*recovery or disposal of waste* arising from the activity on land other than land on which the installation is situated and whether in the ownership or occupation of the licensee or not (including requirements with respect to the furnishing of information to the Agency in relation to the land for the time being used, or land proposed to be used, for the purpose of such recovery or disposal).

130. Annex II of the Industrial Emissions Directive refers to the “[*l*]ist of polluting substances” and the item at number 2 under the heading AIR refers to “[*o*]xides of nitrogen and other nitrogen compounds” and the item at number 11 under the heading WATER refers to “[*s*]ubstances which contribute to eutrophication (in particular, nitrates and phosphates)”.<sup>50</sup>

131. While I agree with Mr. Devlin SC that nitrates and phosphates are a substance for the purpose of the Industrial Emissions Directive, (as referred to earlier) the Inspector’s report (internal page 23) under the sub-heading 12. Organic Fertiliser, 12.1 Poultry Litter (Organic Fertiliser) acknowledges that “... *the quantity of nitrogen and phosphorus generated by the activity is 18,000kg/N and 6,750kg/P based on figures available in the Nitrates Regulations (Annual nutrient excretion rates for livestock) ...*”, and adds that ‘the Nitrates Regulations’ make it possible for the Department of Agriculture, Food and the Marine<sup>51</sup> to know and take account of the additional input of nitrogen and phosphorous from the activity, with a view to ensuring there is no downstream environmental pollution. The Inspector considered in her report that the regulatory

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<sup>50</sup> Similarly, Annex VIII of the Water Framework directive sets out an “Indicative List of the Main Pollutants” and item 11 refers to “[*s*]ubstances which contribute to eutrophication (in particular, nitrates and phosphates).”

<sup>51</sup> Also referred to as “DAFM”.

systems in place will ensure that cumulative impacts as a result of the use of organic fertiliser on land from the activity will not have a significant effect on any European sites.

132. While, in terms of options, the inspector states that the poultry litter *will* be sent for use in the mushroom compost production industry *and may also* be sent for land spreading, I have found, in relation to the jurisdictional question which arises in this application for judicial review, that the Licence related to the site of the activity for which the licence application was made – the scheduled and licensed activity, pursuant to the EPA Act 1992, of the intensive poultry rearing of 74,000 broiler chickens located in an installation located at Rathcahill West, Templeglantine, Newcastle West, County Limerick – and did not extend to the lands on which organic fertiliser *may* be used as fertiliser adding that “... *the Nitrates Regulations specifies when organic fertiliser can be applied to land, the application rates etc. And are enforced by the DAFM and Local Authorities.*”

133. In assessing whether or not the Agency acted within or out with its jurisdiction in this case, the central context and circumstance is that which relates to the scheduled and licensed activity of intensive poultry rearing of 74,000 broiler chickens located in an installation located at Rathcahill West, Templeglantine, Newcastle West, County Limerick and not that which concerned the CJEU in a number of decisions, including *Commission v Spain* (C-121/03) ECLI:EU:C:2005:512; 2005 I-07569 and *Brady v EPA* (Case C-113/12) ECLI:EU:C:2013:627, which held that where the context and circumstance arise it is for the national courts to determine, taking account of all the relevant circumstances obtaining in the situations before them, to determine whether or not slurry meets the following criteria: (i) the producer intends to market the slurry on

terms economically advantageous to himself in a subsequent process, (ii) such reuse is not a mere possibility but a certainty, without any further processing prior to reuse and as part of the continuing process of production.

134. Fourth, similar to the point made in relation to waste, it is contended on behalf of the Applicant that if the Agency do not know the location of the ‘spread lands’, it follows that it cannot know if there will be a deterioration of a water body.

135. As indicated earlier in the judgment, the question of the manner in which the Agency interpreted its jurisdiction in this case is directly related to the scheduled activity applied for prescribed by the provisions of the EPA Act 1992 and subsequently licensed, namely the intensive rearing of poultry in an installation located at Rathcahill West, Templeglantine, Newcastle West, County Limerick which capacity comprised 74,000 broilers and not the future land spreading of poultry litter or wash water on other lands or its possible treatment as waste, as contend for on behalf of the Applicant.

136. While both the Applicant and the Agency rely on observations made by the Supreme Court (Hogan J.) in *An Taisce – National Trust for Ireland v An Bord Pleanála* [2022] IESC 8; [2022] I.R. 173, the relevant aspect of the judgment of Hogan J. to the facts of this case is the court’s distinction between the required assessment (AA and EIA) carried out in the context of the construction and operation of the cheese factory and the unnecessary requirement to do likewise in respect of the milk-production in the Glanbia farms and the other approximate other unknown farms estimated at 4,500 in number.

137. In the circumstances I find that by the manner in which it made its decision on 6<sup>th</sup> February 2019 the Agency correctly defined the ambit of its statutory and regulatory power and jurisdiction under the EPA Act 1992, including section 83(1) and sections 83 to 86 thereof, when granting an Industrial Emissions Licence to Michael Noel O'Connor to carry on the following activity – 6.1 - The rearing of poultry in an installation where the capacity exceeds 40,000 places (in this case 74,000 broilers) at the installation located at Rathcahill West, Templeglantine, Newcastle West, County Limerick.

138. I, therefore, refuse the Applicant the reliefs sought in this application for judicial review.

139. In addition, I make, what are in the circumstances, the following *obiter* observations.

140. First, in addition to seeking an order of *certiorari* the Applicant sought what was described as “related declarations” regarding the Agency’s decision of 6<sup>th</sup> February 2019 to grant Licence P1042-01 to Mr. O'Connor. In terms of pleading judicial review applications, prior to the changes brought about by a number of Practice Directions in, for example, the Planning and Environment List, I agree with Mr. Devlin SC that often the declarations sought (as in this case) are really an indication of what the issues are in a case, rather than the seeking of formal reliefs.

141. Second, it was pointed out in the context of the “related declarations” sought in this case, that the Applicant’s concern was not this particular poultry farm but rather *the approach* of the Agency to this issue *in general* and how the Agency regulates or how

it approaches its role in the land spreading of chicken manure (poultry litter) and wash water.

142. It is not the function of the court, however, on an application for judicial review to give what could amount to an advisory opinion on the approach of a decision making body *generally* or further to do so in the absence of a particular context. This well-settled principle was reaffirmed by the Supreme Court in the judgment of O'Donnell C.J. in *Odum v Minister for Justice & Equality* [2023] IESC 3.<sup>52</sup> In the case before me, for example, I have held that by the manner in which it made its decision on 6<sup>th</sup> February 2019 the Agency correctly defined the ambit of its statutory and regulatory power and jurisdiction under the EPA Act 1992, including section 83(1) and sections 83 to 86 thereof, when granting an Industrial Emissions Licence to Michael Noel O'Connor to carry on the following activity – 6.1 - The rearing of poultry in an installation where the capacity exceeds 40,000 places (in this case 74,000 broilers) at the installation located at Rathcahill West, Templeglantine, Newcastle West, County Limerick. The Applicant was, in my view, incorrect to assume that – because of the fact that (i) the decision of 6<sup>th</sup> February 2019 (which includes the Inspector's Report) *envisages* that there *may be* or *can be* future land spreading of the poultry litter or wash water on lands outside of the installation, and because (ii) poultry litter and wash water can, on different occasions, be waste or not waste – the decision of 6<sup>th</sup> February 2019 was somehow an *authorisation* and *regulation of* land spreading. The Applicant's approach was mistaken in assuming that the references to the possible future alternate end-uses of the poultry litter and wash water on different lands in the decision of 6<sup>th</sup> February 2019 approximates to an

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<sup>52</sup> The Supreme Court comprised O'Donnell CJ and Charleton, Woulfe, Hogan and Murray JJ.

authorisation for that end-use or provides a basis for impugning the decision of 6<sup>th</sup> February 2019 to grant a Licence to Mr. O'Connor for the activity of intensive poultry rearing of 74,000 broiler chickens in an installation located at Newcastle West, County Limerick. Further, there is no *lacuna*, as is suggested on behalf of the Applicant, into which the Agency must act.

143. Third, the remedy of mandamus aside, the seeking of a declaration in an application by way of judicial review which sought to address generally the approach of a public body as to how it regulates or how it approaches its role without the context of a particular decision would offend other well-settled judicial review principles such as, for example, that a decision must be challenged by a person who has the requisite standing to do so; that the available remedies – *certiorari*, mandamus, prohibition or declaration (in certain circumstances damages and quo warranto) are contextual and subject to judicial discretion<sup>53</sup>; that the decision of the public body in question is required to be challenged within a prescribed time period either pursuant to the Rules of the Superior Courts, 1986 (as amended) or under legislation; that the grounds should relate to *the manner* in which *a decision* is reached i.e. its legality, rather than its *merits*; that any decision which is sought to be impugned enjoys the presumption of validity; that the challenge to the decision cannot be a proxy for a collateral challenge to another decision.<sup>54</sup>

144. Fourth, looking backwards in time, for example, the Applicant was critical of the planning authority's decision to grant planning permission in 2012. That decision was

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<sup>53</sup> *Kelly v The Minister for Agriculture & Others* [2021] IESC 23 (substantive judicial review); [2021] IESC 28 (remedy); [2021] IESC 70 (costs).

<sup>54</sup> *Sweetman v An Bord Pleanála* [2018] IESC 1; [2018] 2 I.R. 250.

not challenged and in fairness to the Applicant it was correctly accepted, on his behalf, that any such decision could not now be the subject of a collateral challenge in this application for judicial review. This is perhaps not surprising, in the circumstances, as the leading authority on the question of collateral challenge arose in the decision of the Supreme Court in *Sweetman v An Bord Pleanála* [2018] IESC 1; [2018] 2 I.R. 250 and where Mr. Sweetman was successful before the High Court, Court of Appeal and Supreme Court on the question of what amounted to a collateral challenge.

145. Similarly, looking forward, it is at least open to question whether the Applicant's concerns may in reality be against the Competent Authority under the Nitrates Regulations, namely the Minister for Agriculture, Food and the Marine. Poultry litter and wash water are, for example, categorised as Category 2 Animal By-Product material within Articles 3 and 9 of the EU Animal By-Product Regulations 1069/2009 and the spreading of fertilisers on land comes within the scope of the Nitrates Directive 91/676/EEC and the Nitrates Regulations.

146. Finally, as mentioned at the beginning of the judgment these proceedings date back to 2019 and, as accepted by the parties, relied on an older format of pleading and presentation which applied prior to the more recent Practice Directions. On the first day of the hearing, Mr. Devlin SC carefully and helpfully delineated the remaining 'live grounds' and reliefs sought from a total of 74 grounds (including at least 5 which were initially against the State) which involved a number of Directives and Regulations in addition to the EPA Act 1992 and pointed which grounds were no longer being pursued. As mentioned, this was a helpful exercise and if parties consider using it as a template for future similar cases, which may not be covered by the recent Practice Directions,

consideration might be given to agreeing this approach earlier in a case and prior to the fixing of a hearing date. In this application for judicial review, arising from the assistance of both counsel, this case was completed within the 3 days allocated to it.

## **PROPOSED ORDERS**

147. In the circumstances, I am satisfied that the Agency, when considering the application which was made to it from Mr. O'Connor, correctly defined the ambit of its statutory and regulatory power in the EPA Act 1992, including sections 83 to 86, as applying to the site of the activity for which the licence application was made, *i.e.*, the intensive rearing of poultry within the installation boundary located at Newcastle West, County Limerick and that this did not extend to the authorisation of the possible end use of the poultry litter or wash water generated from the intensive poultry rearing as organic fertiliser or as waste on lands outside of the installation.

148. I, therefore, refuse the Applicant the reliefs claimed in this application for judicial review.

149. I will list the matter for **Tuesday, 6<sup>th</sup> February 2024 at 10.30 am** for the purpose of making a final order and to deal with any ancillary and consequential matters that arise.