



Submission

Submitter:	Mr Sabrina Joyce-Kemper
Submission Title:	SJK Objection Dairygold Mogeely Licence
Submission Reference No.:	S005959
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Application

Applicant:	Dairygold Co-Operative Society Ltd and TINE Ireland Ltd
Reg. No.:	P1103-01

See below for Submission details.

Attachments are displayed on the following page(s).

Sabrina Joyce-Kemper Submission
23/01/2020

Licence application ref: P1103-01 – Dairygold Mogeely

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I wish to object to the granting of this licence for the following reasons:

1. The NIS screens out the following Protected sites, without giving sufficient reasons to do so. There is no scientific evidence put forward to prove that the 5 sites are not interdependent with Cork Harbour SPA or Great Channel Island SAC. They are all part of the Natura Network for that area and if Seabirds who are mobile and utilise one or more sites for foraging rely on a combination of sites for their roosting or foraging then the Network of sites are functionally linked and should be assessed as such under the precautionary Principle.

Ballycotton Bay SAC
Blackwater River (Cork/Waterford) SAC
Blackwater Estuary SPA
Ballymacoda Bay SPA
Ballymacoda (Clonpriest & Pillmore) SAC

2. The NIS finds no impacts on the Cork Harbour SAC. However waterfowl forage in mudflats at low tide. If mudflats at foraging sites are subject to contamination via persistent FOG pollution via inundation and deposits of pollutants, then there will be a corresponding impact on the protected waterfowl as the SAC and SPA are interdependent.

3. The Modelling that was undertaken was 2D modelling this should have been 3D modelling, particularly in light of the sediment build-up in the immediate area of the outfall and the enclosed and shallow nature of the Transitional waters. The simulations cannot be considered accurate without 3d modelling. Under the precautionary principle the licence should not be granted as it is impossible to ascertain the true impact of the discharge on the harbours surface waters and sediments.

4. In the NIS chapter 6 Table 11 Conservation Objectives for CORK HARBOUR SPA repeatedly states in rationale; *“The latest water quality information on the North Channel Great Island waterbody from the EPA indicates that it has ‘good’ ecological status. The addition of the proposed Dairygold, Mogeely treated effluent, to the discharge, would have a negligible impact on the quality of the receiving water body. The hydrodynamic model shows that the Dairygold wwtp discharges in combination with the future Middleton and IDL discharges would not change the current “good” status classification of the waterbody under the regulations.”* They incorrectly assess impacts in relation to whether or not the status would deviate from the “good” status classification of the waterbody. However the EPA cannot base their appropriate assessment on whether the class is downgraded. Under the “Wesser” Judgment Case C461/13 it is whether the water quality is degraded as a result of the licensed activity that must be assessed and if so the licence must be refused.

The impact of the Wesser judgment is explained well by Tiina Paloniitty, The Weser Case: Case C-461/13 *BUND V GERMANY, Journal of Environmental Law*, Volume 28, Issue 1, March 2016, Pages 151–158, <https://doi.org/10.1093/jel/eqv032> an excerpt of which states as follows:

In the Court’s understanding, the Directive consists of two water quality obligations binding on Member States, which are separate but intrinsically linked: the *obligation to prevent deterioration* (‘the non-deterioration principle’) and the *obligation to enhance* (the duty to achieve and maintain good water quality status).¹⁷ In the *Weser* case, they examined both these obligations together in relation to projects that might undermine their attainment.

In particular, the Court examined the normative influence of the WFD's good status objectives in Article 4(1)(a)(i)-(iii): must the objectives there set out be interpreted to mean that permits must not be granted to undertakings that are in contradiction with them? Such an interpretation would mean favouring an *objective of result* interpretation of the Directive's water status objectives. It would mean that no project ought to be allowed to impede the acquisition or maintenance of good surface water status, or to cause deterioration of water status, if no exemption has been granted under Article 4(7).¹⁸

The Court ruled in favour of this interpretation. It took a strong and clear stance in favour of the normativity of the water status objectives in Article 4, rejecting interpretations that the Directive is a mere policy instrument or that the obligations are binding only as to the Member States' best effort. Accordingly, Member States are obliged to refuse authorisation for a project that might adversely affect the attainment or maintenance of the good surface water status objective, or cause deterioration of water status, providing that no exemption has been granted. The Court further clarified that the obligation covers all types of surface waters: since the main proceedings included both natural and artificial water bodies, the Court could determine this issue.¹⁹ The Court also held that the obligation remains at all stages of the Directive's implementation and is irrespective of any negligence on the Member State's part in failing to compile programmes of measures, including the means to reach the good status objectives.²⁰

The Court's reasoning had three dimensions.²¹ First, it referred to the drafting procedure during which the European Parliament actively opposed the view according to which deterioration in and above good status class would be allowed, dismissing the Commission's stance on the issue.²² Second, the Court referred to the Directive itself, citing numerous articles and an extensive Annex on how the attainment and sustainment of the Directive's status objectives could be secured.²³ Third, the Court paid due attention to the saying 'the exception proves the rule'. Since the derogation clauses in Article 4(7) are extensive—and applicable only if all the appropriate steps are taken to mitigate detrimental effects—this provides evidence that there must have been a rule from which an exemption could be granted in the first place.²⁴ The Court also depended on structural argumentation, finding that the categorisation of the derogation clauses implied that the Article 4(1)(a) status objectives are not to be applied merely in relation to development planning but also to individual projects.²⁵ The stance is a natural continuum of the earlier case law ruling that the WFD may be engaged by individual projects, at least ones that have a significant impact on water quality.²⁶

Thus the Court ruled that the obligation to enhance (the obligation to achieve and maintain good status) and the obligation to prevent non-deterioration are binding requirements laid down by the EU legislature.²⁷ The Court also elaborated the precise meaning of the non-deterioration principle in the second part of its judgment.

5. Dual assessment with An Bord Pleanla was not carried out on this application as is required under sections 43 and 44 of Waste Water Discharge Regulations, The memorandum of understanding Between the Board and the Agency and pursuant to judgement of Case C50/09 EU Commission Pilot Complaint 8542/16 and subsequent statutory instrument, S.I. No. 652 of 2016 which amends Waste Water Discharge (Authorisation) Regulations 2007 (No. 684 of 2007). As the IPPC Licence relates to a waste water discharge to a waterbody this should have taken place and as such I do not believe the Board should have granted planning permission without The EPA's participation.

The EPA have been down this legal road before and so are aware that an Environmental Impact Assessment and an Appropriate Assessment must take place before development consent is given as per Article 2(1) of Directive 85/337. The EPA are therefore fully aware that *this entails that the examination of a project's direct and indirect effects on the factors referred to in Article 3 of that directive and on the interaction between those factors be fully carried out before consent is given.* By failing to ensure that, where An Bord Pleanala and the Environmental Protection Agency both have decision-making powers concerning a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of Directive 85/337, as amended by Directive 2003/35, both The Board and The Agency have acted unlawfully in relation to not carrying out a dual assessment of this project and in doing so have not examined direct and indirect and interactions of public and private projects on the

environment. In granting consent without consultation from the EPA the Board acted ultra vires. In this context the EPA now must ensure that they carry out a comprehensive and robust Appropriate Assessment and Environmental Impact Assessment on this project before issuing the Licence. This requires that they give appropriate reasons and considerations for their decision that is supported by scientific evidence for making that decision. The applicant has not provided comprehensive reports in terms of the NIS and EIAR and has failed to carry out 3D modelling of the outfall and to provide the surveys that informed the calibration of the 2D modelling. Therefore this application has lacunae and must be refused as per legal precedence judgment of 21 July 2016, Orleans and Others, C-387/15 and C-388/15, EU:C:2016:583, paragraph 50 and the case-law cited *“assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned.”*

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Sabrina Joyce-Kemper