



Neutral Citation Number: [2015] EWHC 3578 (Admin)

Case No: CO/1140/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT IN WALES

The Court House
Llanberis Road
Caernarfon
Gwynedd
LL55 2DF

Date: 17/12/15

Before :

MR JUSTICE HICKINBOTTOM

Between :

**The Queen on the application of
SEIONT, GWYRFAI AND LLYFNI
ANGLERS' SOCIETY**

Claimant

- and -

NATURAL RESOURCES WALES

Defendant

- and -

**(1) DŴR CYMRU CYFYNGEDIG
trading as DŴR CYMRU WELSH WATER
(2) FIRST HYDRO COMPANY LIMITED
(3) THE WELSH MINISTERS**

**Interested
Parties**

David Wolfe QC (instructed by Fish Legal) for the Claimant
David Forsdick QC and Gwion Lewis (instructed by Bircham Dyson Bell LLP)
for the Defendant
Richard Kimblin (instructed by Aaron & Partners LLP) for the First Interested Party
The Second Interested Party did not appear and was not represented
Richard Gordon QC and Tom Cross (instructed by Legal Services Department,
Welsh Government)

Hearing dates: 24-25 November 2015
Further written submissions: 2-5 December 2015

Approved Judgment

Mr Justice Hickinbottom:

Introduction

1. This claim raises the important issue of whether, for the purposes of the Environmental Liability Directive (EU Directive 2004/35/EC), “environmental damage” includes the prevention or deceleration of recovery from an existing, already-damaged environmental state; or whether it is restricted to a deterioration from an existing state.
2. The Seiont, Gwyrfai and Llyfni Anglers’ Society (“the Claimant”) is an unincorporated association which holds fishing rights in respect of Llyn Padarn, Gwynedd. In this claim, it seeks to challenge the decision of Natural Resources Wales (formerly the Environmental Agency Wales) (“NRW”) dated 12 December 2014 on the Claimant’s notification to it that environmental damage had been caused by discharges into Llyn Padarn from the Llanberis Sewage and Waste Water Treatment Works (“Llanberis STW”) operated by the First Interested Party (“Dŵr Cymru”) (“the 2014 decision document”). NRW determined that, save for an algal bloom in 2009 which resulted in a drop in the ecological status of the water in Llyn Padarn, no other environmental damage had occurred or was imminent as a result of such discharges. The Claimant contends that NRW made that determination on the basis of an incorrect interpretation of “environmental damage”; and, if the correct legal approach had been adopted, NRW’s conclusions as to damage (and, thus, the remedial measures it required Dŵr Cymru to make) would, or may, have been different.
3. On 1 May 2015, Patterson J directed that the application for permission to proceed be listed for oral hearing and, if permission be granted, the substantive hearing should follow immediately. This is the reserved judgment from that rolled-up hearing.
4. At the hearing, David Wolfe QC appeared for the Claimant; David Forsdick QC and Gwion Lewis for the NRW; Richard Kimblin for Dŵr Cymru; and Richard Gordon QC and Tom Cross for the Third Interested Party, the Welsh Ministers. At the outset, I thank each for his contribution.

The Factual Background

5. Llyn Padarn is a freshwater lake situated in Snowdonia, formed by glacially-derived moraine which acts as a dam at its downstream (north-western) end. The village of Llanberis is on its south-west shore. Whilst Llyn Padarn is a natural lake, its boundaries have been modified, notably by the construction of (now disused) railway lines along its two long shores. It is 116.7 hectares in area, 3.2 kilometres in length and has an average depth of 14.2 metres, with a deepest point of 29 metres. The outflow is via the Afon Rhythallt which becomes the Afon Seiont at its confluence with the Afon Caledffrwd. The Afon Seiont discharges into the Menai Straits at Caernarfon.
6. The lake was historically fed from its south-east end by a smaller lake, Llyn Peris, via the Afon y Bala. Nant Peris fed Llyn Peris. However, in about 1980, Llyn Peris became the lower reservoir for the new Dinowric Pumped Storage Hydro-Electric Power Station Scheme, and a 2.2 kilometre tunnel was constructed to take

the flow of water from Nant Peris, by-passing Llyn Peris (which has thus become isolated from the natural river system) and rejoining the watercourse at the Afon y Bala. A dam was built at the north-west end of Llyn Peris which, save for releases of excess water from time-to-time, effectively broke the historic natural watercourse link between the two lakes.

7. Llyn Padarn is the home of a genetically distinct – and thus unique – population of the fish *Salvelinus alpinus*, known as Arctic charr or torgoch. Charr live in deep (>10 metres) cold (generally <15°C) lakes. They are widely distributed and relatively abundant across the northern hemisphere as both anadromous and landlocked populations – although populations in the United Kingdom have generally declined since 1990, with climate change regarded as a significant factor. Landlocked populations have been present in North Wales, where they are at the southernmost limit of their natural range, since the end of the last ice age, 10,000 years ago. Llyn Padarn holds one of the three remaining native populations, each of which is genetically distinct. Populations of charr exist in other North Wales lakes as a result of stocking and relocation of historic populations.
8. Huw Price Hughes is the Secretary of the Claimant society, a post he has held for over 35 years. Members of the society are required to make catch returns. As exhibit HPH2 to Mr Hughes' statement of 7 March 2014, he sets out a schedule of the annual charr catch from Llyn Padarn, which shows a dramatic reduction from 600 in 1997 to 171 in 2001, 79 in 2006, 26 in 2007 and 6 in 2008. Other than 13 in 2010, no charr have been caught in Llyn Padarn since 2008 and, indeed, there is currently no fishing for charr in the lake. There is no reason to doubt those figures as representing the approximate annual catch, or that they reflect a dramatic decline in the Llyn Padarn charr population. The conclusion of NRW's own recent consideration of monitoring results was that, although charr remain present in Llyn Padarn, there is considerable concern over the population and the decline of the species (paragraph 1.2(a) of the NRW Monitoring Report December 2014).
9. Although climate change and over-fishing have also been implicated (see, e.g., paragraphs 153-5 of the 2014 decision document), it is generally accepted – by, amongst many others, Mr Hughes (see paragraph 30 of his 7 March 2014 statement) – that there are two primary causes of this collapse of the charr population.
 - i) Lack of spawning grounds. Historically, Llyn Padarn charr migrated upstream to spawn on the north-western littoral areas of Llyn Peris. The hydro-electric works, to which I have referred, not only damaged or destroyed particular spawning beds, they prevented any upstream migration by fish to the smaller lake. Charr have subsequently spawned on the banks of the Afon y Bala but, it seems, with significantly less success. Steps continue to be taken to improve the available spawning grounds; but, in the meantime, since 2011 a programme of restocking Llyn Padarn with fry and parr has been undertaken. That programme continues.
 - ii) High level of nutrients in the water. Charr require water that is cold, and high in dissolved oxygen (“DO”). The amount of phytoplankton in lakes is influenced by various nutrients in the water, of which phosphorous has the greatest influence on primary productivity. Phosphorous in lakes is largely

derived from sewage. High levels of nutrients from sewage can accelerate reproduction and thus increase the phytoplankton biomass – sometimes rapidly and dramatically, in the form of an algal “bloom”. As each alga is short-lived, this can give rise to a substantial amount of dead organic matter in the water, particularly in the hypolimnion, i.e. the lower depths where the water is non-circulating and thus always relatively cold even in summer months. The decomposition of this matter consumes oxygen from the water, which can reduce the DO level.

A body of water that is lacking in plant nutrients and high in levels of DO is called “oligotrophic”. When it is rich in nutrients and low in levels of oxygen, it is called “eutrophic”. Whilst naturally oligotrophic, it is thought that Llyn Padarn became eutrophic many years ago, because of the discharges of sewage into the lake; and the charr population has suffered as a result.

10. The history and mechanics of sewage discharges into Llyn Padarn is helpfully set out in two statements lodged on behalf of Dŵr Cymru, namely:
 - i) the statement of Nina Jones dated 26 June 2015: Ms Jones is an Environmental Policy Manager with Dŵr Cymru; and
 - ii) the statement of Peter Daldorph dated 25 June 2015: Mr Daldorph is a consultant in strategy, assessment and management in the water industry.

Their evidence, so far as relevant to this claim, is briefly as follows. None is challenged.

11. The population of Llanberis, now about 2,000, peaked in the late 19th century at about 3,000, as a result of the thriving slate industry. The first sewerage system was constructed in about 1915 – a single-pipe system which catered for both sewage and surface run-off water – but it was not until the 1950s that the Llanberis STW was commissioned. Prior to that, sewage and waste water entered the lake untreated.
12. Between 1945 and 1955, phosphorous-based detergents were developed, which dramatically increased the phosphorous content of waste water (usually expressed in terms of weight of total phosphorous (“TP”) per volume unit of water) in the period 1955 to 1995, from when the use of such detergents declined.
13. The level of phosphorous discharge into the lake peaked in the 1950s (paragraph 14 of Mr Daldorph’s statement). The Llanberis STW was opened in phases, from 1953. In line with other such works, it was designed to treat both sewage and surface run-off water which shared the single-pipe sewerage collection system. However, by 1960, still none of the effluent was being fully treated – and some not treated at all – before discharge into the lake. Improvements were made in the 1960s, by the construction of an orthodox sewage treatment works comprising two balancing tanks, four settlement tanks, four percolating filters and four humus tanks.
14. As part of the privatisation of the water industry under the Water Industry Act 1991, Dŵr Cymru was appointed as successor company to the Welsh Water Authority. It took over responsibility for the Llanberis STW, configured as I have described.

15. In 1992, in Llyn Padarn, there was a bloom of algae, notably *Staurastrum*. Following that event, further improvements were made to the Llanberis STW, including the installation of ferric dosing during the biological treatment stage, which has the effect of removing a substantial proportion of the TP content.
16. There was no further bloom in Llyn Padarn until 2009, when there was a significant bloom of predominantly the algae *Anabaena flos aquae*. Subsequently, Dŵr Cymru again improved the Llanberis STW and sewerage network, introducing further ferric dosing, sand filters etc. Since 2009, populations of algae have been small (see paragraph 31 of Mr Daldorph's statement).
17. All discharges of treated effluent are required to have a discharge consent issued by NRW, as the relevant regulator (see paragraph 76 below). Ms Jones explains the current treatment of effluent at Llanberis STW, as follows (paragraphs 28-33 of her statement):

“28. There are three stages to the treatment of effluent in the STW.

29. In the primary stage all flows enter a new balancing tank. They are then screened before being passed into the old balancing tank. The balancing tanks even out the flows. Thereafter all flows are passed forward into the primary settlement tanks where typically around 50% of the solid matter will settle out. The effluent receives its first dose of ferric as it passes into these primary tanks.

30. Settled primary effluent then overflows from the primary tanks to two distributor chambers whence the primary effluent is sent to the four biological filters. At this secondary stage biological treatment occurs as bacteria in the filters digest the biological content of the effluent. The effluent passes from these filters to the humus tanks.

31. There are four small and one large humus tank. The effluent receives a second small dose of ferric to assist settlement in these tanks. At this point the effluent in most STWs would be classed as secondary treated and ready for discharge. However at Llanberis the effluent goes through an additional (tertiary) process.

32. From the humus tanks the treated effluent is passed through four sand filters to remove any residual suspended matter including precipitated phosphorous. At present, there is also an additional BluePRO sand filter which was originally installed as a trial to evaluate the efficiency of this technology as an additional innovative method of further reducing phosphorous content of the final effluent. This can process up to 14 litres of treated effluent per second. The trial was successful and a second BluePRO sand filter will be installed.

This system will be fully commissioned and operational for 31 March 2016.

33. Once the treated effluent is passed through this three stage process, it is discharged through the final effluent channel. The quantity of the final effluent being discharged is monitored by an 'Mcerted' flow meter which can measure flow in l/sec or m³/day. 'Mcerted' means that the meter accuracy is independently audited. In addition there is a sampling point where samples of final (tertiary tested) effluent can be collected and tested visually on site or sent for laboratory analysis."

That is the process for fully treated sewage. The process is compliant with the relevant discharge consents.

18. However, as I have described, sewerage systems were generally designed before the advent of STWs as a single-collection system, i.e. the same pipe was used to collect sewage and surface run-off water. Run-off water can contain pollutants including wildlife waste and pesticides. When STWs were constructed, as at Llanberis, they were designed to treat both sewage and runoff; but it was not feasible to treat the volume of run-off water at times of high loads, for example during periods of heavy rain or melting snow. In Llanberis, less than fully treated run-off water may therefore be discharged in one of two ways.

19. First, settled storm water may be discharged from holding tanks. Ms Jones explains that there is no gravity feed into Llanberis STW: all sewage has to be pumped. The main sewage pumping station ("SPS") is the Llanberis Village SPS. Less than fully treated sewage may be discharged, as follows (paragraphs 22-27 of her statement):

"22. The Llanberis Village SPS is the terminal SPS for the main part of the village, and hence takes most of the effluent flow from the town. There are two rising mains from this terminal SPS to the STW.

(1) The dry rising main – this is used to pump the base level of the town's sewage to the STW where it passes via the inlet works into the balancing tanks.

(2) The storm water rising main – this is used to prevent flooding when rainfall causes levels in the public sewers to rise. This storm water is also pumped to the STW where it passes into four storm water storage tanks.

23. The dry weather flow main can transfer flows at a rate of up to 20 litres per second. At the STW, the effluent in the dry weather flow main is screened and balanced before it passes through the full treatment process.

24. In dry weather, only the dry weather flow main operates. During times of heavy rainfall when the dry weather flow main is pumping at 20 litres per second (i.e. at full capacity), the

storm water main automatically starts to transfer the storm water to the STW. The storm water main can transfer flows at a rate of up to 80 litres per second.

25. The effluent from the storm water main goes direct to the four storm water tanks at the STW which hold a total of 150m³ of storm water. When incoming flow reduces sufficiently, the effluent stored in the storm water tanks is pumped into the balancing tank before it passes through the full treatment process.

26. Effluent from the storm water storage tanks will only discharge directly into Afon y Bala if

- (1) the dry weather flow main is pumping base flow of 20 litres per second, and
- (2) the storm tanks are full to capacity and thus overflowing.

There is a flow meter on the storm water tanks so that the overflow rate can be measured in l/sec or m³/day.

27. The Claimant's case notes that discharges from the storm water tanks are of untreated sewage. In fact, the storm water effluent undergoes a settlement stage before discharge and is highly diluted at the point of discharge."

The amount of settled storm water discharge is therefore dependent upon the amount of storm water load, but also the capacity of the holding tanks. Over time, at Llanberis STW, that capacity has increased.

20. Second, combined sewer overflows ("CSOs") are relief structures that allow run-off water to bypass the relevant STW altogether during periods of particularly high load. Ms Jones explains that CSOs are used across the sewage industry, and that "it would not be possible for a sewerage undertaker to operate a sewerage system without these release valves..." (paragraph 10 of her statement); although, of course, the number of CSOs and the use made of them is again dependent upon the capacity of the relevant STW. Over time, the number of CSOs has been reduced. There are now just two CSOs in operation that flow into Llyn Padarn (paragraphs 50-1 of Ms Jones' statement).
21. The steps which have been taken in practice to reduce phosphorous discharge into the lake have been mirrored by the imposition of increasingly strict regulatory control, by NRW as the relevant regulator, upon the TP content of discharges of treated sewage (see paragraph 41-7 of Ms Jones statement). Until 1995, there was no limit on the TP discharged. After the 1992 algal bloom, TP limits of 3.5mg/l in "look up conditions" (i.e. at least approximately 90% of randomised samples) and 1.6mg/l annual mean was imposed in the discharge consent granted to Dŵr Cymru in respect of Llanberis STW treated effluent. In 2010, after the 2009 algal bloom, those limits were replaced by a single limit of 1mg/l annual mean. From 31 March 2016, that is to be reduced to 0.5mg/l.

22. As I understand it, settled storm water discharges and discharges from CSOs are not the subject of similar TP limits; but they are required to have discharge consents issued by NRW as regulator, which lay down detailed conditions for the circumstances in which such discharges may be made.
23. The evidence is that the various steps that have been taken to reduce the TP levels in discharges have been successful. Estimated annual TP load from Llanberis STW has declined by over 80% since the 1990s (paragraph 13 of Mr Daldorph's statement); and the TP level in the water of Llyn Padarn has fallen very considerably since the 1990s (see paragraph 306 of the 2014 decision document). Save for 2009 – the year of the algal bloom, when the mean annual TP level in the lake rose to 13µg/l – since at least 2006, the level has been below 10µg/l and, since 2009, it has been at 8µg/l or below. The values since 2012 have shown a steady decline: 2012 8 µg/l, 2013 7 µg/l and 2014 6 µg/l.
24. This all appears to be having a generally beneficial effect on the charr, at least to an extent. There is certainly no evidence of a decline in the charr population in Llyn Padarn since 2007 (see paragraph 29(b) of the 2014 decision document). Since 2011, to overcome the problems of lack of spawning grounds, there has been a programme of restocking Llyn Padarn with young fish; and there is evidence the population of adult charr (i.e. charr of over 100mm in length) are now at a level higher than 2005 and increasing (see paragraph 115, table 3 of the 2014 decision document). This suggests that the quality of the water in the lake is, at least, not hostile to the charr.
25. Therefore, in summary, as a result of primarily sewage discharge, there have been high historic levels of phosphorous discharge into Llyn Padarn. The level of phosphorous discharge was high from the mid-19th century – by when it may have been at about the same level as today – and it peaked in the 1950s when the sewage was still discharged untreated. Since the 1950s, the sewage has been treated with increasing sophistication. However, the use of phosphorous detergents led to much raised levels of phosphorous discharge in the period 1955 to 1995. In the event, estimated annual TP load from Llanberis STW has declined by over 80% since the 1990s; and, as I have described, TP levels in the waters of Llyn Padarn have also dropped very substantially.

The Legal Background

Introduction

26. As I have indicated, leaving aside the spawning ground issue, the main concern of the Claimant's members is – and has been for many years – the quality of the water in Llyn Padarn, and the impact that that has upon the charr population (see, e.g., paragraph 5 of Mr Wolfe's skeleton). That brings into play a number of interrelated European and domestic measures.

The Habitats Directive

27. EU Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora made on 21 May 1992 (“the Habitats Directive”) seeks to establish a coherent European ecological network by requiring Member States (i) to take measures to establish a system of protection in respect of identified animal and plant species

(articles 12-16), and (ii) to identify and thereafter designate areas essential at a European level of importance for the maintenance and survival of a natural habitat type in danger of disappearance or priority species as Special Areas of Conservation (articles 3-11).

28. Whilst Llyn Padarn is not a Special Area of Conservation (and thus not a habitat protected by the Directive) – nor is the charr a protected species – the Habitats Directive introduces a number of concepts that find their way into later instruments and measures which are of direct relevance to this claim.

29. Article 1(b) defines “natural habitat” as follows:

“... terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural.”

30. Article 6 provides:

“(1) For Special Areas of Conservation, Member States shall establish the necessary measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative and contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the site.

(2) Member States shall take appropriate steps to avoid, in the Special Areas of Conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive...

(3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site..., the competent authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public...”

31. By article 8(1), Member States have to submit estimates of European Union co-financing they consider necessary to allow them to meet their article 6(1) obligations. In respect of those, article 8(2) provides:

“In agreement with each Member State concerned, the Commission shall identify, for sites of Community importance for which co-financing is sought, those measures essential for the maintenance or re-establishment at a favourable conservation status of the priority natural habitat types and priority species on the sites concerned, as well as the total costs arising from those measures.”

Article 1(e) and (i) define “conservation status of a natural habitat” and “favourable conservation status” in terms essentially repeated in article 2(4) of the Environmental Liability Directive, quoted below (at paragraph 69(iii)).

32. Thus, the Habitats Directive recognises two conceptually distinct – although, of course, inter-related – obligations in respect of protected habitats. The primary obligation is to maintain or improve the standard of habitats on the basis of a threshold level, namely “favourable conservation status”. However, it is recognised that, additionally, there is an obligation to prevent deterioration of a protected habitat, whatever its current status may be.
33. The Conservation of Habitats and Species Regulations 2010 (SI 2010 No 490) implement the Habitats Directive in Wales by applying a protection regime to sites designated as Special Areas of Conservation. I emphasise that Llyn Padarn is not such a site.

The Wildlife and Countryside Act 1981

34. The Wildlife and Countryside Act 1981 (“the 1981 Act”) concerns environmental protection at a national, as opposed to European, level.
35. Section 28 of the 1981 Act enables NRW to designate land a Site of Special Scientific Interest (“SSSI”), by reason of any of its flora, fauna, or geological or physiological features. The protection of those designated sites was substantially increased by the Countryside and Rights of Way Act 2000 which, by section 75 and Schedule 9, inserted new sections 28A-28R into the 1981 Act. For example, in exercising any of their functions, the Welsh Ministers have a duty, set out in section 28G(2), to take reasonable steps to further the conservation and enhancement of the features which have led to the designation.
36. On 27 March 1992, NRW’s predecessor designated Llyn Padarn an SSSI, the features identified as leading to that designation being two, namely (i) its rare and genetically distinct charr population, (ii) the presence of the nationally scarce *Luronium natans* (floating water plantain) – although the exposure of geologically important Cambrian rock sequences at the site was also noted.
37. Although the European and national protection schemes are, to an extent, complementary, there is very considerable overlap between designated areas. Llyn Padarn SSSI does not fall within a Special Area of Conservation; but, of the area within designated SSSIs in Wales, approximately 70% is also designated as being within a Special Area of Conservation.

The Water Framework Directive

38. Given that the Claimant's primary concern stems from the water quality of Llyn Padarn, of particular importance is EU Directive 2000/60/EC establishing a framework for Community action in the field of water policy, made on 23 October 2000 and coming into effect on 22 December 2000 ("the Water Framework Directive" or "the WF Directive").
39. The WF Directive is a cornerstone in the planning and regulation of water quality and resources, setting objectives and time scales for the quality of surface and ground waters and requiring that point source discharges liable to cause pollution are subject to regulation, e.g. by prohibition or prior authorisation (article 11(3)(g)). For these purposes, phosphate is a pollutant (article 2(31) and Annex VIII).
40. The Environmental Permitting (England and Wales) Regulations 2010 (SI 2010 No 675) transpose those requirements into domestic law. Under regulation 12 of and Schedule 21 to the Regulations, a "water discharge activity" requires an environmental permit (currently in Wales, a "discharge consent").
41. Ignoring exceptions (none of which is relevant to this claim), the WF Directive defines "surface water" as "inland waters" (article 1(1)); and "lake" as "a body of standing inland surface water" (article 1(5)). It defines "heavily modified water body" as "a body of surface water which as a result of physical alterations by human activity is substantially changed in character, as designated by the Member State in accordance with the provisions of Annex II" (article 1(9)). As a result of the construction of former railway lines along each long shore (see paragraph 5 above) – which has the effect of artificially steepening the shore – Llyn Padarn is designated as a heavily modified water body of the lake variety.
42. Article 3 requires a Member State to identify individual river basins within its national territory; and article 11 requires the establishment of a programme of measures for each river basin district "in order to achieve the objectives established under article 4". So far as surface waters are concerned and so far as relevant to this claim, article 4(1)(a) provides:
 - (i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water...
 - (ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4...
 - (iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of this Directive [i.e. by 2015], in accordance with the provisions

laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4...”.

43. These obligations were recently considered by the European Court of Justice in Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland Case C-461/13 (Opinion of Advocate General Jääskinen dated 23 October 2014, and Judgment of the Grand Chamber dated 1 July 2015) (“the Weser case”). The Grand Chamber considered the article 4 objectives at [37]-[40]:

“37. ... [T]he ultimate objective of [the WF Directive] is to achieve, by coordinated action, ‘good status’ of all EU surface waters by 2015.

38. The environmental objectives that the Member States are required to achieve are specified in article 4(1) of [the WF Directive].

39. That provision imposes two objectives that are separate, although intrinsically linked. First, in accordance with article 4(1)(a)(i) of [the WF Directive], the Member States are to implement the necessary measures to prevent deterioration of the status of all bodies of surface water (obligation to prevent deterioration). Second, pursuant to article 4(1)(a)(ii) and (iii), the Member States are to protect and restore all bodies of surface water with the aim of achieving good status by the end of 2015 at the latest (obligation to enhance).

40. The origin of those two objectives is apparent from the drafting history of [the WF Directive]. So far as concerns in particular the obligation to prevent deterioration of the status of surface waters, the provisions at issue, in their initial version, could be interpreted as allowing bodies of water classified above ‘good status’ to deteriorate to that class once [the WF Directive] was adopted. It is for that reason that the European Parliament proposed an amendment enabling a distinction to be drawn between the obligation to achieve ‘good status’ and that of preventing any deterioration by the insertion in article 4(1) of the Directive of a new indent laying down the latter obligation separately.”

44. This emphasises that the primary objective of, and obligation imposed upon Member States by, the Directive is the achievement of ‘good status’ of all surface waters; but there is a further particular obligation imposed, namely to prevent deterioration in current status, whatever that might be. It is noteworthy that the Grand Chamber appears to have considered the obligation to prevent deterioration assists in the achievement of the “ultimate objective” of the Directive, i.e. to achieve “good” status of all surface waters. This duality of objectives, which at least broadly mirrors the dual obligations imposed by the Habitats Directive, is reflected throughout the WF Directive, e.g. in article 1(a) a primary purpose of the Directive is said to be “... to establish a framework of protection of inland surface waters... which... prevents

further deterioration *and* protects and enhances the status of... ecosystems..." (emphasis added).

45. In respect of the obligation to achieve "good status", article 2 of the Directive provides the following definitions:

"17. 'Surface water status' is the general expression of the status of a body of water, determined by the poorer of its ecological status and its chemical status.

18. 'Good surface water status' means the status achieved by a surface water body when both its ecological status and its chemical status are at least 'good'.

...

21. 'Ecological status is an expression of the quality of the structure and functioning of aquatic ecosystems associated with surface waters, classified in accordance with Annex V.

22. 'Good ecological status' is the status of a body of surface water, so classified in accordance with Annex V.

23. 'Good ecological potential' is the status of a heavily modified or an artificial body of water, so classified in accordance with the relevant provisions of Annex V.

24. 'Good surface water chemical status' means the chemical status required to meet the environmental objectives for surface waters established in article 4(1)(a), that is the chemical status achieved by a body of surface water in which concentrations of pollutants do not exceed the environmental quality standards established in Annex IX and under article 16(7), and under other relevant Community legislation setting environmental quality standards at Community level."

46. In this case, we are not concerned with "surface water chemical status" – which primarily concerns limits of discharges of overtly dangerous materials established in other Directives (e.g. mercury and cadmium) – but with "ecological potential" of Llyn Padarn as a heavily modified water body, i.e. ecological status values for the closest comparable surface water body (a lake) modified to reflect the physical conditions which result from the heavily modified characteristics of the water body. As it is not suggested that those characteristics result in any modifications relevant to this claim, the fact that, for the purposes of the WF Directive, Llyn Padarn is a "heavily modified water body" rather than a "lake" is of little, if any, significance in this case.
47. The Directive classifies ecological quality in four categories, namely (for an unmodified body of surface water) "high", "good", "moderate" and "poor", for which normative definitions are given in table 1.2 in Annex V. "High" status is where, for the relevant values, there are no, or only very minor, alterations from undisturbed conditions. "Good" status is defined as:

“The values of the biological quality elements for the surface water body type show low levels of distortion resulting from human activity, but deviate only slightly from those normally associated with the surface water body type under undisturbed conditions.”

“Moderate” status is defined as:

“The values of the biological quality elements for the surface water body type deviate moderately from those normally associated with the surface water body type under undisturbed conditions. The values show moderate signs of distortion resulting from human activity and are significantly more disturbed than under conditions of good status.”

Water failing to achieve moderate status is classified as “poor” or “bad”.

48. Various elements are then set out for each surface water body type, and “high”, “good” and “moderate” status – or, for heavily modified water bodies, “maximum”, “good” and “moderate” ecological potential – defined for each. As Weser emphasised, the status of the water body as a whole is dictated by the lowest status of any relevant element.

49. We are concerned with two elements. The first is a biological quality element, namely phytoplankton. The relevant definitions for a heavily modified water body of a lake-type has to be read across from table 1.2.2 in Annex V, which sets out the definitions for lakes. “High” status is defined in terms of a taxonomic composition and abundance which correspond totally or nearly totally to undisturbed conditions. “Good” status is defined thus:

“There are slight changes in the composition and abundance of planktonic taxa compared to the type-specific communities. Such changes do not indicate any accelerated growth of algae resulting in undesirable disturbance to the balance of organisms present in the water body or to the physicochemical quality of the water or sediment.

A slight increase in the frequency and intensity of the type-specific planktonic blooms may occur.”

Therefore, status is to be assessed as “good” only where there is no indication that accelerated growth of phytoplankton will result in “undesirable disturbance” either to the balance of organisms present in the water body or to “the physicochemical quality of the water or sediment”.

50. Second, there is the whole category of general physicochemical elements. For these, “high status” in lakes is defined in table 1.2.2 in terms of values which correspond totally or nearly totally to undisturbed conditions. “Good” status is defined thus:

“Temperature, oxygen balance, pH, acid neutralising capacity, transparency and salinity do not reach levels outside the range

established so as to ensure the functioning of the ecosystem and the achievement of the values specified above for the biological quality elements.

Nutrient concentrations do not exceed the levels established so as to ensure the functioning of the ecosystem and the achievement of the values specified above for the biological quality elements.”

Similarly, for heavily modified water bodies, “good ecological potential” is defined as follows:

“The values for physicochemical elements are within the ranges established so as to ensure the functioning of the ecosystem and the achievement of the values specified above for each of the biological quality elements.

Temperature and pH do not reach levels outside the ranges established so as to ensure the functioning of the ecosystem and the achievement of the values specified above for the biological quality elements.

Nutrient concentrations do not exceed the levels established so as to ensure the functioning of the ecosystem and the achievement of the values specified above for the biological quality elements.”

51. Therefore, for nutrients such as phosphorous, status is to be “good” where, and only where, on proper assessment, there are concentrations in the water that do not exceed the established levels “so as to ensure the functioning of the ecosystem and the achievement of the values specified above for the biological quality elements”, including of course the value specified for phytoplankton. Similarly, for “oxygen status”.
52. Whilst “high status” or “maximum ecological potential” requires an exercise of judgment as to whether the relevant values correspond “totally or nearly totally” to undisturbed conditions, whether a water body has achieved “good” status or ecological potential is consequently dependent, at least in part, upon the achievement of various threshold values set by the appropriate body.
53. The appropriate body in Wales is the Welsh Ministers acting on the basis of guidance from the United Kingdom Water Framework Directive Technical Advisory Group (“UKTAG”). In the River Basin Districts Typology, Standards and Groundwater Threshold Values (Water Framework Directive) (England and Wales) Directions 2010 (2010 No 38) (“the 2010 Directions”), the Welsh Ministers direct NRW to apply various quality standards when it is, for the purposes of the WF Directive, (i) monitoring and classifying the status of a water body and (ii) controlling pollution of surface waters by compliance with standards for substances discharged into surface waters (paragraphs 4(e) and (f), and 5). In this claim, there is no challenge to the appropriateness of any of these adopted standards.

54. We are particularly concerned with two of the standards.
- i) Total phosphorous (“TP”): We are here concerned with the phosphate-content, not of discharges, but of the surface body of water itself. Reflecting paragraph 1.2.2 of Annex II to the WF Directive itself, the standard for TP in freshwater lakes is dependent upon mean depth of the lake. Table 5 in Part 2 of the Directions provides that a “deep” lake is one of over 15m mean depth, and a “shallow” lake is one of between 3 and 15m mean depth. Paragraph 7 and table 11 provide that the “good” threshold value in a low alkalinity body of water (such as Llyn Padarn) is that the annual mean TP concentration must be below 10µg/l for a shallow lake and 8µg/l for a deep lake. Llyn Padarn has a mean depth of 14.2m, and thus falls (just) into the “shallow lake” category; although, as I understand it, since 2012 NRW has measured TP levels for Llyn Padarn against the deep lake threshold of 8 µg/l, on the basis that, although by definition the lake is “shallow”, the waters of Llyn Padarn are in places stratified so that it has some deep lake characteristics.
 - ii) Dissolved oxygen (“DO”): Paragraph 6 and table 7 in Part 2 of the 2010 Directions appear to provide that the “good” threshold value for DO for a salmonid mixed (rather than fully stratified) freshwater lake such as Llyn Padarn – modified or unmodified – is 7mg/l as a mean value for the whole water column in the months of July and August. However, it appears that NRW used 4mg/l as a mean value for the hypolimnion (see, e.g., paragraph 120 of the 2014 decision document), and it seems to be common ground that that was an appropriate DO threshold to adopt. In the event, the precise DO threshold is not vital, because it is common ground that the DO level has fallen short of the threshold level since 2007 and continues to do so.
55. In the Weser case, the Grand Chamber considered the concept of deterioration under article 4(1)(a)(i) of the WF Directive, and held (at [70] of its judgment) that:
- “[T]he concept of ‘deterioration of the status’ of a body of surface water in article 4(1)(a)(i) of [the WF Directive] must be interpreted as meaning that there is a deterioration as soon as the status of at least one of the quality elements, within the meaning of Annex V to the Directive, falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole.”
- It explained (at [62]):
- “A different interpretation of that concept would... deter Member States from preventing deterioration of the status of a body of surface water within a status class. Since classification of a body of surface water depends on the poorest value of the applicable parameters, all the other values could be reduced without that having legal consequences.”
56. Therefore, in respect of deterioration, in line with the principle that the status of a water body as a whole is dictated by the lowest status of any relevant element, if the status or environmental potential of one element falls below (say) “good”, the status

of the water body as whole falls below “good”. This is known as the “one out, all out” rule.

57. Finally, before leaving the WF Directive, there are two other matters I should mention.
58. First, I should refer to recital (11), because of its reference to “environmental damage”, a concept which lies at the heart of this claim. That recital states:

“As set out in article 174 of the Treaty, the Community policy on the environment is to contribute to pursuit of the objectives of preserving, protecting and improving the quality of the environment, in prudent and rational utilisation of natural resources, and to be based on the precautionary principle and on the principle that preventative action should be taken, environmental damage should, as a matter of priority, be rectified at source and that the polluter should pay.”

Thus, the WF Directive introduces the principle that, where preventative action is not possible, environmental damage should be rectified at source and “the polluter should pay”.

59. Second, in respect of Ground 3, Mr Wolfe relied upon the exemption in article 4(7) of the WF Directive, which provides:

“Member States will not be in breach of this Directive when:

- failure to achieve good ground water status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or ground water is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or
- failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities

and all the following conditions are met

(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water

(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under article 13 and the objectives are reviewed every six years;

(c) the reason for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1

are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and

(d) the beneficial objectives served by those modifications or alterations of the water body cannot for reason of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.”

I shall return to that article when I deal with Ground 3 (see paragraphs 163-165 below).

The Environmental Liability Directive

60. The Directive at the heart of this claim is EU Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage made on 21 April 2004 (“the Environmental Liability Directive” or “the EL Directive”). By article 19(1), Member States were required to implement the provisions of the Directive by 30 April 2007.

61. Whilst the primary objective of the WF Directive is the achievement of ‘good status’ of all surface waters by a range of measures including the setting of threshold standard for water bodies and the regulation of relevant activities (such as water discharges) by prohibition or conditional permission, the EL Directive is particularly concerned with unregulated practices and uncontrolled events that (e.g.) lead to contaminated surface water or groundwater.

62. Thus, the purpose of the Directive as set out in article 1 is:

“... to establish a framework of environmental liability based on the ‘polluter pays’ principle, to prevent and remedy environmental damage.”

63. The focus on the “polluter pays” principle is underscored in the recitals, for example:

“(2) The prevention and remedying of environmental damage should be implemented through the furtherance of the ‘polluter pays’ principle, as indicated in the Treaty and in line with the principle of sustainable development. The fundamental principle of this Directive should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.”

“(13) Not all forms of environmental damage can be remedied by means of the liability mechanism. For the latter to be effective, there need to be one or more identifiable polluters, the damage should be concrete and quantifiable, and a causal link should be established between the damage and the

identified polluter(s). Liability is therefore not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with acts or failure to act of certain individual actors.”

“(15) Since the prevention and remedying of environmental damage is a task directly contributing to the pursuit of the Community’s environmental policy, public authorities should ensure the proper implementation and enforcement of the scheme provided for by this Directive.”

“(18) According to the ‘polluter pays’ principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the costs of the necessary preventative or remedial measures. In cases where a competent authority acts, itself or through a third party, in the place of an operator, that authority should ensure that the cost incurred by it is recovered from the operator. It is also appropriate that the operators should ultimately bear the cost of assessing environmental damage and, as the case may be, assessing an imminent threat of such damage occurring.”

64. The polluter pays principle is also recognised in article 4(5), by which it is provided that the Directive is only to apply to environmental damage where a causal link can be established between the activities of a particular operator or operators and the damage:

“This Directive shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators.”

65. “Damage”, in a common law context, necessarily imports the concept of some form of loss, diminution or reduction in value, usefulness or ability caused by some action, activity or omission. However, in the EL Directive, “damage” is expressly defined in article 2(2); and Mr Wolfe submitted, rightly, that Community law often uses terminology that is peculiar to it, so that legal concepts in Directives do not necessarily have the same meaning in Community law as in the law of particular Member States (CILFIT Srl v Ministro della Sanita C-283/81 (6 October 1982); [1983] 1 CMLR 472). He submitted that “damage” in the EL Directive does not import the concept of deterioration as, in the common law, it inherently does.

66. Article 2(2) provides the following definition:

“ ‘damage’ means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.”

67. That definition refers to several other terms which are defined in the Directive:

- i) “Natural resource” is defined as “protected species and natural habitats, water and land” (article 2(12)).
- ii) “Natural resource service” is defined as “the functions performed by a natural resource for the benefit of another natural resource or the public” (article 2(13)).
- iii) In its turn, “protected species and natural habitats” is defined in article 2(3):

“ ‘protected species and natural habitats” means:

- (a) the species mentioned in article 4(2) of Directive 79/409/EEC [i.e. “the Wild Birds Directive”] or listed in Annex I thereto or listed in Annexes II and IV to [the Habitats Directive];
- (b) the habitats of species mentioned in article 4(2) of [the Wild Birds Directive] or listed in Annex I thereto or listed in Annex II to [the Habitats Directive], and the natural habitats listed in Annex I to [the Habitats Directive] and the breeding sites or resting places of the species listed in Annex IV to [the Habitats Directive]; and
- (c) where a Member State so determines, any habitat or species, not listed in those Annexes which the Member State designates for equivalent purposes as those laid down in these two Directives.”

68. “Environmental damage” is defined in article 2(1), which reads (so far as relevant):

“ ‘environmental damage’ means:

- (a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I;

Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of [the Habitats Directive] or Article 9 of Directive 79/409/EEC [the Wild Birds Directive] or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.

- (b) 'water damage', which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in [the WF Directive], of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies;...
- (c) 'land damage', which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms."

69. That, too, needs some definitional unpacking:

- i) It was rightly common ground before me that "environmental damage" as defined in article 2(1) is a subset of "damage" as defined in article 2(2).
- ii) As I have indicated, "protected species and natural habitats" is defined in article 2(3) (see paragraph 67(iii) above).
- iii) "Conservation status", of both habitats and species, is defined in article 2(4) in essentially the same terms as article 1(e) and (i) of the Habitats Directive, as follows:

“ ‘Conservation status’ means:

- (a) in respect of natural habitat, the sum of the influence acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within, as the case may be, the European territory of the Member State to which the Treaty applies or the territory of a member state or the natural range of that habitat.

The conservation status of a natural habitat will be taken as 'favourable' when:

- its natural range and areas it covers within that range are stable or increasing,
 - the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
 - the conservation status of its typical species is favourable as defined in (b).
- (b) in respect of a species, the sum of influences acting on the species that may affect the long-term

distribution and abundance of its populations within, as the case may be, the European territory of the Member State to which the Treaty applies or the territory of a member state or the natural range of that species.

The conservation status will be taken as 'favourable' when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats,
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.”

Therefore, “environmental damage” to habitats protected by the Habitats or Wild Birds Directives is defined as any damage (as defined in article 2(2)) that has “significant adverse effects” on reaching or maintaining the favourable conservation status of the relevant habitat, which is in its turn dependent upon the conservation status of relevant species being favourable.

- iv) Importantly for the purposes of this claim, “baseline condition” is defined in article 2(14) as follows:

“... the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available”;

and “recovery” is defined in article 2(15) as:

“... in the case of water, protected species and natural habitats the return of the damaged natural resources and/or impaired services to baseline condition...”.

70. Articles 5 and 6 set out provisions for “preventative action” and “remedial action” respectively, with article 7 and Annex II providing criteria and a mechanism for how environmental damage is to be remedied. Broadly, the relevant operator (defined in article 2(6) as the person who operates or controls the relevant occupational activity) is required to (i) inform the competent authority and (ii) take necessary remedial and/or preventative measures as appropriate (articles 5(1) and (2), and 6(1)). These obligations fall primarily upon the relevant operator – as you would expect, given the “fundamental principle” of the Directive that the “polluter pays” for damage it causes (see recital (2), quoted at paragraph 63 above) – but the competent authority has a

power at any time to require the operator to take the necessary preventative measures (articles 5(3)(b) and 6(2)(c)) or itself take those measures (articles 5(3)(d) and 6(2)(e)). Furthermore, by article 5(4), where there is an imminent threat of environmental damage occurring:

“The competent authority shall require that the preventative measures are taken by the operator...”;

and, by article 6(3), where environmental damage has occurred:

“The competent authority shall require that the remedial measures are taken by the operator.”

I shall consider these provisions in more detail when I deal with Ground 6 (see paragraphs 167-175 below).

71. The main text of paragraph 1 of Annex II to the EL Directive provides:

“Remediating of environmental damage, in relation to water or protected species or natural habitats, is achieved through the restoration of the environment to its baseline condition by way of primary, complementary and compensatory remediation, where:

Primary remediation is any remedial measure which returns damaged natural resources and/or impaired services to, or towards, baseline condition;

Complementary remediation is any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services;

Compensatory remediation is any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect;

...

Where primary remediation does not result in the restoration of the environment to its baseline condition, then complementary remediation will be undertaken. In addition, compensatory remediation will be undertaken to compensate for the interim losses...”.

72. The annex emphasises that “the purpose of primary remediation is to restore the damaged natural resources and/or services to, or towards, baseline condition” (paragraph 1.1.1); and states that “options comprised of actions to directly restore the natural resources and services towards baseline condition on an accelerated time frame, or through natural recovery, shall be considered” (paragraph 1.2.1), although “when evaluating the different identified remedial options, primary remedial measures

that do not fully restore the damaged water or protected species or habitat to baseline or that restore it more slowly can be chosen” (paragraph 1.3.2). This focus on restoring the environmental position to its “baseline condition” is, in my view, instructive; and is one reason why the concept of “baseline condition” is so vital in the context of the EL Directive.

The Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009

73. The EL Directive is, of course, directly applicable in Wales; but it is transposed through the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (SI 2009 No 995) (“the 2009 Regulations”), which came into effect on 9 May 2009.

74. Under the 2009 Regulations:

- i) NRW is the enforcing authority (regulation 10(2)), and thus the “competent authority” for the purposes of the EL Directive.
- ii) Unless otherwise defined in the Regulations, the definitions within the EL Directive apply. For example, “damage” is not defined; and so the definition in article 2(2) (quoted at paragraph 66 above) applies.
- iii) By virtue of regulation 2, “natural habitat” is defined in terms of the habitats protected by the Habitats and Wild Birds Directives. “Natural resource” is defined as habitats and species protected by those Directives, “species and habitats on [an SSSI]”, water and land.
- iv) “Environmental damage” is defined in regulation 4:

“(1) ... ‘[E]nvironmental damage’ is damage to –

- (a) protected species or natural habitats, or [an SSSI],
- (b) surface water or groundwater,
- (c) marine waters, or
- (d) land

as specified in this regulation.

(2) Environmental damage to protected species or natural habitats or [an SSSI] means damage of a kind specified in Schedule 1.

(3) Environmental damage to surface water means damage to a surface water body classified as such pursuant to [the WF Directive] such that –

- (a) a biological quality element in Annex V to that Directive,

- (b) ...
- (c) a physicochemical quality element listed in Annex V to that Directive,

changes sufficiently to lower the status of the water body in accordance with [the WF Directive] (whether or not the water body is in fact reclassified as being of lower status)...”.

The words in the last parentheses of course presaged the conclusions of the Weser case.

- v) Schedule 1 further defines “environmental damage” for the purposes of regulation 4. Paragraph 1 provides:

“In the case of protected species or natural habitat (other than damage on [an SSSI] to which paragraph 4 applies) the damage must be such that it has a significant adverse effect on reaching or maintaining the favourable conservation status of the protected species or natural habitat...”.

- vi) Paragraph 4(1) of Schedule 1 provides that, in the case of an SSSI, the damage must be to the species or habitat notified under section 28 of the 1981 Act, or species or habitats protected under the Habitats or Wild Birds Directives. It continues, in paragraph 4(2)

“The damage must have an adverse effect on the integrity of the site (that is, the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats or the levels of populations of the species affected).”

- vii) Paragraph A1.11 of guidance upon the application of the 2009 Regulations and English equivalent, issued jointly by the Welsh Ministers’ predecessor (the Welsh Assembly Government) and the parallel authority responsible for England (the Secretary of State for the Environment, Food and Rural Affairs) in November 2009 (“the 2009 Regulations Joint Guidance”), suggests a two-stage approach to this “site integrity effects test”:

“The first step in assessing whether there is a site integrity effect is to determine whether the activity has affected relevant species or habitats, by referring to Annex 6 of this guidance and the relevant citations.... If relevant species have been affected, the next stage is to determine whether the effect is severe enough to be ‘site integrity effect’.”

- viii) By regulation 8 of the 2009 Regulations, it is said that the Regulations do not apply to damage that took place before the coming into force of the

Regulations; or damage that takes place after that date but is caused by an incident, event or omission before that date; or to damage caused by an incident, event or omission after that date if it derives from an activity that took place before that date.

- ix) Regulations 13-16, reflecting article 5 of the EL Directive, provide for the prevention of environmental damage. Regulation 13 is particularly relevant to Ground 6, and is set out below in that context (see paragraph 171).
- x) Regulations 17-23 deal with remediation. Again directly reflecting the EL Directive – and its concept of “baseline condition” – paragraph 3 of Schedule 4 Part 1 expressly states that:

“The objective of remediation is to achieve the same level of natural resource or services as would have existed if the damage had not occurred”;

and, in paragraph 4 of that same part, there are provisions for primary and complementary remediation which mirror the provisions of the EL Directive to which I have referred. Regulation 18 requires an enforcing authority which decides that there is environmental damage to notify the relevant operator(s) of any activity that caused the damage that the damage caused was environmental damage, the operator’s activity was a cause of it, and that the operator is required to submit proposals for measures to ensure remediation will be achieved (“a liability notice”). Once those proposals have been received, under regulation 20, the authority must serve a remediation notice on the operator that specifies (amongst other things) “the measures necessary for remediation of the damage, together with reasons” (regulation 20(2)(b)).

- xi) An operator has a right of appeal to the Welsh Ministers against a liability notice (regulation 19) and against a remediation notice issued by the enforcing authority (regulations 20-21).
- xii) If an operator fails to take steps to prevent or remedy environmental damage in accordance with these provisions (including by failing to comply with a remediation notice), he commits a criminal offence (regulations 13(3), 14(3) and 20(4)).
- xiii) By regulation 29, an interested party may notify the appropriate enforcing authority of any environmental damage which is being, or has been, caused or of which there is an imminent threat (regulation 29(1)). The notification has to be accompanied by a statement explaining the way in which the notifier will be affected by the damage, or the reason he has a sufficient interest; and sufficient information to enable the enforcing authority to identify the location and “the nature of the incident” (regulation 29(2)). The enforcing authority must consider the notification and inform the notifier of any action, if any, it intends to take (regulation 29(3); and must, before taking any decision, give the operator an opportunity to submit comments (regulation 29(4)). However, regulation 29 (3) and (4) do not apply if “in the opinion of the enforcing authority the information provided does not disclose any environmental damage or threat of environmental damage...” (regulation 29(5)(b)).

The Regulation of Water and Sewerage Services

75. I should briefly refer to the overall regulation of water and sewerage service in Wales. There are two relevant regulators.
76. First, NRW regulates the environmental impacts of the activities of water and sewerage undertakers such as Dŵr Cymru. Consequently, as I have indicated, it is the competent authority for the purposes of the EL Directive and the enforcing authority under the 2009 Regulations.
77. Second, the Water Services Regulation Authority (successor to the Office of Water Services, and still referred to colloquially as “OFWAT”) is the relevant economic regulator, under the Water Industry Act 1991. It is responsible for the appointment of undertakers, and the conditions of appointment; and is responsible for ensuring that undertakers properly (i) carry out the activities they are authorised to do by monitoring and enforcing their conditions of appointment and (ii) perform any statutory duties imposed on them. Section 94 of the 1991 Act imposes general duties upon undertakers such as Dŵr Cymru to provide, improve and extend the system of public sewers so as to ensure their area is properly drained; and to provide for the emptying of the sewers and for effectively dealing with the contents of those sewers, by means of sewage disposal works or otherwise. In a five-yearly price review (currently for the period 2015-20), OFWAT sets a limit upon charges undertakers may make to their customers, based upon (i) annual waste water performance reports, prepared by the undertaker and relevant environmental regulator (Form M109), and (ii) a business plan for the five-year period which is subject to assessment by OFWAT.

The Claimant's Notification, NRW's First Decision and the First Judicial Review

78. The Claimant's members have been concerned about water quality in Llyn Padarn, and the effect of poor water quality on the fish population, for many years. In 1994, Mr Hughes, on behalf of himself and the Claimant society, commenced proceedings against Dŵr Cymru in the Llangefni County Court, claiming that phosphate discharges from the Llanberis STW had adversely affected both water and fish (including charr), notably during the summer of 1992 when, as I have described (see paragraph 15 above), there was an algal bloom. The claim, brought in negligence and nuisance, failed at trial before His Honour Judge Daniel, who concluded that no causal link between poor catches and the condition of the lake had been proved.
79. As I have indicated, annual charr catches have declined substantially since the 1990s. On 7 February 2012, through its legal advisers (Fish Legal), under regulation 29 of the 2009 Regulations, the Claimant sent a notification of environmental damage to NRW. The letter referred to the concerns going back to the 1990s, and said that:

“In particular, the loading of phosphates has grown to such an extent that this is no longer an oligotrophic or nutrient-free water body and is deteriorating.

The phosphate inputs have caused environmental damage to the habitat and to the fishery – including to the unique population of genetically distinct Arctic charr. This is also a SSSI which

has been so designated partly due to the presence of this species.

Our members' fishing has suffered as a consequence of the pollutions. In fact, the standard of the angling for salmon and sea trout has now plummeted and continues to be in free fall."

It was said that "environmental damage had been caused by discharges of sewage pursuant to regulation 4 of the Regulations"; and "although damage has taken place before the coming into force of the Regulations, damage continued to occur from the time at which the Regulations came into effect and [NRW] has substantial evidence of discharges of sewage since then". NRW were asked to "act to prevent further damage to the environment as well as remediating damage that has already been caused".

80. The supporting evidence was in the form of a statement of Mr Hughes, dated 8 February 2012. Mr Hughes accepted that the hydro-electric works had had an adverse effect on spawning (paragraph 8); but he said that he believed "the decline in the fishery ties in with the increased numbers of pollutions of the lake and the amount of sewage that is going into it" (paragraph 5). He concluded (paragraph 27):

"[NRW] should make sure that Dŵr Cymru does not delay in sorting out all the misconceptions to the sewer, stop infiltration, introduce complete treatment for storm-related sewage or start to separate surface run-off water from sewage which flows to treatment at the works in Llanberis. That way they will ensure that the lake has at least a chance of recovering."

81. On 10 July 2013, NRW issued a decision document to Dŵr Cymru ("the 2013 decision document"), which considered environmental damage caused after the coming into effect of the 2009 Regulations in May 2009 (see paragraph 7.3). It concluded that there had been no environmental damage to any relevant species or any relevant features of the SSSI, including charr (paragraph 15). In respect of surface water, in paragraph 11, NRW concluded that there had been no environmental damage in respect of any of the physicochemical elements – "because the 2012 assessment shows no drop in status since the [2009 Regulations] came into force" – but, in respect of biological quality elements, there had been environmental damage:

"This is due to the weight of evidence of a change in status in the phytoplankton quality element in the 2012 assessment. The change in status is directly attributable to the algal bloom in 2009. The [Llanberis STW] has been identified as the source of the nutrients that caused the bloom."

However, it continued that, following that bloom:

"In 2010, NRW imposed a regulator-initiated permit variation. The permit variation reduced phosphate limits from 1.6 to 1.0 mg/l. NRW considers that thus far, the measures implemented by the operator to comply with the revised permit limits should result in the phytoplankton quality element achieving good ecological potential in the next WF [Directive] ecological status

assessment in 2015. Other elements, notably [DO] are at less than good WF [Directive] status and lake modelling has identified that further reduction in nutrient levels entering the lake would enhance the protection afforded to the ecosystem supporting the species and habitats in the Padarn SSSI.”

The decision document then set out the additional measures that Dŵr Cymru had undertaken “intended ultimately to reduce the nutrient input into the lake”.

82. In accordance with regulation 20 of the 2009 Regulations, the 2013 decision document was accompanied by liability notice addressed to Dŵr Cymru, requiring it to submit proposals for measures to achieve the remediation of the environmental damage found to have been caused.
83. Following further correspondence, on 7 October 2013 the Claimant issued judicial review proceedings (“the first judicial review”), challenging the 2013 decision document on three grounds (see paragraph 80 of the Claimant’s Grounds of Claim in the first judicial review), namely:
- i) The temporal reach of the 2009 Regulations. Article 19(1) of the EL Directive required implementation by Member States by 30 April 2007. The 2009 Regulations came into effect only on 9 May 2009; and, in line with the 2009 Regulations, NRW only considered environmental damage occurring after that date. On 18 June 2009, the European Court of Justice held that the United Kingdom was in breach of its obligations under the Directive, by reason of its late implementation (Commission of the European Communities v United Kingdom (2009) Case No C-417/08). In the first judicial review, it was contended that NRW consequently erred in only considering damage that had occurred since 2009, rather than 2007.
 - ii) Incorrect approach to “baseline condition”. It was contended that NRW erred in not considering the correct baseline condition, i.e. the condition as at 2007. In relation to this ground, it was said (at paragraph 90 of the Grounds of Claim in the first judicial review) that the baseline condition “is that which would prevail without the damage in question and not, therefore, the condition which prevails because of some prior damage, whether because of the incorrect cut-off date or otherwise”.
 - iii) The failure to secure preventative measures. It was contended that, whilst giving a power to NRW to require preventative measures to be taken, the 2009 Directions wrongly fail to impose a duty on NRW to do so.
84. Wyn Williams J gave permission to proceed on 18 December 2013.
85. On 6 May 2014, the parties agreed that the judicial review should be allowed on the first ground (i), and NRW should be required to reconsider its decision; and, in the schedule to the Consent Order, it was said:
- “In its fresh consideration, [NRW] will also take into account all environmental damage caused by an emission, event or incident taking place after 30 April 2007 if it derives from an

activity which started before that date but which was not finished before then.”

NRW's Second Decision

86. Following the compromise of the first judicial review, NRW reconsidered the Claimant's 7 February 2012 notification on the basis of damage which had occurred since April 2007 (rather than May 2009); and, on 12 December 2014, it issued a second decision document to Dŵr Cymru (i.e. the 2014 decision document).
87. This identified the environmental damage suggested in the Claimant's notification as (i) damage to the water and (ii) damage to the Llyn Padarn SSSI and the population of charr upon which the SSSI designation has been made (paragraph 15), both caused by discharges from the Llanberis STW. Having made its assessment in respect of all post-2007 damage, in essence NRW came to the same conclusions as it did in its first, 2013 decision document, i.e. no environmental damage had occurred – and none was imminent – in respect of the relevant features of the SSSI (i.e. charr and floating water plantain), or to any other relevant species (paragraph 67). In particular, the decision document concluded:
- i) The TP mean for 2007-13 was 8.09µg/l (paragraph 302), and for 2011-13 was 7.9µg/l (paragraph 305). TP had exceeded the threshold level set by the 2010 Directions of 10µg/l for shallow lakes – into which category Llyn Padarn falls – in 2009, and that was due to discharges from the Llanberis STW which caused the algal bloom that year (paragraph 367). That was the subject of the second liability notice issued to Dŵr Cymru, with the 2014 decision document. Otherwise, the TP level had neither (a) exceeded the 10µg/l limit, nor (b) worsened since April 2007. Levels had fallen from 8µg/l to 6µg/l in the years 2012 to 2014 (paragraph 308 and table 4). NRW concluded that “there is no threat of imminent environmental damage occurring as a result of nutrient enrichment” (paragraphs 51 and 370).
 - ii) With regard to DO, it was accepted that, each year from 2003 to 2013, DO levels in the hypolimnion fell to below the target level of 4 µg/l in the summer months. On the basis of scientific data, the document proceeded on the basis that the lower DO tolerance range for charr was 2.3-3.1µg/l. Even at the higher of those levels and at the times of the lowest recorded DO levels, the charr's available habitat in Llyn Padarn, whilst restricted, was nevertheless at least 6m. The document concluded that (a) there was no evidence of a decline in DO levels since April 2007 (paragraph 160), (b) the levels of DO were not such as to exclude charr from the hypolimnion (paragraph 144) and (c) there was insufficient evidence of any demonstrable change in charr habitat volume since April 2007 (paragraph 145).
 - iii) All other biological and physicochemical elements used in the WF Directive classification were, at least, of “good” ecological potential/status.
 - iv) There had been no evidence of a decline in charr population in Llyn Padarn since April 2007 (paragraph 163).

- v) There had been no demonstrable impact from the activity of Dŵr Cymru on charr habitat since April 2007 (paragraph 146).
88. Therefore, the 2014 decision document concluded that there had been environmental damage to surface water as a result of the biological quality element, phytoplankton, dropping from “good” to “moderate” as a result of the 2009 bloom (paragraph 68). However, otherwise it found that (i) was the only environmental damage found to have been caused by Llanberis STW discharges, and (ii) there was no threat of imminent environmental damage occurring as a result of nutrient enrichment because of mitigation measures which had been taken, which it set out. It found that those measures had contributed to the phytoplankton quality element returning to “good” status in the 2013 and (provisional) 2014 classifications (paragraph 69).
89. As I have indicated, that decision document was accompanied by a second liability notice, which again required Dŵr Cymru to submit remediation proposals in respect of the environmental damage which the decision document had found to have been caused by Llanberis STW discharges.
90. It is, of course, the 2014 decision document and consequent liability notice which the Claimant seeks to challenge in this action.

The Grounds of Claim

91. The Claimant initially relied upon six grounds of claim, as follows:

Ground 1: “Environmental Damage” in the context of Natural Habitats: Under the EL Directive, NRW erred in its approach to “environmental damage” to the SSSI, as a habitat, by restricting that term to a worsening of the environmental situation.

In its fully developed form, this ground involves the contention that (i) in making the 2009 Regulations, the Welsh Ministers had exercised their power under article 2(3)(c) of the EL Directive, to determine that all SSSIs in Wales be designated as habitats for equivalent purposes as those laid down in the Habitats Directive, SSSIs enjoy the same protection as habitats protected under that Directive); and (ii) in respect of such sites, the site integrity test for damage found in paragraph 4(2) of Schedule 1 to the Regulations must be ignored because it runs counter to the test for protection from damage that applies to habitats protected under the Habitats Directive. In considering the environmental damage to the Llyn Padarn SSSI, NRW therefore erred by applying the site integrity test.

Ground 2: Standard of Proof: NRW erred in the standard of proof it adopted in respect of the issue of environmental damage.

Ground 3: “Environmental Damage” in the context of Water: Under the EL Directive, NRW erred in its approach to “environmental damage” to Llyn Padarn itself, as a surface water body, again by restricting that term to deterioration of a relevant element.

Ground 4: Numbers etc of Fish: NRW erred in failing to take into account a material consideration, namely “composition, abundance and age structure of fish fauna”, i.e. the charr.

Ground 5: The Effects of the Power Station NRW erred in its approach to damage caused by the hydro-electric power station, in proceeding on the basis that there was no – or, at least, no adequate – evidence to link any particular damaging “emission, event or incident” since April 2007 to the power station.

Ground 6: The Duty to Require Preventative Measures: The 2009 Regulations failed properly to implement the EL Directive, because article 5 of the Directive requires “preventative measures” to be taken in relation to environmental damage; but the 2009 Regulations give NRW only a power to require such measures.

92. Patterson J directed a rolled-up the hearing in respect of all these grounds. However, by letter of 20 October 2015, the Claimant informed NRW that it no longer intended to pursue Grounds 2, 4 and 5. Although in paragraph 2 of Mr Wolfe’s skeleton argument, he says that this course “should not be taken as acceptance (particularly for the purposes of any future claims brought by the Claimant) that the points (particularly the legal arguments) are weak or being generally abandoned”, suffice it to say that I see the wisdom of the Claimant not pursuing these grounds in its claim. In respect of those grounds, I shall simply refuse permission to proceed.
93. Grounds 1, 3 and 6 were pursued at the hearing; but, although the range of debate was wide, Mr Wolfe accepted that each of the remaining grounds was dependent upon the proposition that, properly construed in the context of the EL Directive, “environmental damage” includes not only deterioration of the environmental condition, but preventing, limiting, decelerating or otherwise impairing the progression of any relevant element to the environmentally acceptable, i.e. he accepted that, unless he made good that proposition, each of the grounds failed. This proposition thus lies at the very heart of the claim, as finally put forward.
94. There is no doubt that, in both its decision documents, NRW restricted its consideration to environmental damage in the sense of some worsening of the environmental situation. Mr Forsdick – supported by Mr Kimblin – submitted that it was right to do so, because, leaving aside the proper interpretation of the EL Directive and 2009 Regulations, the only damage referred to in the Claimant’s notification letter of 7 February 2012 was such deterioration as a result of the ongoing sewage discharges from the Llanberis STW. There was no complaint – nor is there now – about the historic, pre-2007 discharges and any damage caused by them. The complaint in the notification letter was expressed in terms of the growth of phosphate loading “to such an extent that this is no longer an oligotrophic or nutrient-free water body”; it was “deteriorating” as a result of ongoing sewage discharges; and “the lake can no longer sustain Arctic charr”.
95. Mr Forsdick submitted that the allegation was clearly that there had been a worsening of water quality in Llyn Padarn, which was ongoing – not that, as a result of the current discharges, any rate of improvement to that quality was less than it might or should be. The 2013 decision document responded to the notification of damage that had been made. In respect of damage, the first judicial review was made, defended and compromised on that same basis. The second, 2014 decision document – which of course responded to the same notification by the Claimant on 7 February 2012 – was also understandably prepared on that basis. The possibility that, as a matter of construction of the EL Directive, “damage” included decelerated improvement was not raised until this, the second judicial review, in which it is not now contended that

any damage in the sense of deterioration occurred – nor, on the evidence, could such damage now be claimed or relied upon.

96. Thus, he said, in responding to the 7 February 2012 notification, NRW had no obligation to consider damage of an entirely different type and on an entirely different basis from that being suggested by the notifier. On that basis, it being common ground now that none of the damage notified was “environmental damage” caused by Llanberis STW discharges, irrespective of the correct interpretation of the relevant provisions of the EL Directive and 2009 Regulations, NRW did not arguably err in responding to the 7 February 2012 notification as it did; and this claim must accordingly fail.
97. Mr Wolfe submitted that, once it had received a regulation 29 notification, NRW was, as a matter of law, bound to consider any and all environmental damage caused by the identified operator/event; but in any event, not without courage, he attempted to persuade me that reliance had been placed on the extended concept of damage, at least in the first judicial review; and this basis of claim was therefore not “new”.
98. In support of this last submission, he relied upon two passages from the first judicial review documentation. First, in paragraph 118(g) and (h) of the Grounds of Claim in that first judicial review – in the section dealing with the ground that the 2009 Regulations failed properly to transpose the EL Directive by giving NRW only a power (rather than a duty) to require preventative measures to be taken – it said:

“(g) In any event, when it comes to the SSSI (of which the charr is a designated conservation feature) the ‘baseline condition’ for reference purposes should be the undamaged status of the SSSI. At present, as above, it is well below that status. In respect of nutrient enrichment it is being maintained at that degraded level (something which NRW’s erroneous focus on 2009 damaged state as providing the ‘baseline’ leads it to think is acceptable) by the ongoing pollution in play here. If pollution load was removed (or even drastically reduced) then over time, the charr population and its habitat, and thus the SSSI, would gradually recover to the true ‘baseline condition’. A significant and adverse environmental pressure on it would be released.

(h) The [Dŵr Cymru] pollution is at the very least holding water quality at a steady – worse – level rather than allowing it to recover. That, in itself, is ongoing ‘environmental damage’, which NRW has failed even to address. But the situation is actually deteriorating when the information on [DO] and charr is taken into consideration.”

Second, Mr Wolfe relied upon paragraph 27 of Mr Hughes’ statement of 8 February 2012, quoted in paragraph 80 above, which again referred to steps which Mr Hughes considered ought to be taken to “ensure that the lake has at least a chance of recovering”.

99. I am, however, entirely unpersuaded by these submissions.

100. The 7 February 2012 notification letter clearly suggested that discharges from Llanberis STW had caused environmental damage only in the sense of a worsening of the environmental situation. As the Claimant now concedes, there was and is no such damage. All of the EL Directive biological and physicochemical elements, except DO, are of “good” ecological potential/status. Excepting phytoplankton as a result of the 2009 bloom, specifically dealt with in the decision documents, none has fallen in status since 2007. Whilst has DO has remained below “good”, it has not fallen in status since then, possibly moving from “poor” upwards to “moderate”. The levels of TP in the waters of the lake have always been within the limit of 10µg/l set by the 2010 Directions for a shallow lake (into which category Llyn Padarn falls: see paragraph 54(i) above); and even within the more conservative figure of 8µg/l for a deep lake, against which TP has in practice been measured (see paragraphs 23 and 54(i) above). TP in discharges continues to fall. There is no evidence of a decline in the charr population in Llyn Padarn since 2007: and there is evidence the population of adult charr are now at a level higher than 2005 and increasing, which is at least suggestive that the water in Llyn Padarn is not hostile to charr (see paragraph 24 above). Therefore, whilst the Claimant’s 7 February 2012 letter notified NRW of environmental damage in the form of a deterioration – and only in that form – there is simply no evidence of any worsening of any relevant aspect or element of the environmental situation since April 2007.
101. Although, of course, it would be preferable if the quality of Llyn Padarn as a surface water body were still more improved – and the DO element is still below “good” status, so that its overall ecological potential for physicochemical elements (and thus the ecological potential for the body of water as a whole) remains less than “good” and thus, insofar as they are required to be, Llyn Padarn and the charr in it are not in a “favourable conservation status” – the 2012 notification letter clearly did not rely upon a deceleration of improvement as “environmental damage”, nor did the first judicial review claim. Whilst paragraph 118(g) and (h) of the first Grounds of Claim hinted at the argument, neither passage relied upon by Mr Wolfe suggests that, in either the notification letter or the first judicial review, the Claimant was relying upon the proposition that deceleration of improvement (or anything less than deterioration) may be damage as a discrete point of law. If such damage had been relied upon, the observations to the Consent Order that compromised the first judicial review claim (see paragraph 85 above) would no doubt have been different.
102. Although I accept that, in its 2013 and 2014 decision documents, NRW did consider possible damage outside that notified by the Claimant – for example, the environmental position of otters, and water plantain – I am not persuaded that an enforcing authority such as NRW is in any event obliged to seek out and consider any and all “environmental damage” that might have been caused by an operator or operation notified, simply on account of the notification that it received. Indeed, it seems to me that that proposition cannot be sound – because the authority is not required even to consider a notification if, in its opinion, “the information provided does not disclose any environmental damage or threat of environmental damage...” (regulation 29(5)(b)). Certainly, I consider that, as a matter of law, NRW was not under an obligation to consider damage that not only fell outside the scope of the notification, but was of a novel and entirely different type from that notified.

103. Therefore, I agree with Mr Forsdick. The original notification letter of 7 February 2012 did not require NRW to consider damage in the sense of a deceleration of improvement to the environmental situation, and NRW did not, as a matter of law, err in not considering it in the 2014 decision document, now challenged. The realisation by the Claimant that the damage it had alleged in the notification could not be made good, caused it to change tack – and very substantially so.
104. However, of course, having heard substantial argument on the wider issues, I shall deal with those issues – particularly as, if the Claimant were now to send a further notification letter to NRW on the basis of damage of the extended interpretation of “environmental damage”, we know, from the submissions in this case, that NRW would surely reject it on the basis that such damage does not fall within the scope of the EL Directive.

The Claimant's Case on Causation

105. Given that, by article 4(5), the EL Directive only applies where there is a causal link between relevant damage and the activities of a particular operator – in this case, the sewage discharges into Llyn Padarn from Dŵr Cymru's operation of the Llanberis STW – before I deal with the extant grounds of challenge, it would be helpful to describe the way in which the Claimant now alleges that those discharges have caused environmental damage. As I have indicated, no claim is now made that any of the activities caused a deterioration in the environmental situation. The claim is now restricted to damage in the sense of decelerated improvement of that situation. The case is set out in paragraphs 33-5 of the Claimant's Grounds of Claim:

“33. ... [T]he lake is becoming ‘eutrophic’ (or nutrient-rich) because treated and untreated sewage entering the lake contains substantial quantities of phosphates which increase the [TP] levels in the water.

34. Those increased levels of nutrients create conditions that can (and do) significantly increase the growth of algae from what would naturally be in the water. That increase in algal growth in turn reduces water quality because, when algae die, they sink to the bottom of the lake and decompose. As this process happens, it in turn depletes the level of oxygen in the water (known as [DO]), upon which the charr depend for survival. The impact is greater with higher levels of nutrients and it is not necessary for there to be a visible and dramatic bloom (such as occurred with the toxic bloom of 2009) for this to happen to varying degrees each year.

35. That, in turn, limits the suitability of the lake for Arctic charr.”

This case as to mechanism was maintained: it is, in essence, repeated in paragraph 16 of Mr Wolfe's skeleton argument.

106. The case is, therefore, as follows. Increased levels of nutrients in the water cause higher levels of algae including, but not limited to, overt “blooms”. When those algae

die, they fall to the bottom of the lake, where they decay. That decomposition uses up DO, the levels of which consequently decrease, particularly in the hypolimnion, the lowest part of the lake which is not affected by thermal movements in the summer. In the summer, the charr tend to occupy the hypolimnion. As a result of the reduced DO, the charr are adversely affected.

107. This mechanism chimes with paragraph 160 of the 2014 decision document:

“There is a historical issue with nutrient levels in the lake that were known to originate from the [Llanberis STW] discharges. Whilst the nutrient levels themselves are not considered to affect the charr adversely, they have an indirect effect in that they have the potential to affect the habitat by causing a blue-green algal bloom, as seen in 2009. This in turn has the potential to lower dissolved oxygen levels in the bottom layer of the lake...”.

108. Mr Wolfe readily accepted that the decline in the Llyn Padarn charr population has also in part resulted from, not only the unavailability of the Llyn Peris spawning beds following the hydro-electric power works, but also from the historic discharges of sewage into Llyn Padarn over a long period of time (paragraph 5 of his skeleton argument). However, the Claimant does not rely upon those historic discharges, which have left a legacy of a lake floor that is both phosphate-enriched (so that it discharges phosphates into the water, particularly during the summer months) and covered with decomposing algae (so that it depletes the DO in the water). Mr Wolfe made very clear that the Claimant relies only upon the continuing discharges into the waters of the lake from the ongoing activity of sewage collection and treatment (see, e.g., paragraphs 6 and 8 of his skeleton argument). It is the phosphate burden of those continuing discharges which, it is contended, result in decelerated improvement in the DO, and thus in the body of surface water as a whole, by the mechanism as set out above.

Ground 1: “Environmental Damage” in the context of Natural Habitats

The 2014 decision document

109. As described in Part A of the document itself, in the 2014 decision document, so far as “environmental damage” to species and habitats is concerned, NRW applied the 2009 Regulations, as follows.

- i) Regulation 4 defines “environmental damage” to include damage to protected species or natural habitats, or an SSSI (paragraph 72).
- ii) Within an SSSI, to be “environmental damage”, by paragraph 4(1) of Schedule 1 to the 2009 Regulations, damage must be to a Habitats or Wild Birds Directive protected habitat or species, or to a habitat or species notified under section 28 of the 1981 Act. The only relevant species was charr (although, for the sake of completeness, I should add that the 2014 decision document considered all other notified and protected species, finding that there was no environmental damage in respect of any, a conclusion that is not disputed) (paragraph 75).

- iii) Furthermore, by paragraph 4(2) of the same schedule, the damage “must have an adverse effect on the integrity of the site (that is, the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats or the levels of populations of the species affected)” (paragraph 76).
- iv) The decision document then refers to, and applies, the two-stage procedure set out in paragraph A1.11 of the 2009 Regulations Joint Guidance (quoted at paragraph 74(vii) above).
- v) First, it considered whether there had been any adverse effect on a relevant species in terms of (e.g.) reduction in the area of habitat, structure, function or quality of habitat, or the physical, chemical, hydrological or biological processes that support the relevant habitats or species (see paragraphs 81 and 95). In line with the requirements of the Consent Order schedule (and, of course, the EL Directive itself), in doing so, it considered the effects of all emissions from Llanberis STW after April 2007.
- vi) In respect of charr, NRW conducted a detailed assessment (paragraphs 96-133), and concluded that, since April 2007, (a) there had been no demonstrable reduction on charr habitat area or volume (paragraphs 136 and 145), (b) there had been no demonstrable impact from the activity of Dŵr Cymru as an operator on charr habitat in the SSSI (paragraph 146), including in respect of DO and TP levels (paragraphs 147 and 160), and (c) no decline in charr population could be demonstrated with any statistical certainty, and there was no (or, at least, no sufficient) evidence that any post-April 2007 emission, event or incident linked to the economic activities of any operator had caused any decline in the charr population (paragraphs 151 and 163).
- vii) Having concluded that there was no post-2007 adverse impact on the habitat, water or charr as a result of Dŵr Cymru’s discharges from the Llanberis STW into Llyn Padarn, it was unnecessary to proceed to the second, site specific stage of the exercise (paragraph 166).

The Claimant’s Submissions

110. Mr Wolfe submitted that this approach was wrong. His submissions were, throughout, fluid – but, as I understood them, at their conclusion, they comprised the following.
- i) If and insofar as regulation 4(2) of the 2009 Regulations purported to make habitats and species that were subject to the protection of the Habitats and Wild Birds Directives subject to a lesser standard of protection if they also fell within an SSSI – by requiring damage to satisfy the site integrity test – it failed properly to transpose the Directive and was unlawful. It must be read up to require the higher level of protection for those habitats and species protected by the two Directives, whether inside or outside an SSSI.
 - ii) In making the 2009 Regulations, the Welsh Ministers had exercised their power under article 2(3)(c) of the EL Directive, to determine that all SSSIs in Wales be designated as habitats for equivalent purposes as those laid down in

the Habitats Directive. Having designated SSSIs in that way, it was not open to the Welsh Ministers then to apply to SSSIs a different test or standard for environmental damage from that specified by the EL Directive for protected habitats and species (Riksskatteveret v Soghra Gharehveran Case C-441/99 (18 October 2001)).

- iii) Therefore, in assessing environmental damage to the SSSI, NRW was wrong to apply the site integrity test.
- iv) If the SSSI was so designated, then (a) the water in Llyn Padarn, (b) the SSSI as a whole “as a defined ‘natural habitat’” (see paragraph 51(c) of Mr Wolfe’s skeleton), and (c) the charr as a notified species for SSSI purposes, were each a “natural resource” under regulation 2(1).
- v) By article 2(2) of the EL Directive (effectively incorporated into the 2009 Regulations, which do not otherwise define the term), “damage” means “a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly”.
- vi) Mr Wolfe submitted that different terms – “adverse change” and “measurable impairment” – have been used for a purpose. He accepts that “adverse change” connotes and inherently requires a worsening or deterioration. It was unclear to me whether he maintained in any form the submission that the environmental situation of one of the natural resources – the water, the SSSI and/or the charr – had “adversely changed” or worsened since April 2007. But, in any event, he submitted that “impairment” was conceptually wider, not being limited to the situation where there has been an adverse change or worsening, but rather including something which prevents or decelerates recovery from an already-damaged state.
- vii) Mr Wolfe relied upon “measurable impairment” to two natural resource services.
- viii) First, he submitted that the charr perform a natural resource service in the form of a function for the benefit of the habitat, so that a measurable impairment of the charr – in the sense of decelerated improvement in their environmental position, as a result of sewage discharges impacting on DO levels – is relevant environmental damage, if and insofar as it reduces that benefit (paragraph 53 of his skeleton argument). However, (a) this submission did not feature in Mr Wolfe’s oral submissions; (b) it is counterintuitive to consider the charr as a natural resource service to its habitat, rather than vice versa; and (c) insofar as it is not a circular argument, in my view this submission does not add to the second submission he made, which was focused on water – and, in particular, the DO element of it – as a natural resource serving a beneficial function for the charr.
- ix) Second – and with more vigour – Mr Wolfe submitted that the continuing discharges from the Llanberis STW limit (and, therefore, “impair”) the DO which remains at less than “good” status; which in turn impairs (a) the water as a natural resource, by slowing down its progress to “good” environmental “status” and (b) the SSSI as a natural resource, by slowing down its progress to

“favourable” conservation status as a natural habitat. By virtue of article 2(4)(a) of the EL Directive, the conservation status of a habitat is “favourable” only when the conservation status of its typical species is “favourable” as defined in article 2(4)(b). The deficient DO level hampers the charr from attaining “favourable” conservation status, and thus hampers the SSSI habitat from attaining such status.

- x) Thus, focusing on the water – and, in particular, DO – Mr Wolfe submitted that there is, therefore, “damage” in the form of “measurable impairment of a natural resource service”. That damage is environmental damage under article 2(1)(a) because it has “significant adverse effects on reaching... the favourable conservation status of [relevant] habitats or species”. Here, again, Mr Wolfe submitted that the terminology used is important, “adverse effects” including, not simply worsening, but also a deceleration of improvement.
- xi) In considering “environmental damage” under the EL Directive, the relevant question for NRW was, therefore, whether the impairment of the function which the water performs for the charr (i.e. the provision of DO) is potentially having significant adverse effects upon the progress of the SSSI (as, in effect, a protected habitat) or the charr (as, in effect, a protected species) towards “favourable” conservation status. NRW erred in not asking itself that question. Had it considered that question, NRW would (or, at least, may) have answered it positively, and made directions to Dŵr Cymru in respect of preventative and remediation measures accordingly.
- xii) If, contrary to his primary submission, the Llyn Padarn SSSI did not benefit from the same protection as a habitat protected under the Habitats Directive, Mr Wolfe submitted that, in paragraph 1(1) of Schedule 1 to the 2009 Regulations, with reference to protected habitats or species, damage is defined in terms that it “must be such that it has a significant adverse effect on reaching or maintaining the favourable conservation status of the protected species or natural habitat...”, so that “significant adverse effect” there clearly included both deterioration of an environmental position but also deceleration of its improvement. “Adverse effect” in paragraph 4(2) must have the same connotation. That is reflected in paragraph A1.22 of the 2009 Regulations Joint Guidance which, under the heading “Recovery potential”, states (in what Mr Wolfe described as a rare insight into the true interpretation of “damage”):
- “In some cases species or habitats on a site may already be in a poor condition or severely damaged and an emission, event or incident may further damage them *or prevent them from recovering*. Such cases should not automatically be excluded. Consideration should be given to the extent to which it affects their recovery potential as well as the timing, scale and severity of the effect.” (emphasis added).
- xiii) Therefore, in considering “environmental damage” under paragraph 4(2) of Schedule 1 to the 2009 Regulations, the relevant question for NRW was whether the impairment of the function which the water performs for the charr (i.e. the provision of DO) is potentially having an adverse effect on the

coherence of the ecological function that enables the SSSI naturally to sustain charr levels, “adverse effect” here again including the prevention or deceleration of recovery. He submitted that, again, had it considered that question, NRW would (or, at least, may) have answered it positively, and made directions to Dŵr Cymru in respect of preventative and remediation measures accordingly.

111. That case gives rise to the following questions:

- i) In the context of the EL Directive, is the Llyn Padarn SSSI a “habitat” such that the environmental damage test for protected habitats in the EL Directive applies to it?
- ii) Does “damage” as defined in the EL Directive (and, by incorporation, the 2009 Regulations) include the prevention or deceleration of recovery from an existing, already-damaged environmental state; or is it restricted to a deterioration or worsening from an existing state?
- iii) On the basis of the true construction of “damage” and the evidence before it, did NRW err in concluding that, other than the 2009 algal bloom, no environmental damage has been caused to the SSSI as a habitat from post-30 April 2007 discharges from Llanberis STW?

112. I will deal with those in turn.

The Designation of SSSIs for the purposes of Article 2(3)(c) of the EL Directive

113. Mr Wolfe submitted that SSSIs in Wales have been designated under article 2(3)(c) as “natural habitats” for EL Directive purposes, so that SSSIs are entitled to the same level of environmental protection as protected habitats. Mr Gordon for the Welsh Ministers submitted that they had not: the 2009 Regulations, as well as implementing the EL Directive, created a parallel but distinct scheme for SSSIs.

114. Mr Wolfe relied upon the following in support of his contention.

115. First, the preamble to the 2009 Regulations states:

“The Welsh Ministers being designated for the purposes of section 2(2) of the European Communities Act 1972 make these Regulations under the powers conferred by that section as read with paragraph 1A of Schedule 2 to that Act.

The Regulations make provision for a purpose mentioned in section 2(2) of, and paragraph 1A of Schedule 2 to, the European Communities Act 1972 and it appears to the Welsh Ministers that it is expedient for the Community instruments referred to in these Regulations to be construed as references to those instruments as amended from time to time.”

116. Section 2(2) of the European Communities Act 1972 provides:

“... at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision —

(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;...”

117. Mr Wolfe submitted that section 2(2) thus gives powers for two separate and distinct purposes, namely (a) implementing EU obligations, and (b) dealing with matters arising out of or related to any such obligations. The preamble refers to the 2009 Regulations being made for “a purpose” (i.e. singular). That single purpose can only be to implement the obligations in the EL Directive, because it is uncontroversial that the Regulations were intended to do that. That excluded the possibility that, in making the Regulations, the Welsh Ministers were, in addition, exercising the distinct power under section 2(2)(b) to deal with matters arising out of the EU obligations being implemented, e.g. in the form of parallel but distinct provisions for SSSIs.
118. That (he submitted) is emphasised in the Explanatory Note to the 2009 Regulations, which states that, “These Regulations implement [the EL Directive]”, no more and no less. There is no suggestion there that they both implement the Directive, and, in addition, create a parallel scheme for SSSIs.
119. Second, before making the 2009 Regulations, the Welsh Government (as well as the United Kingdom Government, for England) clearly considered bringing nationally-defined biodiversity within the scope of the EL Directive, by exercising the power to do so under article 2(3)(c) of the Directive. For example:
- i) The first consultation paper on options for implementing the Directive (jointly published by both Governments in November 2006) expressly raised that as an option (paragraph 3.17, and Part B).
 - ii) After the consultation responses had been received, the Welsh Government reported to the House of Commons Environment, Food and Rural Affairs Committee, that:

“Officials are considering an extension to the scope of the EL [Directive] implementing regulations, so that they protect the animals, plants and habitats within SSSIs for which those SSSIs have been designated, as well as EU protected habitats and species. This is in line with Defra’s policy.”
 - iii) That Committee reported in its 2006-7 Session Report that, in response to the consultation and the United Kingdom Minister’s comments on that response:

“The Minister failed to make a convincing case for not extending the scope of the EL [Directive] so that, as well as protecting EU-based biodiversity, it covers nationally-protected species and habitats too. We recommend that the [UK] Government should exercise its discretion to include nationally-protected species and habitats within the scope of the [EL Directive]. In so doing it would be able to trade off any criticism of ‘gold-plating’ against the gains arising from a better and more consistent implementation of the Directive.”

- iv) The signature submission to the relevant Welsh Minister (the Minister for Environment, Sustainability and Housing) by his officer, dated 8 April 2009, refers to the exercise of simply powers “to implement the Directive in Wales” (paragraph 11), which was reflected in the attached draft Explanatory Note, in the form finally adopted which I have already quoted.
120. Mr Wolfe submitted that, whilst none of these documents could be determinative, taken together they supported the proposition that, in making the 2009 Regulations, the Welsh Ministers were exercising their power under article 2(3)(c) of the EL Directive to designate SSSIs in Wales.
121. Third, the 2009 Regulations Joint Guidance again refers to the 2009 Regulations simply transposing the EL Directive into law in Wales, and not to any separate parallel scheme for SSSIs (paragraph 1.6).
122. Fourth and finally, in responding to the letter before claim, in its letter to Fish Legal dated 16 February 2015, NRW appear to have accepted that:
- “... [I]n the [2009 Regulations], the Welsh Ministers elected to make use of the option given by article 2(3)(c) to include within the scope of the domestic provisions transposing the [EL] Directive ‘any habitat or species, not listed in [the Annexes to the Habitats and Wild Birds Directives] which the Member State designates for equivalent purposes as those laid down in these two Directives’. In other words, the inclusion, within the scope of the [Regulations] of damage to species protected in a SSSI...”
123. However, in my view, by making the 2009 Regulations or otherwise, , the Welsh Ministers did not exercise their power under article 2(3)(c) in the manner suggested by Mr Wolfe, for the following reasons.
124. I did not consider that Mr Gordon’s submission that SSSIs and “habitats” are conceptually different – because the former comprises a space or area, whilst the latter comprises something which is on a space or area – to be compelling. Whilst it is true that regulation 2(1) of the 2009 Regulations refers to “... habitats *on* [an SSSI]” (emphasis added), article 1(b) of the Habitats Directive defines habitats in terms of “terrestrial or aquatic areas”.

125. Furthermore, I did not find the debate on singulars and plurals to be of particular help. There is, of course, the tenet of construction that the singular generally includes the plural, and vice versa. In response to Mr Wolfe's contention that the reference to "a purpose" in the preamble to the 2009 Regulations could only be a reference to the purpose in section 2(2)(a) of the 1972 Act, i.e. the implementation of an EU obligation, Mr Gordon submitted that:

- i) The preamble also refers to "the purposes of section 2(2)" of the 1972 Act, and also to "the powers conferred by that section" (both in the plural); and, in any event, does not refer to the particular purpose of section 2(2)(a).
- ii) The reference to "a purpose" is expressly in the context of section 2(2), and paragraph 1A of schedule 2 to, the 1972 Act. Paragraph 1A provides:

"Where –

- (a) subordinate legislation makes provision for a purpose mentioned in section 2(2) of this Act,
- (b) the legislation contains a reference to a [EU instrument] or any provision of a [EU instrument], and
- (c) it appears to the person making the legislation that it is necessary or expedient for the reference to be construed as a reference to that instrument or that provision as amended from time to time

the subordinate legislation may make express provision to that effect."

Mr Gordon submitted that the passage in the preamble relied upon by Mr Wolfe had simply been taken from paragraph 1A(1)(a), to mark that the pre-condition of the exercise of that power had been satisfied.

I accept that those submissions have some merit; but, as I have indicated, in my respectful view, not that much force. Nor do I consider that the Explanatory Note – which is, at best, a mere summary of the main effect of the instrument, which cannot override the words of the instrument itself – to be of any great help. In my judgment, we need to look elsewhere for assistance.

126. Much more compellingly, Mr Gordon submitted that article 2(3)(c) requires the relevant national authority to "determine" that any habitat not listed in the Habitats or Wild Birds Directives be "designated for equivalent purposes as those laid down in these two Directives"; but, in this case, there is no evidence of any such express determination. The fact that, during the consultation and consideration process, the Welsh Government considered such a step does not overcome this lack of a determination: indeed, if anything, it perhaps undermines the contention that there ever was such a determination. Knowing that they had considered it as an option, if the Welsh Ministers were intent on making a determination, one would have expected them to have made it expressly, clearly and unambiguously. A determination that all

one thousand SSSIs in Wales be designated as habitats for purposes equivalent to those laid down in the Habitats Directive would be a serious and far-reaching decision, as evidenced by the substantial procedure required to identify and create Special Areas of Conservation under the provisions of the Directive itself. It would be curious if such a decision were taken without the clearest mark.

127. Mr Wolfe attempted to overcome the absence of any evidence of an overt determination, by submitting that the making of the 2009 Regulations by the Welsh Ministers itself comprised the determination. However, I am unconvinced.
- i) Mr Wolfe submitted that the real question is “whether SSSIs are a ‘natural habitat’ within the meaning of the EL [Directive]” (see, e.g., paragraph 93 of his skeleton argument). However, whilst “natural *resource*” is defined in regulation 2(1) of the 2009 Regulations to include “species or habitats on [an SSSI] for which the site has been notified...”, “natural *habitat*” is specifically defined in that same regulation as being restricted to habitats and species protected by the Habitats and Wild Birds Directives. It does not include SSSIs, or habitats or species thereon. Although Mr Wolfe appeared to pin his colours to the “natural habitats” mast, I accept that that in itself is not determinative. However, if, in making the 2009 Regulations, the Welsh Ministers had wished to designate SSSIs as habitats for equivalent purposes as those laid down in the Habitats Directive, they could – and, in my judgment, would – have simply included them in the definition of “natural habitat”.
 - ii) Mr Wolfe laid weight on paragraph 4(1) of Schedule 1 to the 2009 Regulations. He submitted that a provision that made no distinction between damage to protected habitats and species on the one hand, and SSSI habitats and notified species on the other, was only consistent with a positive exercise of the article 2(3)(c) power which would have the effect of raising the level of protection for SSSIs as habitats to that of those protected under the two Directives. However, curious as the wording of regulation 4 may be, I do not consider that it assists Mr Wolfe on this issue of construction. Whatever is uncertain about regulation 4, it is clear from it that the Welsh Ministers intended to create a difference between the protection scheme for (i) SSSIs and (ii) protected habitats outside SSSIs. Whether the inclusion in the provisions relating to SSSIs of protected habitats and species that happen to fall into an SSSI is unlawful – which, submitted Mr Wolfe, it would be, as diminishing the European protection afforded to those species and habitat – is not here to the point. Whether that submission of Mr Wolfe’s can be made good – and, I should say, that Mr Forsdick made shadow submissions which suggest that that point is at least arguable the other way (see footnote 9 in his skeleton argument) – is a matter that can be considered on another day, in another claim in which it might be relevant or even determinative. On that issue, I express no view.
 - iii) The materials produced by Mr Wolfe as to the consultation process etc are, at best, indeterminative. For example, although I accept that the House of Commons Select Committee made a contrary recommendation to which I have already referred, in the first consultation paper each Government identified its preferred option in respect of the article 2(3)(c) power as not to exercise it, but to “implement the EL [Directive] so that ‘protected species and natural

habitats' only includes EC protected species and habitats" (see page 55). As I have described, "natural habitat" is so defined in the 2009 Regulations. None of the documents to which I was referred by Mr Wolfe points firmly to the Welsh Ministers opting to designate all Wales SSSIs as "natural habitats" or equivalent for Habitats Directive purposes.

- iv) Indeed, some of the documents appear to be strongly against the proposition that Mr Wolfe seeks to make good. For example, in paragraph 4.4. of the signature submission dated 8 April 2009 (see paragraph 119(iv) above), in speaking of the relevant domestic legislation (including the 1981 Act), the author told the Minister:

“Legislation to protect and require remediation for damage to the environment already exists in the UK. In Wales, this legislation includes the Water Resources Act 1991, Part IIA of the Environmental Protection Act 1990, [the 1981 Act] and the Environment Permitting (England and Wales) Regulations 2007. In some respects, this legislation already fulfilled the policy requirements of the Directive. For example, operators who cause damage can be required to take steps to remediate that damage. Having carefully considered the options, the Assembly Government decided to make separate regulations which will supplement the existing legislation.

It was considered inappropriate to 'gold plate' the Directive by extending all its requirements (for example, complementary and compensatory remediation) to all damage covered by existing legislation, some of which is well below the thresholds in the Directive. However, the Assembly Government was also reluctant to lose the protection provided by existing legislation which is not provided by the Directive, again because of damage thresholds. A consolidation of the two regimes was therefore not appropriate. Implementation by way of amendment to existing legislation would have been difficult to understand, and would not have fully transposed the Directive without freestanding regulations as well.”

That was authored very shortly before the 2009 Regulations were considered, and the Regulations appear to have been approved on that basis by the relevant Welsh Minister. It clearly envisages distinct regimes for SSSIs, and protected habitats. It does nothing to support the proposition that, in signing off the 2009 Regulations, the Welsh Ministers were intending to make a determination that all SSSIs in Wales should be designated as protected "natural habitats" for purposes equivalent to those laid down in the Habitats Directive. Indeed, it appears inconsistent with such a determination.

- v) NRW's response to the letter before claim does not substantively assist Mr Wolfe's argument. That letter went on to say that, because the inclusion of the

SSSIs was voluntary, the method by which they were protected was a matter for the Welsh Ministers' discretion. Having taken further advice, NRW does not stand by that legal analysis as to why there are distinct regimes within the 2009 Regulations for SSSIs and protected habitats/species; but supports the Welsh Ministers' analysis that, in including SSSIs in the 2009 Regulations, they were not exercising their powers under article 2(3)(c), but under section 2(2)(b) of the European Communities Act 1972.

128. For those reasons, I have firmly concluded that, in making the 2009 Regulations to include provisions for SSSIs, the Welsh Ministers did not make a determination that all Wales SSSIs should be designated for purposes equivalent to those laid down in the Habitats Directive, such that the provisions of the EL Directive that apply to protected habitats and species apply equally to SSSIs and species that inform their designation as SSSIs. The 2009 Regulations, as properly construed, provide for parallel provisions for SSSIs and protected habitats and species under the Habitats and Wild Birds Directives. Insofar as regulation 4(2) purports to set a standard of protection for such protected habitats and species that is less than that required by those two Directives, the lawfulness of that provision is immaterial to the issues in this claim, the Llyn Padarn SSSI not being a Special Area of Conservation under the European regime.

“Damage” as defined in the EL Directive

129. However, Mr Wolfe submitted that that first question was not determinative in this claim, because, whatever the answer, NRW had erred in its approach to “damage”. It had proceeded on the basis that “damage” as defined in the EL Directive (and, by incorporation, the 2009 Regulations) was restricted to a deterioration or worsening from an existing state, and had excluded consideration of damage in the sense of the prevention or deceleration of recovery from an existing, already-damaged environmental state. It was this issue which, he submitted, was determinative of this claim.
130. I have already set out Mr Wolfe's submissions in this regard. In brief, by article 2(2) of the EL Directive, “damage” means “a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly”. Whilst “adverse change” necessarily imports and requires a deterioration, “impairment” does not do so, not being limited to the situation where there has been a worsening but including a deceleration of recovery from an already-damaged state. The continuing sewage discharges limit (and, therefore, impair) the DO which remains at less than “good” status, which in turn impairs (i) the water as a natural resource, by slowing down its progress to “good” environmental “status” and (ii) the SSSI as a natural resource, by slowing down its progress to “favourable” conservation status as a natural habitat. That is consequently a “measurable impairment of a natural resource service”, and thus “damage” within the meaning of article 2(2) of the EL Directive.
131. However, I am again unable to accept these submissions. In my judgment, the submission founders on principle, practice and linguistic grounds.
132. Mr Wolfe submitted that the EL Directive sought to pursue both of the objectives in respect of bodies of water expressly set out in the WF Directive, as identified in the

Weser case, namely (i) the obligation to prevent deterioration and (ii) the obligation to enhance, those two elements appearing in the EL Directive recitals and purpose as set out in article 1(1), i.e. “to establish a framework for the protection of inland waters.... which... prevents further deterioration and protects and *enhances* the status of aquatic ecosystems...” (emphasis added). That is true so far as it goes. However, whilst the WF Directive focuses primarily on Member State action to achieve “good” status for all EU surface waters by (e.g.) controlling discharges of pollutants – Weser confirming that that achievement is its “ultimate objective” – the EL Directive, when looked at as a whole, is firmly focused on unregulated practices of, and uncontrolled events and omissions by, an operator and requiring an operator (if, and when, it becomes a potential or an actual polluter) to pay for preventative or remedial measures, the State being primarily the enforcer of those obligations. Of course, that does not mean that the WF Directive is blind to the need to protect environmental positions from deterioration, which is the subject of an important secondary objective of that Directive; or that the EL Directive is blind to the need to ensure that acceptable environmental positions are achieved, which is the subject of an important secondary objective of that Directive. Preventing environmental deterioration can properly be said to assist with its ultimate progress towards ultimately acceptable environmental positions, as appears to be reflected in the WF Directive (see paragraph 44 above). But the focus of each Directive is, clearly, different.

133. The EL Directive is firmly focused on deterioration of the environment of bodies of water, notably the prevention of deterioration and, if such occurs, its remediation by the operator who caused it under the polluter pays principle. Crucial concepts in the Directive are (a) the “baseline condition”, defined in article 2(14) as “the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred”; and (b) “recovery”, defined in article 2(15) as “the return of damaged natural resources and/or impaired services to baseline condition” (see paragraph 69(iv) above).
134. Contrary to the suggestion in paragraph 118(g)-(h) of the Claimant’s Grounds of Claim in the first judicial review (see paragraph 98 above), “baseline condition” here cannot mean “good” condition, or a higher condition than that which may have existed in the possibly distant past, or any condition other than that current at the time of the relevant “event, act or omission” that caused the damage, actual or imminently threatened. Indeed, elsewhere in the Claimant’s Grounds in that first claim, it appears to accept that (see paragraph 83(ii) above). In this context, “baseline condition” is clearly a reference to the environmental condition that existed immediately before the activity of the operator reduced it. In my view, it is not compatible with the concept of “damage” including a deceleration of progress to the optimal or some better status or condition that may or may not have pertained well before the polluting activity of the operator took place.
135. The provisions in the EL Directive relating to remediation are instructive. Paragraph 1 of Annex II describes how “remedying of environmental damage” is “achieved through the restoration of the environment to its baseline level”. Paragraph 1.1.1 states that the purpose of primary remediation is “to restore the damaged natural resources and/or services to, or towards, baseline condition”. Paragraph 1.2.1 of that same annex states that options to directly restore natural resources and services towards baseline condition on an accelerated time frame or through natural recovery

shall be considered, which is language that is again inconsistent with “damage” including a deceleration of recovery to a level higher than that that pertained immediately before the worsening of environmental condition as a result of the relevant activity. The Directive seeks to prevent operators from engaging in activities that will reduce the condition of the relevant environmental element to below “baseline”; and, if such a reduction occurs, to require an operator which has caused the condition to fall below the baseline to pay to return the condition to the baseline.

136. In fact, when considering preventative and remediation measures, the EL Directive treats damage, whether of a natural resource or of a natural resource service, in an identical way. Paragraph 1.1.1 of the EL Directive is but one example. If there were the difference in concepts as Mr Wolfe suggests, prevention and remediation measures would have to be considered separately for each.
137. Indeed, Mr Wolfe’s proposition is, in my view, at least incongruous when considered against a main premise of the EL Directive, namely that the polluter pays for preventative or remediative measures to avoid or remedy environmental damage which it causes. If the damage could be in the form of decelerated improvement, the remediation measures would presumably be steps to accelerate improvement so that appropriate environmental status will be achieved as soon as possible or, at least, as quickly as would have occurred without the operator’s activity or omission that caused the deceleration. I appreciate Mr Wolfe’s conceptual argument; but this would in practice often be tantamount to requiring an operator to pay, not for its own polluting activities, but earlier polluting activities (possibly of entirely distinct operators) or simply paying to establish appropriate environmental status which is in the primary realm of the WF Directive. In practice, at a cost, Dŵr Cymru may be able further to reduce discharges of TP into Llyn Padarn; but it is impracticable for it to stop all such discharges into the lake, whilst the waters and fish in the lake recover from earlier pollution which has resulted in a lake floor from which phosphorus continues to be released and DO taken as a result of the decomposition of algae which proliferated as a result of earlier phosphorous discharges. Mr Wolfe submitted that any additional burden of TP in the waters of Llyn Padarn would adversely affect the recovery of the SSSI, water and charr: but Dŵr Cymru has a statutory duty to treat sewage (see paragraph 77 above) and Mr Wolfe was unable to say how the treatment of sewage and waste water functions in the area could be handled in practice if there was a complete prohibition on TP discharges which his submission, if made good, would dictate.
138. Furthermore, I accept the submissions of Mr Forsdick and Mr Kimblin, that for the test for damage to natural resources to require a deterioration in the environmental position of those resources (as Mr Wolfe accepts is inherent in the term “adverse change”), but to have a test for damage in respect of those same resources as they impact upon the functions of other such resources not to have such a requirement, would be irrational. This is, in my view, a particularly powerful point. It is pure chance whether an activity causes damage directly to a natural resource, or indirectly to that natural resource through another. In any event, to have a test for damage that is more demanding for “direct” damage, than for “indirect” damage, would have no rational basis. In practical terms, such a difference would result in artificial arguments as to the functions that natural resources perform for other natural resources as deployed by Mr Wolfe in this claim. It is only at the most conceptual

and abstruse level that charr could be considered to perform some function for the benefit of the water and habitat in which they live, as Mr Wolfe submitted they did (see paragraph 110(viii) above).

139. In article 2(2), “adverse change” and “impairment” must, in my judgment, refer to conceptually similar effects; and those effects must be in the nature of a worsening or deterioration. Mr Wolfe, rightly, concedes that “adverse change” necessarily refers to worsening or deterioration. Whilst I accept that “impairment” might, in other contexts, include the holding back of a condition or deceleration of improvement, in my judgment, in the context of article 2(2) it is clearly restricted to a worsening or deterioration in the functions which define a “natural resource service”, the term “impairment” being linguistically more appropriate to a deterioration in a function than “adverse change”.
140. During his oral submissions, Mr Gordon produced texts of the EL Directive in French, Italian and Spanish. He did so without translations, but (he said) to make an obvious point that could be made even without the assistance of interpreters. The French version of the definition of “damage” in article 2(2) provides:

“«dommages»; une modification négative mesurable d’une ressource naturelle ou une détérioration mesurable d’un service lié a des ressources naturelles, qui peut survenir de manière directe ou indirecte.”

Mr Gordon’s simple point was that, even without a translation, “une modification négative” (of a natural resource) clearly imports a worsening; as does “détérioration” (of a natural resource service) – and so, in the French version, the need for a worsening in respect of both natural resources and natural resource services is clear. The other translations he produced, he said, made the same point.

141. Subsequent to the hearing, Mr Wolfe obtained formal translations of the definition, which suggested that “détérioration” in French (and the terms used in the Italian, Spanish and German equivalents) does not necessarily simply equate with the English word “deterioration”, and the word used may have at least an alternative meaning sufficiently wide to include a deceleration of improvement. But, responded Mr Gordon, that corresponds to the English language version, “impairment” being linguistically capable of having that wider sense, but the context restricting it to a worsening.
142. Given the other factors bearing upon words used in the English version, I do not consider it necessary or helpful to consider the other language versions. In my view, they appear to me to be neutral. The translations do not positively assist Mr Wolfe – nor does he suggest they might. Nor have I have taken them into account in favour of the submissions made against Mr Wolfe on this issue.
143. Mr Wolfe submitted that “damage” as defined in article 2(2) must be wide enough to include some element of a deceleration towards a particular standard, because “environmental damage” as defined in article 2(1) is expressly defined in terms of “significant adverse effects on *reaching* or maintaining the favourable conservation status” (emphasis added) – and “environmental damage” must be a subset of “damage”.

144. The reference to “reaching... the favourable conservation status” clearly reflects the primary objective of the Habitats and Wild Birds Directives to require Member States to maintain and (where necessary) establish favourable conservation status of the priority natural habitat types and priority species. I accept that the reference to “significant adverse effects on reaching... the favourable conservation status...” appears to be somewhat inapposite in the EL Directive, which is primarily focused on a scheme of prevention and remediation of damage caused by particular operators; but the definition in article 2(1)(a) is constrained by the following:

“The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria in Annex I...”.

Annex I again makes clear that “baseline condition” is the environmental condition immediately prior to the deterioration in that condition caused by the relevant operator’s activity. Although article 2(1)(a) itself refers to “significant adverse effects on reaching or maintaining the favourable conservation status”, Annex I states that:

“The significance of damage that has adverse effects on reaching or maintaining the favourable conservation status of habitats or species has to be assessed by reference to the conservation status at the time of the damage, the services provided by the amenities they produce and their capacity for natural regeneration. Significant adverse changes to the baseline condition should be determined by means of measurable data.”

Those data are said to include:

“... the species’ or habitat’s capacity, after damage has occurred, to recover within a short time, without any intervention other than increased protection measures, to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.”

This therefore emphasises again that the “baseline condition” is the condition immediately before the deterioration caused by the operator’s activity; and excludes the possibility that “damage” includes the concept of a deceleration of improvement. In any event, as Mr Wolfe accepted, “environmental damage” is clearly a subset of “damage”; and, for the reasons I have given, I am confident that “damage” excludes mere prevention or deceleration of improvement.

145. Mr Wolfe also submitted that “adverse effect” when used in paragraph 4(2) of Schedule 1 to the 2009 Regulations must have the same meaning as the same phrase (“significant adverse effect”) used in paragraph 1 of the same schedule – where it clearly refers to both deterioration and a deceleration of improvement. However, the contexts in which the terms are used are very different. In paragraph 1, it is used in the context of protected habitats and species; and, in paragraph 4(2), it is used in the context of SSSIs. Whilst the usual tenet of construction is that the same words mean the same thing in a single instrument, given the different contexts, I do not consider

paragraph 1 assists in the interpretation of “adverse effects” in paragraph 4. For similar reasons, I do not consider the fact that article 2(1)(a) of the EL Directive uses the phrase “significant adverse effects on reaching or maintaining the favourable conservation status of... habitats and species” in the context of the Habitats and Wild Birds Directives assists in the construction of “significantly adverse affects” in article 2(1)(b) in the context of water damage (or, indeed, in the construction of or “adversely affected” in article 2(1)(c) in the context of land damage).

146. For those reasons, I have concluded that “damage” as defined in article 2(2) of the EL Directive is restricted to a deterioration in the environmental situation, and does not in addition include, as Mr Wolfe submitted, the prevention of an existing, already-damaged environmental state from achieving a level which is acceptable in environmental terms – or a deceleration in such achievement. It is common ground that “environmental damage” is a subset of “damage”; and so “environmental damage” necessarily has that same restriction.

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147. Whilst Mr Forsdick supported the submissions of Mr Gordon with regard to the true construction of “damage” in the context of the EL Directive, he also submitted that as a matter of fact, on the evidence, Mr Wolfe could not show that Dŵr Cymru had, since April 2007, caused “environmental damage” – however that term might be construed – in this case.
148. Only one mechanism has been suggested as to how such damage might have been caused, namely that set out in paragraphs 33-5 of the Claimant’s Grounds of Claim, quoted in paragraph 105 above and summarised in paragraph 106, as follows:

“Increased levels of nutrients in the water cause higher levels of algae including, but not limited to, overt “blooms”. When those algae die, they fall to the bottom of the lake, where they decay. That decomposition uses up DO, the levels of which consequently decrease, particularly in the hypolimnion, the lowest part of the lake which is not affected by thermal movements in the summer. In the summer, the charr tend to occupy the hypolimnion. As a result of the reduced DO, the charr are adversely affected.”

The levels of nutrients (i.e. TP) were increased as a result of discharges from the Llanberis STW. There was no evidence that there has been significant discharge of phosphorous into Llyn Padarn from any other source.

149. Mr Forsdick submitted that this mechanism could not be proved, because it was dependent upon the proposition that TP in the water of Llyn Padarn was at a level at which the reproduction of algae was accelerated. However, that proposition (he said) could not be made good.
- i) The 2010 Direction set the threshold level of “good” status for TP in water at 10µg/l.

- ii) That level is set under table 1.2.2 in Annex V of the WF Directive, which requires that the TP level is found to be “good” status only where the concentrations of TP in the water are such “as to ensure the functioning of the ecosystem and the achievement of the values specified above for the biological quality elements”, including of course the values specified for phytoplankton (see paragraphs 50-1 above). In other words, the level for “good” status for TP in the 2010 Directions has been set to ensure that the acceleration of algae growth upon which Mr Wolfe’s causal mechanism relies does not happen.
- iii) As I have described (see paragraph 23 above), save for 2009 – the year of the algal bloom, when the mean annual TP level in the lake rose to 13µg/l – since at least 2006, the level has been “good”, i.e. below 10µg/l; and, since 2009, it has been at or below 8µg/l. Therefore, save for the increase in TP levels which caused the algal bloom in 2009 (which was accepted as “environmental damage” in the 2014 decision document), since 2007 TP has been at a level which, as a result of the category definition, must have been assessed to be below that required to prompt the acceleration of algal growth to such a level that it would have an effect on the DO level or on any other relevant environmental factors. That assessment has not been challenged, nor properly could it be.

The Claimant is therefore unable to prove the (sole) causal mechanism upon which it relies; and, indeed, the sole mechanism that can be sensibly postulated.

150. Mr Forsdick further relied upon the fact that the 2014 decision document in any event concluded that, since April 2007:

- i) Other than that which caused the 2009 algal bloom, the TP level (a) had not worsened and (b) had had no demonstrable effect on the charr habitat (see paragraph 147 of the 2014 decision document).
- ii) There is no threat of imminent environmental damage occurring as a result of TP enrichment (i.e. TP levels) (paragraphs 51 and 370).
- iii) There was no evidence of a decline in DO levels since April 2007 (paragraph 160).
- iv) The levels of DO have not been such as to exclude charr from the hypolimnion (paragraph 144).
- v) There was insufficient evidence of any demonstrable change in charr habitat volume (paragraph 145).
- vi) No other biological and physicochemical elements used in the WF Directive classification had (a) worsened or (b) been less than “good” in ecological potential/status.
- vii) There had been no demonstrable impact from the activity of Dŵr Cymru on charr habitat (paragraph 146).

viii) There was no evidence of a decline in charr population in Llyn Padarn (paragraph 163). In any event, Ground 2 of the judicial review is not being pursued; and so that there is no challenge to NRW's finding that there is no clearly identifiable statistical decline in the charr population since 2007.

None of these findings is challenged. Consequently, if (as I have found) "environmental damage" is restricted to a worsening of the environmental situation, Mr Forsdick submitted that the Claimant's claim must fail on its facts.

151. Even if "environmental damage" includes a deceleration of improvement, he submitted that there is no evidence that the slowing of progress in respect of any environmental element (SSSI, water or charr) has resulted from the discharges of phosphorous from the Llanberis STW since April 2007 – rather than from (e.g.) the historic legacy of earlier discharges, or from extraneous matters such as the hydro-electric works.
152. I am uncertain if Mr Wolfe maintained any argument that there was environmental damage in the form of deterioration: although the overt claim based on a deterioration was not pursued, in some of the more sophisticated claims based upon the indirect effects of natural resource services, they seemed to me to make some, if spectral, reappearance. In any event, Mr Forsdick's submissions on this point are overwhelming. On the evidence and on the basis of the findings made in the 2014 decision document of the basis of the NRW's expert assessment – none of which is challenged – it cannot be argued that the NRW erred in its conclusion that, since April 2007, there has been no deterioration in any relevant environmental element.
153. Mr Forsdick's submission that I can be sure that, had the NRW considered environmental damage in the sense of a deceleration of improvement in those elements, its decision would nevertheless have been the same, is bolder. As all parties were quick – and quite right – to stress, matters of expert assessment are for the NRW, and not this court: and, because of the approach to "environmental damage" taken by the NRW, it did not consider the particular issue of whether discharges from the Llanberis STW caused a deceleration in any environmental element reaching its appropriate "good" standard. Furthermore, in the light of my conclusion on the true construction of "damage" in this context – to exclude deceleration of improvement – the issue is not determinative in this case.
154. However, having exercised appropriate caution, I find Mr Forsdick's submission to be sound.
155. Mr Wolfe referred me to evidence that the burden of continuing phosphate discharges – in combination with the legacy factors of the lake floor, which both releases retained phosphates in the summer and uses up DO in the decomposition of the dead algae lying there – limits the recovery of the DO level, and thus the recovery of Llyn Padarn a body of water and an SSSI. For example, in the 2014 decision document itself, it said (at paragraph 52):

“[T]he biological elements used in the WF [Directive] classification have returned to 'good' or 'high' status, although the [DO] physicochemical element of classification remains 'less than good' thus preventing the WF [Directive] status of

the lake reaching 'good'. As discussed in this section the combination of continuing nutrient inputs into the lake with historic sediment loading would appear to be the factors limiting this element. Evidence suggests that the impact from historic sediments produced by eutrophication can take many years to return a lake into good DO status despite other trophic indices such as TP being good".

See also paragraph 371 to the same effect.

156. Further, there is evidence that low DO levels are disadvantageous to charr. There is considerable general evidence that charr do not like low DO levels; and there is some (although not a great deal) of specific evidence, for example:

"[V]ery low oxygen levels in the deeper cooler waters will still impose a restriction in the area of preferred habitat suitable for these fish... The size of the available habitat to Arctic charr was particularly reduced during the month of September 2013..." (paragraphs 138 and 141 of the 2014 decision document)."

157. However, these do not undermine the clear *findings* made by NRW in the decision document, particularly about mechanism. The 2014 decision document made the following (unchallenged) findings.

- i) The decision document proceeded on the basis that "whilst the [TP] levels themselves are not considered to affect the charr adversely, they have an indirect effect in that they have the potential to affect the habitat by causing [an] algal bloom..." (paragraph 160).
- ii) Other than the increase in TP which caused the 2009 algal bloom – which, the decision document found, resulted from discharges from Llanberis STW, a liability notice being issued in respect of that – TP levels have been and are of "good" status, and so, by definition, the concentrations of TP in the Llyn Padarn waters are such "as to ensure the functioning of the ecosystem and the achievement of the values specified above for the biological quality elements". Furthermore, the decision document concluded that there is no threat of imminent environmental damage occurring as a result of TP levels.
- iii) The decision document proceeds on the basis that the mechanism relied upon by the Claimant as the sole mechanism for environmental damage in this case (i.e. increased TP levels causing accelerated algal growth, which in turn causes reduced DO as a result of lake floor decomposition) is, indeed, the only relevant mechanism that is potentially at work (see paragraph 160). But, in any event, although the DO level is less than "good" and there is evidence that charr generally prefer well-oxygenated water, there appears to me to be no specific evidence that the lower levels of DO have, in this case, led to any slowing of the return of the charr to acceptable environmental status by (e.g.) the lack of DO in the hypolimnion restricting their summer habitat.

- iv) The evidence appears to be that a significant proportion of charr that have been introduced to the lake as parr or fry have matured to adult fish, with the result that the adult population is now increasing.
- v) There is no evidence that the increase in phosphorous content of the water as a result of the STW discharges is having any adverse effect on the charr population; and, in an unchallenged finding, NRW concluded that “there has been no demonstrable impact from the activity of an operator [i.e. Dŵr Cymru] on charr habitat in the [Llyn Padarn] SSSI since 30 April 2007” (paragraph 146).

158. For those reasons, had I been required to do so and not without some hesitation, I would have found that, in any event, this claim would fail on its facts.

Ground 1: Conclusion

159. Ground 1 consequently fails.

Ground 3: “Environmental Damage” in the context of the Water Body

160. Mr Wolfe conceded that, if the true construction of “damage” under the EL Directive is as I have found it to be, Ground 3 must also fail. The causal mechanism upon which he relied was identical. In those circumstances, I can deal with this ground shortly.
161. This ground fails on the same basis as Ground 1. Although, for a body of water, “environmental damage” is defined by article 2(1)(b) of the EL Directive (rather than article 2(1)(a), which was relevant to habitats and species in Ground 1), “water damage” is equally a subset of “damage” as defined in article 2(2). For the reasons I have given, “damage” excludes deceleration of improvement.
162. I need refer to only two specific submissions made by Mr Wolfe.
163. First, he prayed in aid the reference to article 4(7) of the WF Directive within article 2(1)(b): excepted from the “significant adverse effects” referred to in article 2(1)(b) are the adverse effects where the conditions of article 4(7) of that other Directive are satisfied. Article 4(7) is set out above (paragraph 59). Mr Wolfe’s point was that the exception within it covers (under identified circumstances) both failure to prevent deterioration in status and a failure to achieve good water status. He submitted that that is conclusive that “environmental damage” as defined in article 2(1)(b) of the EL Directive must include the prevention or a deceleration of improvement towards good water status.
164. However, I do not agree that that is a determinative point – or even one of great weight in interpreting the relevant provisions. Article 4(7) simply provides for a defence for a Member State in respect of failures in respect of all obligations in the WF Directive – including both the obligation to set and attain certain standards for bodies of water, and the obligation to avoid deterioration. Although article 2(1)(b) requires it to be read across, it can only be read across as a defence to the obligations imposed by the EL Directive – it cannot dictate them. For the reasons I have given,

those obligations – imposed primarily upon operators – have a different focus (and, of course, scope) from those in the WF Directive.

165. Similarly, Mr Wolfe's submission that regulation 9 of the 2009 Regulations – which clearly purports to transpose the article 4(7) exception – failed in its transposition, insofar as it restricted the exception to one involving deterioration, was not made good – because of my conclusion that “damage” under the EL Directive is restricted to such a worsening of environmental position.
166. Second, Mr Wolfe submitted that regulation 4(3) of the 2009 Regulations (set out in paragraph 74(iv) above) failed properly to transpose the EL Directive, because it restricted the definition of “environmental damage” to “changes sufficiently to lower the status of the water body”, i.e. to a deterioration. However, for the reason I have given, that similarly fails: article 4(3) properly transposed the definition of “environmental damage” in the Directive, which is restricted to such a worsening of environmental position.

Ground 6: Measures

167. Mr Wolfe submitted that NRW's failure to require preventative measures of Dŵr Cymru in respect of its discharges into Llyn Padarn was unlawful, not only because of its approach to “environmental damage”, but also because of its approach to preventative measures. In accordance with the 2009 Regulations, NRW considered that it had a discretion as to whether “necessary preventative measures” should be taken. However, as a matter of law, the EL Directive imposed a requirement that such measures be taken.
168. Given my conclusion that NRW was entitled to conclude that there was no ongoing damage being caused by discharges from Llanberis STW – nor was there any imminent threat of any such damage – it is academic as to whether, had there been such damage or threat, NRW would have erred in not requiring Dŵr Cymru to perform appropriate preventative measures. Furthermore, in directing a rolled-up hearing, Patterson J indicated that she did not consider Ground 6, looked at alone, as being arguable. However, as the issue was fully argued before me, it is only right that I deal with it.
169. Article 2(10) of the EL Directive defines “preventative measures” as:

“[A]ny measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage”
170. Article 5 of the EL Directive, under the heading, “Preventative action”, states:

“(1) Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventative measures.

(2) Member States shall provide that, where appropriate, and in any case whenever an imminent threat of environmental

damage is not dispelled despite the preventative measures taken by the operators, operators are to inform the competent authority of all relevant aspects of the situation, as soon as possible.

- (3) The competent authority may, at any time:
 - (a) require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such imminent threat;
 - (b) require the operator to take the necessary preventative measures;
 - (c) give instructions to the operator to be followed on the necessary preventative measures to be taken; or
 - (d) itself take the necessary preventative measures.
- (4) The competent authority shall require the preventative measures are taken by the operator. If the operator fails to comply with the obligations laid down in paragraph 1 or 3(b) or (c), cannot be identified or is not required to bear the costs under this Directive, the competent authority may take these measures itself.”

171. Regulation 13 of the 2009 Regulations, under the heading “Preventing environmental damage”, provides:

- “(1) An operator of an activity that causes an imminent threat of environmental damage, or an imminent threat of damage in relation to which there are reasonable grounds to believe will become environmental damage, must immediately –
 - (a) take all practicable steps to prevent the damage; and
 - (b) (unless the threat has been eliminated) notify all relevant details to the enforcing authority appearing to be the appropriate one.
- (2) The enforcing authority may serve a notice on that operator that –
 - (a) describes the threat;
 - (b) specifies the measures required to prevent the damage; and
 - (c) requires the operator to take those measures, or measures at least equivalent to them, within the period specified in the notice.

(3) Failure to comply with (1) or a notice served under (2) is an offence.”

172. Mr Wolfe submitted that regulation 13 failed properly to transpose article 5, because article 5(4) imposes an obligation on the competent authority to require preventative measures to be taken whereas regulation 13 only gives the authority a power to do so.

173. However:

- i) Article 5(4) does not oblige the competent authority to require preventative measures to be taken by the operator: it obliges the authority to require “*the* preventative measures” to be taken. That is clearly a reference to “the necessary preventative measures” referred to in article 5(3), which the operator is bound to take under article 5(1) and which the competent authority may require the operator to take under article 5(3)(b) and (c).
- ii) The construction proposed by Mr Wolfe would make the power in article 5(3)(b) otiose, because it would be swept up in the obligation to do the same thing in article 5(4).
- iii) It may be unlikely in practice that an authority with responsibility for environmental matters will not require a polluting operator, who can afford to do so, to prevent or remedy damage it causes; but article 5(3)(d) makes clear that the authority may at any time “itself take the necessary measures” – no doubt recovering the costs thereof from the operator, if it can.
- iv) Under the EL Directive, it is for the authority to identify what “the necessary preventative measures” might reasonably be; and, if it considers it appropriate, to notify the operator of what those measures are and that he must make them. Figure 4.1 of the 2009 Regulations Joint Guidance (upon which Mr Wolfe relied) does not suggest otherwise.
- v) Regulation 13 of the 2009 Regulations requires the operator to take the measures notified by the authority as necessary, on pain of criminal sanctions.

174. In my judgment, the regulations properly transpose the obligations imposed by the Directive. Indeed, like Patterson J, I consider the contrary to be unarguable.

175. Ground 6 therefore also fails.

Conclusion

176. For those reasons, none of the grounds is made good.

177. This was, of course, a rolled-up hearing. In respect of Grounds 2, 4 and 5, which were not pursued by the Claimant, as I have already intimated, I shall simply refuse permission to proceed. I shall also refuse permission in relation to Ground 6, for the reasons I have given.

178. The position with regard to the Grounds 1 and 3 is more complex. The parties – and, particularly, Mr Forsdick – submitted with some force that I should refuse permission to proceed in respect of those grounds because the claim as originally made (based

upon damage in the form of deterioration) was not in the event pursued; and, further and more importantly, the nature of the damage that was eventually pursued (deceleration of improvement) was not raised in the Claimant's original notification letter of 7 February 2012, and therefore NRW cannot have erred in law in not considering and dealing with such damage in its challenged 2014 decision document. As I have indicated (see paragraphs 93-103 above), I consider there is considerable force in that argument.

179. However, although precisely how the claim is refused may be of generally little moment to the parties, I consider that, in all of the circumstances and not without some hesitation, I should grant permission to proceed in respect of Grounds 1 and 3. Whilst, after the full argument I have heard, I consider the true construction of "damage" in the EL Directive scheme to be clear – i.e. the construction proposed by the Defendants and Interested Parties is patently correct – the issue is one of some importance and, by granting permission and refusing the substantive claim on these grounds, it will be clear that this judgment has had the benefit of full argument.
180. For those reasons, I shall refuse permission to proceed on Grounds 2, 4, 5 and 6; and grant permission on Grounds 1 and 3, but refuse the substantive claim in respect of those grounds.