

Opening Statement to the Committee on Housing, Local Government & Heritage
on the Water Environment (Abstraction) Bill

Sustainable Water Network (SWAN)

INTRODUCTION

- Our written submission and evidence to the Committee is based on the independent desk research report published in October 2020 by SWAN¹
- I am joined by three experts, Dr. Elaine McGoff, freshwater ecologist with An Taisce and director of SWAN; John Kenny BL, Barrister and co-author of the report and Dr. Kieran Craven, lead author of the report.
- I would first like to make some comments about the significance of abstraction as a pressure and its impact on the environment. Dr. McGoff will then speak about registration and licencing thresholds as they compare with other jurisdictions and we shall then turn over to John Kenny to make opening remarks regarding the legal deficiencies in the Bill. Dr. Craven will then be available for addressing any technical questions.

A. Impacts of abstraction and its significance as a pressure

- Firstly, SWAN acknowledges that abstraction is currently not the most significant pressure on our waters at a national level². Nonetheless, our research identifies that there are still significant risks:
 - It can pose a significant risk at local level to vulnerable waterbodies, adjoining natural habitats such as wetlands that rely on groundwater, and rural domestic wells.
 - It has impacts on hydrology and ecology of water bodies, including reduced base-flows in rivers, lakes and groundwaters, fluctuating lake water levels and declining groundwater levels.
 - Even small abstractions can have a significant impact on certain sites, and this is exacerbated where there are multiple abstractions from the same waterbody.
 - These impacts are also very variable across seasons and will be exacerbated by climate change. An EPA report³ from this year predicts extended drought periods

¹ “Water Abstraction: Interactions with the Water Framework Directive & Groundwater Directive and Implications for the Status of Ireland’s Waters”

² According to the River Basin Management Plan for Ireland 2018 - 2021, 6% of waterbodies are at risk from abstraction. This still comprises 254 waterbodies and almost 10% (9%) of all monitored lakes

³ Nolan, P (2020) Ensemble of regional climate model projections for Ireland. EPA Research Report No. 159. http://www.epa.ie/pubs/reports/research/climate/research159ensembleofregionalclimatemodelprojectionsforireland.html#.VlwLUt_hCEJ

potentially increasing by almost 50% by mid-century. We need to future-proof our water management to respond to these changes.

- Abstraction pressures are also likely to increase with increased economic and population growth.
- In order to manage abstractions, especially the cumulative impacts of multiple abstractions, it is necessary to get an accurate picture of how many abstraction points there are, where they are and how much water is being abstracted. It's worth quoting research led by TCD for the EPA here which found that *"Progress on evaluating the current status of abstraction for Irish rivers...was severely hampered by the lack of an integrated national database of abstraction and discharge."*⁴
- Critically, the proposed Bill will not address the deficits I have outlined above. My colleagues will now provide the detailed rationale and legal analysis to support this.

B. Thresholds in the Bill and how they compare with other jurisdictions

- This Bill purports to mirror the system which they have in place for Northern Ireland and Scotland. However, we would like to highlight that it's far more lenient.
- I'll focus first on the registration of abstractions which is proposed at 25m³. This compares with 10m³ in NI and Scotland (150% higher). Below this there will be zero record of who is abstracting water, where and at what rate. If these abstractions are unknown to the authorities, there is no way to manage them.
- For licencing, this Bill proposes that any abstraction over 2000 cubic metres would require a licence. This is 100 times higher than what is in place in NI, England and Wales. No rationale is provided for setting it so high, and very few abstractions will ever hit that threshold.
- While there is a provision for abstractions between 250-2000 cubic metres being subject to a license, this is only where the risk is deemed significant by the EPA, and it is our contention that the EPA risk assessment is lacking, since it does not take into account a significant proportion of abstractions, which are (and will remain under this Bill) unaccounted for.
- Similarly, even when abstractions are registered or licenced, the Bill does not provide for the means to adjust, pause or revoke a licence if conditions change, for example if there was an impact on the environment, or on adjacent private wells. NI regulations allow licences to be adjusted or revoked for this very reason. This responsive approach is an essential part of any effective management system, especially in light of far more frequent droughts under climate change projections. We need a forward looking system which future-proofs our water resources, not one which is based on old outdated legislation from the 1970s.

⁴ Webster K.E., Tedd K., Coxon C. & Donohue, I. (2017). Environmental flow assessment for Irish rivers. Environmental Protection Agency Research Report 2014-W-DS-21.
<https://www.epa.ie/pubs/reports/research/water/EPA%20RR%20203%20final%20web-3.pdf>

Legal Framework: fundamental flaws

- In my considered opinion there are significant and fundamental legal failings in this Bill, with the misapplication of the Water Framework Directive (WFD), Habitats and EIA Directives. I am of the view that the Bill, as drafted, will be in breach of the WFD, EIA and Habitats Directive, requiring substantial redrafting. We have supplied a detailed legal analysis, but for the sake of brevity, the headline issues are

1. **WFD Compliance:** The Heads of the Bill are not consistent with the requirements of the Water Framework Directive (WFD) which it purports to transpose. The WFD requires the establishment of *“controls over the abstraction of fresh surface water and groundwater .. including a **register or registers of water abstractions** and a **requirement of prior authorisation** for abstraction..”* [SWAN’s emphasis]

While it allows that *“Member States can exempt from these controls, abstractions ..which have no significant impact on water status”* it is clear that registration and licensing of all abstractions is required unless it can be demonstrated that these do not have a significant impact.

Clearly this is not what is provided for in the proposed Bill which appears to proceed on an assumption of non-registration unless significant environmental impacts have been identified – the Bill should, but does not, proceed on the basis of registration of all abstractions unless they are entirely insignificant. The Bill will not have fulfilled its primary purpose unless it addresses this issue. This is particularly relevant given the letter of reasoned opinion issued by the European Commission to Ireland on October 30th 2020 in respect to the WFD transposition and abstraction.

2. **Existing licences:** This legislation proposes to approach existing licences differently to new licence applications. It does not provide for the legal means to refuse a licence to an existing abstractor. This has significant implications if those existing abstractions are found to be having negative environmental impacts. For example, if there was a highly sensitive species or habitat which cannot tolerate any abstraction, there would be no legal means for the EPA to stop abstraction in that area, despite the legal requirement under European Directives to do so. This would be in direct breach of the Habitats and the Environmental Impact Assessment (EIA) Directive.

Simply being in operation for a certain period of time does not exempt developments from the stringent requirements of the Habitats and EIA Directives. In this case a licencing process is equivalent to a development consent in the eyes of the law, and as a result of ECJ and Supreme court rulings, any permission granted for retention planning permission in respect of development requiring EIA would be in breach of the EIA, instead a substitute consent process must be instigated, a far more onerous process, where applications must be considered on a case by case basis and only granted in exceptional circumstances⁵.

Head 11 should be removed entirely

⁵ Supreme Court [2020] IESC 39, An Taisce v. An Bord Plenala

3. **250 cubic metre threshold:** No licences under 250 cubic metres will be required to seek a licence, regardless of their potential impact. There is no scientific rationale for this threshold, and recent European Court of Justice case law holds that a threshold approach is not compliant with the EIA Directive. In addition, it cannot satisfactorily fulfil the requirement under the Habitats Directive which requires that decision makers must be able to conclude 'beyond reasonable doubt' that there will be no adverse impact on a protected Natura site or species before granting permission. If there is no environmental assessment at all below 250 there is simply no scientific basis or data upon which to base any such decision. The same observation applies to the 25 and the 2000 cubic metres thresholds.

4. **The EIA process:** What is described under Head 10 is not EIA compliant, it includes no public participation, relies on a narrower set of criteria than required under the EIA Directive, and it fails to recognise the need for a substitute consent process for existing abstractions deemed to be 'significant'.