



An
Bord
Pleanála

Inspector's Report ABP-300536-18

Question	Whether the provision of an underground electrical cable connection is or is not development or is or is not exempted development.
Location	Substation within Raheenleagh Wind Farm to Arklow 220kV substation, Coolboy, Arklow, Co. Wicklow.
Declaration	
Planning Authority	Wicklow County Council
Planning Authority Reg. Ref.	EX57/17
Applicant for Declaration	The Raheenleagh / Ballinvalley 8, c/o Mr. Eugene Clune.
Planning Authority Decision	None issued.
Referral	
Referred by	The Raheenleagh / Ballinvalley 8, c/o Mr. Eugene Clune.
Owner / Occupier	Raheenleagh Power DAC
Observer(s)	None.
Date of Site Inspection	23 rd April, 2018
Inspector	Robert Speer

1.0 Site Location and Description

1.1. The route of the works in question extends east / north-eastwards for a distance of approximately 16km between the substation serving the Raheenleagh Wind Farm at Raheenleagh / Ballinvalley, Co. Wicklow, and the 220kV substation at Coolboy, Arklow, Co. Wicklow. It primarily follows the public road although it also passes through Coillte forestry plantations at Ballyduff before traversing the R747 Regional Road in order to pass under the railway line at Glenart through lands owned by Iarnrod Eireann. The easternmost extent of the route subsequently crosses the Avoca River Valley and extends through lands owned by Holfield Plastics (some of which formed part of the former Irish Fertilisers complex) with the final construction continuing along the public road, including the R772 Regional Road, before terminating at the Arklow 220kV substation.

2.0 The Question

2.1. On 8th November, 2017 Mr. Ian Doyle, Planning Consultant, on behalf of 'The Raheenleagh / Ballinvalley 8' (c/o Mr. Eugene Clune, Ballinvalley Upper, Arklow, Co. Wicklow), submitted a request to Wicklow County Council for a declaration in accordance with Section 5 of the Planning and Development Act, 2000, as amended, to determine:

- Whether the provision of an underground electrical cable connection from the substation within Raheenleagh Wind Farm to the Arklow 22kV substation at Coolboy, Arklow, Co. Wicklow, is or is not exempted development.

2.2. Subsequently, on 1st December, 2017 the Planning Authority advised the applicant that as it had already issued a declaration on the matter in question pursuant to PA Ref. No. EX18/13, it would not be issuing a declaration with regard to the subject application.

2.3. Accordingly, on the basis that Wicklow County Council failed to issue a declaration on the subject application within the statutory period, Mr. Ian Doyle, Planning Consultant, on behalf of 'The Raheenleagh / Ballinvalley 8' (c/o Mr. Eugene Clune, Ballinvalley Upper, Arklow, Co. Wicklow), has now referred the matter to the Board

for a determination pursuant to Section 5(3)(b) of the Planning and Development Act, 2000, as amended.

- 2.4. Having conducted a site inspection, and following a review of the submitted information, in my opinion, the question before the Board can be reformulated as follows:

'Whether the provision of an underground electricity cable grid connection from the substation within the Raheenleagh Wind Farm to the Arklow 220kV substation at Coolboy, Arklow, Co. Wicklow, is or is not development or is or is not exempted development'.

3.0 Planning Authority Declaration

3.1. Declaration

None issued.

3.2. Planning Authority Reports

3.2.1. Planning Reports:

- States that as the Planning Authority had already undertaken an assessment of the matter in question and issued a declaration with regard to same under PA Ref. No. EX18/13, it would not be issuing a declaration in respect of the subject application.

4.0 Planning History

4.1. On Site:

PA Ref. No. 10/2140. Was granted on 9th July, 2010 permitting Coillte Teoranta & ESB Wind Development Ltd. a ten year permission for the Raheenleagh Wind Energy Project. The project will comprise 11 wind turbines, each having a rated electrical output of approximately 2500 kilowatts, access tracks, a fenced switchyard comprising a single storey control building and substation, an effluent treatment system, an anemometer mast, a borrow pit and all associated site works above and below ground. Each wind turbine will comprise a tower up to 70 metres high, with a

diameter of about 4 metres at the base. Three blades of up to 45 metres length will be attached.

Condition No. 26 of this grant of permission states the following:-

'This permission shall not in any way be construed as any form of consent or agreement to a connection to the national grid or to the routing or nature of any such connection. Prior to commencement of works on site, the applicant shall obtain planning permission for connection of the wind farm to the national grid.'

Reason: In the interest of clarity and the proper planning and sustainable development of the area'.

PA Ref. No. 12/6049. Was granted on 16th March, 2012 permitting ESB Wind Development Limited & Coillte Teoranta permission for minor modifications to the previously approved Raheenleagh Wind Farm development comprising 11 wind turbines (Reg. Ref. 10/2140), the development will consist of an increase in the maximum overall dimensions of the 11 permitted wind turbines (115m to 135m); relocation of turbines by distances ranging from approximately 20m to approximately 150m, relocation of the Electrical Transformer Station by approximately 70m and minor reconfiguration of the layout therein including an enlarged Control Building; minor re-alignments of internal access tracks; substitution of the permitted 70m high anemometer mast with two anemometer masts with a height corresponding to the amended wind turbine towers; and all associated site works, above and below ground.

Condition No. 4 of this grant of permission states the following:-

'In all other regards the development shall accord with the conditions of PRR10/2140 save for conditions 2 and 13 which are revised by conditions 2 and 3 as outlined above.'

Reason: In the interests of clarity'.

PA Ref. No. 13/8080. Was granted on 28th March, 2013 permitting ESB Wind Development Ltd & Coillte Teoranta permission for minor modifications to the previously approved Raheenleagh Wind Farm development comprising 11 wind turbines (Reg. Ref. 12/6049 and Reg. Ref. 10/2140, respectively). The development will consist of alterations to the 38kV substation to include extension to control

building, 5 no. new CCTV cameras with 6 metre high supports, the relocation of the 18m high SCADA pole, widening of the existing road to front of station to provide turning area, new post and rail boundary station fence, 2 no. earth berms and associated site works.

Condition No. 4 of this grant of permission states the following:-

'In all other regards the development shall accord with the conditions of PRR12/6049.

Reason: In the interests of clarity'.

PA Ref. No. EX18/13. Was determined by the Planning Authority on 19th June, 2013 wherein it was held that the provision of an underground electrical cable connection from the substation within Raheenleagh Wind Farm to the Arklow 22kV substation at Coolboy, Arklow, Co. Wicklow, was development which was exempted development.

(N.B. The file reference number for this declaration has also been referenced as PA Ref. No. EX13/18, however, in the interests of clarity, I would advise the Board that the relevant order refers to the applicable reference number as 'EX18/13' and thus I propose to refer to same in my assessment of the subject referral).

4.2. Precedent Cases:

Whilst there have been a number of referral cases determined by the Board with regard to wind farm grid connections in recent years, I would urge caution in referencing same as precedent decisions as the circumstances of each case can vary widely. Moreover, added consideration must be given to the implications of recent legal developments, with particular reference to the *O'Gianna* and *Daly* judgements, when examining grid connections for wind farm developments.

5.0 Policy Context

5.1. Development Plan

Wicklow County Development Plan 2016 – 2022:

Chapter 9: Infrastructure:

Section 9.5: *Climate Change and Energy:*

Section 9.5.2: *Climate Change:*

Climate Change Objectives:

- CCE1:** To have regard to the EU and national legislation and strategies on climate change in the decision making process, in order to contribute to a reduction and avoidance of human induced climate change.
- CCE2:** To support the government programme for the development of national climate change legislation.
- CCE3:** To implement the 'National Climate Change Adaptation Framework - Building Resilience to Climate Change' by supporting the preparation of a Climate Change Adaptation Plan.
- CCE4:** To support the development of a Wicklow County Adaptation Strategy and to support the land use aspects of the strategy.
- CCE5:** To have regard to climate change mitigation and adaptation in assessing all large scale development including all critical transport and energy infrastructural developments.

Section 9.5.3: *Energy:*

Electricity Generation: (1) Wind Energy:

Wind Energy Objectives:

- CCE6:** To encourage the development of wind energy in accordance with the County Wicklow Wind Energy Strategy and in particular to allow wind energy exploitation in most locations in the County subject to:
- consideration of any designated nature conservation areas (SACs, NHAs, SPAs, SAAOs etc) and any associated buffers;

- impacts on Wicklow's landscape designations;
- particular cognisance and regard being taken of the impact on wind turbines on residential amenity particularly with respect to noise and shadow flicker;
- impacts on visual and recreational amenity;
- impacts on 'material assets' such as towns, infrastructure and heritage sites;
- consideration of land cover and land uses on or adjacent to the site; and
- best practice in the design and siting of wind turbines, and all ancillary works including access roads and overhead cables.

CCE7: To facilitate the development of off-shore wind energy projects insofar as onshore facilities such as substations/connections to the grid may be required.

CCE8: To support community-based wind energy projects.

Electricity Transmission and Distribution:

Transmission and Distribution Objectives:

CCE17: To support the development and expansion of the electricity transmission and distribution grid, including the development of new lines, pylons and substations as required.

CCE18: To suitably manage development within 35m of existing 110KV/220kV transmission lines.

CCE19: To support and facilitate the development of landing locations for any cross-channel power interconnectors.

Chapter 10: Heritage:

Section 10.3: Natural Heritage and Landscape:

Section 10.3.2: Biodiversity

Section 10.3.9: Wicklow's Landscape

Appendix 6: Wicklow Wind Energy Strategy:

Section 2: Developing the Strategy:

Section 3: Assessment Criteria:

Item (5):

As landscape issues and visual impacts are perceived as the key impact of wind turbines, a detailed assessment of this impact will be required for all applications.

This assessment shall generally be carried out in accordance with best practice guidance available, including that set out by the EPA in "Advice notes of current practice in the preparation of EIS" and by the DoEHLG in "Wind Energy Development Guidelines for Planning Authorities".

This assessment shall include an evaluation of the landscape and the ability of it to absorb wind turbines. The cumulative impact of any application with any other such development or application in the vicinity shall also be considered, along with any impacts associated with site works, site roads, structures, new overhead transmission lines and any likely 'ex-situ' future development required to transmit energy to the grid. All assessments shall include an analysis of the visual impact of the development from views and prospects listed in the County Development Plan or any Local Area / Town Plan.

Section 4: Environmental Impact Assessment

5.2. Natural Heritage Designations

5.2.1. The following Natura 2000 sites are located within an approximate 15km radius of the lands in question:

- The Slaney River Valley Special Area of Conservation (Site Code: 000781), approximately 4.9km southwest of the site.
- The Kilpatrick Sandhills Special Area of Conservation (Site Code: 001742), approximately 10.7km southeast of the site.
- The Buckronev-Brittis Dunes and Fen Special Area of Conservation (Site Code: 000729), approximately 3.5km northeast of the site.

- The Magherabeg Dunes Special Area of Conservation (Site Code: 001766), approximately 13.1km northeast of the site.
- The Vale of Clara (Rathdrum Wood) Special Area of Conservation (Site Code: 000733), approximately 15km northwest of the site.
- The Deputy's Pass Nature Reserve Special Area of Conservation (Site Code: 000717), approximately 14.8km to the north of the site.

6.0 The Referral

6.1 Referrer's Case

- Article 6 of the Planning and Development Regulations, 2001, as amended, states that, subject to the provisions of Article 9, the classes of development set out in Column 1 of Part 1 of Schedule 2 of the Regulations shall be exempted development. In this regard it is noted that Class 26 of Part 1 of Schedule 2 provides for the following works to ordinarily constitute exempted development:

'The carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking'.

However, Article 9(1) of the Regulations places a number of restrictions on the generality of the provisions of Article 6, including the following:

'Development to which article 6 relates shall not be exempted development for the purposes of the Act -

(a) if the carrying out of such development would –

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.'

Having regard to the foregoing, it should be noted that Condition No. 26 of the governing grant of permission issued in respect of PA Ref. No. 10/2140 states the following:

'This permission shall not in any way be construed as any form of consent or agreement to a connection to the national grid or to the routing or nature of any such connection. Prior to commencement of works on site, the applicant shall obtain planning permission for connection of the wind farm to the national grid.'

Reason: in the interest of clarity and the proper planning and sustainable development of the area'.

Therefore, it is submitted that the 'provision of an underground electrical cable connection from the substation within Raheenleagh Wind Farm to the Arklow 22kV substation (at) Coolboy, Arklow' constitutes:

- i. A connection to the national grid;
- ii. The routing or nature of any such connection.

Moreover, Article 9(1)(a)(i) of the Planning and Development Regulations, 2001, as amended, removes the exemption permitted under Class 26 of the Regulations and, therefore, as the development in question materially contravenes Condition No. 26 of the grant of permission issued in respect of PA Ref. No. 10/2140, it cannot be held to constitute exempted development.

- The Planning Authority erred in its previous determination of PA Ref. No. EX18/13.
- A declaration does not constitute 'permission' in the context of Condition No. 26 of PA Ref. No. 10/2140 and said condition is enforceable notwithstanding the Planning Authority's assessment to the contrary.

6.2. Planning Authority's Response

None

6.3. Owner / Occupier's Response

6.3.1. Coillte:

States that as Raheenleagh Power DAC is the owner of the wind farm, that party is the only entity with authority to deal with the Board in relation to the subject matter.

6.3.2. Raheenleagh Power DAC (Designated Activity Company):

- With regard to the suggestion that Wicklow County Council erred in issuing a Section 5 declaration for PA Ref. No. EX18/13, it is considered that this is a matter for the Planning Authority. However, from a review of the relevant Planner's Report it is apparent that Wicklow County Council assessed the aforementioned Section 5 application having regard to the relevant criteria set out in Class 26 and Article 9 of the Planning and Development Regulations, 2001, as amended.
- In the event the referrer in the subject instance was unhappy with the decision of the Planning Authority in respect of PA Ref. No. EX18/13, the correct course of action would have been for that party to seek to judicially review said decision pursuant to Section 50 of the Planning and Development Act, 2000, as amended. No such application for judicial review was made.
- Raheenleagh Power DAC has relied on the Section 5 declaration issued for PA Ref. No. EX18/13 in good faith and has spent approximately €5.8 million on the grid connection works. There was no challenge lodged against the decision of the Planning Authority and Raheenleagh Power DAC acted on that determination in order to carry those works which are the subject of this Section 5 referral.
- Given that the validity of the existing Section 5 declaration (i.e. PA Ref. No. EX18/13) cannot be challenged in any proceedings, it is submitted that the referrers have lodged the subject application for the sole purpose of availing of an appeal mechanism as regards that earlier declaration. It is considered that this is an abuse of process.
- In the subject case, Raheenleagh Power DAC presumed the grid connection works constituted exempted development and also obtained a declaration from the Planning Authority that confirmed this exemption prior to the commencement of said works.
- Prior to the judgement in the case of *Patrick Daly v. Kilronan Wind Farm Limited and, by order, Derrysallagh Wind Farm Limited* [2017] IEHC 308, planning exemptions for the installation of underground cables and the erection of 20kV overhead lines were widely utilised for the purposes of

connecting wind farms to the national electricity grid. This position was supported by a considerable number of Section 5 declarations issued by planning authorities and the Board in the preceding years. Indeed, as recently as April, 2017, the Board issued a Section 5 declaration which determined that the laying of underground electricity cables between permitted wind farms and the national electricity grid constituted exempted development (Please refer to ABP Ref. No. PL19.RL3503). Accordingly, during 2015 and 2016 when the grid connection in question was being constructed and commissioned, Raheenleagh Power DAC was of the legitimate belief that it could avail of the provision set out in Class 26 of the Planning and Development Regulations, 2001 as amended. Its position on this point remains unchanged at this time.

- The Environmental Impact Assessment which accompanied PA Ref. No. 10/2140 specifically anticipated the issue of a grid connection and the likely issues which could arise as follows:

'Ancillary Development:

It will be a matter for the Commission for Energy Regulation (CER), as advised by the transmission or distribution operator, as to where the connection from Raheenleagh Wind Farm to the Electricity Network will take place. This is not in the control of the developers.

The actual route and connection infrastructure to be used will be a matter to be addressed when an offer of grid connection is actually made and when the location and method of connection to the Electricity Network is fully and finally established.

As noted in the DoEHLG Wind Farm Planning Guidelines (Section 7.12), it will be necessary to submit a separate planning application for the works to connect the development to the Electricity Network, other than where the connection to the grid constitutes exempted development. Condition 13 in the previous grant of permission (Ref. PL27.208007) required that work on the wind farm should not commence until the applicant had obtained planning permission for connection of the wind farm to the national grid. However, in

recognition of the developer having no role in such matters, the DoEHLG Wind Farm Planning Guidelines advise as follows:

It is not appropriate to attach conditions in regard to grid connections on land outside the ownership of the applicant as part of the permission for the wind energy development. For Raheenleagh Wind Farm it is currently indicated that a suitable connection to the national electricity network could be available by connection at the existing substation at Arklow.

It is clear from the foregoing, that the DoEHLG's Wind Farm Planning Guidelines provide for developers to avail of the exempted development provisions related to grid connections set out in Classes 26-29 of Schedule 2 Part 1 of the Planning and Development Regulations, 2001, as amended, *'where the works required to connect the wind energy development to the national grid do not form part of the planning application'*. Only in situations *'where the connection to the grid does not constitute exempted development, . . . will it be necessary to submit a separate planning application to the planning authority'*. This provision was relied on in good faith by the developer when considering the requirements for a grid connection.

- The Board is referred to the correspondence issued by Wicklow County Council as regards compliance with the relevant conditions of the grant of permission:
 - Response No. 1 – In correspondence dated 10th June, 2014 the Planning Authority confirmed that the proposals for compliance with Condition No. 26 were *'acceptable and the development should proceed in accordance with the submissions'*.

Wicklow County Council was subsequently informed by ESBI on 29th May, 2015 of the then imminent commencement of construction of the wind farm.

In view of the foregoing, it is submitted that having received written confirmation from the Planning Authority and an instruction that the development *'should proceed in accordance with the submissions'*, it was entirely reasonable for the developer to proceed in the belief that all necessary planning consents and exemptions had been obtained and that all

relevant conditions had been discharged to the satisfaction of Wicklow County Council and that no further planning consents would be required.

- In order to install underground electricity cables, it is first necessary to obtain a road opening licence from the relevant local authority. The statutory process for such licences requires the local authority to place public notices in newspapers advising that such an application has been received and that submissions can be made to the local authority before a specified date and that any such submissions will be taken into account before a decision is made.

In the subject instance, applications for road opening licences were made to Wicklow County Council in April, 2015 and to Wexford County Council in January, 2015. No submissions were received in respect of these applications and the developer proceeded to act in good faith and in accordance with the terms and conditions of the licences issued.

- The purpose of the conditions imposed in the various grants of planning permission was not to de-exempt works or to require that planning permission be obtained for any and all of the grid connection works.

It is by no means clear that the Planning Authority intended to impose an obligation to obtain planning permission where a reliance could be placed on the relevant exempted development provisions. In instances where such conditions have previously been imposed they have been prefaced by wording such as *Notwithstanding the provisions for exempted development under the Planning and Development Regulations, 2001 . . .* No such wording was included in the subject case which supports the view that the Planning Authority was not seeking to impose a requirement to obtain permission for the grid connection.

The primary reason given for the inclusion of Condition No. 26 in PA Ref. No. 10/2140 was *'in the interest of clarity'*. With this condition the Planning Authority was not seeking to regulate the development of the grid connection but was clarifying a point:

This permission shall not in any way be construed as any form of consent or agreement to a connection to the national grid or to the routing or nature of any such connection . . .

Reason: In the interest of clarity and the proper planning and sustainable development of the area.

Instead, the purpose of this condition (as has been understood by the developer) was to explicitly state that planning permission must be obtained for such works if they were not already exempted development. This is based on the belief that it appears highly unlikely that the condition was intended to cut across the exemptions specifically provided for in the legislation. Given the Section 5 declaration issued in June, 2013 (i.e. PA Ref. No. EX18/13) it would appear that this is also the understanding of Wicklow County Council. Further support is lent to this position by the Planning Authority's confirmation of compliance with planning conditions.

- By reference to Section 34 of the Planning and Development Act, 2000, as amended, it is considered that the imposition of Condition No. 26 in the decision to grant permission for PA Ref. No. 10/2140 exceeds the limitations of the legislation as said condition is not related to lands under the control of Raheenleagh Power DAC and is not, as such, connected with the development permitted on the land to which the relevant planning application relates. Accordingly, it is submitted that the Planning Authority did not have any power to impose a condition which pertained to lands outside of the application site under which the grid connection was to be developed. Therefore, the scope of the obligation imposed by Condition No. 26 must be interpreted insofar as possible in a manner that is consistent with the lawful exercise by the Planning Authority of its power to impose conditions on any grant of planning permission.

6.4. Further Responses (to the circulation of the submission received from Raheenleagh Power DAC):

6.4.1. Response of the Planning Authority:

No further comments.

6.4.2. Response of the Referrer (The Raheenleagh / Ballinvalley 8, c/o Mr. Eugene Clune):

- The submission received from Raheenleagh Power DAC does not address the question raised in the referral in the context of Condition No. 26 of the grant of permission issued in respect of PA Ref. No. 10/2140.
- The assessment of the subject referral should not be influenced by the history of the site, the actions of the various stakeholders, or the implications of the outcome of any determination. The question before the Board concerns the interpretation of the legislation, with particular reference to whether or not Condition No. 26 of PA Ref. No. 10/2140 is subject to the limitations imposed under Article 9(1)(a)(i) of the Planning and Development Regulations, 2001, as amended.
- In the event the Board opts to consider the site history as referenced by Raheenleagh Power DAC, it should also consider the series of events which has led the referrer to seek the subject declaration.
- The referrer consists of 8 No. families who have experienced continued difficulties with the existing Raheenleagh wind farm as regards incidences of shadow flicker and excessive noise levels despite complaints to both the site operator and Wicklow County Council. The referrer is of the opinion that the Local Authority has failed in its duty of care to accurately assess the impacts of the wind farm on their properties:
 - In its assessment of PA Ref. No. 12/6049, it is questioned why the Local Authority did not require revisions to the Environmental Impact Statement in light of the changes proposed to the approved wind farm which included an increase in the overall dimensions of the turbines and the relocation of same closer to surrounding residential properties. The EIS prepared as regards the governing grant of permission pertains to an entirely different development when compared to that constructed on the ground. The existing construction impacts on the referrer's properties by way of noise pollution and shadow flicker, however, if a revised EIS had been prepared as part of PA Ref. No. 12/6049 these issues could have been identified and the opportunity afforded to address same.

- It is queried how the Local Authority determined that the grid connection constituted exempted development in the full knowledge that the provision of same would materially contravene Condition No. 26 of PA Ref. No. 10/2140. The inclusion of Condition No. 26 removes the exemption under Class 26 of the Regulations and voids the Section 5 declaration process as a means of facilitating the grid connection.
- The referrer is frustrated that despite multiple complaints regarding noise and shadow flicker impacts, the Planning Authority has refused to instigate enforcement proceedings or to investigate if a breach of planning has occurred / is occurring (notwithstanding the opportunities to request monitoring data from the site operator by way of the conditions attached to the parent grant of permission which could be used to identify any problem areas).
- The fact that the Planning Authority previously issued compliance notifications with regard to the approved wind farm development should not influence the assessment of the subject referral. Condition No. 26 of PA Ref. No. 10/2140 clearly requires planning permission to be obtained for the grid connection prior to the commencement of development:

'Prior to commencement of works on site, the applicant shall obtain planning permission for connection of the wind farm to the national grid'.

Raheenleagh Power DAC has sought to obtain '*permission*' by recourse to Section 5 of the Act, however, Article 9(1)(a)(i) of the Planning and Development Regulations, 2001, as amended, removes the exemption provided for under Class 26 as regards the provision of underground cabling.

In the absence of any grid connection forming part of the original development proposal (PA Ref. No. 10/2140), the Council imposed a condition whereby planning permission should be obtained for the grid connection prior to the commencement of development. This was not an unreasonable requirement and was commonplace prior to the ruling of the High Court in the case of *Patrick Daly v. Kilronan Wind Farm Limited* (May, 2017).

- It is clear from a review of Condition No. 26 of PA Ref. No. 10/2140 that the Planning Authority is requesting the applicant to *'obtain planning permission for connection of the wind farm to the national grid'* (prior to commencement of works on site). The absence of any reference in the condition to *'exempted development'* is irrelevant given the clear request to *'obtain planning permission'*.
- Section 5.2.6 of the submission made by Raheenleagh Power DAC challenges the legitimacy of Condition No. 26 of PA Ref. No. 10/2140 by reference to Section 34 of the Act on the basis that the condition exceeds the limitations of the legislation as it *'is not related to land which is all under the control of RPDAC and is not, as such, connected with the development permitted on the land to which the relevant planning application relates'*.

In this regard it is submitted that the correct mechanism for the developer / applicant to have challenged the validity of the aforementioned requirement would have been to appeal Condition No. 26. The fact that the applicant enacted the relevant grant of permission thus obliges compliance with the condition in question. The applicant does not have the option of ignoring Condition No. 26 simply because it disagrees with the requirements of same.

Arguments as regards the wording of Condition No. 26 or the questioning of the validity of its scope cannot deny the inclusion of same in the first instance and that the fact that it forms part of the terms and conditions of the parent grant of permission serves to invalidate any reliance on Section 5 exemptions in light of the provisions of Article 9(1)(a)(i) of the Regulations.

- With regard to the reference by Raheenleagh Power DAC to Section 7.12 of the *'Wind Energy Development, Guidelines for Planning Authorities'*, it is important to note that while the provision of a grid connection involves third party lands, Condition No. 26 of PA Ref. No. 10/2140 does not include any direction on how the grid connection should occur nor is it prescriptive as regards any works to be carried out on third party lands. Condition No. 26 simply requires permission to be in place for the grid connection prior to the commencement of the development of the wind farm.

In the subject instance, the Planning Authority determined that a separate planning application was the best means by which to demonstrate that a grid connection was possible and Section 7.12 of the Guidelines states that *'Where the works required to connect the wind energy development to the national grid do not form part of the planning application, . . . it will be necessary to submit a separate planning application to the planning authority'*.

- With respect to the reference by Raheenleagh Power DAC that the Board's determination of ABP Ref. No. RL3503 has set a precedent, it should be noted that said case did not include a condition attached to the grant of permission for the wind farm development which imposed an obligation to obtain planning permission for the connection to the national grid prior to the commencement of works. In the absence of such a condition it is accepted that works which fall within the scope of Class 26 of the Regulations would constitute exempted development. However, in those instances where a condition has been imposed on the grant of permission for the wind farm which requires planning permission to be obtained for the grid connection, it has been held by the Board that the exemption contained in Class 26 does not apply given the provisions of Article 9(1)(a)(i) of the Regulations (please refer to ABP Ref. Nos. RL3408, RL3409, RL3410 & RL3411).
- In response to the assertion by Raheenleagh Power DAC that the referrer should have judicially reviewed the Planning Authority's determination of the earlier (2013) Section 5 referral (i.e. PA Ref. No. EX18/13), it is submitted that due to the very nature of the Section 5 process and the fact that the declaration was not publicly advertised in the same manner as a planning application, the referrer was unaware of same and thus did not exercise a right to judicially review that decision.
- With regard to the suggestion that the subject referral amounts to an abuse of process, it is considered that the extent to which the subject referral will or will not influence the previous determination issued by the Planning Authority is beyond the scope of this referral and should not form a consideration in the assessment of same. Furthermore, it is clear from Section 5 of the Act that

anyone can request a declaration if any question arises in any particular case as to what is or is not development.

- It is considered that the Planning Authority ignored Condition No. 26 of PA Ref. No. 10/2140 and the provisions of Article 9(1)(a)(i) in previously issuing an exemption under Class 26 of the Regulations. Moreover, the Board has previously held that similar cases are not exempt under similar circumstances.
- The referrer reserves the right to pursue a judicial review of the subject referral under Section 50 of the Act.
- The assertion that the subject referral amounts to an 'abuse of process' is rejected and, on the contrary, it is submitted that the purpose of the subject referral is to highlight an abuse of the Section 5 process by Raheenleagh Power DAC.

6.4.3. Response of Coillte (a site owner):

- It is considered that the already constructed and operational underground electrical cable connection between Raheenleagh Wind Farm and Arklow 220kV substation is development and is exempted development having regard to the following:
 - Article 9(1)(a) and Class 26 of the Second Schedule of the Planning and Development Regulations, 2001, as amended. It is further noted that the connection of the wind farm to the national grid as referenced in Condition No. 26 of PA Ref. No. 10/2140 is located outside of the extent of the grant of permission for the wind farm. In addition, on 10th June, 2014 the Planning Authority confirmed that all relevant conditions (including Condition No. 26) had been discharged and that it was '*considered acceptable and the development should proceed in accordance with the submissions*'.
 - The Section 5 Declaration issued by Wicklow County Council on 19th June, 2013 which stated that the development in question constituted exempted development was not challenged. Moreover, an application for leave to judicially review that declaration was not made within the statutory

timeframe and, therefore, the relevant development was installed in good faith.

- The relevant road opening licences issued by Wicklow County Council in January, 2015, which had been publicly advertised, were not challenged.
- Coillte fully supports the contents of the response prepared by ESB International Ltd. on behalf of Raheenleagh Power DAC (dated 13th March, 2018).
- It is unclear how there could be any justifiable merit in deeming a fully operational piece of underground infrastructure to be anything other than exempted development due, *inter alia*, to the fact that:
 - It has been in place since 2016, having already cost a significant sum of money to install.
 - The developer acted reasonably throughout the process and followed all the relevant standards and guidelines that were in place at the time of construction in the belief that all necessary planning consents and exemptions had been formally received.
 - The continued operation of this cable link constitutes an established piece of infrastructure that is of both national and environmental importance. It enables renewable energy generated at Raheenleagh Wind Farm to be connected to the national grid and therefore contributes positively towards Ireland's decarbonisation agenda.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000, as amended:

7.1.1. Section 2(1) of the Act defines "works" as follows:

"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

“statutory undertaker” means a person, for the time being, authorised by or under any enactment or instrument under an enactment to—

- (a) construct or operate a railway, canal, inland navigation, dock, harbour or airport,*
- (b) provide, or carry out works for the provision of, gas, electricity or telecommunications services, or*
- (c) provide services connected with, or carry out works for the purposes of the carrying on of the activities of, any public undertaking;*

7.1.2. Section 3(1) of the Planning and Development Act, 2000, as amended, states the following:

“Development” in this Act means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in use of any structures or other land.

7.1.3. Section 4(2) of the Act states that the ‘Minister’ may by Regulation provide for any class of development to be exempted development for the purposes of the Act.

7.1.4. Section 4(4) of the Act states the following:

‘Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required’.

7.1.5. Section 4(4A) of the Act states:

‘Notwithstanding subsection (4), the Minister may make regulations prescribing development or any class of development that is—

- (a) authorised, or required to be authorised by or under any statute (other than this Act) whether by means of a licence, consent, approval or otherwise, and*
- (b) as respects which an environmental impact assessment or an appropriate assessment is required,*

to be exempted development’.

7.1.6. Section 138(1) of the Act states the following:

'The Board shall have an absolute discretion to dismiss an appeal or referral—

(a) where, having considered the grounds of appeal or referral or any other matter to which, by virtue of this Act, the Board may have regard in dealing with or determining the appeal or referral, the Board is of the opinion that the appeal or referral –

- i) is vexatious, frivolous or without substance or foundation, or*
- ii) is made with the sole intention of delaying the development or the intention of securing the payment of money, gifts, consideration or other inducement by any person,*

or

(b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to-

- i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or*
- ii) any previous permission which in its opinion is relevant'.*

7.1.7. Section 172 of the Act states:

'(1) An environmental impact assessment shall be carried out by the planning authority or the Board, as the case may be, in respect of an application for consent for proposed development where either-

(a) the proposed development would be of a class specified in-

i) Part 1 of Schedule 5 of the Planning and Development Regulations 2001, and either-

- I. such development would exceed any relevant quantity, area or other limit specified in that Part, or*
- II. no quantity, area or other limit is specified in that Part in respect of the development concerned,*

or

- ii) *Part 2 of Schedule 5 of the Planning and Development Regulations 2001 and either-*
- I. *such development would exceed any relevant quantity, area or other limit specified in that Part, or*
 - II. *no quantity, area or other limit is specified in that Part in respect of the development concerned,*

or

(b)

- i) *the proposed development would be of a class specified in Part 2 of Schedule 5 of the Planning and Development Regulations 2001 but does not exceed the relevant quantity, area or other limit specified in that Part,*

and

- ii) *the planning authority or the Board, as the case may be, determines that the proposed development would be likely to have significant effects on the environment.*

7.1.8. Section 177U(9) of the Act states:

'In deciding upon a declaration or a referral under section 5 of this Act, a planning authority or the Board, as the case may be, shall where appropriate, conduct a screening for appropriate assessment in accordance with the provisions of this section.'

7.2. **Planning and Development Regulations, 2001, as amended:**

7.2.1. Article 3(1) of the Regulations defines "electricity undertaking" as follows:

"electricity undertaking" means an undertaker authorised to provide an electricity service.

7.2.2. Article 6 (1) of the Regulations states the following:

'Subject to article 9, development of a class specified in column 1 of part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations

specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1'.

7.2.3. Article 9 (1) of the Regulations states as follows:

'Development to which article 6 relates shall not be exempted development for the purposes of the Act-

(a) if the carrying out of such development would—

i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,

v) consist of or comprise the carrying out under a public road or works other than a connection to a wired broadcast relay service, sewer, water main, gas main or electricity supply line or cable, or any works to which class 25, 26 or 31 (a) specified in column 1 of Part 1 of Schedule 2 applies,

vii) consist of or comprise the excavation, alteration or demolition (other than peat extraction) of places, caves, sites, features or other objects of archaeological, geological, historical, scientific or ecological interest, the preservation, conservation or protection of which is an objective of a development plan or local area plan for the area in which the development is proposed or, pending the variation of a development plan or local area plan, or the making of a new development plan or local area plan, in the draft variation of the development plan or the local area plan or the draft development plan or draft local area plan,

viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site'.

(c) if it is development to which Part 10 applies, unless the development is required by or under any statutory provision (other than the Act or these

Regulations) to comply with procedures for the purpose of giving effect to the Council Directive.

7.2.4. Part 1 of Schedule 2: *Exempted Development – General:*

Class 26:

'The carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking'.

7.3. Relevant Case Law:

7.3.1. *O'Grianna (and others) v. An Bord Pleanála (and others) [2011] IEHC 632*

7.3.2. *Patrick Daly v. Kilronan Wind Farm Limited and, by order, Denrysalagh Wind Farm Limited [2017] IEHC 308.*

8.0 Assessment

8.1. Having conducted a site inspection, and following a review of the available information, in my opinion, it is clear that there are a number of issues which must be taken into consideration in assessing the subject referral and in determining whether or not the works in question constitute development which may or may not involve exempted development.

8.2. Procedural Issues:

8.2.1. In response to the circulation of the subject referral in accordance with Section 129 of the Planning and Development Act, 2000, the submission received from Raheenleagh Power DAC would appear to imply that the Board should consider dismissing the subject referral pursuant to Section 138 of the Act on the basis that it is vexatious, frivolous and without substance or foundation. In this respect, the implication would appear to be that the principle of *estoppel* arises in this instance given that the Planning Authority has previously issued a determination pursuant to Section 5 of the Act (i.e. PA Ref. No. EX18/13) that the grid connection works already undertaken by the developer constitute exempted development i.e. the subject referral amounts to a collateral attack on the validity of an existing Section 5 Declaration that was not challenged by any party through recourse to judicial review

under Section 50 of the Act, and on which the developer was entitled to rely when proceeding with the works.

- 8.2.2. By way of clarity in this regard, the Board is advised that prior to the lodgement of the subject referral, Wicklow County Council had already issued a separate declaration pursuant to Section 5 of the Planning and Development Act, 2000, as amended, to the developer (i.e. ESB Wind Development Ltd. and Coillte Teoranta) under PA Ref. No. EX18/13 which held that the provision of an underground electrical cable connection from the substation within Raheenleagh Wind Farm to the Arklow 22kV substation, Coolboy, Arklow, Co. Wicklow, was development which constituted exempted development. Therefore, whilst the subject referral has been lodged by a third party, it effectively seeks a new determination with regard to those matters previously considered under PA Ref. No. EX18/13.
- 8.2.3. Whilst I would acknowledge the owner's / developer's concerns that the subject referral effectively seeks to 'look behind' the earlier declaration issued under PA Ref. No. EX18/13 and that the appropriate means to challenge that decision would have been to seek leave for judicial review under Section 50(2) of the Planning and Development Act, 2000, as amended, in my opinion, Section 5(1) of the Act provides for '*any person*' to request in writing from the relevant planning authority a declaration on '*any question*' as to what, in '*any particular case*', is or is not development or is or is not exempted development and, therefore, it does not appear to preclude the consideration of either subsequent or multiple Section 5 applications pertaining to the same issue. Indeed, I am aware of previous instances where the determination of a Section 5 referral lodged with the Board has directly conflicted with the decision of Planning Authority as regards an earlier Section 5 declaration which pertained to the same issue / question. Accordingly, in view of the foregoing, and having considered the available information, I am satisfied that it would be inappropriate to dismiss the subject referral pursuant to the provisions of Section 138(1) of the Planning and Development Act, 2000, as amended, and that the Board may proceed to determine it as lodged.

8.3. Is or is not development:

- 8.3.1. Section 3 of the Planning and Development Act, 2000, as amended, defines "*development*" as the carrying out of any works on, in, over or under land, or the

making of any material change in the use of any structures or other land. Having regard to Section 2 of the Act wherein “works” are defined as including ‘any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure’, in my opinion, it is clear that the laying of the subject cabling / grid connection and associated works would involve the carrying out of ‘works’ through an act of ‘excavation’ and ‘construction’ and, therefore, constitutes development. Accordingly, having established that the subject works constitute development within the meaning of the Act, it is necessary to ascertain whether or not they can be considered to be exempted development.

8.4. Is or is not exempted development:

8.4.1. Article 6(1) of the Planning and Development Regulations, 2001, as amended, states that subject to Article 9, development of a class specified in Column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in Column 2 of the said Part 1. In this respect I would draw the Board’s attention to Column 1 of Class 26 of Part 1 of Schedule 2: ‘Exempted Development – General’ of the Regulations which refers to ‘The carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking’ and the absence of any conditions or limitations within Column 2 of that class. Accordingly, I am satisfied that the laying of the underground cabling / grid connection referenced in the subject referral comprises ‘development consisting of the laying underground of...cables...for the purposes of the undertaking’, although it is a requirement of this class that the development be carried out by an “undertaker authorised to provide an electricity service”.

8.4.2. Article 3(3) of the Regulations states that an electricity undertaking means “an undertaker authorised to provide an electricity service”. However, there is no statutory definition to clarify what exactly is meant by this. The Electricity Regulation Act 1999, at Section 2(1), provides the following definition:

“electricity undertaking” means any person engaged in generation, transmission, distribution or supply of electricity, including any holder of a licence or authorisation under this Act, or any person who has been granted a permit under section 37 of the Principal Act”.

- 8.4.3. I note that while this definition refers to holders of licences/authorisations/permits, the use of the conjunction *“including”*, prior to the reference to these instruments, indicates that they are not essential and that the term *“electricity undertaking”* can apply to *“any person”* engaged in generation, transmission, distribution or supply of electricity.
- 8.4.4. As indicated, Class 26 falls under the heading *“Development by statutory undertakers”*. It is one of several classes (Classes 23-32) in this part of the Schedule. It would seem, therefore, that the references to undertakers, undertakings and other bodies/authorities referred to in these classes must be construed as meaning statutory undertakers.
- 8.4.5. The definition of *“Statutory Undertaker”*, as provided in the Act, appears to encompass a very broad spectrum of categories of persons or bodies. It includes *“...a person, for the time being, authorised by or under any enactment or instrument under an enactment to ...provide, or carry out works for the provision of ...electricity”*. In my opinion, Raheenleagh Power DAC would appear to fall within this category as the developer / owner of a wind farm that comprises a project for the provision of electricity as authorised under the Planning Act.
- 8.4.6. Furthermore, I note that the current definition of *“Statutory Undertaker”*, clearly contemplates undertakings that are not solely public undertakings. This compares to the definition in the original 1963 Act [Section 2(1)] that appears to have contemplated public undertakings only. The change presumably reflects the liberalisation of markets in services and infrastructural provision that has occurred since that time. Therefore, I am satisfied that the development falls within the scope of the said Class 26.

8.5. **Restrictions on exempted development:**

- 8.5.1. Article 9(1)(a)(i) of the Regulations states that development to which Article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of

the development would contravene a condition attached to a permission issued under the Act or if it would be inconsistent with any use specified in a permission under the Act. In this respect it is of relevance to note that Condition No. 26 of the 'parent' grant of permission issued under PA Ref. No. 10/2140 which authorised the development of the existing Raheenleagh Wind Farm stated the following:

'This permission shall not in any way be construed as any form of consent or agreement to a connection to the national grid or to the routing or nature of any such connection. Prior to commencement of works on site, the applicant shall obtain planning permission for connection of the wind farm to the national grid.'

Reason: In the interest of clarity and the proper planning and sustainable development of the area'.

8.5.2. Whilst I would acknowledge that the site owner/ developer (i.e. Raheenleagh Power DAC) has sought to emphasise that the cabling/ grid connection works detailed in the subject referral were undertaken pursuant to a previous Section 5 declaration issued by the Planning Authority (PA Ref. No. EX18/13) which held that the works in question were exempted development, and although ESB International was further informed in correspondence dated 10th June, 2014 that its proposals for compliance with Condition No. 26 of PA Ref. No. 10/2140 were deemed to be acceptable to the Planning Authority (i.e. that the method of connection to the national grid did not require planning permission on the basis of the declaration issued under PA Ref. No. EX18/13), I would have serious reservations as regards the approach seemingly adopted by Wicklow County Council in its interpretation of the requirements of Condition No. 26 of PA Ref. No. 10/2140.

8.5.3. In my opinion, it is readily apparent from any reasonable reading of Condition No. 26 that its express intention was to require any connection of the Raheenleagh Wind Farm to the national grid to obtain '*planning permission*'. In this regard, it is of particular relevance to note that the condition specifically refers to a requirement to obtain '*planning permission*' (as distinct from 'approval', 'agreement', 'consent' or any other such connotation) and at this point I would refer the Board to Section 2(1) of the Planning and Development Act, 2000, as amended, which states that '*permission*' (in the context of a planning application) means '*a permission granted under section 34, 37G or 37N, as appropriate*'. Therefore, the inclusion of this

condition would serve to remove any possibility that the grid connection works could be undertaken as exempted development pursuant to Class 26 of Part 1 of Schedule 2 of the Regulations. Furthermore, I am unconvinced by the argument put forward by the site owner / developer that the purpose of Condition No. 26 was not to 'de-exempt' the grid connection works given that the condition was not prefaced by wording such as '*Notwithstanding the provisions for exempted development under the Planning and Development Regulations, 2001 . . .*' In my opinion, the wording of the condition in question clearly and unequivocally imposes a requirement to obtain planning permission for any grid connection.

8.5.4. With regard to the developer's suggestion that the imposition of Condition No. 26 exceeds the limitations of the legislation as said condition does not relate to lands under the control of Raheenleagh Power DAC and is not, as such, connected with the development permitted on the land to which the relevant planning application relates, I am unconvinced by such an assertion, particularly as the use of comparable conditions is commonplace in planning decisions and as the condition in question actually serves to preclude the carrying out of works on lands outside of the control of the applicant (as distinct from imposing a requirement to undertake works) without the benefit of planning permission.

8.5.5. Therefore, on the basis of the foregoing, I am satisfied that the provision of an underground electrical cable grid connection from the substation within the Raheenleagh Wind Farm to the Arklow 220kV substation at Coolboy would materially contravene Condition No. 26 as attached to the grant of permission issued in respect of PA Ref. No. 10/2140 and thus cannot be held to constitute exempted development by reference to Article 9(1)(a)(i) of the Planning and Development Regulations, 2001, as amended.

N.B. (1) Having reviewed the available information, I am satisfied that the works in question are not subject to any of the remaining restrictions set out in Article 9 of the Regulations.

N.B. (2) I would further advise the Board that the email correspondence between Wicklow County Council and Mr. Francis Clauson (as submitted with the subject referral) would appear to acknowledge that notwithstanding the declaration issued

under PA Ref. No. 18/13, there has been a breach of compliance with Condition No. 26 of PA Ref. No. 10/2140.

8.6. The Subject Referral: Environmental Impact Assessment:

- 8.6.1. At this point of my assessment, and in the interest of completeness, it is appropriate to consider the implications of Section 4(4) of the Act which effectively de-exempts any development which attracts a requirement for Environmental Impact Assessment (EIA) or Appropriate Assessment (AA).
- 8.6.2. Whilst the provision of an underground cable for the transmission of electricity does not fall within a class of development for the purposes of Environmental Impact Assessment, it is necessary to have regard to recent legal developments in this area with specific reference to the judgements of the High Court in respect of *O’Grianna v. An Bord Pleanala* [2014] IEHC 632 and *Patrick Daly v. Kilronan Wind Farm Limited and, by order, Derrysallagh Wind Farm Limited* [2017] IEHC 308.
- 8.6.3. In *O’Grianna v. An Bord Pleanala* (delivered on 12th December, 2014), the High Court quashed the decision of the Board in granting planning permission for a wind farm in Co. Cork on the grounds of ‘project-splitting’ and held that the Board had failed to ensure that the grid connection had been considered as part of the Environmental Impact Assessment process prior to the granting of permission for the turbines and ancillary works (*N.B.* The wind farm development itself required mandatory EIA as it exceeded the 5 No. wind turbine threshold provided for in Class 3 (i) of Part 2, Schedule 5 of the Planning and Development Regulations, 2001, as amended). In essence, the High Court judgement was based on the conclusion that the wind farm and the grid connection constituted a single project, and that both elements together would have to be subject to EIA in order to comply fully with the terms of the Directive. Consequently, new applications for permissions for wind farm developments, which require EIA, now include relevant information on proposed grid connections.
- 8.6.4. In the subject instance, the grant of permission issued for the Raheenleagh Wind Farm did not include for the grid connection works detailed in the subject referral and, therefore, the cumulative impact of the said grid connection works when taken in conjunction with the wind farm was not assessed as part of that planning application.

8.6.5. Whilst the Board has previously declared that grid connection works associated with extant grants of permission for wind farms can be held to constitute exempted development, the judgement of the High Court delivered on 11th May, 2017 in respect of *Patrick Daly v. Kilronan Wind Farm Limited and, by order, Derrysallagh Wind Farm Limited* has served to provide greater clarity on the matter and thus can be considered to be authoritative statement of the law as it currently applies:

'In the light of the decision of Peart J. in O'Grianna & Ors. v. An Bord Pleanala, the grid works must be regarded as an integral part of the project as a whole and the assessment of the grid works is to be made in the context of the entire project, as must the assessment of the application for the turbines and works associated with them. That is not to say that a separate EIA will always be required with regard to the grid works and I adopt the dicta of Haughton J. in his judgment in Sweetman v. An Bord Pleanala & Ors. in that regard.

However, as the grid works are part of an overall project, and an EIA is required for the overall project, an environmental assessment must be carried out of the entire project, and, therefore, no part of the project, and ipso facto no individual part treated as a standalone element, can be exempt from planning. This emerges from the European jurisprudence . . .'

8.6.6. The judgement of Baker J further states:

'As a matter of European law the assessment of whether the grid connection works can be treated as exempted development is one that must be considered in the context of a reading that best achieved the aims and objectives of the EIA Directive. I consider that on account of the fact that the grid works cannot be lawfully separated from the project as a whole, that to treat the grid works as exempt fails to give effect to this principle'.

8.6.7. Therefore, having considered the available information, including the judgements of the High Court in *O'Grianna v. An Bord Pleanala* and *Patrick Daly v. Kilronan Wind Farm Limited and, by order, Derrysallagh Wind Farm Limited*, it is my opinion that in order to give proper effect to the requirements of the EIA Directive in this instance (given that the Raheenleagh wind farm was previously subject to EIA and as the relevant planning application made no provision for an EIA of the subject grid connection / cabling works), the subject works constitute development which

necessitates EIA and thus cannot be considered to comprise exempted development given the provisions of Section 4(4) of the Act. In this regard it is of particular relevance to note that the ducting works for the subject grid connection were commenced in 2015 whilst the grid connection became fully operational in 2016 i.e. after the ruling of the High Court in the case of *O’Grianna v. An Bord Pleanala* [2014] IEHC 632.

8.7. The Subject Referral: Appropriate Assessment:

8.7.1. From a review of the available mapping, including the data maps from the website of the National Parks and Wildlife Service, it is apparent that the route of the subject cabling / grid connection works does not extend through any Natura 2000 designation, although the following Natura 2000 sites are located within an approximate 15km radius of the relevant lands:

- The Slaney River Valley Special Area of Conservation (Site Code: 000781)
- The Kilpatrick Sandhills Special Area of Conservation (Site Code: 001742)
- The Buckronev-Brittias Dunes and Fen Special Area of Conservation (Site Code: 000729)
- The Magherabeg Dunes Special Area of Conservation (Site Code: 001766)
- The Vale of Clare (Rathdrum Wood) Special Area of Conservation (Site Code: 000737)
- The Deputy’s Pass Nature Reserve Special Area of Conservation (Site Code: 000717)

8.7.2. Having reviewed the available information, and following consideration of the ‘source-pathway-receptor’ model, including potential hydrological connectivity, it is my opinion that given the nature and scale of the works in question, the site location outside of any Natura 2000 designation, the limited ecological value of the lands in question, and the separation distances involved between the site and the closest Natura 2000 site, the works are unlikely to have any significant effect in terms of the disturbance, displacement or loss of habitats or species on the ecology of any Natura 2000 site.

8.7.3. Accordingly, it is reasonable to conclude on the basis of the information available, which I consider adequate in order to issue a screening determination, that the works in question, individually and in combination with other plans or projects, would not be likely to have a significant effect on any European site and that a Stage 2 appropriate assessment (and the submission of a NIS) is not therefore required.

9.0 Recommendation

9.1. I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the provision of an underground electricity cable grid connection from the substation within the Raheenleagh Wind Farm to the Arklow 220kV substation at Coolboy, Arklow, Co. Wicklow, is or is not development or is or is not exempted development:

AND WHEREAS The Raheenleagh / Ballinvalley 8, c/o Mr. Eugene Clune, requested a declaration on this question from Wicklow County Council and no declaration was issued by the planning authority:

AND WHEREAS The Raheenleagh / Ballinvalley 8, c/o Mr. Eugene Clune, referred this declaration for review to An Bord Pleanála on the 19th day of December, 2017:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) sections 2, 3, 4, 172 & 177U of the Planning and Development Act, 2000, as amended,
- (b) Articles 6 and 9 of the Planning and Development Regulations, 2001, as amended,
- (c) Class 26 of Part 1 of the Second Schedule to the Planning and Development Regulations, 2001
- (d) the planning history of the site,
- (e) The judgement of the *High Court in O’Grianna (and others) v. An Bord Pleanála (and others) [2014] IEHC 632*, and

(f) The judgement of the High Court in *Patrick Daly v. Kilronan Wind Farm Limited and, by order, Derrysallagh Wind Farm Limited* [2017] IEHC 308

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the said underground electricity cable grid connection comes within the scope of sections 2(1) and 3(1) of the Planning and Development Act, 2000, as amended, and constitutes development
- (b) the said underground electricity cable grid connection comes within the scope of Class 26, Part 1 of Schedule 2 of the Planning and Development Regulations, 2001, as amended, and
- (c) the provision of the said underground electricity cable grid connection would contravene condition number 26 of planning register reference number 10/2140, and would, therefore, come within the restrictions on exemption set out in Article 9(1)(a)(i) of the said Regulations, and
- (d) the said underground electricity cable grid connection comes within the scope of section 4(4) of the Planning and Development Act, 2000, as amended, in that it requires an Environmental Impact Assessment.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(b) of the 2000 Act, hereby decides that the provision of an underground electricity cable grid connection from the substation within the Raheenleagh Wind Farm to the Arklow 220kV substation at Coolboy, Arklow, Co. Wicklow is development and is not exempted development.



Robert Speer
Planning Inspector

7th June, 2018