



An
Bord
Pleanála

Inspector's Report ABP 302837-18

Development	Grid connection circuit between Derreenacrinnig West windfarm and Ballylickey ESB substation
Location	Between Derreencrinnig West and Ballylickey, Co. Cork
Planning Authority	Cork County Council
Applicant	ESB Networks
Type of Application	Leave to appeal for substitute consent under section 177C of the Planning and Development Acts, 2000-2018
Date of Site Inspection	28/02/19
Inspector	Pauline Fitzpatrick

1.0 Site Location and Description

This is a linear site that links a substation that will serve an authorised windfarm of 7 turbines at Derreenacrinnig West c. 5.8km to the north of Drimoleague for a distance of approx. 14 km westward connecting to the existing ESB 110kV substation at Ballylickey. Development of the windfarm commenced in August 2017 and is partially constructed. The windfarm is proposed to be connected to the national grid by way of a medium voltage 20kV circuit. The circuit, which is partially constructed, is designed as part overhead line (OHL) and part underground cable (UGC). The application relates to that section of the circuit which has already been constructed and comprises OHL only. The sections constructed are delineated on the plans accompanying the application. The overhead line is mounted on single wooden pole sets.

Commencing at the windfarm the route travels uphill across an area of blanket bog and wet heath at Derreenacrinnig West. The route then descends and cuts through commercial forestry and unenclosed grazing areas. It travels westwards along the Mealagh River valley characterised by improved pasture and wet grassland. It crosses the Mealagh River c. 1km southeast of Ardrah Bridge. It rises up the north side of the valley then descends towards Shandrum across improved and unimproved grassland with occasional areas of heath and commercial forestry. Between Shandrum and Ballylickey substation the route is characterised by improved grassland. Dispersed housing is noted along the local road network.

2.0 Proposed Development

Works had commenced on the construction of the grid connection but ceased following a warning letter from Cork County Council.

It is proposed to seek substitute consent to retain the works that have been carried out. The OHL to which the application refers is in three sections equating to a distance of approx. 9.537km.

An application has been made to Cork County Council for permission under ref. 19/10 for the remaining sections which entail:

- Overhead line for a distance of 1.147 km

- Underground cabling for a distance of 3.198 km

3.0 Planning History and Precedent

3.1. Planning History

PL88.239767 (10/857) – permission granted on appeal in December 2012 for a wind farm comprising of 7 turbines, an electrical compound and sub-station and all related electrical equipment subject to 29 conditions.

D/19/15 – Section 5 declaration by Cork County Council on 01/12/15 that works at Ballylickey 110kV substation are exempted development.

D/10/17 – Section 5 declaration by Cork County Council on 05/04/17 that the installation of a switching station at the consented wind farm development is not exempted development.

D/13/17 – Section 5 declaration by Cork County Council on 07/04/17 that proposed 20kV connection from the permitted Derreenacrinnig West wind farm to the existing 110kV substation at Ballylickey is not exempted development.

D/25/17 – Section 5 declaration request regarding the proposed 20kV connection was withdrawn 03/07/17.

D/41/17 – Section 5 declaration request for the reconfiguration and modification of access track for the development of the windfarm was withdrawn 16/01/18.

Warning letter issued from Cork County Council on 03/05/18 stating that an unauthorised 20kV electrical connection between the windfarm and the existing substation at Ballylickey may have been, is being, or may be carried out.

19/10 – application lodged with Cork County Council for permission for the remaining overhead and underground sections to connect the permitted windfarm to the Ballylickey 110kV substation. Further information has been sought.

3.2. Precedent

21.LS0032 – leave to appeal for substitute consent granted in December 2017 for retention of partially completed grid connection to serve a windfarm in County Sligo (grid connection straddles Counties Sligo and Leitrim).

4.0 Natural Heritage Designations

The nearest sites to the grid connection route are Derryclogher (Knockboy) Bog SAC c. 6.5km to the north, Glengariff Harbour and Woodland SAC c.7km to the west and Cahal Mountains SAC c. 7.5km, also to the west.

5.0 Legislative Context

Section 177C of the Planning and Development Act 2000, as amended, states *inter alia*

(1) A person who has carried out a development referred to in subsection (2) may apply to the Board for leave to apply for substitute consent in respect of the development.

(2) A development in relation to which an applicant may make an application referred to in subsection (1) is a development which has been carried out where an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required, and in respect of which—

(b) the applicant is of the opinion that exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.

Section 177D states –

(1) Subject to section 261A(21), the Board shall only grant leave to apply for substitute consent in respect of an application under section 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required in respect of the development concerned and where it is further satisfied—

(b) that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

(2) In considering whether exceptional circumstances exist the Board shall have regard to the following matters:

(a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;

(b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;

(c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;

(d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;

(e) the extent to which significant effects on the environment on the integrity of a European site can be remediated;

(f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;

(g) such other matters as the Board considers relevant.

6.0 The Application

The applicant is of the opinion that exceptional circumstances exist such that it would be appropriate to permit the regularisation of the development by way of an application for substitute consent.

The case made is structured under the relevant considerations set out in Section 177D(2) and can be summarised as follows:

- The 7 wind turbines and associated electrical infrastructure as granted under PL88.239767 (10/857) have gone through the EIA process.
- The subsequent actions in relation to construction of the grid connection were taken having regard to common practice and planning precedents at the time.

- Planning exemptions for the installation of underground cables and erection of 20kV overhead lines to connect wind farms to the national electricity grid were widely utilised by both developers considered to be ‘authorised undertakers’ and ESBN as a statutory undertaker for many years. This position was supported by the significant number of Section 5 Declarations.
- An Exempted Development Screening Study of the proposed grid connection was carried out.
- Following two High Court rulings it has been established that the grid connection must go through a similar process to that carried out in the assessment of the windfarm so as to allow for the entire project to be assessed in the context of the EIA Directive.
- A remedial EIAR will be submitted with the substitute consent application (if leave granted). This will provide an environmental assessment of the whole project in accordance with the EIA Directive.
- The grid connection does not cross any Natura 2000 sites and there was no removal of or interference with habitats within any European site.
- An AA Screening report was carried out as part of the Exempted Development Screening Study (completed in 2016) which concluded that the project alone or in combination with other projects would not have significant direct or indirect effects on Glengariff Harbour and Woodland SAC, Derryclogher (Knockboy) Bog SAC and Caha Mountains SAC.
- Based on the AA Screening carried out it is clear that there was no intention to circumvent the purpose and objectives of the Habitats Directive.
- There was no interference with protected species and there is no known rare or protected flora or habitats along the route.
- Based on information to date it is very likely that the rEIAR will be in a position to demonstrate that no such significant effects have arisen. The development has not caused significant impacts on the environment or the integrity of a European site, therefore no remedial measures are likely to be required for the completed development.

- The ecological considerations above will be reviewed and updated if necessary.
- The assessment process on the windfarm was open to public consultation and there is evidence of participation in terms of submissions made from the public and other consultees. The substitute consent procedures provide for public participation.
- The applicant is not aware of any unauthorised development carried out by or on its behalf in relation to the subject matter of the application.
- The applicant is not aware of any other matters that the Board would need to consider.

7.0 Planning Authority Submission

The submission sets out the key facts of the case. In addition, the following are noted:

- The County Council is currently in discussions with the applicant with a view to finalising the planning application to complete the final section of the grid connection which will be accompanied by an EIAR.
- It would be reasonable to assume that the applicant had the belief that the development undertaken to date was not unauthorised.

It is considered that there are exceptional circumstances in this case and it would be reasonable to regularise the planning status of the grid connection to the permitted windfarm by granting leave to apply for substitute consent.

8.0 Assessment

At the outset it is noted that the grid connection to which the application refers is only partly constructed with an application lodged with Cork County Council for permission to construct the remaining overhead and underground sections under ref no. 19/10. To date a decision has not been made on the application.

In the interests of clarity, it is noted that as an application for substitute consent can only be made in respect of development that has already been carried out the

Board's determination in this case, whether or not to grant leave to make such an application, is confined solely to the retention elements of the development.

Section 177D(1)(b) of the Planning and Development Act specifies that the Board can only grant leave to apply for substitute consent in respect of an application under section 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment was or is required in respect of the development concerned and where it is further satisfied that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

8.1. Qualifying Development

8.1.1. Environmental Impact Assessment

Consequent to the court decision in O' Grianna vs. An Bord Pleanala 2014 IEHC 632, the sections of the grid connection that are the subject of this application is an integral part of the development of a windfarm of 7 turbines at Derreenacrinnig West which was granted permission under ref. PL88.239767 (10/857), which is a class of development that requires environmental impact assessment. The judgement in Daly vs. Kilronan Windfarm Ltd. 2017 IEHC 308 is the authoritative statement of law as it currently applies to this case. It states that to regard the grid connection as exempt development would fail to give proper effect to the EIA Directive. The judgement did not say whether the grid connection would have to be subject to an EIA before any consent was granted for its retention or completion, but the implication is that a screening determination would, at least, be necessary.

8.1.2. Appropriate Assessment

The applicant refers to an Appropriate Assessment Screening Report prepared as part of the application for a section 5 declaration made to the planning authority and which is on file for the Board's information.

The nearest sites to the route of the grid connection are Derryclogher (Knockboy) Bog SAC c. 6.5km to the north, Glengariff Harbour and Woodland SAC c.7km to the west and Caha Mountains SAC c. 7.5km also to the west.

There is no hydrologic connection between the route and Derryclogher (Knockboy) Bog SAC and Caha Mountains SAC.

The route traverses the surface catchments of the Mealagh and Owvane rivers which discharge into Bantry Bay. Glengariff Harbour and Woodland SAC is located on the opposite side of the bay, 6.5km from the mouth of the Owvane river and c.7.5km from the north of the Mealagh River.

In view of the limited nature of the works undertaken, the employment of standard construction practices integral to such type projects and the separation distances, it is considered that the project alone or in combination with other projects will not have any significant effects. It is therefore reasonable to conclude that, on the basis of the information on the file, which is adequate in order to issue a screening determination, that the development, individually or in combination with other plans or projects would not be likely to have a significant effect on any European Site in view of the site's conservation objectives, and a Stage 2 Appropriate Assessment (and submission of a NIS) is not therefore required.

8.1.3. Conclusion

On the basis of the above and specifically with reference to EIA I submit that the development consisting of the works carried out by the applicant to provide a grid connection are capable of coming within section 177C(2) of the Act if the condition at (b) is satisfied, which requires a conclusion by the Board that exceptional circumstances exist after having had regard to the criteria described in section 177D(2).

8.2. Exceptional Circumstances – Section 177D(2)

I propose to address each in turn:

8.2.1. Whether the regularisation of the development would circumvent the purposes and objectives of the EIA Directive or the Habitats Directive

The application for the windfarm and related electrical infrastructure granted under PI88.239767 (10/857) has been subject of EIA. The subsequent actions in relation to the construction of the grid connection were taken having regard to common practices and planning precedents at the time. Should leave be granted a rEIAR will

be submitted with the substitute consent application which will provide for an environmental assessment of the whole project.

The grid connection does not cross any Natura 2000 site. An AA Screening report carried out as part of the Exempted Development Screening Study in 2016 concluded that the project alone or in combination with other projects will not have a significant direct or indirect adverse impacts on designated site.

I am therefore satisfied that the application would not circumvent the purpose and objectives of the EIA Directive or the Habitats Directive.

8.2.2. Whether the applicant had or could reasonably have had a belief that the development was not authorised.

The permission for the windfarm predated the relevant case law as referenced in Section 8.1.1. above. Planning exemptions for the erection of 20kV overhead lines to connect wind farms to the national electricity grid were widely used by both developers considered 'authorised undertakers' and the applicant as a statutory undertaker for many years. The Board has made declarations that similar works elsewhere were exempt development even subsequent to the O Grianna judgement including RL3377 and RL3503.

On this basis I accept that the applicant could reasonably have held the belief that the works carried out to provide a grid connection were not unauthorised.

8.2.3. Whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or appropriate assessment and to provide for public participation in such an assessment has been substantially impaired.

As noted above an assessment of the environmental impacts of the windfarm has already been carried out and was subject to public participation.

The purpose of the current application is so as to allow for an environmental assessment of the whole project. It is my submission that the provision of information to allow the competent authority to undertake an assessment of the environmental impacts of the development for the purposes of an EIA has not been substantially impaired. I consider that the submission of an application that includes the relevant level of information to allow the Board to undertake EIA can so be

provided to determine whether there were significant impacts on the environment along the route. Furthermore, I am satisfied that the making of an application for substitute consent will permit public participation in the assessment process.

8.2.4. The actual or likely significant effects on the environment or adverse effects on the integrity of a European Site resulting from the carrying out continuation of the development.

There is no evidence to suggest that any significant or adverse effects have arisen to date.

8.2.5. The extent to which significant effects on the environment or adverse effects on a European Site can be remedied.

There are no indicators to suggest that remediation is required

8.2.6. Whether the applicant has complied with previous planning permissions or previously carried out an unauthorised development.

It is practice of the applicant, a statutory undertaker to carry out developments in accordance with planning legislation. It is not aware of any unauthorised development carried out by it or on its behalf in relation to the subject matter of the application.

8.2.7. Such other matters as the Board considers relevant

I consider that no further matters need to be considered by the Board in this case.

8.3. Conclusion

It is my conclusion that exceptional circumstances do exist in this case. In this I place particular emphasis on the fact that regularisation of the development would not circumvent the purposes or objectives of the EIA Directive; that the applicant could reasonably have had a belief that the development was not unauthorised; that the ability to carry out EIA and provide for public participation has not been substantially impaired; and the limited nature of any actual or significant impacts on the environment resulting from the development.

9.0 Recommendation

I recommend that the Board grant leave to apply for substitute consent and direct that the application be directed by a remedial Environmental Impact Assessment Report.

10.0 Reasons and Considerations

Having regard to section 177D of the Planning and Development Act, 2000, as amended, the planning history of the site, all documentation on file and the report of the planning Inspector, the Board is satisfied that:

- (a) the development is one where an environmental impact assessment is required, and
- (b) That exceptional circumstances exist by reference, in particular, to the following:
 - the fact that the regularisation of the development would not circumvent the purpose or objectives of the Environmental Impact Assessment Directive or of the Habitats Directive
 - that the applicant could reasonably have had a belief that the development was not unauthorised;
 - that the ability to carry out an Environmental Impact Assessment or Appropriate Assessment and provide for public participation in such assessments has not been substantially impaired; and
 - the actual or likely significant effects on the environment or adverse effects on the integrity of a European Site, if any, can be remedied.

The Board decided that it would be appropriate to consider an application for the regularisation of the development by means of an application for substitute consent.

The Notice to the applicant advising of the decision should also direct that:

- (a) The application be made within 12 weeks of the giving of the notice or such longer period as the Board may, on request, consider appropriate, and

(b) The application includes a remedial Environmental Impact Assessment Report

Pauline Fitzpatrick
Senior Planning Inspector

April, 2019