Inspector's Supplementary Report ABP-303466-19.

Development	On farm Anaerobic Digestion Plant.
Location	Rathcash, Dunbell, Co. Kilkenny.
Planning Authority	Kilkenny County Council.
Planning Authority Reg. Ref.	18/433.
Applicant(s)	Eamon & John Phelan.
Type of Application	Permission.
Planning Authority Decision	Grant.
Type of Appeal	Third Party
Appellant(s)	John Brennan.
Observer(s)	None.
Date of Site Inspection	22/10/2020.
Inspector	A. Considine.

1.0 Introduction

1.1. Following my previous report, the Board sought a submission from the Environmental Protection Agency in relation to the third-party appeal of the proposed development in relation to the following matters:

1. Any observations on the nature of the material intended to be processed at the Anaerobic Digestion Plant, as described in the application and appeal documentation, namely rotation, catch crops such as whole crops, triticale barley and excess grass and cattle slurry which will be sourced from existing on farm beef fattening units and replacement heifer units, and whether any, all or none of this material would constitute waste for the purposes of a waste permit or waste licence.

2. An observation on the quantum of the material intended to be processed at the Anaerobic Digestion Plant, as described in the application and appeal documentation, namely 19,800 tonnes per annum of rotation, catch crops such as whole crops, triticale barley and excess grass and 10,000 tonnes per annum of cattle slurry which will be sourced from existing on farm beef fattening units and replacement heifer units, and the capacity of the intended primary and secondary digester tanks (3,731 cubic meters each) and the capacity of the intended liquid digestate storage tank (4,926 cubic meters) and whether or not, depending on your observations under point one above, a waste licence is likely to be required at the proposed development.

1.2. A letter issued to the EPA from the Board on the 5th January 2021.

2.0 EPA Response

2.1. On the 25th January 2021, the EPA responded via email to the Board advising as follows:

- The Agency has not received a licence application under the EPA Act or the Waste Management Act for the development.
- It is not possible to determine from the documentation provided whether the development would require a licence from the Agency.

- It is also noted that certain waste activities are exempt from licensing or permitting under the Waste Management Act 1996 as amended.
- Waste operators or local authorities can make an Article 11 request, under the Waste Management (Facility Permit and Registration) Regulations 2007, as amended, to the EPA if they are unsure which type of authorisation if any, is required for a facility for the EPA to make a determination.
- The Agency has no record of an Article 11 request in relation to the development. Unless an application for an Article 11 determination is made, the Agency would not be in a position to determine what type of authorisation if any, would be required.

3.0 Further Circulation

3.1. Following receipt of the above, the Board circulated the EPA response to the applicants, the appellant and the local authority.

4.0 Further Submissions

4.1. In response to the circulated EPA response, the Planning Authority submitted a letter to the Board advising no comment with regard to the EPA submission.

4.2. The Applicant made a submission through their agent. The response includes a legal opinion from McCann Fitzgerald Solicitors which address the matter arising. The submission is summarised as follows:

- The legal opinion notes that the Board is interested in whether certain feedstock for the AD plant is ‘waste’ and, in consequence, whether a waste licence is likely to be required for the activity.
- It is noted that the answer to the question is important as public notices advertising the application for permission are required to state the fact that the application relates to a development where an integrated pollution prevention and control licence or a waste license is required and, if a licence is required, the Board’s powers are limited by Section 54 of the Waste Management Act 1996, as amended, and / or Section 99F of the Environmental Protection Agency Act 1992, as amended.

- It is submitted that the feedstock is not waste, where it is neither discarded nor required to be discarded and that not all AD plants require a waste licence.
- It is considered that the Agency was entirely correct to refrain from characterising the feedstock for the proposed AD plant as waste.
- Organic material that has been grown for the purpose of feedstock cannot be considered waste and must be considered a product.
- In terms of 'excess grass' it is submitted that it satisfies the test for "by-product" or "production residue" in terms of Article 5 of the Waste Framework Directive and Article 27 of the European Communities (Waste Directive) Regulations 2011 and is therefore not waste.
- The Court of Justice of the European Union has already ruled that slurry generated by livestock farms that is used as an agricultural fertiliser is not a "waste", Case C-121/03 *Commission v Spain* refers. The same was confirmed in an Irish context where, in Case C113/12 *Brady v Environmental Protection Agency*, the slurry was stored before use on the lands of third parties.
- The same logic applies with equal force where the producer uses the slurry as feedstock to produce biogas and biofertilizer in an AD plant, as proposed. There is no intention or requirement to discard.
- It is therefore not necessary to engage the provisions of Section 3(1)(g) or 3(2)(b) of the Waste Acts, which exempts from the requirement for a waste licence certain faecal matter and animal by-products.
- The Agency is correct to highlight that there is a procedure to ascertain what waste authorisation might be required, but there is nothing in the Planning and Development Act 2000, as amended, or the Planning Regulations to suggest that this Article 11 procedure must be completed before the Board can make a decision on the appeal.
- The procedure is not mandatory and it is clear that no application will be made, as none is required.

- As such, the Board is not free to rely on the Agency completing this work within a licensing process and the full assessment burden falls on the Board, within the Planning Process.

4.3. It was determined that neither of the above two submissions needed to be circulated further to all parties under Section 131 of the Planning and Development Act, as amended.

5.0 Conclusion

5.1. With regard to the above submission, I note that the EPA has not provided any further clarity or detail on the matter. I note that the applicant has not sought permission for, and the development was not advertised as requiring, a Waste Licence. As such, a positive decision in relation to this development cannot relate to such a development. It is noted that the Environment Section of Kilkenny County Council has advised that the proposed development will require a 'waste permit / licence' in accordance with the Act and requires that prior to the commencement of any waste activity on the site, the development shall have applied for, and be in possession of said permit / licence.

5.2. I refer the Board to my original report where I concluded that the silage – including rotation, catch crops, triticale barley and excess grass - does not fall within the scope of the Waste Framework Directive and as such, does not constitute a waste product. In the context of the subject proposal, I also noted the content of the Waste Framework Directive 2008/98/EC. Article 2 sets out 'Exclusions from the scope' and 2(1)(f) states that the following shall be excluded from the scope of this Directive:

> Faecal matter, if not covered by paragraph 2(b), straw and other natural non-hazardous agricultural or forestry material used in farming, forestry or for the production of energy from such biomass through processes or methods which do not harm the environment or endanger human health.

5.3. Article 2(2)(b) states that 'the following shall be excluded from the scope of this Directive to the extent that they are covered by other Community legislation:

animal by-products including processed products covered by Regulation (EC) No 1774/2002, except those which are destined for incineration, landfilling or use in a biogas or composting plant.

5.4. The Board will note the applicants legal opinion and in particular references to both Article 5 of the Waste Framework Directive and Article 27 of the European Communities (Waste Directive) Regulations 2011, where it is submitted that 'excess grass' satisfies the test for "by-product" or "production residue" and is therefore not waste.

5.5. Article 27 of the European Communities (Waste Directive) Regulations 2011 states

By-products

27. (1) A substance or object, resulting from a production process, the primary aim of which is not the production of that item, may be regarded as not being waste but as being a by-product only if the following conditions are met:

(*a*) further use of the substance or object is certain;

(*b*) the substance or object can be used directly without any further processing other than normal industrial practice;

(*c*) the substance or object is produced as an integral part of a production process; and

(*d*) further use is lawful in that the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.

(2) (*a*) Where an economic operator makes a decision in accordance with paragraph (1) that a substance or object is to be regarded as a byproduct, he or she shall notify the Agency of the decision and the grounds for the decision.

(*b*) Where there is no notice given to the Agency under subparagraph (*a*) in respect of a substance or object and the substance or object, as the case may be, is discarded or otherwise dealt with as if it were waste, the substance or object,

as the case may be, shall be presumed to be waste until the contrary is proved.

(3) The Agency—

(*a*) may determine, in consultation with the relevant local authority and the economic operator concerned, whether a substance or object notified to it as a by-product in accordance with paragraph (2)(*a*) should be considered as waste, and

(*b*) shall notify the local authority and the economic operator concerned in circumstances where a determination is made that a substance or object should be considered as waste and not as a by-product.

(4) Nothing in this Regulation shall relieve an economic operator from his or her responsibilities under the Act of 1992 or the Act of 1996.

(5) The Agency shall establish and maintain a register of by-products to record substances or objects notified to it as by-products under paragraph (2)(*a*).

(6) Where the Agency makes a determination in accordance with paragraph (3) that a substance or object should be considered as waste and not as a byproduct, the determination shall be final.

5.6. In terms of the above, and in accepting the first party submission and legal opinion, I am satisfied that the above Article (2) requires that where an economic operator makes a decision that a substance or object is to be regarded as a byproduct, he or she shall notify the Agency of the decision and the grounds for the decision. As the proposed biogas is intended to be upgraded to biomethane which is to be transported off site to market, there is a commercial element to the proposed development and therefore the applicant will be an “economic operator”. There would appear to have been no communication with the EPA in this case. In this regard, I was satisfied that cattle slurry is an animal by-product which is destined for use in a biogas plant and therefore, is included within the scope of the Waste Directive.

5.7. In addition, the development proposes to process 19,800 tonnes of rotation, catch crops, triticale barley and excess grass (not considered waste) and 10,000 tonnes of cattle slurry per annum. The development will result in the generation of 500m^3/h of biogas with a runtime of 8,600 hours per annum. The development, if permitted will convert the input of organic material into biomethane and organic fertiliser, or digestate. The Biomethane is to be transported from the site once a day. The proposed development therefore falls below the thresholds for mandatory EIA. In terms of the requirement for EIA, I would accept that the proposed development can be considered as falling within the Class 11: Other projects - (b) Installations for the disposal of waste with an annual intake greater than 25,000 tonnes not included in Part 1 of this Schedule.

5.8. Having regard to nature and scale of the development, together with the nature of the site, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for EIA can, therefore, be excluded after a preliminary examination under Article 109(2)(b) of the Planning and Development Regulations 2001, as amended and a screening determination is not required'.

5.9. As noted above, it is unclear whether or not the activity is licensable under the EPA Act 1992, as amended or the Waste Management Act 2007, as amended, or whether or not it requires a waste facility permit from the local authority. I also acknowledge the legal opinion submitted by the applicant, which confirms their position that the proposed development does not relate to a development which comprises or is for the purpose of an activity requiring a waste licence.

5.10. Part I of the Third Schedule of Waste Management Regulations 2007 sets out the classes of activity subject to waste facility permit application to a local authority and Class 8 states:

> The reception, storage and composting of bio-waste at a facility where –
>
> (a) The maximum amount of compost and bio-waste held at the facility does not exceed 6,000 cubic metres at any time, and
>
> (b) The annual intake shall not exceed 10,000 tonnes.

The proposed facility would have an annual input of 10,000 tonnes of waste – ie cattle slurry 'destined for incineration, landfilling or use in a biogas or composting

plant' (Article 2(2)(b) of the Waste Framework Directive 2008/98/EC) - which appears to just comply with the thresholds set out above.

5.11. According to EPA guidelines a Waste Licence is normally required for:

The reception, storage and composting of bio-waste at a facility where:

(a) The annual intake exceeds 10,000 tonnes, OR

(b) The maximum amount of compost and bio-waste held at the facility exceeds 6,000 cubic metres at any time.

5.12. In the context of the subject proposed development, the Board will note that the proposed primary and secondary digester tanks will each have a capacity of 3,731m^3 and the liquid digestate is to be stored in two storage tanks that are indicated as having a capacity of 4,926m^3. In this regard, there is potential for the facility to hold more than 6,000m^3 of bio-waste and digestate at any one time, and as such, it is possible that the proposed facility will require a waste licence.

5.12.1. Article 11 requests can only be made by an applicant who is proposing a waste related activity or a Planning Authority that has received an application for a waste authorisation. As such, the Board may consider it appropriate to seek such a declaration from the EPA or seek that the applicant seek such a request or make an application for a Waste Licence to the EPA, prior to considering this appeal further. In addition, and while I would accept that the scale of the development is sub-threshold, it is open to the Board to seek observations from the EPA in terms of determining whether an EIAR is required or not, should a Waste Licence be deemed necessary.

5.12.2. I would restate that a grant of planning permission in this instance cannot be for a development that requires a Waste Licence.

A. Considine
Planning Inspector
08th March 2021