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Bord
Pleanála

Inspector's Report ABP-304580-19.

Development	Anaerobic Digestion Facility.
Location	Derryville, Moyne, Thurles, Co. Tipperary.
Planning Authority	Tipperary County Council.
Planning Authority Reg. Ref.	11/51/0331.
Applicant(s)	H&L Environmental Services Ltd.
Type of Application	Leave to Apply for Substitute Consent under Section 177(C)(2)(b) of the Planning and Development Act 2000 (as amended).
Date of Site Inspection	22/08/2019.
Inspector	A. Considine.

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1.0 Introduction

This is an application for leave to apply for substitute consent in respect of an anaerobic digestion facility at Derryville, Moyne, Thurles, Co. Tipperary, under section 177C(2)(b) of the Planning and Development Act, 2000, as inserted by Section 57 Planning and Development (Amendment) Act 2010. The applicant is of the opinion that exceptional circumstances exist that should permit an application for substitute consent to be made so as to regularise the development.

2.0 Site Location and Description of 'Energy Park'

- 2.1. The subject site is located in a rural area of Co. Tipperary, in close proximity to the county boundary with Co. Kilkenny and Co. Laois. The area is very rural in nature and lies approximately 3.7km to the east of the village of Templetohy and 11km to the east of Templemore. The wider landscape comprises an area of peat bog. The Lisheen Windfarm, comprising a 36MW, 30 turbine farm, lies approximately 400m to the west, while the Bruckana Windfarm is located 1.5km to the north-east of the site. Other significant developments in the area include the former Lisheen zinc and lead mine, approximately 2km to the south.
- 2.2. The existing facility operates as an anaerobic digester facility, providing heat and energy from a renewable source without contributing to environmental pollution and which processes up to 30,000 tonnes per annum of non-hazardous, biodegradable, primary and secondary sludges from wastewater treatment plants and other biodegradable materials, using an anaerobic digestion process. Outputs from the facility are managed through land application in accordance with nutrient management planning legislative obligations in accordance with the conditions of the Waste Facility Permit, issued on the 9th of May, 2016. The previous WFP, permitted on the 5th of February, 2014, allowed for the recovery of 10,000 tonnes per annum.
- 2.3. The existing facility occupies a site of 1.8ha and is accessed via the R502 regional road. The facility is set back from the public road with a private access road extending approximately 190m from the public road. The site boundaries comprise fencing and trees and the entrance gate is set back from the public road. Within the main site, the permitted development includes the anaerobic digester and associated storage tank, waste reception building, plant room, underground tanks, hardstanding

area, control room, pumphouse, weighbridge, a portacabin office and parking. The Board will note that parts of the permitted development have not yet been constructed.

3.0 Planning History

PA ref 11/51/0331: Planning permission was granted for an Energy Park. The development consisted of a weighbridge, digester, crop drying shed, reception shed, offices, road entrance, internal access road and digestate storage tank. An EIS was included with the application.

This planning permission did not refer explicitly to tonnage per annum, rather the EIS submits that the development would result in the construction of a digester which would have a capacity of 1,200m³, with a capacity of approximately 30-40 tonnes of biomass per day. Following primary digestion, the biomass will be pumped to a storage tank with a minimum capacity of 4,265m³ and reception tanks with a capacity of 310m³ and a total potential of 5,775m³. The EIS submits that the maximum quantity of feedstock material/digestate to be held on site will not exceed 5,000m³ at any one time. The EIS states that the facility will process 12,000m³ of waste material. (I refer the Board to Chapter 2 of the submitted EIS).

PA ref 18/60/1078: Permission was sought for development of the installation of a glass lined steel digestate storage tank of 46.1m in diameter and 5.67m in height; an office building of 5.83m in height, 7.6m in width and 15m in length; a hardstanding car parking area comprising 7 no car parking spaces. Retention Permission of existing onsite weighbridge; the existing office portacabin structure of 9m in length, 3m in width and 2.6m in height until 31/12/2019; the existing control room of 4.31m in height, 5.1m in width and 5.06m in length; the biofilter unit & associated pipework installed in its existing orientation; the existing pump house of 2.4m in height, 2.5m in length and 1.5m in width; the existing storage shed of 2.8m in height, 2.5m in length and 1.7m in width; the plant room of 4.82m in height; 7.66m in width, 7.9m, in length & associated ancillary infrastructure including underground holding tank of 45m³ capacity; tank bund area of 10.5m in length and 3m in width.

The planning application, PA ref 18/60/1078 was withdrawn following a request for further information relating to the permitted tonnage, giving rise to this application for Leave to Apply for Substitute Consent for the facility.

4.0 Legislative Context

4.1. Section 177C of the planning act states inter alia

- (1) A person who has carried out a development referred to in subsection (2) or the owner or occupier of the land as appropriate, to whom no notice has been given under section 177B, 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.

4.2. Section 177D states –

- (1) 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—
 - (a) that a permission granted for development by a planning authority or the Board is in breach of law, invalid or otherwise defective in a material respect whether by reason of a final judgment of a court of competent jurisdiction in the State or the

Court of Justice of the European Union, or otherwise, by reason of—

- (i) any matter contained in or omitted from the application for the permission including omission of an environmental impact statement or a Natura impact statement or both of those statements as the case may be, or inadequacy of an environmental impact statement or a Natura impact statement or both of those statements, as the case may be, or
 - (ii) any error of fact or law or procedural error,
- or
- (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 can be remedied;

- (e) The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;
- (f) Whether the applicant has complied with previous planning permission granted or has previously carried out an unauthorised development;
- (g) Such other matters as the Board considers relevant.

5.0 Policy Context

The submission from the applicant sets out the suite of EU, National and Regional policy documents relevant to the subject application.

5.1. Development Plan

In terms of local policy context, the North Tipperary County Development Plan, 2010-2016 as varied and extended is the relevant policy document pertaining to the subject site. The site the subject of this application is located in a rural area of the County.

5.2. Natural Heritage Designations - EU Habitats Directive (92/43/EEC)

The Habitats Directive deals with the Conservation of Natural Habitats and of Wild Fauna and Flora throughout the European Union. Article 6(3) of this Directive requires an appropriate assessment of the likely significant effects of the proposed development on its own and in combination with other plans and projects. This document requires competent authorities to carry out an appropriate assessment of plans and projects which may have an effect on a European Site.

The subject site does not lie within any designated area. The closest sites including Galmoy Fen cSAC, Site Code 001857, at 8.4km to the north east and Loughans SAC, Site Code 00407, approximately 10.3km to the south east.

6.0 The Applicants Submission

6.1. Background

6.1.1. The applicants have summarised the aspects of the current development that vary from the permitted development under PA ref 11/51/0331 in their submission as follows.

- The office building, car park and crop drying shed permitted have not been constructed to date – a temporary portacabin structure has been installed onsite to act as the interim facility office.
- The weighbridge has been installed 3-4m from the exact permitted location.
- The constructed control room abutting the eastern flank of the reception shed is smaller than permitted.
- The orientation of the biofilter unit varies from that permitted while the associated pipework to the south and east of the building were not identified in the permitted plans.
- A 3m² pump house and 3.45m² storage shed have been constructed adjacent to the biofilter and not included in the permitted plans.
- A 56m² plant room housing the facility pasteurisation unit, and ancillary infrastructure (stairs, pipework), including an underground holding tank of 45m³ capacity have been installed and not included in the permitted plans.
- A 10.5m x 3m tank bund area along the western side of the waste reception building has been installed and not included in the permitted plans.

6.1.2. Leave to appeal for substitute consent is sought primarily to regularise and clarify the tonnage permitted by Tipperary County Councils under Planning Ref 11/51/0331, the planning permission for the established facility on the site. It is submitted that the planning consent is unclear as to what the permitted tonnage is and whether the governing permission permits the processing of 30,000 tonnes of waste per annum, as permitted by the Waste Facility Permit, (WFP) issued by the Council.

6.1.3. The existing, valid, WFP, reference WFP-T-12-0003-02, allows for the acceptance of 30,000 tones per annum and was issued on the 9th of May, 2016. This permit is valid

for a 5 year period. The applicant has submitted the quantities of waste for processing over the past three years as follows:

- 2016 – Total 20,058 tonnes
- 2017 – Total 24,319 tonnes
- 2018 – Total 25,232 tonnes

It is also submitted that the original planning application for the facility included an Environmental Impact Statement. This application for Leave to Apply for Substitute Consent is made due to the uncertainty in the permitted tonnage arising following an application for permission and retention relating to structures on the site, PA ref 18/60/1078. That application was withdrawn at FI stage.

- 6.1.4. The applicant contends that exceptional circumstances exist that would warrant the regularisation of the development by permitting an application for substitute consent. It is further submitted that prior to outlining the exceptional circumstances, it is necessary to confirm whether EIA and/or AA is required. In this context, it is noted that in 2018, the intake was greater than the 25,000 tonnes threshold provided for in the Schedule 5 Part 2 of the Planning and Development Regulations, 2001 as amended. The lack of clarity in the permitted development is raised, whereby the EIS states that 12,000 tonnes of waste matter will be processed at the site per annum but the traffic section of the same EIS would suggest that the estimated traffic increases has the potential to accept up to 100 tonnes per day which would equate to a 28,000 tonne annual intake. It is therefore questioned whether the permitted development permits 12,000 or 28,000 tonnes of waste per annum.
- 6.1.5. In terms of AA, it is submitted that as no significant difference exists between the authorised development and the as constructed development, together with the separation distance between the site and any designated sites, the previous AA screening, which excluded the requirement for a Stage 2 NIS, would stand.
- 6.1.6. The submission advises that in the event of leave being granted to apply for substitute consent, consideration will be required as to whether the increase in tonnage of waste accepted at the facility, has or had the potential for significant effect on the environment. A rEIAR will be submitted which will allow for the full consideration as to the potential for significant effects on the environment. It is

advised that the applicant was not aware of the implications of exceeding a threshold and given the WFP tonnage considered that the facility had a valid planning permission, as noted in the permit.

- 6.1.7. The applicants submission provides an assessment of potential for impacts on the existing environment. It concludes that it is not considered that significant effects on the environment have resulted from the development and no circumvention of the EIA Directive has occurred to date. The applicant requests that the Board consider the information provided and grant leave to apply for substitute consent for the development.

7.0 Planning Authority Submission

The Planning Authority provided details of the planning history associated with the subject site, including copies of the plans and particulars and EIS submitted in support of the application, PA ref 11/51/0331 refers. The short letter also notes that there are no enforcement files on the site.

8.0 Assessment

8.1. Introduction

- 8.1.1. The aspects of the as constructed development that vary from the permitted development under PA ref 11/51/0331 are summarised as follows:
- The office building, car park and crop drying shed permitted have not been constructed to date – a temporary portacabin structure has been installed onsite to act as the interim facility office.
 - The weighbridge has been installed 3-4m from the exact permitted location.
 - The constructed control room abutting the eastern flank of the reception shed is smaller than permitted.
 - The orientation of the biofilter unit varies from that permitted while the associated pipework to the south and east of the building were not identified in the permitted plans.

- A 3m² pump house and 3.45m² storage shed have been constructed adjacent to the biofilter and not included in the permitted plans.
- A 56m² plant room housing the facility pasteurisation unit, and ancillary infrastructure (stairs, pipework), including an underground holding tank of 45m³ capacity have been installed and not included in the permitted plans.
- A 10.5m x 3m tank bund area along the western side of the waste reception building has been installed and not included in the permitted plans.

8.1.2. The applicant submits that the permitted development allowed for a car park, weighbridge, offices, control room and a biofilter unit in principle, while the pump house, storage shed, plant room and tank bund area can be considered as infrastructure that is in keeping with that permitted under PA ref 11/51/0331. It is therefore considered that these elements are not significantly material to the principle of permitted development, and if viewed in isolation, would not be subject to mandatory EIA.

8.1.3. The applicant submits that it is a matter for the Board to determine if the existing EIA carried out by the competent authority based on the EIS submitted satisfactorily addresses the tonnage currently handled on the site. The Board is requested to grant leave to apply for substitute consent for the development in order that the issue of tonnage can be regularised in line with the Waste Facility Permit limit of 30,000 tonnes per annum.

8.1.4. 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.

8.1.5. 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.

8.2. Requirement for Environmental Impact Assessment

8.2.1. The requirement for EIA of certain types of developments is transposed into Irish legislation under the Planning and Development Act 2000, as amended and the Planning and Development Regulations 2001 as amended. Schedule 5, Part 1 of the Regulations provides a list of projects which are subject to mandatory EIA based on, *inter alia*, their scale, nature, location and context. Part 2 of Schedule 5 includes a list of projects that require EIA where specific thresholds are breached or where it is determined that there is potential for significant environmental impact.

8.2.2. In this context, the following Schedule 5 Part 1 projects relate to waste management:

9. Waste disposal installations for the incineration, chemical treatment as defined in Annex IIA to Directive 75/442/EEC³ under heading D9, or landfill of hazardous waste (i.e. waste to which Directive 91/689/EEC⁴ applies).

10. Waste disposal installations for the incineration or chemical treatment as defined in Annex IIA to Directive 75/442/EEC under heading D9, of non-hazardous waste with a capacity exceeding 100 tonnes per day.

The development does not come within the scope of the above.

8.2.3. Schedule 5 Part 2 projects

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.

In this regard, the Board will note the figures presented by the applicant in terms of annual waste accepted at the facility as follows:

- 2016 – 20,058 tonnes
- 2017 – 24,319 tonnes and
- 2018 – 25,232 tonnes

In light of the above, and specifically having regard to the volume of waste intake permitted by the WFP, being 30,000 tonnes, I consider that the development comes within Section 177C(2) of the Act, subject to satisfying the requirements of part (b).

As such, the Board is required to conclude that exceptional circumstances exist in the context of the criteria in Section 177D(2) of the Act.

8.3. Requirement for Appropriate Assessment

8.3.1. There are 5 Natura 2000 sites identified within 15km of the subject site, the closest being approximately 8.4km to the north east of the site, Galmoy Fen cSAC (Site Code 001857). Loughans SAC (Site Code 00407) is located approximately 10.3km to the south east of the site. The screening for AA as part of the parent permission, PA ref 11/51/0331 refers, concluded that as there are no designations within 5km and that the site is not close to a designated site, there was no potential for significant effects arising as a result of the development, and therefore, no requirement to prepare a Stage 2 Natura Impact Statement.

8.3.2. It is reasonable to conclude that, in the context of the constructed development and on the basis of the information available and on file, which is adequate 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 that a Stage 2 Appropriate Assessment, and submission of a NIS, is not therefore required.

8.4. Exceptional Circumstances

Section 177D(2) of the Planning and Development Act provides that, in considering whether exceptional circumstances exist, the Board must have regard to specified issues. I will consider each issue as follows:

8.4.1. Whether the regularisation of the development would circumvent the purposes and objectives of the EIA Direction or the Habitats Directive:

The application for the anaerobic digester, permitted under PA ref 11/51/0331, was subject to EIA. The main and significant elements of the permitted development have generally been constructed in accordance with the permission granted in terms of size and capacity. The primary issue arising in the interim relates to the volume of waste accepted at the site. Section 2.1 of the original EIS submitted in support of file ref 11/51/0331, states that 'the plant will treat two different types of waste mainly liquid and pressed waste

water treatment plant sludge. The EIS states that the facility will process 12,000m³ of waste material per annum (I refer the Board to Chapter 2 of the submitted EIS) but the traffic section of the same EIS would suggest that the estimated traffic increases has the potential to accept up to 100 tonnes per day which would equate to a 28,000 tonne annual intake. It is therefore clear that there is a lack of clarity in this context.

The WFP allows up to 30,000 tonnes to be processed at the site per annum. The Board will note that in 2018, the tonnage exceeded the 25,000 EIA threshold limit.

The development is not in proximity to any Natura 2000 site.

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. I am therefore satisfied that the regularisation of the development in this instance would not circumvent the purpose and objectives of the EIA Directive or the Habitats Directive.

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

The applicant submits that there has been uncertainty surrounding the permitted tonnage at the facility. The Local Authority has not made a clear statement in this regard, other than through the issuing of the Waste Facility Permit for the site. This permit facilitates up to 30,000 tonnes per annum and the Council has stated in their decision to grant the permit, that the development complies with planning permission. Given that the applicant dealt with the two separate legislations, it is submitted that it is not unreasonable for the applicant to have believed that they were operating in compliance with both the planning permission and waste facility permit. In the context of the built elements of the facility, it is submitted that the amendments are considered minor in nature.

Overall, I accept that the applicant could reasonably have believed that the works undertaken were minor in the context of the whole facility therefore were not unauthorised. Notwithstanding the indication in the EIS regarding tonnage, I accept that the Transport chapter of the EIS facilitated a potentially

higher, and the WFP an even higher volume of waste permitted to be accepted at the facility. I also note that dealing with the higher volume has not resulted in any real increase in the actual built infrastructure sought, and permitted, in the original planning application. It is reasonable that the applicant might have had the view that the development was authorised.

- 8.4.3. 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.

The Board will note that planning permission was granted, without any objections from the public, for the development of the Energy Park. The purpose of the current application is to facilitate an environmental assessment of the whole project, and to clarify the permitted facility. In this regard, I am satisfied that the ability to carry out an assessment of the environmental impacts of the development for the purposes of EIA or AA have not been substantially impaired. In addition, I am satisfied that the making of an application for substitute consent will permit public participation in the assessment process, and therefore, public participation has not been impaired.

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

There is no evidence to suggest that the facility as constructed, and as operating, have resulted in any significant direct or indirect effects the integrity of a European Site. The likely area of potential impacts relates to roads and traffic. The rEIS which would be submitted with an application for substitute consent would seek to address any likely effects and these would be assessed.

- 8.4.5. 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.

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

Planning permission was sought for the facility on the site and it is noted that there are no enforcement issues relating to the site. I also note the level of correspondence between the applicant and the local authority following the grant of planning permission, submitted by the applicant, which would indicate clear intentions to comply with the planning permission.

- 8.4.7. Such other matters as the Board considers relevant

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

9.0 Recommendation

I recommend that the Board grant leave to apply for substitute consent for the development under Section 177D of the Planning and Development Act, 2000 as amended, in order to regularise the Energy Park facility.

10.0 Reasons and Considerations

Having regard to Section 177D, Planning and Development Act, 2000, as inserted by Section 57, Planning and Development (Amendment) Act, 2010, the Board is satisfied that:

- a) the development is one where an EIA or a determination as to whether EIA 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.

A. Considine

Planning Inspector

05/09/2019