



An
Bord
Pleanála

Inspector's Addendum Report ABP-308019-20

Development	Windfarm & ancillary works
Location	Derrybrien, County Galway
Planning Authority	Galway County Council
Applicant(s)	Gort Windfarms Ltd. (ESB)
Type of Application	Substitute Consent, Section 177E
Board Request	FI - Exceptional Circumstances
Inspector	Karla Mc Bride

This report should be read in conjunction with the Inspectors Report ABP-308019-20 dated 28th February 2021.

1.0 Introduction

- 1.1. This application for Substitute Consent was submitted to the Board on 21st August 2020 under section 177E of the Planning and Development Act, 2000 (as amended) in respect of an application made by Gort Windfarms Limited for the regularisation of an existing operational windfarm and ancillary works at Derrybrien, County Galway. The application was submitted directly to the Board following receipt of a Notice served by Galway County Council under Section 177B of the Planning and Development Act, 2000, as amended. The Notice was dated 9th June 2020.
- 1.2. Following the enactment and commencement of the provisions of the Planning and Development, and Residential Tenancies Act 2020 on the 19th of December 2020, the Board invited the applicant under section 177K(1C) (a) of the Planning and Development Act (as amended), to submit such information considered material for the purpose of the Board satisfying itself on the question of the existence or not of exceptional circumstances that would justify a grant of substitute consent by the Board. The letter of request was Dated 7th May 2021.
- 1.3. The applicant's response to this request was received by the Board on 21st May 2021 and the response is summarised in section 2.0 below. The Board requested the applicant to publish revised public notices in respect of this information under section 132 and section 177K(1D) of the Planning and Development Act, 2000 (as amended) in a letter dated 23rd July 2021, and the submissions received by the Board are summarised in section 3.0 below. The Board circulated the submissions to the applicant and planning authority in letters dated 27th September 2021, and their response, which was received by the Board on 18th October 2021, is summarised in section 4.0 below. The Board circulated the applicant's and planning authorities' response submissions to the parties in a letter dated 5th November 2021, and the submissions received by the Board are summarised in section 6.0 below.

2.0 Applicant's Response to Board's Request

2.1. The applicant's response to the Board's request under section 177K(1C) (a) of the Planning and Development Act (as amended) in relation to the submission of information considered material for the purpose of the Board satisfying itself on the question of the existence or not of exceptional circumstances is summarised below.

2.2. In providing this information, the applicant had regard to section 177A of the Planning and Development Act and the criteria listed in section 177D (2) in relation to exceptional circumstances.

a) ***Regularisation of the development would circumvent the purpose and objectives of the EIA Directive or the Habitats Directive:*** the original applications were accompanied by assessments (incl. EISs) which complied with all the prevailing requirements; the decision making authorities concluded that the development would not have a significant adverse impact on the environment and these decisions were made in accordance with the requirements of national law; CJEU cases C-215/06 and C-261/18 criticised the state for failing to take steps to ensure that an EIA was undertaken of the Derrybrien Wind Farm, and it noted that sections 177B and 177C of the P&D Act could facilitate an assessment which the PA then relied upon to direct the Applicant to apply for substitute consent; the subsequent application submitted to ABP was accompanied by an rEIAR and rNIS to enable the Board to carry out a remedial EIA and AA; therefore a grant of substitute consent, which would regularise the status of the development, will ensure that the purpose and objectives of the EIA & Habitats Directives are achieved.

b) ***The applicant had or could reasonably have had a belief that the development was not unauthorised:*** the Applicant acted in good faith implementing the planning permissions; the applications were submitted in full compliance with prevailing legislation and there was no attempt to circumvent the EIA or Habitats Directives; the development consents granted were not subject to any challenge in accordance with relevant national law; the development was completed in 2006, it has been operational since then and no enforcement proceedings have been taken by the PA; an application

for relief under S.160 of the P&D Act was dismissed by the High Court & Supreme Court; the State took the view when defending C-215/06 that that there was no necessity to require an application to regularise the status of the development (notwithstanding the final CJEU decision); the Applicant had a reasonable belief that the development was not unauthorised.

c) ***The ability to carry out an assessment of environmental impacts of the development for the purposes of EIA or AA and to provide for public participation in such an assessment has been substantially impaired:***

the submitted documents provide a comprehensive and robust assessment of all stages of the development (incl. the response to the peat slide); any minor difficulties in gathering information did not prevent an assessment of environmental impacts; there was robust public participation with all the various planning applications and consents, including the current application; Section 177K (1D) of the P&D Act allows for further public consultations in respect of information provided in response to a S. 177K (1C) request; the ability to provide for public participation has not 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 continuing of the development:***

the submitted rEIAR and rNIS provide a comprehensive and robust assessment of all stages of the full life cycle of the development (incl. the peat slide event); the rEIAR and rNIS concluded that any significant effects were short lived and that that there are no actual or likely significant effects on the environment or European sites resulting from the carrying out or continuation of the development.

e) ***The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated:***

the rEIAR and rNIS provide a comprehensive and robust assessment of the significant effects on the environment and European sites; the most significant impact was the peat slide which has been substantially remediated; and all other adverse effects can be remediated by mitigation measures.

- f) ***The applicant has complied with previous planning permissions granted or had previously carried out an unauthorised development:*** the Applicant has substantially complied with the terms and conditions of the various planning permissions; no enforcement proceedings have been taken by the PA; an application for relief under S.160 of the P&D Act was dismissed by the High Court & Supreme Court; and the Applicant has not carried out an unauthorised development.
- g) ***Such other matters as the Board considers relevant:*** the Applicant was not a party to the CJEU proceedings under C-215/06 and C-261/18 and it had no opportunity to influence the outcome; this current application is the first opportunity to address the status of the project and its compliance with the EIA & Habitats Directives; engaged with the relevant authorities when carrying out emergency works after the peat slide; and these remedial works subsequently informed best practice for assessing similar wind farm projects.

3.0 Submissions

A total of 11 x submissions (incl. 3 x new Observers) were received from the Prescribed Bodies and Observers following the publication of revised public notices in respect of the information received by the Board in relation to exceptional circumstances, and from the subsequent cross circulation of submissions received. Any new concerns raised by the Prescribed Bodies and Observers which were not already highlighted in their original submissions, along with the concerns raised by the new Observers, are summarised below. Several of the submissions were accompanied by copies of a report entitled “Technical Assessment of Derrybrien Windfarm and Ancillary Works”, and the main points raised in this report will be summarised in section 3.3 below.

3.1. Existing Observers concerns

Transport Infrastructure Ireland:

- TII had no further comments to make.

An Taisce:

- Insufficient **notice** given in respect of the new consultation period, and non-compliance with relevant EU & national legislation related to the prescribed & expert bodies notification process, and request that the process be reinitiated.
- Public **consultations** were not in accordance with the P&D Act, the FI (exceptional circumstances) was not on the ABP website c.2 weeks prior to closure of consultations although the new site notices had been uploaded, which had resultant impacts on the public's ability to participate.
- The attached **EC/Arcadis Report** raises serious concerns about the remedial assessment with regard to peat stability, future monitoring, decommissioning procedures & peat slide risk, and impacts on climate change.
- Query delayed consideration of **exceptional circumstances**, ABP should seek a High Court the definition under S.177D(2) which is inconsistent with the views of the European Court and para (g) may be unconstitutional.
- There is no provision under **Part XA** of the P&D Act to oblige ABP to conduct a rEIA & rAA, and therefore nothing to fully address the proper remedy required by the European Court, and ABP should seek a High Court referral.
- **Other issues** relate to compliance with previous permissions, lease length & legal interest, conflict of interest, and IEN issues should be addressed.

Friends of Derrybrien Environment & Martin Collins:

- Refuse Substitute Consent as **exceptional circumstances** do not exist.
- Inadequate public consultations in respect of the various submissions associated with the applicant's exceptional circumstances response.
- Unavailability of documents at GCC's offices and on ABP's website, a lack of information in relation to the closing date for public submissions.
- The full text of C-215/06 & C-261/18 indicate that the applicant was aware that the development was unauthorised and illegal.
- The attached **EC/Arcadis Report** raises serious deficiencies in the rEIAR.
- Request an Oral Hearing on the exceptional circumstances.

Michael Gallagher & Michael Mahony

- Refuse Substitute Consent as **exceptional circumstances** do not exist, non-compliance with exceptional circumstances criteria & inadequate public consultations.
- A recent ESB sign warned turbary owners of **peat instability**, contractor refused to enter the property, thus constitutional right to cut turf affected.
- ABP cannot allow for the prohibition of turf hoppers on the lands but allow large cranes to access the site for decommissioning.
- The attached **EC/Arcadis Report** raises serious deficiencies in the rEIAR.

VP Shields Solicitors (Derrybrien Bog Co-operative):

- Query legal status of SC Notices served by Galway County Council
- Nature of **exceptional circumstances** not made clear to the public.
- Inadequate and confusing public consultations over the project's life cycle.
- Inadequate rEIAR which does not address the issues as per the EC report.
- Recent interference in turbary activities is symptomatic of applicant's attitude to local community & failure of the EIA to address the impact on turf cutting.
- Any risk of peat slippage can only have occurred as a direct result of the activities associated with the construction & operation of the windfarm.
- Clients have lost the use of the bog for the current year and their future turbary rights are in doubt, and this issue has not been addressed in the EIA.
- Current application should be refused.

South Galway Flood Relief Committee (David Murray):

- Having reviewed the EC/Arcadis Report and the applicant's response to the Board's request, their response falls well short of the requested clarifications.
- Query procedures & timeline in relation to public notices and submissions, adequacy of ABP website & public file.

- Query whether the authors of the EC/Arcadis Report & EC have been given the opportunity to respond to the applicant's response to the report.
- Request the Board to refuse Substitute Consent as **exceptional circumstances** have not been demonstrated.
- Regularisation would not be compliant with the EIA Directive as the Supreme Court ruled that Substitute Consent is inconsistent with EU law.
- Non-compliance with terms & conditions of previous planning permissions and therefore unauthorised development took place.
- Insufficient information provided to allow for an adequate consideration of environment impacts.
- Inadequate public consultation and lack of engagement with stakeholders, and no evidence provided by applicant in relation to stakeholder engagement or how it responded to complaints.
- Erection of hazard signs & interference with turbary rights, no engagement with turf cutters, and no assessment of resultant impacts in the rEIAR.
- Reiteration of previous concerns in relation to hydrology, hydrogeology, forestry removal & flood risk, and lack engagement with SGFRC.

3.2. New Observers concerns

Louis O'Hara:

- Significant issues with the application have been identified in the EC/Arcadis report (incl. future monitoring, demolition waste & future peat slide risks).
- Inadequate public consultations and engagement with the local community.
- Warning signs about peat stability are a cause for concern.
- In relation to **exceptional circumstances**, for the majority of the 5-week consultation period, on-line access wasn't provided for the new information submitted, notices to prescribed bodies & observers did not comply with legislative requirements, and the public have been faced with a lack of clarity on when the consultation commenced.

- No engagement with local community in relation to exceptional circumstances and the application was progressed in August when people were on holidays.

Irish Environmental Network (Attracta Ui Bhroin):

The submission contained 2 x letters dated 30th August & 13th September 2021 and the collective main points are summarised below.

- Serious irregularities in the Board's handling to the application in relation to public participation & procedural requirements with respect to the ***exceptional circumstances*** request, and the request that the process be reinitiated
- Decision making is bound by EU law.
- Inadequate & confusing public consultations, complicated timelines, unavailability of documents (incl. notices & submissions) on ABP website and case file in Board office which was not kept up to date in a timely manner and problems with site notices.
- Non-compliance with EU & national legislation in respect of notices, consultations & public participation, unfair & disproportionate burden on public as result of FI request, the public notification procedure should begin again.
- Insufficient notice given in respect of the new consultation period, and non-compliance with relevant EU & national legislation related to the public and prescribed & expert bodies notification processes, and the public notification procedure should begin again.
- Inadequate cross - consultations of the various submissions associated with the applicant's exceptional circumstances response, and the public notification procedure should begin again.
- Board is a "creature of statute" which is separate to its obligations as a public authority under EU law.
- Unavailability of documents and no inclusion of weekly lists (incl. exceptional circumstances response) at GCC's offices.
- ABP has the ultimate duty to ensure participation hasn't been compromised and any regularisation process needs to accord with EIA Directive standards.

- There is no provision under Part XA of the P&D Act to oblige ABP to conduct a rEIA & rAA, and the SC provisions in Irish legislation do not act as a sound or adequate basis to consider any regularisation of the project.
- In the absence of enforcement and penalty, regularisation is an issue, and a regularisation procedure cannot result in a failure to take enforcement action.
- The requirements of the CJEU in respect of not circumventing the objectives of the Directive & requiring the rules to be applied are binding and cannot be subject to the lesser standard of “have regard to” as per the thresholds for exceptional circumstances, and ABP should seek a High Court referral.
- Inadequate consideration of exceptional circumstances and overreliance of previous planning application assessments by GCC & ABP.
- The **EC/Arcadis Report** raises serious concerns about the adequacy of the remedial assessment in the rEIAR (incl. peat stability, hydrology & climate change), and there has been no opportunity for public comments on it.
- **Other issues** relate to compliance with previous permissions, lease length & legal interest, and conflict of interest & prejudice relative to GCC & ABP who dealt with the original applications, and ABP should request FI.

An Claiomh Glas (Justin Byrne):

- Support the conclusions of the **EC/Arcadis Report** & cover letter and support the position of Ms Ui Bhroin of the IEN.
- Any decision to regularise this development would circumvent the objectives & obligations of the Directive, and fail to demonstrate **exceptional circumstances** to the standard required by the CJEU judgements.
- Adequate assessment of indirect effects of the various phases, substantial project splitting & public confusion in relation to the EIA & AA processes.
- Serious irregularities in the Board’s handling to the application in relation to public participation & procedural requirements over the project lifespan.

- The attached EC/Arcadis Report raises serious concerns about the adequacy of the remedial assessment in the rEIAR (incl. peat stability, hydrology & climate change), and there has been no opportunity for public comments on it.
- Inadequate information in relation to AA, with particular regard to the Slieve Aughty Mountains SPA and QI species (Merlin & Hen harrier), and the wider SPA network for these species, habitat protection & forestry displacement.
- Inadequate & confusing public consultations, unavailability of documents (incl. notices & submissions) on ABP website and case file in Board office which was not kept up to date in a timely manner.

3.3. **Observers Technical Assessment Report**

Several of the submissions were accompanied by redacted copies of a report entitled “Technical Assessment of Derrybrien Windfarm and Ancillary Works” dated July 2021. The report was commissioned by the European Commission Environmental Enforcement Unit and prepared by Arcadis Design & Consulting.

The **EC/Arcadis Report** comprises the following sections:

- Section 1: describes the wind farm background and project details.
- Section 2: describes the background to the Technical Assessment
- Section 3: describes the methodology and approach
- Section 4: assess compliance with EU & Irish environmental law & process.
- Section 5: reviews the rEIAR under the standard range of headings.
- Section 6: sets out the conclusions of the review.
- Section 7: contains a list of consulted sources.

The **EC/Arcadis report** is accompanied by the following technical appendices:

- Appendix A: contains an ES checklist.
- Appendix B: a list of complaints and a list of the reviewed documents.
- Appendix C: contains a supplemental critique of geology, soils & land.

The main points are summarised below.

Introduction

- Note the absence of Scoping, which although not mandatory is advisable.
- Overarching methodology appears comprehensive.
- No attempt to consider the likely significant effects resulting from the disposal & recovery of waste (Annex IV Section 5).
- Compliance with Article 6(2) has been demonstrated (public information).

Project Description

- No significant omissions noted with regard to information provided.

Alternatives

- Query how likely it would be to develop alternative energy projects on the site.
- Limited consideration given to alternatives for decommissioning & remediation
- No consideration given to amending the design/layout to reduce identified environmental impacts.

Population & Human Health

- Broadly compliant with legislation & best practice.
- Limited details in relation to population, community & farming & query extent of stakeholder consultations in relation to baseline data collection.
- Recent erection of a Hazard sign in relation to peat stability has deprived local people of their winter fuel source, which is not a positive economic benefit.
- The Human Health conclusions do not adequately reflect the potential effects of slope instability & peat slides.

Noise & Vibration

- Robust & considered assessment based on acceptable guidance & methodologies, conclusions are reasonable & acceptable.
- Query consideration of adverse long-term impacts on uninhabited property, which may be occupied in the future & mitigation may be enquired.

Shadow flicker

- Note minor inconsistencies but approach follows relevant guidance.
- Query consideration of adverse long-term impacts on uninhabited property, which may be occupied in the future & mitigation may be enquired.

Biodiversity (terrestrial ecology)

- Document is difficult to follow and poorly structured & presented.
- Additional legislation & guidance should be included in an updated rEIAR.
- The baseline is under-described for several species (incl. amphibians, common lizard, badger, breeding & wintering birds other than HH, roosting bats, otter, red squirrel & pine martin), and query some of the timing.
- CIEEM Guidance on Ecological Survey & Assessment in the UK During the COVID-19 Outbreak presents useful alternative methods of survey & data collection to help recreate the historic baseline.
- Greater level of detail in relation to survey dates, methodologies, evaluations for all receptors, assessment process (for birds), would have been helpful.
- Greater level of scoping in and out for further study with justifications would have been helpful as would assessment of habitat loss on species.
- Operational effects are under assessed for habitats, birds have been under assessed in general, absence of assessment of impacts related to ease of access to the site, and bat mortalities may be undervalued.
- The effect of tree felling to increase efficiency has not been fully assessed.
- A more evidence-based assessment of cumulative impacts is required.
- Note absence of mitigation in relation to the steep decline in HH numbers.
- Additional survey effort & mitigation required for the decommissioning stage.
- Overarching management & monitoring plan required for sensitive species (incl. breeding & wintering birds, amphibians & common lizard, bats & otters) and supporting habitat, and additional mitigation or compensation should be considered for loss of habitat for several species (incl. red squirrel, pine martin, badger, nesting birds & bats).

Aquatic ecology & fisheries

- Absence of specific section for relevant legislation & policy.
- Absence of an assessment under the WFD & Eels Regulations.
- EPA guidelines are cited & followed however CIEEM guidelines (2019) should have been used, and the NRA (2003) guidelines are not an appropriate assessment method as they deal with roads & mainly fisheries.
- Document is difficult to follow and poorly structured & presented.
- Absence of comprehensive baseline data prior to construction and query conclusion reached that the data is adequate.
- Appropriate to assess the faunal receptors fish & freshwater pearl mussel separately and separate sections on nature conservation status for each receptor and evaluation would be helpful.
- Absence of stakeholder concerns although FWPM are a key stakeholder concern which were scoped out of the assessment, with no reason given.
- Omission of mitigation monitoring which should cite best practice & the management plan should be overseen by a pollution control officer.
- Yearly monitoring of watercourses should continue, annual monitoring of the site should ensure that appropriate management is being undertaken.
- Method statements for the decommissioning phase should be prepared in advance, along with an assessment under the WFD & Eels Regulations.
- Impacts may be underestimated due to the lack of existing data, and the recommended mitigation measures should be incorporated.

Landscape & Visual

- Relevance guidance has been adhered to.
- Lack of scoping with competent authority & stakeholders.
- Most of the views assessed are from roads which are transient in nature and not other receptors (incl. residential, recreational & amenity).
- Absence of reference to alternative layouts and mitigation measures.

Soils, Land & Geology

- Appendix C provides a supplemental critique of geology, soils & land.
- EU guidance for windfarms on peat soils is based on all-encompassing targets and not specific processes by which the targets may be met.
- Scottish Guidance (SGG-2017) contains best practice guidance for assessing peat stability and slide risk, and this has not been fully complied with.
- No attempt to map the drainage pattern and the effects of this drainage on the afforested & formerly forested peat lands.
- Long standing evidence shows that conifer plantations on peat bog systems can cause shrinkage in peat, resulting in cracking & deformation of the peat matrix, especially along the ploughing furrow.
- Evidence was presented in 2005 for the occurrence of this process at Derrybrien, and SGG-2017 requires the mapping of such features, and this task, which is critical to assessing slope stability, has not been carried out.
- The site has not been subject to survey relevant to slope stability since 2005, thus the 2020 slope stability assessment is based on 15-year old data.
- The risk assessment claims to show that conditions improved sufficiently by 2020 that areas identified as being at “unacceptable risk” for the 1998 baseline conditions are now “negligible risk”, without supporting data.
- This is based on generic assumption that the 2004 drainage programme has increased the cohesive strength of the peat & thus reduced the risk of slope failure, it ignores the fact that either dislocation or consolidation may occur.
- SGG-2017 notes that peat cracks provide can provide routes to channel intense rainfall to weaker layers of peat and thus trigger slope failure, this is not covered in the assessments.
- The site mitigation strategy is one of continued drainage, worsening conditions in the long term, but used to prevent ponding of water on-site as ponding substantially increases the risk of slope failure.

- The decommissioning phase proposes the opposite approach, drainage will no longer be maintained resulting in ponded water which would result in a stated “very slight” risk of slope failure.
- Survey methods used in 2004-5 & for the grid connection in 2017-19, and the peat slide risk assessment do not comply with SGG-2017 guidance.
- Overall result of not following SGG-2017 guidance is that the rEIAR fails to meet the relevant target requirements set out in the EC EIA Guidance (2017).

Hydrology & hydrogeology

- Relevance legislation, guidance, policies & best practice has been cited.
- No regard to forested & formerly forested areas in terms of hydrological mapping, and absence of consideration of peat shrinkage due to drainage, which demonstrates con-compliance with the cited guidance.
- No mapping of ploughing furrows & associated peat cracks, and minimal mapping of possible sub-surface piping associated with the extensive forested ground, which highlights a major gap in the baseline data.
- The assessment criteria is suitably described but not well presented.
- No details of stakeholder engagement & no reporting of concerns raised by stakeholders including a complaint by S. Galway Flood Relief Committee to the EC in relation to their attempt to engage which was ignored by applicant.
- Most of the infrastructure left in-situ during decommissioning, the drainage regime will no longer be maintained resulting in revegetation and ponding, which conflicts with the mitigation approach during the operational phase which seeks to direct rainfall off-site and prevent on-site ponding.
- Given that the mitigation measures have the potential to increase risk over time, a Contingency Plan & physical measures to limit impact merit action.
- A record of stakeholder engagement should be provided along with responses to the issues raised by the S. Galway Flood Relief Committee.
- Some conclusions of this assessment cannot be considered reasonable.

Air & climate

- Robust & considered assessment based on acceptable guidance & methodologies, conclusions for air quality are reasonable & acceptable.
- The Scottish Carbon Calculator for windfarms developments was used, but the assessment only provides total net carbon values for each entire module within the calculator and no individual values which makes it impossible to judge the validity of the overall values presented.

Material Assets

- Baseline information is appropriate but not well presented.
- Assessment methodology broadly follows the criteria set out in the EPA Draft Guidelines on the information to be contained in EIA report (2017).
- Conclusions are reasonable but query the conclusion with respect to the forestry felling prior to construction, although remedial works are not required.

Traffic & Transport

- Absence of scoping with the competent authority or its consultees.
- Environmental sensitivity of the geographical areas has not been defined.
- Absence of baseline traffic flow data for several roads within the study area therefore difficult to assess potential impacts.
- Abnormal loads will be moved at night during decommissioning by means of a Traffic Management Plan, but difficult to assess effectiveness of mitigation measures in absence of baseline data.

Cultural Heritage

- Conforms to relevant guidance although archaeological monitoring sources could not be substantiated, and desk-based sources are acceptable.
- No acknowledgement of the potential presence of as yet unrecorded archaeological artefacts in the peatland environment.
- Effectiveness of mitigation monitoring are dependent on their scope & nature.

Major Accidents & Disasters

- Baseline lacks a detailed review of baseline conditions prior to the land slide.
- No link between the risk ratings & Significance of Effect.
- No evidence of response to stakeholder concerns, including in the aftermath of the peat slide, and currently after the erection of stability hazard signs.
- Lack of evidence that decommissioning will not increase the peat slide risk.
- A long-term maintenance plan following decommissioning should be implemented or works to restore the peat to a point where long term maintenance is not required, should be considered.

Interaction of Impacts

- Insufficient details to justify conclusions but considered in relevant chapters.
- No details of mitigation for minor negative impacts (incl. road widening).
- Note exclusion/omission of cumulative tree felling impacts.

Conclusions

- rEIAR satisfies most of the content requirements of the EIA directive, except for the requirement to estimate quantities & types of waste (Annex IV), which is a major emission given the scale of decommissioning.
- A 5-week consultation window was provided for public consultation which meets the minimum EIA Directive requirements, but query the effectiveness given the large number of complaints received by the EC.
- Inadequacies in assessment methodology noted which casts doubt on the conclusions and effectiveness of the mitigation measures, and especially in relation to the handling of the peat slide risks after decommissioning.
- Although operational management relies on the continued functioning of the drainage system, it will not be maintained after decommissioning when the drains will become blocked & revegetated, leading to an increase in slide risk.
- Further information is required in relation to several issues (incl. biodiversity, peat hydrology & peat stability).

4.0 Applicant response to submissions

The applicant's collective response to the concerns raised by the Observers, including any new concerns which were not already highlighted in their original (and subsequent) submissions, are summarised below.

General

- Note that the substantive issue before the Board at this time is whether “exceptional circumstances” apply.
- Legislation related to “exceptional circumstances” and additional Public Notices came into effect during the course of the Boards consideration of the application, and no further comment will be made in relation to submissions.
- Applicant has endeavoured to provide a response to the Arcadis Report and also the new submissions from IEN & An Claiomh Glas.

Exceptional Circumstances:

- The project meets the criteria of factors set out under S.177D(2) as per the applicant's submission (20/05/2021).
- Regularisation is in full compliance with the purpose & objectives of the EIA & Habitats Directives as it facilitates a full & final assessment.
- Applicant always acted in good faith in respect of permissions granted.
- Applicant has provided ABP with sufficiently detailed and robust information to support reasoned conclusions in relation to likely or significant effects on the environment or adverse effects on the integrity of a European site.
- The legislation related to “exceptional circumstances” came into effect after the application was lodged and during the course of the Boards consideration.

Substitute Consent application:

- Always acted in good faith in respect of permissions granted and no unauthorised development undertaken.
- Application covers the entire lifecycle of the project with no project splitting.

- Can't comment on the statutory consultation procedures & timeframes, has engaged fully with the application process, and note that the Observers were able to make submissions despite their concerns about the process.
- The original & additional public notices were fully compliant with requirements.
- The planning report & rEIAR set out the public consultation procedures and always willing to engage with the local community & stakeholders.
- Sufficient legal interest to apply for consent & continued operation until 2040.
- Reference was made in the public notices as it is intended to ensure that all appropriate licences required under the Waste Legislation are put in place, which may include a waste licence.

Interaction with Turbary Activity:

- Warning signs erected to raise third parties' awareness of risks associated with the mechanical harvesting of peat, it is not an unlawful interference with turf cutting rights, and property rights do not fall within the Board's remit.

Technical Assessment Report

The rEIAR experts have identified the following subject areas where some clarity may assist the Board in its rEIA and rAA:

- Biodiversity - terrestrial ecology
- Biodiversity - aquatic ecology
- Soils, land & geology
- Hydrology & hydrogeology
- Major accidents & disasters.

Biodiversity - terrestrial ecology

Birds:

- Bird surveys were in line with best practice guidance & methodology using standardised survey periods & were conducted from strategically placed VPs.

- Although targeted at SPA SCI species (HH & Merlin), other raptor species were also surveyed & recorded (inc. Sparrowhawk & Kestrel).
- Survey level for breeding & wintering birds is adequate as clear-felled conifer plantations do not support other species of high conservation importance.
- Good baseline data was recorded for breeding & wintering birds during the VP watches & general time spent on site.
- Decline in HH population has been specifically discussed in the rEIAR, assessment based on survey data up to 2018.
- Disturbance to HH & Snipe during the construction period was noted in the original EIS which did not contain mitigation measures, and subsequently referenced in the rEIAR.
- The 2020 HH Monitoring Programme notes that pressures include forestry operations, recreational & vehicular traffic near nest sites, and turf cutting.
- Monitoring data shows that HH has not been displaced from the site & nesting at traditional nesting sites 1-2km from the windfarm have not been affected.
- rEIAR surveys looked for but only observed Merlin once between 2006 -18.
- rEIAR clearly identifies the overhead line as a collision risk to HH in the absence of mitigation & predicted impact from collision has been assessed.
- Birds were assessed based on their conservation status and relative to their occurrence in the project area in line with CIEEM guidance and the assessment methodology strictly follows the standard EPA Guidance (2017).
- All breeding & wintering birds considered, no further mention of Snipe as impacts & disturbance related to the original construction phase.
- No tree nesting bird species or conservation importance used the conifer plantation in the peat slide area, as closed canopy is of low value to birds.
- The regenerated area provided new habitats for at risk ground nesting species (incl. Meadow pipit & Skylark).
- Cumulative impacts are addressed in the rEIAR.

- All bird species are recorded during the standard VP watches and not just HH and 2 x VPs are adequate for the purpose of long-term monitoring.
- Continued maintenance of the windfarm sites open terrain is in effect good management for a range of species

Bats:

- Extensive coniferous forestry plantation remains with ample opportunity for bat roosts and bat boxes are not warranted, and the 2 proposed boxes are adequate given the size of the bridges & watercourse & species present.
- Impact of reduction in commercial plantations & roosting resource is provided.
- No applicable guidance in relation to baseline data collection during pre-construction period & it cannot be collected retrospectively, and professional judgment was applied to historic desk top survey data for the wider area.
- Adequate assessments undertaken for impacts of peat slide on bats in line with available guidance & environmental characteristic of the area.
- Robust surveys broadly in line with guidance but adapted to site conditions, activity surveys undertaken in 2018/19 from April to October, and authors of the rEIAR Bat section sat on the editorial board of the 2019 SHN Guidance.
- Long-eared Bat species was recorded during surveys & impacts considered, all relevant guidance considers it to be very unlikely to be killed by windfarms.
- There is no requirement for bat monitoring, however the applicant considered it pertinent to collect some bat survey data in 2016 to inform management of the windfarm and then repeat the exercise in 2019 to compare activity results.
- Pre-construction baseline data was not collected, the baseline was extrapolated by applying professional judgement to desk survey results for the wider area, and data on the value of habitats & bridges is provided and informed by relative abundance in line with all applicable & relevant guidance.
- Peat slide impacts on bats (incl. peat plume at Lough Cutra & damage to bridge) have been assessed.

- Guidelines for the Consideration of Bats in Wind Farm Projects are not formally adopted in Ireland, the purpose of the 2016 monitoring was to confirm whether bat fatalities had occurred so as to design a monitoring programme.
- The value of the site to *Nathusius pipistrelle* is negligible as it has only been recorded passing through on 2 occasions, given the very small numbers a collision fatality would be significant but highly unlikely.
- Cumulative effects for bats have been assessed in the rEIAR.
- There was a minor typo in s.7.4.3.2.3 of the rEIAR, a minor negative effect due to localised disturbance on bats should have included “at the site level”
- Extensive coniferous plantation provides opportunities for roosting bats without the need of additional bat boxes.

Legislative & Guidance references:

- rEIAR references the Flora Protection Order & National Biodiversity Plan but note that the EC/Arcadis report references an out-of-date version of this Plan.
- The Galway County Heritage & Biodiversity Plan 2017-22 is not listed as it does not relate to wind energy developments specifically whilst the relevant policies & objectives and associated environmental reports are referenced.
- All of the guidance documents referenced in the Arcadis report (except for the one above) are referenced multiple time throughout the rEIAR.

Survey approach to large mammals:

- No applicable guidance in relation to baseline data collection during pre-construction period & it cannot be collected retrospectively, and professional judgment was applied to historic desk top survey for the wider area and supporting habitats, in line with applicable guidance (incl. CIEEM).
- The 2018 Otter survey followed appropriate NRA Guidance and successfully recorded this species, and the 2003 survey checked for the presence Otter along the Owendalulleagh River after the peat slide.
- Data used in the various assessments is robust.

Other:

- Impacts on Common frog, smooth newt & common lizard are assessed.
- Impacts on red squirrel, pine martin & badger resulting from habitat loss were insignificant given the overall size & scale of the wider area.
- Botanical surveys were carried out in accordance with relevant guidance.
- The forested site was drained to facilitate forestry & turbary and most of the drainage changes predate the windfarm, and blanket bog lies outside the site.
- The loss of habitats to hardstanding areas has been addressed.
- Impacts of the peat slide on wet grassland (low value) has been addressed.
- Operation impacts as a result of vehicle movements have been addressed.
- All habitat monitoring since 2004 is listed & there is no requirement for further monitoring of habitats which are regenerating naturally.

The Arcadis commentary does not alter rEIAR assessment or conclusions in relation to Biodiversity – Terrestrial ecology.

Biodiversity – Aquatic ecology & Fisheries

- The WFD status of surface water bodies adequately assessed for biological & chemical status with respect to watercourses and Lough Cutra, as per the EPA Q -value system, and additional field surveys & data collection, and most recent EPA assessments indicate High Status (Q2).
- The impact of the peat slide on Eels & their recovery has been adequately addressed in the rEIAR, the Eel Regulations are designed to direct the management of Eel stocks to halt and/or reverse their decline.
- EPA Guidelines predate CIEEM Guidelines by c.2 years and cover a very similar set of headings, the EPA provide a very detailed section on determining the significance & description of effects and the NRA guidelines were helpful in ranking the importance of sites, the use of the CIEEM Guidelines would not have changed the outcome of the assessments.

- The absence of fish in some of the smaller streams is probably related to the presence of downstream barriers to migration.
- Data assessment was adequate, the EPA Q-value data was crucial due to its extended time scale and wide coverage, and it comprises a high-quality data set including surveys from before, after and since the peat slide.
- The reports referenced by Arcadis are either site specific (incl. Lough Corrib) or do not deal with the species present in the waterbodies (incl. Lamprey), all relevant research paper were referenced in the rEIAR.
- Comprehensive assessment of suspended solids impact on macro-invertebrates & water quality, and other activities affect quality (incl. farming).
- Impact on fisheries from general construction activities (excl. the peat slide).
- Proposed mitigation measures are based on detailed knowledge of ground conditions, slope, and layout of the site, and use tried & tested measures.
- The appointment of a Pollution Control Officer & prior consultation with the IFI has been recommended.

The Arcadis commentary does not alter rEIAR assessment or conclusions in relation to Biodiversity – Aquatic ecology & fisheries.

Soils, geology & land (AGL Consulting Ltd.)

Compliance with EU environmental legislation:

- The Arcadis report has gone beyond assessing the quality & fairness of the rEIAR and it focuses almost exclusively on peat stability (Appendix C).
- While peat stability is a significant issue, the primary purpose of the rEIAR was to describe and assess all impacts & mitigation measures related to the project and its likely significant effects on the receiving soils, geology & land over the full lifespan of the project, and not just peat stability.
- The Arcadis report does not take account of the extensive geotechnical risk mitigation measures that were implemented during the second phase of construction and during the operational phase to mitigate the risk of instability.

- The methodology is clearly set out and is based on the recommendations of the 2017 Draft EPA Guidelines on Information to be Contained in EIA reports, which is designed to ensure compliance with current EU Directives.
- The 2017 Scottish Best Practice Guidelines for Peat Landslide Hazard & Risk have been used to assess the Probability of Occurrence of likelihood of peat failure, which is one of the many characteristics used in the rEIAR.
- The Arcadis assessment is incorrectly based on the 2017 Scottish Best Practice Guideline, which provide no guidance on risk assessments.

Baseline information, supplemental surveys & geotechnical investigations:

- The rEIAR identifies the difficulties encountered with the limited information available on ground & groundwater conditions prior to the peat slide.
- The information obtained after the peat slide on the site during the second phase of construction is considered representative of baseline conditions.
- The geotechnical investigations & site surveys do not prevent a robust assessment of baseline conditions & peat stability, and the Scottish Guidelines are not prescriptive on the scope or content of investigations.
- The rEIAR provides a detailed record of the surveys & geotechnical investigations carried out to mitigate & manage the risk of peat instability during the second phase of construction after the peat slide, which are consistent with the Scottish Guidelines, and in excess of normal requirements.
- Satisfied that vane shear testing is suitable for characterising peat strength.
- The combination of surveys, investigations & stability analyses combined with appropriate mitigation measures on construction activities ensured that the windfarm could be completed without any further risk of instability.
- The rEIAR sought to assess impacts related to the windfarm & ancillary works & their effects on soils, geology & land and not just peat stability.
- The rEIAR presents summaries of the geotechnical investigations carried out between 2003 & 2020 for the GC route and for the Peat Slide & Associated Works, along with a summary & assessment of the testing, monitoring & survey works carried out over the operational phase between 2005 & 2020,

which were incorporated into the rEIAR (incl. walkover surveys, proof load testing, surveying of monitoring points, electronic records of peat movement {none recorded} and ground water levels between 2005 & 2012).

- The suite of tests, surveys, inspections & monitoring records represent a comprehensive assessment of the ongoing effects of the windfarm & ancillary works on peat stability over the operational phase of the windfarm, and the approach adopted was to design out the risk of peat stability.
- The effects of rainfall & drainage on peat stability have been assessed in the rEIAR and the assumptions & conclusions have been robustly tested and validated by the extreme short duration storm events that occurred on several occasions (2012, 2015 & 2020) when c.60mm of rain fell over a 24-hour period with no resultant adverse effects on drainage or peat stability.

Tension cracks along forestry plough lines:

- The Arcadis report referenced the Lindsay & Bragg assertion that the windfarm site was “riven with cracks” which contributed to the peat slide by channelling rainfall into deep tension cracks along the plough lines.
- This view is not representative of conditions observed by the geotechnical engineers during the investigations & walkover surveys over a prolonged period of time during the second construction and operation phases.
- Experience & historic photographs indicate that the rows of trees were separated by shallow furrows rather than deep plough lines, with the surface of the blanket bog remaining intact, with no evidence of deep tension cracks.
- The Arcadis report referenced photographs from Lindsey & Bragg to illustrate cracking & fissuring along forestry plough lines, however these Scottish photos, which deal with mature trees, are not representative of the site.
- The role of forestry in the assessment has been considered along with a combination of other risk factors related to peat strength, hydrology, groundwater, topography & land use.
- Most of the peat probing, gouge auger core sampling & in-situ vane shear testing that was carried out in the forested areas for the second phase of construction was carried out in the forestry furrows to avoid potential

obstructions from tree roots, and the walkover surveys conducted along the furrows did not identify any open tension cracks.

- The rEIAR includes several Geotechnical Mapping Sheets which record tension cracks in the peat around the turbine foundations which arose as a result of excavation works and not shrinkage along forestry furrows.
- The peat risk stability assessment included an assessment of forestry drainage, tree growth and tension cracks as possible contributory risk factors to peat stability, which were assessed in combination with other risk factors.
- The rEIAR acknowledges that damage to the integrity of the upper fibrous layer of the intact peat in the slide area where the forestry drains & furrows were cut into the slope was one of several significant compounding factors that contributed to the peat slide.

Assessment Methodology:

- The rEIAR adequately explains the methodology for the peat stability risk assessment (PSRA) which is an engineering risk assessment that has been included as an appendix to the rEIAR.
- The PRSA is used as input parameter in the EIA to assess the impact of site activities related to the windfarm development and the significance of their effects on the stability of the peat.
- The baseline PRSA represents a characterisation of the risk of peat instability on the site prior to the implementation of appropriate design & construction mitigation measures for the project, and the greatest risk of instability was during the construction phase.
- The rEIAR clearly explains that, that in addition to the drainage improvements, the reduction in the likelihood of peat failure is based on a combination of several factors (incl. the various investigations & analyses, implementation of effective design & construction risk mitigation measures, an improvement in site conditions & reduced level of on-site activity post construction).
- All the floating roads have been proof tested under the maximum design load of the mobile cranes that will be used during decommissioning, maintenance to road & drainage with be minor & localised.

- The risk of peat instability has been designed out by comprehensive geotechnical investigations and stability analyses which have been validated by full scale proof testing, monitoring & observations on site.

Residual risk after decommissioning:

- The long-term efficiency of the drains is likely to reduce as they become clogged by vegetation over time, which will result in a partial gradual restoration of groundwater levels.
- The rEIAR does not state that “all drains will inevitably infill with time” as asserted by Arcadis, and most of the drainage will remain effective even without maintenance, with no resultant adverse impacts on peat stability for several reasons (incl. no on site activity, peat strength will not diminish with rising ground water levels, and natural regeneration)
- The floating roads will not “represent lines of weakness long after the windfarm is decommissioned” as the underlying peat has gained significant strength which will not reverse if water levels are permitted to rise.

Peat stability for mechanical peat extraction in turbary areas:

- The rEIAR assessment of stability impacts relate to windfarm activities for which the likelihood of peat slide has been significantly reduced.
- Activities related to mechanical peat extraction in the turbary area are not related to the project as they occur outside the site boundary and beyond the control of the applicant and are assessed as potential cumulative impacts.
- Noticeable increase in mechanical peat extraction since 2012, and this scale of extraction is a known hazard that increases the risk of peat instability.

Appendix C of Arcadis Report:

This Appendix presents a “supplementary critique” of rEIAR Ch. 10 and the applicant’s response is similar to many of the points summarised above.

- It does not assess the compliance with relevant EU legislation in the context of the stated methodology or consider the description & assessment of impacts for all site activities and their likely effects over the project lifespan.

- It primarily focuses on peat stability risk assessment & compliance with the 2017 Scottish Best Practice Guidelines, and it makes numerous incorrect or out-of-context assertions that the assessment of peat stability is non-compliant.
- The Scottish Guidelines do not specify prescriptive requirements (incl. geomorphological maps) but makes recommendations, however the various detailed information provided (incl. maps of peat depth, LIDAR contours, slope angles, FoS calculations, site drainage & hydrology plans & aerial photos) with the overlaid site map provide a comprehensive level of site mapping.
- As above for shear vane strengths, assorted sampling, testing & analysis.
- Full scale serviceability & proof load tests were carried out on all the floating roads to validate the results of the vane shear testing and the design, stability & performance of the roads.
- As above for purported tension cracks along plough lines/ forestry furrows, the conditions referenced by Arcadis are not representative of this site, and the findings of Lindsay & Bragg have been superseded by an extensive suite of investigations & analyses presented in the rEIAR.
- The Arcadis report does not consider the methodology used in the rEIAR PSRA and instead includes various references to other sections & tables in the rEIAR that are taken out of context, and it does not consider the mitigation measures that have successfully managed the instability risk.
- The rEIAR peat stability methodology does indeed follow the phased assessment procedures recommended in the 2017 Scottish Guidelines.
- When the results of the rEIAR baseline PSRA are superimposed on the results of the Arcadis assessment (which purports to reflect more closely the guidance), Arcadis acknowledges that “there is a good correspondence across all those T-cells identified in the rEIAS”, which indicates that the results are similar, and that any issues related to the PSRA are unfounded.

Conclusion: The AGL report concluded that the methodology used in the rEIAR is robust and that the conclusions set out are both reasonable and complete.

Hydrology & hydrogeology

- As above for purported non-compliance with Scottish Best Practice Guidelines, 2017.
- As above for purported tension cracks along plough lines/ forestry furrows, the conditions referenced by Arcadis are not representative of this site, and the findings of Lindsay & Bragg have been superseded by an extensive suite of investigations & analyses presented in the rEIAR.
- Consulted & engaged with various stakeholders & the rEIAR contains a FRA.
- The omitted areas (Beagh & Dereen) are either a considerable distance downstream (c.20km) or not identified in the S Galway (Gort Lowlands) Flood Relief Scheme as requiring protection and is not subject to karst flooding.
- A recent Flood Relief Scheme Feasibility Study concluded that works in the Slieve Aughty uplands would have very minor benefit to the lowland areas.
- As above for decommissioning, drainage maintenance & regeneration.
- As above for the assessment of landslide risk, peat hydrology & drainage.
- As Above for response to stakeholder engagement.

Major accidents & disasters

- As Above in relation to baseline information, peat stability and future risk.
- As above for assessment methodologies.
- As above in relation to stakeholder engagement & turbary activities.
- As above for the assessment of landslide risk, peat hydrology & the land drainage regime.
- The assessment methodology (incl. various maps) applied was appropriate and robust, and the conclusions reached reasonable.
- As above for effectiveness of mitigation measures during decommissioning.

Other matters

- No need for an Oral hearing.

5.0 Planning Authority response to submissions

The planning authority had no further comments to make.

6.0 Further submissions

Several further submissions from Prescribed Bodies and Observers were received and no new concerns were raised.

7.0 Further Assessment

The following issues will be assessed:

1. Compliance with Board request
2. Consideration of Exceptional Circumstances
3. Consideration of Technical Assessment Report
4. rEIA & rAA
5. Other issues

7.1. Compliance with Board FI request

The Board requested the applicant to provide such information considered material for the purpose of the Board satisfying itself on the question of the existence or not of exceptional circumstances that would justify a grant of substitute consent by the Board as set out in section 1.2 above. The applicant's response to the Board's request is summarised in section 2.0 above and I am satisfied that it complies with the Board's request. The Prescribed Bodies and Observers submissions in relation to the applicant's response submission are summarised in section 3.0 and this includes a summary of the Technical Assessment Report submitted by several of the Observers. The applicant and Planning Authorities' response to the further concerns raised by the Prescribed Bodies and Observers are summarised in section 4.0. Any further submissions received from parties are summarised in sections 5.0 and 6.0.

7.2. Consideration of Exceptional Circumstances

The background to the Board's request to the applicant under section 177K(1C) (a) of the Planning and Development Act (as amended), to submit such information considered material for the purpose of the Board satisfying itself on the question of the existence or not of exceptional circumstances that would justify a grant of substitute consent by the Board is set out in section 1.0 above. In addressing this request, the applicant had regard to section 177A of the Planning and Development

Act and the criteria listed in section 177D (2) in relation to exceptional circumstances and this response is summarised in section 2.0 above.

The applicant's submission was subject to a period of public consultation and the various submissions received from the Prescribed Bodies and Observers are summarised in section 3.0. Their collective concerns in relation to the consideration of exceptional circumstances relate to several matters including non-compliance with environmental legislation, inadequate public participation, insufficient environmental information, unauthorised development, and non-compliance with previous planning permissions.

The parties also raised concerns about several other matters related to procedures, consultation timelines, the adequacy of public notices, and the management of the public files (GCC & ABP) and the ABP website, in relation to the consideration of exceptional circumstances, and these concerns have been noted. Some of the parties requested the Board to seek a High Court determination in relation to the definition of exceptional circumstances and the required assessment criteria, and this request has also been noted.

The criteria set out under S.177D (2) (a) – (g) of the Planning and Development Act, 2020 (as amended) will be applied to the consideration of the existence of exceptional circumstances in respect of this application for substitute consent.

7.2.1. *Whether regularisation of the development concerned would circumvent the purpose and objectives of the EIA Directive or Habitats Directive.*

The EIA Directive seeks to provide for an assessment of the likely significant effects of a development on the environment prior to decision making, and to take account of these effects in the decision-making process. The Habitats Directive seeks to ensure the conservation of a wide range of rare, threatened, or endemic animal and plant species and the conservation of rare and characteristic habitat types. The application is accompanied by a remedial EIAR and remedial NIS. Any decision by the Board to grant or refuse permission for substitute consent for the development would be on the basis of an assessment of the likely effects of the development on

the environment and the likelihood of any significant effects on European sites, as a result of past works.

The three phases of the Derrybrien Wind Farm were granted planning permission by An Bord Pleanála between 1997 and 2000, and subsequent permissions were granted by Galway County Council for various time extensions, changes in turbine type, along with a grid connection and substation. (Refer to section 1.4.1 of my report dated 28th February 2021 for a summary of the planning history). The original planning applications were accompanied by assessments (incl. Environmental Impact Statements) which were considered to comply with the national legislative requirements at the time the applications were submitted, assessed and determined.

The decision-making authorities concluded that the developments would not have a significant adverse impact on the environment in accordance with the requirements of national law at that time. A subsequent CJEU (C-215/06) judgement found that the Irish State had correctly not implemented the Environmental Impact Assessment (EIA) Directive, and this judgement specifically refers to the Derrybrien Windfarm. A second CJEU (C-261/18) judgement found that the State had not complied with the 2008 judgement and required remedies to comply with the ruling. The judgements criticised the Irish state for failing to take steps to ensure that an EIA was undertaken of the windfarm and noted that sections 177B and 177C of the Planning and Development Act (as amended) could facilitate such an assessment.

Following on from these judgements GCC directed the Applicant to apply directly to ABP for substitute consent by way of a Section 177B Notice. There was no requirement for the Board to consider exceptional circumstances in relation to an application for substitute consent submitted under a S.177B Notice. However, the legislative requirements changed during the course of the Board's consideration of the application. Following the enactment and commencement of the Planning and Development, and Residential Tenancies Act 2020, the Board was obliged to invite the applicant to submit information related to the existence or not of exceptional circumstances under section 177K(1C) (a) of the Act, that would justify a grant of substitute consent by the Board.

Having regard to the foregoing, I am satisfied that the regularisation of the development would not circumvent the purpose or objectives of the EIA Directive or Habitats Directive.

7.2.2. *Whether the applicant had or could reasonably have had a belief that the development was not unauthorised.*

For the reasons stated above in section 7.2.1, I am satisfied that the applicant had or could reasonably have had a belief that the development was not unauthorised.

The windfarm development was completed in 2006, it has been operational since then and no enforcement proceedings have been taken by the planning authority, notwithstanding the Observer's concerns that the development is not fully compliant with the terms and conditions of the original planning permissions (i.e. Monitoring).

The applicant's submission also refers to a third-party application for relief under S.160 of the Planning and Development Act in respect of the operational windfarm, that was dismissed by the High Court and Supreme Court, and also the State's original view when defending C-215/06 that there was no necessity to require an application to regularise the status of the development.

It is evident from the information on file, including the details of the three original planning permissions and subsequent EU and national judgements, that there has been a lack of clarity regarding the status of the subject development.

Having regard to the foregoing, I am satisfied, that the applicant had or could reasonably have had a belief that the development was not unauthorised.

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

The application for substitute consent relates to a wind farm development that was originally granted planning permission by An Bord Pleanála following three separate appeals. The permissions were subsequently extended, and the developments amended by several planning permissions granted by Galway County Council. The various applications were subject to statutory public consultations in line with prevailing planning legislation.

The rEIAR includes substantial baseline survey work (along with extrapolated data) for a range of environmental receptors (incl. terrestrial & aquatic ecology, water quality & fisheries, peat hydrology & stability, and European sites). The baseline survey work provides a reasonable basis for the Board's consideration of the application for substitute consent. It is also noted that the applicant has engaged with a variety of public bodies in relation to the work carried out on site.

Having regard to the foregoing, I am satisfied that there is no substantial impairment to the applicant's ability to carry out an assessment of the environmental impacts of the development. The previous planning applications for the windfarm and various extensions and amendments, and the current application for substitute consent required public consultation which provided for public participation in the assessment process. Furthermore, following the enactment and commencement of the Planning and Development, and Residential Tenancies Act 2020, the Board was obliged to invite the applicant to submit information related to the existence or not of exceptional circumstances under section 177K(1C) (a) of the Act, that would justify a grant of substitute consent by the Board, and the public were given an opportunity to make submissions.

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

The activities carried out on the site during the first construction phase, the response to the peat slide event, and the second construction phase have resulted in changes to the immediate and adjacent habitats, and to the drainage and hydrological characteristics of the site. The submitted rEIAR and rNIS provide a comprehensive and robust assessment of all stages of the life cycle of the development (incl. construction before & after the peat slide, existing & future windfarm operations, and future decommissioning phase). The applicant's rEIAR and rNIS concluded that whilst the effects of the peat slide were profound in its immediate aftermath, any significant effects were short to medium term, and that there are no actual or likely significant effects on the environment or European sites resulting from the second construction phase or continuation of the development.

Having regard to the foregoing, I am satisfied that there is no evidence to indicate actual or likely significant effects on the environment or on any European site resulting from the development over the lifespan of the project to date. However, if the Board decide to grant permission for substitute consent, the likely effects of the development on the environment and the likelihood of any significant effects on European sites, as a result of development, are addressed in the remedial EIA and remedial AA.

7.2.5. *The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated.*

The applicant states that the windfarm has been operational since c.2006 and that there have been no significant adverse effects on the environment (incl. water quality & peat stability) or European sites (incl. the Slieve Aughty SPA) since then. The most significant impact was related to the peat slide event which has been substantially remediated and the affected areas have regenerated over time.

Furthermore, the remedial EIAR and remedial NIS submitted by the applicant contain a series of mitigation measures to address any identified adverse effects of the development on wide range of environmental receptors and any European sites that have a connection to the upland peatland site (incl. measures to protect water quality, prevent bird collisions & ongoing monitoring). All other adverse effects can be remediated by mitigation measures.

Having regard to the foregoing, I am satisfied that it would be possible to remediate any significant effects on the environment or any adverse effects on the integrity of a European site that have occurred.

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

There is no evidence to indicate that the applicant has not substantially complied with the terms and conditions of the previous planning permissions for the windfarm to the extent that the planning authority commenced enforcement proceedings, notwithstanding the concerns raised by some of the Observers (i.e. monitoring). For the reasons stated above in section 7.2.1 and 7.2.2 above, I am satisfied that the applicant did not believe that the development was not unauthorised, or that it

carried out unauthorised development that is not addressed by means of the current application for substitute consent.

7.2.7. *Such other matters as the Board considers relevant*

The Applicant states that it was not a party to the CJEU proceedings under C-215/06 and C-261/18 and that it had no opportunity to influence their outcome, and that this current application is the first opportunity to address the status of the project and its compliance with the EIA and Habitats Directives. The applicant further states that it engaged with the relevant authorities when carrying out emergency works after the peat slide event, and that these remedial works subsequently informed best practice for assessing similar wind farm projects.

An application for substitute consent would provide for a full assessment of the environmental and ecological effects of development carried out since the early 2000's, an opportunity to remediate any past adverse impacts, and a means to manage the future decommissioning of the windfarm and rehabilitate the site.

7.2.8. *Conclusion:*

Having regard to the foregoing and taking account of the concerns raised by the Prescribed Bodies and Observers, I am satisfied that the applicant has provided a robust response to the Board's request for information considered material for the purpose of the Board satisfying itself on the question of the existence or not of exceptional circumstances that would justify a grant of substitute consent by the Board.

7.3. *Consideration of Technical Assessment Report*

Several of the submissions were accompanied by copies of a report entitled "Technical Assessment of Derrybrien Windfarm and Ancillary Works" dated July 2021. It is stated that this report was commissioned by the European Commission, Directorate General-Environment, Environmental Enforcement Unit. The report was prepared by ARCADIS Design & Consultancy, and it was provided directly to one of the Observers (Martin Collins) as stated in the accompanying copies of the cover letter that was submitted by other Observers. The cover letter was electronically signed by the Head of the Environmental Enforcement Unit on 31st August 2021.

It is noted that parts of the report have been redacted, including the Specific Contract number, the Contact details, the Author and Approver, and the Contact details of Arcadis Consulting UK. The names of the Team of Experts have also been redacted. No information has been provided in relation to the competencies of the contributing authors to the various chapters with respect to their qualifications, areas of expertise, and any other relevant credentials. Such information is normally required under Article 5(3)(a) of the EIA Directive, as amended, for the preparation of an EIA Report. The absence of such information could affect the weighting assigned to the conclusions of this Technical Report, as submitted to the Board by the Observers.

Furthermore, I have some concerns that the submission of an EC commissioned report at this stage of the national planning process, when an application is under active consideration by a competent authority, may be unprecedented. The Board may wish to give further consideration to this matter.

Notwithstanding these observations the main points raised in the EC/Arcadis Report are summarised in section 3.3 above. The report provides a detailed review of the rEIAR, and it raises a number of issues in relation to: - compliance with EU and Irish environmental law; baseline environmental data collection; environmental survey techniques, data analysis and compliance with relevant guidelines; impact assessment methodologies and resultant conclusions. Whilst reviewing all of the EIA topics under the standard range of headings, the main focus of the report is on terrestrial biodiversity (incl. birds & bats), aquatic biodiversity (incl. water quality, aquatic invertebrates & fisheries), hydrology and hydrogeology (incl. drainage, peat hydrology & flood risk), soils, geology and land (incl. a supplemental critique of the peat stability risk assessments), climate change, and major accidents & disasters having regard to the historic peat slide and future decommissioning.

The applicant's detailed response to the issues raised in the EC/Arcadis Report is summarised in section 4.0 above. The applicant's submission has addressed and clarified most of the issues and concerns raised in the EC/Arcadis Report, including compliance with relevant EU and Irish environmental legislation, waste permits, data collection and survey techniques, and data analysis and assessment methodologies.

I acknowledge that the collection of environmental data was challenging given the time lapse, but I am satisfied that the information, which was extrapolated from a wide range of reliable data sets for the wider area, provided a robust description of baseline conditions prior to construction. I am also satisfied that the data collection (incl. desktop studies), survey methodologies (incl. field surveys for habitats & species, water quality & peat conditions) and data analysis (incl. risk assessments for bird collision & peat stability) were undertaken broadly in line with current best practice guidelines (incl. EPA, IFI, NRA, SNH & SGG). I would also concur with the applicant's assertion that such guidance is not prescriptive.

I have concerns about the EC/Arcadis Report's over-reliance on the Lindsay & Bragg Report (c.2005) in relation to peat hydrology and stability in the immediate aftermath of the peat slide event. The site and environs have been the subject of extensive and ongoing geotechnical investigations since the peat slide, the results of which have contributed to a comprehensive description of the site and understanding of its environmental characteristics. I note that the applicant's submission included a review of the peat stability risk assessments prepared by AGL Consulting Ltd, which was also compared to the risk assessment in the EC/Arcadis Report that was undertaken as per the 2017 Scottish Guidelines, which reached broadly similar conclusions.

The concerns raised in the EC/Arcadis Report in relation to major accidents are noted, however I am satisfied that this issue has been adequately addressed by the extensive coverage of peat stability and other environmental risks in the rEIAR. It is also noted that the site has remained stable since the peat slide event in the early 2000's, and also during the second construction phase and throughout the entire operational phase. However, and notwithstanding this conclusion and having regard to the concerns raised in relation to peat stability during the future decommissioning phase of the project, the Board may wish to amend Condition no. 4 in Section 11 of in my report dated 28th February 2021, to require the annual submission of the rEIAR mitigation measure environmental monitoring results to the planning authority. These results should be retained on record and consequently used to inform the final CEMP for the decommissioning phase.

The concerns raised in the EC/Arcadis Report in relation to waste are noted, however I am satisfied that this issue has been adequately addressed by the rEIAR and clarified in the applicant's submission which confirms that the project will comply with all relevant regulations including waste permits/licences if required.

The concerns raised in relation in the EC/Arcadis Report in relation to climate change and the calculation of carbon budgets are noted. However, I am satisfied that sufficient information has been provided in the rEIAR to conclude that the project would result in a net saving of carbon. I acknowledge that the savings over the lifespan of the project would not be exceptional by today's standards having regard to the age, make and energy generating capacity of the existing turbines which form part of the first generation of windfarms.

Having regard to the foregoing and based on my examination of the documents submitted by the Observers and the applicant's response to it, I am satisfied that the EC/Arcadis Report does not raise any substantive concerns that would either require the Board to seek further information, or affect my assessment of this application for substitute consent, or give rise to any changes to the conclusions reached by this Inspector in respect of the planning assessment, EIA and AA in my report dated 28th February 2021.

7.4. rEIA and rAA

The applicant's response to the Board's request to submit such information considered material for the purpose of the Board satisfying itself on the question of the existence or not of exceptional circumstances that would justify a grant of substitute consent by the Board, the response submissions received from the Prescribed Bodies and Observers, the response submissions received from the applicant and planning authority, and the further response submissions received from the Prescribed Bodies and Observers are noted. I am satisfied that the information submitted would not give rise to any changes to the conclusions reached by this Inspector in respect of the planning assessment, EIA and AA in my report dated 28th February 2021.

7.5. Other issues

General concerns: the concerns raised about several other matters including: - public consultations and stakeholder engagement; administrative procedures; consultation timelines; the adequacy of public notices; and the management of public files and the ABP website; have been noted.

Legal interest: the concerns raised in relation to the remaining length of the land lease are also noted, however such concerns lie outside of the Board's jurisdiction.

Oral hearing: the request by Mr. Collins for an oral hearing in relation to the consideration of exceptional circumstances is noted. However, having examined all of the documents and submissions made during this phase of the application, I am satisfied that there is adequate information on the file, and that all of the participating parties have had access to this information and understand the issues under consideration. I am satisfied that an oral hearing is not required in this instance.

8.0 Recommendation

Having regard to the foregoing, I am satisfied that there is adequate information before the Board to enable it to continue with its deliberations in relation to the proposed windfarm development, subject to an amendment to condition no. 4 to ensure that the rEIAR mitigation measure site monitoring results are submitted to the planning authority on an annual basis and used to inform the final CEMP for the decommissioning phase.

Karla Mc Bride

Senior Planning Inspector

21st December 2021