



An
Bord
Pleanála

Addendum Report
ABP-308208
(PL04.248152)
ABP-308210
(PL04.248153).

Development

Electricity Substation (308208)
6 no . turbines and ancillary
development (308210).

Planning Authority

Cork County Council.

Applicant

Arran Windfarm Ltd
Barna Wind Energy Ltd.

308210

Appellants

Jerome Cohalan and Geraldine
Hanley
Barna Wind Action Group

Observers

Michael P and Mary O' Riordain
Michael Allen
Anthony Cohu
Nigel Fennell
Teresa Flynn

Patrick Manning

Eleanor O'Leary

Sarah Hodgkinson, Tony Miller and
Daphne Babbington

Sarah Larkin

308208

Appellants

Stephanie Larkin and Others

Observers

None

Inspector

Mairead Kenny

1.0 Background

This background to this addendum report and the legal context is outlined below.

- 1.1.1. **PL04.245824 and 244439** The applications for the substation and windfarm which lead to the relevant appeals were made on 26 September 2014 and 19 December 2014 and were accompanied by an Environmental Report (ER) and Environmental Impact Statement (EIS) respectively. The Board upheld the decisions of the planning authority to grant permission.
- 1.1.2. **GL0780** Under judicial review proceedings the Board consented to an order of *certiorari* in respect of both decisions, largely on grounds of procedure. The decisions were quashed on 1 November 2016 and the cases remitted.
- 1.1.3. **PL04.248153 and PL04.248152** Following appointment of a new Inspector and preparation of reports on the substation and windfarm appeals the Board granted permission on 14 March 2019.
- 1.1.4. **GL0832 Klaus Balz and Hanna Heubach v An Bord Pleanála** In the Supreme Court judgement it was determined that the Inspector had failed to engage with submissions that the 2006 WEDG were not fit for purpose. It followed that the Board's decision was flawed, and it was quashed.
- 1.1.5. **GL0919 Barna Wind Action Group v An Bord Pleanála** Proceedings in relation to the above appeals commenced on 27 May 2019. In the context of the Balz decision the Board conceded. The High Court Order was to remit this case. The reactivated case is the subject of this addendum report.
- 1.1.6. **Board Direction dated 24 September 2020.** This sets out the initial steps to be taken in relation to the remitted appeals including notification to parties and observers of the judgement, issuing of notices under section 131 to all participants inviting submissions on the issue of how the appeal should now be further progressed and returning the file to the Board for further consideration with any responses.
- 1.1.7. **Board Directions dated 11 December 2020.** The Direction on both cases is identical. It seeks an addendum report from the Inspector taking account of the judgement, the additional material contained in the submissions and any other

relevant matters. The Inspector may also wish to consider whether a request to the applicant for further information is warranted in respect of the matters arising.

2.0 Submissions

- 2.1.1. The Board's letters of 13th of October invited under section 131 submissions / observations on the issue of how each appeal should be further progressed by the Board. Following consideration of responses, the Board stated that it will then determine how it intends to continue with further processing of the appeal.
- 2.1.2. It was also stated that the Board cannot consider comments that are outside the scope of the matters in question. My summary of submissions below thereby focuses on matters relevant to procedure. In the event of receipt of significant further information there will be further opportunity for public participation.

2.2. ABP-308210-20 (PL04.248153) Wind farm

- 2.2.1. Responses were received from Anthony Cohu, Geraldine Hanley and Jerome Cohalan, Barna Wind Action Group and Barna Wind Energy Ltd. One late submission was also received.
- 2.2.2. **Anthony Cohu**
- 2.2.3. The submission received on 29 October 2020 includes the following comments:
- The boundary of the invitation is unduly narrow. It references only case PL04.248153 and the judgement in the judicial review of this case. The case can only be considered as a single entity encompassing all aspects of the decision and my submission on the appeal case number PL 04.245824.
 - The history of the planning application and the level of public interest is summarised, and requirements of Article 6 of the Aarhus Convention noted.
 - Inadequate evidence that the Inspector took into account the 258 submissions.
 - Conditions on the ground have changed, environmental regulations and processes have changed and the WEDG under critical review.

- The only options that remain in the interest of proper public consultation are either:
 - Post a consolidated version encompassing all of the application and further information documentation on the An Bord Pleanála website and invite each of the persons who lodged submissions with Cork County Council in 2015 to make further submissions to the Board.
 - Refuse permission for the development outright for some or all of the reasons stated in my original submission.
 - Advise the commercial High Court that the quashed decision is accepted.
- Anything less is to deny the public the right to proper participation.
- Enclosed planning reports.
- Enclosed is the decision of the Commissioner for Environmental Information Case CEI/15/0032.

2.2.4. **Geraldine Hanley and Jerome Cohalan**

2.2.5. There are two separate submissions both received on 2 November 2020 in response to the letter addressed to Geraldine Hanley.

2.2.6. The submissions both concern planning and environmental matters with reference to the noise from existing turbines, the nature of this noise, cumulative effects, reduction in property values and the change in character and amenity value of the area.

2.2.7. **Barna Wind Action Group**

2.2.8. This is a submission by Noonan Linehan Carroll Coffey Solicitors on behalf of Denis Buckley and others known as Barna Wind Action Group. It was received by the Board on 2 November 2020 and states in summary:

- We take your letter as an invitation to make further submissions/observations.
- The Board should refuse permission.
- The requirements of the Balz decision apply.

- A Strategic Environmental Impact Assessment is required. Case C – 24/19 refers. The NREAP, relied upon in the applicant's EIAR, was adopted without SEA and it constitutes a 'plan and programme', as is the WEDG 2006. Where an SEA is required but not carried out the plan or program and all permissions based on same must be annulled. The Board shall therefore refuse.
- The facts including the antiquity of the baseline information and modelling and prediction of assessments take them outside the scope of any reasonable interpretation of the transitional provisions in terms of the EIA Directives. The EIA information is wholly out of date and it is not open to the Board to complete an EIA. Nor is it open to the Board to confine its assessment to one prescribed by the 2011 Directive.
- Other attachments refer.
- In terms of participation and natural justice due to the pandemic and lack of broadband in the area we very disadvantaged in terms of commenting on this reactivated case. Contrary to the regulations and the Aarhus Convention.
- Regarding the passage of time and the outdated application documentation there needs to be clarity on what exactly constitutes case numbers 308208 – 20 and 308210 – 20, what 'the plan' is now that other developments are permitted or under constructed, what the EIS is and what it is stating.
- Cumulative impact both visually, environmentally and on the communities concerned should be prepared. Relevant developments in particular are Carrigareirk (246353 and 301563) and Shehymore (243486 and 246915).
- The Lee Valley has been transformed and project splitting is rife in the area that straddles Cork/Kerry. A huge wind farm is in place and is growing all the time. The visual impacts are experienced by day and night.
- We believe that the developer will seek to amend the plans by increasing turbine height to a minimum of 178.5 m. For this reason, there should be a requirement to go back to the public and let them have their say.
- The noise limits cannot be enforced. The cumulative noise impacts and the proposed setbacks of 524 m or 609 m are not acceptable.

- The turbine model used for the noise modelling may not be developed. There may be an application for higher turbines. The noise modelling is academic.
- We need an EIS for the substation.
- The purpose of the substation subject of ABP-308208-20 and the grid connection offer for the wind farm are queried in the context of permission for another substation at the Carrigareirk windfarm 246353 and 301563. Permission also exists for a 33 kV cable between Carrigareirk, Shehymore and Barna. What is the need to build the substation on Barna now if the power can go to Carrigareirk substation?

Barna Wind Energy Ltd

The submission on behalf of Barna Wind Energy Ltd received by the Board on 2 November 2020 is that it is in the remit of An Bord Pleanála to :

- Make an order to grant permission for the development referred.
- Make an order to refuse permission for the development referred.
- Seek further information considered necessary to assist the Board in making its decision in relation to the development referred.

Option 1 or 3 would be welcomed. We trust the Board will take account of the content of the High Court order and judgement in its deliberations.

2.3. ABP- 308208-20 (PL04.248152) Substation

2.3.1. Further submissions in response to section 131

2.3.2. Three submissions were received.

2.3.3. **Barna Wind Action Group** reiterates points made in the concurrent wind turbine case. I have summarised above some comments relevant to the substation.

2.3.4. The **planning authority** has indicated no further comment.

2.3.5. The **applicant's** response is as on the concurrent appeal namely that the Board should grant an order for permission or for further information considered necessary.

3.0 Barna Wind Action Group v An Bord Pleanála GL0919

- 3.1.1. In this section I outline what I consider to be the significant findings in the Barna Wind Action judgement.
- 3.1.2. The judgement identifies a failure by the Inspector and the Board to engage with **submissions in relation noise**. In particular there was a lack of engagement by the Inspector with submissions made to it that the WEDG 2006 are outdated and should not be followed. There is specific reference to the submission made under cover of a solicitor's letter dated 29 January 2019 and the report of Mr Dick Bowdler and the topic of amplitude modulation. The judge notes that remittal of the case will require the Board to consider the very detailed submissions made with regard to noise and in particular to the adequacy of the 2006 guidelines.
- 3.1.3. With respect to **changes to the regulatory regime made by the 2014 Directive** and the 2018 regulations in deliberating on the matter of whether to remit or quash, paragraph 41 refers to uncertainty as to whether the amendments made by the 2014 Directive will apply to the future conduct of the appeals.
- 3.1.4. On the matter of the relevant Directive Article 5 of the 2014 Directive is noted. It is also noted that the submissions of the applicant to the court do not point to any specific changes in the law that would significantly affect the outcome for the specific development. Nothing in the 2014 Directive has been identified which materially changes the legal position with respect to noise. If the unamended regulatory regime continues to apply the impact of noise from the proposed developments on humans will still have to be addressed.
- 3.1.5. On the application of the 2011 or 2014 Directive the judgement is inconclusive. The question is described as a matter that would require more extensive legal debate following the exchange of the usual judicial review pleadings.
- 3.1.6. The general power of the Board to seek further information is noted and in paragraph 35 **the Board is stated to have the ability to seek 'updated information** on the existence and impact of any relevant changes in the local environment', which given the passage of time which has elapsed would be 'wise'.
- 3.1.7. With respect to the **opportunity of the public to make further submissions** this requirement would exist whichever of the regulatory regimes apply.

- 3.1.8. There are **other issues which the judge notes have been raised** including the carrying out or recording by the Board of EIA in relation to the windfarm, failure to comply with the requirements of section 172 (1D) regarding the adequacy of the EIS and project splitting and failure to carry out a cumulative assessment.
- 3.1.9. The **sole specific recommendation to the Board is that it should seek further material to address changes in the receiving environment** in the intervening period since the EIS was prepared.

4.0 Planning Policy

- 4.1.1. There has been no relevant variation to the Cork County Development Plan 2014, which remains in force.
- 4.1.2. The final Review of 2006 Wind Energy Development Guidelines is awaited.

5.0 Assessment

- 5.1.1. Having regard to the prevailing policy and legislative context, the judgement GL0919 and the submissions made in response to the Board's invitation under section 131 the scope of this section of this initial report is:
- To provide a brief response to GL0919 and submissions in response to the section 131 notice.
 - To set out a recommendation for additional information.
- 5.1.2. It is envisaged that on receipt of further information, publication of notices inviting submissions will be required. On receipt of that additional documentation I propose to provide a further addendum report.

5.2. Overview

- 5.2.1. I consider that the substantive matters arising from GL0919 are
- A requirement for further engagement by the Board with submissions which have been made in relation to noise.
 - A general recommendation to seek further information to address changes in the local environment and in view of the elapse of time.

- The question of whether the 2011 or 2014 Directive applies was raised.
- The legal submission with respect to project splitting is noted.
- Comments are made on public participation.

5.3. **Noise**

- 5.3.1. In terms of **noise impacts** I consider that the time which has passed is not highly relevant other than in respect of the guidance which applies, the publication of the draft guidance and knowledge which has been gained in the interim. My final report and the Board's decision will have to respond to the submissions and thus engage with these topics. I consider that there is no reason to request updated baseline information or revised modelling notwithstanding the time which has elapsed.
- 5.3.2. Since the application was lodged to the planning authority in 2014 both the applicant and the third parties have presented significant volumes of material. I consider that this situation detracts from meaningful public participation and does not aid the work of the Board. A request for further information provides an opportunity to clarify the parties' positions.
- 5.3.3. On the matter of noise impacts I therefore consider it appropriate that the applicant provide an updated chapter of the EIAR and that a separate response document be provided as a response to submissions made on the appeal to date. The emerging policy context and the most up to date knowledge would be incorporated in both.
- 5.3.4. On receipt of a consolidated position document and a revised EIAR chapter the Board could guide appellant and observers by issuing letters to notify them of further information and suggesting a targeted and consolidated response on the matter of noise, but that is for later consideration.
- 5.3.5. On receipt of the recommended further information from the applicant and further submissions from the public the Board will be in a better position to engage with the topic of noise as required.

5.4. **Changes in the local environment / elapse of time.**

- 5.4.1. With respect to changes in the local environment and the elapse of time my comments are:

- I consider that there are no likely significant issues to warrant for example a new EIAR. However, it is appropriate that the applicant review the EIAR overall in the context of the elapse of time.
- It would be appropriate that the applicant review the planning history, legislative and policy context.
- I also suggest specific recommendations on landscaping.
- I consider the purpose of the substation should be clarified.

5.4.2. Regarding the **landscape and visual impacts**, I consider that the applicant should be requested to review the EIAR, including the photomontages. Separately I consider that the applicant should be requested to provide a consolidated response to submissions made in the appeals to date, particularly a response on landscape and visual cumulative impacts of the wind turbines and the substation together with the other wind farms.

5.4.3. The proposal to **landscape the substation site** has been subject of detailed comment in submissions and was subject of a condition in my report. The requirement included to 'incorporate dense planting on earthen berms where possible'. The lands available are limited. I consider that this matter would benefit from being pursued at this time.

5.4.4. The **purpose of the substation** is queried in view of the recent planning history. The applicant should be requested to address this matter.

5.4.5. I note that the recent submissions request clarity with respect to 'the plan' and the EIAR and what is being assessed. I consider that this is clear and does not warrant any particular submissions from the applicant. Part of the concern set out by the third parties appears to be related to the references in the EIAR to permission which were extant (and have now lapsed) for a substation and windfarm development at this site. There is no ambiguity regarding what is proposed or its impacts in my opinion. The consolidation and review of the landscape and noise sections of the EIAR as recommended will be pertinent in this context.

5.5. **Application of 2011 or 2014 Directive**

- 5.5.1. As to whether the appeals fall to be considered under the **2011 or 2014 Directives**, my opinion is that the 2011 is the relevant one having regard to Circular 05/2018 and the making of the application prior to 16 May 2017. I do not consider that any of the additional requirements under the 2014 Directive are of particular relevance to this case. However, it would be prudent to afford the applicant an opportunity to address this and for the public to have the opportunity to make submissions in response.

5.6. **Project Splitting**

- 5.6.1. On the related matter of allegations of **project splitting** and the other windfarm developments in this area, I consider that this has no merit to this in the circumstance where the all relevant developments are subject to EIA and the cumulative impacts are properly addressed.
- 5.6.2. With respect to the stated **requirement for an EIAR of the substation** I previously addressed this matter and concluded that the substation is not a project which falls under a class of development for the purposes of EIA. The Board may wish to consider whether it would be prudent to revert to the applicant for a legal submission on this matter in the context of the purpose of the substation and to enable consideration of the matter in the prevailing legislative context. It should be emphasised to the applicant that the assessment of cumulative impacts under EIA needs to be robust.

5.7. **Public participation**

- 5.7.1. The matter of public participation arises in the recent judgement. It would be anticipated that new notices would be published on receipt of a response to this further information request. Thus, the public at large would have the opportunity to make submissions. The request that the Board notify all 258 persons (or groups) who made submissions to the planning authority is not reasonable in this context. There is also a suggestion that the Board would upload all documentation onto its website. While this could be considered I am of the opinion that neither the elapse of time nor any other matter would lead to such requirement. The hard copy public file is and will remain available for inspection as normal. I note the comments about the

pandemic and the broadband. It is my conclusion that the participation of the public has to date been sufficient and that the future procedures will be meet all requirements.

6.0 Recommendation

I recommend that further information be requested as follows. The compilation of a response is likely to require a multi-disciplinary team and I therefore recommend that a minimum period of 2 months be allowed.

1. The Board considers that having regard to the number of submission on the file and the elapse of time it would be of benefit to the parties and the Board to have available a single point of reference which constitutes the applicant's case on the topic of noise. It is also considered appropriate in view of the High Court judgement that you are presented with an opportunity to revise or update that section of the Environmental Impact Assessment Report.

In that context you are requested to

- (a) provide a consolidated and updated section of the Environmental Impact Assessment Report as it relates to noise
 - (b) provide a separate response to the submissions made by appellants and observers on the topic of noise
 - (c) the submission under a and b above should have regard to the emerging policy context and the most up to date knowledge.
2. You are requested to identify, describe, and assess any changes in the environment or policy context, including planning history and legislation, which may warrant an update to or revision of the Environmental Impact Assessment Report and / or the Environmental Report and to provide additional information and revise the documents accordingly.
3. You are requested to review the landscape and visual impact chapter of the EIAR and the accompanying photomontages to ensure that they are up to date and that they provide a robust consideration of cumulative impacts.
4. Regarding the landscaping of the substation site it is considered that this should incorporate dense planting on earthen berms where possible. The applicant is

requested to provide a detailed plan, which may include lands outside the site boundary for the purpose of providing screening landscaping with berms. Any required letter of consent should be provided, and the relevant lands outlined in blue on the application documentation.

5. You are invited to clarify the purpose of the proposed substation in the context of the comments made by third parties relating to the role of other permitted substations.
6. With respect to the application of the 2011 or 2014 Directive the Board considers that the 2011 Directive is relevant. The applicant is requested to review the 2014 Directive and supporting regulations. If any of the changes introduced are considered to be of significance to the proposed development, the applicant is invited to provide supplementary documentation to support the EIAR.
7. You are invited to make a submission addressing the issue of project splitting in the context of other wind energy developments in the area and the substation. The applicant shall also ensure that the EIAR provides a robust assessment of cumulative impacts.
8. The requirement for EIA for the substation development has been raised by third parties. You are requested to address this in the context of any recent relevant legal cases, the purpose of the substation and the matter of project splitting.

Mairead Kenny
Senior Planning Inspector

21 January 2021