



An
Bord
Pleanála

Inspector's Report ABP-309940-21

Question

Whether the increase in megawatt (MW) output from 49.5MW to 59.4MW at a permitted wind farm development, using a new (6.6MW) machine at Ballykilleen, Shean, Kilcumber, Cloncant and Cushaling, Edenderry, Co. Offaly is or is not development and is or is not exempted development.

Location

Ballykilleen, Shean, Kilcumber, Cloncant, and Cushaling, Edenderry, Co. Offaly, and also Co. Kildare

Declaration

| | |
|------------------------------|--------------------------------|
| Planning Authority | Offaly County Council |
| Planning Authority Reg. Ref. | DEC 21/6 |
| Applicant for Declaration | Cloncant Renewable Energy Ltd. |
| Planning Authority Decision | No declaration |

Referral

| | |
|-----------------|-----------------------|
| Referred by | Offaly County Council |
| Owner/ Occupier | 1. Anne Schnittger |

2. Brian Farrell
3. Declan Behan
4. Ellen Leonard
5. Frank Eugene McGuinness Snr.
6. Frank James McGuinness Jnr.
7. Irene Farrell
8. James O'Brien
9. John Bosco Guinan
10. John Wyre & Sister Mary Farrell
11. Michael Behan
12. Padraig Dolan
13. Sean Evans
14. Thomas Grady

Observer(s) None

Date of Site Inspection 07.09.2021

Inspector Anthony Kelly

1.0 Introduction

- 1.1. This is a referral by Offaly Co. Co. The referral relates to whether a proposed increase in megawatt (MW) output at a permitted windfarm (Cushaling Windfarm) would be considered development, and if so, whether it would be considered exempted development.
- 1.2. The purpose of this referral is not to determine the acceptability or otherwise of the proposed increase in MW output in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development and, if so, whether it falls within the scope of exempted development.

2.0 Site Location and Description

- 2.1. The overall site, including nine turbines, access roads, substation etc. is approx. 5.5km in width. It is generally located approx. 3.5km north east of Clonbulloge and approx. 4km south of Edenderry. The vast majority of the overall site is located in east Co. Offaly with a very small area (one turbine) located in west Co. Kildare. This referral relates to the eight turbines within the jurisdiction of Offaly Co. Co.
- 2.2. The overall site primarily comprises bogland and agricultural land. A poorly maintained roadway and the Cushaling River runs generally along the route of the proposed turbine locations from the R401 regional road and across the local road (L3001) connecting Rathangan and Edenderry.

3.0 The Question

- 3.1. The cover letter attached to the application received by Offaly Co. Co. states that the submission seeks to determine 'if an increase in Megawatt (MW) output at a permitted wind farm development is or is not development; and, if development, would it be considered exempted development'. Elsewhere in the cover letter it is stated that the applicant is applying to the planning authority 'to determine if the increase in the output at the permitted wind farm would be considered development?'

- 3.2. No Declaration was issued by Offaly Co. Co. Having regard to the similar, concurrent referral for the single turbine in the Cushaling windfarm in Co. Kildare I consider the same ‘Question’ as used for that referral (ABP-310107-21) can be used for this referral in the interest of consistency and clarity. Therefore, the question is; *Whether the increase in the Megawatt (MW) output at a permitted wind farm development, without increasing the size and scale of any of the works, layout or plans at Ballykilleen, Shean, Kilcumber, Cloncant and Cushaling, Edenderry, Co. Offaly, is or is not development and is or is not exempted development.*

4.0 Planning Authority Declaration

4.1. Declaration

- 4.1.1. Offaly Co. Co. did not issue a declaration on the section 5 application but referred it to the Board for determination.

4.2. Planning Authority Reports

- 4.2.1. No report prepared.

5.0 Planning History

5.1. On Site

- 5.1.1. There has been one previous planning application on site.

P.A. Reg. Ref. 19/606 / ABP Reg. Ref. ABP-306924-20 – In 2020, following first and third party appeals of the decision of Offaly Co. Co. to refuse permission, the Board granted permission for 8 no. wind turbines with a tip height of 187 metres, approx. 4.75km of new internal access roads, upgrade local roads, recreation trail, substation etc. The application was accompanied by an Environmental Impact Assessment Report (EIAR) and a Natura Impact Statement (NIS).

- 5.1.2. Other relevant applications are within Co. Kildare.

P.A. Reg. Ref. 19/1323 / ABP Reg. Ref. ABP-306748-20 – In 2020, following a first party appeal of the decision by Kildare Co. Co. to refuse permission, the Board granted permission for one wind turbine with a tip height of up to 187 metres. The site is part of a larger windfarm development. The application was accompanied by an EIAR and a NIS.

P.A. Reg. Ref. ED/00849 / ABP Reg. Ref. ABP-310107-21 – This is a current application. The applicant has referred a similar section 5 application to the Board following Kildare Co. Co.'s decision that it was development and was not exempted development.

5.2. Relevant Referrals

5.2.1. None.

6.0 Policy Context

6.1. Offaly County Development Plan 2014-2020

6.1.1. A Wind Energy Strategy was prepared as part of the Plan. Fig.9 (Wind Energy Strategy Map for Co. Offaly) shows the site is in an area suitable for wind energy developments.

6.2. Natural Heritage Designations

6.2.1. The closest heritage area is The Long Derries SAC and pNHA (Site Code 000925) approx. 1.7km to the north.

7.0 The Referral

7.1. Referrer's Case

7.1.1. The referrer in this case is Offaly Co. Co. The brief cover letter submitted with the Council's referral states that it is seeking a determination from the Board on the matter.

7.1.2. No submission was made by the applicant following an invitation to do so on foot of the receipt of the referral by the Board. Notwithstanding, the main points made by the applicant, Cloncant Renewable Energy Ltd., in its application to the planning authority can be summarised as follows:

- Turbines of increased efficiency have emerged within the same dimension envelope permitted. While there is no change required to the dimensions of the permitted turbines, or to the associated hardstandings or infrastructure, 6.6MW turbines are now available. The windfarm can be developed with an output of 59.4MW and constructed and operated as described in the EIAR and planning drawings, and in compliance with the conditions of ABP-306748-20.
- At the time of the planning application a candidate turbine of up to 5.5MW was available with a combined nine-turbine expected yield of 49.5MW. While an increased capacity is positive in terms of energy output, it does not require an increase in the size or scale of the development and the windfarm can be developed in accordance with the plans and particulars originally submitted.
- The EIA considered the worst-case scenario. Turbine dimensions and all requirements in terms of the layout, dimensions of hardstanding and roads, all represented a worst-case dimension which can now accommodate a 6.6MW machine of the same scale previously assessed. The generator, an interior component, will be changing in size but the turbine dimensions will remain as permitted. The applicant does not consider this to be development as the environmental assessment considered a worst-case scenario, and the conditions of the permission will be met.

7.2. **Owner/Occupier's response**

7.2.1. None.

7.3. **Observations**

7.3.1. None.

8.0 Statutory Provisions

8.1. Planning and Development Act, 2000 (as amended)

- 8.1.1. Section 3(1) – ‘In this Act, “development” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land’.
- 8.1.2. Section 4 sets out exempted developments for the purposes of the Act.
- 8.1.3. Sections 37A and 37B set out the Board’s jurisdiction in relation certain planning applications and discussions with the Board before the making of the application. These sections are relevant to this referral given the increase in energy output proposed and are further considered in Section 9.1.

8.2. Planning and Development Regulations, 2001 (as amended)

- 8.2.1. Article 6 also sets out exempted development for the purposes of the Act.

9.0 Assessment

In 2020, the Board granted planning permission for a nine turbine windfarm development. Eight of these turbines are in Co. Offaly and one turbine is located in Co. Kildare. The eight turbines were permitted under ABP-306924-20. The turbines identified in the application, and permitted, had a capacity of 5.5 Megawatts (MW). Advances in technology mean turbines with a capacity of 6.6MW are now available with the same dimensions as those permitted. Only the interior generator will be changing in size. The applicant is seeking to determine whether the increase in output would be considered development. A similar referral for the one turbine in Co. Kildare has also been received by the Board (ABP-310107-21).

The issues for the Board to consider are whether the proposal comprises development, whether or not it is exempted development and, if considered to be exempt, whether or not there any restrictions that would de-exempt the development.

9.1. Is or is not development

- 9.1.1. Section 3(1) of the Planning & Development Act, 2000 (as amended) defines development as the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land. In this case there are no works proposed, however there are other considerations.
- 9.1.2. Permission for development on site was granted under ABP-306924-20. Condition 1 states 'The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by the further plans and particulars received by An Bord Pleanála ...' The reason for the condition was 'In the interest of clarity'. The permission relates to a windfarm with an energy output of 49.5MW, which I consider forms part of the 'particulars' and a core element of the permission. Any material increase in this is beyond the bounds of the granted permission. None of the conditions allow for a deviation in the power output generated. Therefore, increasing the power output by 20% would contravene the terms of Condition 1 and would be contrary to the planning permission.
- 9.1.3. Section 37B (1) of the Planning & Development Act, 2000 (as amended), states that 'A person who proposes to apply for permission for any development specified in the Seventh Schedule shall, before making the application, enter into consultations with the Board in relation to the proposed development'. Schedule Seven (Infrastructure Developments for the Purposes of Sections 37A and 37B) (Energy Infrastructure) relates to, inter alia, development comprising or for the purposes of an installation for the harnessing of wind power for energy production (a wind farm) with more than 25 turbines or having a total output greater than 50 megawatts. Section 37A of the Act states that if, following consultation with the Board, the Board serves on the prospective applicant a notice in writing stating that, in the opinion of the Board, the proposed development would, if carried out, be of strategic economic or social importance to the State or the region in which it would be situate, would contribute substantially to the fulfilment of any of the objectives in the National Planning Framework or Regional Economic and Spatial Strategy in force in respect of the area or areas in which it would be situate, or, would have a significant effect on the area of more than one planning authority, the application shall be made to the Board and not to a planning authority. In this case, as the development was for nine turbines and

49.5MW, no consultation appears to have been entered into with the Board. However, as a result of the proposed increase in output the applicant would have been obliged to enter into consultations with the Board had it been proposed in the first instance. To permit, as exempted development, a post-approval situation whereby an intensification of development, in this case a significant increase in energy generation, could circumvent strategic infrastructure development (SID) legislation without any robust public participation or appropriate pre-application consultation with the Board, is not considered to be acceptable, envisaged, or consistent with the proper planning and sustainable development of the area.

9.1.4. The applicant states that there is no change required to the infrastructure and that it can be constructed and operated as described in the EIA and planning drawings. The submitted documentation states that only the interior generator will be increased in size. It also states that the EIA considered the worst-case scenario. Notwithstanding, I do not consider, from the documentation submitted with the referral, that sufficient detail has been provided to enable an adequate assessment of the environmental implications, if any, on the grid connection, grid capacity or any environmental issues that could result, including to European sites notwithstanding the relative remoteness of the site from relevant receptors. I consider there is a vacuum of appropriate information in this regard.

9.1.5. I consider that an increase in energy output to 59.4MW would not comply with Condition 1 of the planning permission, would circumvent the SID procedures laid out in the Planning & Development Act, 2000 (as amended), and adequate information has not been provided to enable the Board to assess the impact, if any, on, for example, the grid or the environment. I consider that the proposal would unacceptably intensify the permitted development and it would comprise 'development'.

9.2. **Is or is not exempted development**

9.2.1. Neither section 4 of the Planning & Development Act, 2000 (as amended), nor article 6 of the Planning & Development Regulations, 2001 (as amended), provide for an exemption relating to energy output from wind turbines. Therefore, the proposal does not comprise exempted development.

9.3. **Restrictions on exempted development**

- 9.3.1. As I do not consider the development to be exempt development, restrictions on exemption do not apply.

9.4. **Conclusion**

- 9.4.1. A windfarm was permitted in 2020 for nine turbines with a combined output of approx. 49.5MW. As it was below 50MW the applicant did not have to engage with the Board initially and separate applications, with EIAR and NIS, were submitted to both Kildare Co. Co. (for one turbine) and Offaly Co. Co. (for eight turbines). Following a refusal of permission for both applications, both were granted following appeals to the Board. Each turbine had an energy output of 5.5MW but now turbines with an output of 6.6MW are available within the same dimension envelope permitted with the only change being the internal generator increasing in size, according to the applicant. The applicant proposes to provide the 6.6MW turbines in lieu of the permitted 5.5MW turbines. Offaly Co. Co. has referred the matter to the Board for determination.
- 9.4.2. In my opinion there are three issues that result in the proposal comprising development. The particulars of the parent permission(s) relate to 5.5MW turbines and an overall output of approx. 49.5MW. An increase to 6.6MW turbines and an overall output of 59.4MW would contravene Condition 1 of the parent permission. Secondly, the SID legislative procedure was introduced for particular circumstances. An applicant is obliged to engage with the Board if development for wind power energy production having a total output greater than 50MW is proposed. This would be circumvented by increasing power output above this threshold without appropriate Board involvement. Finally, and notwithstanding the applicant's position that this alteration is covered by the original environmental impact assessment, I consider that there is a significant vacuum of information submitted with the referral to ascertain the impact the proposed alteration may have on grid connection, grid capacity, the environment, and European sites. I consider the substantial increase in energy output would materially intensify the development from that originally envisaged, proposed, and permitted and would comprise development which is not exempted development.

10.0 Recommendation

I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the increase in the Megawatt (MW) output at a permitted wind farm development, without increasing the size and scale of any of the works, layout or plans at Ballykilleen, Shean, Kilcumber, Cloncant, and Cushaling, Edenderry, Co. Offaly is or is not development or is or is not exempted development:

AND WHEREAS Cloncant Renewable Energy Ltd. requested a declaration on this question from Offaly County Council and the Council referred it to An Bord Pleanála for determination on the 13th day of April, 2021:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) sections 3(1) and 4 of the Planning and Development Act, 2000, as amended,
- (b) sections 37A and 37B of the Planning and Development Act, 2000, as amended,
- (c) article 6 of the Planning and Development Regulations, 2001, as amended,
- (d) the planning history of the site,
- (e) the information submitted on behalf of the applicant regarding the increase in energy output proposed, and
- (f) the report of the Inspector.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the proposed increase in energy output from approx. 49.5MW to 59.4MW would contravene Condition 1 of ABP-306924-20.
- (b) increasing the energy output from approx. 49.5MW to 59.4MW would circumvent the strategic infrastructure development procedure set out in sections 37A and 37B of the Planning & Development Act, 2000, as amended.
- (c) there is an absence of adequate information to enable the Board to ascertain the impact the proposed development may have on, for example, grid connection, grid capacity, the environment, and European sites.
- (d) the substantial increase in energy output would materially intensify the development from that originally envisaged, proposed, and permitted and would comprise development which is not exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the increase in the Megawatt (MW) output at a permitted wind farm development, without increasing the size and scale of any of the works, layout or plans at Ballykilleen, Shean, Kilcumber, Cloncant, and Cushaling, Edenderry, Co. Offaly, is development and is not exempted development.

Anthony Kelly

Planning Inspector

09.09.2021