



An
Bord
Pleanála

Inspector's Report ABP-310287-21

Question

Whether the provision of an underground electricity cable, grid connections, and associated works from the Ballynahulla 220 kV sub-station to Gneeves 38 kV sub-station (Gneeves Wind Farm in County Cork), along the Local Tureencahill to Rathmore Road (L7057), joining the R582, and along the Regional Road to a point crossing the Awnaskirtaun River into County Cork (a tributary of the Blackwater River) in the townland of Shinnagh, is or is not development, and is or is not exempted development?

Location

Ballynahulla 220 kV sub-station to Rathmore along the L7057 and Rathmore to the bridge crossing of the Awnaskirtaun River along the R582, Co. Kerry.

Declaration

Planning Authority	Kerry County Council
Planning Authority Reg. Ref.	EX910
Applicant for Declaration	Patrick Cremins
Planning Authority Decision	-

Referral

Referred by	Patrick Cremins
Owner/ Occupier	-
Observer(s)	-

Date of Site Inspection	12 th August 2021
Inspector	Hugh D. Morrison

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1.0 Site Location and Description

- 1.1. The site extends from the Ballynahulla 220 kV sub-station in the north to the Awnaskirtaun River in the south. This site is a linear one insofar as it encompasses the route of an electricity cable that was laid between these two points. Apart from its initial westwards cross-country portion, it runs underneath the carriageways of the L7057 and the R582. The portion under the local road runs southwards from a point just to the south of the junction between the L7057 and the R577 to the offset junctions in the centre of Rathmore Village between the L7057 and the N72 and the N72 and the R577. Thereafter, it proceeds eastwards along the regional road to the aforementioned bridge.
- 1.2. The total length of the site is c. 12.7 km, of which c. 10.3 km runs along the L7057. This local road follows a remarkably straight alignment between its junctions with the above cited regional roads. Its axis is roughly north/south, and it is situated to the west of the River Blackwater. Five streams run under the local road eastwards to the River Blackwater. (Two of these are named on the Ordnance Survey 1: 50,000 Map, i.e. Toorrencahill Stream and Cullavaw Stream). The initial cross-country portion of the site passes over the Yellow River, which flows south-eastwards to the River Blackwater. The latter portion, along the regional road, terminates at Inchibeg Bridge over the Awnaskirtaun River, which flows northwards to the River Blackwater.
- 1.3. The northern portion of the site passes through elevated land characterised by forest plantations and a wind farm in the townland of Toorengarriv. The main central portion of the site passes through undulating countryside, which rises generally to the west. The southern portion of the site passes through flatter countryside and the village of Rathmore, which lies on the route of the N72 and the Mallow to Killarney/Tralee railway line.

2.0 The Question

- 2.1. The question asked is as follows:

Whether the provision of an underground electricity cable, grid connections, and associated works from the Ballynahulla 220 kV sub-station to Gneeves 38 kV sub-station (Gneeves Wind Farm in County Cork), along the Local Tureencahill to Rathmore Road (L7057), joining the R582, and along the Regional Road to a

point crossing the Awnaskirtaun River into County Cork (a tributary of the Blackwater River) in the townland of Shinnagh, is or is not development, and is or is not exempted development?

3.0 Planning Authority Declaration

3.1. Declaration

3.1.1. Patrick Cremins requested that Kerry County Council (hereafter referred to as the Planning Authority) make a declaration under Section 5 of the Planning and Development Act, 2000 – 2021, on the above cited question. The Planning Authority did not make a declaration within the statutory period.

3.1.2. Patrick Cremins has referred his question to the Board for determination. In a parallel submission (ABP-310086-21), the Planning Authority has referred the question to the Board, too.

3.2. Planning Authority Reports

3.2.1. Planning Reports

None

3.2.2. Other Technical Reports

None

4.0 Planning History

None

5.0 Policy Context

5.1. Development Plan

The Kerry County Development Plan 2015 – 2021 (CDP) refers to the Kerry's Renewable Energy Strategy 2012 for information on the County's Landscape Character Areas (LCA). Under Map 7.5 of this Strategy, the site is shown as lying with LCA No. 34, Munster Blackwater Valley.

The CDP addresses Energy and Power under 10 Objectives. The following two relate potentially to the project in question.

- *EP-1: Support and facilitate the sustainable provision of a reliable energy supply in the County, with emphasis on increasing energy supplies derived from renewable resources whilst seeking to protect and maintain biodiversity, archaeological and built heritage, the landscape and residential amenity.*
- *EP-7: Facilitate the sustainable development of additional electricity generation capacity throughout the region/county and to support the sustainable expansion of the network. National grid expansion is important in terms of ensuring adequacy of regional connectivity as well as facilitating the development and connectivity of sustainable renewable energy resources.*

5.2. Natural Heritage Designations

- Blackwater River (Cork/Waterford) SAC (002170)
- Stack's to Mullaghareik Mountains, West Limerick Hills and Mount Eagle SPA (004161)

6.0 The Referral

6.1. Referrer's Case

6.1.1. Relevant planning history

Patrick Cremins (hereafter referred to as the referrer) states that the underground electricity cable in question runs between the Ballynahulla 220 kV sub-station and the Gneeves 38 kV sub-station, which serves the Gneeves Wind Farm to the south-west of Millstreet in County Cork. He reviews the planning history of the former sub-station and the wind farm, which includes the latter sub-station. He concludes that the permissions for these developments do not include the underground electricity cable in question. He also reviews the planning history of a 38 kV line in the townlands of Knocknaseed and Lisheen (application 04/10 and appeal PL13.240910). The route of this line is mapped in Figure 2.3 of his submission and it clearly does not overlap with the site of the underground electricity cable in question.

The referrer draws attention to two previous Board decisions on comparable cases to the one which is the subject of his question PL04.RL3531 and ABP-300536-18.

- In the former case, the Board ultimately¹ decided, in the light of the O’Grianna High Court Judgement, that, as the underground electrical connections were not considered as part of the EIAs for their accompanying wind farms, they were not, under Section 4(4) of the Act, exempted development.
- In the latter case, the Board decided that the underground electrical connection would contravene Condition No. 1 attached to the permission granted to application 10/2140 and so, under Article 9(1)(a)(i) of the Regulations, it was not exempted development.

The Board’s decision on ABP-300536-18 is instructive for the project in question, as the planning history of the Gneevs Wind Farm indicates that it is to be served by an overhead line between the Gneevs 38 kV sub-station and the Knockearagh 110 kV sub-station to the north-east of Killarney. Condition No. 1 attached to the most recent permission granted to application 13/5717 for this wind farm references the previous permissions, too, and requires that development proceed in accordance with its EIS, which cites the aforementioned overhead lines. For the wind farm now to be served by the project in question breaches Condition No. 1.

The referrer draws attention to the effect of Article 9(1)(a)(i) of the Regulations, which is that Section 5 declarations cannot alter the scope of planning permissions.

6.1.2. **Relevant key planning principles**

In the light of the definition of “development” and the subsidiary definition of “works” in Sections 3(1) and 2(1) of the Act, the project in question is development.

In the light of the definition of “statutory undertaker” in Section 2(1) of the Act, the developer of the project in question was either ESB networks or a wind farm developer or its agent working under the supervision of ESB Networks. Either way this definition of “statutory undertaker” would apply.

The provisions of Article 9(1)(a) are reviewed, item by item:

¹ To avoid confusion, this summary is of the Board’s ultimate decision based on a revised inspector’s report. The questioner cites the inspector’s original report and so, as this report was superseded, it is not relevant.

- In relation to (i), which refers to the contravention of a permission granted under the Act, not only Condition No.1, but Condition No. 2 attached to the permission granted to application 13/5717 for the Gneeves Wind Farm is cited: This condition explicitly refers to “the measures set out in the EIS”. As discussed above, the project in question is a departure from the permitted means of connecting the wind farm to the grid and so it would contravene these conditions.
- In relation to (ii), which refers to the provision of or widening of a means of access, this item is not relevant.
- In relation to (iii), which refers to road safety, provided best practice construction methodologies were pursued, no issue arises under this item.
- In relation to (iv), which refers to front extensions, this item is not relevant.
- In relation to (v), which refers to works under a public road other than those involving the provision of services, this item is not relevant.
- In relation to (vi), which refers to interference with the character of landscapes and/or views identified for protection in a development plan, this item is not relevant, as the project in question is underground.
- In relation to (vii), which refers to objects of archaeological, geological, historical, scientific or ecological interest identified for protection in a development plan, this item is not relevant.
- In relation to (viiA), which refers to archaeology included in the Record of Monuments and Places, this item is not relevant.
- In relation to (viiB), which refers to the need for appropriate assessment, two European sites are identified, i.e. Blackwater River (Cork/Waterford) SAC (002170) and Stack’s to Mullaghareik Mountains, West Limerick Hills and Mount Eagle SPA (004161). The project in question traverses and is proximate to these sites and so it is likely to have had a significant effect on their integrity.
- In relation to (viiC), which refers to adverse impact upon natural heritage areas, this item is not relevant.

- The remaining items (viii) – (xii) are not commented upon.²

The provisions of Article 9(1)(b) are reviewed to the effect that they are not relevant as they relate to Special Amenity Areas.

The provisions of Article 9(1)(c) are reviewed to the effect that they are relevant as they relate to Part 10 of the Regulations, entitled Environmental Impact Assessment. As discussed above in relation to referral PL04.RL3531, the need exists to include grid connections in the EIA of wind farms.

The referrer concludes that under Section 4(4) of the Act, the project in question should have been subject to EIA and AA. Sections 172(1) and 177U(9) of the Act similarly require such assessments. These have not been undertaken. Furthermore, the project in question entails the contravention of conditions attached to the permission granted to application 13/5717. Thus, in reverse order, under Article 9(1)(a)(i), (viiB), and 9(1)(c), the project's exempted development status is de-exempted.

6.2. Planning Authority Response

None

6.3. Owner/ occupier's response

None

6.4. Further Responses

None

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 3(1): Development

² These items are not relevant.

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.

Section 2(1): Interpretation

“statutory undertaker” means a person, for the time being, authorised by or under any enactment or instrument under an enactment to—

(a) construct or operate a railway, canal, inland navigation, dock, harbour or airport,

(b) provide, or carry out works for the provision of, gas, electricity or telecommunications services, or

(c) provide services connected with, or carry out works for the purposes of the carrying on of the activities of, any public undertaking;

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...

Section 4(1): Exempted development

The following shall be exempted developments for the purposes of this Act –

(2) (a) The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that—

(i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or...

(3) A reference in this Act to exempted development shall be construed as a reference to development which is—

(a) any of the developments specified in subsection (1), or

(b) development which, having regard to any regulations under subsection (2), is exempted development for the purposes of this Act.

(4) Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

(4A) Notwithstanding subsection (4), the Minister may make regulations prescribing development or any class of development that is —

(a) authorised, or required to be authorised by or under any statute (other than this Act) whether by means of a licence, consent, approval or otherwise, and

(b) as respects which an environmental impact assessment or an appropriate assessment is required,

to be exempted development.

Section 5: Declaration and referral on development and exempted development

(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter...

(4) Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

Section 138 Board may dismiss appeals or referrals if vexatious, etc.

(1) The Board shall have an absolute discretion to dismiss an appeal or referral—

(a) where, having considered the grounds of appeal or referral or any other matter to which, by virtue of this Act, the Board may have regard in dealing with or determining the appeal or referral, the Board is of the opinion that the appeal or referral —

(i) is vexatious, frivolous or without substance or foundation, or

(ii) is made with the sole intention of delaying the development or the intention of securing the payment of money, gifts, consideration or other inducement by any person,

or

(b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to—

(i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or

(ii) any previous permission which in its opinion is relevant.

(2) A decision made under this section shall state the main reasons and considerations on which the decision is based.

(3) The Board may, in its absolute discretion, hold an oral hearing under section 134 to determine whether an appeal or referral is made with an intention referred to in subsection (1)(a)(ii).

Section 172(1) Requirement for environmental impact statement

(1) An environmental impact assessment shall be carried out by the planning authority or the Board, as the case may be, in respect of an application for consent for proposed development where either —

(a) the proposed development would be of a class specified in —

(i) Part 1 of Schedule 5 of the Planning and Development Regulations 2001, and either —

(I) such development would equal or exceed, as the case may be, any relevant quantity, area or other limit specified in that Part, or

(II) no quantity, area or other limit is specified in that Part in respect of the development concerned,

or

(ii) Part 2 (other than subparagraph (a) of paragraph 2) of Schedule 5 of the Planning and Development Regulations 2001 and either —

(I) such development would equal or exceed, as the case may be, any relevant quantity, area or other limit specified in that Part, or

(II) no quantity, area or other limit is specified in that Part in respect of the development concerned,

or

(b) (i) the proposed development would be of a class specified in Part 2 of Schedule 5 of the Planning and Development Regulations 2001 but does not equal or exceed, as the case may be, the relevant quantity, area or other limit specified in that Part, and

(ii) it is concluded, determined or decided, as the case may be, —

(I) by a planning authority, in exercise of the powers conferred on it by this Act or the Planning and Development Regulations 2001 (S.I. No. 600 of 2001),

(II) by the Board, in exercise of the powers conferred on it by this Act or those regulations,

(III) by a local authority in exercise of the powers conferred on it by regulation 120 of those regulations,

(IV) by a State authority, in exercise of the powers conferred on it by regulation 123A of those regulations,

(V) in accordance with section 13A of the Foreshore Act, by the appropriate Minister (within the meaning of that Act), or

(VI) by the Minister for Communications, Climate Action and Environment, in exercise of the powers conferred on him or her by section 8A of the Minerals Development Act 1940,

that the proposed development is likely to have a significant effect on the environment.

Section 177U Screening for appropriate assessment

(9) In deciding upon a declaration or a referral under section 5 of this Act a planning authority or the Board, as the case may be, shall where appropriate, conduct a screening for appropriate assessment in accordance with the provisions of this section.

7.2. Planning and Development Regulations, 2001

Article 6(1): Exempted Development

Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided

that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

<i>Column 1 Description of Development</i>	<i>Column 2 Conditions and Limitations</i>
<p><i>Development by statutory undertakers</i></p> <p><i>Class 26</i></p> <p><i>The carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking.</i></p>	

Article 9(1): Restrictions on exemption

Development to which article 6 relates shall not be exempted development for the purposes of the Act –

(a) if the carrying out of such development would –

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,

(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,

(c) if it is development to which Part 10 applies, unless the development is required by or under any statutory provision (other than the Act or these Regulations) to comply with procedures for the purpose of giving effect to the Council Directive,

7.3. Other

None

8.0 Assessment

8.1. The question asked by the referrer states the following:

Whether the provision of an underground electricity cable, grid connections, and associated works from the Ballynahulla 220 kV sub-station to Gneeves 38 kV sub-station (Gneeves Wind Farm in County Cork), along the Local Tureencahill to Rathmore Road (L7057), joining the R582, and along the Regional Road to a point crossing the Awnaskirtaun River into County Cork (a tributary of the Blackwater River) in the townland of Shinnagh, is or is not development, and is or is not exempted development?

8.2. The referrer's submission includes maps of the route of the underground electricity cable between Ballynahulla 220 kV sub-station and the bridge over the Awnaskirtaun River, which forms the County boundary between Kerry and Cork. The Gneeves Wind Farm and accompanying 38 kV sub-station is identified as lying to the south-east at a considerable remove from the County boundary, i.e. to the south-west of Millstreet. No indication is given of the route that the underground electricity cable may follow within County Cork and no reference is made to any parallel request for a Section 5 declaration from Cork County Council upon such a cable.

8.3. The submission from the referrer, therefore, does not illustrate the entire route of the underground electricity cable and yet he states that the underground electricity cable in question does run between Ballynahulla 220 kV sub-station and the Gneeves Wind farm.

8.4. Under the parallel referral from the Planning Authority (ABP-301086-21), the documentation forwarded to the Board includes a submission from the operator of the Gneeves Wind Farm, Brookfield Renewable Ireland Ltd, in which it states that its wind farm is connected via an on site 38 kV sub-station to the Rathmore 38 kV sub-station and so it is not connected to the Ballynahulla 220 kV sub-station as the referrer states. The operator draws attention to the overhead line that functions in this respect and which was granted permission under 03/6549 and PL04.206497.

8.5. The referrer draws attention to a later permission for the extension of the Gneeves Wind Farm (13/5717). The EIS submitted as part of this application referred to a grid connection by means of an overhead line between the on-site 38 kV sub-station and the Knockearagh 110 kV sub-station to the north-east of Killarney. Condition No. 2

attached to the permission refers explicitly to the measures set out in this EIS. The scope of “measures” is unqualified, although within the context of the entire Condition this may be a reference to mitigation measures only. From the information before me, I am unclear as to whether this permission has been implemented or not.

- 8.6. To return to the disagreement between the referrer and the operator over the Gneevies Wind Farm grid connection, under the parallel referral (ABP-301086-21), the Board circulated the operator’s letter dated 7th May 2021 to interested parties, including the referrer for comment. While the referrer responded, he did not take the opportunity to provide any supporting evidence for his position.
- 8.7. In the light of the foregoing paragraphs, the referrer has not established the full extent of the project and he has not demonstrated his assertion as to its purpose. The question that he asks refers to only part of the project and yet is, without justification, definitive as to its purpose. This question is not therefore internally consistent, and the purpose stated by it is contradicted by the submission of Brookfield Renewable Ireland Ltd under the parallel referral (ABP-301086-21). Accordingly, I am not in a position to answer the question.
- 8.8. Section 138 of the Act states grounds upon which the Board has an absolute discretion to dismiss referrals. Insofar as the referrer has failed to establish the full extent of the project and demonstrate his assertion as to its purpose, I consider that Section 138(1)(b) is of relevance. This states the following ground of dismissal:

Where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to –

(i) the nature of the appeal (including any question which in the Board’s opinion is raised by the appeal or referral),

- 8.9. Given the unanswered questions prompted by the question asked by the referrer as to the extent of the project and its purpose, I conclude that Section 138(1)(b)(i) is applicable and so the referral of the Planning Authority should be dismissed. Consequently, any assessment of development, exempted development, and de-exemption does not arise.

9.0 Recommendation

That this referral be dismissed.

10.0 Reasons and considerations

Having regard to Section 138(1)(b)(i) of the Planning and Development Act 2000, as amended, the information submitted by the referrer, and the information submitted by the operator of the Gneeves Wind Farm under the parallel referral ABP-310086-21, the Board considers that the nature of the referral is such that questions relating to the extent and purpose of the project in question have either not been addressed or have been addressed but not justified by the referrer. In these circumstances, the Board concludes that the referral should not be further considered and so it is hereby dismissed.

Hugh D. Morrison
Planning Inspector

20th January 2022