



An
Bord
Pleanála

Inspector's Report ABP-317239-23

Question

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 Ticknevin, Carbury, Co. Kildare is or is not development and is or is not exempted development.

Location

Ticknevin, Carbury, Co. Kildare (part of the development is also in Co. Offaly (Ballykilleen, Shean, Kilcumber, Cloncant, Cushaling and Rathmore, Edenderry, Co. Offaly and Ballina, Geashill, Co. Offaly)).

Declaration

Planning Authority

Kildare County Council

Planning Authority Reg. Ref.

ED/00849

Applicant for Declaration

Cloncant Renewable Energy Limited

Planning Authority Decision

Is not exempted development

Referral**Referred by**

Cloncant Renewable Energy Limited

Owner/ Occupier

Applicant is the leasee

Observers

Department of Defence

Date of Site Inspection21st July 2023**Inspector**

Dolores McCague

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1.0 Introduction

- 1.1.1. The Board previously considered this referral, under file reference number ABP-309940-21, decision date 8th October 2021; and the decision was subject to judicial review which resulted in the file being remitted.
- 1.1.2. This is one of two referrals before the Board in respect of a single development which was permitted in the counties of Kildare and Offaly under the following registration numbers:

Kildare PA Reg Ref ED00849, (1 turbine).

Offaly PA Reg Ref DEC21/6, (8 turbines).
- 1.1.3. The subject referral is in respect of the Kildare portion of the development. A referral for the Offaly portion is currently before the Board under reference 317245.

2.0 The Question

- 2.1.1. The question posed to the planning authority is ‘whether the increase in the Megawatt (MW) output at a permitted wind farm, without increasing the size and scale of any of the works, layout or plans at Ticknevin, Carbury, Co Kildare is or is not development and is or is not exempted development.
- 2.1.2. The planning authority’s determination on the question is that it is development and is not exempted development.
- 2.1.3. The planner’s report includes:
- 2.1.4. Alterations of a minor nature to a permission may be permissible if they are generally in accordance with the permission granted or if they are so minor in nature as to not have any implications outside the site. The planning authority considers that the size of the increase in output (20%) is significant and could have potential downstream impacts for the grid, including nature and type of grid connection and grid receiving capacity and may otherwise have attracted comment from third party interests. As such the proposed increase in output is a material departure from that granted and is development and is not exempted development.

The report refers to the seventh schedule of the Planning and Development Act and to Section 37A(2)(c) whereby the Board must determine whether the development

would have a significant effect on the area of more than one planning authority. In this instance the development is within jurisdictions of both Kildare and Offaly. Should the Board determine that an application is Strategic Infrastructure Development the procedures outlined in Section 37C-37H must be followed. This is not discretionary. To issue a Section 5 declaration in this instance would subvert mandatory requirements of the Act and is a material departure from the permission granted.

3.0 Legal and Policy Context Update

- 3.1.1. Since 2021, when 310107-21 was before the Board, the current development plan has been adopted and there has been legislative change.

3.2. Development Plan

- 3.2.1. Kildare County Development Plan 2023 – 2029 is the operative plan. Relevant provisions include:

Chapter 7 Energy & Communications

It is the policy of the Council to:

EC P2 Promote renewable energy use generation and associated electricity grid infrastructure at appropriate locations within the built environment and open countryside to meet national objectives towards achieving a net zero carbon economy by 2050.

It is an objective of the Council to:

C O2 Adopt an informed and positive approach to renewable energy proposals, having regard to the proper planning and sustainable development of the area, including community, environmental and landscape impacts and impacts on protected or designated heritage areas / structures

It is an action of the Council to:

EC A3 Prepare and implement an overall Renewable Energy Strategy for the County in accordance with the current Climate Change Adaptation Strategy for County Kildare.

A Wind Energy Strategy forms part of this Development Plan and is presented in Appendix 2.

- 3.2.2. Appendix 2 – Map 12 Wind Energy Strategy Zones - the site is located in an area where windfarms are open for consideration.

3.3. **Planning and Development, Maritime and Valuation (Amend) Act 2022**

Effective from 16th December 2023.

- 3.3.1. This Act, amending the 2000 Planning and Development Act, includes:

Section 34 of the Principal Act is amended by the insertion of the following subsection after subsection (4):

(4A) Notwithstanding subsection (1), where a planning authority grants permission for a development on foot of an application accompanied by an opinion provided by the planning authority under section 32I(2) the permission shall include a condition in respect of any detail of the development that was not confirmed at the time of the application requiring:

- (a) the actual detail of the development to fall within specified options, parameters or a combination of options and parameters, and
- (b) the applicant to notify the planning authority in writing, by such date prior to the commencement of the development, or prior to the commencement of the part of the development to which the detail relates, as the Minister may prescribe, of the actual detail of the development.

The Fifth Schedule to the Principal Act is amended by the insertion of the following paragraphs after paragraph 34:

35. A condition under section 34(4A), 37G(7A), 182B(5E), 182D(5E) or 293(4A) requiring that any detail of a development that was not confirmed at the time of the application for permission fall within specified options, parameters or a combination of options and parameters.

36. A condition under section 34(4A), 37G(7A), 182B(5E), 182D(5E) or 293(4A) requiring the applicant to notify to a planning authority in writing, by such date prior to the commencement of the development, or prior to the commencement of the part of

the development to which the detail relates, as the Minister may prescribe, of the actual detail of a development that was not confirmed at the time of the application for permission.

3.4. Planning and Development Act (Amendment) (No 3) Regulations, 2023

Effective from 16th December 2023.

- 3.4.1. Introduces the concept of a flexibility meeting request, and an opinion on unconfirmed details.

4.0 The Referral

4.1. Referral Case

- 4.1.1. The referral was made by the applicants, who have copied the letter which they sent to Kildare County Council, in which they state:

Turbines of increased efficiency emerge to the market, sometimes of a larger dimension and sometimes with the dimension envelop, as is now the case with the permitted Cushaling turbines.

While there is no change required to the dimensions of the permitted turbines, or to the associated hardstands or infrastructure, there are now 6.6MW turbines available (complying with the permitted dimensions and tip height of up to 187m). The Cushaling wind farm can therefore be developed with an output of 59.4 MW and can be constructed and operated as described in the EIAr and the Planning Drawings, and in compliance with the conditions of the grant of planning issued by ABP (306748).

At the time of the application for planning, a turbine candidate of up to 5.5 MW was available and with 9 turbines the expected yield was 49.5 MW. There are now machines available up to 6.6 MW which would increase the output of the wind farm to 59.4 MW. It does not require an increase in the size or scale of the development and the permitted wind farm can be developed in accordance with the plans and particulars originally submitted and meet the conditions of the grant of planning.

The Environmental Impact Assessment considered the worst case scenario of the proposed development. The turbine dimensions and all the requirements in terms of the layout, and the dimensions of the hardstand areas and roads, all represented a worst-case dimension which can now accommodate a 6.6 MW machine of the same scale as previously assessed. The turbine dimensions will remain the same as permitted, while one of the interior components, the generator, will be changing in size.

They do not consider this change of machinery as development, as the environmental assessment considered a worst-case scenario, and the conditions of the grant of planning will be met.

They are therefore applying to Kildare County Council to determine if the increase in the output at the permitted wind farm would be considered development.

4.2. Planning Authority Response

- 4.2.1. The planning authority response to the Board's letter refers the Board to the planner's report and states that they have nothing further to add.

4.3. Other Responses

- 4.3.1. The Board wrote to all known parties, 27th May 2021, including those named as owner/occupiers in the documentation supplied to Offaly County Council on the companion file 317245, inviting submissions. A submission was received from Defence Forces Ireland.
- 4.3.2. Defence Forces Ireland, Air Corps Headquarters submitted an observation, 25th May 2021, which includes:

The Irish Air Corps use the EI-R16 and Military Operating Areas (MOAs) to conduct pilot training and to recover aircraft making approaches under instrument flight rules to Casement Aerodrome. Instrument approach procedures to Casement Aerodrome are primarily from the west through EI-416. The airspace is in use nearly every day of the year. This area is designated in accordance with Section 68 of the IAA Act for use by the Defence Forces and published in ENR 5-2 of AIP Ireland. Military aircraft in this airspace may not be flying in compliance with the rules of the air.

The Irish Air Corps oppose the proposed wind farm at Ticknevin, Carbury, Co Kildare for the following reasons:

It lies within an area where low flying training takes place and is regularly used for helicopter low level flight training. This will have to cease.

A portion of the proposed development lies on lands underlying military airspace EI-R16 and MOA 4 within the 20 nautical miles (NM) area of Casement Aerodrome, that is protected against tall structures. At its nearest, the wind farm boundary is 19.8 NM from Casement Aerodrome Reference Point.

The routes taken by Air Corps aircraft to multiple training areas in the MOA 4 and MOA 5 pass through the area of the proposed development. The proposed development will reduce aircraft navigability in the EI-R16 and MOA 4.

A tall structure does not have to penetrate restricted airspace to impact Air Corps flight operations. The ability of transiting aircraft to fly underneath the lower level of restricted airspace, so remaining clear of restricted airspace, is a standard method employed by Military Air Traffic Services to provide separation from Instrument Flight Rules traffic operating above. The proposed development while not penetrating the EI-R16 will effect transiting aircraft to remain clear and below restricted airspace.

4.4. Further Responses

- 4.4.1. The Board wrote to all known parties, 15th June 2023, following quashing of the decision, notifying them that the file had been reactivated and inviting submissions. Offaly County Council responded stating that they had no observation to make.
- 4.4.2. The Department of Defence responded, 3rd July 2023. Their response is stated in similar terms as the earlier observation by Air Corps Headquarters; also pointing out that the Minister for Defence is responsible for the regulation of military aviation, whereas the IAA is responsible for the safety regulation of civil aviation including aerodromes. Any Irish Air Corps (IAC) requirements are separate to Irish Aviation Authority (IAA) requirements.

4.5. Applicant Response

4.5.1. The applicants did not receive Board correspondence, dated 15th June 2023, giving notice of reactivation of the referral, which issued to their agents, Malachy Walsh and Partners, who were then no longer their agents, and the applicants did not therefore submit responses within the required period. The letter from their legal advisors, dated 11th August 2023, refers.

4.5.2. Notice were re-issued and a response was received from the applicants on the 4th September 2023. The response was circulated, allowing a period for submissions. Offaly County Council responded stating that they had no submission / observation to make.

4.5.3. The applicant response, through their agent, 4th September 2023, includes:

Reasons for the proposal:

4.5.4. Wind energy development is a dynamic area with ongoing technological advances. Turbines of increased efficiency consistently emerge to the market, sometimes of a larger dimension and sometimes within the same dimension parameters contained and assessed within a planning application.

4.5.5. While there is no change required to the dimensions of the permitted turbines, or to the associated hardstands or infrastructure, there are now 6.6 MW turbines available which comply with the permitted dimensions, including the tip height of up to 187m.

4.5.6. The permitted development can therefore now be developed in accordance with the plans and particulars and in compliance with conditions, with an increased output of 59.4MW. It can be constructed and operated as described in the EIAR, NIS and planning drawings.

4.5.7. Due to advancements in technology the internal generator has a capacity up to 6.6MW which would increase the output of the windfarm to 59.4 MW.

Whether the proposal is or is not development and is or is not exempted development.

Works

4.5.8. There will be no increase in the size and scale of any works, layout or plans at the permitted development. The 6.6 MW WTGs are the same size and scale as those

assessed in the permitted development. This was accepted by the Board in their original Section 5 determination, the quashed declaration.

Material Change of Use

- 4.5.9. Is there a change of use? Is it material? From case law – if the changes are such that they have an effect on the sort of matters which would properly be considered from a planning or environmental perspective, it might be said that there was a material change of use. They suggest that significant changes in vehicle use and in particular heavy vehicle use that might not otherwise be expected in the area, are one such example. Changes in the visual amenity or noise are others.
- 4.5.10. The proposed increase in MW output will not result in any increase in size or scale and would not have any effect on planning or environmental matters, such as noise, scale, traffic movement or other matters which would give rise to material planning or environmental considerations.

Permitted Development

- 4.5.11. The notices make no mention of 49.5 MW or any particular make or type of turbine. No specific condition limits the windfarm to 49.5 MW and / or the use of particular turbines.
- 4.5.12. Re. condition no. 1, in order for a matter to be ‘particular’ a matter must be specific and / or involve a clear commitment. Whilst detail regarding megawatt output is provided in the planning documentation, no clear commitment is provided which would have the effect of limiting the megawatt output to 49.5 MW.
- 4.5.13. Extracts from the EIAR positively demonstrate that there was an express absence of commitment and that the type of turbines had not been chosen. EIAR, Chapter 2, description of the proposed development: ‘There are a number of makes and models of turbines which are expected to be suitable for this site, however the final choice of the turbines that would be installed will be subject to a competitive tendering procedure’.
- 4.5.14. Section 2.4.4.1 of the EIAR (Turbine Model) states
‘The proposed turbine model will not be specified; however, the project has been designed using worst case models, including the noise and visual impact assessments. A tendering procedure will be undertaken for the supply of the

turbines. The turbine ultimately selected will be certified under the International Electrotechnical Commission IEC 61400-1 safety standards and designed to withstand the environmental conditions encountered on site.'

4.5.15. Section 15.4.2 of the EIAR (Turbine Model) states:

The exact turbine type will not be known until after the contract has been awarded under a competitive tender.

4.5.16. The only reference in the EIAR to specific turbines MW and or overall megawatts is in the context of identifying a worst-case scenario for the purposes of assessment of environmental impacts of noise and also in the context of considering emissions savings.

4.5.17. Section 3.6 of the EIAR states:

The proposed development will contribute approximately 49.5 MW of renewable energy to the grid.

4.5.18. Section 9.3.2.2 of the EIAR states:

If we assume an installed rated capacity of 5.5 MW each per turbine and a capacity factor of 30%, then the minimum estimated annual MWh electrical generation is $2 \times (5.5 \times 9 \times 365) \times (0.3) = 10,840.5$ MWh

4.5.19. Section 10.1 of the EIAR states:

Ultimately the most appropriate turbine model and operating modes will be selected in order to achieve the noise limits set down in the current DoEHLG Wind Energy Development Guidelines, 2006, or imposed by way of planning condition.

4.5.20. Section 10.3.2.1 of the EIAR states:

The maximum operating sound power level of the candidate turbine, namely the Siemens Gamesa 155, is 107.8dB(A).

4.5.21. Section 3.6 of the Inspector's report states:

The proposed windfarm will generate approx. 49.5MW of energy, indicating that in the context of the consideration of the planning applications, the reference to energy production was regarded in approximate terms.

Environmental Considerations

4.5.22. Noise – the Siemens Gamesa 155 5.5 MW was used in estimating maximum operating sound power levels (max 107.8dB(A)).

The Siemens Gamesa 155 6.6 MW is now used in the estimating maximum operating sound power levels (max 105 dB(A)). 2.8 dB(A) below the 5.5 MW WTG modelled and assessed in the EIAR.

CO2 savings will be increased.

Issues raised in the quashed declaration

4.5.23. These are matters which they consider to be outside the Board's consideration under S5(1):

The SID procedure does not affect whether the proposal is development and is not a relevant matter in determining the referral question.

Grid connection and grid capacity are not lawful considerations. In this respect, under its current Grid Connection Agreement with EirGrid, the applicant is limited to exporting 50MW from the wind farm; (EirGrid Enduring Connection Policy Stage 2, ECP-2.1).

4.5.24. The proposal is not development.

4.6. Further Responses

4.6.1. The applicant's response was circulated, 19th September 2023:

4.6.2. Offaly County Council responded stating that they had no submission / observation to make.

5.0 Statutory Provisions

5.1. Planning and Development Act, 2000, as amended

Section 2 Interpretation

(1) In this Act, except where the context otherwise requires—

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application

or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

Section 3 Development

(1) In this Act, except where the context otherwise requires, "development" means—

(a) the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land, or

(b) development within the meaning of Part XXI (in the Maritime Area).

Section 4 Exempted development.

(1) The following shall be exempted developments for the purposes of this Act—

(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;

(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 34 Permission for development.

(4A) Notwithstanding subsection (1), where a planning authority grants permission for a development on foot of an application accompanied by an opinion provided by the planning authority under section 32I(2) the permission shall include a condition in

respect of any detail of the development that was not confirmed at the time of the application requiring—

(a) the actual detail of the development to fall within specified options, parameters or a combination of options and parameters.

Prescribed classes of development requiring assessment.

Section 176.

(1) — The Minister shall, for the purpose of giving effect to the Environmental Impact Assessment Directive, make regulations—

(a) identifying development which may have significant effects on the environment, and

(b) specifying the manner in which the likelihood that such development would have significant effects on the environment is to be determined.

Seventh Schedule

Infrastructure Developments for the purposes of sections 37A and 37B
Energy Infrastructure

1.—Development comprising or for the purposes of any of the following:

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.

5.2. **Planning and Development Regulations, 2001, as amended**

Article 6 (3) Subject to article 9, in areas other than a city, a town or an area specified in section 19(1)(b) of the Act or the excluded areas as defined in section 9 of the Local Government (Reorganisation) Act, 1985 (No. 7 of 1985), development of a class specified in column 1 of Part 3 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 3 opposite the mention of that class in the said column 1.

Article 93. The prescribed classes of development for the purposes of section 176 of the Act are set out in Schedule 5.

Schedule 2 (Article 6)

Part 3 Article 6 Exempted Development — Rural

Class 18 Renewable Technologies

(b) The construction, erection or placing within an agricultural holding of a wind turbine.

Conditions 1-10:

2. The total height of the turbine shall not exceed 20 metres.
3. The rotor diameter shall not exceed 8 metres.

Schedule 5 (development requiring Environmental Impact Assessment (EIA))

Part 2

3. (i) Installations for the harnessing of wind power for energy production (wind farms) with more than 5 turbines or having a total output greater than 5 megawatts

13. Changes, extensions, development and testing

(a) Any change or extension of development already authorised, executed or in the process of being executed (not being a change or extension referred to in Part 1) which would:-

- (i) result in the development being of a class listed in Part 1 or paragraphs 1 to 12 of Part 2 of this Schedule, and
- (ii) result in an increase in size greater than – - 25 per cent, or - an amount equal to 50 per cent of the appropriate threshold, whichever is the greater.

Schedule 7 Criteria for Determining Whether Development Listed In Part 2 of Schedule 5 Should Be Subject to An Environmental Impact Assessment

5.3. Other

- 5.3.1. I have examined the referrals database and have found nothing similar to the subject question/referral.

5.4. Quashed Declaration

- 5.4.1. The Board conceded the case in relation to the previous decision and no details other than the court order are available on this file.
- 5.4.2. The applicant refers to matters which they consider to be outside the Board's consideration:
- SID procedure.
 - Grid connection or grid capacity. The 50MW maximum export capacity was allocated to the applicant in accordance with the terms of EirGrid Enduring Connection Policy Stage 2.

6.0 Assessment

6.1. Is or is not development and is or is not exempted development?

- 6.1.1. A number of issues arise in relation to determining whether the proposal is development and is or is not exempted development.
- 6.1.2. There is no provision for exemption within any of the classes set out in Part 3 of Schedule 2, of the Planning and Development Regulations, 2001, as amended, for the alteration referred to in the question.

6.2. Permitted Development

- 6.2.1. Since the referral relates to a permitted development under construction, the terms and conditions of the permitted development is relevant to the Board's consideration of the subject question.
- 6.2.2. The subject development was permitted under ref ABP-306748-20
- 6.2.3. The permitted development is described in the public notices which accompanied the application as follows:

Cloncant Renewable Energy Ltd. intend to apply for permission to Kildare County Council for a 10 year planning permission with a 30 year operational life for development of a site area of 3.23 hectares in the townland of Ticknevin, Carbury Co. Kildare. The development will consist of up to 1 (one) wind turbine with a tip height of up to 187 metres and all associated foundations and hardstanding areas; 20 metres of new windfarm road, and all associated underground electrical and communications cabling.

This single turbine application forms part of a larger wind farm development located within County Offaly and Kildare with a separate planning application being submitted to Offaly County Council concurrently. The overall development will consist of up to 9 turbines (8 in Offaly and 1 in Kildare) with a tip height of up to 187 metres and all associated foundations and hardstanding areas; approximately 4,750 km of new internal access roads, associated drainage and turning areas; upgrade of approximately 3.500 metres of the existing L50062 public road including upgrade of the existing bridge; a new bridge crossing of the Figile River to provide access between turbine 3 and turbine 4; a c.2.950 m recreation trail and all associated development to include gravel pathways, a footbridge across the Figile River, a parking area, signage, information boards and outdoor fitness equipment; an off-site¹ electrical substation and a battery energy storage facility²; all associated underground electrical and communications cabling to connect the turbines to the substation including approximately 1,550m along the R401 regional road; a spoil storage area; a permanent meteorological mast up to 110.5 metres high; 2 no. temporary construction compounds; 2 no. temporary blade adapter set down areas within the windfarm site and at the junction of the R402 and R401 at Rathmore, Edenderry, Co Offaly; turbine delivery route works including widening of the junction of the R420 and R402 at Ballina, Geashill, Co Offaly and all associated site development works.

The documentation supplied with the application included an 'Information Booklet', prepared for the public consultation engaged in prior to submitting the application,

¹ This is within the red line boundary.

² Drawings 18977-MWP-00-00-DR-C-5409; 18977-MWP-00-00-DR-C-5410; 18977-MWP-00-00-DR-C-5411; refer.

which includes that, what was proposed was a windfarm with 9 turbines with a potential output of up to 49.5mw of electricity.

The documentation supplied with the application, included little detail of the nacelle, eg. no internal drawings.

The documentation supplied with the application, included a layout of the proposed Battery Energy Storage System and electrical substation (in County Offaly). The subject turbine, T9, is in Co Kildare.

The EIAR under the heading alternatives (sec. 3.6 of main report), details the evolution of the project and, regarding the selected alternative, that the proposed development will contribute approximately 49.5MW of renewable energy to the grid.

Other than condition no. 1, no limit on output is stated in the Board's decision. There is an implied limit based on the applicant's proposals.

6.3. Works

6.4. Maritime and Valuation (Amend.) Act

- 6.4.1. Amendments to the Planning and Development Act introduced by the Planning and Development, Maritime and Valuation (Amend.) Act 2022 are intended to provide for a degree of flexibility which certain applications require. A formal pre-planning process for facilitating such flexibility is set out, as is provision for the imposition of conditions which would establish the parameters within which such flexibility is to operate. Arising from the amendments to the Planning and Development Act, a development such as the subject development, could be enabled to respond to technological change occurring prior to commencement of development. Ad hoc requests for change to the terms of a permission are not enabled.

6.5. Strategic Infrastructure

- 6.5.1. The scale of the output from the development, taking account of the currently proposed 6.6 MW rating, would be 6.6 MW for that portion within County Kildare and 59.4 MW for the entire windfarm. In the planning permissions granted by the Board, on appeal, the total combined output was 49.5 MW.

- 6.5.2. A windfarm development with an output in excess of 50 MW would fall under Section 37A of the Act, being 'strategic infrastructure', and different processes of assessment would apply.
- 6.5.3. I am satisfied that in itself the change from a development involving the standard planning application process to one involving the strategic infrastructure process is not a material issue. The introduction of the SID's legislation was intended to 'make provision for the expeditious determination of such applications', (Oireachtas.ie).
- 6.5.4. It is however worth noting that in the case of a SID permission the Board would have the power (s146B) to alter the terms of an approved development even where proposed changes were material. No similar power is explicitly given to the Board in post decision alterations on normal planning applications / appeals permitted prior to the 2022 Act (s146A refers to amendments of permissions, etc. of a clerical or technical nature).
- 6.5.5. Ms Justice Costello in her judgement of 4th February 2016, in the case 'South-West Regional Shopping Centre Promotion Association Limited and Stapleystown Company v An Bord Pleanála' ([2016] IEHC 84), stated that in her opinion 'the Oireachtas was entitled to take notice of and have regard to the very widespread practice of amending planning permissions... when it enacted the provisions of ss 146A-146D of the 2000 Act. In the decades preceding this enactment there had never been a suggestion that the many amending grants of planning permission by planning authorities and the Board were all ultra vires and void', (from paragraph 53); '...had the Oireachtas been of the view that (a) there was no power under the existing planning code to amend planning permissions by applying for, and obtaining, grants of planning permission which revised or modified extant grants of planning permission, and (b) despite the absence of any such power, there was a long standing common practice to grant such permissions, and the Oireachtas wished to ensure that there was to be a very limited power of amendment confined solely to the provisions of ss 146A-146D of the 2000 Act, it would have made it clear that the power to amend planning permissions was confined solely to the provisions it was enacting,'(from paragraph 54).

- 6.5.6. The Board will note that the South-West Regional Shopping Centre case related to the granting of permissions rather than consideration of a question regarding exempted development.
- 6.5.7. I place no weight on the provisions in the (2006 Act) SIDS legislation, other than to point out that the path to altering a permitted development is clearer under those provisions.
- 6.5.8. I also note that the provisions in the Planning and Development, Maritime and Valuation (Amendment) Act 2022 are clearer in setting out a path for providing 'Design Flexibility'.
- 6.5.9. In the present case neither of these legislative provisions apply.
- 6.5.10. The question as presented refers to increasing electrical output. That does not necessarily imply works. An increase in output could arise from a change in wind patterns from those predicted by the anemometers prior to development. That would not involve works. In this case however it would arise from a change of turbine. In my opinion that means that it involves works.
- 6.5.11. These works may or may not constitute a 'material' alteration to the permitted development. As presented, the alteration would not involve any change to the appearance of the structure; and it is stated that they would not have any effect on planning or environmental matters, such as noise, scale, traffic movement or other matters which would give rise to material planning or environmental considerations.
- 6.5.12. I note that references to the turbine in the application details are limited.
- 6.5.13. The proposed alteration would accord with 4(1)(h) of the Act: comprising development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.
- 6.5.14. Works which would require AA or EIA are not exempted development.
- 6.6. Screening for Appropriate Assessment
- 6.6.1. Screening for Appropriate Assessment and Appropriate Assessment (Stage 2) was carried out for the permitted development (306924 Offaly; 306748 Kildare). The

assessment addressed the risk to water quality on aquatic habitats and species in the River Barrow and River Nore SAC (site code 002162). The assessment considered the mitigation measures set out in section 7 of the NIS, concluding that subject to the mitigation measures the proposed development would not impact on the prevailing conditions.

- 6.6.2. Cumulative and in-combination effects - Cumulative and in-combination effects were considered in relation to existing and permitted windfarms within the wider area as well as other listed projects including peat extraction, the Eastern and Midlands Region Water Supply project and climate change, concluding that, with mitigation, in terms of protection of water quality, no significant cumulative impacts would arise, and that no significant residual effects following implementation of the recommended mitigation measures were identified.
- 6.6.3. No significant new impacts are likely to arise as a result of the proposed alterations.
- 6.6.4. It is reasonable to conclude, on the basis of the details provided on the referral file, which I consider adequate in order to issue a screening determination, that the proposed development, individually or in combination with other plans or projects would not be likely to have a significant effect on the River Barrow and River Nore SAC (site code 002162), or any other European site, in view of the site's conservation objectives.

6.7. Screening for Environmental Impact Assessment (EIA)

- 6.7.1. The permitted development was subject to EIA. The EIA included consideration of the output.
- 6.7.2. The proposed development would involve an increase in output of c 20%. In the case of the development permitted in County Kildare (306748) the increase in output would amount to 1.1MW. Per item 13, of part 2, of schedule 5, of the Planning and Development Regulations, 2001, under (a) (ii): although it would not result in an increase in size greater than an amount equal to 50 per cent of the appropriate threshold, it would not result in an increase in size greater than 25 per cent of the development already authorised. EIA is not required for the change.

- 6.7.3. The development is sub-threshold being development which falls within a category requiring EIA but below the threshold. Screening for Environmental Impact Assessment is therefore required.
- 6.7.4. The wind farm development proposal in Counties Offaly and Kildare was subject to Environmental Impact Assessment and was granted permission by the Board under Appeal Refs. 306924 (County Offaly) and 306748 (County Kildare).
- 6.7.5. For the purposes of Screening for Environmental Impact Assessment, I have had regard to Schedule 7 of the Planning and Development Regulations 2001, as amended. This refers to the criteria for determining whether a development would or would not be likely to have significant effects on the environment. My considerations on the alterations relative to these criteria are as follows:

1 Characteristics of the Proposed Development

The size and design of the proposed development – the size and design are not significant.

The cumulation with other proposed development - relevant projects in the vicinity, which could have a cumulative effect with the proposed alteration were considered in the EIA for the wind farm development and the Board permitted that proposal, noting the acceptability of the mitigation measures proposed and the residual effects.

The nature of any associated demolition works - there are no demolition works associated with the alterations.

The use of natural resources - there are no known natural resources being used in the development by comparison with the permitted development.

The production of waste - the alterations would not produce any significant waste by comparison with the permitted development.

Pollution and nuisances – there are no known significant pollution or nuisance outcomes likely to arise from the alterations.

The risk of accidents, or risk to human health – fire risks are associated with battery storage. It is unlikely that any increased risk would be such as to require that the development be subject to EIA.

2 Location of Proposed Development

The existing and approved land use,

The relative abundance, availability, quality and regenerative capacity of natural resources in the area,

The absorption capacity of the natural environment, paying particular attention to the following areas:

- (i) wetlands, riparian areas, river mouths,
- (ii) coastal zones and the marine environment,
- (iii) mountain and forest areas,
- (iv) nature reserves and parks,
- (v) areas classified or protected under legislation, including Natura 2000 areas designated pursuant to the Habitats Directive and the Birds Directive and,
- (vi) areas in which the environmental quality standards laid down in legislation of the EU have already been exceeded,
- (vii) densely populated areas,
- (viii) landscapes of historical, cultural or archaeological significance.

The location of the permitted development and the proposed alterations the subject to the referral is a rural area where there is a dispersed settlement pattern and a low density of population, and agricultural land of low productivity; there are no notable designations, or geographic features other than cut-away bog. The location is not sensitive such as to indicate the need for the alterations to be subject to EIA. In this regard it should be noted that the objection from the Department of Defence / Air Corps Headquarters is to the windfarm rather than to the alterations,

3 Types and characteristics of potential impacts

The likely significant effects on the environment in relation to criteria set out under the foregoing paragraphs taking into account:

- (a) The magnitude and spatial extent of the impact,
- (b) the nature of the impact,

- (b) the transboundary nature of the impact,
- (d) the intensity and complexity of the impact,
- (e) the probability of the impact,
- (f) the expected onset, duration, frequency and reversibility of the impact,
- (g) the cumulation of the impact with the impact of other existing and/or development the subject of a consent for proposed development for the purposes of section 172(1A)(b) of the Act and/or development the subject of any development consent for the purposes of the Environmental Impact Assessment Directive by or under any other enactment, and
- (h) the possibility of effectively reducing the impact.

there are no known complexities or significant environmental impacts likely to arise from the alterations,

any impact is improbable and of negligible significance,

there is negligible cumulative impact,

the proposed alterations could be reversed by reverting to turbines as permitted,

the alterations are limited to the locations of the permitted nacelles,

the nature of the terrain, and the low density of population, means that few people if any will be aware of the alterations and no person is likely to be affected by them,

the proposed alterations have no transfrontier effects.

Having regard to the above Screening for EIA, if it is determined that the development may be viewed as an alteration extending the existing wind farm by reference to Class 13, Part 2 of Schedule 5 of the Planning and Development Regulations, it can reasonably be concluded that the alterations would represent only a very minor extension and it would not result in any likely significant effects on the environment.

As this Screening concludes that the proposed grid connection would not have any likely significant effects on the environment, it may reasonably be concluded that likely significant in-combination and/or cumulative effects with the permitted Cloncant Renewable Energy Wind Farm development cannot arise. Where the

Board has previously determined that the mitigation measures proposed and the residual effects from the Cloncant Renewable Energy Wind Farm development itself are acceptable, then it is reasonable to conclude that the overall project is not likely to have any significant impacts on the environment.

6.8. Are the works material alterations?

6.8.1. In my opinion the works as presented in the question are not material alterations.

6.8.2. The Board may wish to clarify that no other works are involved in the increase in output, such as consequent changes to the proposed '*off-site electrical substation and battery energy storage facility*', from that which is part of the permitted development.

6.9. **Use**

6.9.1. An increase in output of 20%, could be significant, but the question being 'is it material' requires consideration of the impacts likely to arise. Five principles are laid out in the 2010 High Court judgement of Mr Justice Charleton in 'Weston Ltd v An Bord Pleanála' 2009 No 251 JR, with regard to whether or not a change of use is material.

The first principle referred to is whether or not a different product is being produced; the answer here would be 'no'.

The second principle referred to is whether or not there is a change in the method of production; the answer here would be 'no'.

The third principle referred to is the scale of operations, it is stated that some reasonable, but not extensive, level of variation should be seen as integral to any business. The Board must determine whether or not an increase of this scale is integral or if it goes beyond that. This is the main issue which the Board must consider. On balance I consider that, in this case, the increase in scale of 20% is a limited alteration to the permitted use, not a material increase.

The fourth principle referred to is the effects in planning or environmental terms of such intensification; from the information provided there will be virtually no effects in planning or environmental terms.

The fifth principle referred to is that the planning permission must be construed objectively as to what it permits; the terms and conditions of the permission are not contested.

6.9.2. Taking account of the foregoing I consider that the proposal does not involve a material change of use.

6.9.3. Therefore I consider that both the works and the alteration to the already authorised use are development and are exempted development.

7.0 Recommendation

7.1. 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 output from a permitted wind farm, involving the increase in megawatt (MW) output from 49.5 MW to 59.4 MW, is or is not development or is or is not exempted development:

AND WHEREAS Cloncant Renewable Energy Limited requested a declaration on this question from Kildare County Council on the 19th day of March, and the Council issued a declaration on the 13th day of April, 2021 stating that the matter was development and was not exempted development:

AND WHEREAS Cloncant Renewable Energy Limited referred this declaration for review to An Bord Pleanála on the 28th day of April, 2021:

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,

- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4 of the Planning and Development Act, 2000, as amended,
- (d) Section 176 of the Planning and Development Act, 2000, as amended,
- (e) article 6(3) of the Planning and Development Regulations, 2001, as amended,
- (f) article 93 of the Planning and Development Regulations, 2001, as amended,
- (g) Parts 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (h) Schedule 5 to the Planning and Development Regulations, 2001, as amended,
- (i) Schedule 7 to the Planning and Development Regulations, 2001, as amended,
- (j) the planning history of the site,
- (k) the pattern of development in the area.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The proposed alteration involves both works and use.
- (b) The proposed change to the approved development is not material.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 of the 2000 Act, hereby decides that the that the proposed change is development and is exempted development.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has

influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

Planning Inspector

25th November 2024