



An
Bord
Pleanála

Inspector's Report ABP-317245-23

Question

Whether the increase in megawatt (MW) output from 49.5MW to 59.4MW at a permitted wind farm development, using a new (6.6MS) 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 townlands, Edenderry, Co. Offaly (and also Co. Kildare: Ticknevin, Carbury).

Declaration

Planning Authority

Offaly County Council.

Planning Authority Reg. Ref.

DEC21/6

Applicant for Declaration

Cloncant Renewable Energy Limited.

Planning Authority Decision

No declaration.

Referral

Referred by	Offaly County Council
Owner/ Occupier	Cloncant Renewable Energy Limited (private agreements in place with all landowners), as listed: P Dolan M Behan B Farrell E Leonard D Behan A Schnittger J Wyre & Sister M Farrell I Farrell F Jacques McGuinness (Jnr) F Eugene McGuinness (Snr) T Grady J Bosco Guinan S Evans J O'Brien Offaly County Council
Observer	None
Date of Site Inspection	21 st 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 Offaly portion of the development. A referral for the portion in Kildare is currently before the Board under reference 317239.

2.0 The Question

- 2.1.1. The question in the referral submitted by the planning authority is whether the increase in megawatt (MW) output from 49.5MW to 59.4MW at a permitted wind farm development, using a new (6.6MS) machine at Ballykileen, Shean, Kilcumber, Cloncant and Cushaling, Edenderry, Co. Offaly is or is not development and is or is not exempted development.
- 2.1.2. The planning authority did not make a determination on the question.

3.0 Legal and Policy Context Update

- 3.1.1. Since 2021, when 309940-21 was before the Board, the current development plan has been adopted and there has been legislative change.

3.2. Development Plan

- 3.2.1. Offaly County Development Plan 2021-2027 is the operative plan. Relevant provisions include:

Wind Energy Strategy A County Wind Energy Strategy forms part of this Development Plan. The Strategy constitutes a plan led approach to wind energy development in County Offaly and sets out areas 'open for consideration' for wind

energy developments and considerations for the evaluation of wind energy planning applications. Table 3.1 demonstrates County Offaly's contribution to realising overall national targets (under the Climate Action Plan 2019) on renewable energy and climate change mitigation, and in particular wind energy production and the potential wind energy resource during the plan period.

Table 3.1

Wind Energy Target by end of Plan Period: 466.3 MW.

CAEP-38 It is Council policy that in assessing planning applications for wind farms, the Council shall: (a) have regard to the provisions of the Wind Energy Development Guidelines 2006, the Interim Guidelines for Planning Authorities on Statutory Plans, Renewable Energy and Climate Change 2017 and the draft revised Wind Energy Guidelines 2019 which are expected to be finalised in the near future; (b) have regard to 'Areas Open for Consideration for Wind Energy Developments' in the Wind Energy Strategy Designations Map from the County Wind Energy Strategy; (c) the impact of the proposed wind farm development on proposed Wilderness Corridors as detailed in Objective BLO-28 of Chapter 4; (d) have regard to Development Management Standard 109 on wind farms contained in Chapter 13 of the Plan; and (e) have regard to existing and future international, European, national and regional policy, directives and legislation.

CAEP-39 It is Council policy to consider the repowering and renewal of existing windfarm development on a case by case basis where the proposal does not result in a net increase in the number of turbines and it is demonstrated that there is no adverse impact on the receiving environment, landscape, designated sites or residences in the area.

CAEO-05 It is an objective of the Council to implement the Council's Wind Energy Strategy as follows: 1, in 'Areas Deemed Open for Consideration for Wind Energy Development' as identified in Map No. 10 'Wind Energy Strategy Designations', the development of windfarms and smaller wind energy projects will be considered; 2, in all other areas, wind energy developments shall not normally be permitted – except as provided for under relevant exemption provisions in the Planning and Development Regulations 2001 (as amended); and 3, applications for re-powering (by replacing existing wind turbines) and extension of existing and permitted wind farms will be assessed on a case by case basis and will be subject to criteria listed in

Development Management Standard 109 contained in Chapter 13 of Volume 1 of this County Development Plan and the Section 28 Ministerial Wind Energy Development Guidelines.

Map No. 10: Wind Energy Strategy Designations

Areas Deemed Open for Consideration for Wind Energy Developments, in which the subject site is within 'Areas Deemed Open for Consideration for Wind Energy Development'

Offaly County Council has taken a strategic approach to developing this County Wind Strategy. It identifies key areas within the county that are 'Open for Consideration for Wind Energy Developments' or 'Unsuitable for Wind Energy Developments' based on a comprehensive assessment of wind speed, access to the electricity grid and substations, and avoidance of adverse impacts on the landscape and designated sites, all of which facilitate a more robust Plan preparation process. In particular, it is considered that this strategic approach:

- Facilitates a strategic and plan led approach to wind energy development in the county.
- Permits a more accurate analysis of existing environmental resources, potential impacts and identification of mitigation measures where necessary;
- Facilitates the avoidance of particularly sensitive resources where necessary;
- Allows for a cumulative assessment of wind energy developments within the county; and
- Allows the Council a means to assess and potential a means to progress wind energy developments within robust strategic areas in the county, assisting the achieving of national renewable energy targets.

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 32(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 planning authority who have restated the question submitted to them.
- 4.1.2. In support of the question in the Section 5 request submitted to the planning authority, the applicant states:

Turbines of increased efficiency emerge to the market, sometimes of a larger dimension and sometimes within 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 Offaly 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 was to submit further copies of the documents which they had received.
- 4.2.2. A further planning authority response 28th September states that Offaly County Council have no submission / observation to make.

4.3. Owner/ Occupier's Response

- 4.3.1. The Board wrote to all those named as owner/occupiers inviting submissions. On 15th June 2023 the Board wrote to all parties notifying them that the file had been reactivated and inviting submissions. No submissions were received.

4.4. Applicant Response to Referral

- 4.4.1. The applicants did not receive the Board correspondence, (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.
- 4.4.2. Notice were re-issued and a response was received from the applicants on 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.
- 4.4.3. The applicant response, through their agent, 4th September 2023, includes:
Reasons for the proposal:
- 4.4.4. 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.

- 4.4.5. 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.
- 4.4.6. 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.
- 4.4.7. 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

- 4.4.8. 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

- 4.4.9. 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.
- 4.4.10. 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

- 4.4.11. 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.
- 4.4.12. 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.
- 4.4.13. Excerpts 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'.
- 4.4.14. 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.'
- 4.4.15. 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.
- 4.4.16. 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.
- 4.4.17. Section 3.6 of the EIAR states:

The proposed development will contribute approximately 49.5 MW of renewable energy to the grid.
- 4.4.18. 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.

4.4.19. 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.

4.4.20. 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).

4.4.21. 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.

4.5. Environmental Considerations

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.

4.5.1. Issues raised in the quashed declaration – 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).

4.5.2. The proposal is not development.

4.5.3. Issues raised in the quashed declaration – 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).

4.6. Further Responses

- 4.6.1. The applicant's response was circulated, no further responses were received.

5.0 Statutory Provisions

5.1. Planning and Development Act, 2000

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 (i.e. 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 32(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 (strategic infrastructure)

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)

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. 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-306924-20
- 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 Offaly County Council for a 10 year permission with a 30 year operational life for development of a site area of 60.674 hectares in the townlands of Ballykilleen, Shean, Kilcumber, Cloncant and Cushaling, Edenderry, Co. Offaly. The development will consist of up to 8 (eight) wind turbines 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-site electrical substation and a battery energy storage facility¹; and 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

¹ Drawings 19877-MWP-00-00-DR-C-5409; 18977-MWP-00-00-DR-C-5412; 18977-MWP-00-00-DR-C-5411; 18977-MWP-00-00-DR-C-5410 refer.

including widening of the junction of the R420 and R402 at Ballina, Geashill, Co Offaly and all associated site development works. The overall development is for a nine (9) turbine wind farm, with a separate planning application being submitted to Kildare County Council for one (1) turbine located in the townland of Ticknevin, Carbury, Co. Kildare...

The documentation supplied with the application included documentation prepared for the public consultation engaged in prior to submitting the application which includes that, what was proposed was a windfarm with 9 turbines with a potential output of up to 45mw 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.

The documentation supplied with the application included a Fire Risk Assessment which provided site specific information in relation to the proposed substation including 10 no. Battery Energy Storage System (BESS) containers, 20 no. heating ventilation & air conditioning (HVAC) units attached to the battery units, 26 no inverters, 28 no. auxiliary transformers, 2 no control/switchgear container control rooms, plinths and ancillary equipment, 1 no. step up / down transformers etc.

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

Observations on that file refer to output.

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 52.8 MW for that portion within County Offaly 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 Stapleyside 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 Offaly (306924) the increase in output would amount to 8.8MW. Per item 13, of part 2, of schedule 5, of the Planning and Development Regulations, 2001, under (a) (ii): although it would 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. The 25% being the greater of the two amounts, 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 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.

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;

and,

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, using a new (6.6MS) machine 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 Offaly County Council on the 19th day of March, 2021 and the Council referred the question 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) Part 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 (4) of the 2000 Act, hereby decides 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