



An
Bord
Pleanála

Inspector's Report 21. LS0032

Development

Retain partially completed grid connection for windfarm

Location

Between Derrysallagh, Co. Sligo, and the substation at Garvagh Glebe, Co. Leitrim

Applicant

Derrysallagh Windfarm Ltd.

Type of Application

Leave to appeal for substitute consent under section 177C(2)(b) of the Planning and Development Acts 2000-2016

Date of Site Inspection

15th November 2017

Inspector

Stephen J. O'Sullivan

1.0 Site Location and Description

- 1.1. This is a linear site that links the location of a substation serving an authorised windfarm of 10 turbines at Derrysallagh, Co. Sligo, with the national grid at an existing substation on the site of a windfarm at Garvagh Glebe, Co. Leitrim, to the north. The southern end of the route is beside a quarry. The wind turbines and substation authorised there had not been erected there at the time of inspection. The route extends for a stated distance of 9.58km, a short part of which is in Co. Roscommon. The area through which the line passes is hilly and elevated. Coniferous forestry and blanket bog are the predominant landcover, although the land around the southern part of the route is more pastoral, with grassland and one-off houses. This part of the route runs along a county road that has a tarred surface c3.6m wide. The central part of the route crosses the Arigna River and its valley along a forest track and a concrete bridge over the river. The northern part of the route runs along a county road that has a tarred surface c3.6m wide. There are numerous wind turbines near this part of the route which terminates at an existing sub-station within the curtilage of a wind farm.
- 1.2. The application site mostly lies within the carriageway of county or forest roads, apart from short runs through the windfarm sites at either end connecting the substations with the public road. The roads and tracks show signs of recent work consistent with the laying of a 38kV line beneath them.

2.0 Proposed Development

- 2.1. It is proposed to seek substitute consent to retain the works that have been carried out to provide a 38kV grid connection for the authorised windfarm at Derrysallagh to the national grid at Garvagh Glebe Co. Leitrim. The connection comprises 3no. 110mm cable ducts, generally laid in a trefoil formation, with 2 ducts for pull ropes and a warning tape above. The standard cross section would provide a minimum cover of 950mm over the cable ducts, although the section can be altered to allow the ducts to be laid above or below culverts. The connection also involves the installation of 9 joint bays, which are concrete structures below ground with plan dimensions of 4.5m by c1.815m and that are 1.21m deep.

2.2. Works had commenced on the construction of the grid connection but ceased following a court order. Approximately 73% of the ducting has been installed, as have the joint bays and 13 of 17 culvert crossings. The ducting along the bridge over the Arigna River has not been installed. The submitted details describe those parts of the previous works which the applicant proposes to retain and would be the subject of an application for substitute consent. Parts of the previous works would not be retained as part of the completed grid connection, including one of the joint bays and two of the culvert crossings, while other parts would require remedial works. The proposed works that would be needed to complete the connection would be the subject of a future application for planning permission.

3.0 Planning History

Reg. Ref. 12/133: Sligo County Council granted permission for a windfarm of 10 turbines at Derrysallagh in 2013 with an appropriate period of 10 years. The consent was granted after an EIA of the windfarm (but not of any grid connection) had been completed. The planning authority did not carry out an appropriate assessment.

Reg. Ref. 15/35: Leitrim County Council granted permission to extend the 110kV substation at Garvagh Glebe.

Reg. Ref. ED-16-05: Leitrim County Council made a declaration on 24th March 2016 under section 5 of the act that the laying of a 38kV cable for 2.8km to connect the authorised windfarm at Derrysallagh to the substation at Garvagh Glebe would be exempted development under Class 26 of Part 1 of Schedule 2 to the planning regulations, after screening out a requirement for EIA or appropriate assessment.

2017 IEHC 308 – The High Court made an order on 11th May 2017 under section 160 of the planning act to cease works on the grid connection to the authorised windfarm at Derrysallagh and to prohibit further works on the grounds that they were an integral part of the windfarm development that required EIA and so could not be exempted development. The order did not require the reinstatement of works that had already been carried out.

4.0 Natural Heritage Designations

4.1. The site is not in or immediately adjacent to any Natura 2000 sites.

5.0 Legislative Context

5.1. Section 177C of the planning act states *inter alia*

(1) A person who has carried out a development referred to in subsection (2) may apply to the Board for leave to apply for substitute consent in respect of the development.

(2) A development in relation to which an applicant may make an application referred to in subsection (1) is a development which has been carried out where an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required, and in respect of which—

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(b) the applicant is of the opinion that exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.

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Section 177D states –

(1) Subject to section 261A(21), the Board shall only grant leave to apply for substitute consent in respect of an application under section 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required in respect of the development concerned and where it is further satisfied—

.....

(b) that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

(2) In considering whether exceptional circumstances exist the Board shall have regard to the following matters:

(a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;

(b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;

(c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;

(d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;

(e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;

(f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;

(g) such other matters as the Board considers relevant.

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6.0 The Application

6.1. The applicant requests that the board grant leave to apply for substitute consent in respect of the works already carried out on the site under section 177C(2)(b) of the planning act. The applicant is of the opinion that exceptional circumstances exist such that it would be appropriate to permit the regularisation of the development by permitting an application for substitute consent. The exceptional circumstances are as follows-

- The grid connection was screened with respect to environmental impact assessment and appropriate assessment as a stand-alone project. It was

concluded that it would not be likely to have significant effects on the environment or on any Natura 2000 site, and that as such it was exempted development under Class 26. Leitrim County Council made a section 5 declaration which concurred with these conclusions. The board made declarations after the O Grianna judgement and before April 2017 that the construction of grid connections in similar circumstances would be exempted development. The applicant could therefore have had a reasonable belief that the works on the grid connection were not unauthorised.

- The windfarm development, of which the grid connection is now deemed to be an integral part, was not considered likely to have a significant effect on any European site and was not subject to an appropriate assessment before consent for it was granted. A screening report with regard to the grid connection is submitted which concludes that it would not be likely to have significant effects on any Natura 2000 site either, given its separation distance from them and the fact that the laying of the cable did not require works in the channel of any watercourse and so did not affect the drainage of the site or of lands downstream.
- The grid connection would be laid within the public road or existing forest tracks and the works have not occurred within the channel of any watercourse. Therefore it would not have had significant adverse effects on population and human health; landuse; health and safety; flora and fauna; habitats; water quality; hydrology; cultural heritage; air quality; soils; or on the landscape.
- The works carried out have not, therefore, substantially impaired the ability to carry out an environmental impact assessment or appropriate assessment of the development with public participation. They have not caused or be likely to cause significant adverse effects on the environment or on a European site. A grant of leave to apply for substitute consent would not, therefore, circumvent the purposes and objectives of the Environmental Impact Assessment Directive or the Habitats Directive.

7.0 Assessment

- 7.1. Following the court decision in *O Grianna vs. An Bord Pleanala* 2014 IEHC 632, the grid connection that is the subject to this application is an integral part of the development of the windfarm of 10 turbines at Derrysallagh authorised by Sligo County Council under Reg. Ref. 12/133, which is of a class of development that requires environmental impact assessment. The judgment in *Daly vs. Kilronan Windfarm Ltd.* 2017 IEHC 308 is the authoritative statement of the law as it currently applies to this case. It states that to regard the grid connection as exempt development would fail to give proper effect to the EIA directive. The judgment did not say whether the grid connection would have to be subject to an EIA before any consent was granted for its retention or completion, but the implication is that a screening determination would at least be necessary. This means that the development consisting of the works carried out by the applicant to provide a grid connection are capable of coming within section 177C(2) of the planning act if the condition at (b) is satisfied, which requires a conclusion by the board that exceptional circumstances exist after having had regard to the circumstances described in section 177D(2).
- 7.2. The applicant could reasonably have held the belief that the works carried out to provide the grid connection were not unauthorised, as the board had made declarations that similar works elsewhere were exempt development even after the *O Grianna* judgement, including one under Ref. No.10. RL3377. The works that have been carried out are contained within existing roads or tracks. They have not involved works within watercourses or diversions of other drainage features. Given these characteristics, the regularisation of the development would not circumvent the purpose and objectives of the EIA or Habitats Directive. The ability to carry out an assessment of the environmental impacts of the development for EIA or appropriate assessment and to provide for public participation has not be substantially impaired. The actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development or the extent to which they can be remediated would not give reasonable grounds to prevent an application for substitute consent, nor does any failure to comply with previous planning permissions or the carrying out of other unauthorised development. The board is therefore advised that exceptional

circumstances exist whereby it would be appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

- 7.3. A notice of leave to apply for substitute consent must state whether the application should include a remedial EIS or remedial NIS as appropriate. The grid connection is an integral part of a windfarm development for which EIA is mandatory under Class 3(i) of Part 2 of schedule 5 to the planning regulations. A requirement to submit a remedial EIA report with the application would be consistent with this fact. The applicant has submitted a report which concludes that the development would not require appropriate assessment on the basis of the separation distance from the nearest Natura 2000 site, which is more than 7km, and the fact that the development does not impinge on natural habitats, watercourses or drainage, and is below the surface. These characteristics of the development render it unlikely that it would have any significant effect on any Natura 2000 site, either individually or in combination with any other plan or project. It is therefore reasonable to conclude that, on the basis of the information on the file, which is adequate in order to issue a screening determination, that the development, individually or in combination with other plans or projects would not be likely to have a significant effect on any European site in view of the site's conservation objectives, and a Stage 2 Appropriate Assessment (and submission of a NIS) is not therefore required.

8.0 Recommendation

- 8.1. I recommend that the board grant leave to apply for substitute consent and direct that the application be accompanied by a remedial Environmental Impact Assessment Report.

9.0 Reasons and Considerations

Having regard to Section 177D of the Planning and Development Acts, 2000-2016 the Board is satisfied that:

- a) the development is one where an EIA or a determination as to whether EIA is required, and

b) that exceptional circumstances exist by reference, in particular, to the following:

- the fact that the regularisation of the development would not circumvent the purpose or objectives of the Environmental Impact Assessment or Habitats Directive;
- that the ability to carry out EIA and AA and provide for public participation has not been substantially impaired;
- the reasonableness of the grounds for believing that the development was not unauthorised arising from its similarity to development which was declared to be exempted development under section 5 of the acts; and
- the nature and extent of the actual or likely significant effects on the environment resulting from the development.

The Notice to the applicants advising of the decision should also direct that:

- a) the application be made within 12 weeks of the giving of the notice or such longer period as the Board may, on request, consider appropriate, and
- b) The application includes a remedial Environmental Impact Assessment Report.

Stephen J. O'Sullivan
Planning Inspector

23rd November 2017