

# An Bord Pleanála



## Inspector's Report

### REFERRALS

|                                   |   |
|-----------------------------------|---|
| <b>An Bord Pleanála Refs:</b>     | <b>RL3377 and RL3401</b>  |
| <b>Planning Authorities:</b>      | Kilkenny County Council and Tipperary County Council.   |
| <b>Planning Authority Refs:</b>   | Kilkenny DEC 358 and Tipperary 55/15/47   |
| <b>Referrers:</b>                 | Kilkenny County Council and Tipperary County Council  |
| <b>Developer:</b>                 | Cnoc Windfarms Limited  |
| <b>Location of Referral Site:</b> | Ballybeagh, 38kV substation, County Kilkenny to Cnoc Windfarm, Thurles, County Tipperary.   |
| <b>Question:</b>                  | Whether the provision of a 20kV electrical connection between Cnoc Windfarm and Ballybeagh 38kV substation is or is not development or is or is not exempted development. |
| <b>Date of Inspection:</b>        | 30 <sup>th</sup> October and 11 <sup>th</sup> December, 2015.   |
| <b>INSPECTOR:</b>                 | <b>Brendan Wyse</b>   |

## **1.0 INTRODUCTION**

- 1.1** As these two referrals relate to the same proposal, the provision of an electricity line that straddles both County Kilkenny and County Tipperary, and to the same question, the matter can be properly dealt with in a single Inspector's report. A copy of the report is attached to each file.
- 1.2** The Board should also note that the following similar referrals (post O'Grianna grid connections) are also current – RL3369, RL3375. (Counties Meath/Cavan).

## **2.0 THE SITE**

- 2.1** The site is located in the Slieveardagh Hills on the Kilkenny – Tipperary border. It is almost equidistant between Thurles (west) and Kilkenny City (east) and approximately 10 kilometres south-east of Urlingford and the M8 Motorway.
- 2.2** The site, the route of the proposed electricity line, extends south-west/north-east for approximately 2.6 kilometre across hilly terrain from the consented Cnoc Windfarm, Grange, Barna, Thurles, County Tipperary, to the consented Ballybeagh 38kV substation at Ballybeagh, Tullaroan, County Kilkenny. The route straddles a shallow valley in the vicinity of the head of the Munster River that flows away to the south-east. The local landscape is dominated by agricultural grassland with some woodland and commercial forestry.
- 2.3** Maps and photographs are included in the file pouch.

## **3.0 APPLICATION FOR DECLARATION**

- 3.1** The applications were lodged with the respective planning authorities on 13<sup>th</sup> July, 2015 and on the basis of similar documentation. This documentation comprised:
- Cover letter.
  - Application form.
  - Development Drawings (App. 1).
  - AA Screening Report (App. 2).
  - Archaeological Assessment (App. 3).
  - Land Agreements (App. 4).

- Relevant planning permissions (App. 5).
- Construction Method Statement (App. 6).
- Design Specification (App. 7).

### **3.1 Cover Letter**

Includes:

- The proposed electricity line comprises a dedicated 20kV connection from the consented Cnoc Windfarm (Tipperary County Council Ref. 09/781 – ABP Ref. 23.237713) to the consented Ballybeagh 38kV substation (Kilkenny County Council Ref. 12/485).
- Cnoc Windfarms Limited is a statutory undertaker for the purposes of constructing the proposed 20kV line, under the Electricity Regulation Act, 1999 (amending the Electricity (Supply) Act, 1927).
- Planning and Development Regulations 2001, Article 6: Schedule 2: Part 1: Exempted development – general: Class 27, provides that “the carrying out by any electricity undertaking of development consisting of the construction of overhead transmission or distribution lines for conducting electricity at a voltage not exceeding a nominal value of 20kV” is exempted development and therefore does not require planning permission.
- Cnoc Windfarms Limited are acting as an agent of ESB Networks in the provision of electricity infrastructure on the project.
- The connection is to be constructed to the requirements and specifications of ESB Networks such that the connection would be taken over by ESB Networks prior to energisation.
- The connection will comprise approximately 2.6 kilometres of overhead power line on 34 standard ESB Networks 20kV wooden poles at a height of between 8.8 metres and 10.78 metres above ground. Between 2.2 metres and 3.3 metres of pole will be buried into the ground.
- The Archaeological Assessment indicates the possibility that previously unknown cultural heritage material could be impacted upon by the proposed development given its proximity to several sites. It is recommended that the works be monitored by an archaeologist.

- The AA Screening Report indicates an objective conclusion that there are no likely significant effects on any Natura 2000 site due to; the scale of the project; implementation of best practice; and the distance and lack of ecological connectivity with these sites.
- Within County Kilkenny the site is not located in a highly scenic/visually pleasing area. The closest protected view is approximately 10 kilometres to the south-east and there are no views towards the proposed development.
- Within County Tipperary the site is located in a Secondary Amenity Area, an area likely to be capable of absorbing change. The proposed line is modest in scale and the route is largely through a valley with some woodland i.e. it will not be prominent on any summit. The line would be 3.5 kilometres north of War House Hill (V046) which has views east and west. Thus, it will not interfere with these.
- None of the limitations under Article 9, Planning and Development Regulations, 2001, are applicable.
- Declarations are sought confirming the proposed 20kV line as exempted development.

#### **4.0 PLANNING AUTHORITY DECISIONS**

It should be noted that neither Kilkenny County Council nor Tipperary County Council issued a Declaration. Instead they elected, under Section 5(4) Planning and Development Act 2000, as amended, to seek a determination on the matter from the Board.

#### **5.0 REFERRALS TO THE BOARD**

##### **5.1 Kilkenny County Council (RL3377)**

###### **5.1.1 Planning Report/Assessment**

The request issued to the Board includes a Planning Report (prepared by an SEO). This report includes:

## **Appropriate Assessment**

- Planning Authority screening exercise concludes that provided mitigation measures are in place, as proposed, there will be no significant anticipated impact on the River Suir SAC or the River Nore/River Barrow cSAC.

## **Relevant Case Law**

- Tipperary County Council Ref. 09/781 (ABP Ref. 23.237713), consent for the 5 turbine, 11 megawatt Cnoc Windfarm, was subject to EIA. The application did not address the issue of grid connection.
- Kilkenny County Council Ref. 12/485, consent for the Ballybeagh 38kV substation, was not subject to EIA.
- Following on the High Court decision in O’Grianna v. An Bord Pleanála (12<sup>th</sup> December, 2014) it is considered that the works currently proposed would, in combination with the Cnoc Windfarm, require an EIS in order to determine the cumulative impact of the entire project as a whole as the parent permission for the windfarm was subject to EIS. The requirement for an EIS de-exempts the development under Section 4(4) Planning and Development Act 2001-2014.

## **Issues for Consideration of An Bord Pleanála**

- The O’Grianna case seems to deal only with the initial application for the windfarm where details of the connection are not available. In other words the windfarm application is not complete because the authority considering same did not know how the applicant intended to make the grid connection.
- However, in the subject case, when the grid connection is being considered, there are no unknowns, as the windfarm permission already exists and the consideration is only for the connection.
- Accordingly, the question arises as to whether the grid connection can be allowed where the decision to grant the windfarms has already been made.

### 5.1.2 Tipperary County Council

Indication that Tipperary County Council has no observations to make on the referral lodged by Kilkenny County Council.

### 5.1.3 Cnoc Windfarms Limited (Developer)

Includes:

- The Cnoc Windfarm is scheduled to be commissioned for early Q3, 2016.
- Estimated construction time for the connection is 8 weeks.
- Clarification that the lengths of the grid connection are 1,530 metres in County Kilkenny and 1,052 metres in County Tipperary.

#### **Legal Opinion** (Mason, Hayes and Curran)

- An “electricity undertaking”, as referred to in Class 27, Part 1, Schedule 2 of the Planning and Development Regulations, (exempted development for the purposes of the Act) is defined in the Regulations as “undertaker authorised to provide an electricity service”. In the absence of a statutory definition of that term it would appear that it is intended to refer to an undertaking which has been granted the necessary licences and/or authorisation pursuant to the Electricity Regulation Act 1999.
- Cnoc Windfarms Limited is a statutory undertaker for the purposes of constructing the proposed 20kV electrical connection to the specifications of ESB Networks and ultimately to be owned/operated by them.
- Article 9 of the Regulations and Section 4(4) of the Acts provides that certain developments shall not be exempted in specified circumstances. For present purposes the most significant of these provisos is contained in Section 4(4) pursuant to which works which require EIA are not capable of constituting exempted development. Reference also to Section 172 of the Act and Schedules 5 and 7 of the Regulations.

- The Planning Authority Planning Report helpfully distinguishes the factual scenario in the O’Grianna case from the situation arising in the subject case (see 5.1.1 above under “Issues for Considerations” of An Bord Pleanála).
- In addition the Board’s attention is drawn to the fact that in O’Grianna the proposed development necessitated a mandatory EIA pursuant to Schedule 5, Part 2, 3(i) of the Regulations, as the proposed output was 11 megawatts. However, in the present scenario, given the size of the development, there is no mandatory EIA required for the 20kV overhead line unless it is determined that the proposed development is “likely to have significant effects on the environment”.
- The view formed by Kilkenny County Council that, as the parent permission for the windfarm was subject to EIA, an EIA is now required in respect of the grid connection so as to allow consideration of the cumulative impact of the project as a whole, is not supported by either the applicable legislation or the O’Grianna decision.
- The proposed works do not, simply by virtue of their relationship to the consented windfarm, automatically require an EIA.
- While the High Court in O’Grianna held that a projects grid connection cannot be separated from the windfarm itself, this decision must be considered in the context of developments in respect of which the requirement for EIA has already been triggered.
- As part of this submission Cnoc Windfarms Limited has conducted an EIA screening report (included as Appendix A) that determines that the proposed development will not have any significant environmental impacts, including cumulative impacts assessed in conjunction with those identified in the EIS associated with Tipperary County Council Ref. 09/781, ABP Ref. 23.237713.
- It is submitted that the proposed development does not give rise to a likely significant effect on the environment such as to trigger the requirement for an EIA.

### **5.1.4 Kilkenny County Council – Further Response**

Includes:

- Key issue is to consider matter in light of the O’Grianna ruling.
- The concern of the Local Authority is the practical difficulty in that the grant of permission for the turbines limits the options considered in the assessment of the grid connection.

## **5.2 Tipperary County Council (RL3401)**

### **5.2.1 Planning Report/Assessment**

The request issued to the Board includes a Report (unsigned). This report includes:

- The works are, ordinarily, exempt development unless restricted by Section 4(4) of the Act or Article 9 of the Regulations.

#### **Appropriate Assessment**

- An AA screening exercise carried out by the Planning Authority concluded that, provided the mitigation measures are in place as is proposed, there will be no significant anticipated impact on the River Suir SAC or the River Nore/River Barrow cSAC.

#### **Environmental Impact Assessment**

- Having regard to the judgement in O’Grianna it is considered that the proposed works, in combination with the Cnoc Windfarm, require an EIS in order to determine the cumulative impact of the entire project as a whole as the parent permission for the windfarm was subject to EIA.
- By reference to Article 9(vi) the author is not satisfied that the development will not interfere with the character of the secondary amenity area at this location, the preservation of which is an objective of Policy AEH4 of the development plan.
- Conclusion that the development requires EIA and interferes with the character of the secondary amenity area as described and therefore is not exempted development.



## 5.2.2 Cnoc Windfarms Limited (Developer)

Includes:

- Similar information/documentation to that submitted under ABP Ref. RL3377 and as referred to at Section 5.1.3 above. This includes; a legal opinion; an EIA Screening Report; and a clarification letter in relation to the length of the proposed grid connection.
- A Landscape and Visual Appraisal of the proposed 20kV overhead line in conjunction with neighbouring permitted wind farms. This includes 4 no. photomontages from selected viewpoints in the local area. The conclusion is that the proposed development in its own right or in combination with associated wind energy development will not result in any significant landscape or visual impacts, would not interfere with the character of the secondary amenity area and is not in contravention of Policy AEH4 of the development plan.

## 5.2.3 Tipperary County Council Response

Response out of time – returned.

## 5.2.4 Kilkenny County Council

Indicates that Kilkenny County Council has no comment to make on the referral lodged by Tipperary County Council.

## 6.0 PLANNING HISTORY

**Tipperary County Council Ref. 09/781, ABP Ref. 23.237713** (file attached)

March 2011 grant of permission (10 years duration) for a windfarm comprising 5 no. wind turbines to Cnoc Windfarms Limited at Grangehill, Bawnlea and Newpark, Grange, Barna, Thurles, County Tipperary.

Condition 1 refers to the development being carried out in accordance with measures set out in the EIS and the Environmental Management Plan.

Condition 4 expressly indicates that the permission does not consent to a connection to the national grid or routing/nature of same.

Condition 6 requires cables within the site to be laid underground.

**Kilkenny County Council Ref. 12/485 (see file pouch)**

January, 2013 grant of permission (10 years duration) for a 38kV transformer station at Ballybeagh, Tullaroan, County Kilkenny to Ballybay Windfarm Limited.

**Kilkenny County Council Ref. 12/533**

2013 grant of permission (10 years duration) for a windfarm comprising 6no. wind turbines at Boggan and Ballybeagh, Tullaroan, County Kilkenny.

## **7.0 DEVELOPMENT PLANS/NATURAL HERITAGE DESIGNATIONS**

### **7.1 Kilkenny County Development Plan 2014 - 2020**

Area in which site is located is not subject to any landscape/amenity designations and does not come within the compass of protected views, prospects etc.

Slieveardagh Hills is a preferred area for wind energy development (Appendix J, Area 3).

### **7.2 South Tipperary County Development Plan 2009-2015 (as varied – December 2015)**

Area in which the site is located is a designated secondary amenity area – Policy LH2, Protection of Visual Amenity and Character of Primary and Secondary Amenity Areas, applies.

### **7.3 Designated Sites**

#### **River Barrow and River Nore cSAC (Site Code: 002162)**

Very large site encompassing the freshwater stretches of the River Barrow and River Nore and several tributaries as well as the river estuary and adjacent terrestrial habitats. At its closest point, along the Munster River, the European site is approximately 1.3 kilometres

south-east of the referral site. (Map, Conservation Objectives, Standard Data Form and Site Synopsis included in file pouch).

### **River Nore SPA (Site Code: 004233)**

At its closest point this European site is approximately 13.4 kilometres north-east of the referral site.

## **8.0 LEGISLATION AND CASE LAW**

### **8.1 Legislative Provisions**

#### ***(a) Planning and Development Act 2000, as amended.***

##### ***Section 2(1)***

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

##### ***Section 3(1)***

*“development” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.*

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

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

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

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

##### ***Section 4(2)(a)(i)***

*“The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that –*

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

#### **Section 4(4)**

*“Notwithstanding..... 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”.*

#### **Section 172(1)**

*“An environmental impact assessment shall be carried out by a planning authority or the Board, as the case may be, in respect of an application for consent for –*

- (a) proposed development of a class specified in Schedule 5 to the Planning and Development Regulations 2001 which exceeds a quantity, area or other limited specified in that Schedule, and*
- (b) proposed development of a class specified in Schedule 5 to the Planning and Development Regulations 2001 which does not exceed a quantity, area or other limit specified in that Schedule but which the planning authority or the Board determines would be likely to have significant effects on the environment.*

#### **Section 177U(9)**

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

#### **(b) Planning and Development Regulations 2001, as amended**

#### **Article 3(3)**

*““electricity undertaking” means an undertaker authorised to provide an electricity service”.*

### **Article 6(1)**

*“Subject to article 9, development of a class specified in Column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in Column 2 of the said Part 1 opposite the mention of that class in the said Column 1”.*

### **Schedule 2, Part 1**

#### **Development by Statutory Undertakers**

#### **Class 27**

*“the carrying out by any undertaker authorised to provide an electricity service of development consisting of the construction of overhead transmission or distribution lines for conducting electricity at a voltage not exceeding a nominal value of 20kV”.*

### **Article 9(1)**

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

*(a) If the carrying out of such development would –*

- (vi) interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan,*
- (vii) consist of or comprise the excavation, alteration or demolition (other than peat extraction) of places, caves, sites, features or other objects of archaeological, geological, historical, scientific or ecological interest, the preservation, conservation or protection of which is an objective of a development plan or local area plan for the area in which the development is proposed or, pending*

*the variation of a development plan or local area plan, or the making of a new development plan or local area plan, in the draft variation of the development plan or the local area plan or the draft development plan or draft local area plan,*

*(viiA) consist of or comprise the excavation, alteration or demolition of any archaeological monument included in the Record of Monuments and Places, pursuant to section 12(1) of the National Monuments (Amendment) Act 1994, save that this provision shall not apply to any excavation or any works, pursuant to and in accordance with a consent granted under section 14 or a licence granted under section 26 of the National Monuments Act 1930 (No. 2 of 1930) as amended,*

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

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

## **Schedule 5**

### **Development for the purposes of Part 10 (EIA)**

#### **Part 1**

*“20. Construction of overhead electrical power lines with a voltage of 220kV or more and a length of more than 15 kilometres”.*

#### **Part 2**

*“3(b) ....transmission of electrical energy by overhead cables not included in Part 1 of this Schedule, where the voltage would be 200 kilovolts or more”.*

## **8.2 Case Law**

**O’Grianna (and others) v. An Bord Pleanála (and others)**, Record Number: 2014 No. 2014 No. 19 JR; 2014 No. 10 COM (copy in file pouch).

## **9.0 ASSESSMENT**

**9.1** I propose to deal with the issues in these referrals under the following headings:

- O’Grianna
- Legislative Tests
- Precedent Referral Cases (if any)

## **9.2 O’Grianna**

**9.2.1** The Board will be aware that the O’Grianna case refers to a High Court judgement on Judicial Review of a permission granted on appeal by the Board for a development comprising 6 wind turbines and associated buildings/infrastructure in County Cork. The Board’s decision on the appeal (Ref. 242223) was made on 15<sup>th</sup> November, 2013 and the High Court judgement (Ref. 2014 No. 19 JR’ 2014 No. 10 COM) was delivered on 12<sup>th</sup> December, 2014.

**9.2.2** That application for permission attracted a mandatory requirement for EIA as the development exceeded the 5 wind turbine threshold provided for in Class 3(i), Part 2, Schedule 5, Planning and Development Regulations 2001, as amended. As was the case with most wind farm development applications at that time, and in line with advice contained in the Planning Guidelines, no details were included in relation to the connection to the national grid. This would be a matter for later determination as its design (including line, form, overhead/underground) would be undertaken by ESB Networks.

**9.2.3** In essence the High Court judgement, quashing the Board’s decision, was based on the conclusion that the windfarm and the grid connection constituted a single project and that both elements together would have to be subject to EIA in order to comply fully with the terms of the Directive.

- 9.2.4** As a consequence of the judgement new applications for permissions for wind farms developments, and which require EIA, now include relevant information on proposed grid connections.
- 9.2.5** In the context of the subject referrals, however, permission for the relevant wind farm (Tipperary County Council Ref. 09/781, ABP Ref. 23.237713) was granted in March 2011, i.e. prior to the O’Grianna judgement. The decision was in accordance with the law as it stood at that time. The permission, therefore, is valid and is beyond challenge. The application was subject to EIA and it is not now proper or possible to revisit this.
- 9.2.6** In the referrals details are provided of the proposed grid connection. The question of EIA, including cumulative assessment, can be addressed in accordance with the requirements of the Directive and as provided for in domestic planning legislation to the extent that is appropriate for the purposes of a referral. As indicated at Section 8.1 above one of the tests that has to be considered in the referrals is whether or not EIA is required for the subject development.
- 9.2.7** While the O’Grianna judgement clearly has had implications for wind farm applications/appeals arising since the judgement, and where applicants have to include details of proposed grid connections to facilitate EIA of the whole project, I can see no impediment to the Board proceeding to deal with the subject referrals that are in relation to a grid connection for a previously, pre O’Grianna, approved wind farm development, while still meeting fully its obligations under the Directive.

### **9.3 Legislative Tests**

- 9.3.1** To recap the question before the Board can be stated as follows:

*“Whether the provision of a 20kV electrical connection between Cnoc Windfarm and Ballyveagh 38 kV substation is or is not development or is or is not exempted development”.*

- 9.3.2** The relevant legislative provisions in this case are as set out at Section 8.1 above.

#### **Development**

- 9.3.3** Having regard to the nature of the proposal, namely the construction of c.2.6 kilometres of overhead powerline, it is clear, by reference to



Section 2(1) and 3(1) of the Act, that it does constitute development for planning purposes. The focus, therefore, is on whether or not the proposed development constitutes exempted development.

**9.3.4** Following on from Section 4(2)(a)(i) of the Act, and the Regulations made thereunder, the relevant class of development is, as indicated, Class 27, Part 1, Schedule 2, Planning and Development Regulations 2001, as amended. I am satisfied that the proposal is “*a development consisting of the construction of overhead transmission or distribution lines for conducting electricity at a voltage not exceeding a nominal value of 20kV*”. The other requirement of this class is that the development be carried out by an “*undertaker authorised to provide an electricity service*”.

#### **Undertaker/Statutory Undertaker**

**9.3.5** As indicated Article 3(3) of the Regulations states that an “*electricity undertaking means an undertaker authorised to provide an electricity service*”. However, as pointed out in the legal opinion submitted by Cnoc Windfarms Limited (Section 5.1.3 above), there is no statutory definition to clarify what exactly this means. The opinion refers, in the first instance, to the Electricity Regulation Act 1999 which, at Section 2(1), provides the following definition:

*“electricity undertaking” means any person engaged in generation, transmission, distribution or supply of electricity, including any holder of a licence or authorisation under this Act, or any person who has been granted a permit under section 37 of the Principal Act*”.

**9.3.6** I note that while this definition refers to holders of licences/authorisations/permits the use of the conjunction “*including*” prior to the reference to these instruments indicates that they are not essential and that the term “*electricity undertaking*” can apply to “*any person*” engaged in generation, transmission, distribution or supply of electricity.

**9.3.7** I note that the aforementioned legal opinion also contends that Cnoc Windfarm Limited is a “*statutory undertaker*” for the purposes of the proposed development. It does not elaborate on how this conclusion is drawn although it appears to be on the basis that the grid connection is to be constructed to the specifications of ESB Networks and is ultimately to be handed over to them. Cnoc Windfarms Limited, therefore, are acting as agents for ESB Networks for the purposes of constructing the connection.

- 9.3.8** As indicated Class 27 falls under the heading “*Development by Statutory Undertakers*”. It is one of several classes (Classes 23 – 32) in this part of the Schedule. It seems to me, therefore, that the references to undertakers, undertakings and other bodies/authorities referred to in these classes must be construed as meaning statutory undertakers.
- 9.3.9** The definition of “*Statutory Undertaker*” as provided in the Act appears to encompass a very broad spectrum of categories of persons or bodies. It includes “...a person, for the time being, authorised by or under any enactment or instrument under an enactment to ...provide, or carry out works for the provision of ...electricity”. In my opinion Cnoc Windfarm Limited would appear to fall within this category on foot of their authorisation Tipperary County Council Ref. 09/781, ABP Ref. 23.237713 under the Planning Act to construct a wind farm that is a project/works for the provision of electricity.
- 9.3.10** As an aside I would note that the current definition of “*Statutory Undertaker*”, clearly contemplates undertakings that are not solely public undertakings. This compares to the definition in the original 1963 Act [Section 2(1)] that appears to have contemplated public undertakings only. The change presumably reflects the liberalisation of markets in services and infrastructural provision that has occurred since then.
- 9.3.11** I am satisfied, therefore, that the proposed development falls within the scope of the said Class 27.
- 9.3.12** The next step is to consider Section 4(4) of the Act which effectively de-exempts any development which attracts a requirement for Environmental Impact assessment (EIA) or Appropriate Assessment (AA).

### **Environmental Impact Assessment (EIA)**

- 9.3.13** In relation to EIA the proposed grid connection, comprising approximately 2.6 kilometres of overhead 20kV powerline, clearly falls very far short of the thresholds specified in either Class 20, Part 1 or Class 3(b), Part 2 of Schedule 5 of the Regulations. There is, therefore, no mandatory requirement for EIA.
- 9.3.14** There is still the possibility that the Board might form the view that EIA is required if it is considered, though sub-threshold, that the development would be likely to have a significant effect on the environment. In my opinion, given the very small scale of the proposed

development, and noting that the powerline would be carried on standard single wooden poles that are a common feature in the local landscape, and in most landscapes across the country where overground electricity connections are made into individual houses, the likelihood of significant effects on the environment can be excluded by the Board i.e. on a similar basis as is provided for under Article 109(2) of the Regulations. Even a formal determination on the matter is not, in my opinion, necessary.

**9.3.15** It follows that I do not consider that any significant cumulative effect issues arise in this case. In my view, the proposed grid connection, including the construction of same, and as detailed in the developer's Construction Method Statement (Section 3.1 above), would be such a small additional element to the development of the wind farm itself (Tipperary County Council Ref. 09/781, ABP Ref. 23.237713), the substation (Kilkenny County Council Ref. 12/485) and in the context of other permitted wind farms in the area (Kilkenny Ref. 12/533), as to be insignificant in terms of effects on the environment.

**9.3.16** I note that the developers submissions to the Board on both referrals includes an EIA Screening Report (see Sections 5.1.3 and 5.2.2 above). This assesses the proposed development against the criteria set out in Schedule 7 to the Regulations. It concludes that the proposed development does not give rise to any likely significant effects on the environment such as would trigger a requirement for EIA. I concur with this conclusion.

**9.3.17** To the extent that the proposed grid connection might, following the O'Grianna Judgement, be considered, in effect, to be an extension to the wind farm it could perhaps be argued that Class 13, Part 2, Schedule 5 [Development for the Purposes of Part 10 (EIA)] should be considered. This class refers to extensions to developments, including those that would have already been subject to EIA. While it is very difficult to place or measure the proposed grid connection within the terms of this class as would apply in this case, namely the units of measure applied in Class 3(i) for a wind farm (turbines or megawatts), it is clear, in my view, that by any interpretation it would represent only a very minor extension and be far removed from any trigger for EIA.

### **Appropriate Assessment (AA)**

**9.3.18** In relation to AA the application documentation submitted to the Planning Authorities included an AA Screening Report (see Section 3.1 above).

- 9.3.19** The report identifies all possibly relevant European Sites within approximately 15 kilometres of the subject referral site. Correctly, in my view, the assessment focusses on the River Barrow and River Nore SAC (Site Code: 002162). This is easily the closest European Site, at approximately 1.3 kilometres straight line to the south-east. It is the only one with a potential hydrological connection as the proposed grid connection overhead line crosses the Munster River upstream of the SAC (c.1.5 kilometres hydrological distance).
- 9.3.20** As indicated at Section 7.3 above copies of relevant documentation for this site, including, in particular, the Site Specific Conservation Objectives, are included in the file pouch.
- 9.3.21** The Screening Report indicates that most of the habitats and several of the species for which the SAC has been designated occur a significant distance downstream from the proposed overhead line. The distribution of the qualifying interests, and their associated Conservation Objective attributes, are summarised at Table 4 of the report.
- 9.3.22** The report includes a screening matrix based on the European Commission (2002) Methodological Guidance. Some of the main conclusions include:
- Most habitats/species that are qualifying interests for the SAC (and subject to Conservation Objectives) are located at least 38 kilometres downstream of the proposed grid connection line so that impacts are not possible.
  - As the project will have very low machinery requirements air emissions will not give rise to any impacts. The likelihood of impacts from fuel spillages is extremely small as best practice is to be employed. It is noted that concrete will not be used for the wooden pole bases.
  - The chance of siltation impacts is extremely unlikely given the small amounts of soil to be excavated/exposed at any one time, the employment of best practice and the long distances to the SAC and relevant qualifying interests. This conclusion takes account of the seven watercourse crossings identified and any other hedgerows that may include drainage ditches.
  - No significant additional in-combination impacts are anticipated. This takes account of three wind farms and the substation

approved in the local area and it is noted that assessments for these projects concluded similarly.

- No significant disturbance during construction to qualifying species is anticipated. Minor disturbance to otter is possible but any such disturbance would be temporary (construction duration to be limited to one month) and would be of no greater intensity than standard farming activities.
- At 13.3 kilometres distant from the River Nore SPA the project would be too far for overland impacts or interference with Kingfisher flight lines (the qualifying interest for that site).

**9.3.23** The overall conclusion of the Screening Report is that there are no likely significant effects on any Natura 2000 sites, due to scale, implementation of best practice, distance and lack of ecological connectivity. Stage 2 AA is not required.

**9.3.24** I note the similar conclusions drawn in the planning authorities AA screening exercises.

**9.3.25** Finally, in relation to AA, I would draw the Board's attention to the applicant's Construction Method Statement, also included in the application documentation submitted to the planning authorities (see Section 3.1 above). This confirms the limited scale and scope of the project through the construction phase and the employment of best practice.

**9.3.26** I consider, therefore, that it is reasonable to conclude, on the basis of the information on the 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 European Site No. 002162, or any other European site, in view of the site's Conservation Objectives, and a Stage 2 Appropriate Assessment is not therefore required.

**9.3.27** I am satisfied, therefore, that the proposed development does not fall within the scope of Section 4(4) of the Act.

### **Article 9(1) De-exemptions**

**9.3.28** The next, and final, step in this assessment is to consider the relevant provision of Article 9(1) of the Regulations (see Section 8.1(b) above) in order to check if any of these 'de-exemptions' apply.

**9.3.29** Article 9(1)(a)(vi) refers to interference with the character of a landscape or a view that are the subject of preservation objectives in the development plans.

**9.3.30** In relation to County Kilkenny there are no such relevant objectives (see Section 7.1 above). In relation to County Tipperary the area (Slieveardagh Hills) in which the site is located is a designated secondary amenity area and Policy LH2 for the protection of visual amenity and landscape character applies (see Section 7.2 above).

**9.3.31** While I note that the Tipperary County Council Planning Report (see Section 5.2.1 above) indicates some reservations as to the impact of the proposed development on the character of the secondary amenity area (noting Policy AEH4 is now Policy LH2) I am satisfied that the development would not have any adverse material impact and would not interfere with the character of the landscape. In this regard the Board should also note the Landscape and Visual Appraisal submitted by the developer to Tipperary County Council and which includes a photomontage analysis (see Section 5.2.2 above).

**9.3.32** In reaching this conclusion I would place particular emphasis on the following:

- The small scale of the proposed development comprising overhead power lines on standard single wooden poles. Similar connections are commonplace in rural areas and in the immediate area in which the site is located.
- The relative insignificance of the proposed development in the context of other existing developments in the area (houses, farm buildings etc) and the already approved wind farms in the area.

**9.3.33** I am satisfied, therefore, that the proposed development does not fall within the scope of Article 9(1)(a)(vi).

**9.3.34** Articles 9(1)(a)(vii) and (viiA) refer to archaeological and other sites of interest that are the subject of preservation/conservation objectives. The Board will note that the application documentation submitted to the planning authorities included an Archaeological Assessment (see Section 3.1 above). The assessment was based on both a desk-top review of relevant source material and a walk-over survey/field inspection of the proposed power line route. While some archaeological

monitoring during construction is recommended no findings suggesting any direct impacts of significance are made.

**9.3.35** On this basis I am satisfied that the proposed development does not fall within the scope of Articles 9(1)(a)(vii) or (viiA).

**9.3.36** Article 9(1)(a)(viiB) refers to the issue of Appropriate Assessment and as such the conclusion reaches at paragraph 9.3.26 above applies.

**9.3.37** Similarly Article 9(1)(c) refers to the issue of EIA and as such the conclusion reached at paragraphs 9.3.13 to 9.3.17 apply.

## **9.4 Precedent Referral Cases**

**9.4.1** I have not been able to identify any relevant precedent referral cases.

## **9.5 Conclusion**

**9.5.1** It is my conclusion that the proposed 20kV grid connection, in this instance, constitutes exempted development.

## **10.0 RECOMMENDATION**

I recommend that the Board should decide these referrals in accordance with the following draft orders:

### **1. Kilkenny County Council (RL3377)**

**WHEREAS** a question has arisen as to whether the provision of a 20kV electrical connection between Cnoc Wind farm (Grangehill, Bawnlea and Newpark, Grange, Barna, Thurles, County Tipperary) and Ballybeagh 38 kV substation (Ballybeagh, Tullaroan, County Kilkenny) is or is not development or is or is not exempted development;

**AND WHEREAS** Cnoc Windfarms Limited c/o Jennings O'Donovan and Partners Limited, Consulting Engineers, Finisklin Business Park, Sligo, Ireland, requested a declaration on the said question

from Kilkenny County Council and the said Council referred the question to the Board on the 10<sup>th</sup> day of September, 2015;

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

- (a) Sections 2(1), 3(1), 4(4), 172(1) and 177U(9) of the Planning and Development Act, 2000, as amended,
- (b) Articles 6 and 9 and Class 27, Part 1, Schedule 2 and Class 20 Part 1, and Class 3(b) Part 2, Schedule 5 of the Planning and Development Regulations, 2001, as amended, and
- (c) O’Grianna (and others) v. An Bord Pleanála (and others), Record Number: 2014 No. 2014 No. 19 JR; 2014 No. 10 COM.

**AND WHEREAS** An Bord Pleanála has concluded that –

- (a) the said electrical connection comes within the scope of Sections 2(1) and 3(1) of the Act and constitutes development,
- (b) the said electrical connection comes within the scope of Class 27, Part 1, Schedule 2, of the Planning and Development Regulations, 2001, as amended,
- (c) the said electrical connection does not come within the scope of section 4(4) Planning and Development Act, 2000, as amended. In this regard the Board adopts the report of the Inspector in relation to EIA and AA and, thereby, has carried out the necessary assessments to conclude that neither EIA nor AA is required,
- (d) the said electrical connection does not come within the scope of Articles 9(1)(a)(vi), (vii), (viiA) or (viiB) or Article 9(1)(c) Planning and Development Regulations, 2001, as amended, and
- (e) as the wind farm for which the proposed electrical connection is required was approved prior to the O’Grianna decision the Board can proceed to decide the subject referral, including the consideration of EIA and AA to the extent that is necessary, in accordance with the relevant legislative provisions.



**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that the provision of a 20kV electrical connection between Cnoc Wind Farm (Grangehill, Bawnlea and Newpark, Grange, Barna, Thurles, County Tipperary) and Ballybeagh 38Kv substation (Ballbeagh, Tullaroan, County Kilkenny) is development and is exempted development.

## **2. Tipperary County Council (RL3401)**

**WHEREAS** a question has arisen as to whether the provision of a 20kV electrical connection between Cnoc Wind farm (Grangehill, Bawnlea and Newpark, Grange, Barna, Thurles, County Tipperary) and Ballybeagh 38 kV substation (Ballybeagh, Tullaroan, County Kilkenny) is or is not development or is or is not exempted development;

**AND WHEREAS** Cnoc Windfarms Limited c/o Jennings O'Donovan and Partners Limited, Consulting Engineers, Finisklin Business Park, Sligo, Ireland, requested a declaration on the said question from Tipperary County Council and the said Council referred the question to the Board on the 26<sup>th</sup> day of August, 2015;

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

- (a) Sections 2(1), 3(1), 4(4), 172(1) and 177U(9) of the Planning and Development Act, 2000, as amended,
- (b) Articles 6 and 9 and Class 27, Part 1, Schedule 2 and Class 20 Part 1, and Class 3(b) Part 2, Schedule 5 of the Planning and Development Regulations, 2001, as amended, and
- (c) O'Grianna (and others) v. An Bord Pleanála (and others), Record Number: 2014 No. 2014 No. 19 JR; 2014 No. 10 COM.

**AND WHEREAS** An Bord Pleanála has concluded that –

- (a) the said electrical connection comes within the scope of Sections 2(1) and 3(1) of the Act and constitutes development,

- (b) the said electrical connection comes within the scope of Class 27, Part 1, Schedule 2, of the Planning and Development Regulations, 2001, as amended,
- (c) the said electrical connection does not come within the scope of section 4(4) Planning and Development Act, 2000, as amended. In this regard the Board adopts the report of the Inspector in relation to EIA and AA and, thereby, has carried out the necessary assessments to conclude that neither EIA nor AA is required,
- (d) the said electrical connection does not come within the scope of Articles 9(1)(a)(vi), (vii), (viiA) or (viiB) or Article 9(1)(c) Planning and Development Regulations, 2001, as amended, and
- (e) as the wind farm for which the proposed electrical connection is required was approved prior to the O’Grianna decision the Board can proceed to decide the subject referral, including the consideration of EIA and AA to the extent that is necessary, in accordance with the relevant legislative provisions.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that the provision of a 20kV electrical connection between Cnoc Wind Farm (Grangehill, Bawnlea and Newpark, Grange, Barna, Thurles, County Tipperary) and Ballybeagh 38Kv substation (Ballbeagh, Tullaroan, County Kilkenny) is development and is exempted development.

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**Brendan Wyse,**  
**Assistant Director of Planning.**

**January, 2016.**

**sg**