



An Bord Pleanála

Inspector's Report

REFERRAL

An Bord Pleanála Refs: **RL 3408/09/10/11**

Planning Authority: Wexford County Council

Planning Authority Ref: EXD00574

Referrer: Wexford County Council

Applicant for Declaration: Francis Clauson

Location of Site Referral: County Wexford.

Question: “Whether the provision of grid connections from the Croy 110kV/Lodgewood 220kV substation to the Ballycadden, Gibbet Hill, Knocknalour and Ballynancoran wind farms in County Wexford is or is not development and is or is not exempted development”.

Date of Inspection: 17 June 2016

INSPECTOR: **Brendan Wyse**

1.0 INTRODUCTION

1.1 These four referrals relate to four grid connections from a single substation to four wind farms in the same local area. The connection routes are in part the same. The question put is the same in all cases. In the circumstances, it is appropriate to deal with the referrals in a single Inspector’s report. A copy of the report is attached to each file.

2.0 SITE LOCATION AND DESCRIPTION

2.1 The site is located a short distance (approx. 3-12 kms) west/north-west of Ferns in County Wexford. Comprising the routes of the grid connections it extends from the Croy 110kV/Lodgewood 220kV substation in the south to the Knocknalour and Ballynancoran windfarms in the north, a straight line distance of approx. 12 kms. A spur to the east extends to the Ballycadden Wind Farm and a spur to the west extends to the Gibbet Hill wWnd Farm. The area in general is characterised by good quality arable land with a substantial amount of one-off housing. There is also a considerable amount of wind farm development in the area.

2.2 The great majority of the grid connections are underground cables laid in the public roads. The main exceptions are; the initial connection to the substation, which crosses two fields (a distance of approx. 500 metres); the final connection to Ballycadden Wind Farm via a private road, a track and fields (a distance of approx. 1000 metres); the final connection to Gibbet Hill Wind Farm across a private road, a track and fields (a distance of approx. 800

metres); and the link section between the Knocknalour and Ballynancoran wind farms that comprises an overhead power line across fields (a distance of approx. 2 kms).

2.3 In overall terms the grid connections comprise approx. 26 kms of underground cable and approx. 2kms of overhead powerline. Road and bridge markers identify the locations of the former. The latter comprises 3 no. cables on single wooden poles. All comprise 20kV circuits.

2.3 Maps/photographs are included in the file pouch.

3.0 APPLICATION FOR DECLARATION

3.1 The application was lodged by Francis Clauson, Kiltilly, Bunclody, Enniscorthy, County Wexford to Wexford County Council on 11 August, 2015.

3.2 The cover letter submitted includes the following:

“Under section 5 of the PDA 2000 (as amended) I would like Wexford County Council to make a determination for the development described below.

The attached document outlines my case along with the question for determination in Section 10”.

3.3 The attached document includes:

- Maps indicating routes.
- Statement that *“The development starts in the Crory 110KVA/Lodgewood 220KVA substations and makes its way via routes as shown on the*

attached maps to the above listed wind farms (Gibbet Hill; Knocknalour; Ballycadden; and Ballynancoran). The development was carried out by multiple parties (including ESB Networks in some cases) and overseen by ESB Networks.”

- The wind farms and connections were approved by the Commission for Energy Regulation (CER) through the issuing of Authorisation to Construct Consents and Generating Licenses.
- Wexford County Council was asked to make a Declaration that the connections are development and not exempted development.
- The development is made up of underground ducts, cables and yellow roadside markers from the Croy 110kV substation to the on-site substation inside the area defined on the relevant wind farm planning applications via a route either under or in the margin of the local roads.
- That part of the development between the Ballynancoran Wind Farm to the substation inside the Knocknalour Wind Farm is via overhead cables.
- The instances which remove exemption include; Regulation 9; Planning Conditions; Habitats Assessment; EIA.
- Each of the planning permissions for the wind farms contains a specific condition that planning permission shall be obtained for the grid connection prior to construction.
- As in each of the planning permissions for the wind farms the grid connections were separated out so also was any assessment required under the EIA or Habitats Directives. This leads to the assumption that no assessments have been carried out for the grid connections under these Directives.
- The overall development is now under the ownership of ESB Networks.
- The Wind Energy Development Guidance (2006) indicates the necessity for separate planning applications for grid connections.
- Article 9(1)(a)(i) of the Planning and Development Regulations, 2001, referring to contravention of a condition, removes the exemption permitted under Class 26 or 27 of the Planning and Development Act.
- Query if Wexford County Council has signed landowners' consents for each of the folios crossed for the grid connections.

- Reference to the O’Grianna decision.
- Query if Wexford County Council carried out any EIA assessment.
- Query if Wexford County Council carried out an Appropriate Assessment. Reference Slaney River SAC.
- As the grid connections form part of a development which comes within Schedule 5 of the Planning and Development Act [Part 2, Class (3)(i) – wind energy] query basis for exemption under Class 26.
- Section 10 of the document includes the questions:

“Is the development as described made up of the grid connections etc. from the Croy/Lodgewood substation to the four listed wind farms as shown on the attached maps a “development with regard to the PDA 2000 (as amended)?”

“Is the “development” an “exempted development” with regards to the PDA 2000 (as amended)?”

“If so what reasons is Wexford County Council relying upon to make this assertion?”

- Letter from ESB Networks includes the following information:
 - The grid connections in question are 20kV circuits.
 - The connections to the Knocknalour, Gibbet Hill and Ballycadden wind farms are entirely underground.
 - The ducting and reinstatement in all three cases was carried out by a third party. ESB pulled the cables through in two of the cases, the developer in the other case.
 - These connections were energised between October, 2012 and July, 2013.

4.0 PLANNING AUTHORITY DECISION

4.1 It should be noted that Wexford County Council did not make a Declaration. Instead it referred the matter to the Board for determination under Section 5(4), Planning and Development Act 2000, as amended.

4.2 In referring the matter the planning authority's letter states:

"The planning authority requests An Bord Pleanála to determine if the development as described – the development of grid connections from Croy/Lodgewood substation to the four listed wind farms is development and is or is not exempted development."

5.0 REFERRALS TO THE BOARD

5.1 Wexford County Council

5.1.1 Report of Senior Executive Planner/Senior Planner, dated 17th September, 2015.

Includes:

- Recommendation that the grid connections constitute development and exempted development.
- Reference to Articles 6 and 9 and Classes 26 and 27, Part 1, Schedule 2 of the Regulations.
- The grid connection does not cross any Natura 2000 site. There would be no removal or interference with habitat within any European site. Thus there would be no interference with protected species and there is no known rare or protected flora or habitat along the route of the grid connection.
- At its closest point the route of the grid connection is approximately 2.8 kilometres from the River Slaney (South West) which forms part of the River Slaney Valley SAC. Where the connection enters the existing Croy/Lodgewood substation it is approx. 1km from the River Bann (to the west) which is a tributary of the River Slaney SAC.

- Reference to conditions attached to the wind farm permissions requiring planning permissions to be obtained for the grid connections. Statement that *“to rely on this provision to de-exempt the connection to the national grid, it must be determined that the development would likely have a significant effect on the integrity of a European Site, thus, offering due regard to ‘likelihood’, ‘significant effect’, and impact on a European Site’s ‘integrity’.”*
- Statement that *“it is reasonable to conclude from the reading of this condition that it does not expressly prohibit the developer of the wind farm from availing of the exempted development provisions under the Planning and Development Act. In other words, such associated works, when seeking to avail of the exempted provisions under the Act, have not been expressly de-exempted by this condition.”*

5.1.2 Report of Director of Services, Economic Development and Planning, dated 21st September, 2015.

Includes:

- In the main agreement with conclusions drawn in Planners Report.
- Concern re conditions requiring planning permission for grid connections. The conditions appear clear and not subject to much interpretation as to meaning.
- Contention that these conditions only apply where it is determined that the development would have a significant effect on the integrity of a European Site appears to be at odds with previous case law on this matter.
- Exempted development is generally not available in respect of development subject to an EIS which may apply here.
- The issue of the conditions is key.
- In the light of uncertainty decision to refer matter to the Board.

5.2 Submission of Francis Clauson

Includes:

- Reference section 4(4) of the Act – de-exemption where EIA or AA required.
- Reference Article 9(1)(a)(i) of the Regulations – de-exemption where development would contravene a condition of a planning permission. All four wind farm planning permissions include a condition requiring a planning permission for the grid connection prior to construction. Reference An Bord Pleanála Ref. RL3118.
- All four interconnections (substation to wind farms) constitute a single wind energy “installation” from an EIA perspective.
- Wexford County Council in taking the request for a Declaration and splitting into 4 referrals to An Bord Pleanála, has displayed a lack of understanding of this.
- The construction of all of them was overseen by ESB Networks and it is understood that the entire infrastructure is now owned by ESB Networks. Evidence from road opening licences confirms use of common road openings/trenches and ducting over sections of the routes.
- In summary the grid connections are a single “non-exempt development” comprising of “works” which are shared between the multiple wind farms. They should have been subject to EIA. The cumulative impact assessment never took place.
- Project splitting has circumvented the EIA Directive and Irish Planning Law. The four wind farms combined should have been considered to constitute Strategic Infrastructure Development (SID). The grid connection infrastructure, therefore, forms part of a SID. SID’s cannot be exempted developments.
- Reference to the Wexford County Council Planner’s Report – no mention of Article 9(1)(a)(i); no mention of a screening for AA. The Planners reference to AA is flawed in not acknowledging that the grid connections cross tributaries that drain to the Slaney SAC [Refer “SEA Non-Technical Report for the Carlow County Council Development Plan 2009-2015” (Map page 10)]. Also refer to Inland Fisheries Ireland letter in relation to the Knocknalour Wind Farm development (copy enclosed).
- Query the Planner’s Report interpretation of the conditions attaching to the wind farm permissions requiring planning permissions to be obtained for the grid connections.

- Letter from ESB Networks includes the following information:
 - The connection between the Knocknalour Wind Farm and the Ballynancoran Wind Farm is a 20kV overhead line. It was constructed between January and June 2012 and commissioned in July 2013.
 - In order to connect a number of windfarm developments at medium voltage in the area it was necessary to construct a new 110kV/MV substation at Crory which is immediately adjacent to the Lodgewood 220kV substation.

5.3 Observer – Lorna Moorehead

Includes:

- Submission that grid connection from Crory/Lodgewood substation to Gibbet Hill Wind Farm (and the other connections) is development and is not exempted development.
- Reference to Condition 7 of the Gibbet Hill Wind Farm permission and article 9(1)(a)(i) of the 2001 regulations.
- Reference to O’Grianna & Ors v. An Bord Pleanála and the need for EIA.
- Reference to the need for cumulative/in-combination assessments.
- The need for AA.

5.4 Wexford County Council – Further Submission

Includes:

- Reference to An Bord Pleanála Ref. RL3234 – January 2015 decision by the Board that a 10kV overhead electricity line connecting a wind farm to

a substation in County Clare is development and is exempted development.

- The question asked is non-specific in so far as it related to a number of grid connections and does not relate to a specific case as required under Section 5 of the Act.

5.5 Submissions by Windfarm Developers/Operators

5.5.1 Ballycadden Wind Farm Limited

Includes:

- ESB Networks constructed the physical infrastructure to connect Ballycadden Wind Farm to the Croy/Lodgewood substation. The works comprise underground ducts and cables and are the subject of the Declaration sought by Mr. Francis Clauson. The grid connection works serve four wind farm developments, including Ballycadden.
- The conditions imposed on the various planning permissions were intended not to require that planning permission must be obtained for grid connection works but rather that planning permission must be obtained for such works if they are not exempted development.
- It does not necessarily follow that, if the Planning Authority did not carry out the appropriate assessment of the grid connection works, then no such assessments were carried out.
- No argument has been advanced that the grid connection works do not fall within Class 26, Part 1, Schedule 2 of the Regulations and, as such, subject to Article 9, the works are exempted development.
- The works do not fall within the provisions of Article 9(1)(a)(vi) or (viiB). No evidence has been presented that the works interfere with any protected landscape or view (much of the works being underground) or that the development would be likely to have a significant effect on the integrity of a European Site.

5.5.2 ABO Wind Ireland Limited (Gibbet Hill Wind Farm)

Includes:

- ABO Wind carried out the underground grid connection between Gibbet Hill Wind Farm and Lodgewood 220/110kV substation under an agreement with ESB Networks. The ownership of the infrastructure was transferred to ESB Networks who have responsibility for its operation and maintenance.
- No Section 5 Declaration was sought. Exemptions were widely enjoyed at the time by both developers, considered “undertaker authorised” under rules of contestability, and ESB Networks. It was considered that the development fell within Class 26, Planning and Development Regulations, 2001, as amended and satisfied Article 9 qualifying criteria.
- By reference to Section 34, Planning and Development Act 2000, as amended, Condition 7 of the Gibbet Hill Wind Farm permission exceeded the limitations of the legislation as the condition is not related to land which is under the control of ABO Wind and is not, as such, connected with the development permitted on the land to which the planning application relates. The development description for the application (P.A. Ref. 20090266) did not seek consent for the grid connection but only referred to the wind farm.
- By reference to Section 34(4)(a) of the Act the Planning Authority acted “ultra vires” in applying the condition to ABO Wind.
- ABO Wind advised Wexford County Council of their intention to address Condition 7 through the exempted development code and compliance was subsequently confirmed by email from the Council (copy correspondence enclosed).
- The underground cable in itself is not of a type, scale or threshold as set down in Schedule 5, Planning and Development Regulations 2001, as amended, (re EIA). It does not give rise to impacts of a magnitude which would cause a significant effect on the environment.
- As an integral part of the Gibbet Hill Wind Farm it did form part of the assessment of that project for the purposes of EIA. The Planning Authority would have noted Section 3.8.3 of the EIS submitted with the application which noted the then possibilities for the grid connection.
- Article 9(1)(c), Planning and Development Regulations 2001, as amended, is, therefore, not relevant.

5.5.3 Ballynancoran Wind Farm

Stated that wind farm was constructed and is being operated in compliance with planning permission.

5.5.4 Knocknalour Wind farm

Stated that wind farm was constructed and is being operated in compliance with planning permission.

5.6 ESB Networks – Comments on Submission of Francis Clauson

Includes:

EIA

- The O’Grianna decision related only to one windfarm and its grid connection to the substation. It did not state or imply that all wind farms connecting into the same substation form a single project.
- The issue of whether or not each individual windfarm and the respective grid connection should have been subject to EIA is moot as each windfarm, in fact, received planning permission without the grid connection. The latter was constructed later as exempted development.
- The infrastructure was constructed and has been in operation since prior to the O’Grianna judgement on 12 December, 2014. The relevant permissions are beyond challenge.
- None of the grid connections is of a category of development for the purposes of Part 10, Planning and Development Act 2000, as amended. This would be true even if all of them were to be considered as one project.
- By reference to Class 20, Schedule 5, Part 1 of the 2001 Regulations, as amended, the overhead line from Ballynancoran Wind Farm to the substation at Knocknalour Wind Farm is 20kV and less than 15 kilometres in length, thereby significantly below the threshold for EIA. It would also not constitute subthreshold development by reference to the

criteria set down in Schedule 7. Class 13, Schedule 5, Part 2 of the Regulations is not applicable either.

Breach of Condition/Unauthorised Development

- Query whether or not it is the Planning Authority's view that the relevant conditions have the effect of requiring permission even where an exemption is available in the Regulations. It appears highly unlikely that the conditions were intended to cut across exemptions specifically provided for by the Minister. ESB Networks have considered making an application pursuant to Section 146A, Planning and Development Act 2000, as amended, to have the matter clarified.
- It is accepted that an exemption may be unavailable due to the breach of a condition of a planning permission [Article 9(1)(a)(i)] and/or as a result of a consequent unauthorised status [Article 9(1)(a)(viii)].
- Where such conditions have been previously imposed they have been prefaced by wording such as "Notwithstanding the provisions for exempted development under the Planning and Development Regulations 2001...." No such wording was included in the present case which supports the view that the Planning Authority was not seeking to impose a requirement for permission where no legal requirement existed.
- The relevant conditions were intended to regulate the development of the wind farms. They cannot be regarded as applying to development which did not form part of the application. As none of the conditions were referable to land occupied by the grid connections (outside the red line boundary of the individual wind farms) the grid connections cannot be regarded as being in breach of any of the wind farm conditions.
- The submission includes copy correspondence indicating Wexford County Council confirming compliance with the relevant conditions.

SID

- An 'installation' as defined in the Seventh Schedule refers to a single wind farm and not several.

Appropriate Assessment

- The grid connection was screened by the Planning Authority (Ref. P.A. Planners Report).
- The submission includes a report entitled "Review of Ecological Assessment Reports for Wexford Referrals" carried out by ESB International for the ESB. The review examines the assessments carried out for the wind farm developments and endorses the conclusions that

the potential for any significant impact on the Slaney River SAC was insignificant.

The conclusion in relation to the grid connections is similar and is based on:

- The distance from the SAC.
- Where stream crossings were necessary for underground cabling this was executed either by cables being buried in the decking of road bridges or through the use of tunnelling underneath the river.
- The overhead line section consists of single wooden poles also at a distance from the SAC.

5.7 Francis Clauson – Further Submission

Includes:

- Reference to Dillon v. Irish Cement Limited – to avail of exempted development developer must be clearly and unambiguously within the terms of the Regulations.
- Reference to An Bord Pleanála Ref. 204397 (Keeper Hill), Condition No. 11. Similar condition attached by the Board (decision issued 2004).
- Reference to An Bord Pleanála requests for further information under Refs. 244006, 244053 (“O’Grianna” wind farm cases).
- The conditions (regarding grid connections) attached by Wexford County Council fall firmly within Section 34 (4)(h) of the Act.
- There is no formal signed compliance documentation on the planning file.
- The grid connections were constructed at the same time, involve shared routing and constitute one project.
- The grid connections are an extension of the wind farm development and hence fall into Schedule 5 of the Act.
- The assessment of impacts on the River Slaney SAC must include cumulation with other projects, including the wind farms and other developments in the area.

- There is no evidence that any lawfully conducted AA was undertaken by Wexford County Council with regard to this project.

5.8 ESB – Further Submission

Includes:

- The utilisation of the exemption route rendered the condition requiring planning permission redundant and, therefore, not liable to be complied with.
- Concurrence with views expressed by the wind farm developers.

6.0 PLANNING HISTORY

The planning permissions for the four wind farms are as follows:

(1) Ballycadden Wind Farm - P.A. Ref. 20091730

April 2010 permission for wind farm, comprising 9 no. turbines.

Conditions include:

7. Prior to commencement of works on site, the applicant shall obtain planning permission for connection of the wind farm to the National Grid.

Reason: In the interest of clarity and the proper planning and sustainable development of the area.

15. This permission shall not in any way be construed as any form of consent or agreement to a connection to the national grid or to the routing or nature of any such connection.

Reason: In the interest of clarity and the proper planning and sustainable development of the area.

The application included an EIS.

(2) Gibbet Hill Wind Farm – P.A. Ref. 20090266

December 2009 permission for wind farm, comprising 6 no. turbines.

Conditions include:

7. Prior to commencement of works on site, the applicant shall obtain planning permission for connection of the wind farm to the National Grid.

Reason: In the interest of clarity and the proper planning and sustainable development of the area.

17. This permission shall not in any way be construed as any form of consent or agreement to a connection to the national grid or to the routing or nature of any such connection.

Reason: In the interest of clarity and the proper planning and sustainable development of the area.

This application included an EIS.

(3) Knocknalour Wind Farm – P.A. Ref. 20110504

August 2011 permission for wind farm, comprising 4 no. turbines.

Conditions include:

8. Prior to commencement of works on site, the applicant shall obtain planning permission for connection of the wind farm to the National Grid.

Reason: In the interest of clarity and the proper planning and sustainable development of the area.

This application included an EIS.

(4) Ballynancoran Wind Farm – P.A. Ref. 20033444

June 2004 permission for wind farm, comprising 2 no. turbines.

Conditions include:

10. Prior to the commencement of development, planning permission shall be obtained for the erection of powerlines to facilitate the connection of the proposed wind turbines to the national grid.

Reason: In the interest of the proper planning and development of the area.

7.0 DEVELOPMENT PLANS

7.1 Wexford County Development Plan 2013-1019

Site located partly within designated “Uplands” (northern areas) and partly within designated “lowlands” (southern areas).

Objective L03 – To ensure that developments are not unduly obtrusive in the landscape, in particular in the Upland, River Valley and Coastal landscape units and on or in the vicinity of Landscapes of Greater Sensitivity.

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 26

“the carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking”.

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 –

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

- (iii) *endanger public safety by reason of traffic hazard or obstruction of road users,*

- (v) *consist of or comprise the carrying out under a public road of works other than a connection to a wired broadcast relay service, sewer, water main, gas main or electricity supply line or cable, or any works to which class 25, 26 or 31(a) specified in column 1 of Part 1 of Schedule 2 applies,*

- (vi) *interfere with the character of a landscape, or 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,

(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use,

(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.”

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 Preliminary Matters

9.1.1 Given the particular circumstances of this case, involving grid connections to four individual wind farms, and having regard to the content of the submissions on file, I consider that it is necessary at the outset to clarify the nature and scope of the subject development and hence the scope of the referral that is before the Board for decision.

9.1.2 In this regard the information before the Board includes the following:

- The grid connection works were undertaken either by the wind farm developers, and/or their agents, under the supervision of ESB Networks, or by ESB Networks. The entire grid connection infrastructure is now under the ownership of ESB Networks.

- The connections were energised between October 2012 and July 2013 and construction took place sometime between early 2012 and early 2013.
- Common trenching/ducting appears to have been utilised where relevant.
- The development comprises mostly underground 20 KV circuits (approx. 26kms in length) with a short section of overhead 20KV powerline (approx. 2kms in length) linking the Knocknalour and Ballynancoran wind farms.
- The development is as illustrated on the attached maps.

9.1.3 I am satisfied, therefore, that the grid connections comprise, de facto, a single project/development.

9.1.4 I am also satisfied that the question was properly/adequately put to Wexford County Council in the first instance and in accordance with the requirements of section 5, Planning and Development Act 2000 (as amended), and that it did refer to this identifiable single project (see Sections 3.2 and 3.3 above), and that the referral on to the Board by Wexford County Council also refers to the same single project as identified (see Section 4.2 above).

9.1.5 For clarity, therefore, the question before the Board can be properly stated as:

Whether the provision of grid connections from the Crory 110KV/Lodgewood 220KV substation to the Ballycadden, Gibbet Hill, Knocknalour and Ballynancoran wind farms in County Wexford is or is not development and is or is not exempted development.

9.1.6 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 15th November, 2013 and the High Court judgement (Ref. 2014 No. 19 JR’ 2014 No. 10 COM) was delivered on 12th 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 farm developments, and which require EIA, now include relevant information on proposed grid connections.
- 9.2.5** In the context of the subject referral, however, permissions for the relevant wind farms (P.A. Ref.s 20033444; 20090266; 20091730; 20110504) were originally granted between 2004 and 2011, i.e. prior to the O’Grianna judgement. The decisions were in accordance with the law as it stood at that time and the wind farms were subsequently constructed. The permissions, therefore, are valid and beyond challenge. The applications, where relevant, were subject to EIA and it is not now proper or possible to revisit this.
- 9.2.6** It is also the case, in this instance, that the grid connections were constructed over the period early 2012 to early 2013, also prior to the O’Grianna judgement.

9.2.7 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 this referral. As indicated at Section 8.1 above one of the tests that has to be considered in the referral is whether or not EIA was required for the subject development.

9.2.8 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 referral while still meeting fully its obligations under the Directive.

9.3 Legislative Tests

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

Development

9.3.2 Having regard to the nature of the development, namely the laying/ construction of approx. 26kms of underground cable and approx. 2kms 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 development constitutes exempted development.

9.3.3 Following on from Section 4(2)(a)(i) of the Act, and the Regulations made thereunder, the relevant classes of development are, as indicated, Classes 26 and 27, Part 1, Schedule 2, Planning and Development Regulations 2001, as amended. I am satisfied that the development is partly a “*development consisting of the laying underground of....cables....for the purposes of the undertaking*” and partly 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 these classes is that the development be carried out by an “*undertaker authorised to provide an electricity service*”.

Undertaker/Statutory Undertaker

9.3.4 As indicated Article 3(3) of the Regulations states that an electricity undertaking means “*an undertaker authorised to provide an electricity service*”. However, there is no statutory definition to clarify what exactly this means. The Electricity Regulation Act 1999, 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”.

9.3.5 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. In addition, it appears in this subject case, that the wind farms and connections have been approved by the CER through the issuing of Authorisation to Construct Consents and Generating Licences. ESB Networks is also clearly an electricity undertaking.

9.3.6 As indicated Classes 26 and 27 fall 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.

9.3.7 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*”. The developers, in this case, would clearly fall under the terms of this definition.

9.3.8 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.

9.3.9 I am satisfied, therefore, that the development falls within the scope of the said Classes 26 and 27.

9.3.10 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)

9.3.11 As indicated previously all but approx. 2kms of the grid connections comprise underground cabling. The greater part of the development, therefore, does not fall within a class of development for the purposes of EIA. It cannot, therefore, attract a requirement for EIA.

9.3.12 In relation to the remaining, approx. 2kms, of overhead line the possible classes of development to consider for the purposes of EIA are Class 20, Part 1 and Class 3(b), Part 2 of Schedule 5. The former refers to overhead powerlines with a voltage of 220kV or more and a length of more than 15kms. The latter refers to overhead cables not included in Part 1 where the voltage is 200kV or more. I consider that the approx. 2kms length of 20kV overhead line falls so far short of these thresholds that any possible requirement for EIA can be dismissed on a *de minimus* basis and in line with article 109(2), Planning and Development Regulations 2001, as amended, in that the likelihood of significant effects on the environment can be excluded by the Board.

9.3.13 To the extent that the grid connections might, following the O’Grianna Judgement, be viewed, in effect, to be extensions to the wind farms it could perhaps be argued that Class 13, Part 2, Schedule 5 of the Regulations 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 grid connections 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 they would represent only a very minor extension and be far

removed from any trigger for EIA. Again by reference to Article 109(2) of the Regulations, therefore, I consider that the likelihood of significant effects on the environment can be excluded. It follows also that the issue of cumulative assessment does not arise.

9.3.14 It is again noted, in this context, that the subject grid connections were constructed prior to the O’Grianna judgement.

Appropriate Assessment (AA)

9.3.15 Relevant information on file in relation to the grid connection development, and based, in particular on; the submissions of Francis Clauson; the submissions of ESB Networks including the report entitled “*Review of Ecological Assessment Reports for Wexford Referrals*”; and my site inspection, includes:

- The great majority of the grid connections are underground cables laid in public roads, either under the road pavement or in the margins.
- The main exceptions are; the initial connection to the substation that crosses two fields (distance approx. 500 metres); the final connection to the Ballycadden Wind Farm via a private road, a track and fields (distance approx. 1000 metres); the final connection to the Gibbet Hill Wind Farm across a private road, a track and fields (distance approx. 800 metres); and the link section between the Knocknalour and Ballynancoran wind farms that comprises overhead lines on single wooden poles across a number of fields (distance approx. 2000 metres).
- All necessary ground level stream crossings, bar one, were effected by utilising existing road bridge decking. ESB markers on the bridge walls indicate the presence of underground electricity cables.
- The one crossing, exceptional to this, is the crossing of the Ballycarney Stream near the Corah Bridge. The installation here was undertaken using horizontal directional drilling (HDD) as the bridge deck was deemed unsuitable to accommodate the cable. The method involves drilling under the stream channel.

- The overhead link section between the Knocknalour and Ballynancoran wind farms also crosses a small watercourse.
- Given the nature of the development the issue of likely significant effects arises only in relation to the construction phase.

9.3.16 A copy of Fig. 1 from the ESB Networks ecological report is included in the file pouch for convenience. This illustrates the grid connection routes and the relevant streams/watercourses and crossing points. I have highlighted the Corah Bridge crossing point for clarity. The map also shows the nearest and most relevant European Site, namely, the Slaney River Valley cSAC (Site Code 000781). Copies of relevant documentation for this site, including, in particular, the Site Conservation Objectives, are included in the file pouch.

9.3.17 The SAC is an extensive site comprising the freshwater stretches of the River Slaney and a number of its tributaries flowing through three counties (Wicklow, Wexford and Carlow) as well as the estuary at Ferrycarrig and Wexford Harbour. The Conservation Objectives relate to the following:

Habitats

Estuaries

Tidal Mudflats and Sandflats

Floating River Vegetation

Old Oak Woodlands

Alluvial Forests

Species

Freshwater Pearl Mussel

Sea Lamprey

Brook Lamprey

River Lamprey

Twaite Shad

Atlantic Salmon

Otter

- 9.3.18** The great bulk of the development involves underground cabling within existing road pavements and/or road bridge decking and at considerable distances from the SAC. As such there is no direct hydrological linkage with the SAC. I consider it reasonable to assume that best practice was employed during construction and, in this regard, I note that road opening licences were required and that the works generally were supervised by ESB Networks. I also note that no evidence to the contrary is presented. I consider, therefore, that there was no likelihood of significant effects on the European Site arising from the construction of this part of the development.
- 9.3.19** Similarly, I do not consider that there was any likelihood of significant effects arising from the construction of the overhead line section of the development, comprising as it did the placing of single wooden poles into the ground at intervals and subsequent stringing, essentially similar to the common electrical connections in evidence across the countryside.
- 9.3.20** In relation to the stream crossing near the Corah bridge I again consider it reasonable to conclude that best practice construction methods were employed and note again the absence of any evidence to the contrary. This would have effectively eliminated any potential for significant ground disturbance/sediment discharge to the Ballycarney Stream. I also note that the crossing point is approx. 2kms from the nearest point of the SAC and that this was the only location at which this construction approach was needed. The construction period here was also likely to have been very short. I consider, therefore, that there was no likelihood of significant effects arising from the construction of this part of the development.
- 9.3.21** Given the nature of the development as described above, I do not consider that it is reasonably conceivable that its construction would have been likely to give rise to any significant effects over and above those likely to arise from the wind farms or any other projects or plans that might be considered. The issue of in-combination effects, therefore, does not arise.
- 9.3.22** 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 development, individually or in combination with other plans or projects, would not have been likely to have a significant

effect on European Site No. 000781, or any other European site, in view of the site's Conservation Objectives, and a Stage 2 Appropriate Assessment was not therefore required.

9.3.23 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

9.3.24 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.

9.3.25 Article 9(1)(a)(i) refers to a development contravening a condition attached to a planning permission. As indicated at Section 6.0 above all of the permissions for the relevant wind farms in this case include conditions requiring that prior to the commencement of the development (ie. of the wind farm) planning permission shall be obtained for the connection to the national grid. This was the primary reason for the planning authority referring this case on to the Board for decision.

9.3.26 The arguments advance in relation to this matter focus on the following:

- (i) Are the conditions "*ultra vires*" in the context of section 34(4), Planning and Development Act 2000 (as amended)?
- (ii) Do the conditions as drafted over-ride any entitlement to avail of exempted development?
- (iii) Does the issuing of compliance notifications for the wind farm developments affect the situation?

9.3.27 In relation to (i) above this is a matter that could only be determined by the courts and clearly the time for challenging the legality of the conditions is well passed. Suffice to say that section 34(4) of the Act is not exhaustive and the authority conferred to attach conditions is quite wide in scope so long as, of course, the conditions are relevant in planning terms. The type of condition under consideration here is commonly used and is well established in planning practice.

- 9.3.28** In relation to (ii) above it seems to me that the wording of the conditions is clear and unambiguous in that it evidently requires, in each case, that planning permission be obtained for the grid connections. Whether or not it was the intention of the planning authority to thereby disallow the possibility of exempted development is, in my view, not relevant as the conditions as drafted are so clear as to what is required. While it is common practice, as suggested in the submission of ESB Networks (Section 5.6 above), that such conditions are prefaced by wording such as “*Notwithstanding the provisions of the exempted development regulations...*” this is not always the case and it is also quite common that such wording is not included. In the circumstances, I find it difficult to conclude otherwise than the construction of the subject grid connections, in the absence of a prior planning permission, contravened the relevant conditions of the respective planning permissions for the wind farms.
- 9.3.29** It should be noted that I have been unable to source any helpful legal reference specific to this matter and none are advised within the submissions on file. However, I consider the case of *Dillon v. Irish Cement* [Nov. 1986, unreported – HC], as referenced in the submission of Francis Clauson, to be of some relevance (Section 5.7 above). The judgement in this case indicated that the exempted development provisions of the legislation must be strictly construed and that for a developer to place himself within them he must come clearly and unambiguously within the terms of the exemptions in what he proposes to do [Source: *Irish Planning Law and Practice 2(200)*]. This, I consider, lends support to the conclusion I have drawn.
- 9.3.30** I would also draw the Board’s attention to previous referral case ABP Ref. RL3234 – see details in Section 9.4 below. This case was referenced in the submission of Wexford County Council (Section 5.4 above) and it might be considered to support a contrary view.
- 9.3.31** In relation to (iii) above I am of the view that compliance notifications do not have a bearing on the Boards decision on the referral and which is solely concerned with the question before it under section 5 of the Act.
- 9.3.32** I conclude, therefore, that the development does fall within the scope of article 9(1)(a)(i) and that it is, therefore, not exempted development by reference to this article.
- 9.3.33** In relation to Article 9(1)(a)(iii), which refers to traffic hazard/obstruction of road users, the development, being for the most part an underground cable,

would have no impact on traffic safety. I also note the requirement for a road opening licence so it is reasonable to assume that construction complied with relevant health and safety and traffic management requirements.

- 9.3.34** In relation to Article 9(1)(a)(v) I have already concluded that the relevant part of the development falls within the scope of Class 26 (See parag. 9.3.9 above) so that this article does not apply.
- 9.3.35** In relation to article 9(1)(a)(vi), which refers to interference with landscape character, views or prospects, this has no application whatsoever to the bulk of the development which is underground. While the overhead section of the grid connections is located in the designated Uplands in the current Wexford County Development Plan it could not, in my view, be considered to interfere with this landscape character. As previously indicated this section comprises 3 no. cables strung to single wooden poles, similar in nature to the common electricity connections found across the countryside. I am satisfied, therefore, that the development does not fall within the scope of this article.
- 9.3.36** Articles 9(1)(a)(vii) and (viiA) refer to archaeological and other sites of interest that are the subject of preservation/conservation objectives. Given that the vast bulk of the development is within existing public roads and having regard to the relevant provisions of the current Wexford County Development Plan and the Record of Monuments and Places I am satisfied that the development does not fall within the scope of these articles.
- 9.3.37** Article 9(1)(a)(viiB) refers to the issue of Appropriate Assessment and as such the conclusion reached at parag. 9.3.23 above applies.
- 9.3.38** Article 9(1)(a)(viii) refers to unauthorised structures. Consideration of this article only arises in this case following on the conclusion above at parag. 9.3.32 in relation to article 9(1)(a)(i) and on foot of which it might be argued that the wind farms are unauthorised on the basis of non-compliance with a condition of their planning permission. This is essentially a matter for the planning authority and/or the courts to decide. I do not consider that it is appropriate to address it further here.
- 9.3.39** Article 9(1)(c) refers to the issue of EIA and as such the conclusion reached at parags. 9.3.11 to 9.3.13 apply.

9.3.40 Finally, it should be noted that my conclusions as outlined above would be the same even if the grid connections were to dealt with as four separate developments.

9.4 Precedent Referral Cases

ABP Refs. 3369/3375 and 3377/3401

These are recent decisions by the Board in relation to grid connections to wind farms. In each case the wind farms had been granted permission prior to the O’Grianna decision. The Board decided, in all of the cases, that the proposed grid connections (both underground and overhead) constituted exempted development.

It should be noted that the permissions for the respective wind farms in these cases did not include any conditions requiring that planning permission be obtained for the grid connections.

Copy Orders attached in file pouch.

ABP Ref. 3436

This is a current referral before the Board – circumstances similar to the above.

ABP Ref. RL3234

This is a 2015 decision by the Board that a proposed 10kV overhead grid connection to a wind farm was exempted development.

While this case focussed on the issue of AA it is noted that the permission for the wind farm did include a condition (No.4) that permission be obtained for the grid connection. The Inspector was of the view that the condition did not

expressly prohibit the developer from availing of the exempted development provisions under the Act. The Board's Order did not explicitly refer to the matter.

File attached.

10.0 RECOMMENDATION

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 provision of grid connections from the Croy 110kV/Lodgewood 220kV substation to the Ballycadden, Gibbet Hill, Knocknalour and Ballynancoran wind farms in County Wexford is or is not development or is or is not exempted development;

AND WHEREAS Francis Clauson, Kiltilly, Bunclody, Enniscorthy, County Wexford requested a declaration on the said question from Wexford County Council and the said Council referred the question to the Board on the 29th 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 3, 6 and 9 and Classes 26 and 27, Part 1, Schedule 2 of the Planning and Development Regulations, 2001, as amended,

- (c) Conditions 7, 7, 8 and 10 of planning permissions Wexford County Council Refs. 20091730; 20090266; 20110504; and 20033444 respectively,
- (d) O’Grianna (and others) v. An Bord Pleanála (and others), Record Number: 2014 No. 2014 No. 19 JR, and
- (e) The documentation on file and the report of the Planning Inspector;

AND WHEREAS An Bord Pleanála has concluded that –

- (a) the said grid connections come within the scope of Sections 2(1) and 3(1) of the Act and constitute development,
- (b) the said grid connections come within the scope of Classes 26 and 27, Part 1, Schedule 2, of the Planning and Development Regulations, 2001, as amended,
- (c) the said grid connections do 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 was required,
- (d) the said grid connections come within the scope of article 9(1)(a)(i), Planning and Development Regulations, 2001, as amended, as their construction contravened Conditions 7, 7, 8 and 10 of planning permissions PA Ref.s 20091730; 20090266; 20110504; and 20033444 respectively, being the planning permissions for the relevant wind farms (Ballycadden; Gibbet Hill; Knocknalour; Ballynancoran).
- (e) the said grid connections do not come within the scope of articles 9(1)(a)(iii), (v), (vi), (vii), (viiA) or (viiB) or article 9(1)(c), Planning and Development Regulations, 2001, as amended, and
- (f) as the wind farms for which the grid connections were required were approved, and constructed, prior to the O’Grianna decision, and the said grid connections were also constructed prior to that 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 grid connections from the Crory 110kV/Lodgewood 220kV substation to the Ballycadden, Gibbet Hill, Knocknalour and Ballnancoran wind farms is development and is not exempted development.

Brendan Wyse,
Assistant Director of Planning.

June, 2016.

sg