



An
Bord
Pleanála

Inspector's Report PL 27.RL3596

Question	Whether a 38kV underground electrical connection and associated works is or is not development or is or is not exempted development
Location	Between Ballycumber Wind Farm and ESB Substation at Kilmagig, Avoca, County Wicklow
Declaration	
Planning Authority	Wicklow County Council
Planning Authority Reg. Ref.	EX 26/17
Applicant for Declaration	Gerard Dunne
Planning Authority Decision	No Declaration issued
Referral	
Referred by	Gerard Dunne
Owner/ Occupier	Ballycumber Wind Farm Limited
Observer(s)	None
Inspector	Kevin Moore

1.1. Site Location / Description

1.1. The grid connection the subject of the referral is proposed between Ballycumber Wind farm, Ballycumber North and Ballycumber South, Tinahely, County Wicklow to the existing Kilmagig 38kV substation, Avoca, County Wicklow. It consists of 23.427 km of 38kV ducted power cable.

1.2. The cable would be laid underground in the following townlands:

Garnagowlan, Coolgarrow, Kilmagig Upper, Ballycoog Upper, Carrigroe, Coolahullin, Ballanagh, Ballintemple, Kilcarra West, Tomcoyle, Ballycumber South, Clone, Kilpipe, Ballinglen, Kilballyowen, and Killacloran.

1.3 The line runs in underground duct within the following areas:

- 2,566m within agricultural fields and conifer forestry
- 2,182m within private trackway
- 16,755m within public road
- 536m of directional drilling at eight locations
- 1,388m within footpath

2.0 The Question

2.1 The question before the Board is:

Whether a 38kV underground electrical connection, and associated works, between a sub-station to be located within the permitted Ballycumber Wind Farm site and the existing ESB sub-station at Kilmagig, Avoca, County Wicklow is development and, if it is, whether it is or is not exempted development.

3.0 Planning Authority Declaration

3.1 Declaration

Wicklow County Council did not issue a declaration.

3.2 Planning Authority Reports

3.2.1 Planning Reports

The Senior Engineer reported that the planning authority issued a declaration regarding this development previously and it is not obvious why the planning authority should issue the same again.

4.0 Planning History

4.1 Exemption Ref. No. 16/15

The planning authority issued a declaration to Ballycumber Wind Farm Limited on 17th April 2015, by Order No. 338/15. This determined that the construction of a 38Kv underground electrical connection between the consented Ballycumber Wind Farm (ABP Ref PL 27.241827/WCC PL. Ref. 13/8043) and ESB Kilmagig existing sub-station is development that constitutes exempted development.

5.0 Policy Context

5.1 Wicklow County Development Plan 2016-2022

Wind Energy Objectives

Objectives include:

CCE6 To encourage the development of wind energy in accordance with the County Wicklow Wind Energy Strategy and in particular to allow wind energy exploitation in most locations in the County subject to:

- consideration of any designated nature conservation areas (SACs, NHAs, SPAs, SAAOs etc.) and any associated buffers;
- impacts on Wicklow's landscape designations;
- particular cognisance and regard being taken of the impact on wind turbines on residential amenity particularly with respect to noise and shadow flicker;
- impacts on visual and recreational amenity;
- impacts on 'material assets' such as towns, infrastructure and heritage sites;
- consideration of land cover and land uses on or adjacent to the site; and
- best practice in the design and siting of wind turbines, and all ancillary works including access roads and overhead cables.

Transmission and Distribution Objectives

Objectives include:

CCE17 To support the development and expansion of the electricity transmission and distribution grid, including the development of new lines, pylons and substations as required.

5.2 Natural Heritage Designations

On the final section of the grid connection route between Woodenbridge and Kilmagig substation, there is mixed woodland, much of which is located in the Avoca River Valley, which is a proposed Natural Heritage Area.

6.0 The Referral

6.1. Referrer's Case

6.1.1 The Referrer seeks a determination from the Board as to the following:

- whether or not the grid connection falls within the definition of “works” as defined in section 3(1) of the Planning and Development Act;
- whether or not it is an exempted development under the provisions of section 4(2)(a) of the Planning and Development Act or Article 2(3) of the EIA Directive.

6.1.2 The applicant further submitted:

- Ballycumber Wind Farm is a project that requires an EIS in accordance with Article 4(2) of EIA Directive 97/11/EC;
- The Board granted planning permission under Ref. PL 27.241827 subject to conditions. Condition 9(c) states that the permission does not include the works of cabling and connection to the electricity grid. It was established that this was a two-phase project, with a decision made that the second phase requires a separate grant of planning permission for the grid connection.
- The second phase is a necessary part of the overall wind farm development and requires EIA in its own right.

- In *O’Grianna & Others v. An Bord Pleanála* (2014/19JR), Justice Peart ruled that an EIA cannot be considered separately from the grid connection.
- Article 2(3) of the EIA Directive provides for an exemption in exceptional cases. Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in the EIA Directive. A Member State invoking the exemption must consider whether it is possible to undertake another form of assessment and the information must be made available to the public. The Commission must be informed before granting consent to the project, with reasons justifying the exemption. The term “exceptional case” must be interpreted narrowly.
- The grid connection is not an exceptional case in which an exemption can be granted.
- In a consent procedure comprising several stages, the assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment (C-201/02). This means that EIA cannot be carried out until the information and cumulative effects pertaining to the grid connection is submitted to the Council and made available to the public.

6.2 Planning Authority Response

6.2.1 The planning authority stated it was not making any submission.

6.3 Owner/ Occupier’s response

6.3.1 Ballycumber Wind Farm Limited submitted:

- * The Board has, by reason of section 50 of the Planning and Development Act, no jurisdiction to consider the referral and must dismiss it under section 141 of the Act. The subject matter of the referral has already been

the subject of a final determination by the planning authority under Ref. EX 16/15, the validity of which has not been challenged.

- * The developer has a constitutional right not to be exposed to criminal prosecution for acts that were not criminal at the date they were carried out. The developer has carried out the grid connection works without planning permission in reliance on the Council's section 5 Declaration.

6.3.2 Without prejudice to the preliminary objection, the developer submits:

- * The Planning and Development Act sets out a comprehensive code defining "development" and "exempted development" in sections 2, 3 and 4. The Board is not required to look beyond the provisions of that code in making a decision under section 5, unless there is a conflict between the requirements of the Act and/or Regulations and the requirements of the EIA Directive.
- * The grant of planning permission for the wind farm does not treat the grid connection as a second phase of the project. It is not relevant in circumstances where the original section 5 Declaration has given rise to an issue estoppel.
- * Condition 9(c) states: "*This permission does not include the works of cabling and connection to the Electricity Grid.*" It does not state that a separate grant of planning permission must be obtained for the cabling and connection works. Nothing in it excludes the possibility that the developer could carry out works on foot of a section 5 Declaration that works amounted to exempted development.

- * Neither the *O’Grianna v. An Bord Pleanála* or *Daly v. Kilronan Wind Farm Limited* can have the effect of undermining the validity of a pre-existing section 5 Declaration. In *O’Grianna*, the Court made it clear that it was excluding the land in County Leitrim, which was the subject of a section 5 Declaration, from the scope of the Order. Similarly, the Board cannot be required to look behind the validity of a section 5 referral that has already been finally determined.

- * Section 5 gives planning authorities and the Board the primary role in determining whether any particular case is development and, if so, whether it is exempted development (recognized in *Cronin (Readymix) Limited v. An Bord Pleanála*).

- * Section 4(2)(a)(ii) of the Planning and Development Act is not relevant.

- * Ballycumber Wind Farm was subject to EIA and has a grant of planning permission. It is disputed that the grid connection works are likely to have significant effects on the environment. The impact has been evaluated and it was concluded that the works would not have a significant impact on the environment. The project was also subject to screening for Appropriate Assessment in the context of the application for the section 5 Declaration and the planning authority concluded that Stage 2 AA was not required.

- * The Board is not required to consider the terms of the EIA Directive in the absence of any conflict between its terms and its transposition into Irish law. The notification process and strict standards to be met under Article 2 of the Directive have no application to a section 5 Declaration and can be disregarded.

6.3.3 In conclusion, it is submitted that the Board’s jurisdiction rests on there being a “question” in existence. If that question has been resolved in another section 5 Referral, then there is nothing to be referred and the Board does not have any jurisdiction to make a Declaration. It is requested that, if the Board takes into account other documentation, including the submission made to the planning authority by the Referrer (which has not been seen by the developer), that the developer is furnished with a copy of this submission to allow an opportunity for submissions on it.

6.3.4 Details attached with the submission include:

- * Wicklow County Council’s section 5 Declaration of 17th April, 2015;
- * An AA Screening Report;
- * “Ballycumber Wind Farm to Kilmagig 38Kv Substation, Avoca, County Wicklow Grid Connection EIA Screening Report” (July, 2016);
- * Ballycumber Wind Farm to Kilmagig 38Kv Substation, Avoca, County Wicklow Environmental Report” (July, 2016);
- * Letter from Wicklow County Council, dated 25th May 2017, to the developer relating to enforcement.

7.0 STATUTORY PROVISIONS

7.1 Planning and Development Act 2000

Section 2(1)

In this Act, except where the context otherwise requires—

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

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

Section 3(1)

In this Act, “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.

Section 4(2)(a)

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 –

- (ii) the development is authorised, or is required to be authorised, by or under any enactment (whether the authorisation takes the form of the grant of a licence, consent, approval or any other type of authorisation) where the enactment concerned requires there to be consultation (howsoever described) with members of the public in relation to the proposed development prior to the granting of the authorisation (howsoever described).

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 5

- (1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of

this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

- (3)(b) Without prejudice to *subsection (2)*, in the event that no declaration is issued by the planning authority, any person who made a request under *subsection (1)* may, on payment to the Board of such a fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued *under subsection (2)*.

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.

7.2 Planning and Development Regulations, 2001

PART 2 - Exempted Development

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.

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 – ...
 - (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 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 2

Part 1 Exempted Development – General

Column 1 Description of Development	Column 2 Conditions and Limitations
<i>Development by statutory undertakers</i> CLASS 26 The carrying out by any electricity undertaking of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking.	

Schedule 5

Development for the Purposes of Part 10

Part 1

20. Construction of overhead electrical power lines with a voltage of 220 kilovolts or more and a length of more than 15 kilometres.

Part 2

13. *Changes, extensions, development and testing*
- (a) Any change or extension of development which would:-
- (i) result in the development being of a class listed in Part 1 or paragraphs 1 to 12 of Part 2 of this Schedule, and
 - (ii) result in an increase in size greater than –
 - 25 per cent, or

- an amount equal to 50 per cent of the appropriate threshold,

whichever is the greater.

8.0 Assessment

8.1. Introduction

8.1.1 There is no provision to dismiss this referral to the Board under the Planning and Development Act, 2000. In accordance with section 5, any person may request a declaration from a relevant planning authority on any question, in any particular case, as to what is or is not development or is or is not exempted development. In the event that no declaration is issued by the planning authority, any person who made a request can refer the question for a decision to the Board within 4 weeks of the date the declaration was due to be issued by the planning authority. Notwithstanding the planning authority having issued a declaration to the developer on the same question, there is nothing that prohibits the referrer in this instance from now referring the question to the Board, arising from the planning authority not issuing a declaration on the question asked.

8.1.2 A further clarification at the outset relates to the decision of An Bord Pleanála. The Board granted permission for a wind farm at Ballycumber subject to 17 conditions under Planning Appeal Ref. PL 27.241827. Condition 9 of that permission was as follows:

9. (a) *The wind turbines including masts and blades, and the anemometer mast, shall be finished externally in a light grey colour.*
- (b) *Cables within the site shall be laid underground.*

- (c) *This permission does not include the works of cabling and connection to the Electricity Grid.*
- (d) *The wind turbines shall be geared to ensure that the blades rotate in the same direction.*
- (e) *Transformers associated with each individual turbine and mast shall be located either within the turbine mast structure or at ground level beside the mast.*

Reason: *In the interest of visual amenity and for clarification purposes.*

8.1.3 It is apparent from the above that the decision of the Board excluded the cabling and grid connection from the permission associated with the wind farm. The attachment of this condition did not expressly require the developer to seek planning permission for the cabling and grid connection. I note that the developer sought to clarify the issue by way of seeking a declaration from the planning authority that the grid connection constituted exempted development and that the planning authority's declaration, under Exemption Ref. No. 16/15, determined the connection constituted works that were exempted development.

8.2. The Question of Development

8.2.1 The grid connection comprises the laying of a ducted power cable underground between Ballycumber Wind Farm substation and the 38kV Kilmagig substation near Avoca. This would include trenching, typically 600mm wide and 1220mm deep, and would also include burying the cable in the bridge deck of Preban Bridge and directional drilling at eight watercourse/road crossings. The construction phase would also include preparatory works, drainage and attenuation measures.

8.2.2 Having regard to the above, it is apparent that the grid connection would involve the carrying out of "works" by way of construction and excavation which would be

carried out on and in land. The subject matter would, thereby, constitute “development” in accordance with the provisions of sections 2(1) and 3 of the Planning and Development Act.

8.3 The Question of Exempted Development

8.3.1 I note the provisions of articles 6 and 9(1)(a) of the Planning and Development Regulations 2001. Article 6 states that, 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. Article 9(1) refers to development relating to article 6 that shall not be exempted. I note subsections (a)(v), (vi), (vii), (viiA) and (viiB). My considerations on each of these are as follows:

Article 9(1)(a)(v)

8.3.2 Article 9(1)(a)(v) refers to works under a public road. It expressly excludes Class 26 of Part 1 of Schedule 2.

Article 9(1)(a)(vi)

8.3.3 I note that the corridor for the development would be laid over a length of more than 23km and would go through locations where there are listed prospects in the Wicklow County Development Plan, such as Prospects 56, 57 and 61. The Board will note, however, that the development would constitute the laying of an underground cable. Thus, it is concluded that the development would not interfere with any such prospects and would not impact on the character of the area from which such prospects are gained.

Article 9(1)(a)(vii)

8.3.4 It is acknowledged that the underground cable would pass through the Avoca River Valley proposed Natural Heritage Area close to the eastern end of the routing. The development would, thus, include excavation, by using a trenching methodology, within an area of ecological interest. Objective NH5 of the current Wicklow County Development Plan seeks to maintain the conservation value of all proposed and future Natural Heritage Areas in Wicklow. Acknowledging the routing, it is further noted that this routing is proposed to utilize existing trackways in this area. Further to this, I acknowledge the Board's position in Referral 04.RL.2789, which related to an underground electricity cable that ran through a proposed Special Protection Area in County Limerick. In that instance, the Board had regard to:

- the limited extent of the area affected by the routing,
- the laying of the cable within existing public roads and forestry tracks and not in an area of ecological value, with reference to the site synopsis for the pSPA,
- the lack of any significant effect in terms of disturbance of habitats or species, and
- the area to be affected being substantially returned to its pre-existing state after the works are completed.

8.3.5 With due regard to the conclusions drawn above and to the conditions that apply to the laying of the underground cable through the proposed Natural Heritage Area along existing tracks, not across any known area of ecological value, and with trenches backfilled, it appears reasonable to conclude that the excavation and reinstatement that would follow would not be contrary to the Council's objective to maintain the conservation value of the pNHA. Finally, I note the submission of the Department of Arts, Heritage and the Gaeltacht to the developer's agent that was submitted as part of the submission to the planning authority in relation to Exemption Ref. No. 16/15. The Department stated that it is

satisfied that the development has been designed in such a way as to pose no threat to any protected site or species.

Article 9(1)(a)(viiA)

8.3.6 I note that the proposed underground cable would be routed within 100m of six Recorded Monuments. A holy well (Recorded Monument WI040:001) is located on the southern verge of the roadside of the proposed route in the townland of Ballycoog Upper. However, the cable would be located on the opposite side of the road that separates the routing from the Monument and it is proposed to undertake archaeological testing in advance of any cable laying. I note the submission of the Department of Arts, Heritage and the Gaeltacht to the developer's agent that was submitted as part of the submission to the planning authority in relation to Exemption Ref. No. 16/15. The Department had considered the Archaeological Report that had been submitted at that time and set out monitoring requirements. Having regard to the routing proposed and provisions being made, it is considered that the laying of the cable at this location would not consist of the excavation or demolition of this archaeological monument.

Article 9(1)(a)(viiB)

8.3.7 My considerations in relation to Appropriate Assessment are as follows:

- The route of the proposed underground cable would not pass through any Natura 2000 site.
- There are two Special Areas of Conservation within a 10km radius of the cable route where potential impacts of the development could result, namely Slaney River Valley SAC and Buckronev-Brittis Dunes SAC.
- The Slaney River Valley SAC has been selected for a range of Annex I habitats and Annex II species, with the conservation objective being to

maintain or restore the favourable conservation condition of the Annex I and Annex II species for which the SAC has been selected. It is acknowledged that the route corridor drains through the Derry Water, Aughrim and Avoca Rivers. These flow to the sea at Arklow. No part of the corridor drains to the Derry River, which is a tributary of the Slaney River. Thus, there is no hydrological linkage with the Slaney River catchment. Arising from this, the laying of the underground cable along the route proposed would not have any known effects on the Qualifying Interests of the Slaney River Valley SAC.

- The nearest part of the cable route corridor at Kilmagig is some 7km distant from Buckronev-Brittis Dunes SAC. There would be no known linkages between the route of the underground cable and the SAC, either directly or indirectly. Arising from this, the laying of the underground cable along the route proposed would not have any effects on the Qualifying Interests of the Buckronev-Brittis SAC.
- As the underground cable would not have any direct or indirect impacts on any Natura site, it can reasonably be concluded that in-combination effects do not arise.
- It is reasonable to conclude that, on the basis of the above information and the details provided on the referral file, which I consider adequate in order to issue a screening determination, the proposed development, individually or in combination with other plans or projects would not be likely to have a significant effect on Slaney River Valley SAC, Buckronev-Brittis Dunes SAC, or any other Natura 2000 site in the wider area. A Stage 2 Appropriate Assessment would, therefore, not be required.

Article 9(1)(c)

8.3.8 My considerations on Environmental Impact Assessment are as follows.

Class 26

It is first noted that, under Class 26 of Part 1 of Schedule 1 of the Planning and Development Regulations, the carrying out by any electricity undertaking of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking constitutes exempted development. I am satisfied to conclude that the proposal is a “*development consisting of the laying underground of...cables...for the purposes of the undertaking*”. Furthermore, and with regard to article 3(3) of the Planning and Development Regulations, I acknowledge that no dispute has arisen as to whether the developer of Ballycumber Wind Farm is or is not an “electricity undertaking”, notwithstanding this Class falling under those Classes of exempted development defined as “Development by statutory undertakers” under Part 1 of Schedule 2.

I note section 2 of the Planning and Development Act, 2000 and the meaning provided for “statutory undertaker”. It is stated that “*statutory undertaker*” means a person, for the time being, authorised by or under any enactment or instrument under an enactment to - ...

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

I submit that Ballycumber Wind Farm Limited would appear to fall within this category on foot of its authorisation under the Planning and Development Act to construct a wind farm that is a development for the provision of electricity. Additionally, the developer would also hold a licence/authorisation under the Electricity Regulation Act.

Having regard to the above, I am satisfied that the development falls within the scope of Class 26.

Screening for Environmental Impact Assessment

I note that the wind farm development proposal at Ballycumber was subject to Environmental Impact Assessment and was granted permission by the Board under Appeal Ref. PL 27.241827. I again note that the grid connection did not form part of the permitted wind farm development. The Board Order included the following:

The Board considered that the Environmental Impact Statement submitted with the application and other submissions on file, was adequate in identifying and describing the direct and indirect effects of the proposed development. The Board completed an environmental impact assessment, and agreed with the Inspector in her assessment of the likely significant effects of the proposed development, and generally agreed with her conclusions on the acceptability of the mitigation measures proposed and residual effects.

I acknowledge that the likely significant impacts relating to that development were considered by the Board to be visual and landscape character impacts of overground structures, impacts on the amenities of residents of the area, public health impacts (potential landslide), and traffic impacts. Further to the mitigation measures proposed as part of the application, the Board's decision attached conditions that included those for reasons relating to traffic safety, visual amenity, environmental protection, residential amenity, air traffic safety, monitoring of birds, and conserving archaeological heritage.

I acknowledge that the laying of underground cables to serve as a grid connection for a wind farm is not itself a category of development under Schedule 5 of the Planning and Development Regulations 2001 for the purposes of Part 10 of the Regulations, i.e. Environmental Impact Assessment.

The Board will note that the developer, in response to the Referrer's submission, has submitted a "Grid Connection EIA Screening Report" and concludes that the project does not require EIA. The Board will further note, however, that the finding on likely environmental impact and the carrying out of EIA is the function of a planning authority and the Board, where applicable.

For the purposes of Screening for Environmental Impact Assessment, I have had regard to Schedule 7 of the Planning and Development Regulations 2001, as amended. This refers to the criteria for determining whether a development would or would not be likely to have significant effects on the environment. My considerations on the grid connection relative to these criteria are as follows:

1. Characteristics of the Proposed Development

The size of the proposed development

The grid connection would be developed between Ballycumber Wind farm, Ballycumber North and Ballycumber South, Tinahely, County Wicklow and the existing Kilmagig 38kV substation, Avoca, County Wicklow. It would consist of 23.427 km of 38kV ducted power cable and the cable would be laid underground. The line would run underground within the following areas:

- 2,566m within agricultural fields and conifer forestry
- 2,182m within private trackway
- 16,755m within public road
- 536m of directional drilling at eight locations
- 1,388m within footpath

The cumulation with other proposed development

There are no known relevant projects in the vicinity of the grid connection route, aside from Ballycumber Wind Farm itself, which could have a cumulative effect

with the proposed grid connection. Thus, there are no other proposed developments which would be seen to cause significant in-combination effects with the underground grid connection. I again note that the Board undertook EIA for the wind farm development and permitted that proposal, noting the acceptability of the mitigation measures proposed and the residual effects.

The nature of any associated demolition works

There are no known demolition works associated with the grid connection.

The use of natural resources

There are no known natural resources being used in the development of the grid connection.

The production of waste

The development of the underground cable would not produce any significant waste at the construction or operational phases. Material excavated would primarily be used to reinstate affected areas after the laying of the underground cable.

Pollution and nuisances

No known significant pollution or nuisance is likely to arise from the laying of the underground cable within agricultural fields and conifer forestry, along private trackways, within public roads, at drilling locations, or within footpaths

The risk of accidents, having regard to substances or technologies used

While the use of bentonite is acknowledged for proposed directional drilling and it is accepted that concrete-contaminated material could potentially enter

watercourses in the vicinity of the corridor, no likely significant effect will arise with any reasonable application of conventional drilling techniques and conventional drainage management procedures.

2. Location of proposed development

The existing land use

With the exception of a minor loss of conifer plantation, land uses will be retained as the affected areas would be reinstated after the laying down of the underground cable. Impact on land use would be negligible.

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

The Board should first note my conclusions drawn on the screening for AA. The proposed grid connection would have no known direct or indirect impacts on any European sites. The nature of the terrain under which the grid connection would be laid should then be noted. The grid connection would be laid under tracks, roads, footpaths, fields and conifer plantation. Affected areas are to be reinstated and recolonization would result where applicable. There would be no notable changes in soils and geology. Biodiversity is not likely to be effected in any significant manner and, where any minor change may result, it is reasonable to determine that the laying of the underground cable along any potentially affected area would be temporary due the nature of the works proposed. Overall, the environment through which the underground cable would be laid would have the capacity to regenerate rapidly arising from any likely minor environmental changes.

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

- (a) wetlands,**
- (b) coastal zones,**
- (c) mountain and forest areas,**
- (d) nature reserves and parks,**
- (e) areas classified or protected under legislation, including special protection areas designated pursuant to Directives 79/409/EEC and 92/43/EEC,**
- (f) areas in which the environmental quality standards laid down in legislation of the EU have already been exceeded,**
- (g) densely populated areas,**
- (h) landscapes of historical, cultural or archaeological significance.**

The proposed grid connection would be laid underground, primarily in roads, forestry tracks, and in agricultural fields beyond any wetlands, coastal zones, nature reserves and parks, densely populated areas, or landscapes of historical, cultural or archaeological significance.

The locations where the cable would be laid can likely readily absorb the underground cable and subsequent reinstatement of affected lands such that the natural environment would not be subject to any significant environmental effects. Where conifer plantation would be removed and not replaced, it would comprise a narrow strip through a plantation where the absorption capacity is not adversely affected. The effects on areas of ecological significance have already been referred to above and it is noted that the proposed underground cable would not be laid on, in or near any European Site. My considerations in relation to Appropriate Assessment are relevant to this issue.

3. Characteristics of potential impacts

The extent of the impact (geographical area and size of the affected population)

The laying of the proposed underground grid connection is estimated to take between four and six months. The underground cable by its nature would not be visible to the affected population and no operational impacts on the resident population in the vicinity of the route corridor are likely to arise. The two principal potential effects on the area through which the cable would be laid relate to the construction phase and are the potential effects on watercourses and traffic. The character of the terrain through which the underground cable would be laid is again acknowledged. The application of conventional drainage methodologies to avoid sedimentation of open watercourses should ensure there is no likely significant impact on water quality. With regard to traffic impacts, it is accepted that there is the potential for cumulative effects arising from the grid connection development coinciding with the construction phase of the wind farm development. In traffic volume terms and in terms of dispersion of HGV movements over the length of the grid corridor, together with the short timeframe for the laying of the cable, I submit that there would be minor increases in traffic volumes affecting the area and the minor impact would be very much localised. I note that the developer proposes to use designated haul routes and road closures would be subject to the approval of the local authority. I do not foresee any significant environmental impacts resulting from the construction phase of the grid connection works.

The transfrontier nature of the impact

The proposed grid connection has no transfrontier effects.

The magnitude and complexity of the impact

There are no known complexities or significant environmental impacts likely to arise from the laying of the underground cable and from its ongoing operation.

The probability of the impact

The probable impact of the proposed grid connection development can reasonably be determined to be minor/negligible.

The duration, frequency and reversibility of the impact.

The proposed grid connection works are estimated to take between four and six months. The construction and operational phases of this development are not likely to result in any significant environmental impacts. Ballycumber Wind Farm has a permission for a period of 25 years. When that development ceases the grid connection cable can be removed and the affected lands reinstated.

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

As this Screening concludes that the proposed grid connection would not have any likely significant effects on the environment, it may reasonably be concluded that likely significant in-combination and/or cumulative effects with the permitted Ballycumber Wind Farm development cannot arise. I further note that none of the principal likely significant impacts considered by the Board that related to the

wind farm development, other than traffic impacts, are applicable to the grid connection in terms of cumulative impacts. From the screening assessment above, it may reasonably be determined that the additional traffic impact would not be significant.

Where the Board has previously determined that the mitigation measures proposed and the residual effects from the Ballycumber Wind Farm development itself are acceptable and where it has been determined that the grid connection would not likely have any significant environmental impacts or significant cumulative impacts with the wind farm development, then it is reasonable to conclude that the overall project is not likely to have any significant impacts on the environment.

Case Law

Notwithstanding the above considerations, I acknowledge the findings in *O’Grianna -v- An Bord Pleanála* by Peart J. in the High Court, whereby it was held that a grid connection formed part of an overall wind farm project where EIA was required to be carried out in order to avoid ‘project splitting’. It was held that the cumulative impact of the wind farm and grid connection needed to be considered in order to comply with the EIA Directive.

I further acknowledge the recent findings in *Daly -v- Kilronan Windfarm Ltd* by Baker J. in the High Court. While I note that this decision is being appealed, it is reasonable to assume that this judgment represents the current legal position applicable to grid connections that is directly applicable to the referral at hand. I draw the Board’s attention to a number of the findings in that case as follows:

“Effect of the decision in O’Grianna & Ors. v. An Bord Pleanála

45. *In the light of the decision of Peart J. in O’Grianna & Ors. v An Bord Pleanála, the grid works must be regarded as an integral part of the project as a whole and the assessment of the grid works is to be made in the context of the entire project, as must the assessment of the application for the turbines and works associated with them ...*

46. *However, as the grid works are part of an overall project, and an EIA is required for the overall project, an environmental assessment must be carried out of the entire project, and, therefore, no part of the project, and ipso facto no individual part treated as a standalone element, can be exempt from planning ...*

Summary on exemption

57. *... his judgment (i.e. Peart J. in O’Grianna & Ors. v. An Bord Pleanála), it seems to me, carries a necessary implication that because the grid connection is part of the larger project, and if one identified part of that project requires EIA, the grid connection works cannot be considered to be exempt development, as they are part of a larger development which requires an EIA.*

58. *As the grid works are part of a development that does require an EIA, the local authority must carry out an environmental assessment in the context of the project as a whole of which the grid connection forms a part.*

59. *In interpreting the provisions of the PDA which permit an exemption in certain circumstances, a court should not come to a conclusion which has the effect that a project can be impermissibly split, albeit that taken alone part of the project could readily be seen as coming within the exemption. The general principle must be that the project must be considered as a whole, and therefore any argument that an exemption can exist is one that cannot be determined without reference to that first principle.”*

Having regard to the above current legal position, I submit to the Board that, notwithstanding my Screening for EIA, I am constrained in a manner which requires me to conclude that it appears that grid connections for windfarms that are subject to Environmental Impact Assessment cannot be exempted as a matter of principle. While the proposed development of the wind turbines associated with Ballycumber Wind Farm was subject to EIA, the grid connection, as part of the overall project, was not. Based upon the recent High Court findings, it appears that the grid connection requires to be subject to EIA, notwithstanding my conclusions drawn in the Screening for EIA. Therefore, it appears that one is required to conclude that, under article 9(1)(c) of the Planning and Development Regulations, the grid connection from Ballycumber Wind Farm to the existing Kilmagig 38kV substation, Avoca, County Wicklow is not an exempted development as it is development to which Part 10 of the Planning and Development Regulations (i.e. Environmental Impact Assessment) applies. With due regard to these findings, it may be concluded that the grid connection comes within the provisions of section 4(4) of the Planning and Development Act 2000.

9.0 Recommendation

9.1 Having regard to the High Court judgments set out in *O’Grianna & Ors. v An Bord Pleanála* and *Daly v Kilronan Windfarm Ltd.*, I recommend as follows:

WHEREAS a question has arisen as to whether a 38kV underground electrical connection, and associated works, between a sub-station to be located within the permitted Ballycumber Wind Farm site and the existing ESB sub-station at Kilmagig, Avoca, County Wicklow is development and, if it is, whether it is or is not exempted development:

AND WHEREAS the said question was referred to An Bord Pleanála by Gerard Dunne on the 22nd day of June, 2017:

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 Class 26, Part 1, Schedule 2 of the Planning and Development Regulations, 2001, as amended,
- (c) *O’Grianna & Ors. v. An Bord Pleanála*, Record Number: 2014 No. 19 JR,
- (d) *Daly v Kilronan Windfarm Ltd.*, Record Number: 2016 372 MCA, and
- (e) the documentation on file and the report of the Planning Inspector:

AND WHEREAS An Bord Pleanála has concluded that -

- (a) the said underground cable comes within the scope of sections 2(1) and 3(1) of the Planning and Development Act, 2000, as amended, and constitutes development,
- (b) the said grid connection forms part of an overall project for which Environmental Impact Assessment is required and for which EIA of the grid connection was not carried out as part of the assessment of that project, and
- (c) the said underground cable comes within the scope of section 4(4) of the Planning and Development Act, 2000, as amended. In this regard, the Board acknowledges that the above referenced High Court judgments represents the current legal position applicable to grid connections for wind farm developments.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the said 38kV underground electrical connection, and associated works, between a sub-station to be located within the permitted Ballycumber Wind Farm site and the existing ESB sub-station at Kilmagig, Avoca, County Wicklow is development and is not exempted development.

Kevin Moore
Senior Planning Inspector
January, 2018.