

To:-  
An Coimisiun Pleanála,  
64 Marlborough Street  
Dublin1 DO1 V902

From:-  
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Co Galway

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**Re Planning Application**

reference PAX07.323699

Applicant RWE Renewables Ireland Ltd

**Development Description**

11 no. wind turbines and associated infrastructure, including the laying of grid connection cables

**Development Location**

Townlands of Beagh, Beagh More, Clonbar,  
Clonweeweelaun, Cloonaglasha, Clonteen, Corillaun, Derrymore,  
Ironpool, Shancloon, Toberroe and Tonacooleen, Co. Galway

I wish to make the following observations in respect of the planning application detailed above and I enclose cheque for €50 being the requisite fee for same.

**1. Planning Authority Legal Functions**

An Coimisiún Pleanála will no doubt be aware that it has a number of distinct sets of legal tasks facing it when dealing with this application.

These include:-

Firstly, it must assess the planning merits of the application in accordance with both National and EU law, and Directives and rulings of the European Court of Justice, including but not limited to the Planning and Development Act 2024 to ensure that the proposed development is in full compliance across all these jurisdictions

Secondly and applying a specified methodology, it is required to form a view as to the environmental impacts of the development, taking into account the Environmental Impact Assessment Report (EIAR) furnished by the Applicant, the views of the public concerned, and applying its own local and expert knowledge.

Thirdly, and quite different in nature to the first two tasks, the Planning Authority is a competent authority having responsibilities under the Habitats Directive. The critical threshold the Application must pass in this context is that there must be no reasonable scientific doubt as to the question of whether there will be an adverse impact on any protected habitat or protected species which come under the strict protection scheme laid down under the Directive. This is a strict standard and the Authority does not have legal jurisdiction to give permission if it is not met.

I wish to direct the Authority's particular attention to the following specific obligations imposed on it

**Obligation to ensure full compliance with the requirements of Directive 2001/42/EC ("the SEA Directive")**

**CJEU CASE 24/19**

The decision of the Court of Justice of the European Union (CJEU) in the case *A v Others* C-24/19 is relevant to the development proposed in this instance, arising from the requirements of Directive 2001/42/ as interpreted by the Court of Justice in June 2020 in this case.

The Court considered the consequences of a failure to carry out a Strategic Environmental Assessment (SEA) prior to the adoption of a plan or programme and the impact this would have on the relevant plan or programme as well as subsequent projects based on that plan or programme

In the particular case, local residents in Belgium challenged a wind farm development project of five turbines which had been permitted based on conditions outlined in a regional government order from 2006 and a circular on the Assessment framework and conditions for the installation of wind turbines.

They argued that the consent granted should be annulled on the basis that the order and the circular should have been preceded by a SEA, and were therefore in breach of Article 2(a) and Article 3(2)(a) of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive).

**Plans and Programmes**

At issue was the interpretation of the above Articles. Article 2(a) defines plans and programmes as:

"plans and programmes ... which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and .... which are required by legislative, regulatory or administrative provisions"

Article 3(2)(a) provides that an environmental assessment shall be carried out for all plans and programmes:

"(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC"

The Court of Justice -Grand Chamber had to consider whether the order and the circular amounted to a plan or programme and the implications on a development such as the wind farm development should there be a violation of EU law by a Member State.

The Court found that the order and the circular constituted plans or programmes under the SEA Directive.

It found that a SEA should have been carried out prior to their adoption by the Belgian government in 2006. Both the order and the circular contained various provisions in relation to the installation and operation of wind turbines, including measures on shadow flicker, safety, and noise levels.

#### **Consequences of Breach of EU law**

The Court outlined the consequences for a Member State and national competent authorities including An Coimisiún of a breach of EU law in the following terms:

- a) Member States are "required to eliminate the unlawful consequences" of breaches of EU law. Competent national authorities are "under an obligation to take all the necessary measures, within the sphere of their competence, to remedy the failure to carry out an environmental assessment" which can involve "adopting measures to suspend or annul that plan or program".
- b) Only the Court of Justice may, in exceptional cases, temporarily suspend the Application of EU law.

The Court concluded that in cases where a SEA is required but is not carried out, the plan or programme, as well as all permissions for projects based on same, must be annulled. In the instant case, construction of the wind farm development had not yet commenced. The Court of Justice stated that it was clear that the consent must therefore be annulled as such consent was adopted on the basis of the plan or programme which "was itself adopted in breach of the obligation to carry out an environmental assessment". The Court of Justice also held that where installation of a windfarm project "has commenced, or is even completed", consent can be annulled (para 89). There were limited circumstances in which projects would not be annulled:

1. Where there is a risk that the annulment "could create a legal vacuum that is incompatible with that Member State's obligation to adopt measures to transpose another act of EU law concerning the protection of the environment".
2. If the consequences of such annulment were "a genuine and serious threat of disruption to the electricity supply of the Member State concerned which could not be remedied by any other means or alternatives"; as stated in C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*. In this case ((C-411/17) the Court stated that it was permissible to continue the operation of an energy plant, being two nuclear reactors, where this was necessary for the security of energy supply of the Member State as a whole.

In the A case, the Court held that the cessation of activity of a limited number of wind turbines was not likely to have significant implications for the supply of electricity for the whole of Belgium, thereby establishing a high threshold.

**National Renewable Energy Action Plan (N-REAP)  
National Energy and Climate Plan (NECP) 2021 – 2030**

The Irish policy framework for wind farms is based on the National Renewable Energy Action Plan (N-REAP) which was adopted in 2010, and subsequently on the National Energy and Climate Plan 2021-2030.

The adoption of N-REAP is a direct consequence of Article 4(1) of Directive 2009/28/EC on the promotion of the use of energy from renewable sources, which required national authorities to develop a national renewable energy action plan.

Article 4(2) required Member States to notify their N-REAP to the Commission by 30<sup>th</sup> June 2010. Ireland did so in July 2010.

The N-REAP document is a significant one which "sets out the Government's strategic approach and concrete measures to deliver on Ireland's 16% target" under the Directive. It notes that the "development of renewable energy is central to overall energy policy in Ireland."

Both N-REAP and NECP were adopted without carrying out a Strategic Environmental Assessment under Directive 2001/42/EC. That Directive, as noted above in the A case, makes it a requirement to carry out a SEA prior to the adoption of certain plans and programme that set the framework for giving permission for projects which have significant effects on the environment. The Court of Justice noted in the A case that the Belgian Order and 2006 Circular, which fell within the scope of Article 2(a) of the SEA Directive, "contribute to the implementation of the objectives of Directive 2009/28".

N-REAP also constitutes a 'plan and programme' under Article 2(a), and in addition was introduced directly as a consequence of Member States' obligations outlined in that Directive. N-REAP is a national plan which has resulted in the promotion of, and increase in, the use of renewable energy, including wind energy, to meet the national target. The failure to carry out any SEA has significant consequences as are clearly outlined in the A decision, as the Court of Justice re-affirmed the rule that project consents are illegal if they are adopted in breach of a Member State's EU law obligations. The Court of Justice will allow consent granted in breach of EU law to stand only in limited circumstances, such as where there would be a significant impact on

national electricity supply if the project was not undertaken or continued. That would not be the case in this instance. Planning authorities in all EU member states are therefore bound by that decision.

**Wind Energy Development Guidelines 2006**

For similar reasons, the Ministerial Guidelines on Wind Energy Development, issued under s.28 of the PDA 2000, which were expressly published in order to guide planning decisions in relation to wind energy development planning applications, comprise a plan or programme within the meaning of Directive 2001/42/EC.

The status of the 2006 Wind Energy Development Guidelines as being within the definition of such a plan or programme has been implicitly admitted by the Government. The long running review of the Guidelines eventually produced a set of draft revised Guidelines in 2019 which the Minister confirmed had to be made subject to SEA precisely because they fell within the definition. This remains outstanding.

As no prior SEA was completed in respect of the 2006 Wind Energy Development Guidelines as required by the ruling of the Court of Justice in Case 24/19, they cannot be relied upon as a valid basis for granting permission in this case.

### **Obligation to ensure full compliance with the requirements of the Habitats Directive**

Where the development has the potential to have a significant effect, either individually or in combination with other plans and projects, on sites of conservation importance appropriate assessment screening is required in accordance with Regulation 42 (1) of the European Communities (Birds and Natural Habitats) Regulations 2011 and Article 6(3) of the Habitats Directive.

The nature and purpose of the screening process is well explained in the opinion expressed by Advocate General Sharpson in Case C-258/11 Sweetman v An Bord Pleanála at paras 47-49:

"47. It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). (20) The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to *establish* such an effect; it is, as Ireland observes, merely necessary to determine that there *may be* such an effect".

The Court at paras 39 to 44 of its judgement further elaborated on Advocate Sharpson's opinion in the following terms:-

- 39 *Consequently, it should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in points 54 to 56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive.*
- 40 *Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities –*

once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field - am certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 *Commission v Spain* paragraph 99, and *Solvay and Others*, paragraph 67)

- 41 It is to be noted that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (*Waddervereniging and Vogelbeschermingsvereniging*, paragraphs 57 and 58).
- 42 Such an appraisal applies all the more in the main proceedings, since the natural habitat affected by the proposed road scheme is among the priority natural habitat types, which Article 1(d) of the Habitats Directive defines as 'natural habitat types in danger of disappearance' for whose conservation the European Union has 'particular responsibility'.
- 43 The competent national authorities cannot therefore authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types. That would particularly be so where there is a risk that an intervention of a particular kind will bring about the disappearance or the partial and irreparable destruction of a priority natural habitat type present on the site concerned (see, as regards the disappearance of priority species, Case C-308/08 *Commission v Spain*, paragraph 21, and Case C-404/09

*Commission v Spain*, paragraph 163).

- 44 So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case C-404/09 *Commission v Spain*, paragraph 100 and the case-law cited). It is for the national court to establish whether the assessment of the implications for the site meets these requirements.

The ruling in Case C-258/11 *Sweetman v An Bord Pleanála* is quite clear and imposes a very high threshold on the planning authority.

**Obligation to ensure that third-party land owner consent has been granted**

This obligation applies for all components of the development, including any land owners whose lands lie beneath the public road in which it is planned to lay grid connection cables.

Within paragraph 91 of her ruling in *Daly v Kilronan windfarm Limited*

<https://mail.google.com/mail/u/0/?tab=rm&ogbl#sent?projector=1>, delivered on the 11th day of May, 2017 Ms. Justice Baker quotes from the work of Butler, Keane on Local Government as follows:- *'The King has nothing but the passage for himself and his people, but the freehold and all the profits belong to the owner of the soil.'*

The full paragraph reads as follows:-

91. *The local authority has, by virtue of taking a road in charge, assumed liability and power to maintain the road but the title does not thereby vest. Butler, Keane on Local Government (211d Edition, 2003) at p. 84 explains the matter as follows:*

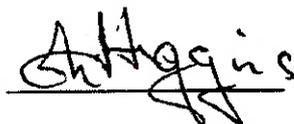
*"At common law everything between the fences including the footpaths, cycle tracks and grass margins constitutes the public road, unless there is evidence to the contrary. Unless their land has been acquired for the purposes of building the road, the owner of the land remains the owner of the soil and the space above subject to the public use of the road. This was defined in ancient times as follows:*

*'The King has nothing but the passage for himself and his people, but the freehold and all the profits belong to the owner of the soil.'* (One Roll.ABR.3 92)

*At common law the presumption is that the owner of the land beside the road is the owner of the soil to the centre of the road. The owner of the soil is entitled to the produce of the land, including the trees and grass growing on it."*

In the absence of full compliance with all or any one of these obligations An Coimisiún must refuse planning consent

Signed:-



JOHN HIGGINS

Date:-

