

Muiriosa Cassells

From: Nigel de Haas <Nigel.deHaas@outlook.ie>
Sent: Monday 24 August 2020 16:45
To: Appeals2
Cc: Niamh Thornton
Subject: ABP-307939-20 - Submission by Nigel de Haas
Attachments: ABP-307939-20 Submission NdeHaas.pdf

Dear Sir/Madam,

Attached please find my signed and dated submission on the application for substitute consent by Cleanrath Windfarm Limited, case number ABP-307939-20. I have copied this to Ms. Thornton, but understand that she is out of the office this week.

Please confirm receipt of this submission, and that it is a valid submission received by the Board within the prescribed time limit which will be taken into account in the consideration of this application.

Yours sincerely,

Nigel de Haas
Inchincurka, Dunmanway, Co. Cork, P47 H308

Tel: 023 8856896

From: Niamh Thornton [mailto:n.thornton@pleanala.ie]
Sent: Tuesday 18 August 2020 17:05
To: Nigel.deHaas@outlook.ie
Subject: RE: Application for Substitute Consent - Cleanrath Wind Farm

Dear Mr. de Haas,

The application for substitute consent referred to below was received in An Bord Pleanála on Friday 14th August, 2020. The period of 5 weeks for making submissions commenced on this date.

The reference number for this application is ABP-307939-20.

The application for substitute consent is available to the public through the offices of the Board and will be made available to view through Cork County Council. The documentation will be circulated to the Cork County Council within the next few days. This documentation will then be made available on Cork County Council's website.

A link to the EIAR documentation and EIAR Portal will be made available on the Board's website in the coming days.

Submissions will be accepted by email and the final date for submission is Thursday, 17th September, 2020.

Kind regards,
Niamh Thornton

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20

Applicant: Cleanrath Windfarm Limited

Local Authority: Cork County Council

Location: Townlands of Reananerree, Cloontycarthy, Cleanrath North, Derrineanig, Cleanrath South, Milmorane, Coombilane, Rathgaskig, Augeris, Gorteenakilla, Carrignadoura, Gurteenowen, Gurteenflugh, Lyrenageeha and Lackabaun, Co. Cork ()

Submission By: Nigel de Haas

Submission Date: 24th August 2020

Inchincurka,
Dunmanway,
Co. Cork.
P47 H308
☎ 023 8856896

The Secretary,
An Bord Pleanála,
64 Marlborough Street,
Dublin 1.
D01 V902

24th August 2020

Ref: Application for Substitute Consent
Cleanrath Windfarm Limited
Case Reference: ABP-307939-20

Dear Sir/Madam,

I wish to lodge this submission to the Board with respect to the application for substitute consent by Cleanrath Windfarm Limited dated 14th August 2020. This is a development that should never have been constructed in whilst a Supreme Court appeal was hanging over it.

I respectfully request that the subject development be refused substitute consent and directed to dismantle the unauthorised construction for the substantive and comprehensive reasons set out in the interests of the proper planning and sustainable development of West Cork.

Yours faithfully,



Nigel de Haas

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20

Cleanrath Windfarm Ltd.

Submission by: Nigel de Haas

Date: 24th August 2020

CONTENTS

1	APPLICATION BY CLEANRATH WINDFARM LTD.....	2
1.1	Leave to Apply for Substitute Consent	2
1.1.1	Ongoing Development Pending Supreme Court Appeal	3
1.1.2	The Exceptionality Test	5
1.1.3	The Exceptionality of Cleanrath Windfarm's Circumstances	6
1.2	Application for Substitute Consent	7
2	INTRODUCTION	8
2.1	Planning Background.....	8
2.2	Construction before Application for Substitute Consent.....	9
2.3	Number of Wind Turbines	10
3	BACKGROUND.....	12
3.1	Primary Driver of Cleanrath Wind Farm Development	12
3.1.1	Supreme Court Judgement [2020 IESC 22].....	13
3.1.2	SEAI - National Energy Projections 2019	13
3.2	Cork County Development Plan 2014 (as varied).....	15
3.3	Inspector's Report on PL04.246742.....	16
4	CONSIDERATION OF REASONABLE ALTERNATIVES	17
4.1	'Do Nothing' Alternative	18
4.2	Early Decommissioning Alternative	18
5	DESCRIPTION OF DEVELOPMENT	20
5.1	Enerco Energy Web Site (Wind).....	21
5.2	Stated Capacity in rEIAR.....	22
6	CONCLUSION	22

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20
Submission by: Nigel de Haas

Cleanrath Windfarm Ltd.
Date: 24th August 2020

1 APPLICATION BY CLEANRATH WINDFARM LTD.

The Board's web site shows that Cleanrath Windfarm Limited filed for leave to apply for substitute consent under S177(C) on 20th December 2019. Section 177(C) of the Planning and Development Act (as amended) provides that a person who has carried out a development to whom no notice has been given under section 177B of the Act, may apply to the Board for leave to apply for substitute consent where the applicant considers that a permission granted for the development by a planning authority or the Board may be in breach of law, invalid or otherwise defective in a material respect, whether pursuant to a final judgment of a court of competent jurisdiction in the State or the Court of Justice of the European Union. The act of filing for leave under S177(C) is implicit confirmation by the applicant that the partially constructed wind farm might be in breach of law as of the date of filing.

1.1 Leave to Apply for Substitute Consent

The An Bord Pleanála Inspector's Report ABP 306272-19 on the application for leave to apply for substitute consent under section 177C of the Planning and Development Acts, 2000-2018 dated March 2020 states that a wind farm comprising of 9 no. wind turbines and ancillary works has been constructed and that it is proposed to seek substitute consent to retain the works that have been carried out.

The report further states that the Board's decision to grant permission under ref. PL04.246742 was quashed by Supreme Court Appeal No: 167/18 judgement delivered in December 2019. The date of this judgement was 12th December 2019 [2019 IESC 90 1], eight days prior to the date of the applicant's filing to the Board for leave to apply for substitute consent.

The Inspector's Report makes no mention of the Determination on which leave to appeal to the Supreme Court was granted on 14th February 2019 [2019 IESCDET 39]. **The Supreme Court will only grant leave to appeal where a bonafide case exists and reasonable doubt exists with respect to the outcome.**

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20

Cleanrath Windfarm Ltd.

Submission by: Nigel de Haas

Date: 24th August 2020

1.1.1 Ongoing Development Pending Supreme Court Appeal

Cleanrath Windfarm Limited were aware that a Supreme Court Appeal with respect to the development of the site was extant from 14th February 2019 and that the judgement arising from that appeal had every possibility of being unfavourable to the development.

In granting leave to appeal, the Court considered that the application raises issues of general public importance as to the proper approach to the ministerial guidelines by the Board and that a distinction could be clearly be drawn between a submission where the guidelines would not be appropriate in a particular case and one where the technical aspects of the guidelines have been overtaken by scientific understanding, and become outdated to the extent that they should not be applied at all.

Despite this uncertainty, the applicant pressed ahead with the development, putting access roadworks and hardstanding were in place by 18th August 2019 as can be seen in Plates 1.1.1(a) and 1.1.1(b).



Plate 1.1.1(a) - Access Roadworks and Hardstanding on 18.08.2019

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20
Submission by: Nigel de Haas

Cleanrath Windfarm Ltd.
Date: 24th August 2020



Plate 1.1.1(b) - Turbine Foundation and Hardstanding on 18.08.2019

The plates above show that site preparation had continued apiece in the six months after leave to appeal to the Supreme Court had been granted to Klaus Balz and Hannah Heubach [2019 IESCDET 39], which shows a certain confidence exhibited by the applicant that the eventual outcome would uphold the grant of planning permission.

This was clearly a commercial risk assessment which the applicant was perfectly entitled to conduct. The converse is that where the eventual outcome is other than that envisaged in the risk assessment, the applicant is entirely the author of its own misfortune, and cannot claim that it did not know that its application may fail.

Yet this is what the applicant advanced, where para.14 of the judgment by Mr. Justice O'Donnell on 5th May 2020 [2020 IESC 22] states:

"It was also stated that more than €40 million had been committed to the development by that date, and concern was expressed that if the development was halted, it might lose the benefit of the REFIT 2 Scheme."

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20

Cleanrath Windfarm Ltd.

Submission by: Nigel de Haas

Date: 24th August 2020

1.1.2 The Exceptionality Test

The test for "exceptionality" is for a set of circumstances that cannot be the norm, as considered at para. 72 by Mr. Justice McKechnie in his judgement in *Sweetman -v- An Bord Pleanála* (Supreme Court Record No: 43/19) on 1st July 2020 [2020 IESC 39]:

"whether the relevant provisions of 2000 Act, dealing with substitute consent, are a sufficient implementation of the Directive having regard to the various decisions of the Court of Justice, commencing with Commission v. Ireland: or more accurately, whether the gateway to an application for substitute consent under s. 177C(2)(a) of the 2000 Act is a sufficient compliance with the exceptionality test as laid down repeatedly by that Court: particularly as it is claimed that once leave has been given, that test forms no part of the decision on the substantive application itself, made under s. 177K of the Act (Issue One, para. 73)."

Mr. Justice McKechnie argues at para. 89 that context is important:

"When the Court of Justice refers to retrospective regularisation as having to remain the exception, its justification is that otherwise developers may be incentivised to ignore or disregard the requirements of a prior consent EIA: in other words, national measures cannot act as an inducement to avoid EIA compliance (para. 74 above). Therefore, such regularisation must remain the exception, rather than the rule. Consequently, the relevant provisions of domestic law cannot permit, allow or facilitate a situation whereby the obtaining of, as in this jurisdiction, a retention permission becomes in any way standard, typical or routine. Given this approach, how therefore does s.177C(2)(a) meet the exceptionality requirement?"

Para. 92 of the judgement, questions how the points considered either individually or collectively, could fairly be described as exceptional:

"These factors, in the context under discussion, are relatively general and ordinary, are undeniably broad and widely drawn and have a commonality to them which is immediately recognisable on inquiry. It is therefore, exceedingly difficult to assign "exceptionality" to such matters."

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20
Submission by: Nigel de Haas

Cleanrath Windfarm Ltd.
Date: 24th August 2020

"The fact that only a limited number of projects might be able to benefit from this provision, is not the point. The point is the broadness or generality of the parameters which are applicable to this pathway (s. 177C(2)(a) and D(1)(a)). Such are unlikely to have the dissuasive effect which is a key objective of the Directive."

The conclusion of the judgement is set out at para. 166 where:

"It follows from the above:

- i. That on Issue One, for the reasons therein stated, I would hold that section 177C(2)(a) and its corresponding provision, section 177D(1)(a) are inconsistent with the EIA Directive as interpreted by the Court of Justice, in that they fail to provide adequately for the exceptionality test as demanded by that court;*
- ii. On Issue Two, I would likewise hold that given the structure of s. 177, the failure to make provision for public participation at the leave application stage for substitute consent is inconsistent with the public participation rights conferred by and outlined in the EIA Directive.*

Accordingly, on Issues One and Two, I will grant appropriate declarations to reflect the conclusions so reached."

1.1.3 The Exceptionality of Cleanrath Windfarm's Circumstances

In considering whether exceptional circumstances exist, the Inspector considered, *inter alia*, whether the applicant had or could reasonably have had a belief that the development was not unauthorised.

The evidence on the ground is that:

- (a) Leave to appeal to the Supreme Court was granted to Klaus Balz and Hannah Heubach on 14th February 2019 [2019 IESCDT 39];
- (b) Plates 1.1.1(a) and 1.1.1(b) show that site preparation had continued apiece in the six months after leave to appeal was granted;

Clearly, the applicant had made a decision to proceed with construction despite the risk that the planning permission could be quashed by the Supreme Court. It is exceedingly difficult to assign "exceptionality" to such circumstances.

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20

Cleanrath Windfarm Ltd.

Submission by: Nigel de Haas

Date: 24th August 2020

1.2 Application for Substitute Consent

The covering letter to An Bord Pleanála (Ref. 191223-a) from Mr. J. Green of MKO dated 14th August 2020 seeks substitute consent on behalf of Cleanrath Windfarm Limited in relation to a wind farm of 9 no. wind turbines with an operational life of 25 years.

The letter sets out that:

- *"Accordingly, it is clear that in the circumstances that pertain herein, an rEIAR must be furnished to describe the impacts that have arisen, are arising or are likely to arise from the part of the development that has been carried out. Simultaneously, an EIAR must be furnished to describe the effects of the carrying out of the development that has not as yet been carried out."*
- *"In the instant case therefore, the existing development (comprising so much of the development as permitted as has been carried out) is the development for which remedial environmental impact assessment is required. Accordingly, an rEIAR has been prepared to describe the impacts of this development and is submitted herewith."*
- *"Simultaneously with this rEIAR, and given that an application for substitute consent for that part of the development that has not yet been carried out (the operation of the wind farm until its decommissioning) is also made pursuant to section 177E(2A)(a)(i) of the Act, (and this development requires a prospective environmental impact assessment) an EIAR has been prepared and is also submitted in accordance with the statutory provisions."*
- *"This EIAR describes that part of the development that has not yet been carried out comprising the operation of the wind farm for the period of 25 years and its ultimate decommissioning. The rEIAR necessarily also deals with these aspects, as, these are effects that potentially flow from the fact that the development has been in part carried out."*

This submission therefore addresses the rEIAR with respect to that part of the development which has been completed and the EIAR with respect to the operation of the wind farm until its decommissioning.

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20
Submission by: Nigel de Haas

Cleanrath Windfarm Ltd.
Date: 24th August 2020

2 INTRODUCTION

Section 1.1 of the Introduction describes the applicant as:

"Cleanrath Windfarm Ltd., Lissarda Industrial Estate, Lissarda, County Cork, which is a subsidiary company of Enerco Energy Ltd. (Enerco). Enerco is an Irish-owned, Cork-based company with extensive experience in the design, construction and operation of wind energy developments throughout Ireland, with projects currently operating in Counties Cork, Kerry, Limerick, Clare, Galway & Mayo."

The applicant is, as set out above, a company with huge experience in wind farm development, and by extension, huge experience in dealing with local planning authorities, An Bord Pleanála and the courts. As such, the applicant clearly had the knowledge and experience to realise that commencing with construction whilst a Supreme Court case on a matter of public interest was outstanding was a risky decision.

2.1 Planning Background

In Section 1.2 "Planning Background", the rEIAR states in para. 2:

"However, the Supreme Court allowed an appeal and in a judgement, dated the 12th December 2019, it stated (at paragraph 57 of its judgment): 'it is necessary to quash the decision of the Board granting permission'."

In the interest of full understanding, paragraph 57 of the Supreme Court judgement sets this out in the context that:

"It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live. I consider, therefore, that it is necessary to quash the decision of the Board granting permission in this case."

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20

Cleanrath Windfarm Ltd.

Submission by: Nigel de Haas

Date: 24th August 2020

2.2 Construction before Application for Substitute Consent

Section 1.2 continues to say that an application for leave to apply for substitute consent was made by Cleanrath Windfarm Limited on the 19th December 2019 and that this leave was granted by the Board on the 5th May 2020.

"In the period between the permission being granted by the Board (on 19 May 2017) and the date of this application for substitute consent, development authorised by the 2017 Permission has been carried out to the extent that 9 of the 11 turbines that were granted permission have been completed along with their ancillary infrastructure."

This is absolutely correct in the way it is phrased, but the facts on the ground support a more complex narrative as borne out by the Supreme Court judgement of Mr. Justice O'Donnell on 5th May 2020 [2020 IESC 22], where para. 16 states that:

"Between October, 2018, and the 9th of December, 2019, site clearance works were carried out, and all but one of the nine turbines fully installed. The last turbine (No. 6 on the site map) was partially installed but, due to bad weather, work had to cease. This was then the state of affairs on the site at the date on which the judgment was delivered. It is said on behalf of the developer that, due to health and safety concerns, it considered that the turbine should not be left in an unfinished state. When the weather improved, Turbine No. 6 was completed on the 16th and 17th of December, and further necessary site clearance works were carried out up until the 20th of December, and it appears that the turbines have been commissioned."

This is further discussed by Mr. Justice O'Donnell in para. 46 where:

"The second factor is the lack of evidence in relation to this matter. The explanation given by the developer that health and safety concerns meant that Turbine No. 6 could not be left in the state it was in as of the 12th of December is tenuous. As the applicants observe, the particular health and safety concerns are not identified, still less substantiated by evidence. Furthermore, it is not explained why it was decided that the only way in which the turbine could be protected, and such health and safety concerns allayed, was by completing the turbine, clearing the site, and allowing the windfarm to be commissioned."

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20
Submission by: Nigel de Haas

Cleanrath Windfarm Ltd.
Date: 24th August 2020

The question of whether these works were carried out in the knowledge of the judgment of the court is assessed by Mr. Justice O'Donnell in para. 47 where he writes:

"Furthermore, although it is self-evident that these works were carried out in the knowledge of the judgment of the court, no explanation was offered by Mr. Murnane as to the company's reasoning or justification for taking this course. It was not suggested that the company had been advised or took the view that the steps it was taking were lawful. No reference was made to the fact of the judgment at all. It is difficult to avoid the conclusion that the developer decided to press on in the belief that it would be in a stronger position in fact (and perhaps in law, since initially it seemed to take the view that the permission was only necessary to complete the development) if it did so."

Difficult indeed, to avoid the conclusion reached by the learned judge.

2.3 Number of Wind Turbines

Section 1.6.1 of the rEIAR states that:

"The development permitted development under the decision to grant permission made in May 2017 (under ref. no. PL 04.246742) comprised:

- *Up to Eleven no. turbines with a maximum ground to blade tip height of up to 150m;*
- *Upgrading of existing and provision of new internal access roads;*
- *Wind anemometry mast (up to 100m height);*
- *Two no. borrow pits;*
- *Underground electrical cabling;*
- *Underground grid connection electrical cabling and all associated infrastructure;*
- *Junction accommodation works and temporary roadway to facilitate the turbine delivery*
- *route;*
- *Electricity Substation;*
- *Construction compound;*
- *Upgrading of site access junctions,*
- *Permanent signage, and*
- *All ancillary works."*

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20

Cleanrath Windfarm Ltd.

Submission by: Nigel de Haas

Date: 24th August 2020

"The development which was actually completed and/or commenced pursuant to the 2017 permission comprised;

- *9 No. wind turbines with a ground to blade tip height of 150 metres and all associated foundations and hard-standing areas.*
- *All associated underground electrical (33kV & 38kV) and communications cabling*
- *connecting the turbines to the national electricity grid.*
- *Upgrade of existing access junctions and roads.*
- *Upgrade of existing and provision of new site access roads.*
- *Borrow pit.*
- *Temporary construction compound.*
- *Accommodation works along the turbine delivery route*
- *Temporary roadway to facilitate turbine delivery.*
- *Forestry Felling*
- *Site Drainage;*
- *All associated site development and ancillary works."*

"The future development components, which comprise the focus of the EIAR (but are also set out in this rEIAR) comprise,

- *The current 'Sleep Mode' operations*
- *Future full operation of the wind farm*
- *Ongoing Maintenance*
- *Peatland Habitat Restoration*
- *Monitoring*
- *Decommissioning (early or post full operational period)."*

It is not clear from the rEIAR whether the wind farm will consist of 11 wind turbines, 9 wind turbines or 9 wind turbines now and up to 2 more at some later date. Mr. Justice O'Donnell appears to understand in para. 15 of his judgement on 5th May 2020 [2020 IESC 22] that the limit is the existing 9 wind turbines with no more in the future where it states:

"The developer had decided to proceed with only nine of the eleven turbines, omitting the turbine closest to the applicants' dwelling. The reduction to nine turbines also had the effect that it removed the need for a substation on the site, and instead it was proposed to connect the site to a substation at the associated Derragh windfarm development."

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20
Submission by: Nigel de Haas

Cleanrath Windfarm Ltd.
Date: 24th August 2020

3 BACKGROUND

Paragraph 1 of the Background Section frames the rEIAR as follows:

"It must be noted that while the decision to grant permission under Pl. Ref. 15/5966/ABP PL04.246742 must be set aside, other permissions associated with separate elements of the Cleanrath wind farm have been granted permission and those consents remain in effect and have not been challenged.

Therefore there are ancillary components and infrastructure associated with the wind farm, which continue to benefit from full grants of permission.

In the interests of clarity please note that the elements of infrastructure which already enjoy the benefit of full permission and which comprise part of the Cleanrath wind farm development are assessed within this rEIAR in order to ensure a comprehensive and complete assessment, however, they continue to enjoy the benefit of full and unchallenged planning permission."

The above constitutes clarification by the applicant that it is the grant of permission under Pl. Ref. 15/5966/ABP and PL04.246742 that is set aside and to which the rEIAR applies.

3.1 Primary Driver of Cleanrath Wind Farm Development

The background section sets the context of the development, saying:

"The primary driver behind the Cleanrath wind farm development is the need to provide additional renewable energy to offset the use of fossil fuels within the electricity generating sector. Increasing electricity generation from wind power represents the most economical renewable option to reduce emissions within the power generation sector and is the most mature technology available to achieve national targets that have been established for decarbonisation."

This characterisation is somewhat at odds with the pleadings of the applicant in the Supreme Court as shown in Section 3.1.1 of this submission.

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20

Cleanrath Windfarm Ltd.

Submission by: Nigel de Haas

Date: 24th August 2020

3.1.1 Supreme Court Judgement [2020 IESC 22]

The Supreme Court judgement of Mr. Justice O'Donnell of 5th May 2020 [2020 IESC 22] records that the primary driver behind the Cleanrath wind farm development was qualification for the Renewable Energy Feed-In Tariff (REFIT) as set out in para. 11 where:

"On the 8th of January, 2020, the developer indicated that the development had the benefit of the REFIT 2 Support Scheme for Renewable Energy Generation ("the REFIT 2 Scheme"), but that, in order for the windfarm to continue to be eligible for REFIT support, the development was required to have valid development consent in place. It was stated that, upon the order of certiorari becoming operative, the development would not have the benefit of valid development consent, and "may lose its REFIT 2 benefit". The loss of that benefit would have commercially catastrophic consequences, it was contended, and in the circumstances it was indicated that the developer intended to apply to the Supreme Court for a stay on the execution of its order of certiorari quashing the decision of the Board to grant permission in the case, pending the determination by the Board of the application for leave to apply for substitute consent, and, if such leave was granted, the determination of the prospective application for substitute consent."

It was contended that the loss of REFIT support would have commercially catastrophic consequences. This is indeed a horse of a different colour from the primary driver being "the need to provide additional renewable energy to offset the use of fossil fuels within the electricity generating sector."

3.1.2 SEAI - National Energy Projections 2019

Section 2.1.2.5 of the rEIAR sets out that:

"The SEAI National Energy Projections 2019, published in May 2019, acknowledges the significant increase in renewable energy share in Ireland over the past number of years. The report details that in 2005, 5% of Ireland's energy came from renewable sources, and in 2019, it is estimated that approximately 13% of Ireland's energy will be generated by renewable sources."

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20
Submission by: Nigel de Haas

Cleanrath Windfarm Ltd.
Date: 24th August 2020

"Notwithstanding, this current progress is still below the required 16% target. Compared to other European countries, Ireland was 22nd out of the EU-28 for overall renewable energy share and 26th out of the EU-28 for progress towards overall 2020 renewable energy target.

- 38.9% renewable electricity by 2020 (target is 40%);*
- 9.8% renewable heat by 2020 (target is 12%); and*
- 10.8% renewable transport by 2020 (target is 10%)"*

This shows that in May 2019 Ireland's renewable electricity penetration was 97.25% of target, as confirmed by EirGrid which reported on 17th March 2020 that:

"Nearly half of all electricity consumed in Ireland has come from wind farms in the first two months of this year. Wind accounted for 49% of electricity demand during the period, with February 2020 proving to be record-breaking month with 56% of demand met by wind energy.

This is the highest monthly total since records began; beating the previous record of 47% set in February 2019. The figure for January 2020 was 41%. The figures are an indication that Ireland is on track to meet its target of 40% of electricity demand to be met by renewable sources by the end of 2020."

<http://www.eirgridgroup.com/newsroom/record-wind-levels-feb-20/#:~:text=Nearly%20half%20of%20all%20electricity,demand%20met%20by%20wind%20energy.>

If the national electricity authority, EirGrid, is clear that "Ireland is on track to meet its target of 40% of electricity demand to be met by renewable sources by the end of 2020", where is the imperative need to grant substitute consent for this development?

The section then offers the assumption that:

"future renewable targets and future commitments will be achieved largely through the deployment of additional wind powered generation."

This may be a core objective of wind farm developers but it is scarcely a credible basis for the required level of national reduction of greenhouse gas emissions in the absence of meaningful measures in other areas.

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20

Cleanrath Windfarm Ltd.

Submission by: Nigel de Haas

Date: 24th August 2020

3.2 Cork County Development Plan 2014 (as varied)

Section 2.2.3.1 of the rEIAR notes that:

"Cork County Council has commenced the preparation of a new County Development Plan (2022-2028), this process remains in the pre-draft stage at time of writing, with various background documents having been released to inform the public discourse."

The submission by the Irish Wind Energy Association (IWEA) on the draft Cork County Development Plan 2022-2028 makes the case, referenced to "Table 3.1", that having disfigured the upper Lee Valley with existing developments including Cleanrath wind farm *"confirms that wind energy developments are considered appropriate proximate to Scenic Routes with varying overall landscape values"*.

	Scenic Routes Within 2km	Overall Landscape Value
Cleanrath Wind Farm	S26	High - Medium
Derragh Wind Farm	S26, S25	High - Medium
Carrigarierk Wind Farm	S32	Medium
Grousemount Wind Farm (SID)	S24	Medium - High
Barnadivane Wind Farm	S36	Low
Boggeragh Wind Farm	S18, S20	Medium - Medium - High
Bawnmore Wind Farm	S20	Medium - High
Carraigcannon Wind Farm	S18	Medium

Table 3.1: Review of established and extant permissions for wind energy development in proximity to Scenic Routes

The IWEA then advocates that arising from this:

"Policy objectives GI 7-2 and GI 7-3 of the current County Development Plan 2014 should be reviewed and recognition given to the ability of wind energy to be absorbed into the landscape in areas proximate to scenic routes by virtue of their locational requirements in a rural setting and their unique scale and massing i.e. slender and tall structures".

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20
Submission by: Nigel de Haas

Cleanrath Windfarm Ltd.
Date: 24th August 2020

It is notable that the table includes all of the wind farms encircling Lough Allua (the Shehy More wind farm has been subsumed into the separate Carrigarierk wind farm owned by Keel Energy, also variously referred to as "Carrigdangan Wind Farm" and "Barna Wind Farm"). The wind industry national representatives are therefore actively using the fact that the Board has granted permission to the above wind farms as a reason to permit future wind farm development in areas of scenic value.

A grant of substitute consent to Cleanrath Windfarm Limited will surely seal the fate of the remaining wild uplands of rural West Cork.

3.3 Inspector's Report on PL04.246742

The applicant relies on the Inspector's Report on PL04.246742 where in relation to landscape the assessment of potential impacts on visual amenity and scenic routes found:

"I would not agree with the contention of [third party] appellants that there will be an over-concentration of wind turbines in this area. The density of turbines to the northwest, across the county boundary in Kerry, is far higher....."

The Inspector continues:

"The perception of visual impact is, necessarily, a subjective one. This section of the EIS does not purport to be entirely scientific, dealing as it does with subjective emotions."

In assessing the cumulative impact of wind farm developments surrounding Lough Allua, the Inspector's Report for 246742 dated 18th November 2016 appears not to have taken the Shehy More wind farm into account that was granted conditional permission under PL04.243486 on 23rd December 2016.

There are two Inspector's Reports for PL04.243486 listed on the An Bord Pleanála web site, and whilst these are undated on the actual documents, R243486A and R243486A(1) both show in their metadata that their final modification was on 27th February 2017 and that therefore they would have been available for the cumulative assessment of the Cleanrath wind farm.

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20

Cleanrath Windfarm Ltd.

Submission by: Nigel de Haas

Date: 24th August 2020

4 CONSIDERATION OF REASONABLE ALTERNATIVES

Section 3.1, para. 4 states that:

"In the event that Substitute Consent is granted, the constructed development will remain unchanged and full operation of the wind farm will recommence with the provision of renewable electricity to the national grid to meet Ireland's climate change targets. The only realistic alternative to the resumption of full operation of the Cleanrath wind farm development is the early implementation of the Decommissioning Plan including the removal of the turbines and associated infrastructure and the development of an alternative source of renewable electricity at another, potentially greenfield location."

This is the classic de facto argument; the developer has chosen to take a commercial risk by constructing the wind farm whilst a Supreme Court hearing was pending in full confidence that despite the outcome of the case overturning the planning permission, the de facto existence of the constructed wind farm can be advanced as justification for its retention.

The rEIAR frames the context as follows:

"Accordingly, the context in which the project is considered is important and, on this application for Substitute Consent, that context includes the fact that the Cleanrath wind farm development has already been constructed and has been operational prior to the submission of the application for substitute consent."

Consideration of alternatives then becomes biased because of the de facto existence of the constructed wind farm as set out above. The rEIAR goes on to base this section on:

"Consequently, taking consideration of the legislative and guidance requirements into account, this chapter addresses alternatives under the following headings:

- *'Do Nothing' Alternative;*
- *Alternative Locations;*
- *Alternative Layouts;*
- *Alternative Designs; and*
- *Alternative Mitigation Measures."*

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20
Submission by: Nigel de Haas

Cleanrath Windfarm Ltd.
Date: 24th August 2020

This is simply not possible in a rEIAR that has been prepared for an application for substitute consent, as it is a retrospective application where the wind farm has already been constructed rather than a prospective application where the guidelines would be appropriate.

4.1 'Do Nothing' Alternative

Section 3.3.1 states:

"The Cleanrath wind farm development has been constructed, has been operational and is now operating in Sleep Mode with the site essentially in a shut-down mode with no export of electricity pending the outcome of the Substitute Consent process. In the event that Substitute Consent is obtained, the intention is to recommence and continue the full operation of the Cleanrath wind farm development until the end of 25 years from the formal commissioning of the turbines in July 2020 and implement the decommissioning plan for the Cleanrath wind farm development at the end of the operational period."

The only alternatives that remain are 'Do Nothing' which is effectively granting substitute consent and 'Alternative Mitigation Measures' which is effectively full or partial decommissioning. The remainder of the discussion in this part of the rEIAR would only apply in the case of a prospective EIAR.

4.2 Early Decommissioning Alternative

Section 3.3.8 of the rEIAR states:

"The Cleanrath wind farm development has been constructed, has been operational for a short-term period and is now currently operating in Sleep Mode where the turbines are in a controlled mode which is maintained by the turbine manufacturer and are generally not producing electricity pending the outcome of the Substitute Consent process. In the event that Substitute Consent for the development is not obtained, then the result may be that a renewable energy facility is not provided at this location or the Cleanrath wind farm development being maintained in the Sleep Mode and subsequently decommissioned early."

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20

Cleanrath Windfarm Ltd.

Submission by: Nigel de Haas

Date: 24th August 2020

The applicant essentially offers a binary option where either substitute consent is granted for the entire wind farm as constructed, or refused for the wind farm in its entirety resulting in full decommissioning and restoration of the site. This is not the only option provided under 'Alternative Mitigation Measures' in the draft EPA Guidelines.

Section 3.4.7 of these guidelines point out that:

"It may be possible to mitigate effects in a few different ways. In these circumstances the EIAR can describe the various options and provide an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects."

Consideration of alternative mitigation measures is simply ruled out in the rEIAR where it states that:

"In these circumstances, the development on the site would not utilise the allocated Gate 3 grid connection offer secured for the Cleanrath wind farm development, and the absence of production of renewable energy from the site is likely to result in a further shortfall in achieving the Government's 2020 target of generating 40% of the State's electricity from renewable sources this year (a target which Ireland will fall short of) and which has recently been increased to 70% by 2030."

This is simply not correct. Section 2.1.2.5 of this rEIAR states the SEAI National Energy Projections 2019 anticipate that 38.9% of electricity will be generated from renewable sources by 2020 (97.25% of the target of 40%) and EirGrid which recently reported that wind generated electricity accounted for 49% of electricity demand during the first two months of 2020, an indication that Ireland is on track to meet its target of 40% of electricity demand from renewable sources by the end of 2020.

The absence of consideration of alternative mitigation measures is apparent where the rEIAR states:

"In the event that full operation of the Cleanrath wind farm development does not recommence, it may be necessary to implement the decommissioning plan early, which would involve further construction works to be carried out which would in themselves require further mitigation measures to offset potential environmental impact."

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20
Submission by: Nigel de Haas

Cleanrath Windfarm Ltd.
Date: 24th August 2020

5 DESCRIPTION OF DEVELOPMENT

Section 4.3.1.1 of the rEIAR states that:

"The turbine numbering of the installed turbines was altered for operational purposes, however for ease of reference, the turbine numbering used in this rEIAR corresponds to that of 2017 Permission application documentation. The corresponding installed turbine number is provided in the Table 4-1 below."

This table shows that the numbering of 9 turbines commences from the most westerly at "7" through the most distant (formerly "1") which is now "15".

Turbine Number	New Turbine Number (as per signage on site)	Irish Grid Coordinates		Top of Foundation Elevation (m OD)
		Easting	Northing	
1	15	120871	70057	209
3	14	121213	69913	213
4	13	121200	69411	190
5	12	120682	69553	208
6	7	119466	69620	260
7	8	119610	69250	253
8	11	120493	69178	222
9	9	119952	68981	228
10	10	120288	68725	229

Table 4-1 Wind Turbine Locations and Elevations

There is a possibility, unstated in the rEIAR, that turbine numbers 1 to 6 apply to the wind farm formerly known as Derragh (Pl. Ref. 12/5270 ABP PL04.245082) constructed by Framore Limited. It is difficult to see how an EIA can be conducted on the partial information provided in the rEIAR in the absence of clarification of the full extent of the Cleanrath wind farm, particularly since the stated capacity of the wind farm on the Enerco web site is 42.6MW, well in excess of the rating of 9 turbines.

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20

Submission by: Nigel de Haas

Cleanrath Windfarm Ltd.

Date: 24th August 2020

5.1 Enerco Energy Web Site (Wind)

The "Wind" section of the Enerco Energy web site states (as of 23rd August 2020) that the capacity of the Cleanrath wind farm (under construction) is 42.6 MW.

Enerco Energy
Creating a Sustainable Future
Consultation - Planning - Design - Construction - Operation & Maintenance
Tel: +353 (0)21 7336034, Email: info@enercoenergy.ie,
August 23, 2020 19:32
A MEMBER OF
Craydel Group

Windfarm Inductions

HOME COMPANY PROFILE RENEWABLE ENERGY **WIND** HYDROELECTRIC SOLAR RESEARCH & DEVELOPMENT COMMUNITY CONTACT US

Wind

Enerco Energy is one of Ireland's leading renewable energy developers with our core activity being the development and construction of medium to large scale windfarms. Ireland is particularly suited to wind power generation as it is positioned on the western side of Europe which allows it to take advantage of strong winds from the Atlantic Ocean particularly along the western seaboard. Expansive mountain ranges guarantee a plentiful amount of potential wind farm sites. Wind energy provides a clean, sustainable solution to our energy problems. It can be used as an alternative to fossil fuels in generating electricity, without the direct emission of greenhouse gases and there will always be wind; it is inexhaustible and renewable.

Wind energy has many benefits as it is a freely available, emission free alternative to imported fuels which are polluting our environment. Ireland's vast renewable energy resources can help us to reduce our reliance on costly fuel imports and stabilise our security of supply for future economic growth. It is envisaged that wind power will make the most significant contribution to the achievement of national and International targets for green electricity, due to its environmental benefits, technological maturity and competitiveness. Enerco Energy possess all the capabilities and resources to plan, design, develop, build and operate a successful windfarm. A sample of the projects which we have been involved with includes;

**Cleanrath Windfarm
Cork (Under Construction)**
42.6 MW Capacity

Craydel Group OUR FAMILY OF BRANDS INCLUDES **emeside engineering** **Enerco Energy** **MCE Ltd.**

Plate 5-1 Screenshot of Enerco Energy Web Site on August 23, 2020

SUBMISSION ON APPLICATION FOR SUBSTITUTE CONSENT

Case Reference: ABP-307939-20
Submission by: Nigel de Haas

Cleanrath Windfarm Ltd.
Date: 24th August 2020

5.2 Stated Capacity in rEIAR

Section 4.3.1.5 of the rEIAR states that:

"The installed wind turbines have a rated electrical power output of 2.4 megawatt (MW) and 3.6 MW depending on their siting on the wind farm site. There are 4 no. 3.6MW turbines and 5 no. 2.4MW turbines, with a combined installed capacity of 26.4MW. For the purposes of this rEIAR, the rated output of 26.4MW has been utilised in the various calculations as appropriate."

This leaves a material discrepancy of 16.2 MW between the currently advertised capacity of Cleanrath wind farm and the capacity submitted to An Bord Pleanála in the rEIAR.

6 CONCLUSION

The applicant made a commercial decision to take the risk of constructing this wind farm in the full knowledge that the validity of the grant of planning permission by An Bord Pleanála was the subject of a Supreme Court challenge.

The judgement of the Supreme Court was to overturn the grant of planning permission by the Board. In short, the applicant lost the case.

The issue before the Board is now very simple; should the applicant be rewarded for a risky decision that resulted in an unauthorised development?

Or should justice be seen to be done with refusal of the application for substitute consent?
