David O'Hara L. Clarke

From: Bord
Sent: Tuesday 23 November 2021 08:30
To: Appeals2
Subject: FW: re ABP-308019-20 - Substitute consent application for the Derrybrien windfarm – request for further comment
Attachments: Re ABP-308019-20 22112021.pdf

-----Original Message-----
From: Attracta Uí Bhroin <attracta@ien.ie>
Sent: Monday 22 November 2021 17:28
To: Bord <bord@pleanala.ie>
Subject: re ABP-308019-20 - Substitute consent application for the Derrybrien windfarm – request for further comment

Dear Sir Madame please see attached as requested further comment

Attracta Uí Bhroin

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1, Green Street,
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Contact by email only to
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Date:22nd Nov 2021

An Bord Pleanála, 34 Marlborough St, D1

By email to: bord@pleanala.ie

Re: Your reference ABP-308019-20 - Substitute consent application for the Derrybrien windfarm – request for further comment.

Dear Sir/Madame,

Please note the following observations re. the above substitute application before the Board. They are made without prejudice to the concerns outlined previously[1] and below in respect of the conduct of this decision-making and in particular the issues with the further consultation executed pursuant to s.177K(1D) of the Planning and Development Act, 2000, as amended (The PDA).

This submission reflect the views of the ELO of the IEN and should not be taken to reflect the views of the IEN or it's members, albeit they may share them.

Context for this submission and the Board's further failure in respect of public participation obligations arising under national and EU law:

1. This submission is made in response to an invitation to me from the Board to comment on:
   - Further particulars provided by the applicant for the above substitute consent, in two separate letters dated 5 November 2021, with the associated particulars, and
   - A further third letter also dated 5 November 2021 pertaining to a response from Galway County Council in its email of 18th Oct 2021 further forwarding it's letter of 15th October 2021.

[1] Emails to the Board on 9th and 16th August 2021, and in particular submission to the Board on 30th August 2021 – copies in Annex I, and observation made on 13th Sep 2021.

2. In each of it's three letters of invitation to me, the Board indicates the invitation to comment has been made given it is the Board's opinion that it would be: ***"in the interests of justice"*** to request comment on the particulars provided. No further justification or legal duty is indicated.
3. The Board's letter and focus on this opinion entirely fails to reflect an appreciation of the legal obligations pertaining to this process of further information, and yet again regrettably there are as a consequence here serious and indeed fatal flaws the public participation obligations engaged, compounding the earlier failures which I have highlighted to the Board.[2]
4. These issues are firstly in relation to national law obligations and secondly in respect of EU law obligations.

I. Firstly in respect of the national law obligations, in it's substantive response on the 18th Oct, the applicant under the Heading of "Responses to General Themes" addresses a section "2.1 Exceptional Circumstances".

II. In summary, there are specific public participatory obligations in respect of further information solicited on the matter of exceptional circumstances under changes to the Planning and Development Act 2000, (PDA) enacted last December 2020, and which apply to this substitute consent application. It is therefore simply not open to the Board to simply side step these public participatory obligations by encompassing this information within a more general process of Further Information. Specifically these are set out below.

III. To be clear it is acknowledge that under the Planning and Development Regulations 2001, Article 233, provision has been made for the Board to request further information from an applicant.

IV. However, in respect of further information on "exceptional circumstances" being requested by the Board of the applicant, the Oireachtas made express provisions in section 177K(1C) – and very particular provisions additionally arise for public participation obligations. These simply have not been observed here.

V. Specifically, under 177K(1C)(a) – the Board can issue a general invitation to the applicant for information on exceptional circumstances which the applicant wishes to provide.

VI. However 177K(1C)(b) covers where the Board requires further information from the applicant on exceptional circumstances. For reference these are set out below:

> "(1C) (a) The Board shall, in relation to an application referred to in paragraph (b) of subsection (1B), invite the applicant concerned to give to the Board such information as the applicant considers material for the purposes of the

[2] *Ibid.*

Board's satisfying itself as to the matter referred to in paragraph (a) of subsection (1A), and any such information shall be given to the Board by the applicant within such period as is specified in the invitation concerned.

(b) The Board may—

(i) in relation to an application referred to in paragraph (b) of subsection (1B), and

(ii) in addition to any other information given, or required to be given, to the Board, in accordance with this Part, require the applicant concerned to give to the Board (within such period as is specified in the requirement) such information as the Board may reasonably require for the purposes of its satisfying itself as to the matter referred to in paragraph (a) of subsection (1A).

.."

(Note: Applications under the ss 1B(b) referred to includes this particular substitute consent application which was pending when Part 2 of the Planning and Development, and Residential Tenancies, Act 2020 was commenced)

VII. It does not matter whether the Board expressed a general invitation to comment on the submissions made, or once again there is a general invitation to the applicant to send in information on exceptional circumstances or whether it raised specific questions – **the Board has re-engaged on exceptional circumstances with the applicant**.

VIII. A number of subsequent subsections then set out associated obligations and rights,

- Section 177K(1D) then sets out further obligations in respect of any invitation issued including full public notifications, and notifications to prescribed bodies
- Section 177K(1G) establishes a duty on the planning authority to enter the information in the register,
- Section 177K(1H) establishes a duty on the Board to consider submissions made, including on the specific exceptional circumstance consultations referred to therein.
- Further requirements in respect of notifications to prescribed bodies, interested persons who have made prior submissions are also set out in the Planning and Development Regulations on foot of changes made also last December 2020 in S.I. 692 2020 in respect of further information on exceptional circumstances.

IX. It is therefore not open to the Board to engage on further information on "exceptional circumstances" outside that which has been specifically provided

for by the Oireachtas and in so doing to compromise the public participatory processes set out in legislation.

X. Therefore section 177K(1C), is the appropriate provision, when the matter of exceptional circumstances is being considered with the applicant in pending applications before the Board, and the Board has either failed to engage with the proper provision given the nature of the information involved, and/or failed to ensure the public participation obligations which arise then, are followed.

XI. Neither does it matter that other further information has also been requested, It is not open to the Board to side step the process specified by the Oireachtas where "exceptional circumstances" is involved.

2. Secondly, in respect of the failure under EU law obligations, when considering regularising a development in breach of EU Law – the EU rules still need to be applied. Therefore the public participation obligations which arise under Article 6(3)(c) of the EIA Directive, when further information comes to light following the publication of the application, need to be followed which includes the notification references and obligations set out in Article 6(2) as referred to in 6(3)(c).
3. The Board has entirely failed to address the notification and consultation requirements.
4. Clearly, the Minister in making regulations under s.177N of the PDA for further information in Article 233 of the Planning and Development Regulations 2001, has also failed to consider the further consultation obligations which arise when material which would fall to be considered under Article 6(3)(c) given its nature and timing etc and which should precipitate notification and consultation.
5. This notification and consultation is to the public concerned which is a broad and generous term and cannot fall to simply mean those who have made submissions – already which is the Board's approach here it seems, as otherwise the reference to the public concerned in the notification obligations in Article 6(2) of the EIA Directive would never trigger any notifications at all.
6. In the context of the substantial Arcadis report commissioned by the EU Commission, provided alongside many submissions in the last round of consultation – it is of concern that it is entirely unclear if rebuttal and response from the authors or Commissioners of that report will be contacted by the Board as clearly these are parties which have a real interest in the matter.
7. To further highlight the importance of adhering to the EU rules in any regularisation procedure the Court of Justice in case c-215/05 in paragraphs 57-58 – set out what the Hon Mr Justice Garrett Simons helpfully described recently in a very recent

judgment[3] on a substitute consent case as: ***"the limits of a Member States discretion to regularise the status of development projects carried out in breach of the requirement of the EIA Directive"***, where he then cited paragraphs 57-58 of Commission v Ireland case c-215/06, the original Derrybrien case – as below: (Note: The added emphasis is mine and the colour is to assist parsing of the different elements of those limits)

> "57 While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it **does not offer** the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.
>
> 58 A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects."

There are a number of dimensions to these limits in paragraph 57 and I have colour coded them accordingly above and below to assist with parsing them:

a) Any system of regularisation should not provide an opportunity to avoid EU law, and most certainly should not incentivise it – This latter element is clear in the Court's criticism in para. 58 of Ireland's system of retention which allowed EIA Development simply be regularised through a retention application.
b) The rules still need to be applied in any regularisation
c) The regularisation of unlawful development should be strictly limited to exceptional cases only

8. While the regulations are deficient in respect of notification and consultation when Art 233 on further information is invoked under the Planning and Development Regulations – the Board, has as a public authority, a duty to disapply national laws which are in breach of EU law as confirmed again by the EU Court of Justice in case c-

[3] *Suaimhneas Limit v Kerry County Council*, neutral citation [2020] IEHC 451

378/17 and a duty to uphold EU law, *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission,*[4]

9. Therefore the Board has erred in effectively opining that the invitation to comment arises only in the context of the interests of justice. While it's recognition of that is welcome, it has therefore failed to adhere to the express will of the Oireachtas in respect of the processes required when exceptional circumstances is revisited with an applicant, and also failed to consider the nature of the information and the public participation obligations under the EIA Directive in the context of the substitute consent application.

10. **Therefore the Board cannot proceed to determine this application without addressing the deficit in public participation which arises here in this round of consultation, and to do so would be *ultra vires*.**

Further public participation issues:

11. More generally on public participation – I would highlight that the applicant's various assertions that the process in the last round of consultation has been adhered to are all incorrect, and I refer to my earlier submissions in respect of the deficiencies of the Board's adherence to the new legislative procedure following its invitation to the applicant under 177K(1C)(a) of the PDA earlier this year. It's very belated publication of information online in no way suffices to address the requirements, and it fundamentally failed to notify prescribed bodies in accordance with the legislation, and other parties who had made previous submissions on the application.

12. **Therefore the Board cannot proceed to determine this application without addressing the deficit in public participation which arises in the earlier round of consultation, and to do so would be *ultra vires*.**

13. More generally I would also highlight that all of my correspondence with the Board on this matter has been via email. In my final submission on the 13th September following the recent round of compromised public consultation on the substitute consent application, and in the document submitted on the 30th of August, my submissions clearly indicated:

"Contact by email only to Attracta@ien.ie"

[4] Judgment of the Court, 4 Dec 2018, c-378/17, *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission*, EU:C:2018:979, para 38,50,52.

14. The Board is operating a restricted access policy in it's offices in the context of the ongoing Covid-19 pandemic, and consistent with Government Guidelines we in the IEN are working remotely. Therefore the Board's choice to disregard this request for contact by email, and to instead to send only via registered post the invitation to comment, has regrettably had serious negative consequences, and entirely failed to reach me until recent days. While the Board's choice to pursue delivery by registered post is understood – the failure to provide for any additional courtesy notification by email to alert me, in light of my express indication on contact, or indeed to alert others in similar circumstances is more than regrettable. It certainly has served to compromise my engagement here in responding, and while the Board was admittedly was not expressly obliged to contact me by email – it in my respectful view reflects yet another failure in the Board's handling of this application to ensure effective participation has been facilitated.
15. It is further noted that the Board has afforded less time to the public to respond during this round than it has to the applicant to respond to its questions, despite the disproportionate advantage the applicant has with the public. The timing disadvantage cannot be overstated. The letter to the applicant issued on a Monday 27th of September with some 22 days to respond if the response of the 18th October is to be taken as the due date. However, the letter to the public issued by post on a Friday 5th November and allowed only 18 days, and would not have been received until Monday 7th at the earliest, compromising a further 2 days, giving at best 16 days to the public.
16. In the context it was also open to the applicant to engage the offices of consultants to provide a technical 14 page additional component to the response, and presumably they had access to the report for some considerable period prior to this. Even the applicant refers to this on page 30 of their substantive response on the 18th October as follows:

> " Given the highly technical nature of this topic a detailed response has been prepared by AGL Consulting Ltd. AGL are specialists geotechnical engineers who had detailed knowledge of the developments site and have provided expert inputs into the rEIAR"

17. In the context the discrepancy in advantage conferred on the applicant is very significant.
18. I regret to raise the issue of bias but given the overall approach to the handling of the application, and the issues in providing for effective participation and fair procedures, and it's failures to explain the issues raised in respect of failures in the last round of consultation which concluded on 13th September 2021, I am regretfully obliged to raise a serious concern on the bias of An Bord Pleanála here in determining this matter, compounding concerns raised earlier about its and the State parties conflict of interest. I would further flag as highlighted by the CJEU in c-261/18

– that the state owned applicant is an emanation of the State and it too has duties under EU law here.

Restriction on the scope of comment and lack of clarity on "the matter in question" to which we are to respond.

19. The Board has expressly indicated in it's letter of invitation for comment of 5th Nov 2021, that comment is to be restricted to "the matter in question" –
20. However, the "matter in question" is not entirely clear as the Board's questions to the applicant or Galway County Council are nowhere specified in the documentation provided or on it's website. It therefore falls to be inferred and determined from the perspective presented by the applicant in their response.
21. Additionally, and very problematically, the further public consultation enabled under an invitation under s177K(1C), after further input is sought from the applicant, are **not** restricted as to the content of the public's or prescribed body's submissions.
22. Therefore in light of the earlier comment in respect of the Board's failure to process the subset of further information relating to exceptional circumstances in accordance with the PDA 177K(1C) and what flows as a consequence from that – the Board has impermissibly restricted the scope of submissions here in this consultation and misdirected the public and presumably the also the prescribed bodies involved.

Expertise and standard of assessment.

23. The Board has entirely failed to make clear at any point in this process that it has ensured it has the necessary level of expertise available to it to determine this application – as is required not only under the EIA Directive, as amended by 2014/52/EU, but also under s. 177K(1)(a) which states: "the Board shall ensure that it has, or has access to, sufficient expertise to enable it to examine the remedial environmental impact assessment report and ensure its adequacy".
24. I note once again s.177K entirely fails to put a duty on the Board to do the remedial assessment and note my earlier comments in respect of the duty to ensure EU rules are applied when considering a regularisation of an unlawful development.
25. This is particularly important in the context of conflicting views on technical assessment of the technical issues around hydrology, peat stability and hydro morphology between the applicant and the Arcadis report, and indeed Biodiversity.
26. I adopt in full here the issues raised in the submission from J Byrne and An Claíomh Glas, and highlight again the issues in respect of the standard of certainty required for Appropriate Assessment,(AA) noting in particular the comments on the lack of clarity on Favourable Conservation Status, the lack of specific site specific conservation objectives, which refer to both "maintaining or restoring" undermining any credible AA in the context. There is also no management plan in place for the SPA to achieve the objectives for the site and the effect of the belated designation of

the site cannot side step what would seem to be an invariable conclusion of adverse impacts on the site had it been done at the time.

27. I note the applicant sits with their original assessment for Merlin and Hen Harrier and entirely fails to really engage with the material structural issues compromising the ability to do an adequate and lawful AA for the site, remedial or otherwise.
28. The deficiency in information generally and within the application in respect of Merlin remain unresolved. Merlin in particular therefore requires a precautionary approach and surveying which addresses the practical issues with surveying adequately and accurately for this species. This has been nowhere adequately responded to in the in the further submission from the applicant.

Hen Harrier and Windfarms:

Summary of interactions

29. In summary much further information is needed on the effect of wind turbines and Hen Harrier and there is no basis on which to conclude safely the establishment and ongoing operation of the windfarm will not have an adverse impact on the integrity of the site.

With regard to the conservation management of the Irish Hen Harrier population, there are several effects that may arise as a result of potential interactions with the wind energy sector.

(i) loss of, or displacement from, foraging and nesting habitat during the breeding season;

(ii) direct disturbance of nesting and roosting birds;

(iii) loss of, or displacement from, winter foraging resources and roosting habitat; and

(iv) risk of bird mortalities through collisions with turbines.

Overlapping distributions and population level impacts

In 2015, breeding Hen Harrier territories (*i.e.* confirmed and possible breeding records) were recorded across 83 10km grid squares in Ireland. Over 32% of these squares overlapped with at least one wind energy development. This percentage overlap has increased nearly fivefold since the original national survey was conducted in 2000; meanwhile, the breeding harrier population is estimated to have declined over this period.

Using the Review Turbine Database 2016 (NPWS, unpublished), it is calculated that almost 82% of turbines were located in the 100–400m altitudinal range; 92% of Hen Harrier territories recorded in 2015 were located in the same range. Over 66% of turbines and almost 60% of Hen Harriers occurred between the 200 and 400m contours. As described earlier, as of 2016, 44.5% - 62.7% of the SPA turbines occurred in habitats that could be suitable for nesting Hen Harrier. Similarly, 60.2% - 78.4% of turbines are located in habitats that are classified as suitable for foraging.

The most recent Bird Atlas (2007-2011) recorded harriers during the winter period across 403 10km squares; 88 of these 10km squares are known to contain winter roost sites (Balmer *et al.*, 2013; NPWS, 2015a). It has also been calculated that, as of 2016, over 1,000 turbines had been installed across over 16% of the known wintering range of the Hen Harrier (NPWS, unpublished).

For the WINDHARRIER study, Fernández-Bellon *et al.* (2015) assessed the breeding performance of Hen Harriers across Ireland in relation to wind energy development. Several measures of breeding performance were investigated and no statistically significant relationships were found between these breeding parameters and distance of the nest from the nearest wind turbine, although for those nests observed, nest success was lower within the closest distance band (0-1km) to turbines. Fernández-Bellon *et al.* (2015) conclude that these findings support earlier research that highlighted the importance of areas within a 1 km radius of raptor nests to breeding success.

Also for the WINDHARRIER study, Wilson *et al.* (2015) examined Hen Harrier population trends in relation to wind energy development in Ireland from 2000 to 2010, and noted that considerable overlap occurs between Hen Harrier breeding distribution and the location of wind energy developments. They reported *"A weak negative relationship was identified between wind farm presence and change in the number of breeding Hen Harrier pairs in survey squares between 2000 and 2010. However, the available evidence suggests that this was not a causative relationship but that local factors not included in the current study may have been responsible for the observed changes in Hen Harrier numbers within the survey squares. Furthermore, Hen Harrier population trends were negatively affected by a complex interaction between wind farm developments and the proportion of land between 200m and 400m above sea level".*

Loss of, or displacement from, foraging and nesting habitat during the breeding season

During the breeding season and beyond, the diet of Hen Harrier consists of small birds and small mammals. Wilson *et al.* (2015) identified that the densities of forest birds were significantly lower within 100m of wind turbines; and that densities of open-country bird species were also found to be lower at wind energy development sites, but that these differences were independent of distance to wind turbines. Therefore, lower densities may be due to larger-scale effects of wind energy developments.

Examining the foraging preferences of adult birds during the breeding season and differences between wind energy development and control sites, Wilson *et al.* (2015) highlighted the importance for Hen Harriers of open habitats that hold high diversity and densities of prey species (rough grassland, natural grasslands, scrub and peatland).

Pearce-Higgins *et al.* (2009b) provide evidence of significant Hen Harrier avoidance of apparently suitable habitat within 250m of turbines, with a predicted 53% reduction of Hen Harrier flight activity within 500m of turbines, assuming that modelled habitat usage is proportional to breeding density. However, Haworth and Fielding (2012) examined Harrier flight activity data from five wind energy developments and a more limited level of avoidance is suggested, concluding that Harriers are displaced at relatively smaller scales of between 0- 100/200m (Haworth and Fielding, 2012).

The wider implications of these findings of displacement or avoidance effects need to be considered in relation to their potential effects on the Hen Harrier population at the national level. It is estimated that, as of 2016, 21% of all turbines in Ireland occurred within the breeding Hen Harrier SPA Network. The number of turbines within 1km of the boundaries of these SPAs had also increased, as set out earlier. Turbines have also been permitted in undesignated areas that have previously or continue to support breeding Hen Harrier. The review also indicates that, as of 2016, turbines outside the SPA network were predominantly located across peat bogs (48%), as well as there being a predominance of turbine installation in open habitats over which harriers are known to forage. Within the SPAs, as of 2016, over 50% of the turbines were installed over heath-bog and/or rough grassland.

Direct disturbance of nesting and roosting birds

The presence of operating wind turbines can exert a displacement pressure on foraging and nesting harriers. The presence of ancillary activities, including construction and maintenance activities, near nest and roost sites can elicit direct responses from birds. This disturbance may manifest itself in the temporary abandonment of the area by nesting or roosting birds. Depending on the timing, intensity and recurring/chronic nature of the source of the disturbance, birds may abandon the nesting and/or roosting site entirely. For Hen Harrier, Ruddock and Whitfield (2007) suggests the implementation of a minimum set-back distance of 500 - 750m in order to minimise the potential impacts of human activity on nesting attempts.

Loss of, or displacement from, winter foraging resources and roosting habitat

An examination of available data at the 10km level shows that almost one quarter of the known winter range of Hen Harrier in Ireland overlaps with wind energy developments. Although research on the impacts of wind energy developments on harriers outside of the breeding season is very limited, it is likely that some level of turbine avoidance by foraging birds occurs and therefore, some level of foraging habitat loss has occurred as a result of the development.

Risk of bird mortalities through collisions with turbines

A review of the relevant scientific literature on the collision risk of harriers with turbines indicates that the species is probably at low risk of collision generally, given the low altitude of the majority of its flight activity. The WINDHARRIER report noted that harriers at wind

energy developments spent 12% of their flight time within wind turbine rotor-sweep height, while the amount of time spent by juveniles flying at this height was negligible; thus, it was concluded that the overall collision risk to harriers during the breeding period season was low. **However, as noted earlier, since 2015, and even in the absence of a robust system for carcass searches on wind energy developments, there have been three probable/confirmed incidences of Hen Harrier mortality caused by turbine strike and one possible case reported to NPWS-DHLGH. This suggests that collision risk for this long-lived species, with a low reproductive output, may increase along with any increase in wind energy developments.**

On the guidance for bird assessment and wind farms.

There are no specifically Irish-prepared ornithology guidelines to inform surveys for the development of wind energy in Ireland. Specific direction has been provided by NPWS (2002) for Hen Harrier surveys to inform impact assessments for wind energy development. This included the recommendations for 500m wind energy development buffers and wider hinterland surveys up to 5km for Hen Harriers. Furthermore, recommendations for systematic sampling to quantify site usage between April and August via vantage point observations were given (based on Madders, 2002), as well as consideration of cumulative effect of other wind energy developments in the area. Further guidance will be prepared by NPWS as an action of the HHTRP.

The first guidance document used in Ireland was from 2003:

Percival (2003) reviewed available knowledge on the effects of wind energy developments on birds, particularly in relation to potential issues in Ireland, including disturbance-related research. This work also set out to provide a methodology for assessing the effects of wind energy developments on bird species. It addressed: baseline data collection, evaluation of sensitivities, establishing the magnitude of possible impacts, determination of significance of possible impacts, mitigation and cumulative assessment. The review recommended the adoption of British Wind Energy Association (BWEA) and Scottish Natural Heritage (SNH, now known as NatureScot) guidance with Ireland-specific adaptations. This study also set out a number of criteria which could be used to assess the ornithological sensitivity the site being assessed and the species involved e.g. it considered that SPA selection species (or Species of Conservation Interest/SCI) should be considered 'very high' sensitivity. On the basis of its ecological characteristics (where it is not an SCI species), Hen Harrier was classified as 'high' sensitivity. Thus, in Ireland, in the SPAs for which Hen Harrier is an SCI species, it would be considered to be 'very high' sensitivity, and where it occurs outside the SPA Network, 'high' sensitivity.

Percival, S. M. (2003). Birds and wind farms in Ireland: A review of potential issues and impact assessment. Ecology Consulting. 25pp

In Scotland, a detailed framework for ornithological interactions has been set out (SNH, 2000; 2006; 2011) and frequently, independent ecologists operating in other jurisdictions, including28 other constituent parts of the UK (England, Wales and Northern Ireland) and in Ireland, ***may use or adapt SNH (now known as NatureScot) guidelines during their assessment and implementation of wind energy development planning processes**. In addition to best practice guides for construction and decommissioning, these guidelines include recommendations on specific surveys, methods, seasons, assessment, avoidance, disturbance, repowering, habitat management, cumulative assessment, SPA connectivity, carcass searches, power lines, meteorological masts and are available online on the NatureScot website.

Note *NPWS have not endorsed the widely regarded industry standard for bird assessment methodology devised by SNH, it is only optional.

Some guidance which the Board should consider:

SNH (2000). Windfarms and birds: calculating a theoretical collision risk assuming no avoiding action. Scottish Natural Heritage.

SNH (2006). Assessing significance of impacts from onshore windfarms on birds outwith designated areas. July 2006. Scottish Natural Heritage.100

SNH (2011). Guidance on assessing connectivity with Special Protection Areas (SPAs). Scottish Natural Heritage.

SNH (2014). Repowering onshore wind farms: bird survey requirements. November 2014. 3pp. Scottish Natural Heritage

SNH (2016). Wind farm proposals on afforested sites – advice on reducing suitability for hen harrier, merlin and short-eared owl. Scottish Natural Heritage.

SNH (2017) Recommended bird survey methods to inform impact assessment of onshore wind farms. Scottish Natural Heritage

SNH (2018) Assessing the cumulative impacts of onshore wind farms on birds. Scottish Natural Heritage

Scope

29. The scope of the remedial assessment has not been clarified properly by the Board and the issue of the separate nature of an assessment on the waste is of serious concern. The Board either conducts the entirety of the remedial assessment or the deficicies in Irish legislation to conduct remedial assessments across the entirely of Ireland's fragmented consent regime need to be addressed and no substitute consent can arise until all remedial assessments have been conducted, and exceptional circumstances determined in respect of all consents/permits or licences where there are EU law obligations.
30. There has been no consideration at all of obligations under the Environmental Liabilities Directive and the applicants duties, liablities and obligations under it – and the Board cannot close it's mind to this even if it determines it falls outside of it's remit.
31. The Board also needs to satisfy itself as to the adequacy of the applications and assessments made in respect of displaced forestry – which resulted consequent on this development. This has arisen in the context of a deeply flawed forestry licencing regime, where the CJEU has found major deficiencies in respect of same, in respect of several judgments, including People over Wind, and Commission v Ireland.
32. The implications for CJEU in Grace Sweetman also need to be uppermost in the B'ard's mind in respect of the treatment of the entire site for the species for which it is designated and the clarifications within that judgments

Conclusion:

I submit in conclusion the Board cannot proceed to grant substitute consent on the basis of the current application and procedure, and urge the Board to engage to ensure these matters are properly resolved.

Yours sincerely

Attracta Uí Bhroin, Environmental Law Officer, IEN, ***and in a personal capacity***.