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15th Nov 2021

Observations of the Derrybrien Windfarm Substitute Consent "Exceptional Circumstances" Application by the ESB / GWL PL07 308019-20

A Chara,

This document offers some observations on the Applicant (ESBs) response issue to An bord Pleanála of 21st October 2021.

As this response relates to the Arcadis report and other and the Applicant utilizes the previous submission of 20th May 2021 as part of their submission, in the interests of fair justice, both of these submissions are within the scope of observations of the 21st October submission.

The requirement of Section 177K(1A)(a) of the Planning and Development Act, compel the Board not to grant substitute consent unless it is satisfied that **exceptional circumstances** exist that would justify the grant of consent.

On review of the Arcadis report July 2021, and the requested clarifications by the Bord, we feel that Applicant's response falls well short of the requested clarifications.

On the basis that there is no clear evidence of the key criteria of "exceptional circumstances, we formally request An Bord Pleanála to refuse Substitute Consent to the windfarm development at Derrybrien (application No PL07 308019-20)

Regards,

- David Murray, South Galway Flood Relief Committee

David Murray

1 QUERIES ON TIMEFRAMES

We would like some clarifications at this point on An Bord Pleanála. Was there correspondence with the Applicant where it refers to '8 items of correspondence issued on 27th Sept 2021.' Can you clarify if there was correspondence here and what were these documents?

From the Applicants response, there are not mention of the submission by David Murray/South Galway Flood Relief Committee. Why was this not included in the Applicants response?

The Applicant provide a response to submissions, on 18th October, 21 days after 27th September.

The Board, however, has only given 14 days (from receipt of mail, to return of mail) on which to respond to the submission. This is not an equitable exchange and contradicts with the Boards Mission.

Also, have the authors of the Arcadis report/EU been given adequate time to respond to the critique of their report?

In the interest of equity, we request that an Bord Pleanála extends the time frame for observations on the Applicant's submission

2 OBSERVATIONS ON EVIDENCE AND PROOF OF EXCEPTIONAL CIRCUMSTANCES.

2.1 Response

Response Point 1 :

The applicant offers *Regularization of the development, by way of grant of Substitute Consent, would be in full compliance with the purposes and objectives of the EIA directive and the Habitats directive.*

In July this year the Irish Supreme court ruled that 'substitute consent' inconsistent with EU environmental law. <https://www.irishtimes.com/business/construction/supreme-court-rules-substitute-consent-inconsistent-with-eu-environmental-law-1.4293618>

The applicant offers an observation 'Notwithstanding the passage of time since the development...'. The Applicant was first asked to completed an EIAR in 2008 ,but refused to do so. This observation is therefore not relevant.

Response on Point 2:

The applicant reiterates that they acted in good faith and that numerous submissions incorrectly refer to an 'unauthorized development'

According to 'Guide to Planning Enforcement in Ireland' states that "*development can be lawfully carried out in either of the following circumstances:*

- *in accordance with the terms of the planning permission granted for it*
- *in the case of an exempted development, without planning permission but in accordance with the terms of the exemption.;*

The guide then gives the following example of unauthorized development:

- **non-compliance with conditions attached to a planning permission;**

Unauthorised development is also summarized by Galway County Council as "*a development which requires planning permission and does not have that permission or if works are not being carried out in accordance with permission granted.*"

2.1.1 The Windfarm Construction commenced prior to conditions being met

Construction commenced on the windfarm site with the construction of access roads and the first of 71 turbine bases started on **2 July 2003** (Lindsay report).

Appendix #1 highlights examples of conditions (No. 20) that were required prior to commencement of development - with dates of conditions being met of September 2003-November 2003. It clear that by starting the construction in **July 2003**, the developers Hibernian Windpower Ltd, were in clear breach of the conditions of the planning permission which **by definition** makes it an 'unauthorised development'.

These conditions are a fundamental and irrefutable part of the planning contract, so it is not reasonable to assume that the developer was not aware of them. This therefore strongly refutes the

supposed lack of awareness by the applicant or applicant parent company in the unauthorized nature of work.

2.1.2 Robust Drainage Scheme was a known un-authorized development

We would also state that the remedial works to implement a 'robust drainage scheme' plan implemented following the 2003 landslide was unauthorised. This scheme include digging 6ft x 8ft drains from each of the 70 turbine bases to keep the mountain dry. This 'robust-drainage' scheme proposed *'drainage for each access road, all turbine bases and each repository site . . . continuously for the life of the windfarm project and thereafter'*. This was fundamentally an un-authorised development that should have required its own EIA and planning permission. The development contradicted the previous EIA stated that *"construction of turbine bases does not result in long-term drainage of the surrounding peat"*. Therefore, the development of this robust scheme, fits with the definition of an unauthorised development, which would have been fully known to the developers of the windfarm. This is a prime example of the type of unauthorised development associated with the project.

In their response, the applicant reiterates that :

1. The development was not unauthorized because Galway County Council did not issue an enforcement notice.
2. The development was not unauthorized because refusal by the high court of the injunction brought by the Derrybrien Development Cooperative Society

The applicant states that repeated assertions of unauthorised development are therefore inaccurate. Our response is as follows:

- For (1), just because Galway County Council did not issue an enforcement notice, doesn't mean the development was not unauthorized. An Bord Pleanála, being an **independent and impartial national body can draw its own conclusions.**
- For (2), the high-court injunction related specifically to 'deforestation' and not to the matters outlined in Appendix #1 or to the Robust Drainage Scheme.

On these grounds we strongly disagree with the applicant's stance that they (or their parent company) had or could reasonably have had a belief that the development was not unauthorised.

Point 3 :

The Applicant states that they have provide sufficient information to support reasonable conclusion in relation to the significant effects on the environment or adverse effects on the integrity of EU Sites, resulting from carrying out or continuation of the development. The observations herein and reported observations have not been dealt with sufficiently to draw this conclusion.

2.2 OBSERVATIONS ON SECTION 2.3 – LACK OF PUBLIC CONSULTATION (PAGE 5, PARAGRAPH 4)

The Applicant does not accept the assertion that it refused to engage with any local stakeholders and refers to the continued availability of a nominated contact person – The Community Liaison Officer. It refers the Board to the submission of 4th December 2021. In the submission, Public Consultation and Stakeholder engagement are summarised in section 2.3

2.3 Mr. M. Mahony Submission

The submission comments on the level of public consultation carried out prior to the submission of this application is queried. The Board is respectfully referred to the details set out in Para. 2.4 of the Planning Report, and rEIAR Section 1.9 which set out the various means by which the general public were engaged throughout the history of the development of the Project. It is noted that – working within the prevailing public health advice, the Project Community Liaison Officer and dedicated project website remain active today – though a very low level of engagement has been reported.

Background.

Article 6 of the EIA Directive in 4.4 Public Consultation : :

“The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken. “

The Supreme Court Ruling Record 1st July 2020 between An Taisce and An Bord Pleanála considers public participation rights under EU Law and refers to Article 6(4) of the EIA Directive around ‘early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2)‘.

The ruling record notes the following from the EIA Directive (2011/92/EU) – ‘effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken‘.

The Arcadis Report outlines in 5.12.4 Response to Stakeholder Concerns

The Chapter does not provide any details with regard to stakeholder engagement and no reporting of any concerns raised by stakeholders is included.

The South Galway Flood Relief Committee submitted a complaint to the EC detailing how they attempted to contribute to the rEIAR but were ignored by the developer. The only communication they received in response to the letter sent to the developer in April 2017 was in a notice on 2 September 2020 stating that a rEIAR has been submitted to An Bord Pleanála.

Observations

The South Galway Flood Relief Committee (SGFRC) submitted a complaint to the Applicant in April 2017, outlining key concerns regarding the potential impacts on flooding in South Galway. The Applicant refused to engage several times on rEIAR process (The Applicant refused to even acknowledge that there was a process) and the only communication that the SGFRC got was a notice on 2 September stating that a rEIAR had been submitted to An Bord Pleanála.

There are some items of note.

- **Website** : The website was only created in February 2020 (just 4 months before EIAR publication) and was only communicated with the publication of their newsletter subsequent with the EIAR Being published. The website states "The public can view all documents related to this Substitute Consent application once the application is made in the offices of An Bord Pleanála, Galway County Council and on our dedicated project website www.derrybrienwindfarm.ie."

The website, therefore, was not a portal for communications but for dissemination.

The applicant indicates that the website remains active but has a very low level of engagement. We agree with this statement.

Engagement : As outlined in Previous submission, the SFGRC had attempted to become involved in the process early on (as mandated in Article of the EIA Directive) but was blocked. The applicant has indicated that A Project Community liaison Officer was appointed but at no time between SGFRC request for engagement (2017) and the publication of the EIAR was any engagement sought.

The Applicant has indicated that they have gone through the proper public consultation process but for the general public there was no consultation process.

The publication process which has been defended by Applicant, but it is clear, that there was a distinct policy not to engage with the relevant community groups. This is in direct contradiction to the policies and rulings identified in the Arcadis report as stated above and as stated within the Arcadis report conclusions "*The lack of a scoping process is evident in the complaints from statutory consultees such as the South Galway Flood Relief Committee.*"

The response from the Applicant does not change the fact that the scoping/public engagement process as seen by the South Galway Flood Relief Committee, other stakeholder groups and the Arcadis report was grossely insufficient and in direct contravention to the EIA directive. This actually reinforces the Irish Supreme Court Ruling.

2.3 OBSERVATIONS ON SECTION 2.3 – INTERACTION WITH TURBARY ACTIVITY

The key observation here is the signs warning of peat instability would not have been erected in this area if the Windfarm development did not happen. Turbary rights include the right to cut and carry away turf from a specific plot of bogland.

Most harvesting to day involves mechanical turf-cutting. Not all plots are cut every year but 34 plots have been identified in the rEIAR to be active and cut by mechanical means. In the rEIAR there are tables/figures on Baseline Peat Stability Risk Assessment for the site – prior to implementation of risk mitigation measures. The Likelihood of peat instability in relation to turbary rights is summarized in the table below:

Likelihood	% Turbary Plots affected (including north/south)	Recommended Mitigations
4 to 5	49%	<ul style="list-style-type: none">• No further mechanical peat harvesting should be carried out in these areas until after the windfarm is decommissioned• Turf cutting can be carried out by hand excavation but should only be done during the months of May to September
3.5-5	51%	<ul style="list-style-type: none">• No further peat harvesting by saw cutting should be carried out in the peat;• Turf cutting can be carried out by hand excavation but should only be done during the months of May to September.• Significant restriction on mechanical harvesting

Therefore in ~50% of the turbary plots ,the recommendation from the rEIAR is that *“no further mechanical peak harvesting should be carried out in these areas until after the windfarm is decommissioned”*. This statement severely impacts Turbary rights and also relates it the windfarm.

The windfarm development has therefore introduced a new environmental risk that interferes with the Turbary rights. The National Peatlands Strategy plan acknowledges that environmental objectives can sometimes conflict with Turbary rights. In their general principles they state *“The rights and interests of land-owners and land users on Ireland’s peatlands will be fully considered in policy and decision making, along with full consideration of the interests of the wider community.”* It then acknowledges the need for *“affected turf-cutters will be provided with appropriate compensation packages for losses or will be assisted in making alternative arrangements to meet their fuel needs.”*

The windfarm development has forcibly created a situation which has resulted in no mechanical peat harvesting in 2021. This is yet another example of the lack of engagement and the negligent treatment of the local community of Derrybrien and South Galway.

- Were the Turbary owners consulted about this during the Environmental impact analysis? - No
- Were any Derrybrien committees engaged? – No
- Was the Community Liaison Officer engaged? – No

In relation to their final statement on the matter the Applicant respectfully submits that *“this is a matter of private law and is not something relevant to the determination by the Board of the application of substitute consent.”*

Criteria (a) for Substitute consent defines as *“Whether Regularization of the development concerned would circumvent the purpose and objectives of the EIA Directive or the Habitats directive.”* This mandates a comprehensive, complete and correct rEIAR. Some key considerations are :

- Article 6 focus on public consultation and indicates that *“The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.*
- Annex IV of the EIA directive indicates that the EIA need a description of the likely significant effects of the project on the environment including
 - *“the risks to human health, cultural heritage or the environment.*

We ask the Board to consider the following observations:

Socia-Economic Impact : Chapter 4 – Population and Human Health, regarding Turbary states:

*“More recently mechanical turf cutting by Contractors has occurred with an increase in the number of plots where turf cutting has been carried out. Turbary provides an economic benefit to the turbary rights holders in the area and as such there would be a small but **positive cumulative economic benefit** effect during the wind farm operation when the overall socio- economic benefits of the Community Benefit fund are taken into account.*

There was no consideration of the impacts of the development on Turbary rights.

Cultural Impact: As identified, public consultation was not adopted during this rEIAR development and therefore communities couldn't express their opinion and be part of the decision-making process. For instance, Turbary rights owners have indicated that Turf cutting is part of their heritage & tradition. <https://www.thejournal.ie/turf-cutting-3-3766317-Dec2017/>

If the Applicant had considered community input and knowledge, they would have been able to address this under rEIAR chapter 15 - Cultural Heritage.

The impact therefore of the recommendations on Turbary rights and tradition was therefore not assessed, or mitigated.

In conclusion, we are respectfully asking the Board to assess this as it relates to ensuring that the Substitute Consent process that requires a robust rEIAR.

2.4 OBSERVATIONS ON SECTION 3.4 HYDROLOGY AND HYDROGEOLOGY

2.4.1 Observations on Section 3.4/Page 32/Paragraph 6 : Public consultation

The Arcadis Report asserts the relevant rEIAR chapter does not provide any details with regard to stakeholder engagement. The Applicant refers to Section 3.3 (AGL Consulting report).

This has already been covered in section 2.2 herein.

2.4.2 Observations on Section 3.4/Page 32/Paragraph 6 : Historical Flooding/Scoping

The Applicant refers the Board to their submission on 4th Dec 2020, Section 2.9

Background Context :

In Chapter 11 of the Applicant's EIAR stated under Flood Risk Identification the Applicant states:

A desktop review of historic flooding was undertaken primarily using OPW website www.floodinfo.ie. The 'Past Flood Events' dataset forms a record of all available flood records

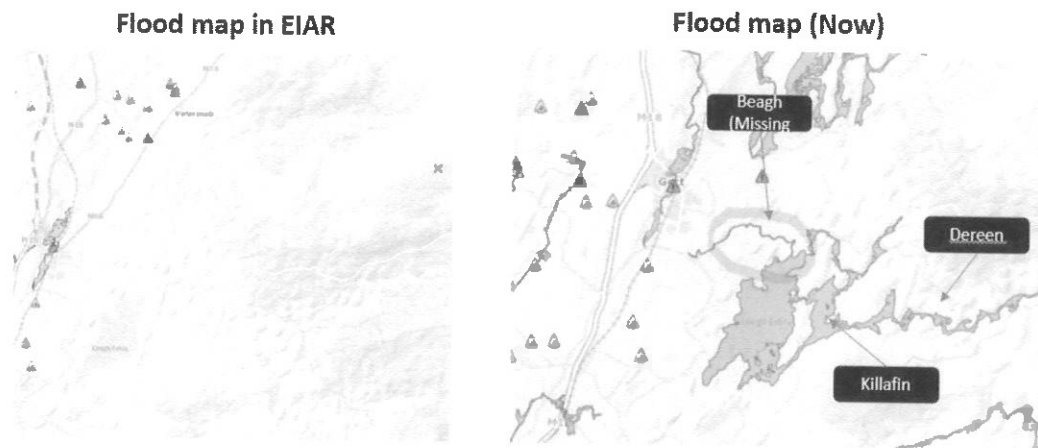
In previous submission D. Murray/SGFRC indicated that www.floodinfo.ie was incomplete as it did not indicate any of the severe flood events in Beagh that happened since Windfarm construction.

The Applicant's response in Section 2.9 to this was to **redefine** the meaning of the word 'primarily' (*definition : 'for the most part'*) to mean 'in the first place' and not 'for the most part'. Does this redefinition also apply to all of the 22 uses of 'primarily' in Chapter 10, and in addition to its use within the complete EIAR. Are there any other redefinitions of words that we need to know about in the EIAR?. This statement by the applicant indicates a disrespect toward this process.

The fact remains that the desktop study, based 'primarily' using OPW website did not show any historical flooding events around the Beagh, Derreen or other areas. The only mention of 'Beagh' in the Flooding EIAR is in relation to Beagh Bridge. There was no consultation with anybody in Beagh community or SGFRC to determine flooding levels, flooding thresholds etc .

While the Applicant redefined the use of floodinfo.ie as not the primary method for desktop review, it did not clarify what was 'for the most part' the method for desktop review.

The following diagram on the left shows what shown in the rEIAR (based on floodmaps.ie) and (on right) updated information (Nov 2021) which shows more extensive flooding west of Lough Cutra. Independent of whether this information was updated in floodmaps.ie, it shows the extent of the flooding in the area and this area should have been scoped for more analysis. An open public consultation process or engagement with SGFRC would have provided this information.



By not including the required flooding threshold analysis, it is therefore impossible to conclude that the impact of increased flow rate due to Windfarm development would be on these communities.

The applicant continues to highlight their lack of respect of the community by describing Dereen has having few if any houses in the area, meaning that those communities, due to their rural circumstances, are irrelevant for consideration. The areas around Dereen, Killafin, Beagh are not the most populous, but these communities are impacted by flooding and have flooding risk. Again, this reinforces the evidence of a poor scoping process by the Applicant.

Flood relief Scheme : The Applicant then referred to the South Galway/Gort Lowlands Flood Relief Scheme (February 2021) and hydrological assessments and stated their conclusion that feasible and cost-effective works in the uplands are would have minor benefits in the lowlands area. The following are some key observations:

- This statement relates to a cost-benefit of improving/restoring flood risk mitigation by the flood relief scheme. This cost-benefit does not relate the windfarm development which must mitigate impacts of increased drainage and transformation of land from a high runoff category to a very high runoff category.
- This statement relates to the 'lowlands area' which is seen as the key area from Coole Lake to the sea, the main flooding area. The lowlands is impacted by flooding volumes and duration and high-runoff rates will have lesser impact.
- The Applicant has concluded that run-off rates in the rivers are increased by the development but because of lack of flooding threshold analysis of areas like Beagh, cannot conclude on the potential impacts.

The Applicant quotes from the Flood Relief Scheme Feasibility Study that even permanent reductions in run-off would not alter the fact that extreme flooding would occur during a 1% AEP and would not negate the requirements for flood alleviation works in the Gort Lowlands. The following are key observations:

- There is no expectation that the Applicant is responsible for all flooding in South Galway and that alleviation works would stop this from happening. The Applicant is however responsible for impacts resulting from their development, which transforms an area from a “high runoff” Category to a ‘very high runoff category’ and where potential downstream impacts on flooding thresholds are not known, the hydrology changes must be mitigated.

The Applications conclusion of “The runoff from Derrybrien Wind Farm would not have any discernible effect on this” is therefore incorrect because the Applicant did not do any flooding threshold analysis, in relation to the uplands.

2.4.3 Observations on Section 3.4/Page 34/Paragraph 3 : Stakeholder Engagement

There is no record of SGFRC stakeholder engagement because there was not SGFRC stakeholder engagement. The Applicant to date, has not responded satisfactorily to our issue raised.

3 OBSERVATIONS ON SECTION 3 : RESPONSE TO TECHNICAL SUBMISSION

The Applicant has issued a response on the Arcadis technical assessment but missed some of the key points from the Report

3.1 ARCADIS REPORT : SECTION 5.18.4 RESPONSE TO STAKEHOLDER CONCERNS

The South Galway Flood Relief Committee raised that the cumulative effects of forestry felling and operations have not been considered in the rEIAR

The Arcadis refers to the submission by South Galway Flood Relief Committee in October 2020. This is also a submission to the Board which was submitted also to An Bord Pleanála. It states

Impact on Current Flood Regime in Downstream Watercourses, (Chapter VI : 11A-54)

Under 'Estimated impacts of tree felling', Page 11A-61, the following statement was made - *"It should be noted that for the purposes of this assessment, **only the impact of felling associated with the wind farm project was considered** and any other felling carried out in the area during construction and following commissioning is beyond the study scope."*

We disagree with this statement as guidance from the NPWS for Appropriate assessment indicates *"each plan or project, when being considered for approval at any stage, must take into consideration the possible effects it may have in combination with other plans and projects when going through the process known as appropriate assessment."* (**Appropriate Assessment of Plans and Projects in Ireland, Guidance for Planning Authorities, NPWS_2009_AA_Guidelines**)

This concern was noted in the Applicants response on 4th Dec 2020, section 2.9 where they conclude *'the effects of felling in adjacent coniferous plantations during construction stage were deemed -at worst to be slight, short term and local in nature, they were not considered further in the flood risk assessment'*

The following are some key observations:

3.1.1 Afforestation operations were not considered

In the analysis of cumulative impacts, felling is mentioned but afforestation operations are not. There was, in fact, no consideration however given to afforestation, which is an operation undertaken within 1-2 years of felling. This involves, for the most part, mound drains running downhill every 8m-10m which would have a more substantial impact of hydrology on just the felling.

A study that was used during the South Galway Flood Relief Scheme uplands study can be found here - <https://hal.archives-ouvertes.fr/hal-00304540/document>. In their analysis of pre and post forestry hydrology dynamics it states that it can be *'decades later that water yields fell below pre-forestry levels. Similarly far from reducing peak flows, the afforestation increased them due to the network of artificial drains.*

3.1.2 Road Creation operations were not considered

Sometimes there are new roads constructed during forestry management. These have an impact on hydrology and have not been considered in the rEIAR

3.1.3 Cumulative impacts of forestry operations prior to the development were not included
The impacts of felling and afforestation on hydrology can run on for years and sometimes decades.
In the 8 years previous to the windfarm development, in the sub-catchment there has been

- 987 hectares (9.87 square km) of afforestation,
- 1,852 hectares (18.52 square km) of clear Felling,
- 1,209 hectares (12.09 square km) of Thinning.

The cumulative impacts of forestry impacts prior to the development were not considered in the rEIAR.

3.1.4 Cumulative impacts of forestry operations post development were not considered
Cumulative Impact assessments did not consider future forestry planning post development

In summary, the following is a timeline and relevance of cumulative impacts:

	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Felling	Not Considered								Felling Considered							Not considered			
Road Creation	Not Considered																		
Afforestation	Not Considered																		

The applicates assessments are that felling impacts assessments were deemed to be short term.

Therefore, we respectfully ask the Board to review the material herein and conclude that overall the cumulative impacts of forestry operations were not fully considered in the rEIAR.

