



[2025] IEHC 2

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2024.0001069]

BETWEEN

ANNAGH WIND FARM LIMITED

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

JUDGMENT of Humphreys J. delivered on Friday the 10th day of January 2025

1. EU law relating to environmental impact assessment (**EIA**) requires a consenting authority to conduct as complete an assessment as possible (judgment of 3 March 2011, *Commission v Ireland*, C-50/09, ECLI:EU:C:2011:109). Logically, that procedure is equally as relevant to appropriate assessment (**AA**) as to EIA. Here, with commendable thoroughness, the board's inspector identified a submission relevant to the AA that had emerged on a related file, and conducted her assessment taking that into account, and also commendably proposed that the applicant, who was not otherwise on notice of this, would be given an opportunity to comment. Unfortunately the board sought to have its cake and eat it too, by adopting the inspector's assessment (which had been carried out with knowledge of that external submission and which came to substantive conclusions rather than merely rejecting the application material as inadequate) in its order, while purporting to disregard the submission in its non-legally-binding direction and dispensing with the proposal to notify the applicant of anything further. The applicant thus learned of the submission for the first time on receipt of the board's decision. The very fact-specific question here is whether that was a correct procedure.

Geographical context

2. The proposed development is for the construction of six wind turbines, turbine foundations and crane pad hardstanding areas, new site tracks and associated drainage infrastructure and all associated infrastructure, services and site works, to constitute the proposed Annagh Wind Farm at Annagh North, Co. Cork.

3. The inspector describes the context:

"The appeal site is located in a rural area of County Cork, approx. 45km north of Cork City. Charleville is located approx. 6km northeast of the site, while Buttevant is located approx. 8km southeast of the site. The closest settlement village is Churchtown, which is located approximately 3km to the south of the site.

The site measures 78.6ha and is accessed via the L1322 local road, which meets the N20 at Ballyhea, approx. 4km to the east of the site entrance. The surrounding area is characterised by generally dispersed settlement patterns with small linear clusters of one-off rural dwellings and farmyards located along the local road network. The EIAR submitted with the application states that there are 104 No. dwellings located within 2km of the site (31 No. dwellings within 1km of the turbines), with the closest dwelling being within 690m of a proposed turbine (No. T03). To the east of the site, on the southern side of the L13221, there is a fertilizer storage facility and a meat processing facility (Dawn Meats), with an Aldi storage depot located further east on the northside of the road, at the junction with the N20. It is proposed that the meteorological mast that forms part of the development, would be constructed on site via the L5528."

Facts

4. We will return in more detail to the facts relating to the contested submission regarding the development at a different but nearby site, Ballyroe solar farm, but in the meantime a general outline can be given.

5. On 2nd December 2021, the applicant lodged a planning application with the planning authority, Cork County Council (the **council**) in respect of the proposed development (planning ref. 21/7246). The application was accompanied by an environmental impact assessment report (**EIAR**) and Natura impact statement (**NIS**). Planning permission was sought for a 10-year permission, with construction estimated to take 12-18 months, with a 35-year operational life from the date of commissioning of the entire wind farm. The total maximum export capacity of the proposed wind farm is anticipated to be approximately 37.2 MW.

6. Submissions were received on the proposed development in December 2021 and January/February 2022.

7. The council's ecologist prepared a report on the proposed development, dated 2nd February 2022, which recommended that permission be refused or, alternatively, that further information be provided.

8. The council's senior executive planner, in a report dated 3rd February 2022, determined that further information was required from the applicant in relation to the proposed development.
9. The local authority issued a request for further information (**RFI**) on 4th February 2022 in relation to five items including in relation to biodiversity, AA, and the submission made by the National Parks and Wildlife Service (**NPWS**).
10. A response to the RFI was submitted to the local authority on 3rd November 2022.
11. Submissions were also received from the public and from, *inter alia*, the Department of Housing, Local Government and Heritage in November and December 2022.
12. The council's ecologist prepared a report on the proposed development, dated 15th December 2022, which recommended that permission be refused.
13. The council's planner's report, dated 21st December 2022, also recommended that permission be refused.
14. The council issued a notification of decision to refuse to grant on 22nd December 2022.
15. The applicant submitted a first party appeal of that decision on 27th January 2023.
16. On 1st August 2023, the board sought clarification from the applicant's consultants on a number of matters relating to the documentation provided. The applicant's consultants responded by letter dated 28th August 2023.
17. The Climate Action Plan 2024 was adopted on 8th January 2024 while the matter was pending before the board.
18. The inspector conducted a site inspection on 13th and 14th February 2024, and prepared a report dated 27th February 2024. The report includes, as discussed further below, an AA which has regard to a submission relating to Ballyroe solar farm which is 0.9 km away.
19. The board's direction (BD-016559-24) (ABP-315652-23), dated 12th June 2024, purported to disregard the Ballyroe submission.
20. The impugned board order was subsequently made on 27th June 2024, refusing permission but stating the reliance was being placed on the AA carried out.

Procedural history

21. The proceedings were instituted on 20th August 2024.
22. I granted leave to bring judicial review proceedings on 9th September 2024.
23. The applicant served the originating notice of motion on 13th September 2024.
24. The board filed its statement of opposition and affidavit on 15th October 2024.
25. I granted an application to allow the applicant to amend its statement of grounds on 18th November 2024. The proposed amended statement of grounds had been previously circulated and the application was not opposed by the board.
26. The applicant served its written submissions on 11th November 2024.
27. The board served its written submissions on 24th November 2024.
28. The applicant served its replying submissions on 29th November 2024.
29. The matter was substantively heard under the expedited procedure on Thursday 19th December 2024 (we can note that this is just under four months after the proceedings were instituted – pretty good by normal standards, and utterly impossible without the List utilising an expedited stream), at which point judgment was reserved.

Relief sought

30. The reliefs sought in the amended statement of grounds are as follows:
 1. An Order of Certiorari by way of application for judicial review quashing the Order of An Bord Pleanála (the 'Board') dated 27 June 2024 (Board reference no. ABP-315652) refusing permission for the development of Annagh Wind Farm at Annagh North, Co. Cork.
 2. An Order remitting the said application for planning permission in respect of Annagh Wind Farm to the Board for reconsideration in accordance with law.
 3. Such declaration(s) of the legal rights and/or legal position of the applicant and persons similarly situated and/or of the legal duties and/or legal position of the respondent as the court considers appropriate.
 4. A Declaration that Section 50B of the Planning and Development Act 2000, as amended, and / or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 and/or that the interpretative obligation set out in Case C-470/16 North East Pylon Pressure Campaign Limited v. An Bord Pleanála whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, apply to these proceedings.
 5. Further or other orders
 6. Costs."

Grounds of challenge

31. The core grounds of challenge are as follows:
 1. Domestic Law Grounds

1. The decision of the Board dated 27 June 2024 (ABP-315652) refusing permission for the development of Annagh Wind Farm at Annagh North, Co. Cork (the 'impugned decision') is invalid as the Board relied upon materials ~~relating to the environmental impacts of peat rehabilitation works~~ that were not available to the Applicant and/or subject to submission and/or failed to seek submissions or observations from the Applicant contrary to the requirements of sections 137 and/or 131 of the Planning and Development Act 2000 and/or to seek further information from the Applicant or to consider seeking same contrary to the Applicant's rights to fair procedures and natural and constitutional justice, further particulars of which are contained at Part 2 below.

2. The impugned decision is invalid as the Board did not comply with the requirements of section 15 of the Climate Action and Low Carbon Development Act 2015 (as amended) and/or failed to have regard to relevant considerations and/or had regard to irrelevant considerations and/or was contrary to the requirements of section 131 of the Planning and Development Act 2000 and/or to seek Further Information from the Applicant in relation to the Climate Action Plan 2024 and associated documents or to consider seeking same contrary to the Applicant's rights to fair procedures and natural and constitutional justice, further particulars of which are contained at Part 2 below.
European Law Grounds

3. The impugned decision is invalid as the Board failed to have regard to relevant considerations in Council Regulation (EU) 2022/2577 (the Regulation to accelerate the deployment of renewable energy, or RE Power EU) and/or Directive 2023/2413 (the Renewable Energy Directive, or RED III), further particulars of which are contained at Part 2 below.

4. The impugned decision is invalid as the Board erroneously concluded that it was precluded from granting permission as it was not satisfied that the proposed development would not be likely to have a significant effect on the European sites and therefore erroneously stated the test for appropriate assessment and/or also failed to have regard to Council Regulation (EU) 2022/2577 (the Regulation to accelerate the deployment of renewable energy, or RE Power EU), and/or section 177AA of the 2000 Act, and/or Article 6(4) of the Habitats Directive, further particulars of which are contained at Part 2 below."

Core ground 1 – regard to matter not put to applicant

32. Core ground 1 is:

"1. The decision of the Board dated 27 June 2024 (ABP-315652) refusing permission for the development of Annagh Wind Farm at Annagh North, Co. Cork (the 'impugned decision') is invalid as the Board relied upon materials ~~relating to the environmental impacts of peat rehabilitation works~~ that were not available to the Applicant and/or subject to submission and/or failed to seek submissions or observations from the Applicant contrary to the requirements of sections 137 and/or 131 of the Planning and Development Act 2000 and/or to seek further information from the Applicant or to consider seeking same contrary to the Applicant's rights to fair procedures and natural and constitutional justice, further particulars of which are contained at Part 2 below."

33. The parties' positions as recorded in the statement of case are summarised as follows:

"Core Ground 1

Applicant's Position

In their submission on the RFI Response, the NPWS/DAU did not express any objection to the proposed development. Nor did the DAU recommend refusal. On the contrary, the DAU accepted that disturbance and dispersal collision risks for Whooper Swan would be insignificant. The DAU recommended only that a particular type of curtailment mitigation measure be applied in respect of migratory collision risk. The Applicant accepted that mitigation measure.

The DAU made a separate submission, in respect of a different solar development, months after the Applicant submitted its appeal to the Board. That submission purported to identify a different ornithological picture in the greater geographical area from that produced by the Applicant and its experts after extensive surveying in the course of the application.

The AA conducted by the Inspector and expressly relied on by the Board is dependent on information contained in the DAU solar submission.

The Applicant, having expended very significant amounts of time and money on dedicated bird surveys over a three-year period, was never given an opportunity to make a submission on the DAU solar submission, which was critical to the Board's reasons for refusal.

Respondent's Position

The Board did not rely on the DAU solar submission in making its decision - whilst not referenced in the Applicant's Amended Statement of Grounds in respect of this Core Ground, the 'Note' contained in the Board Direction (as outlined above) expressly explains that the

Board did not need to rely on the DAU solar submission as it considered ‘...a decision could be made on the basis of the documentation submitted with the application and appeal and in this regard shared the view of the Planning Authority and found that it could not determine beyond reasonable scientific doubt, that the proposed development, either individually or in combination with other plans or projects would not have an adverse effect on the Whooper Swan, a species of conservation interest of the Kilcolman Bog SPA and in this regard the Board was precluded from granting permission’.

When the Board’s decision is objectively interpreted by reference to its complete context, the basis for same is clear and it is equally clear that permission was refused by the Board without having to rely upon or consider the DAU solar submission. The Board’s reasoning, without relying on the DAU solar submission, by reference to the materials/evidence before it, concerned the inadequacy of the information provided for the purposes of AA and lack of information/uncertainty regarding adverse impacts. For example, the Board, in agreeing with the Council, accepted the various inadequacies identified by the Council in the information presented, including those identified in the Council’s Ecologist Report(s) and the Council’s Planner’s Report(s). In addition, independent of considering the DAU solar submission, the Inspector raised other AA issues – for example, in considering potential in-combination collision/migration impacts (§9.10.19 et seq) and, in agreeing with the Council, raising concerns with the proposal to rely on ‘post consent monitoring to identify any adverse effects’ on Whooper Swans and proposed use of ‘untested mitigation measures’.

This ground is premised on a misunderstanding of the Board’s decision/reasoning.”

Sequence of events relating to the Ballyroe submission

34. The sequence of events relating to the Ballyroe submission is fairly intricate and relates specifically to the facts of this particular case. What happened is as follows.

35. In **November 2021**, the applicant submitted with the application an EIAR and a report to inform the appropriate assessment process (the **AA report**).

36. On **2nd February 2022**, the Development Applications Unit in the Department of Housing, Local Government and Heritage (the **DAU**) made a submission which expressed concern at the lack of nocturnal surveys in respect of Whooper Swan.

37. On **4th February 2022**, the council made a RFI requiring additional information in relation to the known use of the site by Whooper Swan, including nocturnal surveys.

38. The applicant responded on **3rd November 2022** with survey information.

39. On **12th December 2022**, the DAU made a submission on the RFI response. This submission agreed that disturbance of Whooper Swan from the wind farm was “not considered significant” and that there was a “low risk” of collision from dispersal flights. However, it did identify a “much higher” migration collision risk and the DAU expressed concerns in relation to the applicant’s proposal in respect of post-decision consent in respect of what it identified as unproven technology. Instead, the DAU recommended that no provision for “smart” curtailment be provided and instead that a condition be imposed that simply provided for curtailment from dawn to dusk from 15th September to 15th December and 21st February to 15th April, with additional requirements in relation to supervisory control and data acquisition (SCADA) data and dog searches for casualties to ensure that the measures were being effective.

40. The council’s ecologist’s report dated **15th December 2022** recommended refusal. It included the following:

“FI Request Item 2(g): Additional information is required in relation to the known historic use of the site and surrounding lands by Whooper Swan. This should include an identification of locations of nearest known existing and historic Whooper Swan sites relative to the proposed development site. Applicants are also requested to submit an assessment of potential for activities associated with the construction and/or operation of the windfarm to cause disturbance / displacement to Whooper Swan at/ from these sites. The assessment should take account of the likely cumulative effects of development in the surrounding area. It is noted that a flock of 130 Whooper Swan were recorded by the Ecology Office within a field 500m south of the proposal site in January 2022.

FI Request Item 2(h): There are concerns in relation to the potential impact the proposed development may have on migration / commuting routes of Whooper swan, a qualifying interest species of the Kilcolman Bog SPA. Given that species of swan, including Whooper Swan can undertake nocturnal migration, and taking into consideration that this species usually vacates roosting grounds for feeding grounds at dawn, the potential for the proposed windfarm site to intersect migration / commuting routes for this species cannot be fully discounted at this time. Therefore, the applicant is requested to undertake a nocmig (nocturnal migration / Nocturnal flight call (NFC)) survey of the site and provide an updated assessment of any likely implications (direct and indirect) of the proposed development for Whooper swan and other avian species.

Response and Assessment: The applicant has submitted an Avian Monitoring Report for 2021 and 2022 in response to the FI requests in relation to Whooper Swan. This report provides supplementary information to that submitted as part of the EIAR.

As in line with the request for further information item, the primary focus of my assessment is the Annex I species and species of conservation interest of the Kilcolman Bog SPA, Whooper swan. My assessment has had regard to the submission from the Department / NPWS on the 12th of December 2022.

Per the response, additional rounds of dawn and dusk surveys were undertaken during the months of February, March and April. An additional round of surveys was conducted in April 2022 to cover spring migration.

I note that no such survey was undertaken in January, with respect of Whooper swan. January is the month in which the swan census is undertaken as to coincide with the international swan census to estimate the size and distribution of each population, as well as identify important wintering sites. Age assessments are also made during the surveys, providing a coordinated estimation of breeding success.

Per the submitted report, there were 37 records (5 only heard and 32 actual sightings) of Whooper swan during the 2021/2022 winter surveys. I note that this is in comparison to only 8 recordings during the 2019/2020 winter period (no observations during VP's and recorded on 8 occasions during hinterland surveys). The maximum count of Whooper swan observed at roost was 140 individuals on the 21st of February 2022. Other high counts include 117 birds on the 18th of February and 11 birds on the 9th of March 2022. Only a single sighting of birds (4) flying through the site was made on the 17th of February at a height of 50-100m.

In line with the NPWS submission and as it stands based on the literature available regarding swan displacement, the distances from the Whooper swan feeding and roosting areas recorded during the avian surveys are more than 600m away and as such the disturbance from moving turbine blades viewed from such a distance is not considered significant. However, I would caution that the sample size of data utilised to inform the distribution of foraging / roosting Whooper swan in the area is limited and, in my opinion, a complete understanding of the spatial movements of swan within the area has yet to be determined. The results of the requested nocturnal survey in my opinion raise more serious concerns with regard to the potential collision risk and barrier effect in which the operation of the wind farm may have to migrating Whooper Swan. I also have concerns in respect of other species of conservation concern such as the red listed Redwing, Snipe and Barn Owl which were recorded regularly during the survey period.

While the number of confirmed nocturnal movements of Whooper through / over the site was relatively low at 5, the number of calls registered is particularly high. The night of the 16th of March, which I note is within the primary period of Whooper Swan exodus / spring migration recorded a minimum of 406 calls (300, 76 and 30 respectively) with a further 91 calls (86 and 5 respectively) on the 23rd of March. All records are attributed to separate flocks with conditions for migration noted to be ideal. Per the report, the results of the survey would suggest that the locally wintering Whooper swan population does not traverse the proposed wind farm site at night during their wintering period. However, it appears that either this flock, flocks from elsewhere, or a combination of the two traverse the site during their departure / spring migration. As such the applicant has stated that it is prudent to curtail turbine activity at night during the sensitive Whooper swan spring migration, between the final quarter of February and mid-April. Further to this a similar recommendation is proposed with regards to the autumn migration i.e. between mid-September and mid-November.

Per the response it is considered that with the implementation of the mitigation the proposed wind farm development will have a slight imperceptible reversible residual impact on birds. With regards to the SPA it is stated that taking cognizance of the measures incorporated in the project design and mitigation measures to avoid effects, the proposed development will not adversely affect the integrity of the SPA or any other European site.

Firstly, the proposed curtailment of turbines for approximately 5 months of the year in respect of Whooper swan spring and autumn migration, in addition to the proposed curtailment of turbines during bat activity season (April-October) calls into question the potential viability of the proposal. Secondly and more importantly from an ecological and Appropriate Assessment perspective the submitted nocturnal data indicates that migration collision risk is much higher. The NPWS submission notes that given it cannot be ruled out that the flocks recorded within the Awbeg / Annagh area are not associated with flocks to which the Kilcolman Bog SPA conservation objective apply, and that the proposed Whooper swan migration mitigation measures rely on untested mitigation technology, calls into

question the completeness of the Appropriate Assessment. Therefore, the NPWS within the submission state that they will have difficulty with such agreements for that reason. I too am of this opinion.

Thirdly, post-construction assessment of how wind farm development affects bird numbers and distribution is still generally lacking currently, despite post-construction monitoring being required at most sites, and such information being extremely useful for informing environmental impact assessments at new developments.

Furthermore, the response notes that there 'may be some cumulative' impacts during the operational phase of the windfarm with surrounding wind farms. This in my opinion is not a robust scientific assessment and falls short of establishing beyond reasonable scientific doubt that adverse effects on the SPAs integrity will not result.

With respect of the permitted (Ballyroe and Fiddane) and proposed (Coolcaum) solar farms in the vicinity of the proposal site it is stated that habitat loss and disturbance during all stages of these projects will be limited and no cumulative effects are envisaged in this regard. However, as previously pointed out, the picture of Whooper swan usage of these sites is ever evolving due to a concentrated effort primarily by the local NPWS Conservation Ranger. Since the time of a grant of approval of the Ballyroe solar farm, information has to light indicating that Whooper swan will be permanently displaced from two fields due to the development. I note that the VP's utilised as part of the Annagh windfarm proposal, including the Swan VP's fail to capture the full extent of both the Ballyroe and Coolcaum sites, with the majority of same being outside the VP viewshed. Therefore, in my opinion at this time there is not enough information on file as to the potential in combination impacts the operation of the windfarm and Ballyroe solar farm will have of foraging and/or roosting Whooper swan in the area. As such, I cannot conclude that adverse effects on Whooper swan a species of conservation interest of Kilcolman Bog SPA will not occur due the in-combination effect with other developments proposed and/or permitted in the area.

NPWS AA guidelines (2010) state the following in relation to the assessment process;

'The requirement is not to prove what the impacts and effects will be, but rather to establish beyond reasonable scientific doubt that adverse effects on site integrity will not result.'

It is my opinion that there is not enough information on file at this time as to exclude that beyond reasonable scientific doubt the proposal, will not have a significant effect on Whooper swan a species of conservation interest of the Kilcolman Bog SPA. Therefore, given this uncertainty and taking a precautionary approach it is assumed the effects could be significant. Consequently, I am unable to complete Appropriate Assessment and any subsequent grant of approval of the proposal would be contrary to Objective 15-2 of the County Development Plan and therefore refusal is recommended."

- 41.** The planner's report FI assessment dated **21st December 2022** recommended refusal saying *inter alia*:

"A key part of the further information request related to the Kilcolman Bog SPA and the Whooper Swan which is of conservation interest of this SPA. The applicant has submitted an Avian Monitoring Report for 2021 and 2022 in response to the FI requests in relation to Whooper Swan. This report provides supplementary information to that submitted as part of the EIAR. As set out in detail within the Ecologists report, the ecological view is that there is not enough information on file at this time as to exclude that beyond reasonable scientific doubt the proposal, will not have a significant effect on Whooper swan a species of conservation interest of the Kilcolman Bog SPA. Therefore, given this uncertainty and taking a precautionary approach it is assumed the effects could be significant. Consequently, the Ecology office are unable to complete Appropriate Assessment and any subsequent grant of approval of the proposal would be contrary to Objective 15-2 of the County Development Plan and therefore refusal is recommended."

- 42.** On **27th January 2023**, following formal refusal by the council, the applicant lodged its appeal to the board.

- 43.** On **19th June 2023**, a nearby application for permission for a solar farm extension at Ballyroe was refused by the council (<https://planning.corkcoco.ie/ePlan/AppFileRefDetails/226901/0>).

- 44.** On **27th February 2024** (misdated 2023), the inspector prepared a report recommending refusal. Annexed to that was Appendix B: Department of Housing, Local Government and Heritage's submission (15th June 2023) in respect of Reg. Ref. 22/6901 relating to the Ballyroe solar farm. The submission contained significant information in relation to Whooper Swan, their distribution, location, and night flight paths.

- 45.** The AA section is 53 pages long. The section on the Whooper Swan is as follows:

"Whooper Swan: Qualifying Interest of Kilcolman Bog SPA (004095)

9.10.1. The Applicant highlights in Chapter 8 of the EIAR that the primary site for Whooper Swan in the surrounding area is Blackwater River SAC/Annagh Bridge, where flocks of this species were observed feeding in Improved agricultural grassland fields c. 1 km south of the proposed wind farm site. Flock sizes recorded ranged between 6-107 birds (averaging 45 birds), on several occasions over winter periods 2019-2020 and 2020/2021.

9.10.2. In terms of potential construction impacts, the Applicant states that Whooper Swan could potentially forage in the improved agricultural grassland onsite, however no observations indicating this occurs were recorded. It is argued that swans show high fidelity to foraging sites, and that their absence from the site and presence elsewhere can effectively be interpreted as there being no suitable foraging habitat or conditions for this species onsite. As such, it was considered by the Applicant in the original EIAR submitted to the Local Authority that the proposed development would have a long-term imperceptible impact on the Whooper Swan. In terms of potential operational impacts, the EIAR states that Whooper Swan were not recorded in the flight activity study area during VP surveys and that due to their absence from the wind farm site, no disturbance/displacement/barrier effects are predicted for Whooper Swan. The Applicant considered that disturbance and/or habitat loss would result in Temporary Imperceptible Impact. The EIAR concludes that there will be no significant residual impacts on Whooper Swan resulting from the proposed development.

9.10.3. Both the Local Authority and NPWS raised a number of concerns in relation to the EIAR's assessment with respect to potential impacts on Whooper Swan resulting from the development and neighbouring developments and as such, the Applicant was requested to submit a nocmig (nocturnal migration/Nocturnal Migration Call (NFC)) survey of the site and provide an updated assessment of any likely implications (direct and indirect) of the proposed development for Whooper Swan and other avian species, and to provide an assessment of the likely cumulative effects of development in the surrounding area. In response, the Applicant submitted additional rounds of dawn and dusk surveys that were undertaken during the months of February, March and April. An additional round of surveys was conducted in April 2022 to cover the spring migration period. Furthermore, two additional VPs were added in February 2022 to look at Whooper Swan roosting/foraging sites in the greater area. There were 37 records (5 heard and 32 actual sightings) of Whooper Swan during the 2021/2022 winter surveys. The maximum count of Whooper Swan observed in the study area at roost was 140 individuals on the 21st of February 2022. Other high counts include 117 birds on the 18th of February and 11 birds on the 9th of March 2022. Only a single sighting of birds (5) flying through the site was made on the 17th of February at a height of 50-100m. The Annagh Wind Farm Ornithological Surveys Report (October 2022) also highlights that the nocturnal activity analysis suggests that the locally wintering Whooper Swan population does not traverse the proposed wind farm at night during wintering period. 'However, it appears that either this flock, flocks from elsewhere, or a combination of the two can traverse the site during their departure'. Accordingly, the Applicant proposed that turbine activity at night would be curtailed during the Whooper Swan migration period between 15th September and 15 November and 1st March and 14th April. (I note that the First-party Appeal states that the Applicant is happy to curtail the turbines during the mitigation periods as referenced by the DAU, i.e. 21st September to 15th December and 21st February and 15th April.)

9.10.4. At this juncture, I will highlight that the Department of Housing, Local Government and Heritage made a submission (15th June 2023) (see attached Appendix B) (herein referred to as the DAU Ballyroe Submission) to the Local Authority in respect of Reg. Ref. 226901 relating to an amendment application to the permitted Ballyroe Solar Farm. (That application (lodged on 23rd December 2022) (and DAU submission) were made subsequent to the Local Authority refusing permission for the proposed wind farm (22nd December 2022)). The subject submission states that the NPWS carried out survey work over the winter of 2022/23 of fields within and directly adjacent to the Ballyroe solar development site where Whooper Swans up to 177 individuals are known to be supported, which the Department highlights exceeds the threshold for a site of national importance. Also, a significant night roost at the Ballyroe Quarry pond with a peak count of 173 Whooper Swans was counted in March 2023. The results of the NPWS surveys show that at the same time the number of Whooper Swan decreased at Kilcolman Bog, their numbers increased in the Awbeg floodplain (Churchtown area) in the townlands of Dromin, Ballyroe, Mountbridget, and Annagh South. In particular, the fields and quarry within the proposed Ballyroe solar farm amendment application were recorded as important foraging and night roost sites for the Whooper Swan with numbers of national importance roosting in Ballyroe quarry.

The Department's Ballyroe submission continues (and illustrated in Figure 1.0 of the submission) that the main commuting corridor between the townlands of Ballyroe and Annagh South where regular Whooper Swan flight path occur morning and evening is located between Ballyroe quarry to foraging grounds in the nearby Aghaburren, Dromin, Annagh South (Blackwater flats), Ballyroe and Caherconner townlands. (See Figure 1 attached with this Report illustrating the approximate location of the referenced townlands.) The Department stated that this area is an important and well-used dedicated Whooper Swan flight path. The Department states:

'Field surveys conducted by NPWS and by Barry O'Mahony, Ornithologist, in support of the current Ballyroe application and the proposed adjacent Coolcaum solar farm application (Planning Ref. 225681) concur in their findings that the Whooper Swan herd which forages and roosts in the Awbeg Floodplain (Churchtown area) can be composed of a combined herd – the Kilcolman Whooper Swan herd and the more local Awbeg Floodplain (Churchtown area) herd of Whooper Swans'. (Bold: My emphasis.)

9.10.5. The NPWS survey results clearly demonstrates ex-situ links between the Awbeg floodplain and Kilcolman Bog SPA. The two closest parcels of land located to the wind farm site that were identified by the Department as foraging areas are located approx. 660m to the west of the proposed metrological mast and c. 750m from proposed T06, respectively.

9.10.6. As outlined in Section 4.0 above, permission was refused for the proposed amendments to the Ballyroe solar farm (Reg. Ref. 226901) as it was deemed by the Local Authority that it would result in a direct loss of an area of core foraging habitat for Whooper Swan. However, the parent permission for the solar farm (Reg. Ref. 204041) will remain live until 2031 (Condition No. 2 of the subject Permission). From a review of CCC Ref. Reg. 204041, I note that no significant impacts were anticipated on Kilcolman Bog SPA in the 'Natura Impact Statement' (dated December 2019), 'as there are no pathways (physical or hydrological connections which could act as a route for potential impacts) from the source site' to the SPA. The Local Authority in a report entitled 'Ecology - Primary Report' (dated 10th March 2020) initially considered that the Whooper Swans in the area were linked to the Blackwater Callows SPA (c. 35km from the site). No link of any ex-situ relationship with Kilcolman Bog SPA was not considered. Whilst permission was refused for the amendment application in line with the DAU's comments on the grounds that it would result in a direct loss of an area of core foraging habitat for Whooper Swan, it is my view, having regard to the similarities between the original solar farm permission and the amendment application at Ballyroe, that it is reasonable to conclude that the original permission will also result in the same impacts on Whooper Swan, if implemented.

9.10.7. I highlight that the Observation from John Maher to the Local Authority in respect of the proposed wind farm development, identifies roosting and foraging areas for Whooper Swan. They are largely consistent with the NPWS survey results. However, the Observation also states that there are direct flight paths from Annagh South to the Annagh Bogs area, crossing over the wind farm site in close proximity to T04, T05 and T06 (see Diagram 2 submitted with Mr Maher's Observation).

9.10.8. Potential Impacts on Whooper Swan

9.10.9. In addition to the information provided on file, my assessment has regard to the following key issues:

- the NPWS's surveying results (which are more up-to-date than the Applicant's) record higher populations of Whooper Swan (max. 177 No.) in the area than that compared to that on this file (originally EIAR - 107 No. and Avian Monitoring Report submitted at RFI stage - 140 No.);
- the NPWS survey results indicate strongly that ex-situ connectivity exists between the Awbeg floodplain and Kilcolman Bog SPA with movements of Whooper Swan between the two areas over the winter period; and
- the fact that the permitted Ballyroe solar farm would result in a direct loss of an area of core foraging habitat for Whooper Swan (a number of which are connected to Kilcolman Bog SPA).

9.10.10. The general conservation objective for the Kilcolman Bog SPA is to maintain or restore the favourable conservation condition of the bird species listed as Special Conservation Interests (SCI) for this SPA. (I consider that the proposed development poses no possible risk to the other SCI species or to wetland habitat of the SPA due to the distance and habitat required for those species). Site specific conservation objectives have not been set for the SPA, however, based on other sites where Whooper Swan is an SCI, the following targets and attributes are of relevance in maintaining or restoring the favourable conservation status of the species with emphasis in bold on the attribute of relevance to ex-situ areas in particular:

- Population trend: Long term population trend stable or increasing
- Distribution: there should be no significant decrease in the numbers or range of areas used by waterbird species, other than that occurring from natural patterns of variation.

9.10.11. Similar to the DAU, I consider the most likely impacts on Whooper Swan as a result of the proposed development relate to the wind farm site, and not to other aspects of the proposal including grid connection works, turbine delivery works, and replant lands, having regard to the nature and scale of these latter works and their proximity to Kilcolman Bog SPA. I consider the primary impacts to be:

1. Disturbance/Dispersal
2. Collision/Migration.

My assessment of these impacts is summarized in Table 9.8 below. ...

9.10.12. Potential Disturbance/Dispersal Impacts: Construction and Operational Phases

9.10.13. In terms of potential disturbance/dispersal, I note the DAU submission (12th December 2022)¹³ [n13 i.e. prior to its submission in respect Ref. Reg. 226901.] in respect of this appeal case, which states that as the proposed turbines are located at distances of more than 600m from the feeding and roosting areas, disturbance from moving blades is not considered significant. The Local Authority's Ecology Officer notes the DAU comments, but states 'I would caution that the sample size of data utilised to inform the distribution of foraging / roosting Whooper swan in the area is limited and, in my opinion, a complete understanding of the spatial movements of swan within the area has yet to be determined.' However, having regard to the NPWS more up-to-date survey records, I consider that the DAU's comments in relation to disturbance and dispersal both during the construction and operational phase are still valid when the application is considered by itself. As such, I consider that the proposed development would not result in any new significant disturbance/disposal residual impacts on the population or number or range of areas used by Whooper Swan.

9.10.14. Potential In-combination Disturbance/Dispersal Impacts: Construction and Operational Phases

9.10.15. There is potential for the dispersed Whooper Swan from Ballyroe Solar Farm to relocate to parts of the wind farm site, acknowledging that parts of the site are in pastoral use. Whilst it is noted that the species shows fidelity to foraging areas in general, it is clear from the NPWS survey results that they may relocate under certain circumstances. Furthermore, as highlighted in Section 9.10.2 above, the Applicant accepts that there is potential for Whooper Swan to forage on the Improved agricultural grassland within the wind farm site (notwithstanding that there were no records of same represented in this application). Should the proposed development be constructed over the same winter period (April-October) as the Ballyroe Solar Farm, the Improved agricultural grassland would not be available to the species, resulting in potential further dispersal of the species. I highlight that it is proposed that the construction works for the wind farm will be undertaken throughout the calendar year. As such, mitigation by avoidance of any disturbance/dispersal by restricting works to the spring/summer months, is not relevant in this instance.

9.10.16. As outlined above in Section 4.0, there is a significant number of other large-scale projects in the immediate area (both permitted and proposed). The total site area for the two permitted solar farms (Fiddane (c.68.8ha) and Ballyroe (c.102.76ha)), the permitted interconnector (c. 15.175ha) and the subject site (78.6ha) accumulates to c. 265ha. This does not include the proposed Coolcaum solar farm (42.6 ha) and the Ballyroe substation (5.8ha), nor any other smaller scale developments permitted or proposed (including any exempted development) in the vicinity. Should all these developments be constructed during the same winter period, the potential for further disturbance to the dispersed Whooper Swan from Ballyroe Solar Farm may significantly intensify.

9.10.17. I acknowledge that there is no way of determining with certainty where the dispersed Whooper Swan from the permitted Ballyroe Solar Farm may relocate if the subject solar farm project is constructed. However, having regard to the characteristics of the subject wind farm site (including inter alia its rural nature, the provision of improved agricultural grassland, watercourses, flood zones, etc.), it cannot be ruled out with confidence that the site may potentially be used by the dispersed species. The proposed development could result in a loss of number and range of areas potentially available to the Kilcolman Bog species (and the local Awbeg floodplain (Churchtown area) herd).

9.10.18. I acknowledge that the impact would be temporary, however I do not consider there is sufficient information on file to determine with accuracy and confidence the extent of the significance of further potential disruption/dispersal impact on Whooper Swan as a result of the proposed development, should it be constructed during the same winter

period as the Ballyroe solar farm and neighbouring renewable energy projects, noting the scale of these projects and their proximity to one another.

In conclusion, in my opinion, as it is not possible to form a full, precise and definitive conclusion capable of removing all reasonable scientific doubt as to the significance of potential disturbance/dispersal impact on numbers and range of areas used by Whooper Swan, the Board is precluded from granting permission for the proposed development.

9.10.19. Potential In-combination Collision/Migration Impacts: Construction and Operational

9.10.20. I share the concerns of the Local Authority's Ecology Officer with respect to potential collision risk and barrier effect, acknowledging that while the confirmed number of nocturnal movements over the site was relatively low at 5, the number of calls registered is high. On the night of the 16th of March, a minimum of 406 calls (300, 76 and 30 respectively) were recorded with a further 91 calls (86 and 5 respectively) on the 23rd of March. The results of the survey would suggest that the locally wintering Whooper swan population does not traverse the proposed wind farm site at night during their wintering period. However, as highlighted by the Applicant it appears that either this flock, flocks from elsewhere, or a combination of the two traverse the site during their departure / spring migration. Hence, the Applicant has proposed to curtail the turbine movement at night during the Spring and Autumn migration periods with the use of new technologies to facilitate smart curtailment (e.g. radar) that would identify Whooper Swan approaching the proposed wind farm and trigger the immediate shut down of all turbines. It is proposed that annual monitoring be conducted for the first three years of the operational phase to monitor the efficacy of the curtailment and to refine the periods if necessary. I note that Whooper Swan was not included in the collision risk modelling submitted with the application (Appendix 8.8).

9.10.21. Both the Ecology Officer and DAU raise significant concerns in relation to this mitigation, advising that such post decision agreement on potential impacts and mitigation measures that are based on untested mitigation technology calls into question the completeness of the Appropriate Assessment. I concur that reliance on post consent monitoring to identify any adverse effect is not in line with the obligations of Article 6(3) of the Habitats Directive. In my opinion, untested mitigation measures cannot be relied upon to determine beyond reasonable scientific doubt that the proposed development would not adversely impact on SCI of Kilcolman Bog SPA. Accordingly, I recommend that permission is refused on this basis.

9.10.22. The Applicant contends that the Planning Authority did not have regard to the DAU's suggested condition for curtailment (see Section 6.1.1 above). Having regard to the DAU's Ballyroe submission which highlights the extent of the ex-situ connectivity between Awbeg floodplain and Kilcolman Bog SPA for Whooper Swan and that the permitted Ballyroe solar farm will result in a direct loss of foraging area and disturbance to roosting areas for Whooper Swan, I do not consider that the suggested condition is appropriate.

9.10.23. Notwithstanding the fact that it has no bearing on the planning assessment, I concur with the Ecology Officer comments with respect to the viability of the proposed development should the turbines be curtailed for approximately 5 months of the year in respect of Whooper Swan spring and autumn migration, in addition to the proposed curtailment of turbines during bat activity season (April-October) and potential curtailment due to shadow flicker.

9.10.24. Having regard to the foregoing, it cannot be determined beyond reasonable scientific doubt that the proposed development would not adversely impact on SCI of Kilcolman Bog SPA and there potentially may impact on the integrity of the European Site.

9.10.25. Conclusion

9.10.26. On the basis of the information on file, it cannot be determined with confidence that the proposed development alone during its operational phase would not result in a significant adverse collision impact on Whooper Swan associated with the Kilcolman Bog SPA and as such the proposal would be inconsistent with the site's conservation objectives. Accordingly, I recommend that permission is refused on these grounds.

9.10.27. Furthermore, I do not consider that there is sufficient information on file to determine that the proposed development in combination with the permitted Ballyroe Solar Farm (CCC Reg. Ref. 204041) and other renewable energy projects in the vicinity, would not result in further disturbance/dispersal of the dispersed Whooper Swan from the Ballyroe Solar Farm should these projects be constructed in the same winter period (October-April). Should the Board refuse permission on these grounds, in the interest of fairness, I recommend that the Board request the Applicant to comment on the DAU Ballyroe

submission and associated NPWS survey results with respect to the proposed wind farm prior to issuing a final decision.

9.10.28. As outlined in Section 10 below, the Board did issue a request for information from the Applicant in relation to discrepancies in the planning documentation. The Applicant was not requested at that time to comment on the DAU's Ballyroe submission as clarity was required in the first instance as to the correct version of the documentation to be assessed. Furthermore, I was not aware of the DAU Ballyroe submission until after I had completed my assessment of the Applicant's EIAR Biodiversity Chapter and NIS."

46. The conclusion is:

"Appropriate Assessment Conclusion

9.13.1. The proposed development has been considered in light of the assessment requirements of Sections 177U and 177V of the Planning and Development Act 2000, as amended.

9.13.2. Having carried out screening for Appropriate Assessment of the project, it was concluded that it may have a significant effect on the:

- Blackwater River (Cork/Waterford) SAC (002170);
- Kilcolman Bog SPA (004095);
- Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (004161);
- River Shannon and River Fergus Estuaries SPA (004077); and
- Lower River Shannon SAC (002165).

9.13.3. Consequently, an Appropriate Assessment was required of the implications of the project on the qualifying features of those sites in light of their conservation objectives of relevance to the proposed development.

9.13.4. Following an Appropriate Assessment, it has been ascertained that the proposed development, individually or in combination with other plans or projects could adversely affect the integrity of Kilcolman Bog SPA (004095).

9.13.5. This conclusion is based on a full and detailed assessment of all aspects of the proposed development including proposed mitigation measures in relation to the Conservation Objectives of these European sites and an assessment of likely in- combination effects with other plans and projects."

47. The board direction is dated **12th June 2024**. Crucially, it relies on the stage 2 AA (emphasis added in bold below). It states:

"The submissions on this file and the Inspector's report were considered at a Board meeting held on 12/06/2024.

The Board decided to refuse permission, generally in accordance with the Inspector's recommendation, for the following reasons and considerations.

Reasons and Considerations

The Board is not satisfied, on the basis of the information submitted with the application and appeal that it can be determined beyond reasonable scientific doubt that the proposed development, either individually or in-combination with other plans or projects will not have an adverse effect on the Whooper Swan, a species of conservation interest of the Kilcolman Bog SPA. Therefore, on the basis of the information provided with the application and appeal **and in light of the Stage 2 Appropriate Assessment undertaken**, the Board cannot be satisfied that the development, individually, or in combination with other plans or projects, would not be likely to have an adverse affect [*sic*] on the integrity of the Kilcolman Bog Special Protection Area (Site Code: 004095) in view of the sites conservation objectives. In such circumstances, the Board is precluded from granting permission for the proposed development. Furthermore, the granting of permission for this development would be contrary to development objective BE 15-2 of the Cork County Development Plan 2022-2028 which seeks to 'Protect sites' habitats and species' and would therefore be contrary to the proper planning and sustainable development of the area.

Note

The Board noted the Inspectors reference and consideration of the potential cumulative and in combination effects of the proposed development with the permitted Ballyroe Solar Farm (CCC Reg. Ref. 204041) on the Whooper Swan and the consideration of the submission from the NPWS in respect of the extension to the Ballyroe Solar Farm (CCC Ref. Ref. 226901) which was refused permission by the Planning Authority after the decision in the subject case was made by the Planning Authority and after the submission of the appeal in respect of the subject case. The Board also noted the Inspectors advice in respect of facilitating the applicant with an opportunity to respond to same but considered that a decision could be made on the basis of the documentation submitted with the application and appeal and in this regard shared the view of the Planning Authority and found that it could not determine

beyond reasonable scientific doubt, that the proposed development, either individually or in-combination with other plans or projects would not have an adverse effect on the Whooper Swan, a species of conservation interest of the Kilcolman Bog SPA and in this regard the Board was precluded from granting permission.

Please circulate the Direction with the Board Order.”

48. On foot of the final note in this passage, the board decided not to allow the applicant to comment on the Ballyroe submission, despite the inspector’s recommendation.

49. On **27th June 2024**, the board refused the appeal. The order also refers to the stage 2 AA (emphasis added below) and states:

“Planning and Development Acts 2000 to 2022 Planning Authority: Cork County Council Planning Register Reference Number: 217246

APPEAL by Annagh Wind Farm Limited care of Fehily Timoney and Company of Core House, Poulacuff Road, Cork against the decision made on the 22nd day of December, 2022 by Cork County Council to refuse permission.

Proposed Development: Construction of six number wind turbines with a blade tip height of 175 metres, rotor diameter of 150 metres and a hub height of 100 metres; construction of turbine foundations and crane pad hardstanding areas; construction of new site tracks and associated drainage infrastructure; upgrading of existing tracks and associated drainage infrastructure where necessary; upgrade of entrance onto local road L1322; all associated drainage and sediment control including the installation of new watercourse or drain crossing and the re-use or upgrading of existing internal watercourse and drain crossings; construction of one number permanent onsite 38kV electrical substation to ESNB specifications including: control building with welfare facilities; electrical infrastructure; parking; wastewater holding tank; rainwater harvesting; security fencing; and, all associated infrastructure, services and site works. One number temporary construction site compound and associated ancillary infrastructure including parking; tree felling to facilitate construction and operation of the proposed development; installation of medium voltage (20/33kV) and communication underground cabling between the proposed turbines and the proposed on-site substation and associated ancillary works; erection of one number permanent meteorological mast with a height of 100 metres above ground level and associated access track; installation of medium voltage (38kV) underground cabling and associated ancillary works between the proposed on-site substation and the existing Charleville Substation within the townland of Rathnacally. The proposed grid connection will be installed primarily within the public road and will include two number watercourse crossings and the installation of eight number pre-cast joint bays. All associated site development works; a 10 planning permission and 35 year operational life from the date of commissioning of the entire wind farm, at Annagh North, Coolcaum, Fiddane, Cooliney, Rathnacally, Farranshonikeen, Ardnageehy and Clashganniv, County Cork.

Decision

REFUSE permission for the above proposed development in accordance with the reasons and considerations set out below.

Reasons and Considerations

The Board is not satisfied, on the basis of the information submitted with the application and appeal, that it can be determined beyond reasonable scientific doubt that the proposed development, either individually or in-combination with other plans or projects, will not have an adverse effect on the Whooper Swan, a species of conservation interest of the Kilcolman Bog Special Protection Area (Site code 004095). Therefore, on the basis of the information provided with the application and appeal **and in light of the Stage 2 Appropriate Assessment undertaken**, the Board cannot be satisfied that the development, individually, or in combination with other plans or projects, would not be likely to have an adverse affect [*sic*] on the integrity of the Kilcolman Bog Special Protection Area (Site Code: 004095) in view of the sites conservation objectives. In such circumstances, the Board is precluded from granting permission for the proposed development. Furthermore, the granting of permission for this development would be contrary to development objective BE 15-2 of the Cork County Development Plan 2022-2028 which seeks to ‘Protect sites’ habitats and species’ and would, therefore, be contrary to the proper planning and sustainable development of the area.”

Did the board indirectly take into account the Ballyroe submission?

50. The critical question is whether the board indirectly took into account the Ballyroe submission. This question answers itself because both the order and direction take into account the stage 2 AA, which in turn was formulated having taken into account the Ballyroe submission. The fact that the board said in the direction that it could decide the matter on the application papers is contradicted by the express reliance on the AA.

- 51.** This isn't a case about onus of proof as to what happened or about any need for the court to make fresh findings of fact, or about any candour issues on the part of the board as alleged. The case is about whether the board's documents stand up to scrutiny on their face.
- 52.** Insofar as the board relies on *Monkstown Road Residents Association v. An Bord Pleanála* [2022] IEHC 318 (Unreported, High Court, Holland J., 31st May 2022) to say that the board differed from the inspector on this point, the applicant's response is compelling:
 "The problem for the Board is that, in this case, the Board, in its Order, was (to use the language of Monkstown) absolutely 'explicit' about the reasons for the refusal, and they included reliance on the Appropriate Assessment carried out by the Inspector. Monkstown is therefore an authority that squarely supports the Applicant ..."
- 53.** The applicant continues:
 "35. The reasons for refusal recommended by the Inspector are not relevant for the simple reason that the Board, in its Order, identified its own reasons for refusal. It is the Board's reasons that are in issue. The Board relied on the Appropriate Assessment and the Board cannot make this basic problem disappear by the use of emphasis (§32):
'On any objective and fair reading of the Board's Decision, it is clear that the Board did not rely on the DAU Ballyroe Submission in any way that required the invoking of its discretionary jurisdiction under s.131 or s.137 of the PDA – the Applicant's submissions to the contrary (inter alia, §57 et seq) are based on the false assumption that the Board relied on the DAU Ballyroe Submission. As the Board did not rely on same, the complaint falls away.'
 36. This is remarkable. The Board's submissions simply fail to deal with what its own Order actually says and, having not done so, instead just declares the Applicant's complaint to be wrong, such as to put one in mind of the approach to legal procedure of the Queen in Alice in Wonderland. [citing Lewis Carroll (Charles Lutwidge Dodgson), *Alice's Adventures in Wonderland* (1865, Macmillan)] ...
 38. This is not a case where the Applicant is selectively reading anything. On the contrary, all it is doing is:
 (a) quoting the Board's Order back to it and making the obvious point that the Appropriate Assessment relied on by the Board in turn relied on materials to which the Applicant was not privy to; and
 (b) identifying the significance of the difference between Direction and Order.
 39. This is not a case where, for example, there is a row about whether 'draft' means final, or where the absence of particular words being used gave grounds for quashing an order where the substance was otherwise ascertainable. On the contrary, this is a case where the Applicant is relying on what the Board actually said and actually did, and the Board is simply ignoring the plain language of its own Order."
- 54.** The contradiction in the board's papers arises on the face of the material. Dealing with it involves drawing the appropriate conclusions from such material. Whether the board subjectively *thought* at the time of making the direction that it was having regard to the Ballyroe submission or not isn't really the point.
- 55.** Ultimately the only available conclusion is that the express reliance on stage 2 AA involves indirect reliance on the Ballyroe submission, which was taken into account in that AA even though the board tried to insert language in the non-binding direction confining itself to the application papers.
- 56.** Assuming for the sake of argument (I will return to this momentarily) that the board could lawfully have disregarded the stage 2 AA and simply decided that the application material was insufficient, the problem for the board is that they didn't do that. The decision *on its face* relies on the stage 2 AA, which in turn does a lot more than simply say that the application materials were inadequate. By way of reminder, it concluded with substantive findings, not merely as to an absence of doubt generally, still less one arising solely from the application papers:
 "9.13.4. Following an Appropriate Assessment, it has been ascertained that the proposed development, individually or in combination with other plans or projects could adversely affect the integrity of Kilcolman Bog SPA (004095).
 9.13.5. This conclusion is based on a full and detailed assessment of all aspects of the proposed development including proposed mitigation measures in relation to the Conservation Objectives of these European sites and an assessment of likely in- combination effects with other plans and projects."
- 57.** The only AA that was carried out was by the inspector so when the board refers to the AA, they mean her work. They didn't try their hand at one themselves. The applicant captures the issue vividly by saying that the board is trying to take the egg back out of the omelette at this stage.
- 58.** As the applicant submits, the AA is "replete" with reference to the submissions, and indeed these go beyond in-combination or cumulative effects to deal with the *ex situ* effects generally – see

in particular paras. 9.10.5 referring to *ex situ* links generally drawing on NPWS information, 9.10.9 which does likewise, and 9.10.22, which crucially rejected the concept of a condition for curtailment which had been proposed by the DAU in relation to this application itself. How and when exactly did the board go through the AA and mentally bracket off those elements? It's totally implausible. And the board of course hasn't suggested that this happened – all they did was add a disclaimer, not revisit the text of the AA. And the disclaimer is in a non-legally binding document. And contradicts the express reliance on the AA in the order. At the ever-present risk of repetition in a case like this, the board's eloquent, forceful, indignant and plausible-sounding submission simply disintegrates on contact with the actual words used in its order.

59. The board reflexively raises the bogeyman scenario that if the board can't write a direction in these terms without that being operative, then that gives rise to a change in the meaning of having regard to something. But that isn't the case – this is fact-specific and turns on the contradictory language used. If the board had not relied on the AA at all (assuming that to be valid which I will return to in a moment) then the problem wouldn't arise. It's the board that is toying with the concept of regard by using contradictory phrasings, not the court.

60. So I can briefly return to the issue, adverted to above, which I don't have to decide, as to whether an attempt to exclude relevant material *that the board actually had* would be contrary to the duty to conduct as complete an assessment as possible. There is a potential distinction between saying that a developer's materials are inadequate and that the assessment ends there without the need to seek further information, on the one hand, and a situation where the board actually has material relevant to the assessment but purports not to factor it in by limiting its consideration to the documentation submitted with the application. I don't need to decide to what extent the former is permissible in EU law, although one could see an argument that the latter is potentially more problematic. However no formal decision is required in the present case.

Legal ramifications of the foregoing

61. The indirect consideration of the Ballyroe submission triggers s. 137(2) of the 2000 Act. That section provides:

"137.—(1) The Board in determining an appeal or referral may take into account matters other than those raised by the parties or by any person who has made submissions or observations to the Board in relation to the appeal or referral if the matters are matters to which, by virtue of this Act, the Board may have regard.

(2) The Board shall give notice in writing to each of the parties and to each of the persons who have made submissions or observations in relation to the appeal or referral of the matters that it proposes to take into account under subsection (1) and shall indicate in that notice—

(a) in a case where the Board proposes to hold an oral hearing of the appeal or referral, or where an oral hearing of the appeal or referral has been concluded and the Board considers it expedient to re-open the hearing, that submissions in relation to the matters may be made to the person conducting the hearing, or

(b) in a case where the Board does not propose to hold an oral hearing of the appeal or referral, or where an oral hearing of the appeal or referral has been concluded and the Board does not consider it expedient to re-open the hearing, that submissions or observations in relation to the matters may be made to the Board in writing within a period specified in the notice (being a period of not less than 2 weeks or more than 4 weeks beginning on the date of service of the notice).

(3) Where the Board has given notice, in accordance with subsection (2)(a), the parties and any other person who is given notice shall be permitted, if present at the oral hearing, to make submissions to the Board in relation to the matters which were the subject of the notice or which, in the opinion of the person conducting the hearing, are of relevance to the appeal or referral.

(4) (a) Submissions or observations that are received by the Board after the expiration of the period referred to in subsection (2)(b) shall not be considered by the Board.

(b) Subject to section 131, where a party or a person referred to in subsection (1) makes submissions or observations to the Board in accordance with subsection (2)(b), that party or person shall not be entitled to elaborate in writing upon those submissions or observations or make further submissions or observations in writing in relation to the matters referred to in subsection (1) and any such elaboration, submissions or observations that is or are received by the Board shall not be considered by it."

62. We know the board relied on the AA, which in turn relied on the Ballyroe submission. That required notice of the Ballyroe submission under s. 137(2) which wasn't given. That omission vitiates the decision. It isn't therefore necessary to consider the effects of s. 131 or of the right to fair procedures. Nor is it necessary to consider the other grounds of challenge in the circumstances.

63. Despite the possible inference of a vague suggestion to that effect on the papers, the board in argument didn't seem to be saying that the decision would be refused anyway even if the applicant had been allowed to comment on the Ballyroe submission. Such a hypothetical position isn't a conclusion that one could draw in the circumstances given the interconnectedness of the issues, the range of possible responses from the applicant and the other issues in the case. This isn't remotely a situation where one could be satisfied that there is only one available answer. I need hardly also make the point that renewable energy development is a rapidly evolving area and there are many obvious counter-arguments and developing avenues of analysis by reference to which one could see a more benign view being taken of the application.

64. The board did however argue that the applicant shouldn't be allowed to succeed without demonstrating that it would have had something to say in the event of having been consulted. That might be more of an answer if the complaint was a more generalised one about fairness. It is less of an answer if, as here, the complaint is of a specific breach of an identified statutory provision.

65. In any event para. 9 of the affidavit of Bernice Cahill states:

"9. I say that it is most concerning for the Applicant that the Board, having had the application for nearly 18 months, purported to refuse the Applicant's application without allowing the Applicant to make a submission on a crucial submission made by the DAU in June 2023 and contrary to the recommendation of the Board's Inspector. I say had any further requests for further information been submitted then, the Applicant would have responded fully and thoroughly to allay any concerns raised in relation to impacts on Whooper Swan. Respectfully, the Applicant does not agree with the construction placed by the Inspector on the DAU's submission or the conclusions reached in relation to potential impacts on Kilcolman Bog SPA and should have had an opportunity to make a considered submission in relation to same."

66. In the circumstances there isn't anything of substance to the board's legalistic objection to the applicant's entitlement to make this point.

Summary

67. In outline summary, without taking from the more specific terms of this judgment:

- (i) The board order states that it relies on the stage 2 AA. That in turn relied on the Ballyroe submission. It follows from the order that the Ballyroe submission was indirectly considered.
- (ii) The fact that this contradicts the non-legally binding direction which appears to state that the Ballyroe submission was not considered does not nullify the express words of the order itself. Furthermore the direction is also contradictory in that it too relies on the AA which in turn had regard to the Ballyroe submission.
- (iii) The failure to give the applicant notice of the Ballyroe submission was therefore a breach of s. 137(2) of the 2000 Act.
- (iv) It is not necessary to decide the other points.

68. As can be seen, this is all extremely fact-specific.

Order

69. For the foregoing reasons, it is ordered that:

- (i) there be an order of *certiorari* and remittal as sought in reliefs 1 and 2;
- (ii) the matter be listed on 20th January 2025 for the final order with the parties to liaise in the meantime to endeavour to agree the form of the order and costs.