

A photograph of an offshore wind farm with several turbines in the sea, viewed from a rocky beach. The image has a green tint. The turbines are arranged in a line across the horizon. The foreground is a wide, rocky beach with many small, light-colored stones. The sky is overcast with grey clouds.

Marine Planning and Development Management Bill – the General Scheme

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INTRODUCTION

This presentation is divided into two parts: -

1. Part One provides a brief introduction to and summary of the General Scheme of the Marine Planning and Development Management Bill (“MPDM”).
2. Part Two sets out a non-exhaustive list of questions arising from our review of the General Scheme and attempts to highlight the issues which IWEA feel need to be fleshed out prior to the text of the Bill being finalised.

POLICY CONTEXT

1. Past

- Foreshore Acts 1933-2011;
- "Harnessing our Ocean's Wealth" (2012);
- Maritime Area and Foreshore Amendment Bill, 2013 ("MAFA");

2. Present

- European Maritime Spatial Planning Directive (Directive 2014/89/EU);
- Draft National Marine Planning Framework ("NMPF");
- Climate Action Plan 2019;
- Draft Marine Planning Policy Statement;
- Proposed Maritime Jurisdiction Bill;
- General Scheme of the Marine Planning and Development Management Bill ("MPDM");

KEY ELEMENTS OF THE MPDM BILL

A planning system generally comprises three main elements:

1. Forward planning – setting high-level long term planning objectives at national, regional or local level (e.g. County Development Plans);
2. Development consent – making determinations on applications for specific development (e.g. Planning Permissions); and
3. Enforcement - tackling non-compliance (e.g. Warning Letters).

The draft MPDM Bill incorporates each of these three elements, together with a fourth key element which is unique to marine planning, namely:

4. State consenting – the process by which the State, as owner of the maritime area, regulates the occupation of that area by prospective users.

1. FORWARD PLANNING

Part 3 of the MPDM;

- Restates Part 5 of the Planning and Development (Amendment) Act 2018;
- Provides for the designation of Strategic Marine Activities Zones, similar to SDZ's under Part IX of the Planning and Development Acts;
- Provides for Marine Planning Schemes in respect of all or part of a Strategic Marine Activity Zone;
- Requires that the NMPF is reviewed at least every 6 years.

2. STATE CONSENT

The MPDM introduces 2 new forms of State consent: -

- 1. Planning Interest:** Involves an initial assessment as to whether the developer can complete the project. Entry point stage which simply allows the developer to proceed to apply for development consent through the planning process, but does not confer any other rights to the maritime area.
- 2. Maritime Area Consent:** Governs the occupation of the maritime area (financial terms and contractual obligations) but again does not confer any consent to construct. The Minister will in essence be acting qua landlord and therefore will not be required to carry out any environment assessment (EIA/AA). The developer will not be able to apply for an MAC until he has received both a Planning Interest and a subsequent Planning Permission.

3. DEVELOPMENT CONSENT

- An Bord Pleanála (“ABP”) will be responsible for granting Planning Permissions for offshore wind farms and other projects in the maritime area which require EIA / AA;
- A developer cannot apply to ABP for Planning Permission unless he has first been granted a Planning Interest from the relevant Minister;
- ABP will be responsible for carrying out the necessary environmental assessment (EIA and AA);
- Provision is included for a new standalone development consent, modelled on the existing SID provisions in the Planning Acts;
- The Department plans to publish detailed Guidelines for specific sectors, e.g. offshore renewable energy (“ORE”).

CONSENTING CHRONOLOGY

Apply to the relevant Minister for a Planning Interest in respect of the sea area in question

If and when a Planning Interest is granted, carry out the necessary environmental studies

Apply to ABP for a Planning Permission for both the onshore and offshore elements of the project, being careful to avoid project splitting

If and when the Planning Permission is granted, apply to the relevant Minister for a MAC

4. ENFORCEMENT

- Part 6 of the MPDM sets out a new framework for compliance with and enforcement of both State Consents and Development Consents;
- Provision is made for issuing Warning Letters and/or Compliance Notices:
 - by the relevant Minister in respect of alleged breaches of Planning Interests and MAC's;
 - by the relevant Planning Authority in respect of alleged breaches of development consents granted by Planning Authority;
- It is not specified in the General Scheme who will be responsible for enforcement of development consents issued by ABP.

5. SPECIFIC PROVISION FOR ORE UNDER MPDM

- Centralised approach vs. Decentralised approach:
 - Decentralised Approach (e.g. the UK) – this is essentially a developer led model. The developer is responsible for carrying out permitting for the offshore wind farm and all transmission assets, both onshore and offshore. All transmission assets are built to TSO standards but the developer builds, owns and operates (or in the case of the UK the OFTO operates) the offshore grid connection.
 - Centralised Approach (e.g. Germany, Denmark and the Netherlands) – this is essentially a plan led model. State identifies development areas for ORE, conducts sites investigations, obtains the required planning consents and the TSO provides the connection to the grid. The State then tenders for bids from developers to construct and operate the wind farm with a price subsidy if required.
- Which model will apply in Ireland – centralised, decentralised or a mixture of both?

6. TRANSITIONARY MEASURES

- Chapter 2 MPDM – *“consents granted under existing regimes will be managed under the relevant existing legislation until expiry, termination, assignment or any material change proposed – at which time an application will have to be made under the new regime”* (emphasis added);
- Head 47 MPDM – *“DCCAE will develop appropriate drafting instructions for transitional provisions relevant to policy sectors within the scope of this Act”*;
- What constitutes “material change”?
- What differentiates a “Legacy” project from an “Enduring” project?
- Department guidelines urgently required.

7. NEXT STEPS

- The MPDM is being led by the Marine Legislation Steering Group (MLSG) which is chaired by the Dept. of the Taoiseach;
- The MLSG intends to submit the finalised General Scheme to the Government by the end of September;
- Government approval will also be sought by the end of September for pre-legislative scrutiny of the MPDM Bill with the Joint Oireachtas Committee on Housing, Planning and Local Government ;
- In the meantime, work is also on-going with the Office of the Parliamentary Counsel (OPC) to draft the text of the MPDM Bill;
- Plan to submit Bill to Oireachtas early next year;
- Planning guidelines and secondary legislation will be developed in tandem with the MPDM Bill, but won't be commenced until the Bill is enacted.

PART 2 - UNANSWERED QUESTIONS

FORWARD PLANNING

1. Given the significantly increased volume of work that will be required in assessing applications under the MPDM, will extra resources be deployed in both the Department and in An Bord Pleanála?
2. Will the DHPLG be issuing new Planning Guidelines for offshore renewable energy projects, and if so when?
3. The MPDM requires a review of the NMPF at least every 6 years. Following adoption of the NMPF, what is the anticipated time frame to complete the first review and who will manage this process?
4. Head 21 states that "*where, in the opinion of the Government, specified activity is of economic, social or environmental importance to the State, the Government may by order, when so proposed by the relevant Minister, designate any part of the maritime area for the establishment of a strategic zone to facilitate such activity.*" Does this imply that all areas identified in the NMPF will not be zoned, or will be zoned at a later date?
5. The note on Head 30 states it is expected that a Government decision in Q2 2020 on the offshore grid framework as well as the Marine Spatial Plan will provide the policy context that determines whether a centralised or decentralised grid model will be operated in Ireland for ORE. Will the Department be consulting with IWEA and other relevant stakeholders on this issue?

PART 2 - UNANSWERED QUESTIONS CONT.

PLANNING INTERESTS

1. Head 26 states that "*a Planning Interest is limited to the right to apply for planning permission and confers no other rights to the maritime area whatsoever*". What about the right to undertake site investigation surveys, put up a met mast/lidar? Can this be done under the Planning Interest or is a Foreshore Licence still required?
2. How long will the Planning Interest be given for?
3. Will a Planning Interest be required for the route of the subsea cable as well as the offshore wind farm site itself?
4. Will projects which have an existing Foreshore Licence and/or an extant application for a Foreshore Lease, have to reapply for a Planning Interest in respect of their sites?
5. Will there be any requirement for public notice and consideration of objections as part of the Planning Interest process? In this regard we note that Head 43(e) refers to public notice and objections in relation to an application for an extension of the term of a Planning Interest but there does not appear to be similar public participation requirements on the initial application for a Planning Interest.
6. It would appear from Head 28(16) that an appeal against a refusal of a Planning Interest is made to the same Minister who issued the refusal. Is this correct? If so, this would seem to be at odds with fair procedure and we would recommend instead that an independent appeals panel be set up by the Minister along the lines of the procedure set out in Part IV of the Electricity Regulation Act 1999. Alternatively, provision should be made for an appeal to the High Court as per Head 44(6).

PART 2 - UNANSWERED QUESTIONS CONT.

MARINE AREA CONSENTS ("MACS")

1. Head 55 provides that in circumstances where an MAC had been granted and the holder of the consent wishes to materially alter the proposed development, the holder shall be required to apply for a new planning permission. Will the Department be providing guidance on what is meant by "materially alter"?
2. How long will MAC's be given for?
3. Will an MAC be required for the route of the subsea cable as well as the offshore wind farm site itself?
4. Will there be any requirement for public notice and consideration of objections as part of the MAC process? In this regard we note that Head 44 refers to public notice and objections in relation to an application for a modification to an existing MAC but there does not appear to be similar public participation requirements on the initial application for an MAC.
5. It would appear from Head 35(11) that an appeal against a refusal of an MAC is made to the same Minister who issued the refusal. Is this correct? If so, this would seem to be at odds with fair procedure and we would recommend instead that an independent appeals panel be set up by the Minister along the lines of the procedure set out in Part IV of the Electricity Regulation Act 1999. Alternatively, provision should be made for an appeal to the High Court

PART 2 - UNANSWERED QUESTIONS CONT.

DEVELOPMENT CONSENTS

1. Head 74 states that it shall be the "objective" of the Board to ensure that decisions are made within a period of eighteen weeks. Would the Department consider inserting a mandatory time period in the MPDM given the upcoming mandatory timelines for renewable energy consents under the European Clean Energy Package?
2. It is not clear from Head 108 who should be responsible for enforcement activities in respect of permissions issued by the Board. Is this likely to be the relevant planning authority, as would be the case for enforcement of the terrestrial planning code?

TRANSITIONAL MEASURES

1. Can the Department provide guidance at this stage as to the definition of "legacy" and "enduring" projects as referred to in the CAP as these terms do not appear to be defined in the General Scheme of the MPDM Bill?
2. Head 47 dealing with transitional provisions states that the DCCAE will develop appropriate drafting instructions for transitional provisions relevant to policy sectors within its scope. We assume that this includes transitional provisions for offshore renewable energy projects. Can the DCCAE provide guidance as to when these transitional provisions will be drafted and what they will contain?