

Public Submission: Offshore Renewable Energy: Maritime Area Consent (MAC) Assessment for Phase One Projects

Summary

We vehemently object to the awarding of 'relevant project' status to the developments proposed on the Codling Bank (Codling 1 & Codling 2, because clear documentary evidence shows that with regard to legal, environmental and public participation issues, proper procedures have not been followed. A Maritime Area Consent cannot be awarded to these proposed developments based on the evidence. This submission details these failures.

Introduction

While we welcome the replacement of the long-outdated and largely autocratic 1933 Foreshore Act, we object to a number of aspects of the proposed act, most strongly with respect to the introduction of the 'relevant projects'. We believe that the spirit and intent behind the Directive 2014/89/EU, Maritime Area Planning (MAP) and National Marine Planning Framework (NMPF) are not upheld, and the essence of the act is perverted through the introduction of *relevant projects*.

Specifically, with regard to the Codling Wind Park Project (CWP), we would like to clarify for the minister that Codling Wind Park has no right to either site (Codling Wind Park I or Codling Wind Park II). As conceded by the Department, Codling Wind Park Ltd (CWPL) failed to meet the Longstop dates outlined in both the Foreshore Lease granted to Codling Wind Park I (Codling 1) in 2005, to the extension to that lease granted in 2013 and a further longstop date extension in 2020 and as such CWPL are now in development default. The Minister had an obligation to act in the public interest and to terminate their lease on both occasions in which CWPL were in Development Default. The 2005 lease has expired. As stated in the 2005 lease agreement, once terminated "*all rights and powers exercisable by the Lessee Pursuant to this Lease will cease*" (Paragraph 25(3)). Furthermore, the lease awarded in 2005 contravened the Aarhus Convention as Public Participation was inadequate. This is unquestionably illustrated by the fact that the lease was awarded without a single submission from the public. Therefore this lease should never have been awarded in 2005 and the duration of the lease should have been terminated due to CWP Development Default.

When viewed on the Gov.ie Foreshore Licence website (<http://www.housing.oid.gov.ie/planning/foreshore/applications/overview>) there are only three applications by CWPL (2009, 2013 and 2020). Only one of these documents (investigational licence) has an Environmental Impact Statement (2020). Only two of these submissions have public submissions. In the case of the 2013 application there is only one public submission. There is no publicly available EIS on Codling I and no adequate EIS carried out on Codling II. This highlights the level of environmental assessment and public participation that has been afforded this massive wind park in this highly sensitive marine habitat.

CWPL never received *foreshore authorisation* (a foreshore lease) for Codling Wind Park II (Codling 2), to the South of Codling Sandbank and there is absolutely no justification for considering this a relevant project. CWPL did not submit a whole and complete application for said lease but rather a scant description of a rough intention (in 2009) with no Environmental Impact Statement and no

public consultation. CWPL has not received a grid connection for Codling 2 (additional 1000MW). The Lease Application for Codling 2 (FS006460) was not determined.

I challenge the decision to accept Codling 2 as part of Codling 1 with no adequate environmental data. “*Relevant Projects*” are those that either applied for or were granted a lease under the Foreshore Act 1933 (p8 Offshore Renewable Energy Maritime Area Consent Assessment for Relevant Projects Consultation). Codling 2 does not qualify as it was never granted a lease or a valid grid connection. Codling Windpark 1 and 2 is now being processed as one project (Offshore Renewable Energy Maritime Area Consent Assessment for Relevant Projects Consultation), which is unlawful. Moreover, 3.1.2 Geographic boundaries of the proposed project states “*all Relevant Projects must be within the coordinates of the original Foreshore lease application*”. As the only approved and valid foreshore lease application these coordinates must relate to the Codling 1 coordinates and should not include Codling 2.

Codling 1 and 2, being two separate projects, are not geographically distinct, and as such are competing for the same maritime area, so on the first weighted approach of the assessment methodology in the MAC assessment CWP1 & CWP2 Fail. We find this statement to be true for Codling 1 and Codling 2 and Kish Bank and Bray banks also which are located close by. Therefore details outlined in 2.5.1 Pass/Fail vs Weighted approach are inaccurate.

Section 2.3.2 ‘Maritime Area Planning (MAP) Act and the legislative basis for MAC’, it is recognised that the previous Foreshore Act 1933 was unfit for purpose, with much needed reform of marine governance. However, instead of learning from past mistakes the department is enabling the mistakes of the Foreshore Acts to come to fruition by permitting a select number of projects to advance without adequate environmental assessment or environmental site selection. These projects were “*designated*” with no environmental assessment under a scheme that was agreed behind closed doors with no public consultation during the strict lockdown in May 2020. This contravenes the Aarhus Convention. Moreover, of these proposed projects given special status, two at least are subject to Judicial Review based on failure to comply with the Habitat Directive. This goes against the Act’s objectives of providing the legal underpinning to “*an entirely new marine planning system*” as quoted in Section 2.3.2 ‘Maritime Area Planning (MAP) Act and the legislative basis for MAC’. Rubber stamping relevant projects that have inadequate environment assessment and in the case of Codling 2 (no EIS). To proceed with this ‘*relevant project*’ status is not in keeping with the Act’s objective to “*balance harnessing our huge offshore wind potential with protecting our rich and unique marine environment.*”

We argue that having clung on to the inadequate Foreshore Act 1933 for as long as we have, the Government has forced Offshore Renewable Development into the 12nm limit zone, an area of which, if biodiversity was taken seriously, would have been avoided by developers. Now with the introduction of this new Act, let the developments justify their site selection and if they can justify their presence in the proposed sites on environmental and biodiversity grounds then they should have no need for this ‘*relevant projects*’ status.

CWPL have recognised in writing that they have no rights for Codling 2 stating “*We clearly recognise that the current lease only related to CWP[1]*”. In Schedule 2 Interim Conditions 5 of the extended Longstop to the lease CWP were asked to proceed with CWP as a stand alone project. CWP defaulted on this condition, “[*We*] confirm that it is its intention to proceed with the CWP project as a stand alone project, irrespective of any future decision on the second application in relation to Phase 2 of the CWP development”. CWPL are in Development Default as a number of the Interim Conditions and the Conditions Precedents were not satisfied by two extensions of longstop

date. We argue that the Minister had an obligation to act in the public interest and to terminate their lease when they were in developmental default.

There is a clear argument that CWP never intended to comply with the original lease (2005) as on the 13th December 2007, two years after the 2005 lease was granted, CWP sought to "discuss the possibility that connection dates offered (by EirGrid) may instigate Special Force Majeure circumstances". They wanted to discuss this with the Department before they were refused a connection to the grid. In this letter they anticipated that connection dates would be offered. This clearly indicates that they never intended to build what was in their lease (i.e. Codling 1), this is evidenced by the fact that the developer requested an extension to the foreshore licence *as there wasn't a market*. This was not grounds for Force Majeure. Moreover, CWP had no right to Codling 2, they had no lease for Codling 2 and the above letter indicates that they did not have any intention of abiding by the agreement in the lease for Codling 1 and searched for a Force Majeure before being refused Grid connection.

Not alone did CWP deprive the Irish public of renewable energy, **neither did they make payments that were due under the foreshore lease agreement**. In summary, CWP asked for a Force Majeure having made a timely application to EirGrid. Miraculously the date for applications to be processed by EirGrid changes from the 17th of December (the date CWP was processed) to the 16th of December and this facilitated CWP claiming Force Majeure due to a delay in receiving a connection offer by EirGrid PLC. Therefore, CWP were denied grid connection and granted a Force Majeure from the Minister under what seems to be false pretences.

It appears that CWP never intended to meet their obligations under the lease agreement as the timeline was made impossible by the fact that the connection application was not deemed complete until 17th December 2007, more than two years after the grant of the lease and the fact that the connection application was for a maximum Export capacity that significantly exceeded the proposed capacity of phase 1. In this timeframe, they would never have met the conditions of the lease. A Special Force Majeure should not have been given as *The definition further provides that "a Special Force Majeure Event will not be deemed to have occurred if the Minister reasonably determines that:*

B) The lessee has not used all reasonable efforts to secure a connection offer in sufficient time that the lessee could reasonably complete the construction and or installation of the relevant phase in that year"

There is documentary evidence that CWPL did not pay their bills

In *schedule 2 Interim conditions 7* of the 2005 lease a Force Majeure and Special Force Majeure provision do not grant the lessee relief from historic payment obligations or entitlement to an extension of the Longstop Date for any phase. Despite this, payments were still outstanding by 30 November 2012 for Phase 1, 2 and 3.

If, irrespective of all this, Codling Wind Park is countered as a 'relevant project' the size and capacity of the turbines should match that of the original 2005 lease.

Timelines

I object to the 90 day timeline for applications to be completed, as outlined in Section 2.4.1 Phase One (pg 10). This is insufficient time for necessary assessment.

I object strongly to Section 2.4.1 Phase One 'Development Permission' whereby:

"applications for development permission are not required for ORESS1 (offshore wind auction or route to market) eligibility or a grid Connection Assessment".

This is putting the cart before the horse and completely undermining biodiversity and the assessment process. We object to Section 2.5.5 Out of Scope 'Environmental considerations' (p.18) whereby there is no screening for either **Appropriate Assessment or Environment Impact Assessment at the MAC stage**. The MAC process should not be decoupled from the development permission process. Appropriate Assessment and environmental considerations should precede MAC. This undermines the importance of Biodiversity.

I object to the route to market to be accessible for Phase One projects only. This is not a competitive approach. We understand that ORESS1 needs to function competitively. This is a shortcoming that needs to be addressed.

In response to the Consultation Question: Are there any other public interest considerations which the Department should consider at MAC stage?

Ireland's Biodiversity Crisis has been completely ignored at MAC stage

Codling Bank is a sandbank which is slightly covered by water at all times [1110], the largest sandbank in Irish waters and accounts for 50% of the landmass of all the sandbanks in Ireland. This is protected under the Habitats Directive under '*Annex I: natural habitat types of community interest whose conservation requires the designation of special areas of conservation*'. It also has qualifying features, which will be outlined below. Based on its size, and qualifying features this sandbank should have been designated an SAC many years ago and before other sandbanks such as Blackwater Bank SAC as the criteria for designating SACs should be chronological to their proportional area "*Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory*" (ANNEX III — CRITERIA FOR SELECTING SITES ELIGIBLE FOR IDENTIFICATION AS SITES OF COMMUNITY IMPORTANCE AND DESIGNATION AS SPECIAL AREAS OF CONSERVATION). To date the Irish government has chosen not to designate as Natura 2000 sites any sandbanks on which there is an application for OWF development consent. Since 2007, official assessments of the Conservations status of Irish sandbanks confirm that construction of the wind developments on these banks will result in habitat degradation and increased risk of coastal erosion. This is a travesty and unacceptable that the introduction of this new act, for which there was so much hope has been marred by this concept of '*relevant projects*'.

Site Selection:

Biodiversity was not included as a factor in CWP site selection. An EIS of Blackwater Bank was used as a justification for site selection even though Blackwater Bank has a poorer Biodiversity than Codling Bank. An objective assessment of Codling 1 and Codling 2 at the site selection stage or at the site investigation submission stage, where, if all applicable criteria re Habitats' and Birds' Directives were

knowledgeably applied, should have clearly ruled out the proposed site area in relation to cetaceans, fish, bird and sandbanks habitat and species, reef building polychaetes habitats and migratory fish and critical fish spawning grounds, feeding grounds and nurseries. **Biodiversity was not included as a factor in Codling 1 site selection in 2005 when Codling 1 was granted its lease.**

In 2005, and ever since with regards to CWPL, site selection has been developer-led not ecosystem - led. **No Environmental Impact Assessment was carried out by Irish authorities to assess the impact of turbines on the Codling sandbank and its adjacent Natura 2000 sites (Wicklow Reef SAC 8 km, the Murrough SAC/the Murrough SPA 14km, and Wicklow Head SPA 11km Codling Fault Zone SAC 25km from Codling).** **Outrageously, the proposed caballing route to shore is going through 6 SACs and 3 SPA.**

In the minutes from an NPWS-CWP meeting, outlined in the Hartley Anderson review of the 2020 CWPL licence application (FS007045) 'Appendix 1 –Minutes of Codling Wind Park: Project Introduction meeting 15th June 2020' CWPL queried whether trenching/HDD through an SPA has been undertaken before and whether NPWS could point CWP in the direction of some examples. NPWS failed to provide a single example but promised to support CWP. This goes completely against NPWS acting in the public interest and in support of the conservation of biodiversity. A priority appears to be to facilitate offshore wind development, in the name of environmental conservation, at the detriment of biodiversity, not realising that they are two sides of the same coin.

The proposed construction is on Codling Sandbank, an Annex 1 habitat only 13 km from shore. It would consist of up to 420 turbines, up to 320 metres high and up to 5.5 metres wide each, with ballast foundations that will be up to 25 metres wide each or monopile foundations that will be 35 metres deep. Each turbine will have 2,545 tonnes of rock protection. The inter-array cabling will be approximately 117km in length. Each inter-array cable will be 0.5 metres deep and expected to have 5 metres of rock around it. The exit caballing route runs through 6 Special Areas of Conservations (SAC)and 3 Special Protected Areas (SPA):

1. The Murrough SAC;
2. Murrough Wetlands SAC
3. North Dublin Bay SAC (Bull Island)
4. Rockabill to Dalkey Island SAC
5. Wicklow Reef SAC
6. South Dublin Bay and
7. River Tolka Estuary SPA (Sandymount Strand)
8. Dalkey Island SPA
9. Wicklow Head SPA.)

The Murrough, Ireland's largest saltmarsh on the east coast. The name *Murrough* comes from the Irish word "*murbhach*" which means 'salt marsh along the sea'. It is a 15km long coastal wetland site. It resulted from a glacial formation 16,000 years ago and contains a rich diversity of habitats dominated by an extensive ridge of shingle. Inland of this ridge are salt marshes, mudflats, freshwater and brackish marshes, small sand hills, reedbeds, drainage ditches, wet grasslands, wet woodland, and alkaline fen while offshore are the sandbanks of the Codling Sandbank.

Codling Sandbank is the Murrough's first line of defence from coastal erosion. *The Murrough*, is legally protected as a Special Protection Area (for birds) and a Special Area of Conservation. Sadly, over the years coastal erosion has eroded away sizable sections of *The Murrough*, leading to increased calls to protect and preserve it against any further degradation.

The proposed cabling also runs through *Wicklow Deep*, a deep-water glacial esker which is characterised by reefs and brittlestars. The main threat to these reefs and their species is disturbance to the seabed. The developers have also indicated the presence but said that 'extent is unknown' but the BioMar survey indicates that the reef is running NNE and may enter the CWPL application area to the North. These reefs come under the protection of the 1992 Habitats Directive under Annex 1 (reefs) [code 1170] and under the *OSPAR List of Threatened and/or Declining Species and Habitats* (Red List), 2004.

Providing essential fish habitat is just one of several ecosystem services these reefs provide, including water filtration and locking up carbon. These biogenic reefs, therefore, have a role in helping reduce the effects of climate change if restored to and maintained in good environmental condition. *They* are of disproportionate ecosystem value and of high vulnerability to physical disturbance. Once destroyed beds do not seem to recover.

There is no scientific reasoning for the proposed development. The *Offshore Renewable Energy Maritime Area Consent Assessment for Relevant Projects Section 2.3.1 'Offshore Renewable Energy and Ireland's Climate Targets'* outlines the Irish government's commitment to develop a longer term plan to utilise the potential 30GW of offshore floating wind power in our Atlantic waters. Ireland's maritime area is 7 times the size of its landmass and *Infomar* states the seabed channel areas of the Irish sea have suitable depths for floating wind technology to occur which are also relatively close to shore. **Therefore, floating wind technology is feasible for Ireland's east coast.** We argue that the deployment of conventional fixed bottom offshore wind turbines is based on outdated wind technology which will damage blue carbon and ecosystems. **This goes against the Act's objective as being a "key enabler of Ireland's decarbonisation goals" (*Section 2.3.2 'Maritime Area Planning (MAP) Act and the legislative basis for MAC'*).** If the CWPL project were to proceed, the disruption of these habitats and species would increase the amount of carbon in the atmosphere and decimate habitats.

A cost benefit analysis on Codling Sandbank has never been carried out.

Currently, the major commercial activity centred around Codling Sand bank is whelk fishing. The estimated Whelk fisheries turnover is €18m per year and employs ~250 people (directly and indirectly), and Codling Sandbank constitutes the majority of catches. Whelk spawn on Codling Sandbank and any impact, especially a development of the proposed size, would have a prolonged recovery period as there is no planktonic dispersal stage as well as spawning being disturbed. Whelk remains an important source of nutrition for local seabird colonies.

Sandeels are keystone species found on the Codling Bank and sandeel abundance have been shown to have direct effect on some seabird population and the breeding success of kittiwakes (red listed), terns (amber), fulmars (amber listed) and shags (amber listed). Sandeels are part of many food webs for other fish species and seabirds. **If you're a sandeel and you need to live on the seabed, that's a problem with CWPL proposed development.**

The proposed activities of CWPL will result in significant depth of local smothering of whelk and other benthic communities. **No assessment or quantification of this aspect of the planned development has been presented in the CWPL appropriate assessment.** No assessment of the indirect effects of this smothering on Annex I habitats within SACs or birds from local SPAs has been adequately assess or quantify the effect of the proposed development on the Annex IV family of Phocidae (Grey seals) at Lambay Island SAC using figures and seal populations relevant to the SAC. CWPL did not adequately assess or quantify the effect of the proposed development on Risso's dolphin or leatherback turtle. **These European cetacean species are listed on Annex IV of the EU Habitats Directive (92/43) as species requiring strict protection.**

Impacts on fish (particularly non-commercial variety), bird species and cetaceans in the vicinity of the site has not been adequately assessed by CWPL. This may result in a contravention of the Birds' Directive (Directive 2009/147/EC) as well as the Habitats' Directive (92/43/EEC).

Codling Sandbank is thought to be a spawning ground for Bass where the rapid currents may help in rapid dispersal of eggs. The main demersal species (those dependent on the seabed) landed into local ports are cod, haddock, plaice and ray/skate. Codling sandbank provides a nursery ground for plaice and herring, sand eels and scallops.

Skate use the inshore waters behind Codling Bank for pupping the common blue skate which is also critically endangered. The females enter the area from the south, lay their eggs and then move offshore. Tope (critically endangered of extinction) also uses inshore areas of Codling for pupping and nursery grounds. **CWPL has not adequately assessed or quantified the effect of the proposed development on Tope shark (*Galeorhinus galeus*), which is of particular importance as the proposed development area is a known Tope shark nursery area (Ellis et al (2012)).** Their long-life span and low birth rate make them particularly susceptible to species decline. Threats to the tope shark include habitat degradation in nursery areas, which makes the proposed licence particularly precarious to them. Tope shark is listed under the IUCN Red List status as "vulnerable" and is protected under the Northern Ireland Priority Species List. The Tope shark's range is large and they are known to migrate to Strangford and Carlingford Loughs.

CWPL did not adequately assess or quantify the effect of the proposed development on the Undulate Ray (*Raja undulata*), which is a member of the skate and ray family. The flat, bottom dwelling fish is found throughout the Irish Sea. The Undulate Ray is listed on the IUCN Red List as endangered, recognised by the IUCN in Ireland, listed as UK Priority Species and protected under the Northern Ireland Priority Species List. The undulate ray is particularly sensitive to habitat degradation from human activity. Codling Bank is a nursery ground for Spotted Ray and Thornback Ray. **CWPL did not adequately assess or quantify the effect of the proposed development.**

CWPL did not adequately assess or quantify the effect of the proposed development on the European eel (*Anguilla Anguilla*). It is expected that the proposed activities will result in significant depth of local smothering of European eel and other benthic communities. No assessment or quantification of this aspect of the plan has been presented in the appropriate assessment. **European**

eels are critically endangered and the numbers of juvenile eels reaching the coast have declined in recent years due to barriers to migration and habitat loss. This proposed development will add to the habitat loss and migration barriers of this endangered species and prevent them from reproducing. They are sensitive to sound and vibration. They also have swim bladders and underwater sound pollution significantly affects the behaviour of juvenile eels as they become disorientated and fall subject to prey, thus reducing the number of their population. European eels are listed on the Irish Red Data Book listed as critically endangered and recognised by the IUCN and OSPAR in Ireland.

CWPL did not adequately assess or quantify the effect of the proposed development on the Basking Sharks (*Cetorhinus maximus*). Sighting data collected by the Marine Conservation Society (Bloomfield and Solandt, 2008) suggests that the waters in the vicinity of Codling Bank is an area of sightings and activity for Basking Sharks. Basking Sharks are endangered and recognised by the IUCN and OSPAR in Ireland. Their slow growth and reproductive rates make them particularly vulnerable to population decline and threats include collision with boats and habitat disturbance.

CWPL did not adequately assess or quantify the effect of the proposed development on Herring (*clupeiformes*) are listed in the Habitats Directive Annex II. Annex II Herring are hearing specialist species of highly sensitivity, with mechanisms that couple with the swim bladder in inner ear. Seabed removal and suspended sediment would lead to loss of habitat preventing the development of juveniles. Noise vibration can affect juveniles, particularly noise sensitive species such as herring, and noise generalists such as cod, and cause physiological stress.

The current application area is a nursery and a spawning ground for cod. The proposed development would have a negative impact on the development of juveniles of cod.

Nursery grounds are sites where juveniles occur at higher densities, have reduced rates of predation and have faster growth rates than in other habitats. Seabed disturbance is anticipated to have a potential impact on the nursery grounds where seabed removal and the suspended sediment plume can potentially lead to a loss of habitat, preventing the development of juveniles. Noise and vibration caused by seabed disturbance can also potentially affect juveniles within the localised area, particularly noise sensitive species such as cod (vulnerable), potentially causing physiological stress.

CWPL did not provide assessment on species include Atlantic salmon (*Salmo salar*), trout (*Salmo trutta*), European eel (*Anguilla anguilla*), sea lamprey (*Petromyzonmarinus*), European sturgeon (*Acipenser sturio*), twaite shad (*Alosa fallax*) and allisshad (*Alosa alosa*). CWPL did not adequately assess or quantify the effect of the proposed development on the Atlantic salmon (*Salmon salar*), which is a member of the Salmonidae family. Threats to the Atlantic salmon are habitat degradation and the creation of barriers to migration which will most likely result from this proposed development. The Atlantic salmon is protected under the Northern Ireland Priority Species List because it meets the following criteria: Declining population, and it is listed in Annex II and V of the Habitats' Directive.

Basking Sharks (endangered) have been sighted on Codling Sandbank as have the Blue Shark (near threatened). Fish include salmon (it's their migratory route), and common goby. Benthic elasmobranch species present in the area include the lesser spotted dogfish and ray species. The other significant feature in relation to commercial fisheries in the wider area is the occurrence of mussel seed beds which are exploited as a valuable source of seed for the expanding bottom mussel culture industry.

CWPL Provided Inaccurate Scientific Environmental information

In CWPL's 2020 licence application (FS007045) and associated EIS, CWPL miscalculated and misrepresented the number of harbour porpoises likely harmed during investigational operations within the Rockabill to Dalkey Island SAC. The activities would result in a likely significant effect on a large number of porpoises (the QI of the SAC) and have a negative impact on the conservation status of the SAC. This was not highlighted, the assessment was not appropriate and no derogation licence was sought. This represents a contravention of the Habitats Directive.

The surveys create sound above the audible range of the species, inducing traumatic hearing damage and a significant avoidance of the area. **No European Protected licence was sought for any aspect of the proposed surveys.** No mitigation measures were taken. Harbour porpoises breed and live in the Rockabill to Dalkey Island SAC area, 0km distance from the application area. 89% of the area's population of the porpoises have been identified on the Codling Sand Bank itself. Flatfish, and other bottom living fish and elasmobranchs (fish in the shark family including ray, skate, tope, etc.). A number of 'hearing specialists' such as whiting (cod family) have been recorded in or around the Codling area. Codling Bank is a cod nursery ground. For these species piling is expected to stimulate an immediate startle reaction in any fish that are within a distance of tens of kilometres to piling and injury within close proximity (hundreds of metres). Minke whale, risso dolphin, bottlenose dolphin, common dolphin, harbour porpoise and killer whale have been sighted on Codling sandbank. Harbour seals and grey seals are found year-round and this sandbank has been identified as an important area for breeding/moulting (Kitty et al. 2000). The grey seal potentially forages within the local area. Basking shark visit the area also. 309 individual harbour porpoises were sighted in a bird survey carried out by CWP.

Minutes from a meeting held on 19 June 2013 outline that CWP provided a copy of the derogation licence received from NPWS and stated that the surveys are "non intrusive" (seabird and marine mammal surveys during summer 2013). This information is misleading as the surveys would have caused harm to harbour porpoises and should have required a derogation licence and appropriate assessment.

On 3rd March 2014 a letter from the SFPA SEA Fisheries Protection Authority stated that CWPL was deficient on data for fisheries on codling bank especially bivalve shellfish and elasmobranchs:

"Since the Codling Wind Park surveys would have been carried out many new legislative requirements have been implemented which have increased the recording and reporting obligation of fishing activity. As a result the more recent data sets are much more comprehensive."

In 2005, non-quota species were not consistently recorded in the landings data and species including bivalve shellfish may not have been included at all. The area was not under the 'Irish Sea Cod Recovery Programme', as such, not all species of elasmobranchs were under quota and were not therefore accurately logged or identified.

These deficiencies were never highlighted by CWPL. Hartley Anderson in their 2020 (FS007045) report also queried why no baseline fish surveys were proposed. CWP have failed to carry out fish surveys and are using data that is nearly 20 years old and therefore have inaccurate scientific information available to them.

Similarly, the inadequacy of bird reports and the question of the credentials of Coveney Consulting (2002) to have carried out these studies without any mention whatsoever of flight paths, migration paths or patterns of birds is concerning. Coveney Consulting did however count the birds from a boat and 1000 guillemots were counted one day and a significant number of kittiwakes as well as a number of Arctic Terns were sighted. Three key species were recorded flying above 40m in height in the Codling Study Area and therefore at rotor height (Great Black-backed Gull, Herring Gull and Kittiwake). Considering disturbance as a result of the construction or operation of the wind farm, if birds avoid or are displaced from the area around the turbines, this has the same effect as habitat loss to those birds. Construction operations, piling associated with the insertion of monopiles (if used) is likely to be noisiest and hence most disturbing to sensitive species. Codling Sand Bank is a feeding ground for the red listed birds leach's storm petrel; red necked phalarope, kittiwake, puffin, razorbill, common scoter; bewick's swans and the amber listed birds: manx shearwater; red throated diver; shag; fulmar; gannet; herring gull; the little gull; great backed gull; guillemots; black guillemots; lesser black backed gull; common gull; cormorant; red breasted merganser; great northern divers; cory shearwater; starlings; swallows; great skua; sandwich tern; roseate tern; arctic tern as well as auks.

The application area also contains *Sabellaria Spinulosa* (reefs formed by *Sabellaria Spinulosa* are protected under OSPAR). These reefs were never investigated, nor environmentally assessed despite the fact that the Final Report, Subtidal Benthic Investigation of the Greater Codling Bank (NPWS, October 2012), the contractor drew attention to the presence of a reef forming polychaete, *Sabellaria Spinulosa*, stating that reefs formed by this species are protected under OSPAR. They also suggested that "further exploration may be required to determine the presence of reefs in this locality". No further investigation was carried out.

The biodiversity index of Codling Bank is very high (20% of grabs taken by the developers indicated a Shannon-Weiner diversity indices of 3-4 and 35% of grabs indicating indices of 2-3.) Codling Sandbank has qualifying interest; *Sabellaria Spinulosa* (reefs formed by *Sabellaria Spinulosa* are protected under OSPAR) and as such should be designated as an SAC, if not a MPA. Moreover, Codling Sandbank itself is a sandbank [1110], an Annex 1 Habitat. It is Ireland's largest sandbank and should be prioritised for protection. Codling Sandbank, 13 km from shore is *Codling sandbank* and it forms a natural barrier to the eroding force of an easterly gale in the Irish Sea and is our first line of defence in coastal erosion on this coast. It protects Ireland's largest salt marsh which stores ~15,259 Mg of CO₂ (Salt marsh: 917 Mg CO₂/ha, The Murrough Wetlands SAC: ~16.64ha). The Act is meant to be a key enabler of Ireland's decarbonisation goals. Destruction of this salt marsh goes against this goal.

Timeline: CWPL are aware that Codling Bank is unsuitable for Offshore Wind Development

In **April 2000**, The marine institute conducted the Ecoserve survey showing the likely presence of protected species and habitats on Codling Bank. The 2000 Ecoserve report identified Codling sandbank to be rich in reefs for protected habitats. **As a result of these protected habitats the Codling sandbank should have been deselected as suitable sites for a wind farm before this stage.**

However, instead of deselection of the site and designating it a Natura 2000 site, in **August 2000** Investigational Foreshore Licences (F5004704) were granted to investigate both Codling 1 & 2. The approved surveys included invasive geotechnical survey work (CPT, SPT, boreholes). **This constitutes a breach of the Habitats Directive.** Further to this, the surveys carried out works included potentially damaging methods (*e.g.* benthic grabs) which were not included in the foreshore licence. **Again, this constitutes a breach of the Habitats Directive and a breach of Irish Foreshore Act (on behalf of the developer).** On this occasion an investigational survey was only conducted within the Codling 1 and the developer failed to survey the Codling 2 area.

Further to the breach of the Habitats Directive in August 2000, in 2005 the developer was issued an extension to the 2000 investigational licence for a further 3 years, to survey the Codling 2 site. This licence again included invasive geotechnical survey work (CPT, SPT, boreholes) which could potentially damage reef structures. **Again, this constitutes a breach of the Habitats Directive.** Once again the surveys carried out works included potentially damaging methods (*e.g.* benthic grabs/trawls) which were not included in the foreshore licence. **Again, this constitutes a breach of the Habitats Directive and a breach of Irish Foreshore Act (on behalf of the developer).**

The species and habitats found in the 2000 Ecoserve report are threatened and declining in all OSPAR regions and thus are highlighted as a conservation priority under the EU Marine Strategy framework Directive (MSFD). Providing essential fish habitat is just one of several ecosystem services that these reefs provide, including water filtration and locking up carbon. Maintaining these reefs therefore is important for both a healthy marine environment and supporting social and economic activities and these reefs are capable of processing and storing carbon that otherwise would be released into the atmosphere. These reefs are of disproportionate ecosystem value and of high vulnerability to physical disturbance. **Once destroyed these reefs do not seem to recover. The Act is meant to be a key enabler of Ireland's decarbonisation goals. Disturbance of these reefs goes against this goal.**

On the 29th May 2012 a letter from CWP recognised these benthic communities being present as they state the following: *"Site containing vulnerable species or species of interest (e.g. Sabellaria sp.) or protected species"*

Whether the developer is a "fit and proper person" (which includes an assessment of technical and financial competence and is detailed in Schedule 2)

I do not consider the assessment criteria to be sufficient for a Relevant Person. This criteria should also include :

- The applicant made payments in full and on time to the Irish State
- The applicant provided accurate scientific information to the the relevant state bodies
- The applicant complied with the conditions and conditions precedent of their lease (including extensions of Longstops)
- The applicant engaged in legal activities only
- The applicant complied with the Aarhus Convention and the Habitats' and Birds' Directive

We object to the fact that MARA (Marine Area Regulatory Authority) is not independent of the Government. We reject that, irrespective of the outcome of the financial assessment of a relevant person, it remains at the sole and absolute discretion of the Relevant Authority to determine whether an applicant has the financial viability required and meets the fit and proper person test. This defeats the purpose of the "relevant person test". We consider that the relevant authority has too much flexibility to ensure that *Relevant Persons* with the financial capability to deliver ORE Projects pass the financial viability assessment.

Inaccurate Information provided from CWP

CWPL provided misleading, false or inaccurate information

Lease Application Codling 2 (FS006460) was Not Determined. The application references EIA material from the 2002 EIS. The 2002 EIAR did not include the area covered by Codling 2. Maps show this clearly. In addition, the 2002 EIS was carried out 6-7 years previously.

The site selected in 2005 is a completely different site to the Foreshore licence in 2020 (completely different area).

False interpretation of scientific data and false statements were made by CWPL in the Foreshore Licence application FS0006241 (Supporting Information, section 2.3.1, p.14), Inland Fisheries Ireland state:

"fish spawning data is limited in the immediate area around Codling Bank possible due to the low importance of the area as a fishing ground". IFI claim that this to be misleading as a large number of fish species are listed in Table 5 (p 13) of the document as having importance in the Codling Bank area."

This importance may relate to commercial value as well as an importance in the ecological food web (e.g. sand eel as an important dietary element for many sea bird species as well as for sea trout). Additional Sand eel specific surveys would also be required given the potential importance of this area for these species. A well constructed sampling programme should tease out all relevancies (commercial, ecological, leisure angling, etc.) in regard to such species and their use, at different life stages, of the Codling Bank. Moreover, IFI identifies another inaccurate comment on sea bass in Section 2.3.1 requires some correction. A major issue in relation to bass is that it is not known exactly where they spawn. Spawning is considered to occur in the open sea but specific locations are not known. It is considered that Fahy *et al.* (2002) are not quoted correctly with reference to

comments that bass spawn in estuaries. Some of the physical characteristics of the Codling Bank may be ideal for bass spawning. IFI outlines how assessment of salmonids was not addressed by CWP. *"The potential of Codling Bank as a gateway migration pathway (for salmonid and other species) also needs to be assessed and may require targeted gill netting at critical periods."*

14th Feb 2013 Department of Arts, Heritage and the Gaeltacht wrote to the Foreshore Unit RE FS0006241 ARCH outlining that massive mistakes were made with respect to locations of devices:

"The baseline archaeological data being used by CWP is not up to date and it appears that the Shipwreck Inventory of Ireland Database has not been consulted in relation to these works. For example, the proposed location for the device (CPOD 1) to be deployed at Lambay Island is located in an area of high archaeological potential as indicated in the Shipwreck Inventory of Ireland which lists numerous wrecks for the Lambay area, which are subject to statutory protection under section 3 of the 1987 National Monuments (Amendment) Act. There are at least two known wreck sites located at the proposed location of CPOD1 which have not been included on the maps supplied by CWP. It is therefore possible that underwater archaeology may be impacted by the development."

CWPL have not paid their bills:

CWPL has consistently failed to make payments due on their account to the department. Having met none of the longstop dates outlined in the 2005 lease, which should incur a cost of €880,000. In addition, as a result of the lack of electricity produced on the site by CWPL, the taxpayer has failed to gain revenues from the site with regard to royalties due and taxes paid. We put to you that **CWPL have, at every turn, sought to avoid building the wind farm for which they had received a lease for, but instead have occupied the site as an investment asset, which is of no benefit to the public good.**

Payment in respect of Phase 1, as per lease Schedule, was not paid by CWPL when due (30th November 2011). The Department adjusted this, combined with Phase 2 and Phase 3 payments lumped together with interest adjustments to be paid the subsequent year (30th November 2012).

However, no written notification or request for adjustment to payment was offered by CWPL to the Minister in advance of the overdue payment. This is evidence by two communications to CWPL by the department:

- 1) Invoice dated 1st Feb 2012 indicating overdue payment (overdue since 30 November 2011)
- 2) A letter dated 17th Feb 2012 indicating that payment of the advised amount is still overdue.

These pieces of evidence indicate that CWPL failed to provide payment to the Minister within 30 days of the payment date and did not seek adjustments to payments in advance of the due payments. In accordance with these failed payments the Minister may terminate the lease. We argue that in the public interest, the Minister should have terminated the lease at this point.

Schedule 2. Interim conditions 7: CWP confirm in writing that it *"withdraws its previous claims for relief under the Force Majeure and Special Force Majeure provisions of the Lease and shall acknowledge in writing that having regard to relevant circumstances the Force Majeure an Special*

Force Majeure provisions do not grant the lessee relief from historic payment obligations or an entitlement to an extension of the Longstop Date for any phase

Schedule 2. Interim conditions 6: "Continue to pay Up front fees to the Minister in accordance with the lease in respect of all phases, until the earlier to occur of the satisfaction of the Conditions Precedent and the termination of the lease." There is no evidence of any payment and, as such, we must assume that the taxpayer has footed the bill.

Illegal Activities

In 2013 and 2014 CWPL have, by their own admission (CWPL Offshore Scoping Report p.103), carried out investigations on the lease site and beyond (without acquiring the appropriate licence, outlined below) and, as such, have contravened the Foreshore Act, 1933.

Further to this, CWPL attained an Imperative Reasons of Overriding Public Interest (IROPI) derogation licence (DER/MARINE-MAMMAL-2013-36), granted under Regulation 54 of the European Communities (Birds and Natural Habitats) Regulation 2011 for the harming of marine mammals, without an appropriate foreshore licence, without public consultation and possibly without an appropriate assessment. This contravenes the Habitat Directive.

Further to this, as is required under the Habitats Directive (Council Directive 92/43/EEC), no reporting of this derogation to the European Commission was carried out and reporting for that period was marked as 'Report not received' and currently on today's date, 16/02/2022, 8 years later, the report still hasn't been received as marked on the website as 'Report not received'.

CWPL admit that, "both geophysical and geotechnical surveys were carried out in 2013" even though they were not in receipt during that period of an approved foreshore licence for the area. Further to this, CWPL queried and were provided written confirmation by the department that a licence was required for these activities, which is also outlined in the NPWS Appropriate Assessment Guidelines (2009). Also outlined in these guidelines is the utmost importance of compensatory measures and states "Until the Minister has agreed to the proposed compensatory measures, a plan or project cannot be adopted or approved on IROPI grounds" Yet it is clear from the derogation licence issued that the *proposed compensatory measures* were to follow on by email.

Prior to issuing a derogation licence, the The Department of Housing, Local Government and Heritage (DECLG) clearly outlined that a separate Foreshore Licence should be sought for the mast and any survey works required. However, no Foreshore Licence appears to have been granted.

Under the conditions of the longstop extension (Conditions Precedents):

"The Lessee having provided evidence to the Minister that all necessary regulatory consents and permissions have been obtained in respect of the project including: evidence of all other necessary consents, permissions, permits, licences and authorisations required for relevant works, activities or operations in connection with the project".

It is clear that in 2013 works were carried out that did not have a relevant foreshore licence for the associated works carried out. This is further highlighted by the department admitting that they did not have such documents in their possession on multiple FOI/AIE requests.

The legality of operating outside of the 12nm limit is brought into question during these investigations as there is no legal framework for the work to be licenced. Biology does not respect the 12 nm limit and though rich ecosystems such as *"sandbanks slightly covered by water at all time"* may be significantly more rare further out to sea, there are deep water ecosystems that deserve a considered environmental impact statement. The Irish government's sustained refusal to move from the 1933 Foreshore legislation has facilitated an environment of unregulated investigations beyond the 12nm limit. In addition, the government by clinging to the 1933 Foreshore Act have forced these *Relevant Projects* to choose unsuitable sites within the 12 nm limit, which had the ethos of the MPA been implemented site selection of these, which is so vital in avoiding negative environmental impacts, would not be considered acceptable. Therefore, they should not be included as *"Relevant Projects"* on economic grounds as they do not meet the ethos of the MPA.

Derogation Licence Timeline:

On the 17th June, 2013 Natural Power wrote to DECLG asking to send a copy of the Foreshore Licence application as they wished to carry out geophysical works in July (a month later):

"I was wondering if you could send me a copy of the Foreshore Licence application form that we need to compete for the Codling survey works? Given the timeframe for the geophysical surveys in July".

This provided no time frame for appropriate assessment, engagement with stakeholder or public consultation. Within 9 days they were given a derogation licence. An appropriate assessment and careful consideration is required for the issuing of a derogation licence. This wasn't physically possible within 9 days. The Government was required to submit a derogation report to the EC. No report was submitted. Therefore the Derogation licence is not valid and represents a contravention of the Habitats Directive. No Foreshore licence was received so works carried out by CWPL in 2013 and 2014 were presumably carried out illegally. *The derogation issued was with respect to marine mammals but did not include Benthic surveys.* On 27th June 2013 letter sent by DECLG to Natural Power asking to *"confirm when you expect to have the application for Benthic surveys"*. DECLG emphasised the importance that the website would host details of all ongoing survey works as part of the dialogue with local community and interest groups". Despite this, CWP has minimal data available on their website and will not release the 2013 survey data to me when we requested it. However, bird surveys and marine mammal surveys are referenced in the 2020 licence application and therefore must have been conducted. This environmental survey was referenced in the *Codling Wind Park Ltd Environmental Impact Statement* associated with their 2020 licence application (FS007045), available here means it should be made publicly available. The Environmental survey that we are looking for is referenced in the 2020 document as: *"Garner, G., Lacey, C., Vallejo, G. and Nelson, E. 2014. Codling Bank Wind Park bird and marine mammal surveys 12-month report: April 2013-March 2014. Natural Power report to Codling Wind Park Ltd."* Moreover, through FOI we have been informed that the department does not have this Report. If it is not available or complete it cannot be assessed and therefore should not be quoted.

The derogation licence itself fails to adequately outline the area to which the derogation refers, stating:

“proposed geophysical surveys to be carried out 13km of the east coast of Ireland (off Co.Wicklow) between Greystones and Wicklow”

This relates to a line, rather than an area, appearing to provide the developer carte blanche.

The nature and extent of any preparatory work already undertaken by the developer, including stakeholder engagement

Stakeholder Engagement

CWPL stakeholder engagement has been inadequate. The 2005 lease was awarded a foreshore lease without a single submission from the public. Most recently, in April 2021 there was a notice to mariners that states that CWPL will begin their survey work today (12/4/2021) no notice given. More recently, with regard to the Foreshore Licencing ref FS0006241 CWPL indicated that they would engage in consultation with Stakeholders after the Foreshore Licence has been granted. IFI wrote to the Foreshore Licencing DECLG on the 28th February 2014 and in the section headed “*comments on Survey requirements, timing and methodology*” CWP indicates that they will engage in consultation with all relevant parties re the proposed site investigations after the foreshore licence has been granted”. Obviously, this wasn’t satisfactory and was challenged by SFPA. On 3RD March 2014, a letter from the SFPA SEA Fisheries Protection Authority states “It is the recommendation of the Sea Fisheries Protection Authority that a licence is not granted until the survey requirement, timing and fisheries methodologies as stipulated in the Statutory Consultees response to the CWP application have been submitted to and approved by the Statutory Consultees”. On December 2013, Inland Fisheries Ireland disclosed as part of the consultation process (FS006241 Foreshore Licence Section 1.11) that “no consultation took place with relevant fisheries agencies in regard to the proposed fish ecology strategy and methodologies”.

Consultation Question: Which of the two options is the most appropriate for the Relevant Projects

My Response: Option 2

In conclusion, we call on the Minister to recognise the evidence of the failings of CWPL and to act in the public interest and to terminate their lease and all rights to Codling Bank.

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