Environmental Law Office of IEN
Irish Environmental Network

Submission to Consultation on Offshore Renewable Energy

Approach to Maritime Area Consent Assessments for Relevant Projects.

From:

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Version: Final 18 Feb 2022.

Preamble and Caveat:

The opportunity to make a written submission to this consultation is most welcome. The views expressed here are mine as Environmental Law Officer of the Irish Environmental Network, IEN the coalition of national eNGOs. They are informed by the perspective of that remit – the protection of nature through the proper implementation and framework of environmental law.

They views expressed here should not be taken as the views of the IEN, or those of its members, while of course they may be shared in whole or in part.

I would be happy to clarify any of the following and apologise for the rather hasty and less than optimal presentation of these comments, owing to a multiplicity of demands.

Contact:

1. Introduction:

The consultation on the matter of the assessment of Maritime Area Consents, (MACs) by the Minister for Environment Climate and Communications (MECC) is welcome, putting to one side for the present the scope of projects for which MACs are to be assessed, and the scope of this consultation thereon.

The initiative to advance Offshore Renewable Energy is broadly welcomed as an important step in delivering a decarbonised approach to energy requirements, but that welcome extends only to steps which provide for a truly legally compliant and sustainable approach. The most serious concerns have been raised and ignored on Ireland's inadequate approach to Marine Spatial Planning, and its failures in respect of a multiplicity of requirements under i.a. the Birds Directive, the Habitats Directive and the Marine Strategy Framework Directive not to mention related issues arising under a number of waste directives. Therefore the sustainability of Ireland's approach, and indeed its legal compliance are of the most serious concern.

While this submission endeavours to provide some responses to the specific questions tabled as part of the consultation – there are broader issues and commentary which need to be considered here also, and which provide an important context to the more specific responses below, and which address omissions in the approach proposed, and in the consultation itself.

It is regrettable that notwithstanding the extension of 2 days that the consultation on this matter ran for only 30 days. Given the complex considerations in play ,and the need to consider this in the context of both the National Marine Planning Framework and the very lengthy and complex recently Maritime Area Planning Act 2021 – this really does not suffice to have facilitated "effective" public consultation. Further, there is much information, including in relation to the timelines for Marine Protected Areas and Sensitivity Mapping which hasn't been set out to assist the public with an understanding of how these matters will hang together so to speak in future decision-making around Maritime Area Consents, and much of this information isn't readily accessible or clear to the wider public.

2. Overarching response on omission across all the categories of assessment and in the overall process proposed for the decision to grant or vary a MAC.

While I appreciate clearly, that it is the intention of this consultation to strictly limit the focus to being the matters which need to be assessed when granting a Maritime Area Consent or varying it, the entire process and the consideration set out in the consultation document are prefaced on the basis of there being no public participation in the decision on the grant of a MAC. However, it is the fundamental contention here that it simply not adequate or indeed expedient, to seek the public's views on the adequacy of the process and considerations in this consultation, and then to exclude the public for the decision-making on specific applications.

As is hopefully reflected below, I am fully cognisant of the position of both Department's on the view on the nature of a MAC, and their views on why such public consultation is not provided for on

MACs. However I wish to respectfully set out here set what I submit to be both problematic with that view, and inexpedient in that approach.

In each of the elements proposed in this consultation for the assessment on the grant of a MAC – the failure to provide for a consideration of the public inputs is a serious omission, not just in what is set out in the consultation, but in the provisions of the Maritime Area Planning Act, 2022, (MAP Act), and is therefore something which needs to be additionally provided for.

This overarching comment should be considered as a response to each of the sections and questions posed within the consultation on the adequacy of what is proposed/prescribed. This position is set out below with i.a. reference to the concept of a Maritime Area Consent, and the implications for what falls to be assessed and considered when granting one.

Finally, the process and considerations proposed set out in the consultation are in respect of a grant of a MAC or a material change, and the considerations in the MAP Act on material change are not considered appropriate, particularly in respect of the extent of discretion afforded.

2.1 Concept of a Maritime Area Consent:

To be clear it is acknowledged that:

a) It is really important that Ireland ensure that certain really practical considerations are all properly considered about the capability to prepare development proposals, construct and deliver and indeed decommission offshore renewable energy installations (OREI), and to be able to operationalise and provide for connectivity to the grid, and
b) Given the significant investment necessary to advance such initiatives, it is also reasonable to provide some assurance to prospective ORE projects around their ability to reflect an interest and certain rights in a particular area of the marine, subject of course to complying with all the necessary regulatory requirements and receiving all of the relevant Development Consents, permits, licences etc.

So to the extent that such considerations reflect the basic motivation behind the concept of a Maritime Area Consent, it is an absolutely necessary and most welcome concept. (Indeed something similar in relation to Housing could go a long way to ensuring we don't just fast-track consents, but that we actually build homes.) It is, in principal an appropriate additional consideration in our consenting framework, to the other decisions on Development Consent, consents, permits and licences etc necessary under in particular EU law.

I am fully cognisant of the views of both the Department of Housing Planning and Local Government, (DLGHG) and of the Department of Environment Climate and Communications, (DECC), during the initial discussion on the General Scheme of the Marine Planning and Development Management Bill, (GS MPDM), and during the recent passage of the Maritime Area Planning Act, 2021, (MAP Act), which provides for the MAC, and related provisions thereon. Minister of State Burke, and indeed officials from HLGH and DECC have been consistent in the view, that MAC decisions are not something which will be subject to public participation, and have gone further to state it is not an environmental decision. In fact this view has gone so far as to not apply the characteristics of Article 9(4) of the Aarhus Convention to the Judicial Review provisions on MACs set out in Part 4. Chapter 13, a matter which I believe will most certainly end up as a communication on Ireland's non-

compliance in front of the Compliance Committee of the Aarhus Convention sooner rather than later, relying on both Article 9(2) of the Convention and 9(3), and in essence the need to provide for the characteristics of Article 9(4) of the Convention in Judicial Review will arise entirely independently of public participation element.

But turning back again to the failure to provide for public participation, this view that MAC decisions are not environmental and therefore do not attract public participation obligations under the Aarhus Convention, and indeed don't warrant it independently of that and more generally, is something which I wish to robustly dispute. I submit this has material consequences for the matters raised by and in this consultation, and significant omissions in the elements detailed to be assessed in the decision to grant and/or vary a MAC as set out in this consultation, and in the MAP Act, as both entirely fail to provide for public participation on MAC decisions. Further, there are practical considerations and benefits in allowing for such participation.

It has been stated over and over by both Departments, that a MAC is simply a right to occupy an area of the sea, and that to do anything, will require relevant permissions/consents which is where the relevant environmental assessments and public participation requirements will be addressed.

Firstly, notwithstanding the definition of both a "MAC" and a "Maritime Area Consent" in s.2(1) of the MAP Act 2022 made effectively with reference to s.81(a), there is an additional important provision on interpretation in s.2(3) which states:

> "(3) A reference in this Act to a MAC includes—
>
> (a) the maritime usage the subject of the MAC,
>
> (b) the conditions attached, or deemed to be attached, to the MAC by virtue of section 79, and
>
> (c) the rehabilitation schedule within the meaning of Chapter 8 of Part 4."

Additionally, there are a multiplicity of decisions pertaining to a MAC, which clearly have deeply significant environmental consequences, for example changes to the conditions appended to a MAC and decisions on the surrender of a MAC and on the adequacy of the discharge of rehabilitation obligations, or the setting aside of such duties, all of which fall to be considered as MAC decisions. For example:

- The decision by MARA under s.89 on the surrender of the MAC, or
- The decisions under s.97 by MARA on changes to the works in the rehabilitation schedule which was appended to the MAC following a Development Consent.

s.97 of the MAP Act allows for quite extraordinary, and I submit it would seem unlawful powers, to propose to change the conditions appended to the MAC, where such conditions may have been stipulated on foot of potentially either or both -

- An Article 6(3) assessment under the Habitats Directive,
- An assessment and development consent under the EIA Directive

To make such changes is on its own an issue, and to do so absent public participation is doubly problematic under both EU law the EIA Directive, and Article 6(3) Habitats Directive where even Ireland has albeit belatedly now finally provided for public participation on Appropriate Assessment in accordance with the clarification of the CJEU in case c-243/15, and their are additional requirements of course under Article 6(10) of the UNECE Aarhus Convention.

However, it is not my intention here to rehearse all the case law of the Court of Justice on such matters, or indeed relevant findings and recommendations of the Aarhus Convention Compliance Committee, including against Ireland in ACCC/C/2013/ 107 in respect of the issues with s.97. My intention here is to simply establish what is self-evidently obvious, when looking at the multiplicity of decisions and acts relating to a MAC under the MAP Act 2022, which is they have undoubted environmental significance.

In short a MAC decision is not just a decision to grant – there are a multiplicity of other decisions in and around a MAC which have deep environmental significance.

The point where the Minister for DECC, or in time MARA will make decisions on the grant of a MAC would also has environmental significance even just in terms of displacing other activities to other areas of the marine, preventing certain activities possibly with either positive or negative environmental implications, and because of the overall corporate structure and assurances it establishes or fails to establish in which the development will end up occurring, and the environmental consequences which then may or may not then be adequately covered.

Once a MAC has been granted – there is now a material interest for the MAC holder to ensure they are successful in securing the relevant consents, and that in itself can precipitate and incentivise unfortunately negative impacts and effects.

Additionally, where someone may have interests impacted by the grant of a MAC – there is simply no mechanism in the current procedure for grant of a MAC to allow such interests be heard or considered, and the legal implications of ignoring such interests, hardly need to be raised here – given the obvious considerations in play. On what basis the MECC or MARA intend to rely on omitting such interests in in the decision-making on granting a MAC is entirely unclear and it would help to clarify matters if that could be set out formally.

The approach of certain operators and their track record and credibility in both complying with conditions and discharging rehabilitation duties, and the adequacy of bonds, and other measures as surety, and the adequacy of the scrutiny and consideration of the assessment of financial considerations in light of the environmental sensitivities at the site of the proposed MAC, and the track-record of those involved are all significant considerations where the public's input would also add value. It is notable s.35 of the Planning and Development Act 2000 allows an authority to consider information about the track-record of an applicant on past failures to comply with planning and to then apply to engage with the applicant on such matters and apply to the High Court where it considers it wishes to refuse permission etc etc. There is clear precedent and acknowledgement that in decisions there is merit in not just looking at the application per se – but also on wider considerations on the applicant and the risks presented. While the MAC process is very much in this vein in evaluating the applicant, it then rather bizarrely excludes one of the most important sources

of information on such matters – the public whose interests are ultimately those to be served by the decision-making executed on the matter of a grant or refusal of a MAC.

There are fixed square-bracketed sums proposed in this consultation around the financial assessment – which could be entirely inadequate in the context of the risks presented by some operators, and therefore an unjust burden in the context of others, and which might need to be significantly adjusted given the potential environmental risks which may arise and the extent to which the corporate construct behind the MAC need to be evaluated in terms of the liability which they can potentially cover. While the consultation looks at these in a generic and abstract frame this is not adequate.

Ultimately there is also an argument of expedience. Exclusion from decision-making will invariably breed distrust and resistance from communities. It is also not clear why the Departments are so adamant they do not wish to hear from the public on the use of the commons of the marine, and whether the public has views on whether certain applicants are fit and proper persons and whether the information provided to assert relevant technical experience is correct and adequate, or on the adequacy and accuracy of information provided on financial capacity etc

I fear the motivation is one around the access to justice implications of participation, but that is of course not the only basis on which the characteristics of the Aarhus Convention Article 9(4) can and will very clearly be argued irrespective of any participatory dimension. So it would seem to be a very short-sighted approach which is likely to throw even these initial stages into the hands of the courts, creating additional burden and uncertainty for all concerned, particularly given the doctrine of consistent interpretation, Article 9(3) of the Aarhus Convention, and the self-evident nature of the MAP Act as law relating to the environment, including implementing multiple EU Directives.

It would seem not just more compliant with our legal obligations, but also in our interests to make sure in granting MAC's we have the best possible input, which includes hearing from the public, and a process which can be done comprehensively and without the additional contention challenging the exclusion of the public. In a number of key areas for the assessment of applicants for the MAC there is a reliance on self-assessment, self certification etc. and the obvious issues for over-stretched and under-resourced officials, and given the pressure to allow for ORE given the Minister's remit on same – the risks and indeed conflict of interest issues are huge.

The further requirement for declaration of interests of those involved in the decision-making process, and the extended range of interests in their families etc also needs to be considered. In a more transparent and democratic process such considerations can be more appropriately managed.

Ultimately we need and want to facilitate these projects done in a way which is compliant with the law and which is sustainable and which helps us then deliver on climate action. Excluding the public would seem very short-sighted in the context.

Some further specific comments are made in respect of specific considerations raised in the consultation document:

- ***Technical Assessment Criteria:***
  - Needs to include provision for public participation and due consideration of such submissions on the experience set out by the applicant.
  - The criteria also need to include a requirement for significant experience in decommissioning and rehabilitation – this is a significant omission from what is set out.
  - There is a concerning absence of any specificity in the criteria around environmental considerations and health and safety

- ***MAC Applicants Commitment to the Project and Resource Plans***
  - Needs to include provision for public participation and due consideration of such submissions on the experience set out by the applicant.
  - There is nothing in the resource plan which codes against the possibility of effectively window-dressing resource plans with some "Senior Members of the team" who are high-powered and well experienced consultants and resources, without and adequate clarification of the extent to which they will actually be involved in the project phase, and what other commitments they will have over the period.
  - The focus on "Senior Members" of the team is also imbalanced, and greater scrutiny is needed across the whole team, to provide for resilience in the case of movements of staff and overall competence, and the risk of window-dressing the team as mentioned earlier.
  - It is not clear why it is proposed that at least some of the senior members of the team need 10 experience of the Irish planning system.
  - There is a concerning absence of any specificity in the criteria around environmental considerations and health and safety
  - In respect of technical ability to run the project at any phase be it in planning, construction or operation or decommissioning – there should be clear provision that MECC or MARA as the case may be, can issue notices specifying additional specific capabilities required, or notifying the MAC holder if the staff currently engaged lack the requisite ability. So in short the assessment at the point of the grant of the MAC cannot limit specification of future requirements.

- **MAC Financial Capacity Assessment:**
  - ***Relevant Persons Assessment***
  - There is insufficient focus on cumulative financial risk assessment – it is simply not sufficient to look at exposure of the individuals involved or the consortium in the context of their Irish exposure on ORE projects – the issue must be one of their total exposure and capacity full-stop.
  - There is no clarity on the basis for the figure of €50 milliion included in square brackets on a number of elements in this section. It appears arbitrary and unrelated

to the scale of risk and environmental damage and sensitivities and the scale of costs to plan, develop and operate and decommission.

- The gearing of 90% seems extraordinarily high and is indicative of a very high level of risk including consequent on potential volatility of markets. It is considered entirely inappropriate.
- The cash cover ratio should not be limited just to the Irish ORE projects, and certainly not at such a low level as 1.0 in that context.
- There must be absolute requirements in respect of the ability to meet costs and liabilities and this must be expanded to require adequate security for compliance with its obligations, in the form of a bond or guarantee, and that in default of such security MECC or MARA as the case may be shall suspend or revoke the MAC and any consent.
    - Such bonds or securities needs to be specified in respect of all phases – including planning to avoid either speculative MAC proposals with a view to flipping them, to dis-incentivise squatting on MACs, to ensure MACs aren't pursued with a view to quelling competition and promoting the chances of other MAC's and associated consents being successfully advanced as the pressure to deliver on ORE targets increases.
- Through different phases and in light of changing circumstances and knowledge there should be flexibility to increase the financial surety requirements.

- **Failure to address considerations on the conditions to be applied to the MAC and mechanisms around Fit and Proper Persons.**

  It is interesting to reflect on the issues with the evaluation of fit and proper persons in the context of the EPA's licensing regime.

  Some have commented in the context of the EPA regime that the provisions which trigger a revocation of a licence consequent on conviction are too draconian. However it would seem to be sensible that where an operator has been seriously negligent and caused serious injury or harm then it should absolutely be open to revoke a licence and in the context here – revoke the MAC. But some provision for monitoring might be appropriate in some instances with the option to revoke or suspend, in addition to dissuasive penalties.

  There needs to be a flexible and targeted procedure for bringing recalcitrant MAC holders back into compliance, rather than an all-or-nothing blunt instrument, but clearly this needs to be calibrated based on the extent of issue and non-compliance and risk perceived.

Further more General Comments:

Sensitivity Mapping

The expectations created around grants of MAC in the absence of sensitivity mapping remains a major concern notwithstanding the separate Development Consent procedure.

The focus on the expansion of ORE on the east coast is particularly fraught. It is driven solely out of an expedience and view on technical delivery capability without consideration and the ease to which connections to the grid can be made and the extent to which considerations on grid connectivity have been advanced. The language of the consultation document is quite unambiguous on those drivers and is quite stark in respect of its omission of environmental considerations. The extent to which there are environmental sensitivities, and deficiencies in environmental knowledge and deficiencies even in the existing Natura 2000 designations have all been left to the Development Consent Process. For the avoidance of doubt albeit it hardly warrants saying – the absence of information on environmental sensitivities does not signify there are no such sensitivities – just that they are unknown, and in such instances the precautionary principle must be applied.

I think it fair to say it is feared by some, myself included, that this is being done on the expectation of trying to argue Article 6(4) Habitats Directive and IROPI if necessary. That approach fails to respect the very heavy and onerous requirements on the exhaustion of alternatives specified in Article 6(4) amongst other things, and also the implications of the Birds Directive in particular in respect of incomplete designations, and what imperatives must be excluded in such cases as has been severally clarified by the Court of Justice of the EU.

A far more preferable approach is to identify areas with least environmental sensitivities and then work from there. Sensitivity mapping is not expected until end of Q1 2022, and it is entirely unclear how adequate that will be, what further information or consultation will be required to fill in gaps and leverage additional sources of information. There is simply no detail on this in the public domain and it is manifestly unfair to expect the public to engage in this consultation when the scope of that sensitivity mapping is unclear.

It also appears from this consultation document that such sensitivity mapping has absolutely no bearing on the decisions to grant MACs. However there are a multiplicity of other factors under Part 4 Chapter 3 which fall to be considered, and indeed which have yet to be specified in regulations as yet unmade. While the consultation indicates that further secondary legislation is required to be put in place – it is entirely unclear from the consultation and indeed entirely unclear from the MAP Act the scope of such regulations made under s.80(3) and how adequately they will encompass considerations to ensure MACs are not granted in areas of environmental sensitivity.

We have seen very clearly in the context of Dublin Bay how Dublin Port's expansion plans served to try to inform the red line proposals for Natura 2000 designations. It is understandable that people will fear the MAC process and grants of MACs will operate similarly to compromise environmental designations.

So a further over-arching comment is to highlight the inadequacy of the considerations proposed in respect of environmental sensitivities and in light of the deficiencies of the NMPF and the delayed

with implementing not just Marine Protected Areas but also a programme capable of delivering on Good Environmental Status, (GES) of the Marine Environment. That requirement for GES is of course the context in which our Marine Spatial Planning and the ultimate constraint for our Marine Development and activity, as is clearly set out in the recital 2 to the Marine Spatial Planning Directive and which informs any purposive interpretation of the subsequent objectives and provisions of the Directive.

Relevant projects and Relevant Maritime Usage.

It is ultimately submitted that the issues associated with the relevant projects inclusion in the National Marine Planning Framework, NMPF and how this has not been done in accordance with the Marine Spatial Planning Directive is problematic for the whole process, and is unresolved in the approach to the MAC which appears to as it were try to tidy up some loose ends with this new approach based on "relevant maritime usage" as defined in the MAP Act.

It is of course a concern that MAC decisions by MECC are only being considered in respect of ORE as that is all that is provided for in respect of "relevant maritime usage" and section 101 of the MAP Act.

The issue remains of the NMPF still informing development consent decisions – but where the NMPF is flawed in respect of their inclusion of a number of such projects, as they were simply inserted into the NMPF without going through the process set out in the Maritime Spatial Planning Directive. Whereas the MAP Act could have addressed such issues, it has failed to do so, and the concern is now the MAC consents will serve to further confuse the issue of what should proceed and what should not.

The failure of the NMPF to adequately provide as an output a spatial plan of existing and future uses and activities, in accordance with article 8(1) of the Marine Spatial Planning Directive, and which was developed in accordance with the methodology and requirements set out in the Directive remains an issue for the granting of MACs, and the expectations created across the board, and the impact of events which will flow and indeed not flow consequent on the grant of the MAC.

Conclusion

Regrettably issues with storm Eunice compromised this engagement – but it is hoped earnestly that this submission will facilitate some further constructive dialog so we can together with colleagues construct and appropriately robust, inclusive and fair approach to the decisions on the grant of Maritime Area Consents.

Finally, I wish to thank the Department for its consideration of these remarks and re-affirm I would be more than happy to clarify as necessary given the rather constrained response possible here.