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Mr Conor McCabe,
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Y35 AP90.

[Sent by email: Conor.McCabe@housing.gov.ie]

7th October 2021

Dear Conor,

The Irish Planning Institute (IPI) welcomes the opportunity to provide feedback on the Maritime Area Planning (MAP) Bill. The IPI represents the majority of spatial planners in the State, and some 900 IPI Members work right across the planning system – in Planning Authorities, Regional Assemblies, semi-state organisations, An Bord Pleanála, and Central Government, as well as planning consultancies, and for developers. The IPI acknowledges the huge amount of work undertaken by Department officials in drafting the Bill, which seeks to provide a legislative framework for a new streamlined development consent process for activities in the maritime area. The IPI understand Regulations will follow shortly after the enactment of the MAP Bill. In this regard, some of the points and queries noted below may be addressed by way of regulations.

1.0 General Observations

1.1. With the progression of the legislation and the acceptance of MAC applications, there will likely be a glut of Phase 1 projects coming to An Bord Pleanála (ABP) at the same time looking to hold pre-application consultations. In addition, there is significant potential overlap for An Bord Pleanála (ABP) in receipt of applications for Phase 1 projects. Implementing the legislation will necessitate substantial resource investment in capital investment, staffing, expertise and upskilling across the planning system. The IPI recently conducted a survey on resourcing of Planning Departments in Local Authorities which found that marine spatial planning is considered the top area of expertise required. Therefore, there is a significant resource issue for both An Board Pleanála and Local Authorities.

1.2. The progression of the legislation in advance of the Marine Protected Area legislation and further designation of European sites remains an issue for the overall success of the legislation and the potential for judicial review as well as initial decisions in advance of Offshore Renewable Energy Plan and Section 28 guidance. Together this risks the legislation not being consistent with the MSP and MSFD Directives and particular requirements around sustainability, achievement of good environmental status and promotion of sustainable development.

2.0 Observations on Maritime Spatial Plans (MSPs) and Designated Maritime Area Plans (DMAPs)

2.1 S.20 (2) : 'A competent authority (D) shall be deemed to have all the functions necessary to perform functions for the purposes of the designation concerned.'

The IPI recommends prior to designating competent authorities for the purpose of preparing DMAPs, the Minister should ensure the appropriate resourcing of selected authorities.

2.2 S.21: Public engagement in the DMAP process.

Public consultation mechanisms should be established at the early stages to ensure transparency in the overall system, from plan-making to decision-making. The step of a preliminary consultation, such as an issues paper is missing. It does not give citizens and interested parties a chance to voice their opinion from the beginning of the process. Faced with the necessity to take quick actions on climate change, Ireland cannot risk disengaging citizens from the very start. Citizenship and public engagement should accompany every step of plan-making to ensure adhesion and support for plans and later down the line for proposals put forward. Citizen input is required in the drafting of proposals, not just the preparation of drafts. In addition, interested parties may be able to feed into the evidence base required for DMAPs.

2.3 S.25: Clarification of review function.

The planning system has been greatly enhanced since the creation of the Office of the Planning Regulator role to review development plans and local area plans. In particular, it allows for cohesive plan making throughout the planning hierarchy. Clarity is required whether such a step is envisaged in marine management. This section appears to give the reviewing function to the Minister. The wording of the section as it stands does not make way for a potential transfer of functions down the line.

3.0 Observations on Maritime Area Regulatory Authority (MARA)

3.1 The IPI welcome the establishment of MARA as a single-entry point to marine consent. The IPI would welcome clarification on the proposed timeframe of the establishment of MARA.

3.2 Further information is required as to why aquaculture does not form part of the proposed agency's remit as it is an important economic activity in the Irish maritime area.

3.2 The IPI recognises the integral role MARA will play in supporting this legislation and ensuring it will effectively protect and develop our maritime area. The IPI strongly supports a multi-disciplinary approach to MARA's staff and Board composition to deliver on its mandate.

3.3 Given that MARA will be able to enter co-cooperation agreements and make arrangements with public bodies for staff, clarity is needed whether there is any intention that MARA will have a role in creating or overseeing marine plans and the sub-national level plans. If that is the case, the forward planning, enforcement and MAC structures need to be clearly defined and articulated within the legislation.

3.4 The IPI recognises MARA will have an important role in co-operating with other bodies. To facilitate co-operation between the relevant bodies, additional resources will need to be made available. In particular, training and upskilling will be required. The IPI supports the inclusion of a list of statutory bodies that will actively engage with MARA to deliver on its functions to avoid any gaps or overlaps appearing in responsibilities.

4.0 Observations on Maritime Area Consent (MAC)

4.1 The IPI supports the concept of the MAC framework and procedure. However, we have several queries in relation to the process noted below that may be appropriately addressed in the subsequent regulations following the enactment of the Act.

4.2 Clarity is required for MAC applicants whether a MAC will automatically terminate if an applicant fails to obtain planning permission. The IPI notes the wording of the Bill as drafted does not appear to accommodate fresh planning applications. In addition, further details are needed on how long a MAC will remain in place for to ensure clarity and certainty for applicants. Furthermore, the Bill is unclear on whether a separate MAC will be required for the subsea cable route to for example, an offshore wind farm site.

4.3 While the IPI recognise, the MAC is a state consent and considers the property and the person, not the project. In terms of public participation within the MAC process, there appears to be no current provision for same in the legislation. The IPI would encourage the Department to consider an opportunity for public participation at the first step of the regime to deliver a robust and inclusive participatory system.

4.4 MARA will have a central role in the compliance and enforcement of our maritime area but clarity is needed on whether MARA will have enforcement power if the surrender of MAC is not compliant with conditions.

4.5 Clarification is needed on whether the works stipulated under S.92 (1) rehabilitation and emergency works covered by a MAC include the need for an EIA and AA screening to comply with EU Directives.

4.6 The IPI understands a small proportion of our maritime area is privately owned. However, clarification is needed on how the interface between public and privately owned areas will be addressed.

4.7 Consideration is needed on who will be responsible for monitoring and policing any inconsistencies between a judicial review of a MAC and an application for planning permission under the Planning and Development Act 2000 (as amended). Moreover, how will information be shared between Local Authorities, ABP and MARA?

4.8 Further information is required on what fair procedures will be in place to address perceived Ministerial bias and/ or conflict of interest.

5.0 Observations on Licenses Authorising Certain Maritime Usages in the Maritime Area

5.1 S.115(7): The IPI welcome this inclusion to allow for potential colocation of activities.

5.3 S.121 – 122: The Bill does not appear to consider a change of ownership of companies holding licences but seems to consider two options: active holder and surrender. If a licence holder changes ownership, how will the Minister ensure the financial and environmental standing of the new licenced company?

5.4 The IPI note there does not appear to be a proposed legal requirement on licence holders to submit a document similar to a closure and remediation management plan (used in waste licencing) and therefore no requirement to ringfence funds to be used by the appropriate parties to remove devices if a company fails to meet its obligations.

6.0 Observations on Enforcement

6.1 The IPI believe consideration should be given to ringfencing fund at licencing stage to allow for remediation of sites if those are not transferred to another party. Without ringfenced funds, the onus would be on public bodies to remediate sites, resulting in public expense.

7.0 Observations on the Amendments to the Planning and Development Act 2000 (as amended)

Issues arising relating to Chapters III and IV:

7.1 The issue of the designation of the nearshore area and the boundaries between the nearshore areas of planning authorities is central to development for the purpose of this chapter. Clarity is required on how these designations will be made and whether they need to be prescribed in regulations.

7.2 The identification/prescription of documents required for an application appears to be left open to ABP. This puts an additional onus on ABP, especially in the context of recent legal decisions[1] and the level of plans and particulars provided with an application. Further consideration should be given to more prescriptions in the Act or regulations regarding the information to be provided.

7.3 The IPI note that the list of information that is to be provided to the Board in a pre-application consultation includes Schedule 7A information. Firstly, clarification is needed on whether this would trigger the 8 weeks within which the Board would be required to undertake a screening assessment and would it act to make screening for EIA effectively mandatory for the Board and circumvent s.289.

7.4 Scoping of EIA as provided for under s.290 (and under s.300 for alteration applications) will place significant demands on the Board in terms of expertise and resources. Therefore, ABP must be appropriately resourced.

7.5 An application under s.291 provides for EIA/AA, screening for AA or Schedule 7A information 'as required by the Board'. It is not clear how this requirement will be assessed, especially if the applicant does not avail of the screening or scoping provisions.

7.6 The IPI is aware that Offshore Renewable Energy Guidelines are being prepared, which should include the preparation of a community report similar to the report prepared for terrestrial wind farms. Therefore, the IPI suggest the following addition in S.291:

(b) (iii) a community Report

7.7 With regard to the power of the Board to attach conditions to any decision, it would appear that the conditions listed under s.293(4) don't make any reference to or explicit provision for points of detail to be agreed between the applicant and the Planning Authority and ABP. This is unlike the provision of s.34(5) of the principal act. Additional consideration is needed as this could be an issue or potential grounds for challenge.

S.293 Suggested addition:

[1] Sweetman v ABP (2021 IEHC390)

(9) A condition attaching a financial bond should the applicant not be in a financial position to remediate the site should the permission be suspended or expired.

7.8 Regarding s.295 and timelines for a decision, the general approach of specifying a timeframe from a period in the process (i.e. receipt of FI or completion of oral hearing) rather than just from the receipt of application is welcome. Given the nature of the applications, the practicality of a decision in 18 weeks remains questionable and not exactly clear as to what would constitute 'exceptional circumstances' to get an extension of the 18 week timeline.

7.9 Regarding s.297 and alterations to permissions, the provision for pre-application consultations in advance is welcomed. The same issue around the submission of Schedule 7A information as in the initial application and the onus on the Board to make a decision within 8 weeks on screening for EIA arises. However, it appears that the Schedule 7A request is discretionary in the case of alteration applications. Further information is required on what happens if the requester submits the Schedule 7A information anyway. The 146B procedure is quite unwieldy in SIDS with a number of decision stages relating to materiality and the need for EIA and AA, which are not always clear cut and open up potential legal challenges. The only alternative is a design envelope approach, but the current legal context would appear to be fraught and would require a lot of consideration regarding the scope of information submitted and the format of EIARs and NISs. Such an approach would need very prescriptive regulations/requirements around application documentation rather than leaving that up to the discretion of ABP.

7.10 S.304 provides that legal challenges against a MAC shall not act to prevent an applicant who is granted a MAC from making an application. It is not clear what would happen in the event that a MAC was struck down or that the decision on a MAC was remitted back to MARA.

8.0 Conclusion

The Irish Planning Institute is willing to engage further with the Department of Housing, Local Government and Heritage, to provide its expertise and perspective in relation to the issues raised in this. The Institute appreciates the opportunity to provide its views on the MAP Bill. If the Institute can be of any further assistance, please do not hesitate to contact us.

Yours sincerely,

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President 2020 - 2021
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