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Committee Clerk,
Chairperson, and Members
Joint Committee on Housing, Local Government and Heritage

Date: 03rd December 2020

Subject: Submission on the general Scheme of the Marine Planning & Development Management Bill (MPDM)

Dear Committee Clerk,

We welcome this opportunity to contribute to the pre-legislative scrutiny of the MPDM.

Brief introduction

Mainstream Renewable Power ("Mainstream") is one of Ireland's largest independent renewable energy developers and considered a world leader in the development of offshore wind. Mainstream has developed over 5GW of offshore wind capacity, including 25% of the UK's current operational and under-construction offshore wind plant. Mainstream is currently developing one of Asia's largest offshore wind farms in Vietnam, and is developing offshore wind energy opportunities across Europe, Asia Pacific, USA, and Ireland.

Context for the MPDM

Ireland needs a legislative framework for offshore renewable energy which is comprehensive, transparent, robust, and flexible enough to accommodate the growth of the Irish offshore renewable sector in immediate and long-term. Mainstream would stress the need to prioritise not only the MPDM Bill, but also all necessary secondary legislation, guidance and policies which will underpin the legislative framework. To echo the statement of IWEA, the possibility of legislative delay is the single biggest risk to achieving Ireland's target of at least 3.5 GW of offshore wind by 2030, let alone the new target of 5 GW outlined in the Programme for Government.

Mainstream's interest

As a world leader in offshore wind, and an Irish company, Mainstream is extremely positive on Ireland's offshore wind potential. Mainstream is committed to delivering high quality offshore wind projects that meet the latest environmental standards and best practice. Mainstream also want to

deliver value for Irish electricity consumers, both domestic and commercial, and generate additional revenues for Ireland.

Mainstream is currently committed to development activities for three offshore wind projects within Irish waters. Mainstream is targeting areas with high wind resource, low environmental impact, and cost-efficient access to potential grid connections onshore. Mainstream intends to apply for a Marine Area Consent (MAC) as soon as possible following the commencement of the Marine Planning and Development Management Act 2021.

Drawing from international best practice experience, Mainstream would like to recommend the following legislative proposals to the Committee for further consideration as part of the pre-legislative scrutiny process. To summarise the below recommendations in one key message to the Joint Committee, we need to ensure the MPDM Bill and it's supporting legislation ensures that we have a robust, transparent and competitive process to provide Ireland with every opportunity to lay the foundation for a successful Irish Offshore Wind industry.

Recommendations

1. **Marine environmental surveys**: The revised FAQ document (November 2020) indicates that marine environmental surveys, or site investigations, which are a necessary precursor to almost all activities and developments in the marine environment and to any application for development consent, will be subject to a requirement for development consent, or planning permission, from An Bord Pleanála (the Board). A draft MAC will be required, in the first instance, followed by the application to the Board for development consent which will be subject to environmental impact assessment (EIA), and appropriate assessment (AA), or screening for EIA or AA, at which point a MAC will be granted to occupy the area for the purposes of carrying out the survey.

   The Committee will be aware that marine environmental surveys, or site investigations, range from non-invasive observational and monitoring surveys, to geophysical and geotechnical surveys, to grab-sampling and borehole drilling. These activities are fundamental to detailed project investigation and design, as well as conservation and protection measures. These activities need to occur at the earliest stage in the development process, long before any application for development consent is prepared for submission, and in the case of certain ecological surveys, many years of data may be required in advance of an application for development consent. Some site investigation work simply involves the placement of monitoring equipment in a marine area for a period of time.

With the exception of, for example, exploratory drilling, environmental survey work would typically not constitute "works" or a "material change of use" of an area such as to constitute 'development' under the Planning Acts. Environmental survey work typically involves carrying out a specified activity in a specified area for a specified period of time, or periodically, and not necessarily requiring permanent or exclusive occupation of the area while the activity is undertaken.

It is understood that the relevant Minister does not wish to be responsible for the EIA or AA of marine projects and activities, and for this reason it is proposed to deem marine environmental surveys as 'development' subject to a requirement for planning permission from the Board, however the Board does not currently act as a permitting body for *activities.* Planning permission is not required for the majority of terrestrial environmental survey work, whereas licences are required for certain work from bodies other than the Board. Activities such as geophysical and geotechnical survey work would be more appropriately regulated under a licence.

While it is proposed that non-invasive, low-impact marine survey work would be defined as 'exempted development', as soon as an AA is required the exempted status of the 'development' is lost, and an application for planning permission is required. The threshold for AA to be required is exceptionally low. It is virtually impossible to 'screen out' the requirement for AA when operating within the marine environment simply by virtue of operating with vessels and equipment. It is considered that the planning process is unsuitable for marine environmental survey work, and to subject the majority of environmental surveys (due to the need for AA) to a requirement for planning permission from An Bord Pleanála is to ensure that projects will be delayed as the project design process cannot commence properly until survey work is completed.

Consideration should be given to keeping marine environmental surveys within a licensing process, preferably by a body with experience of marine licensing, management and enforcement. In the UK this is the Marine Management Organisation, which operates a three-tier approach to marine survey licensing: (i) self-assessment and exemption, (ii) standard form, and (iii) full application.

A licence is typically personal to the licensee. A licence can be transferred and assigned with the agreement of the licensor. Planning permission typically "attaches to the land" and is not personal to the recipient. This assumes that "the land" is in exclusive ownership or control. The same cannot be said of the marine environment unless a MAC is granted over an area on an exclusive basis, which is unlikely where marine environmental surveys are concerned.

The Department of Housing, Planning and Local Government has received a significant number of applications for marine environmental survey licences under s.3 of the Foreshore Act 1933, as amended, although only a small number of these licence applications have been published publicly on the Department's website. The Department has provided no indication on how those applications will be dealt with prior to the commencement of the MPDM or after, and in particular, whether they will be subject to a requirement for a MAC plus planning permission.

The Minister for Housing, Planning and Local Government has jurisdiction under the Foreshore Act to grant a lease or a licence for certain works or activities out to the 12 nautical mile limit of the foreshore. Beyond that, jurisdiction under the Continental Shelf Act is vested in the Minister for Environment, Climate and Communications. To ensure an appropriate long-term pipeline of projects, applications for marine environmental survey activities beyond the 12nm limit should be accepted and considered by DECC without delay, under the Continental Shelf Act, and if considered necessary transitioned in to the new MPDM regime once commenced. There is currently no application process for proposed marine environmental surveys of areas beyond 12 nautical miles, or of areas which straddle either side of the 12 nm limit, despite such areas having significant development potential for sustainable, cost-efficient offshore wind. It is proposed under MPDM to bring these jurisdictions under the single statutory framework of the MPDM. If marine environmental surveys are defined as 'development' requiring planning permission, that would make the Board responsible for deciding whether certain geophysical or geotechnical survey work out beyond the 12 nm zone is 'in accordance with proper planning and sustainable development' in circumstances where the Board has no such role in relation to similar types of surveys in the terrestrial environment.

Further, planning permission does not typically accommodate overlapping applications by different 'developers' of the same development area, whereas overlapping marine environmental survey work is not unusual. A licensing process, with defined criteria and principles for resolution of conflicts, is more appropriate for marine environmental surveys, than a planning permission process.

In the UK a licence to survey the seabed (The Crown Estate) or a marine area (the MMO) is typically granted within 13 – 14 weeks of the application being made. Applications and licences finance the work of these bodies to ensure that they are sufficiently and appropriately resourced to support of the offshore renewable energy sector in a timely manner. The proposed two-stage MAC and planning process for marine environmental survey work is likely to add considerably to the length of time it takes to obtain permission to carry out marine environmental surveys. Planning applications to the Board take at least 18 weeks to be decided, often longer where complex technical issues arise.

The Board depends also on expert submissions from prescribed bodies including NPWS, Marine Institute, HSA, Commissioners for Irish Lights, and others. In Mainstream's experience of best international practice, the importance of ensuring that the relevant decision-maker has a technically expert team with relevant marine experience, supported by an appropriately resourced senior executive team, with access to external expertise from other bodies and consultants where needed, cannot be overstated.

Further, the process for amending permissions granted by An Bord Pleanála (s.146A and subsequent provisions of the 2000 Act) is complex, subject to judicial review, and time-consuming. A flexible licensing process is much more appropriate to activities that are inherently dynamic, temporary, periodic, subject to oceanic and climactic variability, and sometimes technically complex requiring specialist marine engineering expertise. A delay of a few weeks by a decision-maker can cause a delay of over a year if the 'window' for the particular monitoring or survey work closes before the permission is granted. This can have knock-on consequences for the project programme, which can result in permissions becoming invalid due to the passage of time. A licensing regime is much more flexible and suitable than a planning permission process.

2. **Renewable Energy Support Scheme (RESS) interaction with MPDM –** The grant of a MAC for an offshore renewable energy project should not be contingent on success in RESS. As recognised in the Climate Action Plan 2019, RESS is not the only route-to-market. A developer should be entitled to a MAC where a route-to-market has been demonstrated, whether via RESS, Corporate Power Purchase Agreement (CPPA), or any other commercial arrangement that may be put in place to fund the construction and operation of the project. The General Scheme appeared to suggest that a MAC would be tied to RESS.

   There are a number of factors driving the timeline for the MPDM, one of which is the desire to run the first offshore RESS auction in 2021 to include so-called 'Relevant' projects. Mainstream would just make the observation that a RESS auction in advance of development consent could undermine confidence in both the MPDM and RESS process.

3. **Non-statutory prioritisation of projects –**Mainstream is aware of the challenge faced by the Departments in advancing the MPDM, NMPF, RESS, Offshore Grid Strategy, and future OREDP, with limited resources, during a pandemic, and coinciding with Brexit preparations. Mainstream commends the Departments for their continuing efforts to engage with the offshore renewable energy industry on these matters. At a recent briefing, however, it became clear that after the so-called 'Relevant' projects, the Departments have adopted a non-statutory prioritisation of projects. No analysis or criteria have been published to underpin this prioritisation. There is no statutory basis for it. There has been no opportunity

for Mainstream to enter into a process to be considered for prioritisation. It would appear that the Departments have simply decided to focus their resources on certain applications that have been made by certain prospective developers in certain geographic areas, before they allow any other potential projects to progress. Resourcing constraints within a Government Department ought not to be the determining factor in whether projects are allowed to progress to the stage of being able to apply for a marine environmental survey licence or permission.

Mainstream ask the Committee to consider whether a non-transparent, uncompetitive, non-statutory approach to the prioritisation of future projects is consistent with the EU Renewable Energy Directive (Recast), the objectives of the Climate Action Plan, and the objectives of the NMPF which is to move towards a plan-led approach to offshore renewable energy development. Mainstream's view is that it is not.

Based on international best practice experience, Mainstream recommends that the MPDM and the related legislative and policy framework should support future projects to progress through the project development phases in a timely, transparent, and competitive manner, based on policies, principles and criteria that recognise the significant expertise of the offshore renewable energy sector in identifying and developing sites with significant resource potential, and their desire and ability to design their projects so as to ensure a high level of protection for the environment, including marine biodiversity.

The offshore renewable energy industry needs open market competition, to drive efficiencies, and to ensure that projects are developed in line with industry and environmental best practice. Ultimately, this pays off with value for electricity customers (domestic and commercial) and will underpin the healthy, sustainable growth of an indigenous and international offshore wind sector in Ireland.

4. **Change of control** –Typically a project is developed by a Special Purpose Vehicle (SPV) or project company, and it is quite common for the ownership of the SPV to change more than once within the lifecycle of the project. Under the Foreshore Acts a lease or licence is granted to the lessee or licensee, and cannot be assigned, transferred, or used to secure a loan, without the prior written consent of the Minister. This has proved problematic where a project requires financing / re-financing, or is the subject of an M&A transaction.

   Mainstream recommends that, in order to ensure that the MPDM is fit for purpose, the legislation should facilitate changes of control and ownership in a project throughout the various stages in the lifecycle of the project, from the initial MAC application stage, to the development consent stage, to the construction and operation, and ultimately the

decommissioning and restoration stage. Restrictive conditions and covenants prohibiting or effectively prohibiting the normal commercial activities associated with the development and management of assets should be avoided where possible. Approvals for change of control should be facilitated in a streamlined, timely, and transparent process.

It is recommended that the MPDM should provide for the possibility that a project may change ownership at one or more times during the multi-stage consenting process for offshore renewable energy projects, and prior to decommissioning.

5. **Onshore, terrestrial planning** – The focus of the FAQ and General Scheme is, of course, marine planning, and emphasis has been placed on the desirability of having a single marine area consent for marine development. However, the onshore terrestrial planning for the grid connection and support infrastructure is critically important and the Committee is requested to explore ways in which to make it more robust and fit for purpose. For example, it is currently necessary to enter in to pre-application consultation with the Board pursuant to s.182A of the 2000 Act to determine whether or not grid infrastructure and substations constitute 'electricity transmission infrastructure' for the purposes of that section, in order that an application may be made directly to the Board as a Strategic Infrastructure Development ('SID'). It is recommended that any onshore infrastructure required to support an offshore wind farm should be clearly designated as 'Strategic Infrastructure Development' so that there is no ambiguity as to the procedure to be applied. Furthermore, whereas the Board has an express power under s.37G of the 2000 Act to grant permission for SID listed in the Seventh Schedule of the 2000 Act, notwithstanding that the proposed SID would materially contravene the development plan or local area plan for the area in which the development would be situated, there are no equivalent provisions pertaining to electricity infrastructure under s.182A or s.182B (or indeed gas infrastructure under the equivalent provisions). Given how narrowly the Courts have construed the Board's power to materially contravene a development plan or local area plan, and the criteria to be applied when a material contravention is engaged (s.37(2)(b) of the 2000 Act), onshore grid infrastructure for offshore wind projects should be clearly and expressly capable of being granted by An Bord Pleanála, notwithstanding that it would contravene a development plan, local area plan, or planning scheme (where applicable).

Summary of recommendations to the Committee

1. Marine environmental surveys which do not constitute "works" or a "material change of use" and which are temporary, short-term, periodic, or transient, should not be subject to a requirement for planning permission or designated as 'exempted development' for which planning permission is only required if EIA, screening for EIA, or AA is required. Marine

environmental surveys should be subject to a streamlined, proportionate, transparent licensing process, operated by a body with relevant marine environmental and engineering expertise and experience. If necessary, funding mechanisms could be put in place to ensure that the licensing body is appropriately resourced or can access appropriate technical resources where necessary to meet demand from the sector.

2. The grant of a MAC for offshore wind should not be conditional on RESS success.

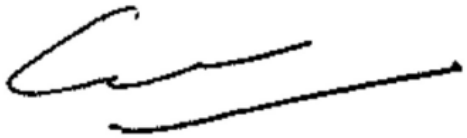
3. There should be no informal, non-statutory prioritisation of projects following 'Relevant' projects without a fair, transparent, competitive process based on published criteria and analysis. If there are administrative or resourcing barriers to this, those should be addressed to remove those barriers, in accordance with the State's obligations under the Renewable Energy Directive (Recast).

4. There should be no unnecessary barriers to projects transferring ownership or control within the life-cycle of the project, including during the MAC and development consent process.

5. Onshore, terrestrial planning legislation for electricity grid infrastructure, including substations, requires attention in light of recent Court decisions. The MPDM should deal expressly with the powers the Board requires in order to determine applications, notwithstanding that the proposed development would materially contravene a development plan, local area plan, or planning scheme (where applicable).

We hope that the above comments will constructively support the Joint Committee's pre-legislative scrutiny of the MPDM Bill. We are happy to appear in person to provide oral evidence to the Joint Committee if required or should you need further written information on the above, please do not hesitate to contact us.

Yours sincerely,



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