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Offshore Renewable Energy Projects in Ireland

Overview of the Risks and Challenges in the
Planning Process and with Judicial Review
2023–2030

Table of Contents

Introduction	1
Policy and Legislative Framework	3
The Consent Processes	4
The Risks: Timelines and Delays	6
The Planning Issues Considerations and Constraints	11
Enabling Infrastructure: Ports and Grid Network	13
Resources and Skills	14
Judicial Review	16
Summary	20
Appendix – Timeline Chart.....	A-1

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Introduction

This Briefing Document is intended to outline the current and evolving policy, legislative framework, planning consent (development management) and legal/judicial environment to support the development of offshore wind/renewable energy (OWE/ORE¹) within the Irish jurisdiction².

It is also intended to highlight areas of potential risks and the consequential delays which ensue.

The Irish Government has set ambitious goals to produce alternative renewable energy under the Climate Action Plan 2021 and accompanying legislation, which is to be welcomed.

However, the successful navigation of the detailed, multi-faceted, and multi-step process will require a strong knowledge of the consenting and judicial review system and an awareness of the risks, potential bottlenecks, and stumbling blocks which are likely to arise throughout this lengthy process. These risks are often hidden within the complex architecture of the development process from project inception to the final consent/licensing and green light for energy production.

This Briefing Document provides an update on the current risks and challenges within the Irish consenting/planning area and the Judicial Review processes which are particularly relevant to the offshore wind sector.

As matters stand, we believe Ireland will not deliver on its 2030 targets of 5GW of Offshore Wind production due to a lack of resources in the planning approval process and major bottlenecks in the areas of Judicial Review and legal challenges in the courts system. Indeed, the anticipated 8-year cycle for the delivery of an offshore wind project is more likely to be a 10-to-15-year cycle or longer unless immediate and drastic actions are taken. See the attached Chart at Appendix 1.

Government should consider the immediate appointment of a single suitably qualified and experienced person or agency to drive and implement the required changes, resourcing, and acceleration that are now required in this multi-faceted and critical programme. That programme is in our view otherwise bound to fail to reach its targets as currently organised. A high-level committee will not suffice due to the multitude of agencies, government departments, and resources required across all to meet the 2030 targets. There must be a single point of contact, authority, and accountability.

Legal challenges and judicial review applications will inevitably occur in all upcoming and future offshore wind development projects. Their outcomes will be determined in the newly established Environmental and Planning Division of the Irish High Court. This will be by no means a straightforward or speedy process despite Governmental assurances. This may be exacerbated by the current tendency to send certain matters or questions of law and the interpretation of EU Directives to the European Court of Justice for determination. This area

¹ OWE: Offshore Wind Energy, ORE: Offshore Renewable Energy

² Extent of Ireland's Maritime Area (490,000 Km²) which is 7 times its land mass.



of dispute resolution often involves such referrals given the multitude of EU laws relevant to environmental law in particular.

A key action for all offshore wind development projects will be to identify and understand the principal risks to the planning and consent process (discussed further in this Briefing Document), including Judicial Review. It may not be possible to completely avoid Judicial Review challenges; there are constitutional obligations regarding access to court and the right to effective judicial remedies in the event of errors in decision making processes by a Government body. However, it may be possible to reduce risk and mitigate against further delays if planning applications are correctly framed and presented in the first instance. This can help to avoid a return to the beginning or midway along the 'planning consenting process' as a result of legal challenge.

Mitigating such risks will include identifying deficiencies, inefficiencies, and challenges and the likely issues to be faced and anticipated through each step of the process. This must involve recognising the bottlenecks which have long been identified in the unwieldy planning process. It is hoped that this Briefing Document will assist in highlighting some of the areas to focus on to minimise delay and disruption to an individual project during the lifetime of the consent process.

The overarching objective is to assist in adding value, minimising cost, reducing risk, and in creating more certainty for offshore wind development projects.



Policy and Legislative Framework

The suite of legislation and policies set out below establishes the policy framework which we say should inform all future decisions in the Irish Maritime Area and Offshore Renewable Energy (“ORE”).

This includes EU legislation and domestic Irish Legislation at primary and secondary level.

- Climate Action Plan, 2021
- National Marine Planning Framework (NMPF), May 2021
- Programme for Government (5GW ORE by 2030, 30GW ORE longer term, 30% MPAs by 2030)
- Maritime Area Planning Act 2021. This forms the legal basis for marine plans (including the NMPF) and for a new development consent procedure to replace the foreshore legislation.
- Marine Planning Policy Statement (MPPS) (2019)
- Offshore Renewable Energy Development Plan, 2014 (70GW potential ORE) Planned Review.
- Report on expansion of Ireland’s Marine Protection Areas
- Directive 2014/89/EU – Maritime Spatial Planning Directive
- The proposed Planning and Development Act 2023

It is expected that Ministerial guidelines and circulars will also be published in the near term to assist consenting authorities and project promoters.

The **Maritime Area Planning Act, 2021** is the key primary legislation which establishes the framework for the maritime consenting process.

Enacted in December 2021, the main provisions of the Act relate to:

- Forward planning
- State consent – Maritime Area Consent (MAC) (Initially DECC³ then MARA⁴)
- Planning Consenting. Development management (ABP)
- Licencing of activities
- Enforcement (via a new agency (MARA) who in the medium term will have responsibility for MACs)

³ Department of Energy Climate and Communications.

⁴ Maritime Area Regulatory Authority to commence operation formally Q3 July 2023



The Consent Processes

The various stages of the planning and consent process are set out below with the Government Department/Agency with responsibility listed.

1. **Foreshore Licensing (DHLGH)⁵**

The current foreshore license regime is due to be retired and replaced with a new licensing process to be administered by MARA.

2. **Maritime Area Consent (MARA)**

This will be underpinned by the MPPS⁶, MPA legislation, and new planning guidelines. MARA will be responsible for assessing applications and the issuing of licences. These will be known as Marine Area Consents (MACs). It will also have responsibility for ongoing enforcement.

3. **ORESS⁷ (DECC)**

At time of writing four ORE sites have been approved, three were unsuccessful. The next auction under the ORESS is expected to take place in 2024.

4. **An Bord Pleanála (ABP)**

Once a MAC has been issued an applicant will be eligible to apply to ABP for a development envelope opinion and a pre application process (PAC) can commence.

This will be followed by a full application.

Where ABP consider that IROPI applies, a separate consenting process is initiated, and in this instance, it will be up to the Minister to decide. The Minister/Department responsible for this potentially accelerated process is currently under review, with impending changes to legislation proposed.

5. **Enabling Infrastructure: Grid Connection (Eirgrid)**

This process can only commence once planning consent has been received from ABP (including a successful Judicial Review Process)

6. **Enabling Infrastructure: Ports (DOT⁸)**

Minimum port capacity is a serious issue at present. Belfast Port is the only location which can handle the requirements of an ORE project.

7. **Regulatory: CRU (Commission for Regulation of Utilities)**

Assessing and approving applications for licences to generate and construct.

⁵ Department of Housing, Local Government and Heritage.

⁶ Marine Planning Policy Statement

⁷ Offshore Renewable Electricity Support Scheme

⁸ Department of Transport



The process has two distinct parts. One relates to licensing, planning, environmental, and financial aspects for individual projects and the other relates to the energy itself, the auction process, and the grid connection.

Both processes rely on the other and a project must plan for the successful navigation of both process in an orderly sequence to ensure minimal disruption to project realisation.

There are currently two phases under consideration. Phase 1 is active, and Phase II will commence shortly.

Headline Objectives of the Maritime Area Consent (MAC) Stage

- Management of maritime space conflicts
- Assessment of financial and technical capabilities of project promoters
- Public interest considerations
- Protection of State's property interests
- Consent portfolio management

Headline Objectives of the Offshore Renewable Energy Support Scheme (ORESS)

- To support sustainable and stable electricity prices over a medium term
- To promote competition in the offshore renewable energy sector
- To enable an orderly process for connection to the grid network

Headline Objectives of the Planning Consenting Stage (ABP)

- To allow case specific environmental assessments
- To ensure compliance with the principles of proper planning and sustainable development
- To allow public and stakeholder participation

Headline Objectives of the Grid Connection Process (Eirgrid)

- To ensure an orderly process for connection to the grid
- To ensure that the network has adequate capacity for connections



The Risks: Timelines and Delays

With any new statutory consent process there will be risks which can lead to delay and impact on timelines. It is essential to understand, identify, and quantify risks at the earliest possible stage to minimise their impact on project delivery.

The consent process for ORE in the Irish system has such risks and challenges. It is an opportune and important time to identify and assess those risks. Whilst progress has ramped up in recent months there remain a number of significant outstanding issues. Some of these are outlined below.

Progress milestones to date:

- National Marine Planning Framework (NMPF⁹) –June 2021
- Maritime Area Planning Act –December 2021
- DECC invited MAC applications from Phase 1 projects on 24 April 2022
- First Phase I PAC requests to ABP – early Q3 2022

Expected future timelines/potential delays:

- First applications – none received to date. PACs have not issued from ABP due to lack of guidance and resources. Inadequate Information from applicants and lack of developer readiness.
- Review of Offshore Renewable Energy Development Plan (OREDPlan). It is envisaged that this would be sectoral plan for ORE and would identify areas for development. No definitive timeline but likely to be post Phase 1 and 2 ORE project applications.
- Marine Protected Areas (MPAs) – Consultation and report (July 2021). Designation of MPAs requires legislative change. The DHLG&H have indicated that while the MPA Bill 2023 is planned to come before the Dáil by summer 2023 the necessary primary legislation and detail may be as much as two plus years yet. It is therefore unlikely to be finalised during the lifetime of the current government.
- First decision dates from ABP uncertain but likely to be a minimum of 2 years.
- First judicial reviews uncertain but likely to take 18 months post ABP decisions (excluding ECJ referrals) which can take between 1 to 4 years.
- There is an expectation that each project will be subject to a judicial review challenge following the original planning decision.

⁹ A guidance document or circular is expected to assist with the interpretation and implementation of this process as part of the consenting process pending designation of the MAPS to respond to case law, i.e., where ABP requires a benchmark upon which to assess potential impacts.



- No project is expected to reach Final Investment Decision (FID) until judicial review is completed.
- 4-year lead time for vessel ordering, however a large multi-jurisdictional developer may benefit from a portfolio approach.
- Turbine installation begins post vessel mobilisation and the installation work will take approximately three years: assuming no other supply chain constraints present.
- Assuming sufficient port capacity available by 2027 to deliver on OWEP targets.
- Date of first grid connections uncertain.

Potential challenges at each stage of the consenting process:

1. Foreshore Licensing (DHLGH)

Currently responsible for foreshore assessment, obtaining ministerial consent and managing the existing foreshore estate including ORE, cabling, site investigations, port work, etc.

The current system is notoriously slow. There are no statutory or mandatory timelines in place with the DHLGH for issuing of foreshore licences. This has led to significant delay to marinas, harbours, port development, and other infrastructure projects in the past.

This regime is due to end once MARA is fully operational.

2. Maritime Area Regulatory Authority (MARA)

Responsible for granting licences and MAC applications and enforcement under the MAP Act.

The MARA Policy architecture has not been completed to date. The high level MPPS is in place however the MPA legislation is not. This will create serious risk at the judicial review stage which will be referred to again.

(See Judicial Review)

The relevant planning guidelines for MARA have not issued yet which will also lead to uncertainty and a need for engagement / understanding when published.

3. National Planning Authority (ABP)

Responsibility: Assessing and determining ORE, port, grid, and related planning applications.

ABP is struggling with a significant under resourcing issue at present. It should also be noted that this is exacerbated by the general absence or infancy of this specialism

in Ireland. The agency has a heavy pre-existing workload with NPAs¹⁰, SID¹¹ projects onshore renewable energy projects such as solar and wind. It has a significant backlog of cases at present which has led to significant delays across all existing consent types.

In addition to the new maritime area consenting function ABP is responsible for dealing with appeals under the new residential zoned land tax act (an additional 600 appeal cases in the past three weeks) and must handle appeals under the new LRD process for large scale residential projects.

It is being reported that ABP has over the last two years been sanctioned to increase its workforce by 33% to 300 WTE approx. However, the existing backlog and surge in new appeals along with the responsibility for new functions means that the agency will continue to struggle to meet its SOPs¹² for the foreseeable future. It is not simply a matter of increasing the number of staff. It is also critical that the requisite skill sets and experience are procured.

(See Resources and Skills)

The delay in identifying environmentally sensitive areas under the relevant EU Directives and domestically transposed environmental legislation relating to SACs¹³, SPAs¹⁴, and MPAs will pose a significant hurdle for ABP planners assessing individual cases. The vacuum in terms of designations and the identification of “qualifying interests”, habitats, and bird and animal species will create uncertainty and potentially serious planning and legal vulnerabilities.

4. IROPI¹⁵

It is envisaged that IROPI (Articles 6(4) of the Habitats Directive) will be a recurring issue for many ORE projects. To date no significant project has progressed through the 6(4) process.

Galway Port is the only significant infrastructure project to undertake the IROPI route. It has yet to be approved 10 years since the project sought approval.

Delays relating to the successful resolution of the IROPI question will have impacts for ORE in the Irish Sea and elsewhere.

IROPI has become a significant issue in Scotland and wider afield in Europe. It is important for project promoters to be aware of the issue.

¹⁰ Normal Planning Appeal

¹¹ Strategic Infrastructure Development

¹² Statutory Objective Period

¹³ Special Area of Conservation (EU Habitats Directive)

¹⁴ Special Protection Area (EU Birds Directive)

¹⁵ Imperative Reasons of Overriding Public Interest



Article 6 (4) provides that, in circumstances of a negative Appropriate Assessment by the Competent Authority, a project can still be given consent subject to the following:

- The absence of alternative solutions
- Imperative reasons of overriding public interest, including those of social or economic nature applying
- All compensatory measures necessary are provided to ensure that the overall coherence of Nature 2000 is protected. The Commission are notified of the compensatory measures adopted.

Stages of IROPI Process

The IROPI process is labyrinthine.

For IROPI to be granted:

- Two Ministers must consult (DECC and DHLGH)
- Further consultations are thereafter possible: between the Minister, ABP, and the applicant which may result in modifications
- An EU Commission opinion required in certain circumstances
- If compensatory measures sufficient: ABP may grant
- The Minister (DHLGH) informs Commission (includes compensatory measures)
- Compensatory measures not sufficient: ABP shall not grant

The Government is aware of this challenge and is exploring if IROPI can be addressed in parallel with planning application in the plan-led regime and that these activities do not impact the planning timeframes.

5. Enabling Infrastructure: Ports

None of the Tier 1 ports identified in the Irish Port policy have capacity to facilitate the construction and support of ORE projects.

The Government is aware of this challenge and is latterly seeking to encourage the necessary investment in this enabling infrastructure.

At present the Port of Belfast is the only port on the island of Ireland with the scale and capacity to accept the large turbines being imported.

(See Enabling Infrastructure: Ports and Grid Network)

6. ORESS I & II

The most efficient aspect of the process to date has been the successful auction in May 2023 under ORSSS I, with four large and significant projects being awarded the right to sell energy to the grid at the agreed rate and to advance to the planning stage.



7. Grid Connection (Eirgrid)

At present the national grid does not have the capacity to absorb the 3GW of energy being proposed under the ORESS.

It is expected to begin planning for the creation an offshore electricity grid which will connect to the onshore Irish grid and the wider European grid. An interconnector from Ireland to France has planning consent from ABP and is being advanced.

It is expected that the grid infrastructure will be in place to the extent required when the phase 1 projects emerge from the planning and judicial review process.

8. Supply Chain

This is an area of concern, but it is not an area which will be covered in this Briefing Document other than to highlight it as a critical part of the overview process and an area which will merit its own separate review and consideration.

9. Phase II Projects

The next round of consents is expected to tie in with new national policy and MPAs.

MARA establishment brought forward to Q3 2023 with first call for applications in Q4 2023.

Competitive MAC will be required before entering the planning process.

Grid Connection Assessment (GCA) can be completed within 6-months.

GCA will be required as a pre-requisite for qualification for ORESS2, starting in Q1 2024.

ORESS2 will take place in 2024.

Planning permission pre-application will begin at the end of 2023 post MAC.

Turbine installation will begin post vessels mobilisation and the installation work is expected to last for 3 years if no other supply chain constraints present.

Risks:

The potential risks for Phase II mirror Phase I with risks in planning / consenting system capacity. There is a risk the process for allocating seabed leases becomes gridlocked and challenges delivering onshore grid reinforcements.

The Planning Issues | Considerations and Constraints

1. Development Management / Consent – Main Provisions

- The new Maritime Area Planning legislation covers all forms of ORE, cables and interconnectors, gas storage, and ports / harbours / dredging. Fisheries have been specifically excluded.
- Mandatory pre application consultation for applications to ABP.,
- Process of pre applications and applications very similar to existing terrestrial Strategic Infrastructure Development applications.
- The “Development envelope” opinion is a new piece of legislation yet to be tested in the Irish courts, although introduced in response to recent case law. It allows for flexibility and options in an application, but these must be agreed prior to the making of an application. It is not clear what happens if they arise during application / assessment.
- Provision for public consultation, statutory consultees.
- Provision for further information requests, revised plans, oral hearings.
- Provision for modifications similar to s.146B/C¹⁶.
- Legislation provides for the Phase 1 ORE projects (mainly on the east coast) to be prioritised in Marine Area Consent and progression to application stage, (Phase 1 / Relevant projects).
- Criteria for Phase 2 projects being developed.

2. Planning Issues for Consideration by ABP

There are several planning issues that may need to be considered when assessing a planning application for an ORE Project including:

- **Coastal erosion:** The potential impact of the ORE Project on coastal erosion patterns will need to be assessed.
- **Marine wildlife:** The potential impact of the ORE Project on marine wildlife, including fish, birds, and other animals, will need to be considered.
- **Shipping and navigation:** The ORE Project may impact shipping and navigation in the area, and this will need to be taken into account.

¹⁶ S146B/C : the Board may, on the request of any person who is carrying out or intending to carry out a strategic infrastructure development, alter the terms of the development the subject of a planning permission.



- **Seabed habitats:** The potential impact of the ORE Project on seabed habitats, including any potential impacts on endangered or protected species, will need to be assessed.
- **Fisheries:** The ORE Project may potentially impact traditionally important fisheries areas such as for prawns and shellfish in the Irish Sea which are static.
- **Wave and tidal energy:** The potential for the ORE Project to interfere with wave and tidal energy generation in the area will need to be considered.
- **Distance from shore:** The distance of the ORE Project from the shore will need to be considered when assessing the potential impacts on the local community and environment.
- **Accessibility:** The ORE Project will need to be accessible for maintenance and repair purposes, which may require the development of infrastructure such as ports or helipads.
- **Potential economic benefits:** The potential economic benefits of the ORE Project, such as job creation and increased tourism, will need to be considered.
- **Potential economic impacts:** The potential economic impacts of the ORE Project, such as the effect on local businesses or property values, will need to be assessed.
- **International law:** The planning application will need to be assessed in the context of relevant international law, including any treaties or agreements that may apply.

3. Specific ABP Risks

- ABP lacking in the necessary resourcing, skills, and availability of relevant consultants.
- There is, in our view, a policy disconnect. For example:
 - No location specific plans available until OREDP2 (most likely to be available post Phase 1 & 2) arising from the “plan led” approach).
 - MPA legislation (most likely to be enacted post Phase 1 & 2)
- Initial projects will be reliant on the high level NMPF and not on detailed planning guidelines.
- Background information / surveys. This has been a big issue in maritime consenting in ORE projects in Scotland and has led to controversy and delays. This may result in a reliance on the IROPI process which is untested in Ireland.
- Lack of clarity around other aspects of MAP Act – e.g., single application option, commencement dates.

Summary

Significant resource and policy issues and slow progress with the legislation and agencies will undoubtedly lead to delays.



Enabling Infrastructure: Ports and Grid Network

At present the Port of Belfast is the only port on the island of Ireland with the scale and capacity to build the large turbines being deployed in ORE Projects.

There is building momentum behind ensuring that several Tier 1 Irish ports would be readied to provide enabling support to the ORE sector.

It should be noted that all proposals will require a MAC in the first instance and secondly require planning consent (if not already achieved) and be subject to judicial review.

Case history has shown that those opposed to onshore renewables have also targeted the enabling infrastructure such as substation applications / grid improvements / interconnectors, battery storage park etc. Several large wind projects have been severely delayed or abandoned as a result.

There is still a non-alignment in SID between substations and connected applications with some being direct applications to ABP and others to local authorities leading to significant delays.

See below a summary of the various relevant ports and their predicted state of readiness to provide the necessary services to the ORE sector.

Shannon Foynes Port

Reported to be ready by December 2028. Investment funding being sought.

Port of Cork (Ringaskiddy)

Reported to be ready by Q1 and Q2 2026. Planning consent in place. Investment funding being sought.

Cork Dockyard (Verolme)

Reported to be ready by 2027.

Rosslare Port

Reported to be ready by 2027. Recently re categorised as a Tier 1 Port. Investment funding being sought.

It is unclear whether the reported timelines are achievable where planning and Judicial Review challenges have not been resolved.

Eirgrid Progress

Grid Connection Assessment (GCA) can be completed within 6-months.

GCA will be required as a pre-requisite for qualification for ORESS2, anticipated to commence in Q1 2024

The next auction for Phase 2 ORE projects under ORESS2 expected to take place in 2024.



Resources and Skills

For any new process to be implemented successfully the necessary skills and resources need to be in place in the key state consenting agencies and the governing Departments (DECC and DHLGH).

It is also essential that offshore wind project promoters have the necessary skills to enable their applications to proceed through the new processes as speedily and cost effectively as possible.

For over three years ABP¹⁷ has been seeking additional resources from its parent department in anticipation of the Marine consenting function in addition to its already considerable workload in other areas of development management.

To date ABP has been dramatically under-resourced and this remains a critical risk for this key stage of the consenting process. The timelines which are anticipated by Government are overly optimistic based on the lack of capacity in the agency and ultimately the very optimistic forecasts will not be met.

The agency has only recently been sanctioned to seek an additional 100 WTE staff to bring it to 300 WTE. Assuming this sanction is implemented the recruitment process will take several months. It is unlikely that the skills required can be recruited in such a short time and will require overseas recruitment in addition to domestically. It should also be noted that the private sector is competing for recruitment of the same experts and skills in what are very specialist fields.

All of this means that official Government estimates of timelines appear on their face to be optimistic and open to question or challenge. Project promoters will need to be pragmatic and realistic when setting their own targets and financing models.

The new agency MARA¹⁸ is adopting responsibilities from the Department for several significant obligations as well as assuming new and complex functions.

It is unclear as to whether the necessary staff and skillsets will be in place in the near term to meet its obligations. It is reported that the Chair and CEO of the agency will commence their roles in July 2023. It would be expected based on the experience of both the Land Development Agency (LDA) and Office of the Planning Regulator (OPR) that the new agency will take several months to attain organisational readiness.

MARA is still in its early establishment phase.

From the brief and non-exhaustive list below the range of specialist skillsets required by ABP/MARA, Local Authorities, and the private sector is apparent.

Marine Planners	Botanists	Ocean Engineers
Marine Archaeologists	Zoologists	Acoustical Engineers

¹⁷ [An Bord Pleanála](#)

¹⁸ [Maritime Regulator](#)



Marine Ecologists	Marine Biologists	Vibration Engineers
Avian Ecologists	Marine Geotechnical Engineers	Marine Mammal Biologist
Fisheries Specialists	Shipping / Navigation Specialists	Military Specialists
Landscape Architects or Visual Impact Assessment Specialists		

This list is focussed on the planning consent area processes and is in addition to the fields of legal, finance, project management, and other skills required over the lifetime of an ORE project.

It is apparent that within some sections of the ORE development community there is a lack of awareness of the risks that faced terrestrial elements of renewable energy in wind, solar, etc. This included protracted planning permissions, grid connection issues, and Judicial Reviews.

Judicial Review

The process of Judicial Review was originally intended to be limited to a review of any official decision-making process; they have now evolved into a detailed critique of the process but more ominously have begun to dive into the merits of decisions.

In the last number of years there has been an exponential increase in cases of Judicial Review against ABP.

There has been a trend toward much greater scrutiny by the judiciary of decisions taken by the various government agencies. The "O'Keefe principles¹⁹" are often no longer followed. There has been an undermining of the faith in the expertise of the decision makers in many different sectors.

It's inevitable that many ORE decisions will be judicially reviewed. The reviews will be initiated by a combination of applicants to the courts: ENGOs, Residents Groups, and Individuals. Considerable expertise has built up in specialist legal firms and amongst several serial litigants who take Judicial Review cases on behalf of those opposed to development for various reasons.

Judicial Review challenges often occur following the ABP application at decision stage. However, it is possible that the pre-application process may also be challenged given the history of challenges to pre applications in SID and SHD.

In 2020 the entire NPF²⁰ was judicially reviewed on environmental grounds but this was unsuccessful. In 2017 the National Mitigation Plan for climate change was quashed by the Supreme Court in Judicial Review proceedings brought by Friends of the Environment.

We have listened to the stated objectives of ORE project promoters. From what we have learned we set out below the various areas of interests arising in this critical group of stakeholders:

1. **Legislative Vulnerabilities**

These are some of the current gaps in the legislation which may well encourage applicants to take more Judicial Review cases and to test domestic and EU legal and environmental principles in the High Court and Supreme Court and beyond to the European Court of Justice.

Habitats Directive (AA)

A lack of clarity in relation to SAC and SPA designations for land use and related appeals against such designations or lack thereof and upcoming secondary legislation may have a major impact on "firmness" of planning decisions. MARA will be responsible for AA "screening" but some of these decisions may be challenged IROPI

¹⁹ Under the O'Keefe principles, a Court cannot carry out a "substantive review" of the material in order to form a view as to whether the material can uphold the conclusion of the expert decision-maker.

²⁰ National Planning Framework



has been a major issue in Scotland and may require additional primary legislation in Ireland.

MPAs

Whilst it is proposed to lay a new draft Bill on Marine Protected Areas before the Dáil before the 2023 summer recess, there is a lack of detail around the legislation which may weaken the planning process. This disjointed approach will ultimately lead to serious risk for the integrity of the system and a lack of progress on MPAs will undermine the robustness of planning and consenting decisions when challenged in the courts.

2. Resources Shortfall

MARA has recently and belatedly been established and the CEO is taking up her role in July 2023. Based on the evidence with the LDA and OPR it will take several months (Q4 2023) before the agency is fully operational. This will lead to potential challenges in the courts as to the appropriate levels of input and engagement by the agency in the maritime area planning and consenting process.

Recent reports in relation to ABP have indicated it lacks sufficient resources to progress pre-application / applications in a timely manner. This will mean delays to all the timelines currently being advanced by Government ministries and leads to uncertainty and risk. This may lead to additional grounds for legal challenges.

3. Material Contravention of Local Authority Development Plans

Individual local authority development plans vary considerably in their approach to planning and zoning matters. It is not infrequent that these plans can be at odds with national policy and lack a coordinated approach.

In certain circumstances policy obstacles are introduced through the creation of protected views, rezoning land to sterilise it from development, and the expansion of environmentally sensitive areas, SACs, etc.

This is likely to have downstream impacts and challenges for enabling infrastructure such as grid connections, cabling, electricity sub stations etc.

There is a historical legacy of political intervention in Development Plan making. In at least one county a policy was introduced to limit the number of consents that could be granted in the functional area contrary to national policy and without a sound rationale or planning basis and had to be overturned subsequently by Ministerial Direction in 2022.

4. High Court / Environment and Planning Court

The New Environment and Planning court list established as a division of the High Court has been welcomed in many quarters especially by the ENGOs, politicians, and some specialists in the legal profession. There is a belief that this, in conjunction with changes proposed in the proposed new Planning and Development Act due for enactment in 2022, will lead to an expedited Judicial Review process.



There is little evidence to suggest this will be the case and it is clear that the timeline for completion of fully fought Judicial Review cases will remain of at least 12 – 18 months based on the volume of cases being taken and the availability of judges dealing with Judicial Review in the planning and consenting area, but this may be assisted by the appointment of additional judges.

It has been reported that the judges handling the current Judicial Review list will be re-assigned to the new Planning and Environmental division of the High Court. It is unlikely that the current trend in recent decisions is likely to change.

New case law is being made in the planning and development space on a near constant basis affecting past and future decisions in profound ways. This can have the effect of “changing the goal posts” for infrastructure developers, planning experts, planning decision makers.

In many instances, long-held views and interpretations by international experts in planning and design and regulation are being re-interpreted at the High Court.

This poses serious challenges for infrastructure developers, consenting authorities, decisions makers, and advisors (inspectors and professional consultants). It therefore has significant impacts on the projects leading to increased risks of delay and uncertainty.

The High Court in recent times has made far reaching decisions in the area of judicial review of planning decisions including in the areas of interpretation of EIA's; lack of a revised and updated EIAR; design envelope for wind turbine blades; lack of “piling” and construction details; policy vacuum on certain environment related issues; sunlight/daylight guidance; residential density and public transport.

1. The recent **Galway Road Case / Friends of the Irish Environment v ABP** was conceded by ABP over the lack of reference to the Climate Action Plan 2021.

ABP said:

"The board accepts that, in particular in the context of the proposed development at issue and the decision in this case, the failure to consider the new Climate Action Plan 2021 in accordance with section 15 of the Climate Action and Low Carbon Development Act 2015 as amended prior to making its decision is sufficient to vitiate the lawfulness of its decision. Accordingly, the board is consenting to an Order of Certiorari on that basis,"

Accordingly, in offshore wind energy applications a high level and standard of investigation will be required for any Appropriate Assessments / NIS and EIS. These will be required to consider the entire route and not only the wind installations themselves but also the route back to shore which will invariably lead the projects into (or close to) AA designated Natura Sites, SPAs, and SACs.



The cumulative impacts of large offshore projects along the national road network will need to be carefully assessed and any impacts mitigated against.

2. **Irish Water. Clonsaugh case:** ABP Case reference 301908. Decided 11.11.19.

[2020] IEHC 601 Joyce-Kemper v ABP Grant of Certiorari quashing the permission 24.11.20.

Project: Greater Dublin Drainage Project consisting of a new wastewater treatment plant, sludge hub centre, orbital sewer, outfall pipeline, and regional biosolids storage facility.

Summary of Judgement: *"Board failed to identify and comply with its obligation under Article 44 of the Wastewater Discharge (Authorisation) Regulations 2007, as amended, to seek the observations of the EPA on the likely impact of the proposed development"* Source OPR.

The identified legal deficiency in this case has not been remedied by legislation as of yet and could have consequences for offshore wind projects.

3. **Derryadd Wind Farm Case.** Case reference 303592: Decided 12/06/2020.

[2021] IEHC 390²¹ **Sweetman V ABP** Grant of Certiorari quashing the permission.

Project: A 10-year planning permission for the construction of a wind farm comprising 24 no. wind turbines, 1 no. 110kV substation and all related works at Lanesborough, Co. Longford.

Summary of Judgement: The High Court ruled that there was breach of Article 214(1) of the Planning and Development Regulations 2001, for failing to provide adequate *"plans and particulars"*. In particular, the Court found that the approach of submitting a *"design envelope" / "Rochdale envelope"* which showed maximum dimensions of turbines, rather than anything more specific, for a windfarm development was not permissible under the Regulations.

4. **[2020] IEHC 294 Protect East Meath v An Bord Pleanála & Ors.**

Project: SHD for 450 dwelling units, office space, and creche.

Summary of Judgement

ABP conceded before the Court that there was not sufficient evidence before it to screen out significant effects on the Boyne Estuary SPA and that it thereby erred in law.

²¹ Derryadd Windfarm Link [2021 IEHC 390](#)

Summary

This Briefing Document sets out a selection of the issues arising from the current status of planning and judicial review in Ireland and some aspects and potential implications for offshore renewable energy projects. Others will arise.

The following is a summary of the key issues facing the Offshore Renewable Energy sector in the near term.

Policy and Legislative Gaps

Lack of comprehensive and complete legislative framework for the new consenting regime and in Marine Protected Areas and IROPI processes.

Skills Shortages in Planning and Marine

Resource deficiencies in key in state agencies, MARA, and ABP.

Some skills shortages in specialist areas are listed in *Resources and Skills*.

Planning Complexity

The planning system envisaged in the new proposed Planning and Development Act will take time to embed within ABP and to be coordinated with MARA. There is a reported lack of urgent engagement between agencies including NPWS, The Marine Institute, and other stakeholders.

Judicial Review

The courts are faced with an increasingly heavy caseload, new legislation, untested principles, IROPI, greater judicial scrutiny and engagement with merits will lead to consistent challenge and delay in the High Court and possible appeals to the higher courts and to the European Court of Justice.

Enabling Infrastructure

Lack of appropriate port and electricity grid and battery storage infrastructure is a significant threat to the near-term delivery of projects.

Culture

The third-party appeal system and judicial review options has proven costly to the State in terms of progress and infrastructure improvement whilst potentially fatal to projects in the public, semi state, and private sectors.

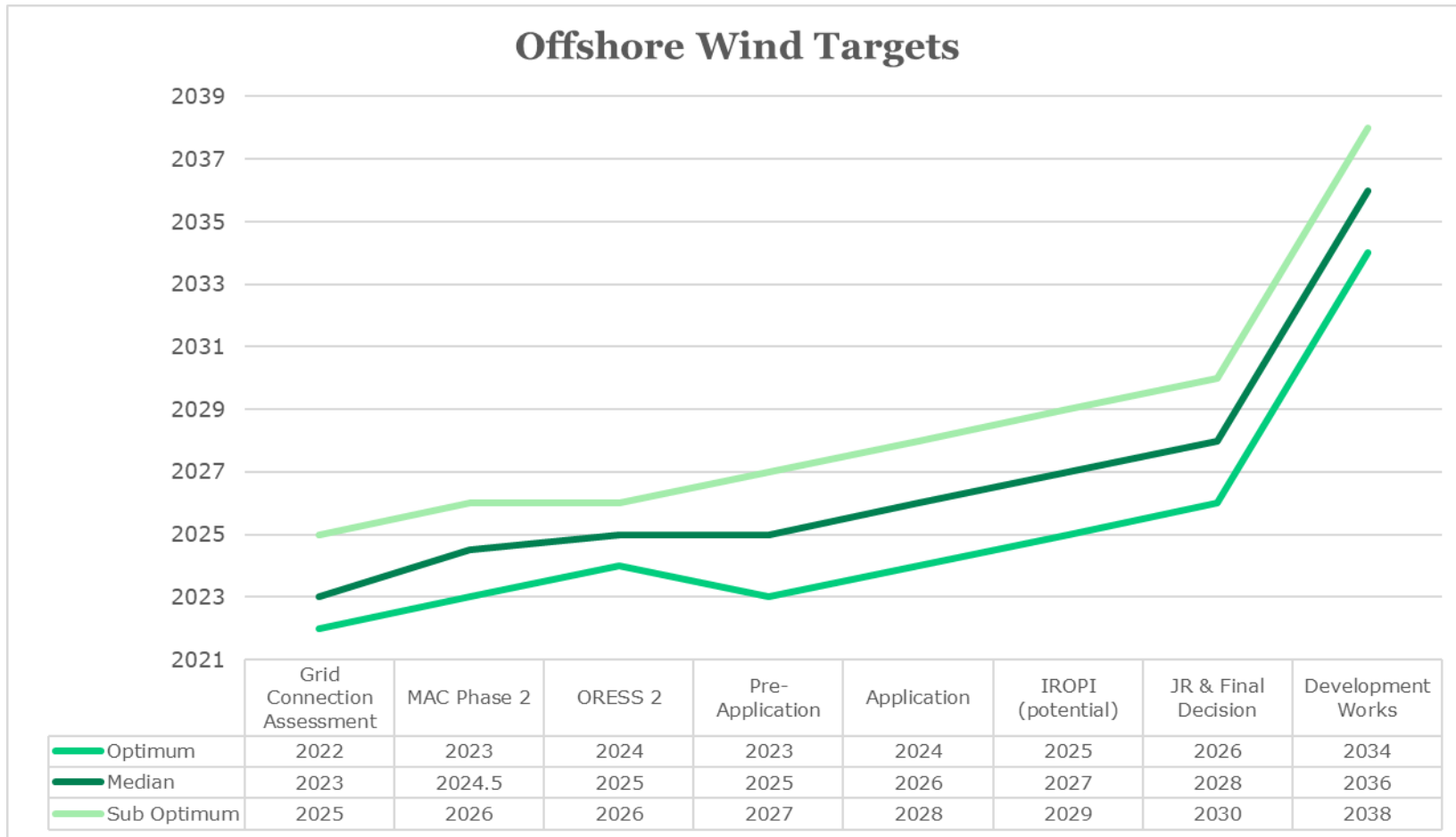
Leadership on Delivery

There must be a single point of responsibility, accountability, authority, and action for this multi-faceted programme to drive the multitude of agencies and government departments involved to secure the necessary resources required to meet the 2030 targets.

It will require the appropriate expertise, experience, and streamlined authority to navigate through roadblocks and potential setbacks to ensure delivery and coordination.



Appendix – Timeline





Locations:

Austin, TX
Beaumont, TX
Birmingham, MI
Chicago, IL
Collin County, TX
Dallas, TX
Denver, CO
Detroit, MI
Grand Rapids, MI
Houston, TX
Lansing, MI
Las Vegas, NV
Los Angeles, CA
Morgantown, WV
New York, NY
Philadelphia, PA
Phoenix, AZ
Pittsburgh, PA
Princeton, NJ
San Antonio, TX
San Diego, CA
San Francisco, CA
Scottsdale, AZ
Washington, DC
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