**CREATOR(S):** O'HAGAN, A.M., LE LIEVRE, C., CULLOCH, R. and BENNET, F.

**TITLE:** Profiling Member State consenting processes and reconciling EU legal requirements.

**YEAR:** 2016

# Profiling Member State consenting processes and reconciling EU legal requirements (WP2 findings)

Anne Marie O'Hagan
Célia Le Lièvre
Ross Culloch
Finlay Bennet

RiCORE
RISK BASED CONSENTING FOR OFFSHORE RENEWABLES

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

# Main Tasks

- Identification and engagement of stakeholders
- Legal and institutional review of national consenting systems
- Legal feasibility for the implementation of a risk-based approach
- EU habitat, species and technology compatibility



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

# Stakeholder Engagement

**Workshop** on marine renewable energy licensing

- Determine current national consenting practices, operational experiences and difficulties
- Compare and contrast approaches to implementation of over-arching EU legislation
- Introduce risk-based management approaches using the Survey, Deploy & Monitor (SDM) methodology as an example;
- Discuss the potential legal and regulatory issues
- Identify what is required to enable a risk-based management approach.



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

# Workshop Findings: general

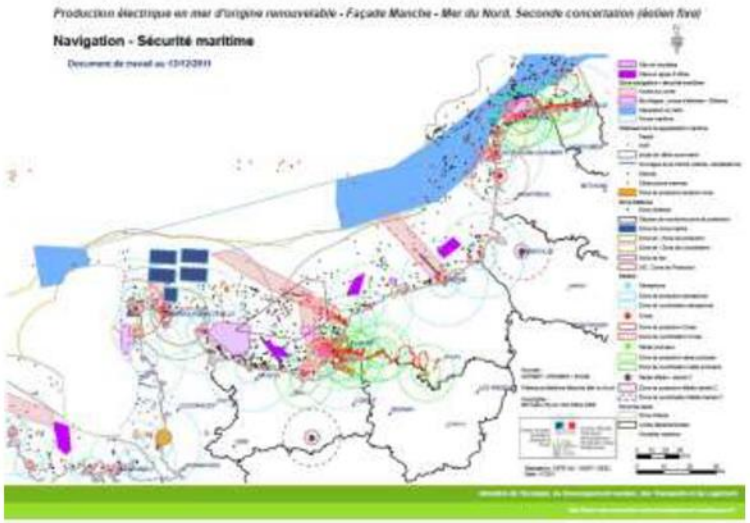
- **No dedicated licensing processes**
- **Fragmented consenting procedures**
- **Multiple competent authorities & multiple consents**
- Time to obtain necessary consents
- **Uncertainty on ecological implications of devices**
- Extensive and time-consuming **Environmental Impact Assessment**
- **Absence of tailored EIA monitoring requirements**
- Lack of **guidance on consenting itself** and application processes



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

# Workshop Findings: specific to RBM

- All consenting processes still apply
- Maps generated for SDM might reveal potential issues
- Status of SDM: policy, binding, certainty?
- SDM offers small projects a reasonable possibility that only one year of survey work will be required.
- SDM is suitable for large-scale (mega) projects if progressed in suitably sized phases.
- Funding of pre-consent survey work by competent authority should be further explored.
- SDM could act as a way of transferring knowledge from developers to regulators







This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

# National consenting systems

National consenting procedures reviewed according to five key aspects

- ✓ **Occupation of maritime space**
- ✓ **Licence to install & operate offshore generating installations**
- ✓ **Environmental assessment and monitoring**
  - ✓ EIA and Appropriate Assessment approvals for offshore works
  - ✓ EIA and AA approvals for onshore works
- ✓ **Terrestrial planning permissions**
- ✓ **Public participation**

**Highlight fragmentation / integration**



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

- **Decreto-Lei 38/2015**

**New MSP Scheme – Two instruments for implementation of MSP**

- **Situation Plan**

  Allocate current uses (aquaculture, fisheries, tourism) – set baseline conditions – **sets spatial and temporal distribution of human activities & infrastructure**

- **Allocation Plan**

  **Allocate new uses** not included in the Situational Plan - **subject to formal public consultation and approval by the Council of Ministers**. Automatically integrated in Situation Plan after approval



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

# National consenting systems: *example from Portugal*

## Uses identified in the Situation Plan/Allocation Plan are subject to:

- **Private use Title – Directorate - General for Natural Resources, Safety and Maritime Services**
- **Licence for electricity generation – Decreto-Lei 215B/2012 - Directorate General of Energy and Geology**
- **Grid connection - Electricidade de Portugal**
- **Environmental Impact Assessment –** Required whenever the project is located in Natura 2000 site, national ecological reserve
- **Outside marine protected areas: favourable advice**
- Small scale projects: Coordination Committee on Regional Development
- Large scale projects (20 turbines): Portuguese Environmental Agency
- **Terrestrial planning permission - Local Authorities**



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

# National consenting systems

- Issues previously identified were: lack of dedicated process, lack of clear guidance, multiple authorities and consents

- Key findings
  - Existing legislation appears capable of dealing with newer technologies
  - Move towards more integrated approaches
    - One application for land-sea elements
    - One point of contact
  - Electrical, grid connection, terrestrial planning and associated EIAs still appear to operate independently in the majority of countries
  - Need strong inter-departmental/consenting authority communication and operation
  - Timelines rarely have a statutory basis but may have a policy one
  - Little specificity in terms of environmental assessment



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

# Feasibility of Risk-based Management

## Terminology

- A risk-based approach is any approach that seeks to inform decision making through an understanding of the scientific uncertainties and associated consequences in terms of likelihood and magnitude of impact.
  - Adaptive Management: a structured process that enables learning by doing and adaptation based on what is learned. Adaptive Management is a form of a risk-based approach focused on reducing scientific uncertainties.
  - The Survey Deploy and Monitor (SDM) policy implemented by Marine Scotland is an example of a risk-based approach to site characterisation pre-consent and monitoring to reduce scientific uncertainties post-consent. It is a policy that achieves the goals of AM.




This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

# Feasibility of Risk-based Management

## Adaptive Management

- Enables managers to manage the risk of unacceptable impacts occurring whilst allowing changes in the environment to be monitored
- Requires the regulator to accept a certain level of uncertainty regarding the impacts of a proposed development
- Changes ('adaptations') to future management is done on the basis of actual data derived from the monitoring programme
- Focus must always be on reducing scientific uncertainty and hence lead to better assessments

## Precautionary Principle

- Strong legal basis in EU law
- When scientific uncertainty is high and the potential for adverse effects exists, regulators should err on the side of caution
- Does not actively seek to reduce scientific uncertainty
- Does not have a goal of improving decision making over time by reducing the uncertainties
- Can lead to overly-precautionary assessments that are unrealistic and not well informed



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

# Feasibility of Risk-based Management

## Adaptive Management and EIA

- EIA is very rigid
- Endorses a single response model based on predictions about the impacts and leaves little room for adaptation in post-approval stage
- Relies on historical data to build a single set of fixed mitigation measures
- Focus of EIA tends to be on maintaining an initial state or baseline conditions rather than providing a strategic plan aiming at reducing uncertainties and mitigating environmental impacts
- Need for a feedback mechanism within EIA and wider consenting

## Adaptive Management and AA

- Habitats Directive is precautionary
- If a plan or project is likely to undermine a site's conservation objectives, it must be considered likely to have a significant effect on that site.
- Assessment of that risk must be made in the light of the characteristics and specific environmental conditions of the site concerned
- "Best scientific knowledge" / "no reasonable scientific doubt"
- EC guidance has clarified that inherent scientific uncertainties need not preclude an assessment of no impact to integrity
- Competent authorities must make a decision on the level of acceptable risk



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

# Feasibility of Risk-based Management

## *KEY CONCLUSIONS*

- AM does not usually have a statutory basis but is enshrined in the Marine Strategy Framework Directive
  - It is not defined in MSFD
- A key challenge posed to statutory AM is the time frames involved – reducing uncertainty takes time
- Monitoring programmes should provide valuable scientific data on the potential ecological impacts of a development on key receptors that will then trigger an adaptation of management actions
- Institutional challenges are recognised as one of the greatest barriers for the implementation of AM
- EC should consider providing guidance on how the EIA and Habitats Directives can reflect and enable AM processes
- Consenting authorities in Member States need to communicate their 'risk appetite'



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

# Compatibility with Natura 2000 network

- EIA, Birds and Habitats Directives: strong philosophy of the precautionary principle
- Could result in more mitigation and more compensation than may be necessary owing to the uncertainties
- Risks cannot always be avoided
- The level of risk that is considered acceptable by the decision maker will be based upon the conservation objectives for qualifying interests of sites
- To apply AM in the context of the Nature Directives, the conservation objectives of protected sites must recognise the need for a flexible approach to risk by consenting authorities
- AM and the precautionary principle are not contradictory and may be implemented simultaneously to improve scientific understanding.




This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.

# Thank you

UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

ERI

MaREI
Centre for Marine and Renewable Energy



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 646436.