

## **Communication to the Aarhus Convention Compliance Committee**

### **I) Organisation**

Name: Irish Underwater Council  
Address: 78A Patrick Street, Dun Laoghaire, Co. Dublin, Ireland  
Telephone: +353 1 284 4601  
Email: info@diving.ie

Contact person: Louise Gilligan  
Position: General Manager  
Telephone: +353 1 284 4601  
Email: louise@diving.ie

### **II) Party Concerned**

Environmental Protection Agency  
PO Box 3000, Johnstown Castle Estate, Wexford Y35 W821, Ireland

### **III) Length of Communication**

Ten pages, plus five attached documents

### **IV) Facts of the Communication**

This communication is based on the situation regarding Dumping at Sea Permit Reg. No. S0004-01, issued by the Environmental Protection Agency in July 2011 in respect of an application by Dublin Port Company. A wider review of Dumping at Sea Permits in Ireland indicates a systematic failure within the permit issuing process to comply with certain Articles of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). Furthermore, there also appears to be issues relating to the dissemination of environmental information with regards Dumping at Sea permits in Ireland.

Dumping at sea activities in Irish waters are regulated under the Dumping at Sea Acts 1996 as amended.

On 29 September 2009, Dublin Port Company (DPC) submitted an application for a Dumping at Sea permit to the Department of Communications, Marine and Natural Resources under the Dumping at Sea Acts 1996 and 2004. This permit application was subsequently

allocated the Permit Reg. No. S0004-01. This permit was sought for the disposal of dredge spoil arising from maintenance dredging of the port. The total volume for disposal was stated to be 4 million tons of *"silty sand and sandy silt"*. The date on which it was proposed to commence dumping was November 2009. The date on which it was proposed to complete dumping was *"6 years from commencement of dumping under this permit"*.

On 15 October 2009, DPC published a public notice in the Irish Times newspaper in respect of permit application S0004-01 in which the DPC stated that *"It is proposed that the disposal operation will take place between November 2009 and October 2015"*, and that the dredge material consisted *"of a mixture of sediments predominantly silt and sand mix"*. A public notice of this type is a requirement of the application procedure. The dates for the commencement and completion of the dredging activity in the public notice do not coincide with the commencement and completion dates in the application form.

Although the initial permit application was lodged with the Department of Communications, Marine and Natural Resources, it was the Irish Environmental Protection Agency (EPA) that issued Permit Reg. No. S0004-01 on 28 July 2011. With respect to the commencement and completion dates for dumping activity, this permit states that *"Loading and dumping activities must be completed within six years of the date of commencement of activities"*. This is a different date range to both the original application and the public notice.

DaS Permit Reg. No. S0004-01 was first used on 23 April 2012 (i.e. date of commencement of activities), meaning it is valid until 22 April 2018.

DPC intends to undertake maintenance dredging in spring/summer 2016 and spring/summer 2017, with the dredge spoil to be disposed of at sea using Permit Reg. No. S0004-01.

Use of DaS Permit Reg. No. S0004-01 in 2016 and 2017 would mean that the permit would be in use beyond the end of the completion date of October 2015 that appeared in the public notice. Therefore, the use of this permit beyond October 2015 has not been subject to proper and full public participation.

On review of other Irish Dumping at Sea permits, it is noted that all of the permits checked used the same phrase as that used for Permit Reg. No. S0004-01 to define the operational period of the permit, although the duration of dumping activity varied on a case-by-case basis. All DaS permits issued by the EPA used the wording *"loading and dumping activities must be completed within X months/years of the date of commencement of activities"*. This wording shifts control of the operational duration of the permit from the regulator to the applicant. With no completion date specified in the permits, this leaves many current permits in a position where the applicant has 'permission' to dump beyond the end of the completion date as notified to the public.

This issue has been raised by the Irish Underwater Council directly with the EPA. The EPA responded by stating that *"Public participation in the Dumping at Sea permit application process was afforded in accordance with the Dumping at Sea Act 1996 as amended"*. Whilst

it is not contested that the permit underwent public participation, it is apparent that the information upon which this participation took place was misleading and thus the public participation procedure was flawed.

The Irish Underwater Council also requested that correspondence between the Irish Underwater Council and the EPA regarding Permit Reg. No. S0004-01, and between DPC and the EPA be made publically available on the EPA website. The EPA has not facilitated this request, stating that *“the EPA’s Office of Environmental Enforcement does not maintain correspondence relating to Dumping at Sea permits”*. However, the EPA’s own guidance document, ‘Dumping at Sea EPA Enforcement and Permitting Booklet’, states, on page 7, that *“All permit application documents, correspondence, submissions etc. are available on the EPA website”*. Therefore, in not publishing this correspondence the EPA is failing to meet the standards that it has set itself.

A further issue with Dumping at Sea Permit Reg. No. S0004-01 is that it appears that it was used for the disposal of contaminated material. This was not made apparent in the public notice and does not appear in the DaS permit application form.

Since there was no mention of the disposal of contaminated material in either the public notice or the permit application form, it is clear that this aspect of the dumping at sea activity received no public participation whatsoever. The bulk disposal of contaminated material at sea, where contaminants could readily enter the human food chain through consumption of seafood, is a matter of great public interest.

## **V) Provisions of the Convention Alleged to be in Non-Compliance**

Article 6(2)(a)

Articles 5(1) and 5(2)

## **VI) Nature of Alleged Non-Compliance**

This communication relates primarily to public participation. However, the situation whereby dumping at sea permits are issued without fixed start and end dates opens the system up to further cases where non-compliance may occur - i.e. dumping at sea permits being used beyond the period notified to the public in the public (newspaper) notice. There is also a concern that the EPA is not making all documentation relating to Dumping at Sea permits fully accessible to the public.

In Ireland, an essential element of a dumping at sea permit application is a public notice in a newspaper. The objective of this newspaper notice is to inform the public, and any other third parties, of the intention of the applicant to apply for a dumping at sea permit. This public notice fulfils the requirement of Article 6(2) of the Aarhus Convention. Article 6(2)(a) states that *“The public concerned shall be informed... by public notice ... of ... the proposed activity and the application on which a decision will be taken.”* In order for the notice to be effective, it is essential that the information provided to the public in the public notice is

accurate. This requirement for accuracy is reflected in the Dumping at Sea Act 1996, which states in Regulation 5(7) that *“A person who, in relation to an application for a permit under this section, makes a statement to the Minister that is false or misleading in a material respect shall be guilty of an offence unless it is shown that the person concerned did not, and could not reasonably have been expected to, know that the statement was false or misleading in a material respect.”* There is therefore an onus of responsibility on the regulatory authority and the applicant to ensure that the information provided to the public in the public notice is full and accurate. It is therefore reasonable to assume that the information provided by the applicant in their public newspaper notice would be the same as the information provided by the applicant to the EPA in the Dumping at Sea permit application form since failure to do so could be an offence in Irish law and is contrary to the requirements of the Aarhus Convention.

The EPA Dumping at Sea Permit Application Guidance Note, Section A4, states that the newspaper notice *“must contain the following information:*

- *a sketch map showing the location of the proposed site or sites and the approximate distance therefrom to a specified place on the mainland, and*
- *brief details of the commencement and duration of the proposed activity, and*
- *characteristics, composition and the approximate amounts of any substance or material involved and the method of the proposed loading as the case may be”*

Provision of these details in the DaS Permit Application Form would ensure compliance with Article 6(2)(a) of the Aarhus Convention. It would also ensure compliance with Regulation 5(1)a of the Dumping at Sea Act 1996, which states that *“The Minister may... grant... a permit to a person who applies to the Minister for a permit authorising the dumping of a specified ... quantity of a specified substance or material in a specified place within a specified period of time”* [emphasis added].

However, in the case of DaS Permit Reg. No. S0004-01, it is the details of the commencement and duration of the dumping at sea, and the nature of the materials to be dumped which are the issues. In the case of permit application S0004-01, there are significant discrepancies between the relevant dates for the permit:

- DPC published a public notice in the Irish Times newspaper in respect of permit application S0004-01 on 15 October 2009, in which the DPC stated that they intended dumping from November 2009 to October 2015 (copy attached). Note that this is a specific period of time that is fixed between two dates.
- However, what DPC actually applied for in the DaS application form was a permit to run from November 2009 but from 6 years from date of commencement (see page 6 of attached permit application form). In other words, the commencement date was not fixed and could be subject to change.
- The EPA issued DaS Permit Reg. No. S0004-01 in July 2011, with the time specified as “Loading and dumping activities must be completed within six years of the date of commencement of activities” (see Condition 3.1 of attached permit).
- DaS Permit Reg. No. S0004-01 was first used on 23 April 2012 (commencement date, obtained from record of voyage logs in Appendix 1 of the Annual Environmental Report for 2012 for Permit Reg. No. S0004-01, copy attached), meaning it is valid until 22 April 2018.

The issue here with respect to the Aarhus Convention is that there is a significant difference between the dates of the permit as notified to the public and the actual active dates of the permit. Essentially, the permit has not undergone any public consultation for the period December 2015 to April 2018, over which time period the EPA considers the permit to be valid. DPC has stated its intention to use DaS Permit Reg. No. S0004-01 for the disposal of dredge spoil in spring/summer of both 2016 and 2017. The use of this permit post November 2015 is questioned due to lack of proper and full public consultation and failure to fully implement the requirements of the Aarhus Convention (particularly Article 6(2)(a)).

The Irish Underwater Council has raised this issue with the EPA, who responded by stating that *“Public participation in the Dumping at Sea permit application process was afforded in accordance with the Dumping at Sea Act 1996 as amended. Pursuant to the requirements of the Dumping at Sea Act 1996 as amended, Dublin Port Company placed a newspaper advertisement [i.e. public notice] in the Irish Times of the 15th October 2009. No submissions from members of the public were received in relation to the application. Eleven submissions were received from statutory and notified consultees. A permit (Reg. No. S0004-01) was granted to Dublin Port Company on the 28th July 2011 and the permit was available to view on the EPA website from that date. No applications for leave to take a judicial review were made on the permit”*.

It is not disputed that the DaS Permit Reg. No. S0004-01 did undergo public participation as required by the Dumping at Sea Act 1996 as amended. However, the public participation procedure was flawed due to the inaccurate information provided by DPC to the public with respect to the dates, and failure by the EPA to ensure that the dates information provided to the public in the newspaper notice was the same as the dates information in the Dumping at Sea permit application form. The problem is then exacerbated by the EPA issuing an essentially open-ended permit where the applicant controls the commencement date and hence also the completion date, in this case pushing the completion date over 2 years past the end of the period of public consultation.

The result is that any person who may have had an observation to make regarding dumping by DPC using Permit Reg. No. S0004-01 in 2016, 2017 and/or 2018 was excluded from the public participation process by virtue of the fact that they were misinformed by the public notice which stated that all activity would have been complete by October 2015. The EPA appear to imply in their response that because there were no submissions from the public with respect to dumping activity in the period November 2009 to October 2015, then there would be no submissions relating to dumping activity after October 2015. However, were this permit application to undergo public participation now, it is likely that there would be a significant number of submissions from the public. DPC applied for a new Dumping at Sea permit in 2015 and the EPA received over 800 submissions from members of the public, elected representatives, local businesses, fishermen's organisations, etc. (see ‘View Third Party Documents’ section at <http://www.epa.ie/terminalfour/DaS/DaS-view.jsp?regno=S0024-01>).

Based on the issues arising from Dumping at Sea Permit Reg. No. S0004-01, all of the other Irish Dumping at Sea permits for all ports were examined. The wording for the

commencement and duration dates noted above for Permit Reg. No. S0004-01 are reproduced for every permit, although the duration of operations varies on a case-by-case basis (i.e. “loading and dumping activities must be completed within X months/years of the date of commencement of activities”). With no completion date specified in the permits, this leaves many current permits in a position where the applicant has ‘permission’ to dump beyond the end of the completion date as notified to the public.

As noted above, Regulation 5(1)a of the Dumping at Sea Act 1996 states that *“The Minister may... grant... a permit to a person who applies to the Minister for a permit authorising the dumping of a specified ... quantity of a specified substance or material in a specified place within a specified period of time”* [emphasis added]. It is debatable whether the phrase “loading and dumping activities must be completed within X months/years of the date of commencement of activities” is a specified period of time as there is no start date and no end date. As long as the wording of Dumping at Sea permits remains this way, it is almost inevitable that there will be further dumping at sea operations that extend beyond the date notified to the public as the completion date. Therefore, by not fixing a completion date for dumping operations, the procedure for the issuing of Dumping at Sea permits in Ireland appears flawed in terms of compliance with the Aarhus Convention.

Another issue relating to DaS permit Reg. No. S0004-01 is that the dump site lies within a Special Area of Conservation but screening for Appropriate Assessment has not been undertaken. When this issue was raised by the Irish Underwater Council with the EPA, the EPA stated that they did not intend to review Permit Reg. No. S0004-01 but that DPC had “agreed” to implement some mitigation measures, indicating that there had been communication between the EPA and DPC on the subject.

The EPA’s guidance document, ‘Dumping at Sea EPA Enforcement and Permitting Booklet’, states, on page 7, that *“All permit application documents, correspondence, submissions etc. are available on the EPA website”*. On this basis, the Irish Underwater Council requested that correspondence between the Irish Underwater Council and the EPA, and between the EPA and DPC, be made publically accessible on the EPA website. The EPA refused this request, stating that *“the EPA’s Office of Environmental Enforcement does not maintain correspondence relating to Dumping at Sea permits”*.

It is a requirement of Condition 2.4 of Dumping at Sea Permit Reg. No. S0004-01 that *“the permit holder shall notify the Agency [i.e. the EPA] at least two weeks prior to the commencement of the loading and dumping activities”*. The Irish Underwater Council asked whether this communication from DPC to the EPA would be made publically available and were told it would not. Instead, enquiries regarding start dates of dumping at sea activities have to be directed to the applicant. It seems extraordinary that such basic information would not be made available to the public by the regulatory authority.

The collection and dissemination of environmental information is a requirement of Article 5 of the Aarhus Convention. In particular, Article 5(2) states that *“within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively*



*accessible*". Article 5(2)(b)(i) states that there must be "*publically accessible lists, registers or files*".

The EPA does maintain a website relating to Dumping at Sea permits with details of documents from the applicant, third parties, and from the EPA itself (<http://www.epa.ie/terminalfour/DaS/index.jsp>). This website should fulfil the requirements of Article 5 of the Aarhus Convention (and Regulation 5(9) of the Dumping at Sea Act, 1996). But it is not clear why in this case certain documents are considered suitable for inclusion whilst others are not. This raises questions as to the transparency of the environmental information hosted by the EPA with respect to Dumping at Sea permits. As already stated, transparency is a requirement of Article 5(2) of the Aarhus Convention.

Neither the public notice of 15 October 2009, nor the Dumping at Sea permit application form make reference to the use of the permit for the disposal of contaminated material. Yet, even though Dublin Port Company did not publically seek authorisation to dump contaminated material at sea, they received permission to do so from the EPA. This giving of permission is somewhat coded within the permit. The permit does not explicitly state that the permit is to be used for the disposal of contaminated material. Nor does it state that some of the monitoring procedures that are incorporated within the permit are included because of the permission to dump contaminated material. There is reference to the dumping of contaminated material in the Introduction to the DaS Permit itself, although the permit states that "*this introduction is not part of the permit and does not purport to be a legal interpretation of the permit*". Conditions 3.8 and 3.9 of Dumping at Sea Permit Reg. No. S0004-01 make reference to sediments from certain locations that require to be capped, but there is no indication that contaminated material is present and that the capping is a containment procedure for contaminated material. It is not explicitly stated in the Annual Environmental Report (AER) for DaS Permit Reg. No. S0004-01 that dumping of contaminated material took place. However, the OSPAR report for the dumping activity in 2012 (Appendix 3 of the AER for Permit Reg. No. S0004-01 for 2012) makes reference to three sediment samples collected from the dump site for monitoring of the "*area referred to in Condition 3.9*". This monitoring requirement is itself listed in Schedule B of Permit Reg. No. S0004-01. To find the evidence that this permit has been used to dispose of contaminated material at sea requires a forensic examination of the permit and supporting documents. Whereas, it is in the public interest that this information be clearly and openly available.

As already stated, the EPA requires that the newspaper notice "*must contain ... information [on the] characteristics, composition and the approximate amounts of any substance or material involved*". Since the characteristics and composition of the material to be dumped needs to be detailed, it is clear that if the applicant intended to use the permit for the disposal of contaminated material then this should have been made apparent in the public newspaper notice. The public notice stated that the dredge material consisted "*of a mixture of sediments predominantly silt and sand mix*", with no mention of the presence of contamination. The permit application form described the general nature of the dredge spoil as "*silty sand and sandy silt*", again with no mention of the presence of contamination. Once more, attention is drawn to Regulation 5(7) of the Dumping at Sea Act 1996 which

states that “A person who, in relation to an application for a permit under this section, makes a statement to the Minister that is false or misleading in a material respect shall be guilty of an offence unless it is shown that the person concerned did not, and could not reasonably have been expected to, know that the statement was false or misleading in a material respect.” However, the EPA did not seek to prosecute the DPC for the provision of misleading information, rather the permit was progressed with critical information regarding the disposal of contaminated material being withheld from open public scrutiny. Such information as was made available has to be actively sought out by reading through literally hundreds of pages of appendices of raw data of sediment analysis, with each parameter of heavy metal and organic pollutant being checked off individually against the relevant dumping at sea guidelines (as issued by the Marine Institute). In essence, there was not full and open disclosure of information relating to the levels of contamination in the port sediments that the applicant sought to dispose of at sea. This appears to constitute a non-compliance with Article 6(2)(a) of the Aarhus Convention.

It is apparent that the use of DaS Permit Reg. No. S0004-01 for the disposal of contaminated material at sea received no public participation whatsoever. The regulatory authority appears to have made no attempt to allow public debate on the matter, and there is an extraordinary lack of transparency regarding the availability of information relating to this particular activity. Condition 3.10 of DaS Permit Reg. No. S0004-01 states that for every dumping voyage, the applicant must record, at a minimum, the source of the dredged substance or material (latitude and longitude). Despite being a condition of the permit, this information is actually missing from all of the voyage logs (which form Appendix 1 of the AER), making it impossible to determine the origin from within the harbour of any of the loads of dredge material, and therefore it is impossible to identify which were loads of contaminated material (or capping material).

In summary, this complaint relates to Article 5(1), Article 5(2) and Article 6(2)(a) of the Aarhus Convention. Essentially, there has been a failure to fully disclose the information required to form an objective opinion on the proposed dumping at sea, which in turn has compromised effective public participation in the permit application process. There was a failure to provide sufficient information to the public (re. contamination), and there was provision of inaccurate information to the public (re. operational dates of dumping and presence of contamination) with respect to Dumping at Sea permit Reg. No. S0004-01. There has also been a lack of transparency regarding availability of environmental information with respect to Dumping at Sea Permit Reg. No. S0004-01, including failure to make correspondence regarding this permit publically available (a stated function of the EPA in their own guidance document), and failure to openly disclose the true nature (characteristics and composition) of the sediments that were scheduled to be disposed of at sea. Indeed, the Annual Environmental Report for 2012 for Permit Reg. No. S0004-01 does not openly disclose the fact that contaminated material has been disposed of in Dublin Bay.



## **VII) Use of Domestic Remedies**

All of the issues above, with the exception of the dumping of contaminated material, have been raised directly with the EPA. This complaint has been dismissed by the EPA, as evidenced by the quoted statements above.

The issues described above have also been raised with Aoife Joyce, Assistant Principal Officer, Environment Policy & Awareness, Department of the Environment, Community and Local Government. The Department of the Environment, Community and Local Government is responsible for implementation of the Aarhus Convention in Ireland. However, Ms. Joyce has communicated to the Irish Underwater Council that the Department cannot intervene over specific cases.

The Minister for the Environment, Community and Local Government, Alan Kelly, was also contacted but a statement from the Minister's office said that *"the Minister cannot intervene in this situation as the EPA is an independent statutory [sic - statutory] body."*

## **VIII) Use of Other International Procedures**

The Irish Underwater Council informed the EC Directorate-General Environment of these issues, but was referred back to Aoife Joyce at the Department of the Environment, Community and Local Government.

## **IX) Confidentiality**

No confidentiality is sought.

## **X) Supporting Documents**

Note that much of the supporting documentation originating from the applicant (Dublin Port Company), the Environmental Protection Agency, and third parties, plus the Annual Environmental Report for 2012 (the only year during which dumping activity has taken place using this permit), can be downloaded from: <http://www.epa.ie/terminalfour/DaS/DaS-view.jsp?regno=S0004-01>.

The following key documentation is attached:

1. Dumping at Sea Permit Application Form from Dublin Port Company, dated 29 September 2009.
2. Public notice from the Irish Times newspaper, dated 15 October 2009, indicating the intention of Dublin Port Company to apply for a Dumping at Sea permit.
3. Dumping at Sea Permit S0004-01, issued by the EPA on 28 July 2011.
4. Dumping at Sea Act 1996
5. Annual Environmental Report (2012) for Dumping at Sea Permit No. S0004-01

**XI)     Signature**

---

Mike Orth,  
President  
Irish Underwater Council