Roinn Cumarsáide, Gníomhaithe
ar son na hAeráide & Comhshaoil
Department of Communications,
Climate Action & Environment

UNITED NATIONS
ECONOMIC COMMISSION FOR EUROPE

Ms. Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
Palais des Nations, Room 429-4
CH-1211 GENEVA 10
Switzerland

11th February 2019

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Ireland with articles 5 and 6 of the Convention with respect to Dumping at Sea Permits (ACCC/C/2016/139)

Dear Ms. Marshall,

We are writing to you in response to the letters dated the 19th of April 2018 and the 7th of December 2018 from the Irish Underwater Council "the Communicant" in relation to the Communication to the Aarhus Convention Compliance Committee concerning compliance by Ireland with articles 5 and 6 of the Convention with respect to Dumping at Sea Permits (ACCC/C/2016/139) (hereinafter 'the Communication').

Communicants Letter of 19th April 2018

The Communicant's letter of the 19th of April 2018 purports to respond Ireland's previous submissions to the Committee of the 5th of May 2017 ('the previous submissions). Ireland responds to the aforesaid letter of the 19th April 2018 in accordance with headings contained therein.

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General observations

Ireland rejects the Communicant's contention that its objection to the admissibility of the Communication is misconceived. The simple fact is that the Communication specifically cites and relies on Dumping at Sea Permit ('DAS') Permit Reg. No. S0004-01. As highlighted in the previous submission, the application process in respect of DAS Permit Reg. No. S0004-01 commenced on the 15th of October 2009 and concluded with the grant of a permit on the 28th of July 2011 prior to the ratification and the entering into force in Ireland of the Convention in 2012. The Communicant's assertion that regard should be had to DAS Permit Reg. No. S0004-01 as evidence of 'a purported change' in practice of the issuing of DAS Permit ignores the fact that no regard can be had to matters relating to the issuing of a DAS Permit which predated Ireland's ratification of the Convention in 2012. For this reason, Ireland restates it previous submission that the Communication is inadmissible.

The Communicant's assertion (citing the Judgement of the Irish Supreme Court in *Conway -v- Ireland*[1]) that there is no domestic remedy available to it insofar as Irish legislation is incompatible with the Convention is an oversimplified and incorrect analysis of the legal position. Ireland submits that subject to satisfying certain requirements there are domestic remedies available to an individual who asserts that Irish legislation is incompatible with the Convention as is apparent from the judgement in *Conway*.[2] In the first instance, it must be noted that the purported legal principles relied upon by the Communicant do not form part of the legal reasoning of the judgement and are of persuasive value only. In its judgement the Court stated that having regard to the provisions of Article 29.6 of the Constitution of Ireland, that as matter of Irish constitutional law, the Convention cannot, save to the extent that it may be determined by the Oireachtas become part of Irish domestic law. Accordingly, the Court stated that a simple claim based on an allegation of a breach of the Convention would necessarily fail as a matter of Irish law. However, in its judgement the Court noted that having regard to the fact that the EU has ratified the Convention and has adopted measures designed to implement the Convention in its laws this means that, at least in that indirect way, the Convention has some application in Ireland. The Court clarified that proceedings which claim that a relevant

[1] [2017] IESC 13; [2017] I I.R. 53
[2] See in particular paragraphs 2.5- to 2.7 of the judgement in *Conway*

provision of the Convention may be applicable or influence the proper interpretation or application in Ireland of EU measures as a matter of European law would not be precluded and need to be considered on its merits. In this manner domestic remedies are available to an individual who asserts that Irish legislation is compatible with the Convention.

Further, any analysis of this issue must have regard to the fact that pursuant to s.8 of the Environment (Miscellaneous Provisions) Act, 2011 (as amended) ('hereinafter the EMPA 2011') the domestic Court is required to take judicial notice of the Convention and those provisions of the Convention implemented by directly applicable European Union Law

Ireland would highlight that the Communicant, in its letter of the 19th of April 2018, has failed to explain its failure to exhaust domestic remedies in respect of DAP Reg. No. S0004-01 and for reasons set out in its previous submission Ireland submits the Committee should find the Communication inadmissible.

Allegation that dumping at sea permits permit are issued without fixed start/end dates

Ireland restates its previous submission that the allegation that DAS Permits are issued without fixed start/end dates is misconceived. Contrary to what is suggested in the Communicant's letter of the 19th of April 2018 no concession has been made by Ireland that any such practice existed whether "up until 2016" as alleged or at all. As set out in the previous submissions Ireland highlights that even in the minority of cases where a DAS Permit does not specify an end-date by which dumping must conclude, all DAS Permits contain conditions which in effect require the cessation of dumping within a specified time period. This includes DAS Permit Reg. No. S0004-01 which is the subject of the Communication.

Furthermore, as highlighted in the previous submissions the provisions of s.5(1)(a) of the Dumping at Sea Act, 1996 (as amended) ('the DAS Act') preclude the EPA from issuing a DAS Permit with an 'open-ended timeframe' a

fact which the Communicant now appears to accept. The practical effect of s.5(1)(a) of the DAS Act is that DAS Permits are in fact issued for a fixed period.

For reasons already set out herein, the Communicant's assertion that it has no domestic remedy to have legislation (including the DAS Act) struck down due to incompatibility with the Convention is misconceived. In particular, in *Conway* the Supreme Court acknowledged that in principle the provisions of the Aarhus Convention may be directly effective in member states or require to be implemented so far as practicable by a conforming interpretation of national procedural rules albeit that not every provision of the Convention would meet the relevant criteria for direct effect.

Also misconceived is its assertion that the costs of any challenge to legislation incompatible with the Convention would be prohibitive. This submission is made in reliance on the submission of the Environmental Pillar[3]. As set out in the previous submissions, Ireland does not accept either the factual accuracy or legal analysis of the submissions and observations submission of the Environmental Pillar on the legal provisions and case law governing legal costs in certain environmental cases in Ireland and refers the Committee to its submissions in its Responses to Communication ACCC/C/2013/107 (Kieran Cummins) and Communication ACCC/C/2014/113 (Kieran Fitzpatrick) previously submitted to the Compliance Committee and exhibited for ease of reference at Appendix C of the previous submissions.

Without prejudice to the foregoing to the extent that it is alleged that a challenge to the DAS Act is not within the categories of judicial actions to which special costs rules apply as set out in Section 3 of the EMPA 2011 this is incorrect. Section 3 of the EMPA establishes a special costs rule which means that in Ireland, save in very exceptional circumstances,[4] no costs are imposed upon an applicant in environmental litigation (an "environmental litigant"). In summary, where an environmental litigant is successful they will recover their legal costs and if unsuccessful they will generally bear their own legal costs. Ireland would highlight that s.3(4) of the EMPA expressly reserves the Court's entitlement to

[3] Dated 13th September 2016.
[4] These are set out in s.3(3) of the EMPA and relate to circumstances where the Court considers a claim to be frivolous or vexatious or it considers costs should not be awarded by virtue of the party's conduct or where a party is in contempt of court.

award costs in favour of a party- including an unsuccessful environmental litigant - in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so. Further, any analysis of the provisions of s.3 of the EMPA must have regard to the fact that pursuant to s.8 of the EMPA the domestic Court is required to take judicial notice of the Convention and those provisions of the Convention implemented by directly applicable European Union Law. Therefore, any award of legal costs that may be made must ensure that those legal costs are not prohibitively expensive. The Communicant's and the Environmental Pillar's contention that any challenge to domestic legislation on the grounds it is incompatible with the Convention could not have the benefit of the special costs rule set out s.3 of the EMPA is misconceived and based on an incorrect analysis of the legislation and caselaw[5]. The scope of application of s.3 and the types of proceedings to which it applies are set out in ss.4, 5 and 6 of the EMPA. Having regard to these statutory provisions and case law as to their application, Ireland does not except that all proceedings which challenge to domestic legislation on the grounds it is incompatible with the Convention would not fall within the scope of the special costs rule as set out in s.3 of the EMPA.

The aforesaid submissions in respect of legal costs is made without prejudice to Ireland's submission that a consideration of Ireland's legal regime for costs is manifestly beyond the scope of this Communication.

Alleged non-compliance with the duty to actively disseminate environmental information relating to Dumping at Sea permits

In its letter of the 19th April 2018, the Communicant alleges non-compliance with Article 5 of the Convention because *"relevant public authorities are not actively disseminating this information and are under no obligation to do so, nor is the EPA under an obligation to ensure that the condition of a DAP result in active dissemination of all relevant environmental information*". It is further alleged that the lack of active dissemination of environmental arising from DAS Permit's "*illustrates a general non-compliance by Ireland with Article 5 of the*

[5] *O'Connor -v- County Council of the County of Offaly* [2017] IEHC 606

Convention… because there are no specific legislative or regulatory measures for active dissemination in the DAS legislation".

Ireland disputes both the factual and legal basis of these allegations. In particular, it disputes that Article 5 of the Convention imposes a duty to "actively disseminate environmental information" in the manner alleged by the Communicant. Furthermore, no proper evidential basis is advance for the Communicant in support of these allegations.

Ireland also refers to the previous submissions where in the context of describing the public participation in the DAS Permitting process it outlined the requirements that all application documentation is published electronically and the existence of a publicly available register of DAS Permits which may be accessed and downloaded by any member of the public. It should be noted that the EPA also provides access via its website[6] to a range of enforcement documentation containing environmental information. Information available online includes Annual Environmental Reports, EPA Site Visit reports and Loading & Dumping Commencement Notices. In addition to this, the EPA provides public access at its offices in Wexford, Castlebar, Cork and Dublin to information on the enforcement of DAS Permits. This includes all correspondence between the holder of a DAS Permit and EPA as well as information on complaints and incidents. A dedicated personal computer is available at each regional office where the public may browse and print information.

In addition, as highlighted in the previous submissions it is the practice of the EPA to impose a condition in a DAS Permit that a public awareness and communication programme be established and maintained by the permit holder. Typically the condition will provide as follows:-

2.9.1 The permit holder shall, within one month of the date of grant of this permit, establish, maintain and implement a Public Awareness and Communication Programme to ensure members of the public can obtain information at reasonable times, concerning the environmental performance of the permitted activity.

[6] WWW.EPA.ie

Such conditions are subject to enforcement by the EPA, and in conducting inspections of permitted activities, the EPA ensures that permit holders comply with this requirement. In practice, permits holders make environmental information available to the public on request. Ireland would highlight that such a condition had been imposed and implemented in DASP Reg. No. S0004-01 which is the subject of this complaint. Ireland submits these requirements meet the obligations imposed by Article 5 of the Convention including any obligations imposed in respect of dissemination of environmental information.

Furthermore, as the Communicant acknowledges, Article 5 of the European Communities (Access to Information on the Environment) Regulations 2007-2018 ('the AIE Regulations')[7] imposes obligation on public authorities in respect of the dissemination of environmental information. In summary, Article 5 of the AIE Regulations imposes an obligation on public authorities to:-

- inform the public of their rights under the Regulations and provide information and guidance on the exercise of those rights,

- make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means,
- ensure that environmental information compiled by or for it, is up-to-date, accurate and comparable, maintain registers or lists of the environmental information held by the authority and designate an information officer for such purposes or provide an information point to give clear indications of where such information can be found.

Having regard to the foregoing, Ireland submits the DAS Permitting regime as operated in Ireland is not in breach of any alleged requirement to actively disseminate environmental information under Article 5 of the Convention. Ireland has introduced an appropriate regulatory and legislative measures to

[7] The AIE Regulations transpose Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information. Article 7 of the aforesaid Directive requires member states to take measures in respect of the dissemination of environmental information.

ensure active dissemination of environmental information in general and in particular environmental information relating to DAS Permits. The Communicant has failed to adduce any evidence to the contrary and is not as alleged left without a remedy.

The foregoing submission is made without prejudice to Ireland's submission that a generalised complaint as to Ireland's legal regime governing access to environmental information is manifestly beyond the scope of this Communication.

Communicant's letter of 7th of December 2018

General

In its letter of the 7th of December 2018, the Communicant purports to furnish the additional information requested by the Committee in its letter to it dated the 4th of November 2018. The Committee in its letter of the 4th of November 2018 requested the Communicant to clarify which of the permits listed in Annex 1 of its reply to the Committee's questions of 5th September 2016 were:

(i) Issued after 18th September 2012; and

(ii) Within the scope of either article 6(1)(a) or (b) of the Convention

In its letter of reply, dated the 7th of December 2018, the Communicant attached (at Appendix 1 of the aforesaid letter) "details of all Dumping at Sea Permits (DAS Permits) issued since 1th of September 2012". Ireland would highlight that the list furnished by the Communicant is factually incorrect in that it omits to include three DAS Permits which were issued after the 18th of September 2012. A corrected list of all DAS Permits which issued after the 18th of September 2012 is set out in Appendix A.

Ireland notes the Communicant's concession that none of the DAS Permits listed in Annex 1 fall within Article 6(1)(a) of the Convention. Ireland also notes the Communicant's assertion that that all of the DAS Permits issued after

September 18th 2012 are within Article 6(1)(b) of the Convention and the basis for this assertion as set out in the letter dated the 7th of December 2018.

Further, Ireland does not accept the contention that all DAPs for which there has been stage 1 screening under Article 6(3) of the Habitats Directive necessarily fall within the scope of Article 6(1)(b) of the Convention for that reason alone nor the Communicant's contention that "*in those cases the competent authority considers that those permits may have a significant effect on the environment*". The purpose of stage 1 screening, particularly when carried out in the context of an already existing permit procedure such as that for DAS permits in Ireland, is to determine whether the activity the subject of the permit application is likely to have a significant effect on any designated site. It cannot be the case that it follows from the fact that the screening exercise has been carried out and regardless of the outcome that the relevant authority must be regarded as considering that the activity is likely to have a significant effect on the environment. However, as Ireland has an existing regime for the grant or refusal of DAS permits (within which the Article 6(3) screening takes place) which involves public participation Ireland accepts that decisions made within this regime fall within Article 6(1)(b) of the Convention.

Variation or amendment of Dumping at Sea Permits

The Communicant states that public participation rights do not apply to the variation of conditions in a DAP (including the period in which dumping occurs) and that "*it seems that [if] the competent authority considers it possible that the dumping period can be subject to amendment or otherwise agreed with it*". Ireland submits this is a materially inaccurate statement.

In addressing this issue, it is necessary to clarify the circumstances in which a DAS Permit may be varied and/or amended and the practice of the competent authority, the Environmental Protection Agency ('the EPA'), in this regard. In general, a DAS Permit will authorise the loading and dumping at sea of dredged material subject to conditions which prescribe how activities are to be carried out. To provide the necessary operational flexibility a DAS Permit will typically contain the following conditions:-

1.7 No change to the loading and dumping activities authorised by the permit shall be carried out or commenced without the prior written agreement of the Agency

4.4 The frequency, methods and scope of monitoring, sampling and analyses, as set out in this permit, may be amended with the agreement of the Agency following evaluation of test results.

As is apparent, these conditions may provide for variations of a DAS Permit but only in limited circumstances and subject to prior agreement with the EPA. There are three mechanisms available for dealing with a request to vary the conditions in a DAS Permit namely:-

(i) A letter of agreement,

(ii) An amended permit, or

(iii) A new permit application.

A request for a variation of a condition in a DAS Permit by way of a letter of agreement will dealt with the EPA's Office of Environmental Enforcement (OEE) whilst a request for an amendment to a DAS Permit or a new permit is dealt with by the EPA's Licensing Programme. It should be noted that variation by way of letter of agreement will only be available in respect of minor or insubstantial changes which can be accommodated and controlled within existing permit conditions and limitations. An amendment to an existing permit will be required where the proposed alteration requires a change to a condition or Schedule of the existing permit. A new permit will be required for more substantial changes involving alterations to the site boundaries or activities (including the commencement of or duration of the activity) or which require appropriate assessment. As the grant of a new permit requires the making of a fresh permit application, it is not correct to say that there are no rights of public participation if a condition relating to the period in which dumping is permitted is varied (see further below).

Further, where a permit holder requests the OEE to make a variation to a DAS Permit, details of this request, together with any subsequent approval or rejection by the OEE, are available for public viewing at its offices on the EPA's electronic public file. Any request by the holders of a DAS Permit for a variation to a permit are submitted electronically by way of a licence returns, and each one is given a unique reference number. These requests are available electronically at the offices of the EPA headquarters and regional inspectorates.

The variation requests received by the EPA have generally related to the proposed variation of a timeframe for the submission/completion of something, the nature of certain monitoring requirements which the permit had initially outlined, or the amendment of a tonnage limit for the quantity of material to be dumped at a particular time period within an overall period. In relation to tonnage variation requests, it is important to note that any variations granted ensured that the total quantity of material to be dumped over the lifetime of the permit remained unaltered and other regulatory controls (e.g. closed periods for Dumping at Sea) were still required to be complied with.

Amendment of Permits

Under Section 5(4) of the DAS Act[8] the EPA may amend a DAS Permit whenever it deems it appropriate but only following a process of consultation with specified Government Departments. However, Ireland wishes to clarify that EPA practice is that s.5(4) of the DAS Act is only used to make non-material clerical changes to DAS Permits.

The holder of a DAS Permit may request the EPA to amend DAS Permit. Pursuant to s.7A of the DAS Act, an application for an amendment for a DAS Permit is treated in a manner similar to an application for a DAS Permit. Accordingly, the same public participation requirements and consultations with

[8] Section 5 (4) of the DAS Act provides " The Agency may, after consultation with the Minister for the Environment, Heritage and Local Government, the Minister for Agriculture, Fisheries and Food, the Minister for Enterprise, Trade and Employment and such other Minister of the Government as the Agency considers appropriate, revoke or amend a permit under this section, whenever the Agency deems it appropriate.

statutory bodies apply in respect of an application to amend a DAS Permit as would apply in respect of an application for a DAS Permit. The permit holder is required to publish a newspaper notice and members of the public are permitted to make submissions on the application to vary the DAS Permit. Any valid submissions received from members of the public are taken into consideration as per the standard DAS Permit application process.

The EPA has produced a guidance document for permit holders in 2017 entitled, '*EPA Guidance on Requests for Alterations to a Dumping at Sea Permit' which is* available on the EPA website[9] and accessible to members of the public. This guidance was developed in consultation with the Dumping at Sea (DAS) Advisory Committee and assists DAS Permit holders in managing proposed alterations to DAS Permits and outlines the mechanisms for dealing with an alteration request. For convenience this guidance is exhibited at Appendix B.

As previously highlighted s.5(4) of the DAS Act requires the EPA to notify specified Government Departments and any other Department of Government it considers appropriate of an application to amend a DAS Permit In addition to this statutory requirement, the EPA will as a matter of practice also notify Inland Fisheries Ireland, the Petroleum Affairs Division of the Department of Communications, Climate Action and Environment, The Marine Survey Office in the Department of Transport and An Taisce - the National Trust for Ireland. The EPA will (apart from cases of minor clerical amendments) also notify the Dumping at Sea Advisory Committee. In cases where the activity might have transboundary implications, the EPA notifies the Marine Division of the Department of Environment and the Loughs Agency in Northern Ireland.

Where the requested amendments to a DAS Permit are approved by the EPA, the decision is circulated to all relevant consultees and anyone who made a submission on the original DAS Permit and/or them application to amend the Permit. It should also be noted that the amendment and any related correspondence, including submissions and notifications, are placed on the EPA website which may be accessed by any member of the public.

[9] http://www.epa.ie/pubs/advice/dumping%20at%20sea/epaguidanceonrequeststoalter

Since 18th September 2012, there have been a total of eight amendments of DAS permits authorised by the EPA. These are summarised in Appendix B - Table 2. As is apparent, four of these amendments were initiated by the EPA and four amendments were requested by the holder of the DAS Permit. Appendix B - Table 3 outlines the bodies consulted by the EPA in relation to each of these amendments to the DAS Permit and provisions made for public access.

Arising from the foregoing Ireland submits that it is incorrect for the Communicant to simply allege that there is no provision for public participation in respect of the alteration of DAS Permits.

Dumping at Sea Permit (Ref: S0028-01)

In its letter dated the 7th of December 2018 the Communicant makes specific reference to DAS Permit (Ref: S0028-01) and the fact that Condition 3.1 therein provides that "*all dumping activities shall be completed by 30 April 2019 or as otherwise agreed by the agency*" as evidence of the possibility to vary the dumping period without public participation. Ireland would highlight that these provisions of DAS Permit (Ref: S0028-01) are exceptional and do not reflect the EPA's general practice when issuing a DAS Permit. No change to the end date of the permit will be made by agreement with the EPA if screening establishes that such change would require appropriate assessment. If appropriate assessment is required, then an application for a new permit would be required and would facilitate public participation.

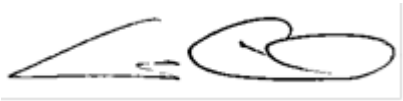
Conclusions

In summary, Ireland restates it submission that the dumping at sea permitting regime in Ireland provides full and transparent access to environmental information and enables full public participation in the permitting process in accordance with the requirements of Article 5 and 6 of the Convention. There has been full participation and transparent access to environmental information relating to the grant of Dumping at Sea Permit Reg. No. S0004-01 which is the subject of this Communication. Nothing advanced by the Communicant in its letters of dated the 19th of April 2018 and the 7th of December 2018 establishes the contrary.

For the reasons above, we respectfully request that the communication as referenced above is dismissed.

Please do not hesitate to contact the undersigned if you require any further information.

Yours sincerely,



Kevin McCormick
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APPENDIX A

Corrected list of all DAS Permits which issued after the 18th of September 2012 furnished by the EPA

APPENDIX B

EPA Guidance on Requests for Alterations to a Dumping at Sea Permit 2017

APPENDIX C

- Table 1

Summary of DAS Amendments made since 18th September 2012

- Table 2

Brief outline of reasons for DAS permit amendments, consultations made by the EPA and provisions for access by the public