

Irish Underwater Council
78A Patrick Street
Dun Laoghaire
Co. Dublin

Office of Environmental Sustainability,
EPA Headquarters,
P.O. Box 3000,
Johnstown Castle Estate,
Co. Wexford

24 March 2016

Dear Sir/Madam,

RE. PROPOSED USE OF DAS PERMIT S0004-01 BY DUBLIN PORT COMPANY

1 Introduction

1.1 In documentation submitted by Dublin Port Company (DPC) in respect of Dumping at Sea (DaS) permit application S0024-01, it is apparent that the DPC intends to continue maintenance dredging and subsequent dumping of dredge spoil under DaS permit S0004-01 (see page 2 of Section 2 of Alexandra Basin Redevelopment Response to Request for Further Information, February 2016). The volumes of dredge spoil proposed for disposal on the Burford Bank are 400,000 m³ in 2016 and 250,000 m³ in 2017.

1.2 The Irish Underwater Council (IUC), the national governing body for scuba diving and snorkelling in Ireland, has reservations about the legality of this proposal. These reservations relate to the fact that there is a conflict in the operative dates for DaS permit S0004-01, and that the DaS permit S0004-01 did not undergo Appropriate Assessment.

2 Conflicting Dates

2.1 The DaS permit application form from Dublin Port Company is dated 29 September 2009 – this was subsequently allocated permit application number S0004-01. It is an application to dump up to 4,000,000 tonnes of dredge spoil. In this application, the answers to question 12 on page 6 are as follows:

12. Date on which it is proposed to

(a) commence dumping: November 2009

(b) complete dumping: 6 years from commencement of dumping under this Permit.

2.2 DPC cannot possibly have hoped for the DaS permit application to be processed between 29 September and November 2009 due to the lengthy consultation period required. In fact, the DaS application form even states that the form should be submitted at least four months before dumping

is due to commence. The DaS permit S0004-01 itself is dated 28 July 2011 by the EPA. Strangely, it seems to have no end date. In other words, it is open ended. However, DPC had a self-imposed limit of 6 years from the date they commenced dumping.

2.3 An integral element of the DaS permit application procedure is that the applicant must place a notice in a newspaper. This notice clearly states that disposal operations will take place between November 2009 and October 2015. The newspaper notice must accurately inform third parties, including the general public, of the intention of the applicant.

2.4 Dumping under DAS permit S0004-01 started on 23 April 2012. Therefore, based on the original application form (para 2.1), DPC presume they have six years from this date under this permit (to 22 April 2018). There is now a conflict with the original newspaper notice which stated that dumping operations were to cease by October 2015. Both of these dates originate from the applicant – which is the legally binding date?

2.5 It is unclear why the applicant would put a fixed end date for dumping operations in the newspaper notice, whilst actually applying for a variable end date in the DaS application. Essentially, the applicant informed the public (and other third parties) that they were applying for one thing, when in reality they were applying for something else.

2.6 The dumping for the proposed summer 2016 maintenance dredging cannot possibly be covered by a public consultation procedure that stated that the dumping was due to finish in October 2015. Essentially, any dumping that occurs in 2016 and 2017 would do so without full and proper public and third party consultation. This is contrary to the requirements of the Aarhus Convention, to which Ireland is a signatory, which requires full and transparent dealings on environmental issues, especially with respect to public participation.

3 Appropriate Assessment

3.1 DaS permit S0004-01 was issued on 28 July 2011. The only dumping undertaken with this permit took place in 2012. These two actions pre-date the designation of the Rockabill to Dalkey Island Special Area of Conservation (SAC), which was designated in December 2012. The dump site licenced for this permit was at the Burford Bank in Dublin Bay and it was in this area that dumping occurred in 2012. The Burford Bank dump site lies entirely within the Rockabill to Dalkey Island SAC.

3.2 Any future dumping at the Burford Bank will be taking place within an SAC.

3.3 The EPA has decided that the application for a DaS permit for the Alexandra Basin Redevelopment (ABR) project, DaS application S0024-01, requires Appropriate Assessment in accordance with the European Communities (Birds and Natural Habitats) Regulations 2011. These regulations transpose into Irish law the EU Habitats Directive (92/43/EEC).

3.4 Article 6(2) of the Habitats Directive states that “*Member States shall take appropriate steps to **avoid**, in the special areas of conservation, the deterioration of natural habitats and the **habitats of species for which the areas have been designated**, in so far as such disturbance could be significant in relation to the objectives of this directive*” [emphasis added]. Note that the area of the Burford Bank is considered by the NPWS to be ‘suitable aquatic habitat’ for harbour porpoise, a species which is one of the qualifying interests of the SAC.

3.5 In interpreting Article 6(2), Section 3.2 of the European guidance document “Managing Natura 2000 Sites: The Provisions of Article 6 of the ‘Habitats’ Directive 92/43/CEE” (European Communities,

2000) states that “this article should be interpreted as requiring Member States to take all appropriate actions which it may reasonably be expected to take, to ensure that no significant deterioration or disturbance occurs”. Furthermore, the same section continues “Article 6(2) applies **permanently** in the special areas of conservation (SACs). It can concern past, present or future activities or events...If an already existing activity in a SAC causes deterioration of the natural habitats or disturbance of species for which the area has been designated, it must be covered by the necessary conservation measures foreseen in Article 6(1). This may require, if appropriate, that the negative impact be brought to an end either by stopping the activity or by taking mitigating measures.” [underline added]

3.6 The EPA, by deciding that permit application S0024-01 requires Appropriate Assessment, must now also require DaS permit S0004-01 to undergo Appropriate Assessment. The impact on the qualifying interests of dumping under permit S0004-01 has not been assessed. The fact that DaS permit S0004-01 has already been issued is irrelevant as the EU Habitats Directive captures existing procedures within its remit.

4 Conclusions

4.1 The IUC urges the EPA to suspend, with immediate effect, all dumping on the Burford Bank until the issues highlighted in this letter are resolved. The proposed start date for dredge and dumping operations is April 2016 so this requires urgent attention

4.2 The conflict in end dates must be resolved and the legal termination date of permit S0004-01 determined.

4.3 Further dumping under DaS permit S0004-01 cannot be considered until full and proper public and third party consultation has taken place. Public consultation is necessary before any dumping beyond the originally advertised cessation date of October 2015 takes place.

4.4 It is apparent that DaS permit S0004-01, although issued before the designation of the Rockabill to Dalkey Island SAC, is now captured by the requirement for Appropriate Assessment. This must be undertaken before further dumping of dredge spoil on the Burford Bank can be considered.



Dr Tim Butter

BSc (Hons) Marine Biology
MSc in Environmental Engineering
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Dr Tim Butter
Irish Underwater Council
78A Patrick Street
Dun Laoghaire
Co. Dublin

24th March 2016

Dear Dr Butter,

Re: Dublin Port Company Dumping at Sea Permit Reg. No. S0004-01

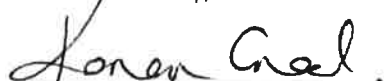
I refer to your email and attached letter of 24th March 2016, concerning the above referenced Dumping at Sea Permit.

In response to the questions you raise, I wish to advise that a Dumping at Sea Permit, Reg. No. S0004-01, was granted to Dublin Port Company on 28th July 2011. Condition 3.1 of Permit Reg. No. S0004-01 states that '*Loading and dumping activities must be completed within six years of the date of commencement of activities*'. Loading and dumping under Permit Reg. No. S0004-01 commenced on 23rd April 2012. In accordance with Condition 3.1 of the permit, loading and dumping activities may continue until 22nd April 2018.

The EPA has no plans to revoke or amend Permit Reg. No. S0004-01. However, Dublin Port Company has agreed to employ a Marine Mammal Observer to ensure that there is no deterioration in the habitat or disturbance of the Harbour Porpoise (*Phocoena phocoena*). The Marine Mammal Observer shall meet the monitoring and reporting requirements of the National Parks and Wildlife Service (NPWS) and full reporting will be provided to NPWS and the EPA.

If you have any further queries, please do not hesitate to contact me.

Yours sincerely,



Dr Karen Creed

Irish Underwater Council
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Dun Laoghaire
Co. Dublin

Dr Karen Creed
Office of Environmental Sustainability,
EPA Headquarters,
P.O. Box 3000,
Johnstown Castle Estate,
Co. Wexford

24 March 2016

Dear Dr Creed,

RE. PROPOSED USE OF DAS PERMIT S0004-01 BY DUBLIN PORT COMPANY

Many thanks for your letter of 24 March 2016. However, it does not actually address either of the core issues raised by my letter of 24 March. In summary, these issues are as follows:

1 Appropriate Assessment

By requiring Appropriate Assessment of Dumping at Sea (DaS) permit application S0024-01, the EPA has already decided that the dumping of dredge spoil within the Rockabill to Dalkey Island Special Area of Conservation (SAC) constitutes a plan or project as defined by the EU Habitats Directive, and that it is a plan that is likely to have a significant effect on the European Site, either individually or in combination with other plans or projects, and is not directly connected with or necessary to the management of the European Site. DaS permit S0004-01 has not been subject to Appropriate Assessment. However, Dublin Port Company (DPC) proposes to use DaS permit S0004-01 to dump 400,000 m³ of dredge spoil in 2016 and 250,000 m³ in 2017 in the Rockabill to Dalkey Island SAC.

Section 46 (1) of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011), relating to review of existing plans, is explicit:

46. (1) Where a public authority has decided to adopt or undertake, or has given any approval for a plan, the implementation of which—

(a) is not yet completed at the date of the making of these Regulations and may continue or commence after the date of the making of these Regulations, or

(b) is not yet completed at the date on which a relevant site becomes a European Site and may continue or commence after the date on which the relevant site becomes a European Site,

and the public authority has not conducted a screening for Appropriate Assessment or an Appropriate Assessment of the implications for the European Site of the plan in view of the site's conservation objectives before deciding to undertake, or give any approval for that plan where the plan—

(i) is likely to have a significant effect on the European Site, either individually or in combination with other plans or projects, and

(ii) is not directly connected with or necessary to the management of the European Site,

then the public authority shall review its decision or approval for the plan, applying the provisions of Regulations 42 and 43 with the appropriate modifications, and it may thereupon affirm, modify or revoke its decision or approval.

Summarising the effective text from this section: Where a public authority (i.e. the EPA) has given approval for a plan (i.e. DaS permit S0004-01), the implementation of which is not yet completed at the date on which a relevant site becomes a European Site (i.e. Rockabill to Dalkey Island SAC) and may continue after the date on which the relevant site becomes a European Site (i.e. as proposed by DPC), and the public authority has not conducted a screening for Appropriate Assessment or an Appropriate Assessment of the implications for the European Site, **then the public authority shall review its decision or approval for the plan**, applying the provisions of Regulations 42 (i.e. Screening for Appropriate Assessment and Appropriate Assessment of implications for European Sites) and 43 (i.e. Proposed plans or projects and imperative reasons of overriding public interest) with the appropriate modifications, **and it may thereupon affirm, modify or revoke its decision or approval**.

The legislation is very clear. The EPA has a statutory responsibility to undertake Appropriate Assessment in this instance. To fail to do so is a breach of Irish and European legislation. Any further dumping at sea in the Rockabill to Dalkey Island SAC, without first undertaking Appropriate Assessment, would also constitute a breach of Irish and European legislation.

The EPA has a duty to comply with Irish legislation. In your letter of 24 March 2016, you stated that “the EPA has no plans to revoke or amend Permit Reg No. S0004-01”. As indicated above, the EPA can only affirm its approval after first undertaking Appropriate Assessment. Furthermore, under these circumstances, the EPA is legally obliged to review DaS permit S0004-01. Since no Appropriate Assessment has been undertaken, on what legal basis did the EPA decide not to review its decision to approve DaS Permit Reg. No. S0004-01?

2 Public Consultation

Your letter does not address the issue of effective public consultation. There are two issues:

- 1) The newspaper notice, informing the public and other third parties of the intention of DPC, stated that the DPC were applying for a DaS permit running from November 2009 to October 2015. However, DPC actually applied for a DaS permit running for 6 years from the commencement date, which is very different to the information in the newspaper notice. There is a duty of care to ensure that appropriate and accurate information is provided to the Minister (and hence the public) on all fora used in the application process (Section 5(7) of the Dumping at Sea Act, 1996).
- 2) Because the newspaper notice stated that all operations under the DaS permit sought by DPC were to terminate by October 2015, then any person or third party with observations relating to dumping at sea in 2016, 2017, and 2018 would not have commented on the application. Essentially, the misinformation published in the newspaper notice has excluded all those parties who might have had observations relating to dumping occurring after October 2015. Therefore, this DaS permit application S0004-01 has not undergone full public consultation.

The two issues raised above, which have not yet been adequately addressed by the EPA, greatly undermine public participation in the DaS process. Public consultation in environmental issues is a cornerstone of the democratic process and is enshrined in the Aarhus Convention.

As stated in my letter of 24 March 2016, this matter is of the greatest urgency as Dublin Port Company are intending to use DaS permit S0004-01 for dumping dredge material in the Rockabill to Dalkey Island SAC from Friday 1 April 2016. If this dumping were to proceed without a full review, including Appropriate Assessment, both the EPA and DPC would be in contravention of Irish and European law.

A handwritten signature in dark ink, appearing to read 'T Butter', is positioned above the printed name.

Dr Tim Butter

BSc (Hons) Marine Biology
MSc in Environmental Engineering
PhD in Environmental Engineering

From: timothy.butter@gmail.com [mailto:timothy.butter@gmail.com]
Sent: 28 March 2016 17:40
To: Karen Creed
Cc: mike.orth@gmail.com; clairekavanagh@gmail.com; Louise Gilligan
Subject: Re: re DAS Permit S0004-01

Dear Dr Creed,

Thank you for your response to my letter of 24 March. The response of the EPA to this matter to date is inappropriate. Therefore, please find attached a further letter from the Irish Underwater Council relating to his matter.

I also request that this letter, plus my previous letter of 24 March and your response be uploaded to the relevant sections of the EPA web site for documentation relating to DAS permit S0004-01.

Furthermore, since your letter mentions an agreement with Dublin Port Company, I also request that the correspondence upon which this agreement was made is also uploaded (this agreement relates to the employment of a Marine Mammal Observer).

I would also be very grateful if the attached is forwarded to the EPA legal department. I suggest the attached letter be reviewed in context with the recent High Court judgement Balz v An Bord Pleanála, particularly paragraphs 232 and 233.

Yours sincerely,
Dr Tim Butter

Tim Butter PhD
Irish Underwater Council
78A Patrick Street
Dun Laoghaire, Co. Dublin

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do not necessarily reflect the policy of the Environmental Protection
Agency.

From: timothy.butter@gmail.com [<mailto:timothy.butter@gmail.com>]
Sent: 30 March 2016 09:56
To: Karen Creed
Cc: clairekavanagh@gmail.com; Louise Gilligan; mike.orth@gmail.com
Subject: Re: re DAS Permit S0004-01

Dear Dr Creed,

Subject to Condition 2.4 of DAS Permit S0004-01, the Dublin Port Company "shall notify the Agency at least two weeks prior to the commencement of the loading and dumping activities."

Has the EPA received such notification from DPC with respect to dumping of dredge spoil in April 2016? If such correspondence has been received by the EPA I would highlight that fact that the EPA is required to upload all correspondence relating to DAS permits to the EPA website (as per pg 7 of Dumping at Sea EPA Enforcement and Permitting Booklet).

Regards,

Tim

Dr Tim Butter
Irish Underwater Council

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From: Regina Campbell

Sent: Wednesday, 30 March 2016 16:31

To: timothy.butter@gmail.com

Dear Mr. Butter,

I refer to your email below.

The EPA has not received notification (as of today) under Condition 2.4 of the Permit S0004-01 of the permit-holders intention to commence loading and dumping activities.

I am to advise you that the EPA currently provides documentation relating to Dumping at Sea permit applications, Dumping at Sea permits issued and Annual Environmental Reports on the EPA website at this link: http://www.epa.ie/terminalfour/DaS/index.jsp#.VvqT_mVlgdU. The EPA's Office of Environmental Enforcement does not maintain correspondence relating to Dumping at Sea permits (other than the Annual Environmental Report) online. General information is also available in the *Dumping at Sea EPA Enforcement and Permitting Booklet* available at the following link: http://www.epa.ie/pubs/advice/dumping%20at%20sea/EPA%20Dumping%20at%20Sea_web.pdf

Please note that Dublin Port Company is required to maintain a Public Awareness and Communication Programme under Condition 2.7 of their permit and this requires that members of the public can obtain information at reasonable times in relation to the activities permitted under S0004-01. You are therefore advised to contact the permit holder in the first instance in relation to any queries you have.

Yours sincerely,

Regina Campbell

Regina Campbell
Inspector
Office of Environmental Enforcement
Environmental Protection Agency
Inniscarra
Co. Cork.

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Fax: + 353 (0) 21 4875545

Web address: www.epa.ie

Environmental Protection Agency on Twitter:

<http://twitter.com/EPAIreland>.

EPA Climate Change on Twitter:

<http://twitter.com/EPAClimateNews>

EPA Research on Twitter:

<http://twitter.com/EPAResearchNews>

YouTube:

<http://www.youtube.com/user/epaireland>

Dr Tim Butter
Irish Underwater Council
78A Patrick Street
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12th April 2016

Dear Dr Butter,

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LoCall: 1890 33 55 99

Re: Dublin Port Company Dumping at Sea Permit Reg. No. S0004-01

I refer to your recent correspondences concerning the above referenced Dumping at Sea Permit.

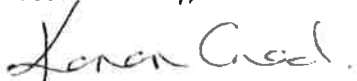
I can clarify that the EPA provides documentation relating to Dumping at Sea permit applications, Dumping at Sea permits issued, and Annual Environmental Reports on the EPA website. The EPA's Office of Environmental Enforcement does not maintain correspondence relating to Dumping at Sea permits (other than the Annual Environmental Report) online.

The EPA is satisfied that the present permit requires the activity to be carried on without causing deterioration in habitat or disturbance of species in European Sites. Accordingly the EPA has no plans to exercise its powers of amendment / revocation under Section 5(4) of the Dumping at Sea Act 1996 as amended. Further to your reference to Regulation 46 of the European Communities (Birds and Natural Habitats) Regulations, 2011 as amended, it should be noted that Regulation 46 is not applicable to projects, only to plans, and therefore does not apply in this case. The EPA is aware of and complying with the requirements of Article 6(2) of the Habitats Directive (92/43/EEC).

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 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.

If you have any further queries, please do not hesitate to contact me.

Yours sincerely,



Dr Karen Creed
Environmental Licensing Programme

cc Senator Averil Power

From: timothy.butter@gmail.com

Sent: Wednesday, 13 April 2016 13:41

To: [Karen Creed](#)

Cc: [Mike Orth](#), clairekavanagh@gmail.com, [Louise Gilligan](#)

Dear Dr Creed,

If you refer to Regulation 46(3) of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011). This section states:

(3) For the purposes of this Regulation, a decision, including a decision to adopt or undertake, or give approval for a plan, may include those adopted, undertaken or approved pursuant to any of the enactments set out in the Second Schedule to these Regulations.

The Dumping at Sea Acts 1996 to 2009 are listed in the Second Schedule of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011). **Therefore, the dumping activity of Dumping at Sea permit S0004-01 constitutes a plan as defined by the Habitats Directive and is subject to the requirements of the Habitats Directive, including screening for Appropriate Assessment.**

Furthermore, this statement of fact is in agreement with the EPA's position regarding DaS permit application S0024-01. This permit application was screened for Appropriate Assessment by the EPA on 11 December 2015, with the Agency determining that Appropriate Assessment is required (ref letter from Dr Tara Higgins, EPA, to Ms Ruth Barr, RPS Consulting Engineers, dated 15 December 2015).

Since the EPA has so far avoided taking the necessary legislative action with regards DaS permit S0004-01, as required by S.I. No 477 of 2011, I wish to notify you that the Irish Underwater Council has lodged an official complaint with the EU and that the Environment DG has also been notified of the situation.

Yours sincerely,
Tim Butter

Tim Butter PhD
Irish Underwater Council
78A Patrick Street
Dun Laoghaire, Co Dublin

From: timothy.butter@gmail.com [<mailto:timothy.butter@gmail.com>]
Sent: 17 May 2016 09:31
To: Das Reports
Cc: Mike Orth; Louise Gilligan; clairekavanagh@gmail.com; Dermot NDO
Subject: Re: DaS Permit Reg. No. S0004-01

Dear Sir/Madam,

Is the Aftercare Management Plan for DAS Permit Reg. No. S0004-01 available for public inspection? If so, would it be possible to see a copy for review?

Many thanks in advance,
Tim

Dr Tim Butter
Irish Underwater Council, 78A Patrick Street, Dun Laoghaire, Co. Dublin
www.diving.ie

From: [Das Reports](#)
Sent: Tuesday, 10 May 2016 14:18
To: timothy.butter@gmail.com

Dear Dr. Butter,
I acknowledge your email and we will revert to you in due course.

Regards,
Pól Ó Seasnáin
Inspector
Office of Environmental Enforcement
EPA, Inniscarra, County Cork, P31 VX59
Tel: 021 4875540

From: timothy.butter@gmail.com [<mailto:timothy.butter@gmail.com>]
Sent: 09 May 2016 09:57
To: Karen Creed
Subject: DaS Permit Reg. No. S0004-01

Dear Dr Creed,
Can you advise me whether DaS permit Reg. No. S0004-01 has been used for the disposal of contaminated dredge material?

Thank you!
Tim

Dr Tim Butter
Irish Underwater Council, 78A Patrick Street, Dun Laoghaire, Co. Dublin
www.diving.ie

From: Das Reports
Sent: Thursday, 19 May 2016 14:56
To: timothy.butter@gmail.com

Dear Tim,

See attached Aftercare Management Plan for DaS Permit Reg. No. S0004-01 as requested.

In relation to your other query, the OEE is minded to treat this as a complaint and under established procedures OEE will forward this to the permit holder for a response before deciding, and in turn communicating to you, whether to (i) close the complaint or (ii) open a compliance investigation. This is not a routine query and, while we will respond as quickly as we can, it will likely take some time to respond to fully. In line with our customer charter (see http://www.epa.ie/pubs/reports/other/corporate/EPA_Customer_Charter.pdf), we will keep you informed as to when you can expect a full reply.

In this regard, and before we forward the matter to the permit holder, do you wish your personal details to remain confidential?

Regards.

Pól Ó Seasnáin
Inspector
Office of Environmental Enforcement
EPA
Inniscarra
County Cork
P31 VX59
Tel: 021 4860814

From: timothy.butter@gmail.com [<mailto:timothy.butter@gmail.com>]
Sent: 18 May 2016 16:30
To: Das Reports
Cc: Mike Orth; Dermot NDO; clairekavanagh@gmail.com; Louise Gilligan
Subject: Re: DaS Permit Reg. No. S0004-01

Thank you Pól, that's great.

Have you been able to determine whether DaS Permit Reg. No. S004-01 has been used for disposal of contaminated material? I note from the EPA customer charter that it is usual to respond to most enquiries within 5 working days and this time period has elapsed.

Thank you again,
Tim

cc:
Mike Orth - President, Irish Underwater Council
Dermot Moynihan - National Dive Officer, Irish Underwater Council
Claire Kavanagh - Scientific Officer, Irish Underwater Council
Louise Gilligan - General Manager, Irish Underwater Council