

to Aoife.Joyce, .

Dear Aoife,

I have been recommended to contact you regarding the application of the Aarhus Convention to the Dumping at Sea permitting process.

The issue has come to light due to current controversy regarding Dumping at Sea Permit Reg. No. S0004-01, issued by the Environmental Protection Agency (EPA) in July 2011 in respect of an application by Dublin Port Company (DPC).

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. The Dumping at Sea Act 1996 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 an onus of responsibility on the regulatory authority and the applicant to ensure that the information provided to the public 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 is an offence. 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"*

[emphasis added]

It is the details of the commencement and duration of the dumping at sea which are the issue in this instance. In the case of permit application S0004-01, there are significant discrepancies between the relevant dates for the permit:

- DPC published a newspaper notice 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.
- However, what DPC actually applied for in the application form was a permit to run from November 2009 but from 6 years from date of commencement.

- The EPA issued the permit 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”.
- Permit S0004-01 was first used on 23 April 2012 (commencement date), meaning it is valid until 22 April 2018.

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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. DPC has stated it’s intention to use permit S0004-01 for the disposal of dredge spoil in spring/summer 2016 and 2017. The use of this permit post November 2015 is questioned due to lack of public consultation and failure to fully implement the requirements of the Aarhus Convention.

This issue has been raised with the EPA, who have stated 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 [sic] 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”*. The EPA has not disputed the fact that any person who may have had an observation to make regarding dumping by DPC in 2016, 2017 and/or 2018 has been excluded from the public participation process by virtue of the fact that they were misinformed by the newspaper notice which stated that all activity would have been complete by October 2015. 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.

The following text relating to the Aarhus Convention is taken from the website of your own department:

“Under the Convention, the public has a right to participate in decision-making in environmental matters.

Arrangements should be made by public authorities to enable the public to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment. Any subsequent comments are to be taken into consideration in the decision-making process. Information must be provided on the final decisions and the reasons for it. In the European Union, this part of the Aarhus Convention has been implemented by Directive 2003/35/EC on public participation (‘the Public Participation Directive’).”

The EPA is correct in stating that there was a procedure for public participation. However, this consultation was flawed due to the misinformation 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 further past the end of the period of public consultation.

Finally, on foot of the issues arising from Dumping at Sea permit S0004-01, all of the Dumping at Sea permits for all ports were examined. The wording for the commencement and duration dates noted above for permit 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.

Regulation 5(1)a of the Dumping at Sea Act 1996 states "*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.

I would be very grateful for your opinion on this issue.

Regards,
Tim Butter

May 4

to timothy.butter

Dear Tim,

Thank you for your e-mail and apologies for the delay in responding.

Ireland ratified the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, commonly referred to as the Aarhus Convention, on 20th June 2012. The Convention sets out rights of participation for the public in decision-making in environmental matters.

The Department of the Environment, Community and Local Government (DECLG) has overarching responsibilities in relation to the transposition of the Aarhus Convention and related EU Directives, including Directive 2003/35/EC on Public Participation in Ireland. However, their implementation and operation is a matter for each public authority and the Department has no legal authority or function in determining whether or not a public authority is acting in compliance. While DECLG provides information to public authorities on Aarhus matters generally, with a view to ensuring that an informed decision is made by the public authority, ultimately, the actions undertaken by any public authority is a matter for the individual public authority to consider on a case by case basis.

Several pieces of legislation have been used to transpose the Public Participation Directive into Irish law, including the integration of its requirements into Irish planning law and into legislation governing other environmental consents, which would include the obligations for public participation under licensing regimes.

In accordance with the Aarhus Convention, a member of the public may seek the right to domestic remedies on a decision-making process through a public authority's own complaints and review mechanism, then potentially, if appropriate, through Judicial Review. The Aarhus Convention also has its own complaints procedure, the Aarhus Convention Compliance Committee (ACCC), to which any member of the public may make a communication concerning a Party's compliance with the Convention. It is important to note that the ACCC may require that a communicant has exhausted domestic remedies prior to accepting a case before the compliance committee.

There are also two legislative measures in place to support non-prohibitive costs in accordance with the 3rd Pillar of the Aarhus Convention, Access to Justice. These are Section 50B of the Planning and Development Act 2000, as amended by the Planning and Development (Amendment) Act 2010 and the Environment (Miscellaneous Provisions) Act 2011, which may apply to judicial review proceedings seeking to challenge a decision of a public authority.

However, any of the undertakings outlined above would need to be considered by any individual or group of individual's intending to under-go this complaints and review procedure and while the Department of the Environment, Community and Local Government hold a legislative and policy role for the implementation of the Aarhus Convention in Ireland it is precluded from offering any legal interpretation and, as such, it would be inappropriate to indicate any course of action to be undertaken.

The issue raised here is relating to the granting of a specific licence under the Dumping at Sea Acts and, as such, is an operational matter for the EPA.

Kind regards, Aoife

May 4

to Aoife, Mike, Louise, clairekavanagh, Dermot

Dear Aoife,
Many thanks for your response.

I quoted in my email to you the response from the EPA when this issue was raised. My interpretation of this statement was that the EPA considered that the permit application had undergone due process and that they were not considering a review of the permit.

The permit application did undergo due process. The problem in this case is that after the public participation was complete, the permit was issued for a period longer than that which underwent public consultation (as notified to the public in the newspaper notice). Indeed, the issuing of a permit beyond the date of the end of the public notified period was not necessarily an issue either, unless the applicant intended to use the permit after the end of the notified period. Since use of the permit after the end of the public notification period would appear to constitute an offense under Section 5(7) of the Dumping at Sea Act 1996, it would have been safe to assume at the time of the issuing of the permit that it would not be used after the end of the notified period. However, it now seems that the applicant does now intend to use the permit after the end of the publically notified period and that the EPA Dumping at Sea licencing section will not intervene.

From your response, am I correct in understanding that the next step is to lodge a formal complaint with the EPA? If this is correct, do you know who should be contacted within the EPA?

Many thanks again,
Tim

May 5

to timothy.butter, Mike, Louise, clairekavanagh, Dermot

Dear Tim,

I understand from your emails that you have already engaged in correspondence with the EPA on this particular permit. I would suggest therefore that, in the first instance anyway, the person in the EPA with whom you have been dealing thus far might be best placed to set out the options now available to you.

You will appreciate that the EPA was established as a non-commercial and independent state-sponsored body under the Environmental Protection Agency Act 1992 and, accordingly, day-to-day operational matters are at the discretion of the Agency alone, and the Department has no role in such matters.

I note however that the EPA does have a formal complaints procedure <http://www.epa.ie/enforcement/report/> which I hope will provide some clarification for you.

Kind regards,

Aoife