

**Responses to the Aarhus Convention Compliance Committee concerning compliance by Ireland in connection with dumping at sea (PRE/ACCC/C/2016/139)**

1. The Aarhus Convention entered force for Ireland on 18 September 2012. The Compliance Committee can therefore only examine the compliance of decisions to permit activities covered by article 6 of the Convention that were taken after 18 September 2012. In your communication you state that Dumping at Sea (DaS) Permit Reg. No. S0004-01 was issued on 28 July 2011, i.e. before the Convention's entry into force for Ireland. In the light of the above, please explain how the decision-making on Permit Reg. No. S0004-01 is subject to the requirements of article 6 of the Convention.

**RESPONSE**

Ireland signed the Aarhus Convention on 25 June 1998. Dumping at Sea (DaS) Permit Reg. No. S0004-01 was issued on 28 July 2011, over 13 years after Ireland had signed the Convention. Whilst Ireland did not fully ratify the Convention until 18 September 2012, the basic principles of the Convention should have been implemented by the time that this permit was issued. Also there appears to have been no change in procedure for the granting of DaS permits since the ratification of the Convention.

The issues raised regarding DaS permit Reg. No. S0004-01 are relevant to many dumping at sea permits issued in Ireland since 18 September 2012. These issues include:

- The permitting of dumping activities beyond the dates notified to the public in the public notice. This issue applies to DaS permits S0007-02, S0009-02, S0011-02, S0012-02, S0013-02, S0017-01, S0019-01, S0020-01, and S0022-01. See appendix 1 DAS Permits
- Failure to inform the public and other third parties in the public notice of the presence of contaminated sediments in the material to be dumped. This issue applies to DaS permits S0013-02, and S0015-02. It is understood that the dumping of moderately contaminated sediments is legally permitted under some circumstances. However, it is contended that this is information that would be of interest to third parties (including members of the public but also, for example, anglers and commercial fishermen) and should be open to public consultation. See appendix 2 – Public Notice
- ALL dumping at sea permits issued in Ireland, including those issued since 18 September 2012, use the wording *“Loading and dumping activities must be completed within X months/years of the date of commencement of activities”* to define the operational period of the permit. See appendix 3 for example in relation to permit S0009. Therefore, the permit holder of a dumping at sea permit has total control over the timing of dumping activity, generally with a permit lasting a number of years and covering multiple dredging campaigns. The applicant need only give the regulatory authority (the Environmental Protection Agency, EPA) two weeks' notice of the intention to start dredging and dumping. This makes it very difficult to assess in-combination effects where Appropriate Assessment is required, particularly where a number of ports or harbour facilities use the same dump site. Furthermore, in situations where Appropriate Assessment is required the permit facilitates a number of dredging campaigns spanning many years based on a single Appropriate Assessment. This contradicts the ECJ ruling on Case C-226/08 (*Stadt Papenburg v Bundesrepublik Deutschland*) which determined that with respect to dredging operations that *“each intervention in the navigable channel”* is a *“distinct project for the purposes of the Habitats Directive”*. This means that each

intervention (i.e. dredging campaign) is a separate project and requires a separate Appropriate Assessment. See appendix 4 – Case C 226-08

2. Please explain how a permit for the disposal of dredge spoil into the sea issued under the Dumping at Sea Act 1996 qualifies as a decision on a proposed activity within the scope of article 6, paragraph 1(a) or (b) of the Convention.

## RESPONSE

Please refer to the Aarhus Convention Annex I, List of Activities Referred to in Article 6, Paragraph 1(a).

Paragraph 9b of Annex I relates to *“Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1,350 tons”*. Dredging, and subsequent dumping at sea, is a vital element in the management of such facilities.

Paragraph 22 of Annex I relates to *“Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this Annex, shall be subject to Article 6, paragraph 1(a) of this Convention. Any other change or extension of activities shall be subject to Article 6, paragraph 1(b) of this Convention”*. In Ireland where dumping at sea permits are proposed for dumping in or near a Natura 2000 site, they are routinely subject to the requirement of Appropriate Assessment. It is therefore evident that dumping at sea is inherently an activity which *“may have a significant effect on the environment”*, as per Article 6, paragraph 1(b).

3. What domestic remedies (e.g. administrative or judicial review or other domestic procedure) has the communicant or another member of the public used to challenge each of the following:

## RESPONSE

The Irish Underwater Council had previously contacted the Environmental Protection Agency on numerous occasions with regards the issues raised in the original submission to the Aarhus Convention Compliance Committee. Initial responses from the EPA were not particularly helpful, largely ignoring the issues regarding public consultation and access to documentation. See appendix 5- EPA Correspondence.

The Irish Underwater Council also contacted Ms Aoife Joyce, Environmental Policy and Awareness, Department of Communications, Climate Action and Environment, (formerly Department of the Environment, Community and Local Government) by email on 22 April 2016. In her response of 4 May 2016, Ms. Joyce stated that *“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.”*

This response from the State body with responsibility for implementation of the Aarhus Convention appeared to imply that there was no support for any investigation into compliance with the Convention by a public authority such as the EPA. See appendix 6 – Communication with Aoife Joyce

As a consequence of the above, the IUC formalised previous communications by lodging an official complaint to the EPA on 15<sup>th</sup> of May 2016 with regards these and other issues arising from dumping at sea permit S0004-01. Dermot Conway, Solicitor, acting on behalf of the IUC, issued a letter to the EPA on 30th June 2016 stating the intention to initiate a judicial review of this DaS permit. Upon receipt of our legal representations the solicitors acting for EPA requested the IUC do not pursue a Judicial Review until conclusion of an investigation by the EPA. Subsequently, a response was received from the EPA on 22 August 2016. While letter of 22 August 2016 does address some of the questions raised within this section it fails to give adequate explanations of a number of important items including the issuing of open ended permits and the lack of adequate public consultation. See appendix 7 – EPA formal letter of complaint and appendix 8 – Response to IUC.

3 (a) The EPA's alleged statement that it "does not maintain correspondence relating to Dumping at Sea permits when the EPA's own guidance allegedly states that "All permit application documents, correspondence, submissions etc. are available on the EPA website";

## RESPONSE

The EPA, in its response of 22 August 2016, appears to recognise the discrepancy between what it says it does, and what it actually does. The EPA stated its intention to make "*more information on DAS enforcement available online*" whilst noting that the "*EPA makes correspondence publically available for other licences e.g. waste licenses [sic] / industrial emission licenses [sic] and the intention is that in time DAS correspondence will also be similarly available*". It is noted that the EPA made no commitment to a deadline to implement these changes to the availability of DAS documentation.

The EPA then states that "*currently the EPA endeavours to make information available to the public on request*" however they also state that in the first instance information regarding DAS permits should be sought from the permit holder. Whilst the IUC initially raised this issue with respect to DAS permit S0004-01, this situation is widespread among other DAS permits issued in Ireland since 18 September 2012. For example, condition 2.9 of DAS permit S0021-01, issued by the EPA on 22 July 2015, and which relates to a Communications Programme, states that "*The permit holder shall, within one month of the date of grant of this permit, establish and maintain a Public Awareness and Communication Programme to ensure members of the public can obtain information at reasonable times*". The function of the Aarhus Convention is surely to make such information available from the regulatory authority rather than the permit holder. See appendix 9 – DAS S0021-01

At a very basic level, DAS permit holders have to give the EPA two weeks' notice in writing of the intention to start dredging using the DAS permit. Even though the EPA has a copy of this correspondence, it is not posted on the EPA website. Instead any interested third party has to contact the permit holder individually.

At a more substantive level, correspondence relating to changes to the permit agreed between the permit holder and the EPA subsequent to issuing of the permit is also not posted to the EPA website and therefore hidden from public view. For example, with regards to permit S0004-01, Dublin Port Company wrote to the EPA on 8 March 2012 to request the addition of three new areas to be dredged. These areas are described as Sludge jetty, Bar West, and Bar East. These three areas are mentioned

in the supporting documentation for the application for permit S0004-01 but with volumes to be dredged indicated as zero cubic metres See table 3 in appendix 10 – Analytical Report. It is assumed permission to this extension was granted as these areas were dredged in July 2016 (even though Bar East now lies within the Rockabill to Dalkey island SAC), however this documentation is not available from the EPA website. Whilst it is recognised that this permit and the changes indicated above all pre-date the 18 September 2012, it must be recognised that if similar changes have been made to other permits after this date, then the information on these changes cannot readily be accessed. Indeed, if a person does not know that a change has been made, who are they to request the correspondence that relates to the change. The current situation leaves the EPA expecting a person to make regular contact with the permit holder to ask if any changes have been made. This is clearly an unworkable and impractical procedure and well outside the scope of good practice.

As a point of fact, the IUC contacted Dublin Port Company by email on 15 April 2016 to request that the organisation be given advance notice of the start of the 2016 dredging campaign for diver safety reasons and, although DPC agreed to this request (email of 18 April 2016), they did not give notice as promised.

In answer to the question, the IUC lodged a formal complaint with the EPA on 15 May 2016, following substantial correspondence with the EPA.

### 3 (b) The alleged use of DaS Permit Reg. No. S0004-1 to dispose of contaminated material;

#### RESPONSE

This is not an allegation, it is a statement of fact as confirmed by the EPA in their letter of 22 August 2016.

It is duly noted that the disposal of “moderately contaminated” materials is allowed under OSPAR under certain conditions and that DAS permit S0004-01 appears to facilitate such disposal. It is however, reiterated that the intention to dispose of contaminated material was not made readily available to the public from the information in the public notice, the DAS application documents, or the permit itself. The information on sediment composition is available in one of the 16 appendices to the application, but as raw laboratory data with no interpretation on the significance of different concentrations of contaminants. For example, the laboratory data sheets list 19 individual PAHs, whereas the Marine Institute guidelines for disposal of dredge material in Ireland use a sum of 16 specific PAHs in classifying level of contamination. Therefore, in order to interpret the raw chemistry data presented in the appendix, a member of the public would also need a copy of the Marine Institute guidelines, plus a calculator to add up the concentrations of the 16 individual PAH concentrations. The EPA have suggested that their Inspectors Report contains interpretation of this data, but of course this document post-dates the period of public consultation.

### 3 (c) The alleged failure to make publicly available the notification that the EPA requires permit holders to give at least two weeks prior to the intended commencement of loading and dumping activities;

#### RESPONSE

Please refer to response to Question 3(a) as this question essentially is an extension of the failure to ensure all correspondence relating to DAS permits is made publically accessible. Instead, members of the public are expected to contact permit holders directly for such information.

(d) The alleged failure by the permit holder to comply with Condition 3.10 of DaS Permit Re. No. S0004-01 regarding the recording of the source of the dredged substance or material.

## RESPONSE

This issue was raised by the IUC in the official complaint lodged with the EPA on the 15<sup>th</sup> May 2016. In its response of 22 August 2016, the EPA stated that it was *“satisfied that the licensee complied with Conditions 3.10(ii) and 3.10(iii) during the 2012 dredging campaign”*. Condition 3.10(ii) relates to the recording of the source of the dredged material. The EPA then states that *“the EPA does not require that all of the detail automatically recorded under Condition 3.10 be included in the register reported in the AER”* (Annual Environmental Report). However, attention is drawn to Condition 7.7 of DAS permit S0004-01, which states that *“The permit holder shall submit electronically to the Agency, by the 31st March of each year, an AER covering the previous calendar year. This report shall include as a minimum the information specified in Schedule C: Annual Environmental Report of this permit”*. The first item in Schedule C is *“Register/log of loading and dumping at sea activities”*. It is therefore clear that the log of loading data should be included in the AER. See appendix 11 – Das S0004-01

As of Monday 5<sup>th</sup> of September no further communication has been made with the EPA since receipt of their response of 22 August 2016.