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Secretary to the ACCC
UN Economic Commission for Europe
Palais des Nations
1211 Geneva 10
Switzerland

25th April 2022

Dear Ms. Marshall,

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

1. Introduction

Diving Ireland (formerly trading as the Irish Underwater Council) would greatly appreciate the opportunity to address the communication from the Party Concerned dated 4 March 2022 as it supports many of the original claims raised by the Communicant. The original communication from the Irish Underwater Council in May 2016 related primarily to two issues:

- i. public participation in the application process for dumping at sea permits (DAS permits) in Ireland, and
- ii. access to information regarding DAS permits.

In Ireland, the regulation of DAS permits is a function of the Environmental Protection Agency (EPA, or Agency).

The initial complaint focussed on DAS permit S0004-01. A public notice in a newspaper is required for all DAS permit applications as a prelude to public participation in the decision-making process, with this notice to include the dates over which the permit is sought. The public notice for DAS permit S0004-01 indicated that the applicant sought to undertake dumping at sea between November 2009 and October 2015. However, when DAS permit S0004-01 was issued, the time limit imposed by the EPA was that "*loading and dumping activities must be completed within six years of the date of commencement of activities*". The permit was first used on 23 April 2012, meaning that the permit was valid to 22 April 2018. Therefore, the operation of this DAS permit between October 2015 and April 2018 was not subject to any public participation due to erroneous information provided by the applicant in the public notice and/or use of language in the conditions of the DAS permit that did not tie the duration of the permit to the duration specified by the applicant. *This relates to Article 6 of the Aarhus Convention – public participation in decisions on specific activities.*

In trying to obtain basic information regarding DAS permit S0004-01, it was found that documents that would be expected to be available through the EPA's online portal were not available. At the time the EPA had responded by stating that "*the EPA's Office of Environmental Enforcement does not maintain correspondence relating to Dumping at Sea permits*". In effect, the EPA was holding back documents that would reasonably be expected to have been in the public domain, protecting communications between permit holders and the regulator from third party scrutiny. The lack of public access to important documents related to DAS permits, and thus access to information on environmental matters, was the second issue raised by the original communication. *This relates to Article 5 of the Aarhus Convention – collection and dissemination of environmental information.*

This communication intends to update the ACCC based on the information provided by the Party Concerned in their communication of 4 March 2022.

2. Inadequate Public Participation with Regards Time Limits of DAS Permits

It is noted that the EPA appears to have moved away from issuing the DAS permits with open time limits and where the applicant controls the time period for dumping. The most recent DAS permits available on the EPA website, such as DAS permit S0015-03, have defined final dates when the permit can be used. Furthermore, these dates are now in alignment with the dates specified in the public notices. These changes in policy are welcomed. However, the response of the Party Concerned to changes to the conditions of DAS permits S0021-01 and S0012-01 is very concerning.

2.1 Change of Condition 3.1 of DAS permit S0021-01

Page 9 of the communication from the Party Concerned of 4 March 2022 confirms that there was communication between the DAS permit holder (Port of Cork) and the EPA to request a change in dates for DAS permit S0021-01, that this change was accommodated without public consultation, and that this communication only became available following an Access to Information on the Environment (AIE) request by Diving Ireland. This exchange undermines public participation in decision making process in the environmental area and highlights deficits in the EPA website with regards access to environmental information.

The change that was sought by Port of Cork was to alter Condition 3.1 of DAS permit S0021-01, which states "*Loading and dumping of dredged material from Ringaskiddy East shall be completed by 31st December 2018*", pushing the completion date out to 30 April 2019 (Appendix 1). Since this change was accommodated by the EPA (appendix 2), the dumping at sea activity that took place between 1 January 2019 and 30 April 2019 occurred with no public participation whatsoever.

The Party Concerned, in their communication of 4 March 2022, states on page 9 that "*An amendment to an existing DAS Permit will be required where the proposed alteration requires a change to a condition or Schedule of the DAS permit*". To be clear, the request from Port of Cork was to alter a condition of an existing permit, in this case Condition 3.1 of DAS permit S0021-01. It is the understanding of the Party Concerned that the request from Port of Cork to alter a condition of a DAS permit required an amendment of the permit, whereas the EPA did not amend the permit but instead agreed a "change" to the permit. This nuance in terminology is critical in this case.

Section 5 of the Dumping at Sea Act 1996 describes the regulations in relation to the application procedure for DAS permits, and the authority of the EPA to award, revoke or amend a DAS permit. It states at 5(7) *“in this section references to an application for a permit include references to an application for an amendment of a permit”*. Therefore, an application to amend an existing DAS permit must be subject to the same regulations regarding public notification and public participation as applies to an application for a new permit. The Party Concerned states (on page 9):

“As indicated by the Communicant’s letter, a requested change in date was agreed by the EPA for DAS permit reg. S0021-01 and a copy of the approval was submitted by the EPA as part of the response to AIE request. The change was agreed by the EPA based on the fact that there was no increase in overall quantity or scale or intensity of the activity permitted and that the closed periods set out in schedule A.4 of DAS permit S0021-01 were adhered to”.

The Dumping at Sea Act does not appear to give the EPA the power to “change” an existing permit, only to amend a permit, which therefore requires full public participation. The EPA quoted the provisions of Condition 1.7 of DAS permit S0021-01 to agree to the proposed change, but while the EPA does have the power to amend a permit, this can only be done subject to fulfilling the requirements of the Dumping at Sea Act with regards full public participation.

Furthermore, it is disingenuous of the Party Concerned to suggest that this was a small change (or “variation”) to a permit and that in some way it was not worthy of full public participation as required by law. Paragraph 5(1) of the Dumping at Sea Act 1996 states:

“The Agency may grant 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”.

The DAS permit, at its core, only regulates three things: the quantity of material to be dumped, the location of the dump site, and the time period over which the dumping may take place. It is reiterated that the DAS permit is for a fixed, “specified period of time”. Therefore, the request was to change a core condition of a DAS permit. The magnitude of the change or variation is immaterial as a change to a condition of a permit, as has been confirmed by the Party Concerned in the communication of 4 March 2022, constitutes an amendment of that permit. There is no doubt that Condition 1.7 of this DAS permit could be clearer with regards the procedures required for a change to the permit.

It is also noted that paragraph 5(5) of the Dumping at Sea Act 1996 states:

“An application for amendment of any such permit shall be subject to such fee payable in such manner, as the Minister for the Environment, Heritage and Local Government may, with the consent of the Minister for Finance, prescribe by regulations”, and “Where under regulations made under this subsection a fee is payable in respect of any application, the application shall not be considered or decided unless the Agency is in receipt of the fee or the appropriate part thereof, as the case may be”.

The Act is saying that as Port of Cork requested an amendment to the duration of a DAS permit, a fee must be payable, and the fee paid to the EPA before an amendment of the permit could be considered by the Agency. There is no evidence that a fee was applied in this case. It appears that the EPA acted unilaterally in amending this DAS permit without due regard to the obligations imposed upon it by paragraph 5(5) of the Dumping at Sea Act.

The Port of Cork would normally be guilty of an offence under the Dumping at Sea Act 1996 for dumping beyond the specified time limit set out in the conditions of their DAS permit. However, paragraph 2(2) of the Act states:

“it shall be a defence for a person (“the defendant”) charged with an offence under this section to prove that the commission of the offence was due to a mistake or to the act or default of another person”.

The EPA issued an email to Port of Cork on 20 December 2018 agreeing to the permit holders request (received the same day) to change the duration of DAS permit S0021-01, which was due to terminate on 31 December 2018, out to 30 April 2019. By issuing this letter, which was issued without due regard to the requirements of the Dumping at Sea Act 1996, the EPA have ensured by their own actions that this offence under the Act that the Agency is supposed to enforce cannot now be prosecuted since the defence in paragraph 2(2) now applies.

2.2 Change of Condition 2 of DAS permit S0012-01

The communication from the Party Concerned of 4 March 2022 brings to light new documentation relating to DAS permit S0012-01 (Port of Waterford). Annex B.5 of this communication is a copy of a letter from the EPA to Port of Waterford in relation to an extension of the completion date of the permit from 30 November 2013. This letter is not available through the EPA website, and nor is the correspondence from Port of Waterford to the EPA to request this extension. Nevertheless, the letter from Port of Waterford was dated 10 October 2013, with the EPA responding with their decision on 21 October 2013 (i.e. 11 days later). The EPA was satisfied to allow the permit time extension.

Permit S0012-01 is not available on the EPA website. However, review of Technical Amendment B reveals that the completion date of 30 November 2013 formed part of Condition 2 of this permit. Therefore, the EPA facilitated a change in a condition of this permit.

As stated in the previous section in relation to DAS permit S00221-01, the Party Concerned considers a “change” to a condition of a DAS permit to require an amendment of that permit. Section 5A of the Dumping at Sea Act requires that an amendment of a DAS permit requires a public notice of the proposed activity, and a period of full public participation for a period of not less than 21 days from publication of that notice.

As in the previous example, the EPA made its decision in the absence of public consultation and has not made any documentation relating to the request from the permit holder and the response of the EPA available to the public.

2.3 Interpretation of Amendments to DAS Permits

It is notable that the Party Concerned and the EPA appear to have differing interpretations of the requirements of the Dumping at Sea Act with regards amendments to DAS permits.

The Party Concerned is of the view that an adjustment to a condition or schedule of a DAS permit constitutes an amendment of that permit. The Dumping at Sea Act is clear that references to an application for a permit include references to an application for an amendment of a permit (paragraph 7(A)). By this interpretation, an application to amend a permit is subject to the requirements of publication of a public notice, and subsequent 21 days or one month period for public participation in the decision-making process.

However, based on the evidence presented by the Party Concerned and discussed above, the EPA has made changes to conditions of DAS permits without requiring the permit holders to apply for an amendment to their permits, nor for the applicants to publish a notification, nor for the proposals to undergo public participation, and no fees were paid by the permit holders for the amendments. Furthermore, no documents related to these changes are in the public domain.

To add further to the confusion, the EPA has an internal guidance document on alterations to dumping at sea permits – *EPA Guidance on Requests for Alterations to a Dumping at Sea Permit*. The current version, which was revised in June 2019, is available at [EPA-Guidance-on-Requests-for-Alterations-to-a-Dumping-at-Sea-Permit-2019.docx \(live.com\)](#). This document contains, on page 5, a screening matrix to determine the action required by the Agency on receipt of a request to alter a DAS permit. This screening matrix indicates that a new permit (rather than an amendment) will be required if there is a change to the duration of the proposed activity. This completely contradicts the evidence put forward by the Party Concerned in page 5 of the communication of 4 March 2022 which suggests that an extension in the duration of activity can be accommodated by the EPA issuing a letter of agreement. The screening matrix also indicates that an amendment to a DAS permit is required where there is a change to a condition of a DAS permit. Again, to be clear, the specified time period is a core condition of a DAS permit, so to extend the duration is to change a condition and amendment is required (not a letter of agreement). Therefore, the EPA's own guidance document contradicts itself. In some respects, the contradiction is irrelevant as the EPA has not followed its own guidance document anyway.

It is also noted that the *EPA Guidance on Requests for Alterations to a Dumping at Sea Permit* states that “for a permit amendment or new permit application, an appropriate assessment screening report will be required to be submitted”. Whilst the EPA might be confused as to whether a change in duration of a DAS permit requires a new permit or an amendment of a permit, in either case public participation is required as is a full appropriate assessment.

It has already been acknowledged that in recent DAS permits the conditions linked to the duration of the dumping activity now include a terminal date and this date is in alignment with the date sought by the permit applicant in the public notice. But this improvement is worthless if the DAS permit holder can write an email to the EPA requesting a “change” to a condition of the permit and the EPA allows this “change” by return email without the required public participation in the decision-making process.

A different type of alteration to a DAS permit occurred with Dublin Port Company's DAS permit S0024-01. Page 10 of the communication by the Party Concerned to the ACCC of 4 March 2022 refers to a complaint that was raised with regards this permit, this relating to the 40-fold increase in dumping rate (spill rate) between the models used in the DAS permit application (108 kg/second) and the actual practice at the dump site (approximately 4000 kg/second, as determined through analysis of the dredger vessel log in the AER). In this matter, the *EPA Guidance on Requests for Alterations of Dumping at Sea Permit* guidance document takes a very different view to that of both the Party Concerned and the EPA itself. The screening matrix on page 5 asks, does the proposed alteration alter the method of the proposed dumping? A positive answer to this question indicates that a new Dumping at Sea permit is likely to be required. Clearly, increasing the speed of dumping by 40 times is an alteration to the method of dumping. It is the opinion of the Party Concerned in their letter of 4 March 2022 that the EPA were correct to do absolutely nothing when the Agency was made aware of this change. But this is very much contrary to the EPA's own guidance document which could not be clearer in stating that a new permit application was likely to be required. It is obvious that this change required a new DAS permit, and with it the period of public participation. But in acting in direct contradiction to their own guidance document, the EPA denied an opportunity for public participation in the environmental decision-making process.

3. Access to Information on Environmental Matters with Respect to DAS Permits

The EPA has an online portal for public access to documents relating to DAS Permits, available at [Environmental Protection Agency \(epa.ie\)](https://www.epa.ie). With respect to any given DAS permit, documents held on this system are stored in five files. Appendix 3 shows an example of this arrangement with documents allocated to one of the following files:

- View applicant documents
- View EPA documents
- View Third Party documents
- View Miscellaneous documents
- View Licence Enforcement documents

Part of the original communication from the Irish Underwater Council was that, although a document system was in place, key documents were often not available. The communication from the Party Concerned of 4 March 2022 includes numerous examples of these omissions and these are reviewed below. These examples raise further questions about document management which are also examined.

The findings and recommendations with regards to communication ACCC/C/2015/131 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, adopted by the Compliance Committee on 26 July 2021, are relevant to the current communication with regards access to environmental information and timeliness of the availability of environmental information. The ACCC's interpretation of Article 5(3) of the Aarhus Convention is laid out in paragraphs 100 to 105 of the findings and recommendations with regards to communication ACCC/C/2015/131, and these paragraphs are included below for ease of reference (available in full at [ECE MP.PP C.1 2021 23-2113407E.pdf \(unece.org\)](https://www.unece.org/documents/2021/03/23-2113407E.pdf)):

100. Article 5 (3) [of the Aarhus Convention] requires each Party to “ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks”.

101. The word “progressively” in article 5 (3) must be construed in the context that more than two decades have passed since the Convention’s adoption. Compared to the early, emerging state of electronic information tools at that time, the primary means through which environmental information is now disseminated by public authorities in most, if not all, Parties is through electronic means, namely public authorities’ websites.

102. The requirement that electronic databases be “easily accessible” has several components including that: access is free of charge; registration requirements, if any, are kept to a minimum without the need for personal identification; databases have a user-friendly interface with easy-to-use search functions including, where relevant, the possibility to easily identify all documents relevant to particular procedures; and the databases are systematically organized and well-structured.

103. “Easily accessible” also entails that the information is accessible in a timely fashion. This has at least two aspects. First, the information must be promptly uploaded onto websites once it comes into the public authority’s possession. Second, the information must be immediately retrievable when using the database. Information cannot be “easily accessible” from a website if the public effectively has to make an access-to-information request under article 4 of the Convention to gain access to the information in the database.

104. Article 5 (3) (d) stipulates that information accessible in electronic databases should include “other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention”, provided that such information is already available in electronic form. The Committee considers that this must include, as a minimum, the environmental information relevant to their functions that public authorities are required to possess and update in accordance with article 5 (1) (a).

105. This means that, in those Parties where national law requires that all documents be submitted to public authorities in electronic form, those documents must be available promptly through electronic databases. However, the obligation in article 5 (3) (d) goes beyond that. In similar vein to the word “progressively” in article 5 (3), first sentence, the phrase “provided that such information is already available in electronic form” in the final clause of article 5 (3) must be read in the light of the general availability of electronic documentation and communication in the present day, more than two decades after the Convention’s adoption. It is clear to the Committee that this reference should no longer constitute a valid reason for not making available all environmental information that is otherwise covered by article 5 (3) (d).

3.1 Change of Conditions of DAS permit S0012-01 and S0021-01

As has been fully discussed in the previous section, communications relating to changes to conditions of DAS permits S0012-01 and S0021-01 only entered the public domain after an AIE request from the Irish Underwater Council for DAS permit S0021-01, and via the documents submitted to the ACCC by the Party Concerned for DAS permit S0012-01. As these “changes” in reality constituted amendments to the permits, as confirmed by the Party Concerned, all documents relating to these amendments should have been made available for public consultation under the provisions of Section 5 of the Dumping at Sea Act.

Paragraph 103 of the findings and recommendations with regards to communication ACCC/C/2015/131 states that with regards Article 5(3) ““easily accessible” also entails that the information is accessible in a timely fashion. This has at least two aspects. First, the information must be promptly uploaded onto websites once it comes into the public authority’s possession. Second, the information must be immediately retrievable when using the database. Information cannot be “easily accessible” from a website if the public effectively has to make an access-to-information request under article 4 of the Convention to gain access to the information in the database”. To reiterate, the environmental information pertaining to alterations to two DAS permits were obtained in one case via an AIE request and in another via an unsolicited communication from the Party Concerned to the ACCC. This information was NOT easily accessible. With regards the latter, nobody outside the agency and the permit holder could have known that the information even existed let alone request a copy.

Furthermore, in the case of the alteration to DAS permit S0021-01, all communications between the permit holder and the EPA were by email and thus already in an electronic format. Based on the findings with respect to case ACCC/C/2015/131, the ACCC is already of the opinion that “Article 5 (3) (d) stipulates that information accessible in electronic databases should include “other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention”, provided that such information is already available in electronic form. The Committee considers that this must include, as a minimum, the environmental information relevant to their functions that public authorities are required to possess and update in accordance with article 5 (1) (a).” [emphasis added], and “this means that, in those Parties where national law requires that all documents be submitted to public authorities in electronic form, those documents must be available promptly through electronic databases. However, the obligation in article 5 (3) (d) goes beyond that. In similar vein to the word “progressively” in article 5 (3), first sentence, the phrase “provided that such information is already available in electronic form” in the final

clause of article 5 (3) must be read in the light of the general availability of electronic documentation and communication in the present day, more than two decades after the Convention's adoption. It is clear to the Committee that this reference should no longer constitute a valid reason for not making available all environmental information that is otherwise covered by article 5 (3) (d)". Therefore, there is no reason why the EPA would withhold these communications. In fact, it is in the best interest of the Agency to make these communications publicly available to improve trust in the function of the Agency.

3.2 Annual Environmental Reports

The publication of Annual Environmental Reports (AER) is a condition of all DAS permits, typically in the section relating to notification, records and reports. Condition 6.7 of DAS permit S0021-01 is typical:

"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, and shall be prepared in accordance with any relevant guidelines issued by the Agency or as otherwise prescribed by the Agency".

The 31 March deadline applies to most DAS permits, with a small number of permits requiring environmental reports to be submitted within three months of the completion of activities.

The Party Concerned states *"The Communicant's complaint that AER's for a number of DAS permits are not available on the EPA website is misconceived"*. This statement itself is misconceived. There are a number of DAS permits with no AER, and two where the AER is filed in the folder for a different DAS permit. For a third permit, the AER was not available at the time of the communication in May 2021 but is now available, but the lateness in posting the AER raises other questions relating to document control procedures. Furthermore, there are numerous cases where AERs have not been submitted after years in which no recorded dumping at sea activity took place.

There is no AER for DAS permit S0029-01 (see appendix 4). Annex 2 of the communication by the Party Concerned of 4 March 2022 contains a link to the Enforcement Documents file for this DAS permit, but no AERs are included in this file. This is in spite of the EPA undertaking site visits on 14/5/2018 and 7/12/2018, thus confirming that dredging and dumping was taking place, with a non-compliance raised on the first visit.

There is no AER for DAS permit S0028-01 to cover activity that took place in August 2018. There is an EPA site visit report for an inspection that took place on 13/8/2018, but no corresponding AER for this period. Technically, for this permit it would be a Final Environmental Report as condition 6.7 of this permit required that *"the permit holder shall submit electronically to the Agency a Final Environmental Report within 3 months of completion of the loading and dumping activities"*. The environmental report that is available in the Enforcement Documents file for this permit covers the period from December 2019 onwards.

There is no AER for DAS permit S0012-01 (in fact, there are no enforcement documents of any description for this permit). Annex B5 of the communication from the Party Concerned of 4 March 2022 is a copy of a letter from the EPA to the Port of Waterford allowing dumping to continue beyond 30 November 2013. It would therefore be expected that there would be AERs for dumping occurring in 2013 and/or 2014 using this licence. It should be noted that the permit itself is also not available on the EPA website. There is no public record of any dumping activity having taken place using DAS permit S0012-01 other than Annex B5.

The 2019 AER for DAS permit S0012-02 is in the Enforcement Documents folder for a different permit, S0012-03. The AER for DAS permit S0021-01 is in the file for DAS permit S0021-02. So, while the Party Concerned is correct to say that these AERs are available, the system for locating the document is flawed and thus essentially useless. An interested party should not need to go through document files for other DAS permits to find details relating to the DAS permit that they actually require. The final paragraph of page 8 of the communication of 4 March 2022 from the Party Concerned emphasises the confusion that this has caused. With regards to DAS permit S0030-01, condition 6.7 of this DAS permit requires:

“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 D: Annual Environmental Report of this permit, and shall be prepared in accordance with any relevant guidelines issued by the Agency or as otherwise prescribed by the Agency”.

The absence of an AER for this permit was raised in the communication from the Irish Underwater Council to the ACCC dated 20 May 2021, 50 days after the required submission date for this document. The AER for 2020 for permit S0030-01 is now available through the EPA website but is dated 13 July 2021 (see appendix 5). This is 104 days after the submission date. The appendices to this AER are dated 27 August 2021 (149 days after the due date, see appendix 6). The AER is incomplete without these appendices as these contain the raw data relating to the dredging campaign and subsequent dumping at sea and are required items as listed in Schedule D of this permit.

It is worth re-iterating the findings and recommendations with regards to communication ACCC/C/2015/131, paragraph 103, which states *“Easily accessible” also entails that the information is accessible in a timely fashion. This has at least two aspects. First, the information must be promptly uploaded onto websites once it comes into the public authority’s possession.*” The delay in uploading this AER is not in compliance with the easy accessibility of documents that is demanded by the Aarhus Convention.

It is noted that the EPA did raise a non-compliance with Donegal County Council for late submission of the 2015 AER for DAS permit S0011-02 (recorded in the Reported Incidents Summary of the 2015 AER – there is no record of this incident being raised by the EPA in the Enforcement Documents file for this permit). The effectiveness of raising this non-compliance is debatable, as the 2016 AER is dated 10 April 2017, and the 2017 AER is dated 23 April 2018 – i.e. all subsequent AERs were submitted late. It is important to note that the EPA, by issuing an incident notice for late submission of the AER, is of the opinion that late submission of the AER does constitute an “incident” as defined by the DAS permit. The significance of the non-adherence to deadline submission dates for documents is expanded upon in the section 3.3 below.

With regards Appendix A, provided by the Party Concerned in the communication of 4 March 2022, for a number of DAS permits it is stated “*Dumping at Sea permit holders are only required to submit an AER for any given year if an activity authorised under their permit has taken place or if any reporting by the permit is required*”. This applies to the comments relating to S0010-01, S0016-01, and S0019-01. This statement from the Party Concerned is not corroborated by the conditions of DAS permits. For example, condition 6.7 of DAS permit S0016-01 states (in full):

“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 and shall be prepared in accordance with any relevant guidelines issued by the Agency or as otherwise prescribed by the Agency”.

This condition does not confer the right of the permit holder to not submit an AER even if no dumping at sea activity took place in the previous calendar year. An AER is required “each year” to cover the “previous calendar year”. It is unclear why the Party Concerned is of the belief that no AER is required after years in which no activity took place as this is incompatible with the wording of the permits themselves. The Party Concerned should be aware of this as some DAS permit holders do submit AERs for years where no activity took place.

An AER stating no activity took place is vital for oversight as written proof to confirm that no activity took place. This is essentially a nil return. The absence of an AER cannot be taken as an absence of loading and dumping activity because, as is highlighted earlier in this section, these activities have on occasion taken place with no AER to cover the activity. An AER is required for every year that the permit is active, from the year of date of commencement to the year of date of completion. The wording of some permits whereby “*the permit holder shall submit electronically to the Agency a Final Environmental Report within 3 months of completion of the loading and dumping activities*” makes activities more difficult to track as it removes the requirement to produce an AER for a nil return. In other words, there is no active engagement from the permit holder to confirm that no activity took place – it just has to be assumed that if there is no nil return that no activity took place and that the permit holder is in compliance. It is difficult to be certain, but there appears to be around 30 missing nil return AERs across 15 different DAS permits. The EPA posted a tranche of nil return AERs on 26 and 27 May 2015 covering seven different DAS permits (S0002-01, S0004-01, S0006-01, S0008-01, S0010-01, S0016-01, S0019-01 over the years 2011, 2012, 2013 and 2014), appearing to indicate some appreciation that nil returns are required.

Failure to produce the documents stipulated by the conditions of a DAS permit is an “incident”, and any dumping that took place after a failure to provide the documents demanded by conditions of a DAS permit is an offence under the Dumping at Sea Act 1996, as explained further in section 3.3 below.

The AER is the single most important document for third party review of dumping at sea activities, and thereby public participation with regards environmental matters. The poor record keeping by the EPA with regards the Annual Environmental Reports for DAS permits, as highlighted above, are an active hinderance to public participation and constitute some of the worst failures of the EPA to maintain full and proper documentation relating to dumping at sea.

3.3 Timeliness of Document Availability

With regards to DAS permit S0030-01, condition 6.7 of this DAS permit requires:

“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 D: Annual Environmental Report of this permit, and shall be prepared in accordance with any relevant guidelines issued by the Agency or as otherwise prescribed by the Agency”. [emphasis added]

As stated above, the absence of an AER for this permit was raised in the communication to the ACCC dated 20 May 2021, which was 50 days after the required submission date for this document. The AER for 2020 for permit S0030-01 is dated as 13 July 2021 (see appendix 5). This is 104 days after the submission date. The appendices to this AER are dated 27 August 2021 (149 days after the due date, see appendix 6). The AER is incomplete without these appendices as these contain the raw data relating to the dredging campaign and subsequent dumping at sea and are required items as listed in Schedule D of this permit.

The availability of documents on or before the dates specified is essential for transparency, third party oversight of dumping at sea activities, and public participation in environmental decision making procedures generally. It is also a requirement of Article 5(3) of the Aarhus Convention that documents are “easily accessible”, and that this term means that the information is accessible in a timely fashion and that it must be promptly uploaded onto the EPA website once it comes into the Agency’s possession (findings of ACCC/C/2015/131, para 103)

Bearing in mind that the AER is to be submitted in an electronic format, and thus immediately ready for upload, Diving Ireland questions what caused the delay in upload of this document:

- Was it delivered on time but withheld for a time by the EPA? If this was the case, why was there a delay?
- Why was an incomplete AER uploaded by the EPA on 13 July 2021 with the rest published over one month later?
- Was all or part of the AER submitted late by the permit holder, in which case was any disciplinary action taken against the permit holder? In the latter case, condition 6.11 of DAS permit S0030-01 states:

“The permit holder shall submit the reports, proposals and submissions required by this permit by the deadlines specified. The permit holder shall not be in compliance with the requirements of this Condition unless it has submitted every report, proposal and submission, the deadline for which has passed.”

Failure to produce a document required by a condition of a DAS permit within the time frame specified by the permit is an “incident”, based on the Glossary of Terms for this permit which defines an incident, among other things, as “*any loading or dumping at sea activity which does not comply with the requirements of this permit*”. Where an incident has occurred, Condition 5, Incident Prevention and Emergency Response, applies. Condition 5.1(iii) requires that “*In the event of an incident the permit holder shall immediately carry out an investigation to identify the nature, source and cause of the incident and any impact arising therefrom*”, and condition 5.2(i) requires that “*The permit holder shall provide a report of the investigation into the incident to the Agency for its approval within one month of the incident occurring or as otherwise agreed by the Agency. The report shall include a proposal to identify and put in place measures to avoid recurrence of the incident*”.

Failure to respond correctly to this incident means that dumping activity undertaken by the permit holder was not in full accordance with the DAS permit and therefore an offence has been committed under the Dumping at Sea Act 1996. Indeed, if any dumping has occurred since 31 March 2021, then this activity would also no longer be in accordance with paragraph 2 of the DAS Act 1996 and an additional offence would have occurred.

It is also noted that with regards to this permit, the commencement notice is dated 15 May 2020, notifying the EPA of the intention of the permit holder to start loading and dumping activities on 1 June 2020. This commencement notice, which is a requirement of Condition 2.4 of DAS permit S0030-01, was not uploaded on to the EPA website until 2 June 2021 over one year after dumping activity started. Such late provision of documentation is simply not acceptable and actively hampers public participation in the administration of dumping at sea legislation and control. It is also clearly not in compliance with Article 5 of the Aarhus Convention.

3.4 Observed Gaps in Document Availability

The communication from the Party Concerned, dated 4 March 2022, includes details of many gaps in the availability of documents through the EPA website, and an insight into the types of documents that the EPA withholds from public scrutiny.

3.4.1 DAS permit S0021-01 (Port of Cork).

Section 2.1 of this communication includes details regarding the request by Port of Cork to extend the duration of DAS Permit S0021-01. It is re-iterated that correspondence between Port of Cork and the EPA regarding this matter only came to light through an AIE request by Diving Ireland.

3.4.2 DAS permit S0012-01 (Port of Waterford).

Section 2.2 of this communication includes details regarding the request by Port of Waterford to extend the duration of DAS Permit S0012-01. It is re-iterated that correspondence between Port of Waterford and the EPA regarding this matter only came to light inadvertently in the documents submitted by the Party Concerned to the ACCC on 4 March 2022.

3.4.3 Annual Environmental Reports

Section 3.2 above has already detailed short comings related to availability of some AERs.

3.4.4 DAS permit S0009-02 (Shannon Foynes).

The communication from the Party Concerned, dated 4 March 2022, describes how the EPA raised a “non-compliance” with the permit holder in Site Visit Report SV12371 for failing to notify the EPA two weeks prior to commencement of the loading and dumping activities. The glossary of terms for DAS permit S0009-02 defines an “incident” as “*any loading or dumping at sea activity which does not comply with the requirements of this permit*”. Failure to give the EPA the necessary notification prior to commencement of the loading and dumping activities is a breach of Condition 2.4 of this DAS permit, and therefore this activity did not comply with the requirements of the permit.

In fact, the Site Visit Report SV12371 includes two “non-compliances”, the second being that activities occurred on a flood tide when Condition 3.13 only permitted them on an ebb tide.

Since both “non-compliances” described in the Site Visit Report more accurately constitute incidents, as defined in the glossary of terms, condition 5 (Incident Prevention and Emergency Response) of DAS permit S0009-02 will apply. Condition 5.2 states:

“The permit holder shall provide a report of the investigation into the incident to the Agency for its agreement within one month of the incident occurring or as otherwise agreed by the Agency”.

There is no record of this report in the Enforcement Documents section of the EPA website for DAS permit S0009-02. Either the report does not exist, or it has not been uploaded to the public access portal.

Furthermore, Schedule C of this permit requires the inclusion of a Reported Incidents Summary in the AER. However, the 2014 AER for this permit states *“We are happy to report that there were no Incidents as a result of our dredging activities during the Year.”* The failure to report this incident in the 2014 AER is itself a separate incident, as defined by the DAS permit.

The failure to include these incidents in the AER means that the AER is inaccurate, and it is therefore impossible for a member of the public to determine that the DAS permit had in fact been subject to enforcement action by the EPA.

3.4.5 Non-compliances

The EPA uses the term “non-compliance” widely to describe occasions where a DAS permit holder does not fully comply with their DAS permit, as in the example in section 3.4.4 with DAS permit S0009-02. The term “non-compliance” is not defined in the Glossary of Terms for DAS permits and does not appear in the conditions of the DAS permits. It is therefore difficult to determine the legal standing of a “non-compliance”.

The term “incident” is defined in the Glossary of Terms for DAS permits. Almost all of the issues with DAS permits that are described by the Party Concerned in the communication of March 2022 appear to be “incidents”, so it would be useful if the Party Concerned could define what is meant by a “non-compliance” in the context of DAS permits and why “incidents” are being categorised as “non-compliances”.

This distinction is very important because when an “incident” is recorded, it requires a clearly defined response from both the DAS permit holder and the EPA, based on conditions of the DAS permit, including a paper trail of investigations and reports, overseen by the Agency. Whereas, a “non-compliance” has no definition and no defined response, and can be ignored by both the permit holder and Agency, as indicated in the example in section 3.4.3 above.

Based on the fact that “incidents” are being called “non-compliances”, all documents that would be expected to be generated in response to an incident are not being generated. This then also carries through to the AERs, which are required to list all “incidents”.

A particular example of this is Dublin Port Company’s DAS permit S0024-01, in which the Glossary of Terms includes in the definition of an “incident” that *“a complaint of an environmental nature shall constitute as incident for the purposes of this permit”*. The Complaints Summary of the 2021 AER includes a list of all the complaints received over the lifetime of this permit. There are 8 complaints listed, all of an environmental nature, but none

were raised as incidents. Therefore, the Reported Incidents Summary of the AER states that no incidents occurred. This is not a fault of Dublin Port Company, rather than incorrect interpretation of the permit by the regulatory authority. According to the AER, Dublin Port Company responded to these complaints to the OEE (Office of Environmental Enforcement), but these responses are not in the public domain.

The overall outcome of this use of terminology is that issues arising where a DAS permit holder does not fully conform with the conditions of that DAS permit are not easy to locate as the expected documents are not generated, and the issues are kept out of the AERs. This, in turn, makes third party oversight of the permits more difficult and obstructs public participation. It also weakens regulatory oversight.

3.5 EDEN and LEAP

The EPA hosts a public access online portal for DAS permits, [Environmental Protection Agency \(epa.ie\)](https://www.epa.ie), which has been referred to widely in this case.

However, in the communication to the ACCC of 4 March 2022 the Party Concerned makes a number of references to another on-line portal called the Environmental Data Exchange Network (EDEN), particularly with respect to notifications of commencement of dumping at sea activities but also that “non-compliances” are submitted by the EPA to the permit holder via the EDEN online portal. This includes DAS permits S0031-01, S0028-01, and S0030-01, where these notices were submitted via EDEN and then uploaded to the EPA website months after the event. EDEN is the likely resting place of the responses that were sent from Dublin Port Company to the OEE due to the numerous complaints made regarding DAS permit S0024-01 and which are listed in the 2021 AER for this permit.

EDEN is not an open public access system, so uploading these notices to EDEN but not to the EPA portal does not appear to meet the requirements for access to information on environmental matters as already deliberated upon by the ACCC with respect to case ACCC/C/2015/131. At the very least Article 5, Paragraph 2(b)(i) of the Convention requires an index or register of documents on EDEN to be made publicly available so that members of the public can monitor the flow of information between the EPA and permit holders. Article 5, Paragraph 2(c) further requires that the information itself should be made available free of charge.

The EPA also hosts a third portal called Licence Enforcement Access Portal (LEAP), details of which are available at: [Access to EPA information on compliance and enforcement | Environmental Protection Agency](https://www.epa.ie). As described by the EPA at this URL, LEAP includes:

All ‘formal enforcement correspondence’ between the EPA and regulated facilities. This includes all communications between the holder of the licence, permit or authorisation and the EPA, for the purpose of their formal regulatory interactions.

*This correspondence includes, in addition to the information and documentation available on the **Licence Details Page**, as listed above, for each licence, permit or authorisation:*

- *Site updates*
- *Performance and monitoring reports*

- *Notifications of complaints, incidents and 'non-compliances' (these are instances where a condition of the licence, permit or authorisation is breached)*
- *Summary of complaints*
- *Compliance Investigations (these are focused on fixing specific problems that we have identified and restoring compliance with the licence)*
- *EPA instructions and corrective actions that address non-compliance at regulated sites to achieve improvements in compliance status*

All this information is in electronic format, and is accessible using our Licence Enforcement Access Portal (LEAP).

In spite of the information being in electronic format, members of the public can access LEAP by appointment only and must physically attend the EPA Headquarters in Wexford or the regional offices in Dublin, Cork and Castlebar in order to gain access. As confirmed to the communicant by FP Logue solicitors the EPA has stated that remote access via the internet to this system is not possible nor is it possible for information to be copied in an electronic format (see attached correspondence at Appendix 7).

The findings of the ACCC in relation to case ACCC/C/2015/131 are repeated here:

100. Article 5 (3) requires each Party to “ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks”.

101. The word “progressively” in article 5 (3) must be construed in the context that more than two decades have passed since the Convention’s adoption. Compared to the early, emerging state of electronic information tools at that time, the primary means through which environmental information is now disseminated by public authorities in most, if not all, Parties is through electronic means, namely public authorities’ websites.

102. The requirement that electronic databases be “easily accessible” has several components including that: access is free of charge; registration requirements, if any, are kept to a minimum without the need for personal identification; databases have a user-friendly interface with easy-to-use search functions including, where relevant, the possibility to easily identify all documents relevant to particular procedures; and the databases are systematically organized and well-structured.

103. “Easily accessible” also entails that the information is accessible in a timely fashion. This has at least two aspects. First, the information must be promptly uploaded onto websites once it comes into the public authority’s possession. Second, the information must be immediately retrievable when using the database. Information cannot be “easily accessible” from a website if the public effectively has to make an access-to-information request under article 4 of the Convention to gain access to the information in the database.

104. Article 5 (3) (d) stipulates that information accessible in electronic databases should include “other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention”, provided that such information is already available in electronic form. The Committee considers that this must include, as a minimum, the environmental information relevant to their functions that public authorities are required to possess and update in accordance with article 5 (1) (a)

105. *This means that, in those Parties where national law requires that all documents be submitted to public authorities in electronic form, those documents must be available promptly through electronic databases. However, the obligation in article 5 (3) (d) goes beyond that. In similar vein to the word “progressively” in article 5 (3), first sentence, the phrase “provided that such information is already available in electronic form” in the final clause of article 5 (3) must be read in the light of the general availability of electronic documentation and communication in the present day, more than two decades after the Convention’s adoption. It is clear to the Committee that this reference should no longer constitute a valid reason for not making available all environmental information that is otherwise covered by article 5 (3) (d).*

Based on the above findings by the ACCC, the EDEN and LEAP systems fall far short of the requirements to access to environmental information as required by the Aarhus Convention. It is particularly concerning the information cannot be downloaded by the EPA from its own LEAP system given that enforcement information is routinely required to be used in judicial proceedings.

The EPA is urged to ensure that the use of the EDEN and LEAP systems are compliant with the requirements of the Article 5(3) of the Aarhus Convention in these areas. It is noted that failure of the permit holder to provide the necessary documents in PDF format is a recurring issue which it would seem should be easily rectified.

4. Concluding Comments

The Party Concerned concluded their communication of 4 March 2022 by stating “*The EPA provides public access to a large amount of environmental information relating to the enforcement of DAS permits. The material is easily accessible to the public via the EPA website*”. The examples provided by the complainant in this case make it clear that this statement does not hold true under scrutiny – a substantial proportion of environmental information relating to the enforcement of DAS permits is purposefully withheld from the public through the use of the EDEN and LEAP portals. The EPA website hosts a large amount of environmental information relating to other aspects of DAS permits, but full access to enforcement information can only be obtained via AIE requests or in-person visits to the EPA offices.

The EDEN and LEAP portals, as currently constructed, seem by design to directly obstruct public access to environmental information and makes public participation in environmental decision-making more difficult.

It is important that the EPA clarifies why it uses “non-compliances” to describe what appear to be “incidents”. This choice of terminology appears to reduce regulatory oversight of dumping at sea, whilst also making it more difficult for the public to obtain information on DAS permits in instances where they have failed to conform to the conditions of the permit.

It is also important that the EPA explains the legal basis for amending the conditions of DAS permits without public participation, since the DAS Act requires full public participation in amending DAS permits. The current procedures are also incompatible with the Agency’s own guidelines on alterations to dumping at sea permits.

This communication has identified non-compliance by Ireland in relation to public participation procedures and active dissemination of environmental information relating to dumping at sea permits.

While the EPA now appears to have ceased issuing permits for non-specific periods it still appears to have an informal system of “altering” or “changing” permits thereby avoiding statutory amendment procedures even in cases where its own guidelines require amendment and public participation. In the communicant’s view these informal procedures which are not provided for in legislation indicate additional non-compliance with Article 6 of the Convention

In terms of active publication of information, the EPA doesn’t appear to have a documented procedure for active publication which clearly identifies the categories of information that it disseminates and its location contrary to Article 5, Paragraph 2(a) of the Convention. The current picture of how the EPA actively disseminates environmental information has only been arrived at via a lengthy and tortuous engagement between the communicant, the EPA and the Party Concerned which has been supplemented by numerous requests for access and queries raised by the committee. It is also clear that the EPA does not even observe whatever limited procedures it has and that it does not have in place measures to compel the lodging of documents such as AERs which are not lodged on time.

To the best of the communicant’s knowledge the EPA does not have a documented procedure for active publication which identifies the categories of environmental information that it holds and how it may be accessed. In addition, the communicant is unaware of any efforts by the EPA to actively engaged with the public to either put in place such procedures or to consider feedback from the public about its active dissemination policies. The communicant considers that, at the very least, the Convention requires the Party Concerned to ensure that the EPA should be transparent about these matters, and to consult regularly with the public about this issue. It is regrettable that major gaps in compliance have only surfaced during his communication after a very lengthy period of engagement during the committee’s procedure

At this stage the communicant believes that the communication should now proceed to a hearing and a decision as quickly as possible.

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Diving Ireland is grateful for the opportunity to address the ACCC at this point.

Yours sincerely,



Rory Keane
Company Secretary
Diving Ireland