

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

22 July 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)**

Diving Ireland hopes that the correspondence from the Party concerned of 2 June 2022 fully clarifies issues raised by the communicant in the correspondence of 25 April 2022. These included the issues described below.

A definition of a “non-compliance” in the context of regulatory oversight of a Dumping at Sea (DAS) permit holder failing to adhere to the conditions of their permit. This is where an “incident” is already defined in a DAS permit as “any loading or dumping at sea activity which does not comply with the requirements of this permit”. Diving Ireland considers this clarification is important because DAS permits include within the conditions of that permit a defined document trail that must be created after an incident has been raised, whereas the term “non-compliance” is not defined in any DAS permit and the term does not occur within the text of any DAS permit. In terms of the original communication from Diving Ireland, this then relates back to the absence of documents from the EPA record that would normally be expected to be present and available for inspection.

This is not an idle complaint. An important aspect of active dissemination of environmental information under Article 5 of the Convention is that the public should have access to all of the environmental information relating to a particular permit whatever the classification of it by the public authority. It is the communicant’s position that active dissemination should not depend on a particular internal classification, in other words the EPA has an obligation to publish all of the environmental information relevant to each permit and may only withhold information from publication on the basis of an exceptions under article 4, paragraphs 3 and 4 where they have been implemented in domestic law.

With regards the commencement notice for DAS permit S0030-01 being uploaded over one year after it was issued to the Environmental Protection Agency (EPA, or Agency), it presumes the ACCC is satisfied that this is because the notice was issued to the Agency in the wrong format (i.e. it was not a pdf document). For the record, Condition 2.4 of DAS permit S0030-01 states *“The permit holder shall notify the Agency at least fourteen calendar days prior to the commencement of the loading and dumping activities, by webform or by such other means as may be specified by the Agency”*. As a statement of fact, the DAS permit does not require the document to be submitted in pdf format, in fact it states that it should be by “webform”.

With regards the same notification, Diving Ireland does not contend that the document was not available on the EPA LEAP system in May 2020. However, it is simply noted here that the response of the Party concerned was written from the perspective of a body that knew the document existed. It is a big commitment for a member of the public to take time off work to physically visit an EPA office to check for a document that the person does not know exists. In this era of universal internet access, it is entirely unacceptable and contrary to the obligations under Article 5 of the Convention to maintain an electronic system for storage of enforcement information that is separate from the main licence portal and that can only be inspected in three physical locations in Ireland.

The Party concerned contends on page 19 of the correspondence of 2 June 2022 that *“the LEAP Portal is fully compliant with the Aarhus Convention”*. On page 18, the Party concerned also states that *“public access to documentation [on LEAP] is available at EPA offices around the country and documentation is accessible by anyone who wishes to access them on appointment”*. For members of the ACCC who may not be familiar with Ireland, *“offices around the country”* means the three EPA offices in Dublin, Wexford, and Inniscarra in rural County Cork. Based on Google Maps, it is a 530 km, 7 hours round trip drive by car from the port of Killybegs in Co. Donegal to the nearest EPA office, while the city of Galway is 418 km, or 5 hours round trip drive by car, to the nearest EPA office. The ACCC may wish to explore public transport options for themselves, although please note that the Inniscarra office is not served by public transport. As was indicated earlier in this communication, this trip could be to look for a document that you don’t know exists, such as the commencement notification for DAS permit S0030-01 referred to above. The ACCC must decide whether the findings of case ACCC/C/2015/131 apply to the current case. Do documents on the LEAP system constitute *“environmental information in electronic databases which are easily accessible to the public through public telecommunications networks”* as required by Article 5(3) of the Aarhus Convention?

With regards the extension of the functional dates of DAS permit S0021-01, the Party concerned has referred to this as a “minor change”. For the record, Paragraph 5 of the Dumping at Sea Act 1996 states that *“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”*. In essence, the DAS permit therefore regulates three variables: the material to be dumped, the place it is dumped, and the time period across which the dumping may take place. The ACCC must therefore decide whether a change to the period of time set out in the Conditions of a DAS permit is indeed a “minor change”.

The ACCC must also consider whether such a change can be made via simple letter of agreement from the Agency to the permit holder, or if such a change more accurately constitutes an amendment to a DAS permit with the associated requirement for public participation. Indeed, the ACCC may wish to consider whether the Dumping at Sea Act 1996 gives the Agency any power to “change” a DAS permit.

It is entirely possible that a small change in the time period may have a significant effect on the environment, but this must be examined on a case-by-case basis to see if it triggers a requirement for public participation. Therefore, it is not compatible with the Convention for such a change to be considered minor in every case.

On page 15 of the correspondence of 2 July 2022, the Party concerned states that “*the EPA does not consider that the late submission of an AER and/ or commencement notices constitutes an ‘incident’*”. Diving Ireland would like the ACCC to carefully consider the implications of this statement with regards to finalising their decision in this case, and the broader implications of this statement if it is observed across all the activities regulated by the EPA. This statement could be used by the holders of any regulatory licence or permit to give themselves carte blanche to return regulatory documentation whenever they wish, regardless of deadlines imposed by the licence they operate under. With regards dumping at sea activities, in general, DAS permits state that incidents include “*any loading or dumping at sea activity which does not comply with the requirements of this permit*”. It is a **condition** of **every** DAS permit that the permit holder give the Agency 14 days’ notice of their intention to start dumping activities. The filing of environmental reports is a **condition** of **every** DAS permit, with most having a deadline of 31 March in the year after activity took place. For example, Condition 6.7 of DAS permit S0024-01 states “*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 critical issue here for the ACCC is does failure of a DAS permit holder to comply with the conditions of their DAS permit then mean that the permit holders’ loading or dumping at sea activities do not then comply with the requirements of the permit and therefore constitute an incident.

It is noted that the Party concerned has not contested the Diving Ireland interpretation of the AER requirements to include the submission of AERs after years in which no loading or dumping took place (a nil return). The ACCC can now consider their assessment of this case in the knowledge that there are indeed many missing AERs across numerous DAS permits relating to nil returns. The requirement to file Environmental Reports is a requirement of every DAS permit so all of these cases must now be considered as failures to comply with the conditions of those permits. A full list of missing nil returns can be supplied on request.

Diving Ireland hopes that the ACCC now fully understands that complaints of an environmental nature made to the Environmental Protection Agency are different to complaints of an environmental nature made to the permit holder (page 16 of response from Party Concerned). Diving Ireland fully appreciates that the terminology relating to complaints of an environmental nature constituting incidents does not apply to all DAS permits, but it is reiterated that this definition does apply to DAS permit S0024-01. “*Only complaints received by the permit holder falls under a reportable incident to the EPA. Complaints made directly to the EPA are not deemed reportable as an incident*”. This statement would appear to have significant impact on the ability of the Environmental Protection Agency to regulate environmental licences and permits more broadly where issues are raised by members of the public directly to the Agency, such as fish kills in rivers due to breaches in conditions of licensed wastewater discharges, or where a complaint relates to a licenced emission to air. For the record, DAS S0024-01 states at Condition 6.5 that “*The permit holder shall record all complaints related to the loading and dumping activities. Each such record shall give details of the date and time of the complaint, the name of the complainant (if provided), and give details of the nature of the complaint. A record shall be kept of the response made and any corrective action undertaken in the case of each complaint. This record shall be made available to the Agency upon request*”. The permit itself does not appear to make any requirement regarding the route that the complaint takes between the complainant and the permit holder. It certainly does not exclude complaints made to the regulatory Agency from being classified as complaints pertaining to the permit holder.

The ACCC is requested to carefully examine the reasoning of the Party concerned to explain the absence of a Final Environmental Report for dredging activity in August 2018 for DAS permit S0028-01 (page 9). The communication of 2 June 2022 indicates that because the loading (dredging) related to highly contaminated Class 3 sediments which were subsequently disposed of on land that this was outside the scope of the permit, which was issued for dredging and dumping of less contaminated Class 1 and Class 2 material. This is not clear in the permit, which only mentions the presence of Class 3 material at the site in the Introduction to the permit, which then states that “*this introduction is not part of the permit*”. The EPA undertook a site visit with regards this permit on 13 August 2018 which, according to the Party concerned, was when dredging of Class 3 material was occurring. The ACCC may wish to ask themselves the question, if the permit does not relate to the dredging (i.e. loading) of highly contaminated Class 3 material, why were the EPA undertaking a site visit if the operation did not require a permit? And, if the DAS permit does not regulate dredging of highly contaminated Class 3 material, would it be appropriate to actually have some regulation of such an activity? For the record, Condition 6.7 of DAS permit S0028-01 states “*the permit holder shall submit electronically to the Agency a Final Environmental Report within 3 months of the completion of the loading and dumping activities*” [emphasis added]. The Party concerned has confirmed that the permit holder was undertaking loading activities in August 2018, even if there were no corresponding dumping at sea activities. The Party concerned stated that “*no dumping at sea activities occurred in 2018 and therefore there was no requirement under the DAS permit to submit information on the activities completed during 2018*”, and “*there was no requirement under the Schedule D of the DAS permit to submit information on the excavated material removed for treatment on land which is outside the scope of a DAS Permit*”. For the record, Schedule D of DAS permit S0028-01 provides a list of the information to be included in the Environmental Report. The first item on this list is a “*register/log of loading and dumping activities*”. The Dumping at Sea Act 1996 states that “*the Agency may grant a permit for the loading onto the vessel of a specified quantity of a specified substance or material at a specified place within a specified period of time, which is intended to be dumped from the vessel*”. The legislation does not state that the material once loaded is then necessarily dumped at sea, just that it is dumped from the vessel. The ACCC must satisfy themselves that the reason given by the Party concerned for the absence of the AER is valid and that materials that are loaded at sea but not dumped at sea (i.e. they are dumped on land) are excluded from the scope of DAS Permits. When the case goes to a hearing, the EPA will have an opportunity to outline what controls and environmental regulations are in place for dredging contaminated materials at sea that are subsequently not disposed of at sea.

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

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

Yours sincerely,



Rory Keane

Company Secretary

Diving Ireland