

Public Consultation on Proposed Amendments to the European Communities (Access to Information on the Environment) Regulations 2007 – 2018 (the “AIE Regulations”)

To: The Department of the Environment, Climate and Communications (“DECC”)

From: Coillte CGA

Date: 8 January 2024

Introduction

Coillte welcomes this opportunity to make submissions to DECC on the review of the AIE Regulations.

Coillte notes that a Draft version of the revised AIE Regulations (the “**Revised AIE Regulations**”) has been made available for comment in the present consultation. It is understood that the proposed amendments seek to address the findings of non-compliance by the Aarhus Convention Compliance Committee in November 2020 ACCC/C/2016/141 Ireland, and also follow on from the general public consultation that took place in 2021.

Coillte made a submission as part of that consultation, appended here for ease of reference. However, for completeness and clarity we propose to repeat any previous submissions where appropriate and necessary.

The three questions suggested by DECC are noted and this submission generally follows that format.

Furthermore, while it is most relevant to the third question, and will be expanded upon in that context, Coillte would also like to highlight certain challenges in the operation of the AIE Regime in the context of the Forestry sector. These include the volume and scope of requests being received, anonymous requests and the extent of searches which should be conducted.¹ Some of the suggested amendments seek to address these issues whilst of course recognising the importance of the dissemination of, and right of access to, environmental information.

Overall, Coillte warmly welcomes the proposed amendments made in the Revised AIE Regulations, and notes that several recommendations made in the previous consultation have been incorporated. Therefore, save insofar as we propose further amendments in this submission, **Coillte supports the proposed changes to the AIE Regulations suggested to date.** In particular, Coillte supports the following proposed amendments:

- (i) The removal of the requirement to transfer a request to another public authority in certain circumstances in addition to informing the applicant of the public authority to whom the request should be made as set out in Regulation 6(6) of the Revised AIE Regulations.
- (ii) The formalisation of the third party consultation procedure in Regulation 6.
- (iii) The clarification in Regulation 6(8) that a more specific request is to be treated as a new request for the purposes of the period within which a decision must be made.
- (iv) The removal of the qualification on what may constitute a “manifestly unreasonable” request in Regulation 7(1)(d).

¹ 22 requests in 2020, 73 in 2021, 655 in 2022 and 258 in 2023.

- (v) The clarification in Regulation 8(3) that the obligation under the current article 10(5) to separate out where possible certain environmental information for release does not apply to requests for information which are too general or manifestly unreasonable.
- (vi) The preparation of new Guidelines within 12 months of the coming into operation of the Revised AIE Regulations.

Confidentiality

We note that the DECC intends to publish the contents of all submissions received and will redact any personal data prior to publication.

We confirm that this consultation response does not contain any personal, commercially-sensitive or otherwise confidential information.

1. Should any of the proposed updates outlined be amended? If yes, please provide details of the suggested amendment and why you consider such an amendment to be necessary.

1. Regulations 4(1), (2) and 6(3)

Regulation 4 (1)		
	Revised AIE Regulations	Recommended Amendments
1. Reg 4(1)	(1) A public authority shall -	(1) Subject to paragraph (4) , a public authority shall -
2. Reg. 4(1)(f)	(1) A public authority shall - (f) take necessary measures to organise the environmental information relevant to its functions, held by, or for, the public authority concerned with a view to its active and systematic dissemination to the public, by information technology or by other electronic means,	(1) A public authority shall - (f) take necessary all-reasonable measures necessary to organise the environmental information relevant to its functions, held by, or for, the public authority concerned with a view to its active and systematic dissemination to the public, by information technology or by other electronic means,
3. Reg 4(1)(g)	(1) A public authority shall – (g) ensure that environmental information complied by, or for, the public authority concerned, is up-to-date, accurate and comparable, and	(1) A public authority shall – (g) take reasonable steps to ensure that environmental information complied by, or for, the public authority concerned, is up-to-date, accurate and comparable, and
4. Reg 4(1)(h)	(1) A public authority shall – (h) provide assistance to the public in exercising the right of access to environmental information by means which may include one, or more, of the following: <ul style="list-style-type: none"> (i) The designation of information officers within the public authority concerned; (ii) the establishment and maintenance of facilities for the examination of the information required within the public authority concerned; (iii) the provision of registers or lists of the environmental information within the public authority concerned; (iv) the provision of information points, with clear indications of where such information can be found within the public authority concerned. 	(1) A public authority shall – (h) provide reasonable assistance to the public in exercising the right of access to environmental information by means which may include one, or more, of the following, as may be appropriate having regard to the nature of the environmental information concerned : <ul style="list-style-type: none"> (i) The designation of information officers within the public authority concerned; (ii) the establishment and maintenance of facilities for the examination of the information required within the public authority concerned; (iii) the provision of registers or lists of the nature and type of environmental information within the public authority concerned; (iv) the provision of information points, which may be provided by way of electronic means on a website, with clear indications of where

such information can be found within the public authority concerned is publicly available for inspection;

Purpose and Justification

Coillte welcomes the broadening of the obligations placed on public authorities by Regulations 4(1), 4 (2) and 6(3) and believes that it will assist in achieving significantly greater levels of transparency in environmental decision making, as envisioned by the Directive and the Convention. Coillte also recognises that proactively organising and disseminating environmental information to the public in particular by electronic means will also make discharging other obligations under the AIE Regulations less onerous for public authorities.

However, this also needs to be considered in the context of the very broad definition of environmental information as reflected in decisions of the Commissioner for Environmental Information and the Courts. There is accordingly a risk that Regulation 4 of the Revised AIE Regulations as currently drafted would impose potentially significant and excessive obligations on public authorities to organise and make available a significant volume of documentation including administrative and operational records.

In this regard, we have recommended the inclusion of some minor amendments to give clarity to the obligations, and in some instances to limit them. However, the goal of these amendments is not to reduce the amount of environmental information being disseminated into the public realm, but rather to ensure that it does not become overly onerous, and discouraging to smaller and mid-sized public authorities, and to prevent overreliance on Regulation 4(4) to justify not meeting the obligations under paragraph (1).

The purpose of these amendments is to emphasise that the obligation in Regulation 4(1) to proactively disseminate environmental information is not absolute, but rather is subject to paragraph (4) and, in turn, Regulations 6, 7 and 8. We anticipate that qualifying the Regulation 4(1) obligations by the inclusion of the words “Subject to paragraph (4)”, as well as the specific amendments to subparagraphs (f), (g) and (h), will have three beneficial effects to the administration of the AIE Regime as a whole.

Firstly, it will clarify the scope of the obligation. By prefacing paragraph (1) by referencing paragraph (4), a public authority will be given a “road map” as to how it must discharge its obligations under that Regulation. In addition, the inclusion of the word “reasonable” to subparagraphs (f), (g) and (h) reflect the language used in the Regulations and identify areas where a public authority will need to balance time and costs allocations against the goal of disseminating environmental information noting again the very broad definition of environmental information. In this regard, the Aarhus Compliance Committee has consistently stated that there is an obligation to implement the Convention by means of a “clear, transparent and consistent framework” (see for example ACCC/C/2017/147 Concerning compliance by the Republic of Moldova). The amendments to Regulation 4(1) serve to assist in meeting this obligation.

Secondly, expressly subjecting the Regulation 4(1) obligation to the exemption provisions serve to clarify the obligations imposed on public authorities and prevent potentially endless, disorganised, unfocussed dissemination, contrary to the goals of the Revised AIE Regulations. In particular, public authorities who deal with significant volumes of environmental information, may take comfort in the fact that they can rely on manifestly unreasonable exemptions (as amended below), and in so doing can focus on disseminating key pieces of environmental information only in the first instance, rather than having to make every minor piece of environmental information (which could include emails, handwritten notes, etc) available. In this regard, these amendments serve to encourage public authorities to prioritise the most relevant environmental information.

The specific amendments to subparagraph (h) further reinforce the idea that public authorities should be prioritising the release of significant environmental information. The inclusion of the words “*as may be appropriate having regard to the nature of the environmental information concerned*” is crucial in ensuring that public authorities are not required to, for example, maintain facilities where the many thousand internal emails that might be sent each day in a public authority can be examined for the purposes of (h)(ii). In such circumstances, the best means of discharging the obligation to give assistance might be to positively work with the co-operating member of the public to identify what they are specifically seeking and to then conduct a search of emails in light of that information.

The proposed amendment to paragraph (h)(iv) further assists in this regard, though in a more specific context. By replacing the words “*where such information can be found within the public authority concerned*” with “*where such information is publicly available*”, a public authority can discharge its obligations by directing requesters to public platforms that hold environmental information but are maintained by different public bodies. Examples of this are the EIA Portal, maintained by the Department of Housing, Local Government and Heritage, or the Forestry Licence Viewer, maintained by the Department of Agriculture, Food and the Marine.

Thirdly and finally, expressly prefacing the Regulation 4(1) obligation by subjecting it to the exemption provisions will serve as a reminder to public authorities that they must consider matters such as confidentiality of third parties (Reg 7(1)(a)(i)), environmental protections (Reg 7(1)(a)(iii)), and the public interest (Reg 8(1)) prior to publishing or otherwise releasing information. Further, it is not anticipated that qualifying the obligation will have any adverse effect on the dissemination of environmental information to the public as (i) it is already provided for in the regulations, and (ii) it does not detract from the right to make a specific request for information that is not publicly available, and which triggers a more detailed analysis of the requested information.

We note that the Directive does not have a comparable Article to Regulation 4(1).² It does, however, include a general goal at Article 1(b) of the Directive

“(b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted.”

This goal is expanded upon by recital (9) which states that a public authority should “make available and disseminate environmental information to the general public to the widest extent possible”.

We believe that the proposed amendment aligns with Article 1(b) and recital (9) in that it will prevent the Article 4(1) obligation from becoming so burdensome and onerous that it is not acted on at all, or to a sufficient extent. This qualification will, we believe, encourage public authorities to take all steps that are practical to disseminate key environmental information without requiring a disproportionate investment of time and resources.

² Instead the obligation appears to arise from a finding of the Aarhus Compliance Committee (ACCC/C/2009/37 concerning compliance by Belarus (ECE/MP.PP/2011/11/Add.2, para. 69)), that member States are obliged to ensure that each public authority possesses the environmental information which is relevant to its functions.

Regulation 4 (2)		
	Revised AIE Regulations	Recommended Amendments
1. Reg 4(2)(e)	(2) Environmental information mentioned in paragraph (1)(f) shall include at least the following: (e) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3 of the Directive;	(2) Environmental information mentioned in paragraph (1)(f) shall include at least the following: (e) authorisations granted by or to the public authority concerned with a significant impact on the environment and environmental agreements entered into by the public authority concerned or a reference to the place where such information can be requested or found in the framework of Article 3 of the Directive;
2. Reg 4(2)(f)	(2) Environmental information mentioned in paragraph (1)(f) shall include at least the following: (f) environmental impact studies and risk assessments concerning the elements of the environment, referred to in paragraph (a) in the definition of environmental information, or a reference to the place where the information can be requested or found;	(2) Environmental information mentioned in paragraph (1)(f) shall include at least the following: (f) environmental impact studies and risk assessments prepared by or submitted to the public authority, that form part of any plan or project that has been authorised or is in the process of seeking authorisation, or are otherwise complete, concerning the elements of the environment, referred to in paragraph (a) in the definition of environmental information in Regulation 2(1), or a reference to the place where the information can be requested or found;

Purpose and Justification

The purpose of the proposed amendment to subparagraph (e) is to clarify that a public authority is not required to actively disseminate environmental authorisations that were neither granted to the public authority concerned, nor granted by the public authority to a third party.

Qualifying paragraph (2)(e) would not detract from the rights of the public in any way. In this regard, should a request be received for an authorisation that does not relate directly to the public authority concerned, Regulation 6(6) will be triggered, and assistance provided to that requester by directing them to what appears to be the relevant public authority.

A similar amendment has been inserted into paragraph (2)(f) for the same reason.

The more substantive amendment to paragraph (2)(f) are the inclusion of the words *“that form part of any plan or project that has been authorised or is in the process of seeking authorisation or are otherwise complete”*.

We understand that the goal of Regulation 4(2)(f) of the Revised AIE Regulations is to ensure that all environmental impact assessment, Strategic Environmental Assessments, and any other environmental impact studies and assessments shall be made available for public view. Coillte welcomes the reinforcement of the concept that such assessments and reports should be made publicly available. However, we consider that it would be helpful to make it clear that these documents only fall within the scope of Regulation 4(1)(f) where those documents are complete and in particular, where they relate to a specific statutory consultation process, that the process has concluded or at least commenced, and the relevant document published as part of that process.

By way of example, a Natura Impact Statement (“**NIS**”) may be prepared by Coillte as part of a forestry licence application where the proposed activity is likely to have a significant effect on a European site. The public will then have a right to be consulted on the NIS and can make observations to DAFM in relation to same. The Minister for Agriculture, Food and the Marine will then consider the NIS and submissions made on the application and complete their Appropriate Assessment (“**AA**”) in accordance with the Habitats Directive. The AA determination will then be released to the public as part of the decision on whether Coillte will be issued a forestry licence or not.

In summary, the NIS in this example forms part of an environmental decision-making process in which public participation will occur. However, the determination as to when the specific document should be released generally lies with the designated competent authority or as otherwise specified in the legislation. It would not appear either appropriate or necessary to require that these assessments be made available prior to their publication as part of the statutory public consultation process.

On that basis, the purpose of this amendment is to ensure that the AIE Regulations do not undermine and are consistent with other statutory regimes that give effect to the Aarhus Convention by not requiring the premature dissemination of assessments and reports.

2. Regulation 5(1)

Regulation 5 (1)		
	Revised AIE Regulations	Recommended Amendments
1. Reg. 5 (1)	(1) Subject to paragraph (2), a request for environmental information shall – ... (c) state the name of the applicant, (d) state the contact details, which may be an address for the recipient of electronic mail, of the applicant,	(1) Subject to paragraph (2), a request for environmental information shall – ... (c) in the case where the applicant is a natural or legal person , state the name of the applicant, (d) in the case where the applicant is an unincorporated body of persons, state the name of a natural or legal person who shall have the care of the request,

	(e e) state the contact details, which may be an address for the recipient of electronic mail, of the applicant,
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Purpose and Justification

This amendment should be read in conjunction with our proposed amendment to Part 3 in section 2 below, dealing with the potential risks posed by AI to public bodies in the context of the AIE Regulations (section 2, issue 2). The purpose and justifications outlined in that section are repeated here.

3. Regulation 6(5) and 6(6)

Regulation 6 (5)		
	Revised AIE Regulations	Recommended Amendments
1. Reg. 6(5)	(5) Where a request is made to a public authority and the environmental information request is not held by, or for, the authority concerned, the authority shall as soon as possible refuse the request in accordance with paragraph (4).	(5) Where a request is made to a public authority and all or any of the environmental information requested is not held by, or for, the authority concerned, the authority shall as soon as possible refuse the request, or partially refuse the request as the case may be , in accordance with paragraph (4).
Regulation 6 (6)		
2. Reg 6(6)	(6) Where paragraph (5) applies and the public authority concerned is aware that the information requested is held by another public authority, it shall as soon as possible, inform the applicant of the public authority to whom it believes the request should be directed.	(6) Where paragraph (5) applies to any or all of the environmental information requested and the public authority concerned is aware that the relevant information-requested is held by another public authority, it shall as soon as possible, inform the applicant of the public authority to whom it believes the request should be directed.

Purpose and Justification

The purpose of this amendment is to allow for the situation where only part of the environmental information requested in a composite, or multi-part request is not held by the public authority concerned. In such circumstances it should be open to partially refuse the request in accordance with paragraphs (5) and (6) and to issue a decision in respect of the remainder of the request.

4. Regulation 6(8)

Regulation 6 (8)		
	Revised AIE Regulations	Recommended Amendments
1. Reg. 6(8)(a)	(8)(a) Where a request is made by the applicant in too general a manner, the public authority concerned shall, as soon as possible and, in any case, not later than one month after the date of receipt of the request, invite the applicant to make a more specific request and offer assistance to the applicant in the preparation of such a request.	(8)(a) Where, in the opinion of the public authority , a request is made by the applicant that is <ul style="list-style-type: none"> (i) phrased in too general a manner, or (ii) manifestly unreasonable in accordance with regulation 7(1)(d)(i), the public authority concerned shall, as soon as possible and, in any case, not later than one month after the date of receipt of the request, invite the applicant to make a more specific request and offer reasonable assistance to the applicant in the preparation of such a request.

Purpose and Justification

The obligation to offer assistance in Regulation 6(8) is a specific extension to the general obligation expressed in Regulation 4(h) and in Coillte's view is an important regulation for ensuring that the public's rights are fully given effect to. Furthermore, this provision is of benefit to both the applicant and public authorities, as it provides a means by which the public authority can assist the applicant in making a more specific request rather than simply refusing same, or wasting time and resources in answering a broad request to provide information that an applicant had not actually sought, but which nevertheless fell within the scope of the request.

Accordingly, Coillte welcomes the proposed inclusion of Regulation 6(8)(b) and (c), which serves to strengthen the effect of the procedure in sub-paragraph (a) and will facilitate greater engagement. The following proposed further amendment paragraph (8)(a) serves to broaden the circumstances under which the power under Regulations 6(8) can be exercised.

Regulation 6(8)(a) as drafted is limited to circumstances where requests are phrased in too general a manner, reflecting the wording in Article 3(3) of the Directive. In practice, however, it is used in broader circumstances, particularly where a request appears to be manifestly unreasonable due to the volume of information sought. However, we note that the Aarhus Convention does recognise a broader, general obligation to give assistance. In this regard, the preamble of the Conventions states:

"Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,"

Further, Article 3 (2) provides that:

“2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.”

It is also worth noting that the Convention groups “manifestly unreasonable” and “formulated in too general a manner” together in the context of the exemption provisions. In this regard, article 4(3) of the Convention provides:

“3. A Request for environmental information may be refused if: - (b) The request is manifestly unreasonable or formulated in too general a manner;”.

By expressly introducing additional circumstances where assistance can be offered for a request, which would otherwise be unanswerable or not compliant with the regulations, greater effect will be given to the right to environmental information. In addition, we submit that the proposed amendments to this regulation reflect the practical realities of how Regulation 6(8) (previously Article 7(8)) is currently used. Furthermore, it synergises with Regulation 6(7).

5. Regulation 6(10)

Regulation 6 (10)		
	Revised AIE Regulations	Recommended Amendments
1. Reg 6(10)	10. Where a request is made for environmental information and in the opinion of the public authority release of the information may adversely affect – (c) commercial or industrial confidentiality, where such confidentiality is provided for in national, or European Union, law to protect a legitimate economic interest.	10. Where a request is made for environmental information and in the opinion of the public authority release of the information may adversely affect – (c) commercial or industrial confidentiality of a third party , where such confidentiality is provided for in national, or European Union, law to protect a legitimate economic interest.
Purpose and Justification		
The purpose of this amendment is due to a perceived omission in the Revised AIE Regulations. Both subparagraphs (a) and (b) of paragraph (10) relate to the interests of third parties. Similarly, corresponding provision in the current AIE Regulations (Reg 7(11)) specifically refers to the interests of third parties. Furthermore, commercial or industrial confidentiality are later protected more generally at Reg 7(1)(a)(v).		

6. Regulations 7(1) and 8(1)

Regulation 7(1)		
	Revised AIE Regulations	Recommended Amendments
Reg 7(1)(d)(i)	(d) where the request – (i) is manifestly unreasonable,	(d) where the request – (i) is manifestly unreasonable because

- (I) of the volume or range of information sought, having regard to any other request made by the same requester within overlapping time periods,
- (II) of the conduct of the requester,
- (III) the request is vexatious or frivolous,
- (IV) the request forms part of a pattern of manifestly unreasonable requests from the same applicant or from different applicants who, in the opinion of the public authority appear to have made the requests acting in concert ,
- (V) the request constitutes an abuse of process, or
- (VI) any other matter the public authority considers relevant, having regard to any guidance issued by the Minister.

Purpose and Justification

First and foremost, Coillte agrees with the proposal to remove the words “*having regard to the volume or range of information sought*”. As the Directive does not limit the “manifestly unreasonable” exemption in this manner, we welcome this amendment as a means of bringing the Revised AIE Regulations into line with EU law and allowing public authorities greater flexibility in applying this exemption.

Coillte recognises that “manifestly unreasonable” is very general and it may therefore be of assistance to include circumstances where a request might be considered “manifestly unreasonable”, while still allowing for the discretion intended by the Directive through subparagraph (i)(VII) “*any other matter the public authority considers relevant*”. **However, Coillte is not opposed to leaving Regulation 7(1)(d)(i) without expansion, as drafted in the Revised AIE Regulations, and addressing the particular circumstances in which the exemption can be applied, and how it can be applied, in Guidance documents. It would however suggest that at a minimum express provision be made to enable a public authority to refuse frivolous or vexatious requests or requests which form part of a pattern of manifestly unreasonable requests by one or more applicants acting in concert as suggested at d(III) and (IV) above.**

By way of justification, it is important to note, as stated above, that neither the Convention (Article 4(3)(b)) nor the Directive (Article 4(1)(b)) limit the exemption provisions beyond the words “*the request is manifestly unreasonable*”. Accordingly, it is submitted that the AIE Regulations as currently in effect unnecessarily reduced the scope of the exemption provision and reduced the protection of a legitimate interest that the Directive sought to protect, the correct allocation of public funds and the resources of public authorities.

The European Commission’s First Proposal for the AIE Directive envisioned that the “manifestly unreasonable” exemption cover a number of situations:

“Public authorities should also be entitled to refuse access to environmental information when requests are manifestly unreasonable or formulated in too general a manner. Manifestly unreasonable requests would include those, variously described in national legal systems as vexatious or amounting to an abus de droit. Moreover,

compliance with certain requests could involve the public authority in *disproportionate cost or effort or would obstruct or significantly interfere with the normal course of its activities*. Authorities should be able to refuse access in such cases in order to ensure their proper functioning.”

The European Commission stated that the precise meaning of this should relate to corresponding national law provisions. In this regard, we have recommended that the exemption provision make explicit reference to “*frivolous or vexatious*” requests. However, we have also recommended that further, specific circumstance be identified to avoid confusion, all of which are grounded in national law, as required by the European Commission. In this regard, the leading definition of “vexatious” in Irish law arises in the jurisprudence surrounding Issacc Wunder Orders. In particular, the Court in *Riordan v Ireland (No 5) [2021] 466 HC* described it as:

“(a) *the bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;*

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;

(c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;.”

In relation to (a) and (d), we recognise that a public authority can simply refuse a request for a category of information that it, or the Commissioner, has decided is exempt.

In relation to (b), we have recommended that a general circumstance is included at paragraph (1)(d)(i)(V) namely that a request can be refused where it “constitutes an abuse of process”.

With respect of (c) we have recommended the inclusion of (1)(d)(i)(II) to cover situations where the requester’s own conduct is such that it is necessary that the public authority decline to further process the request in the interest of protecting staff welfare.

We have also recommended that public authorities be expressly allowed to consider any temporally overlapping requests made by the same requester when considering whether a request is manifestly unreasonable having regard to the volume and range of information sought in subparagraph (1)(d)(i)(I), for the same reasons as those set out for the inclusion of (1)(d)(i)(IV). The analogy with the FOI exemptions is noted in this regard and it should be expressly recognised that, while a request on its face may not appear manifestly unreasonable, it should be so viewed in the context of a pattern of requests.

Finally, recognising the intended flexibility of this exemption provision, we have recommended the provision facilitate circumstances that are not expressly stated by including “*any other matter the public authority considers relevant*” at paragraph (1)(d)(i)(VI). However, to balance this broad provision, this circumstance should be qualified by reference to Ministerial Guidance.

Regulation 8(1)		
	Revised AIE Regulations	Recommended Amendments
1. Reg 8(1)	(1) A public authority shall consider each request made to it on an individual basis and weigh the public interest served by disclosure against the interest served by refusal.	(1) Subject to Regulation 7(1)(d)(i), a public authority shall consider each request made to it on an individual basis and weigh the public interest served by disclosure against the interest served by refusal.
Purpose and Justification		
The purpose of this amendment is to facilitate the proposed amendments to the “manifestly unreasonable” exemption, and specifically, the circumstances where the public authority is permitted to look at patterns of requests, overlapping requests, or the conduct of the requester. In such circumstances, the object of that exemption provision would be defeated if the public authority was strictly confined to considering each request on an individual basis.		

6. Regulation 10

Regulation 10		
	Revised AIE Regulations	Recommended Amendments
1. Reg 10(1)	(1) A Where - ... the applicant, the person other than the applicant or a third party may appeal to the Commissioner against the decision of the public authority concerned.	(1) (1) A Where - ... the applicant, the person other than the applicant, or a third party may appeal to the Commissioner against the decision of the public authority concerned.
3. Reg 10(11)	(1) Subject to Regulation 11, a public authority shall comply with a decision of the Commissioner under paragraph (5) not later than 3 weeks after the date of its receipt.	(1) Subject to Regulation 11, a public authority shall comply with a decision of the Commissioner under paragraph (5) not later than 3 weeks two months after the date of its receipt.
Purpose and Justification		
<p>The first proposed amendment is to clarify that third parties may appeal decisions. As drafted in the Revised AIE Regulations, it appears that the persons with a right to appeal are (1) the applicant, (2) the person other than the applicant or a third party. This inclusion of the comma after “applicant” clarifies that there are three potential applicants, namely (1) the applicant, (2) the person other than the applicant, and (3) a third party.</p> <p>The second amendment is to bring Regulation 10(11) into line with the time limit for a statutory appeal under regulation 11. A public authority should not be required to comply with the final decision of the Commissioner before the time period for an appeal has lapsed. While we accept that there is a need to act on a decision of the Commissioner with some degree of expedience, especially in circumstances where the original request may have been made several months prior, Regulation 11 affords a</p>		

potential appellant two months within which it can bring a statutory appeal of the decision. This time period reflects the legitimate public interests of allowing time to consider the merits of an appeal, as well as the practical realities of how long it can take to prepare and initiate legal proceedings. A public authority should not be in breach of the Revised AIE Regulations for exercising their rights to consider and prepare an appeal over the course of the two month period.

Similarly, a third party to whom confidential information relates also has a right to appeal a decision of the Commissioner in accordance with Regulation 11. It would defeat the purpose of the exemption provisions that protect legitimate interests, and the statutory right of appeal, for the subject information to be released after three weeks while a third party may still bring an appeal.

In these circumstances, we recommend that the time period be amended from “three weeks” to “two months”.

7. Regulation 12

Regulation 12		
	Revised AIE Regulations	Recommended Amendments
1. Reg 12(2)	(1) The Minister shall review any guidelines published under paragraph 1 at regular intervals not exceeding 5 years.	(1) The Minister shall review any guidelines published under paragraph 1 at regular intervals not exceeding 5 3 years.
Purpose and Justification		
<p>Technological developments and the increased importance of environmental issues means that the scope of and issues arising in the context of the operation of the AIE Regulations is ever changing and evolving. The European and National jurisprudence reflects this with new case law arising frequently. Accordingly, it is of vital importance that the Ministerial Guidelines are frequently updated, and we suggest at the latest every three years, to reflect this.</p> <p>In particular, given that public authorities are required by Regulation 12(3) of the Revised AIE Regulations (previously regulation 13(2)) to “have regard to” Ministerial Guidelines in the performance of their functions under the Regulations, it is of vital importance that these Guidelines are no more than 3 years old. Furthermore, up to date guidelines will ensure that public authorities, the Commissioner, and members of the public are better informed on the AIE Regulations and can exercise their rights and obligations thereunder without the need to resort to legal advice in most instances. In this respect, Coillte notes that the current Guidance is ten years old and welcomes the proposal to publish new Guidance within 12 months of the adoption of the Revised AIE Regulations.</p>		

8. Regulation 13

Regulation 13		
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	Revised AIE Regulations	Recommended Amendments
1. Reg 13 (1)	(1) A public authority may levy a charge when it supplies environmental information in accordance with these Regulations (including when it makes such information available following an appeal to the Commissioner under Regulation 10), provided that such charge shall be reasonable having regard to the provisions of the Directive	(1) A public authority may levy a charge when it informs the applicant of its decision to make available environmental information in accordance with these Regulations (including when it makes such information available following an appeal to the Commissioner under Regulation 10), provided that such charge shall be reasonable having regard to the provisions of the Directive
Purpose and Justification		
<p>The purpose of this amendment is to make express what was both implied by the Revised Regulation 13(1) and which is a common practice among public authorities.</p> <p>The current wording of the revised Regulation 13(1) could be interpreted as meaning that, upon the supply of the environmental information to the Applicant, the charge may also be levied. We submit that this reading of the regulation is illogical. If a charge were levied at the same time that the information was provided, an applicant (who would be in receipt of the information) would have no incentive to pay the public authority.</p> <p>Therefore, we have proposed the amendment to clarify that that the charge may be levied at the time that the applicant is informed of the decision to release the environmental information. Furthermore, given both the Convention and the Directive permit a charge to be levied “<i>for supplying information</i>”, the above amendment aligns with those documents.</p>		

2. Should any other specific part of the Regulations be amended? If yes, please provide details of the suggested amendment and why you consider such an amendment to be necessary.

This question shall be addressed by reference to specific issues that arise from the AIE regulations as they currently operate.

Issue 1: Calculation of Time Limits within the Regulations

Proposed Amendment to Regulation 2
<p>(1) In these Regulations –</p> <p style="text-align: center;"><i>“month” means 20 working days;</i></p> <p style="text-align: center;"><i>“week” means 5 working days and “weeks” shall be construed accordingly</i></p>
Purpose and Justification
<p>The absence of an express definition in the AIE Regulations or Directive for “month” means that the definition from the Interpretation Act, 2005 (the “Interpretation Act”) is typically applied. The Interpretation Act defines “month” as a “calendar month”.</p> <p>The result of adopting this interpretation is that the time periods set out in the Revised AIE Regulation can encompass or fall on weekends of public holidays, resulting in a lesser amount of time for public authorities to process requests and for members of the public to consider whether to submit and prepare requests for internal review/appeals to the Commissioner.</p> <p>By expressly providing a definition for month as meaning “20 working days”, this procedural difficulty is easily addressed. Furthermore, the calculation of time periods is clearer with this definition.</p> <p>In terms of legal justification, as noted above the Directive does not provide any definition for “month”, and accordingly the State already prescribes one through the application of the Interpretation Act. Accordingly, there is nothing prohibiting a different definition being expressly included in the Revised Regulations.</p> <p>We have also recommended that “Week” be similarly defined for the purposes the Regulations.</p>
Alternative Amendment
<p>In the alternative to defining “month” differently to the manner in which it is defined in the Interpretation Act, the Minister may wish to include an amendment along the lines of the following:</p> <p style="text-align: center;"><i>Where a time period referred to in these Regulations expires on a day that is a Saturday, a Sunday or a public holiday, the period shall be deemed to expire on the next day, following that day, that is not a Saturday, a Sunday or a public holiday.</i></p> <p>In addition, it may be considered appropriate to omit the Christmas period for the purposes of calculating any time period in the Regulations similar to s.251 in the Planning and Development Act, 2000, as amended:</p>

“251.— Where calculating any appropriate period or other time limit referred to in this Act or in any regulations made under this Act, the period between the 24th day of December and the first day of January, both days inclusive, shall be disregarded”.

This might be inserted as a new Regulation 6(2)(d) for the purposes of the time period for the initial request:

“(d) Where calculating the time period for the purposes of subparagraph (a) or (c), as the case may be, the period between the 24th day of December and the 1st day of January, both days inclusive shall be disregarded.”

Comparable paragraphs would have to be included in Regulations 9 and 10 to deal with internal reviews and Appeals to the Commissioner respectively. In the alternative a separate AIE regulation could be included dealing with the calculation of time periods under the Regulations generally.

Issue 2: Right to Environmental Information and AI

Proposed Amendment to Part 3

Part 3

Right to Request Environmental Information

Right of Access to Environmental Information

5. Subject to these Regulations, any natural or legal person shall have right of access to environmental information held by or for public authorities.

Request for Environmental Information

6. (1) Subject to paragraph (2), a request for environmental information shall – ...

[(c) in the case where the applicant is a natural or legal person, state the name of the applicant,

(d) in the case where the applicant is an unincorporated body of persons, state the name of a natural or legal person who shall have the care of the request,

(~~d~~ e) state the contact details, which may be an address for the recipient of electronic mail, of the applicant,]

(3) Without prejudice to paragraph (1), a request for environmental information shall not be valid for the purposes of this regulation where it has been generated and submitted entirely by artificial intelligence software.

Purpose and Justification

This amendment should be read in conjunction with our proposal with respect to Regulation 5 (renumbered to regulation 6 after the inclusion of our regulation 5 – section 1, amendment 2) above, which have been included at Regulation 6 in square brackets for clarity.

The purpose of this amendment is to future proof the AIE Regulation against the potential threats posed by artificial intelligence and ensure consistency with the impending EU AI Act, the terms of which were agreed by the European Parliament and Council on 8 December 2023. In particular, Coillte anticipates that, should appropriate safeguards not be put in place, an AI system could be used to issue several thousand minor AIE requests to a public authority daily. If these requests were otherwise valid under the Regulations, this would administratively cripple the public authority or would result in widespread non-compliance with the Regulations.

Accordingly, we have firstly proposed to include an express right to environmental information, giving effect to Recital 8 of the Directive, which states that:

“It is necessary to ensure that any natural and legal person has a right of access to environmental information held by or for public authorities without his having to state an interest.”

This also ensures that each and every request must emanate or ultimately be issued by a natural or legal person, as opposed to a software system. This directly aligns with the primary safeguards envisioned by the impending AI Act, which is to ensure that all AI systems are overseen by people, rather than by automation to prevent harmful outcomes (see Commission Proposal 2021/0106), and that “*fundamental rights, democracy, and the rule of law and environmental sustainability*” are protected.

The express right of natural or legal persons to environmental information is complemented by the proposed amendments to regulation 6(1), which recognises that this might include an unincorporated association (noting also the interpretation of person in the Interpretation Act 2005). Accordingly, the proposal to include the new regulation 6(1)(d) ensures that, even where the precise identity/composition of an applicant is unclear, an identifiable natural or legal person shall have charge of a request.

Finally at Regulation 6(3), we have proposed to insert a paragraph that expressly states that a request generated by AI shall not be in compliance with that regulation, irrespective of whether it is compliant with the other mandatory regulations/requirements. This is the most important proposed safeguard against the risks posed by AI as it allows a public authority to decline to validate such requests. However, this power is not disproportionate, as it is balanced by the obligation expressed in Regulation 6(7) to engage with an applicant in respect of a request that could be regarded as an AIE request but which has not been made in accordance with the regulations.

We note that the High Court intends to make a reference to the CJEU raising questions that are of relevance to this issue (*Coillte CGA -v- Commissioner for Environmental Information [2023] IEHC 640*). We recognise that the determination of CJEU may have a bearing on how some of these issues can be addressed in the Revised AIE Regulations.

Alternative Amendment

N/A

Issue 3: Procedures of public authorities

Proposed Amendments to Regulations 5 and 9

5. (1) Subject to paragraph (2), a request for environmental information shall –
(g) subject to Regulation 6(7), comply with any other procedures relating to the making of requests established by the public authority concerned, where those procedures are in accordance with these Regulations and the Directive.

9 (2) When making a request for an internal review in accordance with paragraph (1), the applicant shall have regard to any procedures relating to internal reviews established by the public authority concerned, where those procedures are in accordance with these Regulations and the Directive.

Purpose and Justification

The purpose of this amendment is to ensure that, insofar as possible, applicants for environmental information follow reasonable procedures set down by public authorities in relation to AIE Requests. This might include, for example, requiring that requests or internal review requests be made to a specific email address, or addressed to a specific person.

By expressly providing that public authorities can set out their own AIE procedures, it will ensure that requests and internal reviews are conducted efficiently and expeditiously, and significantly minimise the risk that requests are overlooked due to, for example, being sent to an inactive or unmonitored email address or to the incorrect person.

Coillte is of the view that these regulations will not hinder or otherwise lessen or infringe the public's ability to exercise their right under the AIE regulations, for three reasons.

Firstly, any procedures laid down by public authorities cannot contradict with AIE Regulations or the Directive.

Secondly, Regulation 5(1)(g), as proposed, is expressly subject to Regulation 6(7) which requires that, on receipt of a request that could be regarded as an AIE or FOI request, the public authority concerned must inform an applicant of how they can exercise their right to environmental information.

Thirdly, all public authorities are under a general, constitutional obligation of fair procedures, which would prohibit any overzealous adherence to a procedure to deprive a person of their rights.

Alternative Amendment

N/A

Issue 4: Time period for a decision in certain circumstances

Proposed Amendment to Regulation 6

6. (13) **Subject to paragraph (14)**, where a decision is not notified to the applicant within the relevant period specified in paragraph (2)(a) or as the case may be, paragraph (2)(c), a decision refusing the request shall be deemed to have been made by the public authority concerned on the date of expiry of such period.

6. (14) (a) The public authority may suspend the time period specified in Regulation 6 (2)(a) or Regulation 6(2)(c), as the case may be, in the following circumstances:

(i) Where the public authority has invited an applicant to make a more specific request and is offering assistance in the preparation of such a request in accordance with paragraph (8)(a);

(ii) where the public authority is seeking to engage with a relevant third party and afford them an opportunity to make submissions in accordance with paragraph (10);

(iii) where the public authority has decided to require the payment of a charge in advance of processing the request in accordance with Regulation 13(5).

6. (14) (b) Where a public authority decides to suspend the time period in the manner prescribed by paragraph (a), it shall, as soon as possible and at the latest, before the expiry of the time period specified in Regulation 6 (2)(a) or Regulation 6(2)(c), as the case may be –

(i) give notice in writing to the applicant, and any other person or third party, of the reason why the relevant time period is being suspended, and

(ii) in the case of subparagraph (a)(i) and (a)(ii), specify the period of the suspension, not being longer than two weeks,

(iii) in the case of subparagraph (a)(iii), specify that the period will be suspended pending payment.

Purpose and Justification

These amendments create a means by which the time period within which a decision is required to issue under Regulation 6(2)(a) or (c) can be suspended in certain circumstances. The purpose of this is to ensure that the one/two month period, as the case may be, is not entirely exhausted where:

1. the applicant has been invited to make a more specific request in accordance with Regulation 6(8)(a),
2. where the interests of third parties may be affected and the public authority is seeking to identify and invite them to make a submission, or
3. Where an advance payment is requested for the processing of the request and the public authority is awaiting same.

By way of justification, it is important to note that neither the Convention nor the Directive prohibit the suspension of the time period within which a decision must issue.

In addition, if the Commissioner is permitted by the Revised AIE Regulations to suspend the time period within which their decision must issue, as they are by Regulation 10(8)(b), and this is not considered to conflict with the Directive, it would also seem reasonable to allow a public authority to suspend the time periods set out in regulation 6(2)(a) and (c) in the limited circumstances suggested here.

Furthermore, allowing for the time periods to be suspended will permit a more measured decision to be made, that correctly weighs the issues and conflicting rights, as appropriate. Each circumstance identified above gives effect to principles of good public decision making under the AIE Regulations and generally under public administrative law namely:

1. The obligation to offer assistance and allow an applicant an opportunity to decide whether to put in a revised request, in accordance with regulation 6(8), or to continue with their original request, without exhausting the decision time period,
2. Protecting the rights of interests parties that are recognised by the AIE Regulations,
3. Ensuring that the processing of a request need not commence/be completed where advance payment is required but has yet to be paid, and therefore that public resources are not expended unnecessarily.

Alternative Amendment

N/A

Issue 5: Reasonableness and Adequacy of Searches

Proposed Amendment to Regulation 6
<p>6. (14) Notwithstanding Regulation 4 and subject to Regulation 7, where a request is made for environmental information and in the opinion of the public authority it might hold some or all of the information requested, it shall make reasonable efforts to identify and locate that information, if any, for the purpose of paragraph (1).</p>
Purpose and Justification
<p>The purpose of this amendment is to state that a public authority is only required to make “reasonable efforts” to locate environmental information that it believes that it holds in responding to a request, and that such efforts are subject to Regulation 7 and in particular the manifestly unreasonable exemption.</p> <p>Coillte proposes the inclusion of this paragraph with a view to balancing the right of access to environmental information (noting again the very broad definition of environmental information) and the appropriate use of public resources in conducting searches and processing requests.</p> <p>A number of Commissioner decisions in relation to the obligation to undertake searches and the application of the manifestly unreasonable exemption, as currently provided for in the AIE Regulations, are of note in this context.</p> <p>For example, in <i>Ms W and Coillte (OCE-135471-L1L8F7)</i> the Commissioner annulled Coillte’s decision for failing to carry out adequate searches. The searches in question were detailed at paragraph 15:</p> <p><i>“15. Coillte have outlined that in an effort to locate relevant records they undertook a physical search of all relevant areas of the organisation in which the records sought might be held, in addition to a search of the electronic databases and records held both on mainframe computers and individual staff computers. Coillte also conducted interviews with individual members of staff who may have dealt with such records and carried out detailed discussions with relevant records management staff. Despite all of this no relevant records were discovered.”</i></p> <p>Furthermore, in <i>Mr F and Coillte (OCE-130454-P8G5D2)</i> the Commissioner found that taking between “76 and 108 hours to identify, locate and extract information requested” was reasonable for the purposes of the manifestly unreasonable exemption due to the fact that “this workload would be divided across twenty-five staff members”.</p> <p>Voluminous requests and extensive searches can impose a significant administrative burden on public authorities in practice, and require the dedication of substantial time and resources in order to meet this standard. These resources ultimately come from public funds and may also divert resources from other important functions. Furthermore, total administrative burden presented by the multitude of AIE requests that public authorities may receive should also be recognised where applicable.</p> <p>We submit that this amendment, combined with the amendment to the Regulation 7(1)(d)(i), and adequate Ministerial guidance will serve to assist in striking an appropriate balance between the various interests and rights involved.</p>
Alternative Amendment
N/A

Issue 6: Documents prepared as part of a statutory procedure in which there will be public participation

Proposed Amendment to Regulation 7

7. (1) Subject to Regulation 8, a public authority may refuse to make available environmental information in accordance with Regulation 6—

...

(d) where the request –

(vi) concerns documents, data, or material that will be, or has been submitted as part of a statutory consent procedure in which a public consultation on the relevant environmental information will take place,

(3) Where environmental information is refused under paragraph (1)(d)(v), the public authority concerned shall inform the applicant of the name of the authority preparing the material (including, as the case may be the public authority itself) and the estimated time for completion.

(4) Where environmental information is refused under paragraph (1)(d)(vi), the public authority concerned shall inform the applicant of all relevant details in relation to the public consultation, including:

(i) the name of the public authority that will hold the public consultation in relation to the environmental information (including, as the case may be, the public authority itself),

(ii) the relevant application for consent to which the environmental information relates,

(iii) the expected time when the public consultation on the relevant environmental information will commence,

(iv) how the applicant can be notified of and participate in the relevant public consultation.

Purpose and Justification

Coillte, as a semi-state forestry company, is responsible for managing 440,000 hectares of primarily forested lands. In light of this, Coillte is required to prepare and submit a number of Forestry Licence Applications in accordance with the Forestry Act, 2014, as amended. These applications are often necessarily accompanied by various environmental assessments, including Environmental Impact Assessment Reports and Appropriate Assessment (“AA”) Screening/ Natura Impact Statements (“NIS”).

The purpose of this proposed amendment is to address situations where an AIE request is made for access to draft or in-progress applications, including EIARs and NISs, prior to them being finalised and submitted to or published by the relevant consenting authority - - but which will ultimately be made available when complete and finalised as part of the statutory process. Both EIARs and NISs are undoubtedly environmental information, however, they are documents that will form part of a specific statutory process, namely an Environmental Impact Assessment and an Appropriate Assessment, carried out in the case of Forestry Licence applications by the Minister for Agriculture Food and the Marine under the EIA Directive and Habitats Directive respectively.

Both the EIA and Habitats Directives transpose elements of the Aarhus Convention, including parts of the public participation in environmental decision making and access to environmental information pillars.

It is our submission that it is not possible to divorce an NIS or EIAR from the specific statutory process to which it relates. Furthermore, in the course of this process, the decision as to when these documents are opened for public consultation lies with the relevant competent authority, namely the Minister for Agriculture, Food and the Marine or as may otherwise be specified in legislation. The premature release into the public domain of environmental information that will ultimately form part of a public consultation procedure may hinder that procedure and undermine the powers of the Minister/other consenting authority to administer that procedure, and ultimately adversely affect the environmental decision-making process.

Coillte does not consider that it would be appropriate for the AIE Directive to be used in a manner that could undermine/confuse the processes set out in the EIA Directive and Habitats Directive.

Accordingly, we have proposed the above amendment to Regulation 7(1)(d)(vi) to expressly state that a public authority refuse access to documents and applications that will ultimately form part of a consent procedure in which public participation will be an element (such as a planning application, an Industrial Emissions Licence, or a forestry licence).

To ensure that this exemption provision is proportionate and gives effect to the right of access to environmental information insofar as possible, we have also recommended the inclusion of sub-paragraph (4). This requires that certain information be provided to an applicant where a request is refused paragraph (1)(d)(vi) so that they might obtain the environmental information when it is published and take steps to participate in that procedure if they wish.

Separately, we have included a minor amendment to paragraph (3) to make it clear that if a public authority itself is preparing the material that is in the course of completion for the purposes of paragraph (1)(d)(v), it shall so inform the applicant of this fact.

Alternative Amendment

In our view, there are two potential alternatives to the above amendment that would give comparable levels of protection to environmental statutory consent procedures. The first would be to issue clear guidance to the effect that the circumstances identified above would be covered by the exemptions set out at paragraph (1)(d)(iv) (unfinished documents or data) or (1)(d)(v) (material in the course of completion).

In the alternative, it might be open to amend paragraph (1)(d)(ii) as follows to bring environmental decision making within the “course of justice” exemption:

“7. (1) Subject to Regulation 8, a public authority may refuse to make available environmental information in accordance with Regulation 6—

(b) where disclosure of the information requested would adversely affect one, or more, of the following:

*(ii) the course of justice (including criminal inquiries, ~~and~~ disciplinary inquiries **and in environmental decision making**);”*

Issue 7: Grounds of Appeal and Procedures on Appeal to the Commissioner

Proposed Amendment to Regulation 9(2) and Regulation 10(1)

9. (1) Where the applicant's request has been refused under Regulation 6, in whole or in part, or deemed to have been refused in accordance with Regulation 6(13), the applicant may, not later than one month after the date of receipt of the decision to refuse, or as the case may be the date of the deemed refusal in accordance with Regulation 6 (13), request the public authority to review the decision, in whole or in part.

9. (2) (a) A request for an internal review in accordance with paragraph (1) shall be made in writing and shall state the grounds on which request for an internal review is based.

10 (2) (b) An appeal under this Regulation shall be made in writing and shall state the grounds on which the appeal is based.

~~(b-c)~~ Where the Commissioner is satisfied, in the circumstance of a particular case, that it is reasonable to do so, he or she may extend the time for initiating an appeal under subparagraph (a).

Proposed Amendment to Regulation 10

10. (5) Following the receipt of an appeal under this Regulation, the Commissioner shall circulate the appeal, to the relevant parties to the appeal, including, as the case may be –

(a) the public authority who made the decision that is the subject of the appeal,

(b) any third party or other person who made a submission in accordance with regulation 6(10),

(c) any other person who the Commissioner considers it appropriate,

and shall, by notice in writing, invite those parties to make a submission on the appeal within a time period specified by the Commissioner.

10. (6) Without prejudice to paragraph (5), the Commissioner may redact, or circulate only the grounds, or a summary of the main content of an appeal, observation or submission rather than the appeal, observation or submission itself, having regard to any sensitive or confidential information contained therein.

10. (7) Following the receipt of any submissions in accordance with paragraph (5), or on the lapsing of the time period within which the submission may be made, the Commissioner shall –

(a) review the decision of the public authority,

(b) review any submissions received in accordance with paragraph (5), and

(c) affirm, vary or annul the decision concerned, specifying the reason for his or her decision,

in accordance with these Regulations and for the purposes of Article 6(1) of the Directive.

10. (8) (b) The timeline in paragraph (8)(a) shall be suspended –

(iii) where the Commissioner has invited submissions in accordance with paragraph (5), until such time as the submissions are provided or the time period lapses,

(iv) where further information is required by the Commissioner from the applicant or a third party to the appeal, until such time as the information requested is provided.

Purpose and Justification

The purpose of these amendment is to ensure that a degree of structure is imposed into the internal review and appeal processes.

Firstly, the amendments to Regulation 9(2) and 10(2) will serve to add clarity to process by requiring that the grounds of appeal be stated.

Secondly, the amendments to Regulation 10(5) – (8) insert a procedure that ensures that each party to an appeal will know, at least, the key points raised by the other parties, and therefore be aware of the case that they must meet.

While Coillte recognises the merit of affording the Commissioner a degree of flexibility in the running of appeals, public authorities whose decision is the subject of the appeal should, at the bare minimum, receive the grounds of appeal so it is aware of the submissions being made and can address same. Similarly, appellants should be aware generally of the content of submissions of the public authority or any third party.

An amendment is also proposed to insert paragraph (6) to Regulation 10 recognising that, in certain situations where, for example, an appeal or submission may contain confidential information, that appeal may need to be redacted or summarised prior it being circulated in accordance with Reg 10 (5) to avoid the potential release of exempted information.

Alternative Amendment

N/A

Issue 8: Costs and advance payments

Proposed Amendment to Regulation 13

13. (5) Subject to this regulation, upon the receipt of a request the public authority may require the advance payment of a charge prior to the commencement or completion of the processing of the request in circumstances where: -

(a) public authorities make available environmental information on a commercial basis and where the advance payment is necessary in order to guarantee the continuation of collecting and publishing of such information;

(b) in the case of a voluminous request, the public authority is aware of approximately how many hours will be required to locate and process the Environmental information, and due to the number of hours required it is reasonable.

(6) Where advance payment of a charge has been made by an applicant in accordance with paragraph (5), and the ultimate cost of processing the request is less than what was charged, the difference shall be refunded promptly to the applicant.

(7) A decision to require the advance payment of a charge in accordance with paragraph (5) shall be capable of being internally reviewed in accordance with Regulation 9.

Purpose and Justification

The Revised AIE Regulations do not, as currently drafted envision a situation in which a public authority may require an advance charge prior to the processing of a request, notwithstanding that the AIE Directive does specifically allow for same in recital (18) in limited circumstances:

*“Public authorities should be able to make a charge for supplying environmental information but such a charge should be reasonable. This implies that, as a general rule, charges may not exceed actual costs of producing the material in question. **Instances where advance payment will be required should be limited. In particular cases, where public authorities make available environmental information on a commercial basis, and where this is necessary in order to guarantee the continuation of collecting and publishing such information, a market based charge is considered to be reasonable; an advance payment may be required.** A schedule of charges should be published and made available to applicants together with information on the circumstances in which a charge may be levied or waived.”*

The recital states that the circumstances in which an advance charge can be levied should be limited, and then goes on to give a specific example. Accordingly, we have drafted the above proposed amendment to include the example given in the Directive, as well as the situation where the request is particularly large, and the public authority can make an accurate estimate of the amount of time required.

Alternative Amendment

This could be addressed by way of ministerial guidance.

3. Any other comments on the existing AIE Regulations and their implementation of the AIE Directive 2003/4/EC.

Under this heading, Coillte would like to comment on three matters that arise in the context of the AIE Regulations, as currently in effect. These are:

1. Confidentiality of proceedings of public authorities;
2. The Application of Article 9(2)(a) and the Manifestly Unreasonable exemption;
3. Reasonable Assistance and interactions with Requesters

1. Confidentiality of the Proceedings of Public Authorities

Regulation 8(a)(iv) in the current AIE Regulations provides that environmental information shall be refused if it would adversely affect:

“(iv) without prejudice to paragraph (b), the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts);”

In *The Commissioner for Environmental Information -v- Coillte Teoranta [2023] IEHC 227* the Court held that Coillte could not rely on the FOI exemptions incorporated into article 8(a)(iv) to refuse information relating to its proceedings. This creates a unsatisfactory situation whereby some semi-state bodies are afforded a narrower range of exemptions under Regulation 8(a)(iv) than other public authorities.

We note that the Revised AIE Regulations have recommended an amendment to this provision by omitting the references to the FOI Act as follows:

“(iv) without prejudice to subparagraph (b), the confidentiality of the proceeding of public authorities, where such confidentiality is provided for by law”.

Coillte would be grateful for clarification as to whether the intention of this amendment was so that the range of exemptions which could be relied upon by public authorities under the AIE Regulations is the same regardless of whether they are an FOI body. It is submitted that there should be consistency in this respect and either all public authorities, for the purposes of the AIE Regulations, should be entitled to avail of the FOI exemptions or alternatively the ability to rely on them should be removed in full as appears to be the intention of the proposed amendment.

In addition, we would be obliged if Ministerial Guidance could be provided on the scope of this exemption generally.

2. The Application of the Manifestly unreasonable exemption

In the course of this submission, we have identified issues in relation to the operation of the manifestly unreasonable exemption provision and the duty to undertake searches and the obligations placed on public authorities and significant burden on public funds.

In particular, the Commissioner has taken the view under the current Regulations that Article 9(2)(a) is not applied correctly where (i) the processing of a request can be spread out over a number of members of staff so that individually, each person must dedicate only a few hours to it, (ii) Regulation 10(5) has not been applied to separate out and release as much information as possible, and (iii) where the information requested should have, or could have been organised in a manner which would have allowed it to be easily processed.

In relation to item (ii), we note with approval that the Revised AIE Regulations clarify that a public authority is not required to separate out environmental information where it has decided to refuse

a request on the basis of it being too general or manifestly unreasonable (Regulation 8(3)(c)). In this respect, we would simply state, by way of support of this amendment, that it is the Request itself that is manifestly unreasonable and refused, not the particular categories of information sought.

However, we believe that Ministerial Guidance is required in relation to issues (i) and (iii).

In relation to issue (i), it should be recognised that responding to any AIE request places a burden on public funds and resources, and therefore insofar as possible it should be limited to members of the AIE departments within public authorities, rather than requiring significant input from operational staff. Furthermore, this issue predominantly looks at AIE requests in isolation and may not recognise the total number of requests being processed in any given month. For example, while it is true that 100 hours spread out across a number of staff members may not be a significant administrative burden in and of itself, where there are several AIE requests (or in Coillte's case anywhere between 10 and 40 per month in 2023) this can significantly interfere with the day-to-day operations of public authorities.

In respect of issue (iii) we accept that there is a general obligation to actively disseminate environmental information, and Coillte welcomes this. However, in any given month many thousands of pieces of raw and operational data could be produced, together with administrative emails etc, which would potentially fall within the scope of the Regulations. The activity of organising this information to facilitate its release could, alone, be manifestly unreasonable and would represent a separate work stream for public authorities.

To a certain extent, the amendments that we have proposed to Regulation 4 would qualify the active dissemination obligation. However, we believe that Ministerial guidance is required as to how exactly public authorities and the Commissioner should interpret the manifestly unreasonable exemption in the context of Regulation 4 and Regulation 7, and in particular how much weight should be given to the fact that, ultimately, public resources must be used to discharge these obligations.

3. Reasonable assistance and interaction with Requesters

In this submission Coillte has recommended that several amendments be included in relation to the obligation to offer assistance, enabling public authorities to set down their own procedures and expanding the manifestly unreasonable exemption to include the conduct of the applicant. However, Coillte would welcome ministerial guidance on the extent of the obligation to offer assistance to members of the public.

Conclusion

Again, Coillte would like to thank the Minister and DECC for this opportunity to make submissions on the Revised AIE Regulations and reiterate that, in general we welcome the amendments proposed thus far.

However, our submission seeks to identify and address specific issues that Coillte has encountered in the administration of the AIE regulations, as well as anticipate matters that the Regulations will have to navigate. In so doing, we have proposed a number of amendments, including the insertion of a number of new Regulations, paragraphs and sub-para. Therefore, should the Minister require any clarification on any of our proposals, we would be more than happy to expand upon same. In addition, we would be happy to prepare a further revised version of the AIE Regulations with Coillte's proposed amendments included (with consequential renumbering) for the sake of clarity.