

Defra and Welsh Government Proposals to enhance regulators' powers to tackle waste crime

Defra and the Welsh Government intend to bring into force powers on two proposals to restrict access to a waste site by physical means and to serve a notice to remove all waste from a site.

Background to CIWEM

CIWEM is the leading independent Chartered professional body for water and environmental professionals, promoting excellence within the sector. The Institution provides independent comment on a wide range of issues related to water and environmental management, environmental resilience and sustainable development.

CIWEM welcomes the opportunity to respond further to the Defra and Welsh Government consultation on proposals to enhance regulators' powers to tackle waste crime.

Summary

CIWEM welcomes proposals to enhance measures to tackle waste crime. However the way the proposed powers are phrased suggests that there has to be a "serious risk" of pollution to act and this will need to be evidenced. It also does not give the regulator much time to act and in cases where required, we consider it would be useful for the regulator's restriction notice to be able to be extended.

CIWEM considers what is required is power to take swift action to:

- remedy non-compliance involving deposit of waste at permitted sites,
- prevent criminal action for gain at non-permitted sites and,
- to save public cost of removing and legally disposing of waste.

It also seems a little odd that government believes the powers would only be expected to be used a handful of times considering the scale of the problem of waste crime.

Specific comments on the proposals

1. Introduction

The introduction is not altogether helpful nor does it set out the issue fully.

In 2015/16, over 1000 illegal sites in England were shut down.

This statement misses how many were in existence or how many were discovered in this time. Nor does it provide figures for other years to show the scale of the problem. In isolation this

does not really quantify or elucidate the issues and as a result the solutions might not be appropriately targeted.

These sites have many negative impacts. They can cause a serious pollution to the natural environment. Nearby communities are severely impacted by odour, litter, dust, vermin, fly infestations and fires. The cost to the UK economy is estimated between £568m and £808m per year, with a large portion of that being lost Landfill Tax revenue.

Note two principal effects are indicated – pollution and cost. Although arguably there are others.

£23 million was allocated to the Environment Agency (EA) in the 2015 Spending Review specifically for tackling waste crime in England.

Figures for other years are not given nor does it show how this money was spent. It would be useful to know this to obtain a better perspective (if time permits).

The Government is also preparing a consultation to be launched in the summer that will set out our approach on: 1) improving the competence of operators at permitted sites, and 2) reforming the exemptions system to drive up compliance standards.

It would be useful to have an understanding of how this proposal (if taken forward after the General Election) might dovetail with the current proposals under consultation.

3. Power to restrict access to waste sites

3.1 Why is the power needed- [...] substantial evidence showing that the most effective way to prevent issues at waste sites from escalating is to stop more waste entering the site by physical means.

*3.2 What is the proposed power – [...] The Government Response to the 2015 consultation stated the intention for the power to apply only when a regulator acts to remove the risk of serious pollution under regulation 57 of the Environmental Permitting (England and Wales) Regulations 2016. To better meet the policy objective to prevent issues at waste sites from escalating by preventing waste being deposited at a site, we are now proposing to add a new power under the Environment Act 1995 to enable the regulators to serve a **restriction notice** and also to apply to a court for a **restriction order**.*

3.2.1 Restriction notice: enabling the regulator to restrict access:

The proposed power will enable the regulators to serve a restriction notice to enable them to prevent access to a waste site, or part of a site, for up to a maximum period of 72 hours, where the regulator is satisfied that:

- 1) There is a risk of serious pollution which is a result of the deposit, treatment, keeping or disposal of waste;*
- 2) The notice is necessary to prevent that risk from continuing or worsening; and*
- 3) The regulator will act to remove the pollution risk itself or require another person to remove the risk.*

There appears to be some inconsistency in the proposals. The introduction draws attention to the numbers of incidences – without referring to how much pollution was caused - and

quantifies/ estimates the cost (£800m) but this is not apportioned. Yet the proposed (immediate action) restriction notice by the regulator focuses on serious pollution risks.

It is widely accepted that the main criminal intent is to profit from (cheap) illegal waste dumping, similarly an operator will gain by failure to observe the conditions of a permit allowing more waste to be deposited than the limited amount. So if these are the main drivers then surely the conditions for the restriction notice should be relatable i.e. that the waste is deposited without the benefit of a permit or exceeds the conditions of a permit (implying that it is done illegally for gain).

The way this proposal is phrased is that there has to be a "serious risk" of pollution which will need to be evidenced. This could frustrate many examples of illegal disposal or call into question in a Magistrate's mind just what the test should be and if it is met (supposing that an operator seeks a stay of the regulator's notice). For example an excessive amount of inert waste or soil might not be within the scope, or it might be argued that the pollution might not be imminent as the waste would have to break down first.

We suggest that the operative term should be "risk of harm" and not qualified by "serious", as in the *Environmental Protection Act 1990*.

If this power is put forward as drafted then the regulator will need more time. For example, discovery on a Friday does not give much opportunity to follow up with further action before the notice expires on a Monday.

3.2.2 Restriction order: power of the courts to restrict access

A court may make a restriction order where it is satisfied that:

1) *Either:*

a) There is a risk of serious pollution as a result of the deposit, treatment, keeping or disposal of waste at a site, or

b) In relation to the deposit, treatment, keeping or disposal of waste, a person has undertaken certain unlawful conduct which has caused or is causing pollution, or has failed to prevent pollution from worsening or continuing;

2) *The order is necessary to prevent the risk of pollution from continuing or worsening; and*

3) *The regulator will act to remove the risk of pollution itself or require another person to remove the risk.*

Following our earlier comments the emphasis on pollution here is more worrying. "a)" should be broadened or there should be a wider condition relating to deposit of any waste – saving the pollution condition for immediate action. In practice the regulator should be able to issue a notice on their own account as in 3.2.1 above and then go to the courts after the initial period has elapsed.

3.2.3 Rights of waste occupiers and owners-

While it is reasonable and sensible to restrict access to a site, there should naturally be restrictions. We are not proposing that a restriction notice prevents an occupier or owner from accessing a site. A magistrates' court will be able to make a restriction order to prevent

access to an occupier or owner where it is necessary to prevent any arising risk of serious pollution, or actual pollution caused, from worsening or continuing.

Some owners will be victims – please see general comments below.

3.3 Contravening a restriction notice or order- offence if an occupier or owner contravenes a restriction notice or restriction order or removes a copy of a restriction notice or restriction order fixed to the site.

This should refer to “any person”. It might not be easy to identify a perpetrator in any case.

4.3 What are the impacts on waste site occupiers and owners?

It seems a little odd that the powers would only be expected to be used a handful of times. It is expected to be applied only to 26 occupied sites per year and 3 owned sites and would impact on “waste occupiers” ranging from £646,100 to £2,147,600 and owners between £74,550 and £247,800, yet waste crime is costing the UK economy £800m and is supported by around £23m GIA. If the full powers are used for the remainder of the cases (the 1000 quoted), including removal of waste, does this not also imply that the remainder of the cost is born by the regulator i.e. potentially some £797m?

General comments

Service of restriction notice

On whom or what should this be served? There are three potential users – an owner, an occupier or an illegal “visitor”. It may not be possible to identify an illegal “occupier” who may just be a user that dumps waste obtained at a location(s). The legal owner or occupier may not be aware of the problem.

Is it possible for the notice to be served on the property/ land as well, without necessarily identifying the owner/ occupier or in default if they cannot be readily found, to be able to take immediate action necessary to prevent pollution or harm? Can the notice be served on all at the same time - owner, occupier and other (criminal)?

In cases where required, we consider it would be useful for the regulator’s restriction notice to be able to be extended. Will the regulator be able to physically lock a site?

Guidance

The regulator should be required to develop guidance to ensure “that the regulators act in a proportionate and reasonable manner” so as to provide comfort to legitimate operators. For example the burden on legal owners such as the National Trust, the Woodland Trust, farmers and Network Rail etc. is well known and further powers granted should be in line with protection of their legitimate interests, not increasing the risk. Therefore “very unlikely” in 3.3 should be even stronger e.g. “extremely rarely”. Sentencing Guidance to magistrates on environmental offences in this regard should also be updated.

Resources

The regulators need the necessary resources to be able to enforce this power, including detection, or it will be merely a paper exercise. Visible policing of waste crime is an important deterrent.