

Defra and the Welsh Assembly Government

Waste regulation and crime

Part I: A consultation on proposals to enhance enforcement powers at regulated facilities

Part II: A call for evidence on other measures to tackle waste crime and entrenched poor performance in the waste management industry

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 submit written evidence to the Defra and the Welsh Assembly Government on proposals to enhance measures to tackle waste crime and entrenched poor performance in the waste sector. This response has been prepared by members of CIWEM's waste management technical panel which includes regulators and operators within the waste management industry.

Summary

General comments

CIWEM advocates that all waste operations should be conducted according to regulatory requirements without causing harm to the environment and human health. We support improvements to the system with more emphasis on resourcing the combatting of criminal activity infiltrating and abusing the waste market. Measures to tackle failures of poor performance at permitted and exempt activities operating as legitimate commercial enterprises should then be reviewed in line with the Macrory review of regulatory penalties (summarised below).

The distinction between the two parts of the consultation document are misleading as much of the consultation does not seem to be directed at 'real' criminals, but transgressors within the permit system. This tends to run counter to the title of the consultation document which implies that criminal activity outside the system is intended to be addressed as well. Both legitimate operators and criminals are important and will need to be targeted using different approaches for best effect. Yet it is not clear how these groups are distinguished, apart from the example of the SEPA 'spectrum'.

Ensuring business compliance

Strong local enforcement will have the greatest impact on encouraging compliance. This could include through 'naming and shaming' offenders, faster prosecution (whether in the courts or using more rapid forms such as fixed penalties) and tougher sentencing. The knowledge of the threat of these actions is often enough to make many local businesses respond positively. Nevertheless enforcement and prosecution needs to be followed through and the regulatory officers involved need to be well trained and have the confidence to enforce the powers.

Environmental Permit applications only require a summary of the Environment Management System (EMS) which does not allow adequate assessment of the future management of a site. The effect is that permits can be issued without adequate management systems in place. Amendments to the EMS should be part of an official administrative variation within the permit, to ensure that the sites are still being adequately operated.

A Fire Prevention Assessment should also be mandatory for the assessment of new permits, within a designated timescale.

Enforcing against criminals and criminal gangs

It is our understanding that there is now more evidence of the involvement of organised criminal gangs in waste crime. This calls for further action in combatting environmental crime, through multi-agency coordination, providing a joined-up approach on money laundering, tax evasion, illegal immigration (with or without enslavement) and other criminal activities taking place through waste sites or companies.

Resources

CIWEM considers that a lack of resources is a greater issue than the need for new powers. Visible policing of waste crime is an important deterrent. We believe this will also encourage more compliant behaviour by legitimate operators. We urge the Government to reverse the budget cuts to the regulators and prioritise long-term funding of waste crime detection and prosecution. This in turn will provide an economic benefit.

Overall Approach

Finally we wish to recall the principles outlined in the Macrory Review of Regulatory Penalties (November 2006) and the expectation that any outcomes from this consultation should have regard to the: *"aim to ensure that regulators have access to a flexible set of modern fit-for-purpose sanctions that would allow regulators to sanction in a risk based proportionate and appropriate manner as outlined in the Hampton Report."* The principles include:

Six Penalties Principles

A sanction should:

1. Aim to change the behaviour of the offender;
2. Aim to eliminate any financial gain or benefit from non-compliance;
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
4. Be proportionate to the nature of the offence and the harm caused;
5. Aim to restore the harm caused by regulatory non-compliance, where appropriate; and
6. Aim to deter future non-compliance.

Seven characteristics of a successful sanctioning regime

Regulators should:

1. Publish an enforcement policy;
2. Measure outcomes not just outputs;
3. Justify their choice of enforcement actions year on year to stakeholders, Ministers and Parliament;

4. Follow-up enforcement actions where appropriate;
5. Enforce in a transparent manner;
6. Be transparent in the way in which they apply and determine administrative penalties; and
7. Avoid perverse incentives that might influence the choice of sanctioning response.

CIWEM's response to the consultation questions

Q1. Do you agree with the proposals, A to F? Please provide any additional comments to support your answer against each proposal and, if possible outline any additional measures needed to underpin them?

We do not disagree with the proposals but believe that they imply major resource issues, including appropriate training. When dealing with waste crime, individuals or groups of individuals with experience of regulatory action may be well versed in regulators' methods and can be adept at circumventing or delaying attempts at enforcement, through challenge and avoidance. Staff at the Environmental Agency/ Natural Resources Wales need to be better equipped and experienced to successfully counter these types of individuals.

An increase in resource, for example from policing organisations will be needed for the new powers to be used effectively. The power for the regulator to physically prevent access to a site under proposal C needs appropriate procedures, trained officers and police support for public protection to prevent a breach of the peace and or/harm to persons. The need for dedicated support from the police should be factored into any changes.

Q2. Do you have any views on whether there are unforeseen costs or benefits to legitimate operators, the regulators or any other organisation that may result from any of the proposals A-F?

Rather than unforeseen benefits, there should be improvements in compliance by legitimate operators where the regulatory focus is directed to illegal operators. A match between permit charges and operator compliance (Opra scores) should be made with enforcement against illegal operators.

CIWEM supports the contention in the Environmental Services Association document¹ that: *"waste crime remains a substantial threat to the legitimate waste sector, and the resources available to tackle it are coming under increasing pressure. Yet cutting enforcement expenditure seems a false economy."*

Fixed penalty notices for fly-tipping

Q.1 Would the introduction of fixed penalty notices for the offence of fly-tipping help tackle the problem?

Possibly. It may produce some revenue that could be applied to funding pollution prevention measures.

Q.2 What are the advantages of the use of fixed penalty notices for fly-tipping?

¹ Environmental Services Association Education Trust (ESAET). 2014. Waste Crime: Tackling Britain's Dirty Secret

Fixed penalty notices act as an immediate deterrent and regulators may gain some revenue. However detecting fly tipping is difficult as it often occurs in less obvious places or at times where detection is less likely.

Q.3 What are the disadvantages of the use of fixed penalty notices for fly-tipping?

Fixed penalty notices may have low levels of success without immediate detection prospects and may be viewed as having a lack of proportionality. Regulators' safety may be put at risk from challenging fly tippers, as fly tipping often occurs in remote areas.

Q.4 If a proposal was made to introduce fixed penalty notices for fly-tipping, how much should the fixed penalty be set at to act as a sufficient deterrent?

Classifying relevant offences is important. It would not be appropriate to apply such penalties to householders for 'mistakes' in putting out bags for domestic collections. We agree with paragraph 12.13 of the *Government Review of Waste Policy in England 2011* which stated Defra would: "*Protect civil liberties by stopping councils from criminalising householders for trivial bin offences, while ensuring that stronger powers exist to tackle those responsible for fly-tipping and serious waste crime*". Confiscation of vehicles as well as a fixed penalty would be an additional effective deterrent.

Q.5 Do you have any views on the possible cost or benefits of issuing fixed penalty notices?

Fixed penalties are likely only to be successful with effective action that could include additional resources such as police support.

Actions to improve landowner awareness of potential liabilities for waste.

Q.7 Do you have any proposals on the best way to educate and increase awareness amongst landowners of their potential liabilities?

As part of the permit application process, the environmental regulator should provide the landowner with an information note highlighting their responsibilities. To confirm they have received and understood these responsibilities and the liabilities they may face, they could sign a declaration prior to a permit being issued. The information could contain suggestions as to what measures they could put in place to protect themselves. Landowners for exempt sites should be similarly informed.

Q.8 What more can be done through the lease arrangements with tenants to prevent or mitigate the potential liability of landowners?

Most leases require tenants to comply with statute. Provided this is enforced then the landowner should not be exposed to a liability.

Q.9 Would you like to see operators provide evidence to the regulators of their landowner's awareness and consent to the proposed waste activity as part of the permit application process?

Yes. A similar approach should apply to exemption notifications. See also the answer to question 7.

Q.10 Do you have any views on the ability of liquidators to disclaim environmental permits as 'onerous property' in England and Wales?

We support an amendment to ensure that liquidators cannot disclaim environmental permits as onerous property.

Operator competence

Q.11 What are your views on amending legislation to formally require operators of regulated waste management facilities to be competent in respect of: (a) technical competence (b) financial provision and (c) operator performance?

CIWEM welcomes the re-introduction of these requirements.

Q.12 If a proposal were put forward to enshrine the components of the test in legislation, should the legislation apply to just waste management activities or some or all other types of regulated facility?

All types of regulated facility.

Q.13 Would it be appropriate for operator competence to be re-assessed if a company changed its directors, company secretary or similar managers?

No, the important aspect is whether the site manager is competent. The company structure and size would determine whether a change to senior management would be likely to have an impact.

Q.14 If proposals to assess operator competence on a change to directors etc were put forward, would it be appropriate to apply that requirement to all companies?

Yes.

Q.15 If an operator competence test were to be enshrined in legislation, in what way might that be done? Examples might include the inclusion of an operator competence requirement in permit conditions, the creation of a specific new offence for failure to maintain operator competence or the extension of existing suspension and revocation powers to breach of the operator competence test.

All of the above.

Q.16 What are the arguments for applying technical competence to all types of permitted waste management facility, through one of the two currently approved schemes?

This will provide simplicity and continuity as many operators should be familiar with the system already.

Q.17 What are the arguments against applying technical competence to all types of permitted waste management facility, through one of the two currently approved schemes?

Applying technical competence may create a barrier for small companies unless a simplified scheme is in place for small or low risk operations.

Q.18 If this were proposed, would it pose a difficulty for any particular part of the waste industry?

As in question 17, small companies may find this difficult.

Q.19 Please provide views on the ways in which the regulators are made certain of the name(s) of the technically competent manager(s) at permitted sites.

An annual electronic notification with waste data returns may be provided, or more frequently if a change occurs.

Q.20 Please provide views on how those providing technically competent management at a site should be held to account for the standards of performance.

If the site does not comply with permit conditions the manager's certificate of competence can be endorsed. Ultimately this could lead to revocation of the certificate after repeated failures.

Q.21 Please provide views on the amount of time those responsible for managing the site should be present and what factors should determine that period.

This should be subject to regulatory best practice guidance and not enshrined in law. The regulators should have the resource to produce such best practice guidance.

Q.22 Should financial provision for some or all permitted waste operations be reintroduced on a site-specific basis linked to the type of activity and the type of wastes received?

Financial provisions can be quite complex and tie up funding that could be applied directly to site management. It would be preferable for the regulator to be sufficiently well resourced to apply the existing powers effectively including the changes noted earlier. A need for further provisions may then be reviewed.

It may be possible to apply risk criteria to sites (for example priority of waste stream, risk of fires, overall sector compliance), to determine what measures need to be put in place. It is important to recognise that some exempt sites (mostly those that would technically become illegal) are just as likely to pose a significant risk. Application of financial provision in respect of these would send a clear message that sites should not be run with a view to becoming an illegal waste site. This in turn would penalise responsible operators, so this would need to be considered in the review of exemptions.

Abandoned or orphaned sites

Q.29 Does the Government need to make a scheme to cover the full costs of clearing and remediating abandoned or orphaned sites mandatory so that they do not rely on the public purse or would a voluntary approach work?

This could raise a number of questions over the fairness of determining who is liable and who would subscribe to the fund, whether this is the current owner or past owners as well.

Powers to recharge for pollution works

Q.34 Do you have evidence of pollution caused by the deposit of waste on land by waste operations or abandoned waste that might merit powers to remediate?

Q.35 What are your views on widening the scope of the regulators powers to recover the costs of investigations and remedial works undertaken to prevent or remedy pollution caused by the deposit of waste on land?

CIWEM believes this is a good idea but it would require regulators to recruit the expertise to manage these investigations whilst avoiding excessive additional (consultancy) costs. All investigations would need to be conducted objectively by a competent individual such as a Specialist in Land Condition (SiLC) or a Chartered Scientist (CSci).

Exemptions from environmental permitting

Q.36 Do you have any evidence of the extent of waste crime and poor performance from those operating under registered exemptions from environmental permitting?

It is likely to be quite prevalent, however it may be difficult to determine the extent as these sites are normally only uncovered once a complaint is made or incident occurs.

Q.37 Is there a need to tighten up the process for the registration of exempt waste operations? If so, what steps would you wish to see introduced into the registration process?

Yes. Improved data on waste quantities and types (as some and not all activities are poor). Risk assessments could be improved with the potential for accreditation.

Q.38 Would you wish to limit the scope of the activities that are exempt from the need for an environmental permit? If so, which exemptions would you want to see further restricted and why?

A closer look at the risks and what measures can be taken would be needed, however many waste to land exemptions (mobile plant) are still abused, as are some storage exemptions.