

4. Proposals

4.1. Past Performance

The current situation

The regulators have the power in the EPRs to assess an operator's past performance to determine whether they are competent to hold a permit and effectively run a waste site. The Core Guidance sets out that the regulators can take into account an operator's compliance with regulatory requirements, such as enforcement or suspension notices, and convictions for relevant offences when assessing past performance. This assessment also extends to 'relevant persons', defined in the Core Guidance as being associated or in partnership with the waste operation, for example the director, manager, secretary, or a corporate body.

Regulators take into account offences that are committed in relation to the environment or the operation of a waste site. The regulators have set out relevant offences that permit applicants and holders should be aware of (Table 1).

Table 1 List of relevant offences for permit applications for waste activities and installations¹

Offence
Control of Major Accident Hazards Regulations 1999
Control of Major Accident Hazards Regulations 2015
Control of Pollution (Amendment) Act 1989: Section 1, 5 or 7
Customs and Excise Management Act 1979: Section 170 and 170B (for environmental/metal theft related offences only)
Environment Act 1995: Section 110
Environmental Permitting (England and Wales) Regulations 2016: Regulation 38
Environmental Protection Act 1990: Section 33, 34, 34B and 59
Food and Environment Protection Act 1985: Section 9
Fraud Act 2006: Section 1 (for environmental/metal theft related offences only)
Hazardous Waste (England and Wales) Regulations 2005
Hazardous Waste (Wales) Regulations 2005
Legal Aid, Sentencing and Punishment of Offenders Act 2012: Section 146
Pollution Prevention and Control (England and Wales) Regulations 2000
Proceeds of Crime Act 2002: Sections 327, 328, 329, 330, 331 & 332 (for environmental/metal theft related offences only)
Producer Responsibility Obligations (Packaging Waste) Regulations 2007
Scrap Metal Dealers Act 1964 (for environmental/metal theft related offences only)

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/552882/LIT_8189.pdf

Scrap Metal Dealers Act 2013 (for environmental/metal theft related offences only)
Theft Act 1968: Sections 1, 8, 9, 10, 11, 17, 18, 22 & 25 (for environmental/metal theft related offences only)
Transfrontier Shipment of Waste Regulations 1994
Transfrontier Shipment of Waste Regulations 2007
Vehicles (Crimes) Act 2001: Part 1
Waste Electrical and Electronic Equipment Regulations 2006
Waste Electrical and Electronic Equipment Regulations 2013
Waste (England and Wales) Regulations 2011: Regulation 42
Water Resources Act 1991: Section 85, 202 or 206

This list includes offences specific to waste sites, such as not complying with the conditions of an environmental permit under the EPRs, or obstructing an enforcement officer carrying out an inspection under the Environment Act 1995. It also includes offences such as using a waste company as a front for money laundering under the Proceeds of Crime Act 2002, or committing metal theft under the Scrap Metal Dealers Act 2013.

The Core Guidance states that regulators must take into account the terms of the Rehabilitation Offenders Act (ROA) 1974². A person with a spent conviction must be treated as not having committed or been convicted of that offence. Whilst the ROA 1974 only applies to individuals, the Core Guidance states that corporate bodies should be treated the same way as an individual.

A person must declare previous unspent offences and previous compliance history when making a permit application or when applying to transfer or vary a permit. Intentionally providing incomplete or false information is an offence under the EPRs and a permit may be refused or revoked on that basis. If a person who is applying or transferring a permit has been convicted of a relevant offence or has poor compliance history, then the regulators assess the scale of an offence and previous compliance to establish the likelihood of re-offending and whether the operator is still competent to run a waste site. If the regulators determine that a person is still sufficiently competent then this information will be used by the regulators to target inspections and take early action if performance starts to decrease.

The case for action

A recent spot-check by the EA National Enforcement Service highlights the extent of operators who have been convicted of related offences. The review of 22 permits chosen at random showed that holders of three of the 22 permits (13.6%) were convicted of a relevant offence and would have their competence to run a waste site reviewed. An additional one permit would be considered high risk and a further

² <https://www.legislation.gov.uk/ukpga/1974/53>

seven would be medium risk, but are not able to be captured under the current definition of relevant offences. We, therefore, believe that the scope of relevant offences in the Core Guidance is not wide enough because it only relates to offences committed in relation to the environment and waste. Additionally, we are seeing a significant increase in the level of fraudulent behaviour in the waste industry. Certain waste operators falsify paperwork and records in order to misclassify waste, for example recording hazardous waste as inert waste in order to pay substantially lower landfill tax to dispose of it.

The call for evidence highlighted the potential impact of the changes to the ROA 1974 on the waste industry. In particular, a conviction that led to a fine is now spent within 12 months rather than five years. As the majority of waste and environmental convictions lead to fines (approximately 90%), an operator who is a repeat offender and fined every year for harming the environment and human health could apply for an environmental permit without the regulators being able to take into account those spent convictions 12 months after their last conviction. In such cases, it may be likely that the operator will not comply with future permit conditions given their previous convictions and issues they had running a waste operation. In addition, the regulators can consider permit applications based on compliance history going beyond 12 months, in case poor past compliance did not lead to one or more convictions. We concluded in the government response that there is a case for reviewing whether relevant spent convictions for up to 5 years for waste operators should be considered when determining the suitability to hold a permit. After further consideration, we believe that there is a case for this and we have developed proposals that benefit the waste industry, whilst still respecting the rehabilitation periods for offenders.

Regulatory enforcement officers are being faced with an increase in abusive language and behaviour from certain waste operators, and an increasing number of incidents where operators block access to a site and relevant records. Whilst the steps for regulators to deal with this unacceptable behaviour are set out in their guidance documents^{3, 4}, and the powers of the EPRs enable the regulators to take account of behaviour, the Core Guidance does not make the scope of the power in EPRs sufficiently clear that the regulators can decide to not issue, transfer, vary or continue a permit because of repeated poor behaviour. Regulators are able to convict operators of unacceptable behaviour, which would mean that they would have a 'relevant offence' as above, but convictions are made only in the most

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/552592/LIT_10503.pdf

⁴ <https://naturalresources.wales/media/680303/complaints-and-commendations-policy-january-2017.pdf>

serious of cases and the operator is able to continue to operate whilst the conviction is secured through the courts.

There is also growing evidence that operators, who are not compliant with the regulators' enforcement action or are convicted of an offence, will transfer their permit to another person or apply for another permit under another person's name. The other named person can often be related to the operator, for example, a friend, family member or partner. The operator is getting around the system and is still involved in the running of the site, for example taking decisions that influence the running of the site or receiving a share of the profits from the site. This is not being captured by the current definition of 'relevant person' in the Core Guidance, however, and the regulators are not able to enforce against this. Whilst the regulators already have the power to not issue, transfer or to revoke a permit if they believe the operator on the permit is not the actual operator, this does not capture the situations where the person may not be the actual operator anyway, but is making decisions on the running of the site. The regulators have recently successfully prosecuted individuals who were the controlling mind of a non-compliant waste operation after the permit has been issued. The person was making the key decisions about the management of the site but was not named on the permit and there are currently grounds for revoking or not issuing that permit.

Our proposals

As concluded in the government response, strengthening the regulators' assessment and enforcement of an operator's past performance will increase the regulators' knowledge to help make a more informed decision about whether an operator should be issued or continue to hold a permit. Doing so will raise the standards of competence at waste sites by preventing people who are not competent or able to fulfil their waste permit conditions from holding a permit or obtaining a permit in the first place.

We are proposing the changes below to strengthen the regulators' assessment and enforcement of past performance.

Widening the definition of relevant offences

To enable the regulators to gather the appropriate level of information about individuals, we are proposing to widen the definition of relevant offences. We want to enable the regulators to take account of offences, such as tax evasion or money laundering, that have been committed in relation to any sector, not just committed within the waste industry. To achieve this, we propose to remove the reference to 'environment or the operation of a waste site only' under the definition of relevant offence, so a relevant offence is widened to 'an offence that impacts on a person's ability to operate of a waste site'. To make this clear and transparent for permit

holders and applicants, we propose to amend guidance by removing the limiting reference to environment and metal theft in respect of the following Acts of Parliament:

- Customs and Excise Management Act 1979
- Fraud Act 2006
- Proceeds of Crime Act 2002
- Scrap Metal Dealers Act 2013
- Theft Act 1968

We are also proposing to broaden the definition of relevant offences listed in Table 1 to include offences committed under the Serious Crime Act 2015 and the Public Order Act 1986. This will enable the regulators to take into account offences that are committed in relation to an organised crime group, and violent and threatening behaviour.

The process for an operator to provide information about their previous offences or how the regulators gather the information of previous offences will not alter from this change. This change would mean that during an application, transfer, variation or review of a permit, the regulators will assess against the broadened list of offences and will be able to make a more informed decision about whether a person is competent to run a site.

Go to question 1.

Go to question 2.

Rehabilitation of offenders

After discussing with the relevant government departments we have concluded that it is not appropriate to amend the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 to include waste operators. Waste operators are not comparable to other occupations listed on the Exceptions Order mainly because they are not involved with vulnerable persons. As set out in the call for evidence, under the Home Office's Scrap Metal Dealers Act 2013, in-line with section 7(3) of the ROA 1974, a local authority can take a person's spent convictions into account in exceptional circumstances. We do not believe that the regulators should always take into consideration spent convictions. Rehabilitation periods of offenders should be respected and spent convictions for the past 5 years should only be taken into account in exceptional circumstances. An example of an exceptional circumstance may be when an operator is a repeat offender fined every year for harming the

environment and human health. Currently, such an operator would be able to apply for an environmental permit without the regulators being able to take into account those spent convictions if applying 12 months after their last conviction.

Go to question 3.

As the majority of waste permits are operated by corporate bodies, treating corporate bodies the same as individuals when assessing spent convictions has a significant negative impact on the waste sector. We believe that corporate bodies should be treated differently from individuals and the regulators should be able to consider the convictions of corporate bodies. The regulators will assess the scale of the conviction to establish the likelihood of re-offending and make an informed decision about the suitability to hold a waste permit.

Go to question 4.

Poor behaviour

We are proposing to make it clearer that the regulators are able to take into account an operator's poor behaviour towards regulatory officers when assessing past performance. We understand that the definition of what counts as poor behaviour can be subjective, so to apply a consistent approach across all enforcement teams, we believe that guidance should be amended and aligned to the definition used by the regulators in their guidance documents. The EA's guidance, for example, defines poor behaviour as 'Behaviour or language (written, verbal or online) that we consider may cause staff to feel intimidated, afraid, offended, threatened or abused'. We are also proposing that preventing access to a site or relevant records or information is considered as poor behaviour. This change will make it clear that poor behaviour is unacceptable and can be taken into account when the regulators are deciding whether to issue, transfer or vary a permit.

Go to question 5.

Widening the definition of relevant person

We are proposing that the definition of 'relevant person' could be widened to capture operators who are not compliant with the regulators' enforcement action, or convicted of an offence, and then transfer their permit to another person or apply for another permit under another person's name. This change will seek to capture operators who the regulators consider are the controlling mind of the management of a site, for example because they are taking decisions that influence the running of the site or are receiving a share of the profits from the site. Whilst the regulators can already prosecute a person who is the controlling mind of a non-compliant site, a change of this kind could make it clear what action the regulators can take at an earlier stage, for example during permit application, if they are aware that an operator is the controlling mind of a waste site, despite the permit being transferred

or set up in another person's name. Any widening of the definition of a relevant person is not about a person being guilty by association. We do not think it is proportionate to propose a relevant person is any person connected with a known operator, for example, a family member or partner.

Go to question 6.

The impact of this change

The proposed changes will not result in any additional burden on legitimate operators and there will only be minimal costs on the regulators.

Waste operators

We do not anticipate any direct costs to operators, as operators already have to provide information about offences when applying for or transferring a permit so this will not increase the burden of doing this. This change will result in certain operators not being issued with a permit or not being able to transfer their permit because they have been convicted of the broadened list of relevant offences, they have demonstrated poor behaviour or they are captured by the new definition of relevant offences. We consider, however, that these people should not be regarded as competent to operate a waste site.

Regulators

A permitting officer would have to spend additional time checking a permit application or transfer against the widened definition of relevant offences or any poor behaviour. We calculate the total cost to the regulators as £17,505 - £35,010 per year on an ongoing basis.

4.2. Management Systems

The current situation

- The Core Guidance makes it clear that, in order to ensure a high level of environmental protection. Operators should have effective management systems in place. This applies to all permitted activities including waste management facilities. Under the EPRs, the regulators have the power to revoke a permit if an operator is considered not to have an effective management system.

A well written and implemented management system identifies how day to day activities need to be carried out in order to minimise the risk of pollution and therefore reduces the impact on the local community and the environment. Producing a written management system needs not be unduly onerous. As explained

in the Core Guidance, the nature of the management system should be proportionate to the complexity of the operation at the site. Since 2008, the majority of permits that have been issued, or varied, contain a modern management system condition that requires the operator to:

“manage and operate the activities in accordance with a written management system that identifies and minimises risks of pollution, including those arising from operations, maintenance, accidents, incidents, non-conformances, closure and those drawn to the attention of the operator as a result of complaints”.

The generic risk assessments associated with permits are based on the assumption that the operator will have an effective management system. Guidance on developing a management system and what should be included is set out online⁵ by the regulators.

The case for action

One of the most effective ways to address poor performance, safeguard compliance and incentivise continual improvement is to require operators to develop and implement a formal written management system. A well designed and implemented management system is an effective means for operators to monitor, manage and improve their performance.

Permits issued prior to 2008 did not include a condition that required a written management system, although some did require the operator to have a working plan (a rudimentary management system). Some of those permits have since been varied to include the modern condition but it is estimated that 2,500 of the 6,700 pre-2008 permits still do not contain the modern management system condition and 2,000 operators are operating without an adequate written management system. Placing these operators under a legally enforceable requirement would provide a means of delivering a step change in performance standards.

Regulators assess an operator’s compliance against permit conditions and other associated obligations. In the absence of a modern management system condition in the permit, it is not possible to score an operator for poor site management unless it results in non-compliance with another condition. Consequently, sites without the condition may have fewer breaches of permit conditions recorded against them than those with permits issued after 2008. Clearly, this disadvantages operators with newer permits and results in under-reporting of poor performance among operators

⁵ <https://www.gov.uk/guidance/develop-a-management-system-environmental-permits> (England) and <https://naturalresources.wales/permits-and-permissions/environmental-permits/environment-management-system/?lang=en> (Wales)

with older permits. Ensuring all permit holders are required to operate in accordance with a written management system would deliver greater environmental protection, fairer outcomes for good performers and provide a level playing field across the waste sector.

Our proposals

The 2015 call for evidence sought views on whether the requirement for management plans and their content should be embodied in legislation, or whether they should be left to the regulators to determine. Following the consultation, government concluded that a consistent approach to the use of the management system is important, and that it would discuss with the regulators and industry how best to ensure a consistent approach across the sector. The proposal has been developed up as a result of those discussions and is set out below.

Clarifying the legal requirement for management systems

In order to overcome the legacy issues arising with many older waste permits which do not have a management system condition, we propose to amend the EPR to require all regulated facilities that undertake waste operations to be managed and operated in accordance with a written management system. The minimum content of which will be set out for the regulators to enforce. This would enable regulators to treat non-compliance of a management system in the same way they do a breach of permit condition and allow them to use the full range of enforcement options including, where necessary, enforcement or suspension notices. This change would remove the inconsistency between pre-2008 and post-2008 permits by placing all waste operators under a similar obligation to have a written management system. In doing so it would also address a significant cause of non-compliance and poor performance.

Go to question 7.

The impact of this change

Waste operators

Of the 2,000 sites that are operating without an adequate written management system, we have estimated that approximately 1,000 operators would need to develop and implement a written management system and a further 1,000 would amend their working plan to meet the modern format.

The estimated average cost of writing a management system is £3,000 and of reviewing and revising a working plan so it complies with the modern management system condition is £1,000.

Regulators

Any additional costs to the regulators will be minimal. There is existing guidance on management systems available to operators so there will be no additional development costs although it is likely minor amendments will be required. Site audits and inspections involve a range of actions which can include checking an operator's management system where one is in place. The regulator's charging scheme already includes an element in their annual subsistence charges for this work.

4.3. Technical competence

The current situation

All permitted waste sites need to demonstrate appropriate levels of technical competence. Under the EPRs, the regulators have the power to refuse or revoke a permit if an operator is not considered to have sufficient technical competence. Since 2008, all permits that have been issued, or varied, contain a permit condition for the operator to be technically competent through a government approved scheme. Prior to this, this requirement was set out in the Waste Management Licensing Regulations 1994.

Whilst all permitted sites need to demonstrate technical competence, the conditions of the permit, supported by the Core Guidance, sets out how all operators of waste sites need to demonstrate suitable levels of technical competence. It specifies the two government approved schemes that currently meet the criteria given by regulators. They are the CIWM/WAMITAB⁶ scheme of individual operator competence and the ESA/EU Skills⁷ scheme of corporate competence. Some large waste management businesses prefer to use the ESA/EU to develop in-house systems, whilst other waste businesses would chose to assess and develop individual employees through the CIWM/WAMITAB scheme or employ an external Technically Competent Manger (TCM) to provide advice on the management of the

⁶ Chartered Institution of Wastes Management / Waste Management Industry Training and Advisory Board

⁷ Environmental Services Association / Energy and Utility Skills

site. Operators need to keep up their technical competence throughout the life of the permit and demonstrate their continuing competence to the regulators.

The case for action

As set out in the 2015 government response, an appropriate standard of technical competence across the waste sector is essential to ensure that waste sites are being operated in a way that does not result in poor performance. There is, however, potentially a significant gap in the level of technical competence in the waste sector. This gap is being caused because, whilst the regulators are clear that waste sites need to demonstrate technical competence, there is no longer a specific legal requirement in the EPRs that a waste site has to demonstrate their technical competence through a scheme approved by government. The regulators are able to use the full range of their discretionary enforcement powers, such as enforcement and suspension notices, on permits that contain a technical competence condition (permits issued or varied after 2008) because there is a legal requirement in the EPRs for the operators to fulfil the conditions of their permit. The regulators, however, do not have the option of using the full range of their discretionary enforcement powers on a permit that does not contain a technical competence condition (the majority of permits issued before 2008) and consider it a disproportionate use of their powers to always revoke these permits if the waste site is not demonstrating sufficient levels of technical competence. Always revoking a permit because of poor technical competence is not the best way to increase the performance across the waste sector and could lead to sites continuing to operate without a permit.

The regulators could vary a permit to include a technical competence condition after a site is inspected at a cost to the operator. It is estimated that at the current rate of permit variation, it would take around 20 years to vary the pre-2008 permits to include a technical competence condition and that would not achieve the step change in behaviour from the whole sector needed now. It is not appropriate to vary all these permits at once and the majority of the costs will fall to operators.

Following the 2015 call for evidence, the scheme providers and the regulators are working together to review the time TCMs should be present on site. The time a TCM must spend on site currently depends on the type of permit, location and the regulatory compliance rating, although currently a TCM does not need to attend a site for more than 48 hours per week regardless of the type of operation or performance.

There is also significant evidence, however, that certain TCMs are not acting in a proper manner. Some TCMs are spread too thinly, providing cover at many waste sites at the same time, whilst other TCMs are known to provide poor or wrong advice to waste operators or operators are fraudulently using a TCMs credentials without

the TCM knowing. If a TCM covers many waste sites, the operator of one of those sites can show the regulators that they meet suitable levels of technical competence because they have employed a TCM. The TCM will not have the time or ability to influence the running or compliance levels, in-line with the agreed time to be on a site, to ensure that the site performs well as they have too many other sites to cover. The management of the site is regarded as not being technically competent because the TCM is not providing effective technical input.

There is currently no process for the regulators to take action against TCMs who act improperly. Once an individual or company has gained a qualification through a government approved scheme and becomes a TCM, the qualification cannot currently be taken away from the individual providing they keep up their training requirements.

There is currently also no requirement on a waste site to notify the regulator of the identity of their TCM unless specified in their permit condition. Knowing the TCM would enable the regulator to build up a national picture of TCMs against waste permits and cross reference the data against CIWM / WAMITAB qualifications or EU Skills records to prevent fraud.

Our proposals

Given the support in the call for evidence 2015, we are proposing changes to the EPRs and guidance to strengthen the regulators' assessment and enforcement of an operator's technical competence to address the current gap in technical competence and raise the standard of performance across the waste sector.

Clarifying the legal requirement for technical competence

We propose to create a level playing field for all permits by making it explicit in the EPRs that all permitted waste sites need to demonstrate technical competence through a scheme approved by government. This change will provide the regulators the flexibility to use the full range of their enforcement powers, such as enforcement or suspension notices, on all waste operation permits to ensure they are technically competent. It will create consistency across all waste permits and drive up the standard of technical competence in the waste sector by ensuring that all waste operators demonstrate their technical competence through an approved scheme.

Go to question 8.

Notifying the regulators of the technical competence at a site

We propose to insert a requirement into the EPRs for operators to notify the regulators of the TCM arrangements at their waste site and when a TCM changes at

the site. This will enable the regulators to build up a national list of TCMs against waste permit data and cross reference that against data provided by WAMITAB and EU Skills to detect fraud. We propose that the regulators ask for the full name and WAMITAB/CIWM reference of the TCM, or name of auditor and date of last audit for EU Skills, to be included in the waste return. We believe that including this requirement in legislation, rather than the regulator simply requesting this in a waste return, would help to ensure that all waste operators do provide this information. It will also enable the regulators to use the full range of their enforcement powers to ensure operators provide this information as it would be a breach of a deemed permit condition in the EPRs.

Go to question 9.

Action against technically competent managers acting improperly

The regulators and technical competence scheme providers are considering whether to introduce a system to address TCMs that act improperly by covering multiple waste sites or providing poor or wrong advice to waste operators. This could be done through a 'registration' system, where a TCM would need to have both a technical competence qualification and be registered as a TCM in order to be considered competent by the regulators. We are not proposing to create a whole new system or scheme and we will build on the current competence schemes. If a TCM acts improperly they could be de-registered, and their ability to work as a TCM would be suspended or removed entirely.

We believe that the responsibility of running a waste site ultimately lies with the operator and an operator should undertake due diligence when employing a TCM. A registration system will mean that the regulators will regard a waste site whose TCM has been deregistered as not being able to demonstrate technical competence.

We do not think it is appropriate to create a specific criminal offence in the EPRs to sanction a TCM who acts improperly. We believe that taking away TCMs' ability to work is a sufficient sanction to incentive positive behaviour. Additionally, creating an offence for TCMs could result in a situation where an operator may claim a defence that the TCM should be prosecuted instead of them and they could argue they are free from responsibility from the actions at their site.

Go to question 10.

Impacts of this change

The proposed changes will impact the waste site operators, the regulators and the providers of the government approved schemes.

Waste operators

There will be a cost on a proportion of operators to become technically competent through an approved government scheme, although this is a cost that should currently be incurred by all waste sites. We estimate that the technical competence gap could be as high as 2,000 waste operators. Permits issued and varied after 2008 already have a technical competence condition in their permit and large scale operators are likely to have already undertaken a technical competence qualification through an approved scheme.

We understand that the majority of waste operators would train an employee to become technically competent through the individual WAMITAB/CIWM scheme, rather than the corporate ESA/EU skills scheme, as the operators who use the ESA/EU skills scheme are likely to already be technically competent. Based on current information, we have not been able to quantify what proportion of waste operators will employ a TCM, rather than training a current employee. It would be useful for industry to provide any information on this in order for us to determine the impact of this change on the waste sector.

Go to question 11.

We have currently estimated that the cost to the waste sector is £3.45m - £3.65m to develop technically competent staff and £209k - £277k per year to demonstrate their continuing competence.

The regulators will undertake a risk based approach to implementing the technical competence element at sites. The regulators will focus on poorest compliance sites that are not competent within one year of the regulations coming into force and will expect all remaining sites to gain a technical competent qualification within two years.

There will be a minimal cost to operators to inform regulators who the TCM is at a waste site, as it should not increase the time it takes for an operator to complete a waste returns form.

Technical competence scheme providers

As set out in the Core Guidance, we are clear that technical competence qualifications could be delivered through any scheme approved by government and encourage other schemes to be developed. The two approved schemes have been running for around eight years so the infrastructure to deliver qualification is already in place through a network of course centres across the country. There would be an impact on the scheme providers as more operators need to gain a technical competence qualification, however the infrastructure is in place to deal with this

increase and the operators will need to pay for the qualification so there is no financial impact on the scheme providers.

Regulators

We do not envisage that there will be any significant costs to the regulators to assess the additional number of operators that will undertake a qualification through an approved scheme. The regulators act as beneficiaries of the schemes, which is typical of independent third party accreditation. The regulators check that sites are using one of the schemes and accept the qualification as evidence of technical competence, therefore avoiding the need to get directly involved in the training and assessment process. The task of checking technical competence forms part of a list of a regulators compliance assessment that is carried out during inspection or audit and the process for checking technical competence is already accounted for in the subsistence fee during inspection of sites. There will also be a minimal cost to the regulator to include a TCM's full name, field and qualification number in the annual waste return and to check these returns to minimise fraud.

4.4. Financial Competence and provision

The current situation

All operators are expected to be in a financial position to comply with the obligations of their permit throughout the life of that permit. This includes during day to day operations and when returning the site to a satisfactory state prior to surrendering the permit. The majority of operators comply with their permit by cleaning up the site before applying to surrender the permit.

Whilst operators of landfill and mining waste operations are required to make financial provision for future closure and aftercare of their site, this is not the case for other waste operators.

The case for action

Operators need to ensure that the way they run their business complies with their permit. Failure to ensure adequate site infrastructure, pollution prevention measures, plant and equipment or staff training can all result in poor performance and permit breaches. It is therefore important to ensure that anyone applying for a permit has sufficient financial standing to meet these obligations. Where an operator does not meet this requirement there is a danger that the liability for dealing with any remaining waste falls to the landowner. This can occur when a company goes into

administration, in cases of insolvency where the permit may be disclaimed as onerous property, or when the operator chooses to abandon the site and cannot be found. It can also be precipitated by a major incident if the operator is unable to fund the clean-up.

Abandoned waste sites can pose a risk to health, increase the risk of environmental damage and have a significant effect on local amenity including disruption to businesses in the immediate vicinity. The severity of any impact depends upon a number of factors but there is rarely a solution that does not ultimately involve removal of the abandoned waste. There have been a number of high profile cases in recent years involving operators abandoning sites and leaving behind large quantities of waste. On occasion, waste operators have adopted a tactic of stockpiling waste on a site before abandoning it to leave others to deal with their liabilities. These operators do not have to cover the costs of disposing of the wastes and can therefore undercut legitimate waste operators.

In addition, a number of sites have suffered waste fires which have required prolonged and repeated intervention by public services and caused concern and disruption to local communities. The cost to regulators and other public services has been substantial.

Responsibility for clearing abandoned sites where the operator cannot be traced normally falls to the landowner but in some instances the costs can fall on taxpayers, particularly where there is no recognised owner of the land.

Our proposals

The majority of respondents to the 2015 call for evidence supported the introduction of a financial competence assessment and some form of financial provision from waste operators. We have liaised with the regulators, industry and other key stakeholders to further develop proposals for financial competence and for financial provision.

Financial Competence

It is important that an operator's financial standing and credibility is assessed at the permit application stage to ensure they are capable of meeting their obligations under that permit. Those operators who are unable to demonstrate adequate financial standing should not receive a permit. It is also important that an operator's financial competence is maintained throughout the lifetime of a permit to ensure they are financially able to run a waste business.

In determining applications, regulators can undertake credit checks to consider whether the applicant is/remains financially able to meet the full obligations of their

permit(s). Checks are only generally undertaken, however, where the regulator is informed that the applicant has been or is subject to insolvency proceedings. The same is true of checks during the life of the permit.

Improving these checks would provide greater assurance that applicants are financially able to meet the full obligations of their permit. We do not consider that increasing permitting charges to resource the regulator to do this is sensible when other third party organisations are better placed to professionally provide efficient checks on operators.

The Core Guidance states that the operator of any regulated facility should be financially capable of complying with their environmental permit but also says that regulators should only consider financial solvency explicitly in cases they have reason to doubt the financial viability of the activity. We propose that regulators can require an independent report from a recognised⁸ financial organisation to be submitted by the operator with all permit applications and transfers, and at any time during the life of the permit.

The purpose of the report is to rate the financial solvency and risks associated with the applicant's business model. It will provide the necessary insight into whether at the time of the assessment an operator is financially competent to fulfil their permit obligations. The regulator would be able to stipulate the format and content, which will be proportionate to and dependent upon the size and complexity of the facility and the operator's business. The information would inform the regulator's permitting and enforcement decisions. We also expect that the report will benefit some operators in their discussions with potential investors.

Go to question 12.

Financial Provision

It may be necessary to secure funds to cover liabilities that might arise in the event of an operator being unable or unavailable to meet their permit obligations. The majority of respondents to the call for evidence supported the introduction of some form of financial provision for non-landfill waste operations. Many respondents thought financial provision should cover both returning the land to a satisfactory state and foreseeable clean-up costs relating to the breach of a permit or environmental accident. A number of respondents urged the government to link the assessment of financial provision to the level of risk posed by a waste site.

Consideration was given to requiring operators to have insurance to cover the cost of removing waste from their site. After discussion with the insurance industry, however, it became clear that insuring operators against their own illegal actions will

⁸ Recognised by the Financial Conduct Authority or Prudential Regulation Authority

create perverse incentives whereby an operator could abandon their site in the knowledge that the cost of clean-up would fall to the insurer. In light of this, the insurance market is reluctant to offer insurance products to cover abandonment. The option of establishing an industry super fund was also considered. If all waste permit holders were to pay into the fund then regulators would be able to draw down funds to pay for clearing abandoned sites. This option was discounted because the availability of such a fund may result in an abrogation of individual responsibility and, like an insurance scheme, actually incentivise abandonment. In addition, contributions to the fund might fall disproportionately on larger companies who would be the least likely to act in a manner that resulted in the fund being used.

There is not, therefore, a viable and effective industry-wide scheme that pools together operators' risk in a way that does not lead to perverse incentives. We believe that the most pragmatic approach is for operators to take out individual financial provision agreements, based on the nature of their operation or their performance as an operator, rather than the whole sector.

We believe there are significant benefits in regulators having the power to require operators to make financial provision. This would enable the regulators to use their full range of enforcement powers to ensure operators meet this requirement.

Requiring all waste site operators to provide financial provision would meet the policy objective to significantly reduce the number of waste sites being abandoned and costs to taxpayer to pay to clear abandoned waste sites. There would be a significant disincentive for an operator to stockpile waste and then abandon the site. It would also increase compliant behaviour across the whole waste sector, as operators would be incentivised to run their business in-line with permit conditions to avoid the risk of insolvency or going into administration. A number of respondents to the call for evidence suggested that the requirement to make financial provision should apply to higher risk operators rather than all waste site operators. Targeting financial provision in this way would lead to a reduction in sites being abandoned and reduce costs to the taxpayer to clear abandoned waste. It would also balance protecting the public purse against an increase in costs to waste businesses, as the number waste sites that are abandoned are a small proportion of the total number of sites.

Go to question 13.

If financial provision is targeted at only the higher risk operators the regulators will need a clear supporting framework which identifies relevant criteria to ensure this is done in a fair and consistent manner. There is no single indicator that an operator is likely to fail or that a site is likely to be abandoned. There are certain factors, however, that may indicate an increased risk of this happening or that the impact will be particularly severe. These may include factors such as waste type, market conditions, pollution potential, risk to local amenity, proximity to transport

infrastructure, financial competence. Once the framework has been developed it will be included in guidance.

Go to question 14.

Many respondents to the 2015 call for evidence expressed the view that the amount of financial provision should be based on the cost of returning the land to a satisfactory state to meet permit surrender requirements and to foreseeable clean-up costs resulting from a permit breach or environmental accident.

We consider that the financial provision must reflect the cost of clearing the maximum quantity of wastes allowed onto the site under the permit at any one time and disposing of that waste to landfill (or the most appropriate alternative if landfill is not an option). Using landfill as the assumed disposal route should ensure sufficient funds are available to achieve the clearance.

Many permits specify maximum throughput rather than maximum storage. In such cases, the amount of provision would be calculated using figures provided by the operator stating the maximum quantity of waste by type that they would hold on their site at any one time. These figures would be written into the operator's management plan and would be binding.

Go to question 15.

In exceptional circumstances we propose that regulators may extend the provision to include costs of responding to and completing remedial measures in the event of a permit breach or environmental accident where the risks indicate this to be justified. Guidance on 'exceptional circumstances' would be set out.

Go to question 16.

We recognise that the inherent value of certain waste streams, for example scrap metal, which may make recovery of waste a viable option. However, the variability in market value for such wastes and the potential for additional costs to separate them for recovery hinder the use of a standard recovery rate when calculating the financial provision required. One option to reflect this inherent but variable value would be to provide a fixed percent reduction on the level of financial provision required for wastes with significant recovery values.

Go to question 17.

In order to apply financial provision, regulators would produce a standard costs model and associated guidance which operators would be required to follow to calculate the amount of provision. Operators would calculate their liability and identify the mechanism they wish to use to make the provision. The operator and regulator would then agree the amount and mechanism. Both parties would need to

periodically review the sum and mechanism to ensure they remain adequate and secure.

There are a number of established options available for making financial provision which are already used by landfill operators including performance bonds, third party cash deposits and escrow accounts. Any mechanism must ensure that funds are sufficient, secure (even in the event of insolvency) and available when required. Currently, landfill operators may choose to use insolvency proof bonds, or alternatively to secure or set aside funds through escrow or trust managed accounts. We believe that in common with the landfill sector, other operators should be able to agree with the regulator the most appropriate form of financial provision that meet these criteria.

Go to question 18.

Managing financial provision funds

Landfill operators are already required to make financial provision for the long term maintenance and aftercare of their sites. They make financial provision using a variety of different mechanisms which the regulators check, agree and administer. The core role of regulators does not normally extend to the management of funds. Other organisations have more expertise and experience in this area. In addition, regulators exercising direct control of funds can be problematic with funds being lost when a company dissolves and disclaims their permit as onerous property.

We believe that there may be potential benefits from sub-contracting the holding and administration of financial provision to third party financial institutions. The regulator would retain responsibility for agreeing the amount of financial provision required and oversee legal agreements governing its use.

Go to question 19.

The amount of financial provision which a landfill operator is required to make must be adequate to discharge the obligations of the permit. This includes the closure and aftercare obligations and a sum for specified events such as a gas leak or leachate breakout.

In the absence of the operator, the regulator may intervene to carry out works allowed for under the financial provision agreement. In acting as the 'operator of last resort' it incurs costs which are not covered by the financial provision fund. These costs can be substantial and may include actions such as the serving of certificate of default, the consideration of site specific pollution risks and tendering for consultants or contractors to remove pollution risks. These costs are inevitable and it seems unreasonable that they do not follow the 'polluter pays principle' and fall instead upon the regulator.

Go to question 20.

Ensuring financial provision funds continue to reflect liabilities

A landfill operator's financial provision is calculated at the permit application stage and the cost profile, the timetable for building up and using the funds, is normally only reviewed against inflation or for a substantial permit variation. In line with guidance, the regulators do not carry out periodic checks to ensure that the operator is building and maintaining their funds as agreed, or charging an adequate gate fee (as required by the Landfill Directive) to cover future costs. There is, therefore, a risk that income is insufficient to fund essential pollution prevention works.

To ensure that the amount of financial provision available more accurately reflects future costs, regulators would need to seek more frequent updates from operators about the works carried out at their site and the funds available for future work so that this can be checked against projected costs. A more robust scrutiny of the funding available for future works will reduce the risk of those funds being insufficient.

Go to question 21.

Impacts of this change

Financial Competence

Waste operators

An operator will need to obtain an independent financial report when applying for a new permit or transferring a permit. Based on a small survey of business health check products offered by the financial services sector we expect that this will cost operators around £50 for each report. There were 1,167 applications for new permit and permit transfers in 2016 so the maximum total cost is estimated to be £58,000 per annum.

Regulators

Regulators will assess the independent financial report as part of the application determination process and this will need to be resourced. The total additional cost to regulators is calculated to be £26,000 per year.

Financial Provision

Providing regulators with the ability to require financial provision should reduce the number of abandoned waste sites. This would have positive impacts on the natural environment and society through less waste being abandoned. It would also have financial benefits for the taxpayer, as less public funds are used to clear abandoned waste. The cost to the waste industry will be dependent on whether financial provision is targeted or provided by all waste sites.

5. Estimated costs and benefits of proposals

An impact assessment was developed to estimate the costs and benefits on the economy, environment and society from the proposals to strengthen operator competence.

The main costs will be on waste site operators and the regulator. Specific costs are set out in each proposal. Operators will face transition costs to become technically competent, produce management systems and become familiar with the changes. There will also be an ongoing cost on operators to obtain a financial competence report. The main cost for regulators is the additional time to check financial competence reports in permit applications and transfers.

The proposals will reduce the number of poor performing sites. This will result in benefits to society from avoided environmental damage and decreased impacts on local communities. A reduction in poor performing site will also mean the regulators will have to deal with fewer pollution incidents from poor performing sites. There will also be non-monetised benefits from the proposals. Mainly, the proposals will result in the creation of a more level playing field where non-compliant waste operators will be less able to undercut legitimate and compliant businesses. Other non-monetised benefits include the reduction of health impacts from pollution incidents and the improvement in the reputation of the waste industry from less poor publicity of poor performing sites.

A number of assumptions were made when calculating the costs and benefits. The main assumptions were: estimating the proportion of waste operators impacted by the intervention, the costs to the waste site operators, and the decrease in the number of poorly compliant sites from the intervention.

The Regulatory Policy Committee (RPC), an independent advisory non-departmental public body providing scrutiny on the evidence and analysis supporting the estimates of costs and benefits in regulatory proposals, reviewed the draft impact assessment relating to Part A (operator competence) of the consultation. RPC have indicated the draft impact assessment requires more work to clarify the approach to calculate costs and benefits, as well as address technical analytical issues.

RPC questioned our approach to estimate the direct costs and benefits of the proposals to businesses, and in particular whether each of the considered options (i.e. option 1, current situation, and implementation of tighter regulations in options 2 and 3) were compared to the same baseline, as this would change the relative costs and benefits calculated for each option, and possibly lead to a risk of double counting. RPC also requested that a summary calculation sheet is added to detail the expected costs and benefits of option 3.

The post-consultation impact assessment will be revised to account for the consultation responses and address RPC comments. A revised impact assessment will only be published alongside the final government response to the consultation, once RPC provides a final sign-off.

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