



Department
for Environment
Food & Rural Affairs

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**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**

February 2015



Llywodraeth Cymru
Welsh Government

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Any enquiries regarding this document/publication should be sent to us at: Waste.RegulationandCrime@defra.gsi.gov.uk in England, and waste@wales.gsi.gov.uk in Wales.

Defra

Waste Regulation and Crime

Area 2B

Nobel House

17 Smith Square, London

SW1P 3JR

Or

Waste & Resource Efficiency Division

Department for Natural Resources

Welsh Government

Cathays Park

Cardiff

CF10 3NQ

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Defra Ministerial foreword

We all depend on the services the waste management industry provides. It has a vital role to play in this Government's work to secure a strong, growing economy that flourishes alongside a healthy natural environment. We want to support the great companies in this industry that operate to the highest standards. That is why it is essential we take effective action against the small minority of rogue operators who are undermining and undercutting the law-abiding majority.

These criminals are polluting the environment, endangering human health and showing contempt for local residents. Their flouting of the regulations ranges from unsightly, often dangerous fly-tipping to mounds of rubbish containing tens of thousands of tons that can catch fire, pollute water, provide a breeding ground for rats and flies and give off smells that make life a misery for those living nearby. The people responsible then leave authorities and landowners/ landlords to clear up the mess and deal with the consequences. The estimated cost of waste crime to our economy is £568 million a year.

We are already moving to crack down on this unacceptable behaviour. The Government is working with the Environment Agency to take tougher and speedier action against illegal sites using existing powers. For example, there has been a reduction in the risks posed by waste fires, with 88% of high-risk sites subject to enforcement action. We also secured an extra £5 million in the 2014 Budget to target effort on those operating sites and exporting waste illegally, those who deliberately misdescribe waste and those whose waste sites continually fail to perform at the expected standard.

These are good steps in the right direction but we need to go further. We want to strengthen the Environment Agency's powers to enforce effectively and provide it with more flexibility to take the most appropriate action. All businesses should operate within the rules, be technically and financially competent and not expect the taxpayer to pick up the bill for poor behaviour. This consultation sets out our proposals to enhance those powers, for example by allowing the authorities physically to prevent waste from entering a site. We are also seeking views on requiring each operator to make financial provision, which could be in the form of bonds or bank guarantees, to provide secure cover for meeting their obligations. We invite all in the industry to consider these proposals and send in views and evidence so that we can make an informed decision.

But we cannot do this alone. Industry has a strong interest in tackling illegal activity itself and we would like to see it continue to play its part in promoting greater professionalism, calling for consistent higher standards and sharing intelligence with the Environment Agency. We believe that by working together we can truly deliver a strong and sustainable economy, enhance the natural environment and improve the quality of people's lives.

The Rt Hon Elizabeth Truss MP
Secretary of State

Dan Rogerson MP
Parliamentary Under Secretary of State

Welsh Government Ministerial foreword

Green growth is a key driver for our vision for the sustainable future of Wales and the state of our environment is a key aspect of how we live now and the legacy we will leave for future generations. We want to provide opportunities for economic development in a way that is environmentally sustainable and socially inclusive, providing safer, cleaner and more resilient communities. The waste industry is key in helping us move to do this. To this end, the waste industry is carefully regulated to protect human and environmental health. However, the cost of waste crime to business is high with the cost to the UK economy estimated at £568 million a year. We want to ensure legitimate businesses can operate on a level playing field, reducing unfair competition from unscrupulous operators who undercut them. This is why improved compliance through regulation such as the Environmental Permitting Regulations is important.

We know that most of the waste industry operates responsibly and meets the required standards. But a small part of the industry fails to meet these standards or operates outside the law. These criminals have no regard for the local community when mountains of waste catch fire, pollute air and water and create smells, noise or harmful dust. We are working with our regulator, Natural Resources Wales, to take stronger and tougher enforcement action using existing powers where appropriate and necessary to ensure that operations do not result in harm to human health and pollution to the environment. As a starting point, Natural Resources Wales is discussing with Welsh Government immediate and longer term actions needed to improve regulatory compliance, including identifying those waste sites which pose a high risk of fire due to inadequate waste storage and poor management of waste. But we need to do more. We have listened to our regulator and identified several areas where changes are needed to existing powers to make their process of enforcement action more flexible and more effective in tackling waste crime and poor performing sites.

This consultation sets out a number of proposals and I would welcome your views. Part I sets out proposals to enhance Natural Resource Wales' powers, for example, to suspend or revoke permits if the conditions of a permit are not met. We propose that some, if not all of these proposals should be expanded to cover the whole industry and be extended to all operators who hold a permit. In addition, Part II seeks your views in a Call for Evidence which will help to inform further proposals. Measures include strengthening the technical competence, performance and financial requirements for operators, the clean-up of abandoned waste management sites, the adoption of fixed penalties for fly-tipping and the role of exemptions under the Environmental Permitting Regulations.

We need to work together on this and I therefore invite you, the industry, the public sector and members of the public to send us your views on how we can tackle illegal waste activity and improve site performance and compliance in Wales. This will reduce the pollution and misery caused to local residents by badly managed sites and enable legitimate waste businesses to flourish.

Carl Sargeant AM
Minister for Natural Resources

Executive summary

The case for action

1. The UK Government and the Welsh Government are committed to boosting economic growth while continuing to protect and improve the environment. A vital component of this goal is developing and delivering a resilient, sustainable and more circular economy. It is essential that we make the best use of our materials and resources, keep them in circulation, prevent and deal with waste and recycle properly. This approach is critical for our future growth, increased resilience and ensures better environmental and human health.
2. Both Governments want to see businesses leading the way to help and grow the economy while improving the environment in which we live. It is clear that Government has a role to play to facilitate and ensure the right framework is in place so that businesses have the tools and the freedom to realise the benefits. This includes ensuring that the regulatory framework is effective and properly enforced to ensure there is a level playing field for responsible businesses. However, for this to happen, we must tackle criminal activity and entrenched and persistent poor performance.
3. While it is difficult to fully assess the true cost of waste crime, including e.g. tax evasion, industry has estimated that the direct cost to the UK economy is £568 million a year¹. Tackling waste crime costs the Environment Agency (EA) alone around £16 million each year. We recognise that tackling waste crime and persistent poor performance matters strongly to legitimate businesses, which are being undercut by criminals and need the confidence to invest. A fire in one illegal waste site in Wales resulted in a total cost of over £1.5 million to all the agencies involved.
4. Waste crime harms our environment. Pollution incidents from poor management of waste sites and inadequate storage arrangements impact on the quality of air, water and land. Waste crime hits local communities, can affect people's health and cause nuisance. Recently we have seen a number of major waste fire incidents. While the total number of incidents may not have increased, their impact has, from the large amounts of smoke and fumes and water from fire-fighting.
5. For all of these reasons, both Governments are determined to tackle the problem and to come down hard on waste criminals and persistent poor performers. We are working

1 The Environmental Services Association Education Trust (2014) [Waste crime: Tackling Britain's dirty secret](#)

with the EA and Natural Resources Wales (NRW), as the regulators in England and Wales respectively, to take forward action to minimise these problems.

Action being taken

6. We have listened to the resource and waste management industry about the impact on the wider industry from a small group of illegal and poor performing operators. We will work with the EA and NRW to ensure that regulation is enforced properly. In England, these steps have been set out in the Waste Crime Action Plan (attached at **Annex A**), which outlines measures to strengthen regulation and enforcement of persistent poor performers, with swifter and tougher action against waste criminals. In Wales, the Welsh Government is working closely with NRW to determine what action can be taken to tackle illegal waste activity and improve poor performing waste sites.
7. Action is already underway. In England, the EA is taking speedier and tougher action against those who deliberately flout the rules and undermine the legitimate waste management industry. We have for example seen a reduction in the risks posed by waste fires, with 88% of high risk sites now subject to enforcement and the remainder now compliant. We have also seen the EA close down 255 active illegal sites within a six month period from April 2014. In Wales, one of the main challenges for NRW has been the number of incidents including waste fires. In response, NRW set up an Improving Compliance Task and Finish project which identified a range of immediate and longer term actions to improve compliance in the waste sector. Immediate actions have included clearing waste sites deemed to pose a high risk of fire and taking steps to reduce risks at other sites. Other actions being taken include a programme of permit reviews, compliance priority planning and a review of options for financial provision at waste sites. The development of a new Landfill Tax for Wales is also an opportunity to explore how this can help tackle waste crime.
8. The UK Government secured an extra £5 million in the 2014 Budget specifically for tackling waste crime. This funding is being used to target illegal operators, those who deliberately mis-describe waste and those who export waste illegally. With increased enforcement, the EA is closing down more illegal sites more quickly and is sharing intelligence, including on tax avoidance, with HM Revenue & Customs. Operators can expect that their technical competence, management systems and financial resources will be under increased scrutiny. This will make it easier for the EA to refuse applications from criminal operators and to suspend or revoke permits or prevent waste entering the sites of those who persistently operate to poor standards. The Welsh Government is working with NRW to identify what further work and funding is needed to address these issues.
9. While we have made real progress, we recognise the case for doing more to support the vast majority of waste businesses that operate according to the rules.

Call for further action

10. This consultation seeks views on further strengthening the regulators' powers in respect of **all types of facilities** that operate under an environmental permit. The proposed enhancements will broaden the scope of the regulators' powers to prevent or remedy pollution. The enhanced powers will not pose an additional burden on the 96% of operators of permitted waste management operations who manage their sites satisfactorily. While targeting the few, we expect these powers to level the playing field for the many, and reduce the impact that waste crime and entrenched poor performance have on businesses and local communities.
11. Specific proposals are set out in **Part I** of this document. The consultation is on proposed measures including powers to suspend and revoke permits if certain conditions are not met; issue notices to prevent breaches worsening; take physical steps to prevent further breaches e.g. by physically stopping waste coming onto sites; allow the regulators to remove a risk of serious pollution at a facility, regardless of the circumstances; remove pre-conditions for regulators to bring High Court proceedings; and require the removal of waste from land.
12. The UK Government and the Welsh Government are also seeking, through a call for evidence, views on further tough changes to the law. **Part II** of this document invites views on options to strengthen the technical competence, performance and financial provision of all operators. It seeks views on measures to strengthen the demonstration of technical competence to operate a site; require the clean-up of abandoned and orphaned waste management sites; adopt fixed penalties for fly-tipping; and measures to protect landowners/ landlords from the impacts of waste crime. Finally views are sought whether the process for registering exemptions from permitting should incorporate any of the measures elsewhere in the call for evidence or whether the scope of exempt waste operations should be reduced. The call for evidence also seeks information on the current challenges faced by the public, local authorities, regulators and the waste industry, including the costs and impacts on businesses associated with the options outlined in the document.
13. The call for evidence includes measures for waste operators to make financial provision that will be secure throughout the lifetime of a site. Both Governments are minded to introduce some form of upfront financial provision from waste operators, perhaps through bonds or bank guarantees, escrow accounts and / or insurance.
14. We therefore invite industry and others to send in their views and evidence to support and inform the future direction and policy options to tackle waste crime and persistent poor performers.

1. Introduction

1.1 This document is concerned with tackling waste crime and entrenched poor performance by a small group of operators in the waste industry. **Part I** is a consultation inviting views on proposals to amend the enforcement powers of regulators including through possible amendments to the Environmental Permitting (England and Wales) Regulations 2010² (the EPRs) and the Environmental Protection Act 1990³ (the 1990 Act). The aim of the proposals is to help the Environment Agency (EA) for England and Natural Resources Wales (NRW) to tackle entrenched non-compliance at sites permitted (or previously permitted) to handle waste, by widening the scope of existing enforcement powers. Although this consultation paper focusses on waste issues, some of the proposed changes such as those relating to the suspension and revocation of permits and access to the High Court would apply to **all types of facilities** regulated under the environmental permitting regime and will therefore also be of interest to industries other than the waste industry.

1.2 The UK Government and the Welsh Government are seeking views on the proposed approach and invite comments by 6 May 2015.

1.3 **Part II** of the document is a call for evidence on a range of other measures related to waste crime and entrenched poor performance at waste management sites. The UK Government and the Welsh Government are seeking views and information to determine specific further proposals. Any further proposals will be subject to consultation and implementation will be in accordance with government requirements for managing public money.

2. Purpose of the consultation

2.1 On 1 September 2014 Defra Minister, Dan Rogerson, responded to concerns raised by the waste industry about the extent of waste crime and poor performance and its impact on local communities and legitimate businesses. The text of the Ministerial letter is at **Annex A**. The Ministerial letter set out a joint Defra and EA Waste Crime Action Plan for England, aimed at tackling waste crime and entrenched poor performance by some in the waste industry. The Waste Crime Action Plan was informed by a report from the Environmental Services Association Education Trust, *Waste Crime: Tackling Britain's Dirty Secret* which indicated that waste crime cost the UK economy £568 million a year. The report recommended actions that Government and the waste industry should take forward to tackle this problem.

2.2 The Waste Crime Action Plan contains a number of measures that are already underway. These largely relate to increased interventions at poorly performing sites, and in

² [The Environmental Permitting \(England and Wales\) Regulations 2010](#) (as amended)

³ [The Environmental Protection Act 1990](#)

particular speedier and tougher enforcement action. Where there is evidence of non-compliance, the EA works with HM Revenue and Customs (HMRC) and other agencies to share information and align enforcement activity.

2.3 The measures proposed in this consultation will enhance regulators' existing enforcement powers. As the proposals relate to enforcement powers, they generally pose no additional burden on the operators of compliant sites. The UK Government and the Welsh Government recognise that 96% of permitted waste management operations in England and 94% in Wales have been assessed by the regulators as satisfactory (compliance bands A-C). Compliance varies across the waste management industry ranging from the criminal at one end to the environmental champion at the other. It is the small proportion of criminals and operators who have been persistent poor performers who are the focus of Defra and EA action in England and the focus of the Welsh Government and NRW action in Wales.

2.4 Both Governments anticipate that these proposals will complement regulators' speedier and tougher enforcement approach to tackle non-compliant waste activities more effectively, and help reduce the impacts of waste crime and poor performance on the environment and local communities. These proposals will help bring about a level playing field for the legitimate waste industry and encourage growth through investment.

2.5 The associated call for evidence in Part II of this document aims to increase our evidence in relation to other proposals in the Waste Crime Action Plan in England; in Wales the call for evidence will help to inform the Welsh Government's on ongoing work with NRW to improve compliance at poorly performing sites and to tackle illegal waste activities. The call for evidence seeks information on the current problems encountered by the public, local authorities, regulators and the waste industry, and information on the costs and impacts on businesses associated with the options outlined in the document. Your responses will inform policy options and specific proposals that may follow the call for evidence.

3. Geographical extent and definitions

3.1 This document and descriptions of law relate to England and Wales only.

3.2 References to "the regulator" or "regulators" are references to the EA and NRW. However, there are some facilities that operate under the environmental permitting regime that are regulated by local authorities, so where appropriate local authorities are included in references to "the regulator" or "regulators".

3.3 Unless otherwise stated, references to "the Government" are references to both the UK Government and the Welsh Government.

3.4 References to "landowners" are references to both landowners and landlords.

4. Audience

4.1 This consultation and the call for evidence are primarily (but not exclusively) aimed at:

- local authorities,
- waste producers,
- operators of permitted and exempt waste facilities,
- waste brokers and dealers,
- waste carriers,
- professional and membership organisations,
- businesses,
- consultants and
- charitable/ voluntary bodies.

As these proposals extend to all operators of regulated facilities, this consultation and the call for evidence will be of interest to all businesses across England and Wales that hold an environmental permit.

5. Responding to this consultation and the call for evidence

5.1 If you are responding to the consultation and the call for evidence in relation to England, please send responses:

Online via the [Defra Consultation Hub \(Citizen Space\)](#)

By email to: Waste.RegulationandCrime@defra.gsi.gov.uk

Or in writing to:

Waste Regulation and Crime Team
Defra
Area 2B, Nobel House
17 Smith Square
London
SW1P 3JR

If you are responding to the consultation and the call for evidence in relation to Wales, please send responses:

By email to: waste@wales.gsi.gov.uk

Or in writing to:

Waste & Resource Efficiency Division
Department for Natural Resources
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

6. Duration

6.1 This consultation (and the associated call for evidence) will run for 10 weeks with additional consideration for Easter holiday. This is in line with the Cabinet Office's 'Consultation Principles' which advises Government departments to adopt proportionate consultation procedures.

The consultation opens on **26 February 2015**.

The consultation closes on **6 May 2015**.

7. After the consultation

7.1 A summary of the responses to this consultation and the call for evidence will be published on the Government websites at www.gov.uk/defra and www.wales.gov.uk.

7.2 This summary will include a list of names and organisations that responded but not personal names, addresses or other contact details.

7.3 If you do not want your response - including your name, contact details and any other personal information - to be made publicly available, please say so clearly in writing when you send your response. Please note that if your computer automatically includes a confidentiality disclaimer, this will not count as a confidentiality request.

7.4 Please explain why you need to keep details confidential. We will take your reasons into account if someone asks for this information under freedom of information legislation. But, because of the law, **we cannot promise that we will be able to keep those details confidential.**

8. Compliance with the consultation principles

8.1 This consultation element of this document is being conducted in line with the “Consultation Principles” as set out in the Better Regulation Executive guidance which can be found at <https://www.gov.uk/government/publications/consultation-principles-guidance>.

8.2 If you have any comments or complaints about the consultation process, please address them to:

Defra Consultation Co-ordinator

Room 629

9 Millbank

17 Smith Square

London SW1P 3JR

Or e-mail: consultation.coordinator@defra.gsi.gov.uk

Part I – Consultation

9. Proposals to enhance enforcement powers

Background to the consultation

9.1 In broad terms waste crime falls into three categories:

- violations of permit conditions or other illegal acts by operators who are already part of the regulatory system;
- acts that would be illegal whether or not the perpetrator is within the regulatory system; and
- acts committed by offenders outside the regulatory system.

9.2 The measures proposed in this consultation will primarily address waste crime that falls into the first and second of these categories.

9.3 Waste crime can blight the areas where it occurs, can pose a risk to the environment and human health, and affects the livelihoods of those who work in the legitimate waste management industry. Waste crime has been estimated by the Environmental Services Association Education Trust to cost the UK economy £568 million a year. Waste crime includes illegal waste sites that operate without an environmental permit or registered exemption, the deliberate misdescription of waste linked to landfill tax evasion, and the illegal export of waste. It also includes fly-tipping. An additional £5 million funding was provided to the Environment Agency (EA) in the 2014 Budget to prioritise tackling these aspects of waste crime. The Welsh Government is working with Natural Resources Wales (NRW) to identify what further work and funding is needed to address these issues.

9.4 The EA and NRW deal with the more serious instances of waste crime, while local authorities focus on smaller scale fly-tipping. At the end of March 2014 the EA was aware of 556 operational illegal waste management waste sites. In Wales, NRW is aware of 87 illegal waste sites (for reporting period April 2014 - Nov 2014). It is usually the case that once the regulator closes one site, new ones start up elsewhere. The EA and NRW are also working with HMRC to tackle the deliberate misdescription of waste and illegal waste exports.

9.5 In addition to the above forms of waste crime, the entrenched or persistent poor performance by some site operators is of equal concern. All waste management sites must operate under an environmental permit or a registered exemption (i.e. the operation is exempt from the need for an environmental permit). However, many deliberately and repeatedly flout the conditions of permits or the rules of exemptions.

9.6 The impacts of waste crime and poor performance include:

- degradation in the quality of local environments;
- cost and aggravation for landowners, and the regulators who are left to deal with waste that is dumped illegally;
- loss of revenue to the Exchequer from tax evasion;
- pollution of the environment and risks to human health; and
- undermining the legitimate majority of the waste management industry that complies with the law.

Current powers available to regulators to reduce the extent of non-compliance with environmental permits

9.7 Enforcement action can mean any action that the regulators take where they suspect an offence has been committed, or in some cases is about to be committed. The action taken ranges from providing advice and guidance, to serving notices through to prosecution, or any combination that best achieves the desired outcome.

9.8 Within this overall approach, where an offence has been committed and the delivery of advice and guidance has not or will not achieve the necessary outcome, the regulators will normally consider issuing a type of sanction as well as taking any other preventative or remedial action necessary to protect people and the environment. The regulators will aim to use sanctions in a manner that is appropriate to the offence, as set out in the EA's [Enforcement and Sanctions Guidance](#).

9.9 Options that the regulators can use include:

- issuing a warning;
- statutory enforcement notices and works notices;
- enforcement undertakings in England (from April 2015);
- prohibition notices;
- suspension or revocation of environmental permits;
- variation of permit conditions;
- injunctions;
- carrying out remedial works;
- issuing a formal caution;
- prosecution and orders ancillary to prosecution; and
- the above sanctions used in combination.

9.10 Where the law allows, the regulators will seek to recover the costs of investigation and enforcement proceedings. Where they incur costs, for example, where they have carried out emergency remedial works, they will seek to recover the full costs incurred from those responsible in accordance with the 'polluter pays' principle and the appropriate legislation.

The waste crime action plan

9.11 In September 2014, Defra Ministers set out a joint Defra / EA Waste Crime Action Plan for England (attached at Annex A). The Waste Crime Action Plan encompasses four themes:

- speedy and tough enforcement action;
- greater intelligence sharing;
- making the polluter pay; and
- making better use of regulatory controls.

9.12 It is the Government's view that most of the increased interventions envisaged under the Waste Crime Action Plan can be carried out using existing legislative powers and duties and, where possible, the cost of doing so should be borne by those who cause harm by repeatedly failing to comply.

9.13 Since the start of this year, action by the EA to tackle waste crime and entrenched poor performance at permitted sites has included:

- increased interventions at poorly performing waste sites to reduce the risk of serious fires;
- a consultation on a proposed 300-500% increase in annual charges for the poorest performing sites (compliance bands DEF);
- making increased use of the power to suspend permits of those who are poor performing and those who fail to pay their annual subsistence charges to the EA (this is in addition to seeking to recover any debts);
- a consultation on introducing a new charge for the first year of operation of a site to allow increased compliance assessment, so that operational practice can be more closely assessed as to whether it is in accordance with the site management plans;
- a consultation on changes to the EA's standard rules permits (the proposed changes include the introduction of a new Fire Prevention Plan requirement for permitted sites which are allowed to store combustible waste);
- completing a Memorandum of Understanding with HMRC to facilitate the sharing of intelligence and information; and
- increased inspections of waste shipments.

9.14 In Wales, action to tackle waste crime and improve compliance at poorly managed sites by NRW has included:

- tackling continual poor performance (in compliance bands DEF);
- a review by NRW of fires at waste sites with a targeted campaign to develop site-specific action plans to tackle specific risk areas/ activities;
- making increased use of the power to suspend permits of those who are poor performing and those who fail to pay their annual subsistence charges to the NRW (this is in addition to seeking to recover any debts); and

- addressing improvements to the exemption registration process to identify potentially non-compliant operations.

9.15 In addition, both Governments have recently consulted on enhancing the powers for regulators and local authorities to seize property, in particular vehicles, suspected of involvement in fly-tipping and other waste offences. The UK Government has also introduced civil sanctions in England that will allow the EA, from April 2015, to accept an enforcement undertaking from a person suspected of committing an offence.

Enhancing regulators' enforcement powers

9.16 We propose to introduce measures that will enable the regulators to:

- A. suspend permits where an operator has failed to meet the conditions of an enforcement notice;
- B. issue notices that include steps an operator must take to prevent the breach of a permit getting worse, for example, key actions to stop more waste coming onto poorly managed sites;
- C. take physical steps to prevent further breaches by an operator of their permit, for example, physically stop waste coming onto sites that are not complying with their permits;
- D. take steps to remove a risk of serious pollution, whether or not a facility is under a permit;
- E. make an application to the High Court more readily by removing preconditions; and
- F. widen the regulators' ability to require the removal of waste from land.

These proposals are explained in detail below.

Why are these powers being introduced?

9.17 The enhanced powers would allow the regulators to use them in a broader range of circumstances and have increased flexibility to adopt the most effective compliance or enforcement option and continue to contribute to a reduction in illegal waste activity. They would reduce the opportunity for entrenched poor performance to persist and increase the chances for effective enforcement action.

9.18 There will be benefits for the regulators but also for the legitimate waste management industry as more effective action to tackle illegal waste activity will help create a level playing field.

9.19 The environmental permitting regime has created a simplified and consistent approach to the way in which potentially polluting activities are regulated. **While the focus of this consultation is on providing enhanced powers to the regulators to tackle waste crime, some of the powers will also enable enforcement action to be taken in respect of any activities that come within the environmental permitting regime by operating a 'regulated facility'.** For example, the operation of a sewage treatment works, or a chemical plant.

The proposed changes in detail

Proposal A - Suspending permits where an operator has failed to meet the conditions of an enforcement notice.

Why is change needed?

9.20 Operation of regulated waste facilities outside the conditions of the permits can lead to loss of amenity (for example from odours, noise, dust and pests), cause misery to local residents and undermine legitimate businesses operating in the area. It is important that the regulators are able to suspend the operation of such facilities to prevent these impacts.

9.21 The current provision under regulation 38(3) of the Environmental Permitting Regulations (EPRs) means that an operator of a regulated facility on whom an enforcement notice is served under regulation 36 and who then commits an offence by breaching that notice, can still continue to operate.

9.22 Regulation 37(2) of the EPRs sets out that the regulator may suspend an environmental permit by serving a suspension notice. However, this power is currently restricted to situations where the regulator considers that the operation of the regulated facility involves a risk of serious pollution.

Proposed change

9.23 The Government considers that the regulators' powers of suspension should be extended to situations where an enforcement notice issued under regulation 36 has not been complied with, irrespective of the risk of serious pollution. The regulators should be able to suspend a permit in situations other than when there is a risk of serious pollution, where that is appropriate, and a broader power should be provided. Breach of an enforcement notice is already an offence and it is considered appropriate to allow suspension as another possible enforcement mechanism for the regulators to use in such circumstances. This power would have to be exercised proportionately.

9.24 It is therefore proposed that the provisions to suspend a permit be extended to include situations where an enforcement notice has been issued and the conditions in that notice have not been met. The proposal would apply to any type of regulated facility.

Likely impact on legitimate businesses

9.25 No impact. Operators who are meeting the conditions of their permit or who have complied with the conditions of an enforcement notice issued under regulation 36 of the EPRs would not be affected by the proposed changes.

Proposal B - Enable the regulators to issue notices that include steps an operator must take to prevent the breach of a permit getting worse - for example, in the waste industry, key actions to stop more waste coming onto poorly managed sites

Why is change needed?

9.26 Regulators need explicit powers to issue enforcement notices where this is appropriate to bring a site back into compliance with the conditions of a permit.

9.27 The build-up of waste on a site in excess of what is allowed under a permit can increase the risk of waste fires or cause loss of amenity (such as odour, noise, dust and pest problems). The wording of the existing legislation is not sufficiently clear that regulators can use enforcement notices to prevent more waste being accepted at a site while the existing excess quantities are being dealt with. Preventing more waste arriving at a site can be an appropriate part of remediating a breach of a permit condition.

9.28 Under regulation 36 of the EPRs, the regulator can serve an enforcement notice requiring steps to be taken to remedy a contravention or a likely contravention of an environmental permit. This may include circumstances where the operator is storing more waste on site than allowed under the permit.

9.29 Regulation 36(2)(c) provides that an enforcement notice must specify the steps that must be taken to remedy the contravention or to ensure that the likely contravention does not occur.

9.30 Regulation 36(3) provides that steps may be specified in the notice including steps:

- a) to make the operation of a regulated facility comply with the environmental permit conditions; and
- b) to remedy the effects of pollution caused by the contravention.

Proposed change

9.31 While there may be an argument that such a requirement is already permitted under the current provisions, we think it necessary to clarify so as to give legal certainty and avoid disputes. The Government therefore proposes to ensure that the powers relating to service of an enforcement notice are broad enough to allow the regulator to require steps to ensure that a likely contravention does not occur or to stop an existing contravention becoming worse. For the waste industry, this would include a requirement to prevent more waste coming onto the site, if that is an appropriate step to bring the site back into compliance.

9.32 It is proposed to amend legislation to ensure the regulators can specify in the enforcement notice the steps to remedy an existing or likely contravention. Such measures might include the removal of excess waste. It is also proposed that operators would be

required to display a notice specifying that no further waste can be brought into that facility.

Likely impact on legitimate businesses

9.33 No impact. Only operators who are in breach of their environmental permits would be affected by this change. It is likely (though not necessary) that warnings will have been given to the operator prior to exercise of this power.

Proposal C - Enable the regulators to take physical steps to prevent an operator from committing further breaches of the permit

Why is change needed?

9.34 In a recent high profile case, it was clear that the only way to prevent the worsening of a situation was to stop more waste entering the site by physical means (e.g. by locking the gates).

9.35 Existing powers are not sufficiently explicit to specify that the regulators can take steps to prevent waste from entering a site e.g. by barring access or locking site gates. This is particularly important in cases where suspension notices have not been complied with and the entry of further waste onto the site causes a risk of serious pollution and/or nuisance. The need to prevent more waste from entering a site might also arise at an illegal waste site.

9.36 Regulation 57(1) of the EPRs allows regulators to arrange for steps to be taken to remove the risk of serious pollution if they consider that the operation of a regulated facility under an environmental permit involves such a risk. Regulation 57(2) enables regulators to arrange for steps to be taken to remedy the effects of pollution if: an offence under certain provisions of regulation 38 has been committed; or if they suspect that an offence under regulation 38 is being or has been committed and that pollution is being or has been caused as a result.

9.37 However, current powers do not sufficiently make clear whether these steps might include the ability to take physical measures such as the action of locking the gates or barring access to the site to prevent more waste coming onto the site, without resulting in claims against the regulator such as for trespass or criminal damage.

Proposed change

9.38 It is proposed to amend legislation to make clear that the regulator may arrange for steps to secure the facility, except where this would prevent access to a private dwelling. It is also proposed to require a regulator to notify the operator of such steps. It is envisaged the proposed amendment would probably only apply to waste management sites.

Likely impact on legitimate operators

9.39 No impact if action is restricted to sites where the operator has committed an offence. Others who use an affected site may have to use an alternative authorised site. This may have a temporary additional cost compared with the arrangement with the affected site.

Proposal D – Enable the regulators to take steps to remove a risk of serious pollution, whether or not a facility is under a permit

Why is change needed?

9.40 Where a facility has a permit, a regulator may revoke that permit in whole or in part and any post-operation requirements, such as site restoration, may remain in force (regulation 22). The regulator may at that time also require steps to be taken by the operator after revocation takes effect (regulation 23). The revocation notice must specify any additional steps the operator must take to avoid any pollution risk or to return the site to a satisfactory state.

9.41 If the regulator considers that the operation of a regulated facility under an environmental permit involves a risk of serious pollution, it may arrange for steps to be taken to remove that risk using powers under regulation 57(1).

9.42 However, it is currently not possible for a regulator to use its powers under regulation 57(1) to remove a risk of serious pollution at a waste site after a permit has been revoked or where there is no permit in existence. Furthermore In some situations, a regulator considers that it cannot wholly revoke a permit where it would be appropriate to do so where it wishes to retain the ability to remove a risk of serious pollution.

9.43 A change to the legislation is proposed in order to ensure that the regulators can remove a risk of serious pollution whether or not a facility is under a permit. It should be noted that under regulation 57(2) the regulator can take such steps itself and seek to recover the costs but cannot require the operator to take such steps.

Proposed change

9.44 It is proposed to amend the legislation to broaden the scope of the powers to prevent or remedy pollution even where an environmental permit is not in place including: where the operator is operating without a permit; where a permit has been fully revoked; or where a permit is revoked during or subsequent to any remedial action under regulation 57. This proposal would be likely to apply to all types of regulated facility.

Likely impact on legitimate operators

9.4 This change would only impact on operators of regulated facilities whose operations involve a risk of serious pollution.

Proposal E - Enforcement by the High Court

Why is change needed?

9.46 The regulators can take proceedings in the High Court to secure compliance with enforcement, suspension or other notices (regulation 42 of the EPRs). However, the exercise of this power is currently predicated on the regulator demonstrating that they have given due consideration to the use of criminal proceedings for failure to comply with a notice and concluded that such proceedings would be ineffectual. The regulators may therefore follow the criminal enforcement route first before considering High Court proceedings. However, in the time it takes to pursue a criminal prosecution, failure by an operator to take the actions specified in an enforcement or suspension notice may lead to pollution or harm to local communities.

9.47 In most cases where the EA has obtained injunctions it has found them to be effective in stopping offending. However, under the current arrangements there have been circumstances where the need to demonstrate that a criminal sanction would not be effective has prevented the EA using the power and has prevented an early intervention. The EA has also encountered a situation where, having obtained an injunction, the court then declined to enforce it because it considered the EA should have prosecuted first. The regulators would like to make greater use of enforcement by means of High Court proceedings regardless of what other enforcement steps are available to them. The EA currently uses this power between one and five times a year. The EA expects that the proposed change is likely to result in the power being used between five and 10 times a year.

Proposed change

9.48 It proposed to amend legislation to provide that a regulator may take proceedings in the High Court to secure compliance, whether or not the regulator has taken other enforcement steps.

9.49 Such a proposal would be subject to a Justice Impact test. The proposal would apply to all types of regulated facility

Likely impact on legitimate operators

9.50 No impact. The power would only be exercised where an operation is in significant breach of its permit and/or poses a risk of significant harm.

Proposal F - Power to serve a notice to remove waste

Why is change needed?

9.51 Waste can be accepted at a permitted site within the conditions of the environmental permit granted to the site operators by the regulators. A regulator can serve a notice on an occupier of land to remove waste unlawfully deposited under section 59 of the Environmental Protection Act 1990. That power also applies to sites without a permit. If that site is abandoned and there is no occupier, or the occupier has been served with a section 59 notice but has failed to comply with it, or the notice is quashed on appeal on certain grounds, the regulators and local authorities have the power to serve a notice on the landowner under section 59ZA of the 1990 Act requiring them to remove waste from the site. However, under the current powers, the section 59 and 59Z notices can only cover the amount of waste deposited unlawfully. In the case of a permitted site, this means any waste deposited in excess of the permitted quantity. For example, where a site authorised to accept up to 5,000 tonnes of waste but where 12,000 tonnes of waste has been accepted onto the site, the notice could only require the removal of 7,000 tonnes excess waste, since 5,000 tonnes was lawfully deposited - even though its continued storage is in breach of a permit condition.

9.52 Similarly, under the provisions relating to exemptions from environmental permitting, waste may be accepted and deposited in accordance with a registered exemption but may then be stored for longer than the period provided for by the exemption. In these circumstances a regulator can remove the exemption registration but it does not have the power to serve a notice requiring the waste to be removed because the deposit was lawful at the time it was made.

9.53 The power to serve a notice under section 59 or 59ZA of the 1990 Act applies where waste (including extractive waste deposited after 7 July 2009) has been deposited in contravention of section 33(1) of the 1990 Act (prohibition on unauthorised or harmful deposit, treatment or disposal etc. of waste) or regulation 12 of the EPRs (requirement for an environmental permit).

9.54 This power enables the regulators (or a local authority) to serve a notice on the occupier of premises to remove waste and/or to eliminate or reduce the consequences of its deposit - but only if the regulators (or local authority) reasonably consider that the occupier deposited, knowingly caused or knowingly permitted the deposit.

Proposed change

9.55 The Government proposes that legislation should be amended to cover not only notices to remove illegal deposits (the current provision) but also to cater for the situation where the initial deposit was lawful but the continued presence or storage of that waste subsequently became unlawful.

9.56 The proposed change would not change the overall obligations that might fall to an occupier or landowner. It might mean that landowners may have to deal with all the waste left at a site (and as a consequence, they are likely to incur greater costs). See section 13 on protection of landowners.

Likely impact on legitimate operators

9.57 There would be no impact on legitimate operators as exercise of the power would be restricted to cases where waste had been deposited in breach of a permit or exemption. As described above, there is no overall change in the obligation on landowners. However, where liable, the costs for landowners in meeting the obligation could increase to include the removal of all the waste on a site. This power is exercised by the EA less than 5 times a year on average. We are currently unable to quantify the likely impact of this proposal so will use the consultation to develop our understanding of the impact. It should be noted that other measures to control the amount of waste stored and increase compliance assessment of regulated facilities are likely to reduce the occasions where the power is exercised against landowners.

10. Estimated costs and benefits of these proposals

10.1 This section sets out the costs and benefits that might arise as a result of the proposed amendments to the legislation. However, as there are no costs to legitimate operators, there is no requirement to provide an impact assessment to accompany the consultation on proposals to enhance the regulators' enforcement powers.

Who will be affected by this?

10.2 While the proposals will apply to all operators of regulated facilities under the Environmental Permitting Regulations (EPRs), the key groups that will be most affected by them are illegal/ non-compliant waste operators who act in breach of their environmental permit. The proposals will affect the Environment Agency (EA) and Natural Resources Wales (NRW) which will be able to exercise discretion in the use of the enhanced powers once the legislation is amended; the High Court which will hear any cases brought before it by the EA or NRW; and the Planning Inspectorate which manages the appeals procedure under the EPRs.

10.3 The proposed amendments are principally aimed at tackling illegal / entrenched non-compliant waste operations. Legitimate businesses located in the vicinity of a non-compliant waste business may benefit from a reduction in the pollution or loss of amenity caused by a non-compliant site. Legitimate waste businesses should also benefit. The enhanced powers will help create a level playing field to ensure that those businesses which breach their permit are brought into compliance or closed down.

Costs and benefits for business

10.4 Businesses that carry out activities in accordance with their permit or the conditions of their registered exemption are not expected to experience costs as a result of these proposals.

10.5 Businesses that carry out their activities illegally (for example those that engage in waste activities for which they do not have a permit or which are in breach of a permit or registered exemption) will experience costs as a result of these proposals. It is not appropriate to include costs for businesses that carry out waste management activities illegally in our assessment.

10.6 Businesses that operate outside the conditions of their permits are more likely to have their permits suspended or revoked and therefore are likely to lose their market share, leaving responsible contractors to compete effectively on price and quality of service. These proposals will make responsible waste management a more attractive proposition, as well as benefitting the environment and local communities.

10.7 There could be some additional costs to landowners who become responsible for clearing increased amounts of abandoned waste. However, this will be rare and limited to occasions where an operator is not in a position to have enforcement action taken against them. Comments are welcomed on the extent of any additional cost.

Costs and benefits for the regulators

10.8 The regulators may incur some additional costs from issuing and enforcing suspension and revocation notices. They would also incur some occasional additional costs in ensuring sites are supervised, to enable legitimate access to land where waste is being physically prevented from entering a site. However, the number of cases where notices are expected to be required each year is fairly low and the regulators will only do this where it believes that failing to take this action would result in a high risk of pollution or public amenity loss. In these situations, it is likely that the regulators would also incur substantial costs in cleaning up pollution or taking legal action against the site owner, so we have not included an assessment of the scale of this additional cost.

10.9 The overall purpose of these additional powers is to reduce the pollution and public amenity loss caused by illegal waste activity. The changes will ensure the current powers are more effective and will add clarity. They are likely to be welcomed by the legitimate industry, as well as other businesses and householders affected by pollution and the loss amenity caused by badly-run waste facilities.

10.10 It is anticipated that these enhanced powers will lead to a reduction in the number of waste sites that pose a high risk to the environment, which will mean a reduction in clean-up and enforcement costs to the regulators. In the financial year 2013/14, the EA spent £16 million on enforcement at illegal or poorly performing sites. Significant costs are borne by local authorities, including the fire services, to tackle waste fires and cleaning up the pollution at these sites. In Wales, a review by NRW of fires at waste sites estimated, for the quantities of waste involved in the fires reviewed, that the cost of disposing of the waste alone was in excess of £2 million. This does not include the costs of haulage, remediation, supervision etc. A fire at one illegal waste site resulted in a total cost of over £1.5 million to all the agencies involved.

10.11 In addition, current and past cases indicate that clean-up costs of abandoned waste sites on private land can cost anywhere between £250k and £5million. There are currently estimated to be around 50 abandoned waste sites in England, and the EA is continuing to pursue clean-up with the responsible parties wherever possible.

Nine sites have been abandoned in Wales since April 2013. NRW is dealing with these sites as well as other sites which were abandoned prior to this time. Increased compliance is likely to benefit private landowners since it should reduce the incidence of sites with significant quantities of abandoned waste.

10.12 The most notable benefit for the regulators will be the reduction in costs associated with emergency preventative action to avoid pollution and amenity loss and any associated clearance costs, although this has to be balanced against any additional enforcement costs.

10.13 The proposed changes will enhance the current regime by enabling the regulators to take swift enforcement action before a situation has developed which poses a significant risk to the environment. The proposals may also remove a small burden on HM Courts and Tribunals Service by providing alternative enforcement options for regulators.

10.14 Benefits will also be felt by the general public and local businesses in areas near poor performing waste sites, from a reduction in harm to local communities and disruption to their lives.

11. Consultation questions - Part I

11.1 We are seeking views on the proposed changes to enforcement powers set out in Part I. These questions are set out below:

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?

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?

Part II - Call for evidence

12. Fixed penalty notices for fly-tipping

Rationale for change

12.1 Fly-tipping is one of the most noticeable types of waste crime. Fly-tipping often bypasses any waste controls and blights our streets and countryside. Many people and businesses are duped into paying unscrupulous persons whom they believe will deal with their waste responsibly but who then dump the waste illegally.

12.2 Fly-tipping is the illegal disposal of waste and can range from a single black bin bag to thousands of tonnes of e.g. construction and demolition waste. It can also include liquid waste. The penalties for fly-tipping are:

- on summary conviction: imprisonment for a term not exceeding 12 months or a fine not exceeding £50,000⁴ or both;
- on conviction on indictment: imprisonment for a term not exceeding five years or a fine or both.

12.3 In 2013/14, local authorities reported 852,000 incidents of fly-tipping in England, costing taxpayers an estimated £45 million to clear. Various sources have estimated the cost of fly-tipping on private land as between £50 - £150 million a year. In 2013/14, local authorities reported 32,934 incidents of fly-tipping in Wales, costing taxpayers an estimated £1.9 million to clear; money that could have been better spent elsewhere to improve the lives of communities in Wales.

12.4 The Government Review of Waste Policy in England 2011⁵ recommended that Defra should “*consider whether the current levels of fines and sentences for fly-tipping are sufficient; whether prosecutions are visible enough and whether Magistrates have enough information/training about sentencing for waste crime; whether there is scope for greater incorporation of the Macrory principles of restorative justice; and whether fixed penalty notices may be appropriate for fly-tipping and duty of care offences in some circumstances*”.

12.5 Since then, the Sentencing Council has published its guidelines⁶ to courts on sentencing for environmental offences, including fly-tipping. These guidelines came into

⁴ It is expected that this amount will shortly be changed to an unlimited amount as a result of the commencement of section 85(1) of the [Legal Aid, Sentencing and Punishment of Offenders Act 2012](#)

⁵ [Defra \(2011\) Government Review of Waste Policy in England 2011](#)

⁶ [Sentencing Council \(2014\) Environmental Offences Definitive Guideline](#)

effect in July 2014. It is too early to demonstrate whether the guidelines have increased fines and whether this is acting as a deterrent.

12.6 Local authorities have made a case that the cost of investigation, bringing prosecutions and ultimately clearance and disposal of fly-tipped material remain a significant barrier and these costs are not recovered through the courts. This is reinforced in the Local Government Association's 2013 Wealth from Waste Report⁷ which states that *"Residents want quicker action on incidents, particularly in the case of persistent offenders whose actions can blight neighbourhoods. The establishment of fixed fines for small scale fly-tipping could provide an additional tool to local authorities for tackling persistent undesirable behaviour as well as acting as a deterrent"*.

12.7 Local authorities have indicated that the cost of investigating a fly-tipping incident, bringing prosecutions and ultimately clearance and disposal of material remain significant. This has been backed up by evidence gathered by Buckinghamshire County Council on behalf of the National Fly-tipping Prevention Group. The evidence suggested that some local authorities only recover 60% of costs when they prosecute a fly-tipping case. It is worth noting that those that responded did not feel that the low amount of costs awarded acted as a disincentive to prosecution, as successful prosecutions generate publicity which can act as a deterrent to potential fly-tippers.

12.8 In a development of the Welsh Government's new fly-tipping strategy, stakeholders advised that the only options currently for punishing fly-tippers are to either take a case to court or issue a simple caution. Enforcement officers across Wales would like the option of being able to issue a fixed penalty notice to punish small scale fly-tipping offences. The new Fly-tipping Strategy contains actions to investigate introducing a new fixed penalty notice or other enforcement tools for fly-tipping incidents⁸.

12.9 Section 88 of the 1990 Act⁹ enables local authorities to issue a fixed penalty notice for very small scale fly-tipping incidents (e.g. disposing illegally of a single plastic sack of rubbish) and this approach may be appropriate for a first offence akin to littering¹⁰.

12.10 Currently, larger scale incidents are only enforceable by prosecuting offenders through the courts or issuing a caution in cases where liability is admitted by an offender.

12.11 The Government would like to support the regulators and in particular local authorities in their efforts to tackle fly-tipping and provide greater flexibility in enforcement of such offences. This will enable a more efficient and proportionate response for small-scale local fly-tipping where the cost of bringing a prosecution may not be proportionate to

7 [Local Government Association \(2013\) *Wealth from Waste: the LGA local waste review*](#)

8 [Welsh Government \(2014\) consultation on 'A Fly-tipping Free Wales – Our strategy for tackling fly-tipping'](#)

9 [Environmental Protection Act 1990](#), section 88

10 Defra (2006) [Fixed Penalty Notices: Guidance on the Fixed Penalty Notice Provisions of the Environmental Protection Act 1990, the Clean Neighbourhoods and Environment Act 2005 and other legislation](#)

the offence. This is in line with recent calls from local authorities¹¹. Prosecutions would remain an option for the enforcing authorities to use and the preferred way of dealing with more serious cases e.g. persistent offenders or large scale dumping.

12.12 In Scotland fixed penalty notices have already been introduced for fly-tipping under section 33A of the 1990 Act¹². The level of the fixed penalty has recently been increased to £200¹³. Under litter legislation (EPA 1990) in England, litter authorities can set local levels within the range £50 to £80, or if they are not set out a default of £75 applies. In Wales, litter authorities may prescribe a local penalty from £75 to £150 and the default fine is £75.

12.13 The Government Review of Waste Policy in England 2011 said that we 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”*.

12.14 Fly-tipping poses a risk to the environment and human health. It is right that tougher sanctions should be available to deal with people who are serious offenders. A householder making a mistake when they put their bin out for collection is of a completely different order and this is why the UK Government is using the Deregulation Bill to remove criminal sanctions relating to how householders present their waste for collection. The Deregulation Bill provides for civil sanctions when a householder’s failure to comply causes a nuisance, or when the failure is detrimental to the amenity of the locality. Those sanctions will not cover minor problems such as failing to close the bin lid properly, leaving the bin out for too long, or mistakenly putting something in the wrong bin.

Options for change

12.15 This call for evidence is seeking views on the options and case for introducing fixed penalty notices in England and Wales and invites comments on its assessment of the likely costs and benefits.

12.16 Currently local authorities are only able to issue a fixed penalty notice for very small-scale fly-tipping incidents akin to littering but, due to the varying severity and impact of fly-tipping, these are not suitable for all incidents.

12.17 The Government is therefore considering the case for widening the enforcement options to allow the use of fixed penalty notices. Such a provision would require an amendment to primary legislation.

12.18 If a fixed penalty notice were to be introduced for fly-tipping in England and Wales, the amount of the fixed penalty would need to be sufficient to act as a deterrent, while not

11 [Local Government Association \(2013\) *Wealth from Waste: the LGA local waste review*](#)

12 [Environmental Protection Act 1990, section 33A](#)

13 <http://www.legislation.gov.uk/ssi/2013/315/introduction/made>

being so high that offenders would not pay it or would rather go to court in the hope of receiving a lower penalty.

Impact and costs

12.19 The introduction of fixed penalty notices for fly-tipping would not be expected to impose any additional direct costs on legitimate businesses or individuals that comply with waste legislation.

12.20 Having a more flexible range of penalties to use could be more effective at changing behaviour and reducing the costs in particular to local authorities, the other regulators and the courts, due to a reduction in the number of prosecutions¹⁴ for fly-tipping offences. The Government has already introduced a number of fixed penalty notice powers to tackle illegal waste activity and related anti-social behaviour (such as littering) and failure to produce a waste transfer note).

12.21 We believe that fixed penalty notices could have the desired effect as the threat of a fine makes people think about their behaviour. The threat of an on-the-spot fine seems to have an increased effect as many people believe the threat of a court fine to be minimal.

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

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

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

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?

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

14 Defra (2014) [Fly-tipping statistics for England, 2013/14](#)

13. Actions to improve landowner awareness of potential liabilities for waste

Rationale for change

13.1 The Government is concerned that there may be a growing problem of landowners who are unaware of illegal activity or flagrant poor performance at waste management sites on land or premises that they have leased to commercial enterprises.

13.2 If the tenants abandon the land, become insolvent or their environmental permit is revoked, landowners can be left financially liable for disposing of some or all the waste left on the site and for dealing with any pollution caused by the waste. Where no permit or registered exemption is in force, they may also be subject to enforcement action under waste legislation. The Government also acknowledges that when landowners do become aware of a problem they may have limited mechanisms to enable them to pass on any cost to their tenants.

13.3 In some cases the landowner may be fully aware that a tenant or other party has illegally deposited waste on the land or may occasionally be complicit in the offence being committed. In these cases, the landowner may be open to an accusation that they 'knowingly permitted' the deposit of the waste and consequently the potential that they have committed an offence under section 33 of the 1990 Act. Uncertainty around a landowner's involvement in their tenant's operations can make the relationship between the landowner and a regulator a difficult one.

13.4 Waste producers and waste holders are required to manage waste in a way that guarantees a high level of protection of the environment and human health. In accordance with the 'polluter-pays' principle, the costs of waste management should be borne by the original waste producer, or by the current or previous waste holders.

13.5 The Government is committed to the 'polluter-pays' principle and would like to avoid any unnecessary burdens associated with the clean-up of abandoned waste management sites by landowners who are not complicit in the illegal waste activities or continual poor compliance by their tenants.

13.6 There is already good practice that can be adopted by landowners. These include: carrying out due diligence of potential tenants before they take up occupation; agreeing appropriate lease terms; obtaining a bond/ sinking fund or personal guarantees from directors; and alerting regulators early to emerging problems. However, taking action to end a lease arrangement (which may be the only available remedy open to the landowner) may make it more likely that the operator leaves the site and abandons waste.

Options for change

13.7 The proposals in chapter 9 to amend legislation will help the regulators tackle waste that was originally deposited or stored legally but has later been stored or kept unlawfully.

13.8 One of the problems for regulators and landowners arises from the fact that a liquidator of a company incorporated in England and Wales has the power to disclaim onerous property under the Insolvency Act 1986 and case law¹⁵ has held that a waste management licence (issued under a previous regime) was property capable of being so disclaimed. Although not tested in the courts, it is very likely that this reasoning would also apply to an environmental permit. This would free the operator of any remaining liability as regards the conditions of the permit and consequently increase the liability of the landowner. This is not the case in Scotland where the Inner House of the Scottish Court of Session has held that liquidators of Scottish companies cannot disclaim the company's sites and environmental licences; the liquidators can only abandon an environmental licence if that is permitted by the licence.

13.9 The Government would be interested in any proposals on the best mechanisms to increase awareness amongst landowners of their liabilities in relation to waste management operations on their land or their premises. Initiatives from industry, the regulators, business advisors and lawyers may all have their place in helping to protect landowners.

13.10 Other steps that could be taken include the regulators requiring applicants for environmental permits (and the registration of exempt waste operations) to provide evidence that they have notified their landowner of their intention to carry out a waste management activity and/ or evidence from the landowner that they consent to such activity.

Q.6 Please provide evidence including examples of the extent to which waste is being abandoned and landowners are being left to tackle waste or pollution caused by current or former tenants.

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

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

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?

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

15 Celtic Extraction Ltd (in liquidation), Re [2001] Ch 475

14. Operator competence

Reason for change

14.1 When the waste management licensing system was replaced with a new environmental permitting regime in 2007, changes were made to the way that operators of regulated facilities were assessed. The previous 'fit and proper person' test that applied to most but not all waste operations was removed in favour of a lighter touch 'operator competence' provision largely reliant on government guidance. The areas of interest are technical competence, financial provision to meet the obligations arising from the permit, operator performance record, including relevant convictions, and management systems. It should be noted that these principles apply to all types of regulated facilities, not just waste management sites.

14.2 Current poor performance by some operators in the waste industry has been linked to poor business planning and a failure to provide or maintain sufficient financial provision to fulfil the permit obligations throughout the lifetime of the permit. In some notable cases this has led to stockpiling or abandonment of waste, waste fires and nuisance from so-called refuse derived fuel which is awaiting export, and this has given rise to significant public health and amenity concerns. The operators of the permitted or exempt activities are then unable (financially) or are unwilling to take action to clear the site. In addition, attempts to require landowners to clear sites have proven fruitless for similar reasons.

14.3 The requirement to provide technical competence is reported to suffer from poor levels of compliance in some parts of the waste industry. It is not clear how many sites provide technically competent management and, of those that do, the extent to which the nominated technically competent manager(s) is/are controlling site operations. There is a view that, unless a permit specifically requires technically competent management, the provision is difficult to enforce and enforcement action is open to challenge. The regulators have focused their efforts on sites where failure to provide technically competent management is linked to poor compliance.

14.4 The conviction for relevant offences is a consideration of the regulators when granting a permit. However, changes to the Rehabilitation of Offenders Act 1974 mean that convictions involving a fine are spent within 12 months, with the result that relevant criminal convictions do not necessarily lead to refusal of the grant of a permit or the revocation of an existing permit. Furthermore, failures to comply with enforcement notices or other enforcement action are just as indicative of a likelihood of failure to comply with a permit as a relevant conviction.

14.5 It is therefore proposed that the provisions for demonstrating operator competence should be reviewed with a view to tightening the requirements in the waste management industry and better enshrining them in the legislation. Ministers are strongly minded to take forward measures in respect of operator competence and in particular financial provision.

Current position

14.6 Under paragraph 13 of Schedule 5 to the EPRs, a regulator must refuse an application for the grant of an environmental permit if the applicant cannot satisfy the regulator that he will:

- (a) be the operator of the regulated facility; and
- (b) operate the regulated facility in accordance with the environmental permit.

14.7 Chapter 9 of the Government's Environmental Permitting Core Guidance¹⁶ (the Guidance), underpins the above requirement by setting out considerations for 'operator competence', including the role of management systems.

14.8 The Guidance says that "*operator competence can be considered by the regulator at any time, whether as part of the determination of an application or at any time during the life of a permit. The regulator may refuse an application, set permit conditions or take enforcement action having regard to the principles of operator competence described in this Chapter*". The above provisions apply to all types of regulated facility.

14.9 Notwithstanding the above, the regulators consider that a reason for the poor compliance with operator competence in the waste management industry is linked to the need to rely on the Guidance and the fact that there is no direct reference in the EPRs to technical competence, financial provision and operator performance. Accordingly, the regulators feel that they are open to challenge around the assessment of operator competence at the application stage, when varying a permit or in taking enforcement action for failure to continue to be competent. They would like to see the components of the operator competence test more directly reflected in the legislation so that applicants and operators can be more readily assessed. The extent to which the operator competence test for waste management activities should be reflected in the legislation and the options for demonstrating it forms the basis of the call for evidence.

Operator competence (overall)

14.10 Other than taking enforcement action, the best way to limit the opportunities for illegal waste operations and deliberate poor performance is to prevent those responsible from being able to operate or to remove their right to operate if they are subsequently determined as unsuitable.

14.11 There is already provision for a fit and proper person test in primary legislation (the Pollution Prevention and Control Act 1999¹⁷). The easiest way of ensuring the operator competence provisions are more explicit, would be to better embed them in the EPRs, by requiring operators of regulated facilities to: (a) be technically competent (b) make

16 Defra (2013) [Environmental Permitting Guidance Core guidance For the Environmental Permitting \(England and Wales\) Regulations 2010](#)

17 [Pollution Prevention and Control Act 1999](#)

adequate financial provision to fulfil the obligations arising from the permit (c) satisfy the regulators through operator performance, and (d) provide adequate management systems that demonstrate how the operator will comply with the permit. If adopted, procedures and guidance would need to be amended to set out what is required of an applicant or operator to meet each component of the test. Views on whether such a proposal would lend itself to regulated facilities other than waste management would be welcome?

14.12 The operator competence provision can be assessed when considering the various applications – at the application stage for a permit, on application to transfer a permit or on application for a significant variation. The provision could be reassessed at any point during the lifetime of the permit. Failure to maintain operator competence would make an operator liable to enforcement action.

14.13 A change in the directors or senior managers of a company can sometimes have an impact on the company's competence. This might be because the new directors or managers introduce new methods or systems of working or because they change the financial structure of the company. Currently a change of director or manager of a company does not require any re-assessment of the operator competence of the company. If there was an obligation on companies to notify the regulator of change of director, company secretary or other similar manager a re-assessment of operator competence could be undertaken if the regulator deems it appropriate.

14.14 The Guidance provides that the regulator may consider operator competence at any point during the life of the permit and, if not satisfied, can revoke the permit. In order to ensure that the question of competence is more closely linked to the operation of a regulated facility in accordance with the permit, a greater range of existing sanctions could be made available for failure to meet the operator competence test. These might include having operator competence as a condition of a permit.

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?

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?

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

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?

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.

Technical competence

14.15 For 'relevant waste operations', there are currently two schemes of technical competence approved by Defra/ the Welsh Government. These are the CIWM/WAMITAB¹⁸ scheme of individual operator competence and the ESA/EU Skills¹⁹ scheme of corporate competence²⁰. Relevant waste operations are those that were previously subject to the waste management licensing system but not those that operated for historical reasons under the former pollution prevention and control permitting regime. The latter included most larger-scale incinerator operations.

14.16 From 2015, more waste operations will be subject to the Industrial Emissions Directive²¹ (IED) which will further blur the boundary between those waste activities carried out under an environmental permit that are subject to additional IED controls and those carried out under an environmental permit that are not.

14.17 Applying technical competence to all waste operations under an environmental permit would increase consistency of approach across the waste industry. It can be argued that the problems experienced with poor operations are not linked to the larger activities that currently do not demonstrate technical competence through the two approved schemes. Extending technical competence through one of the two approved schemes may increase the regulatory burden for some operators. Alternatively technical competence could be delivered through different means for those newly subject to the provision.

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?

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?

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

19 Environmental Services Association / Energy and Utility Skills

20 [Wamitab Operator Competence Scheme](#) and [ESA/EU Skills Competence Management System](#) also [Environment Agency Guidance RGN No.5 on Operator Competence](#)

21 [Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions \(integrated pollution prevention and control\)](#).

Q18 If this were proposed, would it pose a difficulty for any particular part of the waste industry?

14.18 Some trade associations have expressed concern that some operators have avoided providing technically competent management at sites or have paid lip service to the requirement. There are several possible causes of this. There are those who were 'deemed' competent when the waste management licensing system was replaced, others who registered with a scheme provider but have failed to complete the competence assessment, and those who have supplied the name of a technically competent manager(s) who do not exercise control over the management of the site.

14.19 If the requirement to provide technically competent management were specifically included in legislation, there may be an additional need to ensure that operators notify the regulators of any change in the name(s) of the technically competent manager(s) and that those names can be verified with the scheme provider. That could be done by including a condition in the permit or else by notifying the scheme provider so that the regulator can check.

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.

14.20 Entrenched poor performance or deliberately flouting the law is not consistent with an operator retaining its status as providing technically competent management. Those displaying such behaviour should cease to be regarded as technically competent for environmental permitting purposes.

14.21 It has therefore been suggested that technically competent managers should be held more responsible for the operation of the sites they control and more open to the possibility of enforcement action, including being determined by the regulators to have ceased to be technically competent by virtue of the site performance record.

14.22 Other issues raised include the span of control of an individual technically competent manager and the amount of time that person should be on the site(s) s/he controls and whether this in turn should be linked to permit compliance. It has been suggested that an increase in the level of supervision required by technically competent managers should increase compliance with the permit. This point is principally a matter for the regulators and scheme providers but would underpin increased responsibility and liability of the technically competent manager.

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.

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.

Financial provision

What should financial provision cover?

14.23 Under previous legislation, financial provision was required to be adequate in order to meet the obligations arising from the licence/ permit. Any financial provision ought to be accessed by the operator in the first instance and available to others in default of the operator. Subject to the proposed changes in the consultation in Part I of the document to require the operator to act, the regulators will only intervene to carry out remedial works at a site if there is an imminent or serious risk of harm or pollution which would permit it to act under powers specifically provided in legislation.

14.24 Since environmental permitting was introduced in 2007, the regulators have carried out a credit check on all applications for permits. Where there have been queries about the financial status of an operator, the regulator may require further assurances from an applicant before determining the application. The Environment Agency (EA) does not record the number of times that permit applications have been refused on the basis of financial status alone but seven permit applications and seven permit transfers were refused in 2014 on the basis of operator competence.

14.25 The regulators do not normally require an applicant/ operator to make specific financial provision to demonstrate his/her ability to fulfil the obligations arising from a permit. The exceptions are landfill permits and some extractive waste permits where there are requirements about financial provision set out in the Landfill²² and Extractive Waste²³ Directives. Where financial provision is required, the extent of it is focussed on the post-closure and aftercare phases when a site has ceased to operate. It is at this stage when there is no further income from site operation that the risk of failure to comply increases.

14.26 There have been cases where an operator has gone into liquidation and the liquidators have been able to disclaim the licence/ permit as onerous property and avoid fulfilment of the permit obligations, whether or not financial provision was available.

14.27 More recently, there have been notable cases of stockpiling or abandoning waste or waste fires that cause harm to local communities and great cost to landowners or public services. The operator has never made financial provision and either found it difficult to afford the input and output of waste or deliberately sought to maximise profit, and has subsequently walked away from a site. This has led to renewed calls for the reintroduction of financial provision for all types of waste management facility that can be accessed by the regulators or a third party to pay for the costs of pollution control and/or site clearance.

22 [Council Directive 1999/31/EC on the landfill of waste](#)

23 [Directive 2006/21/EC of the European Parliament and of the Council on the management of waste from extractive industries](#)

14.28 It has been further argued that financial provision should cover the operational phase, as well as any post-closure and aftercare phases. This may be particularly relevant for landfill and extractive waste operations where failure by the operator may require completion of operational aspect as well as post-closure aftercare. It is also now commonplace for landfill infrastructure in the final phases to be installed after waste disposal has ceased. It has been argued that these elements of infrastructure should already be covered by financial provision.

14.29 Furthermore, there is a case for requiring financial provision to cover not only the obligations arising from the permit but any additional foreseeable accidents, such as fires at sites storing combustible waste and the clearance of quantities of waste that exceed those allowed by the permit. For example the inclusion of a requirement to fund the clearance of 110% of the amount of waste permitted under the permit. Improved financial provision by operators was also cited as an option to addressing some of the issues surrounding Refuse Derived Fuel (RDF) in Defra's call for Evidence on the RDF Market last year²⁴.

14.30 It would be important to ensure that any financial provision was sufficient to cover the costs of any necessary remedial work. This means that additional costs that a regulator or third party would incur (such as administration or consultancy fees) would need to be provided for. It would also be inappropriate to argue that costs can be reduced based on economies of scale that only an operator could benefit from.

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?

Q.23 If so, should the amount of the financial provision be linked not only to returning the land to a satisfactory state to meet permit surrender requirements but also to foreseeable clear-up costs resulting from a breach of a permit or after an environmental accident?

Q.24 For landfill sites, should the scope of financial provision be extended to cover operational costs that are incurred during the period when waste is accepted for disposal and/or after waste disposal has ceased?

Options for making financial provision

14.31 If specific site/activity financial provision were to be required, it would be important to be able to guarantee:

- that operators would be able to put such provision in place - is there a market?
- that it would be available to the operator should it be required;

24 [Defra \(2014\) Refuse-derived fuel market in England: Defra response to the call for evidence](#)

- maintenance at an appropriate level throughout the life of the permit;
- its security in the event of an operator disclaiming on the permit requirements, and its availability in such circumstances to the operator, the regulators or a third party.

14.32 Under the waste management licensing system, various types of financial provision were considered appropriate including bonds and escrow accounts. Defra and the EA have undertaken an initial scoping exercise of the ways by which ongoing financial provision might be provided and maintained. These include bonds, bank guarantees, escrow accounts and insurance. Although not strictly financial provision, a regulator could rely on independent assessments of an operator's business plan at various stages throughout the subsistence of the permit. This could include an assessment of whether there is a genuine end market for the proposed output from a recovery process. These approaches could be used alone or in combination but would be at the cost of operators.

14.33 It should be noted that the case for financial provision should also be considered in the context of the separate call for evidence regarding abandoned and orphaned sites which is covered in the next section.

Table 1: Advantages and disadvantages of different mechanisms for making financial provision.

Ref.	Options	Advantages	Disadvantages
1	Bonds/bank guarantees – third parties assess risk and require an appropriate level of security.	Shifts the burden to the operator to demonstrate to a third party that they have an effective business plan and sufficient assets/resources. Can work well if terms are clearly specified.	Can tie up a significant amount of company capital and the costs for small businesses may be prohibitive. In some cases the regulators have experienced difficulties accessing funds, for example if the operator goes into liquidation. Limited market for bonds.
2	Assessment of business plans/ expenditure plans.	Forward looking, rather than just a snapshot view at the time of application. Could be outsourced to a third party for independent assessment.	May not take account of the impact of unforeseen changes in the market. A poor business plan may not provide sufficient justification for the regulator to take enforcement action against an operator that is already permitted.
3	Escrow accounts - the regulator holds joint funds with the site operator	Reduces the regulators' risk of financial exposure. Can work well if the terms are clearly specified. Potential flexibility on draw down of funds for necessary site	Can tie up a significant amount of company capital and the costs for small businesses may be prohibitive. Additional administrative burden for the regulators.

		improvement works.	
4	Insurance	<p>Introducing this as a requirement could create a market for the insurance industry to provide a product.</p> <p>Reduces the regulators' risk of financial exposure.</p>	<p>A suitable insurance product does not currently exist and the costs for small businesses may be prohibitive. Insurers will only offer insurance to those they consider to be a "good risk".</p> <p>Any insurance needs to be maintained, this would require regular checks by the regulators. Insurance would also have to survive the business if it went into liquidation.</p>

Q.25 What is the best mechanism or combination of mechanisms for waste operators to make and maintain financial provision for their sites so that they are secure and available to fulfil permit obligations and deal with the consequences of breaches of the permit or environmental accidents?

Q.26 If required to make financial provision, what would be the likely costs of making financial provision and the impact on waste operators of different sizes?

Operator performance

14.34 In assessing operator competence, the regulators may consider the record of compliance with regulatory requirements of the operator and other relevant persons (e.g. a director or manager).

14.35 These considerations include, but are not restricted to, evidence of convictions for relevant offences. Relevant convictions are currently listed in EA guidance for applicants, the same guidance is used by NRW²⁵. Refusal of a permit would normally be appropriate for offences that demonstrate a deliberate disregard for the environment or environmental regulation. The regulators may also refuse an application for a permit if the applicant or another relevant person provides incomplete or false information. One permit application and one permit variation were refused in 2014 by the EA on the basis of incomplete or incorrect information. Since 1 April 2013 there have been no permits refused by Natural Resources Wales (NRW) on the grounds of known existing non-compliance and performance.

14.36 In assessing relevant convictions the regulators must take into account the terms of the Rehabilitation of Offenders Act 1974. That Act applies only where an individual has been convicted of an offence. However, where the person convicted is a corporate body, the regulator should have regard to whether the conviction would have been spent if it had been committed by an individual and should normally treat the corporate body in the same way. As noted above, changes made to that Act mean that where a conviction led to a fine, the conviction may now be spent within 12 months rather than five years, as was

²⁵ EA (2013) [Permit applications and relevant convictions](#)

previously the case. This will limit the scope of the regulators to refuse an application unless they can also take into account relevant convictions that are spent.

14.37 As a result, this limits the scope of the regulator to refuse an application unless it can also take into account convictions that are spent.

14.38 The Home Office published statutory guidance for local authorities on how to determine suitability of a scrap metal dealer and had originally said that spent convictions shouldn't be considered. However, it amended the guidance so it reflects section 7(3) of the Rehabilitation of Offenders Act 1974 and is in line with the existing legal framework – and it now says:

“Generally, local authorities should not consider spent convictions when making a decision on suitability and should disregard any spent convictions on the part of the applicant. Only if the local authority is satisfied that justice cannot be done except by admitting or requiring evidence relating to a person's spent convictions may the authority require the evidence and take it into account. In doing so, the local authority must have regard to the age, circumstances, relevance and seriousness of the spent convictions”.

14.39 The regulators are also not necessarily aware of relevant convictions secured by other bodies e.g. a local authority conviction for fly-tipping. There is a separate initiative under the Waste Crime Action Plan in England to examine how convictions' records of various enforcement bodies can be better shared.

14.40 The regulators will additionally take into account an operator's previous compliance record such as past application refusals, permit revocations or actions that have had actual or potential adverse consequences for people and the environment.

Q.27 If you support amending legislation to require operators of waste management facilities to demonstrate operator competence, are changes needed to the particular aspects of past performance, including spent convictions, that should be taken into consideration in determining an application for a permit?

Management systems

14.41 In order to ensure a high level of environmental protection, operators of waste activities should have effective management systems in place. The nature of the required management system depends upon the complexity of the regulated facility. The Guidance covers the issue of management systems.

14.42 The regulators generally require an operator to carry out activities in accordance with a site management plan. Breach of a site management plan is a breach of a permit condition.

Q.28 Should the requirement for operators' site management plans be embodied in legislation or are they and their content best left to the regulators to determine?

15. Options to address abandoned or orphaned waste management sites

Rationale for change

15.1 The Government is aware of cases of formerly permitted and formerly exempt waste management sites where waste had been abandoned, often causing a major problem for local communities. In some cases, operators have gone into liquidation and landowners are left with a significant amount of waste on the site or in their premises for which they must arrange disposal. There have been cases where landowners have insufficient financial resources to fund the necessary site clearance and remediation and so sites have been left with residual waste.

15.2 Since 2004, the regulators have either permitted or closed landfills to meet the requirements of the Landfill Directive. In England there are 495 sites permitted in accordance with the Landfill Directive that can accept waste and 1,391 that are still regulated under an environmental permit but can no longer accept waste. In Wales, there are 25 operational and 162 closed sites, regulated under an environmental permit. All operational permitted sites have financial provision but only around 10% of closed sites have it. If operators go into administration or are declared bankrupt, they can disclaim their permit as 'onerous property', leaving a legacy of waste in the ground.

15.3 Where no financial provision is in place, the permit has been disclaimed or the operator ceases to exist, there may be a requirement for public funding to maintain pollution control arrangements or to carry out remediation. Environment Agency (EA) figures indicate 88 sites being abandoned, 31 in the last five years, two of those had financial provision. The regulators expect landfill site abandonment to happen more frequently in future. Drivers for this are the long-term operating costs and reduced waste inputs, leading to lower than predicted profits and company failure. It is prudent to prepare for this scenario arising more frequently.

15.4 In Scotland and the Republic of Ireland, there have been instances where the operators of permitted sites have gone into liquidation and left substantial environmental legacies, with no funds to either maintain pollution control systems or to remediate abandoned sites. In Scotland, the operators were two major open-cast coal companies; in the Republic of Ireland it was an operator of several large landfill sites.

Options for change

15.5 The Government is inviting views on whether a scheme should be established to meet the costs associated with the clearance and remediation of abandoned or orphaned waste management sites and how such a scheme might operate.

15.6 One example is the industry mutual liability scheme that exists for offshore oil and gas operators, although this scheme relates to pollution during production rather than longer-term risks. All offshore operators currently active in exploration and production on

the United Kingdom's continental shelf are party to a voluntary oil pollution compensation scheme known as OPOL²⁶. Under the scheme, operating companies agree to accept strict liability for pollution damage and the cost of remedial measures. Parties to the scheme have to establish financial responsibility to meet claims by producing evidence of insurance from insurers, a guarantee from a company with a suitable financial or credit strength rating or evidence that they qualify as a self-insurer. Participants also jointly agree that, in the event of a default by one of the parties, each will contribute proportionally to meet claims.

15.7 In the United States, the Superfund (a trust fund created by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)) is a federal programme designed to clean up sites contaminated with hazardous substances. CERCLA created a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. Under this law the US Environment Protection Agency can identify parties responsible for hazardous substances releases to the environment and compel those parties to clean up sites, or it can clean up itself using the Superfund and recover the costs from responsible parties by referring such matters to the US Department of Justice.

15.8 Wherever possible and practicable, the Government supports the 'polluter-pays' principle. Operators of waste management sites should be held responsible for remediating any environmental pollution they cause.

15.9 Like financial provision, any fund would need to be secure to prevent an operator defaulting on a contribution to the fund and views are sought on how this might best work. Views are also sought on whether such a scheme ought to be additional to making site specific financial provision or an alternative mechanism for making financial provision.

15.10 The scheme could be operated by industry, the regulators or the Government. It could be mandatory for all with contributions made on a proportionate basis or the scheme could be optional if site-specific financial provision has been made. The advantage of a national scheme is that the risk would be shared and the resultant economies of scale would likely be lower compared with site-specific financial provision.

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?

Q.30 Should joining such a scheme be an alternative to, or additional to site-specific financial provision?

Q.31 If you think such a scheme is desirable, please provide your views on how it should be funded and administered, including how decisions on the need to draw from it would be made?

26 [The Offshore Pollution Liability Association Ltd](#)

Q.32 Do you have any evidence or views on what level of funding would be required for such a scheme so as to be proportionate to the risk?

Q.33 Do you have any evidence or views of the costs and impacts incurred by the public sector, businesses or landowners in cleaning up and remediating land or premises which have been used for waste management operations and then abandoned?

16. Powers to recharge for pollution works

Rationale for change

16.1 Section 161 of the Water Resources Act 1991 allows the regulators to carry out investigations and to undertake works to prevent or remedy pollution to controlled waters and to recharge reasonable expenses to cover the costs of these works.

16.2 Section 15 of the Environmental Damage (Prevention and Remediation) Regulations 2009 also enables the regulators to take action to prevent environmental damage. These provisions include environmental damage caused by the deposit of waste on land but only where there is evidence of contamination of land that results in a significant risk of adverse effects on human health.

16.3 Regulation 57 of the EPRs gives the regulator the power to do works (or arrange for works to be done on its behalf) and to recover the costs of those works from the operator. However, these powers can only be used in two situations:

- a) if the regulator considers that the operation of a regulated facility under a permit involves a risk of serious pollution, it may arrange for steps to be taken to remove that risk; and
- b) if the commission of certain offences causes pollution, the regulator may arrange for steps to be taken to remedy the effects of that pollution.

Options for change

16.4 Current legislation could be amended to provide the regulators with powers to prevent or remedy pollution on land from the deposit of waste consistent with the powers available in respect of the pollution of controlled waters under section 161 of the Water Resources Act 1991.

16.5 The Government would like to invite views on whether the scope of the regulators' powers to undertake works and to recover the cost of those works should be widened to allow the recovery of costs for investigations and remedial work undertaken by the regulator to prevent or remedy pollution associated with the deposit of waste on land.

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?

17. Exemptions from environmental permitting

Rationale for change

17.1 Exemptions from environmental permitting operate under a simple registration system which, with one exception for waste electrical and electronic equipment (WEEE) treatment, does not require the operator to pay a registration fee. Exempted waste operations such as permitted operations are subject to the need for appropriate periodic inspections. This means that for the regulators, compliance and inspection of exempted waste operations pose a burden, funding for which is provided by a grant-in-aid. If the regulators take a proportionate approach, it is likely that many exempt waste operations are not often inspected or are inspected only when there are complaints or problems brought to the regulators' attention.

17.2 Exemptions aim to provide a light-touch, proportionate form of regulation to encourage bona fide small-scale, low risk waste recovery and disposal operations. Exemptions have in particular been used to reduce the regulatory burden on farmers in respect of good agricultural practice. Exempt waste operations range from small bulking up of recyclable waste by a manufacturer or distributor, community composting, smaller scrap metal facilities though to anaerobic digestion and spreading of waste to confer agricultural benefit.

17.3 It has been suggested that for some operators of waste management sites exemptions can provide a veil of legitimacy under which waste crime and poor performance can be carried on with little likelihood of discovery and enforcement action. As a result, there is a case that requirements for exempt waste operations should be tightened so that inspections can be funded by operator fees and charges and operators become subject to some form of operator competence requirement.

17.4 An alternative view is that the exemptions themselves are appropriate but the limited levels of compliance assessment and inspection linked to absence of fees and charges and reliance on government grant-in-aid funding?

17.5 However, there is limited information about compliance of exempt waste operations. Under the Waste Crime Action Plan for England, the EA will make an assessment of environmental harm and compliance and report to the UK Government with recommendations by summer 2015.

17.6 The Government would like to seek views on current issues concerning exempt waste operations. However, the call for evidence is not seeking views on changes to existing exempt waste operations

17.7 The UK is one of the few Member States to make extensive use of the Waste Framework Directive²⁷ derogation to provide exemptions from the need for a permit. It does so to provide a light-touch regulatory regime to encourage recycling and recovery. In England and Wales the current exemptions are set out in the EPRs.

17.8 The changes to the environmental permitting regime made by the EPRs in 2010 reflected a significant change to the way in which exemptions were provided. The EPRs introduced many new exemptions, while at the same time considerably reducing the scope of others where there was an environmental case for doing so or evidence of abuse.

17.9 However, the Waste Framework Directive requirement for an operator to register an exempt waste operation has remained simple. The operator needs to provide his/her name, a description of the exempt waste operation and the place(s) where it is being carried out.

Call for evidence

17.10 Subject to the completion of the EA's review of compliance with the current exemptions in England and this call for evidence, there are options for the use of exemptions in the future.

17.11 Firstly, the rules on registering an exemption could be tightened up so as to require greater assessment of the exemption notified to the regulators. This could include some or all current permitting requirements currently in place or under consideration in this consultation and call for evidence. So operators registering an exemption could be subject to:

- assessment of a form of operator competence;
- submission of operating procedures on registration;
- confirmation of consent from a landowner;
- introduction of charges to increase assessment prior to registration compliance assessment and inspection.

17.12 These or other measures would necessitate the introduction of fees and charges to allow the regulators to recover their costs.

17.13 Alternatively, the registration requirements for exempt waste operations could remain as they are now, but the activities and types and quantities of waste that can be handled under an exemption could be reduced in some or all cases so that a significantly fewer number of operations would benefit from the exemptions.

²⁷ [Directive 2008/98/EC of the European Parliament and of the Council on waste.](#)

17.14 It could be argued that imposing more requirements on exempt waste operations and introducing charging will undermine the lighter regulatory touch and prevent many (including charities, schools and voluntary groups) from continuing small scale local recycling or recovery operations, thus discouraging rather than encouraging such operations. Reducing the scope of some or all of the exemptions may still provide an opportunity for abuse and will bring many more sites into permitting at increased cost. On the other hand, the regulators would be better positioned to target inspections at those industries that pose a higher risk or where intelligence suggests they are subject to poor compliance or abuse.

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?

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?

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?

18. Call for evidence questions – Part II

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?

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

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

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?

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

Actions to improve landowner awareness of potential liabilities for waste

Q.6 Please provide evidence including examples of the extent to which waste is being abandoned and landowners are being left to tackle waste or pollution caused by current or former tenants.

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

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

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?

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

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?

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?

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

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?

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.

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?

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?

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

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.

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.

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.

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?

Q.23 If so, should the amount of the financial provision be linked not only to returning the land to a satisfactory state to meet permit surrender requirements but also to foreseeable clear-up costs resulting from a breach of a permit or after an environmental accident?

Q.24 For landfill sites, should the scope of financial provision be extended to cover operational costs that are incurred during the period when waste is accepted for disposal and/or after waste disposal has ceased?

Q.25 What is the best mechanism or combination of mechanisms for waste operators to make and maintain financial provision for their sites so that they are secure and available to fulfil permit obligations and deal with the consequences of breaches of the permit or environmental accidents?

Q.26 If required to make financial provision, what would be the likely costs of making financial provision and the impact on waste operators of different sizes?

Q.27 If you support amending legislation to require operators of waste management facilities to demonstrate operator competence, are changes needed to the particular aspects of past performance, including spent convictions, that should be taken into consideration in determining an application for a permit?

Q.28 Should the requirement for operators' site management plans be embodied in legislation or are they and their content best left to the regulators to determine?

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?

Q.30 Should joining such a scheme be an alternative to, or additional to site-specific financial provision?

Q.31 If you think such a scheme is desirable, please provide your views on how it should be funded and administered, including how decisions on the need to draw from it would be made?

Q.32 Do you have any evidence or views on what level of funding would be required for such a scheme so as to be proportionate to the risk?

Q.33 Do you have any evidence or views of the costs and impacts incurred by the public sector, businesses or landowners in cleaning up and remediating land or premises which have been used for waste management operations and then abandoned?

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?

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?

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?

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?

Annex A

The text of the letter from Parliamentary Under Secretary of State, Dan Rogerson dated 1 September 2014 on the Waste Crime Action Plan for England.

I recognise that you and others in the resource management industry have worked hard to create a unified voice and drive improvements in your industry. The work undertaken by the industry particularly through the Environmental Services Association Education Trust Report, *Waste Crime: Tackling Britain's Dirty Secret* has been instrumental in shaping our thinking on tackling waste crime and poor performance and I am grateful to all involved.

There have been some important successes, such as the 1,300 illegal waste sites stopped by the Environment Agency in 2012/2013 and we need to continue to do more to root out the illegal operators and the rogue traders that blight our communities and damage legitimate business. We have secured £5 million of additional funding for the Environment Agency to tackle waste crime. This provides a significant opportunity to close down illegal operations, audit sites to look for deliberate mis-description of waste and disrupt the illegal export of waste.

Operational delivery of the Environment Agency's action to tackle the above three issues using the additional £5 million has started. In addition we recognise that more systemic actions are also required to address waste crime and poor performance. I have listened to the industry, local representatives and members of the public and I am pleased to provide further detail on a series of proposals we have developed with the Environment Agency. While government and the Environment Agency will take the lead in further developing and implementing these proposals over the course of the next twelve months. I want us to continue to work together to ensure that regulation is implemented in a robust, fair and proportionate way to protect communities, the environment and the legitimate resource management industry.

Our proposals to tackle waste crime and poor performance are focussed around four key themes.

- Speedy and tough enforcement action
- Greater Intelligence sharing
- Making the polluter pay
- Making better use of regulatory controls

Speedy and tough enforcement action

The Environment Agency needs to adopt the right balance between helping legitimate business to comply on one hand while, on the other, taking appropriate, robust and timely enforcement action to stop those who deliberately or repeatedly flout the rules or pose a significant risk of harm or nuisance. Specific proposals include:

- Increased Environment Agency interventions at poor performing sites with the objective that none remain poor performers for more than 18 months;

- Improved co-ordinated activity by the Environment Agency and HMRC to ensure a complementary, and where appropriate, joined up approach to tackling non-compliance linked to tax evasion;
- Government and the Environment Agency to review the sanctions and penalties available to aid effective enforcement for environmental offences;
- Government and the Environment Agency to review of whether it should be easier to suspend or revoke an environmental permit when significant non-compliance is found and whether opportunities to challenge this (by appeal or judicial review) should be more limited; and

Greater Intelligence sharing

Government, regulators and industry share a common interest in ensuring that those that flout the law can be readily identified and are subject to timely and robust enforcement action. Specific proposals include:

- The Environment Agency to work with industry to review and where possible improve existing arrangements for reporting alleged illegal operations and the gathering and feedback of the use of intelligence;
- Government and Environment Agency to review the potential for improving the collation and access to records of convictions for waste and associated offences to prevent, where possible, past offenders being issued with permits; and
- The Environment Agency to make full use of the Memorandum of Understanding on Information Exchange with HMRC to share information and develop a better understanding of key compliance risks.

Making the polluter pay

Most waste crime is economically motivated and should not be allowed to pay. Operators should make the necessary financial arrangements to meet their obligations as well as being technically competent to manage and treat waste. The true costs of regulating those that operate to poor standards should be recovered through fees and charges. Specific proposals include:

- The Environment Agency to consult during 2014/15 on increased charges for poor performing sites to recover the cost of increased interventions;
- The Environment Agency to monitor the impact of the new Sentencing Council's guidelines on the fines being handed down by the courts in the cases it brings and make available its findings to Government to consider whether there needs to be further guidance; and
- Government and the Environment Agency to consider a new statutory mechanism to allow the Agency to re-charge waste sites for pollution clean-up costs in the same way that water polluters can be re-charged.

Making better use of regulatory controls

It is recognised that much waste crime operates in plain sight and can be tackled to a degree through greater inspection of waste documentation and records. Specific proposals include:

- The Environment Agency to apply greater scrutiny to newly permitted sites within their first year of operation. This will include more detailed and robust checks of the management system to ensure that it is fit for purpose and being fully implemented on site;
- The Environment Agency to introduce revised procedures for assessing operator competence. These procedures will focus on a series of detailed checks including financial, technical and behavioural indicators during permit application, variation and transfer. This will ensure only those that can fulfil their permit obligations receive or retain a permit;
- Government and the Environment Agency to review the case for strengthening the fit and proper person test of applicants for environmental permits, for example by requiring operators to provide better evidence of their technical competence;
- The Environment Agency to integrate checks on site records, waste transfer notes and where appropriate hazardous waste consignment notes into its regular site inspections for targeted waste streams;
- The Environment Agency to ensure that site management systems contain appropriate and specific minimum standards relating to the storage of combustible materials, reducing the impact of amenity issues and ensuring sustained good performance;
- The Environment Agency to carry out a review of the regulation of waste carriers, brokers and dealers and prepare a report and with recommendations on improvements to the regulation of these activities;
- The Environment Agency will aim to publish a plan by April 2015 for fulfilling its duties in respect of carrying out appropriate inspection of waste activities that are exempt from the need for an environmental permit, quantify compliance problems and recommend enhancements to the regulation of these activities;
- Government and the Environment Agency to work with industry and stakeholders to establish how best to notify landowners that actual or proposed waste activities are taking place and to share advice on the potential legal obligations that may arise from leasing land to waste operations; and
- The Environment Agency to provide a mechanism for greater scrutiny of Regulatory Position Statements and Enforcement Position Statements, including a more detailed assessment of the risks posed by activities allowed under these statements.

These proposals reaffirm the importance the government attaches to protecting communities and legitimate business. I am particularly keen that those who commit crime or have entrenched poor standards of operation are subject to speedier and tougher enforcement action. Those who repeatedly operate to poor standards will be open to increased regulatory inspection to secure compliance and they will increasingly pay for this in their fees and charges to the Environment Agency. Better still we propose action to stop rogue operators from getting environmental permits and other authorisations in the first place.

Some of these proposals require continued and potentially increasing co-operation with industry. When you have had a chance to digest the proposals I would welcome the opportunity to meet with you to discuss your views including on how we can take action together.

I see these proposals very much as a first step in the process of bringing about real change that will tackle those who fail to follow the rules, protect and enhance the reputation of all legitimate businesses in the resource industry and ensure the Environment Agency operates as a firm but fair regulator.

I look forward to working with you on this important agenda.

DAN ROGERSON MP