Cyfoeth Naturiol Cymru
Natural Resources Wales

Waste Regulation Branch
Waste and Resource Efficiency Division
Welsh Government
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Dear Sir/Madam

The Department of Environment, Food and Rural Affairs (DEFRA) and, Welsh Government

Part 1 – 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.

Natural Resources Wales welcome the opportunity to provide our views on the above consultation and call for evidence.

We support the need for new and amended legislation to expedite our actions to address poor performance and illegal waste activity. We recognise the need to strive for better and continuous performance at permitted sites and to tackle those who operate outside the current regulatory framework. We have previously highlighted our ideas and proposals for legislative changes to help improve the compliance landscape in Wales within a letter to the Minister in June 2014 and our subsequent workshop with Welsh Government officials. We also highlighted our commitment to addressing issues and concerns following a spate of waste fires, illegal sites and persistent poor performers at permitted sites.

Overall, the performance of the waste sector in Wales is improving. A compliance review in 2014 has shown a decrease in the number of permitted facilities to be in our poorer compliance categories (D, E and F). We support the additional measures proposed in the consultation as we believe this will further improve our ability to regulate poor performers and deal with “rogue” operators. We want to ensure that regulation and our approach supports good business and is not disadvantaged by those intent at avoiding meeting the standards. We recommend that the Government’s response to the call for evidence should focus on those who intentionally operate outside the regulatory framework. This will ensure that it

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becomes harder for those that flout the regulations to commit waste crime, mean that good business is allowed to thrive and supports a green and prosperous economy for Wales.

I trust you will find these comments and recommendations useful. If you have further queries relating to our comments, please contact Julie Tate julie.tate@cyfoethnaturiolcymru.gov.uk

Yours faithfully,

Ceri Davies
Executive Director for Knowledge, Strategy and Planning

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Part 1 - Consultation Questions and Comments

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

Natural Resources Wales support the proposals to amend and clarify powers under the Environmental Permitting (England and Wales) Regulations 2010 (EPR). Our detailed comments on each proposal are below.

A proposal which we strongly believe is worth reconsidering and not contained in this consultation document is the transfer of environmental permitting appeals from the Planning Inspectorate to the Environment Jurisdiction of the General Regulatory Chamber (First Tier Tribunal). The merits of this approach are fully dealt with in the *Macrory report* "*Consistency and Effectiveness, strengthening the new Environmental Tribunal"*. We believe that this would enable a more coherent and consistent approach for EPR appeals as indicated in your consultation issued on Environmental Permitting in February 2013 but then not further enacted.

If there is a Government desire that there is a further increase in focus in Wales on tackling waste crime then there maybe merit in following the approach in England where an additional £5 million from the 2014 Budget was provided to the Environment Agency to tackle waste crime. We note in the consultation the recognition that the additional powers proposed will mean that regulators will incur an additional cost. Whilst we strongly support the proposal to strengthen the legislation, any changes to the regulatory framework would require consideration of the further resources that would be needed.

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

We welcome this proposal as it re-instates a power previously held under Waste Management Licensing Regulations. Permit conditions are largely set with the intention of being protective of the environment and human health. Having extended powers of suspension when an operator fails to comply with a Regulation 36 enforcement notice will enhance our compliance and protective response toolbox. This will allow us to ensure that a site does not deteriorate whilst

undertaking further compliance improvements and/or enforcement action is being considered/prepared for court. It may also reduce the need to view revocation as the next option and also support the case for High Court Intervention where the suspension is also ignored.

We have experienced situations, where operators have breached the conditions of their permit and caused environmental pollution but where the burden of proof to demonstrate ‘‘risk of serious pollution’ has been prohibitive in the avoidance of further environmental damage. The regulatory options currently available remain to serve an enforcement notice and prepare a case for prosecution, the latter can add time delays where further deterioration of a site can occur.

This proposal will increase our work burden to police the suspension but we consider this is as a swift and early intervention to prevent the continuance of offending and to halt the activity and prevent furtherance of environmental damage.

Proposal 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;

We welcome the proposal to clarify the existing powers that allow the inclusion of steps to bring a permitted facility into compliance. This may include the need to prevent further waste entering a site until the non-compliances are resolved e.g. repair of infrastructure on to which waste is placed. It’s important to note that the use of this power in practice would not preclude an operator from continuing to run a waste business. For example, waste could be diverted to other suitably permitted facilities during the site improvements or the operator could remove wastes to sell (as in many cases the value will still hold where it has been segregated, treated and stored appropriately).

Our permits do not currently specify the exact amount that a site can hold at any one time (as this is part of the operator’s Environment Management System as part of appropriate measures to control waste storage on site). The proposal however, supports ensuring that operators understand their obligations under their site management system. We will also be considering in the future whether it would be helpful to specify storage limits and times (for certain wastes types) within the permit to make these requirements clearer for both operator and regulator, and therefore make compliance assessment and enforcement of waste storage issues easier.

Proposal 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;

We support this proposal but also recognise that this power would be exercised as only a last resort and as part of our Enforcement and Prosecution Policy.

For both Proposal B and C we recognise that there would need to be appropriate consideration for any liabilities on the regulator. If a decision by the regulator is proven in the balance of probabilities to have been incorrect. The ability of the operator to be compensated or allow the regulator to exercise this power would need further consideration.

A further point of consideration with this power that needs further clarification is *para 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."*
As well as private dwellings this should also include access to other facilities that may use the same entrance (multi operator sites). Many permitted facilities share the same access and can have complex operational arrangements.

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

We support this proposal. The current situation means that we cannot remove the risk of serious pollution at a waste site once a permit has been revoked or if there is no permit in existence. This then acts as a barrier to revocation and would be particularly useful where the use of our current section 59 powers of the EPR (to require the removal of waste illegal waste deposits) are deemed too lengthy when serious pollution is occurring.

A recent example where we could have drawn on this power was at an illegal waste treatment facility. The site operator had registered several exemptions at the site but the operations were not compliant with the specific exemption criteria, such as waste types and quantities. Despite the exemptions being deregistered the operator continued to accept waste illegally. We successfully prosecuted achieving a custodial sentence and subsequently undertook a Proceeds of Crime Act claim. If we had powers to install physical barriers or lock gates, this may have prevented further waste being deposited on site and the consequential environmental deteriation.

A clear distinction is required from powers designated under Sections 108 & 109 of the Environment Act so they do not 'cross over' and cause confusion.

In addition we would find it helpful if further clarity could be provided on the 'burden of proof' needed the to demonstrate "risk of serious pollution". We recommend that the existing case law is used as basis to provide guidance to regulators and operators.

Proposal E makes an application to the High Court more readily available by removing preconditions.

We support increasing the flexibility in this power. We often require the support of the High Court when Operators have been subject to prosecution but continue to disregard the regulatory requirements placed on their sites. Currently, we are only able to approach the High Court to secure compliance with enforcement, suspension or other notices once we have given due consideration to the use of criminal proceedings and concluded that such proceedings would be ineffectual. The ability to take High Court proceedings where there is serious regulatory non-compliance without having to demonstrate a history of enforcement steps would be a useful tool to avoid time delays where a site is further deteriorating.

Proposal F: widen the regulators' ability to require the removal of waste from land.

We welcome this clarification that all waste can be subject to the powers in section 59 of the Environmental Protection Act 1990. This will be particularly useful where exempt activities have exceeded the prescribed waste limits and requires removal.

However, with the current section 59 notice, the appeal provision inhibits the removal of waste. Under appeal the appellant does not have to remove the waste until the notice is upheld.

We can provide evidence of circumstances where this is the case and the waste remains stored on site posing the same risk to the environment and undermining legitimate business as it did before the notice was issued. We would suggest that consideration is made as to how the appeal process could be expedited to ensure that decisions are made in a timely manner.

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

The proposed powers appear to present little impact on legitimate operators and we would support Welsh Governments conclusions in this regard. The main considerations under the proposed powers are:

Proposals A, B, C - If action were taken against a strategically important site, costs may be incurred as other operators may have to pay more to find alternative onward facilities. This could also result in penalties for waste carriers held within time limited contracts for waste removal. The whole waste chain can be financially disadvantaged including the producer.

With Proposal B there is an element of legitimate business losing out if the timescales for the operator to comply are generous. Previous use of the word “immediately” to prevent more waste entering a site that was full to capacity and causing pollution was criticised by a PINS appeal. It was then recommended that “21 days” was a reasonable timescale to stipulate.

D – If this power is in place then consideration needs to be given as to the penalties that need to be in place to serve as a deterrent and the mechanism and ease for cost recovery. This could deter tipping activities where operators may think the regulator will clean up after them. Cost recovery similar to S.85 Water Resources Act may prove helpful.

E, F –no comment.

A recent exercise looking at the average amount of time spent at bringing D, E and F performers into compliance in 2014 demonstrated that the costs to the regulator far outweigh the cost recovered through the fees and charges process. Some of these proposed powers may go some way to help bring these sites into compliance more quickly which may reduce impact on our resources.

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Part 2 – Call for Evidence - Questions and Comments

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?

One of the key outcomes of the draft Welsh Government strategy, 'A Fly Tipping free Wales', published in 2014, was to ensure that anybody who fly-tips is caught and punished appropriately.

Currently the only options for punishing fly-tippers are to either take a case to court or issue a caution. Enforcement officers across Wales have stated that they would like the option of being able to issue a Fixed Penalty Notice to punish small scale fly-tipping offences.

We believe that the introduction of fixed penalty notices (FPNs) for fly tipping offences will offer an effective new tool to regulatory bodies. Such notices offer an alternative to punishment for cases where it may not be appropriate or cost effective to pursue a formal prosecution case through the court system.

The introduction of FPNs would reduce the administrative burden on regulatory authorities, and should ensure that smaller scale incidents which may currently go unpunished receive an appropriate enforcement response. FPNs should be considered as one of a range of different enforcement responses. We do not believe it would be appropriate to use such notices for all offences however. The ability to deal with larger, more harmful or repeat incidents through the criminal court system should be retained.

It has long been recognised that any punitive policy only works if there is a concerted effort to introduce it in the form of a campaign which is linked to publicity (ref: seatbelt FPN).

There is also a need to ensure that there is adequate waste infrastructure to support the recovery and disposal of small quantities of industrial and commercial waste.

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

These notices will provide a quick, visible and effective way of dealing with certain fly tipping cases, and act as an alternative to prosecution. This approach avoids taking "small" scale offences to the courts and reduces demands on officers

preparing prosecution files. However, this will depend on the processes put in place. They also reduce the numbers of people - both accused and witnesses - who have to attend court and ease the burden on the courts of processing such cases.

Q.3 What are the disadvantages of the use of fixed penalty notices for fly-tipping?
We recommend that FPNs should only be used to deal with specific types of fly tipping, and should not be considered for responding to all fly tipping incidents. Specific guidelines should be drawn up detailing when it is appropriate to use FPNs to ensure that they are proportionate and transparent.

The issuing of a FPN also allows the tipper to avoid a conviction. Whilst this does offer a number of advantages for one-off offenders, it could cause concern that repeat offenders would not be recognised unless there was a robust intelligence sharing system employed by regulatory authorities.

One of the key actions in the draft 'A Fly Tipping Free Wales' strategy is to support the introduction of a shared intelligence database across Wales. This should allow Authorities to share information on fly tipping offences, and identify repeat offenders and problematic waste streams. It is critical that this system is delivered to ensure that FPN's are only used where appropriate.

Other areas that would need consideration with this approach is the level of fine attached to the FPN – it has to cost recover, the need to address failure to pay, officer safety and the speed in which the FPN is issued.

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?
The level of any FPN should proportionate and be set at a level which exceeds the cost of lawful management of the waste deposit plus an additional financial penalty to cover costs and offer appropriate deterrent. It is essential that any notice levy significantly exceeds the cost of lawful management of the waste deposited for two main reasons. If the FPN does not exceed the cost of managing the waste properly, it provides no deterrent to potential tippers. Fly tipping will continue to be seen as a cheaper alternative to appropriate management. Secondly, the FPN must at least recover enough money to ensure that the waste can be removed and managed appropriately.

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

We believe it would be beneficial if the money collected from the FPNs were allocated back to the Regulators, as it would help contribute to the costs associated with officer's time and waste removal. The costs associated with issuing a FPN would be significantly less than to take a prosecution.

Actions to improve landowner awareness of potential liabilities.

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.

This needs to be looked at from two different perspectives:
1. The landowner on whose land permitted activities are carried out and
2. The landowner whose land has been subject to illegal waste activity.

The former should be easier to control with processes put in place that mean a landowner has a level of responsibility for the activities they allow. However, we must remember that it is the "operator" of the permitted facility that has the legal obligation for that activity. Whether a landowner then increases lease costs or requires a "bond" is a matter between the landowner and operator rather than the regulator (otherwise it may confuse any future financial provision requirement).

Illegal waste activity is subject to less control and is where increased awareness and education of both public and private landowners can help. Absent landlords are an issue as disused units and land are often attractive, especially if mixed within active business – illegal activity can occur under the radar. The responsibilities and liabilities on landowners do need improved focus.

The following are some examples where landowners have been left to tackle waste or pollution caused by current or former tenants.

A waste transfer station on local authority owned land, adjacent to a local authority landfill site, was destroyed in a fire and the operator subsequently abandoned the site and went into liquidation. The local authority were left with the costs of removing several thousand tonnes of waste involved in the fire, demolishing the damaged building and emptying and decommissioning the site drainage. Additionally the waste transfer station operator had deposited approximately 15,000 tonnes of soil and rubble on the side of the capped and restored landfill site. Prior to the fire the local authority were not aware that the waste transfer station was operating on its land.

A waste site originally permitted to reprocess fridges, expanded to accept wood wastes, accepting large quantities for biomass export. The business was not prepared for market price fluctuations and the company went into liquidation leaving 10000 tonnes on site. The wood waste caught fire which lasted for 7 days. We successfully prosecuted the company for breaching permit conditions. The landowner was left with a bill for clean up, and subsequently went into administration.

A site where a waste transfer permit was in place but the operator stored waste in excess of their limits in a building. The company went into liquidation and the liquidators declared the permit onerous property, therefore the landowners were left with a building full of waste. Additional mixed waste was added due to the site being unoccupied. The landowners cleared the site at significant cost, to reclaim the site for future non-waste tenants.

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

We agree with the proposed suggestion that an effective mechanism would be for the operator to provide evidence that they have notified their landowner of their intention to carry out an environmental permitting activity and/or evidence from the landowner that they consent to such activity. There would need to be clarity as to "who" the landowner is – many land agents manage land on behalf of landowners. This is already an established practise when determining land spreading deployments where landowner consent is recorded which could be replicated for other permit applications. Further consideration would be required with regard to:

- how landowners could be notified/consulted during the permit application/transfer/variation determination
- how landowners could be made aware of the potential clear up costs from the proposed activities
- what further regulatory costs this may incur to include this process
- what delays may occur during the permit determination process as a consequence of a notification/consultation requirement.
- Whether there is scope to inform a landowner if the site is poorly performing or the operator is prosecuted.

There are existing groups and networks which can be used to educate landowners and can be used to help disseminate messages. In Wales, Fly Tipping Action Wales is establishing a private landowners working group to help implement the actions of the Wales Fly tipping strategy. Whilst this is different from highlighting

liabilities for landowners for abandoned sites, the major landowner groups are represented on the group.

The public sector is also major landowner in Wales, and could perform as an exemplar. Welsh Government could consider providing information on the liabilities for landowners, and set specific 'due diligence' requirements on those organisations they fund.

In general, awareness could be increased through the planning process, regulator and government websites.

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

Checklists could be produced and supported by government and key stakeholders for landowners when
1. Leasing land for permitted activities and
2. To raise awareness and reduce their vulnerability to illegal waste activity.

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

Yes. As highlighted in our response to Q7. Operators used to be required to demonstrate under the Waste Management Licencing Regulations that they had permission to operate from the landowner, this requirement should be reinstated.

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

We would support Government in evaluating the implications of restricting liquidators ability to disclaim a company's sites and environmental licences under the Insolvency Act. The current system appears to allow companies to be relieved of their legal liabilities and for it to be passed onto the landowner. The costs involved in such cases can be extremely high if significant amounts of waste are left on site. Some activities, such as landfill, also represent a liability which can continue over a number of decades and if operators go into liquidation, it will often result in their Financial Provision becoming void. Any costs associated with restoration, remediation or aftercare could then potentially fall upon the public purse.

We are aware of the following examples:

- a waste operation operated by a company whose director had been involved with 11 previously liquidated waste companies – all of which were left to landowner/tax payer to clean up.
- a compost site which was left to the landowner to clean up when the operator liquidated and the permit was disclaimed as 'onerous property'. The landlord was aware of the activities at the site but was not aware of the financial instabilities or compliance issues of the operator.

It important to consider that once a company has gone into liquidation, the site usually stops operating and therefore the permit conditions cannot be used to aid removing any remaining waste. Additionally, if the permit stays in place someone would have to apply to surrender it, which would be unlikely to be a priority for the liquidator.

Operator competence

Overall 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?

We would welcome any legislative change which reinforces the key elements of operator competence consistently across all regulated facilities for waste. The requirements of Operator Competence are currently laid down in the WG/DEFRA Environmental Permitting Core Guidance and we support the consideration of making the requirements more explicit and within legislation for waste management facilities.

a) Technical Competence

The requirement for demonstrating technical competence used to be part of the Waste Management Licensing Regulations, but was not transposed into the EPRs. We support introducing an offence if the required technical competence is not in place as this would emphasise the importance of this requirement to the operator and assist our ability to take enforcement action. We also recommend that further work is undertaken to explore the effectiveness of the practical delivery of Technical Competence as we have concerns that in some instances operators buy in this service with limited influence onsite performance and permit compliance.

We have concerns over the transitional period for obtaining technical competence after the issue of permit. With many operators allowing this requirement to lapse (sometimes because the provision of courses in particular areas is poor). However, if there is a requirement to have Technical Competence and Continued Competence built into legislation then it will be easier to ensure this is element is delivered by operators.

b) Financial Provision

The requirement for financial provision also used to be part of the legislation but was removed from all sites except landfills. We understand that this was on the basis of previous case law and we suggest that this would need re-examination prior to reintroduction. However, we would welcome an amendment to the legislation to require financial provision and suggest that the amount could be specified on type, quantities and location of wastes, and operator/owner performance.

c) Operator performance

We would support Government exploring the costs and benefits of introducing a requirement for publishing of performance information. For example, a scheme similar to the Foods Standards Agency (FSA) Rating Scheme for food premises could be introduced for waste facilities where operators would be required to display their performance. A recent FSA review shows its success at improving and driving standards at food premises.

We also recognise that in addition to amending legislation, the public sector in Wales can also influence Operator Competence by ensuring that contracts (and sub-contracts) that involve waste are not given to those sites that are persistent poor performers – ensuring that good business is rewarded.

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?

Our experience is that the waste industry sector is fundamentally different to other sectors of regulated industry and that the need for these requirements is currently more pressing than for other industries. Primarily, in the waste industry, operators are paid to accept waste and not to create a product, and often there is very little financial incentive to manage it correctly. We welcome the current waste policy in Wales which supports greater source segregation of waste and that seeks to move us away from this culture.

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

Yes we believe it would be appropriate for the operator competence to be re-assessed if there was a change in management. It is a requirement to check relevant convictions at original permit determination stage however any additional checks would warrant further assessment of the potential regulatory burden that this would place on both the Operator and the Regulator. It would need to be clear which elements of the test would require re-assessment. We believe it would serve as a useful focus to the operator that "operator competence" is important.

It is also important to recognise that currently changes to directors and other senior managers do not require any formal "permitting" interface. In that changes can be made without the need for a transfer application. Hence, such a requirement would need to be a regulatory requirement and underpinned with an appropriate permit condition.

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?

When a company changes there is a need for a formal transfer and hence the requirements are re-checked. This is the current situation, we would welcome any proposals to strengthen this requirement.

Q.15 If an operator competence test was 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.

We would welcome any legislative change which reinforces the key elements of operator competence. We would support further work to consider what the most effective mechanism(s) would be.

We would support the introduction of a specific new offence for the failure to maintain operator competence and the extension of existing suspension and revocation powers to breach of the operator competence test.There are existing tools to enforce operator competence in modern permits through the management condition (1.1.1). However, not all permits have this condition.

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Technical Competence

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?

We recommend that any technical competence requirements should apply across the entire permitted waste industry as it avoids confusion for the sector and regulator on application and assessment. However, before the scheme is extended there is a need to ensure that its "merits" are assessed and the status/profile of the Technically Competent Manager (TCM) is increased. We would support the existing schemes effectiveness being assessed on whether it does support operator competence (reflected in operator performance). Without some kind of mechanism which reinforces the role of TCM, or an appropriate enforcement response which gives the role and the associated responsibilities additional credibility, the existing requirements lack strength.

Before any changes are made we also recommend that further assessment of the potential regulatory burden & benefits that this would place on both the Operator and the Regulator.

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?

We recognise that introducing a technical competence requirement to all waste management facilities could pose an additional and potentially disproportionate impact on smaller and/or lower risk facilities. The design of the scheme would need to consider how this could be delivered proportionately against the facilities scale, type and level of risk.

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

If the requirements for TCM were to be strengthened then there may be an impact on the smaller operators, who often 'buy in' a proportion of a TCM's time from a consultancy or other contractor. There may be concerns raised that as the costs are prohibitive to employ a full time TCM, that Regulators would expect their supervisory staff to be competent if they wished to continue to operate. This may therefore require a change to existing requirements to allow easier access to learning materials and assessments.

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.

We would like to see a more effective way of checking the qualifications and continued competence assessments for sites. Currently the regulator relies on requesting information from Operator of a permitted facility or interrogating the relevant schemes databases.

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.

We believe that it would be more effective to give a TCM some binding responsibility and status to ensure that standards are met and maintained on permitted facilities. The TCM should provide the role of the “internal regulator” for the sites they have responsibility for.

We would also support the TCM also being open to enforcement action along with the site directors, unless the TCM can demonstrate he/she has informed the operator of their obligations. There should also be a mechanism by which we can inform the scheme provider if an operator is an entrenched poor performer or is prosecuted.

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.

The facility risk should determine the amount of time, but the percentage of time should be set at a level which is adequate to ensure the TCM can undertake their role effectively. We would suggest that work would need to be undertaken to consider how:

- management time links to operator performance at the site.
- what further guidance would be needed to specify management time and performance.
- the amount of TCM time spent per site and whether there is a limit required of the number of sites covered.

Financial Provision

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?

We support a thorough investigation of the costs and benefits of the introduction of Financial Provision (FP). We anticipate that there are parts of the existing industry that would not be able to afford the initial FP requirements.

The WG/Defra Environmental Permitting Core Guidance currently states that for non-landfill and mining waste facilities that “regulators should only consider financial solvency explicitly in cases they have reason to doubt the financial viability of the activity”. Currently we only assess financial viability as part of a permit determination process, we believe it could be more effective to undertake detailed financial checks for all waste applications and transfers prior to issuing of permits. However this would have implications on the operator and regulator which would need to be considered further and would only addresses the status at time of application and will not deal with an operation that financially fails or a site that has a serious incident e.g. a fire. As indicated previously, often any on-going liabilities are left to landowners or the tax payer.

We believe that any FP scheme should be risk based, possibly using a scheme similar to OPRA, where complexity of the activity and location of the activity all feed into the calculation.

As well as the level of FP required it also important that the effectiveness and associated regulatory burden or benefits of different types of FP is also considered. We are aware of circumstances where there were issues with accessing the funds once the operator had gone into liquidation and often it was found the funds were not maintained. The costs of negotiating and drafting financial guarantees, monitoring compliance and enforcement can be high and these aspects need to be added to the design and administrative costs when setting any value of fund.

Any form of FP would also have to be protected from access by liquidators and protected from Insolvency legislation.

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?

In practical terms it is unclear how FP could be set to cover foreseeable clear up costs, as you would expect permit conditions to address foreseeable pollution.

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?

FP for landfills is currently set to cover the costs of aftercare. It explicitly does not cover the costs of ongoing operational costs during active phase. It may also not fully consider the costs from additional infrastructure following closure. However, existing FP should adequately cover the post closure and aftercare phases and

hence the latter part of this question may need further clarification as to what point in a landfills lifecycle it refers to.

We would support further work to consider the costs and benefits of introducing a wider scope of FP for landfill to mitigate risks.

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?

We would support Welsh government in undertaking further work to identify the different mechanisms (some of which are suggested below) and consider their respective costs and benefits. The need for financial provision is so that there is a mechanism in place to ensure the impacts from serious permit breaches and incidents can be dealt with without financially burdening the tax payer under the 'polluter pays' principle. Examples would be bonds lodged with the environmental regulator, which would require the regulator to have a new financial management system to oversee this and each business would have to be assessed individually.

Another option would be to consider a "decommissioning programme plan" for all waste permitted sites not subject to current FP. Requiring sites to provide to the regulator details of actions to be taken to clear the site of waste if operations ceased including costs and how the operator will finance these. However, this again will introduce a regulatory burden on the operator and will require the regulator to assess these submissions relative to information that is not readily available to them i.e. business accounts.

In context, the numbers of sites that are left abandoned are low compared to the number that continue to operate. So an alternative could be a levy to be introduced for all permitted sites (and this specific levy relates to operator performance scores also – so a site that moves into poor compliance has to contribute more to its standard levy). The levy goes into a fund either managed by the regulator or an independent body nominated by government. This fund could then be used by the regulator to address failed sites. Perhaps a proportion could be returned to the operator at surrender point if the site has maintained good performance and has no issues.

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?

This would depend on the type of FP required. It would also depend on whether mechanisms could be agreed with companies holding multiple permits. A number of larger waste operators have questioned whether the current mechanism of maintaining FP for each individual site could be replaced by a single FP commitment for the wider company. This may offer some benefits for the larger companies by reducing their FP obligations whilst maintaining the same level of protection. Smaller companies would not benefit from the same economies of scale however, which may place them at a financial disadvantage.

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?

The Rehabilitation of Offenders Act 1974 exists to support the rehabilitation into employment of reformed offenders who have stayed on the right side of the law.

Under the Act, following a specified period of time which varies according to the disposal administered or sentence passed, all cautions and convictions (except those resulting in prison sentences of over 30 months) are regarded as 'spent'. As a result the offender is regarded as rehabilitated. This means that it is unlikely that spent convictions could be considered in a permit assessment.

We do however think that consideration should be given to improved cross regulator exchange of information on poor performers across political borders.

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?

We feel it is important to clarify that the quality of an operator's Environment Management System (EMS) is a part of the operator competence assessment. Currently only a summary is required for bespoke permits. Standard Rules Permit applications only require a tick in a box as a declaration that they have an EMS in place, there is no assessment of quality of the EMS at permitting stage. Introducing an assessment would require greater resource upfront for permit applications and pre-issue work for the regulator.

It would improve our ability to regulate these requirements if there was a direct offence for not having an EMS. The standard of the EMS could then be set in government guidance.

In Wales we have recognised schemes e.g. Green Dragon, Green Compass etc. and hence it may be appropriate to consider that an EMS has to be a formal accredited type. However, the impact on smaller sites would need to be considered.

In changes to the TCM role it should become a requirement of the TCM to ensure the EMS remains “fit for purpose” and an audit trail of updates is required to demonstrate the “dynamic” application of an EMS. This will ensure that the document becomes a key working document at the site.

Options to address abandoned or orphaned waste management 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?

We would support Government in considering introducing a scheme that covers the costs of clearing and remediating abandoned or orphaned sites. This scheme would have to be mandatory for it to work and it would also need to be considered whether this fund could be accessed for illegal waste sites.

Another consideration would be whether such a scheme would offer a sufficient disincentive to those who are intent on abandoning sites once they have made their profit. An incentive scheme may help promote this approach that if good performance is sustained over a fixed period of time then the operator gets a proportion back with interest to invest back in their business.

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

We have no firm preference for either FP or a government backed, and we would support further work to explore which mechanism would be the most effective. We believe it would be an unfair burden to have both.

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?

If a scheme was determined to be the most effective mechanism then It should be funded by the operators and independently administered. Welsh Government

should have a key role in drawing funds and assessing sites with input from the regulator.

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?

A number of factors including, but not limited to;

- Previous convictions
- Poor performance
- Location
- Types of activity
- Waste quantities

should be taken into account when considering any amount needed. Whilst it would be desirable to link the level of provision needed to the perceived risk on site, there is a risk that this may lead to a lack of waste infrastructure provision in some locations if the levy were to become too prohibitive.

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?

There have been a number of cases over recent years where the public sector has had to step in to mitigate the impacts of waste abandoned on site:

- A fire in a factory full of abandoned waste tyres burned for a number of weeks and cost almost £2million clean up. In addition to the safety concerns surrounding the fire, the associated smoke raised concerns in the local community with regards impact on the health of residents. A glass recycling company was caught fraudulently issuing Packaging Recycling Notes. The Company was subsequently prosecuted and the Directors received custodial sentences and Proceeds Of Crime Act proceedings. The Company then went into liquidation leaving approximately 70000 tonnes of waste on site. A new company formed from the existing employees is now paying to remove the abandoned waste.

Powers for 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?

We have an example whereby approximately 200 tonnes of waste was tipped on a Site of Special Scientific Interest. The responsible party failed to comply with an enforcement notice served to remove the waste and a prosecution case was taken and remediation sought under Countryside and Wildlife Act. The court rejected our action as company had recently liquidated.

An illegal deposit of 15000 tonnes of waste soils that slipped down a river bank and blocked the watercourse. The offender was prosecuted but defendant pleaded they had no funds 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?

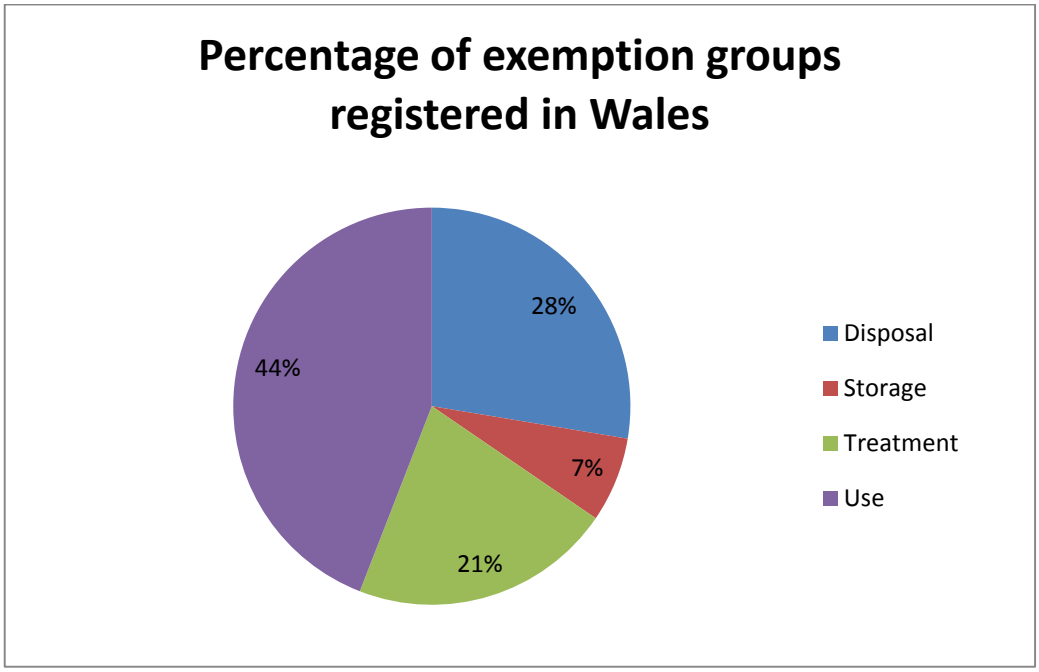
Yes – We believe that the scope of our powers should be widened to recover these as this would bring cost recovery in line with water recharge scheme.

Exemptions from environmental permitting

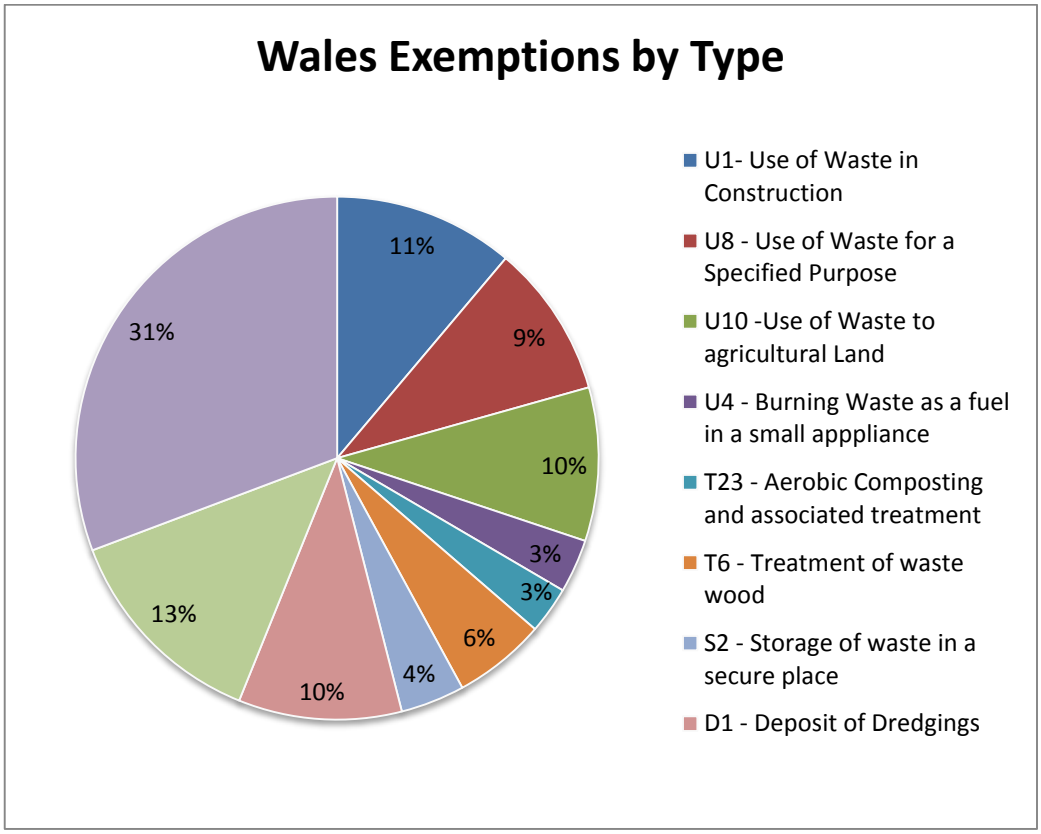
Q.36 Do you have any evidence of the extent of waste crime and poor performance from those operating under registered exemptions from environmental permitting?

Exemptions have been developed to provide a risk-based and proportionate approach to the regulation of waste recovery and disposal operations, complementing the environmental permitting regime. In order to be exempt, an activity has to be able to meet overarching environmental and health objectives.

There are 60 waste exemptions available (not including non-Waste Framework Directive exemptions). There are approximately 74,400 registered exemptions in Wales for the Use, Treatment, Storage and Disposal (U, T,S and D) of waste at any one time. There is no charge for registration and no assessment at registration. The diagram below shows the current split in exemption registrations in Wales.



The key exemptions registered in Wales shown below account for 69% of the total exemptions registered in Wales. U1, U10, U8, D1, and D7 exemptions being the most common registered.



The majority of these exemptions are registered and operated without further issue. For example in Wales, 404 sites that have registered exemption include hospitals, GPs and pharmacies utilise the T28 exemption to denature controlled drugs.

Information from incident reports and intelligence show that the majority of exemptions available do not cause compliance concerns however there is an element of using the exemption registration system as a “veil of legitimacy” for intentional illegal activity to avoid the costs and associated regulatory control of obtaining permits.

One of the reasons for this may be the inclusion in exemptions of wastes that have a low intrinsic value and/or can be easily mis-described e.g. Construction & Demolition waste, wood, tyres etc.

A strategic review of waste exemptions was undertaken by the Environment Agency in 2012.This review included Environment Agency Wales and registrations located within Wales. The issues identified during the review were not unique to Wales and included:

- Concerns over the registration process,
- Quantities of waste and types;
- Issues concentrated on a limited number of exemptions. A campaign in North Wales in 2011/12 assessed 276 U1 exemptions and identified that 14% of the sites were abusing the quantity and /or quality of waste criteria.
- In addition there were examples of concerns over U8 (specifically around the use of unsuitable animal bedding), T11 (lacking focus on onward movement); U10/11 (concerns over the lack of assessment of benefit to land; T6 (quantities are too high) and using S2 to add further capacity.
- There are regulatory challenges from multiple registrations, registrations at permitted sites (and the automatic revocation under Regulation 22), interactions and registration of incompatible exemptions.

The abuse of exemptions should not be allowed to undermine legitimate waste management industry investment and brownfield development. If exemptions were removed, then it would severely undermine the vast majority of legitimate operators who rely on this regulatory framework to facilitate their use, treatment and recovery of waste and resources. It would require each operator to have an environmental permit adding a huge additional burden on Natural Resources Wales as a waste regulator, and likely have a significant negative affect across the industry.

We are aware that Defra have funded the Environment Agency to undertake a compliance review of registered exemptions in England, as the exemption regime is the same for England and Wales, the report would be provide useful evidence for us to consider in Wales.

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?

The registration of exemptions has posed a number of challenges to NRW as a waste regulator. Examples include:
- the use of multiple registrations on a single site (thus resulting in a higher risk than the exemptions intended),
- the registration of exemptions at permitted sites,
- the associated automatic revocation where the exemption registered duplicated an activity permitted on a site (Regulation 22),
- the registration of incompatible exemptions in an attempt to avoid the need for a waste permit, with the appropriate level of control.

We believe that it may be beneficial to review, and where necessary, amend the registration process for certain exempt activities. In Wales, we have revised the registration system such that we look in further detail anyone who registered more than 10. However, there is no scope for the regulator to currently:
1. Prevent the registration of exemptions by those who have relevant offences;
2. Prevent those under investigation from re-registering exemptions (which allows them to continue under an assumption of some form of legality);
3. Place a limit on the number that can be registered at a single place;
4. Require a declaration or proof of landowner permission for these activities to take place.

Some of the above suggestions do not accord with a low risk/lighter touch regulatory approach. Hence we would recommend that the specific exemptions that are giving rise to regulatory issues should be reviewed with the intention of moving these activities under the permitting regime. Leaving a lower quantity threshold exemptions allowing very small scale operations. We would not recommend that “Complex exemptions that are fee-paying are reintroduced. It is preferred that these are subject to permitting.

Specifically we have cases in Wales of illegal operations where the registration of exemptions has been used by an operator to demonstrate a level of perceived legality. The regulator has removed the registrations from the system to support

Duty of Care and prevent producer's etc. taking waste to illegal sites. However, often it is the case that the site will re-register.

The registration of exemptions is a free system, as the regulator we are required to undertake appropriate periodic inspection however we have limited scope to effectively assess compliance, as we are unable to cost-recover.

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?

The previous review identified key exemptions that were more likely to be associated with illegal waste activities. For these exempt activities consideration must be given to:
1. Quantities allowed and waste types should be reviewed for a limited number of exemptions. (Q36 identifies the exemptions that cause the greatest challenge);
2. Amending the legislation to ensure that all regulated facilities cannot register waste exemptions;
3. Provide in the legislation an upper limit of the quantity of exemptions at any one place;
4. The legal framework around the specific exemptions within the regulations should be clarified and drawn out in the document that aligns with the Core Permitting Guidance.