



Comhshaol, Oidhreacht agus Rialtas Áitiúil
Environment, Heritage and Local Government



DRAFT

Circular No WP19/10

23 July 2010

Re: Waste Management (Management of Waste from the Extractive Industries) Regulations 2009 (S.I. No 566 of 2009) –follow up to Information Seminar of 15 April 2010 –draft Guidance Circular

A Chara,

I am directed by the Minister for the Environment, Heritage and Local Government to refer to Circulars WP1/10 of 8 January 2010 and WP10/10 of 16 March 2010 and the seminar on the Regulations held on 15 April 2010.

Feedback has been received on some of the Q and A aspects and the following is being considered as guidance to issue to all local authorities and the EPA.

As agreed at the seminar this document is being circulated in draft form initially so as to facilitate feedback and comments by 23 August 2010 to enable a final version to issue by the end of August 2010. The document attempts to deal with the key questions but if there are gaps or omissions please revert so that we can address them-also note that in one or two areas clarification is given following reconsideration of points made at the seminar.

As you are aware there are three types of facilities covered by these Regulations:

- 1) Category A waste facilities. These are facilities presenting major risk or containing hazardous waste or dangerous substances above a certain threshold. These facilities will require an Extractive Waste Licence from the Environmental Protection Agency.

- 2) Non-hazardous non-inert waste facilities. These facilities contain potentially dangerous waste material. The material is non-hazardous but it is also non-inert and so could represent a risk to the environment. This category would not contain just 'inert and unpolluted soils'. These facilities will, under the Regulations, require a permit from the local authority. The permitting regime is governed by Regulation 23(2).
- 3) Non-polluting inert facilities. These are facilities that contain nothing else but 'inert and unpolluted soils' and pose effectively no environmental risk. These facilities are covered by paragraph 1 of Regulation 2(4), and do not require authorisation by way of licence or permit but have other requirements such as set out in Regulations 4 and 5-such as requirements to prepare a waste management plan.

Local authority responsibilities –non-category A facilities-but also initial assessment of whether the site is a Category A site or not

As indicated at the seminar and in order to clarify further Regulation 9(1) (b)

- 1) Local authorities should by reference to Health Safety or site visits determine the sites which could fall within Category A in their functional area, this should be done in the coming weeks. Besides Annex III of the Directive, detailed criteria by which this assessment may be made are contained in Commission Decision 2009/337/EEC a copy of which is set out in circular WP1/10. Our information is that at most only a handful of such sites exist-if any.
- 2) Once a site is identified as a candidate Category A site the owner should be contacted immediately and told that he needs to carry out a risk assessment by a relevant competent person and send it to the local authority. The Regulations provide that the Risk Assessments should be completed by 30 September 2010 but as these guidelines are behind schedule the deadline is being extended until 30 November 2010.
- 3) The local authority receives the risk assessment and if the site is confirmed as a Category A site and has no permit then the operator should be encouraged to submit a waste licence application immediately to the EPA. In the event that the site is not a Category A facility (i.e. non hazardous, non inert waste facility) and there is no waste permit for the activity the operator should be encouraged to submit a permit application immediately. The new permit category commences on 1 January 2011.

- 4) If the site already has a permit then the local authority should review the permit and bring it into line with the Regulations-the procedures are as set out in the Waste Facility Permit Regulations and no further guidance on this aspect will issue.

Non-polluting inert facilities

Regarding non-category A non-polluting inert waste facilities, and for which local authorities will be responsible—primarily quarries and waste from peat extraction –there are no authorisation requirements but the following general requirements apply:

- The operator of such facilities has the responsibility to ensure that waste from the facility is managed without risk to the environment (Regulation 4 (1))(This is also, of course, a requirement for the non-hazardous non-inert waste facilities). The local authority will be responsible for ensuring that the operator carries out this duty and also for prohibiting uncontrolled dumping of extractive waste-periodic inspections under the RMCEI template will suffice to meet this requirement and plans for 2010 should reflect this
- The operator will be required to draw up a waste management plan for the minimisation, treatment, recovery and disposal of extractive waste-see Regulation 5-as this Regulation prescribes the contents of such plans no further guidance on this issue will follow.

Questions or comments received and proposed answers

- 1) What exactly, in the context of the regulations constitutes extractive waste and a waste facility? There could potentially be a situation where operators, consultants and local authorities take different, legalistic views on the applicability of the regulations, leaving the judiciary as the ultimate arbiter where disputes arise.

Answer

It is necessary to refer to the legal definitions in the Regulations.

“Extractive waste” means waste (-defined in section 4 of the Waste Management Act 1996, as amended which basically means any substance or object which the holder

discards or is required to discard-note that there will be circumstances where the material is not waste and if this is the case then the Regulations will not apply to that material-the intention to discard is the triggering factor) and

“extractive industries” means all establishments and undertakings engaged in surface or underground extraction of mineral resources for commercial purposes, including extraction by drilling boreholes, or treatment of the extracted material.

"waste facility" means any area designated (by the operator) for the accumulation or deposit of extractive waste, whether in a solid or liquid state or in solution or suspension, for the following time-periods:

- (a) no time-period for Category A waste facilities and facilities for waste characterised as hazardous in the waste management plan;
- (b) a period of more than six months for facilities for hazardous waste generated unexpectedly;
- (c) a period of more than one year for facilities for non-hazardous non-inert waste;
- (d) a period of more than three years for facilities for unpolluted soil, non-hazardous prospecting waste, waste resulting from the extraction, treatment and storage of peat and inert waste.

Such facilities are deemed to include any dam or other structure serving to contain, retain, confine or otherwise support such a facility, and also to include, but not be limited to, heaps and ponds, but excluding excavation voids into which waste is replaced, after extraction of the mineral, for rehabilitation and construction purposes;

It is difficult to give guidance at this stage as individual cases will differ-in time it is hoped that cases presented by local authorities or indeed by industry can be used as examples.

One such area requiring consideration are aggregates. If such material is in a completely unmanaged state, (piled in unstable mounds which do not contribute to the environmental management of the site and pose a potential risk to the environment and are in situ for a

period of more than 3 years), these should in all cases be considered waste , whereas conversely if it is managed properly –the above conditions do not exist-then the provisions of the Regulations need not apply to such material. This would not preclude a future classification as waste should the site become poorly managed-and a Plan for the management of such material could be requested in order to fully satisfy the requirements of the directive –its contents could be the same as a waste management plan-but may not require the same level of detail.

A waste management plan –see Regulation 5-will vary from a fairly simple to a more complex depending on the nature of the operation –operators should make their case – burden of proof etc.-as to why a plan is a simple one-degree of risk etc.

The Waste Management Plan must describe techniques for the minimisation, treatment, recovery and disposal of extractive waste, taking account of the principle of sustainable development. The plan must describe how the objectives in Regulation 5.2 are met and include the information required by Regulation 5.3 of the Regulations.

Regulation 10 of the Regulations and one or two other “burden of proof considerations “are suggested as determinants on the waste/non waste question:

- stability of the material
- no pollution of either surface or groundwater
- definite use-material is suitable and appropriate for further use with no further processing required
- restoration plan
- meeting planning requirements

Relevant ECJ jurisprudence in such matters –for example, Case C-194/05-paragraphs 30-44 and which lists the main cases including, for example, Case C-9/00 *Palin Granit* should be referred to “....storage (of surplus materials) at the place of extraction for an indefinite length of time to await possible use for site restoration “can also be relied on. The Agency may be consulted if there are continuing concerns.

- 2) Need to identify what is deemed not to be extractive waste and/or a waste facility. (e.g. clarify if material held for long term future restoration of the quarry is considered waste)

Answer

As answer 1-long term storage in the conditions specified would render the material as non-waste.

- 3) Guidance should also be clear that not all quarries will have a waste facility or an obligation to produce an extractive waste management plan.

Answer

This is accepted subject to the comments on 1 above. In addition, it should be noted that Regulation 5 of the Regulations covers the extraction and waste management stages-the Extractive Waste Management Plan deals with the management of the waste before and during extraction and not just afterwards.

- 4) Guidance should also have regards to the implications of the waste framework directive and should have regard to any new concepts or regulations which are likely to be introduced in transposing this Directive into Irish Law.

Answer

This is not required-in due course that directive will be transposed and its own set of guidance issued. Article (2)(2)(d) of the waste framework directive excludes waste covered by the "Mining waste directive". However, for the purposes of the mining waste directive, "waste" is as defined in the

Waste Framework directive and the same principles and case law, in determining whether a material is waste or not, will , of course , apply.

- 5) Do all quarry operators need to do extractive waste management plans? i.e. including those that don't have any extractive waste site per se. If the material is going to be re-

used for restoration/backfill of void, is it “waste” at all. Regulation 5 is rather silent on this, it does not link Waste Management plans to “extractive waste” very clearly. Regulation 5 links better to “operator”. Definition of operation is person responsible for “extractive waste”. Hence if there is no “extractive waste” then there may not be any “operation” and regulation 5 waste management plans are not needed.

Answer

This is a similar question to question 4 and depends on the question of waste-if the Regulations apply to the quarry (and they may not apply in every case), then an extractive waste management plan is required.

The management of extractive waste, includes the temporary storage of extractive waste as well as the operational and the after-closure phases-all quarry operators should, then, have extractive waste management plans. See also the answer to questions 1 and 2. Regulation 10 talks about backfill of voids etc. The EPA will provide some guidance on this matter in the near future.

- 6) Registration – Once registered will a registration certificate need to issue and if so can a certificate with condition issue to cover environmental aspects i.e. Waste management on site groundwater and surface water protection measures etc.

Answer

Registration is an on line process and no certification will issue.

- 7) When does the material stored on site become a waste and how do you determine if it is a waste after a specified time period. What would you cover in the waste management plans.

Answer

As 1 above.

8) Fees to register – Will the same system apply i.e. using Local Government Act specified fees for registration and then include conditions in registrations certificate to cover LA inspections etc.

Answer

There are no fees for registration.

9) Definition of a Waste Facility, page 9 and Regulation 9 “...means any area designated” by whom? **(Answer-the operator)**

The period of 3 years, following which unpolluted soil may be designated a waste facility, is very restrictive and impractical, in that material to be used for backfilling/restoration/landscaping may have to be stored for decades – certainly more than 3 years in many cases.

Answer

The time period is in the directive and cannot be re-negotiated-if of course the material is not classified as waste then it does not apply.

10) Are perimeter screening mounds excluded from designation. Materials potentially classed as waste are routinely used to screen extractive operations over the entire life of the development. If the regulations are silent on this issue perhaps the EPA could provide some clarification.

Answer

Where the material used to construct berms originates on site and that there is a definite need for such berms then it could be considered as not a waste as long as there is no risk to the environment.

11) Clarification sought on whether or not operators falling in Category A are only required to draw up an Extractive Waste Management Plan.

12) Answer

The requirement falls to all operators of extraction facilities whether Cat A or not.

13) Regulation 9, P18; (1) (b); implies that all operators must complete a risk assessment by end September of this year in order to classify a waste facility, please clarify.

Answer

While this a requirement of the Regulations, as indicated at the seminar and in order to clarify further Regulation 9(1) (b) , local authorities should firstly examine sites to determine if they are likely to fall into a Category A classification-and then only ask the operator to do the Risk Assessment-otherwise a lot of costly and unnecessary risk assessments will be undertaken by operators. Records of such site visits should be maintained. In addition, as stated on page 2 of these guidelines , under the local authorities responsibilities section, this deadline is now being extended until 30 November 2010.

14) Regulation 12-the duration of after-care responsibility is a matter for determination by the competent authority [subsection(3)] This is causing difficulties for some closed metal mines in that the agency appears to be seeking such care to be provided in perpetuity. This is unreasonable and impractical.

Answer

It should not be an issue for quarries. Requirements regarding closure and aftercare of mines are set out in EPA mine licences. Regarding closed metal mines, in many cases the person responsible are not clearly known. However, the regulations address mainly the extractive waste facility rather than the extraction facility.

15) Regulation 19. Regarding Financial Guarantee, it would be helpful if the EPA could make a statement that Bonds are an acceptable form of financial guarantee. The

payment of cash Bonds for extractive sites that potentially have a long duration is an unacceptable burden on operators.

Answer

Requirements regarding EPA licensed facilities are as set out in EPA licences. This matter is currently under review due to the Environmental Liabilities Directive. New guidance will emerge and conditions may change in the future. Financial guarantees regarding permitted sites will be a matter for the relevant Local Authorities-no further guidance is envisaged.

16)Regulation 19 -Public access to the register should be available for all non-commercial data. It is not clear whether registration extends to both quarries and waste facilities.

Answer

The Regulations do not require to make such information available nor is it currently planned to make it available. The data belongs to the Local Authorities and it is up to them to make it available if they wish. This is a low priority matter at this stage. In addition, the Regulations require registration of the “extractive sites” only (quarries, mines and peat extraction , for example), but the Online Register has been designed to capture information on the associated waste facilities too.

17)Regulation 22(6) It is noted that the Agency shall prepare guidance to assist Local Authorities. The IMDS would be pleased to assist in any such exercise if required.

Answer

The requirement of the regulations is to register the extraction facilities only but it has been designed to also capture information on location where the extractive waste is being

managed-see also the answer to question 15. Planning guidelines 11 on Quarries and Ancillary activities should also be noted.

Further enquiries about this circular may be made to Mr Gerry Byrne –at 018882600 and mail at gerry.byrne@environ.ie

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A handwritten signature in black ink that reads "Pat Fenton". The signature is written in a cursive style with a large initial 'P' and a long horizontal line extending from the end of the name.

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