

# Crimestoppers

As part of the CIWM's Fighting Waste Crime campaign, **John Galvin MBE** provides the second of a two-part perspective on the problem of waste crime and entrenched poor performance and how we should look to move from enforcement to crime prevention.



**P**reventing waste crime rather than tackling it through enforcement after the event has to be the end goal if local communities are to have confidence in the industry and the regulator. This will require a steady shift towards increased compliance effort of the regulated community through inspection, audits of records and other data, and other forms of intervention to reduce the opportunity for and impact of non-compliance.

## The Polluter Should Pay

IN ACCORDANCE with the polluter pays principle, the cost of waste management should be borne by those who produce waste, or hold it. In this country we have long used this as justification for a system of fees and charges of waste operators.

The regulator is under a duty to carry out appropriate periodic inspections of hazardous waste producers, carriers, brokers and dealers and permitted and exempt site operators.<sup>1</sup> Appropriate inspection should equate to whatever level of inspection or other compliance effort is needed to secure the environmental and health objectives that underpin waste regulation.

Increasing the fees and charges of permitted operators, particularly the poorly performing ones, to recover the cost of increased scrutiny and compliance, would therefore seem eminently sensible. Under the Waste Crime Action Plan (WCAP) the Environment Agency (EA) consulted on during 2014/15 a significant hike in charges for poorly performing sites, but the proposals were not taken forward in the Fees & Charges Scheme.<sup>2,3</sup> Instead the EA is preparing a longer-term charging strategy for consultation later this year and it will be of considerable interest to see if the WCAP action is included in these proposals and, if so, whether it receives support from industry and Government.

The increased funding for the EA to tackle waste crime assumes that every pound invested will lead to the return to the Exchequer in the form of increased tax revenue. Modelling done for ESA Education Trust estimated that each pound spent on enforcement is likely to yield a return of as much as £5.60 to the benefit of government, industry and wider society.<sup>4</sup>

Because the regulator's enforcement costs (as opposed to compliance inspection) cannot be recovered through fees and charges, enforcement and other unfunded burdens is largely paid for through government grant-in-aid to the regulator. Therefore the potential savings for government from a switch to compliance-led models with cost recovery is evident. This would work for permitted facilities but there are some areas of regulation not subject to fees and charges, such as exempt waste operations and others where the fees only recover the cost of registration and not periodic inspection, such as carriers, brokers and dealers. What is therefore needed is a fundamental review of how the regulator is funded to fulfil its statutory duties and how it can recover its costs from the waste management operators in accordance with the polluter pays principle.

Annual charges for permitted sites are linked to the Opra banding allocated according to a site's compliance record. Increasing charges for operators will clearly lead to closer scrutiny of which band a site is in and how the banding is arrived at.<sup>5</sup> The principles of Opra are laudable and well-established, but the system will need to continually develop to better differentiate between those who are trying to comply and those that aren't.

## Permitting Requirements

THERE ARE other things that can be done to reduce the likelihood and impact of criminal activity. The WCAP sets out that the EA will integrate checks on site records, Duty of



Care information and, where appropriate, hazardous waste consignment notes into its regular inspections for targeted waste streams. The WCAP also sought greater scrutiny of (particularly new) operators' site management plans to ensure they are fit for purpose and being fully implemented. These are compliance costs and so should also be recovered through fees and charges.

Requiring operators to take measures to prevent waste fires has not been a feature of some environmental permits for combustible wastes and should sit equally alongside mitigation of other risks such as odour, noise and dust so that the conditions or standard rules in combination with site management plans clearly set out the amount of waste that can be stored at any time and the maximum storage period. It appears this clarity has been a casualty of the standard rules approach to permitting but the EA has recently consulted to reverse that trend. The desire of operators to store wastes to operate in markets cannot be open ended if it poses an unacceptable risk or fire or other harm.

## Operator Competence

OPERATOR COMPETENCE includes technical competence, financial provision and past operator performance, and better use of these provisions could help considerably in keeping the rogue operator out. One area where there is less than ideal available data concerns the technical competence of permitted waste operators. If there is a weak correlation between poor performance and operator competence this might suggest there is room for improvement in the standards of the approved schemes of technical competence themselves.<sup>6</sup>

Scrutiny of applications for permits, particularly around operator competence, can be increased under existing legislation. However, the Government has already indicated its commitment to better enshrine the principle of operator competence in the legislation, so any toughening of the approach in that direction now will likely be welcomed by most.<sup>7</sup> Where poor performers have previously demonstrated they have competent management but that turns out not to be the case, perhaps we should be looking at removing or suspending their technically competent status ability to operate?

It remains a major frustration that operators can abandon sites, go into liquidation and the liquidator can disclaim the permit as onerous property, thus circumventing the surrender procedures, not to mention the cost of clear up, in some cases only for those responsible to resurface under another company name. Insolvency law seems unlikely to change, so instead we should look at alternative routes to prevent rogue directors from being able to operate as well as seeking to recover from them the costs incurred by the public purse.

Possibly the most difficult aspect of operator competence is whether the operator has the financial wherewithal to meet the obligations arising from the permit. While financial provision by way of a bond – or similar – is mandatory for landfill, it is rare for a permit to be refused for other types of activity, based on a limited financial health check. However, mandatory financial provision for operators of all types of waste would be a draconian step and one which might impact disproportionately on smaller companies and tie up funds of legitimate business. There is however, a need to protect the



*Are you certain your waste carrier is doing the right thing?*

public from abandoned and orphaned sites, so a combination of options around financial provision and mandatory insurance to cover site clearance, for example, is needed.

## Regulatory Reforms

I BELIEVE most of the benefit of tackling waste crime will come through better compliance and enforcement of the existing legislation rather than new regulation. However, in the longer term regulatory reform in some areas will be needed if we are to prevent crime.

Perhaps there is a need to rethink our whole approach to waste management and regulation so that payment for the service is linked to evidence of appropriate handling in accordance with the waste hierarchy?

The Duty of Care applies to all those producing or handling waste, but 20-odd years after its introduction it is still poorly complied with by many and that is exploited by unscrupulous operators.

There are two principal reasons why there is poor knowledge and compliance with the Duty of Care. Firstly there are 5.4m private businesses in the UK that are subject to it, so it is difficult to reach out to more than a fraction of them.<sup>8</sup> Secondly the Duty of Care was introduced as a self-enforcing system with no duty on the regulator to police it. This suggests that while it still needs to be shared between all the parties in the waste chain, perhaps we should be demanding more from those that collect and deal with waste – a much smaller population size?

Mandatory use of electronic Duty of Care (Edoc) is being promulgated by some as the way to ensure all businesses pass on their waste to authorised persons and provide an accurate description of it. An alternative is to impose a duty on the regulators (and local authorities which also have

powers) to police compliance of all business. I include myself among the many who think that local authorities should owe a heightened Duty of Care in respect of the wastes they collect or dispose of. If they oversaw the final recovery or disposal of all the waste they handled, the opportunities for waste crime would be considerably reduced.

An area that is certainly ripe for regulatory reform is the registration of carriers, brokers and dealers. With the increase in international waste movements, all exporters of waste should either be site operators or else are acting as brokers or dealers. This is an area where rigorous inspection and auditing of brokers and dealers records is needed, if not a complete overhaul of the registration process linked to the introduction of rigorous requirements such as operator competence.

By contrast there are over 120,000 registered waste carriers, ranging from small builders to major waste companies that class as upper tier carriers. The registration process is the same for all and does not require any operator competence assessment other than a declaration of relevant offences. While the EA has revoked the registration of some waste carriers that have been convicted of relevant environmental offences, carrier registration has been regarded by some observers as a "licence to commit crime". The number of registered upper-tier carriers is being slowly supplemented by the registration of lower tier carriers as a result of EU case-law that requires anyone who normally and regularly transports waste to register.<sup>9</sup> This would potentially increase the carrier population size by up to 440,000, with arguably little or no environmental benefit.

The Government sought a derogation from the need for

some businesses to register as waste carriers. The European Commission has acknowledged this and the proposed revision to the Waste Framework Directive contains a draft derogation from registration for those business handling less than 20 tonnes of non-hazardous waste a year.<sup>10</sup> It would be better if the derogation was couched in terms of who could benefit, ie those carrying their own waste, rather than an arbitrary amount that would be nigh on possible to enforce. However, it

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provides a basis for further negotiation.

The EA is carrying out a review of the registration of carriers, brokers and dealers under the WCAP and it will be important to closely examine any recommendations it has for reform of the registration system and compliance.

Under the WCAP the Environment Agency is preparing a plan for fulfilling its duties in respect of carrying out appropriate periodic inspection, quantify compliance problems and recommend enhancements to the regulation of these activities. My own view is that there is nothing intrinsically wrong with the majority of the current suite of exemptions, although some higher risk ones, such as anaerobic digestion, ought to be carried out under an environmental permit.

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The number of operators registered for exempt waste operations is broadly similar to the number of registered carriers, but the number of individual activities and locations covered by these registrations is considerably larger. If the current EU requirement for registration remains unchanged in a revised Waste Framework Directive, then we may need to either tighten up controls on some of the activities currently exempt or else limit the scope of the exemptions further. My inclination is towards the latter, to keep registration simple and, if possible, restrict those eligible to be exempt to not-for-profit and community groups, rather than those who are clearly part of the waste management industry or are clearly benefiting in some other way. But this may not be possible; the alternative of greater scrutiny of the registration of exempt waste operations will come at cost and lead to calls to introduce charging for registration, which seems politically unlikely. However, if the revised Waste Framework Directive were to introduce a derogation for the registration of exempt waste operations for some such as voluntary organisations, charities and those carrying out purely innocuous operations, then we could better justify increasing the controls on those that remain under exemptions, or make a stronger case for doing away with exemptions in favour of permits.

This paper has not looked at crime prevention in the context of fly-tipping or regulatory reforms of producer responsibility, transfrontier shipment and hazardous waste legislation. There are other areas we should be thinking about, such as mandating minimum standards of treatment processes and the materials that derive from them if we are to properly embrace the waste hierarchy and turn waste into a resource.

The MRF Regulations were a first move in that direction, and policing treatment standards and outputs would change the role of the regulator but could lead to real improvement.<sup>11</sup>

We can shortly anticipate the outcome of the latest Cutting Red Tape review of waste. As with charging, there is a balance to be struck between reducing unnecessary administrative and other burdens with an acceptance that proportionate, fair and firm regulation is good for business and good for the environment. We will make a better fist of this if we are evidence-led and there is improved open dialogue between Government, the regulator and the regulated industry, rather than following the mantra of the day, whatever that may be.

It will be virtually impossible to stop waste crime, however. We can keep the abuses down to a tolerable level by better understanding and tracking markets and practices in the "real" world, in the knowledge that criminals will find the line of least resistance before we do. This, coupled with good monitoring and the use of intelligence, should allow us to respond to prevent, rather than be saddled with its aftermath.

We must also continually remind ourselves what we want to achieve from regulation. To my mind, regulation does not seek to bring about innovation or, necessarily, be seen as business friendly. Regulation is the way we set minimum standards below which we will not tolerate and by doing so provides confidence for those who wish to innovate and invest, and affords them sufficient protection to allow this to happen. ■

*References for this article are available on request*

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