

The CIWM is the professional body which represents around 6,500 waste and resource management professionals, predominantly in the UK but also overseas. The CIWM sets the professional standards for individuals working in the waste management sector and has various grades of membership determined by education, qualification and experience.

Landfill Tax: Extending the scope to illegal disposals

CIWM consulted its membership, wider stakeholders and particularly the CIWM's Waste Regulation Special Interest Group who helped form this response.

Q1) - Are you:

- a) a business**
- b) an organisation - if so, please provide details (e.g. trade body)*
- c) an individual*

CIWM is an organisation - the chartered professional body for the resource and waste management sector.

Q2) - If you are in business, where is your business established?

- d) England or Northern Ireland*
- e) Scotland or Wales*
- f) Located elsewhere*

Q3) - If you are in business, how many staff do you employ across the UK?

- e) Fewer than 10*
- f) 10 - 100*
- g) 101 - 500*
- h) More than 500*

Q4) - Are you aware of any circumstances where it would be difficult to distinguish between a site that is illegally operating without a permit or licence, and a site that is exempt?

CIWM is aware that there are insufficient resources for the Environment Agency (EA) to actively monitor waste management activities exempted from environmental permitting. The EA have insufficient resources to effectively monitor permitted waste sites, and also are not necessarily proactive in taking immediate and definitive action when breaches of permitting restrictions become apparent.

Confirmation as to whether a site where waste activities are undertaken:

- a) qualifies as a "non-Waste Framework Directive (NWF) Exemption" and does not need to be registered, i.e.:



- NWFD 2 temporary storage at the place of production
 - NWFD 3 temporary storage of waste at a place controlled by the producer
 - NWFD 4 temporary storage at a collection point
- b) the site has been registered for another activity e.g. registered for waste treatment but not waste disposal
- c) where the 3 year time limit for a registration has expired.

This, along with checking that qualifying materials are as described and the use of qualifying materials status to avoid landfill tax, will prove difficult under the current budget constraints of the regulators.

The Environment Agency issue low risk position and regulatory position statements for certain situations and depending on whether such a position statement is still valid would have to be checked. CIWM believes this is the time for the use of low risk and regulatory position statements to be reviewed.

There is within the Waste Framework Directive the proviso that any storage of waste prior to disposal for a period of one year or longer is subject to the Landfill Directive.

CIWM is aware of thoughts along the lines of reducing the number, size and potentially the scope of activities that would be eligible for exemption under the Environmental Permitting regime and look forward to the forthcoming consultation from Defra regarding waste crime and persistent poor performance.

As exemptions are likely to continue in some format in the future CIWM suggests strengthening the current waste duty of care regime not only for exempt sites but for all waste sites. If registration of the exempt site included mandatory data collection (edoc is one such system) this would provide advantageous regulatory and strategic data of waste flows through the site – monitoring the scale and type of activity.

CIWM anticipates that it will be HMRC who takes the lead in investigation and enforcement activity relating to the avoidance of landfill tax, along with a significant advice and support role for the Environment Agency (EA). Defra and HMRC will need to make sure that the EA has the necessary resources to enable proportionate but rigorous enforcement.

It is likely that some small operations would meet the generic rules of an exemption save for the fact that the operator had failed to register the exemption. These operations are technically unlawful and therefore liable to the extended tax, even though there was no intention of wrongdoing. Applying a tax liability to the deposit for those that fail to register may be a disproportionate response and could well draw criticism.

Q5) - Do you agree the above definition would provide a good starting point for HMRC? Can you suggest any other hallmarks that should be included?

CIWM believes this is a good starting point although there are elements of potential subjectivity – multiple loads, organised manner and run as a business – which would be open to interpretation. Consideration needs to be taken of innocent landowners or landowners who discover activities and take all reasonable steps to prevent/discourage illegal waste deposits.



CIWM would like to bring to HMRC's attention other routes leading to waste being illegally deposited and subsequent landfill tax avoided:

- a) waste abandoned in transit e.g. at a port and storage is considered incidental to that transport and is therefore not a licensable activity
- b) where waste is originally deposited lawfully e.g. under a permit or exemption but is subsequently abandoned in quantities above or below the permitted maximum.
- c) waste entering a permitted site for treatment but not treated and sent for landfill without paying landfill tax.
- d) waste being classified as qualifying material when it is not.

CIWM suggests that HMRC works with those representing the sector – ESA, CIWM, and R&WUK to strengthen this definition to cover not only deposits made where the types and quantities of waste are not in accordance with any permit or exemption but to ensure those that are currently operating legally do not subsequently become illegal. Landowners should not be discouraged from leasing land for legitimate operations.

CIWM is aware of discussions around the use of terms like illegal waste site and dumping and differentiation from fly-tipping. Dumping is used as a demarcation in the attempt to separate it from fly-tipping – fly-tipping being seen as a one-off 'incident'. However, fly-tipping can be organised and consist of multiple loads (baled or loose). Fly-tipping is often seen as a way to avoid landfill tax and can lead to an illegal waste site when such multiple loads accumulate, sometimes on land owned by a culpable party.

One consequence might be a perpetrator claims the waste was dumped spontaneously and he is not 'operating' as a business – are they dealt with under fly-tipping prosecution or HMRC powers for landfill tax?

The Consultation is concerned with 'sites operating without the appropriate environmental licence or permit' so it is the concept of the 'site' and the 'operator' that need addressing clearly rather than the nature of the deposit. That should then make the identification of a culpable operator easier and exclude innocent landowners/occupiers.

HMRC's objectives will not be achieved if landowners who would not be prosecuted by the EA had to pay landfill tax for in-situ waste. Also, where landowners become aware after waste has been deposited and take all reasonable steps to prevent harm to the environment and further deposits.

Q6) - What do you think about the proposal to tax all of the material deposited at an illegal waste site, regardless of whether the person making the deposit intended to dispose of that material?

Intent to dispose (by the illegal site operator) should not be a test for determining tax liability. Intent is very difficult to prove.

The punitive element of the tax is explained in the consultation document as "a penalty of up to 100% of the tax due plus interest" on top of recovery of the unpaid tax. That seems appropriate. However there is still the calculation of the "tax due". This will depend on:

- estimation and / or weighing of the waste (see Q15)
- characterisation of the waste as standard / lower rate (see Q16)



- whether the illegal deposit is to be directly landfilled or whether it is suitable for a waste treatment operation where only part of the process output should be subject to landfill tax

Would calculation of the tax that should be paid in this way reduce the deterrent effect of the proposals? If HMRC includes full rate tax for all of the waste present, there could be accusations of excessive taxation, depending on the actual fate of the waste removed.

CIWM is awaiting the further consultation by Defra on waste crime and persistent poor performance later this year. CIWM is aware there is likely to be consideration of changes relating to financial provision for permitted waste activities – along the lines of calculation of the provision including full site clearance and remediation – including any landfill tax liability. It is important that any additional tax liability should be for wastes deposited beyond the limit specified, to avoid double taxation (see Q8).

Q7) - Are there any risks or wider consequences we should be aware of with this "deemed disposal" approach?

Legal and compliant permitted waste transfer operations represent the very model of sustainable working in the UK. Large landowners need to be encouraged to allow their land to be used for these purposes, especially where there is easy and permissible access to transportation networks and suitable infrastructure linkages. It could be supposed that where land owners are made liable for landfill tax against the actions of waste criminals and less reputable waste transfer operators, particularly in light of the legacy of non-permitted waste storage (which can date back literally decades), these same landowners will be dissuaded from entering into agreements where their land can be used specifically for these purposes. Financial liability for the removal of waste already potentially runs into millions of pounds of liability. Landfill tax on non-permitted waste would contribute to a full embargo on waste transfer operators, compliant or not, from using third party land for these activities, which would potentially cause increased levels of fly-tipping; illegal dumping and non-permitted waste storage.

Need to ensure that innocent landowners are not caught, this makes the definition of the 'operator' of the illegal waste site very important to get right.

CIWM is aware of situations where it is very likely the 'operator' can't be found or more than one person falls within the definition of an operator? Who pays then? Another scenario is where the original perpetrator is not found but the landowner is then aware of the deposit in circumstances where there is a site and a decision is taken that retention in situ is the best environmental option?

Q8) - What are your views on how HMRC should deal with the possibility of double taxation?

CIWM strongly believes that double taxation should be avoided. HMRC should ensure that the definition of operator in the context of an illegal waste site does not include an innocent landowner/occupier (which should include an owner/occupier who takes all reasonable steps to prevent illegal waste deposits and to minimise pollution once aware).



Q9) - Do you think a credit system would be workable?

Case specific credit arrangements will be needed between HMRC and the receiving site(s) and this will need to take account of delivery direct to a landfill disposal site or clearance of illegal deposits to treatment facilities and subsequent disposal of non-recyclable wastes.

Care should be taken to recognise any difference between estimated waste tonnage at the illegal site and actual waste tonnages as weighed-in at the receiving site (see Q11).

Where landfill tax on an illegal waste site is paid by a landowner/occupier who was not involved in the illegal waste deposit in the first instance then they should be able to get credit for it.

Q10) - What evidence could be produced that the material had been taxed under the illegal waste provisions?

CIWM believes such evidence can only be issued by HMRC and acts in some way like a receipt. Prosecution and tax recovery could be based on an estimate of the types and quantities of wastes illegally deposited, and this could differ from actual tonnage of waste weighed-in at the receiving site.

Q11) - Do you think a credit system could be exploited? If so, how?

Yes. Waste tonnage could be over-reported at the receiving site. Any tax credit scheme would have to be agreed and monitored by HMRC including mandatory use of a suitable electronic duty of care recording system such as edoc or the operator's equivalent of that system.

There will be a powerful driver for carriers removing taxable waste to add other waste loads (collected from elsewhere) to it in the knowledge the tax liability lies elsewhere. For this reason, any such credit system will need rigorous implementation if it is adopted.

Q12) - We are interested in your views on whether it would be appropriate to extend the liability to people other than the illegal waste site controller?

CIWM understands the thinking behind this question but the intent to avoid landfill tax might not go beyond the person committing the illegal disposal. Duty of Care is there as a self-regulating regime and maybe there are sufficient reasons to consider making this a mandatory requirement for all parties. All movements of waste are mandated but the checking and recording of such is not co-ordinated or regulated. Edoc would allow for all current data systems to be co-ordinated and gathered into one point – allowing restricted access to regulators, like Environment Agency and HMRC to check waste movements and investigate any leaks or losses from the system.

The courts are there to determine blame and ascertain guilt and in doing so penalise with fines and proceeds of crime action. Waste producers should ensure they have the



legal paperwork to show their waste was deposited, without this it should leave them open to penalty, including the risk of landfill tax avoidance. After successful prosecution CIWM believes HMRC has a clearer indication as to who could be brought to book in relation to landfill tax avoidance.

Q13) - Other than the illegal waste site controller, who in the supply chain do you think should be liable for the Landfill Tax? How far up the supply chain do you think liability should be extended?

CIWM believes this can only be achieved if there is irrefutable evidence that such parties were involved. The waste producer may have been charged landfill tax but the material subsequently did not make it to a legal site. Yes, they should have checked under Duty of Care where the material went but they did not intend to avoid paying landfill tax.

Subject to prevention of double recovery of the tax the liability should be extendable to any party who can be demonstrated to have benefitted from tax avoidance, through breaches of duty of care, including waste producers, carriers and brokers / dealers. CIWM suggests HMRC works with the waste management sector to confirm the weak points.

In this context, householders who do not hire a legitimate business (skip, van clearance) and give their waste to those that just turn up at the door - to avoid paying the legitimate price because it is too expensive due to the landfill tax – should be included in such liability.

Q14) - We are interested in your views on due diligence, and whether the examples above are representative of the types of steps that a responsible person should take. Do you think due diligence provisions could be strengthened without adding unnecessary burdens and/or any present opportunities that could be exploited?

CIWM agrees that using Duty of Care and evidencing those actions is a good way to show compliance. Duty of Care was seen as a burden in the last Red Tape Challenge – with which CIWM totally disagreed - so adding more requirements might not be appreciated by some, regardless of the benefits in protecting their reputation and saving them from prosecution.

If checking that landfill tax is charged/chargeable becomes a requirement (which makes sense), legislative changes will need to be made to Duty of Care along with updates to the Duty of Care guidance.

A further option would be creation and use of a publicly accessible central register of permitted facilities so that the person using that facility can satisfy themselves that there is a permit and that it is authorised to take their waste. The current system gives a list of permitted sites with insufficient details and is not always reliably up-to-date.



The ease to which businesses/people can register as a carrier/broker is perhaps something that should be challenged. Defra have been working with the Environment Agency on improvements to the carrier/broker/dealer system but there have been barriers/hurdles along the way.

Defra's previous consultation on waste crime addressed the issue of 'fit and proper' person and CIWM awaits the proposed consultation on waste crime and poor performance to see if this is followed up in detail.

Q15) - Can you provide any practical suggestions for how HMRC could estimate the weight of material at illegal waste sites?

The Environment Agency has been working on measurement techniques and there are conversion factors that are recognised by the waste management sector. The use of survey and analysis by suitably qualified and independent experts (e.g. quantity surveyor) is also acceptable. In some cases there may be reasonably accurate records of waste inputs to use too.

Q16) - Do you agree that it would be reasonable to apply the standard rate of Landfill Tax to all material disposed of at an illegal waste site? If not, can you suggest a method for determining the standard and lower rated materials?

Yes. CIWM fully understands the arguments put forward in the consultation paper and suggests that waste under the qualifying order can only be taxed as standard rate **as it is not from its original source**. Inert would have to be characterised in accordance with Landfill Directive requirements.

Q17) - Do you agree that it would be appropriate to extend the penalty provisions to illegal waste sites?

Yes, so long as this does not inhibit EA or other regulators also using the Proceeds of Crime Act to pursue criminality. (The example in the paper is the reason why some persons will take the risk of illegal deposit and why applying this provision with back tax and penalties could be a very useful deterrent.) CIWM again emphasis the need to protect the fully innocent landowner.

Q18) - Do you think that the above mix of civil and criminal sanctions presents a strong deterrent to tackling the risk of tax loss at illegal waste sites? If not, can you suggest any other ways HMRC could strengthen its response?

Yes – the deterrent effect is enhanced by including provisions for both civil and criminal sanctions.

HMRC/EA must be wary of the double jeopardy issue but the threat of a custodial sentence, seizure of assets and a significant tax fine should have an impact.



Q19) - While it is too early to assess the impact of these approaches, we would be interested in whether there are any aspects of the Scottish and Welsh approaches that you think we should consider further?

Consideration should be given to the approach that Wales has taken, in setting a higher tax for material found to be illegally disposed of giving a clear message that regardless of the waste type, illegal disposal is not tolerated and will be acted upon.

Q20) - Are there any unintended consequences that we need to be aware of to help inform our understanding of the impacts?

Waste tourism – does England look like it is going to have the least rigorous approach? Or the other way around and material is illegally disposed of in Wales and/or Scotland?

Businesses not being aware of their employees disposing illegally – might drive the works van but operate a fly-by-night business. The EA's enforcement decision-making process is unclear as to how it will act in the case of rogue employees – for example, organisations where individuals act in breach of company policy. So, a company can be prosecuted under strict liability legislation e.g. Section 33(1)(c) where an employee acted contrary to training, policy etc. If that company/landowner also has to pay landfill tax with penalties then it amounts to a double blow, provides no incentive and no discouragement to the actual criminal. This gap in the EA's enforcement policy needs to be addressed.

Given the difficulties identified in estimating and proving the total tax liability could it be possible that HMRC will be accused of over-recovery of landfill tax in some cases?

If implemented, tax credits could be complex and lead to appeals for over-recovery.

Risk of a resource-constrained regulator taking a less rigorous approach to sites where HMRC will enforce the tax.

Qualifying materials as there are more applications for end of waste, by-products and determinations.

