

The Proposed EU Directive on the Management of Waste from the Extraction Industries

A progress report by Bob Le Clerc, executive secretary of the CBI Minerals Group, and Chris Dobbs, land and minerals manager with Tarmac Central Ltd

The EU Commission published the draft directive on the management of waste from the extractive industries on 2 June 2003 following two years of consultation. The need for a directive was, in the Commission's view, highlighted by two major mine tailings dam accidents in Spain (1998) and Romania (2000).

The adoption of a directive to cover mine waste is supported by the minerals extraction industry because it will remove the existing uncertainty over whether mineral extraction waste comes within the scope of the Landfill Directive (which, if it did, would have onerous implications) by providing a separate and more appropriate control regime independent of the Landfill Directive.

Procedure for the adoption of the draft directive

The draft directive is subject to the 'co-decision' procedures of the European Union. These require it to be approved by both the European Parliament and the Council of Ministers. It has been progressing through this procedure during the past year and industry has been lobbying in Brussels, to influence the EU Parliament's position, and in London, to influence the UK Government position in the Council of Ministers. The EU Parliament gave the draft directive its first reading in March 2004 when some 76 amendments were introduced.

The UK position in the Council of Ministers is being promoted by a team from the Department of Trade & Industry (DTI), the Office of the Deputy Prime Minister (ODPM) and the Department for Environment, Food & Rural Affairs (DEFRA). The DTI has done an excellent job in listening to industry's concerns and co-ordinating the UK response. A Council working group, comprising all EU member states, was set up in April 2004 to review the details of the directive and the first debate took place at the Council of Ministers on 28 June.

The amendments of key concern proposed by both the EU Parliament and the Council of Ministers are discussed later in this report.

The draft directive will be considered again by the Council of Ministers on 14 October 2004 when the Dutch presidency hopes to reach a common position among member states. A second reading in the EU Parliament will follow, possibly by the end of the year. If there then remain substantive differences between Parliament and the Council of Ministers, the draft directive will be subject to a conciliatory process, which could take several months to complete. The directive is, therefore, unlikely to finally become law before the middle of 2005.

Once adopted, member states must bring regulations into force to implement the directive within 24 months. All waste facilities must comply with the provisions of the directive within four years of it coming into force (except for financial guarantees, which will not apply for six years).

The directive is, therefore, not likely to have an impact on mineral operators until 2009 at the earliest.

Main provisions of the draft directive

The draft directive published by the EU Commission in June 2003 contains 25 articles and three annexes. The key articles that will effect operators are:

Article 2 – Scope

Article 2 sets out five situations where waste is excluded from the scope of the directive:

- a. Waste that is generated by the extraction and treatment of mineral resources, but which does not directly result from those operations, such as food waste.
- b. Waste resulting from the offshore extraction and treatment of mineral resources.
- c. The deposit of un-polluted soil resulting from the extraction, treatment and storage of mineral resources and working of quarries.
- d. Waste generated at an extraction or treatment site and transported to another for the purposes of its deposition into or on to the land.
- e. Waste from the prospecting of mineral resources.

This article also states that the deposit of non-hazardous inert waste should be given a 'light touch'. It is that only a few sections of the directive should apply to it. This is regarded as helpful although the CBI team are concerned that the term 'non-hazardous inert' is not found in other waste legislation and might, for example, mean that wastes such as scalplings, which have minimal potential to pollute, are excluded from the 'light touch' simply because of some overly technical or precautionary approach to their organic or leaching content.

The significance of this point in terms of the limited application of the directive to facilities for 'non-hazardous inert' waste become clear from consideration of the articles noted below.

Article 4 also makes it clear that, where waste falls within the scope of this directive, it will be excluded from the Landfill Directive (1999/31/EC).

Article 5 – Waste management plan

Article 5 requires member states to ensure that operators draw up a waste management plan for the treatment, recovery and disposal of extractive wastes.

The article sets out the details of what is to be included in the plan and states that it must be reviewed every five years. These requirements are not particularly onerous as much of the detail is already required as part of a planning application for a competent tip or lagoon design in the UK. The article also states that plans produced pursuant to other national or community legislation may be used to obviate unnecessary duplication provided these plans contain the same essential details.

Article 6 – Major-accident prevention and information

Article 6 addresses the need for operators of 'Category A' facilities to have a major-accident prevention plan in place for facilities which contain hazardous or dangerous substances or where, in the event of failure, the loss of human life or environmental harm cannot be reasonably excluded. As drafted this article does not apply to inert facilities.

Article 7 – Application and permit

Article 7 requires an operator to apply for a permit before operating a waste facility and sets out the content of the application. Again, this article states that where member states have an existing permitting regime that addresses the matters to be covered in the permitting process, there is no need for duplication. This article also does not apply to non-hazardous inert waste.

Article 11 – Construction and management

Under this article, member states are required to ensure that a 'competent person' manages a waste facility and that it is suitably located, constructed and monitored. Appropriate arrangements must also be put in place for the rehabilitation of the land and for the closure and management of the waste facility after operations have ceased.

Article 12 – Closure and after-closure procedures

Article 12 requires closure and after-closure procedures to be put in place for the monitoring and control of the physical and chemical stability of the facility. It requires the operator to meet the cost of these measures, which must remain in place for 'as long as may be required by the competent authority taking into account the nature and duration of the hazard'. Again, this article does not apply to non-hazardous inert waste facilities.

Article 14 – Financial guarantee and environmental liability

Article 14 requires the operator of a facility to provide a guarantee in the form of a financial deposit or equivalent – including industry-sponsored mutual-guarantee funds – so that 'all the obligations under the permit...including the after-closure provisions are discharged' and that there are funds readily available for the rehabilitation of the land effected by the facility. Again, this will not apply to non-hazardous inert waste.

Article 14 also makes it clear that the recently adopted Environmental Liability Directive will apply to mine waste.

Key amendments proposed by the EU Parliament

The directive received its first reading in the EU Parliament in March 2004 following an earlier, more detailed debate in the Environment Committee.

Parliament recommended 76 amendments, which, if adopted, would result in a significant broadening of the scope of the directive and would make it considerably more onerous. The following proposed amendments are highlighted:

- Parliament decided, as a result of lobbying by the industry, that unpolluted soil, prospecting wastes and waste transported to another site belonging to the operator for disposal (items c, d and e in article 2) should be included within the scope of the directive; this is helpful.
- Another amendment, which was strongly supported by industry, that proposed that the 'light touch' defined in Article 2 should apply to all non-hazardous wastes, was defeated. The 'light touch' therefore remains applicable only to 'non-hazardous inert waste'.
- An amendment was approved to extend the obligations placed on operators of inert facilities, in particular to require them to apply for a permit and to place closure and after-closure procedures.
- At the beginning of 2004 the European Court delivered judgement on the Avesta Polarit case, which relates to the definition of mine waste. The judgement refers to a particular set of circumstances, but broad interpretation of it is that where materials are surplus to the extraction of the mineral (such as overburden) and are specifically designated for use in the reinstatement of the site, they are not 'waste'. This decision therefore potentially excludes many of the materials which previously came within the scope of directive. To overcome this, the EU Parliament proposes to broaden the scope of the directive to include 'extractive residues'. The CBI is pleased that the UK Government is supporting the industry's opposition to broadening of the scope of the directive to cover non-waste issues.

- The EU Parliament has approved several other detailed amendments which make the draft directive considerably more prescriptive. These include a requirement that there must be independent validation of the design of facilities.

Council of Ministers

The Dutch presidency put forward a new 'global compromise package' of amendments at the end of July 2004 with the aim of securing agreement on the text in the Council of Ministers.

The UK Government's position in the discussions leading up to this proposal has been very supportive of industry's position.

Many of the proposals in the global compromise package should be acceptable to industry, but the CBI has made representations on the following key points:

- Continued concerns about the use of the term 'non-hazardous inert' waste and the risk of disproportionate control.
- That the directive should be restricted to considerations of physical stability/security and pollution prevention at waste facilities, and not stray into areas such as waste minimization or landscape impacts.
- Clarification that the waste management plan requirement for all wastes will not include a de-facto 'fit and proper person' test.
- Objection to a proposal that permit condition could be reviewed without any checks or balances regarding the impact of the review on the economic performance of business concerned.
- Clarification that where a financial guarantee must be provided, the obligation can terminate on completion of after-closure obligations.

Future progress

The likely timetable for the adoption of the directive is outlined above. The Council working party, which comprises representatives from all member states, including those that have recently joined the EU, meets again this month [September] to consider the details. It is expected that the Council of Ministers will reach a common position on 14 October 2004. The directive will then be given a second reading by the EU Parliament. It is too early to say whether the differences between Parliament and the Council can be resolved without the need for reconciliation.

The CBI Minerals Group will continue to lobby the UK Government and MEPs on behalf of the minerals sector as a whole during this period.

Implications for the UK minerals sector

As a result of sustained lobbying by the CBI and others, both in Whitehall and Brussels, it is hoped that the directive will be proportionate and not over prescriptive, and that it will not have major financial implications for the UK quarrying and mining industries. UK planning and mines and quarries legislation already adequately cover many of its provisions. Once adopted, it will be important to continue to lobby the UK Government to ensure that the transposition of the directive into UK law is not 'gold plated' and that the existing legislative regimes in the UK are not duplicated.

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