

The legal definition of waste

The mineral and waste directives have different definitions of waste which is causing issues for mining operators. *Rebecca Carriage* discusses how this conflict is being addressed by government departments and the sector

Waste can be a thorny issue for the minerals sector. But its issues are not the same as for waste operators, with whom it often appears to be confused by regulators. This was sharply illustrated during the transposition of the Mining Waste Directive but there are other implications.

The fundamental problem is that the definition of waste in the Waste Framework Directive sounds subjective. It is any substance or object which the holder intends to or is required to discard. But the European Court of Justice and the UK's domestic case law has always treated the definition as essentially objective to give, as those courts see it, a high level of environmental protection. This means that material the sector often would not consider to be waste might fall within the definition.

Managing waste from extraction

Minerals operators must get to their raw material. This has to be put somewhere, it may be there for some time and it is usually used again. The same applies to material excavated that is not the mineral sought but could have another use. Assessing whether or not this is legally waste causes a major headache.

The directive has been transposed into domestic law for two years and the Confederation of British Industry Minerals Group is on the second edition of its guide to what is and is not likely to be extractive (or mining) waste. It is based on a practical and pragmatic 'extractive minerals management statement' approach.

This involves assessing extractive materials and verifying conclusions about whether they are waste or not. The Environment Agency will then raise any issues, particularly if it disagrees with the conclusion.

There remain areas of disagreement; the sector does not generally accept the agency's classification of certain silt as waste – especially if it is mechanically separated.

Guidance on the legal definition of waste, issued by the environment department (DEFRA) in 2012, sets out its and the Environment Agency's position. There have been cases in the past where they have taken opposing views, so it is helpful to have a joint

approach. The guidance consists of a general introduction and the conclusions that DEFRA and its co-authors have come to on the definition of waste. It contains a list of key European Court of Justice cases, including two relating to extractive waste (Palin Granit and AvestaPolarit). The guidance does not give case summaries but quotes passages from court decisions, so it is not the whole story.

For example, the passages quoted for AvestaPolarit reflect that the case dealt with the filling of galleries in a mine, even though the judgment supports a much wider waste and by-product principle.

This document is where DEFRA and the agency will start a debate on waste.

Complying with planning conditions

The legal definition of waste is critical when operators import material onto site to carry out restoration schemes. What does the permission require? If non-waste, has enough been done to change the status of any waste to non-waste as a result of processing carried out by the operator or others?

Often the restoration material remains as waste. Another question is whether the operator is carrying out a disposal or recovery operation. Recovery involves waste used as a suitable replacement for non-waste materials (as set out in the European case of Abfall).

The usual regulatory approach (for example, in the agency's environmental permitting regulation 13 of March 2010) is that quarry backfilling is disposal rather than recovery. This remains controversial within the sector, which points to regular recovery classifications for the same type of

material used for golf courses and land reclamation projects. A new version of the regulation is being debated.

Minerals operators often let or licence unused parts of their sites to small companies or sole traders collecting, sorting and recycling materials. Given recent changes to the old low-risk status activities and the need for an environmental permit or full exemption for most waste-related activities, operators should be careful about what happens to those environmental permits when the tenant leaves. This often happens acrimoniously.

The individual or company carrying out the waste activity applies for the permit or exemption rather than the minerals operator. Permits do not remain with the site like planning permissions, but stay with the applicant. Operators need to have a contract with occupiers to make sure permits are either surrendered or transferred when they leave.

The Environmental Permitting (England and Wales) Regulations 2010 make it clear that the person carrying out the regulated activity will be the permit holder. Those changes have been made over the past few years and it is something that minerals operators often overlook.

Landfill tax exemption

Not quite a legal definition point, but any material expected to be exempt from landfill tax because it will be used, for example, to line a landfill site must comply with the Landfill Tax (Qualifying) Material Order 2011. This includes certain naturally-occurring minerals, construction materials, silt and dredging.

The sector has been in a heated debate with the government for some time about the quantity of extractive waste produced in this country. The UK's figures have always been much higher than other EU countries. It is understood that DEFRA's initial annual calculation is likely to be reduced by a factor of five as a result of careful analysis of the legal definition of waste. This issue is not going to go away. ■

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