

INDUSTRY CODE OF PRACTICE

IMAGE: © Michael Fuller



Definition of waste in remediation & development

The Industry Code of Practice – towards better regulation

By **CLIVE BOYLE**, Vice Chair, EIC Contaminated Land Working Group

I have a feeling of déjà vu as I sit down to prepare this piece for the *Land Remediation Yearbook* – once again writing about waste regulation in the context of land remediation. So apologies to all of those who thought they were working in development, not as waste managers, but as has been said before – we are where we are. Hopefully though, this article will herald a significant step towards better regulation in an area that has exercised practitioners and regulators over the past decade or more.

Now the timing of publication is such that, when reading this, many of you will already have contributed to the planned consultation on the Code of Practice and if it is not already implemented, the date will be known and imminent. So, with consultation still to take place, I shall refrain from providing detail on the Code of Practice, rather explaining the reason for its existence and the principles in it, then highlighting some benefits that should derive from its existence and use.

WHY A CODE OF PRACTICE?

The construction and remediation industries have been grappling with the Environment Agency interpretation of waste legislation for some years now, and this culminated in the publication of EA guidance in April 2006 – *'The Definition of Waste – Developing greenfield and brownfield sites'*. While this guidance was welcomed for the direction it took, it remained a qualified advisory document, leaving practitioners unable to rely on some important aspects; hence at risk from inconsistent application, stalled projects or, at

worst, prosecution for failing to comply with waste legislation.

At issue was when do soils (both natural and impacted by contamination) become a waste on a development site, and then at what point do they cease to be a waste during the process of excavation, movement, possible treatment on or off site, then final re-use on the same or a different site.

Having long campaigned for clarity, certainty and consistency in regulation of land remediation, EIC pressed, with other stakeholders, for resolution of this matter and removal of the qualifications in the EA Guidance.

EA embarked upon a programme of work in spring 2007 which set out a framework whereby it is willing to move to a more deregulatory approach to this important aspect of development activity. It is anticipated that the EA Guidance will be reissued on completion of the work to reflect this approach and that the Guidance will point towards means by which operators can provide the necessary reassurance to EA that any work is being carried out in line with the framework.

One means of providing that reassurance is an Industry Code of Practice that will build upon existing available guidance, develop examples of best practice and set out lines of evidence.

By following the EA Guidance and the Code of Practice, operators will be able to show that in certain specified circumstances the materials they are using are either not waste in the first place, or have been fully recovered and hence are no longer waste. This will enable the work to be undertaken without the need for a waste permit of any kind.

Work on the Code of Practice has been led by CL:AIRE, with a Steering Group comprising a number of industry stakeholders: Environment Agency, English Partnerships, HBF, SAGTA and EIC.

SCOPE OF THE CODE OF PRACTICE

The Code of Practice will have the same geographical scope as the original EA guidance – England and Wales. It deals with materials that are excavated on site and then moved or treated. It addresses four scenarios: Re-use of materials on the site of origin, Cluster projects, fixed soil-treatment facilities and direct movement to sites not covered by one of the first three scenarios. At the time of writing, there is potentially further work to be done on the soil-treatment facility and direct-movement scenarios, but the principles of application of the Code of Practice in these areas will be clearly set out in the initial version of the document.

The Code of Practice will be a live document, updated on the basis of experience gained from its application and industry response.

PRINCIPLES IN THE CODE OF PRACTICE

This Code of Practice provides engineers, contractors, consultants and developers with a basis upon which to demonstrate to the EA that they are following best practice with respect to the use and reuse of materials.

In the context of materials being handled on sites undergoing remediation and/or development there are three key principles that have to be considered and demonstrated, both in terms of **cont..**

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showing that they are not waste and when wastes cease to be waste. These are:

- Suitability for use, without any further treatment;
- Certainty of use;
- Quantity – only the appropriate quantity is used.

In demonstrating that the three key principles have been applied, the aims and objectives of the Waste Framework Directive must not be undermined, principally the protection of human health and the environment.

Where it can be demonstrated that the three key principles apply, the materials should not be considered to be waste. Hence waste legislation will not be applicable for the handling, storage, transport or placement of those materials on land. This applies equally to materials which are waste (for example, surplus to requirements or excavated materials in need of treatment), in demonstrating that they have been fully recovered and hence cease to be waste.

LINES OF EVIDENCE

The Code of Practice sets out how the above principles can be demonstrated by lines of evidence, including:

- Following best practice in the form of CLR11 Model Procedures;
- Production and use of a Materials Management Plan (MMP), which includes a tracking system and contingency plans;
- Formally defining roles and responsibilities;
- Contractual arrangements;
- Production of a Verification Report – demonstrating that the MMP has been followed and remediation/design objectives have been furthered by the use of the materials.

SELF REGULATION – QUALIFIED PERSONS AND THE DECLARATION

To provide EA with the required reassurance that the Code of Practice is being applied correctly, on a case by case basis, a Declaration is proposed, that will enable a Qualified Person to confirm that appropriate lines of evidence have been demonstrated.

EA will require that the Qualified Person signs off the Declaration, which will then form part of the audit trail on the completion of the project. EA has stated that it will collate the Declarations, selecting a number for review and audit, to ensure that the arrangements are working correctly.

Industry views have been sought on the qualities and qualifications appropriate for the Qualified Person and it is likely that they will include professional standing, qualifications, relevant experience, together with some specific training. In the longer term, there is also scope for this to align with wider industry interest in establishment of quality standards and accreditation schemes.

THE CODE OF PRACTICE – WILL IT MAKE A DIFFERENCE?

It is important to note that this is a voluntary Code of Practice. While it should provide an effective means for practitioners to gather their current good practice in a form that will enable them to work without all of the rigours and implications of waste regulation on many sites, it will not serve all cases. Equally, practitioners may choose not to employ the Code of Practice, opting either to stay within the waste regulatory framework (obtaining the necessary permits or exemptions), or to argue the non-waste case from first principles on a site-specific basis. The fact that EA has established a framework for determining the waste/non-

waste question should make this second option more readily accessible; but in reality it is likely to look very similar to applying the Code of Practice.

Two of the specific material-reuse scenarios covered in the Code of Practice relate to soil-treatment centres, both fixed facilities and Cluster projects. For some years now, it has been suggested that these could have a significant role to play in site remediation and brownfield development in the UK, but uncertainty over the waste status of the outputs has undoubtedly limited their use to date. The Code of Practice should make a significant change in this area and facilitate further developments.

Reputable developers and their informed professional advisers almost certainly work on sites in the knowledge of and in compliance with waste-regulation requirements. The use of the Code of Practice to demonstrate their good practice, allowing self regulation, should release precious regulator resources to inspect and deal with those sites where little or no thought is being given to waste issues at present.

The concept of a Qualified Person, to confirm appropriate use of an Industry Code of Practice, aligns with other moves towards the development of quality standards, benchmarking of skills and competence and accreditation within the land-remediation and brownfield-development sectors.

Finally, while definition of waste has been the subject of long and sometimes heated debate, the development of the Code of Practice can be seen as a fine example of industry and regulator working together effectively, to achieve better regulation with benefits to both parties – and the protection of human health and the environment.



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