Article 27 Consultation
Environmental Protection Agency

Submitted by email to Article27@epa.ie

13th December 2018

Re: Draft Guidance on Soil and Stone By-products

Dear Sir/Madam,

The IWMA is pleased to respond to the current consultation on Soil and Stone By-Products as presented in the EPA draft guidance document published on 19th October 2018.

The IWMA's main concern is with Article 27 By-Product declarations that relate to non-virgin or contaminated materials. Demolition projects and brownfield developments generate large quantities of such materials and we have concerns that many by-product declarations in recent years have been inappropriate as they contained non-virgin or contaminated materials. The EPA must be pro-active in examining such declarations before the material is moved.

We provide answers below to the three questions posed in the consultation document.

Consultation Questions

Question 1: Do you agree with the proposed EPA Regulatory Position on soil and stone by-products.

No.

In general terms, we take the view that the generation of excavated natural virgin uncontaminated soil (e.g. greenfield) and stone as a waste should be prevented or if not possible re-used, where possible, in line with the waste hierarchy.

Recital (11) of the Waste Framework Directive (2008/98/EC) states:

"The waste status of uncontaminated excavated soils and other naturally occurring material which are used on sites other than the one from which they were excavated should be considered in accordance with the definition of waste and the provisions on by-products or on the end of waste status under this Directive."

This gives an appropriate scope for virgin/uncontaminated subsoil and topsoil removed from one site to another to be considered as by-products if all the criteria listed in Article 5(1) are met.[1]

Clearly, the four criteria listed in the Waste Framework Directive must be met for this to happen. They are:

> (a) further use of the substance or object is certain;
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> (b) the substance or object can be used directly without any further processing other than normal industrial practice;
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> (c) the substance or object is produced as an integral part of a production process; and
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> (d) further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.

In the previous EPA guidance that has now been withdrawn and in decisions taken by the EPA in recent years, the Agency introduced additional criteria that we consider were not supported by the legislation, including the following exclusions on the use of by-product soil and stone:

- Use in backfilling of quarries.
- Use in licensed or permitted sites.
- Use in sites that formerly had a licence or a permit.
- Use in sites at a rate greater than 25Kt/a, where such sites were not subject to EIA.
- Use in sites where the EPA was not satisfied that the planning permission is valid.

By-products are not waste and are not subject to waste legislation or EIA. It is only when the EPA declares that such material is waste that the problems arise, with the result that site owners, local authorities and developers are left in a very difficult position. There is no (reasonably accessible/appropriate) appeal process (other than a judicial review) in Article 27 decisions as the EPA decision is effectively final, therefore it is imperative that the Agency makes these decisions based on the four criteria listed above and not on criteria outside of that scope.

The EPA must also accept that planning permission is valid if it has been granted, regardless of the Agency's views on EIA and AA. Some EPA decisions on by-products have resulted in the effective over-turning of valid planning permissions and we believe that this goes beyond the remit of the EPA.

For example, a site in Barnadown, Co. Wexford had planning permission to improve land by raising it 0.8m using excavated uncontaminated virgin soil and stone from greenfield sites, declared as by-products. The planning application was explicit in detailing that the fill materials would comprise of by-products and not waste. The local authority and EPA decided that this was acceptable when the first project delivered soil and stone by-products to the site from a new school development in Gorey.

However, the EPA later determined that similar uncontaminated virgin soil and stone materials from several other greenfield projects were not acceptable as by-products due to

[1] Article 5(1) of the WFD was transposed by Article 27(1) of the European Communities (Waste Directive) Regulations 2011.

the fact that there was no EIA carried out with the planning permission and whilst the consultant submitted a Natura Impact Statement with the planning application, the EPA determined that the local authority did not carry out an Appropriate Assessment screening.

A statutory process conducted by the planning authority was effectively over-ruled by the EPA in a non-statutory process with no appeals mechanism. This action defies natural justice and is clearly unfair to the parties involved. The final determination on the validity of a planning permission is not an EPA function.

As the land restoration scheme is incomplete, an attempt was made by the landowner to extend the duration of the planning permission earlier this year through a Section 42 application. That application was refused by Wexford County Council on the basis that the EPA has declared the soil and stone to be waste and the planning authority now takes the view that an EIA should have been conducted, as it has been determined by the EPA that waste materials were deposited rather than by-products. So the EPA turned the project into a waste operation by challenging the validity of the planning permission, which we believe was ultra vires in the first place.

We take the view that using excavated uncontaminated virgin soil and stone as by-products in projects with planning permission to use such materials should be permitted by the EPA, regardless of any associated financial transactions (i.e. payment for the soil). Reclamation, backfilling, landscaping, restoration and other projects that need soil and stone may well be prepared to pay for it depending on market forces. The fact that it may not have a positive value, does not preclude its declaration as a by-product, based on the four criteria listed above.

The holder of the material may choose to have it reused as a by-product rather than choose to discard it and that decision is written in to the economic operator's declaration, so it would be wrong for the EPA to assume that the holder chooses to discard it, just because it has a cost attached. The cost of disposal as a waste may be higher than the cost of use as a by-product if it can be used legally at a location close to the site of origin. In such circumstances, it may well be economically advantageous for the operator to declare it a by-product rather than a waste.

By way of demonstrating the core issue, we offer the following example of a similar scenario where a cost burden does not prove that material is a waste. A business might be under pressure to remove stock from a premises to make way for new products. That stock could be moved at a cost to the holder to be sold by another party, but the cost incurred by the holder may be less than the cost of discarding the stock as a waste. The fact that the stock is an economic burden to the holder, does not mean that it has to end up as a waste. The stock still has a use and is not being (or required to be) discarded. It is however more economically beneficial for the holder to arrange for it to be sold, compared to the alternative higher cost option of discarding the stock.

The EPA have stated their policy is to encourage the prevention of waste including the lawful and beneficial use of excess uncontaminated soil and stone. The key criteria of determination as a waste should be the beneficial use (within a reasonable time period) and that the soil is not polluted or contaminated. The proposed guidance places excessive and unnecessary focus on the financials of an individual case which will vary independently of the more relevant environmental criteria. For instance uncontaminated soils from different greenfield sites may have to travel significantly different distances to the same site of beneficial reuse and it would be wrong to determine that in one case it is a waste as the higher transport costs result in an overall cost (i.e. economic burden) to the economic operator.

Question 2: Do you understand the four by-product conditions that determine if a material is a by-product?

Yes.

Question 3: Do you agree that a period of 4 weeks is a reasonable advisory period for economic operator to wait for an indication of the EPA's intended course of action regarding any individual notification?

Yes.

The EPA's suggestion of a four week period for the EPA to consider the declaration before it is moved should be very helpful in this regard, assuming that the Agency will provide adequate resources for this task.

Any declarations from brownfield sites or demolition projects or crushed concrete should be prioritised by the EPA with intervention as necessary prior to the movement of the material. Declarations relating to natural virgin soil and stones from previously undeveloped sites should be less of a concern in this regard.

It is important that the EPA provides adequate resources to manage the Article 27 process. This process ultimately reduces the administrative burden when managing uncontaminated virgin soil and stone excavations that will not lead to overall adverse environmental or human health impacts. However, if the EPA does not put the resources in place to stop the movement of inappropriate materials such as C&D wastes, crushed concrete and/or contaminated soils to sites where these material will lead to overall adverse environmental or human health impacts, then a lot of resources will be subsequently required to rectify the issue and to take enforcement action against the producer / contractor / landowner.

In some cases, the local authorities can assist with the four week 'red flag' process. However, there are cases where the local authority is directly involved in Article 27 notifications and in those cases, it is important that the EPA reviews the declaration for 'red flags' at an early stage.

Other Issues for Consideration:

We suggest that volumes of materials moved under article 27 should be tracked under site waste/environmental management plans to aid in waste recovery target reporting.

The EPA database of Article 27 notifications should also include the tonnage of material declared as a by-product.

In the event that a site C&D waste management plan is approved by the relevant local authority under a planning condition and is then amended to manage materials as by-products rather than waste, the amended plan should also require approval from the local authority before the material is moved.

Yours Sincerely,

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