

Remediation and the Waste Management Regulatory Regime

AGS Position Paper

Version 2 - Updated December 2002

1. Legal Background

- 1.1 The EA document "Guidance on the Application of Waste Management Licensing to Remediation" (Version 2.0, January 2001) classifies contaminated soil arisings as "controlled waste". This is based on its designation as "directive Waste" [ie it is waste as defined by the EC Waste Framework Directive]. This requires a three stage test;
- it is within the scope of the Waste Framework Directive
 - it is listed in Part II of Schedule 4 of the 1994 Waste Management Licensing Regulations
 - it must have been discarded or intended to have been discarded.
- 1.2 The EA Guidance (2001) states that the contaminants themselves can be considered waste as they have been "*abandoned or control of them has been lost*" and since "*the soil is not discrete from the contaminants, that too will be waste*".
- 1.3 In addition uncontaminated natural arisings from service and foundation excavations on development sites may be classified as waste. The EA have indicated that the purpose of such excavations is to install elements of a development and not to 'win' material. They would, therefore, conclude that the intention is to discard the surplus arisings and consequently they would be classified as waste.
- 1.4 As a consequence of these positions virtually all development sites in England and Wales will be handling and re-using waste materials. For these operations to comply with the law the activities will either have to be exempt from Waste Management licensing or operate under a Waste Management Site Licence. An alternative promoted by the EA is to operate a mobile plant license but the circumstances in which these can be used are largely restricted to specialist forms of ground remediation

2. EA Interpretation

- 2.1 The EA position on exemptions from waste management licensing is set out in their Guidance (2001). The implications of the guidance are that even if there is an appropriate use for the 'waste', if it requires any form of treatment or containment the operation will not be an exempt activity.
- 2.2 In its simplest form, if there is made ground on a site which requires some form of cover to render the site suitable for its intended use, that material cannot be moved or reused below the proposed cover layer without a Waste Management Site Licence. This situation applies on many redevelopments of brownfield sites. In order to ensure that the cover layer is not contaminated during the development process and the required thickness is achieved, its application is usually left to the last activity on site. Technically, under the current EA position, regrading of the site to achieve the required landform prior to placing the cover layer should be subject to a site licence.
- 2.3 In the past AGS members have also reported that EA officers are applying the requirements of waste management licensing to routine geotechnical treatment of clean natural soils with poor physical properties (for example lime/cement stabilisation of soft clays, installation of sand drains to accelerate settlement of compressible soils etc.). However in 2002 the EA stated in writing that geotechnical treatment of natural uncontaminated soils would not be considered a licensable activity.

3. Implications for Remediation

- 3.1 There are major implications for all developments and a significant disincentive for brownfield developments as a result of this guidance and its current interpretation by the EA.
- 3.2 The requirements for exemptions for reusing any suitable made ground will merely generate paperwork both for the developers and the EA in registering the exemptions but otherwise should not cause major problems. It should be noted however that on the basis of the current EA position, most developments would require to register exemptions.
- 3.3 The major issue however, is that of the requirement for a Waste Management Site Licence for reusing made ground which is not suitable without 'containment or treatment' together with the subsequent surrender of the licence. The EA Guidance (2001) suggests that only "*significant or substantial amounts*" of regrading would require a licence and suggests that the relevant enforcement positions would be used to define this amount. The EA Functional Enforcement Guidelines include for 1,000m³ of in-situ treatment, which in the context of site regrading would be a very small amount. The alternatives under the current position are:
 - To apply for a waste management licence to allow reuse of these materials on-site or
 - To take all made ground off site to an appropriately licensed landfill. (Clearly for many sites this is likely to be uneconomic and is certainly not a sustainable solution).
- 3.4 The delays and red tape required for the application and monitoring of a Waste Management Licence alone will create a major disincentive for many development projects. In addition there will be issues of perception associated with the presence of a Waste Management Licence and the potential affect on the value and onward sale of the development. Institutional investors are likely to be very reluctant to invest in a development, which will be subject to a waste management licence.
- 3.5 Although all types of developments are affected, the most sensitive issue will be in selling houses on sites that are subject to a current Waste Management Licence. With the majority of developments, remediation and site regrading activities will continue throughout the development process (e.g. when a development occurs in phases and the early phases are being occupied or sold as development occurs elsewhere on the site). Thus, even without allowing for delays in applying for surrender, an active waste management licence is likely to be in place for all the potential occupations and sales on such sites.
- 3.6 The option of a mobile plant license is promoted by the EA. The advantage is that the license is applied to the 'plant' and therefore leaves the site when the licensed operation is complete. The issue of potential blight associated with a Waste Management License discussed in paragraph 3.5 is therefore avoided. However it should be noted that this approach has been developed by the EA largely to cover specialist ground improvement techniques and cannot be applied to most standard site regrading operations.

4. AGS Conclusions and Recommendations

In the first version of this paper, the following conclusions were reached and recommendations made. Added in *italics* are comments on developments since version 1 of this paper was produced.

- 4.1 AGS members have numerous clients operating in the development market. It is our collective opinion that the presence of a Waste Management Site License will have a major impact on the viability of all brownfield developments and virtually render houses on such sites unsaleable. Even if the house buying public are unaware of the issues, conveyancing lawyers have indicated that they would advise both mortgage companies and house buyers not to invest in properties whilst an active licence is in place.

- 4.2 It is our conclusion that these difficulties arise from the application of the waste management regulatory regime to inappropriate circumstances (ie development sites are not landfills or sites of waste management). Neither the existing planning nor waste management regimes provide appropriate or adequate administrative control on redevelopment sites where remediation of land contamination is taking place as a part of that redevelopment.
- 4.3 AGS therefore strongly advise that the guidance on waste management licensing on redevelopment sites be reviewed. If this does not occur there is likely to be a major impact on the government target set in PPG 3 for the reuse of brownfield sites. It is recommended that this review should critically examine:
- The EA interpretation of its definition of “waste” on development sites. *It is accepted that the legal definition of waste derives from the EU directive which in itself is not open to challenge. Nevertheless, AGS considers there remains room for the EA to review its interpretation of the directive definition in the context of contaminated soils.*
 - Extending the exemptions in Schedule 3 of the Waste Management Licensing Regulations to include the reuse of marginally contaminated soil on redevelopment sites. *AGS understands that the EA have made recommendation to DEFRA for additional exemptions to schedule 3 but that these do not address the specific issue of routine regrading activities on constructions sites. AGS considers there remains an option to extend the range of exemptions.*
 - Clarify the position regarding the use of geotechnical processes to treat natural soils. *Although the EA have produced a produced a letter indicating that these operations due not fall under the control of the waste management licensing regime, to avoid confusion, AGS recommends that this advice is formally issued in Guidance.*
- 4.4 For the long term it is recommended that Government should develop a new statutory implement for bespoke licensing of site remediation, which would remove this activity from the Waste Management Licensing regime.

In 1999 Government made commitments to prepare a new regime to regulate contaminated land remediation projects. No progress was made until in December 2001 when industry representative including AGS met with officials to launch an initiative which would involve this Working Party in drafting new legislation – a “Single Regeneration Permit”. The original intention of this Permit was for it to be used for ex site/ in situ soil treatment schemes, replacing the separate mobile plant licenses, site working plans and discharge consents. The AGS has a concern that the Remediation Permit (RP) as currently drafted would not provide a solution to certain issues relating to construction activities such as excavation, movement and replacement of soils and has suggested a series of exemptions. A government group has been set up to develop the proposal but the likely date for further consultation is unknown.