

## **FINDINGS OF A STAKEHOLDER WORKSHOP ON THE FUTURE POLICY AND REGULATION OF EXCAVATED MATERIALS IN ENGLAND AND WALES**

### **PAPER 1: SETTING THE SCENE**

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#### **1. INTRODUCTION**

The Specialist in Land Condition (SiLC) Professional & Technical Panel (PTP) and CIRIA's Soil Community of Practice (CoP) convened a stakeholder workshop on 1 February 2024 to explore alternative policy and regulatory approaches for excavated soils and other materials on development projects. The desired outcomes from the workshop included examining what good regulation and policy in this area would look like, the benefits that could be achieved, and the barriers to change.

This, the first of three papers, provides the basis for the workshop and key considerations that informed it. The second paper provides more detail of the scope and factual outputs from the workshop. The third paper identifies shortlisted 'options to consider' for future improved policy and regulation of excavated materials.

It should be noted that the terminology used in the workshop was 'soils' but as a sub-set of 'excavated materials', this wider terminology has been adopted in both papers. The focus was on England and Wales due to regulatory divergence across the rest of the UK. However, the regulatory issues and challenges associated with the sustainable reuse of excavated materials are not specific to England and Wales, or indeed the UK as a whole, but apply internationally.

#### **2. SETTING THE SCENE**

The regulation and management of the reuse of excavated materials, including soil, is a key factor in the successful redevelopment of many sites, both brownfield and greenfield. Excavated materials, unless of a specific type excluded, are classified as waste under the Waste Framework Directive (WFD) until 'recovered'. Notably, the key criterion regarding definition of 'waste' from the EU Waste Framework Directive 'means any substance or object which the holder discards or intends or is required to discard'. However, this definition is not applied as widely, or as rigidly, to many other 'waste' streams or by-products, from charitable donations to Marmite™. Article 2.1c of the WFD excludes 'uncontaminated soil and other naturally occurring material excavated in the course of construction activities where it is certain that the material will be used for the purposes of construction in its natural state on the site from which it was excavated'. However, this definition excludes made ground, materials needing processing or affected by contamination.

The definition of waste and its specific application to excavated materials is noted to have arisen from EU case law. Now that UK has left the European Union, there is an opportunity to move away from this definition of waste and to reassess our soil regulations and policy to reflect the enormous value and resource of excavated materials. The UK is not alone in grappling with these issues – for example, similar issues are being encountered in several states and territories across Australia where concerns are being expressed about inappropriate disposal of excavated materials in terms of compromising circular land use in the context of developing a circular economy.

Regulation of the reuse of excavated materials on development sites, especially brownfield sites, is complex, costly and time-consuming. Waste management permitting and recovery are currently regulated through applying the CL:AIRE Definition of Waste Code of Practice (DoWCoP) with use of Materials Management Plans (MMPs), registering waste exemptions, or applying for a Deposit for Recovery or other environmental permit (site-based permits). DoWCoP itself was developed in the early 2000s, following concerns raised by the development sector over the obstacles waste permitting was presenting to redevelopment of brownfield sites. Creation of the scheme was a recommendation of the joint industry, government and regulator-led Remediation Licensing Task Force established by

the Cabinet Office. DoWCoP represents a voluntary approach and a form of industry self-regulation but its future is in doubt or subject to major changes with a protracted time period for review of draft version 3 by the Environment Agency.

The application of DoWCoP is already increasingly being limited by the Environment Agency, such as for development on sites of former landfills, and where stockpiles have been present on site for more than 12 months; changes to WML exemptions are limiting their scope to smaller volumes of materials and a narrower range of acceptable materials with an emphasis on ‘clean naturally occurring materials’. This has partly been driven by concerns from regulators about misapplication of DoWCoP and waste exemptions, and ‘sham disposal’ activities by rogue operators, or other poor practice. This has led to a tightening of waste regulation enforcement and a greater reliance on waste deposit for recovery permits, but without a consequent increase in regulatory capacity. In consequence, there are now long lead-in times (typically >12 months) to apply for and receive a site-based permit, which are often incompatible with development timescales. Furthermore, the developer must show that the project could be carried out using non-waste material and must include the costs of removing the waste from site and replacing with non-waste (e.g. quarried material) in their viability assessment.

The current regime therefore places significant regulatory hurdles in the way of materials reuse. However, there are no equivalent barriers in place for disposal of soils to landfill. This can be achieved without delay (for absolute non-hazardous wastes) and simply requires compliance with waste Duty of Care requirements. When faced with lengthy permitting delays, developers or contractors often switch to off-site disposal to avoid delays to the development programme. There is no regulatory requirement to justify disposal whereas this is needed to justify reuse, often due to concerns over sham recovery/ disposal or rogue operators.

Whilst there are fiscal measures in the form of landfill taxes, these are based around hazardous properties (rather than risk or value of lost resource) with inert soils charged a much lower rate of tax (currently £3.30/t lower rate vs. £103.70/t standard rate). This tax regime does not discourage disposal of soils as reflected in the most recently available UK landfill statistics<sup>1</sup>, which show, for example, that 58.5 million tonnes of soils were disposed of in 2018 – a staggering 58% of the total waste tonnage received by landfills. The tax regime puts most of the fiscal burden on the more difficult to reuse soils that fall under the standard rate and offer little incentive to reuse inert soils.



Image 1: Waste hierarchy (© Defra, 2011)

<sup>1</sup> Source: UK statistics on waste <https://www.gov.uk/government/statistics/uk-waste-data/uk-statistics-on-waste> (2018 data), published 28 June 2023,

The regulatory burdens imposed on reuse of excavated materials, contrasting with the comparative ease of disposal to landfill, are not compatible with the waste hierarchy, which prioritises waste management options according to what is best for the environment. According to Defra<sup>2</sup>, 'it gives top priority to preventing waste in the first place. When waste is created, it gives priority to preparing it for re-use, then recycling, then recovery, and last of all disposal (e.g. landfill)' – see graphic. Application of the waste hierarchy is a legal duty for all that produce, collect, transport, recover or dispose of waste under regulation 12 of the Waste (England and Wales) Regulations 2011, which came into force in September 2011. Notably, Defra 'Guidance on Applying the Waste Hierarchy (2011)<sup>2</sup> does not cover the construction sector.

The current regulatory approach, and the increasingly restrictive application of DoWCoP and waste exemptions, is also noted not to be proportionate to environmental risk. In fact, there is a greater emphasis on volume, so the larger the volume of excavated material proposed – and hence greater potential value for recovery, the more likely a developer needs to go down the time-consuming and burdensome site-based permit route.

Facilitating the sustainable conservation and reuse of excavated materials is becoming ever more important due to the urgent responses needed to respond to the climate and biodiversity crises. The current waste regulatory regime, and the way it is developing, is not compatible with the need to take account of the value and services provided by re-used / recovered excavated materials including:

- a growing medium,
- a carbon sink,
- a water store,
- a load bearing horizon, and
- in supporting biodiversity.

Soils in particular are a precious resource that can take many hundreds of years to be formed, especially in temperate climates. The House of Commons Environment, Food and Rural Affairs Committee recently stated in its report on soil health<sup>3</sup> that soil quality should be considered in the same way as air and water quality. However, there is no mention of specific policies on soils in the latest iteration of the National Planning Policy Framework (NPPF)<sup>4</sup>.

The UK government's sustainability agenda – and those of the devolved nations – seeks to promote the circular economy, sustainable use of energy and resources, climate resilience and carbon reduction in order to drive to meet Net Zero by 2050. The UK Green Building Council (UKGBC) identifies in its Net Zero Whole Life Carbon Roadmap<sup>5</sup> that material and site efficiencies are key pathways to Net Zero for the UK Built Environment. Reuse of excavated materials also has direct sustainability benefits in avoiding the quarrying of virgin aggregate and associated haulage emissions. The UKGBC Roadmap<sup>5</sup> states that consumption emissions related to imported construction materials and products are a significant element of the built environment's carbon footprint.

Reuse of excavated material is not currently a consideration at planning application stage. As stated in the NPPF<sup>4</sup>, planning issues should not be revisited through the permitting regime, and there shouldn't be double regulation. A site which has been granted planning consent for development, including details of final development levels, should not be subject to dual regulation under waste legislation. Planning consent should grant reuse of material, allowing the environmental permitting

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<sup>2</sup> Defra, Guidance on applying the Waste Hierarchy, 2011.

<sup>3</sup> 'Take soil as seriously as air and water to protect food supply and environment, MPs urge', 5 December 2023, <https://committees.parliament.uk/committee/52/environment-food-and-rural-affairs-committee/news/198809/take-soil-as-seriously-as-air-and-water-to-protect-food-supply-and-environment-mps-urge/>

<sup>4</sup> NPPF, December 2023, <https://www.gov.uk/government/publications/national-planning-policy-framework--2>

<sup>5</sup> Net Zero Whole Life Carbon Roadmap – A Pathway to Net Zero for the UK Built Environment, November 2021, <https://ukgbc.org/wp-content/uploads/2021/11/UKGBC-Whole-Life-Carbon-Roadmap-A-Pathway-to-Net-Zero.pdf>

regime to focus on implementing the process to protect human health and the environment. This has been achieved in Scotland where reuse of excavated material on the site of origin during development without treatment is dealt with through a 'remediation plan' agreed with the local authority under the planning approval. Where treatment is needed, this is regulated by SEPA under waste management licensing or environmental permitting regulation.<sup>6</sup>

The reuse of excavated materials tends to be a more significant economic issue on brownfield sites due to the presence of contamination or anthropogenic materials. Reuse of such materials, as opposed to 'clean naturally occurring materials', is also becoming more challenging due to the changes to DoWCoP and exemptions and greater need for site-based permits. To support the levelling up agenda and Brownfield-first local plans, developers should be targeting such sites, but the current regulatory regime actively discourages brownfield development and of former landfills and waste sites in particular. This has a detrimental impact on inner city regeneration and increasing social values in these often deprived areas. Naturally, many developers then choose greenfield sites for development in preference.

It is also noted that BRE completed a report in April 2021 on behalf of Defra<sup>7</sup> identifying and shortlisting policies to reduce soils entering landfill in England. The BRE report highlighted that there are drivers and barriers that lead to large amounts of soil waste which is managed by landfilling. The report provided examples of case studies and evidence from interviews of stakeholders showing that much higher recovery rates are possible. It concluded that whilst there is a range of guidelines and policies to protect soils, there is a lack of a clear legislative framework across various sectors. These conclusions and recommendations are consistent with those of this workshop and have yet to be implemented.

### 3. SUMMARY

In summary, therefore, there is a widespread perception amongst many stakeholders in the development sector that the current approach to regulating excavated materials through the waste regulatory regime, and how it is continuing to develop, is not fit for purpose. The increasing requirement to apply for Deposit for Recovery permits (and away from other regulatory options), coinciding with a lack of resources at the EA and NRW, also means that the permitting system is slow and highly inefficient. This is leading to unwanted delays, unnecessary costs and unsustainable outcomes. This, combined with the relative ease of disposal of excavated materials to landfill, is considered to be incompatible with:

- government policy to promote brownfield over greenfield development.
- the waste hierarchy – an established legislative requirement.
- circular economy principles, including avoiding quarrying virgin material and circular land use.
- soil as a precious resource in its own right and the wide range of services it provides that are of benefit in tackling the climate and biodiversity crises, and
- pathways to Net Zero needed by the construction sector.

Many of these issues and concerns have been discussed at SiLC, CIRIA Soil CoP and other industry events over the last few years, and formed the backdrop to the stakeholder workshop. Indeed, SiLC previously wrote to Defra and the EA in June 2021 and April 2023 expressing concern about the effects of regulation of the reuse of materials on brownfield development sites.

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<sup>6</sup> SEPA, Land remediation and waste guidelines, 2018

<sup>7</sup> Identification and short-listing of policies to reduce soils entering landfill in England - EV0154, <https://randd.defra.gov.uk/ProjectDetails?ProjectId=20776>