



9 October 2009

STAGE ONE: CONSULTATION ON THE TRANSPOSITION OF THE REVISED WASTE FRAMEWORK DIRECTIVE (DIRECTIVE 2008/98/EC)

INTRODUCTION

1. The UK Environmental Law Association (**UKELA**) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study and formulation of environmental law in the UK and the European Union. UKELA attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.
2. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Waste Working Party.
3. UKELA makes the following comments on the joint DEFRA/WAG Stage One: Consultation on the transposition of the revised Waste Framework Directive (Directive 2008/98/EC).

GENERAL COMMENTS

4. UKELA notes that a number of new Articles contained in the revised Directive are not addressed in this consultation. In particular, Article 10 (which requires Member States to take the necessary measures to ensure that waste undergoes recovery operations, in accordance with Articles 4 and 13) and Article 12 (which requires Member States to ensure that, where recovery in accordance with Article 10(1) is not undertaken, waste undergoes safe disposal operations which meet the provisions of Article 13 on the protection of human health and the environment) are not addressed. It is therefore not clear how (if at all) DEFRA/WAG envisages that these two Articles will be transposed (which they must be if the UK is not to run the risk of infraction proceedings by the European Commission). Is it DEFRA/WAG's view that existing legislation in England and Wales already transposes these Articles? If so, can DEFRA/WAG specify what legislation?
5. UKELA also notes the consultation does not address the issue of the definition of waste. Although the revised Directive does not materially change the definition of waste, Article 2(1)(b) and Article 2(1)(c) exclude from the scope of the revised Directive the following:

“(b) land (in situ) including unexcavated contaminated soil and buildings permanently connected with land;

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- (c) *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*’.
6. The revised Directive offers no guidance on the meaning of the terms “*contaminated soil*” and “*uncontaminated soil*”, which were introduced into the revised Directive in the light of the *van de Walle* case (C-1/03). These terms must therefore be interpreted by Member States. How does DEFRA/WAG intend to interpret these terms? What degree of contamination is required before soil is to be considered contaminated? UKELA suggests that legal certainty is needed on the meaning of these terms in order to provide clarity for the construction industry, the waste management industry and remediation contractors, and urges DEFRA/WAG to provide guidance. In this regard, UKELA is aware of the existence in England and Wales of the guidance provided by the CL:AIRE Development Industry Code of Practice, which identifies when excavated material ceases to be waste and has approval and support from the Environment Agency. SEPA is currently consulting on an equivalent for Scotland. However, UKELA notes that the Code seeks to move away from distinguishing contaminated from uncontaminated material and looks to assess risk on the basis of the proposed use of the material.
7. In view of recital 11 in the revised Directive DEFRA should clarify its thinking on re-use of soils on sites other than the site from which they were excavated. It appears that where there is certainty of re-use these may fall outside of waste control altogether, having regard to the decision in *Environment Agency v Inglenorth* [2009] EWHC 670 (Admin).
8. UKELA also wishes to raise the issue of the status of Circular 11/94 in the light of the transposition of the revised Directive. UKELA notes that Circular 11/94 has not been formally withdrawn, but is now very out of date. The transposition of the revised Directive would seem a good opportunity to clarify the status of Circular 11/94 and to replace it with more up to date guidance.

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QUESTION 1: WHAT STEPS DO YOU CONSIDER DEFRA/WAG SHOULD TAKE TO APPLY THE WASTE HIERARCHY SET OUT IN ARTICLE 4(1) OF THE REVISED WFD AS A PRIORITY ORDER IN WASTE MANAGEMENT LEGISLATION? FOR EXAMPLE:

(A) HOW SHOULD PRODUCERS OF WASTE - OTHER THAN HOUSEHOLDERS - BE REQUIRED TO APPLY THE WASTE HIERARCHY AS A PRIORITY ORDER WHEN TAKING THEIR DECISIONS ON THE TREATMENT OPTIONS FOR THEIR WASTE OR BEFORE ITS TRANSFER TO ANOTHER PERSON FOR TREATMENT? PLEASE EXPLAIN HOW YOU CONSIDER THE REQUIREMENT WOULD OPERATE AND HOW IT WOULD BE ENFORCED.

9. UKELA notes that there are already a number of legislative requirements which require producers of waste to consider the treatment options for their waste. For example, the Site Waste Management Plans Regulations 2008 apply to construction projects valued over £300,000 and require the principal contractor to ensure that waste produced during construction is re-used, recycled or recovered as far as is reasonably practicable. Under the Environmental Permitting (England and Wales) Regulations 2007 no waste can be disposed of to landfill unless the producer can demonstrate that it has undergone pre-treatment or that pre-treatment is either technically unfeasible or the waste is inert and treatment will not realise any environmental benefit. There is also a range of compliance requirements for waste producers contained in producer responsibility legislation such as the Packaging Waste Regulations and the WEEE Regulations. Consequently, DEFRA/WAG may wish to consider the consolidation of these various pieces of legislation to require waste producers to produce waste management plans. These plans should be based on an assessment of the wastes against the options inherent in the waste hierarchy. Producers could be required to demonstrate that they have considered the options and to justify the route chosen in relation to the waste hierarchy. There would need to be a threshold above which the production of a plan would be mandatory, in order to reduce the administrative burden on small producers of waste.

(B) WHAT OTHER MEASURES, IF ANY, SHOULD BE ADOPTED IN THE SPATIAL PLANNING SYSTEM TO APPLY THE WASTE HIERARCHY AS A PRIORITY ORDER?

10. The planning system could be used to expand the requirement to produce site waste management plans for construction projects valued over £300,000 into being a more general requirement to produce waste management plans for new developments and for changes of use. UKELA has evidence that a number of planning authorities are already requiring the submission of site waste management plans prepared under the Site Waste Management Plans Regulations as part of a planning application, even though such plans are not required under the Regulations until prior to commencement of construction. It would therefore be relatively easy for planning authorities to require a waste management plan to be submitted as part of any planning application (subject to a size threshold in order to reduce the administrative burden on small producers of waste). UKELA suggests that PPS10 could be

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updated to provide for this. An alternative requirement would be to define exactly in regulations at what point the waste management plan must be prepared and ensure that the point is early enough to have some influence on the project.

(C) HOW SHOULD ESTABLISHMENTS OR UNDERTAKINGS APPLYING FOR PERMITS FOR THE TREATMENT OF WASTE UNDER ARTICLE 23 OF THE REVISED WFD BE REQUIRED TO DEMONSTRATE THAT THEY HAVE APPLIED THE WASTE HIERARCHY AS A PRIORITY ORDER IN REACHING THEIR DECISION ABOUT THE TYPE OF TREATMENT OPERATION FOR WHICH A PERMIT APPLICATIONS IS BEING MADE?

11. Any treatment operation is developed on the basis of the waste types and quantities to be supplied. UKELA is therefore unsure as to why the waste hierarchy should be applied at this stage because if the producers of the waste have been required to demonstrate that they have applied the waste hierarchy then it follows that this will determine the nature of the treatment operation for which the permit application is being made.

(D) HOW SHOULD COMPETENT AUTHORITIES BE REQUIRED TO APPLY THE WASTE HIERARCHY AS A PRIORITY ORDER IN MAKING THEIR DECISIONS ON PERMIT APPLICATIONS FOR THE TREATMENT OF WASTE?

12. Any permit application for the treatment of waste should be determined on the basis of the criteria set out in Article 13 of the revised Directive (i.e. no endangering human health or harming the environment) because the waste hierarchy will already have been considered by the producer as part of the obligations proposed in paragraphs 9 and 10 above.

(E) HOW SHOULD THE WASTE HIERARCHY BE APPLIED TO WASTE TREATMENT OPERATIONS ALREADY AUTHORISED AND IN OPERATION ON THE DUE DATE FOR TRANSPOSITION OF 12 DECEMBER 2010?

13. UKELA does not see why existing facilities should require review if the measures proposed in paragraphs 9 and 10 above are applied.

QUESTION 2: ARE THERE SPECIFIC WASTE STREAMS WHERE YOU BELIEVE THAT DEPARTING FROM THE WASTE HIERARCHY WOULD BE JUSTIFIED BY LIFE-CYCLE THINKING ON THE OVERALL IMPACTS OF THE GENERATION AND MANAGEMENT OF SUCH WASTES, IN ORDER TO DELIVER THE BEST OVERALL ENVIRONMENTAL OUTCOME?

14. UKELA generally agrees with the contents of paragraph 2.31 of the consultation paper. The assessment contained in that paragraph is a sensible approach and recognises that energy recovery may be the most practical and economic option for certain waste streams such as wood.

15. UKELA suggests that the use of CD&E waste for the restoration of quarries may also justify a departure from the waste hierarchy, as would the landfilling of asbestos and the incineration of certain clinical wastes.

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QUESTION 3: ARE THERE ANY FURTHER STEPS STAKEHOLDERS AND MEMBERS OF THE PUBLIC WOULD LIKE DEFRA/WAG TO TAKE TO ENSURE THAT THE DEVELOPMENT OF WASTE LEGISLATION AND POLICY, TO APPLY THE WASTE HIERARCHY AS A PRIORITY ORDER, IS A FULLY TRANSPARENT PROCESS?

16. If the proposals set out in paragraphs 9 and 10 above were adopted, then UKELA believes that the requirement for public consultation on planning applications and permit applications would safeguard transparency.

QUESTION 4: ARE THERE ANY SPECIFIC WASTE STREAMS WHICH YOU CONSIDER SHOULD BE THE SUBJECT OF A PRODUCER RESPONSIBILITY REGIME UNDER ARTICLE 8? IF SO, PLEASE EXPLAIN WHAT THE ECONOMIC AND ENVIRONMENTAL COSTS AND BENEFITS OF SUCH REGIMES WOULD BE.

17. No. UKELA considers that DEFRA/WAG should not consider introducing any additional producer responsibility regimes for specific waste streams unless further regimes are adopted by the EU. Going beyond the requirements of current EU legislation risks putting producers of the relevant waste streams in the UK at a competitive disadvantage compared with equivalent producers in the rest of the EU.

QUESTION 5: ARE THERE ANY FURTHER MEASURES YOU CONSIDER IT WOULD BE APPROPRIATE FOR DEFRA/WAG TO TAKE UNDER THE TERMS OF ARTICLE 11(1) TO PROMOTE THE RE-USE OF PRODUCTS OR PREPARING FOR RE-USE ACTIVITIES? PLEASE GIVE REASONS TO SUPPORT YOUR ANSWER.

18. The counting of whole appliances sent for re-use against WEEE collection targets is noted and welcomed, but re-use may be further promoted if additional credit were to be allocated against collection targets for whole appliances that are actually re-used. There needs to be greater public awareness of the availability of goods and products for re-use, the means by which they can be made available and the means by which they can be acquired. UKELA queries whether it would be possible to develop the concept of goods or product 'libraries' where items can be 'borrowed' for re-use.
19. UKELA believes that more work needs to be done to change the public perception of items from 'second-hand' to 'environmentally re-used'. A change in the approach taken by regulators towards the re-use of goods and products is also necessary, as evidenced by the Environment Agency's actions in the case of *Environment Agency v Thorn International UK Limited [2008] EWHC 2595 (Admin)*, although it is significant that the court found in that case that Thorn was not carrying out a waste management operation.
20. Clarification over the point of departure from the definition of waste would also help. The definition of re-use implies that it cannot be applied to a waste. Therefore, a waste must be 'prepared', but this gives rise to the potential for a legal debate about what 'prepared' means (in a similar way to the debate over the meaning of 'discard').

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QUESTION 6: DO YOU AGREE WITH THE PROPOSED APPROACH TO IMPLEMENTING THE REQUIREMENTS OF ARTICLE 11(1) ON SEPARATE COLLECTIONS? PLEASE PROVIDE REASONS FOR YOUR ANSWER INCLUDING, IF POSSIBLE, THE COSTS AND BENEFITS OF YOUR PREFERRED APPROACH.

21. Separation at source is the most efficient way to achieve recycling of the necessary quality. UKELA understands that co-mingling may be a practical necessity, but greater efforts should be made towards promoting and securing efficient separation at source so that co-mingling is seen as the less desirable solution rather than being accepted as a necessary inevitability. That being said, the MRF component of the waste management industry is well developed in the UK and the technology applied in separating the component materials is well advanced and effective. The outputs are fit for purpose with regard to their end use. Separate collections will continue to develop to meet specific market demands (e.g. high quality white paper).
22. UKELA understands that decisions on the best ways to collect waste are a matter for local authorities, but the possibilities of securing greater efficiencies through regionally or nationally consistent policies or procedures need to be considered.

QUESTION 7: DO YOU CONSIDER THAT:

(A) THERE ARE ANY MEASURES THAT ARE TECHNICALLY, ENVIRONMENTALLY AND ECONOMICALLY PRACTICABLE AND APPROPRIATE TO TAKE IN ENGLAND AND WALES, ON THE SEPARATE COLLECTION OF HOUSEHOLD, COMMERCIAL OR INDUSTRIAL WASTE TO MEET THE NECESSARY QUALITY STANDARDS FOR THE RELEVANT RECYCLING SECTORS? PLEASE GIVE YOUR REASONS FOR YOUR ANSWER.

23. Please see answer to Question 6.

(B) IF YES, WHICH MEASURES DO YOU THINK SHOULD BE INTRODUCED TO ACHIEVE THIS?

24. Please see answer to Question 6.

QUESTION 8: DO YOU CONSIDER THAT:

(A) IT WILL BE TECHNICALLY, ENVIRONMENTALLY AND ECONOMICALLY PRACTICABLE TO SET UP BY 2015, IN ENGLAND AND WALES, SEPARATE COLLECTION FOR PAPER, METAL, PLASTIC AND GLASS WHICH IS CLASSIFIED AS HOUSEHOLD, COMMERCIAL OR INDUSTRIAL WASTE? PLEASE GIVE REASONS FOR YOUR ANSWER.

25. UKELA believes that it would be technically feasible to set up separate collections, but can see no environmental advantage in doing so, as the technology in modern MRFs results in adequate separation of individual waste streams. Economically, it is likely that separate collection of paper, metal, plastic and glass would result in additional costs.

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26. Many businesses already separate out certain recyclables from their waste streams (e.g. cardboard and metal), which are separately collected. However, to encourage SMEs to recycle rather than dispose of their waste (which often the case) a co-mingled approach could be most appropriate if space at the producer's premises is at a premium.

(B) IF YES, WHICH MEASURES DO YOU THINK SHOULD BE INTRODUCED TO ACHIEVE THIS?

27. If DEFRA/WAG did wish to set up separate collections, UKELA notes the existing requirement in the Household Waste Recycling Act 2003 for all English waste collection authorities to collect at least two types of recyclable waste from households and suggests that this requirement could be modified to specify as a minimum the four materials listed in Article 11(1). There could also be a legal obligation imposed on producers of commercial and industrial waste to separate their waste for collection. This could form part of the requirements for waste management plans referred to in paragraphs 8 and 9 above.

QUESTION 9: DO YOU AGREE WITH THE PROPOSED APPROACH TO IMPLEMENTING THE RECYCLING TARGET FOR HOUSEHOLD AND SIMILAR WASTE REQUIRED BY ARTICLE 11(2)(A)? PLEASE PROVIDE REASONS FOR YOUR ANSWER INCLUDING, IF POSSIBLE, THE BENEFITS OR OTHERWISE OF YOUR PREFERRED APPROACH.

28. Yes, in respect of household waste. In respect of waste streams similar to those from households, UKELA generally agrees with the proposed approach, but has some reservations. UKELA is aware that some waste collection authorities collect a component of commercial waste, but most is collected by private waste collection contractors. Consequently, neither the mechanism for applying the targets nor the body/bodies responsible for meeting the targets is clear.

QUESTION 10: (ENGLAND ONLY) GIVEN THE LAWRRD MODEL SCENARIOS ABOVE, DO YOU AGREE WITH THE GOVERNMENT'S PREFERRED "NO FURTHER MEASURES" APPROACH? PLEASE GIVE REASONS FOR YOUR ANSWER.

29. Yes. UKELA believes that the current approach is working in England. It would be useful to define how home composting is accounted for within the mix of biodegradable waste. Without DEFRA providing a consistent method to measure the amount of home composting that is undertaken in England it is difficult to gain an accurate picture of the level of recycling that is being undertaken.

QUESTION 11: (ENGLAND ONLY) IF YOU THINK THE GOVERNMENT SHOULD LOOK TO INTRODUCE ADDITIONAL MEASURES TO ENSURE THAT THE RECYCLING TARGET OF 50% FOR HOUSEHOLD AND SIMILAR WASTES IS REACHED BY 2020, DO YOU HAVE VIEWS ABOUT WHAT THESE ADDITIONAL MEASURES SHOULD BE? IF SO, PLEASE SPECIFY AND GIVE REASONS FOR YOUR ANSWER.

30. UKELA does not believe that additional measures are necessary in England. That said, UKELA would question whether these targets should instead be considered as benchmarks

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against which future improvement can be measured. Consistency between England, Scotland and Wales should be encouraged to demonstrate that the UK as a Member State has a defined common denominator as to what benchmark/target it is working towards.

31. Notwithstanding its belief that no additional measures are necessary in England, UKELA believes that further thought and effort needs to be applied towards the introduction of incentive schemes to households recycling more waste (but without penalising households not recycling, i.e. not a 'pay as you throw' system, but a system that rewards for recycling). Although DEFRA has been given powers in the Climate Change Act 2008 for five local authorities to run pilot schemes to do this, UKELA understands that none applied. UKELA would urge DEFRA to be more resilient and robust in designing the criteria for such schemes.

QUESTION 12: (ENGLAND ONLY) DO YOU HAVE VIEWS ABOUT TARGETING ANY ADDITIONAL MEASURES ON SPECIFIC MATERIALS? IF SO, PLEASE SPECIFY WHICH MATERIALS YOU CONSIDER ARE HIGH PRIORITY AND GIVE REASONS FOR YOUR ANSWER.

32. Again, UKELA would encourage discussion regarding how home composting is incorporated into the mix and ensuring that there is a focus away from landfilling. This is particularly important when considering Local Government Performance Framework measure NI192 and also the contribution towards the municipal biodegradable waste landfill diversion targets.

QUESTION 13: (WALES ONLY) DO YOU THINK THAT WALES' APPROACH WILL MEET THE REQUIREMENTS OF ARTICLE 11(2)(A) OF THE REVISED WFD? PLEASE GIVE REASONS FOR YOUR ANSWER.

33. In its "*Towards Zero Waste*" strategy, Wales published targets for 2019/2020 as an impressive 64% (minimum levels of re-use and recycling/composting), with 80% of that coming from kerbside collections and source separation/civic amenity facilities), rising to 70% for 2025. Within this target, Wales has focused primarily on food waste, paper and card, and plastic. Whilst the Welsh approach is very ambitious, and progress up to now has been good (the recycling and composting rate for municipal waste has increased nine fold in the first three quarters of 2008/2009, being 36%), there remains one key legal issue which directly impacts on the likelihood of Wales meeting the Article 11(2)(a) target.
34. WAG currently lacks the requisite powers to bring these ambitious targets to fruition - and indeed has not explained in its strategy how these targets are going to be achieved. It is hoped that the proposed National Assembly for Wales (Legislative Competence) (Environment) Order 2009 will provide WAG with legislative competence in relation to the prevention, reduction, collection, management, treatment or disposal of waste in Wales (reference is made to matter 6.1 of the Order). The Order has been scrutinised by the National Assembly Legislative Committee and Welsh Affairs Select Committee, but has not

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yet been implemented. It was first published in 2007, and a series of revisions have been made during this intervening period. Therefore, it is of vital importance that WAG is given legislative teeth to drive forward the mechanisms which will enable the Article 11(2)(a) target to be met. Without these teeth, it is difficult to see how Wales will meet this target, and if Wales misses its target then the UK will be at risk of infraction proceedings by the European Commission.

QUESTION 14: DO YOU AGREE WITH OUR ASSESSMENT OF THE EXTENT TO WHICH WE ARE ALREADY MEETING THIS CONSTRUCTION AND DEMOLITION WASTE RECOVERY TARGET IN ENGLAND AND WALES?

35. UKELA does not understand how DEFRA/WAG can be confident in its assessment of the extent to which it is meeting the target if its work on CD&E waste data is not yet complete.

QUESTION 15: DO YOU BELIEVE THAT ANY ADDITIONAL POLICY OR LEGISLATIVE MEASURES ARE NECESSARY FOR US TO GUARANTEE THAT WE ARE MEETING THIS TARGET IN ENGLAND AND WALES?

36. It would be premature to respond to this question before DEFRA/WAG has completed its work on obtaining accurate data to enable it to analyse progress towards the target. That being said, provided the various legislative and policy measures (including landfill tax, site waste management plans and the Strategy for Sustainable Construction) are fully enforced and implemented there should be no need for additional measures. In any event this should be reviewed in 2012 as suggested.

QUESTION 16: DO YOU AGREE THAT THE UK IS CURRENTLY SELF-SUFFICIENT IN INSTALLATIONS FOR THE RECOVERY OF MIXED MUNICIPAL WASTE FROM PRIVATE HOUSEHOLDS ETC? IF NOT, PLEASE (i) EXPLAIN YOUR REASONS AND (ii) THE STEPS YOU CONSIDER NEED TO BE TAKEN BY THE UK TO ACHIEVE SELF-SUFFICIENCY IN RELATION TO SUCH INSTALLATIONS.

37. UKELA is surprised that DEFRA/WAG is asking this question. If the UK is currently self-sufficient in such installations, then why do so many waste collection authority and waste disposal authority tenders appear to specify new build facilities for recycling and recovery of waste? Also, why are there still incidences of mixed municipal waste being illegally exported for disposal, such as the incident in July 2009 in which more than 90 containers of waste were discovered having been illegally exported to Brazil?

QUESTION 17: DO YOU CONSIDER THAT THE FOLLOWING CHANGES WILL HAVE AN IMPACT ON THE WAY HAZARDOUS WASTE IS MANAGED? PLEASE GIVE REASONS FOR YOUR ANSWER AND, IF YES, SET OUT THE IMPLICATIONS THAT YOU CONSIDER THE CHANGES WILL HAVE:

- (A) **THE ADDITION OF A NEW PROPERTY: “H13 (*) ‘SENSITIZING’”: SUBSTANCES AND PREPARATIONS WHICH, IF THEY ARE INHALED OR INGESTED OR IF THEY PENETRATE THE SKIN, MAY INDUCE NON-HEREDITARY CONGENITAL MALFORMATIONS OR INCREASE THEIR INCIDENT”.**

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- (B) **EXISTING PROPERTY H13 HAS BEEN RE-NUMBERED TO H15. THIS MEANS THAT THIS PROPERTY “H15: WASTE CAPABLE BY ANY MEANS, AFTER DISPOSAL, OF YIELDING ANOTHER SUBSTANCE, EG A LEACHATE, WHICH POSSESSES ANY OF THE CHARACTERISTICS ABOVE” NOW ALSO APPLIES TO “H14: ECOTOXIC”. IN OTHER WORDS, H14 (ECOTOXICITY) NOW HAS TO BE CONSIDERED AS A CRITERION FOR H15.**
- (C) **ARTICLE 18(2) WHICH ALLOWS MIXING ONLY WHERE THE PERMITTED MIXING OPERATION CONFORMS TO BEST AVAILABLE TECHNIQUES.**

38. As a matter of law, the three proposed changes must have an impact on the way in which waste is managed. That impact should result in greater consideration and treatment of hazardous properties and improved practices. UKELA cannot quantify the extent of this operational impact, but believes it is environmentally positive.
39. On the issue of mixing by waste producers and use of BAT, DEFRA and the Environment Agency need to set out how effective regulation of such activities is to be undertaken. Is there to be a methodical review of registered hazardous waste producers and also attempts to enforce against those who have failed to register or do not need to do so?

QUESTION 18: DO YOU AGREE WITH THE PROPOSED APPROACH TO RELY ON THE MEASURES ADOPTED TO TRANSPOSE AND IMPLEMENT THE WASTE HIERARCHY (AND RELATED MEASURES) AND NOT TO PRESCRIBE UNDER ARTICLE 21(3) THAT WASTE OILS MUST BE REGENERATED IF TECHNICALLY FEASIBLE? IF NOT, PLEASE PROVIDE REASONS FOR YOUR ANSWER AND, IF POSSIBLE, EXPLAIN THE ECONOMIC AND ENVIRONMENTAL COSTS AND BENEFITS OF YOUR PREFERRED APPROACH.

40. Taking into account the waste hierarchy, the potential for the currently low level of waste oil regeneration to increase should be pursued. Depending on the technology currently available it may be more appropriate to seek to encourage this increase through policy and incentive rather than by prescription.

QUESTION 19: DO YOU AGREE THAT SUFFICIENT MEASURES ARE ALREADY BEING TAKEN IN ENGLAND AND WALES TO ENCOURAGE BIO-WASTE TREATMENT ETC AS ENVISAGED IN ARTICLE 22? IF NOT, PLEASE (I) EXPLAIN YOUR REASONS AND (II) THE MEASURES YOU CONSIDER NEED TO BE TAKEN IN ENGLAND AND WALES TO ENCOURAGE BIO-WASTE TREATMENT AS ENVISAGED IN ARTICLE 22?

41. Greater effort should be directed towards disseminating information about the collection, processing and treatment of bio-waste, particularly regarding the importance of separation at source generally. More effective material contribution should encourage investment and new technology. It would also help if there were further tools to identify when outputs arising from bio-waste treatment cease to be waste. PAS100 and PAS110 exist, but this portfolio requires expansion to match the potential range of useful outputs from bio-waste treatment. At present there is currently a regulatory aversion to compost-like output, which can have beneficial effects in reclamation and remediation projects.

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QUESTION 20: WHAT REVISIONS DO YOU CONSIDER DEFRA/WAG SHOULD MAKE TO THE EXISTING ARRANGEMENTS FOR WASTE MANAGEMENT PLANS (SEE PARAGRAPH 2.134 ABOVE) TO TRANSPOSE THE REQUIREMENTS OF ARTICLES 28(1), (2) AND (3)(A)-(E) OF THE REVISED WFD? PLEASE GIVE REASONS FOR YOUR ANSWER.

42. Member States have an obligation to transpose the terms of the revised Directive by 12 December 2010. Therefore, if and to the extent that precise obligations need to be made into law, then these should be enshrined in law rather than merely changing the waste management plans. Changing the waste management plans alone will not be sufficient to fulfil the mandatory provisions of Article 28.

QUESTION 21: WHICH, IF ANY, OF THE DISCRETIONARY ISSUES SET OUT IN ARTICLES 28(4)(A)-(D) OF THE REVISED WFD DO YOU CONSIDER DEFRA/WAG SHOULD ADDRESS IN THE ARRANGEMENTS FOR WASTE MANAGEMENT PLANS ADOPTED IN RESPONSE TO QUESTION 20? PLEASE GIVE REASONS FOR YOUR ANSWER.

43. The discretionary elements in Article 28(4) are set out below for reference:

“4. *The waste management plan may contain, taking into account the geographical level and coverage of the planning area, the following:*

- (a) *organisational aspects related to waste management including a description of the allocation of responsibilities between public and private actors carrying out the waste management;*
- (b) *an evaluation of the usefulness and suitability of the use of economic and other instruments in tackling various waste problems, taking into account the need to maintain the smooth functioning of the internal market;*
- (c) *the use of awareness campaigns and information provision directed at the general public or at a specific set of consumers;*
- (d) *historical contaminated waste disposal sites and measures for their rehabilitation.”*

44. It is not apparent that any new policies or law need to be implemented in respect of any of the discretionary provisions in (a)-(d) above. (a) to (c) are covered to some extent in the waste strategies in any case. (b) will also be covered in impact assessments carried out by Government in relation to any new regulations. From a legal perspective, issues arising out of historical contaminated waste disposal sites will be dealt with under the site closure requirements of the Environmental Permitting regime, and under the contaminated land regime in Part 2A of the Environmental Protection Act 1990. Whilst there is no reason why these matters cannot be touched upon in the waste strategies, they are currently dealt with.

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QUESTION 22: WHAT ARE YOUR VIEWS ON THE MERITS OF EITHER (I) FREESTANDING NATIONAL WASTE PREVENTION PROGRAMMES IN ENGLAND AND WALES OR (II) A MORE DISPERSED APPROACH WHICH WOULD INVOLVE INTRODUCING A REQUIREMENT FOR LOCAL AUTHORITIES TO DRAW UP THEIR OWN WASTE PREVENTION PROGRAMMES? PLEASE GIVE REASONS FOR YOUR ANSWER.

45. UKELA has concerns about separating waste management plans and waste prevention programmes and believes that integrating them would lead to greater consistency and quality of decision-making. As noted in paragraph 2.144 of the consultation paper, there already exists a tiered system for implementing Article 7 of the existing Directive and Article 28 of the revised Directive in the UK. This same tiered system could be used to implement the waste prevention programmes required by Article 29 of the revised Directive. UKELA believes that waste prevention programmes are more likely to be successful if they are developed at local authority level within a national policy framework, rather than being set as high-level national policies, as local authorities are best placed to adopt the programmes that are best suited to their local conditions. UKELA therefore favours a more dispersed approach. Incorporating waste prevention policies into local planning policies would also enable local authorities to take such policies into account when determining planning applications.

QUESTION 23: WHAT ARE YOUR VIEWS ON THE INTEGRATION OF WASTE PREVENTION PROGRAMMES INTO THE WASTE MANAGEMENT PLANS REQUIRED BY ARTICLE 28 OF THE REVISED WFD, THEIR INTEGRATION INTO OTHER ENVIRONMENTAL POLICY PROGRAMMES OR THEIR FUNCTIONING AS SEPARATE PROGRAMMES?

46. Please see response to Question 22 above. UKELA cannot see how a waste management plan can be complete without including a waste prevention programme.

QUESTION 24: MEMBER STATES MUST EVALUATE THE USEFULNESS OF - BUT NOT NECESSARILY ADOPT - THE 16 EXAMPLES OF WASTE PREVENTION MEASURES IN ANNEX IV OF THE REVISED WFD. DO YOU HAVE VIEWS ON THE USEFULNESS OF ANY OF THESE EXAMPLES AS WASTE PREVENTION MEASURES? IF SO, PLEASE SPECIFY THE MEASURES AND GIVE REASONS FOR YOUR ANSWERS.

47. UKELA believes that economic instruments (paragraph 1) and the promotion of eco-design (paragraph 4) are particularly useful as waste prevention measures. In the UK, economic instruments such as landfill tax and LATS have proved effective at reducing waste and represent a more flexible legal mechanism for achieving environmental goals than prescriptive regulations. Eco-design requirements are also an effective legal mechanism for reducing waste, as they tackle the problem at source by “designing out” waste.

QUESTION 25: DO YOU CONSIDER THAT THE COSTS AND BENEFITS OF THE TRANSPOSITION AND IMPLEMENTATION OF THE PROVISIONS OF THE REVISED WFD THAT ARE THE SUBJECT TO THE STAGE ONE CONSULTATION EXERCISE HAVE BEEN ACCURATELY ASSESSED IN THE INITIAL IMPACT ASSESSMENT AT ANNEX 3 (PAGE 71) TO THE CONSULTATION PAPER? IF NOT, PLEASE PROVIDE WHATEVER EVIDENCE YOU

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CAN TO ENABLE A MORE ACCURATE ASSESSMENT TO BE MADE IN THE IMPACT ASSESSMENT THAT WILL FORM PART OF THE STAGE TWO CONSULTATION EXERCISE.

48. UKELA has no comments on this question.

OTHER ISSUES: END-OF-WASTE STATUS; THE “R1 FORMULA” AND THE RECOVERY/DISPOSAL DISTINCTION.

49. Although DEFRA/WAG has not asked any specific consultation questions about end-of-waste status, and the “R1 Formula” and the recovery/disposal distinction, UKELA wishes to make the following comments on these issues.

End-of-waste status

50. UKELA welcomes the adoption of Article 6 of the revised Directive and comitology procedure it introduces for the development of end-of-waste criteria, and believes that these measures will do much to provide legal certainty on when waste ceases to be waste and thereby prevent litigation. However, it is apparent that it may take the Commission some time to prepare the end-of-waste criteria referred to in paragraph 2.149 of the consultation paper and for these criteria to be formally adopted by the Committee established under Article 39 of the revised Directive. In the interim, how does DEFRA/WAG propose to resolve end-of-waste issues? Also, how does DEFRA/WAG envisage that the criteria will be applied in the UK? UKELA notes the existence of WRAP Quality Protocols for a range of materials - what will be the status of these Protocols when criteria are formally adopted for particular materials already covered by a Protocol?

The “R1 Formula” and the recovery/disposal distinction

51. UKELA generally agrees with DEFRA's/WAG's analysis of the “R1 Formula” and the recovery distinction, except for its comments in paragraph 2.180 of the consultation paper. *Commission v Luxembourg* reiterates the legal analysis contained in *Commission v Germany*. UKELA also wishes to point out that the judgments in both cases were delivered on the same date and that the Advocate General was the same in both cases.

52. UKELA welcomes the Environment Agency's proposed approach to the application of the R1 Formula pending the development of guidelines by the European Commission. Disregarding operational variations when applying the R1 Formula and instead applying the formula on the basis of plant design figures provides legal certainty for operators of incinerators and is a more pragmatic approach. It also has the advantage of allowing the status of a plant to be determined at the planning and permitting stage.

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Contact:

Angus Evers

Convenor, UK Environmental Law Association Waste Working Party

c/o SJ Berwin LLP, 10 Queen Street Place, London EC4R 1BE

Telephone: 020 7111 2763

Email: angus.evers@sjberwin.com

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