
Guidance on the Waste Management (Management of Waste from the Extractive Industries) Regulations 2009



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**Guidance on the Waste Management
(Management of Waste from the Extractive Industries) Regulations 2009**

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1. The Purpose of this Guidance Note

This guidance note is designed to be a detailed and comprehensible explanation of the Waste Management (Management of Waste from the Extractive Industries) Regulations 2009¹ (hereinafter the “Extractive Waste Regulations”). The aim is to illustrate how the key elements of the legislation impinge on individuals and organisations in the extractive industries that handle extractive waste, as well as describing the various obligations that fall on local authorities in respect of the regulatory functions that apply to this sector.

Aside from this guidance note, the Department of the Environment, Heritage and Local Government has published three Circulars on the Extractive Waste Regulations. These are Circulars WP 1/10 of 8/1/10, WP 10/10 of 16/3/10 and WP 24/10 of 4/10/10. The content of these Circulars has been considered in the preparation of this guidance note and incorporated within it. In a number of instances, the interim position expressed in these Circulars about certain elements of the Extractive Waste Regulations has been up-dated and subject to minor revision. In general, these changes have been necessitated to fully reflect further information that has become available about either the operational practices of this sector or the potential regulatory impact this legislation has on it.

As non-compliance with the Extractive Waste Regulations can be addressed via the enforcement provisions of the Waste Management Acts 1996- 2011 (the “WMA”), reference to those provisions also has been included.

This guidance note contains extracts and quotations from the legislation, which are intended to be illustrative of key legal wordings. They are included to assist the reader’s understanding of the Extractive Waste Regulations without recourse being necessary to the text of the actual legislation. However, in some instances, words or phrases may have been omitted to make these extracts easier to understand. Also included in the following chapters are an extensive series of footnotes pointing to where the various requirements are to be found in the legislation. These are intended to orientate readers who wish to explore the exact wordings of these provisions in more detail.

In respect of any of the contents of this guidance note, it is vital that, prior to a local authority considering embarking on enforcement action, readers consult the legislation itself in order to obtain the full picture. Any interpretation contained in this guidance note simply constitutes what is intended to be a helpful summary of key facets of the Extractive Waste Regulations. For this reason, readers are reminded that this guidance note is not a substitute for legal advice and should not be used for that purpose. The only body qualified to give a definitive interpretation of the law is the courts.

A draft of this document was subject to public consultation in 2011. Responses were received from:

- The Department of the Environment, Community and Local Government
- The Society of Chartered Surveyors Ireland
- The Irish Concrete Federation
- The Irish Mining and Quarrying Society
- Meath County Council
- Offaly County Council
- Kildare County Council

The contribution of all of these organisations is acknowledged.

Contributions to this document were made by Michael Owens, Brian Meaney, Stephen McCarthy and Patrick Chan of the Environmental Protection Agency.

1 SI 566 of 2009

2. Introduction

The Extractive Waste Regulations transpose EU Directive 2006/21 of 15 March 2006 on the management of waste from extractive industries (hereinafter “Directive 2006/21”) into Irish law. The primary purpose of this Directive was to take a Europe-wide initiative to prevent further catastrophic failures of containment systems at extractive waste facilities. A number of these collapses had occurred in the period prior to the completion of the Directive and there remain to this day concerns that inadequately engineered containment systems may present a significant risk to human health and the environment.

While many of the more recent incidents from extractive waste facilities in Europe involved uncontrolled emissions of hazardous waste from lagoons and tailings ponds, sites where inert waste has been deposited also were deemed to require additional regulatory attention. The instability of some quarry spoil tips may cause a significant potential danger to land occupiers in close proximity, while also having the potential to cause environmental damage. This type of threat arises not only as a direct consequence of a collapse, but also because it may cause other, indirect impacts, such as the obstruction of local drainage systems and consequent flooding. Similar issues of concern also may arise from poorly constructed settlement lagoons containing inert materials.

An additional purpose of this legislation is to improve the overall management of extractive waste of all types. Following the general approach that is a key feature of the EU’s environmental policy, Directive 2006/21 sets out a preventative approach, whereby negative environmental effects associated with the management of extractive waste should be prevented, minimised or otherwise reduced wherever this is possible.

It follows that Directive 2006/21 has a wide scope, applying to all activities that are embraced by the term “extractive industries”. As will be seen, this covers not only the mining sector and its hazardous wastes, but also extends to inert waste arising from quarrying, sand and gravel extraction, and related activities.

Readers who wish to look for guidance published in other member states should be aware that the equivalent legislation and guidance of some of these jurisdictions often makes reference to the “Mining Waste Directive” and/or the “Mining Waste Regulations”. This is despite the legislation in these countries also covering activities such as quarrying. As the words “extractive waste” form part of the title of both the Directive and the Irish legislation – as well as there being only a very limited number of mines that are active in Ireland – the term “extractive waste” is used throughout this guidance.

2.1 The Structure of this Guidance Note

Each of the chapters of this guidance is structured around a key theme of the Extractive Waste Regulations. From Chapter 4 onwards, each one starts with a bullet-point summary of the key elements of the forthcoming material. This allows readers to quickly grasp the main points, before moving on to consider these aspects in more detail in the text that follows. These key points are then returned to at the end of each chapter, by two separate bulleted lists. These set out, again in summary form, the nature of the most significant obligations that fall, respectively, on local authorities and on the extractive industry.

The next chapter of this guidance is intended to set out the key aspects of the legislation in general terms, thereby acting as an introduction to the more detailed material that follows. Also explained is how the Extractive Waste Regulations interact with other environmental legislation and planning control. A short section is also included to assist any reader who wishes to scrutinise the actual legislation itself.

Chapters 4 to 15 cover the key themes of the Extractive Waste Regulations, with Chapter 4 commencing this process by summarising certain key concepts of the Extractive Waste Regulations that need to be thoroughly understood. This is necessary so that the scope and limits of application of the various provisions of the legislation – which are analysed in more detail in subsequent chapters – can be appreciated. This discussion covers the focus of the Regulations, including what is meant by terms such as “extractive waste” and the “extractive industries”. A consideration of the vitally important concept of a “waste facility” then follows, along with an evaluation of the meaning given to terms such as site “operator”.

Having established this background, Chapters 5 to 7 set out the key obligations that apply to extractive waste facilities of all types, with the text being complemented by a discussion of what is expected of local authorities in respect of the enforcement of these duties. These chapters cover the general obligation on all extractive waste facility operators to neither endanger human health nor cause an unacceptable risk of environmental pollution, as well as the legislation's requirements relating to extractive waste management plans and the provisions relating to site restoration.

All of the above-described chapters focus on the elements of the Extractive Waste Regulations that will apply to all local authorities and all operators in the extractive industry. This discussion is followed by two chapters (Chapters 8 and 9) that address the Regulations' obligations that are specific to two different categories of extractive waste facility. In practice, the most important of these will be the first half of Chapter 8 – which discusses the requirements placed on operators of inert waste sites – as this sector is envisaged to be by far the most common in Ireland. However, for the purposes of completeness, the remainder of that chapter and Chapter 9 covers the legislation's provisions that apply to extractive waste facilities which handle unpolluted soil, peat waste and non-hazardous, non-inert waste. In respect of each of these categories of site, guidance is provided on how the different types are to be defined and distinguished.

Chapter 10 describes the provisions that require a local authority to identify any additional potential Category A facilities, with the following chapter of this guidance note (Chapter 11) focusing on sites that closed in the period when Directive 2006/21 was being finalised.

Chapter 12 sets out the obligations on local authorities to register all locations where extractive activities are taking place, with Chapter 13 containing a discussion of the enforcement roles of local authorities and, to a lesser extent, of the Environmental Protection Agency. This material also highlights the requirement of the legislation for individual local authority officers to be explicitly authorised under the Extractive Waste Regulations. This key issue should be noted and acted upon by all local authorities. These chapters also cover items such as the legislation's requirements about site inspections and reporting to the Agency.

Chapter 14 discusses reporting requirements, where it is noted that some, quite extensive, data has to be gathered about how the Directive 2006/21 is operating in Ireland. This material must be submitted periodically to the European Commission.

Chapter 15 covers the legislation's requirements for external emergency plans. These need to be drafted by a local authority when a Category A facility is situated in its functional area.

Appendix 1 covers the vital issue of the definition of "waste", looking at the relevant case law of the Court of Justice of the European Union and setting down a series of key determinants that must be considered in respect of extractive waste. Appendix 2 contains a copy of the questionnaire produced by the European Commission. This material has been included to give local authorities prior warning of the type and scope of data that needs to be collated about the activities of the extractive industry in their functional areas. Appendix 3 contains a copy of the EPA's form relating to potential Category A sites.

2.2 Further Guidance

The EPA has also published general guidance for the extractive industries in the form of the publication *Environmental Management in the Extractive Industries (Non-Scheduled Activities)*. A BATNEEC Guidance Note is also available for the extraction of peat. Both are available on the Agency's website.²

² <http://www.epa.ie/downloads/advice/general/name,13511,en.html> and <http://www.epa.ie/downloads/advice/bat/>

3. Key Aspects of the Extractive Waste Regulations

3.1 Summary of the Main Provisions

The bulk of the Extractive Waste Regulations focuses on improving the quality of management of the most hazardous types of extractive waste facility. Many of these will involve the long-term storage of environmentally harmful waste, such as mine tailings; however, these provisions also impact on certain inert waste sites, such as quarry spoil tips, where possible instability poses an unacceptable level of risk to neighbouring land occupiers or to the environment. All of these sites are termed “Category A facilities”. Many will be already licensed by the EPA, but local authorities are required to identify any additional sites that may warrant Category A status (see Chapter 10).

Besides Category A facilities, the legislation breaks down other extractive activities into five classes. The purpose of dividing up extractive waste facilities in this manner is to ensure that an appropriate level of environmental regulation applies to each generic type; it also reflects the main types of common extractive activity. The five classes relate to sites that involve:

- extractive waste created by minerals prospecting activities
- inert waste resulting from the extraction, treatment and storage of mineral resources and the working of quarries
- the deposit of unpolluted soil
- the extraction, treatment and storage of peat
- the handling of non-hazardous, non-inert waste

With the exception of any extractive waste facilities that are a consequence of prospecting for minerals or facilities that are licensed or licensable by the Agency, local authorities have been assigned the responsibility for regulating all non-Category A sites. In practice, most of the local authority-regulated sites will be handling inert waste and will involve quarrying or sand and gravel extraction.

As noted, a purpose of splitting extractive waste facilities into these five generic classes is to reflect the appropriate level of stringency of environmental regulation that is required. In turn, this matter is essentially a function of the level of environmental risk associated with the material being handled. Accordingly, no licences or permits are needed to authorise facilities solely handling inert extractive waste that has been generated on-site or for sites that handle only peat or unpolluted soil (see Chapter 8). However, extractive waste facilities that contain non-hazardous, non-inert waste are considered to be more environmentally significant and therefore are required to be subject to the waste facility permit regime that is consequent to the Waste Management (Facility Permit and Registration) Regulations 2007³ (see Chapter 9).

While most non-Category A sites will be outside the waste facility permitting regime, various elements of the Extractive Waste Regulations apply at all sites operated by the extractive industry. In summary, this includes the following requirements:

- the general obligation that extractive waste does not cause a danger to human health or an unacceptable risk to the environment (Regulation 4) or cause environmental deterioration (Regulation 13: see Chapter 5)
- the duty on all site operators to draw up extractive waste management plans (Regulation 5: see Chapter 6)
- the requirement that operators ensure that good practice is incorporated into an extractive waste facility’s design, operation, closure and aftercare (Regulations 10-12: see Chapter 7).

Besides having a duty to enforce the above-mentioned requirements at all extractive sites located in its functional area, each local authority also has a number of other statutory functions under the Extractive Waste Regulations. These include:

- the obligation to produce a publicly-available external emergency plan for any Category A site situated in its functional area (Regulation 6: see Chapter 15)

³ SI 821 of 2007, as amended by the Waste Management (Facility Permit and Registration)(Amendment) Regulations 2008 (SI 86 of 2008), by the Waste Management (Food Waste) Regulations 2009 (SI 508 of 2009), by the Extractive Waste Regulations (Regulation 23) and by the European Communities (Waste Directive) Regulations 2011 (SI 126 of 2011).

- the duty to notify the Agency of any additional potential Category A facility it comes across (Regulation 9). In most instances, these will be quarrying sites associated with spoil tips or lagoons that exhibit significant instability (see Chapter 10)
- the responsibility to compile a register of all extractive industries operating in its functional area (Regulation 19: see Chapter 12)

In addition, each local authority has to provide summary data on the regulation of extractive waste facilities within its functional area. This material will be required for reporting to the European Commission⁴ (see Chapter 14 and Appendix 2).

In order to ensure that there is compliance by operators with the requirements of the Extractive Waste Regulations, all extractive sites will need to be periodically inspected (see Chapter 13).

It should be noted that the above list of local authority functions is not exhaustive, being provided here as a useful summary for readers unfamiliar with this legislation.

3.2 Interactions between the Extractive Waste Regulations and other Legislation

It is important to appreciate that the Extractive Waste Regulations overlap with other legislation that is within a local authority's environmental protection remit. This legislation includes the Waste Management Act and the Planning and Development Act, as well as the Local Government (Water Pollution) Act. In summary, the following legislation has particular relevance, with later chapters of this guidance providing more detail about the key issues.

3.2.1 Waste Management Act

The various enforcement tools provided to local authorities in the Waste Management Act have application where there is non-compliance with the Extractive Waste Regulations.⁵ In addition, the term "extractive waste" is founded on the Act's definition of "waste"⁶, with that definition being subject to the provisions on by-products and the "end-of-waste criteria" contained in the European Communities (Waste Directive) Regulations 2011⁷ (this matter is discussed in Appendix 1).

3.2.2 Waste Licensing and Waste Facility Permits

Local authorities are reminded that all landfill sites remain required to be licensed by the EPA and that this position is unchanged by the Extractive Waste Regulations. In this respect, the Regulations confirm that, in instances where waste other than extractive waste is deposited as back-fill into any void at an extractive site, the Landfill Directive continues to apply.⁸

⁴ See Directive 2006/21, Article 18 and Commission Decision 2009/358 and Appendix 2.

⁵ Regulation 16(3).

⁶ Waste Management Act, Section 4(1), as amended by the European Communities (Waste Directive) Regulations 2011, SI 126 of 2011, Regulation 4

⁷ SI 126 of 2011, Regulations 27 and 28.

⁸ Regulation 10(2).

As all sites that are subject to the Landfill Directive fall within the licensing regime, with the relevant requirements being contained primarily in the Waste Management (Licensing) Regulations 2004,⁹ it follows that all sites subject to that Directive remain within the remit of the Agency, not of local authorities.¹⁰

In cases of doubt, local authorities can invoke the procedure set down in Article 11 of the Waste Management (Facility Permit and Registration) Regulations 2007 and request the Agency to make a final determination about whether a waste licence is required.

3.2.3 IPPC Licensing

A small number of extractive sites are regulated by Integrated Pollution Prevention and Control (IPPC) licence that are issued under the Environmental Protection Agency Act 1992. This includes:¹¹

- metalliferous mining and processing operations,
- sites where more than either 200,000 tonnes per year or one million tonnes in total of minerals¹² are extracted,
- peat extraction sites exceeding 50 hectares.

3.2.4 Planning and Development Act

The Extractive Waste Regulations' focus is mainly upon the control of extractive waste and/or extractive waste facilities. This means that this legislation will not normally apply to areas of an extractive site that do not involve the handling of extractive waste. Accordingly, most environmental issues arising from non-waste activities at quarries and other similar facilities will not be able to be addressed through the Extractive Waste Regulations. Instead, local authorities must look to other enforcement mechanisms, particularly those contained in the Planning and Development Act and that are consequent to a site's planning conditions.

A series of key amendments to the Planning and Development Act entered into force on 15 November 2011.¹³ These are aimed at significantly strengthening planning controls on quarrying and related activities. These provisions develop from the existing system set down by Section 261 of the Planning and Development Act 2000 – with this provision being amended – and introduce additional duties on planning authorities under new Section 261A.

Given that the extractive sector will be subject to the Extractive Waste Regulations and the changes associated with Section 261A of the Planning and Development Act, both of which are to be enforced by the same local authority, it is important that, where possible, a co-ordinated approach is undertaken by the different sections of a local authority that are responsible for these regimes.

3.2.5 Local Government (Water Pollution) Act 1997

Any extractive site that discharges process water into a watercourse requires a discharge licence under Section 4 of the Local Government (Water Pollution) Act 1977. Uncontrolled discharges of polluting matter to such media are an offence under the Act's Section 3. These general requirements are not changed by the Extractive Waste Regulations. However,

⁹ SI 395 of 2004, Articles 48-53.

¹⁰ No landfill activity is specified as being able to be authorised by a waste facility permit or registration certificate in Schedule 3 to the Waste Management (Facility Permit and Registration) Regulations.

¹¹ Environmental Protection Agency Act 1992, Schedule 1, as amended by the Protection of the Environment Act 2003, Section 18

¹² "Minerals" in this context means so-called "Schedules Minerals" as set down in the Schedule to the Minerals Development Acts. This term excludes extractive materials such as sand, gravel, clay and stone.

¹³ See Sections 74 and 75 of the Planning and Development (Amendment) Act 2010 (as amended by the European Union (Habitats and Birds) Regulations 2011 (SI 473 of 2011)). Not all of Section 74 has been subject to commencement: see Planning and Development (Amendment) Act 2010 (Commencement)(No 3) Order 2011 (SI 582 of 2011).

in a number of places¹⁴ the Regulations reinforce the requirements of the Water Framework Directive (Directive 2000/60). A particular emphasis is placed on the need for discharges from waste management activities¹⁵ at extractive sites to be controlled in a manner that causes no deterioration to local water quality. This duty applies to discharges to both surface waters and groundwater.

In respect of this duty, as well as the fact that both the Extractive Waste Regulations and the amendments to the Planning and Development Act imply a more active approach to the regulation of this sector, local authorities should implement a programme to actively review the appropriateness of the conditions of all discharge licences that are associated with extractive waste operations.

3.3 Reading the Regulations for the First Time

A number of key aspects of the legislation need to be appreciated by persons studying the legislation for the first time. In summary, the following considerations should be noted:

- the legislation only applies to “extractive waste” and, in this respect, there are certain exclusions,
- there is a need to differentiate between extractive “waste” and other by-products at an extractive site; this issue can become quite complex in respect of quarry backfilling,
- by no means does all of the legislation apply to every extractive site,
- there are different cut-offs which exclude certain extractive sites from the legislation, either entirely or partially. These affect historic waste facilities, as well as the active, but short term, storage of materials such as inert waste,
- while some elements of the legislation place obligations on operators of extractive waste facilities, other obligations fall on operators that manage extractive waste or on the extractive industry. In some cases, there are significant differences between the scope of these terms,
- by focussing mainly on extractive waste or on extractive waste sites, the legislation does not impinge upon other, non-waste related, activities at quarries and other sites,
- the legislation must be read in conjunction with a series of EU Decisions. These Decisions have not been incorporated into the text of the Extractive Waste Regulations, but must be read as a series of supplements/clarification to the national legislation.

Like all environmental legislation, when the actual text needs to be consulted, it must be read in its entirety. This principle applies particularly to the Extractive Waste Regulations, as some elements set down exclusions that cause other parts of the legislation not to apply to particular sectors or to sites that were in operation before certain key dates.

In this respect, particular attention needs to be placed upon Regulations 2(4) and 21(4). For example, Regulation 2(4) states that some parts of the main body of the Extractive Waste Regulations do not apply at all to sites that handle only inert waste or unpolluted soil;¹⁶ similarly, Regulation 21(4) sets a series of cut-off dates for sites that closed before December 2010. While the nature of these and other similar requirements is discussed in more detail in later chapters, it is important to understand the significance of these provisions when reading the legislation.

¹⁴ Regulations 5(3)(g), 11(2)(a), 12(5), 13(1), (4) and (5), 21(3). Regulation 4 also requires local authorities to ensure that operators of extractive sites do not cause undue risks to water bodies of all types.

¹⁵ As noted, the Extractive Waste Regulations only apply to operations involving extractive waste and not to actual minerals and other materials extraction activities.

¹⁶ Regulations 7, 8, 11(1) & (3), 12, 13(6), 14 and 15 are all excluded for sites of this type, unless the site is a Category A facility. These requirements are covered in Chapter 8.

4. Fundamental Definitions in the Extractive Waste Regulations

Key Points

- In order to fully appreciate how Extractive Waste Regulations impinge on the extractive industry, it is vital that readers of this guidance understand how certain key terms are defined. Readers also need to recognise how certain exclusions limit the scope of this legislation.
- The definitions of “extractive waste” and “extractive industries” cause the legislation to affect all operators of activities such as quarries, sand and gravel extraction, mining sites and peat extraction.
- All operators need to comply with a limited number of elements of the legislation: see Chapter 5, 6 and 7.
- A key concept is what the legislation means by “waste facility”. Should a particular place where extractive waste is deposited fall within that definition, significant additional legislative requirements apply.
- Depending on the types of waste that are handled, an operator of a “waste facility” must additionally comply with the provisions that are summarised in either Chapters 8 or 9. For quarries and sand and gravel extraction sites involved in handling only inert waste, a “waste facility” is an area of the site that has been set aside for that purpose and which remains so designated for a period exceeding three years.
- The legislation distinguishes between the backfilling of excavation voids and other waste-related activities that would comprise the use of a “waste facility”. For this distinction to apply, the backfilling activity must have a purpose that clearly contributes to the permanent restoration of the site.
- The legislation assigns the primary responsibility for compliance on persons who fall within the definition of an “operator”. Depending on the nature of corporate governance, the “operator” may be a company; in smaller, non-incorporated organisations, the operator may be the site owner or the site occupier who is undertaking the extractive activity. In all instances, the legislation indicates that the “operator” is the natural or legal person who is responsible for the management of extractive waste at the site.
- Issues relating to the definition of “waste” are considered separately in Appendix 1 to this guidance document.

4.1 Background: Fundamental Definitions

As will be seen, some elements of the Extractive Waste Regulations set down requirements that apply to what is termed a “waste facility”. In other instances, the legislation’s requirements apply more generally to “extractive waste”, to an “operator” that is responsible for the management of extractive waste or to the “extractive industries”. As these terms have different meanings, they constrain the scope of application of different elements of the Extractive Waste Regulations. Accordingly, it is vital to understand these definitions and their inherent distinctions.

In virtually all cases, the focus of the Extractive Waste Regulations is upon “extractive waste”. In turn, the scope of the concept of “extractive waste” is founded on the definition of “waste” under both national and EU law. The issue of the definition of “waste” is a complex one, being governed by a series of judgments by the Court of Justice of the European Union. For this reason, this issue is considered separately in Appendix 1 to this guidance note.

4.2 Scope of the Regulations

4.2.1 Key Concepts: “Extractive Waste”, “Extractive Industries”, “Mineral” and “Treatment”

The scope of the Extractive Waste Regulations is oriented by a number of different elements of the legislation. A key provision is Regulation 2(2), which makes clear that, subject to minor exclusions, the Regulations impinge on:

the management of waste resulting from the prospecting, extraction, treatment and storage of mineral resources and the working of quarries, hereinafter “extractive waste”.

In this context, “extractive waste” is stated to mean:¹⁷

“extractive waste” means waste from the extractive industries within the meaning and the scope of these Regulations.

Key elements of this definition include what is meant by the term “waste” and “extractive industries”. These definitions, and hence their associated meanings, are used in other parts of the Extractive Waste Regulations which set down requirements that relate to “extractive waste” and the “extractive industries”. The whole matter of the definition of “waste” is considered separately in Appendix 1 to this guidance.

The meaning given to the term “extractive industries” is as follows:¹⁸

“extractive industries” means all establishments and undertakings engaged in surface or underground extraction of mineral resources for commercial purposes, including extraction by drilling boreholes, or treatment of the extracted material.

Both the terms “extractive waste” and “extractive industries” give rise to their own definitions.¹⁹ One of the most important of these is the meaning given to “mineral resources”:

“mineral resource” or “mineral” means a naturally occurring deposit in the earth’s crust of an organic or inorganic substance, such as energy fuels, metal ores, industrial minerals and construction minerals, but excluding water.

This makes clear that, besides mining, waste from coal and peat extraction is covered, as is the quarrying and sand and gravel sector.²⁰

¹⁷ Regulation 3(2).

¹⁸ Regulation 3(2).

¹⁹ See Regulation 3(2).

²⁰ This position is confirmed by the types of activities referred to in Regulations 2(2) to (4).

It also should be noted that the term “extractive industries” not only includes the actual extraction of minerals and other materials, it also refers to their “treatment” in the post-extraction phase. The term “treatment” is defined in the legislation:

““treatment” means the mechanical, physical, biological, thermal or chemical process or combination of processes carried out on mineral resources, including from the working of quarries, with a view to extracting the mineral, including size change, classification, separation and leaching, and the re-processing of previously discarded waste, but excluding smelting, thermal manufacturing processes (other than the burning of limestone) and metallurgical processes;”

While the exclusions at the end of the definition of “treatment” should be noted, it is clear that activities such as gravel-washing and the re-working of old piles of discarded materials are within the Regulations’ concept of treatment. This causes some elements²¹ of the Extractive Waste Regulations that are separate from the actual quarrying or similar activity to be subject to this legislation. Examples include off-site mineral processing, as well as some storage sites for quarry products.²²

4.2.2 Key Exclusions From The Regulations

Three important exclusions are set down in Regulation 2 to the Extractive Waste Regulations.²³ These are global in their extent, meaning that no waste or other substance that falls within these provisions is subject to these Regulations. The full wording is shown in Box 1.

Box 1. Regulation 2(3): Exclusions from the Extractive Waste Regulations

The following shall be excluded from the scope of these Regulations:

1. waste which is generated by the prospecting, extraction and treatment of mineral resources and the working of quarries, but which does not directly result from those operations, waste resulting from the offshore prospecting, extraction and treatment of mineral resources,
2. injection of water and re-injection of pumped groundwater as defined in the first and second indents of Article 11(3)(j) of Directive 2000/60/EC, to the extent authorised by that Article.

In respect of the exclusions shown in Box 1, the first is the most important. It refers to waste generated by quarrying and related activities “which does not directly result from those operations”. This provision follows Article 2(2)(a) of Directive 2006/21. Its purpose is to clarify that scrap machinery, waste oil, canteen waste, and so on, is not within the ambit of the legislation.

If the wording of the first exclusion was taken on its own, there could be ambiguity about whether over-burden derived from quarrying and from other similar operations is subject to this exclusion. However, when the Regulations and the Directive are considered as whole, it is clear that over-burden is to be considered a “direct” result of quarrying and

²¹ See in particular Regulation 19 and the need for local authorities to register all “extractive industries” within their areas (this matter is covered more fully elsewhere in this guidance document).

²² Chapter 12 describes in more detail when quarry product storage is subject to the Extractive Waste Regulations.

²³ Regulation 2(3).

other operations when it involves “waste”. For example, both the Regulations and the Directive state that the legislation embraces “unpolluted soil”²⁴, which is defined²⁵ as meaning:

...soil that is removed from the upper layer of the ground during extractive activities and that is not deemed to be polluted under Community law.

Local authorities also need to be careful about the status of waste that is a consequence of manufacturing activities undertaken at an extractive site. On the one hand, waste that arises from treatment processes²⁶ that are applied to rock, aggregates, energy fuels, industrial minerals and other materials²⁷ are extractive waste. This would, for example, include wet materials from washing processes, dry matter from separation systems, and so on.²⁸

However, waste that arises as a consequence of manufacturing processes involving minerals and other similar products, such as bitumen production or concrete block-making, falls outside the Extractive Waste Regulations. This is partly due to the above-mentioned exclusion in Box 1; it is also a consequence of the Regulations’ definitions of the “extractive industries” and “treatment”. While the definition of the “extractive industries” embraces commercial undertakings involved in the “treatment” of extracted material, the definition of “treatment”²⁹ appears to be constrained to only those processes that are carried out on mineral resources “with a view to extracting the mineral”. So, for example, the production of bitumen or concrete products does not involve “extracting the mineral”. The result is that waste arising from these processes is outside the Extractive Waste Regulations, instead being subject to the Waste Management Act and its subsidiary legislation.

The second exclusion in Regulation 2(3) to the Extractive Waste Regulations relates to waste derived from off-shore extractive industry activities. Instead of the Extractive Waste Regulations, separate legislation such as the Dumping at Sea Act 1996³⁰ applies. When any of this waste is brought ashore, it is then subject to the Waste Management Act.

The third exclusion relates to water that is pumped back into groundwater or is otherwise re-injected below the surface. Its scope is defined via Regulation 2(3) of the Extractive Waste Regulations’ cross-reference to specified Articles³¹ of the Water Framework Directive (Directive 2000/60). It precludes the Regulations applying to practices at mines and quarries where pumped groundwater is injected back into an aquifer or other geological structure, as well as when other process waters are handled in this manner. As these types of operation are controlled by separate legislation, the effect of this exclusion is to prevent regulatory duplication and overlap. Such activities are instead subject to authorisation under Regulation 8 of the European Communities Environmental Objectives (Groundwater) Regulations 2010.³²

Besides these exclusions, Regulation 2 also contains other provisions³³ that selectively exclude certain, generally lower risk, extractive waste activities from different elements of the legislation. These are discussed in more detail in the chapters of the guidance that consider how the legislation applies to quarries and other activities that handle waste that is inert or non-inert and non-hazardous, as well as comprising peat or unpolluted soil.

24 See for example Citation 4 of the Directive and Extractive Waste Regulations, Regulation 2(4).

25 Regulation 2(3).

26 See the definition of “treatment” in Regulation 3(2).

27 See the definition of “mineral resources” in Regulation 3(2).

28 That this type of material should be subject to the legislation is clear from the purpose of Directive 2006/21, which is to ensure that, inter alia, containment-based systems operated by the extractive industries, including dams and ponds, do not pose a threat to the environment or endanger human health.

29 See the definitions in Regulation 3(2).

30 As amended by the Dumping at Sea (Amendment) Act 2004, the Sea Fisheries and Maritime Jurisdiction Act 2006, the Foreshore and Dumping at Sea (Amendment) Act 2009 and the European Communities (Public Participation) Regulations 2010 (SI 352 of 2010).

31 Directive 2000/60, Article 11(3)(j), first and second indents.

32 SI 9 of 2010.

33 See Regulation 2(4).

4.3 Definition of “Waste Facility”

4.3.1 The General Meaning Of “Waste Facility”

The Extractive Waste Regulations define the term “waste facility” in Regulation 3(2). This term is used extensively within the legislation, with a number of the requirements falling solely on an operation that falls within this definition.

The legislation’s definition of “waste facility” has two dimensions. Firstly, to be within this definition, a site must meet the physical criteria that are specified by the Regulations. Secondly, the definition also contains certain time limits. These set down the length of time that an area of an extractive site has to be designated for it to be classed as a “waste facility”.

The presence of these time limits within the definition of “waste facility” mean that, notwithstanding whether the physical configuration of a site causes it to fall within that part of the statutory definition, if the relevant time limit is not exceeded, the site does not constitute a “waste facility” under the Regulations. In turn, this means that the obligations of the legislation which pertain to an extractive “waste facility” do not apply. It therefore follows that the significance of these time limits needs to be fully appreciated, particularly when a regulatory body is considering enforcement action.

The full definition of “waste facility” is set down in Box 2. In terms of the physical features/configuration of the site, the first element requires there to be an identifiable area where extractive waste has been deposited or has accumulated. In this respect, the definition refers to any area that has been “designated” for this purpose. In the EPA’s view, the term “designated” should not be viewed in an inordinately rigid manner, particularly given the purpose of the legislation and its background in Directive 2006/21. While “designated” can imply an area identified by signage or featuring on a plan or drawing, it also can mean an area that has been adopted for that purpose by the usage to which it has been put. Accordingly, if one or more areas of an extractive site have been set aside for the storage of extractive waste and are periodically used for that purpose, then these locations have been “designated” as such by the site operator.

Box 2. Regulation 3(2): Definition Of “Waste Facility”

“Waste facility” means any area designated for the accumulation or deposit of extractive waste, whether in a solid or liquid state or in solution or suspension, for the following time-periods:

1. no time-period for Category A waste facilities and facilities for waste characterised as hazardous in the waste management plan,
2. a period of more than six months for facilities for hazardous waste generated unexpectedly,
3. a period of more than one year for facilities for non-hazardous non-inert waste,
4. a period of more than three years for facilities for unpolluted soil, non-hazardous prospecting waste, waste resulting from the extraction, treatment and storage of peat and inert waste.

Such facilities are deemed to include any dam or other structure serving to contain, retain, confine or otherwise support such a facility, and also to include, but not be limited to, heaps and ponds, but excluding excavation voids into which waste is replaced, after extraction of the mineral, for rehabilitation and construction purposes.

The final paragraph of the definition³⁴ goes on to indicate that the examples of designated areas could be delineated by a dam or other structure, but may also constitute a heap, pond or something else. However, the backfilling of excavation voids is excluded by the final part of this definition: this important matter will be returned to.

³⁴ That the final paragraph of the definition applies to items (a) to (d) that are listed above in the definition of “waste facility” is confirmed by Article 3(15) of Directive 2006/21.

As noted, the definition of “waste facility” refers to “heaps” and “ponds”. However, the wording is clear that these are simply illustrations of different types of facility.³⁵ While there are definitions of both a “heap” and a “pond”, the scope of a waste facility is not solely confined within these definitions.³⁶

As the references to “heaps and ponds” are simply examples of different configurations of waste facility, the definition of “waste facility” extends to other configurations that are not mentioned. Most obviously, non-engineered piles of extractive waste are also within this concept. However, as noted above, the definition also contains the proviso that the relevant time limits affecting the use of the area for the management of extractive waste must also be exceeded for a site to be classed as a “waste facility”.

From Box 2, it can be seen that there are potentially four time limits that affect extractive waste facilities of different levels of hazard. For local authorities, the most significant of these is the three-year cut-off that applies to the storage of unpolluted soil, peat waste or inert extractive waste. Again, the significance of this timeline cannot be over-emphasised. It means that no heap of inert quarry-derived waste falls within the definition of a “waste facility” unless the area in which it is put has been designated for that purpose for a period of more than three years. In turn, this means that places where inert quarry wastes have been deposited for less than this period are not subject to the provisions of the Extractive Waste Regulations which pertain to “waste facilities”.³⁷

In respect of non-inert, non-hazardous extractive waste, it should be noted that a deposit of this type of material constitutes a “waste facility” when the designated area has been used for the much shorter period of one year.

These definitional issues place constraints on the scope of some of the elements of the Extractive Waste Regulations. The result is that, should an extractive waste activity not fall within the definition of a “waste facility”, those parts of the Regulations aimed at placing controls on a “waste facility” will not apply. For example, Regulation 11 requires monitoring

and inspection records to be kept in relation to the management of a “waste facility”. However, it must be appreciated that other elements of the legislation, including Regulation 5 on extractive waste management plans and Regulation 18 on the registration of sites operated by this sector, set down rather wider controls that apply to “extractive waste” or the “extractive industries” as a whole, rather than to just what the Regulations view a waste facility to be.

Finally, it also needs to be understood that the definition of “waste facility” is a place where extractive “waste” is held. This is significant for the reason that products derived from extractive activities do not normally constitute a material that is “waste”. Accordingly, this leads to a consideration of what is meant by the term “waste” in Irish and EU law. The important matter of the distinction between waste and products is discussed in Appendix 1 to this guidance.

4.3.2 “Waste Facility” in the context of backfilling Excavation Voids

As noted, some parts of the Extractive Waste Regulations contain requirements that affect the management of extractive waste at a location that falls into the definition of a “waste facility”. In this respect, readers need to be aware of one important exclusion; this relates to the backfilling of voids caused by extraction activities. As the final part of the definition of “waste facility” in Regulation 3(2) in Box 2 makes clear, “excavation voids into which waste is replaced, after extraction of the mineral, for rehabilitation and construction purposes” do not fall within the definition of a “waste facility”.

As back-filling is a common practice at many extractive sites, it is vital that this exclusion is fully considered and understood. A key element in this part of the definition of “waste facility” implies a consideration of the purpose of the operation. The wording used makes the exclusion hold only where the back-filling is being undertaken for “rehabilitation

35 See the words “deemed to include” in the first line of the final paragraph of the definition in Regulation 3(2), as well as “include, but not be limited to” in the third line.

36 In this respect, the definition of “heap” is quite restricted, being defined in Regulation 3(2) as meaning “an engineered facility for the deposit of solid waste on the surface”.

37 Readers are, once more, reminded that not all of the scope of the Extractive Waste Regulations are constrained by the definition of “waste facility”.

and construction purposes". Accordingly, transient stock-piling of material in an excavation void, even if done for a long-term period, would not normally constitute this type of restoration operation. The result is that, provided the other elements of the definition of "waste facility" are met, such transient stockpiling operations can be subject to the same controls that apply to other forms of "waste facility".

Within this context, the definition of "rehabilitation"³⁸ also should be noted as it is helpful:³⁹

"rehabilitation" means the treatment of the land affected by a waste facility in such a way as to restore the land to a satisfactory state, with particular regard to soil quality, wild life, natural habitats, freshwater systems, landscape and appropriate beneficial uses.

This definition implies that any construction or rehabilitation activity involving backfilling must have a defined purpose, which may be indicated by consistency with the site's planning permission and/or its planning application documentation, including any environmental impact statement.

At the risk of repetition, readers should be aware that, while a location where the backfilling of an excavation void is taking place is not to be regarded as within the definition of "waste facility", other parts of the Extractive Waste Regulations still apply. This is because these elements do not contain a reference to a "waste facility", but instead place controls on "extractive waste" and its management. A pertinent example is Regulation 10, which specifically addresses backfilling (see Chapter 7).

4.4 The "Operator": Assignment of Responsibility for Compliance

The Extractive Waste Regulations assign responsibility for compliance on persons handling extractive waste by placing specific duties on the site "operator". This term is defined as having the following meaning:⁴⁰

*"operator" means the natural or legal person responsible for the management of extractive waste, including in respect of temporary storage of extractive waste as well as the operational and the after-closure phases.*⁴¹

In some instances, such as when a quarry or other extractive site has been sold, the identity of the operator will change. The EPA's view is that this circumstance is embraced within the definition set out above. The new owner is "responsible for the management of extractive waste".

In respect of some sites that have closed since the legislation came into force, there may be no identifiable operator; however, this circumstance is expected to be unusual. For example, in cases where a site was leased and the lessee has ceased to trade, responsibility will have moved back to the site owner. Again, the EPA considers that such a person is "responsible for the management of extractive waste". Receivers and liquidators also will normally be in this position.

³⁸ Regulation 3(2).

³⁹ Unlike other instances where "rehabilitation" is used in the Regulations, this definition is not binding in the context of its use within the term "waste facility." The reason is that the wording of the definition of "rehabilitation" indicates that it applies only to sites that are "waste facilities". As discussed in this chapter, where backfilling activities take place for bona-fide restoration purposes, such locations are not caught by the definition of "waste facility". The definition is shown here for the reason being that it gives a general, but non-binding, indication of what the term means, with that indication being according to the normal usage of this term in the English language.

⁴⁰ Regulation 3(2).

⁴¹ Regulation 12(4) places an obligation upon the "waste holder". In most instances, this person will be the same as the "operator", with the term being defined in Regulation 3(2): "waste holder" means the producer of the extractive waste or the natural or legal person who is in possession of it.

Key Terms & Definitions

Summary: What Local Authorities Must Do:

- Be clear about, and conversant with, the meaning of the key terms set down in this Chapter. This is because an understanding of the statutory content and powers conferred by the Extractive Waste Regulations is fundamental to the effective enforcement of the legislation. In addition, local authority staff may have to provide guidance to the industry when this is requested.
- In their inspections of quarries and other similar premises, make and retain date-related visual records of where extractive waste is being stored. In enforcement proceedings, this material will provide vital spatial and temporal evidence in respect of the time limits contained in the definition of “waste facility”.
- Appreciate that the legislation distinguishes between activities that involve “waste facilities” and the back-filling of excavation voids and the significance of this distinction.
- Understand the concept of “operator” in the Extractive Waste Regulations. When visiting extractive activities for inspection purposes, there is a need to identify and record details of how extractive waste is being managed in order to obtain a clear picture of the identity of the “operator” at each site.

Key Terms & Definitions

Summary: What The Extractive Industries Must Do:

- Ensure that site operators have a broad understanding of the key terms in the Extractive Waste Regulations and how they provide a regulatory context that affects the operations being carried out.
- Appreciate that areas of the site used for the storage of waste for prolonged periods will become defined as “waste facilities” and that additional requirements of the Extractive Waste Regulations, such as the requirement for record-keeping and inspections by competent persons, will then apply (see Chapter 7).
- Comprehend the nature of the definition of “operator” and understand what obligations the legislation places on such an entity. In instances when a site is sold, the new owner needs to appreciate the responsibilities that have been taken on.
- Understand that, while material that is defined as “extractive waste” is subject to the Extractive Waste Regulations, other types of waste that are beyond the term “extractive waste” are subject to the Waste Management Act. This includes canteen waste, scrap machinery, tyres and construction and demolition waste. Unless the premises benefits from a statutory authorisation⁴² for the on-site disposal or recovery of these types of materials, these and other similar wastes will need to be removed for authorised management off-site. Both the destination of this waste and any waste haulier will need satisfy the requirements for statutory authorisation under the Act.

42 Normally a waste licence or waste facility permit issued under the Waste Management Act.

5. Regulations 4 and 13: Key Provisions affecting all Extractive Sites

Key Points

- Regulation 4 of the Extractive Waste Regulations requires all operators of extractive sites to ensure that their waste-related activities do not endanger human health or the environment. Such activities also must not create a risk to the different environmental media and receptors, nor must nuisances be created. Non-compliance with these requirements is an offence.
- Regulation 4 affects all of the extractive industry, including those sites handling inert waste in quarries and in sand and gravel extraction.
- Regulation 4 applies to all forms of extractive waste, including that in short-term storage. The time limits that are contained in the Extractive Waste Regulations relating to “waste facilities” (see Chapter 4) do not apply.
- Separately, Regulation 13 requires local authorities to ensure that all operators of extractive sites are fully compliant with all relevant elements of EU law. A particular emphasis is placed on the obligation stemming from the Water Framework Directive that there is no further deterioration in local water quality.
- Regulation 13 also requires a local authority to ensure that extractive waste-related dust and, if present, gas emissions are reduced or prevented.

5.1 Operators’ Obligations: Regulation 4

Following Directive 2006/21, a principal objective of the Extractive Waste Regulations is contained in Regulation 4. Regulation 4(1) sets down a duty that applies to all operators in the extractive industry that manage extractive waste. Regulation 4(2) places local authorities under a duty to ensure that all operators of extractive sites comply with this requirement.⁴³ As Regulation 4’s obligations relate to the handling of “extractive waste”, the scope of this provision is not confined to sites that fall within the legislation’s definition of “waste facility”.

In respect of the obligations Regulation 4(1) places on the extractive industry, the full wording is shown in Box 3. This provision contains two over-riding obligations that apply to operators of any quarry or other similar site. These are to take the “necessary measures” to ensure that extractive waste is managed (a) without endangering human health and (b) without using processes or methods which could harm the environment.

Box 3. Regulation 4(1): The Key Duty on all Extractive Site Operators

The operator shall take the necessary measures to ensure that extractive waste is managed without endangering human health and without using processes or methods which could harm the environment, and in particular without risk to water, air, soil and fauna and flora, without causing a nuisance through noise or odours and without adversely affecting the landscape or places of special interest.

⁴³ A cut-off of 1 May 2006 applies: see Regulation 21(3) and also Directive 2006/12, Article 24(3). The date of 1 May 2006 was when Directive 2006/12 entered into force. These transitional provisions are discussed in Chapter 11 of this guidance note.

The requirement to ensure that extractive waste is managed without endangering human health and harming the environment is then enlarged upon by the phraseology that follows. Regulation 4(1) continues by stating that these

obligations must be discharged so that extractive waste does not cause a risk to waters, air, soil and flora and fauna. Additionally, extractive waste must be managed so that it does not result in a nuisance through noise or odour. It also must be handled in a manner that does not adversely affect the landscape or places of interest.

The whole focus of Regulation 4(1) is a preventative one, in the sense that it is orientated towards preventing any likely damage to human health or the environment. This approach is consistent with the general approach of EU environmental law. For this reason, the Extractive Waste Regulations refer to the endangerment of human health, as well as processes or methods that “could” harm the environment. In a similar vein, the final part of the definition refers to activities that cause risk, rather than to actual occurrences. In this context, the reference to a risk to water, air, soil and flora and fauna clearly relates to some risk that is of a significant magnitude as to cause some form of predictable damage.

While nuisances derived from noise and odour are mentioned in the final part of Regulation 4(1), there is no explicit reference to dust in this part of the Extractive Waste Regulations.⁴⁴ This is despite airborne dust being a possible problem when extractive waste is handled. However, if a dust emission comprises materials that are environmentally toxic, then it seems that the earlier part of Regulation 4(1) applies: in such circumstances, there would be some element of endangerment of human health or harm to the environment. Moreover, in other instances, significant dust issues may give rise to risks to water, air, flora, fauna, and so on.

Regulation 4(1) also obligates site operators not to allow extractive waste to cause adverse effects to the landscape and places of special interest. In most cases, an operator of an extractive site that complies with its planning permission normally would be able to demonstrate that there are no unacceptable adverse effects on the landscape. This will be particularly the case where the planning permission has been granted recently and where the application was accompanied by an environmental impact statement.

The reference in Regulation 4(1) to “places of special interest” relates to the need to protect locations of historic, ecological, cultural or other importance. Again, these are all matters that normally would be demonstrated by a site’s compliance with any planning permission that has been issued recently.

The wording used in Regulation 4(1) is taken from Article 4(2) of Directive 2006/21, which is itself based on the phraseology used in the Directive on Waste (now Directive 2008/98).⁴⁵ A very similar wording is also used in the definition of “environmental pollution” in the Waste Management Act.⁴⁶

5.2 Local Authorities’ Duties: Regulation 4

As competent authority for the purposes of non-Category A extractive waste facilities,⁴⁷ each local authority is responsible for the enforcement of Regulation 4. Accordingly, Regulation 4(2) places a local authority under an obligation to ensure that all operators managing extractive waste comply with Regulation 4(1).

Additionally, two further requirements stem from Regulation 4. The first arises from the final part of Regulation 4(2) and will be considered at the end of this section. The second is a consequence of Regulation 4(3) when it is read in conjunction with Regulation 4(4).

⁴⁴ Separately, dust is mentioned in Regulation 13(2): the context is slightly different to that set by Regulation 4. Regulation 13 is discussed later in this chapter.

⁴⁵ Originally Article 4 of Directives 75/442 and 2008/98. Directive 2008/98 repealed and replaced Directive 2006/12 on 12/12/2010.

⁴⁶ WMA, Section 5(1), as amended by the Waste Management (Registration of Brokers and Dealers) Regulations 2008 (SI 113 of 2008), Article 19(5) (c).

⁴⁷ See Regulation 22(2).

A full wording of Regulations 4(3) and (4) is contained in Box 4. In summary, Regulation 4(3) requires each local authority to ensure that operators “prevent or reduce as far as possible” any adverse effects on the environment or human health that may arise from the handling of extractive waste. This includes the prevention of major accidents, of which catastrophic slippage would be the most obvious example, as well as ensuring that the requirements set down by Regulation 4(1) apply in the post-closure phase.

Box 4. Regulations 4(3) & (4): Additional Duties on all Extractive Site Operators

(3) The competent authority shall ensure that the operator takes all measures necessary to prevent or reduce as far as possible any adverse effects on the environment and human health brought about as a result of the management of extractive waste. This includes the management of any waste facility, also after its closure, and the prevention of major accidents involving that facility and the limiting of their consequences for the environment and human health.

(4) The measures referred to in paragraph 3 shall be based, inter alia, on the best available techniques, without prescribing the use of any technique or specific technology, but taking into account the technical characteristics of the waste facility, its geographical location and the local environmental conditions.

In accordance with Regulation 4(4), these measures are to be founded on the well-known EU-generated concept of “best available techniques”. This term is given the meaning contained in the Directive on Integrated Pollution Prevention and Control.⁴⁸

While Regulation 4(4) cautions against a local authority mandating that any particular product or equipment brand is to be specified as part of this process, the reference to best available techniques is aimed at ensuring that the extractive industry adopts the most up-to-date and widely used approaches to the management of impacts arising from the handling of extractive waste. Given the significant differences in the environmental contexts of different extractive waste operations, this approach always must take into account site-specific factors, local environmental conditions, and so on.

Additional advice on the nature of the concept of best available techniques for some activities within the extractive industry sector can be found in the European Commission’s publication ‘*Management of Waste Rock and Tailings in Mining Activities*’. This document forms part of the BREF Note series under the IPPC Directive.⁴⁹

Depending on circumstances, the requirements of Regulations 4(3) and (4) can be discharged by local authorities via the conditions of planning permissions and/or in their consideration of the content of planning applications, particularly those that include an environmental impact statement. For example, such a statement should, in the manner set down by Schedule 6 to the Planning and Development Regulations 2001 to 2011, contain mitigation measures to avoid significant adverse effects on the environment. These measures should include the consideration of the stability of any extractive waste storage areas, nuisance mitigation, and so on. As there may not always be an opportunity to implement Regulation 4(3) and (4) via planning conditions, they need to be addressed by other regulatory means and/or be required to be reflected in an extractive site’s waste management plan. Extractive waste management plans are discussed in Chapter 6 of this guidance.

In some cases, a local authority may wish to act rapidly, in order to address concerns about some potential environmental problem caused by the handling of extractive waste. In such circumstances, the range of enforcement

48 See the definition in Regulation 3(2). That definition refers to the now-superseded Directive 96/61. The current version is Directive 2008/1 with best available techniques being discussed in Article 2(12).

49 Obtained from http://eippcb.jrc.ec.europa.eu/reference/brefdownload/download_MTWR.cfm

tools set down in the Waste Management Act can be deployed.⁵⁰ This may include the issuing of statutory notices,⁵¹ injunctions⁵² and so on. Additionally, non-compliance with any conditions of a site's planning permission that overlap with Regulation 4 may be able to be addressed via the provisions of the Planning and Development Act and its subsidiary legislation.

Finally, Regulation 4(2) also requires each competent authority to take all necessary measures to prohibit the "abandonment, dumping or uncontrolled depositing of extractive waste". In practice, the relevant prohibitions are already contained in the Waste Management Act and some of its subsidiary regulations. However, this does not preclude a local authority enacting by-laws to deal with particular extractive waste-related issues. Having said that, the main way all local authorities are expected to satisfy this element of Regulation 4(2) is via the policing and enforcement functions conferred on them by the Waste Management Act and the Planning and Development Act.

While this point has been made before, it perhaps worthwhile that it is reiterated. Regulation 4 is a good example of the focus of the Extractive Waste Regulations. It is restricted to controlling only the manner by which extractive waste is handled, with its ambit not extending to an extraction activity in its entirety. This is clear from the legislation's requirement that a site operator ensures that "extractive waste" is managed in accordance with Regulation 4(1). Accordingly, unacceptable emissions such as noise and water pollutants arising from the management of extractive waste can be controlled via the powers conferred on local authorities under Regulation 4. However, this mechanism cannot be used to address unacceptable environmental impacts that arise from other, non-waste, contexts within an extractive site.

5.3 Local Authorities' Duties: Regulation 13: Prevention of Environmental Deterioration

To a certain extent, Regulation 13 overlaps and repeats what has already been required under Regulation 4. It obligates all local authorities to ensure that operators in the extractive industry take the necessary measures to meet all Community environmental standards when extractive waste is being managed. A particular emphasis is given to preventing the deterioration of the status of present water quality, a key objective of the Water Framework Directive (Directive 2000/60).

According to Regulation 13, this must be done by considering the leachate-generation potential of extractive waste during a site's operational and post-closure phases. In some instances, water balance calculations are required, but these are considered necessary only in the case of lagoons or other containment structures used for the management of semi-liquid extractive waste.

The other requirements of Regulation 13(1) are discretionary.⁵³ These relate to the duty placed on a local authority to satisfy itself that leachate generation is prevented or minimised and that surface water, groundwater and soil does not become contaminated. A second discretionary duty relates to the need to ensure that contaminated water or leachate is collected and treated to an appropriate standard. In respect of either of these discretionary provisions, the EPA's view is that a local authority can only determine that these provisions are not to apply to a particular site when it is able to conclude that there is no leaching potential from the extractive waste, or the possibility of contaminated surface run-off from the deposited material. Evidence to this effect should be contained in the extractive waste management plan for the site.

⁵⁰ Regulation 16(3) is intended to give the provisions of the Waste Management Act application in respect of the Extractive Waste Regulations.

⁵¹ Waste Management Act, Sections 18 and 55.

⁵² Waste Management Act, Sections 57 and 58.

⁵³ While Regulation 13(1)(a) applies to all sites, the requirements of Regulations 13(1)(b) and (c) can be lifted at the discretion of a competent authority (see Regulation 13(3)).

A local authority is also required to ensure that an extractive site operator takes adequate precautions to prevent dust being emitted from any deposited waste.⁵⁴ A similar obligation relates to gaseous emissions.

In instances where extractive waste is to be placed into non-engineered water bodies, including flooded quarries, Regulation 13 places a local authority under a duty to require the operator to ensure that there is compliance with Directives on Dangerous Substances (76/464) and Groundwater (80/68), as well as the Water Framework Directive (2000/60).

Finally, Regulation 13 also contains some requirements relating to back-filling of excavation voids. As these are similar to what is required under Regulation 10, they are covered later as part of the discussion on that aspect of the Extractive Waste Regulations. While Regulation 13(6) has a discretionary application to non-hazardous, non-inert waste sites, it concerns the handling of cyanide-contaminated liquors. Accordingly, it is unlikely that these will be present in any non-Category A site.

Key Duties affecting all Extractive Site Operators

Summary: What Local Authorities Must Do:

- Appreciate that they are required by the Extractive Waste Regulations to ensure that each operator is compliant with Regulation 4 and hence carry out individual site inspections at appropriate intervals.
- Understand that the focus of Regulation 4 is confined to environmental and other effects from extractive waste and not from general quarry operation.
- Undertake appropriate enforcement action when there is clear evidence that the requirements of Regulation 4 are being breached.
- Ensure that best available techniques are being used by any operator to manage extractive waste in order to protect human health and the environment.
- Appreciate that Regulation 13 places each local authority under a duty to ensure that each operator is fully compliant with EU law. A particular emphasis must be placed on ensuring that there is no deterioration in local water quality, particularly from the leaching of contaminants contained in extractive waste and where backfilling into standing water takes place.
- Understand that Regulation 13 also requires a local authority to ensure that all operators take adequate measures to prevent dust and other emissions from deposited extractive waste.

⁵⁴ Regulation 13(2)

Key Duties affecting all Extractive Site Operators

Summary: What The Extractive Industries Must Do:

- Take appropriate steps to ensure that the management of any quantity of extractive waste is fully compliant with Regulation 4 of the Extractive Waste Regulations.
- Ensure that the environment and public health is protected at all times by the deployment of best available techniques in respect of extractive waste.
- Ensure that there is full compliance with EU law and that leaching or other discharges do not cause a deterioration in local water quality, particularly when back-filling takes place.
- Prevent dust and other emissions from stockpiled extractive waste.

6. Regulation 5: Extractive Waste Management Plans

Key Points

- All operators must draw up an extractive waste management plan. This requirement applies to all quarries, sand and gravel extraction sites, locations where peat extraction takes place and other similar facilities operated by the extractive industries. The only exceptions relate to sites that are about to close, as well as peat workings and sites that are handling only unpolluted soil where both such activities are on a small-scale.
- All extractive waste management plans need to be submitted by 31 December 2011.
- An extractive waste management plan does not need to be a complicated document. It must reflect the list of topics to be covered in Regulation 5 of the Extractive Waste Regulations, with the coverage of these topics focussing on a limited number of specified objectives.
- For existing sites, a key aspect of each plan concerns how the environment is to be protected from deposited extractive waste, as well as how restoration is to be carried out on any remaining deposits of extractive waste.
- Once produced, the extractive waste management plan only needs to be revised when a “substantial change” has taken place to the waste management arrangements at the site. To constitute a “substantial change”, a change in waste management arrangements must have taken place that is associated with significant negative effects on the environment.

6.1 Background: The Extractive Waste Management Plan

With the exception of some sites that are about to close⁵⁵ or are handling peat or unpolluted soil on only a small-scale basis,⁵⁶ the EPA's view is that all operators of extractive sites have to draw up an extractive waste management plan. This requirement is a consequence of both Regulation 5 of the Extractive Waste Regulations and the various duties conferred on site operators to be fully compliant with other elements of the legislation. As the breadth of the obligation to draft an extractive waste management plan is an important issue in the industry, it is appropriate that this matter is explained in more detail in the next section.

6.2 Extractive Waste Management Plans: Who must draft them

In accordance with Regulation 5(1)(a) of the Extractive Waste Regulations, the “operator” is required to draw up an extractive waste management plan. What should be noted about Regulation 5(1)(a) is its use of the term “operator” on its own – in other words, it is not deployed in conjunction with any additional words that link this concept directly to an extractive waste facility. In accordance with the definition of “operator”,⁵⁷ this term refers to the person that is responsible for the management of the extractive waste, rather than the operator of a waste facility. Accordingly, this obligation falls on all operators of extractive activities that are subject to the Extractive Waste Regulations.

⁵⁵ See Regulation 21(4); the application of these provisions on sites that are closing is dealt with in a Chapter 11 of this guidance note.

⁵⁶ See Chapter 8.

⁵⁷ See definition in Regulation 3(2).

Box 5 contains the full wording of Regulation 5(1)(a). Also shown is the definition of the term “operator”. As noted, that the obligation to submit an extractive waste management plan extends to all operators of extractive sites finds its basis primarily from that definition. In summary, the definition states that the “operator” is someone who is responsible for the management of extractive waste, “including in respect of temporary storage of extractive waste”. This definition stems from Article 3(24) of Directive 2006/21 and, for that reason, it must be interpreted in accordance with that Directive.⁵⁸ As the Directive does not itself place any further constraint on this term, words such as “temporary storage” hold their common meaning. This means that the term embraces any transitional storage of extractive waste.

Box 5. Regulations 5(1)(a): Duty to Draft an Extractive Waste Management Plan; Definition of “Operator” in Regulation 3(2)

Regulation 5(1)(a): The operator shall draw up a waste management plan (to be known as an Extractive Waste Management Plan) for the minimisation, treatment, recovery and disposal of extractive waste, taking account of the principle of sustainable development.

Regulation 3(2): “operator” means the natural or legal person responsible for the management of extractive waste, including in respect of temporary storage of extractive waste as well as the operational and the after-closure phases.

In this context, what is important to note is that the timelines set down elsewhere in the Extractive Waste Regulations – and which define the different types of extractive waste facility - do not apply. This is due to the fact that neither Regulation 5(1)(a) nor the definition of “operator” make reference to an extractive waste facility, referring instead just to extractive waste.

It follows, therefore, that, as any site may produce extractive waste at some point in its life-cycle, all operators of such sites are obligated to develop an extractive waste management plan. This position holds even in respect of sites that are founded on the objective of producing no waste at all, including those activities that operate in such a way that all of the material extracted is sold on. This is because, in accordance to the definition of “operator”, a person⁵⁹ running this type of extractive site is still “responsible” for the management of “extractive waste”: in the sense that one of the key aspects of this type of operation is to avoid producing such waste in the first place.

This approach accords with a key concept of EU waste management policy, namely the waste hierarchy. Since 31 March 2011, the hierarchy is now part of the Waste Management Act, being set down in Section 21A.⁶⁰ It indicates down the following approaches to waste management in priority order:

1. waste prevention
2. preparing for re-use
3. recycling
4. other recovery not entailing recycling
5. disposal.

⁵⁸ For example, this means that the definition of “temporary storage” is not constrained by the restricted meaning given to this term in the Waste Management Act, whereby temporary storage is defined as a period not exceeding six months (see the Act’s Section 5(3)).

⁵⁹ The definition of “operator” also makes clear that this term embraces companies, partnerships and so on, as well as individuals: see the words “natural or legal person”.

⁶⁰ Section 21A was added to the Act by the European Communities (Waste Directive) Regulations 2011, SI 126 of 2011, Regulation 7.

At an extractive site, this above-mentioned goal of waste prevention can be met by the optimisation of the physical, technical and managerial arrangements, being supported by competitive pricing, marketing and other related activities, all of which are intended to ensure the re-sale of all extracted material. However, while these actions collectively cause no waste to be produced, waste is still being managed. The absence of any waste being produced is a demonstration of the effectiveness of the chosen approach, rather than proof that there is no need to consider waste issues at the site at all.⁶¹

In this respect, what has become clear in the last 36 months is that very marked changes have taken place in the operational practices of the quarrying and sand and gravel sectors in Ireland. These are a consequence of over-capacity and recession-related impacts. Many sites that hitherto sold-on all extracted quarry products are now stockpiling certain, often lower-grade, materials. This is because market demand has fallen very significantly, to the point that it is no longer possible to sell these materials at a price that covers handling and transportation costs. In other cases, sites are being mothballed, with heaps of unsold product being left in-situ.

Should the present economic conditions affecting the extractive industry continue, these stockpiles may well remain on-site for a prolonged period. Some may never be processed or sold-on. In accordance to case law of the Court of Justice of the European Union,⁶² quarry products and other similar materials fall within the statutory definition of “waste” when they are held on-site for an indefinite period and in the absence of any possible identifiable use. This rule applies regardless of whether this material is inert or otherwise environmentally inconsequential.

Accordingly, this background indicates that, presently, there is no certainty about whether a quarry or other extraction activity will be able to sell all of its products and not produce any waste. This reality itself indicates a further and additional justification as to why extractive waste management plans must be drawn up by the entire sector, not just by operators of sites that have identifiable waste streams.

Finally, the EPA considers that the extractive waste management plan has the potential to play a key role in assisting local authorities in fulfilling their statutory duty to ensure that the sector complies fully with the Extractive Waste Regulations. As discussed in other chapters of this guidance, the legislation requires local authorities to ensure that there is compliance by all operators. For example, Regulation 4 requires a local authority to satisfy itself that each operator is not causing an unacceptable environmental risk or endangering human health, is appropriately managing any such affects and that the measures deployed represent “best available techniques”.⁶³

Similarly, Regulation 9(1)(b) of the Extractive Waste Regulations requires a local authority to identify all potential Category A sites that are not within the EPA's licensing regime.⁶⁴ Under Regulation 13, a local authority is required to satisfy itself that each operator is fully compliant with other items of EU law, including the Water Framework Directive.⁶⁵ This provision also allows a local authority to decide that leachate collection and treatment is not appropriate,⁶⁶ with such a decision having to be made in accordance to a risk assessment and on a case-by-case basis.

In all of these respects, it is the EPA's view that a local authority's ability to carry out these duties should be underpinned by information submitted by all operators in the extractive industry. This allows a local authority to prioritise its enforcement activities, via the identification of low, medium and high-risk extractive waste facilities. In this respect, the content of the extractive waste management plan is considered the ideal vehicle for this data to be conveyed to a local authority.

61 That the waste plan requirement applies to all operators in the extractive industry seems also to be confirmed by recital 13 to Directive 2006/21: “Member states should ensure that operators in the extractive industry draw up appropriate waste management plans ...Such plans should be structured in such a way as to ensure appropriate planning of waste management options with a view to minimising waste generation and its harmfulness...” [author's emphasis].

62 See in particular Case C-9/00 *Palin Granit*: discussed further in Appendix 1.

63 See Regulation 4(2), (3) and (4). A description of how the environment and human health may be adversely affected by the deposit of waste has to feature in an extractive waste management plan in accordance with Regulation 5(3)(d).

64 Discussed in Chapter 10 of this guidance. A statement justifying why a site does not warrant Category A status must feature in an extractive waste management plan, as this is a requirement of Regulation 5(3)(a)(ii).

65 Information about a site's compliance with the Water Framework Directive has to feature in an extractive waste management plan in accordance with Regulation 5(3)(g).

66 See Regulation 13(3).

While the EPA's view is that an extractive waste management plan should be submitted by all⁶⁷ extractive site operators, this obligation is not as onerous as initially it may appear. Many plans will be relatively simple documents. They may warrant little or no amendment over an extractive site's life-cycle, partly for the reason that the Extractive Waste Regulations set quite a high threshold for when a plan must be changed (see later). Accordingly, it is not considered to be unduly burdensome to require – in accordance with both the Extractive Waste Regulations and Directive 2006/21 – the entire sector⁶⁸ to develop such documentation.

This interpretation also means that the requirement to produce an extractive waste management plan is uniform across the entire extractive industry of Ireland.

6.3 Extractive Waste Management Plans: Content

As noted above, the EPA's view is that an extractive waste management plan normally should not be a highly detailed and complex document. This observation holds particularly for sites that are involved in the handling of inert materials, are not located in a sensitive environment and which do not pose any significant environmental or public health risk. Accordingly, local authorities are cautioned to reflect carefully about whether additional information is truly necessary before taking a final decision that a plan that has been submitted is inadequate.

The content of an extractive waste management plan is determined by Regulation 5(1)(a) of the Extractive Waste Regulations (see Box 5), with the minimum⁶⁹ detail being mandated by Regulation 5(3). In this respect, the governing foundation of each plan is its focus on “the minimisation, treatment, recovery and disposal of extractive waste, taking account of the principle of sustainable development”.⁷⁰

Besides meeting these general principles, Regulation 5(2) sets down three underlying objectives for extractive waste management plans. These entail the need to prevent or reduce both the production of extractive waste and its harmfulness,⁷¹ to encourage the recovery of extractive waste⁷² and to ensure both its short – and long-term safe disposal. Box 6 sets out the complete wording.

67 This is subject to one minor exception that relates to small-scale sites involving the extraction of peat and unpolluted soil. This exception is due to the discretion allowable under Regulation 2(4): see Chapter 8.

68 As set down in Chapter 8, the only exceptions to this requirement are peat waste and unpolluted soil sites of limited environmental significance, as well as sites that closed before the legislation entered into force.

69 See the words “at least” at the start of Regulation 5(3).

70 Regulating 5(1)(a).

71 Regulation 5(2)(a).

72 Regulation 5(2)(b).

Box 6. Regulation 5(2): Objectives of an Extractive Waste Management Plan

The objectives of the extractive waste management plan shall be to:

- a. prevent or reduce waste production and its harmfulness, in particular by considering:
 - (i) waste management in the design phase and in the choice of the method used for mineral extraction and treatment,
 - (ii) the changes that the extractive waste may undergo in relation to an increase in surface area and exposure to conditions above ground,
 - (iii) placing extractive waste back into the excavation void after extraction of the mineral, as far as is technically and economically feasible and environmentally sound in accordance with existing environmental standards at Community level and with the requirements of Directive 2006/21/EC where relevant,
 - (iv) putting topsoil back in place after the closure of the waste facility or, if this is not practically feasible, reusing topsoil elsewhere,
 - (v) using less dangerous substances for the treatment of mineral resources,
- b. encourage the recovery of extractive waste by means of recycling, reusing or reclaiming such waste, where this is environmentally sound in accordance with existing environmental standards at Community level and with the requirements of Directive 2006/21/EC where relevant,
- c. ensure short and long-term safe disposal of the extractive waste, in particular by considering, during the design phase, management during the operation and after-closure of a waste facility and by choosing a design which:
 - (i) requires minimal and, if possible, ultimately no monitoring, control and management of the closed waste facility,
 - (ii) prevents or at least minimises any long-term negative effects, for example attributable to migration of airborne or aquatic pollutants from the waste facility, and
 - (iii) ensures the long-term geotechnical stability of any dams or heaps rising above the pre-existing ground surface.

Within these objectives, the Extractive Waste Regulations place an emphasis on the design of a site, being founded on the concept that effective design will reduce the production of extractive waste, encourage its recovery and minimise short – and long-term liabilities. Indeed, one of the goals is to ensure that, where possible, a completed site can be left without the need for on-going monitoring.⁷³ Within this type of consideration, long-term geotechnical stability is a key factor.⁷⁴

As noted, additional content of an extractive waste management plan is specified by Regulation 5(3). Accordingly, the various sub-elements of the plan must include the following information:

- a statement indicating which category of waste site the facility falls within: inert; non-inert, non-hazardous; unpolluted soil or peat waste. In all cases, a justification must be given to explain why the site does not warrant Category A status. This must consider the nature of possible hazards at the site, focussing particularly on short-, medium – and long-term site stability issues,
- details on the nature of the extractive waste produced at the site, covering the composition of the material, its leachability and so on, estimates of the total quantities of extractive waste that will arise from the operational phase of the site,
- a description of the extraction operations and of other processes that are the source of the waste, as well as any additional treatment method applied to the waste after it has arisen,
- a description of possible environmental and human health impacts arising from any extractive waste being deposited at the site, along with details of preventative measures needed to minimise those impacts during site operation and in the post-closure period,

⁷³ Regulation 5(2)(c)(i).

⁷⁴ Regulation 5(2)(c)(iii).

- a detailed justification of the siting of any extractive waste facility, along with information on its design, the measures necessary to prevent pollution to any environmental media, the arrangements for the handling any contaminated water or leachate, erosion prevention measures and the provision being made to ensure that there are not unacceptable dust emissions,⁷⁵
- details of proposed monitoring, control, site inspection and corrective action procedures. Where excavation voids are to be back-filled for site restoration purposes, the plan must include information on how issues relating to stability and environmental contamination are to be controlled,⁷⁶
- a description of measures relating to the proposed closure, rehabilitation and aftercare of the site, including information on site restoration,⁷⁷
- information on the measures deployed at the site to preclude any negative affect on local water, air and soil quality,
- a detailed survey of the condition of the land to be affected by the waste facility,
- a general map of the entire site, which must include the details of the site boundary, extraction areas, the extractive waste facility/ies and site infrastructure.

Regulation 5(3) additionally emphasises that the plan must set out how the extraction method and any subsequent approach to materials and waste handling satisfies the need to prevent or reduce the quantity of waste being produced.⁷⁸ The objective of reducing the harmfulness of extractive waste is also mentioned in this context, but this is expected to be a less significant factor for most extractive waste management plans for inert waste sites operated by the quarrying or sand and gravel sectors. It is something that is, for obvious reasons, more significant at a Category A facility that harbours hazardous waste.

Besides the need to comply with the specific elements mandated by Regulation 5(3) of the Extractive Waste Regulations, the objectives set down in Regulation 5(2) must be met by each extractive waste management plan. These objectives are linked into the content of the plan by the final paragraph of Regulation 5(3). This states that the plan must be of sufficient quality to allow a local authority to be able to see how its content meets these objectives, as well as any others that arise from Directive 2006/21 itself.

6.4 When an Extractive Waste Management Plan must be submitted

All extractive waste management plans are to be submitted by 31 December 2011⁷⁹ at the latest. However, any extractive waste management plan associated with a non-inert, non-hazardous waste site needs to be included with an application for a waste facility permit.⁸⁰ In the case of existing sites of this type, the deadline for permit applications was 1 January 2011 (these requirements are discussed in Chapter 9 of this guidance).

In the case of new extractive waste facilities an extractive waste management plan can be submitted as part of an application for planning permission, forming a component of the application documentation or being contained within

an environmental impact statement.⁸¹ In either case, the plan should be a clearly identifiable and self-contained. If it is to be included in an environmental impact statement, the plan must feature as a separate chapter, with its introductory section explaining its statutory basis and why it has been included.⁸²

75 This material is a consequence of Regulation 5(3)(d)'s cross-reference to Regulation 11(2)(a) and (b).

76 See Regulation 5(3)(e)'s reference to Regulations 10 and 11(2)(c).

77 See Regulation 5(3)(f) and Regulation 5(3)(d)'s reference to Regulation 11(2)(d).

78 These requirements are a result of the final sentence in the second paragraph to Regulation 5(3), and its references to Regulation 5(2)(a)(i) and 5(2)(a).

79 This is the deadline set by the Department of the Environment, Heritage and Local Government's Circular WP 24/10 (see the answer to its question 16).

80 This is a requirement of Regulation 7(3)(c).

81 In the small number of case where the extractive waste facility requires to be authorised by a waste facility permit, the plan can be submitted with the permit application.

82 A statement as to why a plan has been included as part of an EIS is needed to ensure that persons less familiar with the Extractive Waste Regulations understand the reasoning behind its inclusion.

Regulation 5(5) of the Extractive Waste Regulations states that a competent authority can decide that, because all of the relevant information set down in Regulations 5(1) to (4) has been contained in other material that has already been submitted by a potential site operator, there is no need for duplicate information to be included. However, it is the Agency's view that it is generally desirable that free-standing plans are submitted. This allows the plan to be more easily checked against the statutory requirements set out in Regulation 5 to the Extractive Waste Regulations. It also aids clarity about which version is applicable when a plan is updated. Having said that, there is no reason why the plan itself cannot be quite short, cross-referring to relevant material submitted in a planning application, environmental impact statement or to other documentation.

6.5 Review of Extractive Waste Management Plans

Following Directive 2006/21, each Extractive Waste Management Plan has to be reviewed by the operator every five years.⁸³ Regulation 5 of the Extractive Waste Regulations goes on to state that, in the event that there has been a substantial change to either the operation of the waste facility or to the waste that is being deposited, the plan needs to be amended. Accordingly, operators of extractive sites need to examine the content of each extractive waste management plan and consider whether it still adequately reflects current and future operations.

In this respect, the legislation refers to a "substantial change" as being the trigger for a review of an extractive waste management plan. Such a change is defined as one that may, in the opinion of the competent authority, have a significant negative effect on human health or the environment.⁸⁴ It also must be one that relates to waste management at the site; in other words, to either the operation of the waste facility or other extractive waste that is being deposited.⁸⁵ Accordingly, local authorities should note that both of these criteria set a relatively high threshold as to when a plan is to be amended.

It is the EPA's view that a "substantial change" usually will involve one or more of the following events:

- when the change is consequent to an amendment to the site's planning permission and where the application for that amendment was accompanied by an environmental impact statement and/or requires an appropriate assessment under the Habitats Directive (Directive 92/43). In all cases, these alterations must affect site waste management practices,
- when the change has been required due to concerns about a possible threat being created to the environment or human health by the present waste management arrangements at an extractive activity. Such concerns may have been articulated in the form of an enforcement notice issued under the Planning and Development Act, a Section 55 notice issued under the Waste Management Act, a Section 12 notice under the Local Government (Water Pollution) Act 1977 or a notice issued under either the Safety, Health and Welfare at Work Act 2005 or its subsidiary legislation,
- when an extractive waste management plan has been submitted as part of a planning application and where the grant or refusal of the application has required some aspects of the plan to be modified to fully accord to the decision by the planning authority.

It should be noted that this list is not exhaustive. A local authority can make its own judgement on this matter and, if necessary, provide supplementary guidance to operators about this issue. However, regard must be had to the constraint caused by the Extractive Waste Regulations' definition of "substantial change".

When an extractive waste management plan is amended, the revised plan should be sent to the local authority responsible for the area in which the extractive waste facility is situated. In general, it is preferable that a new plan is

⁸³ Regulation 5(4).

⁸⁴ See definition in Regulation 3(2).

⁸⁵ Regulation 5(4).

submitted, rather than just information on the nature of the amendments. This allows the currency of the up-to-date plan to be readily apparent to all parties.

A revised plan can be included within a planning application for changes to an existing facility. In other circumstances, it can be notified separately.

Local authorities and site operators should note that, in accordance with Regulation 5(4), there is no need to revise an extractive waste management plan every five years if no substantial change to the existing waste management arrangements has taken place.

6.6 Local Authorities' Duties

As noted earlier, the final deadline for submission of an extractive waste management plan is 31 December 2011. Local authorities should, without delay, notify all relevant operators of extractive sites that an extractive waste management plan is to be submitted by that date. Local authorities are also encouraged to require extractive waste management plans to be included as part of a planning application for both a new extraction facility and for a major change at an existing site. It is desirable, therefore, that all potential applicants are made aware of this requirement at, for example, any pre-application meeting or via a local authority's planning guidance.

Each local authority is required to evaluate an extractive waste management plan in order to verify that it conforms to the requirements discussed earlier in this chapter. These involve compliance with the general objectives set down in Regulation 5(1)(a),⁸⁶ as well as the more specific obligations contained in Regulations 5(2) and 5(3) (see above). If it does do so, the plan must be formally approved under Regulation 5(6). In the case where an extractive waste management plan has been submitted as part of a planning application for new facility or for an extension to an existing facility, this process of approval can take the form of the grant of the permission. Otherwise, a local authority's approval must be communicated separately to each site operator.

In the event that a planning authority declines to approve any proposed works and other development that is envisaged by a plan that was submitted as part of a planning application, this refusal should be regarded as a "substantial change" in respect of Regulation 5(4). Accordingly, the plan should be reviewed to address any restriction that is consequent to the planning authority's decision. In such circumstances, it is recommended that any planning permission issued should include a condition to mandate that a revised plan be submitted within an appropriate timescale. Where the decision on the planning application is outright refusal, an amended plan normally should be required of the site operator; however, if the authority's decision simply causes site operations to continue as before, no revised plan is needed where the content of the existing plan remains current.

The Extractive Waste Regulations mandate that the process of approval of an extractive waste management plan be governed "on the basis of procedures to be decided by the competent authority".⁸⁷ The EPA's view is that this provision requires all local authorities to develop a procedure for the consideration and approval process for extractive waste management plans and for their review. This must be capable of tracking the process of the submission of extractive waste management plans, their currency and any amendments. It is suggested that this procedure is kept simple,

being founded on a logging system to ensure that all plans that are submitted are duly processed within a reasonable timescale. Provision should be made for plans being included within planning applications.

⁸⁶ This duty is a consequence of Regulation 5(1)(b).

⁸⁷ Regulation 5(6).

Besides establishing a procedure for the consideration of extractive waste management plans and their amendments, a final duty of Regulation 5 of the Extractive Waste Regulations is for local authorities to monitor the implementation of each plan.⁸⁸ This exercise can form part of the inspection process by local authorities of extractive waste facilities that is required by Regulation 16. This type of monitoring should also feature within each local authority's RMCEI annual inspection programme.

Extractive Waste Management Plans

Summary: What Local Authorities Must Do:

- Appreciate that all operators need to produce an extractive waste management plan in accordance to the rationale explained in this chapter.
- Develop procedures for the recording, receipt and processing of plans submitted by operators.
- Actively require all extractive waste management plans to be submitted by 31 December 2011.
- Understand that the focus of an extractive waste management plan is solely on issues affecting extractive waste management (including measures that cause waste prevention). This means that the legislation does not require the plan to extend to wider issues relating to site closure that are unconnected with extractive waste management.
- Verify that the content of each submitted plan complies with the requirements of Regulation 5 and, if so, formally approve the plan in accordance with Regulation 5(6). Unless there is a good reason not to do so, this consideration and approval process should be done within two to three months of the receipt of a plan. In particular, local authorities should not hold unprocessed or semi-processed plans for prolonged periods without issuing a decision on them.
- Monitor, as part of a local authority's site inspection duties (see Chapter 13), compliance with the plan on an on-going basis.
- Require that existing plans are to be amended and re-submitted only when the nature of waste management operations has changed sufficiently for it to constitute a "substantial change". Such a change is one that has the potential to have "significant negative effects on human health or the environment".

⁸⁸ Regulation 5(6).

Extractive Waste Management Plans

Summary: What The Extractive Industries Must Do:

- Understand that the production of an extractive waste management plan is a legal obligation under the Extractive Waste Regulations.
- Appreciate that all extractive sites are involved in the management of extractive waste, even those that do not produce any waste on a regular basis or have deployed a successful preventative approach. Accordingly, all operators must produce an extractive waste management plan.
- Arrange for the production and submission of an extractive waste management plan by 31 December 2011.
- Comprehend that the production of an extractive waste management plan is not something that is onerous and that, once produced, it only needs to be updated when a change of significant magnitude takes place that relates to site waste management arrangements.
- Review the plan every five years and, should a “substantial change” have taken place to the site’s waste management arrangements, submit an amended version to a local authority forthwith.
- Understand that a component of a local authority’s inspection function under the Extractive Waste Regulations is to verify a site’s compliance with the content of the extractive waste management plan.

7. Regulations 10 and 11: Design, Rehabilitation and Closure of all Types of Waste Facility

Key Points

- Regulation 11(2) of the Extractive Waste Regulations set out provisions that govern the design of new extractive waste facilities and extensions. However, backfilling is excluded from Regulation 11, being governed instead by Regulation 10.
- Each local authority must ensure that new extractive waste facilities and extensions should accord with five key principles, including that pollution is prevented, that the waste facility remains stable in the long term, that arrangements are made for its inspection and that appropriate rehabilitation and aftercare is carried out.
- A new extractive waste facility must comply with all of Regulation 11(2) and, potentially, such a facility can be located within an existing quarry or other type of extractive activity. In other words, the provisions affecting new extractive waste facilities do not apply solely only to new quarries or other similar proposed sites.
- Regulation 10 deals with the practice of back-filling of excavation voids and imposes three separate regulatory obligations on local authorities in respect of their inspection and supervision functions.

7.1 Background: Rehabilitation and Closure

While Regulation 11(2) covers an extractive waste facility's design, on-going management and restoration, Regulation 10 separately applies where an "excavation void" is being backfilled with extractive waste.⁸⁹ Regulations 11(1) and (3) do not apply where extractive waste only comprises inert waste, peat waste or unpolluted soil.⁹⁰

7.2 New Extractive Waste Facilities and their later Modification

Regulation 11(2) of the Extractive Waste Regulations affects operators of all types of new extractive waste facility, as well as those considering extensions to existing sites.⁹¹ The full wording is contained as Box 11. As can be seen, this provision places a duty on each local authority to ensure that these waste facilities are appropriately located, constructed, managed and restored in a manner that neither causes pollution nor stability issues. As with most of the Extractive Waste Regulations, the focus here is both on modifications to existing waste facilities as well as upon new waste facilities. A new waste facility can be established not only at an entirely new quarry or other extractive site, but also within a premises that is currently operating.

As the Extractive Waste Regulations do not require a permitting system for the operation of extractive waste facilities involved in the deposition of inert waste, waste peat and unpolluted soil, these requirements have instead to be reflected within the conditions of a planning permission issued for either a new waste facility or for a change or

⁸⁹ While Regulation 12 is entitled "Closure and after-closure procedures for waste facilities", it does not apply to sites that only handle inert waste, unpolluted soil or peat waste (see Regulation 2(4)). Accordingly, it is considered later in the context of extractive waste facilities that involve the deposit and keeping of non-hazardous, non-inert waste.

⁹⁰ See Regulation 2(4).

⁹¹ As noted, in contrast to Regulation 11(2), Regulations 11(1) and (3) do not apply to inert waste facilities, as well as those that handle unpolluted soil or peat.

extension to an existing facility. Accordingly, local authority staff that handle internal inter-departmental consultations on planning applications should ensure that the content of any planning application contains information that responds to these aspects of the Extractive Waste Regulations.

Box 11. Regulation 11(2): Obligations on New Extractive Waste Facilities and Extensions

The competent authority shall satisfy itself that, in constructing a new waste facility or modifying an existing waste facility, the operator ensures that:

- a. the waste facility is suitably located, taking into account in particular Community or national obligations relating to protected areas, and geological, hydrological, hydrogeological, seismic and geotechnical factors, and is designed so as to meet the necessary conditions for, in the short and long-term perspectives, preventing pollution of the soil, air, groundwater or surface water, taking into account especially Directives 76/464/EEC, 80/68/EEC and 2000/60/EC, and ensuring efficient collection of contaminated water and leachate as and when required under the permit, and reducing erosion caused by water or wind as far as it is technically possible and economically viable,
- b. the waste facility is suitably constructed, managed and maintained to ensure its physical stability and to prevent pollution or contamination of soil, air, surface water or groundwater in the short and long-term perspectives as well as to minimise as far as possible damage to landscape,
- c. there are suitable plans and arrangements for regular monitoring and inspection of the waste facility by competent persons and for taking action in the event of results indicating instability or water or soil contamination,
- d. suitable arrangements are made for the rehabilitation of the land and the closure of the waste facility,
- e. suitable arrangements are made for the after-closure phase of the waste facility.

Records of the monitoring and inspections referred to in point (c) shall be kept, together with licence documentation, in order to ensure the appropriate handover of information, particularly in the event of a change of operator.

For most planning applications relating to major extractive waste facilities, information on the measures necessary to address Regulation 11(2)(a) (b), (d) and (e) – see Box 11 – should be contained in an environmental impact statement that accompanies the application. If it is not, then it needs to be gathered under a further information request. In general, this information should not normally be required to be submitted later on, particularly as a consequence of a planning condition⁹². However, Regulation 11(2)(c), which mandates regular site inspections and monitoring by a competent person, may need to be reflected as a planning condition. A condition governing the required nature of a response to the discovery of any instability of an extractive waste deposit may, where this risk has the potential to arise, need to be included. Additionally, a planning condition should also address the need for record-keeping in accordance with the final paragraph of Regulation 11(2).

7.3 Backfilling Excavation Voids

The Extractive Waste Regulations separately cover the practice of back-filling an excavation void with extractive waste. At the outset, it is important to understand that most backfilling operations for the purposes of site rehabilitation and

⁹² With the exception of Regulation 11(2)(c), the other information within Regulation 11(2) falls within the scope of information that must feature in an environmental impact statement, as set out in Schedule 6 to the Planning and Development Regulations 2001 to 2009. In this respect, the Department of the Environment, Heritage and Local Government's Circular Letter PD2/07 cautions against the deployment of planning conditions to rectify deficiencies in an environmental impact statement.

construction purposes will not fall within the Extractive Waste Regulations' definition of a "waste facility".⁹³ This causes Regulations 11 and 12 not to apply; perhaps for this reason, backfilling is dealt with separately in Directive 2006/21 and, accordingly, in Regulation 10 to the Extractive Waste Regulations.

Regulation 10 and its requirements relating to backfilling brings the matter of the definition of extractive "waste" to the forefront, for the reason that not all backfill activities will involve the handling of waste. This matter is also a function of case law from the Court of Justice of the European Union. For that reason, the whole issue of the definition of "waste" is discussed separately in Appendix 1 of this guidance note and will not feature in this section. Instead, the paragraphs that follow cover the provisions of the Extractive Waste Regulations that apply when extractive waste is used as backfill.

Regulation 10 requires a local authority to ensure that backfilling accords to three principles. These apply whenever surface or underground excavation voids are being backfilled for rehabilitation or construction purposes. In instances when these principles mandate that particular measures are to be taken by a site operator, local authorities are expected to ensure that such measures are contained in any planning application for a new site or its extension. In instances where specific provision needs to be made, they also may need to be reflected as planning conditions. In some instances, these obligations also can be formalised as conditions of any discharge licence issued under the Local Government (Water Pollution) Act.

The first principle affecting back-filling⁹⁴ relates to the need to ensure that the deposited extractive waste remains stable in both the short – and long-term. Besides ensuring that the waste is suitable for this purpose, fulfilling this objective must take account of local environmental conditions, including factors such as any potential for watercourse-related erosion. Besides instability, pollution or contamination of the different environmental media is also to be avoided, as well as "where possible" damage to the landscape. In order to ensure long-term environmental protection, plans and other arrangements must be put in place to govern the monitoring of the site; these must also further the overall environmental protection objective of preventing pollution to any environmental medium.⁹⁵ Records of all monitoring must be kept, in order to ensure that a full suite of relevant information can be handed over if and when the identity of the operator changes.

The second principle of Regulation 10⁹⁶ focuses on the need to ensure that backfilling does not cause pollution of soil, surface water and groundwater. This obligation is to be discharged by each local authority ensuring that an operator takes the required measures to meet all relevant EU environmental standards and ensures that, in accordance with the Water Framework Directive, there will be no future deterioration in current water status. This process involves an evaluation of the leachate-generation potential of the backfill measures, in order to prevent the contamination of any water discharges and the collection of any contaminated water with a view to its treatment.⁹⁷

These regulatory objectives do not, however, mean that leachate generation prevention measures need be deployed at all sites, or that any collected water associated with a discharge from a backfilled excavation void need be treated in all cases. Having considered the relevant risk issues, the Extractive Waste Regulations allow a local authority to reduce these requirements when the backfill operation is not expected to cause any additional potential hazard to soil, groundwater or surface water.⁹⁸

In some instances, the rehabilitation of an extractive site by backfill may involve groundwater levels being allowed to rise to flood the filled area. This practice is also provided for in Regulation 10 of the Extractive Waste Regulations.⁹⁹ Again, the site operator is to be required to prevent any form of pollution or water status deterioration that might arise

93 Backfilling for the purposes of construction and site rehabilitation is excluded from the definition of a "waste facility": see final paragraph in the definition contained in Regulation 3(2).

94 Regulation 10(1)(a).

95 As required by Regulation 10(1)(a)'s cross-reference to Regulation 11(2).

96 Regulation 10(1)(b).

97 Regulation 10(1)(b) via its cross-reference to Regulation 13(1).

98 Regulation 10(1)(b) via its cross-reference to Regulation 13(3).

99 Regulation 10(1)(b) via its cross-reference to Regulation 13(5).

from this practice. In this respect, that person must be able to provide a local authority with a convincing case as to why there will be no negative impacts. This is to be done via a consideration of the leachate-generation potential of the waste, justifying whether measures are needed to prevent, divert or otherwise treat contaminated water and so on.¹⁰⁰ This case must include a demonstration of compliance with the Water Framework Directive (Directive 2000/60).

The third principle of Regulation 10 requires that, when backfilling is to take place, a local authority must ensure that the operator undertakes an appropriate level of monitoring of both the composition of the extractive waste and of the void itself.¹⁰¹

Finally, readers are reminded that most backfilling operations for the purposes of site rehabilitation and construction purposes will not fall within the Extractive Waste Regulations' definition of a "waste facility".

Design, Rehabilitation and Closure

Summary: What Local Authorities Must Do:

- Recognise that Regulations 10 and 11(2) (only) of the Extractive Waste Regulations apply to all extractive sites that handle only inert waste, unpolluted soil and peat waste.
- Understand that, under Regulation 11(2), local authorities are subject to a duty to ensure that extractive waste facilities are appropriately designed, located, managed, maintained and that adequate arrangements are made for the closure and post-closure phase.
- Appreciate that the provisions of Regulation 11(2) relating to new extractive waste facilities have relevance when such infrastructure is being re-located or established within an existing extractive site.
- Ensure that, in accordance to Regulation 10, backfilling activities involving the reinstatement of excavation voids result in (a) stable structures, (b) do not cause pollution and (c) are subject to monitoring by the operator where such an action is necessary.
- Make sure that the requirements of Regulations 10 and 11(2) are reflected in the consideration of planning applications for sites that manage inert waste, unpolluted soil and peat waste.
- Verify that site operators are keeping records of site monitoring and inspections.
- Appreciate that, in accordance to the Extractive Waste Regulations, backfilling operations of any duration do not fall within the concept of a "waste facility" and that, in such circumstances, Regulation 11 does not apply.
- Understand that Regulations 11(1) (which requires that the waste facility is managed by a competent person) and 11(3) (which mandates the operator to immediately notify stability-related events) do not apply to sites that handle only inert waste, unpolluted soil or waste from peat extraction.

¹⁰⁰ Regulation 13(5), including its cross-references to Regulations 13(1) and (3).

¹⁰¹ Regulation 10(1)(c) via its cross-reference to Regulations 12(4) and (5). While Regulation 12 does not apply to inert waste, unpolluted soil or peat extraction sites – and may not apply to non-hazardous, non-inert waste sites under a local authority's discretion – it is considered that the cross-reference in Regulation 10(1)(c) and the words "mutatis mutandis" mean that the requirements of Regulation 12 do apply when a waste-related back-filling process is undertaken at these sites.

Design, Rehabilitation and Closure

Summary: What The Extractive Industries Must Do:

- Appreciate that the provisions of Regulation 11(2) of the Extractive Waste Regulations relating to new extractive waste facilities may apply when such infrastructure is being re-located or established within an existing extractive site.
- Ensure that new extractive waste facilities and extensions to those already existing are established and managed in accordance to Regulation 11, being developed in compliance with principles that ensure long-term physical stability and pollution prevention. Such facilities must be subject to inspection and monitoring and, when nearing closure, be appropriately rehabilitated and ultimately restored.
- Keep records of all site monitoring and inspection activities where they relate to extractive waste facilities.

8. Specific Provisions affecting Inert Waste, Peat Waste and Sites handling Unpolluted Soil

Key Points

- The provisions of the Extractive Waste Regulations relating to sites where inert waste, peat waste and unpolluted soil are deposited only apply when these materials constitute “extractive waste”. For a material to constitute extractive waste, it must fall within the statutory definition of “waste”. Many quarry products, restoration materials and other similar materials do not fall within the definition of “waste”; however, materials that are left stockpiled on-site with no certainty about their future use are, in accordance with European Union case law, to be considering as “waste” (see Appendix 1) and hence are also “extractive waste”.
- All extractive waste facilities involving inert waste, peat waste and unpolluted soil are required to comply with the common requirements of the Extractive Waste Regulations that have been described in the earlier chapters of this guidance document. These include the following obligations on operators:
 - To take the necessary measures to ensure that extractive waste is handled without endangering human health or without causing environmental risk (see Chapter 5).
 - To submit an extractive waste management plan (see Chapter 6).
 - To ensure that both stability and the general environment is safeguarded when extractive waste is returned to any excavation void (see Chapter 7).
 - To take measures to ensure that any run-off, leachate or other contaminated water emission is both fully compliant with EU environmental law, including the principle that there should be no further deterioration in local water quality (see Chapter 5).
 - To have all the required premises identified on the relevant local authority’s extractive industry register (see Chapter 12).
 - Ensure that new waste facilities and modifications to existing ones are designed to protect the local environment, that record-keeping and regular monitoring of the site takes place, along with suitable closure and after-care arrangements.
- The Extractive Waste Regulations also set down provisions of different levels of regulatory stringency that are specific to sites handling particular types of extractive waste. The lowest level of these requirements applies to sites that solely handle inert waste, peat waste and unpolluted soil.
- Subject to certain exceptions, sites that handle only extractive waste that constitutes inert waste, unpolluted soil or waste from peat extraction are not subject to the licensing or permitting systems.
- Normally, the provisions relating to sites that handle only “inert waste” will apply to most of the quarrying and sand and gravel sectors in Ireland. However, care is needed about whether the material being handled fits precisely within this definition. Should it not do so, the additional layer of control applicable to the next tier of extractive waste facilities – those handling non-hazardous, non-inert waste – will apply (see Chapter 9).
- Inert waste is defined in the Extractive Waste Regulations, with additional criteria being contained in Commission Decision 2009/359. Both of these elements must be considered when doubt arises about whether some form of extractive waste is inert. Key aspects concern leachability and sulphide levels.
- Commission Decision 2009/359 makes clear that there is no need for laboratory testing when adequate information already exists about the nature of particular waste types. Accordingly, testing is only necessary when there is an element of doubt about this matter.
- Should any type of extractive waste facility be subject to significant stability problems that pose a serious threat to the public or the environment, the site falls within the concept of a Category A facility and the EPA’s licensing system applies (see Chapter 10).

8.1 Background: Inert Waste, Peat Waste and Unpolluted Soil Sites

This first part of this guidance document has focussed on the key provisions that affect all types of extractive activity that is to be regulated by local authorities. As noted, these involve a general duty on site operators not to cause pollution or endanger local populations, the need for an operator to produce an extractive waste management plan and for certain design principles to be incorporated within proposals for new facilities. Where a Category A facility is located within its functional area, a local authority also has to draft an external emergency plan for the site.

Besides these provisions, the Extractive Waste Regulations also set down some specific obligations that affect, to varying degrees, different classes of extractive operation or extractive waste facility. The most complex of these relates to Category A facilities, with lesser provisions impinging upon other types of extractive site. The latter type of obligations will fall mainly on the quarrying and sand and gravel sectors, as these activities comprise the bulk of the extractive industry in Ireland.

The Extractive Waste Regulations also contain provisions aimed at extractive sites that involve the long-term storage of peat waste or unpolluted soil. While it is considered unlikely that there will be many of this type of site in Ireland, it is desirable that the legislation's obligations on this sector are summarised in this guidance document for the purposes of completeness.

In some instances, it is possible that the type of waste being handled by the quarrying sector does not fit squarely within the definition of "inert waste". Instead, the site may be classed as handling non-hazardous, non-inert waste. If this is the case, somewhat more onerous provisions will apply, including a requirement that, separately from the site's planning permission, the waste site is duly authorised under the Waste Management Act by a waste facility permit. The relevant requirements of the Extractive Waste Regulations that affect this type of site are discussed in the next chapter.

As rules of varying degrees of stringency apply to operators handling these different types of extractive waste, it is particularly important for local authorities to be clear on how they are to be differentiated. As will be seen, this process centres upon the definitions assigned to concepts such as "inert waste", "non-hazardous, non-inert waste", "unpolluted soil" and "peat waste".

Prior to considering these definitions in any detail, a common factor in all of them should be understood. This is the explicit presence of word "waste" in the terms "inert waste", "non-hazardous, non-inert waste" and "peat waste" in the Extractive Waste Regulations, with this also being implicit within the concept of "unpolluted soil". All of these waste types are sub-sets of the Regulations' concept of "extractive waste", and the key word is here is the word "waste". In other words, for inert and non-inert materials derived from quarrying and other extractive activities to be subject to this legislation, the material must fall within the definition of "waste". A similar requirement affects materials that comprise peat or unpolluted soil.

Accordingly, it follows that many stockpiles of quarry products at an extractive site will not be waste. In accordance to the case law of the Court of Justice of the European Union,¹⁰² this material only becomes waste if it is being held for an indefinite length of time, where its further use is uncertain and/or where there is no market for it. A similar line of reasoning affects topsoil and other similar materials that may be being stored for later utilisation in bona-fide¹⁰³ restoration purposes. It also applies to bunds and acoustic screens, as long as the presence of this infrastructure at the site has a legitimate purpose.¹⁰⁴ Information about materials held on-site that may or may not be waste can be obtained by the deployment of the questionnaire attached to the Department of the Environment's Circular WP 24/10 dated 4 October 2010.

Besides the issue of whether the material in question is waste, there are three other factors that need to be considered in respect of materials such as inert waste, unpolluted soil and waste from peat extraction. Firstly, places where these

¹⁰² See, in particular, the *Avesta* and *Palin Granit* judgments discussed in Appendix 1.

¹⁰³ In other words, the material deposited must be of a type and quantity that is appropriate for the intended purpose at the site where it is stored.

¹⁰⁴ For example, an acoustic screen needs to be located with reference to possible receptors. Often, the size and location of these and other types of bund will be a consequence of a condition of planning permission or be documented in a site's planning application or environmental impact statement.

waste types are managed are excluded from the more onerous elements of the Extractive Waste Regulations, such as the need to be authorised by a permit.¹⁰⁵ This matter will be returned to later in this Chapter.

Secondly, care is needed in ensuring that any site that is considered to fall within one particular category does not also involve the deposit of other waste of a different type. For example, an extractive waste facility that handles mainly inert waste but also receives deposits of non-hazardous, non-inert extractive waste will need to be authorised by a waste facility permit.¹⁰⁶

A similar outcome may await an operator who wishes not only to handle extractive waste generated by on-site activities, but also to import inert waste from other sources; alternatively, these circumstances may warrant a waste licence being required.

Finally, in the event that there is a risk of collapse and a major accident – and notwithstanding the fact that a site may only comprise inert extractive waste – a site may have attained Category A status,¹⁰⁷ being subject to the additional regulatory obligations that are appropriate to this activity. As set down earlier in this guidance note, it is imperative that the EPA is contacted about any potential Category A sites and, if urgent stability problems are identified, appropriate action is taken without delay.

8.2 Quarries and other Sites that only handle Inert Waste

8.2.1 The Key Definition: “Inert Waste”

“Inert waste” is defined in the Extractive Waste Regulations as follows:¹⁰⁸

“inert waste” means waste that does not undergo any significant physical, chemical or biological transformations. Inert waste will not dissolve, burn or otherwise physically or chemically react, biodegrade or adversely affect other matter with which it comes into contact in a way likely to give rise to environmental pollution or harm human health. The total leachability and pollutant content of the waste and the ecotoxicity of the leachate must be insignificant, and in particular not endanger the quality of surface water and/or groundwater. The waste shall fulfil all of the criteria detailed in Commission Decision (EC) No. 2009/359/EC or any amendment thereto.

Other than the final sentence, this definition is the same as contained in the Landfill Directive¹⁰⁹ and that which features in many waste licences. The main requirement is that the material in question is inherently chemically stable, with no significant leachability. However, this definition is also embellished by the cross-reference to Decision 2009/359.¹¹⁰ That Decision amplifies some of the elements of the Extractive Waste’s Regulations’ concept of “inert waste”. It also contains some important clarification about the need for testing and verification.

Article 1 of Decision 2009/359 sets down a more detailed definition of “inert waste”. This is reproduced as Box 12. While some of the definition used in the Extractive Waste Regulations is repeated, the sulphide thresholds should be noted. These may affect extractive waste that contains a significant proportion of pyrite (iron sulphide: FeS_2) or similar compounds. On exposure to air and rainwater, this contamination may have the potential to cause leaching, resulting in

¹⁰⁵ See Regulation 2(4).

¹⁰⁶ Smaller-scale sites can be alternatively authorised by a certificate of registration where inert waste is imported.

¹⁰⁷ Regulation 2(4), first paragraph is clear that the full gamut of the Extractive Waste Regulations applies to inert waste sites that are also Category A facilities.

¹⁰⁸ Regulation 3(2).

¹⁰⁹ Directive 1999/31, Article 2.

¹¹⁰ Commission Decision of 30 April 2009 completing the Definition of Inert Waste in Implementation of Article 22(1)(f) of Directive 2006/12/EC of the European Parliament and the Council concerning the Management of Waste from the Extractive Industries, OJ No L110/46. 1.5.2009.

a sulphate-containing polluting liquor. For this reason, it is conceivable that high sulphide-containing extractive waste, and also that which involves the deposit of waste containing significant quantities of heavy metals such as zinc, may not fall within the category of “inert waste”. It is also possible that the presence of some types of flocculent in settlement ponds could have this effect.

An additional element of Commission Decision 2009/359 concerns the requirement for laboratory analysis and other testing. However, the Decision states that there is no need for testing when a regulatory body is satisfied that sufficient knowledge already exists to indicate that an extractive material comprises only inert waste. When a more in-depth assessment is required, the characterisation procedures contained in Commission Decision 2009/360 are to be applied.¹¹¹

It follows from the above that, for extractive waste to be considered to be inert waste, the full requirements set out in the definitions given by the Extractive Waste Regulations and Decision 2009/359 must be satisfied. While Decision 2009/359 indicates that, in many cases, there is no need for laboratory testing to take place in instances where the waste composition is already known, local authorities need to have available sufficient information to make this decision. In this respect, operators of extractive waste facilities or applicants for planning permission should submit evidence that is adequate for this purpose. This information can be included within the extractive waste management plan for the site.

Box 12. Decision 2009/359: Additional Criteria for determining “Inert Waste”

Waste shall be considered as being inert waste, within the meaning of Article 3(3) of Directive 2006/21/EC, where all of the following criteria are fulfilled in both the short and the long term:

- a. the waste will not undergo any significant disintegration or dissolution or other significant change likely to cause any adverse environmental effect or harm human health;
- b. the waste has a maximum content of sulphide sulphur of 0.1%, or the waste has a maximum content of sulphide sulphur of 1% and the neutralising potential ratio, defined as the ratio between the neutralising potential and the acid potential, and determined on the basis of a static test prEN 15875 is greater than 3;
- c. the waste presents no risk of self-combustion and will not burn;
- d. the content of substances potentially harmful to the environment or human health in the waste, and in particular As, Cd, Co, Cr, Cu, Hg, Mo, Ni, Pb, V and Zn, including in any fine particles alone of the waste, is sufficiently low to be of insignificant human and ecological risk, in both the short and the long term. In order to be considered as sufficiently low to be of insignificant human and ecological risk, the content of these substances shall not exceed national threshold values for sites identified as not contaminated or relevant national natural background levels;
- e. the waste is substantially free of products used in extraction or processing that could harm the environment or human health.

8.2.2 Statutory Obligations: Inert Waste Sites

Two key elements of the Extractive Waste Regulations determine the degree to which the legislation applies to quarrying, sand and gravel extraction and other extractive sites that handle only inert waste.

Firstly, Regulation 2(4) limits the scope of application of the full requirements of the Extractive Waste Regulations in respect of those non-Category A sites that handle only inert extractive waste that has been generated on-site. Accordingly, operators of this type of facility are absolved from needing to comply with Regulations 7, 8, 11(1) and (3),

¹¹¹ See Commission Decision 2009/359, Article 2.

12, 13(6), 14 and 15.¹¹² In general, these excluded elements only apply to Category A sites or to non-inert, non-hazardous extractive waste facilities.

Secondly, the definition of “waste facility” in the context of an inert waste site is time-limited. While this matter has been enlarged upon in Chapter 4 of this guidance, the definition of “waste facility” is restricted to an area of an extractive site which has been used or otherwise designated for the deposit of inert extractive waste for a period greater than three years.¹¹³ This means that some elements of the Extractive Waste Regulations only apply when this period has been exceeded. This rule finds particular application in respect of the provisions that determine how extractive waste facilities are to be built and managed. It therefore places a critical limitation on the scope of the requirements of Regulation 11(2) that apply to an inert waste facility.¹¹⁴

While the main requirements of the Extractive Waste Regulations that affect all extractive waste facilities have been described earlier on in this guidance note, it is useful that the different elements that affect this sector are summarised here. However, readers should be aware that the following list constitutes only what is intended to be a helpful summary, with the full details being set out in the relevant sections of previous chapters.

Summary of obligations on operators of extractive sites that handle inert waste:

- to take the necessary measures to ensure that extractive waste is handled without endangering human health or without causing environmental risk (Regulation 4: see Chapter 5),
- to submit an extractive waste management plan (Regulation 5: see Chapter 6),
- to ensure that both stability and the general environment is safeguarded when extractive waste is returned to any excavation void (Regulation 10: see Chapter 7),
- to take measures to ensure that any run-off, leachate or other contaminated water emission is both fully compliant with EU environmental law – particularly the Water Framework Directive – and the principle that there should be no further deterioration in local water quality (Regulation 13: see Chapter 5),
- to have all the required premises identified on the relevant local authority’s extractive industry register (Regulation 19: see Chapter 12).

In addition to the above, when an area has been designated for the deposit of inert waste for a period of over three years, Regulation 11(2) of the Extractive Waste Regulations also applies.¹¹⁵ This is because this area constitutes a “waste facility”. Accordingly, new waste facilities and modifications to existing ones must be designed to ensure that the local environment is protected and that there is full compliance with EU environmental law. In addition, record-keeping and regular monitoring of the site must take place, with suitable closure and after-care arrangements being put into effect. Chapter 7 contains more detail.

8.3 Sites handling Unpolluted Soil

8.3.1 Key Definitions: “Unpolluted Soil” and “Waste Facility”

The term “unpolluted soil” is defined in the Extractive Waste Regulations:¹¹⁶

“unpolluted soil” means soil that is removed from the upper layer of the ground during extractive activities and that is not deemed to be polluted under Community law.

¹¹² The proviso here is that the site in question does not have Category A status.

¹¹³ See the definition in Regulation 3(2).

¹¹⁴ Regulation 12 also contains provisions that are to be imposed on a “waste facility”; however, these do not apply to inert waste sites due to Regulation 2(4).

¹¹⁵ Inert waste sites that are not Category A facilities are excluded from Regulations 11(1) and (3) by Regulation 2(4).

¹¹⁶ Regulation 3(2).

In respect of the reference to the waste not being polluted under Community law, a key criterion will be the presence of significant contamination from dangerous substances. These are defined via the much amended Directive 67/548 and Directive 1999/45.

By the presence of this provision in both the Extractive Waste Regulations and Directive 2006/21, it is clear that topsoil, sub-soil and associated materials can constitute “waste” in some circumstances. This is despite this material being intended for re-use at the extractive site or elsewhere. As discussed in Appendix 1, “waste” is something that is discarded, intended to be discarded or required to be discarded. This means that, if unpolluted soil is somehow surplus at a site operated by the extractive industry, it may well constitute “waste”. For example, the operator may have no further use for it, its presence on the site may cause it to be an obstruction to on-going development works, and so on. Being unwanted in such circumstances, the material constitutes “waste”. Conversely, should unpolluted soil be stored at the extractive site for the purposes of site restoration, this material may well not be “waste”. In this type of instance, Appendix 1 indicates that it is essential that there is certainty that the intended re-use will occur¹¹⁷ and, for example, that this re-use is consistent with the need to restore the site.

In the context of waste that comprises unpolluted soil that has arisen from on-site activities, the definition of a “waste facility” involves any area that has been designated for the deposit or accumulation of unpolluted soil for more than three years.¹¹⁸

8.3.2 Statutory Obligations: Unpolluted Soil Sites

In a similar manner to non-Category A inert waste facilities, extractive waste facilities that handle unpolluted soil are also absolved from the need to comply with Regulations 7, 8, 11(1) and (3), 12, 13(6), 14 and 15.¹¹⁹ This means that, in principle, operators of unpolluted soil sites are to be subject to the same requirements as those that apply to sites that handle inert extractive wastes. There is, however, one key difference that may allow a lighter regulatory touch to apply to this sector. This is that, subject to the proviso set down below, the Extractive Waste Regulations allow a local authority discretion to reduce or waive any of the remaining requirements of the legislation entirely.

The proviso here is that the Extractive Waste Regulations state that this discretion can only be exercised when a local authority “is satisfied that the requirements of Regulation 4 are met”.¹²⁰ In this respect, the legislation’s cross-reference to Regulation 4 is highly significant and its implications need to be approached carefully. The basis of Regulation 4 is contained in Directive 2006/21¹²¹ and hence this provision must be interpreted in a manner that fulfils the purpose of the parent EU legislation.

Regulation 4(2) places a duty on all regulatory bodies, including local authorities, to ensure that each operator who handles extractive waste of any kind takes the necessary measures to ensure that neither human health is endangered nor the environment harmed by the site’s operation. An additional obligation on regulatory bodies is to make sure that extractive waste is not abandoned, dumped or otherwise deposited in an uncontrolled fashion.¹²²

As part of this whole process, Regulation 4 then states that regulatory bodies such as local authorities are obligated to ensure that each operator takes all necessary measures to “prevent or reduce” relevant adverse impacts, prevent accidents, and so on,¹²³ when they may otherwise arise from extractive waste management. The legislation dictates that these measures are to be based on the concept of “best available techniques”.¹²⁴ Such techniques are required to take into account the technical characteristics of the waste facility, its location and local environmental conditions.

¹¹⁷ The criteria about certainty of further use are also a key element of the waste/by-product determination criteria contained in the European Communities (Waste Directive) Regulations 2011, Regulation 27(1). This is discussed further in Appendix 1.

¹¹⁸ See the definition of “waste facility” in Regulation 3(2).

¹¹⁹ Regulation 2(4).

¹²⁰ Regulation 2(4), second paragraph.

¹²¹ Directive 2006/21, Article 2(3), second paragraph.

¹²² Regulation 4(2).

¹²³ Regulation 4(3).

¹²⁴ Regulation 4(4).

What is significant to note about the contents of Regulation 4 is that the obligations it places on operators and regulatory bodies are highly site-specific. As mentioned, best available techniques are to be considered in the context of the geographical situation of each waste facility and local environmental conditions. Accordingly, while discretion has been granted to a regulatory body by Regulation 2(4) to absolve sites handling unpolluted soil from the entirety of the Extractive Waste Regulations, Regulation 4 is clear that such a judgment must be undertaken on a case-by-case basis. In other words, it is not possible for a regulatory body to decide at the outset that no unpolluted soil site in its functional area is to be subject to the relevant requirements of the Extractive Waste Regulations. Instead, such a decision can only be exercised having considered each individual location where this waste is held, its environmental setting, and so on.

The EPA's view of these provisions is that, where waste that contains unpolluted soil is deposited for a sufficient time-period for the site to constitute what the Extractive Waste Regulations define as a "waste facility", then a local authority should not decide that, as allowed by Regulation 2(4), the Regulations are not to apply. This principle therefore applies to any site where unpolluted soil is deposited in area that has been designated for that purpose for a period exceeding three years. Operators of such sites should be required to produce an extractive waste management plan and comply with the other requirements that apply to inert waste sites (see earlier in this chapter).

In the case of shorter-term deposits of waste unpolluted soil for less than three years, if the deposit is of a significant magnitude, then EPA considers that the Extractive Waste Regulations should apply. The EPA's view is that this can be judged on whether the rate of deposit exceeds 25,000 tonnes per year or may be associated with significant effects on the environment. These two criteria are those that are applicable in a planning context, where they govern whether an environmental impact statement is to be submitted with a planning application for a waste facility. In this respect, the concept of "significant effects on the environment" is to be judged in accordance to the material listed in Schedule 7 to the Planning and Development Regulations 2001-2011.¹²⁵

In the case of smaller-scale deposits of unpolluted soil, a local authority can exercise its discretion about whether items such as an extractive waste management plan are needed. In such instances, it is essential to the operation of the legislation that any such decision is adjudicated upon in a manner that complies with the Local Government Act, being formally considered and recorded. In other words, the decision to exclude any particular unpolluted soil site from the requirements of the Extractive Waste Regulations is one that must be taken corporately by the local authority, as opposed to being undertaken informally by a local authority staff member.

8.4 Sites handling Peat Waste

8.4.1 Key Definitions

The term "peat" is not defined further in the legislation and holds its ordinary meaning. As with the other requirements of the legislation, the provisions that affect this material relate not only to the extraction phase, but also to its treatment and storage. As noted earlier, the term "treatment" is wide-ranging and covers the re-working of waste peat stockpiles.

A site where peat waste is stored only falls into the definition of a "waste facility" after storage takes place in an area designated for its deposit or accumulation for a duration of more than three years.¹²⁶ Unsurprisingly, the definition of "waste" also needs to be considered in this context.

¹²⁵ As amended by the Planning and Development Regulations 2008 (SI 235 of 2008), Article 8.

¹²⁶ See Regulation 3(2).

8.4.2 Statutory Obligations: Peat Waste Sites

In a similar manner to that affecting extractive waste facilities that handle only unpolluted soil, the Extractive Waste Regulations allow a local authority discretion to exclude peat waste sites from the requirements of the legislation.¹²⁷ Should it be considered necessary for the Extractive Waste Regulations to apply, a local authority is entitled to require a site operator to conform to all of the relevant provisions of the legislation, with the exception of Regulations 7, 8, 11(1) and (3), 12, 13(6), 14 and 15.¹²⁸ This means that the same level of controls as apply to sites handling inert waste can be applied when they are required.

The EPA's view of these discretionary provisions is the same as that which applies to extractive waste operations that involve the handling of unpolluted soil. This means that all of the relevant provisions in the Extractive Waste Regulations should affect this sector when:

- a. the peat waste is to be deposited in an area that has been designated for this purpose for a period in excess of three years; or
- b. the peat waste is to be held at a location for less than three years, but where the volume of waste is of a sufficient magnitude to exceed one or more of the thresholds that govern when a waste project is subject to environmental impact assessment; or
a local authority considers that there are other reasons why the Extractive Waste Regulations should apply to a site that is not subject to criteria (a) and (b) above.

For the reasons explained earlier, the final type of decision listed above must be exercised on a case-by-case basis and be made in accordance with the Local Government Act.

¹²⁷ Regulation 2(4), paragraph 2.

¹²⁸ Regulation 2(4).

Inert Waste, Peat Waste and Sites handling Unpolluted Soil

Summary: What Local Authorities Must Do:

- Understand when the definitions of “waste” and “extractive waste” apply to materials handled by the extractive sector.
- Recognise how the Extractive Waste Regulations make distinctions between “inert waste,” “non-hazardous, non-inert waste,” “unpolluted soil” and “peat waste” and appreciate the appropriate level of control that is applicable to these different waste types.
- Require an operator to demonstrate that the waste being held on-site falls within the definition of inert waste when uncertainty arises about its composition. However, laboratory testing should only be required when there is doubt that the material may well not be inert.
- Appreciate that Regulation 2(4) of the Extractive Waste Regulations, as well as the definition given to “waste facility”, places significant limits on the scope of much of the Regulations in the context of sites that handle only inert waste, unpolluted soil and waste from peat extraction.
- Understand that the scope of the discretionary provisions contained in the Extractive Waste Regulations that affect extractive waste facilities that handle solely unpolluted soil or waste peat is limited by the contents of this guidance.
- Ensure that only waste generated by the site itself is being managed or require the import of waste from an off-site source to be duly authorised under the Waste Management Act.
- Verify that no stability or similar safety-related issue is affecting any site to the extent that it should be classed as a Category A facility (see Chapter 10).
- Ensure that an operator of an inert waste, peat waste or unpolluted soil site:
 - Takes the necessary measures to ensure that extractive waste is handled without endangering human health or without causing a significant environmental risk (see Chapter 5).
 - Submits an extractive waste management plan (see Chapter 6).
 - Makes sure that both stability and the general environment is safeguarded when extractive waste is returned to any excavation void (see Chapter 7).
 - Takes the required measures to ensure that any run-off, leachate or other contaminated water emission is both fully compliant with EU environmental law, including the principle that there should be no further deterioration in local water quality (see Chapter 5).
- Ensure that all sites handling inert waste, unpolluted soil or waste from peat extraction are recorded on the extractive industry register (see Chapter 12).
- Consider using the questionnaire attached to the Department of the Environment’s Circular WP 24/10 to obtain information about the nature of individual extractive operations taking place within each local authority’s functional area.

Inert Waste, Peat Waste and Sites handling Unpolluted Soil

Summary: What The Extractive Industries Must Do:

- Appreciate that materials that are stockpiled with no definite intended further use are likely to fall within the definition of “waste” and “extractive waste” and that the Extractive Waste Regulations will apply in such circumstances.
- Be clear as to whether any waste resultant from quarrying and sand and gravel extraction is fully within the definition of “inert waste”. If it is not, then the provisions relating to non-inert, non-hazardous waste will apply, including the need to make an application for a waste facility permit to authorise the extractive waste management operation (see Chapter 9).
- Ascertain, when required by a local authority, that extractive waste held on the site does, in fact, fall within the definition of “inert waste”.
- Understand that extractive waste sites, regardless of waste type, will be considered as Category A facilities (see Chapter 10) if they exhibit stability or other issues that pose a serious threat to the public or the external environment.
- Take the necessary measures to ensure that extractive waste is handled without endangering human health or without causing environmental risk (see Chapter 5).
- Submit an extractive waste management plan (see Chapter 6).
- Ensure that both stability and the general environment is safeguarded when extractive waste is returned to any excavation void (see Chapter 7).
- Take measures to ensure that any run-off, leachate or other contaminated water emission is fully compliant with EU environmental law, including the principle that there should be no further deterioration in local water quality (see Chapter 5).
- Have all the required premises identified on the relevant local authority’s extractive industry register (see Chapter 12).
- Ensure that new waste facilities and modifications to existing ones are designed to protect the local environment, that record-keeping and regular monitoring of the site takes place, along with suitable closure and after-care arrangements (see Chapter 7).
- Appreciate that the Extractive Waste Regulations apply only to waste generated on-site by extractive activities. Should waste be imported from off-site sources, certain additional requirements under the Waste Management Act will apply, including that the site is duly authorised.¹²⁹
- Cooperate with any request by a local authority for the provision of information about the nature of the activities taking place at the site, including fulfilling any requirement to complete the questionnaire that is contained in Department of the Environment’s Circular WP 24/10.

¹²⁹ Usually by a waste facility permit or waste licence.

9. Specific Provisions affecting Sites handling Non-Hazardous, Non-Inert Waste

Key Points

- It is expected that few extractive waste sites will fall into the category of a non-hazardous, non-inert waste facility. However, this category will be applicable to a small number of sites where the deposited extractive waste does not meet the criteria set down in the Extractive Waste Regulations and in Commission Decision 2009/359 for “inert waste” (see Chapter 8). One key determining parameter will be the sulphide level.
- Extractive waste facilities that are designated for the deposit of non-hazardous, non-inert waste are required to be authorised by a waste facility permit. Such permits are issued by the local authority for the area in which the site is situated.
- For a permit to be necessary, the place where extractive waste is held must have been designated for that purpose for over one year. Otherwise, it will not satisfy the definition set by the Regulations of “waste facility”.
- Besides the need to obtain and comply with the conditions of a waste facility permit, the operator of a non-hazardous, non-inert extractive waste facility must also;
 - take the necessary measures to ensure that extractive waste is handled without endangering human health or without causing environmental risk (see Chapter 5),
 - submit an extractive waste management plan (see Chapter 6),
 - ensure that both stability and the general environment is safeguarded when extractive waste is returned to any excavation void (see Chapter 7),
 - take measures to ensure that any run-off, leachate or other contaminated water emission is both fully compliant with EU environmental law, including the principle that there should be no further deterioration in local water quality (see Chapter 5),
 - have all the required premises identified on the relevant local authority’s extractive industry register (see Chapter 12),
 - ensure that new waste facilities and modifications to existing ones are designed to protect the local environment, that record-keeping and regular monitoring of the site takes place, along with suitable closure and after-care arrangements (see Chapter 7).
- The Extractive Waste Regulations mandate that certain specified additional material is to be submitted with an application for a waste facility permit for an extractive waste facility. Extra criteria also apply when a decision on the acceptability of the application is being taken, with specified additional conditions being required to be included when a permit is granted. A financial guarantee (or equivalent) must be sought, with the amount calculated in accordance to the separate criteria set down in Commission Decision 2009/335.
- Additional requirements over-and-over those in the Waste Management (Facility Permit and Registration) Regulations also apply when site closure is due.

9.1 Background: Non-Hazardous, Non-Inert Extractive Waste Facilities

For the reasons set out in the previous chapter, it is expected that most extractive waste facilities will fall within the inert waste category. A few others may involve the management of unpolluted soil or peat waste. Accordingly, there may only be a few sites that contain the final type of waste that is subject to local authority control: non-hazardous, non-inert extractive waste.

Sites within the non-hazardous, non-inert waste category will be mainly quarries where the level of sulphide exceeds the limits set down in Commission Decision 2009/359:¹³⁰ see Box 12 in Chapter 8. This is due to high natural levels of pyrite. Other instances may involve potash and rock salt extraction activities or where potentially polluting flocculants are deployed in settlement lagoons.¹³¹

9.2 Key Definitions: Non-Hazardous, Non-Inert Waste Sites

The term “non-hazardous, non-inert waste” is, rather obviously, bounded by the scope of definitions of inert waste and hazardous waste. The definition of inert waste was discussed at the start of the previous chapter and will not be repeated here. The Extractive Waste Regulations state that¹³² “hazardous waste” has the meaning set down in the Waste Management Act. Accordingly, it needs to be considered, at first instance, in relation to the entries in the European Waste Catalogue and Hazardous Waste List. The presence or absence of dangerous substances may also be relevant to these entries. A copy of the Catalogue and the EPA’s guidance about it can be found on the Agency’s web site.¹³³

A second definition of consequence is the meaning given to “waste facility”. In contrast to the equivalent definition that affects inert waste facilities – where a designated area for the accumulation of inert extractive waste has to be in place for a period exceeding three years – a “waste facility” for non-hazardous, non-inert waste is a storage area that has been designated for the accumulation of waste for more than one year.¹³⁴

9.3 Statutory Obligations: Non-Hazardous, Non-Inert Waste

In a manner that has similarities to the Extractive Waste Regulations’ provisions that affect sites handling unpolluted soil or peat waste, local authorities are granted some discretion to reduce certain of the requirements of the Regulations for sites that handle non-hazardous, non-inert waste.¹³⁵ However, a significant difference between these provisions and those affecting the other types of extractive waste facility is that the discretion to absolve non-hazardous, non-inert waste sites is less wide-ranging. It is restricted to relate to only the content of Regulations 11(3), 12(5) and (6), 13(6), 14 and 16: the other elements of the Extractive Waste Regulations always have application.

In these respects, two points should be noted. Firstly, the cross-reference in Regulation 2(4) to Regulation 16 appears to be an error. From Directive 2006/21,¹³⁶ it is clear that this reference should be to Regulation 15.¹³⁷ Secondly, it is the Agency’s view that it is undesirable that operators of most types of non-hazardous, non-inert extractive site should be able to benefit from these discretionary provisions, particularly when waste facility permits are needed to authorise this type of activity. Accordingly, the following sections of this chapter provide additional guidance on how local authorities should approach these discretionary elements.

130 “Inert waste” is limited to material that “...has a maximum content of sulphide sulphur of 0.1%, or the waste has a maximum content of sulphide sulphur of 1% and the neutralising potential ratio, defined as the ratio between the neutralising potential and the acid potential, and determined on the basis of a static test prEN 15875 is greater than 3” (Commission Decision 2009/359, Article 1(1)(b)).

131 In coal mining areas, extractive waste derived from such an activity may not fall within the inert waste category due to its combustion potential or due to pollutants caused by coal-washing. However, little or no such activities take place in Ireland.

132 Regulation 3(2).

133 See http://www.epa.ie/downloads/forms/wreport/nwr/EPA_waste_catalogue_hazard_list_2002.pdf

134 See the definition in Regulation 3(2).

135 Regulation 2(4), paragraph 3.

136 See Directive 2006/21, Article 2(3).

137 The cross-reference to Regulation 15, rather than to Regulation 16, also applies in the context of the provisions affecting extractive waste that comprises inert waste, peat and unpolluted soil: see Regulation 2(4), paragraph 1.

9.3.1 Waste Facility Permits: Applications

A key difference in the manner by which the Extractive Waste Regulations approach the control of non-hazardous, non-inert extractive waste facilities is to require all such sites to be subject to the waste facility permit system.¹³⁸ However, for a permit to be required, there must be an identifiable “waste facility” situated on the site. Due to the definition of “waste facility”, the requirement that a site is authorised by a permit only applies when a designated place where non-hazardous, non-inert waste has accumulated or has been deposited or has been (or will be) in-situ for more than one year.¹³⁹

The requirement that non-hazardous, non-inert extractive waste facilities are to be governed by a waste facility permit has been phased-in, in order to give any affected operator time to make an application. In accordance to the Extractive Waste Regulations, the deadline for the submission of an application was 1 January 2011.¹⁴⁰ That date is when the Waste Management (Facility Permit and Registration) Regulations 2007 are amended by the Extractive Waste Regulations, with this change making explicit that the waste facility permit system applies to non-hazardous, non-inert extractive waste facilities that are subject to Directive 2006/21. However, the Department of the Environment, Heritage and Local Government’s Circular WP 24/10 advises local authorities to give operators some additional leeway in respect of this deadline. Affected extractive waste facility operators are to be given 120-days to submit a waste facility permit application, with that period commencing on the date they were notified that a permit is required.

As the application process for a waste facility permit is already contained in the Waste Management (Facility Permit and Registration) Regulations, it is not repeated by the Extractive Waste Regulations. However, a small number of additional requirements are set out in Regulations 7 and 8. These have been included in the Extractive Waste Regulations in order to fully transpose Directive 2006/21 into Irish law. Local authorities need to ensure that these additional aspects are satisfied when a waste facility permit application for this type of extractive waste facility is received.¹⁴¹ Should these relevant details not be submitted, a local authority should request them rather than return the application as invalid.

Regulation 7 of the Extractive Waste Regulations requires that the following additional material be submitted above-and-beyond the particulars mandated by the Waste Management (Facility Permit and Registration) Regulations:¹⁴²

- details of any possible alternative sites for the extractive waste facility,¹⁴³
- a copy of the site’s extractive waste management plan,¹⁴⁴
- the arrangements governing the site’s financial guarantee or other equivalent fund.¹⁴⁵

In respect of the above-mentioned requirement to submit information on alternative sites, it is important to note that what is being required is information about alternative locations for the extractive waste facility, not alternative locations for the extractive activity as a whole. Moreover, an applicant’s ability to list alternative options is also constrained when an application relates to a site that was in operation prior to the Extractive Waste Regulations entering into force. It may also be limited by the site’s planning permission.

Matters relating to financial guarantees are discussed further below, partly for the reason that Commission Decision 2009/335 sets down some additional requirements. As will be seen, this may need an independent third-party to undertake the relevant costings and, accordingly, the output of that exercise should be included within the permit application.

¹³⁸ Regulation 7(2)(a).

¹³⁹ Regulation 7(2)(a) states that a “waste facility” involving non-hazardous, non-inert waste needs to be authorised by a waste facility permit.

¹⁴⁰ See Regulation 7(2)(a)’s cross-reference to Regulation 23(2), with Regulation 23(2) entering into force on 1 January 2011 via the commencement date set by Regulation 1(3).

¹⁴¹ Regulation 8(7) requires a local authority to ensure that there is “coordination” between the procedures contained in the Extractive Waste Regulations and the Waste Management (Facility Permit and Registration) Regulations in relation to public participation procedures.

¹⁴² Waste Management (Facility Permit and Registration) Regulations, Article 10.

¹⁴³ Regulation 7(3)(b).

¹⁴⁴ Regulation 7(3)(c).

¹⁴⁵ Regulation 7(3)(d) and its cross-reference to Regulation 14. While financial guarantees are a discretionary requirement under the Extractive Waste Regulations (see Regulation 2(4), paragraph 3), for the reasons discussed later in this section, the Agency’s view is that they are necessary for sites of this type.

Regulation 7 of the Extractive Waste Regulations also requires that any waste facility permit application must contain “the information provided by the operator in accordance with Article 5 of Directive 85/337/EEC if an environmental impact assessment is required under that Directive”.¹⁴⁶ While the Waste Management (Facility Permit and Registration) Regulations do not mandate that an environmental impact statement (EIS) must accompany a permit application, guidance already published by the EPA states that such a document should accompany all permit applications when a proposed site exceeds the relevant national EIA threshold of 25,000 tonnes of waste per annum.¹⁴⁷ An EIS is also needed when a smaller site may be associated with “significant effects on the environment”: this matter can be determined using the procedure contained in Article 103 of the Planning and Development Regulations that applies to planning applications. Overall, the inclusion of a valid environmental impact statement with the application would, in the Agency’s view, satisfy this element of Regulation 7 of the Extractive Waste Regulations.

Regulation 8 of the Extractive Waste Regulations also extends the scope of the application procedures contained in the Permit Regulations. However, these provisions relate only to the public participation aspect and do not significantly change the procedures for a handling permit or permit review applications.¹⁴⁸ As will be seen, there is also a certain amount of duplication between these separate legislative requirements.

For example, both the Waste Management (Facility Permit and Registration) Regulations¹⁴⁹ and the Extractive Waste Regulations¹⁵⁰ require all submissions to be considered in the process of determining a waste facility permit application for this type of site. When a decision is made, both the applicant and any person who made a submission are to be informed of the decision.¹⁵¹ A copy of both the permit,¹⁵² as well as the report containing the relevant reasons and considerations behind the decision on the application, must be made available for public inspection.¹⁵³

Regulation 8(2) of the Extractive Waste Regulations requires local authorities to make certain information publicly available in respect of a waste facility permit application for a non-hazardous, non-inert waste facility. It refers to the “the main reports and advice transmitted to the competent authority at the time when the public were informed in accordance with paragraph 1”. In respect of a waste facility permit application,¹⁵⁴ this reference is considered to embrace the application documentation, as well as any internal reports generated by the local authority. Additionally, any amendment material submitted and any other reports also have to be made available.¹⁵⁵ All of these requirements can be satisfied by the usual arrangements that allow the public access to waste facility permit application documentation. However, Regulation 7(6) states that sensitive information of a purely commercial nature, including estimates of mineral reserves, should not be disclosed.

A significant difference between the procedures governing the consideration of permit applications under the Waste Management (Facility Permit and Registration) Regulations and the Extractive Waste Regulations relates to newspaper notices. Both Regulations 8(1) and 8(3)¹⁵⁶ of the Extractive Waste Regulations require that the public be informed

¹⁴⁶ Regulation 7(3)(5).

¹⁴⁷ See Guidance Manual - Waste Facility Permit and Registration Regulations, pages 12 and 16. This is available at the following link <http://www.epa.ie/downloads/advice/waste/wasteregulations/wfpguidancemanualweb.pdf>

¹⁴⁸ While not all of Regulation 8(1) would appear on first reading to pertain to applications for waste facility permits – for the reason that Regulations 8(1)(a), (b) and (e) only refer to licences – it is clear from Directive 2006/21 (see Article 8(1)) that the intention of the parent EU legislation is for these requirements to apply to all forms of authorisation relating to extractive waste facilities. In Ireland, this includes not only waste and IPPC licences but also waste facility permits.

¹⁴⁹ Article 15(1).

¹⁵⁰ Regulation 8(5).

¹⁵¹ Waste Management (Facility Permit and Registration) Regulations Article 18(5); Extractive Waste Regulations, Regulation 8(6).

¹⁵² Waste Management (Facility Permit and Registration) Regulations Article 18(7); Extractive Waste Regulations, Regulation 8(6).

¹⁵³ While reasons and considerations are not required for a first-time application under the Waste Management (Facility Permit and Registration) Regulations, they must be included when such a permit is subject to a review (compare Article 18(5) to Article 35(9)). In all cases, they must be included for applications for waste facility permits for non-hazardous, non-inert extractive waste facilities (see Extractive Waste Regulations, Regulation 8(6)).

¹⁵⁴ While Regulation 8(2)(a) refers to the IPPC Directive (96/61), this reference is not contained in Directive 2006/21 (see Article 8(2)(a)). Accordingly, it is considered that the requirements of Regulation 8(2) extend to waste facility permit applications.

¹⁵⁵ This is a requirement of Regulation 8(2)(b).

¹⁵⁶ Regulation 8(1) only refers to a licence, but Regulation 8(3) applies to updates of both a licence’s and permit’s conditions. In accordance to Directive 2006/21, Regulation 8(1)’s reference to a licence should be read as including a waste facility permit.

of any first-time application or proposed review or other update of a waste facility permit for a non-hazardous, non-inert extractive waste facility. While the existing provisions in Article 7 of the Waste Management (Facility Permit and Registration) Regulations satisfy this requirement by requiring a newspaper notice to be deployed for a first-time application, such a notice is not always required in the context of a permit review.¹⁵⁷ However, in the manner required by Regulation 8 of the Extractive Waste Regulations, local authorities always must ensure that a newspaper notice is used to indicate that any form of review is taking place.

The standard format for a public notice announcing a waste facility permit application, as prescribed by the Waste Management (Facility Permit and Registration) Regulations, also needs to be supplemented in three respects:

- the notice must state that submissions can be made within 25 days of the date of receipt of the application,¹⁵⁸
- the “nature of possible decisions” must be included.¹⁵⁹ It is suggested that this requirement is addressed by the following wording:¹⁶⁰
“The [name of local authority] may give its approval to the application for a waste facility permit with or without conditions or may refuse the application”,
- the opening times of the local authority office where the application can be inspected¹⁶¹ must appear.¹⁶²

Finally, the Extractive Waste Regulations confirm that the fee for a permit application for non-hazardous, non-inert waste facility is that set down in the Waste Management (Facility Permit and Registration) Regulations.¹⁶³

9.3.2 Considering Applications and Permit Conditions

The Agency’s view is that Regulation 7(4) of the Extractive Waste Regulations also affects how a local authority is to judge an application for a permit for a waste facility that is to accept non-hazardous, non-inert extractive waste. While this element of the legislation only refers to a “licence”, it is clear from Directive 2006/21 that this reference extends to any form of authorisation that is required to be issued for an extractive waste facility.¹⁶⁴ This means that, in addition to the criteria set down in Article 18(4) of the Waste Management (Facility Permit and Registration) Regulations, a permit application for an extractive waste facility must be compatible with the following additional principles:

- that the operator can demonstrate compliance with all of the requirements of Directive 2006/21,
- that the management of waste at the site does not conflict or otherwise interfere with the implementation of the Regional Waste Management Plan for the area or the Agency’s National Hazardous Waste Management Plan.¹⁶⁵

¹⁵⁷ See Waste Management (Facility Permit and Registration) Regulations, Articles 32 and 34.

¹⁵⁸ While the Waste Management (Facility Permit and Registration) Regulations do not require information about the making of submissions to be contained on the site or newspaper notice for a first-time application (see Article 8(1)), a 25-day submission period is prescribed under Article 15. Contrastingly, the equivalent public notices relating to reviews of existing permits mandate the inclusion of an explicit reference to this submission period (see Article 34(1)(a)(ii)(G)). It is considered that the latter requirements of the Permit Regulations for the making of submissions for permit reviews both satisfy Regulations 8(1)(g) and 8(7) in respect of the need for make available information on public participation.

¹⁵⁹ Regulation 8(1)(d), being in turn a requirement of Article 8(1)(d) of Directive 2006/21. The provision of this information is a common feature of EU law, being a consequence of Directive 2003/35. It already features in the national planning legislation: see for example Section 175(4)(a)(i)(IV) of the Planning and Development Act, as amended by the (European Communities Environmental Impact Assessment) (Amendment) Regulations 2006 (SI 659 of 2006).

¹⁶⁰ The wording is taken from the European Communities (Environmental Impact Assessment)(Amendment) Regulations 2006 (SI 659 of 2006).

¹⁶¹ This requirement responds to the requirement of Regulation 8(1)(f) about “times and places” where information can be accessed on the application.

¹⁶² Regulation 8(1)(e) also requires “where applicable, the details relating to a proposal for the updating of a licence or of licence conditions” to be present in a newspaper notice. These words are taken from Directive 2006/21 and, as noted above, the word “licence” should also refer to a waste facility permit. However, it is considered that the permit review procedures that are contained in Article 34(1) of the Waste Management (Facility Permit and Registration) Regulations satisfy this requirement, particularly as the notice for a permit review is required to state that the application is for a review.

¹⁶³ Regulation 7(2)(c), final paragraph.

¹⁶⁴ See Directive 2006/21, Article 7(3).

¹⁶⁵ While this criterion is also relevant to waste licence applications (see Waste Management Act, Section 40(4)(cc)), it does not affect the issue of waste facility permits for sites other than extractive waste facilities.

The Extractive Waste Regulations also affect the content of any waste facility permit that is to be issued for a non-hazardous, non-inert extractive waste facility. Following Directive 2006/21,¹⁶⁶ Regulation 7(2)(b) requires each permit to contain certain specified information:

- a. the identity of the operator,
- b. the proposed location of the waste facility, including any possible alternative locations,
- c. the waste management plan pursuant to Regulation 5,
- d. adequate arrangements by way of a financial guarantee or equivalent, as required under Regulation 14,
- e. the information provided by the operator in accordance with Article 5 of Directive 85/337/EEC if an environmental impact assessment is required under that Directive.

It will be apparent to readers that the inclusion of some of this material within a permit has the potential to pose some difficulty. However, this is a clear obligation of the legislation which, as noted, is also a requirement of EU law and Directive 2006/21.

The EPA's view on how these elements should be incorporated at permit conditions is as follows. Conditions should cross-refer to the application documentation in respect of the extractive waste management plan, the details of the financial guarantee and any environmental impact assessment, thereby binding the operator to comply with these elements. However, a local authority should take care to ensure that any such conditions are clear in respect of instances when it is necessary to take a more stringent approach to that contained in these elements of the application. This can be achieved by including within a condition a statement that indicates that the content of the relevant material submitted by the applicant applies with the exception of when it is over-ridden by one or more conditions of the permit.

Separately, the Extractive Waste Regulations require all non-hazardous, non-inert extractive waste facilities to be managed by a competent person¹⁶⁷ and mandate that "technical development and staff training" be provided. While the need to satisfy a local authority that a site operator is technically competent already features within the decision-making criteria that govern the issuing of a waste facility permit,¹⁶⁸ both these elements need to be reflected by permit conditions. This also means that the details of the nature of the proposed management of a non-hazardous, non-inert extractive waste facility must be required, via permit conditions, to be submitted immediately after the permit is granted or prior to the site being allowed to start operation.

It is also the EPA's view that additional conditions must be included to reflect Regulation 11(3) of the Extractive Waste Regulations.¹⁶⁹ Within 48 hours, a local authority is to be informed by the operator of any event that may affect site stability or may cause a significant adverse environmental effect.¹⁷⁰ Finally, each extractive waste facility operator is required to report, annually or more frequently as a local authority may determine, on the site monitoring programme and also on compliance with the conditions of the permit¹⁷¹ that pertain to the extractive waste facility.

While a local authority is granted discretion as to whether to waive or reduce these requirements,¹⁷² it is the EPA's position that nearly all of Regulation 11(3) needs to be reflected in any permit for a non-hazardous, non-inert extractive waste facility. In this respect, the only items that are discretionary relate to the need for an independent expert to validate any information contained in the annual report and the reporting frequency that applies to the submission of data and other information from operators of closed or otherwise low-risk sites.

¹⁶⁶ Directive 2006/21, Article 7(1).

¹⁶⁷ Regulation 11(1).

¹⁶⁸ See Waste Management (Facility Permit and Registration) Regulations, Article 18(4)(e) and the definition of "fit and proper person" in Article 5(2).

¹⁶⁹ The Regulations do not mandate that the content of Regulation 11(3) is to be reflected in a permit. Instead, the requirements therein can be viewed as free-standing provisions, which, when there is non-compliance, cause a direct breach of the Extractive Waste Regulations. However, as these requirements are to be implemented at the discretion of a local authority, it is considered desirable that all parties are clear about which provisions apply in all cases. In this respect, including these provisions as permit conditions is, in the Agency's view, the best way of clarifying this position.

¹⁷⁰ Both Regulations 11(3) and 12(6) refer also to an internal emergency plan "where applicable". This is a phrase that features in Directive 2006/21. From its context, the EPA's view is that "where applicable" causes internal emergency plans only to be necessary for Category A sites.

¹⁷¹ Regulation 11(3) refers only to a "licence" conditions; however, as there are no licences for non-hazardous, non-inert waste sites, this reference should be taken to relate to the conditions of a waste facility permit.

¹⁷² Regulation 2(4), paragraph 3.

For the same reason, certain requirements relating to site closure and rehabilitation – which are contained in Regulation 12 – also need, in the Agency’s view, to be reflected in the conditions of a waste facility permit for an extractive waste facility of this type. This includes requiring the operator to be responsible for the following aspects of the post-closure phase:

- site maintenance and monitoring,¹⁷³
- controlling stability, contamination risks and other negative environmental impacts, as well as keeping all channels and spillways free of debris,¹⁷⁴
- notifying a local authority of any events likely to affect site stability or that may cause significant adverse environmental affects,¹⁷⁵
- providing any other monitoring result to demonstrate compliance with the permit in the post-closure period.¹⁷⁶

9.3.3 Permits and Financial Guarantees

In principle, the financial guarantee provisions contained in Regulation 14 of the Extractive Waste Regulations are only compulsory for Category A sites. A local authority is given discretion about whether such guarantees are to apply to non-hazardous, non-inert waste facilities.¹⁷⁷ Such guarantees can take the form of bonds or industry-sponsored funds. Their intention is to ensure that there is long-term compliance with the full obligations emanating from any form of authorisation¹⁷⁸ for an extractive waste facility of this nature.

While the Extractive Waste Regulations grant a local authority discretion about whether a financial guarantee is needed for a non-hazardous, non-inert extractive waste facility, it is the EPA’s view that some form of guarantee is necessary for most sites within this sector. If there is already an adequate fund in place as a consequence of a site’s planning permission, authorities should seek to avoid unnecessary duplication. It may well be that the fund already satisfies Regulation 14 and that no additional provision needs to be made. However, whatever is already in place should be evaluated for compliance with the requirements of this element of the Extractive Waste Regulations. The requirement to provide and maintain a guarantee should be clearly set down in the permit, thus ensuring enforceability under both the Extractive Waste and Waste Facility Permit Regulations.

The Extractive Waste Regulations indicate that a financial guarantee for an extractive waste facility has a two-fold purpose.¹⁷⁹ This is to ensure that:

- “all” obligations, including those relating to post-closure, that arise from the authorisation of the waste facility are discharged by the site operator,
- there are adequate funds available for the rehabilitation of the site. In this respect, it should be noted that the scope of rehabilitation appears limited by the legislation to that set down in the site’s extractive waste management plan as well as by what is said in the conditions of the waste facility permit.

The scope of the financial guarantee must be calculated in accordance with Regulation 14(2). It is to be set on the basis of the “likely environmental impact of the waste facility”, reflecting an assumption that, as a worst-case, a third party will need to be employed to carry out the work. In respect of what the Regulations’ phrase “likely environmental impact of the waste facility” means, it is the Agency’s view that this equates to the cost of dealing with all of the liabilities arising from the operation of the site and its post-closure stage. However, while local authorities should ensure that the sum

¹⁷³ As required by Regulation 12(4).

¹⁷⁴ As required by Regulation 12(5).

¹⁷⁵ As required by Regulation 12(6).

¹⁷⁶ As required by Regulation 12(7).

¹⁷⁷ See Regulation 2(4).

¹⁷⁸ Again, Regulation 14(1)(a) refers only to “licences”; but, following Directive 2006/21, these provisions also have application in respect of any waste facility permit issued for the non-hazardous, non-inert waste sector. But contrast, Regulation 14(1)(b) refers additionally to waste facility permits.

¹⁷⁹ Regulation 14(1).

proposed for the guarantee covers all “likely” impacts and inherent risks, operators should not be required to address impacts that have a very low probability of occurrence.

Commission Decision 2009/335¹⁸⁰ provides additional requirements relating to financial guarantees under the Extractive Waste Regulations.¹⁸¹ That Decision states that the form and amount of the guarantee is to be calculated in accordance to seven principles:¹⁸²

- a. the likely impacts on the environment and on human health of the waste facility,
- b. the definition of the rehabilitation¹⁸³ including the after use of the waste facility,
- c. applicable environmental standards and objectives, including physical stability of the waste facility, minimum quality standards for the soil and water resources and maximum release rates of contaminants,
- d. the technical measures needed to achieve environmental objectives, in particular measures aiming at ensuring the stability of the waste facility and limit environmental damages,
- e. the measures required to achieve objectives during and after closure, including land rehabilitation, after closure treatment and monitoring if required, and, if relevant, measures to reinstate biodiversity,
- f. the estimated time scale of impacts and required mitigation measures,
- g. an assessment of the costs necessary to ensure land rehabilitation, closure and after closure including possible after closure monitoring or treatment of contaminants.

In relation to the final item (g) above, Decision 2009/335 requires that it embraces possible premature closure. That Decision also requires that the cost calculation is done by a suitably qualified and independent third-party.

Any condition of a waste facility permit that pertains to a financial guarantee must be worded in a manner that complies with Regulation 14(3). This mandates that the guarantee should be adjustable in order to reflect any rehabilitation work being undertaken at the site. Usually, this will mean that the guarantee can be amended so that the overall sum remaining is a function of the degree to which the site has been restored, reflecting the diminution of the operator’s overall outstanding environmental liabilities consequent to that process. Regulation 14(3) reiterates the linkage between the guarantee and the restoration work set down in the site’s extractive waste management plan and/or as specified by the conditions of the permit.

In many respects, these requirements complement the equivalent provisions contained in Article 19(1)(h) to the Waste Management (Facility Permit and Registration) Regulations. This provision allows permit conditions to require “financial security or a bond”. However, any such form of financial provision must be for the purpose of ensuring the “rehabilitation” of the site. The wording of that sub-article of the Permit Regulations suggests that such conditions cannot extend to other matters that, while a requirement of the waste facility permit, are outside the scope of site rehabilitation.¹⁸⁴

At some point, the guarantee must cease to bind the operator of an extractive waste facility. Normally, this will be when the site is fully restored and when a local authority has clear evidence to suggest that the facility has no outstanding stability or contamination issues. Accordingly, Regulation 14(4) of the Extractive Waste Regulations envisages that the cessation of the guarantee is governed by a two-stage process. Once a site has been closed and restored in a satisfactory manner, the operator is to be released from the obligation to fund this element. However, if it is required,

¹⁸⁰ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:101:0025:0025:EN:PDF>

¹⁸¹ The Decision forms part of the Extractive Waste Regulations via the cross-reference in Regulation 14(2)(b) (see also the final sentence in Regulation 2(1))

¹⁸² Decision 2009/335, Article 1(1).

¹⁸³ In the EPA’s view, this is referring to the physical nature of the restoration that is needed at the site.

¹⁸⁴ Under the Waste Management (Facility Permit and Registration) Regulations, Article 19(1) allows a local authority to include in the conditions of a waste facility permit any condition that is necessary to give effect to one of the 22 Directives listed in Schedule 2 to those Regulations. It should be noted that, as the Extractive Waste Regulations do not feature in that Schedule (despite them being included in Article 4 via Regulation 23(1) (a) of the Extractive Waste Regulations), local authorities need to ensure that any proposed permit condition falls squarely within the list of different conditions that are allowable under Articles 19(1)(b) and (c), 19(3) and 20.

a second component of the guarantee can remain in order to ensure environmental monitoring continues and that corrective action measures are implemented where they are necessary. Once a site has been satisfactorily restored, the local authority with responsibility for its permit must comply with Regulation 14(4) of the Extractive Waste Regulations. This requires the site operator to be provided with a written statement that releases that person – either partially or fully – from the obligation to retain a financial guarantee. Where a limited number of years' monitoring gives no indication of concerns or issues relating to possible environmental impacts, the financial guarantee should be annulled.

9.3.4 Permit Reviews

Under the Waste Management (Facility Permit and Registration) Regulations, a local authority is obligated to review a waste facility permit under two circumstances.¹⁸⁵ These concern when:

- a material change to either the waste-related activity or its emissions has taken place which causes the present conditions of the permit to no longer be appropriate; or
- an amendment to the local authority's waste management plan requires the permit to be reviewed.

The Extractive Waste Regulations set down additional grounds for when a facility permit review can take place at a non-hazardous, non-inert extractive waste facility. Regulation 7(5) mandates a local authority to periodically reconsider and update the permit conditions in light of any of the following three circumstances:

- when a substantial change has taken place in respect of either the operation of the site or the type of waste being deposited,
- due to concerns arising that are a consequence of site monitoring and/or inspections,
- in light of developments in the best available techniques that apply to the handling of wastes in this sector.

While the first of these three factors has similarity to its equivalent in the Waste Management (Facility Permit and Registration) Regulations,¹⁸⁶ the absence of any additional reference to the appropriateness of current conditions of the permit causes the grounds for a permit review to become somewhat wider. The other two factors represent entirely new circumstances where a review of a permit for an extractive waste facility can be instigated.

The Extractive Waste Regulations do not contain much that affects the mechanics of a facility permit review. The EPA's view is that the review process should follow the procedures that apply to first-time applications which have been described above. In all cases, local authorities must ensure that newspaper notices are always deployed to alert the public that the review process is underway.¹⁸⁷ A permit review also must consider whether it is appropriate for the site to remain outside of having Category A status.¹⁸⁸

9.3.5 The Rehabilitation and Post-Closure Process

Regulation 12 of the Extractive Waste Regulations sets down certain requirements that apply to non-hazardous non-inert waste facilities¹⁸⁹ when they are to close, with local authorities being under a duty to ensure that each affected site complies with Regulations 12(2) to (5).¹⁹⁰ Following the wording of the Directive closely, the Regulations mandate that the closure process can only start under one of three conditions.

¹⁸⁵ Waste Management (Facility Permit and Registration) Regulations, Article 30(1).

¹⁸⁶ Waste Management (Facility Permit and Registration) Regulations, Article 30(1).

¹⁸⁷ See Regulation 8(3) and its cross-reference to Regulation 8(1).

¹⁸⁸ See Commission Decision 2009/337, Article 10. This Decision forms parts of national law, see Regulation 2(1).

¹⁸⁹ Regulation 2(4) dis-applies Regulation 12 in respect of sites handling inert waste, peat and unpolluted soil.

¹⁹⁰ Regulation 12(1).

Firstly, Regulation 12(2) states that site closure can commence when all of the relevant conditions in the waste facility permit¹⁹¹ are met. If this provision is viewed in conjunction with Regulation 7(2)(b) and its requirement that the conditions of the permit cause the extractive waste management plan to form part of an operator's compliance obligations under the permit,¹⁹² it can be seen that this provision will often govern the closure procedure. As noted earlier in this guidance, the content of an extractive waste management plan is expected to indicate how the closure process is to be handled.

Alternatively, the closure process can be determined in light of the conditions that are consequent to a successful application by the operator for a permit review.¹⁹³

The third option that allows the site closure process to start is stated to be "where a competent authority issues a reasoned decision to that effect".¹⁹⁴ In order to ensure compatibility with the Waste Management (Facility Permit and Registration) Regulations, the EPA considers that this type of decision should normally be conveyed to the operator via a local authority-instigated review of an existing permit.¹⁹⁵

At some point, site restoration and rehabilitation will be complete. Regulation 12(3) then mandates a local authority to undertake both a final inspection and a full assessment of any monitoring and other reports submitted as part of the closure process. Following the wording of the Directive, Regulation 12(3) requires a local authority to certify that the land affected by the waste facility has been rehabilitated. Again, this process should be married-in with the site closure and permit surrender provisions of the Waste Management (Facility Permit and Registration) Regulations. In accordance with Article 29 of those Regulations,¹⁹⁶ a permit can be surrendered when a waste-related activity is to cease.

In this respect, the Extractive Waste Regulations make clear that a local authority's certification on the cessation of the activity does not absolve the operator from any other obligations arising from national law. Moreover, the legislation also states that, notwithstanding the issuing of a rehabilitation certificate, the relevant conditions of the waste facility permit can continue to bind the operator.¹⁹⁷ This approach is also expanded upon under Regulation 12(4), which makes clear that the operator of the extractive waste facility remains responsible for the post-closure phase for as long as is required by a local authority. The only exception concerns when either a local authority or a governmental body has taken over the site.

Regulation 12 ends with two discretionary requirements that a local authority may deploy at a non-hazardous, non-inert extractive waste facility.¹⁹⁸ A local authority can continue to require an operator in the post-closure stage to control the stability of the site and to undertake appropriate monitoring.¹⁹⁹ However, the statutory grounds behind this course of action are restricted to that which is necessary to ensure that there is compliance with the EU environmental legislation, such as the Directives on Dangerous Substances (Directive 76/464) and Groundwater (Directive 80/68) and the Water Framework Directive (Directive 2000/60). On-going monitoring can be required, as can the regular clearance of any channels or spillways.

Given the above-described requirements of Regulation 12(5), it is suggested that, where a local authority requires on-going monitoring and supervision of a non-hazardous, non-inert extractive waste facility, these requirements should

191 As noted earlier, the word "licence" in Regulation 12(2)(a) also embraces, via the requirements of Article 12(2) of Directive 2006/21, a waste facility permit.

192 See Regulation 7(2)(b)'s cross-reference to Regulation 7(3).

193 See Regulation 12(2)(b); permit review applications may be made under Article 31 of the Waste Management (Facility Permit and Registration) Regulations.

194 Regulation 12(2)(c).

195 Such reviews are undertaken under Article 30 of the Waste Management (Facility Permit and Registration) Regulations. In this respect, it is considered that, in accordance with Article 30(1)(a) of those Regulations, a proposal for the closure of an extractive waste facility constitutes a "material change in the nature, focus and extent" of the waste-related activity.

196 Waste Management (Facility Permit and Registration) Regulations, Article 29(2) as amended by SI 86 of 2008.

197 Regulation 12(3), second paragraph. While this paragraph refers on to "the licence", the meaning of this term is clear from Directive 2006/21 as covering all forms of statutory authorisation for this type of extractive waste facility, including any waste facility permit.

198 See Regulation 2(4)'s cross-reference to Regulations 12(5) and (6).

199 Regulation 12(5).

be imposed by the continuation of the waste facility permit. However, if necessary, the power contained in Regulation 12(5) can be deployed by a local authority to further the specified outcomes.²⁰⁰ This will involve a local authority taking proceedings against a site operator in relation to non-compliance with such matters as failing to adequately control the stability of the site.

However, before proceedings relating to non-compliance with Regulation 12(5) can take place, certain preliminary matters warrant attention. The requirements of Regulation 12(5) only apply to an operator “when considered necessary by the competent authority”. Accordingly, it would be good practice to give a clear warning to the operator that there is non-compliance with Regulation 12(5). Secondly, and as noted earlier, Regulation 12(5) centres upon the need to comply with specified EU environmental law. Accordingly, any aspect of non-compliance by the operator must be able to be traced back to a specific requirement of that legislation.

Finally, Regulation 12(6) places an obligation on an extractive waste facility operator to notify a local authority of any stability-related risks of concern or of any other environmental impacts revealed by site monitoring. In such circumstances, a site emergency plan should be put into effect, as should any instructions given by the local authority on remedial measures.

A local authority also is empowered to require a site operator to provide “aggregated data” obtained from the monitoring necessary for compliance with a permit²⁰¹ and for the other specified reasons. In all cases, the cost should be borne by the operator.

Directive 2006/21 is clear that its requirements should continue to bind the operator until no further environmental liabilities remain. Accordingly, local authorities should ensure that any waste facility permit remains valid for the entire life-cycle of the facility, being appropriately reviewed as necessary. While elements of the Waste Management (Facility Permit and Registration) Regulations appear able to bind a site operator after the permit has expired,²⁰² local authorities should ensure that, towards the end of the five-year lifecycle of each permit, an operator applies for a review. Should no review application be forthcoming, an affected local authority is expected to instigate a review and re-issue the permit.

9.3.6 Transboundary Effects of Non-Hazardous, Non-Inert Waste Sites

Regulation 15 sets down a mechanism for a cross-border consultation when an extractive waste facility may have implications to a neighbouring EU state, which in the case of Ireland will be Northern Ireland. However, as only Category A facilities are mentioned, it does not apply to any other type of waste site, including non-hazardous, non-inert extractive waste facilities.²⁰³ Having said that, should the site also be subject to a planning application that includes an environmental impact statement, a transboundary consultation may be necessary under the Planning and Development Act.²⁰⁴

²⁰⁰ Should this route be taken, a local authority must make clear to an operator as to what measures are needed to be put in place to satisfy Regulation 12(5). In all cases, local authorities should restrict such measures to those which are explicitly contemplated by Regulation 12(5) and its references to Community legislation.

²⁰¹ Regulation 12(6) refers to a “licence”, but for the reasons explained elsewhere in this chapter, the term also covers waste facility permits.

²⁰² See, for example, Waste Management (Facility Permit and Registration) Regulations, Article 29(4).

²⁰³ It does not apply to inert waste, peat or unpolluted soil sites due to Regulation 2(4), paragraph 1. Oddly, given its explicit focus only on Category A sites, it would seem that Regulation 15 is one of the discretionary elements that affect non-hazardous, non-inert extractive waste. While the final paragraph of Regulation 2(4) refers, *inter alia*, to Regulation 16, this would appear to be an error. This position arises from Directive 2006/21, which makes clear that the transboundary provisions contained in its Article 16 are discretionary (see Article 2(3), final paragraph).

²⁰⁴ See Planning and Development Act, Section 174(1).

Sites handling Non-Hazardous, Non-Inert Waste

Summary: What Local Authorities Must Do:

- Appreciate that the applicable timeframe contained within the definition of “waste facility” is different to that affecting sites where inert waste is handled. In the case of locations designated for the deposit of non-hazardous, non-inert waste, the site becomes a “waste facility” after one year.
- Understand that a waste facility permit is required for all sites involving non-hazardous, non-inert waste that fall within the definition of “waste facility” and appreciate the significance of the duration of a year within this requirement.
- Recognise that, as was the case with the Extractive Waste Regulations’ provisions affecting inert waste, certain specified elements of the Regulations are dis-applied in relation to non-hazardous, non-inert waste. However, the scope of these exclusions is less wide than in the former case. It is also the EPA’s view that a number of what would otherwise be discretionary provisions relating to this sector should not apply
- Be aware that 120 days has been proposed as the appropriate time period for a permit application to be lodged after a local authority has notified an operator of the need to obtain such an authorisation.
- Appreciate that the Extractive Waste Regulations require a small amount of additional information to be included in a waste facility permit application for a non-hazardous, non-inert extractive waste facility. This includes a compulsory requirement that newspaper notices are always published to announce a review of a waste facility permit for an extractive waste facility.

Sites handling Non-Hazardous, Non-Inert Waste (Cont.)

- Realise that additional determination criteria, as set down in the Extractive Waste Regulations, apply to the consideration of an application for a waste facility permit for an extractive waste facility and that minor additions must be made to permit conditions.
- Note that financial guarantees or other equivalent security must be put in place, unless an adequate fund already exists under planning conditions. In all instances, this security must accord to Commission Decision 2009/335.
- Recognise that additional provisions set out in the Extractive Waste Regulations apply at site closure and that these supplement the relevant elements of the Waste Management (Facility Permit and Registration) Regulations.
- Ensure that an operator of a non-hazardous, non-inert extractive waste facility:
 - Takes the necessary measures to ensure that extractive waste is handled without endangering human health or without causing a significant environmental risk (see Chapter 5)
 - Submits an extractive waste management plan (see Chapter 6)
 - Makes sure that both stability and the general environment is safeguarded when extractive waste is returned to any excavation void (see Chapter 7)
 - Takes the required measures to ensure that any run-off, leachate or other contaminated water emission is both fully compliant with EU environmental law, including the principle that there should be no further deterioration in local water quality (see Chapter 5)
- Have all the required premises identified on the relevant local authority's extractive industry register (see Chapter 12).
- Ensure that new waste facilities and modifications to existing ones are designed to protect the local environment, that record-keeping and regular monitoring of the site takes place, along with suitable closure and after-care arrangements (see Chapter 7).
- Consider using the questionnaire attached to the Department of the Environment's Circular WP 24/10 to obtain information about the nature of individual extractive operation taking place within each local authority's functional area.

Sites handling Non-Hazardous, Non-Inert Waste

Summary: What The Extractive Industries Must Do:

- Appreciate the distinction that causes certain types of extractive waste to fall within the category of non-hazardous, non-inert waste rather than the lesser categories of inert waste, unpolluted soil or waste from peat extraction.
- Understand that a waste facility where non-hazardous, non-inert waste is deposited is required by law to be authorised by a waste facility permit.
- Apply for a waste facility permit within 120 days of the receipt of confirmation of the requirement to make a permit application, appreciating that minor items of additional information are prescribed by the Extractive Waste Regulations above-and-beyond the material that is required for other types of waste facility permit application. Proposals for a financial guarantee (or equivalent) have to be made.
- Comply with a waste facility permit when it has been issued and, when the site is due to close, satisfy with the relevant requirements of the Regulations that relate to site closure and after-care.
- Take the necessary measures to ensure that extractive waste is handled without endangering human health or without causing a significant environmental risk (see Chapter 5).
- Submit an extractive waste management plan (see Chapter 6).
- Ensure that both stability and the general environment is safeguarded when extractive waste is returned to any excavation void (see Chapter 7).
- Take measures to ensure that any run-off, leachate or other contaminated water emission is fully compliant with EU environmental law, including the principle that there should be no further deterioration in local water quality (see Chapter 5).
- Have all the required premises identified on the relevant local authority's extractive industry register (see Chapter 12).
- Ensure that new waste facilities and modifications to existing ones are designed to protect the local environment, that record-keeping and regular monitoring of the site takes place, along with suitable closure and after-care arrangements (see Chapter 7).
- Appreciate that the requirements of the Extractive Waste Regulations apply only to waste generated on-site by extractive activities. Should waste be imported from off-site sources, certain additional requirements under the Waste Management Act will apply, including that the site is duly authorised.²⁰⁵
- Cooperate with any request by a local authority for the provision of information about the nature of the activities taking place at the site, including completing the questionnaire that is attached to the Department of the Environment's Circular WP 24/10.

²⁰⁵ Usually by a waste facility permit or waste licence.

10. Regulation 9: Classification of Category A Sites

Key Points

- Category A extractive waste facilities are those that pose the most significant risk to the environment and public health. This is usually because they contain hazardous waste or could cause a major accident in the event of a collapse.
- While most Category A sites already will be subject to IPPC licences, spoil heaps associated with activities such as quarrying, sand and gravel extraction or peat working can also be classed as Category A facilities. This is due to the risk they pose due to some form of structural failure that has external consequences. Whether the waste such sites contain is inert is irrelevant to this matter.
- Local authorities and site operators need to determine whether there are any sites that qualify for Category A status that are currently not subject to the EPA's licensing regimes.
- The system for identifying extractive waste sites as Category A facilities is not only governed by the Extractive Waste Regulations but also Commission Decision 2009/337. Accordingly, regard must be had to both of these provisions.
- Any non-IPPC licensed Category A waste facility must be subject to a licence application within 120 days of its status being confirmed.

10.1 Background: Category A Sites

While the EPA has primary responsibility for the regulatory oversight of Category A facilities, local authorities are required to provide a key support role to this process. The Extractive Waste Regulations obligates them to identify any additional Category A sites that are not already subject to the IPPC or waste licensing regimes. This duty arises from Regulation 9(1)(b) to the Extractive Waste Regulations. Most of the sites – if they exist at all – will be quarries that are associated with waste tips or settlement lagoons where severe stability issues with off-site implications have been identified.

10.2 When a Site Constitutes a Category A Facility

The Extractive Waste Regulations specify a series of criteria by which an extractive waste facility is to be determined to have Category A status. These are contained in the Regulations' Schedule 3, with the contents being supplemented by Commission Decision 2009/337. Accordingly, local authorities must have regard to both the relevant Schedule to the Regulations and to this EU Decision.²⁰⁶

The full wording of Schedule 3 is shown in Box 10. In summary, an extractive waste site is to be viewed as a Category A facility when one or more of the following circumstances are met:

- there is a likelihood that a structural failure at the site or an event caused by some form of incorrect operation could result in a major accident,
- the site holds hazardous waste,
- the site holds a waste that constitutes a dangerous substance or preparation as set down in the Directives on Dangerous Substances²⁰⁷ or Preparations.²⁰⁸

²⁰⁶ This is an obligation under Regulation 9(1), being also a consequence of Regulation 2(1).

²⁰⁷ The much-amended Directive 67/548.

²⁰⁸ Directive 1999/45.

Schedule 3 also states that the presence of hazardous waste and dangerous substances and preparations only causes an extractive waste facility to attain Category A status when the levels are “above a certain threshold”. Further detail in this respect is given by Commission Decision 2009/337;²⁰⁹ however, it is unlikely that there will be any non-licensed extractive waste facilities that are found to contain hazardous waste.²¹⁰ If a local authority comes across such a facility, it is imperative that the EPA is informed immediately.

Box 10. Regulation 4(1): The Key Duty on all Extractive Site Operators

A waste facility shall be classified under Category A if:

- a. a failure or incorrect operation, e.g. the collapse of a heap or the bursting of a dam, could give rise to a major accident, on the basis of a risk assessment taking into account factors such as the present or future size, the location and the environmental impact of the waste facility; or
- b. it contains waste classified as hazardous under Directive 91/689/EEC above a certain threshold; or
- c. it contains substances or preparations classified as dangerous under Directives 67/548/EEC5 or 1999/45/EC6 above a certain threshold.

It follows that the most likely type of potential Category A site will be an extractive waste facility which falls into the first of the three criteria mentioned above. Such sites may contain only inert waste, peat, waste soil or non-hazardous, non-inert waste, being classed as a potential Category A facility where collapse of the facility could cause a major accident. As noted above, this may affect not only spoil heaps, but also settlement lagoons and other contained liquid or semi-solid waste. In this respect, Commission Decision 2009/337 sets down the following thresholds:²¹¹

In the case of loss of structural integrity for tailings dams, human lives shall be deemed to be threatened where water or slurry levels are at least 0.7 m above ground or where water or slurry velocities exceed 0.5 m/s.

However, for these limits to apply, there is the obvious need for there to be both proximate off-site receptors and also an available pathway that causes any contained material to present a risk of sufficient magnitude.

For extractive waste facilities comprising non-hazardous waste, the other most relevant element of Commission Decision 2009/337 is Article 6. Besides the need to consider any other site-specific matters that may affect any particular site, eight assessment criteria are set down. These relate to:

- the size and properties of the waste facility, including its design,
- the quantity and quality of extractive waste, including its physical and chemical properties,
- the relevant slope angles of any heaps or other deposits,
- the potential for internal groundwater to build-up within the deposit,
- underground stability,
- local topography,
- the proximity of the site to watercourses, buildings and other built-development,
- the presence of any mine workings in the vicinity.

209 See Commission Decision 337/2009, Article 7.

210 The wide scope of the definition of hazardous waste causes the separate reference in Schedule 3 to the Directives on Dangerous Substances and Preparations to be somewhat superfluous.

211 Decision 2009/337, Article 5(1); the words “tailings” and “dam” are defined in Directive 2006/21, with this definition embracing most forms of settlement ponds at quarries and at sand and gravel pits.

In accordance to the Extractive Waste Regulations, a site is only classed as a Category A facility where there is a risk of a “major accident”. This concept is defined²¹² as an event that gives rise to a serious danger to human health and/or the environment. This risk can be one that arises at the moment or may be a future consequence of extractive waste continuing to be placed at the site.²¹³

Accordingly, for there to be a risk of a major accident, there must be some probability of a collapse or other event, as well as there being present in the vicinity human or environmental receptors that are under threat. Localised and small-scale instability may not be sufficiently serious for a site to warrant Category A status; nor may more significant instability in the case where there are no environmental or other receptors in the vicinity that are at risk.

Having said that, local authorities need also to consider secondary consequences from slippages and other similar events. While an occurrence such as a slippage may not itself cause any form of direct threat, it may result in knock-on effects that are of a sufficient magnitude to create what the Regulations’ term a “major accident”. Examples might be where a slippage could cause a watercourse to become blocked and result in flooding or where a poorly-sited deposit of extractive waste resulted in the surrounding ground becoming unstable. In the latter respects, significant extractive waste deposits located in an upland bog environment may be of particular concern.

10.3 Local Authorities’ Duties

As local authorities are in close contact with the situation in their functional area, they are best placed to identify any other extractive waste facility that may warrant Category A status but which is outside of the EPA’s licensing regime. This is why the Extractive Waste Regulations place an explicit responsibility on such bodies to classify this type of facility.²¹⁴ However, it is important that this process is a fully informed one, involving input from both the EPA and, if appropriate, also from the operator of a site that is causing concern.

In the manner set out by the Department of the Environment, Heritage and Local Government’s Circular WP 24/10, local authorities are required to consider whether any extractive waste facility in its functional area may be a potential Category A site. Should any potential site be identified, the operator can be required to undertake a risk assessment of the facility. As a preliminary screen, the EPA and the Department of the Environment, Heritage and Local Government has developed a simple, 3-page, questionnaire and included this within Circular WP 24/10. The information received back from a site operator should then include a preliminary indication as to whether a more in-depth risk assessment is to be required.

When one is required, affected extractive waste facility operators are under a duty to carry out this risk assessment, as it is an obligation under Regulation 9(1)(b) of the Extractive Waste Regulations. The completed assessment should be forwarded to the relevant local authority, who should then determine whether a particular site can be classified as a Category A site. Where there is doubt regarding a site’s status, Regulation 9(2) allows a local authority to consult with the EPA on the matter, with such a request requiring the EPA to make a final decision.

The process for providing the EPA with the detail about a potential Category A site is to be via the Agency’s web site, where a “Request for Assistance under Regulation 9(2) Form” can be downloaded from the online Extractive Industries Register (see Chapter 12), completed and submitted to the Agency. The request form describes the nature and detail of what is required to make a submission to the EPA under Regulation 9(2). A copy of the form is attached in Appendix 3 of this document. This process is similar to that used by the EPA to determine the regulatory status of a waste site under Article 11 of the Waste Management (Facility Permit and Registration) Regulations.

²¹² See Regulation 3(2).

²¹³ See Schedule 3, paragraph (a) and Decision 2009/337, Article 1(2).

²¹⁴ See Regulation 9(1)(b).

As the criteria contained in Schedule 3 to the Extractive Waste Regulations and in Commission Decision 2009/337 determine whether a site may fall into Category A, any notification to the EPA of a potential site must contain a justification that is based upon these considerations. Providing an adequate and reasoned opinion has been submitted to the Agency, the EPA has to make a decision on this matter within a three-month window.

While Regulation 9(1)(a) of the Extractive Waste Regulations indicates that all risk assessments were to have been completed by 30/9/10, Circular WP 24/10 advised local authorities not to enforce this deadline. Instead, the risk assessment process should have been complete by 30/6/11.

Circular WP 24/10 also advises that an operator of a potential Category A facility should be given 120 days within which to submit a waste licence application. Provided that this step has been undertaken, the Circular suggests that local authorities should not generally seek the site's closure while the application is undergoing consideration by the EPA. However, local authorities retain discretion about this matter. If an immediate risk of high significance is identified, closure should be sought straight-away. In such instances, it is highly desirable that the Health and Safety Authority takes the lead on this matter. Closure also should be considered if there is evidence that an operator who has lodged an application is failing to co-operate further with the application process: for example, by not responding to a request from the EPA that additional information be submitted.

Classification of Category A Sites

Summary: What Local Authorities Must Do:

- Understand the scope of the criteria set down in the Extractive Waste Regulations and in Commission Decision 2009/337 that govern whether an extractive waste facility warrants consideration as a potential Category A facility.
- Determine if any extractive waste site that is not subject to EPA licensing contains hazardous waste or could cause a major external accident due to factors such as instability.
- Appreciate that the Extractive Waste Regulations place the ultimate decision about whether a site constitutes a Category A facility on a local authority.
- Notify the EPA immediately of any potential Category A facility that has been found and consult with the EPA when there is doubt about whether a particular site qualifies for this status.

Classification of Category A Sites

Summary: What The Extractive Industries Must Do:

- Consider whether any of its extractive sites hold hazardous waste or otherwise constitute a significant risk to the public or the environment due to the potential for collapse, instability and other similar factors.
- Notify the existence of any non-EPA licensed site to the relevant local authority immediately.
- Undertake a risk assessment when a potential Category A site has been identified and forward the results of that assessment to the relevant local authority forthwith.
- Apply to the EPA for a licence within 120 days if it is confirmed that an extractive waste facility satisfies the criteria for Category A status.

11. Regulation 21: Sites closed by May 2008 and other Transitional Provisions

Key Points

- Regulation 21 of the Extractive Waste Regulations sets down how the legislation is to apply to extractive waste facilities that were either closed or in a near-closure state in the period up to the end of 2010.
- All of these provisions are triggered by when the “waste facility” is to close. Accordingly, it is vital that this term is understood (see Chapter 4), and that it is the cessation of activity at the waste facility, not the closure of the extractive site as a whole, that holds the key to the application of these transitional provisions.
- Care also must be exercised in understanding how the Extractive Waste Regulations approach the concept of waste facility cessation in respect of these deadlines and what exactly the legislation envisages as “closure”.
- For extractive waste facilities that were closed before 1 May 2008, the legislation has the potential to place obligations on the site operator (if known) when public health and/or environmental issues arise after that date.
- Operators of extractive waste facilities that closed before 31 December 2010 are not under any obligation to produce an extractive waste management plan, provided the operator can satisfy a limited number of other requirements of the legislation.
- Extractive waste facilities that stopped accepting waste by 1 May 2006 and were totally closed by 31 December 2010 need to be identified and their existence notified to the European Commission.
- A number of very old extractive waste sites closed decades ago and, as a consequence, there is no identifiable operator. Rehabilitation works on these sites do not result in the Extractive Waste Regulations applying, particularly if no further minerals or other extractive products are being won for commercial reasons.

11.1 Background: Closed Sites and Transitional Provisions

Regulation 21 of the Extractive Waste Regulations contains a rather complex series of transitional provisions that affect operators of extractive waste facilities that are at, or past, the near-closure stage on the dates specified. Box 13 contains the complete wording. In summary, Regulation 21 determines:

- when the EPA is under a statutory duty to require any of its licensed extractive waste facilities to comply with this legislation.²¹⁵ This duty also extends to other extractive waste facilities that were not completely closed by 1 May 2008²¹⁶,

²¹⁵ Regulation 21(1) and (2).

²¹⁶ See the words in Regulation 21(1) “or which is already in operation on 1 May 2008” which refer to any other, non-licensed, waste site.

- that both the EPA and a local authority are required to ensure that, notwithstanding any waste facility's closure between 1 May 2006 and 1 May 2008, extractive waste is managed so that there is no endangerment of human health, unacceptable environmental risk and non-compliance with EU environmental law²¹⁷,
- that only a limited number of specified obligations of the legislation should apply to extractive waste sites that were in the throes of closure in the period 1 May 2006 to 31 December 2010.²¹⁸

Box 13. Regulation 21: Transitional Provisions affecting Closed and Closing Sites

1. The Agency shall ensure that any waste facility which has been granted a waste licence or an integrated pollution prevention and control licence or which is already in operation on 1 May 2008 complies with the provisions of these Regulations by 1 May 2012, other than in respect of Regulation 14(1), for which compliance must be ensured by 1 May 2014, and Regulation 13(6), for which compliance must be ensured in accordance with the timetable laid down therein.
2. Paragraph 1 shall not apply to waste facilities closed by 1 May 2008.
3. Competent authority shall ensure that, from 1 May 2006 and notwithstanding any closure of a waste facility after that date and before 1 May 2008, extractive waste is managed in a way that does not prejudice the fulfilment of Article 4(1) of Directive 2006/21/EC, and other applicable environmental requirements set out in Community legislation, including Directive 2000/60/EC.
4. Regulations 5, 6(3) to (5), 7, 8, 12(1) and (2) and 14(1) to (3) shall not apply to those waste facilities that:
 - a. stopped accepting waste before 1 May 2006,
 - b. are completing the closure procedures in accordance with the applicable Community or national legislation or programmes approved by the competent authority, and
 - c. will be effectively closed by 31 December 2010.

The Agency shall notify such cases to the Commission by 1 August 2010 and the competent authority shall ensure that these facilities are managed in a way that does not prejudice the achievement of the objectives of this Directive, in particular the objectives of Article 4(1), and those of any other Community legislation, including Directive 2000/60/EC.

While Regulation 21 has its basis in Article 24 of Directive 2006/21, the EPA's view is that the Directive goes somewhat further than what is said in the national legislation. This causes the scope of a local authority's duties under Regulation 21 to be clarified, particularly in respect of extractive waste facilities that were closed by 1 May 2008. This matter will be enlarged upon in the following sections below.

In respect of the deadlines in Regulation 21, it should be emphasised that they all are founded on when the "waste facility" at an extractive site closed. They are unaffected by whether or not actual extraction activities continued afterwards.

11.2 Extractive Waste Facilities that were completely closed by 1 May 2008

A key issue relating to both the Extractive Waste Regulations and Directive 2006/21 concerns whether the legislation affects extractive waste facilities that closed before the legislation entered into force. While there may be no actual

²¹⁷ Regulation 21(3).

²¹⁸ Regulation 21(4).

activity at such a site, contaminated run-off and other negative environmental effects may arise in the post-closure period. Accordingly, it is necessary to consider whether this legislation allows these issues to be addressed or whether local authorities must look to their other powers to achieve this purpose.

For example, Regulation 4 of the Extractive Waste Regulations places a general duty on an operator of an extractive site not to manage waste in a manner that causes environmental pollution or endangers human health. In this respect, a key issue is whether Regulation 4, as well as certain other elements of the legislation, can be deployed against an operator of a closed extractive waste site that is causing significant and on-going issues of concern.

The EPA's view is that the transitional provisions in Directive 2006/21 clarify this matter, indicating that local authorities are not under a statutory duty to ensure that an operator of a waste facility that²¹⁹ "closed" before 1 May 2008 complies with this legislation. That deadline is contained in Article 24(2) of the Directive. In accordance to Article 24(1), each EU member state is required to ensure that any extractive waste facility "which is already in operation" on that date complies with the Directive by 1 May 2012.²²⁰ It follows, therefore, that Member States are not under any explicit duty to require an operator of a waste facility that was closed by that date to act in accordance to this legislation; but the wording also seems clear that a Member State can apply the legislation in this manner if it wishes to.²²¹

A key issue in this respect is what is meant by the term "closed" in Articles 24(1) and (2) of Directive 2006/21. This is because Article 24(4) separately sets down provisions that relate to sites that stopped accepting waste before 1 May 2006, but which are also completing "closure procedures" and will be "effectively closed" by 31 December 2010. While this provision will be discussed further below, it is vital that this requirement is differentiated from the separate deadline contained in Articles 24(1) and (2).

The EPA's view is that the term "closed" in Articles 24(1) and (2) of Directive 2006/21 should have the following meaning. A site should be regarded as "closed" by 1 May 2008 when all of the following conditions apply:

- the waste facility is no longer accepting waste by that date;
- the operator has fulfilled all relevant statutory obligations in respect of restoration, such as those required by the extractive operation's planning permission; and
- it is clear that the operator has no intention to undertake any further works at this waste facility.

As Regulations 21(1) and (2) of the Extractive Waste Regulations are founded on these sub-articles of the Directive, it follows that the relevant dates contained within them should be interpreted in this manner.

The result of this analysis is that neither the EPA nor a local authority is under an obligation to ensure that sites that are "closed" – see definition outlined above – by 1 May 2008 are to be subject to the requirements of Directive 2006/21 and the Extractive Waste Regulations. However, discretion remains with these statutory bodies about how the legislation should affect operators of these closed sites.

In respect of how a local authority may wish to enforce the Extractive Waste Regulations on these older sites, the EPA's view is that the main provision of significance is the need for operators to comply with Regulation 4, thereby ensuring that extractive waste continues to be managed without endangering human health or the environment. Given the fact that operators of sites that have closed in the period of 1 May 2006 to 31 December 2010 do not need to produce extractive waste management plans (see next section), it is the EPA's view that such plans are also not needed for any site that closed prior to 1 May 2008. Moreover, there is also no need for an operator of a non-hazardous, non-inert extractive waste site that closed before 1 May 2008 to be required to apply for a waste facility permit.

²¹⁹ Article 24 of Directive 2006/21 consistently refers to a "waste facility", with this term having the meaning discussed earlier in this guidance note.

²²⁰ This requirement is subject to the additional transitional provisions in Article 24(3) that relate to sites that were closing between 1 May 2006 and 1 May 2008. These are considered in the next sub-section of this guidance note.

²²¹ It should be noted that neither Directive 2006/12 nor the Extractive Waste Regulations state, for example, that the legislation is not to apply to sites that pre-date the Directive. This is not what Article 24(1) to (3) specifies, while Article 24(4) only selectively excludes some sites from specified elements of the Directive.

11.3 Extractive Waste Facilities closing between 1 May 2006 and 31 December 2010

Recognising that items such as extractive waste management plans may not be necessary when a waste facility is due to shut shortly, Regulation 21(4)²²² to the Extractive Waste Regulations allows a certain leeway between two other key timeframes. It states that Regulations 5, 6(3) to (5), 7, 8, 12(1) and (2) and 14(1) to (3) do not apply to those waste facilities that:

- a. stopped accepting waste before 1 May 2006,²²³
- b. are completing closure procedures in a manner approved by the competent authority, and
- c. will be “effectively closed” by 31 December 2010.

It should be noted that this exclusion is selective, with the result that the remaining elements of the Extractive Waste Regulations still apply to facilities that fall within the window between the two dates of 1 May 2006 and 31 December 2010. Affected operators still need to comply with Regulation 4 and ensure that such sites do not cause a risk of pollution or a danger to human health. Similarly, the provisions of Regulation 10 apply in respect of environmental protection requirements relating to backfilling.

In these respects, Regulation 21(4) is a consequence of Article 24(4) of Directive 2006/21. Effectively, a purpose of these provisions is to give operators of extractive waste facilities an incentive to ensure that a site that stopped accepting waste before 1 May 2006 is restored by 31 December 2010. If they have not been, then significantly more of the Extractive Waste Regulations will apply thereafter.

Not all of the excluded provisions in Regulations 5, 6(3) to (5), 7, 8, 12(1) and (2) and 14(1) to (3) will apply to sites that are regulated by local authorities. In practice, the most relevant exclusion on this list is the reference to Regulation 5. This means that there is no obligation on an operator to draft an extractive waste management plan²²⁴ provided that the operator can demonstrate conformance to the deadlines and other conditions contained in Regulation 21(4).

Similarly, an operator who is managing a non-hazardous, non-inert waste site that closed by 1 May 2006 and was fully restored by 31 December 2010 not only does not need to produce an extractive waste management plan, but is also absolved from needing to apply for a waste facility permit.²²⁵

As has been noted, the transitional provisions contained in Regulation 21(4) only apply to certain requirements of the Extractive Waste Regulations. In this respect, Regulation 21(4) emphasises that each local authority must ensure that any affected site is compliant with the objectives of Directive 2006/21, as well as other EU environmental legislation, including the Water Framework Directive.²²⁶

Operators of some potential Category A sites may be able to benefit from the partial exclusion stemming from Regulation 21(4). In turn, this may cause the duty falling on local authorities to produce an external emergency plan not to apply.²²⁷ In instances when a local authority considers that a site that may otherwise warrant Category A status falls within these transitional provisions, the EPA should be contacted and asked to confirm whether a plan is needed.

In the manner required by Directive 2006/21, all sites that are within the interim envelope created by Regulation 21(4) are required to be notified to the European Commission.²²⁸ Accordingly, local authorities must notify the identity of any

222 If the equivalent text of Directive 2006/21 is scrutinised (see Article 24(3)), the purpose of this provision would appear to be to stimulate an enhanced level of vigilance across Europe in relation to the operation and impacts of extractive waste facilities in the two-year period from the Directive being agreed and published (1 May 2006) to the Directive entering into force (1 May 2008).

223 The date Directive 2006/11 was published in the Official Journal of the European Communities.

224 The remaining provisions specified in 21(4) – Regulations 6(3) to (5), 7, 8, 12(1) and (2) and 14(1) to (3) – do not apply to extractive waste facilities handling inert waste, peat or unpolluted soil.

225 See Regulation 21(4)’s cross-reference to Regulations 7, 8, 12(1) and (2) and 14(1) to (3). In this respect, in accordance with Regulations 1(3) and 23, the requirement for this type of site to be subject to a permit enters into force on 1 January 2011.

226 Regulation 21(4), final paragraph.

227 See Regulation 21(4)’s reference to Regulation 6(3) to (5).

228 Regulation 21(4), final paragraph.

site that stopped accepting waste by 1 May 2006 and became totally closed by 31 December 2010 to the Agency as soon as possible.

11.4 Restoration Works at Historic Extractive Waste Sites

Much of Ireland's historic mining, quarrying and other infrastructure will not be subject to this legislation, usually for the reason that it closed many years ago and now no "operator" is identifiable.²²⁹ However, some of these facilities may need to be subject to rehabilitation works, landscaping and similar activities. The EPA considers that this practice does not cause the Extractive Waste Regulations to apply, particularly when no further minerals or other commercial materials are being won as part of these activities.

This position finds its basis in the definition given by both Directive 2006/21 and by the Extractive Waste Regulations to the terms "extractive waste" and "extractive industries", with the statutory obligations of the legislation applying only to activities that fall squarely within these terms. The meanings given to these two key terms are as follows:²³⁰

"extractive waste" means waste from the extractive industries within the meaning and the scope of these Regulations.

"extractive industries" means all establishments and undertakings engaged in surface or underground extraction of mineral resources for commercial purposes, including extraction by drilling boreholes, or treatment of the extracted material.

It is the EPA's view that most, if not all, historic mine rehabilitation projects will not fall within these definitions. All such sites were shut well before Directive 2006/21 and the Extractive Waste Regulations entered into force. If there is to be no further mineral extraction associated with the restoration process, then it cannot be said that the person carrying out such restoration activities is "engaged in surface or underground extraction of mineral resources for commercial purposes". Besides there being no additional removal of mineral resources, the rehabilitation activities are unlikely to have any identifiable commercial purpose.²³¹

This approach also applies when techniques such as restoration blasting are used to reduce the side-slope hazard of a quarry. In the event that the deposited material is simply being landscaped within the site, then this activity seems unlikely to fall within the term "extractive industries".²³² Having said that, if the deposition of waste had not ceased by 1 May 2006, the Extractive Waste Regulations are clear²³³ that there remains the need to comply with this legislation.

These principles will apply mainly at so-called "orphaned" sites, where extraction activities ceased decades ago and where there is no identifiable "operator". However, the EPA's view is that this does not mean that organisations with responsibilities for more modern but dis-used quarries and other extractive sites can also benefit from this interpretation. Such sites are not "orphaned" and there will be an identifiable "operator" in many such cases. Moreover, an organisation that continues to manage extractive facilities at other locations clearly is acting in a manner that falls within the above-mentioned definition of the "extractive industries". It remains "engaged in surface or underground extraction of mineral resources for commercial purposes".

²²⁹ As noted earlier in this guidance, many provisions of the Extractive Waste Regulations are centred upon placing the "operator" under particular legal obligations: see Regulation 4 for example.

²³⁰ Regulation 3(2).

²³¹ This position is consistent with Directive 2006/21, which contains separate provisions that are aimed at historic mining and other former extractive activities. Article 20 requires a member state to compile an inventory of closed waste facilities that may have environmental implications.

²³² Additionally, rock produced by restoration blasting may not be defined as "waste" under the Extractive Waste Regulations and the Waste Management Act.

²³³ See, for example, Regulation 21(4).

Closed Sites and Transitional Provisions

Summary: What Local Authorities Must Do:

- Understand how the different deadlines affect closed and semi-closed waste facilities and appreciate how the Regulations set out different requirements in respect of successive dates.
- Be aware that Regulation 4, which requires an operator to ensure that public health and the environment is protected, appears available to deal with such issues when they manifest themselves at an extractive waste facility that closed before 1 May 2008.
- Inform the EPA of any extractive waste facilities that stopped accepting waste by 1 May 2006 and were totally closed by 31 December 2010.

12. Regulation 19: Register of the Extractive Industries

Key Points

- The Extractive Waste Regulations require that a register be drawn up by each local authority that comprehensively covers the extractive industry situated in its functional area.
- This register is held centrally on the EPA's web site.
- In this context, the scope of the term “extractive industries” is very wide, covering all quarries, sand and gravel sites, mines, peat workings, other places where mineral extraction takes place and additional similar locations. It also includes sites where the results of these activities are subject to storage and/or treatment processes.

12.1 The Register of the Extractive industries

In accordance to the Extractive Waste Regulations, each local authority should have registered all extractive industries in its functional area by 31 December 2010. This is a requirement of Regulation 19 of the Extractive Waste Regulations. In this respect, local authorities should be aware that there is a significant difference between the focus and scope of Regulation 19 and the other elements of the Extractive Waste Regulations.

This difference arises for the reason that, while most of the other provisions of the Extractive Waste Regulations relate only to either an extractive waste facility or to extractive waste, Regulation 19 is oriented to the “extractive industries”, requiring all such bodies to be registered by a local authority. In this respect, the term “extractive industries” is much wider, with its scope being a function of the definition in Regulation 3(2) and by Regulation 19(1) itself.

The definition used by the Extractive Waste Regulations is:

“extractive industries” means all establishments and undertakings engaged in surface or underground extraction of mineral resources for commercial purposes, including extraction by drilling boreholes, or treatment of the extracted material.

The scope of the requirement to put in place a register of the “extractive industries” is supplemented by Regulation 19(1), which clarifies that, besides those activities covered by the definition of “extractive industries”, the register must include sites involved in the:

- a. extraction, treatment and storage of mineral resources,
- b. working of quarries, and
- c. extraction, treatment and storage of peat.

What should be noted here is that, not only must details of all active extraction voids be included, the register extends to any satellite sites where extractive waste is kept or treated. However, the definition of “extractive industries” places a limit on the overall breadth of this requirement. Only sites that are actually operated by an organisation²³⁴ involved in surface or underground extraction need be included. This cut-off thereby precludes details of wholesalers and retailers of minerals and other extractive materials needing to be present on the register.

²³⁴ Regulation 19 refers to “establishments and undertakings”, a term that finds its basis in EU law. It applies to any operator of a commercial activity, be they sole traders, partnerships or limited or unlimited liability companies.

Already each local authority will have centralised records of many quarrying activities situated in its functional area. Such activities are required to register as part of their obligations under the Planning and Development Act and its Section 261.

That Section applies²³⁵ to quarries where planning permission was issued before 28 April 1999.²³⁶ It also catches any other quarry that does not benefit from planning permission and which was in operation on or after 28 April 2004. All operators of these sites had one year in which to notify their existence to their planning authority, with each planning authority being required to register each notification that was received.

While the data recorded on the Section 261 register can form the basis of the register required under the Extractive Waste Regulations,²³⁷ the types of activity that are to be covered is rather wider than that contained in the planning legislation. In accordance with the definition discussed earlier in this section, the register mandated by the Extractive Waste Regulations not only includes quarries, but also mines, peat extraction sites, and so on. Moreover and as noted earlier, places where an operator stores and/or treats extractive waste off-site must be included.

The EPA is required by the Extractive Waste Regulations to set down the exact range and scope of information that needs to be recorded for each site operated by the extractive industries.²³⁸ This material takes the form of a centralised database on the Agency's web site.²³⁹ All local authorities are expected to use this database and to place the full details of the extractive industries situated in their functional area on it. Separately, the EPA will register all extractive sites that are subject to its licensing system.

Register of the Extractive Industries

Summary: What Local Authorities Must Do:

- Appreciate that the register of the extractive industries is intended to cover the entire sector, not just places where extractive waste is held or where only quarrying is carried out. Accordingly, any data obtained from the quarry registration system established under Section 261 of the Planning and Development Act must be expanded to reflect this wider remit.
- Complete, and update where necessary, the register for all of the extractive industries in their functional areas, via the portal on the EPA's web-site.

²³⁵ Planning and Development Act, Section 261(11).

²³⁶ A five-year period that ended on 28 April 2004, the date Section 261 was subject to commencement (by the Planning and Development Act 2000 (Commencement) Order 2004, SI 152 of 2004, Article 2).

²³⁷ Regulation 19(1), final paragraph.

²³⁸ Regulation 19(2).

²³⁹ <http://www.epa.ie/whatwedo/enforce/pa/extractiveindustriesregister/>

13. Enforcement: EPA and Local Authority Roles, Penalties, etc.

Key Points

- A variety of state bodies are given specific duties as “competent authorities” under the Extractive Waste Regulations. The EPA is required to licence Category A facilities, with local authorities covering all of the remainder of the extractive industries sector with the exception of mineral prospecting sites.
- Non-compliance with the Extractive Waste Regulations is an offence with the maximum fine being €500,000; imprisonment of up to three years is also possible.
- Local authorities are required to enforce this legislation, via powers set down in the Extractive Waste Regulations and in the Waste Management Act.
- Non-Category A extractive waste facilities need to be subject to periodic site inspections by local authorities. This includes visits to extractive sites handling only inert waste, such as quarries and sand and gravel extraction.

13.1 Enforcement Bodies

The Extractive Waste Regulations use the term “competent authority” to refer to each local authority, to the EPA and to Department of Communications, Energy and Natural Resources. Which of these bodies are assigned particular functions is determined by Regulation 22.²⁴⁰

The Agency is responsible for all Category A sites. Most, if not all, of these will involve activities already subject to IPPC licences. However, it is conceivable that other waste facilities may warrant Category A status due to, for example, stability issues. If this is the case, a waste licence will be required.

The Department of Communications, Energy and Natural Resources is designated as having regulatory responsibility for any extractive waste facilities that are the result of minerals prospecting. Accordingly, local authorities are left responsible for all extractive waste facilities which are neither classed as Category A facilities nor entail mineral prospecting.²⁴¹ Additionally, and as noted earlier, local authorities are also required to prepare external emergency plans relating to Category A sites.²⁴²

In accordance with Regulation 16(3), the Extractive Waste Regulations are enforced through the EPA’s powers under the Environmental Protection Agency Act and by the Waste Management Act. The powers set down in the Waste Management Act are those that are available to local authorities.

13.2 Enforcement and Penalties

The contravention of the Extractive Waste Regulations is an offence under Regulation 18(1). Local authorities also should consider whether the provisions of the Waste Management Act and its subsidiary regulations have been contravened when problems are caused by the handling of extractive waste. For example, the passing of waste to

²⁴⁰ See also definition of “competent authority” in Regulation 3(2).

²⁴¹ Regulation 22(2)(a).

²⁴² See Regulation 22(2)(b)’s reference to the “implementation of Regulation 6”.

someone who is not authorised to receive it is an offence under Section 32(2) of the Act. Similarly, operators of sites that give rise to “environmental pollution” may breach Section 32(1). In this respect, it should be noted that the definition of “environmental pollution” extends to nuisance caused by dust;²⁴³ by contrast, dust emissions are rather less explicitly mentioned in the wording of Regulation 4 of the Extractive Waste Regulations.

Local authorities are empowered to take cases to the District Court in relation to summary offences involving the contravention of the Extractive Waste Regulations.²⁴⁴ In such instances, the maximum fine for each offence is €3,000 or three months imprisonment (or both). More serious cases are to be taken by the Director of Public Prosecutions, with maximum penalties being fines of €500,000 or imprisonment up to three years (or both).

When a local authority is considering embarking on enforcement action, it is vital that certain key definitions contained in the Regulations are fully understood. These include the definition of “waste” in the context of extractive waste, whether any apparent non-compliance with the Regulations is constrained by terms such as “waste facility”, that the person accused constitutes “the operator” of the site, and so on. All these terms are discussed in more detail elsewhere in this guidance note.

13.3 Appointment of Staff as “Authorised Officers”

It is essential that each local authority appoint members of their staff as “authorised officers” under the Extractive Waste Regulations. This is due to the definition of this term in Regulations 3(2) and 22(4).

The approach the Extractive Waste Regulations use in relation to “authorised officers” means that the usual authorisations held by local authority staff in respect of powers contained in the Waste Management Act are not sufficient to cause local authority staff lawfully to exercise functions conferred by the Extractive Waste Regulations.²⁴⁵

As required by the Regulations, the appointment must be in writing.²⁴⁶ It also must be formally taken as a decision of a local authority and be in accordance with the Local Government Act.

13.4 Powers of Entry and other Functions of Authorised Officers

The Extractive Waste Regulations do not contain powers of entry, sampling, and so on. This is because the relevant powers set down in the Waste Management Act²⁴⁷ apply, being given application by way of 16(3) of the Extractive Waste Regulations.

13.5 Duty to make Site Inspections and Enforce The Legislation

Regulation 16 of the Extractive Waste Regulations places certain statutory duties on local authorities in relation to site inspections. These only relate to extractive waste facilities that are subject to waste facility permits and hence

²⁴³ See definition in Waste Management Act, Section 5(1).

²⁴⁴ Regulation 18(2).

²⁴⁵ Besides being a function of the term “authorised officer” in Regulation 3(2) and the wording used in Regulations 22(4) and (5), the need for staff to be individually authorised under the Extractive Waste Regulations also is a consequence of the Extractive Waste Regulations being made via the European Communities Act 1972, rather than via powers contained in the WMA.

²⁴⁶ See Regulations 3(2), 22(4) and (5).

²⁴⁷ Powers of authorised persons are contained in Section 14 of the Act.

apply only where non-hazardous, non-inert extractive waste is deposited.²⁴⁸ Such inspections are necessary over the entire life-cycle of the site, including pre-development and post-closure, with the inspections focussing on permit compliance.²⁴⁹

In respect of other types of waste facility, both Directive 2006/21 and the Extractive Waste Regulations require that an appropriate level of regulatory supervision by each local authority takes place. The EPA's view is that this includes periodic visits to all sites handling extractive waste, as local authorities are charged with ensuring that there is legislative compliance at all other types of extractive site, regardless of whether they fall into the waste facility permit regime. For example, Regulation 4(2) mandates that a local authority must ensure that operators are managing extractive waste without posing any unacceptable environmental risk, endangering human health or causing a nuisance. Likewise, Regulation 5 requires each local authority to approve an extractive waste management plan,²⁵⁰ while Regulation 16(2) highlights the need for local authorities to ensure that site records are kept up-to-date. Compliance with these obligations can only be met by periodic site inspections.

13.6 Discretionary Functions

In some instances, the Extractive Waste Regulations grant local authorities discretion²⁵¹ about whether certain elements of the legislation are to apply to particular types of site. For example, a local authority has been granted potential discretion about how much of the legislation is to be imposed on a site where unpolluted soil is deposited, as well as at peat waste storage and treatment sites. A more selective and restrictive range of the requirements can be waived in respect of non-hazardous, non-inert waste facilities.

All of these provisions have been discussed earlier in Chapters 8 and 9 of this guidance. In order that there is a uniform approach across Ireland in respect of these discretionary provisions, it is important that their breadth and scope is interpreted in the same way by all local authorities. Accordingly, those chapters of this guidance have provided additional clarification on the nature of the discretionary provisions, as well as containing the EPA's view on desirable boundaries.

²⁴⁸ Non-hazardous, non-inert waste sites are subject to Regulation 16(1) due to Regulation 16(1)'s cross-reference to Regulation 7. While Regulation 2(4) purports to suggest that local authorities have discretion to dis-apply the requirements of Regulation 16 in relation to these sites, this is a minor error in the Regulations. Directive 2006/21 is clear that inspections must be carried out about both Category A facilities and at non-hazardous, non-inert extractive waste facilities: see Article 2(3) and Article 17.

²⁴⁹ Following Directive 2006/21, Regulation 16(1)'s reference to a "licence" should be taken to also mean a waste facility permit.

²⁵⁰ See Regulation 5(1)(b).

²⁵¹ See Regulation 2(4).

Enforcement

Summary: What Local Authorities Must Do:

- Appreciate that they are the competent authority for all extractive waste facilities that are neither Category A facilities nor entail mineral prospecting.
- Make site inspections, including to sites that handle inert waste, unpolluted soil and waste from peat working, recording the relevant details of these visits.
- Deploy the powers conferred on them under the Waste Management Act when significant non-compliance with the Extractive Waste Regulations is apparent.
- Ensure that all inspectors are correctly appointed as “authorised officers” under the Extractive Waste Regulations.
- Understand the content of Extractive Waste Regulations, being particularly careful about the scope and boundaries to concepts such as “extractive waste”, “waste facility” and “the operator” (see Chapter 4) when enforcement action is being contemplated.
- Appreciate that some of the discretionary functions that are conferred on local authorities by the Extractive Waste Regulations relate to matters that, in the EPA’s view, are to be considered to be obligatory (see Chapters 8 and 9).

14. Local Authority Reporting Functions

Key Points

- A significant body of information about the operation of the Extractive Waste Directive in Ireland needs to be transmitted periodically to the European Commission. The nature of that material is set down in Commission Decision 2009/358. General information must be submitted every three years.
- The Department of the Environment, Community and Local Government is responsible for the transmission of most of this material and, accordingly, it will be requesting each local authority to provide specified details about the implementation of the Extractive Waste Regulations in its functional area.
- Any closed extractive waste facility that is presenting or is likely to present a serious risk to the environment or public health must be notified to the EPA and placed on its inventory of closed extractive waste facilities.

14.1 Reporting to the European Commission

Directive 2006/21 requires each EU state to keep the European Commission abreast of developments and issues relating to its implementation on the extractive waste sector.²⁵² Accordingly, the Department of the Environment, Community and Local Government will need to be supplied with information about how the Extractive Waste Regulations are operating in each local authority's functional area.

The breadth of the material that is required to be transmitted to the European Commission is defined mainly by Commission Decision 2009/358.²⁵³ This information is quite wide-ranging, covering a broad range of material about how each EU member state is implementing the Directive. Decision 2009/358 contains three different questionnaires. Under Annex I, details of all authorisations issued under the Directive for extractive waste facilities must be forwarded. This requirement includes any waste facility permits issued in Ireland that authorise the handling of non-hazardous, non-inert extractive waste.

Annex III to Decision 2009/358 contains a separate four-page list of information that is to be submitted to the Commission every three years. Given that local authorities will be requested to provide this material, a full copy of this questionnaire is included as Appendix 2. As can be seen, it requires data about the numbers of extractive waste facilities, as well as the number of extractive waste management plans that have been approved or refused, information on matters relating to inspections of extractive waste facilities, how non-compliances are being dealt with, and so on. The information on extractive waste facilities must be classified by type of site (Category A, inert waste, non-hazardous non-inert waste) and whether the site is operating, closed by 2010 or undergoing closure. Information on environmentally problematic closed or abandoned extractive waste sites must also be provided.

²⁵² Directive 2006/21, Article 18.

²⁵³ Commission Decision of 29 April 2009 on the Harmonisation, the Regular Transmission of the Information and the Questionnaire referred to in Articles 22(1)(a) and 18 of Directive 2006/21/EC of the European Parliament and of the Council on the Management of Waste from the Extractive Industries, 1.5.2009, OJ No L110/39.

The Extractive Waste Regulations also place a reporting role on the EPA.²⁵⁴ This is more limited, applying to information about its licensed Category A sites and of any “events” that have occurred at such sites.²⁵⁵ These events have to be notified directly to the Commission, using the format set down in Annex II to Decision 2009/358. The focus of these notifications concerns potential problems that may affect the stability of a Category A waste facility or otherwise cause significant adverse environmental affects either when it is operating²⁵⁶ or after closure.²⁵⁷

14.2 The Extractive Industries Register

An earlier chapter of this guidance has discussed Regulation 19 of the Extractive Waste Regulations and its requirement that each local authority establish a register of the extractive industries in its functional area. Local authorities are reminded that this exercise should have been completed by the end of 2010.

14.3 Inventory of Closed Waste Facilities

In accordance with Regulation 20 of the Extractive Waste Regulations, the Agency has to develop an inventory of closed extractive waste facilities. This includes historic and abandoned mining and other sites that may be causing long-term environmental and other impacts.

In Ireland, an inventory of closed mines has been finalised, being published as a report entitled **Historic Mine Sites - Inventory and Risk Classification**. This work was undertaken as a joint project between the EPA, the Geological Survey of Ireland (GSI) and the Exploration and Mining Division of the Department of Communications, Energy and Natural Resources. The project was managed by the GSI, commencing in 2006 and completed in 2009. A full copy of this report can be found on the EPA's web site.²⁵⁸

Local authorities will need to identify other closed or abandoned extractive waste facilities (such those located at quarries) in their functional areas that fall within the remit of Regulation 20. This requirement only applies to those dis-used waste sites that either are causing serious negative environmental impacts or have the potential to become a serious threat to human health or the environment in the short to medium-term. Following Directive 2006/21,²⁵⁹ the wording is clear that this requirement only applies to closed or abandoned “waste facilities” that are causing or have the potential to cause such “serious” impacts. In other words, Regulation 20 does not, for example, require all types of dis-used quarry to be entered on the register.

All extractive waste facilities that satisfy the above-described requirements should be registered using the EPA's online Extractive Industries Register (see Chapter 12 of this document). These entries will, in conjunction with the EPA's Historic Mine Sites Inventory, form the complete inventory for Ireland of such sites as required by Regulation 20.

²⁵⁴ Regulation 17.

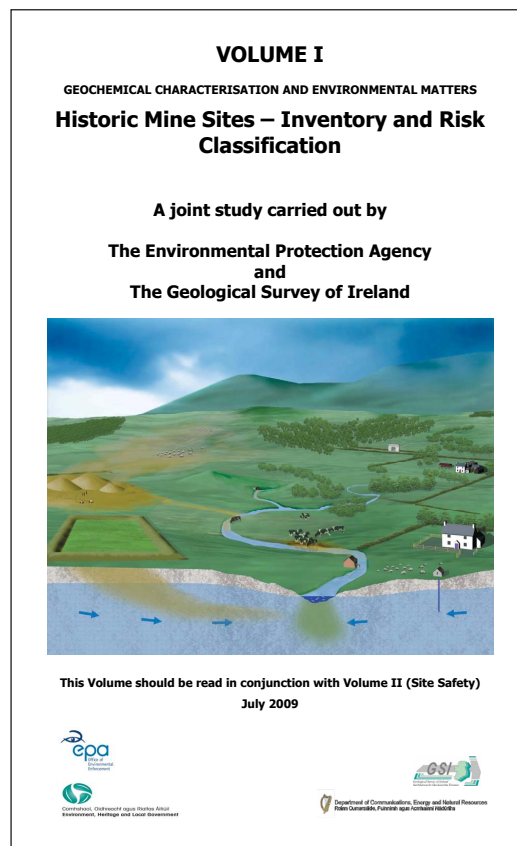
²⁵⁵ Regulation 17(1). Besides being limited only to the report of “events”, this provision only refers to such occurrences that have been reported by extractive waste facility operators under Regulations 11(3) and 12(6). As Regulation 11(3) does not apply to extractive waste facilities that only accept inert waste and unpolluted soil (provided that they are not Category A facilities) (see Regulation 2(4)), this provision places a significant restriction on the scope of this reporting requirement.

²⁵⁶ See Decision 2009/359, Annex II's cross-reference to Article 11(3) of Directive 2009/21 and Regulation 17(1)'s cross-reference to Regulation 11(3).

²⁵⁷ See Decision 2009/359, Annex II's cross-reference to Article 12(6) of Directive 2009/21 and Regulation 17(1)'s cross-reference to Regulation 12(6).

²⁵⁸ <http://www.epa.ie/downloads/pubs/land/mines/>

²⁵⁹ Directive 2006/21, Article 20.



REPORTING

Summary: What Local Authorities Must Do:

- Appreciate that the Department of the Environment, Community and Local Government periodically will be requesting specified information about the implementation of the Extractive Waste Regulations in each functional area.
- Have regard to the type of information that will need to be submitted, by considering Commission Decision 2009/358 and, in particular, the contents of its Annex III, and establish systems to ensure that this material is collated and is made available to the Department when it is requested.
- Compile and keep up-to-date the register of the extractive industries located in each functional area (see Chapter 12).
- Identify any closed extractive waste facility that is causing or has the potential to cause serious environmental impacts or effects on public health, notifying the EPA of any such sites.

15. Regulation 6 - External Emergency Plans for Category A Sites

Key Points

- External emergency plans are only needed for extractive waste facilities that constitute a Category A facility. To be a Category A facility, the waste facility must contain hazardous waste or its configuration must have the potential to give rise to a major off-site accident (see Chapter 10).
- The duty to prepare an external emergency plan falls on the local authority in whose functional area the Category A facility is situated. Also to be prepared by this local authority is an information leaflet that is to be distributed to those in the locality who may be affected in an emergency situation.
- The external emergency plan should reflect the content of the operator's internal emergency plan, with the former making provision for any off-site accident and the latter covering accidents within the site.
- The development and implementation of the external emergency plan should be integrated into a local authority's parallel responsibilities in respect of major accident hazard sites under the European Communities (Control of Major Accident Hazards involving Dangerous Substances) Regulations 2006. However, account must be had of some differences between the requirements of this legislation and the Extractive Waste Regulations.
- If not already commenced, the initial public consultation process should be embarked up within one month of the finalisation of this guidance and the completed external emergency plan must be published before 1 May 2012.

15.1 Background: External Emergency Plans

As noted earlier, the main justification for Directive 2006/21 stemmed from a Europe-wide desire to prevent further catastrophic accidents caused by some form of failure or instability of an extractive waste facility. This type of accident may be caused by the physical collapse of an engineered containment system or be simply due to the inherent instability of extensive, non-engineered, heaps of extractive waste.

As a response to this issue, a key requirement that applies to all Category A waste facilities is for their operators to identify all potentially significant hazards and incorporate appropriate accident prevention methods within an extractive waste facility's design. Partly as recognition that it is difficult retrospectively to include the full range of design-related measures at sites that were in operation before the Directive became national law, there is also a need to develop accident prevention policies and emergency response plans. These require supervision by a person designated as a safety manager at each Category A site.²⁶⁰

While the primary responsibility for both accident prevention policies and emergency plans rests with the Category A site's operator, the EPA and the local authority in which the site is situated also have functions in these respects. Building on its knowledge of the operations that are subject to the site's licence, the EPA is required to ensure that all major accident hazards are fully identified by the operator. This process is intended to ensure that any required mitigation measures have been incorporated into a Category A waste site's design, operation and on-going monitoring programme.²⁶¹

²⁶⁰ Regulation 6(3).

²⁶¹ Regulation 6(2).

Local authorities already have existing responsibilities for emergency planning and management. Along with an Garda Síochána and the Health Service Executive, they are Principal Response Agencies within Ireland's emergency planning system. This framework has been established to deal with more extreme events that may otherwise overwhelm local emergency services.

The responsibilities conferred on local authorities by the Extractive Waste Regulations for Category A facilities have a close similarity to the already-existing emergency planning duties that are a consequence of the Directive on the Control of Major Accident Hazards (COMAH)²⁶² and the European Communities (Control of Major Accident Hazards involving Dangerous Substances) Regulations 2006.²⁶³ In the context of this legislation and those most potentially hazardous industrial sites in the country, local authorities have to prepare external emergency plans in respect of so-called "Upper Tier Establishments".

The requirements of Directive 2006/21 and the Extractive Waste Regulations on external emergency plans for Category A facilities represent an extension of this function.²⁶⁴ Regulation 6(3) of the Extractive Waste Regulations requires each local authority to draft an external emergency plan for any Category A site situated in its functional area. Like emergency plans relating to upper-tier COMAH sites, the purpose of this plan is to set down the measures that are to be taken if an accident with off-site implications occurs. This external emergency plan is intended to complement the internal emergency plan, which each operator has to draft to address any incident within the site boundary.

While the legislation makes a clear distinction between the body responsible for the preparation of the internal and the external emergency plans, a local authority and operator may decide to combine to produce both of these plans. This may save both time and effort, as well as ensuring that the two documents complement each other. If this option is preferred, it is important that the legislative requirement for the production of separate plans is reflected in the final output.

15.2 Format and Content of an External Emergency Plan

The Extractive Waste Regulations are clear that the purpose of an external emergency plan is to document "the measures to be taken off-site in the event of an accident"²⁶⁵ at a Category A site.²⁶⁶ The main requirements governing the contents are contained in Regulation 6(4). This provision lays down four objectives, with the complete wording being reproduced in Box 7. As can be seen, besides establishing both physical measures and managerial and other arrangements to control both major accidents and other incidents, a purpose of the plan is to provide relevant information to both the public and to statutory bodies that are required to respond to an emergency situation. Accordingly, the Extractive Waste Regulations mandate a public consultation phase: this element is covered separately in box 7.

²⁶² Directive 96/82, as amended by Directives 1882/2003 and 2003/105 and Regulation 1137/2008. Directive 96/82 is also known as the Seveso II Directive.

²⁶³ SI 74 of 2006.

²⁶⁴ Regulation 6(1) makes clear that no extractive waste facility that is subject to the COMAH Directive 96/82 is also subject to the Extractive Waste Regulations. In practice, most extractive waste facilities are excluded from the COMAH Directive (see Article 4(e), as amended by Directive 2003/105, Article 1(a)).

²⁶⁵ Note that the reference here is to an "accident", rather than a "major accident". While a "major accident" is defined as an incident which may lead to a serious danger to human health and/or the environment, the term "accident" is considered to relate to any event or incident that has the potential to cause some form of negative effect to occupiers of neighbouring land.

²⁶⁶ Regulation 6(3), paragraph 4.

Box 7. Regulation 6(4): Objectives of an External Emergency Plan

The emergency plans referred to in paragraph 3 shall have the following objectives:

- a. to contain and control major accidents and other incidents so as to minimise their effects and in particular to limit damage to human health and the environment,
- b. to implement the measures necessary to protect human health and the environment from the effects of major accidents and other incidents,
- c. to communicate the necessary information to the public and to the relevant services or authorities in the area,
- d. to provide for the rehabilitation, restoration and clean-up of the environment following a major accident.

In accordance with Regulation 6(3) of the Extractive Waste Regulations, local authorities are also required to take account of the existing arrangements for emergency response which stem from the Framework for Emergency Management. This ensures that an external emergency plan for a Category A site is compatible with other plans developed by the Principal Response Agencies.

The Framework for Emergency Management²⁶⁷ is a key document relating to emergency response in Ireland. It is supported by a series of Framework Guidance Documents. Currently, there are 13 of these:

- A Guide to Flood Emergencies
- A Guide to Local Co-ordination Centres
- A Guide to Managing Evacuation
- A Guide to Miscellaneous Issues
- A Guide to Seveso Obligations
- A Guide to Planning and Staging Exercises
- A Guide to Preparing a Major Emergency Plan
- A Guide to Risk Assessment
- A Guide to Undertaking an Appraisal
- A Guide to Working with the VES
- A Guide to Working with the Media
- A Guide to Major Emergency Training Programmes
- A Guide to Communications Systems (Technical)

Given the similarities between the external emergency planning system for upper-tier establishments under the COMAH Directive and that required for Category A facilities,²⁶⁸ a key reference document is Guidance Document 10, which has the full title of Guidance for those Principal Control Authorities that are designated as Local Competent Authorities under SI No 74 of 2006: European Communities (Control of Major Accident Hazards involving Dangerous Substances) Regulations 2006.²⁶⁹ This document is termed the “Guide to Seveso Obligations” hereinafter.

The following guidance about the content and scope of an external emergency plan for a Category A facility draws heavily from the Guide to Seveso Obligations. For that reason, a local authority charged with the drafting of an external emergency plan will need also to refer to that publication for additional detail.

²⁶⁷ This and related documents are downloadable from www.mem.ie/framework.htm

²⁶⁸ The objectives of an external emergency plan under Directive 2006/21 (Article 6(4)) are virtually identical to those set down in Directive 96/82 in relation to upper-tier COMAH sites (see Article 11(2)).

²⁶⁹ This guidance document is stated to be a working draft. The version being referred to here is the publication that reflects amendments made on 28/9/09.

The Guide to Seveso Obligations²⁷⁰ suggests that the text of an external emergency plan should be derived from the following documents:

- the operator's on-site emergency plan,
- the operator's package of information, as distributed to the public in the specified area,
- maps, drawings, images and descriptions of the establishment, including premises/installations on it,
- information on the activities and inventories that give rise to the major accident scenarios,
- major accident scenarios for the establishment, including a description of any "domino effect" possibilities,
- details of other relevant hazards and risks on the site,
- details of all mitigating resources available on the site,
- occupancy details, including contractor attendances, day maxima and shift minima,
- maps, drawings, images and descriptions of the specified area, including detail of potential exposure of persons, whether living, working, transient, institutionalised or otherwise vulnerable,
- an adequate description of the environment in the specified area and an assessment of the potential exposure/vulnerability of elements of the environment at risk of damage,
- details of persons to be contacted in the event of an emergency.

As a number of these elements of the plan are dependent on information obtained from the site operator, it is vital that early contact takes place and that the requested information is made available. However, local authorities are cautioned about requesting too much material, particularly about risks that may well not have off-site implications or that have a frequency that is too remote to constitute any form of real threat to local receptors.

As set down in the Guide to Seveso Obligations,²⁷¹ local authorities need to define a "specified area" relating to all credible off-site impacts that may arise from a Category A facility. In practice, its conceptual basis may well be significantly different to that normally required under the COMAH legislation, for the reason that it will need to focus less on air-borne hazards and more on events that are a consequence of liquid and semi-solid releases. The expected extent of such events will be a function primarily of a combination of the inventory and configuration of waste stored within the site,²⁷² local topography and the presence of watercourses.

The extent of the specified area should be based upon likely worst-case scenarios; however, its focus should be determined by an assessment of credible risks. It should not extend to events that are so remote as to be improbable. In most instances, it is expected that the specified area for a Category A site will be the same as the external emergency planning zone, which is referred to in the Guide to Seveso Obligations.²⁷³

The drafting process for the emergency plan should have regard to the operator's own internal emergency plan. Should an internal emergency plan not yet be available, a local authority should seek information about relevant risks and accident scenarios directly from the site operator. While Regulation 6(3) requires the operator of a Category A facility to provide the relevant information to the Agency²⁷⁴ who, in turn, is required to pass it to the relevant local authority, this provision only applies at the licence application stage. Accordingly, local authorities need to obtain this information directly from all operators of licensed Category A sites. The submitted accident scenarios will require verification and, if necessary, amendment. This should be done in conjunction with the other Principal Response Agencies.

²⁷⁰ Guide to Seveso Obligations, p6.

²⁷¹ While this is a formal obligation only under the COMAH Regulations, the "Specified Area" concept is viewed as a potentially useful approach to the foundation of the Category A site external emergency plan.

²⁷² For example, the presence or absence of intermediate bund walls and other structures that may prevent a release of the entire contents of the extractive waste facility.

²⁷³ Guide to Seveso Obligations, p7.

²⁷⁴ It is intended that all existing IPPC licences relating to Category A sites are to be changed by May 2012. A new condition will require each licensee to consult with the local authority and with the other Principal Response Agencies with regard to their information needs for emergency planning.

The general format of the external emergency plan should follow that proposed in the Guide to Seveso Obligations.²⁷⁵

- Introduction
- 1. Activation
- 2. Key Actions
- 3. Establishment Site Information
- 4. External Information
- 5. Informing the Public in Advance
- 5. Warning and Informing in an Emergency
- 1. Media Liaison Plan
- 2. Recovery
- 3. Contacts List/Directory
- 4. Schedule of Appendices
- Appendices

A useful 18-page template for an external emergency plan is contained as Appendix B to the Guide to Seveso Obligations. As the Guide notes, the content may need to be changed to reflect local circumstances. For this material to form the basis of a plan for a Category A facility, the template will need to be subject to minor modification in the following respects:

- the plan should make clear that it is required under the Extractive Waste Regulations rather than via the COMAH legislation,
- the definition of a “major accident” and its relevant consequences should be considered only in the context of the Extractive Waste Regulations and the risks imposed by the waste facility,
- the EPA should be identified as one of the statutory bodies that are to be contacted when the external emergency plan is activated.

All external emergency plans should be clear about their currency, the existence of any amendments and other relevant details. Accordingly, the Guide to Seveso Obligations²⁷⁶ suggests that a page should be included before the introduction to provide clear information on such matters as the issue number of the plan and details of any changes to the text.

15.3 Plan Consultation and Finalisation

A key aspect of the Extractive Waste Regulations in respect of external emergency plans concerns a public consultation and participation stage in the plan-development process.²⁷⁷ Accordingly, it is vital that the plan is developed with this objective in mind. In this respect, the Extractive Waste Regulations depart somewhat from the COMAH legislation, due to the slightly different wording deployed by Directive 2006/21 governing the consultation process.²⁷⁸ In addition, the “public concerned” is defined in Regulation 3(2) of the Extractive Waste Regulations, with this definition extending to non-governmental organisations (see Box 8). Collectively, these contrasts cause some of Appendix 1 on public consultations in the Guide to Seveso Obligations to have less application in respect of this stage of the preparation of an external emergency plan.

²⁷⁵ Guide to Seveso Obligations, p8.

²⁷⁶ Guide to Seveso Obligations, p8.

²⁷⁷ Regulation 6(5).

²⁷⁸ Compare Directive 2006/21, Article 6(5) to Directive 96/82, Article 11(3).

Box 8. Regulation 3(2): Definition of the “Public Concerned”

“public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making under Regulation 6 and 7; for the purposes of this definition, non-governmental organisations promoting environmental protection shall be deemed to have such an interest

The Extractive Waste Regulations require the “public concerned” be given “early and effective opportunities” to interact with the process of the preparation of an external emergency plan or its review. This is to be achieved by the public being notified about the intended production of a proposed plan and of its rights to participate in this process. Relevant information must be provided as part of this process, as must details of how comments and questions can be submitted.

The Extractive Waste Regulations then go on to state that the public must be “entitled to express comments within reasonable timeframes” and that, when the plan is finalised, the plan development process must have taken account of those comments.²⁷⁹

The provisions just described mean that it is essential that meaningful public consultation takes place with any community and individual land-owners/occupiers that are situated within the specified area in proximity to a Category A facility. The EPA’s view is that a dual-phase consultation process should be deployed. The commencement of the process²⁸⁰ of drafting the external emergency plan needs to be announced by the publication of a newspaper notice,²⁸¹ with this notification including an invitation to make submissions. The second phase will involve the publication of the draft external emergency plan and, once more, it should be accompanied by a newspaper notice. The notice must indicate the places and times where the draft plan can be viewed, and include an invitation to make submissions. Reasonable and clear deadlines for the receipt of submissions must be included within both stages of this process. The newspaper notices can be based, subject to appropriate amendments, on the template contained in the Guide to Seveso Obligations.²⁸²

The process of public consultation on the external emergency plan should be fully documented, with submissions being acknowledged and retained. When finalised, the plan should be formally approved by a local authority in accordance with the Local Government Act. It is also desirable that an information seminar be held where the public consultation process has indicated that there are significant local concerns.

While this process has similarities to the equivalent system that applies to upper-tier major accident hazard industrial sites under COMAH, local authorities should note that there are slight differences in the procedures affecting the consultation process for Category A facilities. Perhaps the most important of these is that only one newspaper notice is used in the context of the COMAH legislation.

Besides the public, both the operator and other relevant statutory bodies also need to have an input on the content of the draft plan. The draft plan must be sent to the operator for comment, with copies being forwarded to the Principal Response Agencies.²⁸³ It also should be sent to the EPA.

²⁷⁹ Regulation 6(5), second paragraph.

²⁸⁰ This step seems necessary given Regulation 6(5)’s requirement that the public must be given “early and effective opportunities” to participate in the preparation of the plan.

²⁸¹ While an alternative might be to notify all persons living or working within the specified area, this does not seem to satisfy the requirement of Regulation 6(5) that the “public concerned” is notified of the preparation of the plan. The definition of “public concerned” is clear that it extends beyond persons located in proximity to a Category A site.

²⁸² Guide to Seveso Obligations, p13.

²⁸³ Regulation 4(3), fifth paragraph.

While a full copy of both the draft and finalised plan should be made available to the public, these copies should not contain contact details of individuals employed by the site operator who have responsibility for emergency response and incident prevention. It is suggested that this information is contained in an annex to the plan and that this annex should be removed from all publicly-available versions.

15.4 Deadlines for Completing the External Emergency Plan

While Regulation 6 of the Extractive Waste Regulations contains a deadline for the production by a Category A site operator of its major accident prevention policy, the legislation focuses primarily on when a licence application is being lodged for a new site.²⁸⁴ Less account has been taken of the more usual circumstances that will affect most, if not all, Category A facilities in Ireland. Many were in existence prior to either Directive 2006/21 or the Extractive Waste Regulations entering into force. For this reason, it is necessary to provide additional guidance to local authorities on this matter.

The EPA's view is that local authorities should, where not already commenced, initiate the public consultation process set out above within one month of the date of the finalisation of this guidance document. The first round of public consultation should then start with a six-week period for submissions to be made.

While the preparation of the full text of the plan is dependent on satisfactory information being obtained from the operator, a local authority should aim to get the full text of the plan prepared in draft form as soon as possible. The draft plan is then to be made available for the second phase of submissions. In this case, the submission period of four weeks should follow, with the final and completed document being made available within a period of eight weeks.

In all cases, the final deadline for the completion and formal adoption of the external emergency plan has to be 1 May 2012. That date is the deadline set by Directive 2006/21 for EU member states and their extractive site operators to comply fully with the Directive.²⁸⁵

In the event that a local authority considers that inadequate information has been generated by the Category A site operator, it needs to contact the operator without delay. Accordingly, a local authority is expected to verify the completeness of this material within four weeks of its receipt.

15.5 Implementation of the Plan

Once it has been completed, the external emergency plan for a Category A site should be subject to a formal launch in the same way as required for COMAH upper-tier site emergency plans. Similarly, its content and applicability should be periodically tested, with the Guide to Seveso Obligations suggesting that this should be done every three years.²⁸⁶

While the Extractive Waste Regulations do not require the external emergency plan to be updated at a specified frequency,²⁸⁷ its effectiveness needs to be reviewed in light of the testing exercises referred to above. A review may also be necessary after any off-site accident of significance. If arrangements at the Category A site have changed and these are considered to materially affect the content of the plan or the extent of the specified area, then the external emergency plan should be subject to amendment.

²⁸⁴ For example, the first paragraph of Regulation 6(3) requires accident prevention policies to be in place before "the start of operations", with the fourth paragraph requiring the EPA to notify a local authority of the need to draw up an external emergency plan within three months of the date of receipt of the application.

²⁸⁵ Directive 2006/21, Article 24(1).

²⁸⁶ Guide to Seveso Obligations, p8.

²⁸⁷ Instead, the Regulations require more limited information on safety measures (see next section) to be updated on a three-year cycle (Regulation 6(6)).

15.6 Duty to provide Public Information on Safety Measures

The Extractive Waste Regulations require information be provided to the public free-of-charge on site safety measures and on the responses required in the event of there being an accident at a Category A facility.²⁸⁸ This information is focused on the safety management system deployed at the site and covers the items listed in Schedule 1, Section 2 of the Extractive Waste Regulations²⁸⁹ (see Box 9). This list includes matters such as²⁹⁰ organisational structure, responsibilities, practices, procedures and processes for the determination and implementation of an accident prevention policy.

The EPA's view is that this material can take the form of a public information leaflet. Subject to the full incorporation of the material shown in Box 9, this leaflet can follow the general format set out in the Guide to Seveso Obligations.²⁹¹ However, as a consequence of the Extractive Waste Regulations' emphasis on a local authority having primary responsibility for an external emergency plan, the required contact information will need to be amended. Queries from the public and the media should be channelled directly to a defined contact point in each local authority rather than to the other Principal Response Agencies.

The local authority responsible for a Category A facility is required to prepare, publish and circulate this leaflet to persons that may be affected by off-site accidents. This leaflet must also be available to other persons and non-government organisations.²⁹²

Box 9. Schedule 1, Section 2: Content of Public information Leaflet

1. Name of operator and address of the waste facility.
2. Identification, by position held, of the person providing the information.
3. Confirmation that the waste facility is subject to the regulations and/or administrative provisions implementing Directive 2006/21/EC1 and, when applicable, that the information relevant to the elements referred to in Regulation 6(2) has been submitted to the competent authority.
4. An explanation in clear and simple terms of the activity or activities undertaken at the site.
5. The common names or the generic names or the general danger classification of the substances and preparations involved at the waste facility as well as waste which could give rise to a major accident, with an indication of their principal dangerous characteristics.
6. General information relating to the nature of the major-accident hazards, including their potential effects on the surrounding population and environment.
7. Adequate information on how the surrounding population concerned are to be warned and kept informed in the event of a major accident.
8. Adequate information on the actions the population concerned should take, and on the behaviour they should adopt, in the event of a major accident.
9. Confirmation that the operator is required to make adequate arrangements on site, in particular liaison with the emergency services, to deal with major accidents and to minimise their effects.
10. A reference to the external emergency plan drawn up to cope with any offsite effects from an accident. This should include advice to co-operate with any instructions or requests from the emergency services at the time of an accident.
11. Details of where further relevant information can be obtained, subject to the requirements of confidentiality laid down in national legislation.

²⁸⁸ Regulation 6(6).

²⁸⁹ Section 1 of Schedule 2 is not directly relevant to a local authority's external emergency planning function; instead, it is a requirement that is placed on the site operator under Regulation 6(3).

²⁹⁰ Regulation 6(5) and its cross-reference to Schedule 1, Section 2.

²⁹¹ Guide to Seveso Obligations, p14. The requirements in Directive 2006/21 (Annex I, Part 2) are virtually identical to those in the COMAH Directive 96/82 (see Annex V).

²⁹² See Regulation 6(6) and the definition of "public concerned" in Regulation 3(2).

Each local authority that is responsible for an external emergency plan must review the contents of this information leaflet on a three-year cycle, with a view to updating it as necessary.²⁹³ In this respect, the Extractive Waste Regulations' requirement for a three-year review relates to the information leaflet on safety measures and accident response; it does not require an external emergency plan to be reviewed within this timeline.

15.7 Duty on Operator in an Emergency Situation

In accordance with Regulation 6(4) of the Extractive Waste Regulations,²⁹⁴ each operator of a Category A facility is required “immediately” to provide a regulatory body with all relevant information after a “major accident”. In this context, the term “major accident” refers to an event that has the potential to cause a serious danger to human health and/or the environment.²⁹⁵

²⁹³ Regulation 6(6), Second paragraph.

²⁹⁴ Regulation 6(4), final paragraph.

²⁹⁵ See definition in Regulation 3(2).

External Emergency Plans

Summary: What Local Authorities Must Do:

- Understand when an extractive waste site is to be viewed as a Category A facility (see Chapter 10) and that external emergency plans are only needed for such facilities and not at all types of quarry or other similar site.
- Determine whether they need to prepare an external emergency plan due to the presence of a Category A within their jurisdiction.
- Extend their existing emergency response systems, as set up under the European Communities (Control of Major Accident Hazards involving Dangerous Substances) Regulations 2006, to embrace any Category A facility situated in their functional areas.
- Appreciate that the requirements of the Extractive Waste Regulations cause some departures from the provisions and requirements of the European Communities (Control of Major Accident Hazards involving Dangerous Substances) Regulations and associated guidance. These differences relate to aspects such as the procedures to be followed, the events/risks that are to be managed, the content of the external emergency plan and procedures for public consultation.
- Produce an external emergency plan for any Category A facility in their functional area. This plan should contain physical, managerial and other measures to control major and minor off-site. It should be based on credible accident scenarios, developing these from the content of the operator's internal emergency plan (if available).
- Note that the Plan also has to provide relevant information to the public and to the statutory bodies that are required to respond in an emergency situation. The content and structure of the Plan should generally follow the publication known as the "Guide to Seveso Obligations", which forms part of the national Framework for Major Emergency Management.
- Ensure that the external emergency plan is suitable for a public audience and that public consultation takes place in the manner required by the Extractive Waste Regulations and this guidance.
- If it is not already underway, commence the public consultation phase within one month of the finalisation of this guidance document, follow through the other phases as described in this Chapter, and have the finalised external emergency plan complete by 1 May 2012.
- Subject the plan to a formal launch and field-test its content and applicability in accordance to the cycle set down in the Guide to Seveso Obligations. Where inadequacies have been identified, the plan should be amended without delay.
- Provide, separately to the external emergency plan, a public information leaflet about safety measures and emergency response procedures relating to any Category A facility. This leaflet should contain details of a contact point within each affected local authority from where public queries can be managed. This leaflet should be circulated to all persons who may be affected by an off-site accident. Its content must reviewed every three years and revised as necessary.

External Emergency Plans

Summary: What The Extractive Industries Must Do:

- Actively cooperate with their local authority in the production of an external emergency plan for each Category A facility they operate.
- Make available a Category A site's internal emergency plan to the relevant local authority, as well information about accident scenarios. Should the internal emergency plan not be finalised, adequate background material must be provided
- Satisfy the legal requirement that, in the event of a major accident, an operator of a Category A facility must provide all relevant information about its nature, cause and consequences to the local authority. The EPA also should be notified in accordance with the site's licence.

Appendix 1: The Meaning of Extractive “Waste”

A.1 Some Preliminary Points

All of the Extractive Waste Regulations, with the exception of Regulation 19,²⁹⁶ contain provisions that regulate or otherwise apply to the handling of “extractive waste”. As was discussed earlier in Chapter 4, the definition of extractive waste itself turns on its meaning within the Regulations.²⁹⁷ In turn, that meaning is dependent on what is meant by the word “waste” in national and EU law.

The definition of “waste” can be a difficult issue, due to the need to differentiate between substances that are “waste” and other materials that are by-products. While in many instances the status of an object or material in this respect will be pretty obvious, this issue can become challenging in the context of the extractive industries. Accordingly, it is necessary to provide guidance on this issue, particularly as a number of key principles emanate from case law decided at the Court of Justice of the European Union. Moreover, additional legislative clarification, as contained in the European Communities (Waste Directive) Regulations 2011,²⁹⁸ supplemented the existing provisions of the Waste Management Act on 31 March 2011.

Before a more detailed consideration of the relevant issues is set out, it seems important to start off by identifying the types of material that both Directive 2006/21 and the Extractive Waste Regulations cover. From its text, this legislation makes clear that extractive waste can comprise the following examples:²⁹⁹

- inert waste, including material with properties that indicate no possibility of leaching or any other environmental impact,
- rock and overburden that has to be removed to access minerals resources, including soil and topsoil
- waste peat,
- materials that exhibit non-inert properties, including containing leachable contaminants which, while environmentally significant, do not cause the material to be classified as hazardous waste,
- hazardous waste,
- both untreated minerals and their post-treatment residues,
- spoil heaps, tailings³⁰⁰ and other materials held in settlement ponds and as temporary piles.

Given that all of the above-mentioned materials can, in certain circumstances, be regarded as “extractive waste”, it is clearly incorrect to exclude any of them completely. As will be seen, EU case law indicates that a case-by-case and site-by-site approach must be followed. Such an approach always must take into account the principles that are explained below. As will be seen, the most important principle is that any decision taken on this matter accords to the purpose of the EU legislation.

A.2 “Extractive waste” in the Context of the Extractive Waste Regulations

Under Regulation 3(2) of the Extractive Waste Regulations, the term “waste” is defined as having “the meaning assigned to it in the Act”. This means that the definition of “waste” is common to both the Waste Management Act and the Extractive Waste Regulations. That definition features in both Directive 2006/21 and the Directive on Waste. Accordingly, when the term waste is to be considered, regard must be had to the principles and case-law that expand upon the definition of “waste” as set down in Article 1(1)(a) of the Directive on Waste. This matter will be returned to later.

Although a key element, the definition of “waste” in the WMA, while having application, is circumscribed by the Extractive Waste Regulations. Regulation 2(2) makes clear that the Regulations are confined to affecting only waste

²⁹⁶ Regulation 19 requires a local authority to establish a register of the extractive industries.

²⁹⁷ See the definitions of “extractive waste” and “extractive industries” in Regulation 3(2).

²⁹⁸ SI 126 of 2011, see Articles 4, 26, 27 and 28.

²⁹⁹ See, for example, Directive 2006/21, recital 4 and elsewhere in the Directive and the Regulations.

³⁰⁰ Which are described as waste solids or slurries that remain after the treatment of minerals.

“resulting from the prospecting, extraction, treatment and storage of mineral resources and the working of quarries”. Some of these terms, such as “mineral” and “treatment”, also have their own definitions and these are discussed in Chapter 4.

Besides the effect of Regulation 2(2), the concept of “extractive waste” is further narrowed by Regulation 2(3), which indicates that the following waste types are not subject to the Extractive Waste Regulations:

- a. waste that is generated by the prospecting, extraction and treatment of mineral resources and the working of quarries, but which does not directly result from those operations,
- b. waste resulting from the offshore prospecting, extraction and treatment of mineral resources,
- c. injection of water and re-injection of pumped groundwater at mines and quarries.

Again, these items are discussed in more detail in Chapter 4 of this guidance note.

A.3 “Waste” as defined by the Waste Management Act

As noted, Regulation 3(2) of the Extractive Waste Regulations states that the term “waste” in these Regulations is defined as having “the meaning assigned to it in the Act”. In turn, the WMA defines “waste” as follows:³⁰¹

“Waste” means any substance or object which the holder discards or intends or is required to discard.

As indicated, a key element within the definition of “waste” is whether waste is something the holder “discards or intends or is required to discard”. In the manner discussed in more detail later, the Court of Justice of the European Union has held that there are a wide variety of relevant factors involved in such an assessment, not all of which will be applicable to every circumstance when the debate about the definition of waste arises. Again, this means that such decisions must be made on an individual basis, following a site-specific and case-by-case approach.

Since 31 March 2011, the definition of “waste” in the Waste Management Act must also be viewed within the context set by Regulations 27 and 28 of the European Communities (Waste Directive) Regulations 2011. Respectively, Regulations 27 and 28 set down additional decision criteria distinguishing waste from by-products and when what was hitherto defined as “waste” ceases to be so after recovery. The latter often are termed “end-of-waste criteria”. These provisions will be subject to further analysis at the end of this sub-section.

As the term “waste” in the context of the Extractive Waste Regulations has the meaning assigned to it in the Waste Management Act, it is sometimes necessary to consider the list of exclusions set out at the start of the Act. These are contained in Section 3 of the Act,³⁰² which indicates that, depending on circumstances, 11 different waste types are not subject to the Act at all. In respect of the definition of “extractive waste”, the most important is:

“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.”

Provided a material arising at an extractive site falls within this exclusion, it cannot be defined as “waste” under the Act. As it is not “waste”, it also cannot be “extractive waste” in respect of the Extractive Waste Regulations.

When considering how this exclusion applies to extractive waste facilities, it is important to understand the significance of the words: “where it is certain that the material will be used for the purposes of construction in its natural state”.

³⁰¹ WMA, Section 3(1), as amended by the European Communities (Waste Directive) Regulations 2011, SI 126 of 2011, Regulation 4.

³⁰² As amended by the European Communities (Waste Directive) Regulations 2011, SI 126 of 2011, Regulation 4, with similar exclusions in Regulation 26 applying in respect of by-products and the end-of-waste criteria contained in those Regulations.

As will be seen later in this Appendix, this requirement emanates from case law of the Court of Justice of the European Union. It is included to indicate that the exclusion only applies when the holder of the material has a clear and pre-defined purpose for it, with that use taking place within a definite timeframe. For example, if over-burden is being stored at a quarry or other similar extractive site, it may benefit from this exclusion: provided that it is being stored for a legitimate purpose, such as for restoration or landscaping. For that purpose to be legitimate, the material must be suitable for this end use, both in terms of composition and quantity. That end-use also must be one that is necessary and integral to the lifecycle of the site.

For more recent extractive activities, evidence of the legitimacy of these matters should be obtainable from the site's planning conditions, from the planning application documentation, from the site's environmental impact assessment, restoration plan or other similar record.

It also follows that the words "where it is certain that the material will be used for the purposes of construction in its natural state" mean that material held at an extractive site may not be subject to this exclusion where there is no degree of certainty about its end-use on the site. For example, while a material may be suitable for site restoration, if there is no requirement for such an operation to take place, then it seems unlikely that this exclusion will apply.

Finally, it should be noted that "land (in situ) including unexcavated contaminated soil and buildings permanently connected with land" is also excluded from the scope of the Act³⁰³ and, accordingly, from the meaning of the term "waste". In this respect, this exclusion holds only up to the time the soil is excavated. Overall, it would seem that this exclusion has less significance, for the reason that it is difficult to see how "unexcavated contaminated soil" will constitute "extractive waste".³⁰⁴

A.3.1 "Waste" & By-Products

Regulation 27 of the European Communities (Waste Directive) Regulations sets down four criteria that distinguish a by-product from a waste. Accordingly, these criteria have a function in determining whether or not the Extractive Waste Regulations apply.³⁰⁵ For these criteria to be relevant, Regulation 27 indicates that the essential pre-requisites are that (a) the material in question is "resulting from a production process" and (b) its production is not the "primary aim" of that process.³⁰⁶ Both of these caveats reflect earlier judgments of the Court of Justice of the European Union (see later).

Four conditions are then set down in the European Communities (Waste Directive) Regulations to indicate when a material "may"³⁰⁷ be a by-product rather than a waste. All of the following must be satisfied:

- a. the further use of the material must be "certain",
- b. the material must be able to be used "directly" without any further processing beyond what is standard industrial practice,

³⁰³ WMA, Section 3(1)(b), as amended by the European Communities (Waste Directive) Regulations 2011, SI 126 of 2011, Regulation 4.

³⁰⁴ In addition, amended Section 3(2)(d) of the Waste Management Act indicates that the Act does not apply to waste that is subject to the Extractive Waste Directive. In this instance, a significant caveat has been included at the start of Section 3(2), which states that this exclusion applies to the legislation listed only "to the extent that they are covered by other Community acts". The EPA's view is that this phrase means that, unless the Extractive Waste Regulations either indicate to the contrary or do not cover a particular regulatory issue, the content of the Act does not apply. Accordingly, as the Regulations do not define "extractive waste" and, instead, indicate that extractive "waste" has the meaning assigned by the Act, then the definition of waste in the Act still applies. Similarly, Regulation 16(3) indicates that the Regulations are to be enforced in accordance with the Waste Management Act (or EPA Act 1992), while Regulation 7 requires non-IPPC licensed Category A sites to be subject to a waste licence and non-hazardous, non-inert waste facilities to be controlled by a waste facility permit.

³⁰⁵ The main exception to this rule relates to Regulation 19, which requires all premises operated by the "extractive industries" to be fully registered (see Chapter 12).

³⁰⁶ See European Communities (Waste Directive) Regulations, Regulation 27(1).

³⁰⁷ By contrast, the separate end-of-waste provisions in Regulation 28 (see later) state that a material "shall" not be considered to be waste, when four other criteria are met.

- c. the material must be produced as an integral part of a production process,
- d. the further use must be lawful, complying with all relevant product, environmental and health protection requirements, as well as not causing any adverse environmental impact.

Regulation 27(2) of the European Communities (Waste Directive) Regulations mandates that, where a person such as an operator of an extractive site makes a decision that a material is to be considered a by-product rather than a waste, the EPA must be notified of both the decision and of its grounds. Should this notification not be made, the burden of proof in any subsequent legal proceedings rests with that operator. That person therefore has to convince a court that the material is in fact a by-product rather than a waste.

The remainder of Regulation 27 comprises powers that allow the EPA to determine whether a substance or object that is notified to it as a by-product is, in fact, a waste. These powers are discretionary³⁰⁸ and, when exercised, a copy of the operator's notification must be placed in a public register.³⁰⁹ Finally, Regulation 27 ends by indicating that nothing within its provisions can relieve operators of their responsibilities under the Waste Management Act or Environmental Protection Agency Act 1992.³¹⁰

A.3.2 “End-of-Waste” Criteria

Regulation 28 of the European Communities (Waste Directive) Regulations 2011 sets down end-of-waste criteria, which are intended to define the exact point when the definition of waste is no longer to apply to a particular substance or object. This point is typically after a waste has been fully recovered or recycled, with the resultant material instead regarded as the same as a “normal” product.

Reflecting the fact that Regulations 27 and 28 of the European Communities (Waste Directive) Regulations stem from the revised Directive on Waste,³¹¹ there are certain key differences in their approach. The main one is that the intention of the EU legislation is for Europe-wide end-of-waste criteria to be developed as an on-going process. By contrast, the waste/by-product distinction is to be made more locally on a site-specific and case-by-case basis. Unlike the waste/by-product provisions, the end-of-waste criteria only apply after a recovery or recycling operation has taken place.

At present, no EU end-of-waste provisions have been published for extractive waste. However, as an interim solution, Regulation 28(3)(a) of the European Communities (Waste Directive) Regulations confers the EPA with a power to make, on a case-by-case basis, a determination on whether a material has been sufficiently recovered or recycled so as to no longer be defined as “waste”. This determination is governed by four conditions or principles. These are that a substance or object:

- 1. is commonly used for a specific purpose,
- 2. is subject to a market or other existing demand,
- 3. fulfils the relevant technical requirements for the intended purpose and meets the existing legislation and standards applicable to comparable products; and,
- 4. will not lead to overall environmental or human health impacts when used.

As was the case with the waste/by-product distinction, these conditions are based on case law of the Court of Justice of the European Union. Accordingly, the EPA must ensure that any decisions it takes are consistent with these rulings.³¹² Moreover, the Waste Directive Regulations require any such decision to be subject to notification to the European Commission and consultation with other EU member states.

308 See “may” in European Communities (Waste Directive) Regulations, Regulation 27(3)(a).

309 European Communities (Waste Directive) Regulations, Regulation 27(5).

310 European Communities (Waste Directive) Regulations, Regulation 27(4).

311 Articles 5 and 6.

312 European Communities (Waste Directive) Regulations, Regulation 28(3)(a).

While Regulation 27 requires the EPA to document notifications relating to waste/by-product decisions in a public register, there is no similar requirement in respect of decisions about when a material has been recovered sufficiently to attain end-of-waste status. Nor is there any analogous obligation on waste holders to notify the EPA of any of their own end-of-waste decisions.

A.4 European Waste Catalogue and Hazardous Waste List

A useful indication of the potential types of extractive waste envisaged under EU law can be gained from the European Waste Catalogue and Hazardous Waste List (EWC).³¹³ The section of the EWC that is relevant to wastes produced by the extractive industries is shown below.

As with all other entries on the EWC, each extractive waste type is assigned a unique six-digit reference code which, when accompanied by an asterisk, indicates that it constitutes hazardous waste. In some instances, such as waste code 01 03 05, this matter is determined by the presence of dangerous substances in the material. The relevant levels of such substances are set down in the much-amended Dangerous Substances Directive (Directive 76/548).³¹⁴

As can be seen from this extract from the EWC, a wide range of inert extractive wastes feature, including waste gravel, crushed rock and sand and clay. Tailings and other waste derived from washing and cleaning activities also are assigned particular waste codes. For reasons that are not immediately apparent, topsoil derived from over-burden removal is not assigned a code within Section 01 of the EWC. However, this does not mean that the material cannot be extractive waste. As noted earlier, both the Extractive Waste Regulations and Directive 2006/21 are clear that topsoil is subject to this legislation in some circumstances.

In respect of the status of all entries on the EWC, readers are reminded that the key issue is whether a material is embraced by the statutory definition of “waste”. Once a substance or object is so defined, the EWC can be utilised in order to assign the relevant waste codes. However, the EWC itself does not determine whether or not a material is to be defined as “waste”.³¹⁵

313 A version published by the EPA can be found at <http://www.epa.ie/downloads/advice/waste/waste/EPA%20European%20Waste%20Cat&HazWasteList.pdf>

314 This matter is explained further in paragraphs 4-6 on page 14 of the EPA's version of the EWC.

315 Explained in paragraph 1 on page 14 of the EPA's version of the EWC.

European Waste Catalogue and Hazardous Waste List

01	WASTE RESULTING FROM EXPLORATION, MINING, QUARRYING, AND PHYSICAL AND CHEMICAL TREATMENT OF MINERALS
01 01	wastes from mineral excavation
01 01 01	wastes from mineral metalliferous excavation
01 01 02	wastes from mineral non-metalliferous excavation
01 03	wastes from physical and chemical processing of metalliferous minerals
01 03 04	acid-generating tailings from processing of sulphide ore
01 03 05	other tailings containing dangerous substances
01 03 06	tailings other than those mentioned in 01 03 04 and 01 03 05
01 03 07	other wastes containing dangerous substances from physical and chemical processing of metalliferous minerals
01 03 08	dusty and powdery wastes other than those mentioned in 01 03 07
01 03 09	red mud from alumina production other than the wastes mentioned in 01 03 07
01 03 99	wastes not otherwise specified
01 04	wastes from physical and chemical processing of non-metalliferous minerals
01 04 07	waste containing dangerous substances from physical and chemical processing of nonmetalliferous minerals
01 04 08	waste gravel and crushed rocks other than those mentioned in 01 04 07
01 04 09	waste sand and clays
01 04 10	dusty and powdery wastes other than those mentioned in 01 04 07
01 04 11	wastes from potash and rock salt processing other than those mentioned in 01 04 07
01 04 12	tailings and other wastes from washing and cleaning of minerals other than those mentioned in 01 04 07 and 01 04 11
01 04 13	waste from stone cutting and sawing other than those mentioned in 01 04 07
01 04 99	waste not otherwise specified
01 05	drilling muds and other drilling wastes
01 05 04	freshwater drilling muds and wastes
01 05 05	oil-containing drilling muds and wastes
01 05 06	drilling muds and other drilling wastes containing dangerous substances
01 05 07	barite-containing drilling muds and wastes other than those mentioned in 01 05 05 and 01 05 06
01 05 08	chloride-containing drilling muds and wastes other than those mentioned in 01 05 05 and 01 05 06
01 05 99	wastes not otherwise specified

A.5 When is a material “discarded”?

The key to whether something is a waste is whether the material is discarded, intended to be discarded or required to be discarded. Accordingly, whether a substance or object is a waste or a by-product turns on what is meant by the word “discard”. Given that waste is something that can be discarded when it is sent not only to a disposal site but also

is subject to recovery or re-use, the term used in the WMA sits a little uneasily with its typical English-language usage. However, as it is found within the statute and ultimately stems from EU law, it is a term that has a special legal meaning.

In essence, the main principle is that the definition of waste embraces substances or objects that have ceased to be required, normally because they are unsuitable, unwanted or surplus to the requirements of the person involved in their production. What is also important to understand is that, should a material be somehow surplus to the person who produced it, the definition of waste applies regardless of whether the recipient of the material has a potential use for it. As will be seen, European Community case law confirms that issues such as whether the material may be useful to someone else have little bearing on whether it is defined as waste. Nor does it matter if the material being handled is physically or chemically inert and has little potential for any environmental impact. The key issue is whether it has been discarded.

While the European Case law will be discussed below, whether something is being discarded by a holder revolves around an assessment of a range of factors. The definition of waste in the Waste Management Acts states that a holder may:

- discard a material,
- intend to discard a material,
- be required to discard a material.

Obviously, the first factor involves some action by the holder that actually causes a material to be discarded. The legislation also views waste as something that the holder “intends” to discard. This might, for example, refer to surplus material that are stored on-site prior to its collection. Finally, something is defined as waste when it is “required to be discarded”. Examples might be quarrying materials that are not usable or stockpiled materials that remain on-site indefinitely as there is no market for them. Similarly, if a material is contaminated or otherwise not suitable for re-sale, it may be something which “is required to be discarded”. Accordingly, it will be defined as “waste” for that reason.

It is often helpful to consider the intent of the person who holds the material when considering the definition of “waste” in the context of the issue of discarding. This issue is not only assessed by what a site operator involved says. It is obvious why persons are not allowed simply to state that they are not discarding a material and thereby be able to absolve themselves of any legal obligation under the Waste Management Act. Instead, the issue of intent is assessed in relation to what the person has done or is doing with the material, why it has arisen in the first place, what is normal practice for the handling of materials of this nature, and so on.

The issue of “discarding” within the definition of waste also must be considered in the context of the new provisions on waste/by-products that have been summarised in an earlier section above. As discussed, four separate criteria are set out in the European Communities (Waste Directive) Regulations 2011 to distinguish between waste and by-products, with all of these being required to be satisfied for a substance or object to be considered to be a by-product rather than a waste. As the issue of “discard” is so central to the definition of waste, it follows that, should these four criteria all be met, the substance or object in question is not to be considered as discarded.

Finally, a key issue affecting quarrying and other elements of the extractive industries concerns whether a material is needed for site landscaping and restoration purposes. If it is absolutely clear that a material is being held on-site for a temporary period prior to its further re-use, then the material may not be “waste”. For this factor to apply, a site operator must be in a position to demonstrate definitively why the material is needed, guaranteeing what purpose it is to have and the relevant timescale involved in the material’s re-use. This means that the person’s intentions must be absolute, convincing and be able to be enforced if necessary under national law. For example, it may be a matter that is mandated by a site’s planning permission or contained within a restoration plan required by a planning condition.

All the above requires a site-specific and case-by-case approach. Each quarry or other extractive site is unique, involving different production and operational circumstances, surrounding environment, materials, markets, and so on. Moreover, the key principle in the waste/by-product issue is that there must be compliance with the EU legislation

and the case law of the Court of Justice of the European Union. Of particular importance will be the definition of waste and its context in the Directive on Waste; however, a consideration of the purpose and content of Directive 2006/21 on Waste from the Extractive Industries may also be necessary.

Having introduced some of the basic principles, the following section will review the case-law of the Court of Justice of the European Union (CJEU).³¹⁶ As will be seen, there are two key judgments: *Palin Granit* and *AvestaPolarit*. For reasons concerning completeness, some of the other decisions are summarised, with them all appearing in chronological order.³¹⁷ Key quotations have been included, in order to give readers a fuller picture of some of the Court's findings that have direct relevance to the extractive industries sector. Following this discussion, a summary section of the key issues has been included, which is intended to assist readers who do not require the more lengthy material that follows below.

A.5.1 Tombesi CJEU: Joined Cases C-304/94, C-330/94, C-342-94, C-224/95³¹⁸

This judgment covers a number of cases that were referred to the CJEU by the Italian courts. One of these is particularly significant in respect of extractive waste, as it involves waste from marble extraction. The Court's views on a second case, which concerned the output of a rather basic grinding process applied to olive oil waste, also has relevance. In both instances, the defendants claimed that the materials were not "waste" and hence that they were not guilty of offences under Italian law.

The CJEU held that the EU definition of waste "...is intended to cover all objects and substances discarded by their owners, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or re-use".³¹⁹ Accordingly, the Court considered that this principle applied where the marble wastes were being utilised to construct embankments or to fill holes in the ground for land reclamation purposes.³²⁰ It also determined that the olive oil residues did not cease to be waste when only a crude grinding process had been applied to them.³²¹

All of these findings are useful in the context of the extractive waste. The Court confirms that whether a substance or object may have a commercial value does not cause it not to be waste. It also indicates that the beneficial re-use of something in a construction and other similar project does not automatically preclude it from being waste. If the material is "discarded" - for example by being surplus or unwanted to the person who produced it - it is "waste", regardless of end-use.

The finding that simple processing operations do not necessarily cause a substance or object not to be "waste" is also of significance, given the presence of settlement ponds and crushing, screening and other similar equipment in quarries and at mining activities. The principle that partial recovery does not affect the status of a material as a waste is also reflected in one of the four criteria contained in the European Communities (Waste Directive) Regulations and which determine the waste/by-product boundary.³²²

316 All of these judgments pre-date the required transposition date for Directive 2006/21. While most seem to be compatible with the Directive, as discussed later there does seem to be a degree of tension between the *Avesta* judgment and Regulation 10 of the Extractive Waste Regulations (which is follows Article 10 of Directive 2006/21).

317 All are available on the Court of Justice of the European Union's web-site, by entering each case number into the search form at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>

318 Joined Cases C-304/94, C-330/94, C-342-94, C-224/95, 25 June 1997.

319 *Tombesi*, para 52.

320 *Tombesi*, para 53/54.

321 See the last two lines in *Tombesi*, para 54; The Court's view on this matter is more easily understood if it is considered in the light of Questions 5 and 6 that were posed to the CJEU by the Italian Court (see *Tombesi*, para 30). These are explained more clearly in para 61 of the Advocate General's Opinion on this case.

322 See European Communities (Waste Directive) Regulations 2011, Regulation 28(1)(b): "the substance or object can be used directly without any further processing other than normal industrial practice".

A.5.2 Inter-Environnement Wallonie: CJEU Case C-129/96³²³

The CJEU's judgment in *Inter-Environnement Wallonie*, which centred upon the incorrect transposition of the Directive on Waste into Belgian law, contains some useful material about whether an operation that is integral with a production process may involve a waste management activity. This matter has obvious relevance at quarries and at other extractive activities, where waste and by-products may be handled on-site where they arise.

In the mid-1990s, Belgian law restricted the circumstances when statutory authorisations were needed for waste facilities. Permits were only necessary at off-site disposal and recovery activities, excluding such operations when they were integral with industrial production processes. Given that the Directive on Waste specifically states that operations involved in on-site waste disposal or recovery can either be subject to a permit or be registered with a regulatory body,³²⁴ it is unsurprising that the CJEU found against Belgium. It confirmed that the Directive applied to all disposal and recovery activities at the place of production and regardless of whether they had a potential for environmental damage.³²⁵

Following earlier judgments such as *Tombesi*, the Court considered that the definition of waste turned on the meaning of the word "discard",³²⁶ and included materials that were sent for recovery, recycling and re-use'.³²⁷ Rather enigmatically, the Court added: "that conclusion does not undermine the distinction which must be drawn ... between waste recovery within the meaning of Directive [on Waste], and normal industrial treatment of products which are not waste, no matter how difficult that distinction may be".³²⁸ As will be seen, the later decisions of the CJEU are rather more forthcoming in this respect.

A.5.3 Arco Chemie: CJEU Joined Cases C-418/97, C-419/97³²⁹

Two cases are considered by the CJEU in this judgment. The first concerns a high calorific value residue from the chemical industry that was suitable as fuel in cement-making, with the second concerning wood chips that were to be burnt for power generation. The wood chips were sourced from a wide variety of wood waste, with at least some of this material containing potentially toxic preservative. Again, the issue being considered by the CJEU was whether these materials were to be regarded as "waste" up to the point they were burnt as fuel.

As a good proportion of the judgment by the CJEU involves a complex legal argument that has little relevance to extractive waste, it will not be repeated here. What are more relevant are three other findings. The first is that, if the composition of a material makes it unsuitable for further use or that special environmental precautions are needed in its handling, such factors may suggest that the material is discarded or is required to be discarded by the material's holder.

The second is that what are typical practices or norms within the industry about how a material is generally dealt with can give at least some indication about whether it is a waste or by-product. Again, this is but one factor that has to be considered, and usually will not be definitive.

Thirdly, the Court held that the chipping process that was applied to the wood waste was not sufficient to cause the material to cease to be defined as "waste". In this respect, readers will note the similarity of this finding to the *Tombesi* case outlined earlier and to the criteria that determine the waste/by-product boundary in the European Communities (Waste Directive) Regulations 2011. In *Arco*, the chipping process was held to be "...a simple pre-treatment of the waste. A substance ceases to be waste only when it has undergone a complete recovery operation..., that is to say when it can be processed in the same way as a raw material or, as in this case, when the material or energy potential of the waste has been used during burning".³³⁰

³²³ Case C-129/96, 18 December 1997.

³²⁴ See Directive 2006/12, Article 11 and Directive 2008/98, Article 24.

³²⁵ *Inter-Environnement Wallonie*, para 30.

³²⁶ *Inter-Environnement Wallonie*, para 26.

³²⁷ *Inter-Environnement Wallonie*, para 31 These activities are often termed "economic reutilisation" in the CJEU judgments.

³²⁸ *Inter-Environnement Wallonie*, para 33.

³²⁹ Cases C-418/97 and C-419/97. 15 June 2000.

³³⁰ *Arco Chemie*, at para 93.

However, the court also emphasises that whether a material has been subject to a complete or comprehensive recovery operation is just one of the factors that needs to be considered in determining the waste/by-product divide.³³¹ Instead, the key issue is the need to ensure that the exclusion of a material from the definition of waste will not reduce or undermine the effectiveness of EU waste legislation.

A.5.4 Palin Granit: CJEU Case C-9/00³³²

The company Palin Granit Oy applied to the Finnish regulatory authorities for a permit to continue to operate a granite quarry. That application included information that about 50,000 tonnes of leftover stone would be generated each year and this was to be stored on an adjacent site. That material had an identical composition to the quarry's products, might be stored for a relatively short period of time and did not pose any risk to the environment. Potentially, it could be suitable for harbour construction or for breakwaters. However, the quarry had no immediate use for it, but hoped to process the material or otherwise sell it on at some point in the future.

The matter about the status of the deposited stone and the permit for the site ended up in the Finnish courts, being eventually referred upwards to the CJEU for adjudication. The main issue revolved around whether the leftover stone was defined as "waste" under Community law. In turn, this affected the type of permit necessary to authorise the Palin Granit site.

The CJEU confirmed that this stored material should be considered to be "waste". It indicated that the list of generic waste types in Annex I to the Directive on Waste³³³ and in the EWC provided confirmation that any of the listed materials may be waste in certain circumstances. The key issue in deciding this matter "is primarily to be inferred from the holder's actions, which depend on whether or not he intends to discard the substances in question".³³⁴

The Court held that, in order to fulfil the objectives underlying the EU waste legislation, the definition of "waste" should not be subject to an inordinately restrictive interpretation, particularly in light of the wider objectives of EU policy to protect the environment via a precautionary approach which involves a high level of environmental protection.³³⁵ Accordingly, the CJEU found that a decision about whether a material is "waste" has to be one that is exercised on a site-specific, case-by-case, basis. This case-by-case approach must take into account the overall purpose of the Directive on Waste,³³⁶ with that purpose being, as noted, to provide a high degree of environmental protection via the precautionary principle.

The Palin Granit judgment also confirms the findings of the CJEU's earlier judgments. These relate to two important points that affect a material that is to be subject to some form of re-use, recovery or recycling. These are (a) that substances that are to be recovered or re-used may, depending on circumstances, be defined as waste³³⁷ and (b) that the Directive on Waste is intended to cover all objects and substances discarded by their owners, even if they have a commercial value.³³⁸

It then suggests that "waste" is something that arises not as the primary objective of a production process but, instead, is a substance or object that – to use the Court's term – "falls away" when such a process takes place. As this type of material does not constitute the actual end-product, the operator of the production process has an in-built incentive to limit the amount that is produced.³³⁹ Indeed, in an ideal world, the operator would not wish to produce it at all. In this

331 Arco Chemie, at para 95.

332 Case C-9/00, 18 April 2002.

333 Annex I has been dropped in the new Directive 2008/98 on Waste, which enters into force on 12/12/10.

334 Palin Granit, para 22.

335 Palin Granit, para 23.

336 Palin Granit, para 24.

337 Palin Granit, para 29, referring to the judgment in Case C-206/88 Vessoso and Zanetti.

338 Plain Granit, para 29, referring to the judgment in Tombesi.

339 Palin Granit, para 32, referring to the judgment in Arco Chemie.

respect, an identifiable object of Palin Granit's quarry operation was to minimise the amount of leftover stone that had to be stockpiled as much as possible.

However, in other instances, the Court recognised that manufacturing or extraction processes do produce by-products that the operator may not wish to discard. These can themselves be exploited in another process. Accordingly, a distinction must be made between a material being a residue (and hence a waste) and a by-product that the holder intends to market "without any further processing prior to re-use".³⁴⁰ But, in such an instance, it is essential that the subsequent re-use of any such material is certain – not a mere possibility. Moreover, it was regarded as essential that no additional processing must be needed, with the re-use being an integral part of the production process.³⁴¹

Accordingly, the CJEU found that the left-over stone being held by Palin Granit was to be subject to long-term storage, with no immediate market or usage being available for it. It considered that this type of storage operation may pose a burden on the site operator; it may also have environmental implications of a type that are intended be controlled under the Directive on Waste. As the stone's "re-use is therefore not certain and is only foreseeable in the longer term", it should be classed as a production residue and, as such, something that the holder intends or is required to discard.³⁴² Being discarded, the leftover stone was determined to be "waste" under EU law.

This finding is reflected in the waste/by-product decision criteria contained in Regulation 27 of the European Communities (Waste Directive) Regulations 2011. One of the four criteria concerns whether "further use of the substance or object is certain."

The CJEU also makes a number of additional observations. All of these seem, to a greater or lesser degree, to have application to the quarrying sector. As some of these may be helpful to a local authority when it is considering the particular circumstances of material held at an extractive site, the following key quotations are to be highlighted:

- The uncertainty surrounding the proposed uses of the leftover stone and the impossibility of reusing it in its entirety support the conclusion that all that stone, and not merely the stone which will not be reused, is to be regarded as waste.³⁴³
- The place of storage of the leftover stone, whether it be on the quarrying site, at a place next to it or further away, is not relevant to its classification as waste. Similarly, the conditions under which the materials are kept and the length of time for which they are kept do not, of themselves, provide any indication of either their value to the undertaking or the advantages which that undertaking may derive from them. They do not show whether or not the holder intends to discard the materials.³⁴⁴
- The fact that the leftover stone has the same composition as the blocks of stone extracted from the quarry and that its physical state does not change may accordingly render it suitable for the uses which could be made of it. However, that argument would be decisive only if all the leftover stone were reused. There is no doubt that the commercial value of blocks of stone depends on their size, shape and potential uses in the construction sector, qualities which the leftover stone, despite having an identical composition, does not possess. That leftover stone is therefore still production residue³⁴⁵
- ...the risk of environmental pollution posed by unused leftover stone is not mitigated by the fact that its mineral composition is identical to the blocks of stone, inasmuch as that identity does not preclude the need for storage of the leftover material, which is an operation with an impact on the environment³⁴⁶
- ...even where a substance undergoes a full recovery operation and thereby acquires the same properties and characteristics as a raw material, it may nevertheless be regarded as waste if, in accordance with the definition in Article 1(a) of Directive 75/442, its holder discards it, or intends or is required to discard it³⁴⁷

340 Palin Granit, para 34 – see the case of Saetti which is discussed below.

341 Palin Granit, paras 36 & 37.

342 Palin Granit, para 38.

343 Palin Granit, para 40.

344 Palin Granit, para 42.

345 Palin Granit, para 44: being a "production residue", the judgment indicates that it is to be considered "waste".

346 Palin Granit, para 45.

347 Palin Granit, para 46.

- ...the fact that the leftover stone does not pose any risk to public health or the environment also does not preclude its classification as waste. ...Directive 75/442 on waste is supplemented by ...Directive 91/689 ...on hazardous waste ...which implies that the concept of waste does not turn on the hazardous nature of a substance³⁴⁸
- ...even assuming that the leftover stone does not, by virtue of its composition, pose any risk to human health or the environment, stockpiling such stone is necessarily a source of harm to, and pollution of, the environment, since the full reuse of the stone is neither immediate nor even always foreseeable³⁴⁹
- ...the harmlessness of the substance in question is not a decisive criterion for determining what its holder intends to do with it.³⁵⁰

A.5.5 AvestaPolarit: CJEU Case C-114/01³⁵¹

This case was determined by the CJEU in 2003, over a year after the Palin Granit decision. It involved a Finnish chromium mine. The operator applied for a statutory authorisation to continue mining, partly for the reason that the present open-cast arrangements needed to be replaced by underground mining. About one million tonnes of ore was being extracted annually, being associated with some eight million tonnes of left-over rock. Approximately 100 million tonnes of left-over rock were being stored on-site; a proportion of this was intended to be used to fill-in the mine workings, some of the remainder was to be sold as aggregate or for the construction of sea-defence works or breakwaters. What was left was then to be used for landscaping after the site's closure. It also appears that some or all of the sand-like residue from the company's ore processing activities was also to be used as back-fill within the mine.

The Avesta case involved two key points of law, only one of which has relevance to the definition of waste. That issue related to the mine operator disputing the Finnish regulatory body's view that the backfilling of the mine workings constituted a waste management operation. The operator appears to justify this view by asserting that this practice constituted an essential part of the mining operation, preventing excessive subsidence and other related effects. Not surprisingly, a key issue in the CJEU's consideration of this issue was the earlier Palin Granit judgment.

In a similar manner to Palin Granit, the Avesta judgment notes that the principal deciding factor on whether the leftover rock and ore processing residues are a waste concerns whether the holder has discarded them or intended or been required to discard them. Accordingly:³⁵²

... a distinction must be drawn between residues which are used without first being processed in the production process for the necessary filling in of the underground galleries, on the one hand, and other residues, on the other. The former are being used ... as a material in the industrial mining process proper and cannot be regarded as substances which the holder discards or intends to discard, since, on the contrary, he needs them for his principal activity.

Only if such use of those residues were prohibited, in particular for reasons of safety or protection of the environment, and the galleries had to be sealed and supported by some other process, would it have to be considered that the holder is obliged to discard those residues and that they constitute waste.

Following on from these observations, the Court held that, with the exception of materials that have to be considered to be waste due to a particular usage for them being banned, they are to be regarded as a by-product in the following circumstances:³⁵³

348 Palin Granit, para 47 & 48.

349 Palin Granit, para 49.

350 Palin Granit, para 50.

351 Case C-114/01, 11 September 2003.

352 AvestaPolarit, para 36-38.

353 AvestaPolarit, paras 39-42.

... if a mining operator can identify physically the residues which will actually be used in the galleries and provides the competent authority with sufficient guarantees of that use, those residues may not be regarded as waste. In this respect, it is for the competent authority to assess whether the period during which the residues will be stored before being returned to the mine is so long that those guarantees cannot in fact be provided.

*As regards the residues whose use is not necessary in the production process for filling in the galleries, they must in any event be regarded in their entirety as waste. That is true not only for the leftover rock and ore-dressing sand whose use for construction operations or other purposes is uncertain (see *Palin Granit*³⁵⁴ ...), but also for the leftover rock which will be processed into aggregates, since, even if such use is probable, it requires precisely an operation for recovery of a substance which is not used as such either in the process of mining production or for the final use envisaged (see *Palin Granit*³⁵⁵...).*

That is also true for the leftover rock accumulated in the form of stacks which will remain on the site indefinitely, and for the ore-dressing sand which will remain in the old settling ponds. Those residues will not be used for the production process, and cannot be used or marketed in any other way without prior processing. They are therefore waste which the holder discards. If they are landscaped, that constitutes merely an environment-friendly manner of dealing with them, not a stage in the production process.

Accordingly, the CJEU held that the only material that was not waste was the material that was to be deployed as backfill in AvestaPolarit's mine workings. None of the other materials being stored at the site had any identifiable end-use³⁵⁶ and, following the earlier *Palin Granit* judgment, all of them were to be considered "waste". In respect of the backfilling operation, the material was not to be defined as "waste" provided that this practice could be shown to be necessary, with the site operator being able to provide "sufficient guarantees as to the identification and actual use of the substances to be used for that purpose".³⁵⁷

In all of these respects, the *Avesta* judgment is entirely consistent with that of *Palin Granit*. In the latter case, the quarry operator was holding left-over stone seemingly in the hope that a future use might be found for it. By contrast, at the *AvestaPolarit* mine, the practice of back-filling was interlinked with the mining activities that were being carried out. As such, this back-filling activity would seem to provide a much higher degree of certainty that at least a proportion of the surplus materials stored at the site could be re-used. Accordingly, it was found that the Finnish waste legislation did not extend to controlling the underground deposit of this material. However, what is also important to understand is that, for the reasons set out in the *Palin Granit* decision, that legislation still pertained to the other materials stored at the surface of the mine. All of that was defined as "waste", for the reason that the holder was unable to come up with any credible proposal for its re-use.

Similarly, there is consistency with each of the four criteria set down in Regulation 27 of the European Communities (Waste Directive) Regulations 2011. In respect of the backfill at the *Avesta Polarit* mine, it involves material where the future intended use is "certain". The backfill is to be used "directly" without any further processing beyond what is standard industrial practice; this material was produced as an integral part of a production process (ie mining) and its further use complies with all the statutory requirements and does not cause any significant environmental impact. By contrast, the other materials held at the mine failed to meet the criterion that the intended use was certain, with the Court of Justice also indicating that additional reprocessing is necessary and that this operation was not an integral part of the mining activities being carried out on-site.

³⁵⁴ *Palin Granit*, paragraphs 37 and 38.

³⁵⁵ *Palin Granit*, paragraph 36.

³⁵⁶ In this respect, the CJEU's Advocate General described the company's intentions about other alternative re-uses for the left-over rock as "not certain", viewing those for the ore-processing waste as "wholly speculative" (see paragraph 41 of *Jacobs A-G's Opinion*).

³⁵⁷ *AvestaPolarit*, para 43.

A.5.6 Saetti: CJEU Case C-235/02³⁵⁸

The judgment concerned a refinery which was using petroleum coke (petcoke) as a fuel for electricity generation and heat-raising, with the petcoke being produced within the refinery. The CJEU held that this material was not to be defined as “waste”. Factors such as the use of the material constituting an integral part of a production process and its re-use being a common practice at refineries were considered relevant; however, the most decisive issue was that refinery operator did not need to produce this material, but chose to do so for the reason that it provided an energy-generating feedstock.³⁵⁹ Accordingly, the material was not to be viewed as something that was being somehow “discarded” by its holder.

A.5.7 Niselli: CJEU Case C-457/02³⁶⁰

Antonio Niselli was an Italian national, who was caught driving an articulated heavy goods vehicle loaded with scrap machinery. The vehicle was not duly authorised for this purpose, with the result that a court appearance duly followed. The case turned on whether the scrap was defined as “waste” as it was to be re-used. Eventually, it was referred to the CJEU.

Referring back to *Palin Granit* and the earlier judgments, the CJEU confirmed that the definition of “waste” turns on the meaning of “discard”, with that meaning having to be sufficiently wide to embrace both the intent of the Directive on Waste and the precautionary principle. While certain materials may be a by-product and therefore not waste, *Palin Granit* was viewed as confirming that this applied only where the “...re-use of the goods, materials or raw materials is not a mere possibility but a certainty, without further processing and as an integral part of the production process”.³⁶¹

In the above respect, the CJEU indicates that, for a material to be a by-product rather than a waste, three key matters must apply. Not only must the re-use of the material be a certainty rather than a possibility, the material must be able to be re-used “without prior processing”³⁶² and as an “integral part of the “same production process””.³⁶³

Accordingly, as Mr Niselli’s scrap materials required sorting, possible treatment and then re-processing in steel production, “they must ... continue to be classified as “waste” until they have been actually recycled into steel products...”.³⁶⁴

These findings exhibit a closeness to the four criteria that govern the waste/by-product boundary and which are contained in Regulation 27 of the European Communities (Waste Directive) Regulations 2011. This judgment also provides useful analogies within the context of extractive waste. For something not to be waste, there must be a clear and defined end-use for it. Moreover, that material must be suitable for use without treatment, with its re-use being integral with the quarrying or other activity taking place at the site.

All of these factors will, for example, affect the status of materials that have been extracted from the quarry and held on-site for restoration. This material may well not be a waste when it is certain that it is to be used for that purpose. An indication of that certainty may well be via a condition of the site’s planning permission, in proposals made by the operator in a planning application or in an environmental impact statement, and so on.

Besides this matter, the other factors raised in the judgment suggest that a material held by an extractive site operator could be regarded as a by-product when it is suitable for use without treatment and where it is to be used in a restoration activity that is integral to the quarrying operation. In addition, the requirement that the material must be suitable for use in restoration without treatment might imply that silt-bearing washings, for example, are not to be regarded as a by-product, but as being “waste”.

³⁵⁸ Case C-235/02, 15 January 2004.

³⁵⁹ Saetti, at paras 42 and 45.

³⁶⁰ Case C-457/02 Judgment dated 11 November 2004.

³⁶¹ Niselli, para 45.

³⁶² Niselli, paras 45, 46, 47, 49 and 52.

³⁶³ Niselli, paras 45, 47 and 52.

³⁶⁴ Niselli, para 52.

A.5.8 Commission v Italy³⁶⁵

The case came to the CJEU for the reason that the European Commission considered that Italy had incorrectly transposed the Directive on Waste into national law. This was because Italian law stated that construction-generated earth and rocks were to be excluded in their totality from the definition of waste.

Not surprisingly, the Court held that the Italian approach to the definition of waste contradicted EU law. As set down in the *Palin Granit* decision, for a material not to be “waste”, its re-use needs to be a certainty. That re-use also must be possible without any form of additional processing, with it being an integral part of either a production process or the material's use.³⁶⁶ Accordingly, while it may well be the case that these criteria collectively will apply in many circumstances, there cannot be a general presumption that they will apply in all instances when surplus rock or soil arises from construction projects.³⁶⁷

In respect of this guidance document, this judgment adds little to the material already presented above. But it has been included here as a further reminder that surplus rock, soil and other similar materials should not be viewed as being beyond the embrace of the definition of waste. To do so, would be to fail to construe the statutory definition of waste in a manner that accords to EU law.

A.6 Extractive “Waste”: Some Key Principles and Outcomes

The more lengthy discussion about these CJEU judgments has been included above for the reason that it provides detailed information about the relevant issues and the findings of the Court about what the term “waste” is to mean. This material also provides useful background to understanding the intent of the four waste/by-product criteria set down in Regulation 27 of the European Communities (Waste Directive) Regulations 2011. Accordingly, this discussion is intended to help both local authorities and operators of extractive waste facilities when they are undertaking an assessment of whether a substance or object is “waste”. A number of the observations in the *Palin Granit* and *AvestaPolarit* decisions are particularly helpful in this respect, being quoted at greater length for that reason.

However, it is also useful that an overall summary is provided of the relevant key principles. While the following summary has been drawn from CJEU case law, the material presented above may also need to be considered and, if necessary, the full texts of all of the judgments must be obtained. As noted elsewhere in this guidance, in all cases the final decision-maker on this issue will be the courts.

The definition of waste is founded on whether the holder of the material discards it, intends to discard it or is required to discard it. In this context, the following principles are relevant:

1. whether a material falls within the scope of the Extractive Waste Directive and the Extractive Waste Regulations has to be assessed on a site-specific, case-by-case basis,
2. a key precept within such an assessment is the need to ensure that the objectives of the EU Directives on Waste and Extractive Waste are fulfilled, with the environment and the public being subject to a high level of protection that reflects the precautionary principle³⁶⁸,
3. the physical or chemical nature of a material does not determine whether it is waste; extractive waste can range from topsoil to inert materials to hazardous waste. Also irrelevant is whether a material has the same physical or chemical composition to other products that are marketed by the site operator,
4. whether a material has a value does not mean that it is not a waste; neither does the fact that it can be re-used or recycled in an environmentally beneficial manner,

³⁶⁵ Case C-194/05, 18 December 2007.

³⁶⁶ *Commission v Italy*, para 46.

³⁶⁷ *Commission v Italy*, para 52.

³⁶⁸ This is the final of the four criteria governing the waste/by-product boundary in Regulation 27(1) of the European Communities (Waste Directive) Regulations 2011.

5. the definition of waste can include materials that are sent off-site and also those which are recovered or re-used on-site,
6. a waste is typically a substance or object that is generated by an extractive or other industrial activity, with its production not being the main purpose of that activity.³⁶⁹ Instead, it is something that inevitably arises from it, constituting a material that the site operator needs to reduce as much as is physically, technically and economically possible,
7. if a substance or object arises from some process where its production is not the objective of that process, it is likely to be a waste. This will usually be the case where additional operations are necessary to make it suitable for use,³⁷⁰ particularly when they are not integral to the actual production process and have to be undertaken separately or off-site,
8. where an extractive waste is processed with a view to changing its physical or chemical properties, the level of processing must be sufficient for it to have identical properties to other, non-waste-based substances or objects for which there is a market,
9. a material stored on-site that has no definitive future use is likely to be a waste, particularly when the site operator cannot point to any clear plans for it. This principle applies to both primary products and materials that have been re-processed,
10. a material may not be a waste when it is clear that it is to be dealt with by a process that is integral with the main production operation. If this is the case, a clear and credible timeline for such processing must be certain, as must be market for it,
11. back-filling processes at quarries and at other extractive sites may be regarded as integral production operations, provided that the back-filling fulfils a clear, credible and defined purpose which is subject to an explicit and binding timeline.³⁷¹ That purpose must not be to rid the operator of the material that is to be deposited,
12. a defined purpose in respect of backfilling will include the need for an operator to respond to some type of obligatory requirement. Examples of such a requirement include an obligation of a planning condition, a lease or other similar legal document. In all of these respects, the operator of the extractive activity must be able to provide a comprehensive demonstration that the likelihood of the backfilling operation is certain and will take place within a clear and definite timeframe.

Naturally, given the need for a case-by-case approach, not all of the above will be relevant in all circumstances. However, in all instances, the key parameter is the need to follow the principles that underlie EU law. As noted, these are set down in Regulation 27 of the European Communities (Waste Directive) Regulations 2011 and by the case law covered above.

A number of the above-listed aspects are self-explanatory, particularly in light of the more lengthy discussion of Regulation 27 and the relevant case-law. In respect of backfilling, it is up to the operator to demonstrate that the operation is needed. For more modern extraction sites, this matter should be clear from the planning conditions or from the planning application documentation and/or the site's environmental impact statement. In other instances, a restoration plan may be sufficient, provided that a mechanism is available to ensure that it is binding on the operator; in all cases, it must also be clear, practical and sufficiently detailed.

In all cases where waste is to be re-used on-site – including for backfilling – the EU case law is clear that the material being re-used must be immediately suitable for the purpose to which it is to be put. If it is not suitable, but requires changes to its physical and chemical state, then it is likely that the material may be a waste. For example, the *Palin Granit* decision states that, as there is a need to interpret the definition of “waste” widely in order to further the underlying purpose of the Directive on Waste, any determination that a material is a by-product rather than a waste

369 The third of the criteria determining the waste/by-product boundary in Regulation 27(1) of the European Communities (Waste Directive) Regulations 2011.

370 The second of the criteria determining the waste/by-product boundary in Regulation 27(1) of the European Communities (Waste Directive) Regulations 2011.

371 The first of the criteria determining the waste/by-product boundary in Regulation 27(1) of the European Communities (Waste Directive) Regulations 2011.

should be confined to “to situations in which the reuse of the goods, materials or raw materials is not a mere possibility but a certainty, without any further processing prior to reuse and as an integral part of the production process”.³⁷²

It follows from this principle that settlement or other processes in engineered and un-engineered lagoons always will involve the handling of extractive “waste”. This is because the settlement process is on-going within these operations, causing this material to be physically changed over time. Given that this process is effectively treating this material to make it suitable for use, the incoming material is not suitable for use in its present form. Accordingly, it is waste.

Finally, in respect of the above principles and the entire waste/non-waste issue, the Palin Granit judgment makes a further and very valid point.³⁷³ This is that, despite a material being defined as waste, EU member states are allowed a significant amount of discretion about the degree to which low environmental impact waste facilities are to be regulated. The CJEU notes that the Directive on Waste allows not only for permits to be issued to regulate waste sites, but also states that activities involving the recovery of non-hazardous waste be subject to a simple registration system.

In this respect, the Extractive Waste Regulations actually go further, absolving most extractive waste facilities from the need to be subject to any form or permit or registration. Instead, the main requirement is to produce an extractive waste management plan and to comply with some general requirements that are intended to prevent environmental pollution or the endangerment of the public. This system is intended to be a lighter touch approach than that contained in the Directive on Waste. It contrasts with the more stringent requirements placed on operators of other types of waste facility, reflecting the fact that many extractive waste facilities do not handle environmentally significant materials and generally have a low potential for environmental impact.

A.7 Materials Imported from External Sources

Many extractive activities will not have available sufficient material on-site to fully fulfil modern requirements for landscaping and site restoration. For example, operators of older quarries may have sold all of the excavated topsoil and/or other over-burden when the site was developed. While it may be acceptable that a site is left as it is on closure, often restoration and landscaping will be a requirement of a site’s planning permission. Such restoration may well entail the importation of suitable materials from external sources.

The importation of restoration materials from elsewhere also causes the subject of the definition of waste to arise. This is because, when it is defined as “waste”, the acceptance of this material will cause the Waste Management Act to apply to the site, raising the issue of whether a waste licence, waste facility permit or certificate of registration is a necessary pre-requisite for the materials’ receipt.

As already noted, the fact that a quarry or other extractive site has a use for a material does not affect whether it is defined as “waste”. The key issue is whether the material is discarded, intended to be discarded or required to be discarded by its holder. Accordingly, this may cause the intent of the person responsible for the source of the material to have to be considered as part of the process of determining whether the incoming material is “waste”. While the relevant requirements have been discussed at more length above, a key factor will often concern whether the material is surplus or otherwise unwanted by its source. This will be particularly relevant when it results from excavation works that are associated with construction activities. For example, is the material required to be discarded, for the reason that the construction works cannot go ahead without its removal? If this is the case, the material may well be waste, with the Waste Management Act and its subsidiary legislation applying.

³⁷² The requirement that the material is not processed to make it suitable for use is also contained in the guidance for England and Wales on the Extractive Waste Directive: see DEFRA (2010) Environmental Permitting Guidance – the Mining Waste Directive, updated May 2010, version 1.1, Appendix 3; available at <http://www.defra.gov.uk/environment/policy/permits/documents/mining-waste.pdf>. It also features in the UK CBI Mineral Group publication The Definition of Waste – Minerals Industry Guidance for Extractive Materials, July 2010. This document was prepared in discussion with the Environment Agency for England and Wales. See <http://www.cbi.org.uk/pdf/2010701-cbi-minerals-guidance-note.pdf>

³⁷³ Palin Granit, para 41.

A.8 Definition of “Waste” and Potential Category A Sites

While the Palin Granit, AvestaPolarit and the other judgments covered above have set down certain decision rules, a recurring theme is the need to ensure that the overall purpose of the EU legislation is being fulfilled. That purpose is to ensure that the environment is protected and that no unacceptable risks are posed to the public. This is explicit in the Directive on Waste,³⁷⁴ with an essentially similar requirement featuring in Directive 2006/21³⁷⁵ and in the Extractive Waste Regulations.³⁷⁶

Accordingly, given the inherent danger or risk that is implicit when a non-licensed Category A facility is identified, it follows that the material contained in such a site always should be considered to be defined as “waste”. This applies regardless of its composition, for the reason that a site exhibiting stability issues may well pose as much a risk to the environment and to the public as might inadequately impounded liquid hazardous waste.

A.9 Does the Extractive Waste Directive affect existing Case Law?

Like the other judgments covered by this chapter, the AvestaPolarit decision pre-dates the transposition date for Directive 2006/21. Accordingly, it cannot be expected to reflect the Directive, particularly as the decision was issued by the CJEU in September 2003, with the Directive not being finalised until May 2006. However, since the transposition of the Directive, the judgment does appear to sit somewhat uncomfortably with Article 10 of the Directive (and hence Regulation 10 of the Extractive Waste Regulations: see Chapter 7 of this guidance document). This is because the Avesta decision is clear that, when backfilling meets the parameters it sets down, the material in question is not to be regarded as “waste”. By contrast, Article 10 of the Directive sets down requirements that are to bind extractive site operators when their back-filling activities “involve placing extractive waste back into excavation voids for rehabilitation and construction purposes” [emphasis added].³⁷⁷

Clearly, if Avesta is followed, it seems likely that much or all of the material utilised in back-filling may not be defined as “waste”, particularly when it has been generated on-site with its re-use being adequately defined, the relevant timescales being certain and the practice being subject to regulatory approval. However, if this is the case, then Article 10 of the Directive and Regulation 10 of the Extractive Waste Regulations would have little or no purpose. Accordingly, it may be that this element of Directive 2006/21 does in fact change, or even set-aside, this facet of the CJEU’s case law.³⁷⁸

While the discussion in the previous paragraph may suggest that it is conceivable that the AvestaPolarit decision is less binding than heretofore, it is neither possible nor appropriate for this guidance note to decide this matter. This is because this issue is one that can only be determined definitively by the national courts and, ultimately, the Court of Justice of the European Union. However, it is raised here to make local authorities aware of its existence, as it may have relevance when legal proceedings relating to non-compliance with the Extractive Waste Regulations are being contemplated.

³⁷⁴ See Directive 2006/21 Article 4 and Directive 2008/98, Article 13.

³⁷⁵ Directive 2006/21, Article 4.

³⁷⁶ See in particular Regulation 4.

³⁷⁷ See also Recital 20 of Directive 2006/21.

³⁷⁸ This outcome would not be unique. For example, Directive 2008/98 on Waste appears to over-rule at least two earlier judgments of the CJEU.

Article 2(1)(b) seems to make the judgment in case C-1/03 Van der Valle no longer have application, while Article 2(2) has a similar effect on the second part of the AvestaPolarit judgment. This means, respectively, that, from 12 December 2010, unexcavated contaminated land is excluded from the scope of the Directive by Article 2(1)(b), while only EU legislation (and no longer also national legislation) is to be classed as “other legislation” in respect of the exclusions from the Directive in Article 2(2).

Appendix 2: European Commission Compliance Questionnaire on the Implementation of Directive 2006/11

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ANNEX III

'Questionnaire for the report by Member States on the implementation of Directive 2006/21/EC

PART A. QUESTIONS TO BE ANSWERED ONCE FOR THE FIRST REPORTING PERIOD

1. *Administrative arrangements and general information*

Please indicate the competent authority(ies) in charge of:

- (a) verifying and approving the waste management plans proposed by the operators;
- (b) establishing the external emergency plans for Category "A" installations;
- (c) issuing and updating permits and establishing and updating the financial guarantee, and
- (d) making inspection of the waste facilities.

2. *Waste management plans and major-accident prevention and information*

- (a) Please describe in brief: the procedures set up for the approval of the waste management plans as referred to in Article 5(6) of the Directive.
- (b) For the category "A" installations not falling within the scope of Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances ⁽¹⁾, please describe the measures taken to:
 - identify major-accident hazards,
 - incorporate the necessary features into the design, operation and closure of the installation, and,
 - limit the adverse consequences for human health and/or the environment.

3. *Permit and financial guarantee*

- (a) Please indicate the measures taken to ensure that all facilities in operation will be covered by a permit in conformity with the Directive before 1 May 2012.
- (b) Please briefly describe the actions taken to make the best available techniques knowledgeable to the authorities in charge of establishing and controlling the permits.
- (c) Please indicate whether the possibility referred to in Article 2(3) of the Directive of reducing or waiving the requirements for the deposit of non hazardous waste – inert or not, unpolluted soil or peat has been used?
- (d) Please explain the measures taken to ensure that permits are regularly updated as foreseen in Article 7(4) of the Directive.
- (e) Please detail the procedure referred to in Article 14(1) of the Directive and set up for the establishment of the financial guarantee and its periodical adjustment. How many installations are already covered by a guarantee in accordance with the provisions of the Directive? How will it be ensured that all installations will be covered by a guarantee before the 1 May 2014?

4. *Public participation, transboundary effects*

- (a) Please explain how the public opinion and comments is analysed and taken into account before the taking of a decision on permits and for the preparation of the external emergency plans.

⁽¹⁾ OJ L 10, 14.1.1997, p. 13.

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(b) For installations having a potential transboundary impact, how is it ensured that required information is made available for an appropriate period of time to the other Member State and to the public concerned?

(c) For Category "A" installations, and in case of major accident, what are the practical arrangements taken to ensure that:

- required information is transmitted immediately by the operator to the competent authority,
- information on safety measures and on action required is provided to the public? and,
- information provided by the operator is forwarded to the other Member State in case of installation with a potential transboundary impact?

5. *Construction and management of waste facilities*

(a) Please detail the measures taken in order to ensure that the management of the waste facilities is achieved by a "competent person" as referred to in Article 11(1) of the Directive and that staff is appropriately trained.

(b) Please describe in brief the procedure set out for the notification to the authority in the 48 hours of any event likely to affect the stability of the facility and any significant environmental effects revealed by the monitoring.

(c) Please describe how, in accordance with Article 11, the competent authority is verifying that regular reports on monitoring results are:

- transmitted by the operator to the authority,
- demonstrating compliance with the permit conditions.

6. *Closure and after closure procedures, inventory*

(a) Please explain in brief the procedure set out to ensure that after the closure of the facilities and when considered necessary by the authority, regular controls of the stability are achieved as well as measure to reduce environmental effect are taken.

(b) Please detail the measure taken to ensure that the inventory of closed facilities as foreseen in Article 20 of the Directive will be achieved by 1 May 2012.

7. *Inspections*

(a) Please briefly explain whether and if yes, how the minimum criteria for environmental inspection ⁽¹⁾ are taken into account for the control of the facilities falling under the scope of the Directive.

(b) Please briefly describe how inspection activities are planned. Are the priority installations for inspection identified and according to which criteria? Are the frequency and the type of inspection adapted to the risks associated with the installation and its environment?

(c) Please explain what inspection actions are carried out such as on site visit routine or not, sampling, control of self monitoring data, control of the "up to date" records of waste management operations.

(d) Please explain the actions taken to ensure that the approved waste management plans are regularly updated and monitored.

(e) What are the rules on penalties applicable to infringement of the national provisions pursuant to Article 19 of the Directive?

⁽¹⁾ Recommendation of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States (OJ L 118, 27.4.2001, p. 41).

PART B. QUESTIONS TO BE ANSWERED FOR ALL REPORTING PERIODS

1. *Administrative arrangements and general information*

- (a) Please indicate the Administrative body (Name, address, contact person, E-mail) in charge of coordinating the answers to this questionnaire.
- (b) If possible, using the table provided in Annex, please provide an estimate of the number of extractive waste facilities on the territory of the Member State.
- (c) Please indicate the number of cases of waste facilities of Category "A" in operation on your territory having a potential environmental or human health impact on another Member State.

2. *Waste Management Plans and Major-accident prevention and information*

- (a) Please describe in brief:
 - the number of waste management plans approved or rejected temporarily or definitively during the reporting period and,
 - if relevant, and if possible, the main reasons for having definitively refused a waste management plan,
- (b) Please provide a list of the external emergency plans referred to in Article 6(3) of the Directive. If all Category "A" installations are not yet covered by an emergency plan, please indicate the number of missing plans and the planning for establishing these plans.
- (c) If a list of inert waste as referred to in Article 2(3) of Commission Decision 2009/359/EC of 30 April 2009 completing the definition of "inert waste" in implementation of Article 22(1)(f) of Directive 2006/21/EC of the European Parliament and of the Council on the management of waste from extractive industries ⁽¹⁾ has been established in your country, please provide a copy of that list including a brief description of the information and data used to determine whether the listed waste could be defined as inert.

3. *Permit and financial guarantee*

If possible using the table in Annex, please indicate the number of installation for which a permit has been issued in conformity with the provision of the Directive.

4. *Closure and after closure procedures, inventory*

- (a) Please indicate how many closure procedures as detailed in Article 12 of the Directive, were undertaken and/or approved during the reporting period.
- (b) How many installations are closed and regularly monitored in your country?

5. *Inspections*

- (a) Please indicate the number of inspections achieved for the reporting period with, if possible, distinguishing inspections achieved in:
 - Category "A" and the other installations,
 - Inert waste installations, and,
 - Non inert, non hazardous installations,

If a programme of inspection has been drawn up at the appropriate geographical level (national/regional/local), please provide a copy of this (these) programme(s) in annex to the report.

- (b) How many cases of non compliance with the provisions of the Directive were identified? Please indicate the main reasons for non compliance and the actions taken in order to ensure compliance with the Directive?

⁽¹⁾ OJ L 110, 1.5.2009, p. 46.

1.5.2009

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6. Other relevant Information

- (a) Please summarise the main difficulties encountered in implementing the Directive. How were these possible problems overcome?
- (b) Please provide any additional comments, suggestions or information in relation with the implementation of the Directive.

ANNEX ⁽¹⁾

	In operation	In operation with permit ⁽¹⁾	In transition ⁽²⁾	In closure phase ⁽³⁾	Closed or abandoned ⁽⁴⁾
Category A ⁽⁵⁾					
Of which "Seveso" installations ⁽⁶⁾					
Not Category A					
Inert waste ⁽⁷⁾					
Non hazardous non inert waste					
Total					

⁽¹⁾ Number of installations having a permit already meeting the requirements of the Directive.

⁽²⁾ Number of installation which will be closed before 2010 and falling under the scope of Article 24(4).

⁽³⁾ Number of installation for which the closure procedure is still ongoing (Article 12).

⁽⁴⁾ If possible, please, provide an estimation of the number of abandoned and closed facilities potentially harmful and falling under the scope of Article 20 of the Directive.

⁽⁵⁾ Installations classified as Category "A" according to Article 9 of the Directive.

⁽⁶⁾ Installations falling within the scope of Directive 96/82/EC.

⁽⁷⁾ Installations treating exclusively inert waste as defined in the Directive.'

⁽¹⁾ If possible, please provide a breakdown per sector for the construction minerals, the metallic minerals, the industrial minerals, the energy minerals and the other sectors.

Appendix 3: Form for EPA assistance under Regulation 9(2)



Form for Assistance Under Regulation 9(2)

Waste Management (Management of Waste from the
Extractive Industries) Regulations, 2009 – SI 566

EPA Ref. N^o: <i>(Office use only)</i>	<input type="text"/>
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Environmental Protection Agency
PO Box 3000, Johnstown Castle Estate, Co. Wexford
Lo Call: 1890 335599 Telephone: 053-9160600 Fax: 053-9160699
Web: www.epa.ie Email: info@epa.ie

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REQUEST FORM GUIDANCE NOTES

This form must be completed in accordance with the guidance notes below and the instructions accompanying each section of the application form.

This form is for the purpose of requesting assistance by a Local Authority in accordance with regulation 9(2) of the Waste Management (Management of Waste from the Extractive Industries) Regulations, 2009 (hereinafter referred to as 'the Regulations'), in relation to the classification of an extractive waste facility.

It should be noted that regulation 9(2) relates to a 'waste facility' as defined in regulation 3(2) of the Regulations. The timeframes set out therein should be noted.

The applicant should conform to the format set out in this form and accompanying instructions. Each page of the completed form must be numbered, e.g. *page 5 of 20*, etc. The basic information should be supplied in the spaces given in the application form, with supporting documentation supplied as attachments, as specified. All sections of the form must be completed. Where a section is not relevant to the application, the words "not applicable" should be clearly written. The abbreviation "N/A" should not be used.

The risk assessment carried out for the purpose of the classification should be submitted in full as Attachment D.1 to this form. The advice circular issued by the Department of Environment, Heritage and Local Government (No WP 24/10) should be consulted on the matter.

All maps/drawings/plans must be no larger than A3 size and scaled appropriately such that they are clearly legible. In exceptional circumstances, where A3 is considered inadequate, a larger size may be requested by the Agency.

All drawings should:

- be titled and dated;
- have a unique reference number and be signed by a clearly identifiable person; and
- indicate a scale and the direction of north.

Information supplied on this form, including supporting documentation, will be available for public display and open to inspection by any person.

An original signed form shall be submitted. A copy of the request form (and any accompanying documentation) shall also be provided on a CD-ROM in searchable PDF format.

It should be noted that it will not be possible to process or determine the request until the required documents have been provided in sufficient detail and to a satisfactory standard.

This document does not purport to be and should not be considered a legal interpretation of the provisions and requirements of the Waste Management (Management of Waste from the Extractive Industries) Regulations, 2009.

SECTION A: NON-TECHNICAL SUMMARY

A non-technical summary is to be included here. The summary should identify all environmental risks and impacts of significance associated with the waste facility **and should clearly state the local authority's opinion on the most appropriate classification of the facility.**

The following information must be included in the non-technical summary:

A brief description of:

- The location of the waste facility.
- A brief history of the facility, the nature of the associated extraction activity, types and volumes of waste deposited, duration of deposition and date of cessation (if applicable).
- A brief description of the surrounding environment.
- Actual and potential environmental risks and impacts.
- A reasoned opinion as to the most appropriate classification for the waste facility.
- The reasons as to why the request for assistance is being made and why a definitive classification for the waste facility cannot be made.

Any supporting information should form **Attachment A.1.**

SECTION B: GENERAL

B.1. Details of the local authority requesting assistance

Name:*	
Address:	
Tel:	
Fax:	
e-mail:	

*Full name and address of the local authority making the request.

Contact details for Correspondence

Name:*	
Local authority:	
Address:	
Tel:	
Fax:	
e-mail:	

*This should be the name of the person nominated by the local authority for the purposes of this request.

Co-Applicant's Details

Name:*	
Address:	
Tel:	
Fax:	
e-mail:	

*This should be the name of a local authority, other than the lead authority, where a site lies in more than one local authority functional area.

SECTION C: WASTE FACILITY DETAILS

C.1. Waste Facility Location

Name:	
Address:*	
Name of contact at the waste facility:	
Tel:	
Fax:	
e-mail:	

* Include any townland

Attachment C.1. should contain appropriately scaled drawings or maps ($\leq A3$) showing the location of the waste facility (and any associated extraction site) in the context of its surroundings and clearly highlighting the facility and site boundary.

C.2. Extractive Industries Register

This relates to the registration of extractive industries (i.e. sites of extraction) as required by regulation 19(1) of the Regulations.

State whether the extraction site associated with the waste facility in question has been registered on the regulation 19(1) online register at <http://www.epa.ie/whatwedo/enforce/pa/extractiveindustriesregister/> and that the boundary drawn of the site on the register represents the full extent of the site.

Finalised boundary of extraction site entered in Online Register?

☐

Provide the unique code assigned to the extraction site in the online register that is associated with the waste facility in question.

Site Code

C.3. Classification as per Regulation 9(1)

State whether or not the waste facility is considered by the local authority to be Category A:

Category A	<input type="checkbox"/>
Non-Category A	<input type="checkbox"/>

Where non-category A, state whether the facility is considered to be either:

Non-hazardous, non inert	<input type="checkbox"/>
Inert, non-polluting	<input type="checkbox"/>

Provide a reasoned opinion for the classification of the waste facility as stated above. This opinion must address the criteria set out in Schedule 3 of the Extractive Waste Regulations (SI No. 566 of 2009) and in Commission Decision 2009/337/EC.

State why regulation 9(2) is being utilised (i.e. reasons for doubt regarding above classification).

Supporting information should form **Attachment C.3.**

SECTION D: RISK ASSESSMENT

The risk assessment must be carried out by a suitably qualified, competent and experienced person.

The advice circular issued by the Department of Environment, Heritage and Local Government (No WP 24/10) should also be consulted on the matter.

The risk assessment should, as a minimum, include the following:

- A brief history of the waste facility.
- The nature of the associated extraction.
- The types and volumes of waste deposited at the facility.
- The duration of deposition and date of cessation (if applicable).
- A brief description of the surrounding environment.
- Actual and potential environmental risks and impacts.
- The most appropriate classification for the waste facility addressing the criteria set out in Schedule 3 of the Extractive Waste Regulations and in Commission Decision 2009/337/EC.

One copy of the risk assessment shall be submitted. The risk assessment shall also be provided on a CD-ROM in searchable PDF format.

The Risk Assessment report should be submitted as **Attachment D.1.**

SECTION E: DECLARATION

Declaration

I certify that the information given in this request is truthful, accurate and complete and that the enclosed risk assessment is a full and complete representation of all relevant work carried out in relation to the facility in question.

I give consent to the EPA to copy this request for its own use and to make it available for inspection and copying by the public, both in the form of paper files available for inspection at EPA offices and via the EPA's website.

This consent relates to this request itself and to any further information or submission, whether provided by me as Applicant, any person acting on the Applicant's behalf, or any other person.

I recognise that any opinion expressed by the EPA on the classification of the waste facility will be based on the information provided by the local authority.

Signed by : _____
(on behalf of the organisation)

Date : _____

Print signature name: _____

Position in organisation: _____

Note 1: The application should be signed by someone operating at a senior level within the organisation.

SECTION F: JOINT DECLARATION

Joint Declaration ^{Note1}

I certify that the information given in this request is truthful, accurate and complete and that the enclosed risk assessment is a full and complete representation of all relevant work carried out in relation to the facility in question.

I give consent to the EPA to copy this request for its own use and to make it available for inspection and copying by the public, both in the form of paper files available for inspection at EPA offices and via the EPA's website.

This consent relates to this request itself and to any further information or submission, whether provided by me as Applicant, any person acting on the Applicant's behalf, or any other person.

I recognise that any opinion expressed by the EPA on the categorisation of the waste facility will be based on the information provided by the local authority.

Lead Authority

Signed by : _____
(on behalf of the organisation)

Date : _____

Print signature name: _____

Position in organisation: _____

Co-Applicants

Signed by : _____
(on behalf of the organisation)

Date : _____

Print signature name: _____

Position in organisation: _____

Signed by : _____
(on behalf of the organisation)

Date : _____

Print signature name: _____

Position in organisation: _____

Note 1: In the case of a request being lodged on behalf of more than one local authority the above declaration must be signed by all applicants.



Headquarters and South East Region

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