

THE DEFINITION OF WASTE DEVELOPMENT INDUSTRY CODE OF PRACTICE

Discussion Paper for Improving Functionality and
Scope.



INTRODUCTION:

The Environmental Industries Commission (EIC) and a number of its members were instrumental in the initial development of the Definition of Waste Development Industry Code of Practice (DoWCoP) and have remained actively engaged in its continuous evolution. EIC strongly advocates for the DoWCoP as a pivotal instrument in promoting the sustainable and secure use of excavated and source segregated materials, thereby contributing to the reduction of disposal in landfills.

The DoWCoP relates to excavated material, which includes:

- Soil, both top soil and sub-soil, parent material and underlying geology.
- Soil and mineral based Dredgings.
- Ground based infrastructure that is capable of reuse within earthworks projects, e.g. road base, concrete floors.
- Made ground.
- Source segregated aggregate material arising from demolition activities, such as crushed brick and concrete, to be reused on the site of production within earthworks projects or as sub-base or drainage materials.
- **Stockpiled excavated materials that include the above.**

To ensure the continued effectiveness of the DoWCoP, it is important to strike a delicate balance, maintaining its robustness to instil confidence within the industry and regulatory bodies, while ensuring a user-friendly approach that services as a practical alternative to the intricate and protracted waste regulations. Moreover, the successful implementation of DoWCoP relies on the participation of a sufficient numbers of industry professionals willing to assume the role of Qualified Persons.

In recent years, EIC has received feedback from numerous members expressing concerns about the potential disruption of this equilibrium within the DoWCoP, and as a result, diminishing its appeal as a convenient means for legitimate sustainable material reuse in development projects. Extensive discussions on this matter have taken place within the EIC Contaminated Land Working Group, leading to the preparation of this paper, which outlines the concerns and offers potential pathways for resolution.

EIC acknowledges and appreciates the Environment Agency's keen interest in this critical issue. EIC remains steadfast in its commitment to support the DoWCoP and is eager to contribute to a broader industry dialogue, offering the following insights to facilitate a comprehensive and productive discussion.

Going concerns – consultation

The Environment Agency has communicated its intention to engage in consultations with the industry regarding the draft version 3 (V3) of the DoWCoP. However, there have been apprehension amongst members regarding the Environment Agency's stance that certain elements have already been finalised by the Environment Agency Board and are not subject to further discussion. Given that the DoWCoP originated as an industry initiative led by EIC, there are notable concerns regarding the limitations placed on the consultation process. EIC members hope that the forthcoming consultation represents a genuine effort by the EA to solicit the input of practitioners on all aspects of the DoWCoP. It is crucial that the Agency incorporates these viewpoints into its decision-making process to propel this invaluable initiative forward in a manner that aligns with the industry's needs and aspirations for the future.

Frequently Asked Questions:

'Challenges and Concerns'

A number of concerns have surfaced within the Industry, predominantly revolving around the unilaterally adopted FAQs and stringent interpretation made by CLAIRE and the Environment Agency, without due consultation with the industry. The following issues, articulated by members, have brought significant unease to the forefront:

- Concerns regarding the imposition of **double regulation**, whereby the Environmental Permitting for the reuse of appropriately treated landfilled waste necessitates both the Mobile Treatment and Deposit for Recovery Environmental Permits. And more worryingly Landfill Permits, on development sites.
- Apprehensions regarding the prioritisation of the **“substitution”** test over the “discard” test during the assessment process.
- Apprehensions regarding the rigid definition of **“stockpiled”** materials, particularly concerning the Site of Origin, as opposed to the comprehensive approach relating to all on site materials envisioned within the DoWCoP. Instances where previously unregulated stockpiles become problematic when an organisation seeks to rectify issues left unattended by others for years have been highlighted.
- Exclusion of agricultural projects involving the reprofiling of “unproductive” land, coupled with the arbitrary exclusion of **“Engineering” operations** within the Development Control regime. Exclusion of any project where arable crops are to be grown or animals grazed afterwards.

Feedback from one of our contractor members, actively engaged in numerous projects and a longstanding advocate of the DoWCoP, underscores the severity of the issue. They assert:

“We are currently tendering for a project where we have had to point out to the client that, if they have to go for a Recovery Permit for the reuse of onsite stockpiles, and can’t do this under DoWCoP, there may be an 18-to-24-month delay in start onsite and even then, no guarantee of approval. This would make the project completely unviable and a proposed development of 250 homes with huge environmental, social, and economic benefits on a long-derelict site could fall away completely. It’s a travesty!”

EIC has received reports from various members underscoring the persistent concerns surrounding timelines and delays associated with Environmental Permitting. Similar sentiments have been echoed by SiLC (Specialists in Land Condition) following their questionnaire (published on the AGS website)¹. Evidently, these challenges bear direct implications for the government's pursuit of a Circular Economy, sustainability initiatives, and the timely delivery of new housing and infrastructure.

These circumstances prompt a critical inquiry into the allocation of regulatory resources toward addressing these abandoned stockpiles. The concern arises as to the significant resources invested in managing these problematic sites under an Environmental Permit, rather than facilitating the reuse of the suitable portion under the DoWCoP during the development phase. Many of these sites have remained unattended for years, contributing to environmental degradation, leaching, and the proliferation of invasive weed species.”

This does beg the question of how much regulatory resource is being expended upon the abandoned stockpiles, that are so problematic that they have to be dealt with under an Environmental Permit as opposed to reuse of the suitable portion under the DoWCoP at the time of development? A number of which are on sites for years, leaching and being vegetated by invasive weeds.

Definition of Waste and cease to be waste:

¹ <https://www.ags.org.uk/2023/06/findings-of-silc-dowcop-industry-survey-regulatory-challenges-for-regeneration-of-historical-landfills-and-reuse-of-stockpiles-and-mineral-waste/>

The driving force behind the proposed updates to the DoWCoP appears to stem from recent case law developments.

EIC has been informed by the Environment Agency that the current iteration of the DoWCoP, published in 2011, does not align with the Definition of Waste based on contemporary case law, leading to its inadvertent application to the projects for which it was not initially intended.

EIC acknowledges the intricate and convoluted nature of waste legislation, often subject to multiple interpretations. The most significant advantage of the DoWCoP lies in that it obviates the need for contentious debates on the definition of waste and the accompanying case law. The four factors outlined within the DoWCoP essentially distil the essence of waste case law concerning excavated materials and source-segregated demolition material. Notably, the Environment Agency's two published position statements, associated with the 2008 and 2011 versions, were drafted in support of the DoWCoP.

It has long been established that landfilled waste, as well as excavated contaminated soil following the Van Welle case, are classified as waste, but not that they will remain waste for perpetuity. Fundamentally, the DoWCoP strives to demonstrate that appropriately treated waste suitable for use can be regarded as non-waste, provided the stringent checks and balances within the DoWCoP are duly adhered to. These checks and balances are notably more comprehensive and subject to greater oversight than similar Quality Protocols.

Referring to Defra's publication, 'Guidance on the Legal Definition of Waste and its Application' (originally published August 2012 which supports the use of the DoWCoP., Paragraph G3.49 explicitly indicates:

“...if that soil is suitable for use without any treatment and is certain to be used for that purpose, it may be classified as a non-waste product, i.e. on the basis that it satisfies the by-products legal test. The Definition of Waste: Development Industry Code of Practice version 2 explains how this can be achieved in Section 2 “Principles for the use of Materials as Non-waste”.

EIC would like to emphasise that Section 2 of the DoWCoP was collaboratively drafted by Environment Agency Lawyers, along with the original Declaration, during the consultation phase for version 1. As such the wording was not amended and remained the same in Version 2 of the DoWCoP.

Following the OSS ruling on the definition of waste, the DoWCoP Steering Group inquired whether the four factors needed re-examination. At the time, the Environment Agency advised against revisiting these factors.

However, both EIC and wider Industry share the view that the Environment Agency and CLAIRE have misapplied certain case law concerning the definition of waste. Following the Tarmac case, EIC engaged in discussions with the Environment Agency regarding the application of the “substitution test” before the “discard test”, noting that the case specifically pertained to recovery versus disposal, with waste originally intended for use in that specific project. The Environment Agency's response stated that the discard test must be applied before the “substitution test” can be considered.

In response to EIC (17th January 2018), the Environment Agency clarified:

“...can confirm that we only apply the recovery or disposal test to waste. We have no statutory duty to regulate material that is not *waste*”.

Despite EIC's request, the FAQ derived from the Tarmac waste recovery case remains unchanged. More recently, CLAIRE's guidance note (28th July 2023) introduced references to Waste Recover, exempting certain “engineering” projects from its scope. In contrast, the DoWCoP concentrates on the “discard” test and endeavours to establish non-waste status, emphasising the material's utilisation as a non-waste.

The industry remains uninformed about the specific case law that prompted the Environment Agency's reassessment of the DoWCoP. The uncertainty continues whether these changes are as a result of evolving case law or a shift in the Environment Agency's policy stance, transitioning towards a more restrictive approach that channels more development projects into the Environmental Permitting sphere, reminiscent of the scenario preceding the release of the DoWCoP V1 and the original Environment Agency Position Statement in 2008.

EIC firmly believes that while the updating of the DoWCoP is welcomed by the development industry, there is growing concern regarding the proposed alterations and the potentially more restrictive direction. This concern is further amplified by the recent shifts in the interpretation of the DoWCoP, particularly the more stringent approach to landfills, stockpiles, and agricultural engineering projects.

In order to foster greater coherence with waste legislation, industry stakeholders advocate for a clearer structure and better alignment, akin to the by-products tests. Additionally, the inclusion of a specific Declaration from the material holder as an appendix to the Material Management Plan (MMP) would be beneficial. Nevertheless, it is the industry's consensus that the DoWCoP's originally envisaged scope should remain intact, supplemented by additional checks and balances as necessary, thereby providing regulators with an added layer of assurance. It is imperative not to overlook the fact that the powers and duties of the regulator have remained largely unchanged throughout the lifespan of the DoWCoP. Furthermore, expanding the scope of the DoWCoP to encompass additional projects and schemes would ensure that more initiatives benefit from its streamlined and sustainable approach.

Disapplication of Current and Historical Landfilled Waste:

A recent correspondence from the Environment Agency to an EIC member, (and others) pertaining to the approval of a Deployment Form associated with remediation of contaminated land under a Mobile Treatment Licence, articulated the following stance:

".... The Environment Agency considers that any material which consists of current or historically landfilled waste remains waste on excavation and therefore cannot be used under DoWCoP. Excavated landfilled waste materials require appropriate waste controls such as an environmental permit for storage, treatment, and deposit. "

EIC acknowledges the Environment Agency's reservations about the application of the DoWCoP to former landfilled wastes. Members have expressed concerns about the implementation of an unpublished position that has not undergone industry consultation, leading to its current piecemeal and confused application across different areas, hindering the progress of various projects due to the "double permitting" requirement.

Instances have been reposted where officers have cited the possibility of utilising the DoWCoP if the landfill is deemed 'inert', only to subsequently disapply it due to the inclusion of a small section described as 'commercial' in a trial pit log. In another example, the DoWCoP was disregarded for an entire area of a significant former quarry due to waste deposition in a smaller location, despite designated quarries being larger than the area of mineral extraction and subsequent landfilling. Consequently, the Made Ground in the entire surrounding area was disallowed.

Recent assertions in response to a letter from SiLC by Defra and the Environment Agency have inaccurately stated that the DoWCoP was not designed for the reuse of treated suitable materials from historical landfill. However, landfills represent a significant subset of land affected by contamination and therefore fall within the purview of the DoWCoP, with numerous sites successfully progressing under the DoWCoP, as indicated in Environment Agency Officers' communications regarding the approval of Remediation Strategies presented as essential supporting information in associated MMPs.

The application of Environmental Permitting takes the form of Mobile Treatment Licences and regulatory-approved Deployment Forms, tailored to the risks associated with treatment of historically landfilled waste. EIC members commend this approach. However, the primary concern lies in the necessity for dual regulation for the permanent use of processed material that is demonstrably suitable for use, whereby the unusable component is dispatched off-site for further processing or disposal. Since 2008, the proportion deemed suitable for use has been permitted for reuse under the DoWCoP.

While the Environment Agency has expressed concerns about the quality of the reusable proportion, citing instances of questionable quality, warranting the disapplication of the DoWCoP for its reuse and necessitating an additional permit for reuse, the question arises as to why double regulation is deemed a more favourable situation. Especially considering that the MTL, regulated by the EA with funding for formal inspection and enforcement actions (e.g., non-compliance with the MTL conditions related to the Deployment Form), already exists.

EIC proposes a potential amendment to the MTL legislation to streamline the process, allowing the EA to apply land quality suitable for use criteria in approving the MTL Deployment Form. This would involve regulating the treatment process emissions AND the reuse criteria, while retaining the DoWCoP scope for the permanent reuse within the development. Such an amendment could be tailored to dovetail seamlessly with other legislative regimes, such as the planning regime and Part 2A, potentially with a clause setting out which is to take precedence over the other if there was any conflict.

EIC does not contest the Environment Agency's classification of landfilled waste as 'legally' classified waste. The primary objective of the DoWCoP was to demonstrate that, post-treatment and compliance with the four factors, a portion of the material could be viewed as a non-waste when reused under an MMP.

Members of the EIC have expressed concerns that this disapplication could pave the way for a broader disapplication to all Made Ground, which, akin to shallow historical landfills, can also be viewed as historical waste following the demolition of previous structures, regardless of contamination. Such Made Ground is ubiquitous in the majority of urban environments and is addressed in almost every development project across the country.

The distinction between shallow historical landfills and Made Ground concerning their waste classification is a pivotal question. Additionally, the query arises regarding whether gas works waste should be classified as 'landfill' or 'Made Ground.'

The objective behind the Environment Agency's disapplication of historical landfilled waste and subsequent reuse under the DoWCoP is unclear. Equally perplexing is the lack of consideration for alternative options.

EIC members advocate for a more pragmatic approach aligned with the development industry, emphasising an assessment of the treatable and suitable proportion of materials, with a clear exclusion pertaining to domestic waste or black bag-type sites. It is crucial to acknowledge that historical waste remains in situ, as a potentially, and actual, pollution source, with EIC members and others at a later date embarking on improvement projects in accordance with modern day controls.

EIC members are of the opinion that the Environment Agency's disapplication of the DoWCoP leads to an increased classification of more materials as 'waste', necessitating an Environmental Permit, such as Deposit for Recovery (DfR) permits. However, the stricter requirements in demonstrating 'recovery', following the Environment Agency revised guidance that followed the Tarmac case, have led to the rejection of numerous Waste Recovery Plans, with the requirement for a 'landfill disposal' permit. The negative connotations associated with a landfill disposal permit have hindered project progression, particularly in residential developments, where the term landfill carries significant negative implications.

The lengthy process of obtaining an Environmental Permit remains prohibitive, with Waste Recovery Plans now necessitating more comprehensive documentation, resulting in increased submission times. With members reporting that they now look at lead in times in obtaining a Site Based Environmental Permit of 18 to 24 months (with noise and dust issues having to be revisited because the EA does not accept the assessment or controls imposed by the Local Planning Authority).

Projects are stagnating due to the current regulatory regime and the shift away from utilising the DoWCoP. The exclusion of numerous developable landfill sites seems arbitrary and obstructs sustainable materials management, offering no discernible economic, social, or environmental benefits.

Members have witnessed the successful treatment and reuse of up to 90% of landfilled wastes under the DoWCoP. If an exclusion must be implemented, EIC suggests it could be based on the quantity of recoverable materials within a landfill following a trial pitting exercise, with a specific exclusion of designated 'domestic' landfill sites.

Qualified Person's Extended Role and Funding:

EIC emphasises the foundational principles outlined in the DoWCoP concerning liabilities and the specific role of the Qualified Person (QP), which was established following exhaustive consultations with industry. The proposed shift of liabilities from the Project Team to QPs, as suggested, may not lead to the resolution perceived issues within the DoWCoP.

EIC acknowledges that the Environment Agency does not receive funding for the review or inspection of Material Management Plans (MMPs) or Verification Reports. This arrangement was initially intended to enable the Environment Agency to allocate its resources towards higher-risk activities, specifically those projects not progressing via the DoWCoP or the permitting regime.

As part of the proposed consultation, the Environment Agency may consider incorporating additional funding arrangements, such as a percentage of Landfill Tax receipts or a proportion of the Declaration fee for a specified number of audits. Qualified Persons, operating in a capacity distinct from their formal review of MMPs, or other suitably qualified individuals, could conduct periodic inspections. However, the scope and practical aspects of this proposal needs to be carefully considered. For instance, it should be determined whether this practice should be applied across all scenarios of the DoWCoP or specifically tailored to certain projects. It is imperative to acknowledge that CLAIRE already conducts periodic audits, supported by a Disciplinary Procedure. Moreover, it is crucial to bear in mind that the utilization of the voluntary code of practice has not in any way altered the regulatory powers and duties available to the Environment Agency.

Furthermore, it is essential to address whether projects progressed under Quality Protocols should be subject to the same procedures, given that they currently do not undergo the same level of review and oversight as projects progressed under the DoWCoP. It is vital to foster consistency and coherence across all related initiatives to ensure equitable treatment and effective oversight within the broader industry landscape."

Agricultural Land and use of the DoWCoP:

EIC received reassurances with regard to the Environment Agency reaffirming that the DoWCoP remains applicable to development projects on agricultural land, provided they fall under the Development Control regime (May 2023).

However, subsequent guidance released by CLAIRE (July 2023), premised on the Environment Agency's concerns, has led to the disapplication of 'Engineering' operations covered by the Development Control regime. The wording of this guidance has introduced further confusion, particularly with specific reference

to waste recovery 'substitution' tests. Also any after use of the land that entails the growing of arable crops or grazing of livestock has also been dis applied on any project. This has major ramifications to infrastructure projects such as railways, roads, and pipelines (the land take been larger than the resultant structure). The vast majority of which have benefitted from the use of the DoWCoP since 2008. The likely effect is use of the DoWCoP in a linear area for the hard structural element and Environmental Permit covering a linear area to one side, or both, in rural settings. Whereas, if absolutely necessary, the final surface layer, above the engineered layer below, could be subject to low-risk environmental permitting.

EIC members have raised questions concerning the Environment Agency's 'risk' concerns pertaining to the application of the DoWCoP to agricultural land, whereas in applying GAC values of housing with gardens, the assumption of 100% consumption of homegrown produce by a 0–6-year-old female, is a scenario unattainable in agricultural settings. The industry advocates for a genuinely risk-based approach that isn't solely based on perceived risks.

The DoWCoP should be actively promoted for the enhancement of agricultural land, such as elevation adjustments following the stripping and storage of topsoil and subsoil for subsequent use and the importation of 'clean naturally occurring soil and mineral material' under the Direct Transfer scenario. It is essential to clarify that this isn't 'land spreading', as it doesn't involve the application of organic wastes to the surface or root zone of crops. That is something that could be available at that site at a later date after the engineering operation.

EIC members welcome open discussions with the Environment Agency and CLAIRE to provide clear, unambiguous guidance regarding acceptable 'developments' on agricultural land, considering additional factors such as agricultural improvement reports, as necessary. It is imperative to address the inconsistency in the approach and the understanding of the DoWCoP's application to the engineering aspects of projects and the after use associated with the final layer.

Concluding remarks:

- Ensure the scope of the published DoWCoP is maintained, including the reuse of stockpiles, and treated landfilled waste. Review FAQs to adopt a more pragmatic approach and consider removing the incorrectly applied waste 'recovery' tests and as stated in the Stockpile FAQ that “regulatory advice” results in the “requirement” of substances and objects to be discarded.
- Include agricultural reprofiling with appropriate additional checks and balances, fully encompassing 'engineering' projects.
- Address the shift towards a more restrictive interpretation. The pursuit of a more restrictive approach seems to be a policy change in interpretation rather than being driven by pollution or harm concerns. Emphasize that waste doesn't invariably remain waste; it can evolve into a non-waste state.
- Establish a representative working group comprising practitioners covering all DoWCoP scenarios to review current and future FAQs before publication. Include transitional arrangements if the DoWCoP's scope becomes more restrictive as a result.
- Refuse to impose more stringent controls than those already enforced via the Development Control regime.
- Ensure that the DoWCoP remains focused on the definition of waste and delineates when waste can be demonstrated to be a non-waste.
- Conduct workshops to raise awareness about the implications of current restrictions or proposed changes to the DoWCoP, especially concerning Made Ground.
- Encourage open discussions on the post-Brexit opportunity to redefine waste classification under UK legislation or to at least interpret the existing definition differently.
- Propose the implementation of new, simplified standard rules for waste recovery permits, with reasonable timeframes from submission to issuance.

- Prioritize updating the DoWCoP without compromising the drive to support a sustainable-led construction industry. Consider the wider implications on the UK construction industry when deciding on the necessary updates and the potential alternatives to the DoWCoP if significant changes are implemented.
- Ensure that the DoWCoP and environmental permitting work in conjunction to support the development industry in delivering more sustainable and low-carbon development, aligning with the Circular Economy principles.