

Environmental Protection Agency

## Guidance on Soil and Stone By-products

Public Consultation

### Introduction

**By making certain that excess soil and stone is beneficially used, a producer will ensure that the material becomes a by-product rather than a waste.**

This guidance sets out the Environmental Protection Agency's (EPA) proposed guidance and regulatory approach to determinations on soil and stone by-products under Article 27 of the [Waste Directive Regulations 2011](#).

The EPA will have regard to this guidance when determining, on a case-by-case basis, if a soil and stone material meets the criteria to be considered a by-product.

### Legislative Background

The Waste Framework Directive provides for uncontaminated excavated soil (used on sites other than the one from which they are excavated) to be considered in accordance with the definition of waste. The provisions on by-products and the provisions covering end-of-waste status are set out in *Recital 11* of the 2008 Waste Framework Directive.

**Definition of Waste** Waste means any substance or object which the holder discards or intends or is required to discard.

The Court of Justice of the European Union has held that there are a wide variety of relevant factors involved in defining waste, not all of which will be applicable to every case. Decisions must be made on a case-by-case approach.

Uncontaminated soil and stone that is used in construction at the same project site from where it was excavated is not waste. For example;

- Soil that is excavated from one part of a road project and used as fill in another part, all within the same site; or
- Soil excavated to enable construction but stored for use later at the same site for landscaping works.

Excess soil and stone produced during construction projects may be a waste if it is discarded, is intended to be discarded or is required to be discarded. It will be a by-product if it meets each of the four by-product conditions detailed below.

### **Policy Context**

1. Recognising the need for a high standard of environmental protection, and the need to promote sustainable and environmentally sound development, the EPA encourages resource efficiency and the sustainable use of resources in Ireland. EU and national policy on resource efficiency seeks to decouple the link between economic growth and environmental impact.
2. The EPA balances the need for precaution and the need to protect the environment (and the cost of such protection) with the need for infrastructural, economic and social progress and development.
3. Prevention is top of the waste hierarchy established by Article 4 of the Waste Framework Directive. By ensuring that excess soil and stone is used as a by-product, waste is prevented.

4. Ireland's Waste Policy (['A Resource Opportunity – Waste Management Policy in Ireland'](#)) puts prevention as a national priority and focuses the National Waste Prevention Programme on resource efficiency, prevention and reuse.

### **Regulatory Position on natural Soil and Stone By-products**

- The EPA encourages the prevention of waste including the lawful and beneficial use of excess uncontaminated soil and stone.
- Whether a material is a 'by-product' or a 'waste' must be decided on a case-by-case basis in consideration of the full circumstances.
- The actions of, and measures taken by, the waste producer are key to determining whether the material becomes a by-product rather than a waste. If the intent or requirement of the producer is to discard, the material is waste. This is so, regardless of whether anyone else has a use for it.

### **By-product Conditions**

Excess soil and stone resulting from excavation works (the primary purpose of which is not the production of soil and stone) is a by-product if all four by-product conditions are met<sup>1</sup>:

- a) further use of the soil and stone is certain;
  - b) the soil and stone can be used directly without any further processing other than normal industrial practice;
  - c) the soil and stone is produced as an integral part of a production process;
- and*

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<sup>1</sup> As set out in Article 5 of the 2008 Waste Framework Directive and Article 27 of the Waste Directive Regulations 2011

- d) further use is lawful in that the soil and stone fulfils all relevant requirements for the specific use and will not lead to overall adverse environmental or human health impacts.

Guidance on understanding these conditions;

- *The intent of the producer will be a key determinant in the EPA's assessment of the by-product conditions (e.g. by-products should not be a burden to a producer. Where the net cost for removal of a material is ultimately borne by the producer, this is more likely to be waste).*
- *If beneficial use(s) are identified for the entirety of the excavated soil from a project, prior to its production, with that use taking place within a definite timeframe, then use will generally be regarded as certain.*
- *The soil and stone should not be polluted or contaminated. The soil may be suitable for use if the soil meets generally accepted<sup>2</sup> standards for management of soil contamination (and supported, where necessary by site specific use risk assessment) and/or the soil is within the forthcoming EPA Guidance Note on Soil Recovery Waste Acceptance Criteria for unlined soil recovery facilities.*
- *In the context of soil and stone, normal industrial practice is taken to mean physical transformation steps such as grading or crushing. It excludes treatment techniques that address typical waste-related characteristics such as dealing with contamination via soil treatment.*

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<sup>2</sup> For example: the LQM/CIEH Generic Assessment Criteria (2<sup>nd</sup> Edition) and the EPA's Management of Contaminated Land & Groundwater at EPA Licenced Sites

- *Storage of excess materials off-site without certainty of use elsewhere is not exempt and is considered a waste activity.*
- *Where soil and stone undergo a recovery operation, this is an indicator that they are waste. Examples include soil cleaning resulting in recovery of the soil; recycling of inorganic construction materials; and including recovery operations listed in Annex II of the Waste Framework Directive 2008/98/EC, as amended.*
- *The re-use of soil and stone must meet all legal requirements, including, but not limited to, planning permission (or exemption criteria) and all associated applicable environmental impact assessment and appropriate assessment, as required by law. The producer will need to satisfy itself on this prior to making the notification, and will need to provide relevant evidence to support this conclusion.*

Nothing in this position paper excludes or exempts destination sites from the need to be fully compliant with all applicable regulatory requirements under waste, planning and other laws.

### **Proposed procedural approach**

- The EPA will produce and maintain guidance to advise and assist Local Authorities in the granting of permissions related to sites using soil and stone by-products as provided for under Section 56 of the EPA Act, as amended.
- Prior to works, an economic operator (being either the material producer, or with the consent of the material producer) notifies the EPA of the by-

product decision (and this is copied to the relevant Local Authorities). The economic operator who notified the EPA should maintain records of their decision for 24 months. A register will be maintained and will be available for public inspection online to include details of origin and destination sites for soil and stone by-product.

- The EPA will take a risk-based approach to making determinations of waste and may not make determinations in all cases. The economic operator who notified the EPA may receive no formal response from EPA or Local Authorities where no determination has been made. The EPA advises waiting at least four weeks prior to moving the material as a by-product. If, within that time, the Agency decides that a detailed consideration of the notified decision is warranted, it will inform the relevant economic operator of this and will initiate a full consultation process. In that case the economic operator is advised not to move the material until the Agency has either decided or indicated that it does not intend to make a determination at this time.
- Compliance with the four by-product conditions remains the responsibility of the producer and holder of the material. Absence of full compliance with the four by-product conditions may result in the material becoming waste. Holding or handling waste illegally risks enforcement action by a Local Authority and/or the EPA, up to and including fines and imprisonment.

## Consultation Questions

**Question 1:** Do you agree with the proposed EPA Regulatory Position on soil and stone by-products.

[Yes or No]

If "no", please explain your reasoning

**Question 2:** Do you understand the four by-product conditions that determine if a material is a by-product?

[Yes or No]

If you don't understand, please explain what further guidance might assist you to determine if a material is a by-product or a waste.

**Question 3:** Do you agree that a period of 4 weeks is a reasonable advisory period for economic operator to wait for an indication of the EPA's intended course of action regarding any individual notification?

[Yes or No]

Please return your answers to the consultation questions above, by e-mail *only*, to [Article27@epa.ie](mailto:Article27@epa.ie) with "Soil & Stone Consultation 2018" in the email subject line before 5pm on **14 December 2018**.

## Frequently Asked Questions

**Question: My soil is contaminated at levels above naturally occurring concentrations, can it be a by-product?**

Answer: Most likely not. The material would most likely need to be discarded, for example by being subjected to a soil cleaning process. This is a recovery operation under Annex II of the Waste Framework Directive.

**Question: I am sending my uncontaminated soil and stone to a backfill operation as part of a quarry restoration work, is it waste?**

Answer: It depends on the entirety of the case by case circumstance.

'Backfilling' is a waste recovery operation where suitable non-hazardous waste is used for purposes of reclamation in excavated areas or for engineering purposes in landscaping. Waste used for backfilling must substitute non-waste materials, be suitable for the purpose, and be limited to the amount strictly necessary to achieve those purposes. Otherwise the backfilling is waste disposal not recovery.

To be a by-product, the soil and stone material must not be a burden which the producer seeks to 'discard'. For example, it should be transferred on terms that are economically advantageous to the producer.

If a producer is not paying the net cost of moving the material into the backfill site it may be a by-product. If the destination site is charging a



gate fee to get the material into the site, it is likely that you are discarding the material and it is a waste.

**Question: What about temporary storage of by-product materials?**

Answer: Waste material may be stored on the site of generation for less than six months before it needs regulation as a waste activity. Storage time does not always indicate that the material is waste. Storage of by-product material can be for greater than six months once certainty of use is established and subject to complying with other regulatory codes.

**Question: What happens if I don't follow the by-product conditions?**

Answer: You may be holding or handling waste illegally or you may have disposed of waste illegally. As a result you risk enforcement action by a local authority and/or the EPA, up to and including fines and imprisonment.

## Case Study Example



This example is designed to illustrate a case in which material was classified by the producer and notified to the EPA as by-product.

55,000 tonnes of stone, from the deepening of the north channel of Dingle Fishery Harbour.

- Use is certain in the N86 Tralee to An Daingean Road Project
- Used directly, equivalent to quarried stone
- Produced as an integral part of harbour works
- Use is lawful and meets engineering specifications for use in the N86 Project

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