

PLANNING

# **Mining Waste Directive**

*Consultation Paper*

April 2008

# **Mining Waste Directive**

## *Consultation Paper*

**Directorate for the Built Environment**  
E-Planning, Planning Policy and North Division  
Minerals and Opencast Coal

T: 0131-244 47062 F: 0131-244 7555  
E: [miningwaste@scotland.gsi.gov.uk](mailto:miningwaste@scotland.gsi.gov.uk)



## **MINING WASTE DIRECTIVE`**

### **Consultation paper**

1. This consultation paper seeks views on the Scottish Government's proposals to implement EU Directive 2006/21/EC on the management of waste from the extractive industries ("MWD") into Scots law.
2. The MWD was adopted by the European Parliament and the Council of the EU on 15 March 2006. It sets out requirements for the management of waste material, such as rock, tailings and overburden, arising from the prospecting, extraction, treatment and storage of mineral resources and the working of quarries for the purposes of preventing harm to the environment and human health.

### **Responding to this consultation paper**

3. We are inviting written responses to this consultation paper by 7 July 2008. Please send your response to:

[miningwaste@scotland.gsi.gov.uk](mailto:miningwaste@scotland.gsi.gov.uk)

or to:

Ian Mitchell  
Directorate of the Built Environment  
Scottish Government  
Area - 2H  
Victoria Quay  
Edinburgh, EH6 6QQ

4. Please indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received. If you have any queries on the content of the consultation paper or the consultation process, please contact Ian Mitchell at [ian.mitchell3@scotland.gsi.gov.uk](mailto:ian.mitchell3@scotland.gsi.gov.uk) or on 0131 244 7062.

### **Scottish Government consultation**

5. The Scottish Government's Directorate of the Built Environment is changing its methods of distribution, with electronic publication for all its publications, subject to only a very small list of exceptions which will also be published in hard copy, such as the National Planning Framework. In addition, it is creating an improved e-newsletter system which will provide an effective way of alerting interested parties to new e-publications, including consultations. To register for

electronic newsletters about planning, please register your details at <http://response.questback.com/scottishexecutive/planning/> as soon as possible.

6. The Scottish Government also has an email alert system for all consultations (**SEconsult**: <http://www.scotland.gov.uk/consultations/seconsult.aspx>). This system allows people to register and receive a weekly e-mail containing details of all new consultations. SEconsult complements the new planning e-publications system described above and allows you to register for consultations on specific topic areas across the Government. Please follow the SEconsult link above if you wish to register.

### **Handling your response**

7. We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** which forms part of this consultation paper as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

8. All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

### **Publishing responses**

9. Where respondents have given permission for their response to be made public (see the attached Respondent Information Form), these will be made available to the public in the Scottish Government Library within 4 weeks of the close of the consultation and on the **SEconsult** web pages within 4 weeks of the close of the consultation. Where agreement to publish has been given, we will check all responses for any potentially defamatory material before logging them in the library or placing them on the website. You can make arrangements to view responses by contacting the Scottish Government Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

### **What happens next?**

10. Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on the content of the draft regulations which are being prepared to transpose the Directive. These will then be laid before the Scottish Parliament. The Scottish Government will publish guidance to assist with the implementation of the new procedures set out in the final regulations.

### **Comments and complaints**

11. If you have any comments about how this consultation exercise has been conducted, please send them to [johnmcnairney@scotland.gsi.gov.uk](mailto:johnmcnairney@scotland.gsi.gov.uk) or contact him on 0131 244 7528.

## A. RESPONDENT INFORMATION FORM: MINING WASTE DIRECTIVE

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

Name:

Postal Address:

1. Are you responding: (please tick one box)
- (a) as an individual  go to Q2a/b and then Q4
- (b) **on behalf of** a group/organisation  go to Q3 and then Q4

### INDIVIDUALS

2a. Do you agree to your response being made available to the public (in Scottish Executive library and/or on the Scottish Executive website)?

- Yes (go to 2b below)
- No, not at all  We will treat your response as confidential

2b. Where **confidentiality is not requested**, we will make your response available to the public on the following basis (**please tick one** of the following boxes)

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

### ON BEHALF OF GROUPS OR ORGANISATIONS:

3 The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government website). Are you also content for your **response** to be made available?

- Yes
- No  We will treat your response as confidential

### SHARING RESPONSES/FUTURE ENGAGEMENT

4 We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in the future in relation to this consultation response?

- Yes
- No

## B. EQUAL OPPORTUNITIES QUESTIONNAIRE

This Equal Opportunities Questionnaire is requested in order that the Scottish Government can build an accurate picture of the make up and diversity of the people and groups that our planning policies impact on, and to ensure that the way in which we carry out our consultations is inclusive and not unwittingly discriminatory. If you have responded to this consultation as an individual it would be helpful if you could complete the form. This information is only used for this purpose.

If you have a disability that requires us to make a reasonable adjustment to enable you to complete this form, please notify us.

Consultation to which you are responding	<b>MINING WASTE DIRECTIVE</b>
Gender	Male <input type="checkbox"/> Female <input type="checkbox"/>

### Ethnic origin

How would you describe your ethnic or cultural origin?		
Black British <input type="checkbox"/>	Indian <input type="checkbox"/>	White European/Other <input type="checkbox"/>
Black African <input type="checkbox"/>	Pakistani <input type="checkbox"/>	Chinese/Other Asian <input type="checkbox"/>
Black Caribbean <input type="checkbox"/>	Bangladeshi <input type="checkbox"/>	Mixed Racial Origin <input type="checkbox"/>
Black Other <input type="checkbox"/>	White British <input type="checkbox"/>	Other
Asian British <input type="checkbox"/>	Irish <input type="checkbox"/>	

### Age

Under 25 <input type="checkbox"/>	25-40 <input type="checkbox"/>	40 – 55 <input type="checkbox"/>	55- 65 <input type="checkbox"/>	65 + <input type="checkbox"/>
-----------------------------------	--------------------------------	----------------------------------	---------------------------------	-------------------------------

### Disability

Do you have a disability as defined by the Disability Discrimination Act 1995 (DDA)?

Yes  No

The definition of a disability under the DDA is “a physical or mental impairment which has a substantial and long term adverse effect on a person’s ability to carry out normal day to day activities.”

## C. THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

Consultation is an essential and important aspect of the Scottish Government's working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a consultation paper inviting answers to specific questions or more general views about the material presented. Consultation papers are distributed to organisations and individuals with an interest in the issue, electronically or in hard copy and are placed on the Scottish Government's consultations webpage<sup>1</sup> to allow for participation from a wider audience. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (eg, analysis of response reports) can be accessed at: [SEconsult \(www.scotland.gov.uk/consultations\)](http://www.scotland.gov.uk/consultations).

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

**While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.**

---

<sup>1</sup> <http://www.scotland.gov.uk/consultations>

# CONTENTS

	PAGE
PART I: INTRODUCTION	
Background	1
The Directive	1
Defining “waste”	1
Adoption principles	4
Main requirements of the Directive	4
Transposition proposal	5
Links to other control regimes	6
Environmental Regulation	6
Health and Safety	7
Waste Framework Directive	8
Summary	9
PART II: TRANSPOSING THE DIRECTIVE	
Modifying the planning system	10
Working together	10
Meaning of “development”	10
The draft Regulations	11
Proposed scope of the Regulations	11
General requirements	12
Categorising sites	13
The Nature of Mining Waste In Scotland	14
New operations	15
Non-waste facilities	15
Considering waste management plans	17
Waste facilities that do not require an Article 7 Permit	18
Waste facilities requiring an Article 7 Permit	19
Financial guarantees	19
Obtaining an Article 7 Permit	21
Category A waste facilities	21
Competency	21
Existing sites	22
Compliance dates	22
Removing permitted development rights	23
Existing sites not requiring an Article 7 Permit	23
Modification to planning permission (agreement with operators)	24
Waste facilities requiring a permit	25
Publicity	25
Fees	26

Other transitional provisions	26
Live applications	27
Other Issues	27
Environmental Impact Assessment	27
Transfer of permissions	28
Monitoring	28
Enforcement	28
Inventory of closed waste facilities	29
Regulatory Impact Assessment	29

### PART III: MAJOR ACCIDENT PREVENTION AND INFORMATION

Intention	30
Category A waste facilities	30
Transposing Article 6	31
Main Requirements	31
Relationship with existing health and safety procedures	32
Duties on Operators	33
Major-accident prevention policy	33
On-site emergency plan	34
Safety Manager	34
Public awareness	34
Role of external bodies	36
Initial notification	36
On-site emergency plans	36
Provision of information to the public	37
Provision of information to SEPA	37
Enforcement	37
External Emergency Plan	37
Accidents	39
Fees	39

# **MINING WASTE DIRECTIVE CONSULTATION PAPER**

## **List of questions**

- Q1 Do you have any views on procedures for considering whether extracted material should be classified as a non-waste by product?**
- Q2 Do you agree that the Scottish Government should take advantage of all available derogations in the Directive?**
- Q3 Do you agree that the planning application process is the most appropriate means of transposing the MWD?**
- Q4 Do you agree that HSE, like SEPA, should become a statutory consultee for all mineral planning applications?**
- Q5 Do you agree that the meaning of “development” should be amended to include the “management of extractive waste”?**
- Q6 Do you agree that permitted development rights for new applications should be removed from Summer 2008 and by 1 May 2012 for existing sites?**
- Q7 Do you agree that there should be a general requirement for mining waste to be subject to the principles of Best Available Techniques Not Entailing Excessive Cost and that this should be demonstrated through waste management plans?**
- Q8 Do you agree that operators, following discussions with SEPA and HSE, should be able to identify the nature of mining waste involved?**
- Q9 Do you agree that compliance with Article 4 should be demonstrated through waste management plans?**
- Q10 Do you agree that the process for considering waste management plans for non-waste facilities are workable?**
- Q11 Do you agree that planning permission for Category A waste facilities should be withheld until an adequate financial guarantee is in place?**
- Q12 Do you agree that placing a general requirement on operators is an appropriate means of securing the competency requirements of Article 11?**
- Q13 Do you agree with the proposal to specify 1 May 2010 as the date that operators of waste facilities must submit the information required by the Directive?**

- Q14** Do you agree that operators of non-waste facilities must submit the information required by the Directive within 18 months of the Regulations coming into force?
- Q15** Do consultees agree that existing Section 67 procedures provide the most appropriate mechanism for bringing planning permissions into line with waste management plans?
- Q16** Do provisions in the 1997 Act provide sufficient and appropriate powers to enable planning authorities to bring existing consents into line with the Directive, if needed?
- Q17** Do you agree that existing sites requiring an Article 7 Permit should be required to submit a planning application by 1 May 2010?
- Q18** Should the Regulations specify a fee for considering waste management plans?
- Q19** Do you have any thoughts on how the inventory requirements of the Directive can be met?
- Q20** Do you agree that the Regulations should require operators to prepare major-accident prevention policies and on-site emergency plans covering the environment?
- Q21** Do you agree that the public awareness requirements of Article 6(6) should be undertaken by the operator?
- Q22** Do you agree that public awareness requirements should be implemented by 1 May 2012 for existing sites and within 6 months of planning permission for new sites?
- Q23** Do you agree with the proposed consultation and notification procedures?
- Q24** Do you agree that existing enforcement powers are adequate to secure compliance with Article 6?
- Q25** Do you agree that “local authorities” should be identified as the “competent authority” for the purposes of Article 6?
- Q26** Do you agree that local authority emergency planning teams should be consulted on all planning applications which involve Category A waste facilities?
- Q27** Do you agree that external emergency plans should be prepared within 6 months (or such longer period, not exceeding 9 months, as may be agreed in writing) from the date that planning permission is granted for a Category A waste facility?

# MINING WASTE DIRECTIVE CONSULTATION PAPER

## PART I: INTRODUCTION

### Background

1. The European Commission's work on mining waste stems from accidents at mines in Romania and Spain that caused considerable environmental damage. Both accidents involved hazardous chemicals (cyanide and arsenic) being transported considerable distance via water and sludge. The accidents raised significant issues relating to the handling and storage of mining waste; public knowledge and understanding of the risks involved; and communication issues between the various responsible authorities and the public.

### The Directive

2. EU Directive 2006/21/EC on the management of waste from the extractive industries ("the MWD") provides for measures, procedures and guidance to prevent or reduce as far as possible any adverse effects on the environment, and any resultant risks to human health, brought about as a result of the management of waste from the extractive industries. Such "waste" includes tailings (i.e. the waste solids or slurries that remain after the treatment of minerals by a number of techniques), waste rock and overburden (i.e. the material that extractive operations move during the process of accessing minerals, including during the pre-production development stage), and topsoil (i.e. the upper layer of the ground) provided that they constitute waste as defined in Council Directive 2006/12/EC ("the Waste Framework Directive"). Member States are required to transpose the MWD into national law by 1 May 2008. Annex A lists all the Articles included in the MWD. The full text of the MWD is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:102:0015:01:EN:HTML>.

### Defining "waste"

3. Article 3(1) of the MWD provides that, for the purposes of that Directive, "waste" is as defined in Article 1(1)(a) of the Waste Framework Directive. There is no definitive list of what is and is not waste within the meaning of that Article. Whether or not a substance or object is waste, and when waste ceases to be waste, are matters that must be determined on the facts of the case and the interpretation of the law is ultimately a matter for the Courts. It rests, in the first place, with the producer or holder of a substance or object to decide whether it is being discarded and is waste.

4. There is now a substantial body of case law by the European Court of Justice (ECJ) on the interpretation of the definition of waste and the meaning of "discard". A summary of the ECJ's judgments on the definition of waste is available on the Department of Environment, Food and Rural Affairs website at:

[www.defra.gov.uk/environment/waste/topics/pdf/ecj-definition.pdf](http://www.defra.gov.uk/environment/waste/topics/pdf/ecj-definition.pdf)

5. The broad effect of the ECJ's judgments is to interpret the meaning of "discard" for the purposes of determining whether or not substances and objects are waste within the meaning of Article 1(1)(a) of the Waste Framework Directive. In this sense, the ECJ's judgments set out principles which apply to all types of waste. However, two of the ECJ's judgments are of direct relevance to the extractive industries.

6. The main question referred to the ECJ for a ruling in the Palin Granit Oy case (C-9/00) was whether leftover stone resulting from stone quarrying is to be regarded as waste. The ECJ's judgment was that:

"leftover stone resulting from stone quarrying which is stored to await possible use, failing which it will remain indefinitely on the site, is to be regarded as discarded or intended to be discarded and is accordingly to be classified as waste within the meaning of Article 1(a) of [the Waste Framework Directive]."

7. The ECJ also concluded in this case that:

"it is not relevant to the classification of the leftover stone as waste (a) whether it is stored on the quarrying site, a site next to it or further away; (b) that it is the same as regards its composition as the basic rock from which it has been quarried and does not change its composition regardless of how long it is kept or how it is kept; (c) that it is harmless to human health and the environment or (d) that it can be recovered as such without processing or similar measures."

8. In the AvestaPolarit case (C-114/01), one of the main issue considered was:

"are leftover rock resulting from the extraction of ore and/or ore-dressing sand resulting from the dressing of ore in mining operations to be regarded as waste within the meaning of Article 1(a) of [the Waste Framework Directive]"

9. The ECJ's judgment was:

"in a situation such as that at issue in the main proceedings, the holder of leftover rock and residual sand from ore-dressing operations from the operation of a mine discards or intends to discard those substances, which must consequently be classified as waste within the meaning of [the Waste Framework Directive], unless he uses them lawfully for the necessary filling in of the galleries of that mine and provides sufficient guarantees as to the identification and actual use of the substances to be used for that purpose."

10. The judgement also states:

"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."

11. The Scottish Government's view is that the ECJ recognised in this judgment that there are circumstances in which residues from mining operations, which are to be used to fill galleries/voids in the mine from which they were extracted, may be classified as non-waste by-products. These circumstances are where:

- (a) the mining operator physically identifies the residues which will actually be used to fill the galleries/voids;
- (b) the mining operator provides the competent authority with sufficient guarantees of that use; and
- (c) the competent authority assesses 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.

12. Other relevant considerations which the ECJ identified in its judgment on the AvestaPolarit case are that:

- (a) the use of the residues to fill the galleries/voids is (i) necessary and (ii) lawful; and
- (b) that the residues are used for this purpose without prior processing.

13. For many mineral sites, the restoration plan submitted to the planning authority may have identified, or will identify, all the residues which will be used to fill the excavation void and compliance is secured through planning conditions. Scottish planning policies for mineral sites highlight the importance of ensuring financial guarantees, or other appropriate mechanisms, are in place to ensure appropriate restoration of sites. Where this is the case, operators and planning authorities may agree that the identification and guarantees requirements highlighted by the ECJ are met. This would enable any material used to fill galleries/voids to be classified as a non-waste by-product. Such material would fall outwith the scope of the MWD although it would continue to be controlled by planning conditions and other controls.

14. The onus must be on operators to provide the necessary identification and guarantees and to obtain the express agreement of the planning authority that material can be considered as a non-waste by product. For new sites, it may be possible for the contents of restoration plans and financial guarantees to be tailored to meet these requirements, with planning consent acting as confirmation that the necessary guarantees have been provided. However, for existing sites, it is unlikely that ECJ compliance would have been part of the planning authorities considerations. Where operators of existing sites believe that the necessary identification and agreements are in place, or will be put in place, they should seek the express agreement of planning authorities that this is the case. Such agreement should be obtained as soon as possible. Material will be regarded as "extractive waste" for the purposes of the MWD if such identification and guarantees cannot be provided to the satisfaction of the planning authority.

**Q1 Do you have any views on procedures for considering whether extracted material should be classified as a non-waste by product?**

**Adoption principles**

15. The requirements in the MWD will affect all on-shore sectors of the mining and quarrying industry that produce “waste” although impacts on individual operations will depend on whether such waste is classified as inert, non-inert non-hazardous or hazardous. The British Geological Survey was commissioned to undertake a study to assess the nature of the waste produced by active mines and quarries in the UK. This study confirmed that nearly all sites in Scotland produced only inert waste. These findings were based on the current methodology available for classifying waste (i.e. European Waste Classification) whilst acknowledging that ongoing work on the Directive through the EC Comitology process may affect the result of this assessment.

16. As most mining waste in Scotland is likely to be inert, significant environmental damage on the Romanian and Spanish scale is unlikely. Indeed, if well constructed, sensibly located and properly managed and maintained in accordance with existing regulatory requirements, the management of extractive waste should be safe and not cause harm to the environment. Scotland has a good recent track record in this area and it is recognised that the industry takes its responsibilities for safety and environmental protection very seriously. The Scottish Government therefore intend to take full advantage of all available derogations within the Directive. This would, in particular, considerably reduce the regulatory burden on those sites that produce waste that is non-hazardous.

**Q2 Do you agree that the Scottish Government should take advantage of all available derogations in the Directive?**

**Main requirements of the Directive**

17. The MWD sets the underlying principles and provisions that must be transposed into domestic law. Many of its measures, including those relating to health and safety and protection of the water environment, are already covered by existing national legislation. However, the way that information is gathered, submitted, considered and approved will need to be revised to take account of the Directive. Most of the following requirements will be dependent on the nature of the waste managed:

- a waste management plan setting out procedures for the minimisation, treatment, recovery and disposal of extractive waste in line with the MWD;
- a major-accident prevention policy, including a safety management system and internal emergency plan - to be drawn up by the operator for the potentially most hazardous waste facilities;
- a permit to operate a “waste facility” for extractive waste;
- closure and after-closure procedures for waste facilities;

- requirement for a financial guarantee (or equivalent) prior to commencement of operations involving the deposit/accumulation of waste in a waste facility.

18. The flow chart at Annex B sets out procedures for classifying waste and confirms that, in relation to the above, sites producing inert waste are likely to be subjected to waste management plan provisions only.

### **Transposition proposal**

19. The Scottish Government's previous consultation on the Directive in 2003 suggested that most of the Directive's requirements were already being met through conditions forming part of the overall planning permission for mining operations. It was, however, acknowledged that it would be necessary to introduce Regulations to change the basis for decision making, in so far as it relates to the management of waste from the extractive industries, so that planning authorities, through the planning application process, would ensure that the objectives of the Directive are met, rather than merely having regard to them as material considerations alongside other considerations. It remains the Scottish Government's intention to bring forward Regulations for consideration by the Scottish Parliament which would set out how existing planning application procedures will be adapted to ensure compliance with the Directive.

20. The Scottish Government's transposition proposals in Part II of this paper continue to reflect the position that waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries should continue to be regulated primarily through the scrutiny afforded by town and country planning legislation. This is currently done through planning conditions which are imposed to control impacts on visual amenity, landscape, traffic, noise, dust, direction of working, moving, handling and sorting of soils and overburden, restoration and after care schemes, etc. Page 26 of *Planning Advice Note 50: Controlling The Environmental Effects of Surface Mineral Working* sets out the main issues which the planning system must address for controlling mining waste and how planning authorities and operators can ensure that activities are effectively controlled. These principles should continue to apply, adapted as necessary, to secure the high environmental standards promoted by the MWD.

21. Most applications for major new mineral sites are likely to require an environmental statement under the Environmental Impact Assessment (Scotland) Regulations 1999. Schedule 4 of these Regulations identify the information that should be included in such statements. This will include proposed measures to prevent, reduce and where possible offset any significant effects on the environment, including effects on population, fauna, flora, soil, water and air. *Scottish Government Circular 15/1999* and *Planning Advice Note 58* provide further information on the EIA process.

22. Consideration of many of the requirements in the MWD relating to the extraction, treatment and storage of waste will be addressed by applicants as part of existing EIA procedures for new proposals. If EIA is not required, applications

should still contain supporting environmental information setting out proposals for waste management. Such considerations will begin as soon as a project is initiated so that environmental issues can be considered as part of the design of the whole project and therefore better enable applicants to eliminate or reduce impacts as far as possible as the project develops.

23. Resultant planning applications and environmental statements are subject to public scrutiny and consultation with statutory bodies. This should ensure that planning authorities are well placed to specify appropriate mitigation measures. The systematic approach to obtaining and considering environmental information required by EIA goes some way to facilitating the MWD's priority for the promotion of sustainable management of extractive industries with a view to reducing their environmental impact.

24. In order to reduce burdens on planning authorities and operators, the Scottish Government's transposition proposals in Part II of this paper propose that most of the new requirements imposed by the MWD are considered as part of the planning application process. The intention is that there will be statutory requirements to ensure that waste management plans and, where necessary, Article 7 Permits are considered as an integral part of an operator's proposal to work a new site.

**Q3 Do you agree that the planning application process is the most appropriate means of transposing the MWD?**

### **Links to other control regimes**

25. The grant of planning permission would not remove the need to meet other requirements of the MWD that are, and will continue to be, secured outwith planning control. Such requirements are likely to include:

#### Environmental Regulation

26. The Water Framework Directive (2000/60/EC), which aims to protect the quantity and quality of water in the whole water environment, was transposed into Scottish Law by the Water Environment and Water Services (Scotland) Act (2003). This Act gave Scottish Ministers powers to introduce regulatory controls over activities in order to protect and improve Scotland's water environment. The Water Environment (Controlled Activities) (Scotland) Regulations ("CAR") 2005, which came into force on 1st April 2006, provides details of these regulatory controls and applies to:

- discharges to all surface waters and groundwaters (replacing the Control of Pollution Act 1974 and Groundwater Regulations 1998);
- abstractions from all surface waters and groundwaters;
- impoundments (dams and weirs) of rivers, lochs, wetlands and transitional waters;
- engineering works in inland waters

27. The Groundwater Directive (80/68/EEC) identifies potential pollutants against which groundwater needs protecting. These potential pollutants are grouped together under List I and List II substances. List I substances are particularly harmful pollutants and must be prevented from entering groundwater. List II substances have the potential to cause pollution. The input of List II substances to groundwater must be limited to avoid pollution.

28. The Scottish Environment Protection Agency (SEPA) regulates discharges to the water environment, including groundwater, under CAR through a system of licences, registrations and general binding rules. CAR requires that both the Groundwater Directive and the Water Framework Directive are complied with. This means that the requirements of the MWD relating to these Directives are achieved through existing CAR controls.

29. A CAR authorisation is not generally required for activities which should not normally cause pollution of the water environment such as the storage of chemicals. SEPA will control these activities by the use of a CAR Enforcement Notice prohibiting or imposing conditions if it is considered that the activity:

- has caused, is causing or is likely to cause significant adverse impacts on the water environment or any part of it; or
- has caused, is causing or is likely to cause a direct or indirect discharge into groundwater of any of the substances listed in Schedule 2 of CAR

30. SEPA has published a Code of Practice<sup>2</sup> for the owners and operators of quarries and mineral extraction sites which covers activities which, if carried out in accordance with good practice, should not normally cause pollution of the water environment. The Code does not specifically deal with intentional discharges to the water environment from mineral extraction sites or with impacts on the water environment from abstractions or impoundment activities. These activities are dealt with as CAR authorisations (General Binding Rules, Registrations or Licences).

31. Mining waste is, in most instances, likely to fall outwith the scope of the Pollution Prevention and Control (Scotland) Regulations 2000. This means that the MWD Regulations would need to include new requirements to ensure that the principles of the IPPC Directive (96/61/EC) relating to air and soil are, where required, applied to the extractive waste industries i.e. the best available techniques required by Article 4. Such objectives would continue to be secured by planning conditions following consultation with SEPA.

### Health and Safety

32. Mines and Quarries in Scotland are already covered by comprehensive health and safety legislation that already ensure compliance with most of the provisions in the MWD relating to human health. The most relevant are the Quarries Regulations 1999. These apply to quarries and opencast coal sites:

---

<sup>2</sup> <http://www.sepa.org.uk/pdf/publications/codes/mineral.pdf>

- being prepared for extraction of minerals;
- where mineral extraction or preparations takes place as part of a work activity;
- where work to prevent water or other material flowing into an adjacent quarry takes place, including after quarrying has finished; and
- being prepared for abandonment, e.g. landscaping.

33. Tips used in conjunction or connection with the operation of a quarry are covered by these Regulations, even if they are some distance from the excavation site. This is the case whether the tip is only used for waste or landscaping material or is, for example, a clay stockpile adjacent to brickworks.

34. The Regulations place duties upon both the person entitled to work the quarry and the operator and includes requirements to produce a Health and Safety document and for all proposed and existing excavations or tips to be appraised at appropriate intervals. Operators also have to follow a set of excavation and tips rules, which specify the way in which the excavation and tips will be constructed and managed to ensure safety.

35. Part II of The Mines and Quarries (Tips) Act 1969 covers disused tips, whether mine or quarry origin. Under these Regulations, local authorities are responsible for ensuring that disused tips do not, by reason of stability, constitute a danger to members of the public. If an authority suspects a tip is unstable, it has the power to ask from the owner, or any other relevant person, all relevant sections, records and plans relating to the security of the tip and its foundations. Authorities can access the tips and its surroundings to carry out site investigations and instruct the owner of the tip to undertake whatever remedial works are considered necessary.

36. In addition, the Health and Safety at Work etc. Act 1974 sets out general duties to secure the health, safety and welfare of persons at work and protecting persons, other than persons at work, against risks to health and safety arising out of or in connection with the activities of persons at work. The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 sets out reporting requirements and procedures for such events.

#### Waste Framework Directive

37. Most types of waste are subject to control under the Waste Framework Directive (2006/12/EC). However, Article 2(1)(b)(ii) excludes from its scope “waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries” where waste of this kind is “covered by other legislation”. In Scotland, Planning and Health and Safety legislation are regarded as “other legislation” and Waste Framework Directive regulatory controls have not therefore been applied to mining waste. However, both the Waste Framework Directive and the Landfill Directive (1999/31/EC) will continue to apply to waste, other than extractive waste, used for the filling in of excavation voids.

## **Summary**

38. The requirements of the MWD impact on planning, environmental and health and safety regulation. In many instances, these requirements are already being met through compliance with existing procedures. The intention is to meet any new requirements by, as far as possible, building on existing arrangements and, where necessary, making adaptations that result in minimising burdens on all concerned. This will clearly involve the need for planning authorities to work closely with SEPA and HSE in considering extractive waste proposals. Part II of this paper sets out how this could be done.

## **PART II: TRANSPOSING THE DIRECTIVE**

### **Modifying the planning system**

39. The Scottish Government's intention is to modify existing planning application procedures so that they explicitly incorporate most of the requirements of the MWD. This will ensure that proposals for the management of extractive waste are considered as an integral part of the whole mineral extraction process and that the total impact of development on local communities and the environment can be fully addressed. Planning controls will continue to be complemented by existing environmental and health and safety legislation although some standalone provisions will be needed to ensure compliance with Article 6's requirements relating to major accident prevention (see Part III of the consultation paper).

40. The following paragraphs set out proposals to transpose the Directive. Once prepared, the content of draft MWD Regulations will be discussed with major stakeholders and notified to others through the E-publications planning newsletter. It is clearly not possible to meet the Directive's compliance date of 1 May 2008 but the intention is to lay the MWD Regulations as soon as possible during Summer 2008.

### **Working together**

41. As confirmed in Part I of this paper, the requirements of the MWD impact on planning, environmental and health and safety regulation and there is a need for the relevant regulatory bodies to work closely together to ensure that the objectives of the Directive are delivered as efficiently as possible. SEPA is already a statutory consultee on all mineral planning applications. This is not the case in relation to HSE and this leaves open the possibility that a planning application can be approved only for it to require subsequent modifications to meet the requirements of health and safety legislation in relation to, for example, the physical stability of tips. This may lead to breaches in compliance with the MWD. However, this situation can be avoided if HSE were to be made a statutory consultee on all new planning applications involving extractive waste. The Executive's advice will help ensure that health and safety aspects of all proposals are appropriately covered prior to work commencing.

**Q4 Do you agree that HSE, like SEPA, should become a statutory consultee for all mineral planning applications?**

### **Meaning of "development"**

42. The MWD Regulations will include provision which will amend the definition of "development" in Section 26 of the Town and Country Planning (Scotland) Act 1997 to make explicit that "development" includes the "management of extractive waste" (i.e. the management of waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries). This should ensure beyond doubt that those requirements of the MWD which fall outwith environmental and health and safety regulation will be subject to the granting of planning permission.

42. Classes 63 and 64 of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 currently grants permitted development rights relating to waste tipping at mines. These Classes include activities that now must be considered in the context of the MWD. It is therefore intended that the MWD Regulations will revoke both Classes to remove existing permitted development rights so that planning permission would be required to undertake these activities. The Class would be removed for new applications from Summer 2008 and by the required Directive implementation date of 1 May 2012 for existing developments.

**Q5 Do you agree that the meaning of “development” should be amended to include the “management of extractive waste”?**

**Q6 Do you agree that permitted development rights for new applications should be removed from Summer 2008 and by 1 May 2012 for existing sites?**

### **The draft Regulations**

44. The MWD Regulations will set out the required statutory procedures for controlling the “management of waste resulting from the prospecting, extraction, treatment and storage of mineral resources and the working of quarries”. This is defined in **Article 2(1)** of the MWD as “extractive waste”. **Article 3** of the MWD sets out other definitions that will be used in the Regulations.

### **Proposed scope of the Regulations**

45. Part I of the consultation paper confirms the circumstances in which non-waste material returned to the excavation void would be exempt from the MWD. In addition, **Article 2** of the MWD excludes a number of further activities from the scope of the Directive. These are:

- 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;
- 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;

46. Article 2(3) also allows competent authorities to reduce or waive the requirements of the Directive for the deposit of non-hazardous waste generated by prospecting of mineral resources (except oil and evaporates other than gypsum and anhydrite), and the deposit of unpolluted soil and of waste resulting from the extraction, treatment and storage of peat, as long as the general requirements under Article 4 are met. As confirmed above, it is the Scottish Government’s intention to take advantage of all available derogations within the Directive. Planning authorities will, therefore, be given powers to waive or reduce the Directive’s requirements in the circumstances set out in Article 2(3).

47. The implications of the other exemptions and derogations provided for in **Article 2(3)** are set out in subsequent paragraphs.

48. **Recital (20)** of the MWD also confirms that waste placed back into excavation voids either for their rehabilitation or for construction purposes related to the mineral extraction process, such as the building or maintenance within voids of means of access for machinery, haulage ramps, bulkheads, safety barricades or berms, needs also to be subject to certain requirements in order to protect surface water and/or groundwater, secure the stability of such waste, and ensure appropriate monitoring upon cessation of such activities. Accordingly, such waste will not be subject to those requirements of the MWD relating exclusively to “waste facilities”, except for the requirements mentioned in the specific provision on excavation voids at Article 10. Such waste is still caught by Article 5’s requirements for a waste management plan

49. The following types of waste are also excluded from the scope of the MWD but will remain under the control of the Waste Framework Directive and, where appropriate, the Landfill Directive:

a) waste which is generated at a prospecting, extraction or treatment site and transported to a location that is not a waste facility within the terms of the Directive. **Recital (8)** of the Directive confirms that the management of waste of this kind will continue to be subject to control under the Waste Framework Directive, the Landfill Directive and other relevant Community legislation;

b) extractive waste which is deposited, at a waste facility, with non-extractive waste. This is because a waste facility within the terms of the Directive is an area designated for the accumulation or deposit of extractive waste only and the deposit of other types of waste is subject to control under the Waste Framework Directive and, where appropriate, the Landfill Directive.

### **General requirements**

50. **Article 4** of the MWD requires operators to take measures to prevent or reduce as far as possible any adverse effects on the environment and human health. Such measures are to be based, amongst other things, on the best available techniques applied through Directive 96/61/EC on integrated pollution prevention and control and should take account of the technical characteristics of the waste facility, its geographical location and the local environmental conditions. The measures set out in Directive 96/61/EC cover issues such as low waste technology, overall impact on the environment, accident prevention, energy efficiency and the consumption of raw materials. These measures do not presently apply to extractive waste in Scotland so the Regulations will need to include a requirement for operators to demonstrate compliance with Article 4. It is proposed that such compliance should adhere to the Best Available Techniques Not Entailing Excessive Cost principles that are used for the purposes of the Environmental Protection Act 1990 and in EC pollution control Directives and that operators should demonstrated compliance as part of the waste management plan required under Article 5. Non-hazardous prospecting waste and peat sites will need to demonstrate compliance

with Article 4 separately if planning authorities have reduced or waived the other requirements in the Directive.

51. **Article 21(2)** requires Member States to ensure that the competent authority follows or is informed of developments in best available techniques. **Article 21(3)** confirms that the Commission shall organise an exchange of information between Member States and the organisations concerned on best available techniques, associated monitoring and developments in them. The Commission will publish this information. It is likely that the Scottish Government will need to provide further guidance/advice in due course to highlight the outcome of this further work.

**Q7 Do you agree that there should be a general requirement for mining waste to be subject to the principles of Best Available Techniques Not Entailing Excessive Cost and that this should be demonstrated through waste management plans?**

### **Categorising sites**

52. The flow chart at Annex B sets out how the Directive impacts on particular waste streams. This confirms that all non-exempted sites producing extractive waste will be covered to varying extents by the MWD and, in particular, will need to comply with **Article 5** requirements for a waste management plan although some of the provisions in Article 5 apply only to those sites that are categorised as either a “waste facility” or a “Category A waste facility”.

53. “Waste facilities” are those sites where the accumulation or deposit of extractive waste, whether in a solid or liquid state or in solution or suspension, takes place for the following time-periods:

- no time-period for Category A waste facilities and facilities for waste characterised as hazardous in the waste management plan;
- a period of more than six months for facilities for hazardous waste generated unexpectedly;
- a period of more than one year for facilities for non-hazardous non-inert waste;
- 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.

54. 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 Scottish Government’s interpretation is that the definition of waste facility also excludes the following from its scope:

- the accumulation or deposit of unpolluted soil, non-hazardous prospecting waste, waste resulting from the extraction, treatment and storage of peat and inert waste for a period of less than 3 years; and
- the accumulation or deposit of non-hazardous non-inert waste for a period of less than 1 year unless in either case the waste is deposited in a Category A waste facility.

55. In addition to a waste management plan, operators of waste facilities will be required to obtain a Permit which complies with **Article 7** of the MWD. Permits are subject to the further requirements of Articles 8 (public participation), 11 (construction and management of waste facilities); 12 (closure and after-closure procedures); 13 (prevention of water status deterioration, air and soil pollution); 14 (financial guarantees) and 17 (inspections by the competent authority). However, Article 2(3) of the MWD provides that, “inert waste and unpolluted soil resulting from the prospecting, extraction, treatment and storage of mineral resources and the working of quarries and waste resulting from the extraction, treatment and storage of peat shall not be subject to Articles 7, 8, 11(1) and (3), 12, 13(6), 14 and 16, unless deposited in a Category A waste facility.” In addition, the Scottish Government intends to take advantage of the derogations which allow Member States to waive the requirements of Articles 11(3), 12(5) and (6), 13(6), 14 and 16 for non-hazardous non-inert waste unless deposited in a Category A waste facility.

56. Category A waste facilities are defined in Annex III of the Directive as those sites where if:

- 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
- contains waste classified as hazardous under Directive 91/689/EEC above a certain threshold; or
- it contains substances or preparations classified as dangerous under Directives 67/548/EEC or 1999/45/EC above a certain threshold.

57. Only Category A waste facilities will be subject to **Article 6**'s major accident prevention requirements and, because of the higher level of risk associated with these sites, most of the provisions of the Directive will be relevant, particularly those relating to financial guarantees and transboundary effects.

### **The Nature of Mining Waste In Scotland**

58. As part of the transposition process, the British Geological Survey has undertaken a study to assess the nature of the waste produced by active mines and quarries in the UK. The report concluded that, in Scotland, there were 368 active mines and quarries in operation at December 2006. 354 of these sites produced inert waste only. Only 14 opencast coal sites are listed as capable of producing hazardous waste.

59. Subsequent discussions confirmed that the generation of hazardous waste at opencast coal sites is likely to be an extraordinary occurrence rather than the norm since the majority of sites extract using a dry dig process, which produces inert overburden. The generation of hazardous waste occurs when coal is recovered by washing, a process usually supplementary to a dry dig coal recovery operation. The washing process produces water containing suspended solids that must be treated before disposal; this waste can be classified as hazardous.

60. This suggests that the vast majority, if not all, of waste produced at sites in Scotland will be inert. However, under Article 22 of the Directive, the EC is required to adopt by 1 May 2008 a number of specific implementing and amending measures. This includes interpretation of the definition of 'inert waste' set out in Article 3(3) and involves further research and discussions between the Commission and Member States. The UK Government is actively involved in this process and it is recognised that the outcome will have a bearing on the impact of the Directive on UK mining and quarrying industries. The UK is seeking to ensure that the outcome is based on a proportionate and risk-based approach to the management of extractive waste. It is expected that formal proposals on these matters will be brought forward shortly by the Commission for agreement by Member States.

### **New operations**

61. The expectation is that applicants for new mineral developments would hold initial discussions with the planning authority, SEPA and HSE. This will provide an opportunity to consider the principle of using the land for mining or quarrying development; the categorisation of extractive waste; and the operator's proposals for the minimisation, treatment, recovery and disposal of waste (in line with Articles 4 and 5 of the Directive). Such pre-application discussions should already be an integral part of the planning application preparation process and in managing the interface between planning, pollution and health and safety controls.

62. The expectation is that, following these discussions, applicants will be able to self-classify the waste status of the site, and include the relevant information required by the Directive with their planning application. Subsequent consultation with SEPA and HSE should result in confirmation that self-classification is correct.

**Q8 Do you agree that operators, following discussions with SEPA and HSE, should be able to identify the nature of mining waste involved?**

### **Non-waste facilities**

63. Following initial discussions, the operator would submit a planning application to the planning authority. This would include a standalone waste management plan which, in accordance with Article 5(1), should set out the operators proposals for the minimisation, treatment, recovery and disposal of extractive waste, taking account of the principles of sustainable development. To enable compliance with the Directive in one consideration process, the Scottish Government intend to require plans to contain the information required to comply with **Articles 4, 5 and 10** of the Directive by including at least the following elements (it should be noted that all the Directive's

requirements are included for ease of reference although those in bold will only apply to waste facilities):

**(a) where applicable, the proposed classification for the waste facility in accordance with the criteria laid down in Annex III:**

**(i) where a Category A waste facility is required, a document demonstrating that a major-accident prevention policy, a safety management system for implementing it and an internal emergency plan will be put into effect in accordance with Article 6(3);**

**(ii) when the operator considers that a Category A waste facility is not required, sufficient information justifying this, including an identification of possible accident hazards;**

(b) waste characterisation in accordance with Annex II of the Directive and a statement of the estimated total quantities of extractive waste to be produced during the operational phase;

(c) a description of the operation generating such waste and of any subsequent treatment to which it is subject;

(d) a description of how the environment and human health may be adversely affected by the deposit of such waste and the preventive measures to be taken in order to minimise environmental impact during operation and after closure, **including the aspects referred to in Article 11(2) (a), (b), (d) and (e);**

(e) the proposed control and monitoring procedures pursuant to Articles 10, when applicable, **and 11(2)(c);**

**(f) the proposed plan for closure, including rehabilitation, after-closure procedures and monitoring as provided for in Article 12;**

(g) measures for the prevention of water status deterioration in accordance with Directive 2000/60/EC and for the prevention or minimisation of air and soil pollution pursuant to Article 13;

**(h) a survey of the condition of the land to be affected by the waste facility, where applicable; and**

(i) how operations will comply with the best available techniques of Article 4.

**Q9 Do you agree that compliance with Article 4 should be demonstrated through waste management plans?**

## Considering waste management plans

64. Waste management plans should provide sufficient information to enable planning authorities to evaluate the operator's ability to meet the following objectives set out in **Article 5(2)**:

(a) to 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 this Directive 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) to 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 the Directive where relevant;

(c) to 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.

65. Many of the waste management plan objectives should already be an integral part of the consideration process for new developments and, in most instances, compliance with existing requirements in relation to planning, environmental and health and safety regulation and good practice advice should go some way to

securing compliance. Such advice is primarily provided in PANs 50 and 64 and SEPA's Code of Practice for owners and operators of mineral sites.

66. Planning authorities would continue to determine planning applications by assessing whether the proposed development is an acceptable use of land and the environmental effects of extraction and restoration and aftercare proposals are acceptable. In addition, authorities would have to evaluate the operator's ability to meet the objectives of the waste management plan as set out in Article 5(2). Ensuring plans meet the requirements of Article 5(2) would be a statutory requirement, rather than a material consideration, whilst recognising, in some instances, that the measures proposed by operators will continue to be secured through existing environmental or health and safety regulation.

67. SEPA and HSE will be statutory consultees for all planning applications. Their advice on the contents of waste management plans will be crucial in helping the planning authority decide whether proposals are consistent with the environmental and health and safety requirements of the Directive, whether additional information was required, and the conditions to be attached to any planning permission. The planning authority would be obliged to consider the advice provided by SEPA and HSE when considering the planning application.

68. If the planning authority is satisfied that the site does not involve a waste facility it can proceed to determine the application. The waste management plan element of the application should only be approved if it complies with Articles 4, 5 and 10 of the Directive. Planning permission would be made subject to a condition that the waste management plan shall be reviewed every five years and/or amended, as appropriate, in the event of substantial changes to the waste deposited and that any amendments should be notified to the planning authority.

69. Where planning permission is approved, applicants would still need to obtain separately relevant SEPA consents and comply with laws relating to health and safety.

**Q10 Do you agree that the process for considering waste management plans for non-waste facilities are workable?**

**Waste facilities that do not require an Article 7 Permit**

70. The Directive exempts waste facilities from requiring an Article 7 Permit in specific circumstances. This includes, in particular, where inert waste or unpolluted soil is accumulated or deposited for more than 3 years and the facility is not classified as posing a major accident risk under Category A. When assessing such risk, **Recital (15)** confirms that "a waste facility should not be classified in Category A solely on the basis of risks to the safety and health protection of workers" which is covered by other Community Legislation. In addition to being exempt from requiring an Article 7 Permit, such facilities are also exempt from the requirements of Article 8, 11(1) and (3), 12, 13(6), 14 and 16.

71. A planning applications involving a waste facility which does not require an Article 7 permit should be considered in the same way as a site requiring only a

waste management plan. However, operators will be expected to comply with additional waste management plan requirements relating to waste facilities. Again, consultation with SEPA and HSE should clarify which requirements will be secured through existing environmental or health and safety regulation. As with waste management plans, such requirements should not form part of planning authorities' considerations.

### **Waste facilities requiring an Article 7 Permit**

72. Where operators have "self-classified" that development would involve a "waste facility" and that an Article 7 Permit is required, applications must, in addition to Article 5 requirements, also include at least the following 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 submitted as part of the planning application;
- (d) if required, adequate arrangements by way of a financial guarantee or equivalent, as required under Article 14;
- (e) the information provided by the operator in accordance with Article 5 of Directive 85/337/EEC (1) if an environmental impact assessment is required under that Directive.

### **Financial guarantees**

73. In relation to (d) above, Article 14 of the Directive requires a financial guarantee (e.g. in the form of a financial deposit, including industry-sponsored mutual guarantee funds) or equivalent, before the commencement of operations involving the accumulation or deposit of extractive waste in a waste facility. The purpose of this guarantee is to ensure that all the Directive's obligations placed upon waste facilities, including after-closure provisions, are discharged; and that there are funds readily available at any given time to rehabilitate the land affected by the waste facility to a satisfactory state.

74. There are associated provisions setting out the general basis for calculating the guarantee, and requiring periodical adjustments to the size of the guarantee. The European Commission is preparing technical guidelines for the establishment of the financial guarantee, as required by Article 22 of the Directive.

75. The exclusions and use of the derogations provided by Article 2(3) of the Directive mean that a financial guarantee would not be required unless the waste is to be deposited in a 'Category A' waste facility. It is therefore envisaged that the requirement for a financial guarantee will apply only to a small number of extractive waste facilities, if any.

76. If a financial guarantee is required, it should be considered as part of the planning application process. Such consideration is already the norm in cases where planning authorities consider that a financial guarantee is necessary before a planning application to extract minerals is approved. Article 7 requires that no waste facility shall be allowed to operate without a permit and that an operator should only be granted a permit if all the relevant requirements of the Directive is complied with. This will mean that, where required, planning permission should only be granted if an acceptable financial guarantee is in place. This will be confirmed in the Regulations.

**Q11 Do you agree that planning permission for Category A waste facilities should be withheld until an adequate financial guarantee is in place?**

77. If a planning application involving a waste facility is submitted and does not include any of the above information (where required) then the planning authority should advise the applicant of the need to provide the outstanding information. Once received (whether with the application or subsequently), the planning authority should consult with SEPA and HSE in the same way that they would for a planning application involving a waste management plan. In most instances, it is likely that consultation will take place conjointly on both the waste management plan and waste facility requirements.

78. **Article 8** sets out the Directive's requirements for notifying the public of an application for an Article 7 Permit. Existing planning application procedures ensure that proposals for new mineral sites are subject to public advertisement so are considered to already fully meet the requirements of Article 8.

79. Planning authorities would determine planning applications by assessing whether the proposed development would be an acceptable use of land in the context of the development plan and all other material considerations. In addition, the planning authorities would have to consider whether the proposed extractive waste management operations complied with the Directive's general objectives, as set out in Article 4; the requirements for a waste management plan set out in Article 5, and that the operator has complied with all the requirements of the Directive relevant to waste facilities. SEPA and HSE will be statutory consultees for all planning applications. Their advice will be crucial in helping the planning authority decide whether the application met the requirements of the Directive, whether additional information was required, and the conditions to be attached to any planning permission. The planning authority would be obliged to consider the advice provided by SEPA and HSE when considering the planning application.

80. Where planning consent is granted, it should be subject to a condition that the waste management plan and waste facility are reviewed every five years and/or amended, as appropriate, in the event of substantial changes to the operation of the waste facility or to the waste deposited and that any amendments should be submitted for the approval of the planning authority. In addition, conditions should secure compliance with Article 7(4) requirements relating to monitoring results and best available techniques; Article 11 requirements relating to the construction and management of waste facilities; and Article 12 requirements relating to closure and after-closure procedures. The need to comply with these requirements, and how this should be done, will be clarified in the Regulations.

## **Obtaining an Article 7 Permit**

81. Article 7(3) of the Directive confirms that the competent authority shall only grant a permit if it is satisfied that the operator complies with the relevant requirements of the Directive and Article 7(1) makes clear that “no waste facility shall be able to operate without a permit”. The planning application process cannot, on its own, confirm such compliance since meeting all the requirements of the Directive will be reliant on other consenting regimes outwith planning control. Article 7(1) of the Directive, however, allows for the possibility for an Article 7 Permit to be a combination of consents. Any planning permission, including a satisfactory financial guarantee (where required), will therefore be only one part of an Article 7 Permit.

82. To ensure full compliance with Article 7, the draft Regulations will include a requirement that, regardless of planning consent, no waste facility will be able to operate until the operator also obtains any consents under the Water Environment (Controlled Activities) (Scotland) Regulations 2005 needed to meet the requirements of the Directive. The operator would then need to apply (subject to payment of the appropriate fee) for the necessary consent from SEPA before operations at the waste facility can commence. Such consents would then form further elements of the permit required under Article 7. Accordingly, the operator would need to obtain both the planning permission granted by the planning authority and any relevant authorisations and consents granted by SEPA in order to meet the requirements for an Article 7 permit and commence operations at the waste facility.

## **Category A waste facilities**

83. If a waste facility is classified as a Category A waste facility then, in addition to the financial guarantee requirements of Article 14, it will have to comply with Article 6’s requirements relating to major-accident prevention and information. This is considered further in Part III of the consultation paper.

## **Competency**

84. Article 11(1) includes an additional requirement on member states to take “appropriate measure to ensure that the management of a waste facility is in the hands of a competent person and that technical development and training of staff are provided” in relation to any waste facility involving non-inert waste or a Category A waste facility. A further requirement at Article 11(2)(c) is that 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.”

85. The Quarries Regulations 1999 already require that all those working at a quarry must be competent before works start, whether or not they are employees of the quarry operator; and that there are sufficient competent people on site to manage the quarry and supervise as necessary. The requirement for competence is not restricted to quarry managers and those who work on the site, but also to all those in the management structure whose decisions affect quarry operations. HSE’s policy on competence is at [www.hse.gov.uk/foi/internalops/sectors/manuf/3\\_05\\_15.pdf](http://www.hse.gov.uk/foi/internalops/sectors/manuf/3_05_15.pdf). The Scottish

Government's view is that these existing arrangements already meet the competency requirements in the Directive in relation to health and safety, including instability monitoring and inspection requirements.

86. The Regulations will need to make specific provision to ensure compliance with the competency requirements relating to water or soil contamination in Article 11(2)(c) of the Directive. It is proposed that the model in health and safety legislation is followed. This would mean that the Regulations would place a general requirement on operators to ensure that "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 water or soil contamination." are in place, including "technical development and training" of such persons.

**Q12 Do you agree that placing a general requirement on operators is an appropriate means of securing the competency requirements of Article 11?**

## **EXISTING SITES**

### **Compliance dates**

87. The Scottish Government's aim is to implement the Directive in a way that imposes minimum burden on planning authorities and operators. However, the Directive sets out compulsory requirements to evaluate waste management plans and, where necessary, to ensure permits are in place before a waste facility can operate. Member States must ensure that all existing waste facilities comply with the provisions of the Directive by 1 May 2012 although any requirements for a financial guarantee will not need to be met until 1 May 2014. The intention is for the Regulations to specify 1 May 2010 as the date that operators of waste facilities must submit the necessary information to planning authorities. This date, which will apply regardless of whether an Article 7 Permit is required, should allow sufficient time for planning authorities and, if necessary, SEPA, to issue the necessary consents ahead of the Directive's compliance date of 1 May 2012. This will be particularly crucial if the site involves an Article 7 Permit since all the necessary consents must be in place by 1 May 2012 or operations would need to cease until consents are obtained.

88. The Directive does not include specific transposition provisions for existing sites not involving a waste facility. The Scottish Government is therefore proceeding on the basis that there is an expectation that such sites should comply with the Directive as soon as possible after the Regulations come into force. The regulations will, however, need to set out a realistic timetable that allows sufficient time for the preparation and submission of waste management plans. It is proposed that 18 months should be sufficient. This would include an initial period to ensure that all operators are informed of the new requirements.

**Q13 Do you agree with the proposal to specify 1 May 2010 as the date that operators of waste facilities must submit the information required by the Directive?**

**Q14 Do you agree that operators of non-waste facilities must submit the information required by the Directive within 18 months of the Regulations coming into force?**

## **Removing permitted development rights**

89. Certain waste functions currently benefit from permitted development rights under Class 63 of the Town and Country Planning (General Permitted Development) (Scotland) (Order) 1992. These functions are conditional on waste management schemes being approved by planning authorities. The Scottish Government's understanding is that waste activities are, instead, generally covered within the main application for mineral extraction and that existing permitted development rights are rarely used. The intention is for the MWD Regulations to end these rights since there is no guarantee that approved schemes satisfy the requirements of Article 5 of the Directive. Existing sites with waste management schemes already in place will continue to benefit from these rights until 1 May 2012.

90. For existing sites, new arrangements must be put in place to ensure that activities fully meet the requirements of the Directive. It is likely that, for these sites, mining waste activity would have been considered as an integral part of overall extraction proposal rather than a separate activity. So, whilst operating standards at many sites will be of a standard promoted through the Directive, necessary arrangements must still be put in place to ensure that the requirements, particularly those relating to the provision of information, are met. Such arrangements must necessarily be tailored to reflect the waste produced at the site.

## **Existing sites not requiring an Article 7 Permit**

91. Where a site is not classified as a waste facility it is proposed that a lighter regulatory touch can be adopted to ensure activities at existing sites fully meet the requirements of the Directive. The intention therefore is for the Regulations to provide that if a site was already in operation on 1 May 2008, and operations complied with an existing planning permission/permitted development rights, then operators would be required to submit a waste management plan that complied with the relevant provisions of the Directive. The Regulations will confirm that plans should be submitted within 18 months and subsequent activities at the site must be carried out in accordance with the plans as subsequently approved by the planning authority.

92. The Regulations would require approved plans to be reviewed every five years and/or amended, as appropriate, in the event of substantial changes to the way waste is deposited. Any amendments shall be notified to the planning authority. These plans would continue on this basis and remain outwith the planning application process.

93. When preparing waste management plans, operators will, in most instances, begin by revisiting information already submitted with the planning application, including the accompanying Environmental Statement, with the intention of resubmitting this in a way that ensures compliance with Article 5. This will also include identifying where the requirements of the Directive are being met through compliance with non-planning legislation. For example, all existing sites will already be covered by health and safety legislation relating to the physical stability of mines to a standard which already secures compliance with the Directive. The Plan should

also identify whether more must be done to ensure compliance with the Directive and how the operator intends to do this.

94. Once received, planning authorities will need to ensure that the Plan does not relate to a waste facility and that sufficient information is provided to enable them to ensure that their responsibilities under the Directive are met. In reaching a decision on the waste management plan, consultation with HSE should not be necessary although the views of SEPA may need to be sought.

95. Existing waste facilities which do not require an Article 7 permit should be considered in the same way as a site requiring only a waste management plan. The Regulations will confirm that plans should be submitted by 1 May 2010 and subsequent activities at the site must be carried out in accordance with the plans as subsequently approved by the planning authority. As with new sites, operators will be expected to comply with additional waste management plan requirements relating to waste facilities. Again, consultation with SEPA and HSE should clarify which requirements will be secured through existing environmental or health and safety regulation. As with waste management plans, such requirements should not form part of planning authorities' considerations.

#### **Modification to planning permission (agreement with operators)**

96. In instances where the existing planning permission is subject to conditions that are contrary to any approved waste management plan (i.e. soil handling strategies and restoration plans) then it may be necessary to modify the planning permission. The 1997 Act includes Order making provisions that enable planning authorities to modify existing planning permissions. Section 67 sets out the procedures to be followed when an operator does not object to the modification. These procedures require public advertisement and provide for instances where objections to the modification are received. Where, following agreement of a waste management plan, the original consent has to be revisited insofar as it applies to the management of waste it is anticipated that operators will generally be content to agree to such revisions and, if necessary provide appropriate information, to ensure compliance with the Directive and that the procedures at Section 67 of the Act will be the most appropriate way to bring the planning permission into line with the waste management plan.

#### **Q15 Do consultees agree that existing Section 67 procedures provide the most appropriate mechanism for bringing planning permissions into line with waste management plans?**

97. Where submitted Plans do not meet the requirements of the Directive it is hoped that matters can be resolved through discussions with the operator. In the unlikely event that this cannot be done, planning authorities would be required to take the necessary action to ensure compliance. In extreme cases, planning permission and the conditions attached to that permission, insofar as they relate to the management of extractive waste, may need to be modified. In such instances an Order under Section 65 of the Act would be necessary following the procedures set out in Section 66.

98. Compensation is payable in the event of modification of planning permission which affects working rights. It is not anticipated that modifications to planning permissions to ensure compliance with Directive requirements would affect working rights in general, as the modifications would simply require different ways of operating in relation to waste management activities. Therefore it is unlikely that the issue of compensation will arise.

**Q16 Do provisions in the 1997 Act provide sufficient and appropriate powers to enable planning authorities to bring existing consents into line with the Directive, if needed?**

#### **Waste facilities requiring a permit**

99. As with new operations, operators would need to come to a view as to whether an extractive waste facility (under the terms of the Directive) existed and, if such a facility did exist, whether an Article 7 permit was required to operate that facility. Where this is the case, it is proposed that operators must submit a planning application (including a waste management plan) by 1 May 2010. This would be dealt with in the same way as a new application. It is not clear how many sites will be affected by this requirement until considerations on what constitutes inert waste have concluded. However, it is not anticipated that there will be many. This is considered to be the most appropriate way of ensuring that the Directive's requirements, particularly those relating to public participation are met.

**Q17 Do you agree that existing sites requiring an Article 7 Permit should be required to submit a planning application by 1 May 2010?**

100. The application should include all the information, including the proposed waste management plan, to ensure compliance with the relevant requirements of the Directive. The application should relate only to those aspects of the operation involving the management of extractive waste. The planning authority would then determine the application in the normal way, subject to consultation with the SEPA, HSE and the public. As with new operations, the planning authority would only grant planning permission if it were satisfied that the operation complied with all the relevant requirements of the Directive. Planning permission would supersede existing consents so the Order provisions needed for non-waste facility would not be needed.

101. As with new applications, operators may need to apply to SEPA for any necessary consents/modifications and, where necessary, ensure compliance with Article 6 in order to meet Article 7 permitting requirements. These would need to be obtained by 2012 to enable continuous operation of the waste facility. If this is not done, operations must cease until the necessary consents have been received. The financial guarantee requirement, if required, would not need to be met until 1 May 2014.

#### **Publicity**

102. There would be an imperative to ensure that mineral operators were aware of the new provisions and the need to submit revised waste management plans, etc.

The Scottish Government will work with industry representative bodies to ensure that this is done. However, it will also be necessary for legislative provisions to be put in place to ensure all operators receive appropriate notification. Given that there are procedures in place requiring mineral sites to be reviewed (Schedule 10 of the 1997 Act) the expectation is that planning authorities should be aware of all working sites in their areas. The intention is therefore to include provision in the Regulations requiring planning authorities to notify all operators in their area that from 1 May 2012 it will not be lawful to operate an existing waste facility unless it is operated in accordance with the Directive. Such notification should be done within 6 months of the Regulations coming into force.

## **Fees**

103. Existing sites that require an Article 7 Permit will be subject to the Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Regulations. However, there is no existing provision relating to fees to planning authorities for considering waste management plans. A comparison may be made to procedures for the review of old mineral permissions. These reviews do not incur a fee because operators have already paid a fee to obtain their original development consent.

## **Q18 Should the Regulations specify a fee for considering waste management plans?**

### **Other transitional provisions**

104. Article 24 of the Directive sets out transitional provisions, which will apply to extractive waste management operations which are in existence at the time the Directive comes into force on 1 May 2008. As confirmed above, it is intended to use 1 May 2010 as the date for both submitting waste management plans and, if required, a planning application. Failure to do so will mean that operators will not be in compliance with the Directive.

105. Article 24(4) provides that only some of the Directive's requirements will apply to waste facilities that:

- stopped accepting waste before 1 May 2006;
- are completing the closure procedures in accordance with applicable Community or national legislation or programmes approved by the competent authority; and
- will be effectively closed by 31 December 2010.

106. The Scottish Government proposes to rely on the existing legislative framework to deliver the Directive's requirements applying to any such waste facility. Closure procedures will therefore continue to be governed by planning conditions dealing with the restoration and aftercare of mineral sites, and existing health and safety and environmental legislation covering other aspects, such as health and safety precautions, pollution control and operator competence, will continue to apply.

The exclusions and derogations in Article 2(3) of the Directive will also be relevant as to which of the Directive requirements will apply to any particular waste facility covered by Article 24(4).

107. However, in order to ensure that the relevant requirements of the Directive are met in respect of closure and after-closure procedures, the Scottish Government proposes to place an obligation on planning authorities to make sure that the existing mineral planning permission for any waste facility covered by Article 24(4) will satisfy the Directive's requirements, including the general requirements of Article 4. The Scottish Government does not expect that any significant changes to planning permission conditions will be necessary as planning authorities are already expected to control the environmental effects of mineral sites by use of planning conditions. However, the Scottish Government proposes to provide a power for planning authorities to impose additional planning conditions where necessary, to ensure compliance with the relevant requirements of the Directive.

108. The Scottish Government must notify the Commission of waste facilities falling within Article 24(4) by 1 August 2008. As this information is not held centrally, it will be necessary for the Scottish Government to contact planning authorities and operators separately to obtain the information required by the Commission.

109. Article 24(3) applies to waste facilities closed by 1 May 2008. Operators of such facilities are required to comply with the Directive only in respect of after-closure procedures. The Scottish Government's view is that existing legislation delivers these requirements of the Directive and does not propose to make any legislative changes.

### **Live applications**

110. Existing application undetermined at 1 May 2008 must comply with the provisions of the Directive with immediate effect. This means that planning permission should not be granted on or after that date unless the applicant has complied with the relevant provisions of the Directive. Where relevant, applicants should be asked to categorise the extractive waste associated with the proposed development and to submit any further information that is necessary to enable the application to be determined. Planning authorities should then consider this information in the same way as they would an application for a new operation, as set out previously in the consultation paper.

## **OTHER ISSUES**

### **Environmental Impact Assessment**

111. Proposals for new mineral sites will be covered by the provisions of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 1999 if the proposed development falls within Schedules 1 or 2 of the Regulations. Where EIA is required, operators will need to assess the impacts of the whole development i.e. both the extraction of minerals and the associated management of extractive waste. Article 7(2)(e) confirms that any environmental impact assessment should form part of the application for a permit. This is not considered to impose

significant new burdens. For existing sites, any application involving a waste facility may also trigger EIA if it involves a Schedule 1 or 2 development. When considering this, account should only be taken of the area of land where the management of waste takes place and not to other aspects relating to the original planning consent.

112. The Directive does not apply EIA provisions to waste management plans in the same way as it does for the Article 7 permitting process. The Scottish Government's view is that such plans are concerned with the minimisation, treatment, recovery and disposal of extractive waste and this is separate from any "development consents" that have already been obtained by operators. However, the need to consider whether EIA is relevant will be triggered if an approved waste management plan necessitates the need to revisit the original development consent.

### **Transfer of permissions**

113. Where the operator of a waste management operation changes, planning permission runs with the land, so that anyone carrying out an operation on the land concerned is bound by the planning permission and accompanying conditions. There would therefore be no need to apply for a transfer of the planning permission. However, operators would need to apply for transfer of other consents, such as groundwater consents, and also meet operator competence authorisation requirements.

### **Monitoring**

114. The planning authority would be responsible for monitoring operator compliance with the conditions attached to the planning permission and Article 17 introduces a new requirement for planning authorities to inspect waste facilities covered by Article 7. The Scottish Government's intention is to introduce a fee charging regime so that planning authorities can charge operators a fee for regular site visits carried out to mineral sites to monitor compliance with the planning permissions to which they are subject. Such arrangements should help authorities periodically review the planning permission for waste facilities requiring an Article 7 permit and, where necessary, update permit-related conditions in the circumstances set out in Article 7(4) (e.g., where there are substantial changes in the operation of the waste facility).

### **Enforcement**

115. Planning authorities currently have discretionary powers under planning legislation to take enforcement action if they consider that the conditions attached to the planning permission had been, or were likely to be, contravened. To ensure compliance with the Directive, the exercise of planning authority enforcement powers in relation to the management of extractive waste would have to be made subject to a duty to give effect to the Directive's requirements. SEPA has existing powers of enforcement in relation to the discharge consents, as do HSE in relation to health and safety legislation.

## **Inventory of closed waste facilities**

116. Article 20 of the Directive requires Member States to ensure that an inventory of closed waste facilities, including abandoned waste facilities, is drawn up, periodically updated and made available to the public by 1 May 2012. The Inventory should include only those sites which cause serious negative environmental impacts or have the potential of becoming in the medium or short term a serious threat to human health or the environment. The Scottish Government is considering how best to take this work forward. Once a national Inventory is complete, it may be appropriate to pass this work on to local authorities so that they can maintain, and update, the Inventory for sites in their areas as required by the Directive.

**Q19 Do you have any thoughts on how the inventory requirements of the Directive can be met?**

## **Regulatory Impact Assessment**

117. A Regulatory Impact Assessment will be prepared to accompany the final version of the Regulations. This will be subject to prior discussion with the industry.

## **PART III: MAJOR ACCIDENT PREVENTION AND INFORMATION**

### **Intention**

118. Article 6 of the MWD sets out measures aimed at minimising the risk of major accidents and guaranteeing a high level of protection for the environment and human health. Where such risk exists, operators must adopt and apply a major-accident prevention policy for waste. This should involve the delivery of a safety management system, emergency plans to be used in the event of accidents and the dissemination of safety information to persons likely to be affected by a major accident. In the event of an accident, operators should be required to provide the competent authorities with all the relevant information necessary to mitigate actual or potential environmental damage. These particular requirements do not apply to those waste facilities falling within the scope of Directive 96/82/EC on the control of major-accident hazards involving dangerous substances.

### **Category A waste facilities**

119. Article 6 only applies to waste facilities classified as Category A in Annex III of the MWD. These are where:

- 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
- it contains waste classified as hazardous under Directive 91/689/EEC (the Hazardous Waste Directive) above a certain threshold; or
- it contains substances or preparations classified as dangerous under Directives 67/548/EEC (the Directive on Classification, Packaging and Labelling of Dangerous Substances) or 1999/45/EC (the Dangerous Preparation Directive) above a certain threshold.

120. The inclusion of the first criterion means that all extractive waste from mineral sites, including inert and non-inert non-hazardous, has (at least) the potential to lead to the classification of a facility as Category A. However, in assessing risk, **Recital (15)** of the MWD confirms that “a waste facility should not be classified in Category A solely on the basis of risks to the safety and health protection of workers” which is covered by other Community Legislation.

121. Article 22 confirms that the definition of the criteria for the classification of Category A waste facilities is still subject to final agreement under the Comitology process. At present, it is not possible to say how many waste facilities will be classified under Category A in accordance with the final, adopted criteria. However, the overall number is expected to be small, if any.

## **Transposing Article 6**

122. As confirmed above, Article 6 does not apply to Category A waste facilities falling within the scope of Directive 96/82/EC. The relevant parts of that Directive are transposed in domestic law by the Control of Major Accident Hazards (COMAH) Regulations 1999. These Regulations apply mainly to the chemical industry, but also to some storage activities, explosives and nuclear sites, and other industries where threshold quantities of dangerous substances identified in the Regulations are kept or used. For other Category A waste facilities, the intention is to transpose the requirements in Article 6 through new procedures similar to those in the COMAH Regulations. This part of the consultation paper identifies how this would work in practice.

123. The following provisions will apply to both new and existing sites involving a Category A waste facility. The transposition proposals set out in Part II of this consultation paper would mean that all existing sites requiring an Article 7 Permit – including those involving a Category A waste facility - would need to submit a planning application by 1 May 2010. These procedures allow a year to consider the application for a Permit and related requirements, including those in Article 6. This will ensure that, in all cases, considerations in relation to Article 6, including the need to provide competent authorities with the information necessary to prepare external emergency plans, is considered in tandem with the planning application process.

124. Article 5(3)(a) specifically refers to the need for operators to demonstrate that, if required, “a document demonstrating that a major-accident prevention policy, a safety management system for implementing it and an internal emergency plan will be put into effect” as part of the process for providing a waste management plan under Article 5. This, in effect means, that an Article 7 permit for a Category A waste facility can only be granted (and works can commence) when an operator has demonstrated compliance with Article 6 requirements.

125. As confirmed in Part II of this consultation paper, HSE and SEPA will be consulted on all new planning applications involving extractive waste and all existing applications that require an Article 7 permit. This should better facilitate early discussions and close co-operation on all aspects of Directive, including those relating to Category A waste facilities.

## **Main Requirements**

126. There are a number of roles arising from the implementation of Article 6. The first set of duties fall on operators. Article 6(3) of the MWD requires them to take steps to prevent major accidents. Specifically, they must:

- prepare a Major Accident Prevention Policy (MAPP) and put into effect a safety management system implementing it;
- put into effect an internal emergency plan specifying the measures to be taken on site in the event of an accident;

- appoint a safety manager responsible for the implementation and periodic supervision of the MAPP.

127. Article 6(6) also includes a requirement to provide information to the public on safety measures and action to be taken in the event of an emergency. Following the COMAH model, this duty will also fall on operators.

128. The MWD is silent on what role is appropriate for other bodies in relation to the duties placed on operators. Provisions will be needed to ensure that procedures put in place by operators are sufficient to meet the MWD's general obligations. Under COMAH, SEPA and HSE are identified as appropriate consultation bodies.

129. Finally, Article 6(3) requires "competent authorities" to draw up external emergency plans. Linked to this, are duties to provide the public with 'early and effective opportunities to participate in the preparation or review of the external emergency plan'. Under COMAH, these duties fall on local authorities.

### **Relationship with existing health and safety procedures**

130. Article 6 includes provisions that are intended to address risks of major accidents in relation to both health and safety and the environment. Responsibility for health and safety legislation in Scotland is a matter for the UK Government. Many of Article 6's requirements in relation to human health are already secured by operators through compliance with the Quarries Regulations 1999. These include:

- organisation and personnel – operators of mines and quarries are required to document their management structures in a health and safety document. There are also requirements to ensure that staff are trained and competent;
- identification and evaluation of major accident hazards – before a tip or lagoon is constructed the operator must establish whether it presents a significant hazard, and if so, commission a specialist geotechnical assessment;
- operational control – mines and quarries are required to draw up 'tipping rules' which not only set out the design specification for the waste facility but also the management and monitoring arrangements to ensure the tip or lagoon is built in accordance with the tipping rules;
- managing change – there are requirements for the review of safety measures. These arrangements must be recorded in the health and safety document;
- planning for emergencies – there are duties on escape and rescue from mines and quarries, as well as on safety drills;
- monitoring, audit and review – there are requirements on inspection, as well as on the review of safety measures.

131. The Quarries Regulations 1999 do not, however, include procedures that meet the MWD's requirements for off-site emergency plans insofar as they should cover human health. The Scottish Government is considering with HSE how best to introduce such requirements in Scotland. In the meantime, the following requirements will relate solely to those Article 6 provisions which fall within the devolved competency of the Scottish Government i.e. the provisions required to implement the Directive's environmental objectives.

## **Duties on Operators**

### Major-accident prevention policy

132. The proposed Regulations will require operators to draw up a major-accident prevention policy and to put into effect a safety management system implementing the policy before operations can commence. Annex 1 of the MWD confirms that the operator's major-accident prevention policy and safety management system should be proportionate to the major-accident hazards presented by the waste facility. For the purpose of implementing them, account should be taken of the following elements:

(1) the major-accident prevention policy should include the operator's overall aims and principles of action with respect to the control of major-accident hazards;

(2) the safety management system should include the part of the general management system which includes the organisational structure, responsibilities, practices, procedures, processes and resources for determining and implementing the major-accident prevention policy;

(3) the following issues shall be addressed by the safety management system:

(a) organisation and personnel — the roles and responsibilities of personnel involved in the management of major hazards at all levels in the organisation; identification of training needs of such personnel and the provision of the training so identified; and involvement of employees and, where appropriate, subcontractors;

(b) identification and evaluation of major hazards — adoption and implementation of procedures for systematically identifying major hazards arising from normal and abnormal operations and assessment of their likelihood and severity;

(c) operational control — adoption and implementation of procedures and instructions for safe operation, including maintenance of plant, processes, equipment and temporary stoppages;

(d) management of change — adoption and implementation of procedures for planning modifications to, or the design of, new waste facilities;

(e) planning for emergencies — adoption and implementation of procedures to identify foreseeable emergencies by systematic analysis and to prepare, test and review emergency plans to respond to such emergencies;

(f) monitoring performance — adoption and implementation of procedures for the ongoing assessment of compliance with the objectives set by the operator's major-accident prevention policy and safety management system, and the mechanisms for investigation and taking corrective action in case of non-compliance. The procedures should cover the operator's system for reporting major accidents or near misses, particularly those involving failure of protective measures, and their investigation and follow-up on the basis of lessons learnt;

(g) audit and review — adoption and implementation of procedures for periodic systematic assessment of the major-accident prevention policy and the effectiveness and suitability of the safety management system; the documented review of performance of the policy and safety management system and its updating by senior management.

#### On-site emergency plan

133. Operators will also need to prepare an internal emergency plan specifying the measures to be taken on site in the event of an accident. To comply with Article 6(4), this must be adequate to secure 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 the environment;

(b) to implement the measures necessary to protect 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.

#### Safety Manager

134. Operators will also need to appoint a safety manager responsible for the implementation and periodic supervision of the major-accident prevention policy.

#### Public awareness

135. Article 6(6) requires that information on safety measures and on the action required in the event of an accident is provided free of charge, and as a matter of course, to the public concerned. This will need to include at least the following information:

- (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 this Directive and, when applicable, that the information relevant to the elements referred to in Article 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 off-site 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.

136. The intention is to follow COMAH by placing this requirement on the operator and for the information to be subject to 3 yearly reviews and, where necessary, updated (as also required by Article 6(6)). The MWD does not place a timetable on when this information is provided to the public and does not link such provision to Article 5's waste management plan requirements. However, it must be assumed that, for existing sites at least, compliance must be ensured by Article 24(1)'s date of 1 May 2012. For new sites, the Scottish Government' view is that this information should properly be provided after planning permission for a Category A waste facility

is granted and that 6 months from such an approval appears reasonable. This would separate the requirement from the planning application/Article 5 consenting process.

**Q20 Do you agree that the Regulations should require operators to prepare major-accident prevention policies and on-site emergency plans covering the environment?**

**Q21 Do you agree that the public awareness requirements of Article 6(6) should be undertaken by the operator?**

**Q22 Do you agree that public awareness requirements should be implemented by 1 May 2012 for existing sites and within 6 months of planning permission for new sites?**

### **Role of external bodies**

137. COMAH sets out appropriate roles for external bodies in relation to activities that fall within the scope of these Regulations. The intention is for the MWD Regulations to include similar provisions. This is explained further in the following paragraphs, with appropriate adaptations where considered necessary.

#### Initial notification

138. Within a reasonable period of time prior to the start of construction of a Category A waste facility (or by 1 May 2012 for an existing facility) the operator must send to HSE and SEPA a notification containing the following information:

- 1 the name and address of the operator;
- 2 the address of the Category A waste facility concerned;
- 3 the name or position of the person in charge of the facility;
- 4 information sufficient to identify the dangerous substances or category of dangerous substances present;
- 5 the quantity and physical form of the hazardous and/or dangerous substances present and any risk assessment undertaken to show that failure or incorrect operation could give rise to a major accident taking into account factors such as the present or future size, the location and the environmental impact of the waste facility;
- 6 details of the elements of the immediate environment liable to cause a major accident or to aggravate the consequences thereof.

#### On-site emergency plans

139. The operator shall consult:

- (a) persons employed in the establishment;

- (b) the Scottish Environment Protection Agency;
- (c) the emergency services;
- (d) the health authority for the area where the establishment is situated;  
and
- (e) the local authority in whose area the facility is situated;

on the preparation of the on-site emergency plan.

#### Provision of information to the public

140. When preparing information, the operator must consult the local authority in whose area the establishment is situated and such other persons who the operator considers appropriate. The operator shall remain responsible for the accuracy, completeness and form of the information supplied to the public.

#### Provision of information to SEPA

141. As with COMAH, there will be a general requirement that, when requested to do so by SEPA, operators must provide sufficient information to demonstrate that they have taken all measures necessary to comply with the requirements of the MWD Regulations relating to Article 6.

#### **Q23 Do you agree with the proposed consultation and notification procedures?**

#### Enforcement

142. It is considered that sufficient enforcement provisions are already available to the various relevant regulatory bodies to ensure compliance with Article 6. SEPA has appropriate powers under the Water Environment (Controlled Activities) (Scotland) Regulations 2005 and planning authorities can take enforcement action under town and country planning legislation.

#### **Q24 Do you agree that existing enforcement powers are adequate to secure compliance with Article 6?**

#### **External Emergency Plan**

143. The MWD places a duty on the 'competent authority' to prepare an external emergency plan specifying the measures to be taken off-site in the event of an accident. As part of the application for an Article 7 Permit the operator shall provide the competent authority with the information necessary to enable the latter to draw up that plan. There is also an important Directive requirement for public participation in the preparation or review of the off-site plan.

144. Under COMAH, responsibility for preparing “off-site emergency plans” rest with the local authority in whose area the establishment is located. These duties are likely to be undertaken by Councils, in many instances working jointly. The intention is to follow this model and identify “local authorities” as the “competent authority” for the preparation of external emergency plans and for ensuring appropriate consultation on such plans is undertaken.

**Q25 Do you agree that “local authorities” should be identified as the “competent authority” for the purposes of Article 6?**

145. As with on-site emergency plans, external emergency plans must be adequate to secure 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 the environment;

(b) to implement the measures necessary to protect 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.

146. The operation of a Category A waste facility is dependent on the meeting of the Article 6 requirements placed on operators set out above. This means that commencement of operations is not dependent on an external emergency plan being in place although there is a requirement in Article 6(3) for operators to provide, with the application for a Permit, the information that will be needed to draw up an external emergency plan. This suggests that arrangements should be put in place to ensure that “competent authorities” (i.e. local authority officials responsible for external emergency plans) are consulted as part of the planning application process for Category A waste facilities and that planning permission should not be granted until they are satisfied that all the necessary information has been provided to enable them to draw up an external emergency plan. In practice, such work is unlikely to commence until planning permission is granted.

147. The COMAH Regulations require off-site emergency plans to be prepared no later than 6 months (or such longer period, not exceeding 9 months, as may be agreed in writing) from the date of notification of the need to prepare a plan. It is proposed to include similar timescales for the MWD although this period will begin on the date that the planning application is approved.

**Q26 Do you agree that local authority emergency planning teams should be consulted on all planning applications which involve Category A waste facilities?**

**Q27 Do you agree that external emergency plans should be prepared within 6 months (or such longer period, not exceeding 9 months, as may be agreed in writing) from the date that planning permission is granted for a Category A waste facility?**

### **Accidents**

148. The Directive requires Member States to ensure that, in the event of a major accident, the operator immediately provides the competent authority with all the information required to assess and minimise the extent, actual or potential, of the environmental damage. Such a requirement will be included in the Regulations and this will be extended to include SEPA to parallel the Agency's responsibility under COAMH. The MWD Regulations will also include provisions similar to those in Regulation 12 of COMAH which places a duty on operators to put into effect on-site emergency plans.

### **Fees**

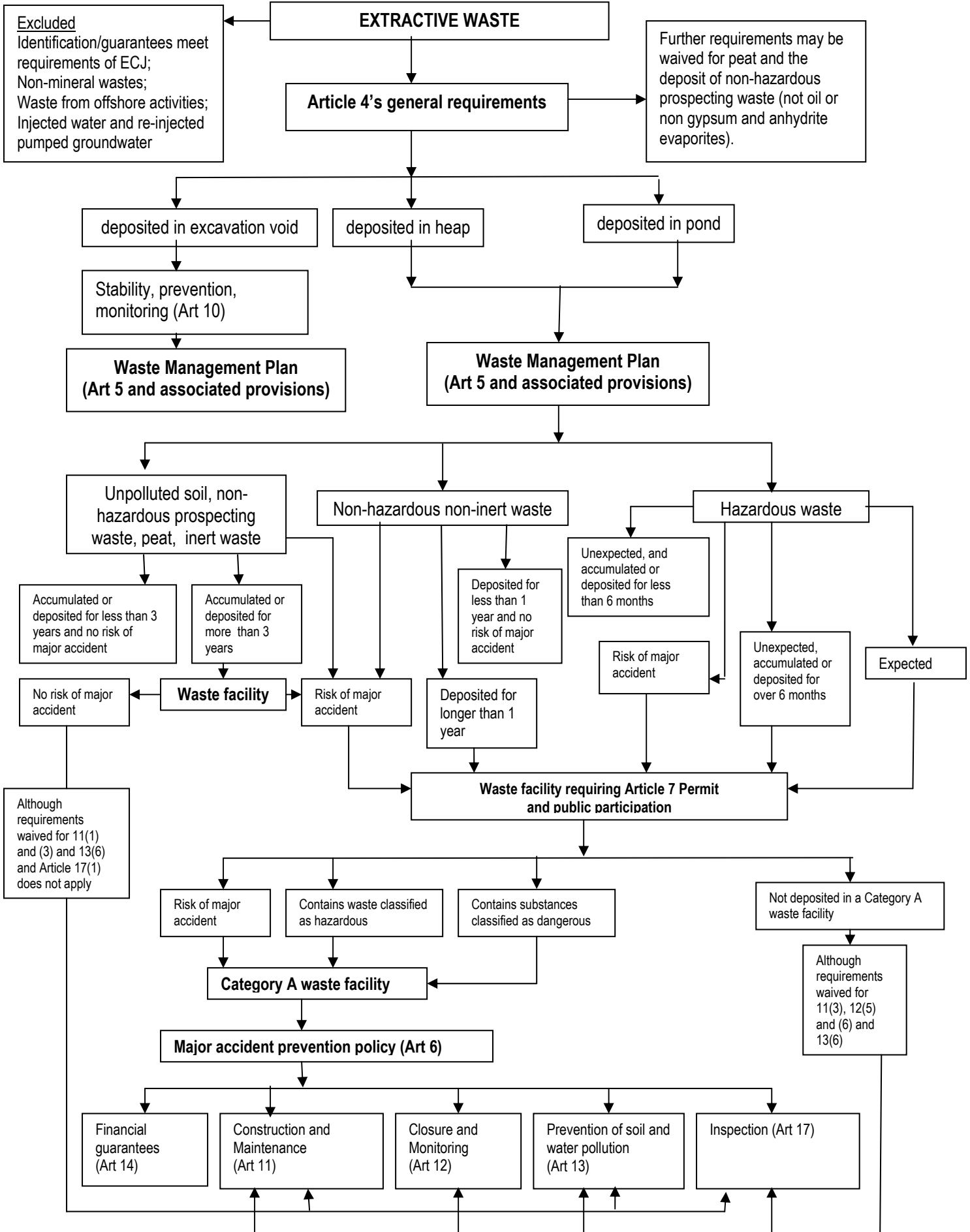
149. The MWD Regulations will include provisions enabling the competent authority and SEPA to charge operators a fee for performing any of the functions set out in this part of the consultation paper. Any fee should not exceed the sum of the costs reasonably incurred by these bodies for the performance of their duties.

**ARTICLES IN THE MINING WASTE DIRECTIVE**

- Article 1: Subject Matter.
- Article 2: Scope of the Directive, including exclusions and derogations.
- Article 3: Definition of terms for the purposes of the Directive.
- Article 4: General requirements: obligation inter alia is to ensure extractive waste is managed without causing harm to human health or the environment.
- Article 5: Requirement for a waste management plan for the minimisation, treatment, recovery & disposal of extractive waste.
- Article 6: Major accident prevention measures for Category A waste facilities.
- Article 7: Requirement for a permit to operate a waste facility, including a financial guarantee.
- Article 8: Public notification and participation in the process for granting a permit under Article 7.
- Article 9: Classification of waste facilities.
- Article 10: Requirements in relation to the replacement of extractive waste back into the extraction void.
- Article 11: Measures to ensure a waste facility is (i) managed by a competent person (ii) constructed (or modified), monitored and inspected so as to ensure physical stability and prevent pollution; & arrangements made for rehabilitation and aftercare of the facility.
- Article 12: Closure and after-closure procedures for waste facilities, including monitoring and reporting obligations (subject to Article 2 derogations).
- Article 13: Measures to prevent water status deterioration, air and soil pollution (subject in part to Article 2 derogations).
- Article 14: Requirement for a financial guarantee for the operation of a permitted waste facility to ensure all permit obligations, including after-closure provisions, are met.
- Article 15: Amendment to the Environmental Liability Directive.
- Article 16: Arrangements to cover international transboundary effects of Category A waste facilities.
- Article 17: Requirements for the competent authority to carry out inspections of waste facilities subject to Article 7 and for operators to keep up-to-date records of all waste management operations for inspection.

- Article 18: Obligation on Member States to report to the European Commission.
- Article 19: Requirement to provide for penalties for infringement of the implementing regulations.
- Article 20: Obligation on Member States to produce and maintain an inventory of closed & abandoned waste facilities.
- Article 21: Obligations on European Commission to ensure exchange of information; and on Member States to ensure competent authority follows developments in best available techniques.
- Article 22: Implementing and amending measures.
- Article 23: Committee.
- Article 24 Transitional Provisions.

**IMPACT OF MINING WASTE DIRECTIVE ON CATEGORIES OF WASTE**





The Scottish  
Government

April 2008

© Crown Copyright

ISBN 978 0 7559 7060-5



RR Donnelley B55757 04-08