February 2010
CEEP.2010/ENV.04

To whom it may concern

Re.: Soil Protection

Dear Madam, Dear Sir,

CEEP forwards to you a document drafted jointly with the *Common Forum* (http://www.commonforum.eu) containing several questions on soil protection that require an answer before the transposition of the Waste Framework Directive into national law.

CEEP is indeed eager to see that Directive properly implemented as CEEP members dealing with waste management endorse the responsibility to fulfil their tasks in a sustainable way while sticking to environment-friendly criteria.

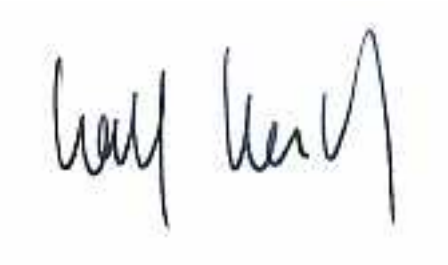
Such an initiative goes in the same direction as the discussions held in the conference on landfill organised together with the Committee of Regions last July which also dealt with the proper implementation of the Directive as far as landfilling is concerned (see declaration adopted on http://www.ceep.eu/images/stories/pdf/events/16072009/final-ceep-declaration.pdf).

More globally, CEEP wants to see that EU measures aiming at protecting the environment do not become a dead letter.

European Centre of Employers and Enterprises providing Public services
Rue des Deux Eglises, 26 ◂ BE 1000 Brussels ◂ Tel + 32 (0) 2 219 27 98 ◂ Fax + 32 (0) 2 218 12 13 ◂ www.ceep.eu ◂ ceep@ceep.eu

CEEP has offered several times its collaboration to the EU institutions in charge of monitoring the implementation of EU measures, and we hope that with the document attached CEEP can be helpful again.

Yours faithfully,



Ralf Resch
General Secretary

Francisco Soares
Chair of the Environment Committee

Common Forum

Ref.: DD/2009.047 **CEEP.2010/Opinion01**

Joint Common Forum and CEEP List of questions of Soil related issues of the revised Waste Directive

- ***Scope of the Directive for soils:***

According to Article 2 (*Scope)* para 1 subpara (b) unexcavated contaminated soil is excluded from the scope of WFD (Van der Valle case study) – OK.
But according to the subpara (c) uncontaminated soil excavated in the course of construction activities where it is certain that the material will be used for the purpose of construction in its natural state on the site which it was excavated is also excluded from the scope.

  - BUT what if it is reused somewhere else?
    - It is either waste - permit or simple notification is needed for the reuse
    - Or not - if no waste status has to be defined by MS.

This could be a heavy procedure for natural ("clean") soils.

- ***Definition of soil considered as waste:***

According to the ***recital*** 11 the waste status of uncontaminated excavated soils which are used on sites other than the one from which they were excavated should be considered according with the definition of waste (means "any substances or object which the holder discards or intends or is required to discard") and the **provisions on by-products** or on **the end of waste status** under WFD.

This definition is very general for soils and has lots of legal uncertainty to it
  - case by case assessment - can not be used categorically to one waste stream?
  - is now somewhat clarified by By-product and End of Waste -concept

- ***Definition of contaminated soil:***

The provided definitions do not include the case of the excavated contaminated soils. We can however deduce from those provided that excavated contaminated soils should be considered as waste. Then the question of the definition of the contaminated grounds arises. What is contaminated?

According to Mr Versmann's answer at CEEP meeting, this could be derived from the 14 Waste Criteria (i.e. toxic, infectious, etc). Then, this definition would be related to hazards and to risks as it is stated in most of National legal framework on Contaminated Land Manangement in European MS.

Some guidance or discussions for defining whether excavated contaminated soil is hazardous waste or not might be useful. We have national guidance based on EU-regulation, but we have to update it in the future as the List of Waste will be updated.

- ***Definition for reuse of soils (natural, slightly polluted, treated):***

Link with the Re-Use, Recycling and Recovery definitions.

Re-Use applies to products which are not waste. It could not be applicable to treated soils.
Recycling doesn't cover the different types of soil treatment.

- ***By-Products (article 5):***

This article states:

1. A substance or object, resulting from a production process, the primary aim of which is not the production of that item, may be regarded as not being waste but as being a by-product only if the following conditions are met:
    (a) further use of the substance or object is certain;
    (b) the substance or object can be used directly without any further processing other than normal industrial practice;
    (c) the substance or object is produced as an integral part of a production process; and
    (d) further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.
2. On the basis of the conditions laid down in paragraph 1, measures may be adopted to determine the criteria to be met for specific substances or objects to be regarded as a by-product and not as waste referred to in point (1) of Article 3.

(a) Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance Comitology

=> This criteria suites better (only?) to industrial by-byproducts. Could treated soils be considered as by-products?

- ***End of Waste Criteria (article 6):***

This article specifies:
Certain specified waste shall cease to be waste when it has undergone a recovery, including recycling, operation and complies with specific criteria to be developed in accordance with the following conditions:

- the substance or object is commonly used for specific purposes;
- **a market or demand exists for such a substance or object**;
- the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and
- the use of the substance or object will not lead to overall adverse environmental or human health impacts.

The criteria shall include limit values for pollutants where necessary and shall take into account any possible adverse environmental effects of the substance or object.

Soil is briefly mentioned in JRC-report, pilot study ”aggregates” in connection with construction and demolition wastes (Soil, rocks and vegetation: waste arising from land levelling, civil works an/or general foundations) – see : **http://susproc.jrc.ec.europa.eu/activities/waste/documents/Endofwastecriteriafinal.pdf**

EoW-criteria may be also defined on the quality of the source waste (e.g. source selection – clean sites):

- Could Clean soil separated at source / excavated at certain clean sites be considered as clean enough?
- On which bases? Leaching criteria? Risk assessment studies?

Soil is not (as such) listed as a priority material for harmonized criteria. Where criteria has not been set at Community level, MSs may decide case by case whether certain waste has ceased to be waste taking into account the applicable case law.

- Decisions shall be notified to Commission

National criteria can be developed and notified to EC. We considered that the development of these criteria would be very challenging and it would also take time.
There market criteria could also be a problem to define correctly (e.g. plenty of inexpensive primary aggregates).

In the whereas (22) of the directive is stated that a recovery operation may be as simple as the checking of waste to verify that if fulfils the end-of-waste criteria. If we look at excavated ‘natural’ (clean) soil, can we assume that looking at the history of the soil (no present or historical risk activities) is enough checking of waste? Or does checking always imply analyses?

We have also a special problem, which is areas with high natural background concentrations. These would have to be taken somehow into consideration. We see that it is important that the system should not create unnecessary administrative burden.

- ***Permit requirement in relation with soil reuse (article 23):***

Article 23 states that "Establishment or undertaking intending to carry out waste treatment (includes recovery) shall obtain a permit from the competent authority".
>> This is rather a heavy instrument for natural soils.

Could following provisions be acceptable?

- "professional" reuse – large quantities => permit
- "private" reuse - small quantities => case by case –assessment, no permit requirement?

- ***Exemption of Permit requirement in relation with soil reuse (24-26):***

The **exemption for permit requirement** for establishments or undertakings that carry out waste recovery (article 24 - 26)

  - if the authorities have adopted **general rules** for each type of activity laying down the types and quantities of waste that may be covered and the method of treatment to be used
  - The establishments and undertakings shall be **registered** with the competent authorities
  - MSs shall **inform** Commission

Could this be a useful instrument for contaminated soil /slightly contaminated soil or treated soil used in certain specific structures?

  - Rather heavy for natural / clean soil?

- ***Review of the list of wastes:***

Interesting for soils (is it hazardous waste or not?). Based on H Waste Criterions, in particular:

  - H9 - Infectious
  - H12 - release of toxic or very toxic gas
  - H14 - ecotoxic
  - H15 (old H13) **-** yielding another substance after disposal

- H9 – Infectious: *wastes containing viable microorganisms* or their toxins which are known or reliably believed to cause disease in man or other living organisms"

>>> Soil is a living environment!

  - List of origins and waste types which can be infectious. Discussions on how it will be applicable to soils.

- H14 – Ecotoxic:
  - CLP/REACH would be the basis for the characterization
  - The limit values from chemical regulation would become obligatory
    - very challenging for metals (heterogeneous matrix)

- Introduction of a fixed test battery for biotests as an additional approach into LoW
    - If the limit values can not be applied to a certain waste
    - Preparation of limit values by national test programmes

Can we assume that if we at national legislation exempt soil as waste threw the end-of-waste criteria; the provisions under the regulation 1013/2006 on shipments of waste are still binding?

- ***If not wastes, REACH?:***

Article 2.2 of REACH provides that *"waste as defined in Directive 2006/12/EC of the European Parliament and of the Council is not a substance, preparation or article within the meaning of Article 3 of this Regulation.*" Therefore, REACH requirements for substances, preparations and articles do not apply to waste2. This does however not mean that waste is totally exempted from REACH. In particular, according
to Article 3(37) exposure scenarios are defined as *"set of conditions, including operational conditions and risk management measures, that describe how the substance is manufactured or* ***used during its life-cycle*** *and how the manufacturer or importer controls, or recommends downstream users to control, exposures of humans and the environment. […]"*. This includes considerations related to the waste stage of substances as confirmed in Annex I paragraph 5.2.2 where the life-cycle is explicitly said to cover the waste stage. In addition, Annex I paragraph 5.1.1 of REACH also makes it clear that the Risk Management Measures of an Exposure Scenario should *cover waste management measures to reduce or avoid exposure during waste disposal and/or recycling*. As soon as a material 'ceases to be waste' in a recovery process, REACH requirements apply in principle as to any other material, with a number of exceptions with conditions.

How do we have to consider natural soils, slightly/heavily contaminated soils, treated soils? We realy need clarification on what REACH wil mean in practice. We have had a look to complex products (i.e. made-grounds, raw materials, tars, composts, etc) or recovered aggregates. Several statements from EC have been studies. They said:

Recovered aggregates will normally be either substances or preparations. In case recovered aggregates consist of one main constituent (possibly with impurities), they will be a mono-constituent substance. In case they consist of several constituents, those constituents may either be seen as separate substances (i.e. then the recovered aggregate will be a preparation) or as constituents of one complex UVCB substance. As outlined in section 3.1.2.1., the two interpretations are to a certain degree interchangeable and it is up to the manufacturer of the recovered material to decide which interpretation is more appropriate in the individual case.

Materials such as slags, clay, tar, metallic minerals and residues of various melting or metallurgic processes will normally be UVCB substances. This is also reflected in the fact that they are listed as substances in EINECS. They can therefore benefit from the staggered registration deadlines.

Materials such as aggregates from mixed construction waste can be seen both as UVCB substances and as preparations. For the reasons outlined in section 3.1.2.1., it may however be more practical to consider them as preparations. The registration obligations will depend on whether all conditions in Article 2 (7)(d) have been fulfilled.

Compost typically has a relatively large number of constituents with a significant variability and a significant number of unknown constituents. Therefore, compost has to be considered as a UVCB substance. Compost is also not listed on EINECS. Therefore, it also cannot benefit from the staggered registration deadlines.

REACH is very complicated and it is important that it will be clarified if there are some questions or uncertainties. Our conception has so far been that soil is out of its scope. The exemptions were discussed last year when the Annex V (about general exemptions from obligation to register...) was amended. For instance compost was added to the list (point 12). Points 7 and 8 in the Annex V exclude substances which occur in nature with certain limitations. There is also a draft guidance to this Annex. It does not include soil as such but it includes for instance minerals.
(http://ec.europa.eu/environment/chemicals/reach/pdf/com_rev_anx_V_guidance_en.pdf)
