Revenue Scotland guidance on how to determine the rate of Scottish Landfill Tax chargeable on contaminated soils

Consultation Analysis

1. Executive Summary

This report provides an analysis of the responses we received to the consultation on Revenue Scotland guidance on how to determine the rate of Scottish Landfill Tax chargeable on contaminated soils.

We received 15 responses which we published on www.revenue.scot on 10 August 2015. These are available to download at Consultations | Revenue Scotland

The responses came from a wide range of interested parties and we are satisfied that we have sufficient evidence to understand the views of landfill operators, the wider waste management industry and those that they serve to make improvements to our current SLfT guidance.

The majority of respondents indicated to us that Option 1 would give greater certainty of the tax due on each load of soil disposed of to landfill without increasing the administrative burden on them.

There was some support for Option 2 but only a minority of respondents thought it would give greater certainty of the tax due without increasing the administrative burden and a significant number of respondents identified potential negative side-effects.

As a result of the consultation we have decided to add a new section of practical guidance to our Scottish Landfill Tax guidance at SLfT2006 on determining the tax rate for a load of waste soil that consists of qualifying material apart from a small amount of non-qualifying material. Within this new section we will specify that, in addition to criteria already set out

in SLfT2006, the landfill operator must obtain and retain evidence of non-hazardous classification under WM3 as evidence that a load of waste soil qualifies for the lower rate of tax.

The new section of guidance is reproduced at Appendix A and will be incorporated into the existing guidance at SLfT2006 and will be effective for all taxable disposals of waste soils to landfill in Scotland on or after 1 October 2015.

Introduction

Revenue Scotland, established by the Revenue Scotland and Tax Powers Act 2014, began administering SLfT from 1 April 2015. The legal responsibilities of both Revenue Scotland and taxpayers in relation to this tax are set out in the Landfill Tax (Scotland) Act 2014 (the LT(S)A 2014) and the associated secondary legislation.

In Scotland, SLfT replaced the UK Landfill Tax; an environmental tax introduced to encourage local authorities and businesses to operate in a more environmentally friendly way by reducing the amount of waste they produce or, if they can't reduce it, reuse, recycle or recover it. SLfT has been designed to support Scotland's Zero Waste Plan which aims to maximise the resource value of materials in our economy and ensure that landfilling is an option of last resort for materials that can be reused, recycled or recovered.

SLfT is chargeable by weight and there are currently two rates for taxable disposals:

- a lower rate of £2.60 per tonne that applies to less polluting wastes
- a standard rate of £82.60 per tonne that applies to all other taxable waste disposals

The lower rate of tax recognises that there is a relatively low level of environmental impact associated with the landfilling of wastes which are less active or polluting in the landfill environment. These wastes do not biodegrade, they do not produce landfill gas and there is a low risk of pollution to groundwater or surface water. Landfill sites handling this material can be subject to a much shorter period of aftercare and be returned more readily to other productive use.

The materials that qualify for the lower rate of tax are listed in the Schedule to the Scottish Landfill Tax (Qualifying Material) Order 2015 ("the Order"). These are referred to as

'Qualifying Materials". "Sub-soil" is listed in Group 1 of the Schedule to the Order and is therefore a qualifying material provided it meets the criteria set out in the Order. Topsoil is not listed in the Order and is therefore a non-qualifying material chargeable at the standard rate of tax if disposed of to landfill.

It is the responsibility of the landfill operator to ensure the correct rate of SLfT is applied and the right amount of SLfT is paid to Revenue Scotland for each load disposed of at their site(s). This judgment is based on evidence including the description on the waste transfer note that accompanies the movement of most waste in the UK, a visual inspection of the waste and any other documentary evidence required by the operator to support their decision. Revenue Scotland's legislative and practical guidance, available to download from www.revenue.scot, has been designed to help make it as easy for them as possible to make the correct judgement.

This consultation was undertaken in response to a request from a number of landfill operators and industry stakeholders for more objective guidance to enable them to determine the rate of tax chargeable on a load of waste soil that consists of qualifying materials that would be chargeable at the lower rate of tax but which also contains a small amount of non-qualifying material chargeable at the standard rate of tax. Such soils are generally referred to as 'contaminated soils' but they do not necessarily contain hazardous materials and they are not necessarily special waste. (Note: Waste with hazardous properties which may render it harmful to human health or the environment is called special waste in Scotland. Elsewhere in the UK and EU it is referred to as hazardous waste)

Loads that contain both qualifying and non-qualifying materials would normally be wholly chargeable at the standard rate of tax but Revenue Scotland may direct, through guidance, that material disposed of can be treated as qualifying material and charged at the lower rate of tax if it would so qualify but for the presence of a small amount of non-qualifying material. The current guidance on this is at SLfT2006.

In practice soils will almost always be found, through testing, to contain an element of contamination by non-qualifying material. The two options proposed set different thresholds at which the level of contamination is sufficiently small for the whole load to be chargeable at the lower rate of tax, with Option 1 setting the threshold lower than Option 2. Hazardous soils are chargeable at the standard rate of tax under both options.

What did the consultation cover?

The consultation ran for a period of almost 6 weeks from 5 June to 15 July 2015.

Respondents were asked to comment on two options for improving the guidance at SLfT2006 by adding specific guidance for soils.

- *Option 1: Current SLfT2006 guidance plus an objective test (WM2/WM3) to determine whether the waste soil is non-hazardous and may be charged at the lower rate of tax.*

- *Option 2: Current SLfT2006 guidance plus WM2/WM3 plus a further objective test (Inert WAC) to determine whether waste soil is chargeable at the lower rate of tax*

The consultation asked 4 questions about these two options:

1. Revenue Scotland seeks to operate to Adam Smith's principle of certainty for the taxpayer about their tax liability. Compared to the current guidance, how easy will it be to be sure of the tax due on each load of soil disposed of to landfill under each option?

2. Compared to the current guidance, how would the volume and type of material being disposed of to landfill change under each option?

3. How will the two options impact on you administratively and in terms of your day to day operations? Do you see any advantages or disadvantages from either of the options? If so, please explain these.

4. Do you have any other comments you would like to make about our guidance on this particular area?

Responses received

We received 15 responses which were all published on www.revenue.scot on 10 August 2015 and are available to download at https://www.revenue.scot/scottish-landfill-tax/consultations.

2 responses were received from individuals and 13 responses from organisations including registered landfill operators, contractors and consultants to the wider waste management industry, trade and professional bodies and public bodies including SEPA, the environmental regulator for Scotland.

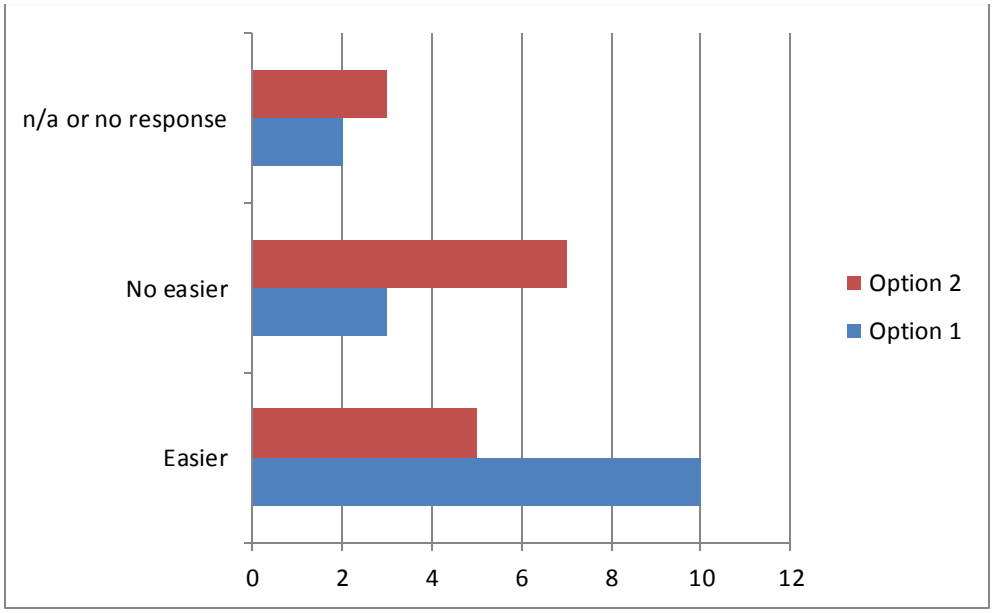
Responses were received from a sufficiently wide range of interested parties for us to be satisfied that we have enough evidence to understand the current views of landfill operators, the wider waste management industry and those they serve.

Analysis of responses

We have undertaken a robust and in-depth analysis of the 15 responses and our findings for each question are summarised below.

Question 1

Question 1 asked: *Compared to the current guidance, how easy will it be to be sure of the tax due on each load of soil disposed of to landfill under each option?*



13 respondents answered this question in respect of Option 1 and 12 Respondents in respect of Option 2.

10 respondents said Option 1 would make it easier than current guidance and 5 respondents said Option 2 would make it easier than current guidance. (Note: This includes 3 respondents who said that both options would give greater clarity)

3 respondents said that Option 1 would not make it easier than current guidance and 7 respondents said that Option 2 would not make it easier.

The 3 respondents who thought Option 1 would not make it easier or give greater certainty said that WM2/WM3 is complex, poorly understood and open to interpretation. However 5 of the respondents who said that Option 1 would make it easier and give greater certainty indicated that the industry is already aware of and uses WM2/WM3 to classify waste and determine whether waste is non-hazardous.

WM3 replaced WM2 from 1 June 2015 as the UK wide standard for classifying and assessing waste. Guidance published jointly by the UK environment agencies states: *"As part of your waste duty of care you must classify the waste your business produces,"* and goes on to say *"You should use this guidance if you produce, manage or regulate waste."*

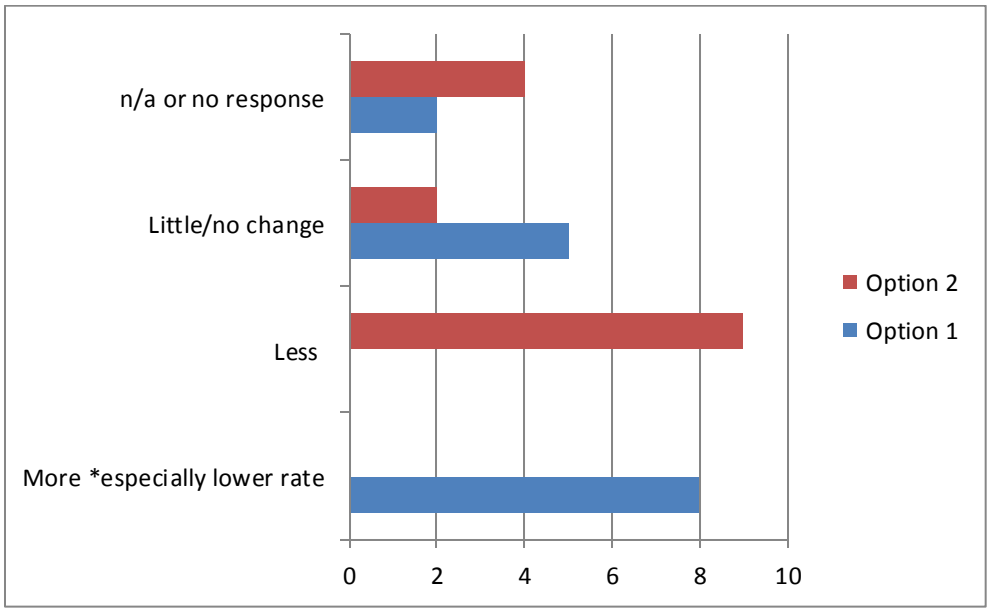
It is reasonable to assume from this that operators within the waste sector should be familiar with, understand and apply WM3 and several respondents confirm this is the case. Adopting Option 1 would therefore give landfill operators an industry wide objective test as part of the evidence required to determine the correct rate of tax chargeable on waste soils disposed of at their site(s).

The respondents who did not think that Option 2 would provide greater certainty raised a number of objections including that Inert WAC is too high a requirement for many naturally occurring Scottish soils, that it is not a soil classification tool, and that it does not accord with the criteria set by Scottish Ministers.

We concluded from the responses that specifying WM3 would provide greater certainty of the tax rate applicable to the waste but Option 2 would be less likely to achieve our stated aim of providing certainty of tax due.

Question 2

Question 2 asked: *Compared to the current guidance, how would the volume and type of material being disposed of to landfill change under each option?*



13 respondents answered this question in respect of Option 1 and 11 in respect of Option 2.

8 respondents said that Option 1 would either result in more soil going to landfill or more lower rated soil going to landfill and 5 said there would no change in volumes. Nobody thought Option 1 would result in less soil going to landfill but 4 of those who predicted an increase in volume also said that Option 1 would lead to more appropriate management and use of soils including their use at landfill sites, for example, as daily cover or for site engineering .

9 respondents said that Option 2 would result in less soil going to landfill and 2 respondents said there would be no change. Nobody thought Option 2 would result in more soil going to landfill but 7 of those who said volumes would reduce or stay the same said this would occur because waste producers would seek alternatives to landfill including illegal disposal.

Respondents recognised that a greater proportion of soils would qualifying for the lower rate of tax under Option 1 than under Option 2 and thought this might drive behaviours but

opinions were divided on whether each option would have a positive or negative effect on the management, use and classification on disposal of waste soils.

- 2 respondents thought that more hazardous soil would be misclassified as non-hazardous and sent to landfill under Option 1
- 3 respondents said the opposite would occur and Option 1 would incentivise the treatment of hazardous soil prior to disposal to benefit from the lower rate of tax.
- 3 respondents thought Option 1 would lead to a decrease in remediation of non-hazardous soil because it would no longer be cost effective compared to disposal.
- 7 respondents thought that Option 2 would lead to less appropriate use and disposal of soil including illegal disposals
- 4 respondents thought the opposite and said Option 2 would result in less illegal or inappropriate disposal of soil.
- 2 respondents said Option 1 would be more palatable and acceptable to the construction industry and their clients
- 4 respondents raised concerns that Option 2 would increase the cost of redeveloping brownfield sites.

The wide variety of contradictory responses to this question made it much harder to draw any firm conclusions but the two things on which there was a majority view were:

- Option 1 is likely to see an increase in soils going to landfill although these soils would not necessarily be disposed of as they could be used by the site operator for site engineering and daily cover.
- Option 2 could see a decrease in soil going to landfill but it is more likely that waste soils would be used or disposed of inappropriately or illegally under this option.

A number of factors are likely to influence whether soils are sent to landfill or not including proximity to a landfill site and transportation costs, need for soil for on-site remediation, market for soil from landfill operators who will want sufficient soil for daily cover and remediation but may not want to fill their sites with waste that does not produce the gas from which they currently earn an important source of income.

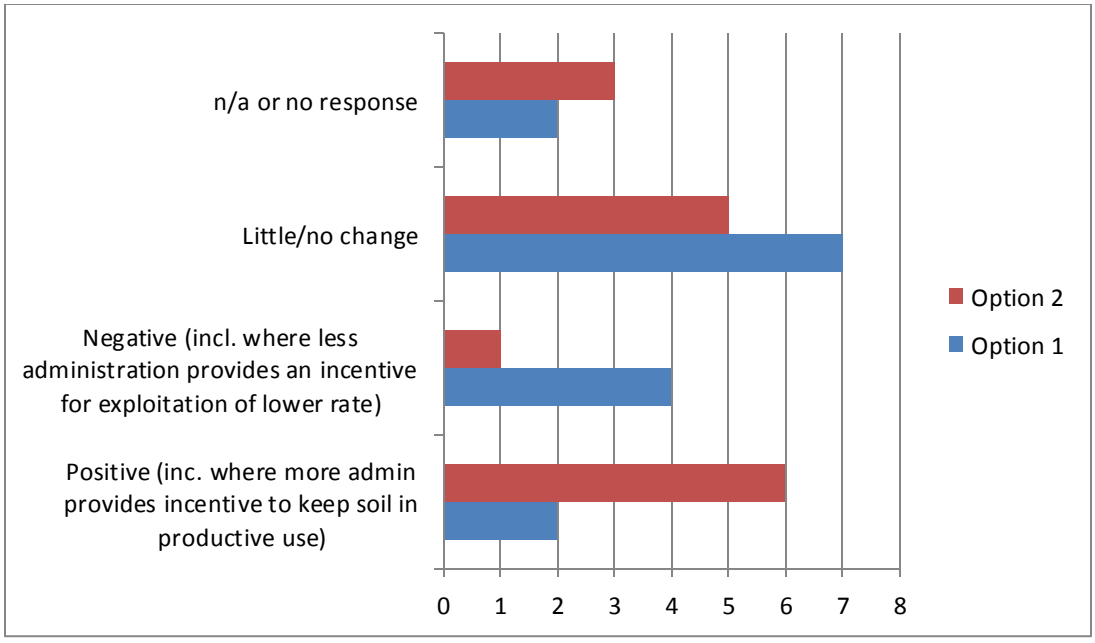
Waste data for Scotland published by SEPA indicate that the vast majority of landfilled soils are generated by the construction and demolition industry. The volume of soils disposed of to landfill dropped significantly between 2008 and 2010 due to the effect of the recession

on the industry. Volumes have increased again since 2010 but they are still well below pre-recession levels. Between 2010 to 2013 there was little change in the overall volume of soils going to landfill (1 to 1.25 million tonnes per annum) and only a very small proportion of these soils was classed as hazardous. Several respondents said elsewhere in their responses that Option 2 would have an adverse effect on brownfield site development due to the increased cost of disposing of waste soil. In addition to the principle of certainty, Revenue Scotland operates under the Adam Smith principle of proportionality and we conclude from this that Option 2 would have a significant impact on the construction and demolition industry because the majority of any increased tax cost would be passed on to and borne by them.

Overall we concluded from the responses that both options could drive a range of possible outcomes, but when considered in the round it is obvious that option 1 is less likely to incentivise mismanagement of soils than Option 2 although we note concerns that Option 1 might dis-incentivise remediation of non-hazardous soils and lead to their disposal to landfill where they are unsuitable for any alternative use.

Question 3

Question 3 asked: *How will the two options impact on you administratively and in terms of your day to day operations? Do you see any advantages or disadvantages from either of the options? If so, please explain these.*



13 respondents answered this question in respect of Option 1 and 12 in respect of Option 2.

4 respondents said that Option 1 would involve less administration, 7 said it would not change the administrative requirement and 2 said it would cause them more administration.

1 respondent said that Option 2 would involve less administration, 5 said it would not change the administrative requirement and 6 said it would cause them more administration.

Overall 11 out of the 13 respondents who commented said that Option 1 would cause them no more administration than current guidance whereas 6 out of the 12 who commented on Option 2 said it would cause them no more administration. We therefore conclude that Option 1 is less likely to increase the administrative burden than Option 2.

WM3 and Inert WAC are both tests that must be undertaken by waste producers and we would not normally expect landfill operators to undertake these. They would however need to obtain and retain evidence of the outcomes of these tests from waste producers and/or contractors as evidence of lower rate.

Question 4

Question 4 invited respondents to make any other comments and this drew a wide range of responses, many of which were not directly relevant to the consultation. Two comments are however worth noting here.

One respondent asked for European Waste Codes ('EWC') to be specified in guidance. There is no direct correlation between tax rates and all EWC codes but this is something that Revenue Scotland will consider for the future when it holds more information and evidence of the types of materials that attract the most commonly used EWC codes.

One respondent asked for a definition of 'contaminated soils'. By 'contaminated soils' we mean soils that do not wholly consist of naturally occurring sub-soil which is listed within Group 1 of the SLfT (Qualifying Material) Order 2015). In practice, even virgin sub-soil is likely to be found through testing to contain other materials but provided these are all qualifying materials or, if non-qualifying materials are present the load of soil is not classed as hazardous or as 'special waste' **and** all the conditions set out in our guidance at SLfT2006 are met, such contaminated soils are chargeable at the lower rate of SLfT.

It should be noted that there is no connection between our use of the term 'contaminated soils' and references to contaminated land. The latter commonly contains substances that could cause significant harm to people or protected species and/or significant pollution of surface waters or groundwater whereas non-hazardous contaminated soils could be harmless and non-polluting.

Overall findings

We welcome all stakeholder views and have taken these all into account in arriving at our conclusions and decision. Several respondents made points that were not directly relevant to the consultation and whilst we noted such views, where they are out with the scope of the consultation we have not included them in our analysis.

Overall the responses indicated significant support for Option 1 but much less support for Option 2. The responses also highlighted to us the possible behaviours that each option may drive.

Having considered all the views expressed we have decided to incorporate WM3 into our current guidance and to improve the general content and lay-out of that guidance by introducing a new section which specifically applies to soils.

Thank you to the stakeholders who responded to the consultation and also to those who attended the preceding stakeholder sessions.

Next Steps

We will add a new section to our guidance at SLfT2006 as set out in Appendix A. This will be effective and must be followed from 1 October 2015 in order to determine the tax rate applicable to chargeable disposals of soil on or after that date.

Appendix A: Additional guidance for waste soil applicable from 1 October 2015

Waste soil

Note: From 1 October 2015, under this direction made under section 14 of the LT(S)A 2014, we will require you to use the flowchart in this section in order to determine whether a load consisting of waste soils only, is chargeable at the standard or lower rate of SLfT when disposed of to landfill.

General Guidance for Soil

For the purposes of SLfT, soil is a qualifying material if it wholly consists of naturally occurring sub-soil as listed in Group 1 of the Schedule notes to The Scottish Landfill Tax (Qualifying Material) Order 2015.

In practice, even virgin sub-soil is likely to be found to contain other materials when subjected to testing and unless these are also listed as qualifying materials and the criteria set out in the Order are met, the whole load will be subject to the standard rate of tax when disposed of to landfill.

The only exception to this is where the amount of non-qualifying material contained in the soil is small and we have directed that the whole load may be charged at the lower rate of tax. This section of guidance explains the process we will expect you to follow from 1 October 2015 to determine the correct rate of tax chargeable on such loads.

WM3:

As part of their duty of care, waste producers must classify the waste that their business produces and WM3 is the current UK standard that they must use. (See: Technical Guidance WM3: Guidance on the Classification and assessment of waste which is available to download from SEPA's website (www.sepa.org.uk)).

In order for lower rate SLfT to apply to the load of soil, it must not be classed as hazardous waste under WM3. The person disposing of the waste should be asked to provide evidence of the non-hazardous classification of the load under WM3. You should review the evidence provided and be satisfied that it appears to be a true and accurate assessment. You must

retain a copy of this evidence and make it available to us if we ask to see it to support the rate of SLfT declared in your tax return.

Flowchart for determining the rate of SLfT chargeable per load of waste soil.
(Applies from 1 October 2015)