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Natural Resources Wales response to: National Assembly Wales' call for Evidence on the Landfill Disposals Tax (Wales) Bill

Introduction

1. Natural Resources Wales works to make sure that the environment and natural resources of Wales are sustainably maintained, sustainably enhanced and sustainably used, now and in the future.
2. We are responsible for ensuring that the waste industry complies with the regulatory regime that has been put in place so that waste does not pollute the environment or harm human health. As well as determining applications for the environmental permits that specified waste activities need, we also inspect those sites to ensure compliance and take enforcement action when needed. We take a strategic overview of waste management including monitoring the wastes that Local Authorities produce and recycle. We use a range of investigatory tools and enforcement powers in the fight against waste crime.
3. Natural Resources Wales (NRW) welcomes the opportunity to provide evidence to the Finance Committee on the Landfill Disposals Tax (Wales) Bill (the Bill).
4. Mark Drakeford the Cabinet Secretary for Finance and Local Government has confirmed that we will have a role in compliance and enforcement on LDT and are actively working with Welsh Government (WG) and the soon to be formed Welsh Revenue Authority (WRA) on what that role will be. NRW has also assessed the Bill in terms of its impact on us as an independent environmental public body.
5. We support the introduction of the Bill and are committed to using our experience to fulfil our planned role in delivering a workable system. We

welcome the recognition that NRW has skills and expertise to deliver compliance and enforcement for the tax. Our existing role in environmental regulation gives us an understanding of the waste sector and how avoidance of the tax has increasingly been a driver for criminality over the last decade.

6. NRW are looking forward to working with the WRA to provide a bespoke compliance and enforcement service on Landfill Disposals Tax (LDT) in Wales. We are committed to continuing to work constructively to deliver an effective operational framework. We recognise that this must be based on operators paying the right tax at the right time but also that powers are needed to deal with those who do not.
7. We agree with the waste industry that a well-informed 'on the ground' presence is required for effective delivery of the tax's requirements. In future by working in partnership with the WRA our LDT team will have delegated access to tax related information about activities at permitted sites which we do not currently have. This pooling of information between NRW and the WRA will provide a picture that is currently not available to NRW or Her Majesty's Revenue Collection (HMRC) who currently collect Landfill Tax in England and Wales. We understand that when this sharing was done in Scotland, the information on the environmental and tax aspects of the landfill sites provided significant scope for further investigation.
8. We welcome the application of the tax to Unauthorised Disposals (UD) as a deterrent to those operating without the right controls being in place. We are sharing our experience of the difficulty of identifying and prosecuting offenders under environmental legislation with the WRA. We are also working with Welsh Government's Waste Regulation Branch to strengthen our existing powers.

The general principles of the Bill and the need for legislation

9. Landfill tax is a behavioural tax which over the last twenty years has successfully diverted waste from landfill and into being reused, recycled or recovered. Its success ultimately leads to decreasing input into landfill sites, so its aim is not to raise revenue. The consequences of this Bill not being approved are not confined to a loss of revenue for Wales – if the collection of the tax was switched off by HMRC and not collected in Wales, it would also remove a tool to continue on the trajectory to reach Zero waste in Wales in 2050 and deliver the objectives of Sustainable Management of Natural Resources. Wales could also see an influx of waste to be landfilled without tax from elsewhere, which would quickly fill available landfill space in Wales.

Any potential barriers to the implementation of these provisions and whether the Bill takes account of them;

10. The operators of permitted landfills are used to the principle of landfill tax payments, and as the regulatory impact assessment states, the transitional costs to LDT will be relatively small. However if HMRC apply the changes to Landfill Tax they have planned in April 2017 to sites in Wales, there will be two sets of changes that would need to be made and there could be resistance or confusion. The RIA could usefully take account of this.

11. Over the last twenty years the Landfill Tax escalator has increased the tax for standard rated wastes from £7 per tonne to its current level of £82.60. As well as diverting the right wastes away from landfill, this has driven a related increase in illegal activity where wastes are mis-described to attract the lower rate (£2.60) or tipped illegally to avoid tax and landfill disposal charges altogether. We welcome the introduction of LDT to UD as this will be another tool in the fight against Waste Crime, but recognise that changing the behaviour of the criminal section of the waste industry is difficult.
12. The reduction in tax revenue from Authorised Disposals (AD) will continue but the level of revenue from UD is unknown. The effect of the change in regulatory intervention may be to drive more waste to AD or to increase income by reducing mis-description.
13. We are expecting that there will be a further consultation this year on whether WRA should be provided with criminal powers in addition to their civil powers. We will respond to this further consultation, but want to flag here that we fully support the application of criminal powers. There will be occasions when NRW's criminal powers cannot be applied, and there may be a risk that the WRA will not have the powers they need to effectively investigate. There will frequently be cases where LDT avoidance or evasion will happen at the same sites where there are also environmental offences – though there will also be cases where no environmental offences are taking place e.g. avoidance of tax at a permitted site by driving past the weighbridge. We will continue to advise on what powers are needed to ensure we have the right LDT regulatory interventions in those cases.

Whether there are any unintended consequences arising from the Bill

14. Having seen the reporting around the Bill's launch, it is clear that expectations about how the LDT will be applied to smaller unauthorised disposals (known as fly-tipping) need to be carefully handled. We and the Welsh Local Government Association are clear¹ about who deals with which type of UD and that we both have a role to play. The Cabinet Secretary Mark Drakeford has stated that NRW and Local Authorities should receive a share of the additional revenue brought in from UD to fund resource on that work area. This is welcome, but again may raise expectations so we look forward to discussing how that incentivisation will work in practice.

The financial implications of the Bill (as set out in Chapter 6 of the Explanatory Memorandum);

15. There are fiscal pressures on all public services, and not having the right resources available would be a barrier to this being an effective regime.

The appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 5 of the Explanatory Memorandum);

¹ <http://gov.wales/topics/environmentcountryside/epq/cleanneighbour/flytipping/protocol/?lang=en>

16. There are numerous references to subordinate legislation within the Bill, both where additional provision or detail is to be provided at a future date, and the ability of Regulations to be made to amend the current provisions of the Bill. The ones that are of most relevance to NRW are around the provision of criminal tax powers, what qualifying material is, and the Loss on Ignition test criteria. We welcome the opportunity to work with WRA to deliver this within the constraints of resources provided.
17. It is important that the legislation can be amended to reflect changes in objectives or taxpayer behaviour and the Bill as drafted also provides for this. The cumulative effect of the potential for change on both taxpayers and regulators needs to be recognised. Looking forward it will be important that there is a commitment to maintain a consolidated version of the Act and Regulations so that the aim of achieving clarity is delivered.

Whether the Welsh Government's principles for the development of devolved tax policy and legislation have been followed

Be fair to businesses and individuals who pay them;

Be simple, with clear rules which seek to minimise compliance and administration costs;

Support growth and jobs that in turn help tackle poverty; and

Provide stability and certainty for taxpayers.

18. These principles appear to have been followed, and we are confident that they will be revisited throughout the development of the subordinate legislation, the related guidance and the transitional provisions.

The definition of a 'taxable disposal' and 'qualifying materials';

19. Environmental controls are needed for wastes that are not required for products. This is because wastes may have become contaminated, or no longer suitable for their original use so their value to the holder is reduced or removed. Deciding whether a substance or object is a waste or not, is often obvious (e.g. the contents of the bin a householder puts out for collection), but sometimes it is not (e.g. soil from an excavation being used for landscaping).
20. This assessment of domestic and European case law and guidance to reach a decision is known as 'definition of waste'. It is relevant to LDT as our experience over the last decades tells us that a definition of waste challenge is likely to be one of the responses of the operator of an unauthorised site receiving a charging notice. In the same way, the operator of an authorised site may decide that a material being used to create a screening bund is not waste, and therefore want to avoid an LDT charge.
21. The Bill could be tested in law, which will inevitably be resource intensive. If there is an argument that a material is not waste, then that will probably need to be addressed through the judicial system before an LDT charging notice can be pursued. The prioritisation of LDT cases will need to be strategically reviewed and resourced. We will continue to work to ensure that expectation is managed about the delivery of revenue from UD.

22. The list of specified landfill activities in Section 8 of the Bill has been decoupled from the definition of a 'taxable disposal' in Section 3, but could reduce or remove the number of challenges at authorised sites when compared to those currently received by HMRC. We will need to monitor the effect of this to ensure that authorised sites are not disincentivised to reuse or recover waste in the operation of the site.
23. The list of qualifying materials is to be provided in subordinate legislation and so we will respond at that point.

The provisions on how the tax will be calculated including the taxable weight of material and the discount in respect of water content;

24. We currently have no information about what exemptions have been claimed or approved by HMRC, but see this being an early area of discussion with those currently claiming them.

The implementation of tax rates and whether these retain the flexibility to deal with subsequent changes at a Wales and UK level;

25. We agree that rates should initially be set in Regulations. To ensure that any changes are appropriately considered it would be useful to know in advance, the criteria that any proposed changes will be assessed against or subject to.

The proposed exemptions;

26. There is one new exemption 'multiple disposals of materials at the same site' which is required to address the changes made in section 8 on what landfill site activities are to be treated as taxable disposals. The other exemption on pet cemeteries is consistent with the existing exemption.

The proposed reliefs;

27. The majority of the existing exemptions have been recategorised as reliefs and this does not change the regulatory impact. We welcome the scrutiny being applied to the approval of the type and quantity of waste to be used in restoration.

The inclusion of unauthorised disposals of waste at places other than authorised landfill sites;

28. NRW welcome this inclusion. However our experience as a regulator is that we anticipate challenge here on whether the material disposed of is a waste.

The inspection of premises for the purposes of ascertaining a person's liability to Land Disposals Tax and the sharing of information between the Welsh Revenue Authority, Natural Resources Wales and local authorities;

29. We are working with WG on the powers that we believe are necessary for the successful delivery of the compliance and enforcement of LDT. We will be responding to the future consultation on the provision of criminal powers.

30. The provision for sharing information is contained in Section 59 and appears to be an option ('may disclose') rather than an obligation to do so. That said, NRW will have an information sharing agreement as part of its working arrangements with the WRA.

The duties on taxpayers to make payments and pay penalties and interest in certain circumstances;

31. These are civil powers which will be delivered by the WRA, who will monitor their effectiveness in practice.

How companies, partnerships and unincorporated bodies are treated in terms of the provisions and responsibility for compliance; and

32. NRW will need to monitor the effectiveness of these provisions in practice, as we review the detail of the information submitted.

Establishing the Landfill Communities Scheme as a grant scheme rather than a tax credit and developing it outside of the Bill.

33. The proposed scheme appears to deliver cost effectiveness. As the funding for the scheme will be top sliced from total LDT revenue (including tax from UD) then it seems to us to be appropriate for communities that meet the same criteria around UD sites to be eligible to bid. This may also encourage communities to report such activities to us. The inclusion of transfer stations is welcomed.
34. NRW's role will be limited to validating the data on the sites i.e. that transfer stations are sending more than 2,000TPA to landfill and we will do this using existing records.

NRW's role

35. NRW have a unique role in delivery of LDT in Wales as it is the only organisation to whom the WRA is proposing to delegate its powers under the TCMA. We are members of the Operational Policy Project Board and the Technical Experts Group, and there is a plan to have a senior representative on the Programme Board.
36. We will agree with WRA in an annual Memorandum of Understanding (MOU) how the LDT team's resources are targeted, which will be set out and monitored formally. The MOU will also set out how we will resolve issues. We are working closely with the Treasury Team and the WRA Programme to check that based on our experience, the operational outcomes can match their policy objectives.
37. NRW has an existing enforcement policy that targets resource based on environmental risk. To ensure that this role is not compromised, our intention is to confine our LDT duties, powers and resources to an entirely separate team within NRW.
38. We foresee the need for a strategic overview of how LDT investigations or Enquiries (within the meaning of sections 43 – 49 of the TCMA) are managed to ensure that our ability to deliver our roles is not compromised. The three roles are (i) NRW as an environmental regulator; (ii) WRA as the

revenue authority and (iii) NRW as delivering LDT compliance and enforcement. We welcome the commitment to setting up a 'Governance' group.

I trust you will find these comments useful. If you have further queries relating to them, please contact Clare McCallan Landfill Disposals Tax Project Manager clare.mccallan@cyfoethnaturiolcymru.gov.uk

Yours faithfully

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