

Definition of Extractive Waste

Introduction

The Mining Waste Directive¹ (MWD) requires that extractive wastes from mines, quarries and other mineral extractions are managed in a way that minimises harm to human health and the impact on the environment. It covers the management of waste resulting from the prospecting, extraction, treatment and storage of mineral resources and the working of quarries, and refers to this waste as 'extractive waste'. The requirements of the MWD only apply to extractive waste.

This position statement sets out our interpretation of extractive waste and describes the principles we will apply in assessing whether materials arising during an extraction process are extractive waste. It only applies to England and Wales.

Relationship with the Waste Framework Directive

The requirements of the Waste Framework Directive² (WFD) apply in principle to all waste produced by the extractive industries. Article 1(1)(a) defines 'waste' as: '...any substance or object in the categories set out in Annex 1 which the holder discards or intends or is required to discard.' This definition applies to substances and objects arising from extractive industries in the same way as it does to those arising from all other sectors of industry. Implementation of the MWD has not changed which materials are treated as waste, but it has changed some of the regulatory requirements placed on material that is waste.

Under Article(2)(1)(b)(ii) of the WFD, 'wastes from prospecting, extraction, treatment and storage of mineral resources and the working of quarries' are excluded from its scope where they are covered by other legislation. Before the MWD this was Planning and Health and Safety legislation, but now the MWD is the 'other legislation'. This means that where waste is covered by the MWD it does not fall within the full scope of the WFD. However, for the purposes of the MWD, waste is as defined in the WFD and we will therefore apply the same principles and case-law in assessing whether a material is waste or not.

¹ Directive 2006/21/EC on the management of waste from extractive industries and amending Directive 2004/35/C, is commonly referred to as the Mining Waste Directive (MWD).

² Council Directive 2006/12/EC on waste

Extractive materials

The MWD covers the management of waste resulting from the prospecting, extraction, treatment and storage of mineral resources and the working of quarries except where:

- the waste does not directly result from these operations;
- the waste arises from the offshore prospecting, extraction and treatment of mineral resources.

The examples of extractive waste given in the recitals to the MWD are:

- waste solids or slurries that remain after the treatment of minerals by a number of techniques;
- rock and overburden that extractive operations move during the process of accessing an ore or mineral body, including during the pre-production stage;
- topsoil, i.e. the upper layer of the ground.

These are the materials that we expect to be assessed, on a case by case basis, as to whether or not they should be treated as extractive waste.

The discard test

As the Competent Authority we frequently have to assess whether a material is waste or not. We do this on a case by case basis in accordance with the applicable case law and in a way that does not undermine the objectives of the relevant legislation. 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. The interpretation of the law is ultimately a matter for the Courts.

When considering whether a material is waste, the basic question which the European Court of Justice (ECJ) has consistently addressed is whether the substance or object has been discarded by its holder. The holder's intention is to be inferred from their actions in the light of the aims of the WFD and having regard to factors identified by the ECJ. The decision rarely depends on a single factor instead we apply a number of tests, referred to as 'discard tests'. It is only by considering all of these tests that a decision is reached. For extractive materials, we consider it is also relevant to assess discard in the light of the aims of the MWD.

Avesta Polarit Test

There are two ECJ judgements that are particularly relevant for the assessment of extractive materials. These are known as the Palin Granit and Avesta Polarit cases. We take the view that there are circumstances in which residues from mining operations, may be classified as non-waste by-products. These circumstances are where all the following criteria are met:

- The mining operator can physically identify the residues to be used to fill the galleries/voids and/or as part of the agreed site restoration plan.

- The mining operator provides us with sufficient guarantees of that use having regard to the timescale over which the restoration will take place.
- We are satisfied that the time for which the residues will be stored before being used is reasonable in the context of the guarantee.
- The residues will be used without further processing.
- Use of the residues for the intended purpose is lawful.

The general principles taken from these cases have been used as considerations for a by-product test to apply alongside the other discard tests.

Flow Chart

We have produced a simplified set of the discard tests that are most relevant for the assessment of whether or not materials are extractive waste. This includes the by-product test derived from Avesta Polarit. These are set out as a flow chart in annex 1. The first step in an assessment is to establish whether the materials are the primary purpose of the production process i.e. are they the products being sought by the mining or quarrying operation. If they are not, they are production residues.

The subsequent tests, and associated notes, are to allow an assessment to be made on whether such production residues are extractive waste. To ensure that the objectives of neither the Waste Framework Directive nor the Mining Waste Directive are undermined it is crucial when using this approach to go through the whole process before reaching a decision.

Guidance on making the assessment

Decisions on the status of extractive materials have to be made on a case by case basis. However, to streamline the process we have agreed a Guidance Note with the CBI Minerals Group that establishes a consistent and cost-effective way of assessing the status of extractive materials. The Guidance Note is available on the CBI website (www.cbi.org.uk/minerals) and provides guidance, cross-referenced to this Position Statement, on the principles to apply.

Use of the Guidance Note is voluntary, but submission of assessments in line with this guidance means that we can make a decision without any delay. The guidance includes a template for an Extractive Materials Management Statement for operators to complete. This should then be used by a verifier to make a recommendation to us about whether the materials are extractive waste or not. The Note specifies the knowledge and experience necessary to be a verifier, which will be backed up with training for the verifiers. We will have regard to the Guidance Note when making a decision based on a recommendation.

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customer service line

08708 506 506

www.environment-agency.gov.uk

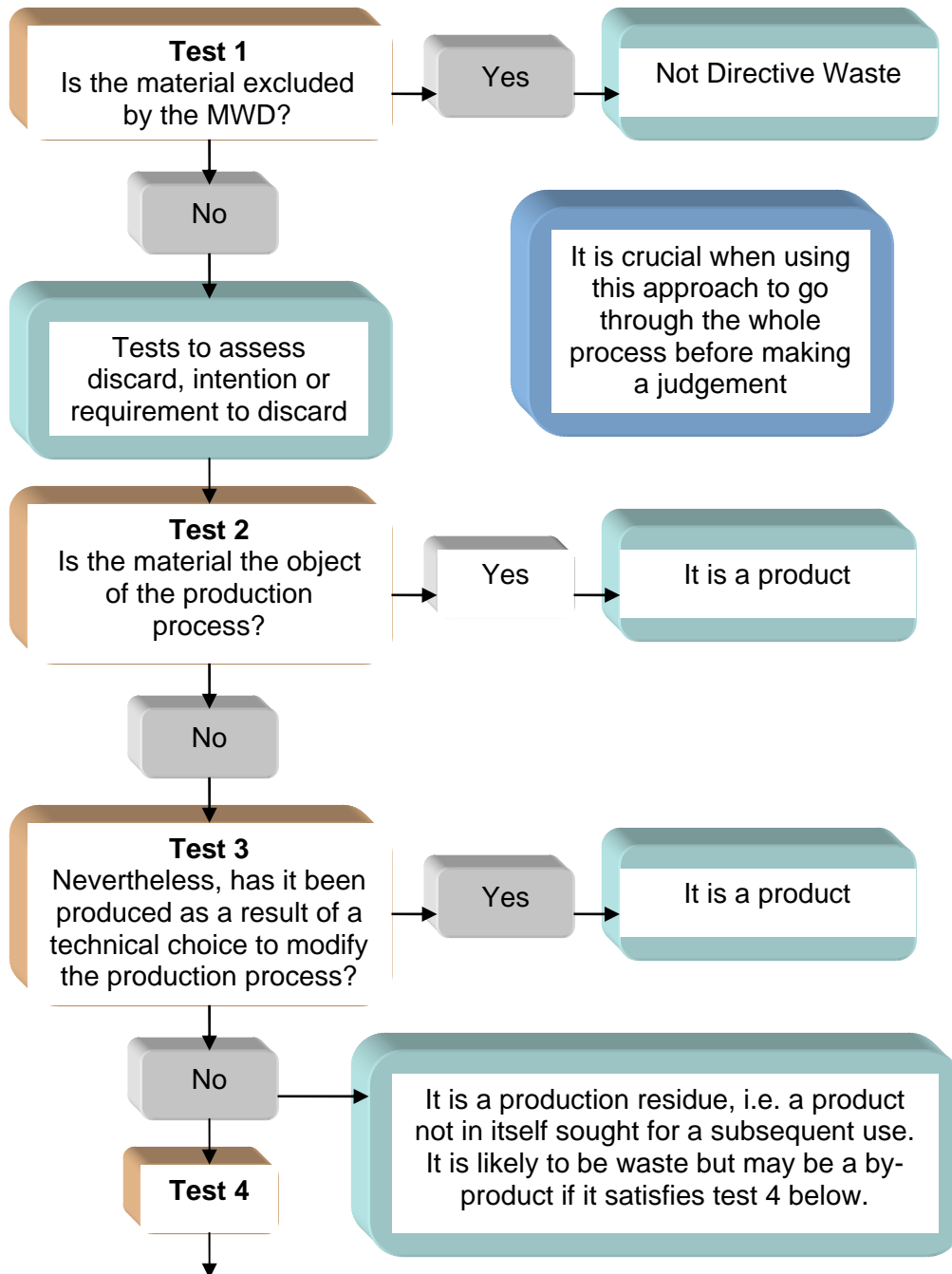
incident hotline

0800 80 70 60

floodline

0845 988 1188

ANNEX 1 - Assessment of whether or not extractive materials are extractive waste



RELATING TO TEST 1

The MWD excludes:

- # Waste that does not directly result from the mining or quarrying operation, or
- # Waste that arises from the offshore prospecting, extraction and treatment of mineral resources.
- # Injection of water and re-injection of pumped groundwater as defined in first and second indents of Article 11(3)(j) of Directive 2000/60/EC (Water Framework Directive), to the extent authorised by that Article, is also excluded from MWD.

RELATING TO TEST 2

Is the material deliberately produced?

If its production could have been avoided, would it still have been produced?

Only if the answer to both of these questions is yes, is the material likely to be a product.

Examples of extractive material to be assessed:

- tailings (i.e. solids or slurries that remain after treatment of minerals)
- rock and overburden (i.e. material moved during accessing an ore or mineral)
- topsoil and sub-soil

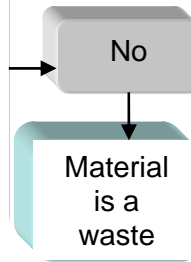
RELATING TO TEST 3

If the operator could have produced the primary product without producing the material concerned, but chose to do so, then this is evidence that the material concerned is not a production residue.

Test 4. BY-PRODUCT TEST

Does the material meet all of the tests regarding:

- 4.1 Certainty?
- 4.2 Further processing?
- 4.3 Integral to production process?
- 4.4 Legality?



Yes

The material is unlikely to be waste, but a last check is required.

Test 5.

Are the aims and objectives of the Mining Waste Directive undermined?

No

MATERIAL IS NOT A WASTE

Yes

MATERIAL IS A WASTE

RELATING TO TEST 4 - BY-PRODUCT TEST

If a material can demonstrably meet the requirements of these tests we will accept that the material may be classed as a non-waste by-product.

4.1 CERTAINTY

The operator must be able to physically identify and quantify the residues that will be used to fill in the galleries / voids and / or other restoration as part of the agreed site restoration plan. 'Restoration' does not include remediation of an area wider than that affected by the mining operation.

The guarantees on its use in a specific time period must be such that it is reasonable to conclude that the material will be used as intended. This guarantee will usually be evidenced by the planning permission. However regard may also be had to the terms of s.106 obligations and also, where these are required, Performance Bonds.

Restoration will usually be in phases, but where top soil is to be stored for extended periods before re-use, we would expect such storage to comply with relevant Codes of Practice for Sustainable use of Soil to demonstrate the structure of the soil is being protected.

We will expect confirmation that there are no contractual agreements that would preclude the materials being used as proposed.

If special precautions are required to ensure protection of groundwater, this would indicate lack of certainty of use.

4.2 FURTHER PROCESSING

If an additional process is required before use, even if such use is certain, this is evidence that the material is waste. Only when a material is ready for use as part of the restoration can it be considered as not a waste.

An example of a further process is the separation of the fines from a slurry to produce a dry material suitable for use in the restoration of the site. The dry material may remain in situ if already in the void, or be removed from the settlement pond and placed in the void.

4.3 INTEGRAL TO PRODUCTION PROCESS

Landscaping and restoration plans are required by planning legislation for all modern minerals workings in England and Wales. We accept that use of extractive material as part of the landscaping and restoration plans will meet this test if the other tests are met.

4.4 LEGALITY

In this context we will expect it to be demonstrated that use of the material will not pose a risk of harm to human health or give rise to pollution of the environment in the short or long term.

The material should not be capable of producing a leachate that has potential to pollute.

If blending is required so that materials meet less prescriptive definitions, it would suggest the material is not suitable for use and therefore is indicative of discard.

The material should be usable without special precautions being in place due to the potential for risk to human health or to the environment.

If the activity in which the material is used would be classified as a Category A mining waste facility, this would be indicative of discard.

RELATING TO TEST 5

Mining Waste Directive:

Sets minimum requirements to prevent, or reduce as far as possible, any adverse effects on the environment or on human health as a result of the management of waste from extractive industries.

Priority action, with reference to accidents and disasters, to develop measures to help prevent major accident hazards from mining waste.