

Response to HMRC consultation: Landfill Tax: disposals not made at landfill sites

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About Energy UK

Energy UK is the trade association for the GB energy industry with a membership of over 100 suppliers, generators, and stakeholders with a business interest in the production and supply of electricity and gas for domestic and business consumers. Our membership covers over 90% of both UK power generation and the energy supply market for UK homes. We represent the diverse nature of the UK's energy industry – from established FTSE 100 companies right through to new, growing suppliers and generators, which now make up over half of our membership.

Our members turn renewable energy sources as well as nuclear, gas and coal into electricity for over 27 million homes and every business in Britain. Over 730,000 people in every corner of the country rely on the sector for their jobs, with many of our members providing long-term employment as well as quality apprenticeships and training for those starting their careers. The energy industry invests £12bn annually, delivers £88bn in economic activity through its supply chain and interaction with other sectors, and pays £6bn in tax to HM Treasury.

Energy UK welcomes the opportunity to respond to this consultation on the secondary legislation to extend Landfill Tax to illegal waste sites and clarify the definition of 'taxable disposal'. We also appreciate the level of engagement provided by the opportunity to respond to the associated preceding consultations and the timely updates on the matter from HM Revenue and Customs (HMRC).

Consultation response

Energy UK represents an industry which consistently aims to achieve the highest standards of environmental performance. Therefore, we support the policy objective to deter non-compliance by making the illegal disposal of waste less profitable, and to reinforce the principle of 'the polluter pays'. We also support the objective of providing greater clarity and certainty to landfill operators in relation to when there is a Landfill Tax charge on material deposited at their sites.

It is recognised and welcomed that HMRC wishes to ensure that the proposals do not inadvertently bring sites that operate legitimately without a permit or licence into the scope of the Tax. Energy UK also recognises and welcomes that the sentiment of industry feedback from the associated preceding consultations has been acknowledged. However, we are concerned that the proposed draft text of the Landfill Tax (Amendment) Regulations 2018 does not fully reflect HMRC's position in this respect and, therefore, there is the potential for unintended consequences of the proposed changes to result in outcomes which would contradict the primary aim of the Landfill Tax.

That is, as drafted, Regulation 2(a)(i) refers only to disposals being "exempt" where the Environment Agency has published guidance in the form of a Regulatory Position Statement. As we have set out in more detail below, there are other regulatory mechanisms by which sites legitimately operate without a permit or licence which are currently, and should remain,

outside the scope of the Tax. Therefore, to be consistent with HMRC's stated policy that sites which legitimately operate without an environmental disposal permit remain outside the scope of the Tax, it is vital that the proposed text reflects all of these regulatory mechanisms and not just Regulatory Position Statements.

By-products from the electricity generation industry have been used for beneficial purposes for many years. The use of combustion by-products, such as Pulverised Fuel Ash (PFA) and Furnace Bottom Ash (FBA), in line with the primary aim of the Landfill Tax, diverts material, which may otherwise have been disposed of in landfill, towards beneficial uses.

For clarity, the current regulatory mechanisms which facilitate the use of combustion by-products to achieve a beneficial outcome in an environmentally sound manner are:

- The Quality Protocol for the use of pulverised fuel ash (PFA) and furnace bottom ash (FBA) in bound and grout applications:
<https://www.gov.uk/government/publications/quality-protocol-pulverised-fuel-ash-pfa-and-furnace-bottom-ash-fba>
- Regulatory Position Statement 172 (RPS 172)
- Bespoke Environmental Permits for deposit of waste for recovery activities

The Quality Protocol (QP) sets out end of waste criteria for the production of PFA and FBA for use in bound and grout applications in specified construction and manufacturing uses. Compliance with these criteria is considered sufficient to ensure that the fully recovered product may be used without undermining the effectiveness of the Waste Framework Directive and therefore without the need for waste management controls.

The Environment Agency's RPS 172 allows unbound PFA and FBA to be used in construction under specified conditions without the need for an environmental permit.

Bespoke Environmental Permits for Deposit for Recovery activities permit the permanent deposit of materials on land for recovery in construction projects under site-specific conditions. The key point, which Energy UK believes it is important to stress, is that in each of the above cases, the activities are not a disposal activity, and should therefore remain outside the scope of the Landfill Tax.

As an example of scale, under the QP, which has become the primary regulatory mechanism which facilitates the beneficial use of these materials, during 2016 approximately 1.3 million tonnes of PFA and FBA were supplied for beneficial uses, of which around 165,000 tonnes were used in engineered fill applications, such as grouting.

Therefore, as the use of PFA and FBA under RPS 172 is a recovery activity, and not disposal, Energy UK considers that the draft Landfill Tax (Amendment) Regulations 2018 must make it clear that such activities carried out in England are outside the scope of the Tax.

The HMRC Landfill Tax update of 13 September 2017 stated that the secondary legislation would ensure that sites which legitimately operate without an environmental disposal permit would remain outside the scope of the Tax. The update gives examples of such sites, including those which operate under a recognised waste exemption, code of practice, or quality protocol. Unfortunately, these examples have not been included in the text of the draft secondary legislation. Therefore, whilst Energy UK acknowledges that the Explanatory Note to the draft Regulations implies that these activities will remain outside the scope of the Tax, there is concern that this is not made explicitly clear.

Whilst Energy UK is certain that HMRC would not seek to deter the beneficial use of combustion by-products via the above regulatory mechanisms, we consider that the current wording of the draft Landfill Tax (Amendment) Regulations 2018 raises a risk of potential unintended consequences for these legitimate activities.

Energy UK is therefore of the opinion that for the avoidance of doubt and to ensure that this legislation achieves its objective of providing greater clarity, it must state clearly that materials used under all of the regulatory mechanisms listed above shall remain outside the scope of the Tax. Any lack of clarity on this has the potential to create uncertainty amongst end-users of by-products from our industry, and consequently, may deter their beneficial use.

For further information contact:

Andy Limbrick

Environment Consultant
Energy UK
Charles House
5-11 Regent Street
London SW1Y 4LR

Tel: +44 20 7747 2924

andy.limbrick@energy-uk.org.uk
www.energy-uk.org.uk

India Redrup

Policy Executive
Energy UK
Charles House
5-11 Regent Street
London SW1Y 4LR

Tel: +44 20 7024 7635

india.redrup@energy-uk.org.uk
www.energy-uk.org.uk