

Compliance with the Waste Framework Directive and Waste Regulations 2011- Recyclate Materials Streams Collections (TEEP)

Whole Systems Approach (WSA) Programme Board

1 August 2013

Purpose:

1. To agree a common RECAP approach to the WFD/ Waste Regulations requirements relating to collection of recyclate materials streams from 2015, so as to inform the progress of the Optimum Service Design (OSD) and Joint MRF Procurement workstreams of the WSA programme.

Issue:

2. As the RECAP WSA is currently considering both new MRF contract provision and also OSD options that will span across the effective 2015 date, there is a need to consider how the WFD & Waste Regulations impact and influence these work streams.
3. WSAPB has previously advised (26 June) that the MRF procurement is not necessarily expected to change service design or collection systems, but rather intended to maximise existing volumes/materials with more into existing bins if operationally and financially practicable and partners 'levelling up' recyclate type. It is understood that it is the options for OSD that will fully consider the implications of operational changes to collections services and thereby, potentially offers the more holistic work stream through which to properly consider the Directive and Regulation requirements.
4. Consequently, the issue for WSAPB to resolve is to determine:
 - how to best consider compliance with the WFD/Waste Regulation requirements
 - determine how to assess and balance the considerations under TEEP, and
 - agree why this is the common adopted approach of RECAP.

Summary:

5. From 1st January 2015 every waste collection authority must, when making arrangements for the collection of waste paper, metal, plastic or glass, ensure that those arrangements **are by way of separate collection**, wherever separate collection:
 - (a) is **necessary** to ensure that waste undergoes recovery operations... and to facilitate or improve recovery; and
 - (b) is technically, environmentally and economically **practicable** (TEEP)
6. There is no statutory guidance to authorities (or to the Environment Agency which will enforce these duties) on assessing these obligations and what the requirement to collect separately particularly means. A recent Judicial Review seems to support comingled collections (subject to the above considerations) but identified glass as a material for particular thought. DEFRA advise that it is planning to consult on guidance on "TEEP" in the autumn and that in the interim, Authorities will need to take their own legal advice as appropriate on the applicability of those duties, and their effect on contracts entered into before, and continuing after, that date (1 Jan 2015).
7. As part of assessing how these legal duties apply to them, it will be for local authorities to weigh up the evidence of what is necessary and practicable. The High Court ruling against a challenge to the Regulations (effectively around whether comingled recyclate

collections were permissible) made it clear that whether separate collection is technically, environmentally and economically practicable depends upon a balancing exercise that is both sophisticated and context-specific.

Context:

8. The Waste (England and Wales) Regulations 2011 as amended by the Waste (England and Wales) (Amendment) Regulations 2012 on the separate collection of recycling, transpose the revised Waste Framework Directive 2008/98/EC and came into force on 1 October 2012.
9. Regulation 13 sets out duties for the separate collection of waste paper, plastic, metal and glass for recycling by 1 January 2015. This obligation is qualified, by “*practicability*” and “*necessity*” and the improvement of quality of recyclate for end use, i.e. separate collection is required if it is technically, environmentally and economically practicable (TEEP) and necessary to facilitate or improve recovery (meeting appropriate quality standards).
10. WFD Article 3 defines “separate collection” as *the collection where a waste stream is kept separately by type and nature so as to facilitate a specific treatment.*
11. WFD Article 11 says - *Member States shall take measures to promote high quality recycling and, to this end, shall set up separate collections of waste where technically, environmentally and economically practicable and appropriate to meet the necessary quality standards for the relevant recycling sectors.*
12. European Commission guidance on the WFD seeks to define TEEP, stating:
 - “*Technically practicable*’ means that the separate collection may be implemented through a system which has been technically developed and proven to function in practice.
 - “*Environmentally practicable*’ should be understood such that the added value of ecological benefits justify possible negative environmental effects of the separate collection (e.g. additional emissions from transport).
 - “*Economically practicable*’ refers to a separate collection which does not cause excessive costs in comparison with the treatment of a non-separated waste stream, considering the added value of recovery and recycling and the principle of proportionality.”
13. A Judicial Review launched by the Campaign for Real Recycling challenged the transposition into the Regulations of the requirements of the Directive on the separate collection of recycling and was dismissed 6 March 2013. Mr Justice Higinbottom’s ruling included the judgements that:
 - *The phrase “technically, environmentally and economically practicable” is used in the Directive as a term of art, importing the principle of proportionality and demanding a sophisticated context-driven exercise of judgment, balancing (amongst other things) the positive and negative environmental and economic effects of separate collection.*
 - *It was and is open to the United Kingdom to fulfil its obligations under the Directive by the system created by the 2011 Regulations, which allows a local authority to*

determine within its area whether separate collection is technically, environmentally and economically practicable; enforced by the Environment Agency.

- *It appears to be common ground that, whilst glass is a well-recognised potential contaminant, metal and plastic can be separated at a stage later than kerb-side without any significant contamination or other relevant disadvantage.*

14. The key issues in the JR outcome and Higginbottom's specific comments suggest the assumptions that:

- Whilst kerbside sort could be considered the de minimus stance, comingled recycle collection is permissible, provided Authorities have assessed (*a sophisticated context-driven exercise of judgment*) that kerbside sort is either:
 - not necessary to ensure appropriate quality of material for its intended end use (i.e. it is a matter for the MRF supplier technologies and onward materials markets)
 - not practicable in regard to TEEP ('economically' likely to be best practicable test given cost of separate/separated collections, especially in rural areas but may be different in urban parts)
- Glass is identified as a particular material that can contaminate and thereby negatively impact upon the quality of other recycle and consequently may specifically warrant separate sort and collection at kerbside (subject to quality requirements and TEEP as above).

15. In a wider sense and in the absence of further case law or DEFRA guidance, it may also be appropriate to assume on the basis of logic and professional/industry deliberation to date, that the key focus of considerations are:

- The general objective of improving the **quality** of recycle materials for the appropriate end use, ideally a 'closed loop' system.
- Whether it is therefore **necessary** to kerbside sort - dependant upon the MRF supplier technologies and known end markets
- The **practicalities** of kerbside sort (TEEP) and the balance and sophistication of those judgements, including whether they apply homogeneously across entire council areas i.e. rural -v-urban

Consequently, the emerging key linkage is the flow between how materials are collected, how they are processed and for what intended re-use, requiring a mature relationship between collection authority and MRF supplier and the initial key test being that of necessity i.e. if it is proven not necessary to kerbside sort then the TEEP consideration need not apply.

Considerations and Risks:

16. The Regulations came into force 1 October 2012 so the legislative requirements are known and therefore a technical requirement for compliance exists. The effective date for separate collection of recycle (paper, metal, plastic or glass) in compliance with the Regulations is 1 January 2015. The contract deriving from the joint MRF procurement will span this period, as will any adopted OSD, so again, there is a technical requirement for compliance. Therefore, RECAP will need to show how it has considered and dealt with the obligations.

17. In terms of risk of challenge, whether from the Environment Agency as enforcing authority or from any further Judicial Review, whilst there is of course a technical risk, the practical risk is less easy to quantify. As RECAP currently operates a long established comingled recyclate service, except for East Cambs that currently kerbside sorts but is moving to a system to match and converge with RECAP partners, there is potentially less risk of challenge than for those Authorities considering a move away from separate collections to comingled, perhaps as a result of austerity/efficiency measures. However, the fact that RECAP is letting a new MRF contract and also considering OSD options may heighten the risk of scrutiny of those new arrangements. Any such risks can be mitigated if RECAP is able to demonstrate how it has paid due regard to the legislative obligations.
18. Glass being identified by Mr Justice Higginbottom as a specific recyclate material impacting on quality of recyclate, suggests particular attention needs to be given to the assessment of separate glass collections. The picture nationally is varied, with some authorities, such as Dorset already separating glass but also experiencing difficulties regarding Health & Safety of operatives and noise issues. More locally, Suffolk already collects glass separately, through bring banks and Household Recycling Centres, but has included comingled glass as one of its four mix options in its current MRF ITT. Industry experience also suggests that separate glass collections, where the material is not mixed with either other recyclate or residual waste (thereby shielded) has high attrition rates on freighter assets. Interestingly, the CIWM recently highlighted a report by consultancy WYG Group into national kerbside recycling performance for 2011/12 that demonstrates the top recycling Authorities have fully comingled services, including glass, whilst the worst performers are separated kerbside sort systems.
19. Given that RECAP, as of September, will all operate comingled recyclate collections, including glass, there also needs to be consideration as to how the public may react to changes in collection systems and what actions the public are expected to undertake, particularly if multiple changes are sought. Indeed, in terms of actual practicality, there is some question whether any specific material (such as glass) could ever be successfully removed from an existing waste stream in totality, even though alternately capturing the majority may be a sufficient and worthwhile objective. Additionally, consideration of kerbside sort implications and particularly the separation of any one key material (certainly a weighty material such as glass), potentially impacts across the other waste collection streams, particularly residual and fleet management/asset regimes - a matter better considered holistically by the OSD deliberations rather than MRF procurement.
20. It would seem simpler to allow the MRF joint procurement arrangements to progress largely on the basis of status quo systems, with any major changes in either material type, sorting requirements or receptacles left for a single holistic change resulting from OSD - which could then be communicated, implemented and monitored with more consistency and clarity across the whole partnership. It may also have less potential political impact than multiple sequential changes if system change was driven by both MRF and OSD outcomes. The exception would be unless the MRF soft market test identifies any recyclate basket mix issues that prompt value realignment of any material(s) i.e. significant value income offsetting collection cost if a material(s) was separated from the mix.
21. Should this be the preferred approach, of course the MRF procurement will need to make proper reference to this process. In that regard, the ITT and any contract will need to articulate, recognise and make provision for any implications of OSD upon how materials might be presented in the future, including importantly, the ability to renegotiate materials basket values at that future time. It is not untypical for contracts to have provision for future service change scenarios.

22. A further MRF consideration is of course remembering the fundamental intent of the objectives, to ensure appropriate quality recyclate. It is the 'necessary' provision that is the initial judgement to be made, i.e. if there is no necessity to kerbside sort to achieve the material quality required for end use - because the MRF technologies can sort and separate sufficiently and/or the materials end markets are contract tied or require the material as already supplied – then there is no legislative requirement for TEEP (see Para 15 above). That is not to say that collection authorities should not play their part in consistently driving up the quality of material supply and how materials are presented, but that then creates further complexities and opportunities in working constructively with a MRF supplier to ensure quality through the emerging MRF Code of Practice and ongoing development of national End of Waste Criteria for the recyclate types. In that regard, the MRF procurement soft market test and evaluation of bids could and should adequately explore, test and weight the quality requirements of potential suppliers.
23. In effect, compliance with WFD / Waste Regulations would be deemed by RECAP to be a considered and reasoned two stage process - the MRF procurement initially levelling-up and jointly presenting a collective and consistent volume/type of material to the market and then; OSD securing the most efficient (saving) and value creating (income) collection systems that ensures the recyclate stream is captured in the most practicable way to ensure appropriate quality for maximised end use – indeed, exactly as required by the legislation, remaining agile to future statutory guidance when available, whilst also mitigating the risk of any challenge.
24. An alternative would be to abort the current joint MRF procurement, pending the outcome of OSD. However, given the above reasoning, that seems an unnecessary and draconian action that would have its own attendant risks and disadvantages. It would defer or prevent one of the key objectives of the WSA in securing assumed maximum value for a collective whole partnership offer of combined recyclate volume; fail to achieve the convergence of contracts and ease of future procurements (perhaps on an even bigger geographical scale) and importantly; would leave a number of partners out of contract in 2014 and potentially irrevocably fracture the RECAP partnership approach.

Recommendation:

25. It is recommended that the two stage approach as set out at Para 23 above is adopted as the RECAP position on WDF / Waste Regulations compliance, for the reasons identified in Paras 21-24 - requiring the MRF procurement process to test material quality requirements with suppliers and the OSD options to test the TEEP considerations of potential kerbside sort.