

# Finance and the future for permits

- The Environmental Permitting (EP) Regulations which came into force last year streamlined the Waste Management licensing and pollution prevention and control regimes. However, the owner or applicant for an EP must be able to provide adequate financial provision to meet the obligations of the permit. Some of these sites can include landfill with aftercare costs for a period of up to 60 years after closure. **MATHEW HUSSEY**, Associate Director, UK Corporate Risks, Tysers and Sarah Owen, consultant, Waterman Energy, Environment & Design, examine the challenges and possible solutions...

## ENVIRONMENTAL PERMITTING REGULATIONS

The Environmental Permitting (England & Wales) Regulations 2007 ('the Regulations') came into force in England and Wales in April 2008. They provide for a single regulatory regime bringing together the former Pollution Prevention and Control (PPC) permitting and waste management licensing regimes. In the future, it is intended to extend the scope of the Regulations as further environmental permitting requirements, typically in the form of European Directives, come into force. Other existing regulatory regimes, possibly including water quality consenting, may also be included under it. Scotland is considering taking a similar approach.

The Regulations made provision for the amendment or revocation of a number of earlier primary and secondary legislation as it related to England and Wales. For example the Landfill Regulations of 2002 (as amended) were revoked and the regulatory link to the provisions of the Landfill Directive ('the Directive') and subsequent Council Decision is now made by direct reference from Schedule 10 of the Regulations.

## AFTERCARE

For landfill, the aftercare period commences when the Environment Agency (EA) is satisfied that waste disposal has ceased, the waste mass is stable and appropriate pollution-prevention infrastructure is in place to manage and monitor the landfill's emissions and impacts on the environment.

During the aftercare period the operator is still responsible for complying with permit requirements including environmental monitoring, the operation of landfill gas, leachate and other pollution-prevention infrastructure, capping and landscape management until such time as the site poses no further risk to the environment or human health and the permit can be surrendered. These activities incur cost over a (lengthy) period of time and when the landfill is no longer generating revenue from waste disposal.

## FIT AND PROPER

Before the EA will issue a permit, it has to be satisfied the operator is a "fit and proper person", including the operator's ability to make financial provision sufficient to comply with permit requirements until permit surrender. Provision has to

be in place at the time of permit issue and maintained throughout the lifetime of the permit. The Directive requires the cost of monitoring and managing the landfill during the aftercare period to be reflected in the price charged for waste disposal. To fail to maintain provision can render the operator liable to enforcement action from the EA.

The Directive stipulates the budgeted aftercare period should be of the order of 30 years post closure. Currently though the EA expects to see consideration of a 60-year period, whilst acknowledging that the actual period could be 75 – 100 years.

## EXPENDITURE PLAN

Calculating the expenditure necessary to make safe, restore and monitor the landfill during the aftercare period is usually undertaken as a joint exercise between the operator and the environmental consultant developing the permit application. The resultant document is termed an expenditure plan. Once the figures have been agreed with the EA, the operator needs to take financial advice as to the most appropriate method of making provision to meet the expenditure plan. ►



The creation of an expenditure plan and the making of financial provision should not be a "do once" activity. It should be periodically reviewed throughout the lifetime of the landfill. For example, for a landfill in a former quarry where all quarrying had occurred prior to waste disposal, the site restoration element of the financial provision could be actively managed to ensure that provision reduces as restoration is carried out.

For inert landfills in particular, the most significant elements of the expenditure plan will relate to restoration activities. If environmental monitoring indicates that a longer or shorter aftercare period than was originally estimated is looking likely, financial provision may need to be adjusted. Environmental consultants and financial advisors each have a role to play in assisting operators in managing these long-term obligations.

### MAKING FINANCIAL PROVISION

Increasing attention is being paid by the EA to the form of the provision to ensure monies are available to the EA in the event the operator is declared insolvent, as the EA then takes on the management role. Case law over the past few years has highlighted some problems in accessing those monies (see *Environment Agency v Hillridge Limited and Others [2003] EWHC 3023 (Ch)*).

It should also be important to the operator that sufficient provision can be made in the most cost-effective manner. Methods of making financial provision include insurance or bank-backed bonds, Escrow accounts, Trusts, Lump sums but other methods are also being developed.

### OTHER METHODS OF MAKING FINANCIAL PROVISION

Waterman Energy, Environment and Design Ltd is currently working with operators who are exploring a new method of financial provision. The FillSecure product, offered through Matthew Hussey of Tysers, Property Insurance & Risk Management Services and Paul Derbyshire of Kynaston-Carnoustie Financial Consultancy Limited, independent financial advisers has been approved by the EA and used to secure permits.

The basis of the FillSecure solution is a bespoke trust (that ensures that the funds are only used for EA-approved works on the landfill site and is ring-fenced from creditors) and a broadly diversified

investment portfolio, which is the responsibility of a professional investment-management company. The EA agreed to accept that a balanced investment portfolio will grow over the long-term. This enabled the FillSecure team to reduce the amount required up front to fund this method of financial provision. (See case study for more on this)

It is likely that in the current economic situation bank and insurance bonds will become more difficult for operators to secure. As the credit market has been adversely affected over the last six months or so, the reduced availability of credit is very likely to result in an increased cost for companies using this

method to secure their financial provision.

Returns from cash in the UK are currently very low with the bank base rate at an all time low of 1%. It is likely that escrow accounts (which are liable to pay tax on interest received) will not achieve a return above this rate. A short-term benefit of this is that inflation is very low, but cash returns rarely keep pace with inflation over the long-term.

There are a number of key questions that are important to the EA and the operator. A selection of these points are shown below and demonstrates the varied requirements of the regulator and operator:

SITUATION	ESCROW ACCOUNT	BANK/INSURANCE BONDING	FILLSECURE 'PRODUCT'
Is the financial provision method approved by the EA?	✓	✓	✓
Is the overall cost of providing for the aftercare lower than the total EA agreed figure?	✗	✗	✓
Can the required aftercare costs be accumulated during the operational phase?	✓	✗	✓
Is there any allowance for inflation within the financial provision put in place to obtain the Permit?	✗	✗	✓
Will there be a substantial residual fund left following the aftercare period?	✗	✗	✓
Does flexibility exist for payment of funds to a beneficiary other than the EA or operator?	✗	✗	✓
Are all the funds required for the closure/capping and aftercare costs protected before the site is closed?	✗	✗	✓

### CONCLUSIONS

The EA has indicated that it is intended to extend the scope of the Regulations as other European Directives come into force. Although the EA expects to see consideration of a 60-year period, it has acknowledged that the actual period could be 75 – 100 years.

At a time where financial issues for a company come

to the absolute fore it is recommended that permit holders review expenditure plans and associated financial provisions. In some instances, long-term sustainable financial solutions can be achieved to meet both current and potential future demands with unexpected cost savings. Surely a 'win-win' situation for all stakeholders and the environment. □

## CASE STUDY

The FillSecure team was approached by an operator trying to secure financial provision for a landfill site that had the Permit application rejected over two years earlier. The rejection was being challenged and the Planning Inspectorate was also considering proposals for the site's development.

The operator was subject to a Company Voluntary Arrangement and was unable to secure either a bank or insurance surety bond to cover aftercare costs, possibly leading to its insolvency. The local council was likely to inherit the site and would have had to cover the cost of both the landfill capping and aftercare.

With an appeal planned for just one month's time, the

FillSecure team reacted quickly to the challenge:

- The FillSecure lawyer, in conjunction with a specialist Counsel, drew up a deed that was used to produce each bespoke trust that formed the basis of the FillSecure solution;
- Before the FillSecure proposal could be submitted, agreement was needed by the waste operator's company shareholders, solicitor and bank. As the FillSecure cost was around 30% of the escrow cost, the bank was prepared to lend this reduced amount;

- The solution was then presented to the Planning Inspectorate with the backing of the waste company, its lawyer, bank and the EA. After a review, the Inspectorate then ordered the EA to issue the Permit with FillSecure as the financial provision.

A superb result for the operator – from initial discussions to the set up of the FillSecure Trust, £3.2M was saved and enabled it to continue business operations.

