

██████████  
Senior Investigation Officer  
Environmental Standards Scotland  
Ìrean Àrainneachdail na h-Alba

**ENVIRONMENTAL**  
**Standards Scotland**  
Ìrean Àrainneachdail na h-Alba

██  
  
██████████  
via email

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29 February 2024

**Case Reference IESS.24.008**

Dear ██████████,

Thank you for submitting your representation to Environmental Standards Scotland (ESS). I have reviewed the information which you have provided regarding the disturbance of a landfill as part of constructing a new active travel path. I note the outcome you seek is answers to questions which would assist you in determining whether there are any gaps in environmental law or whether Dundee City Council (DCC) was non-compliant with environmental law, to inform whether you would make a complaint to DCC.

ESS' investigation team would normally consider whether a representation is suitable for investigation and not normally assist in making a complaint to the Council over an individual issue. Notwithstanding this, I have attempted to answer your questions without taking a view on the merits of any concerns you may have.

Regarding whether there is a possible gap in environmental law, I have not formally assessed this in response to your representation. However, drawing on my previous experience in managing contaminated land during construction works, I am familiar with legislation which dictates re-use of waste within a development, safety during construction, and statutory nuisance. The combination of these place duties on those delivering and

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managing such construction works to mitigate unacceptable impacts to human health and the environment. More details on these is provided below in response to your queries.

The representation does not appear to present evidence of wider, systemic issues which would engage ESS' investigation function. In respect of any concerns you may have about the individual decisions made, there is an alternative remedy through submitting a formal complaint to DCC and then bringing the matter to the Scottish Public Services Ombudsman (SPSO) if you are unsatisfied with DCC's response to your complaint. The SPSO can review individual cases and decisions by public authorities, and determine whether these parties have acted appropriately.

Please find responses to your queries below.

**1. Are there are any regulations or guidelines in Scotland which Local Authorities have to comply with if they wish to excavate an old historic landfill site? This one was 'supposedly' capped by the same local Authority in the late 1950s.**

I do not know of any regulations specific to the excavation of landfill sites, but I believe the following relating to construction, waste, and nuisance may apply in this scenario:

Construction Design and Management Regulations 2015

These regulations establish duties on various parties (including the client, principle designer, and principle contractor) relating to health and safety. Some relevant examples include:

- the Client must provide 'pre-construction information' – all possible information about the construction site on which the project will be completed. Information about health hazards are an example of pre-construction information that contractors may need to safely complete the project
- the Principle Designer must eliminate foreseeable risks – this includes identifying any potential health and safety risks that could arise during the project and ways to eliminate or reduce them
- the Principle Contractor must prepare a 'Construction Phase Plan' detailing how health and safety risks will be managed throughout the construction stage of the project

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## Waste regulation under SEPA

As the Scottish Government summarises on their website,<sup>1</sup> there are at least 27 instances of waste-relevant legislation in force in Scotland. I cannot provide the specific provisions applicable in this instance, but I would refer you to SEPA's document 'land remediation and waste management guidelines'<sup>2</sup> which sets out SEPA's approach to regulating the remediation of contaminated sites under the waste regulatory regime. This establishes the requirements for re-using excavated materials on site without treatment, and requirements for on-site treatment and subsequent use. Should these not be followed in a construction site, it would appear to be SEPA's remit to consider enforcement.

## Statutory Nuisance – Part IIA of the Environmental Protection Act 1990

Dust from demolition and construction sites may comprise a statutory nuisance under Part IIA of the Environmental Protection Act.

**2. Do you consider that DCC should have been explicit with BAM Richies that there was a known landfill site in the location which they were undertaking a geotechnical survey?**

Please refer to question 1 above regarding the responsibility of Clients to provide information about health hazard to contractors, per the CDM 2015 regulations.

**3. Do you consider that DCC should have made all stakeholders and partners aware that work on the Broughty Ferry/Monifieth cycle walkway would include excavating an old historic landfill site. This is particularly in light of the sensitivity of the area lying close to so many designated nature conservation sites?**

I cannot presently identify any legal obligations DCC would have had to inform stakeholders and partners aside from their CDM duties noted above. ESS cannot make comment on the suitability of DCC's individual decisions relating to informing other parties about the hazard.

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<sup>1</sup> [Waste: legislation - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>2</sup> [Land Remediation and Waste Management Guidelines \(sepa.org.uk\)](http://sepa.org.uk)

#### **4. Do you consider the geotechnical investigations to be have been adequate for a landfill site with unknown contents?**

There are no laws or regulations which dictate an appropriate scope for ground investigations. Contaminated land investigations are typically tailored to the proposed development following a desk-based review of risks. There are a series of 'best practice' documents published by British Standards, the Construction Industry Research and Information Association (CIRIA), and other organisations which are used by the industry to inform appropriate scale and scope, but these are not legally binding. The planning authority may chose to apply conditions under planning to investigate contamination and remediate any issues; in this instance the authority may review ground investigation reports and determine whether they were of acceptable scope and findings.

I have not reviewed the BAM Ritchies ground investigation report as this was not provided with the representation and I cannot locate this under what I believe is the relevant planning record (20/00534/FULL). Nevertheless, it would not be appropriate for ESS to comment on the adequacy of the spatial coverage and the analytical suites of analysis undertaken, as this relates to this specific project.

I do note that you have highlighted instances where Total Organic Carbon (TOC) and antimony testing exceeded inert waste landfill thresholds. I would comment that these limits are to determine whether the materials would be classified as inert waste and eligible for disposal at an inert landfill. These thresholds do not necessarily reflect the risk these materials would pose to human health and the environment if in-situ. TOC is a measure of organic content, which may cause gas generation and settlement when the organic materials degrade in a landfill, but it is not a good measure of contaminant risks to humans and the environment.

#### **5. Do you feel the analysis of the bore holes and site digs should have raised any red flags for DCC?**

Please see response to question 4 above.

#### **6. Do you believe that there should have been a requirement for DCC to set out a plan to reduce risks during the excavation work and prevent any spread of contaminants?**

**There was nothing submitted during the planning process to make Planners aware that there was a historic landfill site.**

Please refer to my response to question 1.

**7. Do you believe that DCC should have stopped operations when it was reported to them that Landfill was being smashed and sprayed across the area and even spread further along the coast? Not only did they not stop but they continued at a pace in an effort to complete the works. They denied that they were crushing any materials in the Trommel but we have video and photographic evidence. They deliberately misled SEPA during their site visit by arranging for carriers to be present and remove items of landfill from the location.**

I cannot comment on what specific actions DCC should have taken and the validity of their stance. You may wish to review the requirements given by SEPA in the previously-mentioned waste document and the provisions in Part IIA of the Environmental Protection Act 1990 relating to statutory nuisance to inform your potential complaint to DCC.

### **Conclusion**

I hope the information I have provided will assist you in considering whether to make a complaint to DCC over the issues you have documented. If you have any questions or comments, please contact me at [REDACTED].

Yours sincerely,

[REDACTED]

[REDACTED]

Senior Investigations Officer

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