

Doing Your Duty



Jacqui O’Keeffe MCIWM, consultant solicitor at Norton Rose Fulbright LLP, looks at the Defra and Welsh Department for Natural Resources’ joint consultation on a revised code of practice on the waste duty of care

The Department for Environment, Food and Rural Affairs (Defra) and the Welsh Department for Natural Resources jointly published a consultation on a revised statutory code of practice (the Code of Practice) on the waste duty of care (Duty of Care) at the end of July 2015. The revised code of practice is considerably shorter (13 pages rather than the previous 36) than the current version, which was published in 1996.

Background

THE PRINCIPLES of Duty of Care are set out in the Environmental Protection Act 1990 (EPA) and apply to anyone who is a holder of household, industrial and commercial waste, known as controlled waste.

Section 34 of the EPA imposes a Duty of Care on anyone handling controlled waste (that is producers, carriers, importers, those storing or treating waste, disposers and dealers or brokers) to take all reasonable steps to ensure that the waste:

- is not disposed of unlawfully, without a permit or in breach of any permit
- is not treated, kept or disposed of in a way that causes pollution or harm
- does not escape from a person’s control
- is only transferred to an authorised person
- when transferred, is accompanied by a written description that enables the transferee to know enough about it to deal with it properly (that is, a waste transfer note).

The purpose of the Duty of Care is to ensure that waste is dealt with responsibly and described and treated correctly. The Duty of Care lasts from the moment you produce the waste, until it is transferred to a properly licensed/ authorised person in the waste chain to deal with it. Each party is responsible for checking how that business deals with the waste

The aim of the Duty of Care is to prevent waste crime and fly-tipping, which blights the areas where it occurs and can pose a risk to the environment and human health. Waste

crime has been estimated by the Environmental Services Association Education Trust to cost the UK economy £568m per annum.

The current version of the Code of Practice was published in 1996, and does not reflect a number of important legislative changes to both domestic and European legislation that relate to the duty of care that have been introduced since its publication in 1996, for example:

The waste hierarchy – Article 4 of the EU Waste Framework Directive sets out five ways of dealing with waste, ranked according to environmental impact. Waste holders are required to take all reasonable measures to apply the waste hierarchy as a priority order when waste is transferred to another person.

Addition of waste basic characterisation requirements – if waste is to be disposed of in a landfill, it has to be characterised on the transfer note to ensure that waste management operators fully understand the nature of the wastes they will be receiving (this is a requirement of the EU Landfill Directive and case law).

Waste transfer information – those who transfer and handle waste now have the ability to record waste transfer information on alternative documents such as invoices, orders or receipts; or electronically, for example through the electronic duty of care system (www.edoconline.co.uk).

Household waste duty of care – Section 34 of the EPA imposes a duty of care on householders, in line with the requirements of the EU Waste Framework Directive, for waste producers to have their waste handled by an authorised person. This is a more limited duty compared to that placed on businesses. It requires householders to ensure they pass their domestic waste to someone authorised to take it (eg the council’s waste collection service), but does not require them to complete waste transfer notes.

Although non-compliance with the Code of Practice is not an offence, it can be used as evidence to show that an

The link to the Government website on the Duty of Care is www.gov.uk/managing-your-waste-an-overview/overview

The link to the Government Consultation on the Duty of Care is <https://consult.defra.gov.uk/waste/the-revised-waste-duty-of-care-code-of-practice>

offence under section 34 of the EPA 1990 has occurred.

The purpose of the Code of Practice is to give simple, clear and practical guidance on what those who import, produce, carry, keep, treat or dispose of controlled waste have to do to fulfil their legal Duty of Care obligations. Defra had also published guidance on the use of the Code of Practice in the past.

Consultation Paper

THE CONSULTATION closes on 21 September 2015 and responses can be submitted online. It invites a response to 10 questions.

The revised Code of Practice a) explains the legislative requirements of the Duty of Care, and makes clear who and to what the Code of Practice will apply to; b) provides guidance so that each user understands how it can demonstrate compliance with the Duty of Care and whether the Duty of Care still applies to a waste producer or other waste holder once they have transferred the waste to another person; c) refers to other legislative requirements that also apply to the management of waste and must be complied with alongside the Duty of Care in particular circumstances;

and d) with the aid of modern technology, provides interactive information and refers the user to other web sources to assist in clarification of issues.

The Code of Practice sets out the scope of the Duty of Care in terms of what waste it covers and whom it applies to, and it only deals with controlled waste and does not deal with the duty of care for extractive waste.

Conclusion

SECTION 34(7) of the EPA requires the Government to consult with persons and bodies, representative of the interests concerned, before issuing a Code of Practice.

Defra is also committed, under the Red Tape Challenge (a cross-government review of over 21,000 statutory instruments launched in April 2011), to carry out a Smarter Environmental Regulation Review (SERR), to review and rationalise environmental legislation, guidance and data reporting requirements.

Defra launched the SERR in July 2012. This revised Code of Practice is much shorter, consistent with SERR, and the Government's general approach to streamlining and reducing the length and complexity of legislative guidance. ■

DS Smith has been fined following the death of a worker who became trapped in unguarded machinery at a Devon paper mill. John Stoddart, the company's operations manager, was attempting to smooth out felt on a conveyor when he was pulled into the machinery, causing fatal injuries on 24 September 2011. DS Smith Paper Ltd pleaded guilty to a breach of the Provision and Use of Work Equipment Regulations 1998 and was fined a total of £400,000 and ordered to pay £34,761.67 in costs.

Seamus Toye from Milltown Lane, The Birches, Portadown, Northern Ireland was fined £7,000 plus £31 court costs at Craigavon Magistrates' Court for waste offences. Toye pleaded guilty to four offences in relation to his unauthorised End of Life Vehicle and scrap metal site. On 11 March 2014, Northern Ireland Environment Agency officers visited the site, where they found large amounts of scrap engines, vehicle parts, scrap metal, timber and waste tyres. On 8 December 2014, at Craigavon Magistrates' Court, Toye was given until 5 August to clear his site of all waste. Significant amounts of waste were found on site during two subsequent visits by NIEA officers.

A Fife landowner, Ernest McPherson, has been handed a £15,000 confiscation order for illegally storing waste on land at Lochgelly over a five year period. The order follows on from a Restriction of Liberty Order issued to Mr McPherson in May last year which required him to be at home between 9pm and 5am. McPherson pleaded guilty to keeping thousands of tonnes of controlled waste without the authority of a waste management licence on land at Wee Mary Bing, Wester Cartmore Farm, Lochgelly between December 2006 and March 2012.

A Darlington man has been ordered to pay back £350,000 under the Proceeds of Crime Act – one of the biggest seizures for the Environment Agency in the North East. Tony Leigh Shepherd could have to pay back just under £1.2m – the agreed benefit sum of his criminal activities – if he comes into future assets. Shepherd pleaded guilty to two offences of operating an illegal waste site at West Musgrave Farm, St Helen Auckland, between August 2009 and March 2011. He also pleaded guilty to a third charge of operating an illegal waste site at Barrier Works, Shildon, between December 5, 2010, and July 8, 2011.

