

## E Key Facts No. 1

## Duty of Care for Waste

### Principal statutes and statutory instruments

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| <b>Environmental Protection Act 1990, s.33</b>   | Establishes criminal offences for depositing directive waste in or on land unless in accordance with a waste management licence (now Environmental Permit see E Key Facts No.3); treating, keeping or disposing of directive waste by means of directive disposal or recovery operations unless in accordance with a permit; treat, keep or dispose of directive waste in a manner likely to cause pollution or harm to human health; and knowingly causing or knowingly permitting the first two of the above offences. |
| Environmental Protection Act 1990, s.34  | Establishes the parties to which the duty of care applies, their responsibilities and the criminal penalties for failure to comply.  |
| <b>Waste (England and Wales) Regulations 2011</b>  | Provides details on the specific duty of care requirements for waste under s.34.   |
| Environmental Permitting (England and Wales) Regulations 2010 (SI 2010/975)                                | Requires an Environmental Permit (see E Key Facts No.3) or (registered) exemption to authorise the deposit of directive waste on land; the disposal or recovery of directive waste; the use of certain mobile plant to dispose of or recover directive waste.  |
| <b>Waste Management Licensing Regulations 1994 (SI 1994/1056) (as amended)</b>                             | Provides detailed statutory requirements, definitions and responsibilities for the waste management licensing system, under s.35.  |
| Control of Pollution (Amendment) Act 1989  | Establishes a requirement that all carriers of controlled waste are registered with the Environment Agency with the exception of specified exempt activities and bodies and sets criminal penalties for failure to comply.   |
| <b>Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991 (SI 1991/1624)</b> | Supplements the above by specifying exemptions, application and registration requirements, revocation of registration, fees for registration and the Environment Agency's power to seize vehicles.   |

### Criminal penalties

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| <b>Environmental Protection Act 1990, s.33 (as modified by the Clean Neighbourhoods and Environment Act 2005) and the Environmental Permitting (England and Wales) Regulations 2010</b> | Breach of s.33 of the 1990 Act or s.38(1) of the 2007 Regulations carries a maximum fine on summary conviction of £50,000 and/or imprisonment for up to 12 months or for conviction on indictment an unlimited fine and/or imprisonment for up to five years .      |
| Environmental Protection Act 1990, s.34   | Failure to comply with the duty of care carries a maximum fine on summary conviction of £5,000 or conviction on indictment an unlimited fine. Fixed penalties are also available in specified circumstances (failing to furnish carrier registration documents etc) |
| Control of Pollution (Amendment) Act 1989   | Carrying controlled waste without a registration summary offence only with maximum fine of £5,000, but may include seizure of vehicles used for illegal carriage of waste.  |

### What is directive waste?

The duty of care applies to directive waste. In the UK directive waste was historically defined as waste arising from households, commerce and industry as under the Controlled Waste Regulations 1992, however this has now been extended to include waste from both mines/quarries and agriculture. Since 1 May 1994, the common definition of waste in Europe has been that of Directive waste as defined under the Framework Directive on Waste (75/442/EEC as amended by 91/156/EEC and 91/692/EEC):-

“any substance or object ... which the producer or the person in possession of it discards or intends to discard or is required to discard”.

In practical terms, this is interpreted by the Government to mean any substance or object which has fallen outside of the commercial cycle or chain of utility. Substances or objects meeting this test are probably waste and are now referred to as directive waste, a term which supersedes the older references to controlled waste. Specific guidance on the definition of what is and what is not waste is contained in DOE Circular 11/94.

The duty of care applies to all directive waste, irrespective of whether other statutory classifications apply. Holders of waste classified under other regulations must ensure that they comply with their duty of care in addition to any other requirements that be apply under, for example:

- The Hazardous Waste Regulations 2005 (as amended)
- Transfrontier Shipment of Waste Regulations 2007 (as amended).

### What is the duty of care?

Those persons to whom the duty of care applies (holders of directive waste) must take all such measures as are reasonable in the circumstances to:

- Prevent any other person from committing offences under s.33 or in a manner likely to cause environmental pollution or harm to health;

- Prevent the escape of waste, in other words, to contain waste;
- Ensure that if the waste is transferred, it goes only to an **authorised person** or via an **authorised transport purpose**;
- When transferring waste, to make sure that a written description (transfer note) is also transferred to the new holder that gives a description of the waste sufficient for the new holder and each person receiving it thereafter to be able to comply with their duty to prevent the escape of waste. Records of waste transfers and associated transfer notes must be kept for at least two years in the case of waste and three years where the consignment involves Hazardous waste.

There is a statutory Code of Practice on the Duty of Care made under s.37 of the Environmental Protection Act 1990. Contravention of its provisions is not in itself a criminal offence but could be taken into account in deciding whether the duty had been breached and setting penalties.

*Authorised persons are:*

- A waste collection authority.
- A person who is the holder of an Environmental Permit (see e key facts No.2 and No.3).
- Any person who is exempt from holding a permit (see e key facts No.4).
- A person who is the holder of a registration certificate as an Upper Tier Registered Waste Carrier, Lower Tier Registered Waste Carrier carrier of waste.
- Any person who is exempt from holding a registration certificate for carrying waste, principally charities and voluntary organisations, waste collection and disposal authorities, subsidiaries of British Railways Board, ship operators where waste is to be disposed of at sea, persons authorised by the Animal By-Products Order 1992 to hold or deal with animal waste or the holder of a knackers yard licence.
- In Scotland, a waste disposal authority authorised by resolution.

*Authorised transport purposes are:*

- Transporting waste within the same premises between different places on those premises.
- Transporting to a place in Great Britain waste that has been brought from a country or territory outside Great Britain not having been landed in Great Britain until it arrives at that place.
- Transporting waste by air or sea from a place in Great Britain to a place outside Great Britain.

Persons need to register as an upper tier carrier or broker if they carry, broker or deal in other people's controlled waste, unless they are in one of the lower tier categories listed below. Persons must also register as an upper tier carrier if they carry their own construction or demolition waste. Upper tier registration lasts for three years. There is fee to register or renew a registration.

Persons need to register as a lower tier carrier if you only carry, broker or deal in: animal by-products; waste from mines and quarries; waste from agricultural premises. Registration as a lower tier carrier is also required if a person carries, brokers or deals in other people's waste and are: a waste collection, disposal or regulation authority; or a charity or voluntary organisation. From the end of December 2013 producers of waste will also need to register as a lower tier carrier if they normally and regularly carry controlled waste produced by their own business, other than construction or demolition waste. Registration as a lower tier carrier, broker or dealer is currently free and lasts indefinitely, unless a registration is revoked or withdrawn.

### **To whom does the duty of care apply?**

Any person who imports, produces, carries, keeps, treats or disposes of waste or who has control over it as a broker. Such persons are subject to the duty of care in so far as they hold the waste or control what happens to the waste. Householders are generally exempt from the requirement to produce transfer notes, but are now subject to the requirements to deal only with authorised persons. Employers are vicariously liable for the acts and omissions of their employees in respect of the duty of care.

Brokers making arrangements for waste on behalf of another person must be registered as waste brokers under Reg. 20 of the Waste Management Licensing Regulations 1994 except where they are exempt from registration. Any person who breaches this requirement is liable to a maximum fine of £5,000.

### **Record keeping**

The Environmental Protection (Duty of Care) Regulations 1991 require that all those subject to the duty of care keep adequate records of waste that they receive or consign. Records must be made available for inspection by the Environment Agency. Records must include a copy of the description of waste. This description is normally part of the transfer note. In situations where the waste is of a complex nature or possesses specific hazardous properties, a detailed technical description may be written. Descriptions of waste should refer to any special problems in handling the waste; any unusual properties; what the waste contains or consists of; the quantity and how it is contained. In addition, descriptions should also include: the type of premises or business from which the waste originates and their relevant Standard Industrial Classification (SIC) code; the name of the substance or waste; the process that produced the waste and a chemical and physical analysis (where appropriate). From 28th September 2011 transfer notes must also contain a declaration that the transferor has applied the waste hierarchy. The hierarchy sets out, in order of priority, the waste management options that should be considered:

1. prevention
2. preparing for reuse
3. recycling
4. recovery, eg energy recovery
5. disposal.

Transfer notes must also be provided along with a description of the waste. The transfer note must be completed when waste is transferred from one holder to another. The note should specify details of both the current holder (transferor) and the person receiving the waste (transferee). Additional information must also be provided to show the place of transfer, the date and time of transfer, the details of any broker who may be involved and the appropriate six-digit code referring to the classification of the waste from the appropriate activity heading in the List of Wastes Regulations 2005. The transfer note must be signed by the transferor and transferee.

There are provisions under the Deregulation and Contracting Out Act 1994 to allow for multiple consignments (season tickets) to be covered by a single transfer note. Persons taking advantage of this relaxation in the record keeping requirements must ensure that the waste description is relevant to all consignments (the waste is consistent) and the transfers of waste takes place between the same parties and at the same place. Season tickets should be extended no longer than 12 months.

Sample - for illustrative purposes only