

Enforcement trends and targets in waste crime

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Corporate Crime analysis: Simon Tilling, senior associate, and Sarah Farr, solicitor, both at Burges Salmon, discuss the potential scope and impact of improving regulators' enforcement powers to reduce non-compliance at waste handling sites following the government's recent consultation into waste crime.

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The government proposes to introduce legislative amendments in England and Wales to clarify the regulator's existing enforcement powers in relation to tackling waste crime.

What were the key issues being consulted on?

'Waste crime' is a significant problem, with estimates from the waste industry putting the cost of waste crime to the UK economy at £568m a year. The government wants to address this through plugging gaps in the existing regulation of waste operations, and by giving the regulators enhanced enforcement powers.

The recent consultation on waste crime was split into two parts. Part I focused on clarifying and widening the regulators' enforcement powers for tackling waste crime and, in the process, examined the existing powers regulators have under the Environmental Permitting Regulations 2010, SI 2010/675 (EPR) and the Environmental Protection Act 1990 (EPA 1990).

Part II of the consultation focused on improving a wider range of areas related to waste crime and operator performance-- for example, raising awareness among landowners of liabilities that might arise from allowing waste operations to be set up on their land, and whether previous convictions under the EPR should remain disclosable for up to five years to aid regulators in assessing 'operator competence'.

A key regulatory issue considered in Part II was whether to introduce fixed penalty notices (FPNs) in England and Wales to target small-scale fly-tipping. Another significant proposal is to enshrine the well-known principle of 'operator competence' in legislation, and tighten up the financial and technical competence requirements incumbent on operators.

What has been the government's response to the consultation?

The government has recognised the need for action and is pressing ahead with reform, either through legislation or through further consultation. The government supports granting greater enforcement powers to regulators tackling waste crime and, in particular, to allow intervention before the mishandling of waste becomes an environmental problem.

The new legal powers will strengthen and clarify the regulator's ability to:

- o issue a suspension notice where there has been a breach of a permit condition and a consequent risk of pollution
- o specify in a suspension notice the steps to be taken to remedy the permit breach and remove the pollution risk
- o take physical steps to prevent further permit breaches by an operator, such as restricting access to the waste facility
- o take steps to remove a risk of serious pollution, even where a facility is not permitted (this covers sites that are operating illegally or sites which have had their permit revoked)
- o access the High Court to obtain an injunction to secure compliance with an enforcement notice, suspension notice, prohibition notice, landfill closure notice or mining waste facility closure notice, and
- o require the removal of waste kept unlawfully

The government also wants to move forward with its proposal to introduce FPNs for fly-tipping in England as a quick and easy enforcement option for dealing with small scale offending, while emphasising that regulators should still continue to bring prosecutions in serious cases.

The following issues will be subject to further consultation:

- o whether to embody the 'operator competence' principle in legislation
- o introducing a form of financial provision for waste management operations generally (to cover clean-up costs after site abandonment)
- o asking regulators and the industry whether the requirement of site management plans should be enshrined in legislation
- o reviewing whether regulators' powers should be expanded further so that they can recharge for works they have had to carry out in relation to pollution on land caused by the deposit of waste, and
- o streamlining the waste exemptions regime

Regulators will be asked to consider how the express consent of landlords might be factored into the permitting process, so that they are aware of the potential liabilities that might arise from allowing tenants to run waste operations. We have seen numerous cases recently where tenant waste operations have gone bust leaving the landlord with a significant clean-up bill.

The government will also ask regulators whether relevant convictions under EPA should be 'spent' after 12 months, or whether they should remain disclosable for up to five years.

When will these changes be introduced? What impact could the proposed changes have on businesses?

The enhanced powers for regulators are set to come into force in England and Wales on 30 October 2015 through amendments to the EPA. Although there is no set date as yet for the introduction of FPNs, the government stated they will be introduced in England 'at the earliest opportunity', so this is something to monitor. Meanwhile, the Welsh Government is separately considering whether to introduce FPNs.

The vast majority of the proposals mentioned in Part II will be subject to consultation during 2016.

These upcoming changes are intended to target a small minority of underperforming operations and, in the main, should be welcomed by compliant businesses, many of whom are frustrated by other businesses cutting corners and thereby gaining a commercial advantage. However, their impact will depend on how, and in what circumstances, the regulators use these enhanced powers.

The waste industry is heavily regulated as it is, and non-compliance can occur even within the most well-meaning and professional of enterprises. These new powers can--and no doubt will--be used against all businesses in the sector (as necessary) but an overly officious use of the powers may well give rise to appeals and legal challenges. Even before this expansion of regulator powers, environmental lawyers would typically receive regular instructions from large waste businesses that were in disagreement with regulators regarding permit compliance and the choice of enforcement response. We expect this to increase as regulators test out their enhanced powers.

As further changes are brought in--for instance, to tighten up on operator competence--those operators that are not currently taking their compliance responsibilities seriously will need to significantly improve their performance or else they might not be eligible for a permit, or they may face enforcement action if standards start to slip during the subsistence of the permit.

What should environmental crime lawyers watch out for in the forthcoming changes?

There is always a period of increased uncertainty when there are changes to regulator enforcement policies and powers. We expect an increase in instructions to advise waste operators about the appropriate use of these enhanced powers. There is also the potential for an increase in regulatory appeals (an area in which environmental lawyers are already active).

However, the changes will go beyond just affecting waste operators. Landlords, for example, may decide that they need specific advice about their potential responsibilities under the new regime before letting premises for waste operations. In particular, landlords need to understand the implications of a wider power for regulators to oblige the clean-up of waste that was deposited lawfully but is now kept unlawfully (perhaps due to a revocation of the permit due to tenant insolvency). The landlord might then have to deal with clearing all of the waste that is on the site for compliance reasons, as a result of the new EPA 1990 offence, as well as to recover the site for future use, which often comes at great expense. There have been instances in the past where the landlord's clean-up costs have been in the millions of pounds.

The use of FPNs is also something to monitor as they bring into play the idea of 'proportionate regulation'. However, it is a matter of waiting to see if they are used appropriately because it is not clear what the government currently considers to be 'small-scale' offending, as opposed to when a prosecution would be more suitable. It is also not clear what level of fine will be attached to the FPN and, in turn, whether this will have the required deterrent effect to crack down on routine small-scale fly-tipping.

The impending review of the waste exemptions regime is also important. Waste exemptions can be a useful 'toolkit' for industry, as they help to reduce the regulatory burden. In light of the theme of this latest consultation, it is possible that the process of claiming exemptions might become linked to some form of competence assessment. It is also possible that the scope of the existing suite of exemptions will be narrowed.

Interviewed by Giverny Tattersfield.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor



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