

Appendix 2: SUMMARY OF DUTIES AND POWERS IN RESPECT OF TACKLING ILLEGAL WASTE MANAGEMENT AND FLY-TIPPING FOR THE AGENCY AND LOCAL AUTHORITIES

Introduction

The following details the powers and duties of the Environment Agency (EA) and Local Authorities (LA) in respect of flytipping. Although other bodies are not mentioned here it should be noted that offences under Section 33 and 34(1) of the Environmental Protection Act (EPA) 1990 and Section 85 of the Water Resources Act (WRA) 1991 are not restricted to being enforced by an enforcing body and actions can be brought by any person including landowners.

The sections are ordered as

[A The Duties of Both Local Authorities and the Environment Agency in Respect of Flytipping](#)

[B The Duties of Local Authorities in Respect of Flytipping](#)

[C The Duties of the Environment Agency in Respect of Flytipping](#)

[D The Powers of Both Local Authorities and the Environment Agency in Respect of Flytipping.](#)

[E Additional Powers of Local Authorities in Respect of Flytipping](#)

[F Additional Powers of the Environment Agency in Respect of Flytipping.](#)

These Powers and Duties are a summary of available legislation and are correct as at the 1st September 2004. For more details and amendments made to legislation after this date the issued legislation should be consulted.

A. THE DUTIES OF BOTH LOCAL AUTHORITIES AND THE ENVIRONMENT AGENCY IN RESPECT OF FLY-TIPPING

1. Environmental Protection Act 1990 Part II

1.1 Section 59

In exercising powers under Section 59 the enforcing authority (Agency or LA) should exercise them in accordance with the priority set out in any direction from the Secretary of State (SoS). However nothing affects any power of an authority under section 59 see Section D1.3 for powers.

1.2 Police And Criminal Evidence Act (PACE)

Undertaking any investigation should be in accordance with the PACE Act.

1.3 Anti Social Behaviour Act (ASBA)

Both parties must register with flycapture and enter details to the database

1.4 Regulatory Investigation Powers Act (RIPA)

Surveillance and investigations must be carried out in accordance with RIPA Part I and II.

B. THE DUTIES OF LOCAL AUTHORITIES IN RESPECT OF FLYTIPPING

1. Environmental Protection Act 1990 Part IV

Clearance of litter and refuse

- 1.1** Under Part IV of the Environmental Protection Act 1990 “principal litter authorities” must ensure, so far as is practicable, clearance of litter and refuse from “relevant land” (s89(1)(c)). The following are “principal litter authorities” - a county council; a county borough council; a district council; a London borough council; the Common Council of the City of London and the Council of the Isles of Scilly (s86(2)). “Relevant land” is land that is open to the air (notwithstanding that it is covered if it is open to the air on at least one side), but not a highway (see below for highways), which is under direct control of a local authority to which the public are entitled or permitted to have access with or without payment (s86(4)).
- 1.2** Also under Part IV, local authorities must ensure that any “relevant highway” for which it is responsible, so far as is practicable, kept clear of litter and refuse (s89(1)(a)). A “relevant highway” is one that is maintainable at public expense, but not a trunk road which is a special road. A local authority is responsible for so much of the highway as falls within its area (s86(9)).
- 1.3** There is no statutory definition of “litter and refuse”. However, the code referred to below states that the definition is wide and includes a brief section on fly-tipping (see below). There is a case, an appeal by way of case stated - Westminster City Council –v- John Riding QBD 17 July 1995, which deals with whether rubbish consisting of 10 black plastic refuse sacks, empty beer and crisp cartons and two empty bread bags could be litter within the meaning of s87(1). It was held that it could be litter as there was nothing to suggest that it could not be. The fact that the litter in question was controlled waste (commercial waste) did not prevent such waste being litter for the purposes of s87.
- 1.4** There is a code of practice for the purpose of providing practical guidance on the discharge of these two duties, amongst other things – Code of Practice on Litter and Refuse – EPA 90 (DETR 1999). At paragraph 2.6 which is not part of the code, but is labelled “Good Practice Advice”, there is a short section on fly-tipping, which recommends steps to prevent recurrence of fly-tipping incidents to include such things as higher fences, prosecution and liaison with highway authorities.
- 1.5** Paragraphs 20 to 23 of the Code of Practice provide guidance with respect to “so far as is practicable” in the context of s89(1). The code provides cleanliness standards based on land use and time which should be complied with to discharge the duty. In terms of practicality, it states that some “circumstances may render it impracticable for the body under the duty to discharge it”. Examples are given, such as severe weather conditions; special events preventing access and avoiding damage to sensitive habitats.

- 1.6 The duties that apply to principal litter authorities in relation to relevant land also apply to each local highway in respect of relevant highways (highways maintained at public expense apart from trunk roads) and governing bodies of schools as respects its relevant land open to the air and under the governing bodies' direct control.

Litter Abatement Orders – s91 EPA 1990

- 1.7 These are made by Magistrates' Courts on the application by any person aggrieved by the defacement by litter or refuse of amongst other things, any relevant highway or relevant land. A local authority can, therefore, be the subject of such an order, if it fails to comply with its duties under s89(1). If the local authority fails, without reasonable excuse, to clear the litter or refuse away within the time specified in the order, it shall be guilty of an offence. It is a defence to prove that it has complied with its duty under s89(1) with respect to the land or highway in question. The code of practice is admissible in evidence and where relevant, it must be taken into account.

2. The Litter Act 1983

- 2.1 Where a litter authority provides and maintains in streets or public places, bins for refuse or litter it must make arrangements for them to be regularly emptied and cleaned, sufficiently frequently to ensure no bin or its contents shall become a nuisance or give reasonable ground for complaint (section 5(2) and (3)).

C. THE DUTIES OF THE ENVIRONMENT AGENCY IN RESPECT OF FLY-TIPPING

- 1 The Environment Agency has no specific direct statutory duty requiring it to take any action in respect of fly-tipping.
- 1.1 It is the principal aim of the Agency (taking into account legislation and any likely costs) to protect or enhance the environment whilst discharging its functions, so as to make a contribution towards attaining the objective of sustainable development. The Agency has been given guidance by the Secretary of State as to the Agency's objectives under this provision. The guidance includes the need to take a holistic approach, taking a long term view and working in partnership with regulated organisations to further improve management techniques. In considering costs the guidance suggests the Agency should take a broad view of all costs whether quantifiable or not. [Section 4 Environment Act 1995]
- 1.2 The Agency has a duty (to the extent it considers desirable) generally to promote the conservation and enhancement of the natural beauty, and amenity of inland and coastal waters and associated land, the conservation of flora and fauna dependant on an aquatic environment and the use of such waters and land for recreational purposes. [Section 6 of the Environment Act 1995]
- 1.3 In deciding whether and, if so, how to exercise its powers, the Agency must generally take into account the likely costs and benefits when exercising (or not exercising) its powers, or in deciding the manner of exercising its powers. "Costs"

includes costs to the environment as well as financial costs. [Sections 39 and 56 of the Environment Act 1995]

- 1.4 The Agency has a duty to maintain a public register of waste carriers [The Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991]
- 1.5 The Agency is responsible for the grant of authorisations for waste disposal and recovery operations. It is required to maintain a register of establishments and undertakings exempt from waste licensing. Some of these exempt activities need not be registered. Some need to be registered with local authorities. The Agency has a duty to carry out appropriate periodic inspections of authorised and registered waste management facilities and sites.
- 1.6 Where asked, the Agency has a duty to provide environmental information under the Environmental Information Regulations 1992. Where required to do so by notice, the Agency must supply to the Secretary of State information concerning where it has taken action under sections 33 and 59 of the Environmental Protection Act 1990. [Section 71 Environmental Protection Act 1990]

D. THE POWERS OF BOTH LOCAL AUTHORITIES AND THE ENVIRONMENT AGENCY IN RESPECT OF FLY-TIPPING.

1. Part II of the EPA 90

1.1 Illegal deposit, disposal treating or keeping of waste, Section 33

Nothing in Section 33(1) defines the authorised enforcing agency so anyone can prosecute under section 33. This section prohibits the depositing, treating, keeping or disposing of controlled waste in or on land except and in accordance with a waste management licence. There is also provision under 33(5) that allows for charges to be brought against the person who controls, or is in a position to control, the use of a vehicle, if that vehicle has been involved in fly-tipping. There are statutory defences available to persons charged with offences under this section.

1.2 Duty of Care, Section 34

Section 34 offences, which provide for a range of offences relating to a person's failure to comply with their duty of care as respects controlled waste can be prosecuted by both parties.

Both parties can serve a Section 34(5) notice requiring the furnishing of transfer notes. (This power was extended to LAs by virtue of the Environmental Protection (Duty of Care) (England) (Amendment) regulations 2003 and the Environmental Protection (Duty of Care) (Wales) (Amendment) Regulations 2003).

1.3 Power to remove waste and remediate and serve notice to require removal of waste and remediation, Section 59

Both parties may serve and enforce a notice under Section 59 of the Environmental Protection Act 1990 requiring the occupier of land to remove material fly-tipped in contravention of s33(1) and/or reduce the consequences of the deposit of that fly-

tipped material, subject to a right of appeal and/or the occupier establishing a statutory defence.

Under section 59 both parties may remove fly-tipped material and can seek to recover the necessary costs of doing so from any person who deposited, knowingly caused or knowingly permitted, the deposit of the controlled waste.

1.4 Notice to require information, Section 71

Both the EA and Local Authorities can use S71 notices for the purpose of the Control of Pollution Amendment Act, to require anyone they consider may be able to provide them with the name and address of the person using the vehicle at the time when the offence was committed¹

Local Authorities cannot use Section 71 notices for any other purpose whereas the Agency can use Section 71 notices to obtain any information it reasonable considers it requires.

2 Environment Act 1995

2.1 Powers of Entry Section 108 EA

Both parties have powers of entry for their pollution control functions, for the Local Authority this is restricted to Section 59 of the EPA 90 only.

2.2 Powers to seize or render harmless any article or substance that is a cause of imminent danger of serious pollution of the environment or serious harm to human health, Section 109 EA

Both parties have powers under S109 for their pollution control functions, for the Local Authority this is restricted to Section 59 of the EPA 90 only.

3. Control of Pollution (Amendment) Act 1989

3.1 Seizure of vehicles Section 6 CoP(A)A

Under Section 6 the EA and Local Authorities can seize, under the authority of a magistrates' warrant, and, if no person establishes a valid claim to the vehicle, dispose of a vehicle involved in a fly-tipping incident.

3.2 Proof of registration of waste carriers Section 5 CoP(A)A

Both parties can require the furnishing of proof of registration of waste carriers. LAs were empowered to do this under Section 5 of the Control of Pollution (Amendment) Act as amended by Section 55(3) of the Anti Social Behaviour Act.

¹ This was brought in by (Regulation 20(3) of the Controlled Waste (Registration of Carriers and seizure of Vehicles Regulations 1991) and was extended to LAS by virtue of S7 of the Control of Pollution (Amendment) Act which resulted in a waste disposal authority being a regulatory authority. Furthermore the Anti Social Behaviour Act 2003 in Section 55 (3) made further amendments to include WCAs within the definition of regulatory authority for the purpose of Sections 5-7 of the CoP(A)A).

4. Water Resources Act 1991

4.1 Solid waste in controlled water, S85

Both parties can use Section 85 of the Water Resources Act to take action for solid wastes deposited in controlled waters.

5 Powers to obtain injunctions

- 5.1 In some cases both the Agency and the LAs may be able to obtain an injunction against a person to prevent further offending or requiring remedial steps to be taken. Cases where that power is available are likely to be restricted to the most serious cases

6 Powers to require forfeiture of items Powers of Criminal Courts (Sentencing) Act 2000 Section 143, 146.

- 6.1 As the name suggests this is a power that can be used by either party but belongs to the Courts. Either party can apply for items used in the commission of an offence to be forfeit. In most cases the item should be in the custody of the police to prevent disposal by the defendant before sentencing. It would not be appropriate to remove their driving licence or other property unlikely to be disposed of prior to sentencing.

E. THE ADDITIONAL POWERS OF LOCAL AUTHORITIES IN RESPECT OF FLY-TIPPING

1. Part IV of the EPA 90

The offence of leaving litter, S87 EPA

- 1.1 Under section 87 of Part IV of the Environmental Protection Act 1990 it is an offence to throw down, drop or otherwise deposit litter in a public open place and leave so as to cause defacement by litter. A local authority can take proceedings for breach of this section. It also has powers under section 88 of the Environmental Protection Act 1990 to issue fixed penalty notices.

Designation of land as a Litter Control Area, S90 EPA

- 1.2 Under section 90 of Part IV of the Environment Act 1990, any principal litter authority (see 1.1 above) can, by order, designate any land in their area as, or as part of, a litter control area. The authority must be of the opinion that, by reason of the presence of litter or refuse, the condition of the land is, and unless they make a designation order is likely to continue to be, such as to be detrimental to the amenities of the locality. The Secretary of State can prescribe descriptions of land which can be designated.

Litter Abatement Notices, s92 EPA 1990

- 1.3 Where a principal litter authority (but not an English County Council) is satisfied that relevant land within a Litter Control Area (see 5.1 below), relevant Crown land, relevant land of a designated statutory undertaker or relevant land of a designated educational institution is defaced by litter or refuse, or that such defacement is likely

to recur, it must serve a litter abatement notice, on the appropriate person, requiring it to be cleared within a specified time and/or a prohibition on permitting the land to become defaced by litter or refuse. Failure to comply with a notice without reasonable excuse is an offence, however it is a defence to show that the duty under s89(1) has been complied with. With the exception of relevant Crown land or relevant land of statutory undertakers, if the person on whom the notice is served fails to comply with the requirement imposed, the authority can enter the land, clear the litter or refuse and recover costs necessary in the circumstances. Again the code is admissible as above.

Street litter control notices, S93 EPA

- 1.4 Principal litter authorities, other than a county council, can issue “street litter control notices” under section 93 of the Environmental Protection Act 1990 on the occupiers of premises having a frontage onto a street where the street, or open land adjacent to the street, is recurrently defaced with litter or refuse, or the condition of the premises which is open land is such that it is likely to be detrimental to the amenities of the locality as a result of the presence of litter or refuse, or if the activities on the premises are likely to cause defacement with litter or refuse of the street or land in the vicinity of the premises.

2. Provision of litter bins, S5(1) Litter Act 1983

- 2.1 A litter authority (see section C2.1 above) can provide and maintain in any street or public place, litter bins for refuse or litter

3. Removal of material attracting rats and mice, S4 Prevention of Damage by Pests Act 1949

- 3.1 A local authority can serve a notice on an occupier and/or owner of land, but not agricultural land, in its area, if it appears to the local authority that steps should be taken for the destruction of rats or mice on the land or otherwise for keeping the land free from rats and mice. The notice can include the application to the land of any form of treatment and/or the carrying out on the land of any structural repairs or other works.

4. Remedying land, S215 Town & Country Planning Act 1990

- 4.1 If it appears to a local planning authority that the amenity of a part of their area, or of an adjoining area is adversely affected by the condition of land in their area, it can serve on the owner and occupier of land a notice requiring steps to remedy the condition of the land within a certain time.

5. Cleaning of land in open air to which public has access, S22(3) Control of Pollution Act 1974

- 5.1 A council of a district or London borough and the Common Council of the City of London or a local authority in Wales can arrange for any land in the open air to which members of the public have access, either as of right or otherwise (but not the site of a highway for which there are other powers), to be cleaned. Such arrangements must be with the consent of any person who has an interest in or is

the occupier of such land and can include an agreement for such persons to pay the charges in respect of the cleaning.

6. Cleaning of land other than a highway, S78 Public Health Act 1936

6.1 A local authority can sweep and clean any court, yard or passage, which is used in common by the occupants of two or more buildings, but is not a highway repairable by the inhabitants, if it is not regularly swept and kept clean and free from rubbish or other accumulation to the local authority's satisfaction. The local authority can recover any expenses reasonably incurred from the occupiers of the buildings which front or abut the court or yard, or to which the passage affords access.

7. Remove rubbish seriously detrimental to the amenity, S34 Public Health Act 1961

7.1 A local authority can take steps to remove rubbish, as it thinks necessary, in the interests of amenity, if it appears to it that there is rubbish on any land in the open air in their area which is seriously detrimental to the amenities of the neighbourhood. Rubbish means rubble, waste paper, crockery and metal and any other kind of refuse (including organic matter), but it does not include material accumulated for or in the course of any business or waste deposited in accordance with a disposal licence.

8. Removal of anything abandoned without lawful authority, S6 Refuse Disposal (Amenity) Act 1978

8.1 A local authority can if it thinks fit, remove any thing in its area, other than a motor vehicle, which is abandoned without lawful authority on any land in the open air or on any other land forming part of a highway.

9. LOCAL AUTHORITIES' POWER TO PROSECUTE

9.1 Under section 222 of the Local Government Act 1972, a local authority may prosecute or defend or appear in any legal proceedings where it considers it expedient for the promotion or protection of the interests of the inhabitants of their area.

9.2 Unless legislation precludes it, a local authority may institute criminal proceedings under any legislation.

F. THE ADDITIONAL POWERS OF THE AGENCY AND AGENCY AUTHORISED PERSONS IN RESPECT OF FLY-TIPPING

1 Powers concerning applications

1.1 Refuse to register, Regulation 5 of and schedule 1 to the Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991

The Agency can refuse to register a person as a carrier of controlled waste, where that person, or another relevant person, has been convicted of a prescribed offence.

1.2 Revoke a Registration, Regulation 10 of and schedule 1 to the Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991

The Agency may revoke a person's registration as a carrier of controlled waste in similar circumstances.

1.3 Refuse a Licence or Permit, S36 Environmental Protection Act 1990; Regulation 10 Pollution Prevention and Control (England and Wales) Regulations 2000.

The Agency may refuse an application for a waste management licence or a PPC permit for a specified waste management activity if the applicant or another relevant person has been convicted of a prescribed offence. Prescribed offences include offences under Section 2 Refuse Disposal (Amenity) Act 1978, Section 3 Control of Pollution Act 1974, Section 33 Environmental Protection Act 1990. Offences under litter provisions of Environmental Protection Act 1990 are not prescribed.

2. Powers to deal with obstructions, matter and waste in water

2.1 Section 211 of and Schedule 25 to the Water Resources Act 1991 and Section 23 Land Drainage Act 1991

The Agency may make and enforce bye-laws in respect of obstructions within rivers. Main rivers are generally covered by WRA (and fall to the Agency) and ordinary watercourses by LDA (and fall to the LAs).

2.2 Require removal of obstruction, S107 of the Water Resources Act 1991 and Section 25 of the Land Drainage Act 1991

The Agency may serve a notice on any person who caused an obstruction (so as to impede the flow) within a main river or, in restricted circumstances, on the landowner to remove the obstruction and enforce that notice.

2.3 Remove obstruction from main rivers, S109 Water Resources Act 1991

The Agency may remove obstructions within main rivers

2.4 Require works to be undertaken to remove material in controlled water, S161A of the Water Resources Act 1991

The Agency can serve a notice (a "works notice") on a person who has caused or knowingly permitted poisonous, noxious or polluting matter or any solid waste matter to enter, be likely to enter, or be present in controlled waters requiring them to remove that material and enforce that notice.

2.5 Prevent material entering controlled water and remove material, S161 Water Resources Act 1991.

The Agency may take action to prevent from entering, or remove from, controlled waters, any poisonous, noxious or polluting matter or solid waste matter and seek to recover the costs from any person who caused or knowingly permitted the matter to enter, be likely to enter, or be present in the controlled waters.

3. AGENCY POWERS TO PROSECUTE

- 4.1 The Agency can carry out prosecutions [section 37 Environment Act 1995].
- 4.2 The Agency has issued an enforcement and prosecution policy. Decisions to institute prosecution proceedings are taken in accordance with this policy and functional guidance.