

Explanatory Memorandum to the Unauthorised Deposit of Waste (Fixed Penalties) (Wales) Regulations 2017

This Explanatory Memorandum has been prepared by the Economy, Skills and Natural Resources Department and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Cabinet Secretary's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Unauthorised Deposit of Waste (Fixed Penalties) (Wales) Regulations 2017. I am satisfied that the benefits justify the likely costs.

Lesley Griffiths
Cabinet Secretary for Environment & Rural Affairs
3 October 2017

1. Description

The Unauthorised Deposit of Waste (Fixed Penalties) (Wales) Regulations 2017 (“the Regulations”) will amend the Environmental Protection Act 1990.

The Regulations introduce new powers that will allow enforcing authorities in Wales to issue a fixed financial penalty for small-scale fly-tipping offences. Under these powers the enforcing authorities will be able to retain the money received from the fines to help contribute to the enforcement and clear-up costs of fly-tipping.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

These Regulations will be made in reliance on the powers exercisable by the Welsh Ministers, in section 2(2) of the European Communities Act 1972.

By virtue of section 59(2) of the Government of Wales Act 2006, the Welsh Ministers may exercise the power conferred by [section 2\(2\)](#) of the European Communities Act 1972 in relation to any matter, or for any purpose, if they have been designated in relation to that matter or for that purpose, subject to any restriction in the designation. For the purposes of the European Communities Act 1972, the Welsh Ministers are designated in relation to the prevention, reduction and management of waste [S.I. 2010/1552]

Section 59(3) of the Government of Wales Act 2006 provides that when these powers are exercised, either the Assembly negative or affirmative procedure may be used.

These Regulations will amend primary legislation (Part 2 of the Environmental Protection Act 1990) in order to allow Welsh Ministers to more efficiently implement their obligations (via the Government of Wales Act 2006) under Article 13 (protection of human health and the environment) and Article 36 (enforcement and penalties) of EU Directive 2008/98/EC (“the Waste Framework Directive”). The Directive provides a framework for EU member states in relation to reducing the adverse impacts of the generation and management of waste.

The introduction of Fixed Penalty Notices (FPNs) will confer on authorised officers the power to impose a summary criminal sanction.

As the Regulations amend primary legislation, and also confer on administrative officers a power to issue a criminal penalty, it is considered

appropriate the Regulations should be made subject to the Assembly's affirmative procedure.

3. Legislative background

The Regulations will be made under powers contained in section 2(2) of the European Communities Act 1972. They will enable Welsh Ministers to better implement their obligations under Article 13 (protection of human health and the environment) and Article 36 (enforcement and penalties) of the Waste Framework Directive.

The Regulations will insert provisions into the Environmental Protection Act 1990 (c.43) ("the Act") to allow a Local Authority in Wales to issue a Fixed Penalty Notice (FPN) for a contravention of section 33(1)(a) of the Act. Section 33(1)(a) prohibits a person from depositing controlled waste or extractive waste in or on any land unless in accordance with an environmental permit.

4. Purpose & intended effect of the legislation

In 2015/16, Local Authorities reported over 36,000 incidents of fly-tipping in Wales. It is estimated to have cost the Welsh taxpayer over £2 million to clear¹. Around half of these incidents were recorded as being a car boot load or less in size.

Currently the only criminal sanctions available for dealing with such small-scale fly-tipping incidents are to prosecute in an attempt to secure a criminal conviction. However, Local Authority Enforcement Officers and other key stakeholders have reported some small-scale fly tipping offences are often of a type which makes a prosecution inappropriate.

Additionally, the cost to Local Authorities of investigating, prosecuting and clearing fly-tipping remains significant. Local Authorities have stated where fines are imposed as a result of successful prosecutions, they are paid to the Court. Where courts have also awarded costs to Local Authorities, the amount of the awards is often significantly less than the cost of investigation and prosecution.

Responses to the Welsh Government's Fly-tipping Strategy consultation² in 2012 showed strong support amongst stakeholders for the introduction of Fixed

¹ The Welsh Government's Fly-tipping data: <https://statswales.gov.wales/Catalogue/Environment-and-Countryside/Fly-tipping>

² Welsh Government's Fly-tipping Strategy 2012 consultation - <http://gov.wales/betaconsultations/environmentandcountryside/flytippingfree/?lang=en>

Penalty Notices (FPNs). Respondents felt adopting this approach would allow Local Authorities to deal more effectively and proportionately with high volume, small-scale offences. It was suggested FPNs could also act as an effective deterrent and encourage behavioural change.

The resulting strategy “*A Fly-tipping Free Wales*”, published in 2014, seeks to ensure anyone who fly-tips is caught and punished appropriately. To meet this aim, a commitment was made to investigate introducing FPNs, or other enforcement tools, for such fly-tipping incidents.

The new provisions provide for a fine of not less than £150 and not more than £400 as specified by the Local Authority. The default is £200 if no amount is specified. The new provisions allow a Local Authority to offer a reduction for early payment of not less than £120 if the penalty is paid within 10 days following the date of the notice.

Local Authorities will still have the option to prosecute, for example in relation to operators in the waste management industry, repeat offenders or those responsible for large-scale fly-tipping or the fly-tipping of hazardous waste.

5. Consultation on the new powers

Proposals to introduce powers to allow Welsh enforcing authorities to issue FPNs for small-scale fly-tipping offences have been consulted upon. The consultation ran for 12 weeks between 11 January and 6 April 2017.

The Welsh Government sought views on the key provisions of the proposed draft regulations and responses were received from a wide range of individuals including:

- members of the public;
- Natural Resources Wales;
- Local Authorities;
- environmental organisations;
- private landowners; and
- Trade Unions.

There was overwhelming support for the proposal, with over 90% of respondents agreeing FPNs would help tackle the problem. Respondents were broadly in agreement that FPNs would be a proportionate response to small-scale fly-tipping. They also commented that they are a relatively simple, quick and cheap way of dealing with offenders, as opposed to prosecutions. A

summary of the responses and the Welsh Government's response have been published³.

The final Regulations have not been significantly amended from the original proposals, however the evidence gathered during consultation period will provide a useful resource for future policy development.

³ The Welsh Government's Fixed Penalty Notices for small scale fly-tipping consultation
<https://consultations.gov.wales/consultations/fixed-penalty-notices-small-scale-fly-tipping>

PART 2 – REGULATORY IMPACT ASSESSMENT

Options

Two options have been considered in this RIA:

Option 1: Do nothing. The 1990 Act would not be amended and Local Authorities would have to use existing powers to tackle fly-tipping and prosecute offenders in the courts.

Option 2: Introduce secondary legislation to amend the 1990 Act to enable Local Authorities to issue an FPN for small scale fly-tipping. **(Preferred option)**

Cost-benefit analysis

Option 1

This is the baseline option and as such there are no additional costs associated with this option.

The cost for Local Authorities to investigate an incident, bring a prosecution, clear and dispose of material can be significant. Evidence gathered from a survey of 29 Local Authorities in England and Wales by the UK National Fly-tipping Prevention Group (NFtPG) suggested the average cost of dealing with such incidents was £655.14⁴. Data gathered directly from WasteDataFlow⁵ for all 22 Local Authorities in Wales suggest the figure is higher at £813.48. A large proportion of these costs are often attributed with bringing a case to court (staff costs, legal fees etc).

The NFtPG survey also calculated the average costs awarded by the courts to Local Authorities were £404.60. This meant for the 29 Local Authorities who responded to the UK Group survey, on average, only 60% of costs were recovered when they prosecuted a fly-tipping case.

Consistent receipt of significantly less than the cost of prosecutions can provide a disincentive to Local Authorities to undertake enforcement action, particularly when dealing with small-scale fly-tipping offences. During 2015/16, of the 21,494 fly-tipping incidents investigated in Wales, 52 prosecutions were undertaken, the lowest number since 2006/07.

⁴ Figures based on data gathered from 26 Local Authorities in England and 3 in Wales.

Option 2

Costs

Local authorities

This proposal will introduce new powers that will enable authorised officers of Local Authorities to issue FPNs for fly-tipping offences and provide an alternative, more efficient tool to deal with low level, high volume offences.

There is no obligation on Local Authorities to exercise these powers or to prosecute for the original offence in the event of non-payment of the penalty. This is the case under the existing legislation as there is no obligation to assume the powers available to Local Authorities will be used to tackle fly-tipping.

However, it is anticipated Local Authorities which choose to use FPNs to tackle small scale fly-tipping will incur some small set-up costs for staff training and developing a suitable form of enforcement notice. We assume all 22 Local Authorities in Wales will incur a one-off administration familiarisation cost to familiarise themselves with the proposed changes. We have used data from the “Work Region Occupation” dataset from the Office of National Statistics to calculate wage rates in Wales. For local government administrative occupations, the average hourly wage is estimated to be £11.19. This figure has been uprated by 30% to reflect non-wage labour costs. Using a central assumption of 90 minutes per Local Authority the proposed changes could involve a one-off transitional cost of £480.

Whilst the new powers may encourage Local Authorities who have previously undertaken limited enforcement action to become more proactive in their activities, we do not anticipate the overall number of incidents investigated to increase significantly. This is due to fly-tipping investigations being reliant on sufficient evidence being available to facilitate further action, rather than the type of enforcement options available.

Since 2006/07 Welsh Local Authorities have issued 7,226 littering FPNs (this an average annually of 723 fines) to deal with incidents associated with small-scale fly-tipping. Assuming a similar level of enforcement action is followed when the new powers are introduced, it is estimated Local Authorities would potentially incur annual administration costs of £23,859 issuing FPNs (FPN enforcement costs being set at £33 per incident). However, these costs would be offset by the receipt of the fines, which assuming Local Authorities use the default amount of £200 would result in £144,600 in revenue.

If Local Authorities choose to issue an FPN to an individual rather than prosecute them in the Magistrates' Courts, they will be unable to seek any reimbursement of costs they incur, though will receive the fine revenue. If enforcement is approached proportionately, then the FPNs will only be used as a response to small scale fly-tipping where their use offers a reduction in the prosecution and enforcement loss.

Businesses and households

Businesses that carry out their waste activities legitimately will not experience costs as a result of these proposals.

Businesses and households that carry out waste activities illegally (in this case, fly-tipping waste) will experience costs as a result of these proposals, for example through either finding legitimate disposal routes, or as a direct result of being issued with an FPN. As indicated above, each FPN is expected to be between £150 and £400, with a default value of £200. It is not appropriate to include costs for business and households that carry out their waste activities illegally.

Benefits

Local authorities

The overall purpose of these additional powers is to introduce a new enforcement tool for Local Authorities that will enable them to tackle small scale fly-tipping in a proportionate way. This will reduce costs for Local Authorities to tackle offenders, simplify the enforcement process and will be welcomed by the legitimate waste industry and many in local communities.

Local Authorities are legally responsible for clearing fly-tipped waste on public land. The proposals will enhance the current enforcement regime; make the enforcement of small scale fly-tipping a more feasible enforcement option; and allow Local Authorities to recover some of the enforcement and clearance costs without having to take a case to court.

The proposed amendment will allow Local Authorities to keep the receipts from FPN penalties. They will be able to use the receipts for the purposes of their functions under Part 2 of the EPA 1990 Act, including enforcement of offences. It will be for Local Authorities to allocate the receipts within that budget. Depending on local circumstances, these receipts will go some way to covering the full costs of running an enforcement service and clearing fly-tipped waste. Local communities and the environment will benefit from less blight as a result

of this use of receipts in relation to functions dealing with waste on land. For simplicity however, we still calculate this proposal will benefit in terms of a saving to Local Authorities.

The introduction of the FPN will be an additional deterrent to potential fly-tippers, which may lead to a reduction of fly-tipping incidents. This could mean reduced waste in local environments and improved amenity. Additionally this could mean a reduction in the overall clearance costs incurred by fly-tipping enforcement authorities. However, this will depend on the extent to which the law is enforced.

It is likely the introduction of FPNs will lead to a small decrease in prosecutions for small-scale fly-tipping in the Magistrates' Courts. This will save resources of both Local Authorities and HM Courts & Tribunals Service. Using the prosecution costs derived from WasteDataFlow we estimate Local Authorities that choose to tackle a small-scale fly-tipping incident with an FPN rather prosecution in court will save between £220 and £1398 per case.

At the same time, we expect the proposal will result in a small number of new cases being prosecuted for the original offence in the Magistrates' Courts as a result of non-payment of the penalty and there may be a small number of offences prosecuted under new section 33ZA(9) of the 1990 Act (for giving false details). Overall, we believe there should be a net decrease in the caseload of HM Courts and Tribunals Service.

We calculate those Local Authorities which decide to issue FPNs will benefit from a saving in overall enforcement and clearance costs.

Local Authorities will still have the option to prosecute, for example in relation to more serious, large-scale cases of fly-tipping.

Business

In terms of its impact on our prosperity, improving the quality of the local environment can lead to increased inward investment and economic activity - addressing all aspects of poverty: economic, social and environmental. Fly-tipping also undermines legitimate local waste businesses, with illegal operators avoiding waste disposal costs and undercutting those who abide by the law.

Environment

Fly-tipped waste can have an adverse impact on the resilience of local ecosystems through the contamination of soil and water and it can also pose a risk to human health, for example the disposal of asbestos containing building waste. The dumping of larger items directly into watercourses can also contribute to localised flooding incidents through the creation of artificial obstructions.

Any reduction in fly-tipping incidents that may result following the introduction of FPNs would increase the quality of the local. Wildlife habitats that would otherwise be adversely affected by illegal waste disposal would also benefit from a reduction in fly-tipping.

Summary of the preferred option

The preferred option is **Option 2**. Fly-tipping is a significant problem for local communities and a risk to the environment, with substantial clear-up costs incurred by Local Authorities and private landowners. However, the size and scale of fly-tipping varies and accordingly we believe that addressing it requires a range of possible responses that are proportionate to the offence.

The introduction of new powers will allow Local Authorities in Wales to deal more effectively and proportionately with high volume, small-scale offences. In turn, this will help reduce the burden in taking some cases through the court system and act as an effective deterrent. An effective regulatory regime tackling fly-tipping can, therefore, have an important contributory impact across the following well-being goals in the Well-being of Future Generations Act 2015:

- a prosperous Wales;
- a resilient Wales;
- a healthier Wales;
- a more equal Wales; and
- a Wales of cohesive communities.

The Fly-tipping Free Wales Strategy that has led to these FPN proposals has been developed through an actively collaborative partnership between, Welsh Government, Natural Resources Wales and Local Authorities. This partnership has sought to develop a truly integrated approach to tackling the problem of fly-tipping. The strategy has had a strong focus on early preventative action and, although FPN enforcement occurs after an offence has been committed, the longer term effects of such enforcement are themselves preventative.

These approaches together demonstrate application of the five ways of working set out under the sustainable development principle in the Well-being of Future Generations Act 2015. They will help ensure the realisation of the FPN proposals are well founded in their contribution to the goals listed above.

Specific impact tests

Welsh Language

A Welsh Language Impact Assessment has been undertaken and no direct impacts have been identified.

Equality, Children and Human Rights

There are no issues relating to children's rights or any impacts specifically for children and young people. Neither are there any issues of concern relating to the UN Human Rights Convention or equality.

Competition Assessment

The competition filter test	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No