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## An Overview of Waste Planning in Wales

### Introduction:

The 2006 Stern Review on the economics of climate change reported that waste is currently responsible for emitting 1.4 billion tonnes of carbon-dioxide-equivalent gases that are causing climate change every year. And one half of all that comes from landfill sites. The waste industry - which is still heavily reliant on landfilling waste - is responsible for 3% of all of the UK's emissions of gases that cause global warming.<sup>1</sup> Something must be done –as one famous visitor to the Rhondda Valley once remarked. But it is to be hoped that in this case a rather better effort is made than was the case with unemployment in the Valleys in the Twenties and Thirties.

The aim of this paper is to give an overview of the law and policy governing waste planning in Wales. I shall cover the following topics:

- (1) The Revised Waste Framework Directive;
- (2) The Waste (England and Wales) Regulations 2011;
- (3) The NPS's Env-1 and Env-3;
- (4) Recent Welsh policy.

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<sup>1</sup> See Towards Zero Waste One Wales: One Planet p.11

## The Revised Waste Framework Directive

1. The WFD was revised in November 2008 and the resulting Directive 2008/98EC had to be transposed by Member States by 12 December 2010. Art. 1 of the revised WFD contains an ambitious new objective:

“...to protect the environment and human health by preventing or reducing the adverse impacts of the generation *and* management of waste and by reducing the *overall impact of resource use* and improving the efficiency of such use.”  
(*Emphasis added*)

2. As Scotfold ([2009] En L.R. 75) has noted, however, Art. 1 sends an unclear message about Community waste policy:

“No longer is the Waste Directive merely about *waste* and minimising the adverse impacts of waste generation and management (including through encouraging waste prevention); it is now also about minimising the adverse environmental and health impacts of *resources* generally, as they are productively used throughout their life-cycles.”

### **Definition of “Waste”**

3. The revised WFD retains the subjective test for “waste”, focusing on whether a substance has been discarded. The only real change in the definition is the removal of the Annex 1 list of the categories of waste. However, there are other parts of the revised Directive which do make important changes to the meaning of “waste”. First, Article 5 contains exhaustive criteria for when materials will be industrial by-products and thus not waste. The criteria are designed to reflect the current ECJ jurisprudence on this point: **Commission Communication, ‘On the Interpretative Communication on Waste and By-Products**, COM (2007) 59 final. The important point to note is that in order to be a by-product under these criteria the material must pass the test of certainty of re-use –see Case C -114/01 **AvestaPolarit Chrome Oy** [2003] ECR I-8725.

4. The second change to the definition of waste is the result of Art. 6 which enables criteria to be developed for particular waste streams in order to determine when waste ceases to be waste after it has undergone a recovery operation. Four conditions must be considered when devising such end-of-waste criteria, including that a market exists for the particular material.
5. Thirdly, Art. 2 removes certain specified materials from the concept of waste. In Case C-1/03 **Criminal Proceedings Against Van de Walle** [2004] ECR I-7613, the ECJ held that soil contaminated with spilled hydrocarbons was waste. This decision is reversed by Art.2. Exclusions are also included in respect of uncontaminated soil or natural material used for construction on the site from which it is excavated. This exclusion reverses the finding in C-114/01 **AvestaPolarit Chrome Oy** [2003] ECR I-8725, that leftover rock and sand would need to be assessed as potential waste when used to fill in mine galleries on site.
6. Fourthly, new definitions of “prevention”, “re-use” and “preparing for re-use” are provided in Art.3 These make clear that prevention and re-use are activities that occur in relation to material that is not waste.
7. Fifthly, the revised WFD enshrines the waste hierarchy in law. Waste is not only an environmental problem, it is also an economic problem because everything that is discarded is lost to the economy. The response of the European Union to this problem has been the concept of a “waste hierarchy”. The most efficient and effective way of dealing with waste is to prevent it occurring in the first place. Therefore at the top of the waste hierarchy is the reduction in the use of natural resources and the prevention of waste creation. Should this prove impossible, the substance which would otherwise become waste should be re-used. If re-use is not possible, the waste material should be recycled. If recycling is not possible the material should be used for energy recovery through e.g. energy-efficient incineration. The absolute last resort is to dispose of waste, typically of course by landfill.

8. Art. 4 of the revised WFD enshrined the waste hierarchy into law: prevention, preparing for re-use, recycling, other recovery and disposal. The position is complicated though by Art. 4(2) according to which Member States are permitted to depart from the waste hierarchy. The principal qualification is that Member States may depart from the hierarchy as an absolute priority to deliver “the best overall environmental outcome” where this is “justified by life-cycle thinking” for specific waste streams. There are also exceptions in respect of technical and economic viability, the principles of precaution and sustainability, the protection of resources. In addition, the “overall environmental, human health, economic and social impacts” must be taken into account when applying the waste hierarchy.
  
9. Although it is helpful that the hierarchy has been clarified in Art.4(1), the Art.4(2) qualifications may prove difficult to apply in practice. The Directive’s broader environmental and human health concerns inform the Art.4(2) qualifications and as a result the seemingly clear, ordered waste hierarchy descends into ambiguity and conflicting policy objectives.

### **The Waste (England and Wales) Regulations 2011**

10. The Waste (England and Wales) Regulations 2011 (“the Regulations”) came into force on 29 March 2011. In summary, the Regulations implement the revised Waste Framework Directive and;
  - (1) require businesses to confirm that they have applied the waste management hierarchy when transferring waste and to include a declaration on their waste transfer note or consignment note;
  
  - (2) require a new waste hierarchy permit condition and where appropriate a condition relating to mixing of hazardous waste;

- (3) introduce a two-tier system for waste carrier and broker registration, which includes those who carry their own waste, and introduces a new concept of a waste dealer;
- (4) make amendments to hazardous waste controls and definition;
- (5) exclude some categories of waste from waste controls, notably animal by-products whilst including a small number of radioactive waste materials.

11. The key impacts of the Regulations for the waste industry will be that:

- (1) **Waste producers, holders and carriers:** From 28 September 2011, waste producers, holders and carriers will be required to apply the waste hierarchy on the transfer of waste and to declare that it has been taken into account on their waste transfer notes or waste consignment notes (in relation to hazardous waste). From 1 January 2015, businesses collecting, transporting or receiving waste paper, metal, plastic or glass will need to ensure separate collection;
- (2) **Environmental permit holders:** From 29 March 2011, businesses granted new environmental permits will be subject to conditions requiring them to take appropriate measures to minimise the waste generated by their operations and to treat waste in accordance with the hierarchy. The hierarchy condition will be added to existing bespoke permits when they are varied or during the normal review process. Standard permits will have the hierarchy condition inserted by April 2012 following consultation later this year. Permits relating to hazardous waste will include a condition restricting the mixing of hazardous waste types (or hazardous with non-hazardous waste) and requiring compliance with BATs;

(3) **Waste carriers and brokers:** From the end of 2013, businesses currently exempt from registration (including those carrying their own waste) may be required to register with the EA for the Lower Tier. From 29 March 2011, current permit holders falling under the Upper Tier will need to make an Upper Tier Registration when their existing registration requires renewal. Businesses employing others to collect their waste will need to ensure that such companies are registered;

**Local authorities:**

Local authorities will be required to have regard to the waste hierarchy in the preparation of waste development frameworks in England and local development plans and regional waste plans in Wales. They may also need to revise local waste management plans in accordance with the requirements of the Revised WFD. In the future, local authorities may need to provide for the separate collection of household mixed plastics.

**Statutory Considerations in Waste Applications:**

The Regulations are particularly important because they set down what Councils as waste planning authorities must have regard to in the Waste Framework Directive when

they are exercising planning functions like determining planning applications.<sup>2</sup> So they have to have regard to:

(a) **Article 13** which requires that waste management is carried out without endangering human health, without harming the environment and in particular:

- without risk to water, air, soil, plants or animals;
- without causing a nuisance through noise or odours; and
- without adversely affecting the countryside or places of special interest.

An EfW scheme, for example, should have no difficulty in meeting those requirements but it will have to be proved to the Council. The last point presumably cannot be a complete ban on building a plant outside a town or not on previously developed land which has benefited from a policy only of priority before. Indeed the IPC in England have just given their first development consent for a large EfW plant on a green field site in a rural area where there was a substantial impact on the landscape and on the enjoyment of the countryside and where English Heritage considered that there was substantial harm to the settings of some very important heritage assets include a Grade1\* listed mansion and scheduled ancient monuments. This may be an indication of the importance being given to the movement of the handling of waste up the hierarchy and to the generation of renewable energy. Some EfW

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<sup>2</sup> Draft Regulation 20

such as anaerobic digestion of waste food can have problems with odour.

(b) **Article 16** which deals with the principles of self-sufficiency and proximity so that there should be an integrated and adequate network of waste disposal installations and installations for the recovery of mixed municipal waste so that waste can be dealt with in one of the nearest appropriate installations by means of the most appropriate methods and technologies to ensure a high level of protection for the environment and public health. So Councils will have to take responsibility for the waste generated in their area and they need to grant enough planning permissions to ensure that is achieved. What is the relevant “area” will no doubt be a matter of debate in each case.

## **NPS's**

12. The 2008 Planning Act introduced a new planning system for applications to build Nationally Significant Infrastructure Projects (NSIPs) in England and Wales. The system covers applications for major energy generation, railways, ports, major roads, airports and water and hazardous waste infrastructure. Under this system, national policy on NSIPs is to be set out in a series of new National Policy Statements (NPSs).
13. The NPS for renewable energy infrastructure Env-3, taken together with the Overarching NPS for Energy (EN-1), provides the primary basis for decisions by the



IPC on applications it receives for nationally significant renewable energy infrastructure including Energy from biomass and/or waste (>50 megawatts (MW)).

14. EN-1 covers the following:

- the high level objectives, policy and regulatory framework for new nationally significant infrastructure projects that are covered by the suite of energy NPSs and any associated development (referred to as energy NSIPs);
- the need and urgency for new energy infrastructure to be consented and built with the objective of contributing to a secure, diverse and affordable energy supply and supporting the Government's policies on sustainable development, in particular by mitigating and adapting to climate change;
- the need for specific technologies, including the infrastructure covered by this NPS;
- key principles to be followed in the examination and determination of applications;
- the role of the Appraisal of Sustainability in relation to the suite of energy NPSs;
- policy on good design, climate change adaptation and other matters relevant to more than one technology-specific NPS; and
- the assessment and handling of generic impacts that are not specific to particular technologies.

15. NPS Env-3 is concerned with impacts and other matters which are specific to amongst other types of renewable energy sources, biomass and energy from waste.

16. These are very important documents whose stress on the urgent need for new energy infrastructure and particularly for new renewable energy sources will carry considerable weight in any planning decision which has to balance such considerations against disadvantages such as impacts on the countryside and on a wide range of other interests of acknowledged importance.

17. Whilst the guidance is for the IPC (or its successor body) in relation to big projects the documents themselves say that they are likely to be relevant to local authorities considering smaller projects under the Town and Country Planning Act 1990

## Welsh Policy

18. There are 3 regional waste planning areas in Wales which include the North Region, the South East Wales Region and the South Wales Region. These voluntary coalitions of councils have each produced a Regional Waste Plan. Plans are revised every 3 years.

19. In terms of national waste strategy, we now have “Towards Zero Waste” an overarching waste strategy document that sets out how the Welsh Assembly Government will build on the policy Wise about Waste: the National Waste Strategy for Wales (2002). It describes a long term framework for resource efficiency and waste management from 2010-2050.

20. The Towards Zero Waste strategy comprises a number of documents:

- **Towards Zero Waste** - is a long term framework for Wales that describes the social, economic and environmental outcomes that resource efficiency and waste management will achieve and how they will contribute to a sustainable future. It details high level principles, policies, and targets.
- **Sector plans** - are implementation plans that will form part of the overall waste strategy for Wales. When completed, they will describe the role of the sector, the Welsh Assembly Government and others in delivering the outcomes, targets and policies in Towards Zero Waste.

- **Progress report** - provides information on the types and quantities of wastes currently produced in Wales and how they are managed. It includes progress against targets and actions set in Wise About Waste. The Waste Strategy Progress Report 2002-2008 is published at the same time as Towards Zero Waste.

21. Sector Plans, which will detail the means of implementing the Strategy, are currently being consulted on.

**Conclusions:**

22. These are times of big change in waste management in response to the urgent need to address the threat from climate change. Decision makers are having to take on board new approaches whilst politically having to address old concerns about health and perceptions of harm. We are there to help them.

Rhodri Price Lewis QC

Landmark Chambers

London EC4A 2 HG

28 x 2011

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