

Warwickshire Waste Partnership

18 September 2012

The Waste Framework Directive and Co-mingled Collections

Recommendations

- a) That the Waste Partnership notes the guidance in this report
- b) That Officers bring back reports as and when further guidance has been produced by the UK Government

1.0 Background

- 1.1 The revised Waste Framework Directive (WFD) came into effect on 12 December 2010 and its aims include promoting waste recovery. In order to encourage waste recovery, the Directive expresses a preference for the separate collection of waste.
- 1.2 There are three tiers of obligations in the WFD regarding separate collection of waste. Article 10(2) includes a general obligation to encourage separate collection to facilitate recovery. Building on this, Article 11(1) includes a general obligation to set up separate collection to facilitate recycling. Article 11(1) then adds a more specific obligation to separate collection of at least paper, glass, metal and plastic by 2015.
- 1.3 The Government transposed the WFD into national law through the Waste (England and Wales) Regulations 2011. Consultation on the draft Regulations revealed concern that a lack of clarity about the permissibility of co-mingled collection could lead to local authorities “gold plating” the WFD to avoid legal challenge. Therefore, the Government included words in Regulation 13 “for the avoidance of doubt” which said that co-mingling recyclable waste types counted as separate collection if as a group they were kept separate from other waste streams. In other words, so long as paper, glass, metal and plastic were kept separate from other waste they could be co-mingled at the kerbside or in “bring bins”, even after 2015, because this was a form of separate collection that satisfied the WFD.
- 1.4 Sadly, this did not avoid doubt and the Government has been judicially reviewed by the Campaign for Real Recycling (CRR). The CRR is supported by a mixture of commercial businesses and campaigning and third sector organisations such as the Friends of the Earth. The main aim of the CRR seems to be to improve the quality of recoverable waste available to the recovery industry.
- 1.5 DEFRA accepted that Regulation 13 incorrectly transposed the WFD and needed to be amended. In February this year, the judicial review was adjourned

for six months to allow DEFRA to review the Regulations and implement changes. Expedited consultation concluded in April and in July Regulation 13 was amended with effect from 1st October 2012 by The Waste (England and Wales) (Amendment) Regulations 2012.

- 1.6 DEFRA accepted that Regulation 13 needed to be amended because co-mingling paper, glass, metal and plastic cannot count as separate collection for the purpose of the WFD. There is only separate collection if the paper, glass, metal and plastic are collected separately from each other. There is general acceptance that DEFRA is right to make this concession but the question which has troubled local authorities is whether it means that there is now an absolute obligation to introduce separate collection or whether there is scope for local discretion and, if so, what the limits are and what criteria must guide decision-making.

2.0 European Commission Advice and the Government Response

- 2.1 When consulting on the amendment of Regulation 13, DEFRA took the view that the purpose of the WFD:

“is to promote high quality recycling as an outcome, and it does not mandate a particular approach to collection, to the exclusion of all others to achieve this.”

- 2.2 More specifically, DEFRA interprets the WFD as setting out a preference for separate collection but with two important qualifications either of which can be used to justify co-mingling. In the view of DEFRA, all of the separate collection obligations apply only where separate collection is:

- (a) technically, environmentally and economically practicable; and
- (b) necessary to meet the appropriate quality standards for the relevant recycling sectors

Accordingly, DEFRA proposed an amendment to Regulation 13 which used just these words.

- 2.3 DEFRA¹ also rejected an argument that the Government must dictate a single national solution:

“It is the view of the Government in England that there are inherent difficulties in attempting to impose a one size fits all solution on local authorities, and that local authorities themselves are best placed to determine the most appropriate waste collection system to use in their local area, working with their residents.”

- 2.4 By the time that DEFRA reported on the outcomes of consultation, the European Commission had issued guidance on the WFD which broadly supported its interpretation of the WFD. However, a small number of consultees said that the wording proposed for Regulation 13 involved too much interpretation of the WFD

¹ The Welsh Assembly has taken a different view and will move over time to the universal adoption of kerbside sort collection systems.

and, to avoid another legal challenge, the final amendment to Regulation 13 uses a rather literal cut and paste from the WFD. The result is legally safer but rather less easy to understand. Regulation 13 now says that the separate collection duties only apply where separate collection is:

- (a) necessary to ensure that waste undergoes recovery operations in accordance with Articles 4 and 13 of the Waste Framework Directive and to facilitate or improve recovery; and
- (b) technically, environmentally and economically practicable

Despite this change in language, it is quite clear from the DEFRA response to the consultation that it considers that for all practical purposes the legal position is still as stated in its original draft.

3.0 What Happens Next

- 3.1 As DEFRA noted in its response to the consultation, it is wrong to think that there is a simple dichotomy between full kerbside sorting and full co-mingling. Some authorities have adopted one or other of these two extremes but many have adopted some combination of the two and vary their methods according to the circumstances of different localities within their areas. Consultation responses from local authorities also reveal that separate collection can be counter-productive by reducing the total amount of recoverable waste collected or gives rise to other environmental problems such as congestion on narrow roads. Most importantly, authorities have often made substantial investments in their preferred method of collection and any programme for change should recognise the economic implications and respect the procurement cycle and asset life.
- 3.2 So long as the legal interpretation adopted by DEFRA is not successfully challenged, co-mingling can continue to be justified either on the basis that separate collection is not technically, environmentally and economically practicable (“the practicability test”) or on the basis that it still delivers high quality recycling (“the quality test”).
- 3.3 With respect to the practicability test, the guidance from the European Commission notes that a number of member states have demonstrated that separate collection is viable and implies that the only issue is likely to be whether it is economically practicable. The advice from DEFRA confirms that the fact that an authority has invested in co-mingled collection and is committed to lengthy contracts will be a very important factor in judging what is economically practicable. However, the DEFRA stance seems more open to the possibility that separate collection may not be practicable in a particular locality for other reasons.
- 3.4 With respect to the quality test, in order to be applied in practice, there will have to be accepted standards as to what quality of materials commercial recyclers can reasonably expect to be delivered. It can be expected that the quantity of recycling achieved will be an important benchmark of whether high quality is being delivered by the chosen arrangements. The quality test will also have to

be applied according to the particular type and scale of facilities available in an area and what their specific requirements are.

- 3.5 The view of DEFRA is that the judicial review and the advice from the European Commission has resulted in no significant change in the legal position. The legal position as explained by DEFRA also leaves considerable room for common sense and local judgement. However, even if there is no further legal challenge, there is still considerable uncertainty as to what criteria will govern decisions under the two tests and what evidence will be required to support those decisions. DEFRA has recognised this need and promised further guidance together with a MRF (Materials Recovery Facility) Code of Practice.

4.0 Conclusion

Even though none of the guidance issued by the European Commission or DEFRA is legally binding, it will be welcomed by member authorities in providing a common sense approach on the contentious issue of whether co-mingled collections are compatible with the WFD. This is based on whether it is practicable to introduce separate collections and whether the recycling is of high quality. It will be particularly welcomed by a number of our local authorities who have invested in co-mingled collection systems and are being faced with budget cuts. However, further clarification is required if authorities are to be able to reach decisions that are safe from legal challenge and in which they can have confidence over the long time periods involved in procuring collection services and recovery facilities. Your officers will report further advice when more guidance is available from DEFRA.

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