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| SCOTTISH ENVIRONMENT PROTECTION AGENCY | Guidance: | WML-G-DEF-01 |
| Guidance for SEPA staff IS IT WASTE <i>Understanding the definition of waste</i> | Page no: | Page 1 of 9 |
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1. Background

This document sets out a framework of factors to be considered in establishing whether a particular substance or object is likely to fall within the scope of the definition of waste given in the Waste Framework Directive (75/442 EEC as amended by 91/156 EEC et seq) and adopted in the UK. It is not a substitute for legal or policy advice and this document does not attempt to address all the legal considerations.

The concept of waste can not be interpreted restrictively. Case law dictates that whether something is waste must be determined by reference *to all the circumstances*, having regard to the Waste Framework Directive and the need to ensure that its effectiveness is not undermined. SEPA can however, make use of established definitions within existing waste legislation and take into account principles established by court judgements when considering individual cases.

Ultimately, interpretation of the definition of waste is for the Courts either within the UK or at European level to decide. Sources of reference for recent case law can be found in Appendix 5.

2. Introduction & Scope

This document has been produced by the Waste Policy Unit to assist SEPA staff in understanding when a substance or object becomes waste and when something that has become waste may cease to be a waste. It may be updated from time to time to reflect new case law that influences the decision making process and to add appropriate practical examples when necessary. It is important to read the whole document to appreciate the range of principles that should be applied to the decision making process. Where there is any dubiety about a decision, advice should always be sought from the Waste Policy Unit or Legal Team.

Guidance given in Scottish Office Circular 10/94 has been overtaken by various judgements from the European Court of Justice (ECJ) which have widened the scope of the definition of waste and have tended to restrict the circumstances in which waste can be considered to be fully recovered and therefore ceases to be waste (subject to there no longer being an intention to discard it).

This document provides a summary of some of the decisions taken by SEPA on the definition of waste.

3. What is Waste?

The definition of waste given in the Waste Framework Directive (75/442/EEC) is:

“any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard”

Annex I of the Waste Framework Directive is reproduced in Appendix 1. Whilst this list endeavours to cover most circumstances, it is illustrative and includes a general category – Q16, which covers -

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“Any materials, substances or products which are not contained in the above categories”

The definition should be read in the context of the *holder* (defined by the Directive as “the producer of the waste or the natural or legal person who is in possession of it”) of the waste since it is their intent or decision to discard which determines whether something is waste. Regulatory controls apply to waste until it is fully recovered and has ceased to be waste. The fact that a holder may have a use for a waste or that the waste may have a value does not necessarily mean that it is not being discarded or that it has been fully recovered.

It is important to recognise that the Courts consider the term ‘discard’ to have a ‘special’ meaning in the context of the Waste Framework Directive¹. The simple English dictionary meaning of ‘discard’, equating to whether a substance has simply been ‘got rid of’, is not to be used as the ‘special’ meaning is far broader. In addition to the over-arching general considerations mentioned in the first section of this note, the Courts have provided guidance on indicators to be considered when determining whether the holder has ‘discarded’, or intends or is required to ‘discard’. Some of these indicators are mentioned in Appendix 2.

Whether the holder himself would ordinarily regard what he is doing or intending to do as ‘discarding’ is not necessarily relevant. In many cases the holder is likely to think of ‘discarding’ in its ordinary sense rather than in the ‘special’ sense and it is the actions of the holder that should be considered in light of the indicators. Some of these indicators are mentioned in Appendix 2.

Application and subsistence fees are not relevant to the issue of waste classification.

It is important to note that the classification of materials, substances or products as waste is not intended to stop any uses to which they may be put. It is to ensure that the environment and human health are safeguarded. For many wastes that are being exported, particularly household and electrical and electronic waste, transfrontier shipment legislation will apply. This legislation is designed to ensure that there is protection for the countries of destination and ensure that UK companies comply with the obligations set out the United Kingdom Management Plan for Exports and Imports of Waste.

Examples of waste scenarios developed by SEPA can be found in Appendix 3.

4. When does Waste Cease to be Waste?

Although a waste may be sold or traded, or is capable of being recovered, this does not necessarily mean that it has ceased to be waste. Only once a final recovery operation has been completed – for example by being incorporated into a final product or being used in the place of a non-waste material - does waste cease to be waste. It should be remembered that there may be several treatment processes (possibly on different sites) prior to full recovery and hence prior to something ceasing to constitute waste.

A procedure for evaluating full recovery can be found in Appendix 4.

¹Criminal Proceedings against Euro-Tombesi (C-304/94): [1997] ECR 1-3561

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Appendix 1

The Waste Framework Directive 75/442/EEC Annex I - Categories of Waste

- Q1. Production or consumption residues not otherwise specified below
- Q2. Off-specification products
- Q3. Products whose date for appropriate use has expired
- Q4. Materials spilled, lost or having undergone other mishap, including any materials, equipment, etc, contaminated as a result of the mishap
- Q5. Materials contaminated or soiled as a result of planned action (e.g. residues from cleaning operations, packing materials, containers etc)
- Q6. Unusable parts (e.g. reject batteries, exhausted catalysts etc)
- Q7. Substances which no longer perform satisfactorily (e.g. contaminated acids, contaminated solvents, exhausted tempering salts, etc)
- Q8. Residues of industrial processes (e.g. slags, still bottoms etc)
- Q9. Residues from pollution abatement processes (e.g. scrubber sludges, baghouse dusts, spent filters, etc)
- Q10. Machining/finishing residues (e.g. lathe turnings, mill scales, etc)
- Q11. Residues from raw materials extraction and processing (e.g. mining residues, oil field slops, etc)
- Q12. Adulterated materials (e.g. oils contaminated with PCBs, etc)
- Q13. Any materials, substances or products whose use has been banned by law
- Q14. Products for which the holder has no further use (e.g., agricultural, household, office, commercial and shop discards)
- Q15. Contaminated materials, substances or products arising from remedial action with respect to land
- Q16. Any materials, substances or products which are not contained in the above categories

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Appendix 2

Examples of considerations to be made when assessing whether something is waste

The following are some indicators of whether something has been discarded and is waste (see section 3 above). They are in no particular order of importance and it should be noted that simply satisfying one of these criteria does not necessarily mean an intention to discard has/has not been established. Some indicators in a particular case may suggest an intention to discard exists, whilst others may suggest it does not. The particular circumstances of each case should be considered in order to determine whether a substance has been discarded/an intention to discard is present. It is not sufficient to decide something is or isn't being discarded based purely on the answer to a limited set of questions or lines of enquiry. Questions will inevitably evolve as the facts surrounding the circumstances are ascertained.

- Does the holder intend to discard the material, substance or object?
- Is the holder required to discard the material, substance or object? For example weapons banned by law.
- Was the material, substance or object discarded?
- Is the substance commonly regarded as waste?
- Is the substance undergoing a disposal or recovery operation (many of which are listed in Annex IIA and IIB of the Waste Framework Directive 75/442/EEC, as amended by 91/156/EEC), or does the holder of the substance intend for it to be consigned to such a disposal or recovery operation (or it is required to be consigned to such an operation)? If yes, this is indicative of an intention to discard, indicating the substance may well constitute waste.
- Did the producer set out to manufacture or produce the substance, material or object? If the answer to this question is 'no' the substance may be waste, but further enquiries are necessary.
- Are special precautions required when a material is used? For example, must it be blended or the process adapted to accommodate it? If so, this may be indicative of an intention to discard.
- Is there certainty of use? This question may be relevant in the context of considering whether a substance resulting from an extraction or manufacturing process constitutes a 'by-product'. Case law relating to 'by-products' is complex and legal or policy advice should always be sought on this issue. It must be remembered that in some cases the use itself may be a disposal operation eg. filling a depression for no reason other than to get rid of the substance or using more of a substance than is required, in which case the substance remains waste.

Other points which should be considered are:

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- The fact that a holder may have a beneficial use for the material does not mean that it is not waste or that it ceases to be waste when put to that use.
- The fact that the material or object is fully functional does not mean in itself that it is not waste or that it ceases to be waste.
- The fact that a discarded substance or object has no adverse impact on human health or the environment does not mean that it is not waste or that it ceases to be waste.
- Although the method of treating a substance has no impact on its nature as waste, it may serve to indicate the existence of waste. For example, if the use of a substance as fuel is a common method of recovering waste, that may be evidence the holder has discarded/intends/is required to discard
- The fact that a discarded substance or object has value (e.g. scrap metal) does not mean that it is not waste or that it ceases to be waste.
- The fact that an item has been donated does not mean that it is not waste or that it ceases to be waste, as the decision to discard usually precedes the decision to donate. This example obviously does not apply to money donations or donations (such as food) where the donator has purchased the goods specifically with the intention of donating. Used goods are likely to be waste and donating them does not affect their status as waste.

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Appendix 3

Examples of waste scenarios developed by SEPA.

Where a case is made that waste has been fully recovered, it must be examined against *all* relevant case law. It is also important to check for consistency in approach and consider the impacts of a decision on other processes and waste streams, as well as the regulatory impact.

It is also important to consider whether a waste can be considered to be fully recovered and therefore no longer subject to waste regulatory controls. More information on this is provided in Appendix 4.

1. Some 'fuels' produced from waste remain waste until burned to produce energy. This generally applies to dried sewage sludge pellets, some recovered fuel oils, refuse derived fuels, sawdust from used or treated wood, off cuts from chipboard manufacture, etc.
2. Biofuel from timber and other crops grown to be used as biofuel is not waste.
3. Wood chips and sawdust from virgin timber which is processed into timber products for use as eg. biofuel or chipboard manufacture, are unlikely to be waste where the processor can demonstrate that the material is not being discarded and there is no intention or requirement to discard it during the harvesting and processing activities.
4. Forestry brash, lop and top is unlikely to be waste if it is being produced for a specific use and there is certainty that it will be used for that purpose.
5. Tallow is waste. It remains waste until it is fully recovered through energy recovery or is transformed into an approved product in accordance with the Animal By-Products Regulation EC No 1774/2002, 3 October 2002.
6. Draff being used for animal feedstuff is not waste.
7. Foodstuff discarded from supermarkets is waste.
8. Road planings are waste.
9. Compost produced from green waste may be considered to be fully recovered when produced to an appropriate standard (currently BS PAS 100), there is certainty that it will be used and it is a substitute for other compost material. Excessive or unnecessary application will be regarded as a waste disposal operation.
10. Baled waste tyres are likely to remain waste until fully recovered (eg. by incorporation into a structure).
11. Electrical and Electronic equipment (even if discarded in full working order) is waste when discarded by the holder. It may be fully recovered if it is shown to comply with appropriate standards and is put into a marketing system which ensures that it has certainty of use. In cases of doubt, equipment should remain classified as waste to

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ensure that transfrontier shipment controls apply and give the appropriate degree of protection for the country of destination.

12. Goods given to charity shops are generally waste. They may be considered to be fully recovered when they are sorted and put on the shelf for re-sale.
13. Goods 'donated' to charitable organisations for refurbishment or reuse are generally waste. They may be considered to be fully recovered only when they are refurbished, treated and/or sorted and made available for (re)sale.
14. Manures that are certain to be used as fertilizer in accordance with good practice guidance eg. the PEPFA code, are generally not regarded as waste. However, where agricultural manures are applied to land in quantities over and above what would be beneficial to the land or applied in a manner likely to pollute, they will be regarded as having been discarded as waste.
15. Fishing vessels and offshore structures subject to decommissioning are waste. Recovery in most cases will be through dismantling and recovery of component materials.
16. Dead pets are waste.
17. Scrap metal is waste. It may be considered to be fully recovered through processing in a furnace and turned into ingots which substitute for ingots produced from raw material.
18. Components from scrap vehicles may be considered to be fully recovered when removed from vehicles and are being sold as a substitution (without further treatment) for new vehicle components, to be used in vehicles.
19. Construction and demolition waste will remain waste until fully recovered. This *may* involve processing to an appropriate standard and its marketing in a system which ensures certainty of use and substitution for other construction materials. Refer also to Appendix 4.
20. Oily /contaminated rags/cloths/clothes are waste if they are discarded by the holder. Rags/cloths/clothes which are sent for laundering will not in most cases have been discarded.

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Appendix 4

When waste may be considered to be fully recovered

There will be a limited number of cases where waste may be considered to be fully recovered and no longer subject to the requirements of waste legislation prior to it being used. For example, it *may* be possible to show that a treated waste can be used as a direct substitute for a substance in a manufacturing process without that process being subject to waste regulatory controls or it *may* be possible to use a fully recovered waste as a fuel without the plant being subject to Waste Incineration Directive requirements.

It is the responsibility of the person making a claim that he has fully recovered a waste prior to using it, to provide evidence that the material no longer needs to be subject to waste regulatory requirements.

When considering if a substance or object which was waste has ceased to be waste, the following should be considered:

(i) What is the non-waste material that it will be substituting for and is it a suitable substitute?

In some cases a treated waste may meet specific product specifications (such as a British Standard). Most standards however, relate to performance only and do not take into account potential environmental and human health impacts. In this case they are **not** suitable as evidence of full recovery on their own. A treated waste may contain contaminants that the material it is proposed to substitute for does not. Standards are normally drafted for uncontaminated 'virgin' materials and may therefore not address limit values for contaminants that would not be present in the virgin equivalent.

(ii) Will the material actually be used in the same way as the non-waste material it is being compared with?

(iii) Is further processing required before use? If the answer is 'yes', the substance or object *may* still be waste.

(iv) If used in the same way as the comparable non-waste material, can it be used under the same conditions of environmental protection as the non-waste material without any greater danger of harm to human health or the environment?

It will only be possible to make this claim if the treated waste has been properly characterised, taking into account the former characteristics and use of the material and any subsequent processing it has been subjected to.

(v) Is there certainty that the waste will be used and will it be used in accordance with (ii)?

(vi) Is the person accepting this recovered 'waste' being paid to accept it?

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It is important to note that a waste that has been fully recovered can be reclassified as waste. If for example, a fully recovered waste is being subjected to a disposal operation, 'used' unnecessarily or in excessive quantities, this will be regarded as a disposal operation which is subject to the requirements of the Waste Framework Directive.

Waste Policy should be contacted for advice if Standards alone are provided as justification that a waste has been fully recovered.

Case law

This list and the links provided do not contain all the waste case law. This information is provided for interest only and advice should be sought from legal prior to making any reference to it. No single case should be relied on in isolation when making an assessment and any interpretation of the case law should be agreed with the Waste Policy Unit.

European Court of Justice weblink: <http://curia.eu.int/en/content/juris/index.htm>

Some relevant UK case law:

1998 – Mayer Parry Recycling Ltd v EA

2001 – Castle Cement Ltd v EA

2003 – Mayer Parry II

2004 – Longannet – Scottish Power Generation Ltd (SEPA Judicial review)