

REPORT TO CABINET

Open		Would any decisions proposed :		
Any especially affected Wards	Discretionary /	(a) Be entirely within cabinet's powers to decide YES		
	Operational	(b) Need to be recommendations to Council NO		
		(c) Is it a Key Decision NO		
Lead Member: Cllr I Devereux E-mail: <i>cllr.ian.devereux@west-norfolk.gov.uk</i>		Other Cabinet Members consulted:		
		Other Members consulted:		
Lead Officer: Mark Whitmore E-mail: <i>mark.whitmore@west-norfolk.gov.uk</i> Direct Dial: 01553 616654		Other Officers consulted:		
Financial Implications YES	Policy/Personnel Implications NO	Statutory Implications NO	Equal Impact Assessment NO	Risk Management Implications NO

Date of meeting: 8 January 2018

FIXED PENALTY NOTICES FOR FLY TIPPING AND DUTY OF CARE OFFENCES

Summary

The Environmental Protection Act 1990 allows local authorities to offer Fixed Penalty Notices (FPN's) for:

- Depositing or knowingly causing or permitting the deposit of waste on land where no environmental permit is in place, commonly known as fly-tipping. (**Section 33ZA**)
- Householders who fail to comply with their duty of care when passing their waste to a third party. (**Section 34ZA**)

This report seeks to confirm the level of penalty payable for each offence

Recommendation

That the level of penalty for these offences to be set at:

- Section 33ZA (Fly tipping) £300 reduced to £200 if paid within 10 days.
- Section 34ZA (Household Duty of Care) £200 reduced to £150 if paid within 10 days

Reason for Decision

The council works in partnership with the other Norfolk authorities through the Norfolk Waste Enforcement Group (NWE). NWE is an officer level group with the aim of sharing good practice and, where possible, aligning regulatory processes in the county. The level of penalties have been reviewed and agreed by NWE.

1 Background

1.1 The use of Fixed Penalty Notices

Fixed Penalty Notices (FPN's) were introduced to reduce the burden on authorities and the courts when dealing with low level offences, historically many of these cases would not have been progressed as the costs were prohibitive when weighed against the likely sentence in court.

FPN's offer the opportunity to discharge liability to conviction by payment of a penalty. It is not an offence to fail to pay and indeed the offer of a FPN can be declined with the accused preferring to have the case heard in court should they so wish.

As the offer of an FPN can be refused there is no right of appeal. However, if after a FPN has been served new evidence is produced this will be considered and if appropriate the FPN can be withdrawn.

The decision to offer a fixed penalty will be considered in line with the council's enforcement policy and specific codes of practice or guidelines relating to the offence and based on an evaluation of the evidence by the Principal Officer, Community Safety and Neighbourhood Nuisance or the Environmental Health Manager (Community Safety).

An FPN will only be issued where there is sufficient evidence to progress the case to court for prosecution, should the offer of an FPN be declined or the fine not paid.

1.2 Section 33ZA – FPN's for fly tipping

The Unauthorised Deposit of Waste (Fixed Penalty) Regulations 2016 amended the Environmental Protection Act 1990 to allow, under section 33ZA, authorised officers of waste collection authorities to offer fixed penalty notices (FPN) for offences under section 33(1)(a) of the act.

Section 33(1)(a) makes it an offence to deposit or knowingly cause or permit the deposit of waste on land not covered by an Environmental Permit. This is the offence more commonly known as fly-tipping.

A section 33(1)(a) offence is a serious offence which can attract unlimited fines and/or, on summary conviction, imprisonment for up to 12 months and on indictment up to five years. The act, in its original form, meant that all offences from the very small to the very large could only be dealt with by way of prosecution. The costs of prosecution are rarely covered in sentencing and local authorities were therefore reluctant to bring prosecutions for small scale offences.

The introduction of a fixed penalty regime for small scale fly-tipping offences allows the council to offer an alternative to prosecution that still provides a level of deterrent for the offender and others.

In reaching a decision the authorising officer will have regard to the Sentencing Council Environmental Offences Definitive Guideline. A link to these guidelines is provided in the background papers to this report.

A FPN will only be considered where there is low or no culpability (the level of knowledge associated with the decision to commit an offence) and only a risk of limited or minor harm to the environment, public health or the lawful activities of others. Culpability and Harm for business and individuals are described in the Sentencing Council's Environmental Offences Definitive Guideline. The guideline levels of culpability and harm for individuals and businesses are attached at Appendix 1.

The act allows local authorities to set a level of fine of not less than £150 and not more than £400 and where no level has been set the default is £200. The act also allows for a fine to be discounted if paid within 10 days to no less than £120. Through the Norfolk Waste Enforcement Group (NWEAG), an officer level group, an agreement to set the fine at £300 reduced to £200 if paid within 10 days was agreed. This level was agreed as it was considered that FPN's will be offered for the lowest level of offence only and fines in court are unlikely to be significantly higher. NWEAG believe the fine should be high enough to act as a deterrent without being so high that the majority of cases end up going to court.

It is recommended that the level of £300 reduced to £200 is adopted by Members.

1.3 Section 34ZA – Householder Duty of Care

Between January and March 2018 DEFRA consulted on reducing crime at sites handling waste, and introducing fixed penalties for householder waste duty of care offences. A summary of responses to the consultation, the government's formal response and guidance on the proportionate use of fixed penalty notices are included in the background papers of this report.

In November 2018 The Environmental Protection (Miscellaneous Amendments) (England and Wales) Regulations 2018 were laid before Parliament. Part 2 of the regulations cover the household waste transfer penalty notices in England and come into force on the 7th January 2019.

The regulations amend the Environmental Protection Act 1990 introducing section 34ZA. This amendment allows local authorities to offer fixed penalty notices to individuals who fail to comply with their duty relating to the transfer of household waste. Prior to this the only option available was prosecution. This harmonises the regulatory approach for the different offences of unauthorised disposal of waste (s33 offences) and duty of care (s34 offences).

It should be noted that presenting waste for collection by the council does not require a householder to take the same precautions. Offences relating to the presentation of waste should be dealt with under existing provisions.

The act specifies that the amount of fine must be no less than £150 and no more than £400, with a default of £200 if no amount is specified. There is also provision for a discount for early payment within 10 days of no less than £120.

The Norfolk Waste Enforcement Group has not met since the introduction of these provisions; however discussion with officers has indicated that the default fine of £200 is adopted. It was also agreed that fine is reduced to £150 if paid within 10 days. The difference between the level of fine for this offence and the section 33ZA is that the homeowner is likely to have already paid to have had waste taken away and the level of penalties on prosecution are lower than the section 33 offences which can carry custodial sentences.

It is recommended that the level of £200 reduced to £150 is adopted by members.

2 Policy Implications

There are no policy implications associated with this report.

3 Financial Implications

The ability to offer Fixed Penalty Notices for minor offences will reduce the legal costs incurred in pursuing a case to prosecution. The use of FPN's should not be seen as an opportunity for income generation, they must only be issued where there are grounds for prosecution and never speculatively.

4 Staffing Implications

There are no staffing implications associated with this report.

5 Statutory Considerations

There are no statutory considerations associated with this report. The Environmental Protection Act 1990 has already been amended and the council has the power to offer fixed penalties. This report only seeks to set the level of penalty.

6 Equality Impact Assessment (EIA)

An EIA has not been produced for this report; however an EIA was published with the Statutory Instrument amending the Environmental Protection Act. This EIA has been included in the Background Papers.

7 Risk Management

There is no specific risk associated with this report. FPN's will only be offered where authorising officers believe that there is a reasonable likelihood of conviction should the matter progress to court.

As with any decision to take formal legal action there is a reputational risk should the council fail to comply with its enforcement policy or lose a case in court, however this report does not increase this risk.

8 Background Papers

Sentencing Council – Environmental Crime Sentencing Guideline

https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web2-1.pdf

Impact Assessment for The Unauthorised Deposit of Waste (Fixed Penalty) Regulations 2016

http://www.legislation.gov.uk/ukia/2016/196/pdfs/ukia_20160196_en.pdf

The Environmental Protection (Miscellaneous Amendments) (England and Wales) Regulations 2018

http://www.legislation.gov.uk/uksi/2018/1227/pdfs/uksi_20181227_en.pdf

Review of proposals to tackle crime and poor performance in the waste sector & introduce a new fixed penalty for the waste duty of care

Summary of responses

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721972/waste-crime-consult-sum-resp.pdf

Government Response

<https://www.gov.uk/government/consultations/reducing-crime-at-sites-handling-waste-and-introducing-fixed-penalties-for-waste-duty-of-care/outcome/government-response>

Guidance for local authorities on household waste duty of care fixed penalty notices

<https://www.gov.uk/government/publications/household-waste-duty-of-care-fixed-penalty-notice-guidance/guidance-for-local-authorities-on-household-waste-duty-of-care-fixed-penalty-notices>

Appendix 1

Sentencing Council Environmental Offences Definitive Guideline

Individuals:

Culpability	Harm
<p>Deliberate Where the offender intentionally breached, or flagrantly disregarded, the law</p>	<p>Category 1</p> <ul style="list-style-type: none"> • Polluting material of a dangerous nature, for example, hazardous chemicals or sharp objects • Major adverse effect or damage to air or water quality, amenity value, or property • Polluting material was noxious, widespread or pervasive with long-lasting effects on human health or quality of life, animal health, or flora • Major costs incurred through clean-up, site restoration or animal rehabilitation • Major interference with, prevention or undermining of other lawful activities or regulatory regime due to offence <hr/> <p>Category 2</p> <ul style="list-style-type: none"> • Significant adverse effect or damage to air or water quality, amenity value, or property • Significant adverse effect on human health or quality of life, animal health or flora • Significant costs incurred through clean-up, site restoration or animal rehabilitation • Significant interference with or undermining of other lawful activities or regulatory regime due to offence • Risk of category 1 harm <hr/> <p>Category 3</p> <ul style="list-style-type: none"> • Minor, localised adverse effect or damage to air or water quality, amenity value, or property • Minor adverse effect on human health or quality of life, animal health or flora • Low costs incurred through clean-up, site restoration or animal rehabilitation • Limited interference with or undermining of other lawful activities or regulatory regime due to offence • Risk of category 2 harm <hr/> <p>Category 4</p> <ul style="list-style-type: none"> • Risk of category 3 harm
<p>Reckless Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken</p>	
<p>Negligent Offence committed through act or omission which a person exercising reasonable care would not commit</p>	
<p>Low or no culpability Offence committed with little or no fault, for example by genuine accident despite the presence of proper preventive measures, or where such proper preventive measures were unforeseeably overcome by exceptional events</p>	

Appendix 1

Sentencing Council Environmental Offences Definitive Guideline

Businesses:

Culpability	Harm
<p>Deliberate Intentional breach of or flagrant disregard for the law by person(s) whose position of responsibility in the organisation is such that their acts/omissions can properly be attributed to the organisation; OR deliberate failure by organisation to put in place and to enforce such systems as could reasonably be expected in all the circumstances to avoid commission of the offence.</p>	<p>Category 1</p> <ul style="list-style-type: none"> • Polluting material of a dangerous nature, for example, hazardous chemicals or sharp objects • Major adverse effect or damage to air or water quality, amenity value, or property • Polluting material was noxious, widespread or pervasive with long-lasting effects on human health or quality of life, animal health or flora • Major costs incurred through clean-up, site restoration or animal rehabilitation • Major interference with, prevention or undermining of other lawful activities or regulatory regime due to offence <p>Category 2</p> <ul style="list-style-type: none"> • Significant adverse effect or damage to air or water quality, amenity value, or property • Significant adverse effect on human health or quality of life, animal health or flora • Significant costs incurred through clean-up, site restoration or animal rehabilitation • Significant interference with or undermining of other lawful activities or regulatory regime due to offence • Risk of category 1 harm <p>Category 3</p> <ul style="list-style-type: none"> • Minor, localised adverse effect or damage to air or water quality, amenity value, or property • Minor adverse effect on human health or quality of life, animal health or flora • Low costs incurred through clean-up, site restoration or animal rehabilitation • Limited interference with or undermining of other lawful activities or regulatory regime due to offence • Risk of category 2 harm <p>Category 4</p> <ul style="list-style-type: none"> • Risk of category 3 harm
<p>Reckless Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken by person(s) whose position of responsibility in the organisation is such that their acts/omissions can properly be attributed to the organisation; OR reckless failure by organisation to put in place and to enforce such systems as could reasonably be expected in all the circumstances to avoid commission of the offence.</p>	
<p>Negligent Failure by the organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence.</p>	
<p>Low or no culpability Offence committed with little or no fault on the part of the organisation as a whole, for example by accident or the act of a rogue employee and despite the presence and due enforcement of all reasonably required preventive measures, or where such proper preventive measures were unforeseeably overcome by exceptional events.</p>	