



Consultation on the legal definition of waste and its application

This briefing paper summarises the draft guidance on the legal definition of waste and its application from Defra in conjunction with the Welsh Assembly Government, the Department of the Environment in Northern Ireland, the Environment Agency and the Northern Ireland Environment Agency. It is provided to local authority chief executives, council leaders and all APSE waste services contacts in England, Wales and Northern Ireland. It is also provided to all member authorities in Scotland for information purposes.

Key issues

This briefing sets out:

- Why the guidance is needed

- A practical guide for organisations on when a substance/object becomes waste and ceases to be waste

- Detailed guidance on the legal definition of waste and its application

1. Introduction

Defra have launched a consultation on the draft guidance on the legal definition of waste and its application, approaching APSE for our views. The full document is available by [clicking here](#). The aim of the draft guidance is to help businesses and other organisations to take the right decisions about the classification of substances as waste, particularly in more difficult cases (such as where the substance or object has a value).

The original EU-wide definition of waste was introduced when the Waste Framework Directive was amended in 1991. The Government transposed that definition in 1994 in Great Britain and in 1997 in Northern Ireland. Defra issued guidance in the DOE Circular 11/94. Since then, a number of cases have been referred to the European Court of Justice (ECJ) and there is now a substantial body of case law on the definition's interpretation. This draft guidance issued by Defra will supersede DOE Circular 11/94, taking into account the ECJ case law. However, this draft guidance does not change the legal definition of waste and does not take precedence over the case law on the

definition's interpretation – it only provides guidance on that case law. For these reasons, the consultation paper does not invite views on the definition of waste itself.

2. Consultation details

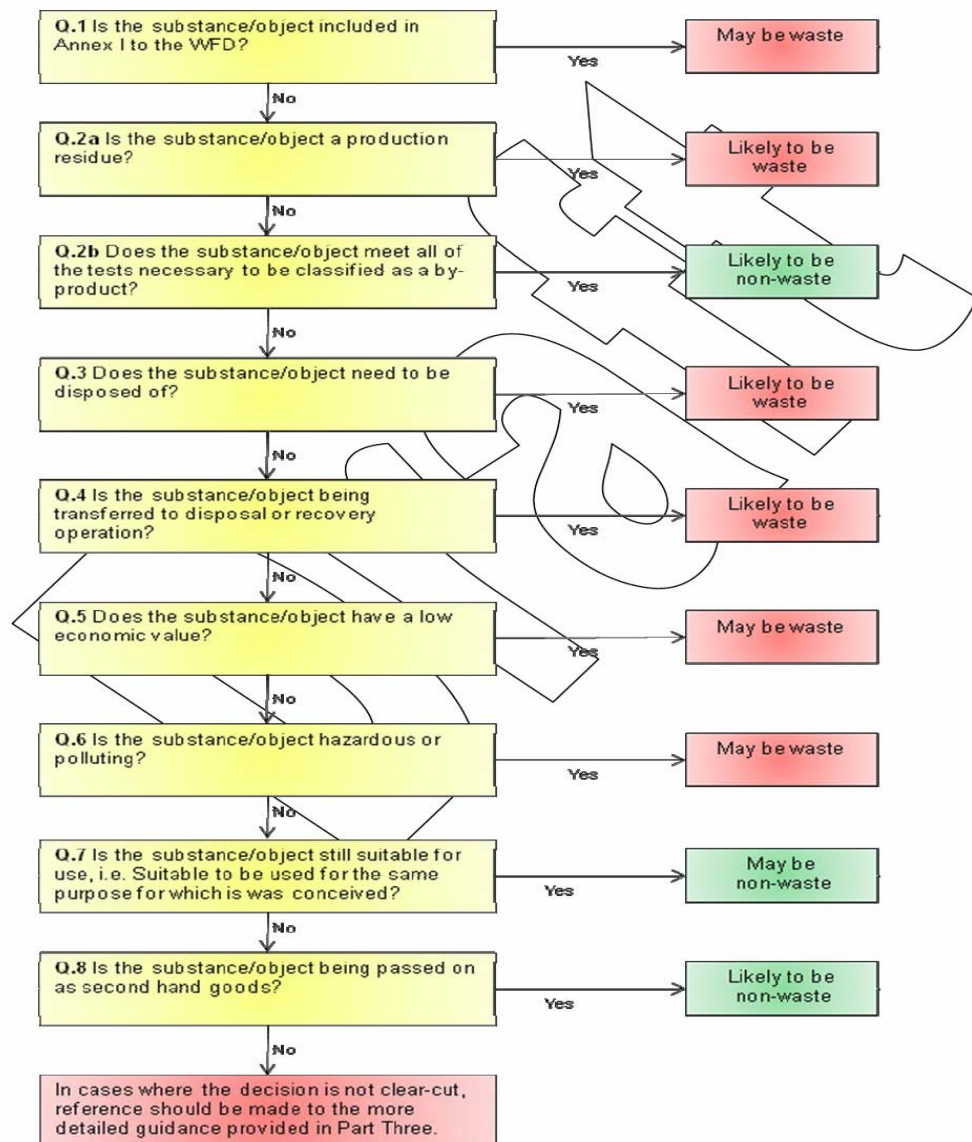
a) Part 1 – A practical guide for businesses and other organisations

The aim of the practical guide is to help those running businesses and other organizations to take day-to-day decisions about whether the substances or objects they are dealing with are likely or unlikely to be waste.

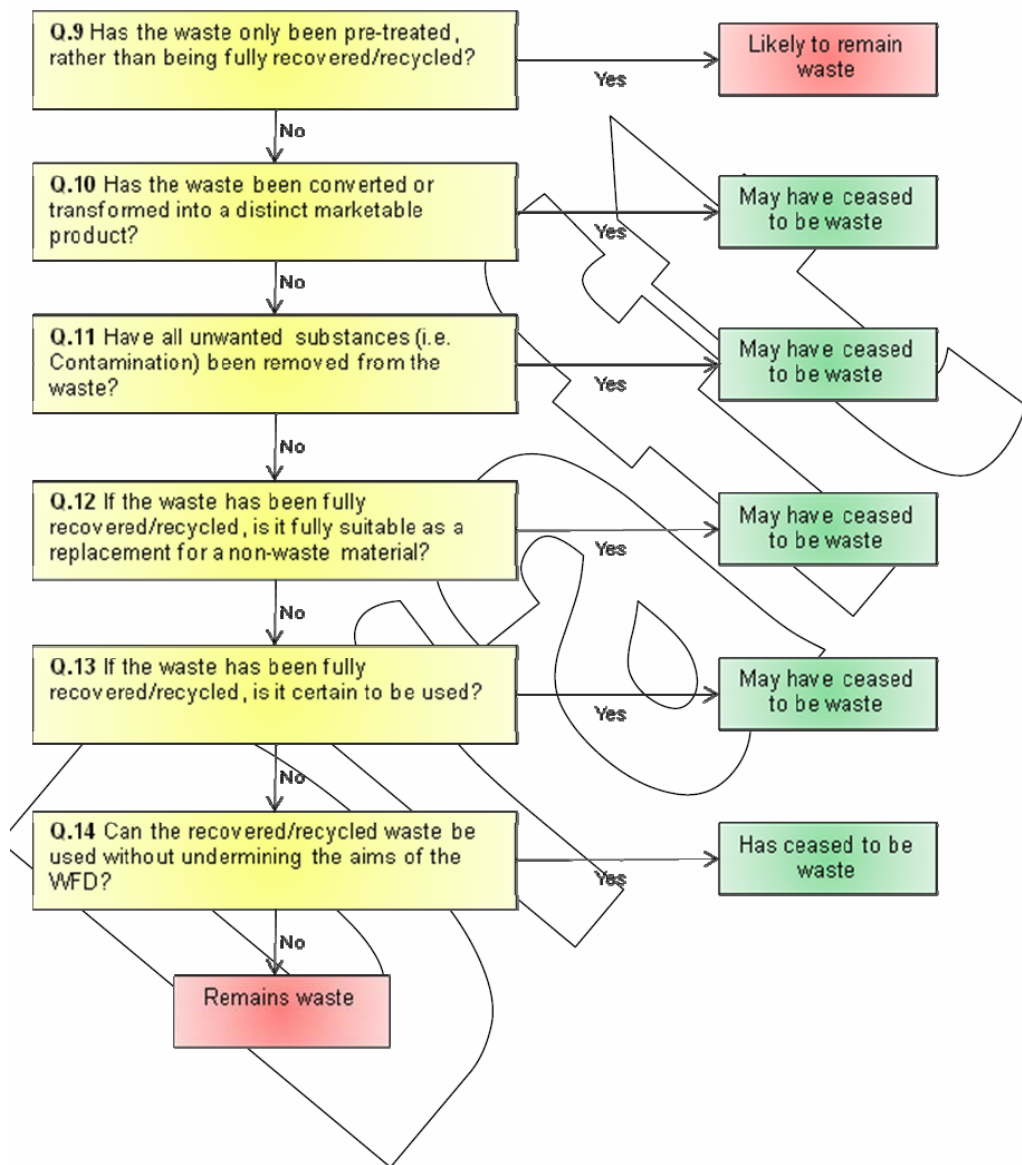
a) Has the substance or object become waste? A substance or object becomes waste when it is discarded and this needs to be decided on a case-by-case basis. The guidance includes a diagram that can help when assessing this.

What then – has the substance or object become waste?

Diagrammatically



b) If a substance or object is waste when does it cease to be waste? The following criteria set out diagrammatically can help to decide this.



b) Part 2 – Background and rationale

This sets out the background to and explains the rationale for providing guidance on waste.

c) Part 3 – Detailed guidance on the legal definition of waste and its application

This part provides detailed guidance on the case law on the definition of waste. It seeks to make the principles established in case law more accessible for those who need to assess whether they are subject to waste management controls.

The guidance states that the main reasons for regulating waste are (a) risk to the environment and human health, (b) waste as a resource and (c) the economic dimension. It provides guidance on the general principles of ECJ case law:

- **The 'discard test'** (pages 62-65) - the basic question which the ECJ has consistently addressed is whether the substance or object has been discarded by its holder. ECJ has explained that the term 'discard' has a specially extended meaning in the Waste Framework Directive and includes the recovery of a substance or object. Clarification is provided on the 'intention to discard', 'requirement or obligation to discard' and 'deliberate and accidental discards'. The guidance acknowledges *'the difficulties in applying the discard test in a very wide range of circumstances have led the EJC to recognize a need for flexibility in adopting a case-by-case approach'* page 65.
- **Characteristics of the substance or object** (pages 65-67) – these cannot by themselves determine whether a substance or object is waste or not, as the discard test relates to the conduct of the holder and not the characteristics of the substance or object. The concept of waste does not exclude substances or objects even if they have a commercial value. If a substance/object has a negative value, that points towards its being waste since it is a burden (page 69). Also, neither the potential to pollute nor the harmlessness of the substance or object is a decisive criterion for determining what its holder intends to do with it and hence whether it is waste.
- **Transfer to another person** (pages 67-68) – transferring a substance or object from one person to another does not in itself affect its classification as waste.
- **Some positive indicators in classifying a substance/object of waste** (pages 68-69)– Annex 1 to the Waste Framework Directive (page 93) lists a number of categories of waste. The final category is a catch all which says *"Q16 Any materials, substances or products which are not contained in the abovementioned categories."* The European Waste Catalogue also provides a non-exhaustive list of wastes.
- **Residues** (page 69) – the starting point is that residues are waste – even if they can be used in some way. Section 3 (page 75) explains the criteria for deciding in what circumstances a residue is a non-waste by-product.
- **Contaminated substances** (page 70) – where a substance is contaminated by reason of its provenance, that may serve to indicate that it is waste.
- **Subject/object is commonly regarded as waste** (page 70) – if something is commonly regarded as waste then that may serve to indicate that it is in reality waste – but it also may not be the case.
- **Waste and disposal, recovery, recycling and re-use** (pages 70-75) – the Waste Framework Directive has two main objectives relevant to the interpretation of the definition of waste (1) to ensure that waste is controlled until it has been safely disposed of or recovered and (2) to promote the use of waste in accordance with the waste hierarchy. Therefore there is a degree of tension between these aims, to regulate the use of waste and to use waste as a resource.

- *Recovery* – the fact that a substance undergoes a process which is a common method of recovering or disposing of waste may be taken as evidence that it is being discarded and hence it is waste. However, all the circumstances must be considered.
- *Recycling* – a recycling operation is different in nature to other recovery operations in that it will always result in the substance in question ceasing to be waste when it is transformed.
- *Re-use* – a distinction is made between re-use as a waste prevention operation and re-use following a recovery operation.

Section 3 (page 75) deals with by-products and section 4 (page 83) provides guidance on end-of-waste.

3. Responding to the consultation

Following consultation, a post-consultation version of the guidance will be published, which will be updated as necessary. APSE will respond to this consultation – please send any feedback through to djohns@apse.org.uk by Monday 12 April 2010. APSE would be particularly interested in your views on:

1. Part 1 (Practical Guide) - Do you consider that the practical guide is helpful? If not, what do you suggest should be included to make it helpful?
2. Part 3 (Detailed Guidance) - Do you consider that there are any other issues that should be addressed in this section?
3. Content of the guidance - Are there issues or factors other than those dealt with in the guidance that you think the guidance should cover? If so, what are those issues or factors and why do think they should be included?
4. Illustrations/case study examples – Would it be helpful if there were real examples of instances when a material would not be waste and instances when a material is still a waste included to illustrate each legal point?

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