

The National Fly-Tipping Prevention Group



Fly-tipping Toolkit: *How to Present Robust Cases to the Courts*

The National Fly-Tipping Prevention Group (NFTPG) is made up of a number of organisations working together to tackle fly-tipping. It includes representatives from central and local government, enforcement authorities, the waste industry, the police and fire service, private landowners, Keep Britain Tidy and the Devolved Administrations. A full list of members plus the Group's aim and objectives is in the Annex.

The NFTPG has its own website at <http://www.tacklingflytipping.com/> and has previously produced guidance on fly-tipping prevention aimed at local authorities and private landowners. The Group meets quarterly and seeks to find ways to influence behaviour to prevent or reduce fly-tipping.

This guide on "How to Present Robust Cases to the Courts" has been developed by the NFTPG and is the first part of the Fly-tipping Toolkit, a web-based tool hosted by the NFTPG. The toolkit will cover a range of topics including:

- How local authorities can set up and run an effective fly-tipping partnership;
- How to best share intelligence within a partnership and with other partnerships;
- How to best promote the duty of care for individuals and businesses;
- Examples of existing good practice to prevent fly-tipping;
- How to use new technology to report fly-tipping;
- How to deal with fly-tipping associated with unauthorised encampments.

This toolkit piece is branded in the name of the NFTPG but does not necessarily reflect the official view and has not had formal sign off by all NFTPG member organisations.

Any enquiries regarding this document should be sent to the NFTPG Secretariat using the contact form on the NFTPG website - <https://www.tacklingflytipping.com/contact/1512>

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Understanding The Sentencing Guidelines for Environmental Offences: A Fly-Tipping Perspective

Introduction

The aim of this document is to assist local authorities and other relevant parties involved in fly-tipping prosecutions in understanding the factors the courts take into account when sentencing an individual who has committed an offence under section 33 of the Environmental Protection Act 1990 (EPA 1990), as it relates to fly-tipping. The focus of the guide is on offenders as individuals and does not cover prosecuting an organisation, however some aspects may be similar.

This document should be read in conjunction with the Sentencing Guidelines for Environmental Offences, issued by the independent Sentencing Council for England and Wales, and published on the Sentencing Council's website. There are specific guidelines for the sentencing of individuals¹ and organisations² for environmental offences. Every court, when sentencing an organisation or individual offender aged 18 or older for fly-tipping, is obliged to follow the sentencing guidelines unless the court is satisfied that it would be contrary to the interests of justice to do so. To note, alongside section 33 of the EPA 1990, the Sentencing Guidelines apply to other environmental offences including section 34 of the EPA 1990, as it relates to a breach of duty of care.

This document has been produced by members of the National Fly-Tipping Prevention Group (NFTPG) in conjunction with Sam Riggs (Barrister) and Dr Anna Willetts (Solicitor). It considers the Sentencing Guidelines for Environmental Offences from a fly-tipping perspective.

This guide may be updated in future, such as to reflect any changes to the guidelines or to include relevant case studies. If you have any relevant examples of prosecuting fly-tipping offences, please get in touch by using the contact form on the NFTPG website - <https://www.tacklingflytipping.com/contact/1512>.

¹ <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/individuals-unauthorised-or-harmful-deposit-treatment-or-disposal-etc-of-waste-illegal-discharges-to-air-land-and-water/>

² <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/organisations-illegal-discharges-to-air-land-and-water-unauthorised-or-harmful-deposit-treatment-or-disposal-etc-of-waste/>

In addition, we have also produced two supporting documents. A **checklist for enforcement officers** to use at the scene of a fly-tip when collecting evidence and a **template charging decision form** for submitting cases for prosecution to local authority legal teams. If you would like to request these two documents, please also use the contact form on the NFTP website - <https://www.tacklingflytipping.com/contact/1512>.

Section 33 of the Environmental Protection Act 1990 (EPA 1990)

It is an offence under section 33 of EPA 1990 to deposit controlled waste or to knowingly cause or permit controlled waste to be deposited without a permit or to dispose of controlled waste in a manner likely to cause pollution to the environment or harm to human health.

An offence under section 33 of EPA 1990 is triable either way. When tried on indictment (Crown Court), the Act allows for a maximum penalty of an unlimited fine and/or up to 5 years' custody. When tried summarily (Magistrates Court), the Act allows for a maximum penalty of an unlimited fine and/or up to 12 months' custody.

Offence range for individuals in the sentencing guidelines: Conditional discharge – 3 years custody

Impact of Fly-Tipping

In the Environmental Services Association's Cost of Waste Crime Report 2021³, the cost of fly-tipping was estimated to be £391.8 million in 2018/19. This figure includes the cost to both the public and private sector as well as the impact on wider society.

According to data from local authorities on incidents and actions taken, in 2020/21 local authorities in England dealt with 1.13 million fly tipping incidents. Of these incidents, 39,000 or 4% of were of 'tipper lorry load' size or larger. The cost of clearing these large fly-tipping incidents for local authorities in England in 2020/21 was £11.6 million⁴.

³ http://www.esauk.org/application/files/3716/2694/1872/ESA_Cost_of_Waste_Crime.pdf

⁴ <https://www.gov.uk/government/statistics/fly-tipping-in-england/fly-tipping-statistics-for-england-2020-to-2021#fly-tipping-enforcement-and-prosecution>

Deciding to Prosecute

Fixed penalty notices (FPNs) provide enforcing authorities with an alternative way of responding to environmental crimes. However, should a fixed penalty notice go unpaid then the normal course of action will be to prosecute. Failure to pursue unpaid penalties undermines the threat of enforcement, and their effectiveness as a deterrent. Fixed penalty notices should not be issued if prosecution is more suitable. For example, if:

- the offence is major, e.g., the scale and effect of the offence merits prosecution
- the offence is committed for reward, e.g., the offender is a registered waste carrier
- the offence is committed by a persistent offender
- the offender is violent or aggressive

Starting a Prosecution

The Full Code Test ("FCT")⁵ must be satisfied for a prosecutor to make the decision to charge a suspect and bring a prosecution. Stage one of the test requires prosecutors to assess the **evidence** in each case and decide whether there is a reasonable prospect of conviction. Stage two of the test, which only applies after stage one has been satisfied, requires consideration of whether a prosecution is in the **public interest**.

Evidence: Is there sufficient evidence to provide a realistic prospect of conviction against the defendant(s) in respect of each offence? When making this assessment, it is necessary to consider if the evidence is reliable, credible & admissible.

Public Interest: Is the case in the public interest to pursue? Factors to consider: Seriousness, Culpability, Victim circumstances, Impact of prosecution, Community, Proportionality & Compensation.

These two steps are covered in more detail in the enforcement officers' checklist which is available on request.

⁵ <https://www.cps.gov.uk/publication/code-crown-prosecutors>

Guideline Steps

Step 1 - Compensation for personal injury, loss or damage resulting from the offence

Where an offender is convicted of a fly-tipping offence, the court has the power to make a compensation order for the offence alongside imposing a fine. A compensation order applies for any personal injury, loss or damage resulting from the fly-tipping offence. The court may decide to impose a compensation order regardless of whether an application has been made by the prosecution.

There is no statutory limit on the amount of compensation that may be imposed for an offence committed by an offender aged 18 or over. However, in determining whether to make a compensation order, and the amount that should be paid under such an order, the court must take into account the offender's means. If the means of the offender are limited, **priority must be given to the payment of compensation over a fine**, though the court may still also impose a fine⁶. In addition, the court must provide a reason if a compensation order is not issued⁷.

"Loss or damage" in relation to fly-tipping should be read in conjunction with section 33B of the EPA 1990⁸ which specifically states that it includes clean-up costs incurred by the waste collection authority or the owner/occupier of the land. Prosecutors should therefore consider applying for compensation for the removal of waste, and any steps taken to remove or eliminate the consequence of the deposit.

⁶ s.135(4) Sentencing Code

⁷ s.55 Sentencing Code

⁸s.33B (2) Environmental Protection Act 1990

(2) The reference in s.133(a) of the Sentencing Code (compensation orders) to loss or damage resulting from the offence includes costs incurred to be incurred by a relevant person in

(a) removing the waste deposited or disposed of in or on the land:
(b) by taking steps to eliminate or reduce the consequences of the deposit or disposal or
(c) both

Relevant person = EA, NRW, waste collection authority, occupier of the land or owner of land (within meaning of s.78A(9)).

For example, if there is damage to the land and the waste is leaching, then the court has the power to recompense the owner/occupier under this step because compensation is not limited to the removal of the waste but extends to taking other steps to eliminate or reduce the consequences of the deposit or disposal. But for such an order to be considered, it requires cogent evidence to be placed before the sentencing court.

For many local authorities, clearance of a fly-tip may be absorbed into their general service. If so, to present costs to the court, some key considerations would include the fly-tip size, the type of waste, the number of vehicles used to clear the fly-tips, the number of trips required, the number of operatives involved, and total time taken alongside accompanying costs.

Step 2 – Confiscation

The purpose of a confiscation order is to deprive the defendant of the financial benefit they have obtained from criminal conduct. A confiscation order can only be imposed by the Crown Court, however the magistrates' courts do have the power to commit the case to Crown Court for sentence for consideration of confiscation in certain circumstances. For instance, if the prosecutor applies for a confiscation order, the magistrates' courts must commit the case to the Crown Court.

Step 3 - Determining offence category – culpability and harm

Culpability and harm are the only factors used by the court to determine the offence category, which informs and determines the sentencing range. **Culpability** describes the level of responsibility or blame for committing a crime. A person who plans a crime will normally be considered more culpable than someone who commits it in the spur of the moment. **Harm** describes the effect of a crime on the victim and the public in general. Culpability and harm are both split into four categories on a sliding scale (1 being the most serious and 4 the least) but these categories can overlap. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting before making an overall assessment and determining the appropriate offence category.

Risk of harm involves consideration of both the likelihood of harm occurring and the extent of it, if it does. Risk of harm is less serious than actual harm. Where the offence has caused risk of harm but no (or less) actual harm, the normal approach is to move down to the next category of harm. This may not be appropriate if either the likelihood or extent of the potential harm is particularly high.

Culpability: As fly-tipping offences generally involve the offender actively depositing waste, the prosecution may wish to consider presenting the offence as a deliberate act.

Harm: Local authorities are unlikely to be dealing with a major Category 1 or significant Category 2 incident, which is generally more relevant for the larger illegal deposits dealt with by the Environment Agency. As the fly-tipping offence has occurred, it could be argued that it has moved beyond there being a risk of harm (Category 4). Therefore, whilst cases must be evaluated on a case-by-case basis, prosecutors may wish to consider presenting their case as having caused Minor harm (Category 3).

Amenity value and interference with or undermining other lawful activities can be relevant to fly-tipping. The costs of clean up could also escalate the level of harm but the court will always bear in mind the principle of double counting (e.g. if a compensation order is made for clean up costs, the court would need to ensure that there was no double counting in the overall financial penalty). Harm should be viewed on an ascending scale (e.g. black bag could be minor, whereas a skip load could escalate the level of harm as could serious amenity issues or multiple breaches). The scale and nature of the tipped material might determine if the offence has significant (Category 2) or minor (Category 3) clean up, site restoration, or animal rehabilitation costs. Remember for 'risk' of harm you move down a category e.g. if there is risk of Category 3 harm, harm is assessed as Category 4.

Step 4 – Starting point and category range

Starting Point

Should a case be presented to court as a Deliberate act that has caused Minor (Category 3) harm, the starting point for a Deliberate Category 3 offence is a Band F fine (600% of relevant weekly income). Depending on mitigating or aggravating factors, the sentencing range is between a Band E fine (which has a range of 300%- 500% of relevant weekly income) OR medium level community order - 26 weeks custody. Fine bands are selected by the court according to their assessment of the seriousness of the case.

The guidelines state that "*The level of fine should reflect the extent to which the offender fell below the required standard. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions.*"

The table of aggravating and mitigating factors is a 'non-exhaustive' list of factual elements providing the context of the offence and factors relating to the offender. It is for the court to determine whether a combination of these or other relevant factors justifies upward or downward adjustment from the starting point. Factual elements specific to fly-tipping should be considered. For example, if the vehicle being used to dump the waste is untaxed and not insured, this could be argued to be an aggravating factor.

In appropriate cases, after the above has been considered, the court may deem it appropriate to move outside the identified category range if the case is so serious and merits departure from the Guidelines.

Aggravating Factors

For a deliberate category 3 fly-tipping case with aggravating factors, the Guidelines advocate moving up the sentencing range to a maximum of 26 weeks custody. The Guidelines state: "*Relevant recent convictions and/or a history of non-compliance are likely to result in a substantial upward adjustment.*" Another statutory aggravating factor is if the offence is committed whilst on bail.

The aggravating factors that may be relevant in a fly-tipping case which have the potential to increase the seriousness of the offence and move up the sentencing bracket could be:

- History of non-compliance with warnings by regulator e.g. stopped and warned previously to obtain a waste carrier's licence (be careful not to double count if the offender has previous convictions – this aggravating feature would be relevant if there are other offences to take into consideration which have not resulted in a conviction)
- Location of offence e.g. the offence would be more serious if waste was fly-tipped in an area of outstanding natural beauty
- Deliberate concealment of illegal nature of offence e.g. operating with false number plates or dumping at night
- Repeated incidents of offending or offending over an extended period of time, where not charged separately
- Established evidence of wider/ community impact e.g. waste leaching or attracting other fly-tipped waste
- Offence committed for financial gain e.g. no waste carrier's licence, charging householder to remove waste
- Obstruction of justice e.g. giving false name or details to the regulator

Mitigating Factors

As the nature of a fly-tipping offence is to dump waste and disappear, it may be that the only relevant factors which the defence may raise to justify a reduction in the fine are *no previous convictions* or *no relevant / recent convictions*.

If there was an avoided cost, thus financial gain, as a result of the dumping, it might be difficult for the defence to argue that there was little or no financial gain or that the offence was a one-off event not commercially motivated.

Financial Circumstances of the Offender

When a defendant is claiming to have little or no income, prosecution can ask the court to make a financial circumstances order under Section 35 of the Sentencing Act 2020, which grants the court the power to compel the disclosure of an individual offender's financial circumstances. The court may conclude that the offender has the ability to pay any fine unless the offender has supplied financial information to the contrary. The onus is therefore on the defendant. In order to assist the court, you may wish to consider drawing the court's attention to the "*Financial Obligations*" heading in Step 4 of the guidelines which states: "*In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case*".

Consider asking the court to tender the defendant to be cross examined on oath about their finances and ascertain who owns the vehicle used to dump the waste, who pays for petrol, insurance, MOT, where does the offender live, living expenses and if payment was received for moving the waste etc. Such lines of cross-examination could expose an offender who is seeking to deliberately mislead the court in respect of finances.

With the burden of proof resting on the defendant, where there is no information to determine the financial circumstances of the offender, the court can proceed on the basis of an assumed relevant weekly income derived from national median earnings.⁹

In the event the court determines an offence to be deliberate Category 3, the starting point of a fine would be much higher than the current maximum fixed penalty notice for fly-tipping. This is before the court has considered whether any of the aggravating factors are present that may justify upward adjustment from the starting point.

⁹ <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/fines-and-financial-orders/approach-to-the-assessment-of-fines-2/3-definition-of-relevant-weekly-income/>

Step 5– Ensure that the combination of financial orders removes any economic benefit derived from offending

This step is not about pursuing assets but removing the economic benefit obtained. For example, if the fly-tipper has avoided paying gate fees and/or landfill tax. If the waste has already been removed, the cost of removal to a licensed facility should be known and that evidence should be presented to the court in an admissible form. If the waste is awaiting removal, evidence should be presented of the estimated cost of removal to demonstrate the economic benefit obtained by the offender. This evidence could be in the form of a witness statement from an experienced officer. The Guidelines specifically states: "*Where it is not possible to calculate or estimate the economic benefit derived from the offence, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law*".

The court has the power to add to the fine the amount of the economic benefit derived from the offence e.g., the disposal costs avoided. Alongside a fine, the court has the power to impose a confiscation order (the case must first be committed to Crown Court - see step 2) to remove the economic benefit derived from the offence. So, on top of the starting point of Band F fine, the court could add the cost of disposal or where confiscation is not applied for, the court can consider combining the fine with a community order to remove economic benefit.

In the event of a compensation order (step 1) or a confiscation order (step 2) being made, the court should avoid double recovery when assessing economic benefit.

Step 6 – Consider other factors that may warrant adjustment of the proposed fine

If a compensation (Step 1) is ordered, it should take priority over a fine.

Step 7 – Consider any factors which indicate a reduction, such as assistance to prosecution

This may apply if a householder assists in identifying a fly-tipper masquerading as a professional waste operator.

Step 8 – Reduction for a guilty plea

For up-to-date approach to reduction of a guilty plea after 1 June 2017, see the Sentencing Council–Reduction in sentence for a Guilty plea Guideline¹⁰.

Step 9 – Ancillary orders

The court may order the forfeiture of a vehicle (if not already seized under s.34B of the EPA 1990) if the court is satisfied that the vehicle was used in, or for the purposes of, the commission of the offence and at the time of conviction the offender has rights in the vehicle.

For vehicles seized under s.34B of the EPA 1990, under s.33A EPA 1990 there is specific provision for the court to make an order for the offender to pay the enforcement authority for costs arising from the seizure of a vehicle and this may also include the storage cost of a seized vehicle and the cost of disposing of the contents of the vehicle.

The court may order the offender to take steps towards the remediation of any land impacted by fly-tipping

The court may order the offender to be deprived of property used to commit crime or intended for that purpose. For repeat offenders of any dishonesty or concealment offence, the court could be invited to consider disqualification as a company director.

For repeat offenders of fly-tipping, the court could be invited to consider disqualification from driving depending on the seriousness of the offence.

¹⁰ <https://www.sentencingcouncil.org.uk/publications/item/reduction-in-sentence-for-a-guilty-plea-definitive-guideline-2/>

Step 10– Totality principle

If an offender is being sentenced for more than one offence, or where the offender is already serving a sentence, the court will consider whether the sentence is just and proportionate to the offending behaviour. In these cases, it is important to ensure there are no instances of double recovery to protect against appeals.

Step 11 – Reasons

When sentencing an offender, the court must state its reasons for deciding on the sentence. If the court has moved to the top of a sentencing bracket and/or departed from the Guidelines, it is critical the court provides reasons for deciding on the sentence. This also guards against a potential appeal. The same applies if the court makes an assumption about the offenders' ability to pay in the absence of proper disclosure. If no reasons are given or if the prosecutor believes the reasons given are insufficient, the court should be invited to correct the position before the case is adjourned.

Step 12 – Consideration for time spent on bail

Fly-tippers are unlikely to be on bail.

Annex – National Fly-Tipping Prevention Group

Aim:

The National Fly-tipping Prevention Group (NFTPG) is a group of organisations working with a common aim to help prevent and tackle fly-tipping. We will do this by working in partnership to influence, advise and raise awareness in order to protect communities and the environment.

Objectives:

1. To work in partnership with the member organisations, the Devolved Administrations, community groups and others to provide a national framework of authoritative approaches, guidance and best practice on the prevention, recording, investigation and clearance of fly-tipping in accordance with an agreed work-plan.
2. To continue to develop the evidence base of the nature and extent of fly-tipping through a national reporting system, collation of data and sharing and using intelligence to identify appropriate interventions
3. To encourage and promote local groups or campaigns made up of interested parties working in partnership to prevent and tackle fly-tipping.
4. To learn, share and use the findings of social research into why people fly-tip to influence others away from fly-tipping, and within the resource constraints support any further research to be undertaken.
5. To communicate widely with those seeking to prevent and tackle fly-tipping and in particular develop the content and promote the NFTPG website as the key source of information (a) for those affected by fly-tipping (b) those wishing to develop local campaigns and (c) to provide a window for sharing best practice, case studies, messages and material to support events and highlight 'hot topics'.
6. To seek to both draw on and influence Government policy and legislation to tackle fly-tipping and empower those involved with taking enforcement action or the administration of justice or deterrents such as sentencing of fly-tipping offences.

NFTPG Members

Association of Drainage Authorities

British Property Federation

Department for Environment Food and Rural Affairs

Canal and River Trust

Chartered Institution of Wastes Management

Countryside Alliance

Department for Levelling Up, Housing and Communities

Environment Agency

Fly-Tipping Action Wales

Keep Britain Tidy

Keep Scotland Beautiful

Local authorities

Local Government Association

National Association of Waste Disposal Officers

National Farmers Union

National Highways

National Police Chiefs Council

National Trust

National Resources Wales

Network Rail

Northern Ireland Environment Agency

Welsh Water on behalf of Water UK

Welsh Government

Zero Waste Scotland