EXPLANATORY MEMORANDUM TO

THE WASTE ENFORCEMENT (FIXED PENALTY RECEIPTS) (AMENDMENT) (ENGLAND AND WALES) REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 This instrument amends the qualifying functions on which local authorities can spend the receipts of fixed penalty notices issued for littering, fly-tipping and breaching the household waste duty of care.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State, Rebecca Pow MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Waste Enforcement (Fixed Penalty Receipts) (Amendment) (England and Wales) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 Leaving litter is an offence under s.87 of the Environmental Protection Act 1990 ("EPA 1990"); the unauthorised deposit of waste ("fly-tipping") and failure to comply with the household waste duty of care are offences under s. 33 and 34 of the EPA 1990. The household waste duty of care requires occupiers of domestic property to take all reasonable measures available to them in the circumstances to ensure that they only transfer household waste produced on that property to an authorised person. This reduces the chance of waste ending up in the hands of those who would fly-tip it.

6.2 Local authorities have powers to issue a fixed penalty notice ("FPN") for these offences. For litter, these powers are in s88 EPA 1990, for fly-tipping in s.33ZA EPA 1990 and for failure to comply with the household waste duty of care in s.34ZA EPA 1990.

6.3 Use of these FPN receipts by local authorities is already restricted to qualifying functions – for litter, s.96(4) of the Clean Neighbourhoods and Environment Act 2005 ("CNEA 2005") restricts the use of receipts to functions under Part IV of the EPA 1990 and s.43 of the Anti-social Behaviour Act 2003. For fly-tipping and household waste DoC offences, s73A(2) EPA 1990 restricts use of receipts to their functions under Part II Environmental Protection Act 1990;.

6.4 This instrument amends the EPA 1990 and the CNEA 2005 (by inserting section 73ZA into the EPA1990 and section 95A into CNEA 2005) to add a new list of qualifying functions for local authorities in England. It also amends section73A EPA 1990 and sections 98 and 96 CNEA 2005 so that they only apply to Wales, ensuring no changes are made to how local authorities in Wales can spend FPN receipts.

6.5 These Regulations are made in exercise of the powers conferred by the Pollution Prevention and Control Act 1999 ("PPCA 1999"). The PPCA 1999 enables provision to be made which corresponds to or is similar to any provision which might be made by Act of Parliament in connection with the Waste Framework Directive. The intention of the ringfence is to encourage more income from FPN receipts to be reinvested in building enforcement capability and capacity within English councils. This should mean that the proportion of incidents which result in enforcement action, including FPNs, would therefore go up over time. At the same time, the increased deterrent effect of the improved enforcement capability could bring down the total number of littering or fly-tipping incidents.

6.6 The Regulations extend the existing powers by inserting section 73ZA(7) to (10) EPA 1990 and section 95A(7) to (9) CNEA 2005. The existing powers in section 73A(5) to (8) EPA 1990 and section 96 (7) to (9) CNEA 2005 will only apply to Wales once these Regulations come into force. This will allow the Secretary of State to continue to make further provisions by subordinate legislation about how local authorities in England use their fixed penalty receipts, including the purposes and the period within which they must be used. This is in line with the enabling powers in paragraph 20(1)(read together with sub-paragraph (2A)(a)) of Schedule 1 to the PPCA 1999 which prevent the creation of new regulation making powers, unless amending or extending an existing power to legislate conferred other than through that paragraph 20.

6.7 The instrument also makes consequential amendments to the Local Government (Structural Changes) (Further Transitional Arrangements and Staffing) Regulations 2009 to ensure that arrangements pertaining to the merging of authorities in England are not affected.

6.8 The instrument also makes amendments to the Littering From Vehicles Outside London (Keepers: Civil Penalties) Regulations 2018 to ensure no changes are made to how authorities can spend income from these civil penalties.

7. Policy background

What is being done and why?

7.1 According to independent research published by the Environmental Services Association in 2021, the estimated national cost of fly-tipping to the economy has increased from £209 million in 2015 to £392 million in 2018/19, and reports of fly-tipping have continued to rise. Street cleansing, including clearing up litter and fly-

tipping, cost councils in England £743 million in 2021/22. This has also followed an upward trend over recent years.

7.2 Litter and fly-tipping can also harm the environment and blight local communities – in a recent survey, 61% of the public thought that litter and dog fouling were a problem in their area, and 49% thought that fly-tipping was a problem. There is a need for more action to be taken to prevent people from committing these offences.

7.3 The Government believe that revenue received through payment of litter and fly-tipping FPNs should be reinvested in expanding or improving councils' enforcement functions and cleaning up the consequences of this antisocial behaviour. A commitment to ensure this revenue is reinvested local in clean up and enforcement was set out in the Prime Minister's Anti-Social Behaviour Action plan, published in March 2023.

Explanations

What did any law do before the changes to be made by this instrument?

7.4 Revenue from FPNs is already ringfenced in legislation for various qualifying functions related to waste management. For example, councils might currently spend litter FPN receipts on street cleansing including removal of detritus and leaves, cleaning up graffiti, public bin infrastructure, maintenance and emptying, education, data collection, enforcement and communications. Fly-tipping FPN receipts can currently be spent on 'waste on land' functions which might include kerbside collections or recycling infrastructure.

Why is it being changed?

7.5 Research has shown that at present, the proportion of total local authority street cleansing expenditure, including revenue from FPN receipts, spent on enforcement and other preventative measures is very low. We believe that revenue received through issuing of these FPNs should be primarily be reinvested for the purposes of expanding or improving council enforcement functions, including employment of authorised officers, and also for cleaning up the consequences of this type of offending.

What will it now do?

7.6 Councils must now spend these FPN receipts on their enforcement or clean up functions only. Enforcement functions include employing officers authorised to issue FPNs for littering, fly-tipping and breach of household waste duty of care, either directly or through the use of private contractors. Enforcement data collection, analysis and publication costs will also be in scope of the revised qualify functions, along with purchasing and maintaining equipment such as cameras and signage, and other investigation and enforcement costs.

7.7 Clean up functions include collecting and disposing of litter and fly-tipping, and restoring land which has been harmed by the unlawful deposit of waste.

7.8 These regulations do not impose new recording or reporting requirements on councils.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

9.1 No consolidation of legislation is required.

10. Consultation outcome

10.1 In accordance with section 2(4) of the PPCA 1999, we consulted key stakeholders on limiting the qualifying functions to enforcement and clean-up activities only. Natural Resources Wales were also made aware of the proposed changes and given the opportunity to comment. Representatives of the Environment Agency, research community, and bodies representing the interests of local government, the waste industry, and the public with respect to litter and fly-tipping were invited to take part in an online consultation. We asked questions about current practice and about a proposed set of definitions. In total we received 16 written responses to our targeted consultation, six of which were from trade bodies or local authority representative organisations, with the remainder being from individual local authorities. We also engaged local authorities directly in two roundtables and one meeting. The majority of local authority responses were from enforcement or cleansing managers, with one finance lead and two community safety officers also joining the roundtables. Local authorities were selected for invitation to the roundtables based on their fly-tipping data, rurality and region. Following two rounds of invitations, 16 authorities attended (25% rural, 18% Urban with significant rural, all regions except West midlands).

10.2 The consultation found that accounting codes are generally used to track litter and fly-tipping FPN income separately. However this is often pooled, along with other FPN income, before being spent on neighbourhood functions. In some authorities FPN receipts are spent on activities beyond the scope set out in the ASB plan, and in at least one case beyond the previous qualifying functions, for example sports pitch maintenance. In a minority of cases receipts were said to be absorbed into general authority budgets.

10.3 Consultees agreed with the principle that income from enforcement should be retained to strengthen enforcement functions and thought this could lead to behaviour change as a result of an increased deterrent effect. However, particularly for fly-tipping, it was felt that FPN income could not meet the full costs of employing authorised enforcement officers. While several roundtable attendees told us that they used private companies for FPN enforcement, particularly against litter and dog fouling offences, consultees were concerned about the potential for these changes to incentivise disproportionate use of FPN powers. To mitigate this risk, we will be providing statutory guidance on the proportionate use of litter FPN powers, as committed to in the Antisocial Behaviour action plan and Environmental Improvement Plan, and we will consider including advisory statements on fly-tipping. The consultation response showed that the proposed new qualifying functions may themselves limit the practice of using FPNs to intentionally raise revenue to pay for other functions.

10.4 Concerns were raised by stakeholders that if an officer is working on litter, fly-tipping and perhaps other antisocial behaviour offences it will not be possible to accurately assign the proportion of the officer's costs which should be paid by litter FPN receipts, fly-tipping FPN receipts or the council's wider budget. Likewise, a piece of equipment bought with receipts from fly-tipping FPNs may well be used to provide evidence of a littering offence. We expect local authorities to take a pragmatic approach, using reasonable estimates where appropriate. We are not introducing any new reporting requirements with these regulations.

11. Guidance

11.1 The Government has previously published guidance for local authorities on the use of their enforcement powers for littering and related offences and on the use of fixed penalty notices for household waste duty of care breaches. This guidance is still applicable and can be found at https://www.gov.uk/government/publications/code-of-practice-on-litter-and-refuse and 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.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because of the low expected impact per business and small number of businesses affected.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is through the course of usual engagement with local authorities.

14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 The Parliamentary Under Secretary of State, Rebecca Pow MP has made the following statement,

"In my view a review provision is not appropriate given the minimal impact on business."

15. Contact

15.1 Pippa Harper at the Department for Environment, Food and Rural Affairs Telephone: 0208 7202159 or email: pippa.harper@defra.gov.uk can be contacted with any queries regarding the instrument.

15.2 Chris Preston, Deputy Director for Resources and Waste, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Parliamentary Under Secretary of State, Rebecca Pow MP, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.