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To: Bryan Sweetland, Cabinet Member for Environment, Highways and Waste

Subject: Waste management legislation.

Classification: Unrestricted

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Summary: This report seeks to amend authorisations and delegated powers to take account of new legislation and emerging needs. It includes a consequent amendment to the fly-tipping enforcement policy.

1.0 Introduction

1.1 There is new waste legislation which provides additional powers and also proposes new controls in respect of fly-tipping enforcement activity. As a consequence a minor amendment to the enforcement policy is indicated. Additionally, there is a need to confirm the delegation of existing waste powers.

2.0 The Regulatory and Sanctions Act 2008

2.1 The Regulatory and Sanctions Act 2008 provides for fixed monetary penalties (FMP) to be applied in relation to fly-tipping offences. The provisions enact recommendations from the Hampton Review and are intended “to raise the quality and effectiveness of regulatory enforcement”. The Government’s Local Better Regulation Office has sought similarly to provide a focus on five principles of Good Regulation namely: proportionality, accountability, consistency, transparency and targeting cases where action is needed.

2.2 The Hampton Review noted that the securing a prosecution for the criminal offence of fly-tipping leads to the Courts having the power to impose potentially very significant fines of up to £50,000 and a maximum term of imprisonment of 5 years, as a strong deterrent. However, there is no lesser sanction available for “minor” offences for which a full criminal case taken through the judicial system might be considered inappropriate. In essence, there is an enforcement gap between a fixed penalty notice for a litter offence and a full criminal prosecution for fly-tipping. The amount of fixed monetary penalties is prescribed and the “income” would not be retained by Kent county Council.

2.3 On this basis, authorisation of appropriate officers (as set out in the appendix) is sought to enable fixed monetary penalties to be applied in respect of fly-tipping offences, together with an amendment to the enforcement policy, to ensure that the use of fixed monetary penalties is consistent with the principles of good regulation.

3.0 **Environmental Protection Act 1990**

3.1 Section 33 – fly-tipping powers

Enforcement in respect of fly-tipping is a function of waste collection authorities. These powers have been delegated to Kent County Council through formal agreements pursuant to s101 Local Government Act 1972, s2 Local Government Act 2000 and The Local Government (Functions and Responsibilities) (England) Regulations 2000. The delegation of powers to Kent County Council has been subject to Cabinet Member decisions as appropriate by the respective waste collection authorities. However, Kent County Council has not, for its part, made a formal decision to accept these delegations, although it has implied its acceptance; taking continual enforcement action on behalf of the waste collection authorities. To regularise the position it is appropriate for Kent County Council to record its acceptance of the delegations of enforcement powers under section 33 Environmental Protection Act 1990 and associated provisions in subsequent legislation in so far as it related to the investigation and enforcement in respect of fly-tipping. This confirms that KCC is lawfully entering into agreements to discharge functions jointly via sharing or delegation of functions with the Kent waste collection authorities. It also helps to demonstrate that Kent County Council is doing “all it reasonably can to prevent crime and disorder in its area” as required by Section 17, Crime and Disorder Act 1998.

3.2 Section 48: Waste collection and disposal duties

This section relates to the duty for a waste collection authority to notify the waste disposal authority of its decisions regarding recycling. The waste disposal authority, consequently, on receipt of such a notice has the power to object in order to ensure that its existing waste contractual arrangements can be met. On receipt of any future notification, delegated authority to raise any necessary objection is sought in order that the matter can be resolved as quickly as possible for all parties should the need arise.

4.0 **Protection of Freedoms Bill**

4.1 This Bill proposes changes in respect of the controls on surveillance, such as that used to secure evidence of fly-tipping, which are currently subject to authorisation under the Regulation of Investigatory Powers Act 2000. These changes are, first, the creation of a specific Surveillance Camera Commissioner, secondly to introduce a code of practice for surveillance camera systems in the public sector, and thirdly to introduce new plans for judicial approval of directed surveillance for local authorities. In respect of this third provision, in the future it will be necessary for an application to be made to a Magistrate for authority for

directed surveillance, subject to Royal Assent of the Bill which is scheduled for October 2011. On this basis, rather than submit a further report at that time, it is requested that subject to the enactment and relevant commencement order for this new legislation that officers are authorised to make applications for directed surveillance through the Magistrates Courts.

5.0 Recommendation

5.1 It is recommended that:-

a) Kent County Council duly authorises appropriate officers, as set out in the appendix, for the purpose of issuing fixed monetary penalties and the administration of the fixed monetary penalty scheme under the provisions of the Regulatory and Sanctions Act 2008;

b) The Enforcement Policy is amended in respect of offences under Section 33 Environmental Protection Act 1990 to include the addition, set out in the appendix, regarding fixed monetary penalties in accordance with the provisions of the Regulatory and Sanctions Act 2008 and subject to compliance with Ministerial Orders and Government guidelines; being consistent with the Environment Agency's administrative arrangements;

c) Kent County Council affirms its acceptance of delegated powers to take enforcement action under the provisions of section 33 Environmental Protection Act 1990 and subsequent associated legislation. Kent County Council will put these powers into effect by entering into agreements with other local authorities pursuant to s101 Local Government Act 1972, s2 Local Government Act 2000 and the Local Authorities (Arrangement for the Discharge of Functions) (England) Regulations 2000;

d) The power to respond to notifications from waste collection authorities under section 48(4) Environmental Protection Act 1990 is delegated to the Executive Director for Environment, Highways and Waste (Executive Director Enterprise and Environment Designate); and

e) Kent County Council duly authorises appropriate officers, as set out in the appendix, for the purpose of applying to the Magistrates Courts for authorisation for directed surveillance under the provisions of the Protection of Freedoms Bill, subject to its enactment and relevant commencement orders.

Background Papers: Fly-tipping Enforcement Policy
BERR: Guidance on the Regulatory and Sanctions Act 2008
Notes on the Protection of Freedoms Bill

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Appendix

1. Authorisations

Officers	Legislation	Purpose
Environmental Crime Enforcement officers, Trade Waste officers, Waste Services Officers	Regulatory and Sanctions Act 2008	Issue of fixed monetary penalties and associated administration.
Head of Waste Management: Environmental Crime Enforcement officers.	Protection of Freedoms Act	Submission of applications for directed surveillance.

2. Addition to the fly-tipping enforcement policy in respect of the use of fixed monetary penalties.

Fixed monetary penalties are to be considered as a sanction in respect of circumstances relating to cases of fly-tipping where recourse to the criminal justice system is considered to be disproportionate. These circumstances may include situations where one or more of the following mitigating factors apply:-

- there is no previous history of fly-tipping
- no monetary gain was associated with the offence
- there is no direct evidence of pollution to air, land or water as a result of the fly-tipping, and the fly-tip, excludes hazardous materials such as asbestos.
- the clear-up costs are less than £200.
- the defendant admits the offence.

Note: Each case will be evaluated in relation to the circumstances of the individual case and nothing in the enforcement policy is to be construed as fettering the discretion of the enforcement authority in this respect.