

Guidance on the legal definition of waste and its application

A practical guide for businesses and other organisations

Date: August 2012



Llywodraeth Cymru
Welsh Government



Department of the
Environment
www.doeni.gov.uk



NIEA Northern Ireland
Environment
Agency
www.ni-environment.gov.uk



defra
Department for Environment
Food and Rural Affairs

© Crown copyright 2012

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or e-mail: psi@nationalarchives.gsi.gov.uk

This document/publication is also available on the following websites at:

<http://www.defra.gov.uk/environment/waste/legislation/eu-framework-directive/>

http://www.doeni.gov.uk/index/protect_the_environment/waste.htm

Any enquiries regarding this document/publication should be sent to us at:

Department for Environment, Food and Rural Affairs
Nobel House
17 Smith Square
LONDON SW1P 3JR

Telephone 020 7238 6000

Website: www.defra.gov.uk

Defra Helpline **08459 33 55 77** - From outside the UK: 44 (0) 207 238 6951

Alternatively you can contact the Welsh Government at:

Waste Regulation Policy Branch, Waste & Resource Efficiency Division, Department for Environment and Sustainable Development, Welsh Government, Cathays Park, Cardiff, CF10 3NQ.

waste@wales.gsi.gov.uk

A copy of the responses to the consultation received in Wales will be placed in the Publication Centre, Welsh Government, Cathays Park, Cardiff, CF10 3NQ.

PB13813a

Contents

Introduction	4
Has the substance or object become waste?	5
Has the substance or object become waste criteria.....	6
If a substance or object is waste when does it cease to be waste?	9
When does it cease to be waste criteria	10

Introduction

1. The definition of waste has been in use in its current wording for over three decades and it is now embedded in the 2008 Waste Framework Directive (Directive 2008/98/EC). This set of guidance provides a legal analysis of Article 3(1) which defines “waste” as:-

“...any substance or object which the holder discards or intends or is required to discard...”
2. Any substance or object is capable of being waste. A substance or object is waste if it is discarded within the particular meaning of the Waste Framework Directive¹ (WFD). The decision on whether something is discarded must take account of all the circumstances, and have regard to the aims of the WFD. This means that every case must be assessed on its merits.
3. Businesses and other organisations take decisions about whether something is or is not waste on a day-to-day basis. In most cases, the decision is straightforward and whoever is taking the decision does not need guidance from the competent authorities to help them take it.
4. This short document aims to provide a practical guide to help businesses and other organisations to take the right decisions on a day-to-day basis about whether something is or is not waste. It does so by setting out criteria below and is in two parts:-
 - Q1/8 address whether a substance or object has become waste; and
 - Q9/14 consider when wastes should be considered to have ceased to be waste.

In cases where the answer to these questions is not clear-cut, reference should be made to the more detailed guidance provided in Part Three of the main Guidance.

5. This guidance in this document has been prepared by the Department for Environment, Food and Rural Affairs (Defra) in conjunction with the Welsh Government (WG), the Department of the Environment in Northern Ireland, the Environment Agency² and the Northern Ireland Environment Agency (NIEA). These organisations are subsequently referred to as “the competent authorities”.
6. Please note that this guidance does not change the legal definition of waste and it does not take precedence over the case law on the definition’s interpretation.

1 Directive 2008/98/EC – available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:114:0009:0021:EN:PDF>.

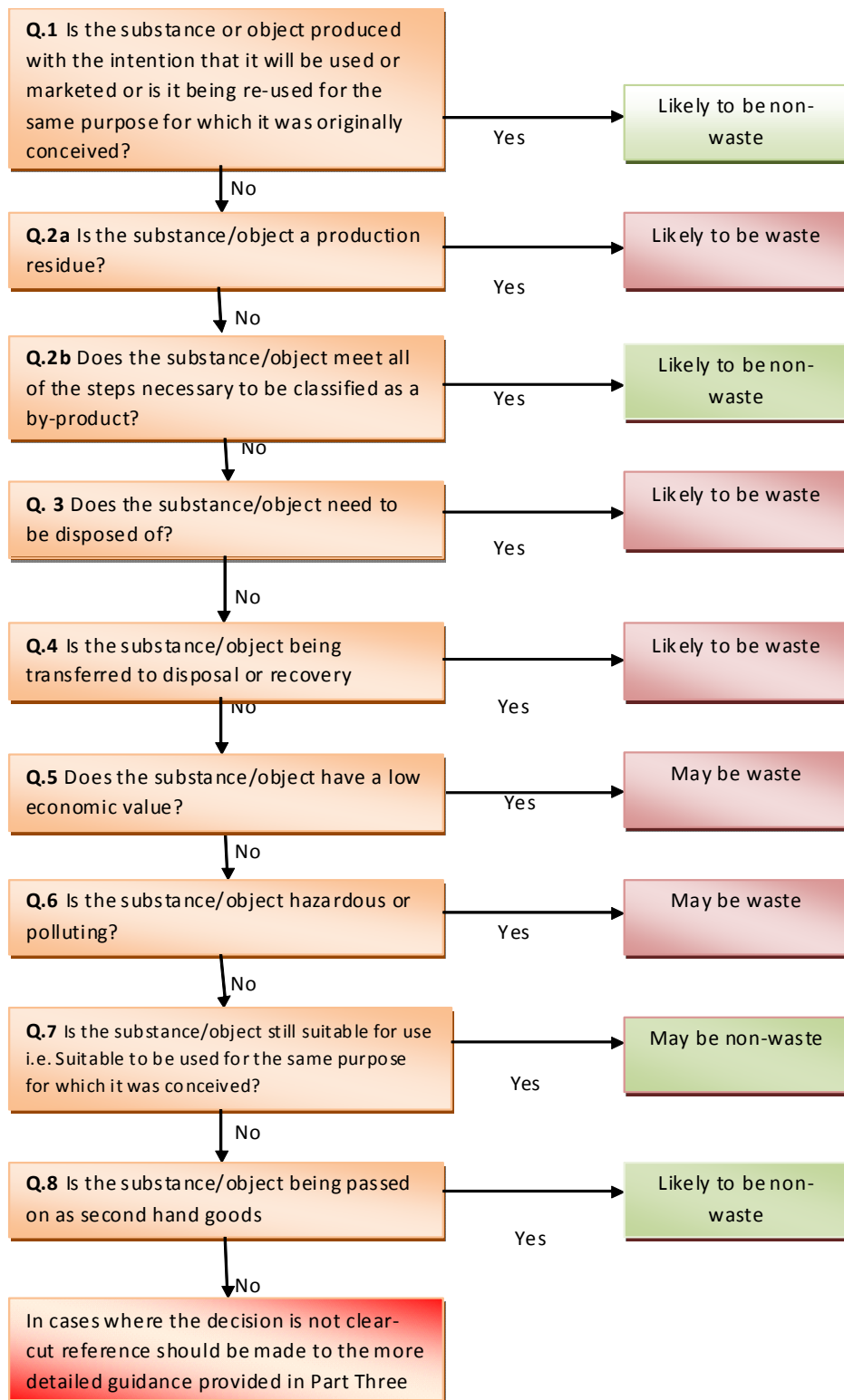
2 The Natural Resources Body was created in July 2012 and will replace the Environment Agency in Wales from 2013.

Has the substance or object become waste?

7. A substance or object becomes waste when it is **discarded**. Discard has a special meaning which is not necessarily the same as its dictionary meaning. It includes not only the disposal of a substance or object but also its recovery or recycling. Whether a substance or object is being discarded has to be decided on a case-by-case basis, and taking account of all the circumstances, to ensure the aims of the WFD (i.e. protection of the environment and human health) are not undermined. In other words, each case must be assessed on its own merits.
8. The following criteria, set out in diagrammatic and textual formats, can help with this assessment:-

Has the substance or object become waste criteria

NB – all questions should be asked in all cases (to reflect the fact that you have to assess each case with reference to all the case law indicators)



Q.1: Is the substance or object produced with the intention that it will be used or marketed or is it being re-used for the same purpose for which it was originally conceived?

If the answer to either of these questions is “yes” then it is likely that the substance or object is not waste.

Q.2: Is the substance or object a by-product of a production process?

Production residues³ are likely to be waste. However, under Article 5 of the WFD production residues can be classified as by-products if specified conditions are met. If a substance or object is a by-product it is not waste. If the answer “yes” can be given to **all** of the following four questions, this will help indicate that a residue is a by-product and not waste:-

- Is further use of the substance or objects not just a possibility but a certainty?
- Can it be used directly, without any further processing prior to its use?
- Has it been produced as an integral part of a production process?
- Is its further use lawful in the sense that:-
- it fulfils all relevant product, environmental and health requirements for the specific use to be made of it; and
- it will not have an adverse impact on the environment or human health?

The answers to the following questions are likely to be helpful in deciding whether the four basic conditions for classification as a by-product have been met:-

- Is the substance or object fully suitable for the proposed use?
- Can it be used without any special precautions being taken to ensure protection of the environment or human health?
- Is there a genuine market for it?
- Is it free of any contaminants that could have an adverse effect on its use?
- Can it be used without any additional risk to the environment or human health, when compared with an equivalent raw material?

Q.3: Does the substance or object need to be disposed of?

A substance or object might have to be disposed of because of a legal requirement (e.g. mercury or some animal by-products). It might also have to be disposed of because of its condition or its continued use might be dangerous (e.g. some out-of-date medicines). If so, it is waste.

³ A residue is a substance or object which results from a production process which is not, in itself, sought for a subsequent use

Q.4: Has the substance or object been transferred to a disposal or recovery operation?

If a substance or object is sent on for disposal or recovery that will indicate that it is waste.

It is sometimes difficult to tell what a “recovery operation” is and what just the normal use of a product is. For example, “use as a fuel” could be either, depending on the circumstances. However, if a particular operation is generally accepted as being a common way of recovering waste that may indicate that it is a recovery operation. Examples of disposal and recovery operations are listed in Annexes I and II to the WFD.

Q.5: Does the substance or object have a low economic value?

If the substance or object has a low or negative economic value, this points to its being waste since it is a burden on the producer or holder who then may have an incentive to get rid of it.

It does not follow, though, that a substance or object with a good economic value to the producer is not a waste.

Q.6: Is the substance or object hazardous or polluting?

Wastes can be quite harmless in themselves, and they may be processed without harmful impacts on the environment. On the other hand, some non-waste products are polluting or hazardous (e.g. poisonous chemicals). So this question of harm is not always relevant to the issue of whether something is waste.

The question does become relevant where the substance or object has become or is contaminated, is leftover, unwanted, or a burden on its holder. It is also relevant when a substance or object has become contaminated with something that presents a risk. In these circumstances, the hazardous or polluting nature of the substance or object can indicate that it is waste.

Q.7: Is the substance or object still suitable for its use?

Substances or objects that can no longer be used for their original purpose (e.g. because they are out-of-date) or have become damaged or unsuitable for use are likely to be waste.

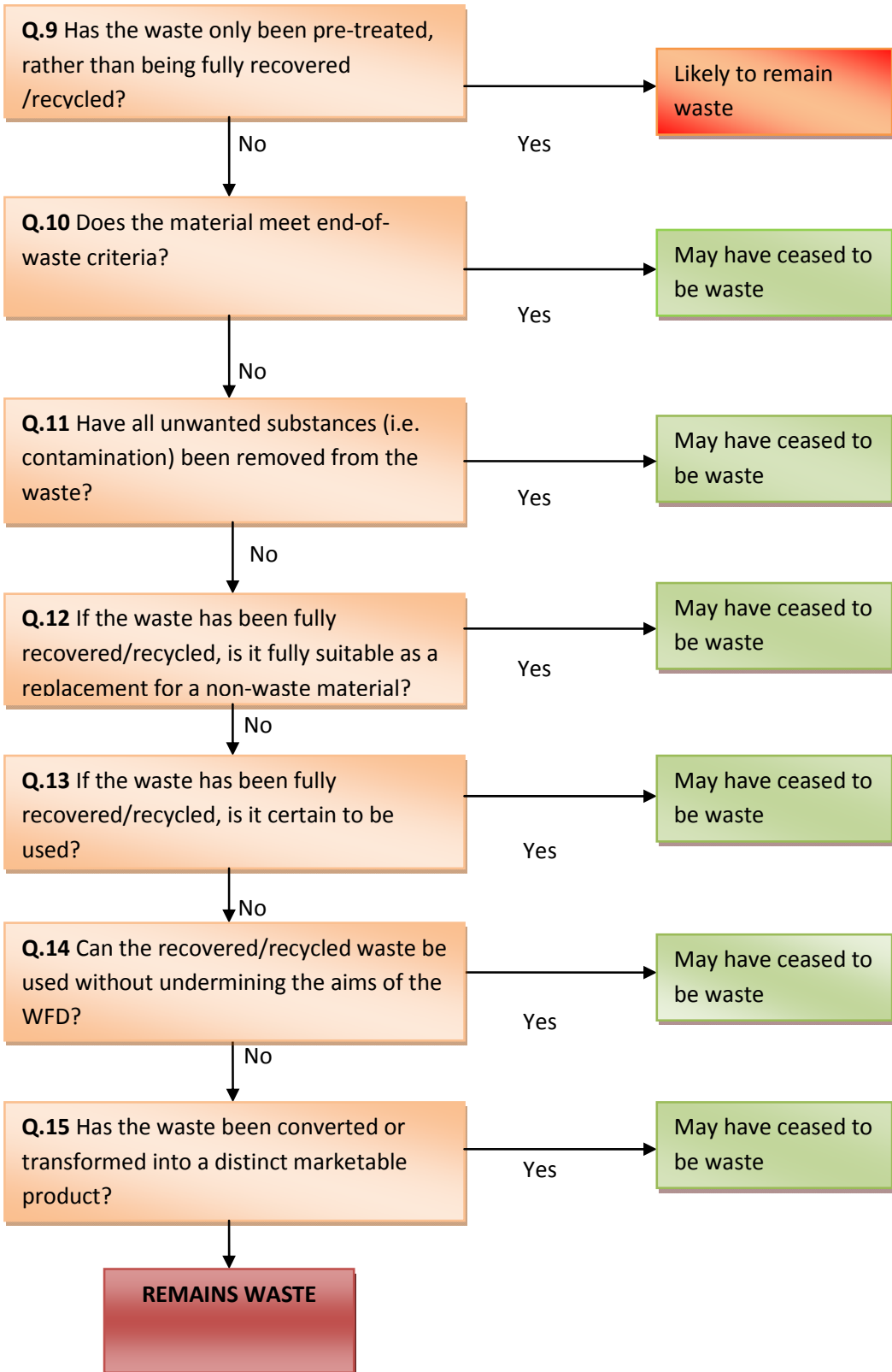
Q.8: Is the substance or object being passed on as second hand goods?

A substance or object may be unwanted by one owner, but it is passed on to be used for its original purpose without needing any processing or treatment. If so, it is generally not waste.

If a substance or object is waste when does it cease to be waste?

9. Once a substance or object has been discarded and is waste, something usually needs to be done to it for it to cease to be waste. This can range from something relatively minor to quite extensive processing, comprising one or more recovery operations. It may be necessary for waste to undergo a series of recovery operations before it ceases to be waste.
10. The following criteria, set out in diagrammatic and textual formats, can help decide whether a waste has ceased to be waste:-

When does it cease to be waste criteria



Q.9: Has the waste only been pre-treated, rather than fully recovered or recycled?

If waste has gone through one treatment but needs further treatment before being ready for re-use, this will indicate that it has not ceased to be waste. Sorting and size reduction often fall into this category.

Q.10: Does the material meet end-of-waste criteria adopted under Article 6 of the WFD?

Article 6(1) of the WFD provides that specified waste ceases to be waste when it has undergone a recovery operation, including recycling, and complies with EU-wide end-of-criteria adopted under the terms of Article 6(2). At the date of publication of this guidance, EU wide end-of-waste criteria have been adopted under Article 6(2) for ferrous and aluminium scrap metal and glass. Proposals are at various stages in relation to copper, paper, plastic and biodegradable waste.

Q.11: Have all unwanted substances been removed from the waste?

Often, waste is contaminated because of its origins or previous use. It will not cease to be waste until the contamination is removed – either so that it can be used again for its original purpose or made into a new product.

Q.12: Is recovered/recycled material fully suitable as a replacement for a non-waste material?

To cease to be waste, the material that results from the recovery or recycling of waste must be **fully suitable** as a replacement for the non-waste material for which it is substituting.

Q.13: If the waste has been fully recovered/recycled, is it certain to be used?

Only if there is a genuine market for the recovered or recycled material and its future use is certain, it is likely to cease to be waste. Otherwise it will remain a waste.

Q.14: Can the recovered/recycled material be used without undermining the aims of the WFD?

The recovered or recycled material will not cease to be waste if it poses greater risk to the environment or human health than the non-waste material it replaces, as this would undermine the aims of the Directive.

Q.15: Has the waste been converted or transformed into a distinct product?

On the other hand, if the waste has been converted or transformed to the extent that it has become a new product in its own right, it may no longer be waste. The new product needs to be distinct from the original waste and minor changes to its composition are unlikely to be sufficient.

Where no EU wide criteria exist or in circumstances where waste does not meet such criteria. The Agency will assess end of waste on a case by case basis, or in accordance with a national end of waste protocol, applying the case law on end of waste in accordance with Article 6(4) of the WFD.