

The Site Waste Management Plans Regulations 2008

Mark De Freitas, October 2008

Introduction and key points

The Site Waste Management Plan (SWMP) Regulations came into force on 6 April 2008. As a result, SWMPs became compulsory for all construction projects in England, where the project value exceeds £300,000.

SWMPs were first introduced as a voluntary Code of Practice in July 2004. A SWMP records the amount and type of waste expected to be produced and how each type of waste will be disposed of, re-used or re-cycled. The Regulations require the SWMP to be prepared before construction work begins and updated during the project. The intention behind the legislation is that this will reduce the amount of waste produced and sent to landfill, improve re-cycling rates and reduce the risk of fly-tipping.

Key points:

- The Regulations apply to England only.
- All projects costing over £300,000 require a SWMP. Projects costing more than £500,000 require more detailed reporting.
- A SWMP must be prepared before construction work can begin and updated during the project.
- Failure to comply with the Regulations is a criminal offence, punishable by a fine not exceeding £50,000 on summary conviction or an unlimited fine on conviction on indictment.
- A £300 fixed penalty notice can be issued in certain circumstances.
- A SWMP is not required where construction work is planned before 6 April 2008 and the work commences before 1 July 2008.

Application

The Regulations apply to England only. Any client intending to carry out a project on a construction site with an estimated cost greater than £300,000 (excluding VAT) must prepare a SWMP *before* construction work can begin. "Construction work" is very widely defined and includes building, civil engineering or engineering construction work; decommissioning, demolition and dismantling; alteration, conversion, maintenance; site clearance and installation of services. There are some exclusions where sites must already meet pollution prevention controls.

Where the client intends to use one or more contractors the client must appoint a contractor as the principal contractor. If the client does not use a contractor then the client takes on the obligations of the principal contractor in the Regulations. If a project is started without a SWMP, the client and the principal contractor are both guilty of an offence.

The requirements of a SWMP

The Regulations require the SWMP to:

- identify the client, principal contractor and the person who drafted it;

- describe the construction work proposed including the site location and estimated project cost;
- record any decision taken before the SWMP was drafted regarding the nature of the project, its design, construction method or materials used in order to minimise waste;
- describe each waste type and estimate the quantities expected to be produced and identify the waste management action for each waste type including re-using, recycling, recovery and disposal;
- contain a declaration that:
 - o the client and the principal contractor will take all reasonable steps to comply with the duty of care regime in the Environmental Protection Act 1990 and the Environmental Protection (Duty of Care) Regulations 1991; and
 - o materials will be managed efficiently and waste managed appropriately.

Updating a SWMP for a project of between £300,000 and £500,000 in value

Whenever waste is removed from projects with an estimated cost of £500,000 or less, the principal contractor must record on the SWMP:

- the name of the person removing the waste, the type of waste removed and the site that the waste is being taken to; and
- within 3 months of the completion of the works, confirmation that the SWMP has been regularly monitored and updated and an explanation of any deviation from the plan.

Updating a SWMP for projects worth more than £500,000

There are additional requirements to update a SWMP on projects worth in excess of £500,000. Whenever waste is removed from the site, the principal contractor must record on the SWMP:

- the identity of the waste remover and the waste carrier's registration number;
- a copy of, or reference to, the written description of waste required under section 34 of the Environmental Protection Act 1990 (a waste transfer note or for hazardous waste, a hazardous waste consignment note); and
- the site that the waste is taken to and whether the operator of that site holds a permit under the Environmental Permitting (England and Wales) Regulations 2007 or is registered for exemption under those Regulations.

There are additional requirements that the SWMP should be further updated as often as necessary and at least every six months in order to review the plan, record the type and quantities of waste produced, re-used, recycled, recovered, sent to landfill or otherwise disposed of. Within three months of the end of the project, the principal contractor must add to the SWMP confirmation that it has been monitored and updated on a regular basis and provide a comparison of the estimated quantities (on the first draft of the SWMP) against actual quantities of each waste type and an estimate of the cost savings achieved by implementation of the SWMP.

Availability and retention of the SWMP

The SWMP must be kept at the site by the principal contractor and be made available to contractors. It should then be kept for two years after completion of the project at the principal contractor's place of business or at the project site.

Additional duties on the principal contractor and the client

The principal contractor has additional duties to ensure that the SWMP is implemented on site (such as site inductions of all workers) and that so far as is reasonably practicable the waste produced is re-used, re-cycled or recovered. Both the client and the principal contractor must:

- review, revise and refine the SWMP as necessary to ensure that any changes in respective roles and responsibilities are clearly communicated; and
- take reasonable steps to ensure that site security is sufficient to prevent the illegal disposal of waste from the site.

Penalties and enforcement

The Environment Agency and local authorities are responsible for enforcement. It is an offence to fail to comply with any of the main provisions of the Regulations. There are also specific offences of:

- knowingly or recklessly making a false or misleading statement in a SWMP; and
- intentionally obstructing a person acting in the execution of the Regulations or, without reasonable cause, failing to assist such a person, or to produce a SWMP when required.

The penalties for breach of the Regulations are:

- on summary conviction, a fine not exceeding £50,000; and
- on conviction on indictment, an unlimited fine.

Where a company is guilty of an offence and it is proven to have been committed with the consent, connivance or attributable to the neglect of a director, manager or similar person then that individual *will also be guilty of an offence as well as the corporate body.*

Alternatively, fixed penalty notices of £300 may be served if a person fails to provide a SWMP or related record on request to one of the bodies responsible for enforcement.

There is some indication that the Regulations may not be rigidly enforced from the outset. The DEFRA Guidance Note to the Regulations records (paragraph 3.3):

“Experience of writing and implementing SWMPs will vary considerably across the construction sector, therefore a phased approach to enforcement should be adopted over the first few years of the Regulation coming into force.”

Position of consultant advisers to the client

It is possible that clients may seek to argue that their consultants should have warned and/or advised them about their duties under these Regulations, for example of the need to prepare the necessary SWMP or to appoint the principal contractor to do so before construction work starts or how to deal with the waste correctly.

If there were in the consultant's appointment express duties relating to these Regulations or an obligation to advise generally in relation to compliance with statutory requirements, then of course the consultant would be in breach if he failed to do so and would be liable for damages if he did so negligently.

The position would be less clear if there were no such express duties. Unless it becomes standard for consultants to provide such advice or, the specific facts of the commission suggest that it should be imposed, the courts are unlikely to imply such a duty.

It is also possible that a consultant could assume such a duty to his client outside his appointment and thus become liable to his client for damages if he volunteers advice of this nature, even though his appointment is silent on the subject.

It needs to be appreciated that the obligations in relation to SWMPs arise under the criminal law and it is not possible for a duty-holder to delegate his obligations – such as the obligation to prepare an SWMP – so as to make a third party criminally liable to a fine in his place if there is such a breach. Further, any indemnity sought by a client from his consultants against such a fine is void and unenforceable as it against public policy.

However, the position is different in contract. Such duties can be delegated if, for example, the client required the consultant to produce an SWMP on his behalf. If the consultant so agreed there would be nothing to prevent the client recovering the losses to which he is entitled under the common law should the consultant be in breach. The client might then be able to recover for example the costs of delays/additional costs to his project because he had to postpone construction work while an SWMP was belatedly being prepared or being re-done because of faults by the consultant.

Consultants therefore need to be very clear in their appointments and dealings with clients as to the extent to which, if any, they are accepting duties or providing advice in relation to these Regulations.

Further Information

DEFRA has published non-statutory guidance to the Regulations which is available on the DEFRA website.

For further information, please contact:

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