

NORTH LANARKSHIRE COUNCIL

REPORT

AGENDA ITEM No 4

To: PLANNING & ENVIRONMENT COMMITTEE		Subject: Scottish Executive's Consultation on Draft Guidance on the Landfill Allowance Scheme (Scotland) Regulations 2005
From: DIRECTOR OF PLANNING AND ENVIRONMENT		
Date: 17 August 2005	Ref: RD	

1. Purpose of Report

- 1.1 To advise Committee of North Lanarkshire Council's response to the Scottish Executive's recent consultation on the Draft Guidance Document on the Landfill Allowance Scheme (Scotland) Regulations 2005.

2. Background

- 2.1 The Landfill Allowance Scheme (Scotland) Regulations 2005 require local authorities as waste disposal authorities exercising functions in relation to waste that is or contains biodegradable municipal waste (BMW) to have regard to any guidance issued by the Scottish Ministers provided for under regulation 22. The objective of this guidance is to ensure a smooth and transparent operation of the Landfill Allowance Scheme.
- 2.2 This report details North Lanarkshire Council's response to said Guidance Document.
- 2.3 A copy of the Draft Guidance Document has been placed within the Members library.

3. Sustainability Implications

- 3.1 Waste must increasingly be managed as part of an integrated process that entails a shift from the current culture of waste disposal to one of resource management that will make a significant contribution towards promoting a more sustainable infrastructure and economy in Scotland.
- 3.2 The National Waste Plan, incorporating the completed Area Waste Plans, was launched by the Scottish Executive on 24 February 2003. It provides a framework within which Scotland can reduce the amount of waste produced and approaches waste management in a more sustainable manner. It laid down a strategy by which Scotland could meet its obligations under the terms of the EU Landfill Directive.
- 3.3 The Scottish Executive has established a specific grant scheme known as the Strategic Waste Fund, used for allocating money to Local Authorities to invest in plans to help implement the National Waste Strategy.

4 Proposals/Considerations

- 4.1 Under the Landfill Allowance Scheme, the total allocation for Scotland for allowances to landfill biodegradable municipal solid waste will be divided up between the local authorities in Scotland.
- 4.2 Local authorities will have a duty to ensure that the amount of such waste that they send to landfill does not exceed the amount authorised by the allowances available to them each year.
- 4.3 Allowances will be allocated to a specific local authority for a specific year. However, there is a limited banking and borrowing of allowances allowed for under the terms of the proposed scheme. There is also provision for the trading of allowances with authorities within Scotland, or in other parts of the UK.
- 4.4 Where local authorities exceed allowances a penalty will be imposed.
- 4.5 The Landfill Allowance Scheme (Scotland) Regulations 2005 require local authorities as waste disposal authorities exercising functions in relation to waste that is or contains biodegradable municipal waste (BMW) to have regard to any guidance issued by the Scottish Ministers provided for under regulation 22. The objective of this guidance is to ensure a smooth and transparent operation of the Landfill Allowance Scheme.
- 4.6 North Lanarkshire Council's response to the Draft Guidance Document is included in this report (Appendix 1).

5 Corporate Considerations

- 5.1 The actions reported to the Committee are consistent with Policy and there are no Personnel, Finance or Property implications in the Report.

Recommendations

- 6.1 That the Committee notes the terms of the Report and approves the submission of the proposed response to the Scottish Executive.
- 6.2 That this report is remitted to the Community Services Committee for information.

C. Morgan

AP David M. Porch
DIRECTOR OF PLANNING AND ENVIRONMENT

Local Government Access to Information Act: for further information about this report, please contact Robert Docherty, Waste Strategy Project Team, on 01236 812353.

Appendix 1 - Landfill Allowance Scheme (Scotland) **Regulations 2005**

Draft Interim Guidance

North Lanarkshire Council Comments

Background

Draft guidance has been made by the Scottish Executive pertaining to the above scheme. The Regulations require local authorities as waste disposal authorities exercising functions in relation to waste that is or contains biodegradable municipal waste (BMW) to have regard to any guidance issued by the Scottish Ministers provided for under regulation 22. The guidance document also contains general guidance to SEPA. The objective of the guidance is to ensure a smooth and transparent operation of the Landfill Allowance Scheme.

The Executive has consulted COSLA representatives and SEPA staff in drawing up this interim guidance. Further discussions will be held with COSLA and SEPA in developing this guidance and individual local authorities and others can express their views on this guidance.

General

The landfill allowances regime applies both in Landfill Directive target years and in other years, between 1 April 2005 and 31 March 2020, known as scheme years. Scheme years run from 1 April in each year. The scheme years ending on 31 March in each of 2010, 2013 and 2020 are relevant for the Landfill Directive targets, and are known as target years.

Comments On Specific Details

Allocation

Section 2.1 states that:

Under Section 4 of the WET Act 2003, Ministers are obliged to make an allocation of allowances to local authorities within the allocation of allowances to individual local authorities for each scheme year. The 'Scheme Year Regulations' (The Landfill (Scheme Year and Maximum Landfill Amount) Regulations 2004 S.I. No. 1936) set limits on total allocations in Scotland for each year, and were made with the agreement of Scottish Ministers.

Scottish Ministers have made allocations up to the first scheme year in 2009/10. These are presented in Annex B.

The allocations for the years 2010/11 and beyond will be made when fuller information is available, see section below on "Beyond 2010". The Executive is considering setting out reasonable planning assumptions for allowances for the years 2010/11 and beyond, to allow local authorities to plan, and to ensure consistency of approach in grant applications.

Section 2.9 states that:

Factors that Ministers may consider in making allowances for years 2010/11 and beyond:-

- the position of councils with exceptionally high or low biodegradable content in collected waste;**
- uneven waste growth and demographic change;**
- decisions about the national strategy for meeting the 2013 targets and therefore major infrastructure;**
- major differences with respect to commercial waste.**

As part of the Lanarkshire Joint Waste Management Procurement Project, it is necessary for the Council to carry out detailed technical modelling to ascertain whether relevant targets would be met over the twenty-five year term of the proposed contract. The model details the Council's arisings, the diversion achieved and the tonnage requiring landfill. This allows the Council to ascertain whether Landfill Allowance Targets are being met, the tonnage required to be sent to a treatment facility to meet said targets and, once financial modelling has been carried out, the cost of said treatment.

Allocations have been given up to 2009/10. As the allocations for the years 2010/11 and beyond will be made when fuller information is available, the BMW allowance for the waste flow model has therefore been projected utilising the method of allocating 5.9% of Scotland's BMW allowance to NLC and 5.8% of Scotland's BMW allowance to SLC for the target years of 2012/13 and 2019/20. The years between 2009/10 to 2012/13 and 2012/13 to 2019/20 have been linearly projected, the years after 2019/20 have been set at the same value as 2019/20.

It is of extreme concern that modelling has been carried out for a twenty five year period, when there has been no confirmation as to the exact landfill allowance that has been allocated to the Council for the majority of that period. It would appear that allowances may not be allocated based on the methodology utilised currently within the model but may be allocated by different criteria as detailed in Section 2.9 of the guidance – the extent and effect of which is unknown. This may result in the Council receiving a lower Landfill Allowance than modelled. This would have the effect of the Council having to treat more waste than projected (the SWF will only fund the minimum amount of treatment required to meet targets – this amount being based on the Councils technical model) and thus increasing the Councils affordability gap. This is assumed as the Phase II Guidance states that the level of SWF will be set at preferred bidder stage and there would appear to be no mechanism to request additional funding, even though said funding would be required to cover the shortfall brought about by targets being tightened by the Scottish Executive.

In addition, if said targets were reduced and more waste is required to be sent for treatment then this would have implications for Infrastructure Capacity, as the model identifies likely tonnages requiring treatment and the infrastructure capacity required.

Therefore, without the Executive setting out reasonable planning assumptions for allowances for the years 2010/11 and beyond, to allow local authorities to plan, and to ensure consistency of approach in grant applications, the Council is faced with making assumptions, that if proven to be invalid, will have large implications for the project.

Banking/Borrowing

Section 2.2 states that:

Banking is provided for in the Regulations (regulation 6). Unused allowances must be banked, without limit, other than in target years and in a scheme year immediately preceding a target year. In order to meet the targets nationally, it is crucial that only allowances allocated for target years are used in target years. Decisions to bank allowances, in line with these rules, must be recorded in the electronic register (see 2.5).

Section 2.3 states that:

Landfill allowances can be brought forward from the following year, subject to limits of 10% in the first three years of the scheme, and 5% thereafter. Borrowing is not allowed in target years or in a scheme year immediately preceding a target year. Prior approval of borrowing proposals is required from SEPA and the procedures for local authorities to submit electronic borrowing requests, and SEPA's consideration of such requests, will be set out when the register is introduced. It is not anticipated that any local authority will wish to make a borrowing request ahead of the electronic register being in place, as the consideration of borrowing will come towards the end of a scheme year.

With regards to banking, it is unlikely that Councils will be able to meet the targets in early years, without treatment infrastructure being available, therefore it is unlikely that there will be any unused allowance to bank. The SWF will only fund the treatment of the minimum amount of waste required for the Council to meet its targets. Therefore any over-performance resulting in unused allowances will be paid for by the Council.

If there were no legal barrier to permitting the banking of unused allowances in a year before a target year for use in the year following the target year we would request that this be allowed.

The suspension of banking, borrowing and transfer

Section 2.6 sets out the conditions in which the Scottish Ministers may suspend banking, borrowing and transferring allowances for any or all local authorities.

The ability for the Minister to suspend banking, borrowing or transferring allowances outwith target years where there is a risk that Scotland may exceed its allowances

will unfairly penalise Councils that have landfilled less than their allowances and may result in unfair penalties in future years.

This will be particularly so where a Council has planned to use banked allowances from one year to accommodate an anticipated difficulty in future years. The ability of the Minister to suspend the banking, borrowing and transfer of allowances for this reason will introduce a degree of uncertainty that is unlikely to assist in long term planning or to promote the establishment of an effective trading regime. It is the view that where the Minister does suspend banking, borrowing or trading he must take account of the impact of such action when deciding whether penalties for exceeding allowances should be waived.

Where the Minister decides to suspend banking, borrowing or trading in respect of a particular Council we believe that he must be able to demonstrate clearly that the Council has contravened paragraphs (2) (a) or (2) (b) of Regulation 9. It is believed that the current proposal of empowering the Minister to act in this way if he "has reason to believe" that a Council is in default is unfair and may unreasonably penalise Councils. We would also contend that a right of appeal should be afforded Councils that are affected by a decision to suspend banking, borrowing or trading under this provision.

A trading system through reallocation

Section 2.7 of the guidance states that:

Prior to April 2008, the Executive shall consider any reasonable requests from local authorities to reallocate allowances by the agreement of both local authorities. Such arrangements can only cover two Scottish local authorities. The Executive will only fulfil such requests which comply with the conditions on transfer in the Regulations (regulation 8), and it is clear that the authority giving up allowances is able in all likelihood to function effectively without the allowances.

The arrangement would involve equal but opposite adjustments to the allocation of allowances of each authority (for example one authority's allocation falling by 1000 tonnes, and the others rising by 1000 tonnes). It would be for the two authorities to determine what arrangement they should enter into to compensate the authority that was giving up allowances, within their normal financial controls and duties.

This arrangement covers allowances up to the 2007/08 scheme year, and any such requests must be made at least by the end of January of the scheme year to which the allowances relate. On granting such a request, the Executive shall write to both authorities, and at the same time formally notify the reallocation to SEPA so that the change can be reflected in the register

This arrangement can only apply between two Councils. This would appear to penalise those projects that are made up of more than two Councils in partnership. Should one have spare allowances then these could only be distributed to one Council in the partnership.

Other potential reallocation

Section 2.8 states that:

In the consultation paper on the Regulations, views were sought on the possibility of reallocating allowances to reflect different authorities success with respect to the strategic waste fund. This will be an issue for Ministers to determine, following further consultation with local authorities, and further advice will be issued in due course.

This issue is of extreme concern. As stated, as part of the Lanarkshire Joint Waste Management Procurement Project, it is necessary for the Council to carry out detailed technical modelling to ascertain whether relevant targets would be met over the twenty-five year term of the proposed contract. The model details the Council's arisings, the diversion achieved and the tonnage requiring landfill. This allows the Council to ascertain whether Landfill Allowance Targets are being met, the tonnage required to be sent to a treatment facility to meet said targets and, once financial modelling has been carried out, the cost of said treatment.

If North Lanarkshire Council's allocation were reduced then this may result in the Council receiving a lower Landfill Allowance than modelled. This would have the effect of the Council having to treat more waste than projected (the SWF will only fund the minimum amount of treatment required to meet targets – this amount being based on the Council's technical model) and thus increasing the Council's affordability gap. This is assumed as the Phase II Guidance states that the level of SWF will be set at preferred bidder stage and there appears to be no mechanism to request additional funding, even though said funding would be required to cover the shortfall brought about by the targets being reduced by the Scottish Executive.

This issue would perhaps be more acceptable if the Lanarkshire Joint Waste Management Project were funded by SWF to send all residual waste to a treatment facility thus perhaps allowing any excess allowance to be distributed amongst other Councils.

Data Audits

It is important that the nature and extent of any reporting criteria be detailed as soon as possible as it has to be considered by Council's entering into procurement contracts. Councils should be allowed the opportunity to comment on any proposed reporting criteria prior to its finalisation.

Actions in the event of "excess landfill"

SEPA has a duty under section 10(2)(d) of the WET Act to inform Ministers "without delay" where it appears to them that a local authority is or may be liable to a penalty.

The Executive believes that this duty can be satisfactorily discharged if SEPA inform the named Executive contact within 10 working days of becoming aware that a council appears to be heading for "excess landfill", even if they use their full borrowing potential.

The Executive will give consideration as to whether a suspension of banking and borrowing (and transfer) is appropriate (as set out at 2.6 above). The Executive is also likely to commence a preliminary check for any disputed factors in the measurement or calculation of excess landfill, and, if still in the scheme year in question, to ask the council what measures it is taking to eliminate or minimise its excess landfill.

As set out in the Regulations (regulations 14 and 15), SEPA will carry out its preliminary and final calculation of the amount of landfill of BMW by each authority, and will reconcile this with the allowances available to each authority.

The assessment of a penalty liability will then be carried out by the Executive in accordance with regulation 19.

A penalty does not become payable unless and until it is notified by Ministers and is due one month after the date of such notification (regulation 21) Prior to any such notification, Ministers shall consult the local authority faced with a penalty liability and have regard to any representation made (regulation 21(2)). Following consideration of the representations and other relevant information, Ministers will take their final decision about any penalty to notify.

It has been intimated that:

- the proposed penalty rate has been reduced to £150/tonne and penalties will be severely reduced in the first three years (£10/tonne in 2005/06, £25/tonne in 2006/07 and £50/tonne in 2007/08);
- any supplementary penalties due in target years will be net of any penalty already paid in that year (subject to a minimum of £1000);
- trading has been delayed until April 2008;
- in advance of notifying local authorities of a penalty liability, Scottish Ministers will be required to consult with and have regard to the views of the local authority

It is unclear as to whether the fine would be applied to per tonne of BMW or per tonne of MSW.

Clarification is sought from the Scottish Executive as to the outcome of their own technical modelling, in particular, as to whether it is envisaged that Councils will be able to meet their landfill allowances without the benefit of suitable treatment infrastructure being available. It should be noted that the construction and operation of treatment facilities will take a number of years and as such it may be the case that many Councils will be unable to achieve the necessary diversion and thus be heavily penalised at a time when large financial resources will be committed to affordability gaps. Thus diverting much needed resources. It is believed that without treatment infrastructure it is highly improbable that the landfill allowances will be met.

This situation will be exasperated if waste growth continues at its present rate, as opposed to the target rates highlighted within the National Strategy. North Lanarkshire Council believes that reducing the rate of waste growth is essential if Councils are to be in a position to meet their targets in the medium and long term.

We contend that Councils have little or no influence in this area and that it is incumbent on the Executive and the national government to introduce more effective constraints and incentives designed to encourage manufacturers, retailers and others to make meaningful contributions to reducing waste.

We believe that the Executive should recognise its responsibility to promote waste reduction by committing itself to annual targets for reducing waste growth.