

GUIDANCE ON SECTION 26(1)(c) OF THE WASTE AND EMISSIONS TRADING ACT 2003: THE SECRETARY OF STATE'S POWERS TO WAIVE, AND TO EXTEND THE TIME FOR PAYING, PENALTIES AND INTEREST

Introduction

1. Section 9(2) of the Waste and Emissions Trading Act 2003 (the WET Act) provides for a waste disposal authority to be liable to a financial penalty for a scheme year if it landfills more biodegradable municipal waste (BMW) than is authorised by the landfill allowances available to it for that year. Section 26(1)(c) of the Act gives the Secretary of State the power to:
 - extend the time for paying the whole or part of the penalty or any interest on it;
 - relieve the waste disposal authority, in whole or in part, from liability to the penalty or any interest on it (in this guidance referred to as 'waiving a penalty').
2. The purpose of this guidance is to outline the procedure for the application of penalties under section 9(2) of the WET Act and to set out the Secretary of State's policy in relation to the exercise of her powers under section 26(1)(c). The guidance does not cover the Secretary of State's policy in relation to any supplementary penalties incurred under sections 9(3) or 9(4) of the WET Act.
3. The guidance is not exhaustive. The decision to make a representation to the Secretary of State to use her powers under Section 26(1)(c) rests with individual waste disposal authorities (WDAs) in the light of local circumstances and any legal advice they may have received.

The application and notification of penalties

(a) Liability to penalties, due dates and the payment of interest

4. As noted above, section 9 of the WET Act imposes a duty on a waste disposal authority not to send more BMW to landfill in a scheme year than is authorised by the allowances that are available to the authority for that year¹. If a waste disposal authority has breached this duty by the end of the scheme year's reconciliation period², it will be liable to a

¹ Regulation 2(3) of the Landfill Allowances and Trading Scheme Regulations (England) (2004) (SI 2004/3212) ("the LATS Regulations") provides for the availability of landfill allowances for the purposes of those Regulations.

² The reconciliation period is a period of six months following the end of each scheme year on 31 March. During this six month period authorities will submit their final quarterly return (during the first three months) and the Environment Agency will calculate the amount of BMW landfilled by each waste disposal authority and prepare a draft reconciliation for each authority. Authorities will be notified of the draft reconciliation and of the amount of BMW landfilled by the end of August and will have until 30 September to borrow or trade allowances

financial penalty of £150³ per tonne of BMW landfilled by the authority in excess of the landfill allowances available to the authority for that scheme year.

5. Where the Secretary of State assesses and notifies the authority of the amount of the penalty following the end of the reconciliation period, the penalty is due one month after the date on which the waste disposal authority is so notified⁴. If the penalty is not paid in full by the due date, the authority is also liable to pay interest on any outstanding amount at a rate of 1% above the London Interbank Offered Rate (LIBOR) on a day to day basis beginning on the due date⁵.

(b) Making a case to the Secretary of State

6. If an authority is liable to a financial penalty, it may ask the Secretary of State to exercise her powers under section 26(1)(c) of the WET Act (in this guidance referred to as 'making a case to the Secretary of State').
7. On receiving a representation from a waste disposal authority, the Secretary of State may choose to grant relief from the penalty (either in whole or in part) unconditionally or subject to certain conditions. Alternatively, the Secretary of State may decide that the authority has not made a strong enough case for relief to be granted.

The Secretary of State's policy in relation to the powers in section 26(1)(c) of the WET Act

8. Financial penalties have been included in the WET Act by Parliament in order to provide an incentive for waste disposal authorities to meet their obligations under the WET Act including, in particular, the duty under section 9(1). In addition, the flexibilities of trading, banking and borrowing allowed within the Landfill Allowance Trading Scheme are intended to give WDAs every opportunity to avoid becoming liable to a financial penalty.
9. With these issues in mind, and in particular not to undermine the efficacy of the penalties provided for in the WET Act, the Secretary of State's policy is to be very selective about the exercise of her powers under section 26(1)(c)(ii). The Secretary of State will in general only exercise those powers in circumstances where it can be demonstrated that a waste disposal authority's failure to meet its duty under section 9(1) of the WET Act was primarily due to circumstances beyond the

if they have landfilled more BMW than allowances available to them. Authorities with surplus allowances may also wish to sell them on the market. Waste disposal authorities can trade or borrow allowances throughout the six month reconciliation period.

³ The LATS Regulations originally specified a figure of £200. This will be replaced by £150 when the Landfill Allowances Trading Scheme (England) (Amendment) Regulations 2005 (S.I. 2005/880) come into force on 9 May 2005.

⁴ See regulation 22(1) and (2) of the LATS Regulations

⁵ See regulation 22(4) of the LATS Regulations.

authority's control. Examples of such circumstances are set out below. However, each case will be considered by the Secretary of State on its individual merits.

10. It should be emphasised that waiving of penalties in the Landfill Directive⁶ target years and between target years would be particularly difficult. In a target year and between target years, even if only a few authorities breach their allowances, the UK could exceed its target under the Landfill Directive and may be liable to fines from the European Court of Justice.

11. The Secretary of State will consider all representations to use her powers under section 26(1)(c)(i) to extend the time for paying the whole or part of the penalty (or any interest on it) on a case by case basis. Authorities should set out clearly why they are unable to pay the penalty within the given time and when they will be able to pay it.

a) Unforeseen circumstances

12. The Secretary of State recognises that an authority may exceed its landfill allowances for reasons that could not be foreseen or were otherwise beyond the authority's control. Examples of such circumstances might include, but are not limited to:

- a major facility breakdown or a major delay in bringing a facility on line;
- a civil emergency;
- natural disaster, e.g. flooding.

13. The Secretary of State would expect to see that plans were in place to achieve the required reduction in BMW landfilled and that external factors outside the authority's control impeded its ability to do so. In all cases, an authority would have to demonstrate that events went beyond what could have been reasonably foreseen and planned for. In other words a waste disposal authority would be expected to show the existence of risk-based contingency plans for the normal range of risks to delivery, and that the event(s) in question were outside the scope of such plans.

14. If an authority is liable to a financial penalty and considers that the reason(s) it exceeded its allowances is primarily due to unforeseen circumstances, in making any case to the Secretary of State it should outline the reason(s) it exceeded its allowances, why it could not reasonably have foreseen the event and avoided this breach, and the strategy it has in place to get back on course.

b) Authorities in Growth Areas

⁶ Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste.

15. The Secretary of State recognises that waste disposal authorities located within the Government's specified growth areas (see Annex A) may find meeting targets for reducing the amount of BMW sent to landfill particularly challenging. The Secretary of State expects authorities within these areas to use their best endeavours to meet these targets, but accepts that it may be unreasonable to expect them to do so on the same timescales as authorities with more consistent population trends. Consequently, depending on the circumstances of the individual case, the Secretary of State recognises that the liability of waste disposal authorities in Government's specified growth areas to penalties under section 9(2) of the WET Act could, on occasions, be due primarily to circumstances beyond those authorities' control.
16. If an authority considers that its liability to a penalty under section 9(2) of the WET Act is primarily the result of population growth agreed with central government, in making any case to the Secretary of State, the authority should provide the following information:
- evidence that the authority had made plans to divert the required amount of BMW from landfill and had undertaken contingency planning to deal with the effects of circumstances beyond its control;
 - the amount of BMW generated as a result of the authority's location within a specified growth area;
 - the amount of this waste that was sent to landfill;
 - why it has not been possible to install the required waste infrastructure in time to meet the authority's required reductions;
 - what plans the authority has to divert the excess BMW from landfill and when it expects to be able to meet its obligations under section 9 of the WET Act;
 - that the waste disposal authority has in the past delivered specified waste-related targets including, where appropriate, necessary associated infrastructure, that the authority is guided by an evidence-based long-term waste strategy, and that it can provide evidence of continuous improvement in line with Best Value (e.g. steady increase in recycling rates and a reduction in waste going to landfill)

Contact Details

17. If you have any queries about this guidance please contact the Local Authority Waste Performance team at landfill.policy@defra.gsi.gov.uk.

Defra
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Annex A

Authorities within ODPM's Specified Growth Areas

In January 2005, the Office of the Deputy Prime Minister listed England's growth areas, and the local authorities included in them, as follows:

Ashford

- Ashford

London-Stansted-Cambridge

- Braintree
- Broxbourne
- Cambridge
- City of Peterborough
- East Cambridgeshire
- East Hertfordshire
- Enfield
- Epping Forest
- Fenland
- Hackney
- Haringey
- Harlow
- Huntingdonshire
- North Hertfordshire
- Redbridge
- South Cambridgeshire
- Stevenage
- Uttlesford
- Waltham Forest

Milton Keynes/South Midlands

- Aylesbury Vale
- Bedford
- Corby
- Daventry
- East Northamptonshire
- Kettering
- Luton
- Mid Bedfordshire
- Milton Keynes
- Northampton
- South Bedfordshire
- South Northamptonshire
- Wellingborough

Thames Gateway

- Barking and Dagenham
- Basildon
- Bexley
- Castle Point
- Dartford
- Gravesham
- Greenwich
- Havering
- Lewisham
- Medway
- Newham
- Rochford
- Southend-on-Sea
- Swale
- Thurrock
- Tower Hamlets

For the purposes of this guidance, any WDA whose municipal waste arises (in part or in full) within one of the local authorities listed is classified as falling within a specific growth area.