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The Waste and Emissions Trading Bill [HL]

Bill 66 of 2002-2003

The *Waste and Emissions Trading Bill* is due to be considered for Second Reading on Thursday 20 March 2003

Part 1 of the Bill would put into place legislation to create a trading system for landfill allowances. The aim of the system is to help the UK achieve its obligations under the Landfill Directive to limit the amount of biodegradable municipal waste being sent to landfill. It also introduces an obligation, again contained in the Landfill Directive, to prepare a biodegradable waste strategy. This part of the Bill extends to the whole of the UK. However, as waste is a devolved issue, many of the measures would be implemented by regulations through the devolved administrations.

Part 2 of the Bill would make the penalties within the UK greenhouse gas trading scheme statutory. This part applies to England, Scotland and Wales only.

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Summary of main points

The *Waste and Emissions Trading Bill* was presented in the Lords on 14 November 2002. Part 1 deals with setting up a trading system for allowances to landfill biodegradable municipal waste (BMW) between local authorities.

The Government published a consultation in October 1999, *Limiting Landfill*, looking at various approaches that could be used to implement that part of the Landfill Directive dealing with municipal biodegradable waste. The Directive sets the following targets for the reduction of biodegradable waste going to landfill:

- By 2010 to reduce biodegradable municipal waste landfilled to 75% of 1995 levels.
- By 2013 to reduce biodegradable municipal waste landfilled to 50% of 1995 levels.
- By 2020 to reduce biodegradable municipal waste landfilled to 35% of 1995 levels.

The Directive also requires the preparation of a strategy to deal with all biodegradable waste.

Following consultation, the Government announced in *Waste Strategy 2000* that a tradable allowance system for local authorities would be put in place for BMW. The system would be implemented across the whole of the UK by the devolved administrations. The Bill sets out the system for tradable permits the Government intends to implement, together with monitoring arrangements and penalties for any offences. It also creates a statutory requirement for the administrations to prepare a biodegradable waste strategy.

The UK Greenhouse Gas Trading Scheme was established in 2002 under the provisions of the *Pollution Prevention and Control Act 1999* (PPC Act). Part 2 of this Bill would amend the PPC to introduce the power to establish financial penalties for such schemes and puts the penalties outlined in the already established UK Greenhouse Gas Trading Scheme on a statutory basis.

CONTENTS

I	Part 1 – Waste Trading	7
	A. Background	7
	B. The Landfill Directive	9
	C. Limiting Landfill	10
	D. Waste Strategy 2000	11
	E. Tradable Landfill Permits	12
	F. Devolved Administrations	13
	1. Scotland	13
	2. Northern Ireland	14
	3. Wales	14
	G. Overview of the Bill	16
	H. Comment on the Bill	17
	1. Select Committee on Delegated Powers and Regulatory Reform	18
	2. Strategy Unit Report	20
	I. Provisions	21
	1. Landfill Targets	21
	2. Landfill Allowance Scheme	23
	3. Scheme Operation and Monitoring	29
	4. Strategies for Reducing Landfilling of Biodegradable Waste	29
	5. Waste Management in Wales	30
	6. Successful Non-Government Amendments	30
II	Part 2 - Trading of Emission Quotas	32
	A. The Carbon Trading Scheme	32
	1. Provisions of the Waste and Emissions Trading Bill	36
	Appendix 1 – Tradable Landfill Permits Consultation	39
	Appendix 2- DEFRA response to the Select Committee on Delegated Powers and Regulatory Reform	41

I Part 1 – Waste Trading

A. Background

The latest estimates show that the UK produces more than 400 million tonnes of waste annually, of which about 30 million tonnes is municipal solid waste (MSW)¹ most of which is disposed of to landfill. Table 1 gives the latest estimates of waste produced in the UK.²

Table 1

Estimated waste production in the UK, by sector

Latest estimates

	Million tonnes	Percentage of total	Date of estimate
Mining & quarrying	118	28%	1997
Agriculture	87	20%	1999
Demolition and construction	72	17%	2000
Industrial	50	12%	1998/99
Dredged material	41	10%	1997
Municipal	30	7%	1999/00
Commercial	25	6%	1998/99
Sewage sludge	1	<1%	1998/99
Total	428		

Note: A number of these estimates are for England and Wales only

Source: *Digest of Environmental Statistics*, DEFRA

Though MSW may seem a small proportion of the total waste produced, recycling levels for municipal waste are often much lower than for other types of waste. For example, about 40% of industrial and commercial waste is recycled or recovered compared to 17% of MSW.³ Recovery, which includes recycling, is the use of waste to replace other materials thereby conserving natural resources. Incineration of waste with energy recovery would be included in this figure.

¹ Municipal Solid Waste includes all waste under the control of local authorities or agents acting on their behalf. It includes all household waste, street litter, waste delivered to council recycling points, municipal parks and garden wastes, council office waste, civic amenity site waste, and some commercial waste from shops and smaller trading estates where local authority waste collection agreements are in place (*Waste Strategy 2000*)

² DEFRA, *Digest of Environmental Statistics*, December 2001
<http://www.defra.gov.uk/environment/statistics/des/waste/index.htm>

³ DETR, *Waste Strategy 2000: Part 1*, 25 May 2000.
<http://www.environment.detr.gov.uk/waste/strategy/cm4693/index.htm>

There are significant differences in the management of MSW across the England. The North West had the highest rate of landfill in England in 2000/01 (94%). The West Midlands had the lowest level of landfill (58%) and the highest percentage of waste incinerated (31%). Rates of recycling/composting varied from 7% to 18%.⁴ National levels are given in Table 2 below.

Table 2: Management of Municipal Solid Waste, 1996/97 and 2000/01, England

Method	1997/97		2000/01	
	thousand tonnes	% of total	thousand tonnes	% of total
Landfill	20,631	83.9%	22,055	78.3%
Recycled/composted	1,750	7.1%	3,454	12.3%
Incineration with EfW	1,446	5.9%	2,479	8.8%
Incineration without EfW	614	2.5%	20	0.1%
RDF manufacture	147	0.6%	67	0.2%
Other	0	0.0%	75	0.3%
Total	24,588	100.0%	28,150	100.0%

EfW - Energy from waste
RDF - Refuse Derived Fuel

Source: DEFRA *Municipal Waste Management Statistics 2000/01*

The variation in waste management between the regions in England can be seen in Table 3. This shows that all the regions disposed of most of their waste to landfill in 2001, with significant variations in the levels of recycling/compost and the use of incineration.

Table 3: Management of Municipal Waste by region, 2001

	<i>England percentage/thousand tonnes</i>									
	England	North East	North West	Yorks & Humb	East Mids	West Mids	East London	London	South East	South West
Landfill	22,072	1,087	3,722	2,502	1,783	1,693	2,407	3,169	3,502	2,207
	78%	75%	90%	85%	78%	58%	82%	71%	81%	82%
Incineration with EfW	2,479	270	45	99	152	912	46	955	0	0
	9%	19%	1%	3%	7%	31%	2%	21%	0%	0%
Recycled/composted	3,443	95	386	284	354	290	465	338	761	469
	12%	7%	9%	10%	15%	10%	16%	8%	18%	17%
Other*	161	0	2	75	0	0	0	1	81	2
	1%	0%	0%	3%	0%	0%	0%	0%	2%	0%
Total	28,155	1,452	4,155	2,959	2,290	2,895	2,918	4,463	4,344	2,678

* includes Incineration without EfW and RDF manufacture

Source: DEFRA *Municipal Waste Management Survey*, (August 2002)

⁴ DEFRA, *Municipal waste management statistics 2000/01*,
<http://www.defra.gov.uk/environment/statistics/des/waste/bulletin/index.htm>

B. The Landfill Directive

EU Council Directive 1999/31/EC on the landfilling of waste came into force in April 1999.⁵ The overall aims of the Directive are as follows:

the aim of this Directive is, by way of stringent operational and technical requirements on the waste and landfills, to provide for measures, procedures and guidance to prevent or reduce as far as possible negative effects on the environment, in particular the pollution of surface water, groundwater, soil and air, and on the global environment, including the greenhouse effect, as well as any resulting risk to human health, from landfilling of waste, during the whole life-cycle of the landfill.

The Directive set targets for the reduction of various kinds of wastes being sent to landfill, brought in new requirements for how landfill sites are managed and required the management of hazardous and non-hazardous waste at separate sites:

Main requirements of the Landfill Directive

- targets for reduction of biodegradable municipal waste to landfill
- banning co-disposal of hazardous and non-hazardous wastes, and requiring separate landfills for hazardous, non-hazardous and inert wastes
- banning landfill of tyres (by 2003 for whole tyres, 2006 for shredded tyres)
- banning landfill of liquid wastes, infectious clinical waste and certain types of hazardous waste (e.g. explosive, highly flammable), all by 2001
- provisions on the control, monitoring, reporting and closure of sites, which already form the backbone of waste management legislation in the UK.⁶

Among other measures, the Directive sets targets for Member States to reduce the amount of their biodegradable municipal waste sent to landfill. Biodegradable waste was focused upon because it is the biodegradable element of waste which breaks down to produce methane, a powerful greenhouse gas.

The Directive requires Member States to set up a national strategy for the implementation of the reduction of all biodegradable waste going to landfill. The strategy must include the following targets set out in the Directive:

- By 2010 to reduce biodegradable municipal waste landfilled to 75% of 1995 levels.
- By 2013 to reduce biodegradable municipal waste landfilled to 50% of 1995 levels.

⁵ Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, OJL 182 , 16/07/1999 P. 0001 - 0019

⁶ DETR, *Waste Strategy 2000 England and Wales Part 1*, May 2000.
<http://www.defra.gov.uk/environment/waste/strategy/cm4693/index.htm>

- By 2020 to reduce biodegradable municipal waste landfilled to 35% of 1995 levels.

These deadlines take into account the 4 year derogation that the Directive allows for Member States that landfilled more than 80% of their waste in 1995.

The Directive defines biodegradable waste as "waste that is capable of undergoing anaerobic or aerobic decomposition, such as food and garden waste, and paper and paperboard". The definition of municipal waste is "waste from households, as well as other waste which, because of its nature or composition, is similar to waste from household". These are the definitions also used in the Bill.

C. Limiting Landfill

The Government set out its intention in a consultation document (*Limiting Landfill*, published in October 1999) to introduce a limit on the amount of biodegradable waste going to landfill. The consultation presented five options:

- Option 1: A ban on landfill of biodegradable municipal waste
This option was considered difficult to implement
- Option 2: A ban on landfill of specific biodegradable municipal wastes
Possibly paper card and putrecibles
- Option 3: Permits for landfill site operators to accept biodegradable-municipal wastes
Amount of biodegradable waste that would be allowed at a particular site would be restricted by permit
- Option 4: Permits for waste disposal authorities to landfill biodegradable municipal wastes
The maximum tonnage of biodegradable municipal waste sent to landfill by each waste disposal authority⁷ would be restricted to the amount which they were separately permitted
- Option 5: The landfill tax
The use of the landfill tax was considered unlikely to provide the necessary certainty that targets would be met.⁸

It also consulted on whether the UK should use a four-year derogation available to Member States who landfilled more than 80% of their waste in 1995.

⁷ Waste collection and disposal activities are not necessarily carried out by the same local government bodies. Where there is a two tier local authority system the District Council is the Waste Collection Authority and the County Council is the Waste Disposal Authority. This is not the case in single tier areas, such as Unitary Authorities, which carry out both roles.

⁸ DETR, *Limiting Landfill: A Consultation paper on limiting landfill to meet the EC Landfill Directive's targets or the landfill of biodegradable municipal waste*, October 1999
<http://www.defra.gov.uk/environment/waste/strategy/landfill/index.htm>

The consultation and proposals worked on the assumption, derived from the Environment Agency *National Household Waste Analysis*, that the average biodegradable content of household waste is 60%. Given this figure the targets contained in the Directive were translated as follows:

The UK currently landfills around 27 million tonnes of its municipal waste each year. Assuming 60% of this is biodegradable, we would need to divert at least: 3.2 million tonnes of biodegradable municipal waste each year to meet the first target; 7.5 million tonnes of biodegradable municipal waste each year to meet the second target; and 10.1 million tonnes of biodegradable municipal waste each year to meet the third target

By 2010 the amount of biodegradable municipal waste landfilled in the UK must not exceed 13.05 million tonnes per annum.

By 2013 the amount of biodegradable municipal waste landfilled in the UK must not exceed 8.70 million tonnes per annum.

By 2020, the amount of biodegradable municipal waste landfilled in the UK must not exceed 6.09 million tonnes per annum

Waste is a devolved issue and, as such, policy and implementation is the responsibility of the devolved administrations. However the responsibility of meeting the Directive targets as a whole rests with the UK Government. The consultation indicated that splitting up of targets would be dealt with through secondary legislation:

The targets in the Landfill Directive are set for the UK as a whole and need to be divided up between England, Northern Ireland, Scotland and Wales. The portions assigned to the devolved administrations of the UK will be agreed at a UK-wide level and set out in secondary legislation by the UK Government. After they have been divided up, it is possible that a different approach to implementing the targets will be taken in the different parts of the UK.

D. Waste Strategy 2000

Following the consultation the Government published the *Waste Strategy 2000*, in which it outlined its proposals for dealing with biodegradable waste, including the intention to make full use of the four year derogation. This included a summary of the responses to the consultation:

In all 203 responses were received. Of these, the overwhelming majority – over 70% –were in favour of Option 4: permits for local authorities to landfill biodegradable municipal waste. When responses were analysed by sector (local authorities, the waste industry, householders, associations, and commercial organisations), the preferred option within each sector was Option 4. Overall there was some support for Option 3 (15%), but support for Options 1, 2 and 5 was less than 5% in each case. The main reason cited by respondents for

supporting Option 4 was that this option allowed local authorities to retain control over planning for the disposal of municipal waste.⁹

On the issue of sanctions for those authorities who failed to meet their targets:

Respondents typically felt that sanctions needed to be significant to be effective, and that any fines for breach of permits should be set at a level higher than the cost of achieving compliance. Fines, forfeiture of functions, and naming and shaming were amongst suggested sanctions.¹⁰

The strategy included the following proposals:

- We propose to introduce tradable permits for local authorities to restrict the amount of biodegradable municipal waste landfilled
- We propose that permits should be granted free to local authorities
- We intend that permits for local authorities in England should be tradable¹¹

The strategy concluded that this would be the most efficient system, as it would allow local authorities to retain most control over how they disposed of their waste:

- costs of achieving compliance can be reduced overall
- authorities will have greater choice over how to meet their reduction targets in the way that best suits local needs
- whichever allocation method is used, some authorities may receive more permits than they initially need and some less; and municipal waste arisings and disposal practices will change over time. A trading system will allow authorities to choose whether to landfill any additional waste (by buying extra permits from an authority that had reduced its reliance landfill further than needed) or to invest in alternative means of disposal.¹²

E. Tradable Landfill Permits

Following the proposals a second consultation document on tradable landfill permits was published in March 2001. The Government made several proposals on permits, trading systems, monitoring and sanctions. The consultation also set out the need for primary legislation to introduce a permit trading system. It outlined the intention to introduce legislation to stipulate levels of fines, to set interim targets for years in between those mentioned in the Landfill Directive and to give the Environment Agency powers to demand information from waste disposal authorities

⁹ DETR, *Waste Strategy 2000 England and Wales, May 2000*.
<http://www.defra.gov.uk/environment/waste/strategy/index.htm>

¹⁰ *ibid*

¹¹ *ibid*

¹² *ibid*

2.1 Tradable landfill permits are a flexible economic instrument, new to waste management in the UK. The system of tradable permits will minimise the cost of meeting the Directive obligations whilst giving local authorities the greatest amount of freedom in how they meet their targets. The fact that they will be tradable will help waste disposal authorities share the cost of the UK achieving the necessary reduction in landfill. Authorities which divert more waste away from landfill –e.g. through greater recycling- will be able to trade their permits to those authorities which do not.

2.2 In any given period, an authority will be able to landfill BMW up to the level of permits held. Authorities will need to ensure that they hold sufficient permits to cover the actual amount of BMW they intend to landfill over a given period. Should diversion of waste away from landfill and other action mean that not all of the permits are required for a particular year, then the authority will be able to trade them. Equally a waste disposal authority which did not have enough permits to cover the amount of waste it intended to landfill would need to either increase its rate of diversion or purchase additional permits.

2.3 Local authorities will not have to trade permits as long as they do not exceed their permitted amounts of BMW sent to landfill. Authorities will be free to meet their targets through diversion alone. Similarly authorities will be free to co-operate to meet their targets. For example, two authorities could pool their permits in order to invest in a shared waste management facility, but each individual authority would need to ensure that their individual targets were met.¹³

Full details of the proposals in the consultation are available in Appendix 1.

F. Devolved Administrations

1. Scotland

The Scottish Executive published a *National Waste Plan* in January 2003. According to this they have not yet made a decision on whether permits to landfill will be tradable.

Landfill Allowances

In calculating future costs, any possible revenues or additional costs arising from trading in landfill allowances are excluded. A system of landfill allowances, placing limits on the amount of biodegradable municipal waste (BMW) that each local authority can landfill, will be introduced across the UK with passage of the Waste & Emissions Bill. Scottish Ministers will decide if local authorities in Scotland are able to trade their allowances. The overall allocation of allowances will be set in order to reduce the amount of BMW sent to landfill to meet the Landfill Directive targets. Scottish Ministers will distribute allowances to Scottish local authorities, and penalties will be imposed on local authorities that landfill in excess of the allowances that they hold. Through this mechanism local authorities should collectively find the most cost-effective ways of diverting the

¹³ DETR, Tradable landfill permits consultation paper, March 2001
<http://www.defra.gov.uk/environment/consult/tradeperm/pdf/tradable.pdf>

required amount of BMW, either by undertaking diversion activities themselves or purchasing permits from other authorities.¹⁴

The plan also set an interim target to reduce landfilling of biodegradable waste collected by local authorities to 1.5 million tonnes per year by 2006. According to the plan this is 200,000 tonnes or 17% beyond the Landfill Directive reduction target for 2010.¹⁵

2. Northern Ireland

The Northern Ireland Executive published a Waste Strategy in 2000. This set targets for landfilling of biodegradable waste and signalled the intention of making these statutory in 2003:

Reduce the quantities of biodegradable municipal wastes being landfilled to 75% of 1995 baseline levels by 2010, 50% by 2013 and 35% by 2020.

It is intended for these targets to become mandatory at the first Strategy review point in 2003 once further analysis of waste arisings and consultation has established that they are achievable, challenging, and have a firm platform of ownership at the local level.¹⁶

3. Wales

The National Assembly for Wales published *Wise about Waste: The National Waste Strategy for Wales* in June 2002. This has set the following targets for biodegradable waste:

To divert biodegradable waste from landfill:

- by 2005, to reduce the amount of biodegradable industrial and commercial waste sent to landfill to 85% of that landfilled in 1998;
- by 2010, to reduce the amount of biodegradable industrial and commercial waste going to landfill to 80% of that landfilled in 1998.¹⁷

The Assembly intends to set a permit system to limit the amount of biodegradable municipal waste local authorities can send to landfill. Unlike the system in England, permits will not be tradable:

¹⁴ Scottish Executive, *The National Waste Plan 2003*, 2003
<http://www.scotland.gov.uk/library5/environment/natwasteplan.pdf>

¹⁵ *ibid*

¹⁶ Northern Ireland Executive, *Waste Management Strategy for Northern Ireland*, 2000
http://www.ehsni.gov.uk/environment/wasteManage/waste_management.shtml

¹⁷ National Assembly for Wales, *Wise about Waste: The National Waste Strategy for Wales (part one)*, June 2003 <http://www.wales.gov.uk/subienvironment/content/wstetext-e.pdf>

The Assembly Government will set up a permit system to limit the amount of biodegradable municipal waste being sent by local authorities to landfill. Local authorities will be expected to produce Municipal Waste Strategies to identify their plans to meet the municipal waste targets.

Target

5.54 The Assembly Government has agreed with the Welsh Local Government Association that individual local authorities will meet the requirements of the Directive. Local authorities will therefore be set a target (UK) for the maximum amount of BMW that they will be permitted to landfill in a given year.

Policy instrument – a permit system

5.55 Following implementation of appropriate primary legislation by UK Government, the Assembly Government will introduce, by secondary legislation, a system to limit the amount of BMW being sent to landfill by local authorities. Detailed proposals will be subject to further consultation. A preliminary outline of the likely principles of the system is (see Part Two, Annex 7 for further detail):

- the Assembly Government will issue permits to each local authority in Wales allowing them to landfill each year a proportion of the total BMW allowed for Wales;
- Wales will not be part of the tradable landfill permit scheme currently proposed for England by DEFRA;
- a form of ‘safety net’ is being considered (e.g. by allocating to Welsh local authorities only 95% of the total number of permits allowed for each of the target years);
- a decision on the method of allocation of permits will be made as soon as possible following further consultation with local government. On the basis of the consultation responses to ‘Managing Waste Sustainably’, the Assembly Government will carefully consider the merits and practicability of a system of allocation based on need, although other options have not been ruled out. The Assembly Government recognises the importance of regions and local authorities understanding exactly what they need to do to meet the Landfill Directive targets when they are producing their regional plans and Municipal Waste Management Strategies over the next few years.
- Environment Agency Wales will monitor the amount of BMW that is landfilled;
- the means of determining the biodegradable content of municipal waste that is landfilled will be agreed between the Assembly Government, the UK Government, the other Devolved Administrations;
- it is intended to introduce a voluntary permit system by 2005 and a statutory permit system in advance of 2010;
- the permit system will need to be supported by sanctions for non-compliance by individual local authorities. Concordats between the Assembly Government and the UK Government mean that if Wales puts the UK into non-compliance with the Directive, any fines levied on the UK as a result will be passed down to the Assembly Government for payment¹⁸

¹⁸ *ibid*

The Assembly has also recently issued guidance on Municipal Waste Strategies, which are to be published by November 2003. The Assembly has expressed its intention to make their preparation mandatory.¹⁹

G. Overview of the Bill

The *Waste and Emissions Trading Bill* was presented in the Lords on 14 November 2002. Part 1 deals with setting up a trading system for permits to landfill biodegradable waste between local authorities. Explanatory notes were published with the Bill.²⁰

The aim of the Bill as outlined in the explanatory notes is as follows:

The Bill seeks to fulfil the requirements of Article 5(1) and (2) of the Landfill Directive by providing for the Secretary of State to set the maximum amounts of biodegradable municipal waste which may be sent to landfills from each country of the UK. The Bill requires a landfill allowance system to be set up under which allocating authorities for each country of the UK must allocate allowances permitting waste disposal authorities in their area to send specified amounts of biodegradable municipal waste to landfills. The Bill also requires the Secretary of State and the appropriate authority for each country of the UK to have a national strategy for the reduction of biodegradable waste sent to landfills.

The term allowances rather than permits has been used to avoid confusion with pollution control permits that are already in force under Integrated Pollution Control (IPC) regulations.

The Regulatory Impact Assessment published with the Bill sets out the system of tradable allowances the Government intends to implement. The Environment Agency would be responsible for monitoring compliance with the scheme. Landfill operators would keep a record of which authority is depositing the waste and return these records to the Agency. Allowances would be traded electronically:

33 The system of allowances, which will be tradable in England and possibly elsewhere in the UK according to the policies of the devolved administrations, will ensure certainty and transparency in the UK's response in complying with the Directive. The system will ensure that all the allowances will be trackable by robust monitoring carried out by the Environment Agency. WDAs that exceed their allowances by landfilling more BMW than they are allowed to will be easy to identify.

34 Landfill operators currently receive a Duty of Care Note when they accept waste from a WDA. The note identifies the waste, who is transferring it and

¹⁹ *ibid*

²⁰ *Waste and Emissions Trading Bill* [HL], Bill 66, Session 2002-03
<http://www.publications.parliament.uk/pa/pabills.htm>

whether he is the producer. The load is also weighed on a weigh-bridge to comply with landfill taxing criteria. In future the landfill operator, in addition to these administrative details, will be required to record which WDA is depositing the waste. The returns of these details to the EA (in England and Wales) will enable the scheme to be monitored and enforced.

35 There will be transparency in the scheme for all stakeholders. The baseline distribution of allowances will be known and proportionate for all WDAs across the UK. There will be an electronic bulletin board system for trading allowances that all WDAs can access – adding clarity within the scheme.

36 The working of the scheme will offer the WDAs the greatest flexibility in deciding how best to meet the Directive Targets. The decisions of how to comply will be made at a local level by people with local knowledge – rather than being directed from elsewhere. The allowances scheme also keeps more money within the Local Authority system by not enforcing other methods of distribution of allowances for example by auctioning. Also if trading is adopted it will be between the WDAs and the monies will stay within local government and not be spent in brokerage. The only leakage of money from the system will occur if there is a breach in limits of waste landfilled or for non compliance for the monitoring of the system.²¹

H. Comment on the Bill

Publication of the Bill was generally welcomed. However there were some areas of concern. The Local Government Association set out the following key messages and issues:

- If the challenging targets set out in the EU landfill directive are to be met, increased funding needs to be made available by the government to allow local councils to achieve a significantly greater diversion from landfill.
- Moving away from a traditional reliance on landfill in the UK cannot be achieved overnight and the introduction of a system of penalties will make it more difficult for waste disposal authorities to comply with landfill targets by diverting funds away from addressing the real challenges of providing alternatives to landfill.
- The government must be prepared to play its part in changing public attitudes to household waste to achieve significantly higher rates of recycling and composting and to reduce public opposition to the building of the new waste treatment plants that will be required.
- A mechanism is needed to ensure cooperation between waste disposal authorities and waste collection authorities so that the disposal authorities are not penalised financially for the failure of a collection authority to meet its performance standards.²²

²¹ DEFRA, Partial Regulatory Impact Assessment for the Waste and Emissions Trading Bill – Waste Element, 15 November 2002. <http://www.defra.gov.uk/environment/waste/wetbill/index.htm>

²² LGA, *Waste and Emissions Bill Lords Second Reading 3 December 2002*, 28 November 2002

The Environmental Services Association, the trade body for companies who work in the waste business, also welcomed the Bill, but was disappointed about the Government's intention to use the four year derogation available within the Landfill Directive. The Association also regretted the trading scheme would only deal with biodegradable waste and not with any of the other waste streams for which EU targets exist.

During Second Reading in the Lords, Baroness Byford, the Opposition spokesperson for Environment, Food and Rural Affairs, expressed disappointment with the content of the Bill:

My Lords, on reading the Bill for the first time my dominant emotion was disappointment. I had anticipated something that would put waste management centre stage. I had envisaged that the Government would take the initiative and produce a document with which there would be little disagreement.

But where is the hierarchy of this waste treatment? Where are the measures to reduce waste production in the first place, then to encourage the re-use and recycling and composting of such waste? Where is the pressure to recover energy from waste? Alas, my Lords, apart from the penalties related to emissions trading, the Bill is predominantly about landfill.

More than that, sadly, it is aimed at biodegradable waste going into landfill, which forms only 6 per cent of our total waste produce. Does inert material in England, Scotland, Wales and Northern Ireland not matter? Am I wrong in believing that the use of plastics is increasing, particularly in excessive wrapping and packaging?²³

1. Select Committee on Delegated Powers and Regulatory Reform

The Committee reported on the Bill on 27 November 2002. It expressed reservations about the extent to which the Bill would give powers to ministers through regulations, the severity of penalties (up to 5 years imprisonment) and the wide ranging powers that allocating authorities would have to impose as yet unspecified penalties.

The bill is, effectively, almost a "skeleton bill". We have previously reported unfavourably on such bills, which leave many important matters to ministerial discretion. Even where the powers in the bill are subject to affirmative procedure, Parliament can only accept or reject what is proposed. It cannot amend it. Had this bill applied only to England, we would have considered seriously whether to recommend that some of what is proposed to be done by regulations should appear on the face of the bill. We appreciate that the highly unusual structure of the bill was to some extent dictated by the different legislative procedures under the devolution arrangements. While we do not

²³ HL Deb 3 December 2002 c1037

propose any amendment at this stage, we draw the House's attention to the extent of the delegated powers in the bill.

CRIMINAL OFFENCES AND PENALTIES

27. Clauses 6(3)(j) and 7(3)(l) enable regulations to create criminal offences. In each case there is a maximum penalty set out in the bill which is the same as that for offences created by regulations under the Pollution Prevention and Control Act 1999. This limit, though high (maximum 5 years imprisonment), is therefore precedented, but the question needs to be raised whether the precedent is relevant. It is not clear what offences under regulation 6 in particular (even if they involve dishonesty) could justifiably attract a maximum penalty of 5 years imprisonment and the Department has not made out a sufficient case for this level of penalties.

28. Clauses 6(3), 7(3) and 10(3) enable regulations to provide for a penalty in certain circumstances. Clauses 8(2) and (3) and 11(3) themselves provide for a penalty. Clause 25 enables the allocating authority to specify penalties (or specify rules for calculating them) for each of those provisions. There is no maximum penalty for which the regulations may provide; nor is there an indication on the face of the bill or in the Department's memorandum of how these penalties will be calculated. We invite the House to consider whether some principles for calculating the penalty should be set out in the bill itself. Similar considerations apply to clause 31 about emissions quota trading schemes.²⁴

The Committee published a response from DEFRA in Annex 3 of its Second Report on 11 December 2003. This explained why in the Department's view the general powers enabling a proportion of Community obligations to be transferred to each administration were not sufficient for the purposes of this Bill. It was decided that the Bill should set out the framework for the scheme with each country then able to establish the detailed provisions for its area to ensure that schemes were compatible across the UK. Full details are available in Appendix 2.

Following the response the Committee expressed its view that the delegation contained in the Bill was appropriate, with some exceptions, but felt that safeguards were needed:

The Committee concludes that the extent of delegation is acceptable in the light of the position under this bill elsewhere in the United Kingdom. But the Committee considers that there must be the opportunity for a debate on the way in which the wide powers conferred by the bill will be used. Accordingly, it considers that the first regulations which apply in relation to England and are made in exercise of the powers conferred by each of clauses 6 (borrowing and banking of landfill allowances) 7 (trading and other transfer of landfill allowances) and 10 (scheme regulations) should be subject to affirmative procedure. It is for consideration whether similar provision should be made for Scotland and Northern Ireland (subject to suspension of the Assembly).

23. We also consider that the delegation of such wide powers to allocating authorities is appropriate only if accompanied by an express statutory obligation

²⁴ Select Committee on Delegated Powers and Regulatory Reform, *First Report*, 2002-03 Session, HL9 <http://www.publications.parliament.uk/pa/ld/lddelreg.htm>

to consult those representing the disposal authorities, landfill operators and others affected by proposed regulations.

Offences and Penalties

24. The Department says it is considering further the question of maximum penalties for offences created under clause 6 and clause 7, and mentions the levels set out in Schedule 2 to the European Communities Act 1972. We would find the delegation to create offences acceptable if those levels were to be applied.

25. In its supplementary memorandum, the Department explains why no maximum penalty is set in the bill for regulations under clause 25 and in relation to clause 31. We accept the reasons given by the Department. In the absence of a maximum, the express consultation requirement mentioned at paragraph 23 would provide some safeguards against inappropriate levels of penalty.²⁵

2. Strategy Unit Report

Margaret Beckett, Secretary of State for the Environment, Food and Rural Affairs held a Waste Summit in November 2001. Following the summit a review of the Waste Strategy by the Cabinet Office Strategy Unit (then called the Performance and Innovation Unit) was announced by Mrs Beckett. The Unit was tasked with focusing on ways of reducing the amounts of municipal waste being sent to landfill in accordance with the targets set out in the Landfill Directive. Their report, *Waste Not, Want Not*, was published in November 2002 and highlighted the introduction of tradable allowances as the first system of its kind in Europe, which will allow the Landfill Directive targets to be met at a lower cost:

This is believed to be the first of its kind in Europe. If an active trading market develops, this system should help to ensure that the targets in Article 5 of the Landfill Directive are met in the most cost efficient and effective way for the UK as a whole.

Waste disposal authorities will be able to send to landfill biodegradable municipal waste only up to the levels of the allowances which they hold. Local authorities that divert more waste away from landfill (e.g. through more recycling) will be able to trade their unused allowances with a local authority that does not hold enough allowances to cover the amount of waste it plans to landfill.

The key advantage of tradable allowances is that they allow the Landfill Directive targets to be met at less cost. This is because those authorities with high costs of diversion from landfill will wish to buy allowances from those with lower costs of diversion so that they can continue to landfill. Lower cost diverters will be incentivised to over-achieve their targets and receive an income from selling the surplus allowance.²⁶

²⁵ Select Committee on Delegated Powers and Regulatory Reform, *Second Report*, 2002-03 Session, HL20 <http://www.publications.parliament.uk/pa/ld/lddelreg.htm>

²⁶ Strategy Unit, *Waste Not, Want Not*, November 2002 <http://www.cabinet-office.gov.uk/innovation/2002/waste/report/index.html>

I. Provisions

Detailed clause-by-clause explanation of the Bill as it currently stands can be found in the Explanatory Notes.²⁷ The following is a discussion of the provisions of the Bill focusing on issues that have been raised during the passage of the Bill through the Lords.

1. Landfill Targets

Clauses 1 to 3 requires the Secretary of State to set targets, by regulations, for the maximum amount of biodegradable municipal waste that could be sent to landfill, for the UK as a whole and, after consultation with the devolved assemblies, for each country in the UK, for target and non-target (or scheme) years. Target years in accordance with the Landfill Directive and set out in clause 23, are 2010, 2013, and 2020. Scheme years are any other year between 2004 and 2019. These clauses also set out the formula to be used to calculate targets for scheme years if no amount is specified by the Secretary of State.

The Bill sets the target dates as those included in the Directive, with the last target date July 2020. However the Explanatory Notes explain how Clause 23 will allow the scheme to be extended beyond that date:

Clauses 21 to 24 define terms used in Chapter 1 of Part 1 of the Bill. In particular clause 22 defines "target years" as scheme years ending with 16 July in 2010, 2013 or 2020. These deadlines incorporate the 4 year derogation for the achievement of the Landfill Directive's targets which the UK is entitled to take advantage of under Article 5(2) of the Landfill Directive.

37. A power is taken in clause 23 for the Secretary of State, subject to a requirement to consult the appropriate authority for each country of the UK, to change the target years, to add or omit target years and to add scheme years. This would enable the Secretary of State to set target years that are either the underrogated target years, or any year up to and including the latest date allowable under the Landfill Directive. Article 5(2) of the Landfill Directive provides that the European Council shall re-examine and may amend the final target set out in the Directive and it is intended that clause 23 would allow the Secretary of State to extend the scheme beyond 2020 should that prove necessary or appropriate.²⁸

Introducing the Bill Lord Whitty, Parliamentary Under-Secretary of State for DEFRA, explained the intention to allocate allowances for every year up until the final target year (2020), to allow authorities to plan ahead in meeting their targets.²⁹

²⁷ *Waste and Emissions Trading Bill* [HL], Bill 66, Session 2002-03
<http://www.publications.parliament.uk/pa/pabills.htm>

²⁸ HMSO, *Waste and emissions trading Bill* [HL], Explanatory Notes, 14 November 2002
<http://www.publications.parliament.uk/pa/ld200203/ldbills/003/en/0300003x--.htm>

²⁹ HL Deb 3 December 2002 c1035

During debate on the Bill, disappointment was expressed at its narrow remit as it only deals with the reduction of biodegradable waste and no other type of waste, such as waste electronic and electrical equipment and end-of-life vehicles. Concern was also expressed at the scheme years running from July rather than from April, as this could result in added complication for local authorities trying to meet targets. Several amendments were tabled during the Lords debates to change the date. During Report stage:

Lord Dixon-Smith: My Lords, when we discussed this part of the Bill in Grand Committee, there was general agreement that there was a potential problem. The key date from the point of view of the European directive is the July date on which the directive came into force, which is set out in the Bill. It has no other validity or relationship to anything else.

When we discussed how to record a waste disposal year, there was general agreement that local authorities in this country operate to a financial year from the beginning of April to the end of March. That is how we run our national accounts and everything else. All recording systems are based on that.

The purpose of the amendments is to put formally on the face of the Bill the fact that, preceding that date in July, the waste disposal year ended on 5th April along with local government and national practice. Therefore, we will not have to devise a new accounting year specifically to meet the European directive that consists of a period a little short of nine months from one financial year and three months and 17 days of another. That would be administrative nonsense, which we should be able to avoid.³⁰

Lord Whitty's response for the Government was that the dates were those specified in the Directive and it might not be possible to modify them, but the Government was waiting to hear from the Commission whether this would be possible:

We have given the matter considerable further thought. We have concluded that there are legal and practical reasons why the scheme years should not be amended as proposed.

The definition of a scheme year comes from the Landfill Directive. The directive requires reductions by the specified percentages by not later than 16th July in the specified years. So there is a target date. That could create a problem—I say this in passing—for local authorities because reducing the period would make it harder for them to meet the specified date.

The other matter to which noble Lords should have regard is that there is a system of quarterly reporting. The process of quarterly reporting will take to the end of June. So there would be a period when the information had to be available anyway. That would provide consistent obligations and data across member

³⁰ HL Deb 3 February 2003 c38

states and would accord with other requirements that appear to fall due on 16th July—as I have said, the quarterly reporting entitlement.

We were aware of the strength of feeling and of the concerns raised by noble Lord. We do not believe that their fears are justified. However, we have written to the Commission to seek clarification as to whether any alteration would be in line with its policy on this particular directive.³¹

A further issue on which there was some debate was the inflexibility of the formula used to calculate targets for scheme years should agreement not be reached between the Secretary of State and any of the devolved administrations. Proposals were put forward to introduce a provision to ensure that the amount of biodegradable municipal waste sent to landfill any particular scheme year could not be higher than that of a previous year. However according to Lord Whitty the Bill as it stood allowed for flexibility as it would give powers to the Secretary of State to set and amend targets as necessary.³²

2. Landfill Allowance Scheme

This part of the Bill deals with the allocation to waste disposal authorities of allowances to landfill biodegradable municipal waste and trading of these. *Clause 4* sets out the role of allocating authorities. The allocating authorities are set out as follows in Clause 24(1): For England, the Secretary of State; for Scotland, the Scottish Ministers; for Wales, the National Assembly for Wales and for Northern Ireland, the Department of the Environment of Northern Ireland.

Allocating authorities are responsible for setting allowances under Clauses 1 and 2 of the Bill. Allocations must be made before the year in question and must be published, together with an explanation of how allocations have been decided. Under *Clause 5* the authorities will have the power to alter allowances that have not been used, as long as they do not exceed amounts set out in Clause 1 or 2.

Clause 5 allows the allocating authority to make regulations to allow Waste Disposal Authorities to bank allowances for future years or borrow allowances for later years. However, this will not be allowed across target years. Breach of regulations would be an offence for which the disposal authority will be liable to a penalty. Under *Clause 7* the allocating authority may make regulations for allowances to be transferred or traded between disposal authorities from all participating countries. Transfers may be limited or suspended by the allocating authority. The regulations may also put in place a licensing scheme for brokers in allowance trading. *Clause 8* sets out the maximum penalties for offences created through regulations under clauses 6 and 7. Offences may be triable and punishable by a fine and imprisonment. Maximum imprisonment may not exceed 2 years.

³¹ HL Deb 3 February 2003 c35

³² HL Deb 17 December 2002 c9GC

Under *Clause 9* there will be a duty on disposal authorities not to exceed allowances for a given year. If they do so they would be liable to a civil financial penalty. If they do so on Directive target year or on a scheme year, and in this way contribute to the UK as whole missing the Directive targets, they will be liable for a supplementary penalty.

During the Lords' Second Reading debate on the Bill, Lord Whitty explained how the allowance scheme was intended to work:

Scheme details will be set out in regulations: each devolved administration will be able to produce its own scheme and decide on the allocation of allowances in its area. It will also have to decide whether to permit trading in its area. Those countries who do decide to take advantage will become part of a cross-border trading scheme.

There is an absolute duty on each waste disposal authority not to exceed the allowances which they hold, whether by initial allocation or as a result of a trade. However, no local authority will be obliged to trade: it may simply stay with its allotted allocation. Equally, the Bill gives flexibility for trading to be for no monetary value—simply a question of transfer by arrangement between the authorities.

However, we are not giving third parties the right to hold or trade landfill allowances. There are a number of reasons for this: first, we want opportunities for local authorities to trade surplus: secondly, because the targets will be difficult for the UK, so we do not want any possibility of allowances being "retired" out of the system. Neither do we want waste companies to purchase allowances and use them themselves; for example, for direct procurement. It is therefore confined to local authorities.

Details of each scheme are for the United Kingdom and my department in England and the devolved administrations. The Bill gives sufficient flexibility to allow for a variety of models. But each local authority will receive allowances which will represent maximum amounts that can be landfilled in each year.³³

a. Banking and Borrowing

The provisions for allowing the borrowing of allowances from years ahead drew criticism. The Government defended the need for local authorities to be able to borrow allowances to enable them to plan for waste management in the long term.

Lord Dixon-Smith highlighted the concerns regarding the borrowing of allowances:

³³ HL Deb 3 December 2002 c1035

A good authority—we are discussing good and bad authorities here—which does not send a great deal of biodegradable and municipal waste to landfill, or at least sends less than its allowance for the current year, will have a surplus. Under the proposals, it can bank that surplus for future years. Its allowance—the amount of waste that it is allowed to send to landfill—will reduce in those future years. However, if it is allowed to use its present good position to build up credits, there seems to be a disincentive built into the system for that authority—although its practice is good at present—to continue to improve. There is a disincentive for the authority to invest in the required new infrastructure or to devote energy and attention to improving its systems and working with waste collection authorities—if it is not one itself—to reduce the amount of waste collected.

There seems to be a disincentive built into the system. It will be interesting to hear the Government's view. They may say that, if it is a good authority now, it will want to continue to improve. However, given the financial pressures on local authorities, which will not go away, if they are already ahead of the game and can keep going for a further two years on the basis of the allowances that they are banking, they may decide to spend their money on something else, where the pressure is greater from the electors, the Government or all the other bodies that now police local authorities. There seems to be a disincentive, and it will be interesting to hear what the Minister has to say.³⁴

The Minister, Lord Whitty, responded that the incentive would be the fact that the disposal authorities have to meet their targets and that it was important to keep the option of borrowing available until the final format of the scheme was decided during consultation:

We acknowledge that some issues surrounding the inclusion of borrowing will need to be brought out in the consultation exercise and that risks are attached to banning borrowing completely at this stage. The balance needs to be kept. The allowance mechanism is intended as a trading scheme and it is vital that the market for trading has the opportunity to work effectively. Were we to exclude borrowing, we could make that more difficult to achieve, particularly if banking is to be permitted. The points made by Members of the Committee about the different circumstances of different waste disposal authorities underpin the importance of a trading scheme. It is also important that an overall scheme, which does not exclude matters such as this, should be available for consultation so that the whole issue can be seen in context.³⁵

This is a change from the Government position during the second consultation on allowances held in 2001, where it had originally indicated that it would not allow borrowing:

³⁴ HL Deb 17 December 2002 c30GC

³⁵ *ibid* c31GC

The Government's initial view is that borrowing is not a sustainable strategy to reduce reliance on landfilling and would, potentially, put at risk UK targets. It would make it possible for authorities to live within their permit allocations in the short term, without undertaking the actions which they will need to meet their targets in the long term. Given these difficulties it is proposed that no borrowing of permits is allowed in any year under the scheme.³⁶

The Environmental Services Association, the trade body for the UK's waste management industry, does not support the borrowing of allowances:

ESA supports the principle of trading. However, the Bill also allows a waste disposal authority to borrow additional capacity to landfill from the landfill allocations of preceding years, except for target years. This may mean that decisions and investment in technologies necessary to enable the UK to comply with the Landfill Directive might be deferred. Even with statutory recycling targets, if municipal waste continues to grow at 3% per annum, a waste disposal authority could feasibly landfill similar quantities of BMW in 2008 as in 2003.

b. Funding

Concern was expressed during the Lords Committee as to the cost to local authorities of implementing the legislation, with calls made to compensate authorities for introducing the scheme. The Minister, Lord Whitty, disagreed with this:

The obligations are to meet targets which are not only a European and a government requirement; I believe that all parties recognise them as being desirable. Therefore, it is not sensible for the Government to undertake to compensate the cost of authorities administering a scheme to meet that outcome. The penalties referred to by the noble Lord, Lord Stoddart—other than those for exceeding targets—are imposed on the waste disposal authorities in order to act as an incentive to comply with the requirements. Overall, I believe that all political parties are committed to those requirements. Therefore, we are arguing only about means. Penalties are one way of ensuring that the delivery takes place. Obviously individual local authorities will try to avoid the penalties. That means that the penalties must be more substantial than the cost of compliance.

None of that requires compensation. It certainly does not require compensation to collection authorities; nor, in my judgment, does it require compensation to disposal authorities. I would therefore resist the overall idea of compensation.

During further debate at Report stage Lord Hanningfield, highlighted estimates of the cost of implementing the legislation in the UK:

³⁶ DETR, *Tradable landfill permits consultation paper*, March 2001.
<http://www.defra.gov.uk/environment/consult/tradeperm/pdf/tradable.pdf>

The total cost for all the waste disposal authorities in the United Kingdom is about £15 million. I do not wish to give noble Lords a lecture on council tax, but they are all well aware of the current problems with regard to council tax levels. Local government is expected to pay for the provisions included in Bills such as the one we are discussing out of its existing funding. Given the demands imposed by education and social services, it is impossible for local government to find even the relatively small sum of £15 million.³⁷

In response Lord Whitty stated that the additional burden may have been exaggerated and that to large extent local authorities were already under an obligation to provide information to the Environment Agency on waste management. He added that it was important that resources were provided to authorities, through the block grant system as with other local authority funding. He went on to state:

I cannot give a quantum commitment otherwise I would be committing the Chancellor of the Exchequer to future expenditure well beyond the current term of this Parliament and possibly even of this Government. I am not in a position to do that. However, clearly, in the calculation of the EPCS element of the block grant one has to take account of the additional burdens that might be implied by additional legislation. I think that is as far as I can go.³⁸

c. Brokers

The Bill contains provisions for local authorities to be allowed to trade permits directly or through a licensed broker system. During Grand Committee in the Lords, an amendment was tabled by Lord Dixon-Smith to allow trade or transfer of allowances only directly between local authorities. This was rejected by the Minister, who went on to give an explanation of the possible role brokers would play:

The question is whether we should allow them. No, they will not be compulsory. Local authorities may well find that direct dealing is best. We are trying to introduce some transparency and flexibility into the system and it may be that some authorities find that it is helpful to have an agent or a system whereby a specialism grows up as the trade grows.

We do not seek to prohibit that in the Bill, but if such a profession is created, we seek to regulate it. That would seem sensible in the public interest; that is all that the clauses are about. The provision makes clear that regulations would need to provide that such brokers were licensed and subject to regulations and conditions of the licence. To return to the issue of penalties, breach of those licence conditions would be an offence.³⁹

³⁷ HL Deb 6 March 2003 c927

³⁸ *ibid* c930

³⁹ HL Deb 17 December 2002 c52

The issue was revisited during the Report stage, when an unsuccessful amendment was tabled to remove section (3)(f) of clause 7, dealing with brokers. In addition Lord Lucas expressed the view that there was no need to license brokers at all. Lord Whitty responded that public authorities need to ensure that whoever was trusted with dealing in allowances would operate in a way that conformed to public service principles.

d. Penalties

Originally, penalties for waste disposal authorities contributing to the UK not meeting landfill targets were only applicable to target years. The Government tabled an amendment at Report stage to extend penalties to authorities who contributed to the UK failing to meet its EU targets by failing their own targets in intermediate years. The amendment was agreed⁴⁰

There were also calls for fines imposed on waste disposal authorities to be hypothecated into improving waste management within authorities. Lord Whitty noted the attraction of keeping money within the system, though he highlighted that the Treasury would be likely to oppose this approach. He also mentioned the Strategy Unit's report, whose recommendations about finance are currently being considered inter-departmentally.⁴¹

The Local Government Association does not support the introduction of penalties for authorities that fail to meet their targets as they see this as diverting funds that are needed to tackle waste:

The proposals contained in the Bill for penalties for local authorities – for failing to keep within targets, for abuses of the proposed trading system, and for failing to provide required information – are considered unhelpful.

The LGA is concerned that the introduction of a penalty system may actually make it harder for some waste disposal authorities to meet targets because penalties will divert funds away from addressing the real challenges of providing alternatives to landfill. It is hard to avoid the view – taking account of the widely acknowledged difficulties in moving at speed away from traditional landfill to alternative modes of waste disposal (such as fundamental changes needed in public perceptions in relation to waste; delays in obtaining planning approvals for waste facilities; time before emerging new technologies come onstream) – that local authorities are being unfairly penalised for a failure on the part of Government to have in place a waste strategy capable of complying with EU requirements.

The LGA would therefore support amendments to remove the penal element from the Bill.⁴²

⁴⁰ HL Deb 3 February 2003 c66

⁴¹ HL Deb 18 December 2002 c61GC

⁴² LGA Briefing, *Waste and Emissions Trading Bill. Lords Report Stage*, 3 February 2003

3. Scheme Operation and Monitoring

Clauses 10 and 11 of the Bill would confer on the allocating authority the duty to appoint, through regulations, a person to be the monitoring authority for its area, lay out the functions of the monitoring authority and confer powers on an allocating authority to impose additional functions. Under *Clauses 12 and 13* regulations may also be made by the allocation authority to impose a duty on waste disposal authorities and landfill operators to keep and provide records, and impose penalties on authorities who fail to comply. *Clause 14* would allow monitoring authorities and allocating authorities to share monitoring information. The Government has already made clear during consultation that the Environment Agency will be the monitoring authority for England.

Under *Clauses 15 and 16*, the allocating authorities would be able to make regulations requiring monitoring authorities to maintain a register of information acquired in the exercise of their function and to make this public.

During Second Reading Lord Whitty summarised how this part of the Bill would be implemented:

The schemes will be monitored by monitoring authorities appointed for each country in the United Kingdom. They will record each transfer on a central register and the trade will not have taken place until the record is made. Using the regulators has the additional benefit of least burden and cost as they are already responsible—or in the case of Northern Ireland soon will be—for regulating landfills and collect information from landfill operators and local authorities, so there is no duplication.

If a waste disposal authority landfills more biodegradable municipal waste than it holds allowances for, there will also be civil financial penalties. These penalties will be set out in regulations. They will need to be set at a sufficient level to ensure that the local authority has the incentive to divert from landfill or buy allowances rather than breach the limits.⁴³

4. Strategies for Reducing Landfilling of Biodegradable Waste

Clauses 17 to 20 of the Bill would require the preparation of a biodegradable waste strategy for all biodegradable waste sent to landfill in England, Scotland, Wales and Northern Ireland by the appropriate authority in each country. This is in compliance with the requirements of the Landfill Directive.

These strategies would have to include details of how targets set out in Clauses 1 and 2 of the Bill will be met by means of recycling, composting, biogas production, materials recovery and energy recovery.

<http://www.lga.gov.uk/Briefing.asp?lsection=0&id=SX116F-A7815475>

⁴³ HL Deb 3 December 2002 c1035

Lord Whitty observed during Second Reading that the strategies have mostly been prepared. However the Environment Services Association does not agree that this is the case:

The Bill indicates Waste Strategy 2000 will serve as the Biodegradable waste strategy. However, the status of Waste Strategy 2000 is unclear following the Strategy Unit's report into Waste Policy. In addition, Waste Strategy 2000 sets recycling/recovery targets for municipal waste rather than biodegradable municipal waste.⁴⁴

5. Waste Management in Wales

Clauses 29 and 30 of the Bill would introduce the power for the National Assembly for Wales to make regulations for the preparation of statutory waste management strategies by local authorities. They will also have the power to require local authorities to supply them with information on waste management. The intention to use these powers was set out in *Wise about Waste: The National Waste Strategy for Wales*, published in June 2002.⁴⁵

6. Successful Non-Government Amendments

During the Third Reading of the Bill, two successful non-Government amendments were tabled. The first amendment (No 13) was moved by Lord Hanningfield .

Page 11, line 35, at end insert—

"() Within the context of the strategy required by section 16, a duty shall be placed on a waste disposal authority and a waste collection authority within a given area to produce and publish a Joint Municipal Waste Strategy.
() Within the context of the Joint Municipal Waste Strategy, a waste disposal authority may exercise a power of direction to a waste collection authority to specify the type of segregated waste to be delivered in support of meeting agreed targets for the recovery and recycling of dry recyclable material and biodegradable waste."

The Local Government Association in its briefing for the Third Reading of the Bill gave its support to such a proposal:

One particular proposal (originally contained in *Waste Strategy 2000*) which the LGA would like to see now taken forward is for WDAs to be empowered to require WCAs to deliver materials to them in segregated form. This would assist the achievement of recycling targets, and enable WDAs to cut down residual

⁴⁴ Environment Services Association, 13 March 2003

⁴⁵ National Assembly for Wales, *Wise about Waste: The National Waste Strategy for Wales (part one)*, June 2003 <http://www.wales.gov.uk/subienvironment/content/wstetext-e.pdf>

waste arisings, and consequently reduce dependency on landfill, in line with the Bill's intentions.⁴⁶

The Minister did not support the amendment:

Our approach has not been that of imposing statutory responsibilities. We have encouraged preparation of joint municipal waste strategies. We have issued guidance and given encouragement to develop such strategies and guidance on how to prepare them. The guidance sets out in broad terms what such strategies should cover and the partnerships needed to develop sustainable waste management among the authorities in an area.

As I said, some authorities have clearly risen to that challenge. It is also true that the Strategy Unit document, *Waste Not, Want Not*, recommends that joint municipal strategies merit further consideration. The Government are indeed considering implementing that part of the report. However, we must also bear in mind that local authorities are drawing to the Government's attention the number of statutory strategies that various pieces of legislation have imposed on them and suggesting that we should be reluctant to impose more.⁴⁷

The Government tabled its own amendment, similar to the provisions in the second part of Lord Hanningfield's amendment, giving waste disposal authorities the power to direct how waste should be delivered to them by waste collection authorities, in order to facilitate recycling and recovery. The amendment only allows the use of these powers to help the authority comply with statutory targets. On introducing the Government amendment, Lord Whitty, stated the following:

We have discussed the need for a good relationship between the waste disposal authorities and the waste collection authorities in areas with two-tier authorities. We all accept that there is a need for that to be clearer.

The amendment would give a power to allow counties to direct districts as to the form in which waste should be delivered. That is in line with the *Waste Strategy 2000*. The amendment would amend Clauses 48 and 51 of the Environmental Protection Act 1990 to allow for that direction, which is already there for a parallel purpose. The amendment would extend a county's existing powers to give directions to a district by providing that such directions may include requirements about the separation of waste as delivered to the county.

The amendment to Clause 48 will place the district under a duty to comply with any directions about the separation of waste. The amendment provides that a county can use that power only if it considers it necessary for assisting it to comply with any obligation imposed on it by or under any enactment. That will include enactments under this Bill, other Bills and the Local Government Act 1999.⁴⁸

⁴⁶ LGA Briefing, *Waste and Emissions Trading Bill Lords Report Stage*, 3 February 2003
<http://www.lga.gov.uk/Documents/Briefing/waste%20bill%20-%20lords%20report.pdf>

⁴⁷ HL Deb 6 March 2003 c938

⁴⁸ HL Deb 6 March 2003 c954

Recommendation 31 in the Strategy Unit report included a review of measures to encourage local authorities (and tiers of authorities) to work together more effectively. This included statutory Joint Municipal Waste Strategies and also the proposal to give disposal authorities more power over how waste is delivered to them.⁴⁹

The second successful amendment (No 18) was tabled by Lord Dixon-Smith:

Page 15, line 23, at end insert—

"() In this Chapter "composting" includes a requirement to maintain selected biodegradable waste at 98 degrees celsius for a minimum of two hours before storing."

Peers expressed their concerns that inadequate composting of catering waste before its use on agricultural land could lead to another outbreak of Foot and Mouth Disease. In his response Lord Whitty outlined the problems this could cause when trying to compost waste:

I imagine that a number of noble Lords have received a letter from the Composting Association. It indicates that if the bulk of catering waste were subjected to the kind of treatment suggested in the amendment, it could in fact have counter-productive effects on safety. Heating waste to such high temperatures can destroy the beneficial micro-organisms that should be encouraged by the composting process, thus rendering the compost ineffective. In addition, destruction of good microbes through heating can increase the susceptibility of the waste to an increase of pathogenic microbes such as salmonella. It is by no means clear that the proposal would guarantee greater safety than the provisions of the by-products regulations already in place.⁵⁰

Both amendments passed on division.

II Part 2 - Trading of Emission Quotas

A. The Carbon Trading Scheme

The UK was the first country to launch an internal carbon trading scheme.

In 1998, the Advisory Committee on Business and the Environment reported to the Government on the issue of climate change. Among their recommendations was that:

⁴⁹ Strategy Unit, *Waste Not, Want Not*, November 2002

<http://www.cabinet-office.gov.uk/innovation/2002/waste/report/index.html>

⁵⁰ HL Deb 6 March 2003 c946

Flexible international mechanisms such as trading should be established as soon as possible on a business to business basis. The UK should take an active role, in establishing these mechanisms and stay closely involved in the international negotiations on trading.⁵¹

On 30 June 1998, an Emissions Trading Group was established at a meeting of Chief Executives organised by the CBI (Confederation of British Industry) and ACBE (the Advisory Committee on Business and the Environment). The work of the ETG related primarily to the establishment of a carbon emissions trading scheme within the UK to ready the UK for the potential establishment of an international emissions trading scheme under the Kyoto Protocol to the Convention on Climate Change.

The Emissions Trading Group presented proposals to the Government in October 1998. These were welcomed by the Government:

The Government congratulates the businesses and organisations involved on the very considerable progress which has been made since we gave our backing to this initiative on 30 June. The Emissions Trading Group set up at that time has addressed the key issues relevant to the design of a trading scheme. It has reached some very helpful and constructive conclusions which we are considering in some detail. It is of great benefit to know the principles supported by this group.⁵²

In June 1999, the Minister for Environment, Mr Meacher, urged business to get involved:

"This is a key moment for both business and government in taking forward together policy on climate change.

"I believe that in many ways UK business is a world leader in its response on climate change. In taking this lead, it can gain major advantages for our industry and our society.

"The development of a domestic emissions trading scheme offers us the opportunity to make significant progress in reducing our greenhouse gas emissions, but in a way which allows cost-effective approaches to be employed across industry. And there are other, more strategic business opportunities to be exploited in establishing a scheme."⁵³

On 24 July 2000, the Government announced £30 million to kick-start the pilot trading scheme:

The incentive will enable companies to take on the risks associated with challenging emissions reduction targets, ensuring that the emissions trading

⁵¹ DETR Press Release 264/ENV, *Climate change report presented to the Prime Minister*, 31 March 1998

⁵² DETR Press Release 1035, issued Jointly with DTI and HM TREASURY, *Government welcome for proposed UK emissions trading scheme*, 27 October 1999

⁵³ DETR Press Release 631, *Government urges UK business to embrace carbon emissions trading scheme*, 30 June 1999

scheme will deliver genuine environmental improvement. It will allow targets to be taken up from 2002, with trading getting underway during 2001.⁵⁴

A consultation paper was issued in November 2000⁵⁵ and responses to the consultation published in May 2001 highlighted general agreement on many aspects of the scheme, including taking account of past emission levels and recent emission decreases, credits to be given for emission reduction projects, and for liability to lie with the seller of permits rather than the buyer. It was also agreed that carbon sinks, for example forests, should not be included in the arrangements and that carbon reductions from additional energy efficiency and renewable energy over and above current obligations should be able to be traded.⁵⁶

The responsibility for climate change became part of DEFRA's remit after the 2001 General Election and the new Department launched the voluntary scheme in August 2001:

Under the scheme participants sign up to delivering emission reduction targets which can either be made by cuts in-house or by buying and selling emission 'allowances' on the market to meet those targets. If firms can reduce emissions cheaply and beat their targets, they can sell the surplus allowances or bank them for future use.

The government has pledged up to £215m over five years from 2003-04 to provide incentive payments for companies to join the scheme. This will be allocated through an auction next year.⁵⁷

The framework of the scheme is outlined in a document available from the DEFRA website.⁵⁸ Companies that are regulated under Part A of the Pollution Prevention and Control Regulations⁵⁹ were eligible to take part in the scheme. The scheme can be summarised as follows:

- (i) *Entry into the Scheme*. This can be via one of four routes:
- with a voluntary emissions target taken on through the financial incentive;
 - through an existing target set through a Climate Change Agreement;
 - via an approved emission reduction project;

⁵⁴ DETR Press Release 491, *£30m kick starts UK emissions trading scheme*, 24 July 2000

⁵⁵ DETR Consultation, *A Greenhouse Gas Emissions Trading Scheme for the United Kingdom*, November 2000 <http://www.defra.gov.uk/environment/consult/ggetrade/index.htm>

⁵⁶ DEFRA, *Analysis of Responses to Consultation Document: A Greenhouse Gas Emissions Trading Scheme for the United Kingdom*, May 2001 http://www.defra.gov.uk/environment/consult/ggetrade/resp_analysis/index.htm

⁵⁷ DETR Press Release 100/01, *£215m scheme offers UK firms chance to be world leaders*, 14 August 2001

⁵⁸ <http://www.defra.gov.uk/environment/climatechange/trading/pdf/trading-full.pdf>

⁵⁹ SI 2000/1973, *Pollution Prevention and Control (England and Wales) Regulations 2000* <http://www.legislation.hmso.gov.uk/si/si2000/20001973.htm> and Scottish Statutory Instrument 2000/323, *The Pollution Prevention and Control (Scotland) Regulations 2000* <http://www.scotland-legislation.hmso.gov.uk/legislation/scotland/ssi2000/20000323.htm>

- by simply opening a trading account.

(ii) *Allocation of allowances.* Target Holders will be allocated with allowances either at the start or end of each compliance period – depending on the nature of their target. Those responsible for carrying out emission reduction projects will be allocated project ‘credits’ which can be traded in the Scheme and used to meet all targets. Other Participants will have to buy any allowances they wish to hold.

(iii) *Trading allowances.* All Participants in the Scheme will be able to trade allowances at any time. The only requirement is that they hold an account in the registry.

(iv) *Reporting and compliance.* Target Holders are required to report their performance at the end of each compliance period. Their performance and allowance holdings will be assessed against their target.⁶⁰

The framework document goes on to discuss details of eligibility, such as what emissions can be counted, definition of baseline emissions and adjustments that might have to be made to source lists, baselines and targets due to changes in participating companies.

For *direct participants*,⁶¹ the timetable for entry to the scheme was as follows:

- From August to 31 December 2001: pre-registration period for those considering entering the Scheme;
- November 2001: draft rules of the Scheme published;
- December 2001: rules of the Scheme and programme for the auction published;
- 1 January 2002: first compliance period begins;
- January 2002: registration period and auction bids from those wishing to enter the Scheme;
- 1 April 2002: successful Direct Participants enter the Scheme;
- 31 December 2002: first compliance period ends;
- 1 January 2003 to 31 March 2003: first reconciliation period;
- April 2003: first incentive payments made to Direct Participants in compliance.⁶²

And for *agreement participants*,⁶³ the timetable for entry was

- 1 April 2001: Climate Change Levy began;
- 1 January 2002 to 31 December 2002: first milestone year begins (companies may have chosen to bring this period forward by up to three months);
- April 2002: Agreement Participants can register with the ETA and open a compliance account in the registry;
- 31 January 2003: end of first reconciliation period for Agreement Participants.

⁶⁰ *Framework for the new emissions trading scheme*, DEFRA,
<http://www.defra.gov.uk/environment/climatechange/trading/pdf/trading-full.pdf>

⁶¹ Direct participants volunteer to take absolute emission reduction targets in return for financial incentives. An auction is used to allocate targets and incentives.

⁶² *Framework for the new emissions trading scheme*, DEFRA,
<http://www.defra.gov.uk/environment/climatechange/trading/pdf/trading-full.pdf>

⁶³ Agreement participants agree targets, absolute or relative, for individual industrial units.

It was possible to participate in the trading scheme without taking on emission reduction targets. It will be possible to partake in stand-alone projects that lead to quantified reductions in greenhouse gases. These projects are subject to prior approval by the government and while they cannot be based in the domestic sector are hoped to stimulate emissions reductions in areas not covered by direct participation.

It is also possible to participate simply by trading in allowances/credits generated through the scheme. Such participants have to register with the Emissions Trading Authority which will be responsible for the day to day working of the scheme.

The ETA will

- issue allowances to Target Holders in the Scheme;
- police compliance with the rules of the Scheme;
- reconcile allowance holdings and emissions data after each compliance period;
- take action against Direct Participants that are not in compliance;
- operate the registry of allowance holdings;
- approve emission-reduction projects; and
- issue credits to project owners.⁶⁴

Part 2 of the *Waste Emissions and Trading Bill* has been introduced by the Government to allow for a system of financial penalties that can be imposed on those found not in compliance with the scheme. This was not in place before the start of the scheme and, in the interim, failure to hold sufficient allowances to cover emissions will result in withholding of incentive payments and reduced allowances in subsequent periods. Full details on the interim and proposed statutory penalties are in the framework document. The provisions of the Bill are discussed below.

1. Provisions of the Waste and Emissions Trading Bill

The *Pollution Prevention and Control Act 1999* (PPC Act) was introduced to:

...make provision for implementing Council Directive 96/61/EC and for otherwise preventing and controlling pollution; to make provision about certain expired or expiring disposal or waste management licences; and for connected purposes.⁶⁵

The Act already contained the ability to make schemes for the 'trading or other transfer of quotas' but there was no provision for introducing financial penalties for non-compliance with such schemes.

⁶⁴ *Framework for the new emissions trading scheme*, DEFRA,
<http://www.defra.gov.uk/environment/climatechange/trading/pdf/trading-full.pdf>

⁶⁵ Long Title of *Pollution Prevention and Control Act 1999*
<http://www.hms.gov.uk/acts/acts1999/19990024.htm>

The Waste Emissions and Trading Bill will not therefore provide any details of a trading scheme or penalty provisions therein but instead *Clause 31* would amend Schedule 1 of the PPC Act such that the Secretary of State will be allowed to include penalties within any trading scheme introduced by regulation for contraventions of that scheme.

Clause 32 would give a statutory basis for the penalties laid out in the UK Greenhouse Gas Trading Scheme. Those already signed up to the scheme would become liable to the penalties that were outlined therein. When the scheme was implemented, it was announced that while the penalties listed could not immediately be applied immanent legislation would put them on a statutory basis and that the legislation would be retrospective.

The penalty is £30 per tonne of excess emissions:

...a direct participant's excess emissions will be the amount in tonnes of carbon dioxide equivalent of verified emissions, during the year for which compliance with paragraph (1) is being assessed, for which allowances were not retired under rule C7.⁶⁶

During its passage through the Lords these clauses attracted no debate.

⁶⁶ http://www.defra.gov.uk/environment/climatechange/trading/pdf/trading-rules_rev2.pdf

Appendix 1 – Tradable Landfill Permits Consultation

Summary of the preferred Government options

Permits

3.16 The Government's initial views are that the permits should be designed as electronic

- Having interim targets set on an annual basis, before and in between National target years
- Be issued once and for all for each year for the period up to 2020
- Targets would be set in advance and, once set, would not be changed without adequate consultation and time allowed for any change
- To provide flexibility it is proposed that local authorities are able to bank but not to borrow permits in interim years. It is proposed that neither banking nor borrowing would be allowed into or across a target year.

Allocation

4.30 The Government's initial view for the allocation is that:

- There should be a single allocation method which would determine, for each waste disposal authority, targets for each year including those in which National targets have been set by the Directive.
- This allocation method should cover the whole period that the permit system is in operation up to 2020.
- Both the initial allocation of permits and the allocation of targets should be on the basis of the amount of BMW landfilled (option A1), requiring every waste disposal authority to make a proportionate reduction in the amount of waste they landfill to meet their targets.
- The total landfilling of BMW permitted in the initial year for each authority would equal the amount of BMW landfilled in the most recent year for which there was data. Targets for each authority would be reduced linearly each year to meet the targets required by the directive.

Trading

5.24 The Government's initial view is that:

- transfers of permits from one authority to another will only be effective once entered on the Environment Agency's database
- authorities will be able to trade directly with each other or use a broker to facilitate trades
- only waste disposal authorities will be able to own permits; third parties will not have this right
- there should be no price restrictions on the trade in permits

Monitoring

A. A Central Register giving details of permits held by each authority –

- (i) Power to restrict access to the information contained on the database

B. Landfill Returns

- (i) Waste disposal authorities will be obliged to submit returns to the Environment Agency providing the following information:

- name of waste disposal authority
 - tonnage of municipal waste landfilled
 - biodegradable content of municipal waste landfilled
- (ii) The Environment Agency will have powers to:
- require waste disposal authorities to submit annual returns on waste landfilled
 - request reasonable information it requires at any time from waste disposal authorities to monitor amount of biodegradable waste sent to landfill

C. Transfer of Permits

(i) The purchasing WDA will have an obligation to advise the Agency of the transfer of permits. The Agency will certify and verify the transfer on the central database. If transferred the following details will need to be provided by the selling authority to enact the transfer:

- The details of the selling and buying authorities
- The date of the transaction
- The serial number and tonnage of the permits traded
- Price (will be zero for permits transferred for no monetary value)

(ii) Power to the Environment Agency to establish and operate a trading register

(iii) Selling authority to enact automatic transfer of permits on the central register

D. Monitoring of the biodegradable content of municipal waste

(i) Biodegradable content assumed to be 60% of municipal waste. Details provided under the obligation for waste disposal authorities to submit landfill returns

(ii) Biodegradable content of municipal waste to be kept under review

Sanctions

7.18 The Government's initial views are that the sanctions system should allow:

- A civil financial penalty to be imposed where an authority landfills more waste than it has permits for
- That penalty could be waived or suspended conditional on the authority taking appropriate action
- The achievement of the targets under the permit system would be subject to the Best Value regime
- This could include intervention through Best Value⁶⁷

⁶⁷ DETR, *Tradable landfill permits consultation paper*, March 2001.
<http://www.defra.gov.uk/environment/consult/tradepem/pdf/tradable.pdf>

Appendix 2- DEFRA response to the Select Committee on Delegated Powers and Regulatory Reform

WASTE AND EMISSIONS TRADING BILL [HL]

Supplementary Memorandum by the Department of Environment, Food and Rural Affairs

171. This memorandum supplements the Memorandum made by the Department in respect of the Waste and Emissions Trading Bill and addresses the concerns expressed by the Committee in paragraphs 22 to 29 of its First Report 2002-03 dated 27 November 2002.

PART 1 CHAPTER 1 - EXTENT OF DELEGATION

172. The Department acknowledges that this Bill is unusual to the extent that it confers wide delegated law-making powers on the appropriate authorities for each country of the UK. However the Department considers that there are good reasons why the Bill is structured in this way.

173. By way of background, the Bill is intended to give legal effect to the legal obligations imposed by Article 5(1) and (2) of the Landfill Directive.[3] Article 5(2) of the Directive requires Member States to reduce the amount of biodegradable municipal waste sent to landfills to 75% of the amount produced in 1995 by 2006, to 50% by 2009 and to 35% by 2016. There is a 4 year derogation of this target for Member States which sent to landfill more than 80% of their collected municipal waste in 1995. The UK qualifies to take advantage of this derogation.

174. Environmental protection is generally a devolved matter:

- Environmental Protection is not a reserved matter under Schedule 5 of the Scotland Act 1998;
- The majority of the functions under the Food and Environment Protection Act 1985, the Environmental Protection Act 1990 and the Environment Act 1995 were transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999 (SI No 1999/672);
- Environmental Protection is not an excepted matter under Schedule 2 or a reserved matter under Schedule 3 to the Northern Ireland Act 1998.

175. The Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly are each responsible for implementing Community obligations in so far as they have power to do so.[4] Where the obligation is a quota obligation which does not relate separately to Wales, Northern Ireland or Scotland, the obligation to implement can pass if an Order is made which creates a separate obligation for that country.[5]

176. HMG and the administrations of Scotland, Northern Ireland and Wales have agreed that each territory should bear its share of the Directive targets. The amount that the UK as a whole is permitted to landfill therefore needs to be divided between the countries of the UK. General powers enabling a proportion of Community obligations to be transferred to each administration are contained in section 106 of the Government of

Wales Act 1998, section 106 of the Scotland Act 1998 and section 27 of the Northern Ireland Act 1998.

177. In the Department's view these general powers are not sufficient for the purposes of this Bill for the following reasons:

- Allocating shares of the UK target to devolved administrations is a key part of the Bill and provides a link between the strategies and their implementation. It is necessary for the power to be tailored to the specific circumstances that may be encountered in giving effect to the landfill allowance scheme;
- The Department considers that it is important to set maximum amounts in years which are not target years under the Landfill Directive (defined as "scheme years" under clause 22 of the Bill) in order to encourage the reduction of biodegradable municipal waste in preparation for meeting the Directive's targets in target years. However, it is doubtful whether the general powers mentioned above would allow the Secretary of State to set maximum amounts for non-target years, as is envisaged in clauses 2 and 3 of the Bill, as these are not (unlike amounts in target years) directly derived from Community obligations;
- Although section 106(3) of the Government of Wales Act 1998 and section 27(4) of the Northern Ireland Act 1998 expressly provide that an Order may set staged targets (i.e. the time by which any part of the obligation is to be achieved) they do not provide for any other variation in the form or character of targets. It follows that this might be taken to be the only permissible deviation from a fixed and certain quantity. This would be consistent with statements in the House of Commons during debates on those Acts on the need for 'fixed positions' to be established through such orders;
- As regards Scotland, the Scotland Act 1998 makes no express provision for staging targets over time and therefore it may not permit UK Ministers to set for Scotland a timetable for compliance with its part of a Community obligation other than the timetable set down in the Community obligation[6];
- For maximum amounts for target years to be set using the general powers in section 106 of the Government of Wales Act 1998, section 106 of the Scotland Act 1998 and section 27(1) of the Northern Ireland Act 1998, but for the maximum amounts for non-target years to be set under the Bill would create complexity and possibly confusion.

178. The Department is therefore of the view that specific powers are necessary in the Bill to allocate targets to each country of the UK for both Directive target years and non-target years (clauses 1 and 2). The Department recognises the importance of regulations made under clause 1 and 2. Accordingly the Bill provides for such regulations to be subject to the affirmative resolution procedure.

179. As regards the setting up of a landfill allowances scheme (clauses 4 to 15), the Department considers that there are good reasons why the Bill should set out a framework for a landfill allowance scheme leaving the details of the scheme to be established in subordinate legislation made by the appropriate authority in each country of the UK.

180. The Scottish Parliament can and, prior to the suspension of devolution in Northern Ireland, the Northern Ireland Assembly could make primary legislation in all areas except

where they are specifically precluded from doing so (section 28 Scotland Act 1998 and section 5 of the Northern Ireland Act 1998). By convention the Westminster Parliament will not legislate in devolved areas for Scotland or Northern Ireland without the agreement of the Scottish Parliament or the Northern Ireland Assembly.

181. Whilst it would have been possible for Scotland, at least, to legislate in its jurisdiction, the Department and the Scottish Executive considered that a uniform approach across the UK was preferable to ensure compatibility between the schemes in the different countries of the UK. In particular this is necessary if cross-border trading is to be permitted.

182. The Scottish Parliament has consented to the Bill (the Sewel motion was passed in the Scottish Parliament on 28 November 2002). Prior to the suspension of devolved government in Northern Ireland on 15 October 2002, it was expected that the Northern Ireland Assembly would indicate its consent to be included in the Bill by passing a similar motion. The suspension of devolution means that this is no longer necessary.

183. The position is different in relation to Wales. The National Assembly for Wales can make subordinate legislation but not primary legislation. It is the Department's policy, in line with the principles of devolution, that the NAW should have the power to establish the details of the landfill allowance scheme for Wales. The only way to do this is for the Bill to provide regulation-making powers for the NAW to exercise.

184. It would, in theory, have been possible to deliver this aspect of the policy by a Bill setting the detail of the scheme in England, Scotland and Northern Ireland but leaving the detail of the scheme to be set by delegated legislation made by the National Assembly for Wales. Scotland and Northern Ireland (if devolved government were restored) would have remained free to adopt in future primary legislation amending the Act. However, this would have led to a strangely unbalanced Act, setting the detail of the scheme in primary legislation for England, Scotland and Northern Ireland, but leaving the detail to delegated legislation in Wales. It would also, in effect, tightly constrain the power of the National Assembly of Wales, who would have to make a scheme compatible with the details already set for England and Scotland and Northern Ireland. This structure would also make very difficult any future changes in the schemes, which will need to be consistent across the UK if trading is to be allowed.

185. For these reasons it was decided that the Bill should set out the framework for the scheme with each country then able to establish the detailed provisions for its area.

CRIMINAL OFFENCES

186. Clauses 6(3)(j) and 7(3)(1) permit regulations providing for the borrowing and banking and trading of landfill allowances to create offences.

187. Examples of offences which may be created under clause 6 and 7 include:

- Acting as a broker without a licence or breaching the terms of the licence (clause 7 only)
- Knowingly or recklessly providing false or misleading information to the monitoring authority.

188. The Department notes the concerns raised by the Committee in paragraph 27 of its First Report and the Department is considering further the maximum penalties currently provided for in clauses 6 and 7 of the Bill.

189. As the Bill is implementing an EC obligation, the Committee may consider that an appropriate precedent would be the penalties permitted under the European Communities Act 1972. Paragraph 1(1) of Schedule 2 to that Act provides that regulations made under section 2(2) of that Act may not "create any new criminal offence punishable with imprisonment for more than two years or punishable on summary conviction with imprisonment for more than three months or with a fine of more than level 5 on the standard scale^[7] (if not calculated on a daily basis) or with a fine of more than £100 a day." Following this precedent the maximum penalty on indictment for offences created by regulations under clauses 6 and 7 could be two years imprisonment or an unlimited fine.

PENALTIES

190. Clauses 6(3), 7(3), 8(2), 10(3) and 11(3) provide for penalties and clause 8(3) provides for a supplementary penalty. The level of penalties and supplementary penalties are to be set by regulations under clause 25. Such regulations may specify the amount of the penalty or provide rules for calculating the amount.

191. The Bill does not specify a maximum penalty for which regulations under clause 25 may provide, nor does it indicate how such penalties will be calculated. The principle is that the financial penalty should be sufficiently high to deter a waste disposal authority from breaching the requirements of the landfill allowance scheme and in particular the duty under clause 8 not to landfill more than is permitted under the allowances it holds. In respect of Article 8, the amount of penalties should make it more economically attractive for waste disposal authorities to adopt other solutions (such as increasing recycling or, where permitted, purchasing allowances from other waste disposal authorities) to avoid breaching the requirements of the scheme and therefore being liable to pay a penalty.

192. However there are good reasons why the Department considers that a maximum or a formula for the calculation of penalties should not be included in the Bill.

- Firstly it is essential that there is some flexibility in setting the level of penalties. If trading of landfill allowances is permitted, the market price for allowances will fluctuate and therefore the penalty needs to be higher than the market price in order to continue to deter waste disposal authorities from failing to comply with the requirements of the scheme. It is difficult to predict what the market price will be in advance.
- In addition a formula expressed in terms of market price would be unlikely to work as there may be difficulties in obtaining price information and allowances may be traded for benefits other than money.
- This is a devolved matter and therefore the Department considers that the amount of penalties is properly a matter for the administrations of each country of the UK to determine. The amount of penalty which is appropriate may vary in accordance with the details of the scheme established by each country under regulations, in particular, whether or not trading of landfill allowances is permitted.

193. The approach taken in relation to penalties for emissions quota trading schemes is similar to that taken for penalties in relation to landfill allowance trading and clause 31 does not set a maximum for the penalties which may be included in trading schemes authorised by regulations under the Pollution Prevention and Control Act 1999. However, the principle behind such penalties is the same as that set out in paragraph 21 above. The Department considers that, in addition to the reasons cited in the first two bullet points in the previous paragraph, it would be inappropriate to set a maximum or formula at this time because the PPC Act powers which clause 31 amends can be used to establish trading schemes for a wide range of pollutants and situations and that no single maximum or formula would be suitable for all pollutants.

December 2002

3 Council Directive 1999/31/EC (OJ L 182, 16.7.99, p.1).

4 Section 106(1) of the Government of Wales Act 1998, paragraph 7(2)(a) of Schedule 5 to the Scotland Act 1998 (see also section 29(2)(d)) and paragraph 3(c) of Schedule 2 to the Northern Ireland Act 1998 (see also section 6(2)(d)).

5 Section 106(3) of the Government of Wales Act 1998, section 106 of the Scotland Act 1998 and section 27(1) Northern Ireland Act 1998.

6 If the UK takes the full four year derogation, the Landfill Directive requires a reduction in the amount of biodegradable municipal waste going to landfills to 75% of the amount produced in 1995 by 2010, to 50% by 2013 and to 35% by 2020.

7 £5,000 (see section 5 of and Schedule 1 to the Interpretation Act 1978 and section 37(2) and (3) of the Criminal Justice Act 1982 as amended by section 17 of the Criminal Justice Act 1991).