

A Direction given by
the Secretary of State for Energy and Climate Change
to the Environment Agency
under section 40 of the Environment Act 1995

Introduction

On 25 January 2012 Murco Petroleum Ltd. (“the Claimant”) brought a claim for Judicial Review against the Environment Agency (“the Agency”), as First Defendant, and the Secretary of State for Energy and Climate Change (“the Secretary of State”), as Second Defendant, seeking an order quashing the decision of the First Defendant to issue a civil penalty notice dated 26 October 2011 pursuant to regulations 39 and 41(2) of the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (“the 2005 Regulations”), or alternatively a declaration that regulation 39 was invalid in that it imposed strict liability to the penalty in all circumstances, as well as being incompatible with Article 6 of the European Convention on Human Rights. The Regulations transpose Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community (“the Directive”). In so far as Article 16(3) of the Directive required such strict liability, the Claimant alleged that this provision of the Directive was itself invalid, and that a reference on that question should be made to the European Court of Justice. The proceedings were stayed pending the Claimant’s appeal to the Welsh Ministers under regulation 32(3)(e) of the 2005 Regulations; following the dismissal of that appeal the Claimants in November 2012 served an Amended Detailed Statement of Grounds, joining the Welsh Ministers as the Third Defendant.

In December 2012 the Secretary of State made and laid before Parliament a new set of Regulations – the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (“the 2012 Regulations”) – implementing the Directive in respect of Phase 3 of the EU Emissions Trading Scheme commencing on 1st January 2013. It is implicit in regulation 54 of those new Regulations that the Secretary of State no longer considers that Article 16(3) of the Directive requires strict liability in circumstances such as those of the Claimant (where a failure to surrender sufficient emissions trading allowances resulted solely from an inadvertent under-reporting of emissions in the verified emissions report for the relevant year, which was then brought to the attention of the regulator).

Furthermore the Secretary of State proposes to amend the transitional provisions of the 2012 Regulations in order to enable operators who have not yet been served a penalty notice under the 2005 Regulations to take advantage of that revised approach to the implementation of Article 16(3) of the Directive.

In those circumstances the Secretary of State wishes to reach an agreed settlement of the Judicial Review proceedings, and the Claimant has indicated that it is willing to withdraw its claim on condition that the penalty notice issued by the Agency is withdrawn. The Agency has indicated that it is willing to withdraw the notice if directed to do so by the Secretary of State.

It is noted that this Direction does not affect any other case in which a penalty notice has been issued under the 2005 Regulations.

The Agency has been consulted on the terms of this Direction.

Direction

The Environment Agency is accordingly directed—

- (a) to withdraw the penalty notice dated 26th October 2011, served on Murco Petroleum Ltd pursuant to regulations 39 and 41(2) of the Greenhouse Gas Emissions Trading Scheme Regulations 2005; and
- (b) not to serve any further notice pursuant to regulation 39 of the Greenhouse Gas Emissions Trading Scheme Regulations 2005 without first consulting the Secretary of State.

This Direction does not require the Environment Agency to take any action in respect of other cases in which a civil penalty notice has been issued under those Regulations.

15 March 2013

Niall Mackenzie
Head, Industrial Energy Efficiency Programme, DECC
for the Secretary of State.