



Department for
Business, Energy
& Industrial Strategy

European Union Emissions Trading Scheme for Offshore Installations – Civil Penalties Guidance Document

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CHAPTER 1: GENERAL PRINCIPLES

Introduction

1.1 The European Union Emissions Trading System (EU ETS) is primarily implemented into UK law by the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (the 2012 Regulations), as amended. The 2012 Regulations allow for the imposition of civil penalties in respect of breaches of the trading system. These civil penalties are distinct from the civil penalties under the Offshore Environmental Civil Sanctions Regulations 2018.

1.2 The EU ETS was introduced to help the EU meet its greenhouse gas target by reducing emissions. The scheme works on a cap and trade basis, whereby member states are required to set a cap on power sector and industrial emissions and participants buy or sell allowances according to their ability to meet the cap. The rationale behind emission trading is that it creates an economic incentive to reduce emissions, whilst allowing industries to determine the most cost-effective means of achieving emissions reduction.

1.3 This guidance document is designed to set out how the Department for Business, Energy and Industrial Strategy's Offshore Petroleum Regulator for Environment and Decommissioning (OPRED) applies the civil penalties regime under the 2012 Regulations; how it makes enforcement decisions, the types of enforcement tools available to it, and the processes followed by it. As OPRED is the EU ETS regulator for offshore oil and gas installations only, this guidance document is only relevant to offshore oil and gas installations.

EU ETS and the 2012 Regulations

1.4 The 2012 Regulations came into force on 1 January 2013. In limited circumstances, certain provisions of the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (the 2005 Regulations) still apply. Where conduct gives rise to an offence under the 2005 Regulations and the offence occurred before 1 January 2013, the criminal offences in those Regulations will apply. In that case, OPRED will consider enforcement action on that basis, rather than based on this guidance document.



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1.6 In relation to a failure to surrender sufficient allowances in respect of emissions arising before 1 January 2013, the civil penalties in the 2005 Regulations apply¹. This guidance document equally applies to these civil penalties.

1.7 Generally, the civil penalties in the 2012 Regulations apply to non-compliance with the trading scheme and/or permit conditions occurring on, or after, 1 January 2013. This includes but is not limited to:

- Failure to submit a verified report of annual reportable emissions by 31 March of the following year for 2012 reportable emissions onwards, unless directed otherwise by permit conditions; and
- Failure to surrender an equal number of allowances to the reported figure by 30 April of the following year, for 2013 reportable emissions onwards unless directed otherwise by permit conditions. (As stated in paragraph 1.6 above, the failure to surrender sufficient allowances for 2012 reportable emissions is covered by the corresponding civil penalties in the 2005 Regulations).

¹ This is subject to Regulation 87B of the 2012 Regulations, as inserted by the Greenhouse Gas Emissions Trading Scheme and National Emissions Inventory (Amendment) Regulations 2013.



CHAPTER 2: Enforcement Pathway

2.1 The enforcement pathway followed by OPRED when it becomes aware of a potential EU ETS non-compliance is set out at Annex A. In short however, OPRED will undertake the following steps:

1. Investigation;
2. Consideration of appropriateness of enforcement action and exercise of discretion;
3. Issue Notice of Intent;
4. Consideration of representations and exercise of discretion;
5. Issue civil penalty notice or formal warning letter.

Investigation

2.2 The penalties under the 2012 Regulations are civil penalties. OPRED will investigate suspected breaches of the statutory requirements to establish whether or not a person² should be made subject to such a civil penalty.

2.3 When gathering evidence to establish whether a person has breached the 2012 Regulations, OPRED will use evidence reasonably available. Alternatively, we may use our statutory investigative powers to require information to ascertain or confirm certain facts. OPRED's powers to investigate suspected breaches of the statutory requirements are set out in regulation 17 of the 2012 Regulations³. They state that OPRED may;

- i. At any reasonable time (or in the case of an emergency, at any time) board any relevant platform, together with any equipment or material as may be required, and may be accompanied by any other person authorised by the Secretary of State;
- ii. Make such examination and investigation as the inspector considers necessary and may install or maintain monitoring or other apparatus on the relevant platform;

² In the context of OPRED's enforcement work, the "person" who has committed the breach under the 2012 Regulations will normally be the "operator" of the offshore installation, as defined at Regulation 3(2) of the 2012 Regulations. Generally, the operator is the corporate entity that holds the permit for the offshore installation.

³ Regulation 17 of the 2012 Regulations has been amended by The Greenhouse Gas Emissions Trading Scheme (Amendment) Regulations 2014. The amended Regulation 17 now refers to the powers of entry contained within Regulation 25 of the Offshore Combustion Installations (Pollution Prevention and Control) Regulations 2013.



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- iii. Direct that any part of the relevant platform be left undisturbed for so long as may be necessary to affect any examination or investigation;
- iv. Take such measures and photographs or record such information as the inspector considers necessary in relation to any examination or investigation;
- v. Take samples of anything found on the relevant platform and of the atmosphere, land, seabed (including its subsoil) or water in the vicinity of the relevant platform;
- vi. In the case of anything found on, or in the vicinity of, the relevant platform and which appears to the inspector to have caused, or be likely to cause, significant pollution, cause it to be dismantled or subjected to any process or test (but not so as to damage or destroy the thing unless that is necessary);
- vii. Take possession of anything to which subparagraph (vi) applies and detain it for so long as is necessary to examine it and do to it anything provided by this Regulation; to ensure it is not tampered with before its examination is completed; to ensure it is available for use as evidence in any proceedings for an offence under Regulation 34;
- viii. Require any person whom the inspector has reasonable cause to believe is able to give information relevant to any examination or investigation to attend at a date and time specified by the inspector; to answer (in the absence of any persons other than those whom the inspector may allow to be present and a person nominated by the individual) such questions as the inspector thinks fit to ask and to sign a declaration of truth of the answers given;
- ix. Require the production of, and inspect and take copies of, any entry in any records which are required to be kept by virtue of these Regulations; any records which the inspector considers it necessary to see for the purposes of any examination or inspection;
- x. Require any person to afford the inspector such facilities and assistance with respect to any matter or thing within their control or in relation to which they have responsibilities, as the inspector considers necessary to enable the exercise of any powers provided under the Regulations.

2.4 When determining whether there has been a contravention of the 2012 Regulations, OPRED will judge each matter on a case by case basis, utilising the guidance contained within this document and the more general principles detailed within OPRED's Enforcement Policy. As the EU ETS creates civil penalties, OPRED will apply the civil standard of proof, in that we must be satisfied on the balance of probabilities that a person is liable, before considering the imposition of a civil penalty.



Consideration of Enforcement Action

2.5 Where OPRED is satisfied that there is sufficient evidence to prove that there has been a breach of the 2012 Regulations, we must consider whether enforcement action is appropriate. To do this we will refer to the principles of enforcement set out in the Enforcement Policy and listed as follows;

- **Proportionality** – OPRED aims to ensure that the level of enforcement action reflects the seriousness of the breach. The more serious the breach, the more likely a civil penalty will be applied.
- **Targeting** – OPRED aims to ensure regulatory enforcement effort is directed primarily towards those whose activities are the least in line with the Regulations. For example, if persons have been subject to previous warnings or enforcement action with no evidence of improvement, or have a history of reportable incidents, the imposition of a civil penalty is more likely.
- **Consistency of approach** – OPRED recognises that consistency cannot be as simple as uniformity and we take into account a number of factors including, but not limited to, the scale of the breach, causal factors and circumstances that gave rise to the breach, including those that arose as the result of something which could not reasonably have been prevented or was due to something done as a matter of urgency for the purpose of securing the safety of any person. Each situation is unique and there is discretion within the framework of this policy to exercise professional judgement to ensure appropriate action is taken.
- **Transparency** – OPRED aims to help those being regulated to understand what is expected of them and what they should expect from OPRED. As such we have safeguards to ensure that any civil penalty action is clearly explained within the notice of intent.
- **Accountability** – OPRED is accountable to the Secretary of State, Parliament and to the public for our actions. To achieve this, we have policies and standards against which we can be judged, and an effective and easily accessible mechanism for dealing with comments and handling complaints.



The Notice of intent

2.6 Where OPRED are satisfied that enforcement action is appropriate, a provisional penalty amount will be calculated using the process set out in Chapter 3 below. Following this, a notice of intent will generally be served. The notice will normally contain the following;

- (a) A summary of the evidence being relied upon.
- (b) The regulation under which the liability arises.
- (c) The amount of the civil penalty proposed.
- (d) How that amount has been calculated including any discretion exercised.
- (e) Whether or not an additional daily penalty will apply.

Consideration of Representations and Exercise of Discretion

2.7 The notice will give the person an opportunity to make representations, usually within 28 calendar days from the date of the notice. The Department must take account of any representations received in response to that notice before making a final decision on the imposition of a penalty. Where an additional daily penalty is appropriate, the Department may choose to serve a civil penalty notice on a person and subsequently provide them with an opportunity to make representations. If representations have not been received within 28 days, and the person has not arranged for an extension of the 28-day deadline with OPRED, then the Department will make a final decision on the imposition of a penalty in the absence of representations.

2.8 Where OPRED serves a notice of intent and receives representations within the 28-day period allowed, OPRED will consider whether to exercise the discretion given to it under Regulation 51 of the 2012 Regulations. OPRED does not have any discretion over the €100/tonne penalty for failure to surrender allowances equal to its annual reportable emissions by the required deadline, as defined in the Regulations.

2.9 In general, one or more of the following options may be exercised by OPRED where it is considered appropriate;

- refrain from imposing a civil penalty at all;
- reduce the amount of a civil penalty from that set in the legislation;
- extend the time for payment of a civil penalty;
- withdraw a penalty notice at any time; and
- Modify a penalty notice by substituting a lower penalty at any time.



2.10 OPRED will consider each breach individually, according to the facts of the case, whilst seeking to ensure consistency in enforcement in accordance with this guidance. We will consider any representations made by the person liable to the penalty prior to making a final decision on the appropriate exercise of our discretion.

2.11 In considering the exercise of its discretion, OPRED will have regard to certain public interest factors as follows;

- **General:** The importance of each public interest factor may vary on a case by case basis. Deciding on the public interest is not simply a matter of adding up the number of factors in favour of or against applying a penalty. We will decide how important each factor is in the particular circumstances of each case and make an overall judgement.
- **Intent:** Whether or not the non-compliances were committed deliberately, recklessly or with gross negligence, or were instead the result of an accident or a genuine mistake.
- **Foreseeability:** Whether or not the circumstances leading to the non-compliance could reasonably have been foreseen, and if so, whether any avoiding and/or preventative measures were taken.
- **Nature of the non-compliance:** The extent to which the non-compliance undermines important aspects of the trust in, transparency, reliability and effectiveness of the scheme, taking into account the length of time that a person has been required to comply with the legislation and has taken steps to rectify the situation.
- **Deterrent effect:** The deterrent effect, both on the non-compliant person, and others.
- **Previous history:** Where non-compliance has continued or been repeated despite OPRED taking enforcement action, we will normally increase the level of our enforcement response and impose a more serious or severe sanction.
- **Attitude of the offender:** Whether or not the non-compliant person has a poor attitude towards the non-compliance and/or is uncooperative with the investigation. Conversely, whether the offender has provided the details of the non-compliance voluntarily, or through a self-reporting mechanism, or has independently remedied the non-compliance.

Civil Penalty Notice / Formal Warning Letter

2.12 Once a final decision has been made, we will notify the person of this in writing. Where the decision is to impose a civil penalty, a penalty notice will be issued containing a summary of the reasons for its imposition. The penalty notice will inform the person of the regulation that has been breached, the amount of the civil penalty due and the date by which the penalty must be paid where no additional daily penalty applies. The penalty notice will also detail how the penalty was calculated and whether the person is required to pay any additional daily penalties.



2.13 When the level of any additional daily penalty can be determined, a further penalty notice will be served, confirming the total amount due (the further notice). This notice will also specify the date by which the amount due must be paid.

2.14 Where OPRED elects to use its discretion and not impose a penalty, a formal letter will be issued advising that we will maintain a record of the contravention for a period of three years and that it may be considered when determining appropriate enforcement action should further contraventions of the 2012 Regulations occur. The record of the contravention will not be published.

Mandatory penalties

2.15 The legislation does not provide discretion in relation to any penalty arising under regulation 54(1). In those cases, we are required to impose a civil penalty where a breach has been proved on the balance of probabilities.

Insolvency

2.16 Where we have discretion over the imposition of a civil penalty, we will not normally impose financial penalties in respect of individuals or corporate entities subject to an insolvency procedure.

Failure to pay a civil penalty

2.17 If a person fails to pay a civil penalty, it is recoverable as a civil debt.

Publication of penalties

2.18 The 2012 Regulations impose a requirement to publish the name of an operator against whom a civil penalty has been imposed under regulation 54(1). We may also publish the name of operators who have been awarded civil penalties in respect of other breaches of the 2012 Regulations. Publication will take place as soon as possible after the expiry of the period for appealing the imposition of a penalty; or when an appeal has been made, after the determination or withdrawal of that appeal.



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2.19 Generally, we will publish the following information:

- the person on whom the penalty was imposed;
- the legal requirement that was not complied with; and
- the amount of the penalty.

2.20 Publication means publishing details on the GOV.UK web-pages.

2.21 OPRED will normally publish the details of penalties imposed for a period of 3 years.



CHAPTER 3: CALCULATING AND IMPOSING PENALTIES

Assessing the penalty to be imposed

3.1 The level of penalty applicable to each breach is set out in regulations 52 to 70 of the 2012 Regulations. In some cases, a fixed sum only is specified; in others the penalty consists of a fixed sum and an additional daily penalty (up to a prescribed maximum); and in other cases, the penalty must be calculated in accordance with a formula.

3.2 Where we consider it may be appropriate to impose a penalty, the sum specified in (or calculated in accordance with) the 2012 Regulations will be the starting point. If applicable, we will then consider whether it is appropriate to exercise our discretion under regulation 51, to reduce or waive that penalty.

Additional daily penalty

3.3 An additional daily penalty may apply in respect of the following breaches:

- Failure to comply with a condition of a permit;
- Failure to return allowances;
- Failure to comply with an enforcement notice; and
- Failure to comply with an information notice.

3.4 An additional daily penalty may be appropriate if there is a continuing breach which the person could take action to remedy. If the breach cannot be remedied, or if it has already been remedied by the time the initial civil penalty notice is served, an additional daily penalty will not apply.

3.5 Where awarded, an additional daily penalty will start to accumulate from the date that the initial civil penalty notice is served and will stop accumulating either after a set period has elapsed, on the date that the person remedies the breach, or on the date that the maximum amount payable (if applicable) has been reached. It is therefore largely a tool to encourage timely compliance.

3.6 OPRED may exercise its discretion over either or both elements of the penalty; that is, the fixed sum and the additional daily penalty.



Civil penalties available

3.7 This section will give more detailed guidance on the penalties applicable to each breach. OPRED will consider the public interest factors and any representations received before making its final decision.

3.8 **Regulation 52 – Carrying out a regulated activity without a permit** – Regulation 52 sets out the formula to be used for the calculation of this penalty as follows;

Penalty of $A + (B \times C)$, where;

A is the estimated amount of costs avoided by the operator in that year as a result of carrying out a regulated activity without such authorisation;

B is the estimated amount of reportable emissions from the installation in the period during which a regulated activity was carried out without such authorisation;

C is the carbon price for that year.

Any penalty imposed must be greater than the amount of any economic benefit gained by the operator as the result of carrying out an unauthorised regulated activity.

3.9 **Regulation 53 – Failure to comply with a condition of a permit** – Regulation 53 sets the level of penalty for the breach of the majority of permit conditions as a fixed sum of £3,750 plus £375 additional daily penalty for each day the operator fails to comply with the condition following the issue of a penalty notice, up to a maximum of £33,750.

3.10 The penalty for failing to comply with a condition requiring notification of a qualifying significant capacity reduction or a qualifying partial cessation is set at £5,000.

3.11 **Regulation 54 – Failure to surrender allowances** – Regulation 54 provides that OPRED must impose a civil penalty where a person fails, by 30 April of the relevant year - unless stated otherwise in permit condition 3a, to surrender a number of allowances in the registry equal to the annual reportable emissions of the installation made in the previous year.

3.12 The civil penalty is €100 for each allowance that the person failed to surrender. This penalty is mandatory, and OPRED have no discretion in imposing this penalty. However, regulation 54 sets out one exception to this mandatory penalty. If an operator satisfies the criteria set out below in section 3.13, that person is liable to a reduced penalty of €20 for each allowance that the person failed to surrender. OPRED may apply its discretion to reduce or waive this penalty.

3.13 The criteria are that, before OPRED serves a penalty notice on the person (or a notice of our intention to do so), that person must;



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- notify OPRED that there are annual reportable emissions not included in the annual emissions report that has been submitted for that year;
- request that the regulator make a determination of the annual reportable emissions for that year, and;
- surrender allowances equal to the reportable emissions as so determined.

3.14 This penalty is calculated in Euros, which are then converted to the Sterling equivalent using the first published conversion rate in the month of September prior to the year the breach occurred. The figure is further adjusted to take into account any increase in the Harmonized Price Index. An example of the calculation used is given below;

- 50,000 allowances not surrendered in 2014 (incorrect AER submitted in 2015)
- $50,000 \times 20 \text{ Euros} = 1,000,000 \text{ Euros}$
- **To Calculate the Sterling Equivalent;**
- $1,000,000 \times 0.79025 \text{ (Exchange Rate)} = \text{£}790,250$
- $790,250 \times 1.47\% \text{ (HICP 2014)} = \text{£}11,617$
- $790,250 + 11,617 = \text{£}801,867$
- $801,867 \times 0.05\% \text{ (HICP 2015)} = \text{£}401$
- $801,867 + 401 = \text{£}802,268$
- **Total Penalty Payable £802,268**

3.15 **Regulation 59 – Failure to surrender a permit** – Regulation 59 sets the level of penalty for this breach as a fixed sum of £5,000 No additional daily penalty is applicable.

3.16 **Regulation 67 – Failure to return allowances** – Regulation 67 sets the level of penalty for this breach as a fixed sum of £20,000 where a person receives allowances to which they were not entitled; and fails to return, or return on time, such allowances. An additional daily penalty of £1,000 for each day a person fails to return allowances following the service of a notice can be applied with no maximum level.

3.17 **Regulation 68 – Failure to comply with an Enforcement Notice** – Regulation 68 sets the level of penalty for this breach as a fixed sum of £20,000 where a person fails to comply, or comply on time, with the requirements of an enforcement notice. An additional daily penalty of



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£1,000 for each day a person fails to comply following the service of an enforcement notice is applicable, up to a maximum of £30,000.

3.18 Regulation 69 – Failure to comply with an Information Notice – Regulation 69 sets the level of penalty for this breach as a fixed sum of £1,500 where a person fails to comply, or comply on time, with the requirements of an information notice. An additional daily penalty of £150 for each day a person fails to comply following the service of an information notice is applicable, up to a maximum of £13,500.

3.19 Regulation 70 – Providing false or misleading information – Regulation 70 sets the level of penalty for this breach as a fixed sum of £1,000 where a person provides false or misleading information.



CHAPTER 4: OTHER ENFORCEMENT POWERS

Enforcement Notices

4.1 Enforcement Notices may be served when OPRED considers that a person has contravened, is contravening, or is likely to contravene any provision of the 2012 Regulations, the Monitoring and Reporting Regulation or a permit issued to them. An enforcement notice is primarily used to restore compliance with the relevant provisions.

4.2 A notice will contain the following information:

- the fact that OPRED is satisfied a relevant provision has, is, or is likely to be, contravened;
- the circumstances of the contravention;
- the steps which must be taken to remedy the contravention; and
- The period within which those steps must be taken.

4.3 We may use an Enforcement Notice to specify actions required to be taken by an operator to restore compliance, or where an operator has failed to comply with a requirement, even when an additional daily penalty has reached its maximum.

4.4 Regulation 68 of the 2012 Regulations specifies that, where a person fails to comply with an Enforcement Notice, the civil penalties are;

- £20,000 fixed sum, and;
- £1,000 for each day that a person fails to comply with the notice following the service of a penalty notice up to a maximum of £30,000.

Revocation of Permits

4.5 Regulation 14 of the 2012 Regulations states that OPRED may at any time revoke a permit. We must do so where an operator fails to apply to surrender their permit in accordance with the timescales set out in the 2012 Regulations. We envisage that this power will otherwise only be exercised in exceptional circumstances including instances where;

- There is evidence of a deliberate attempt to falsify information or mislead for gain, or other reasons, in connection with a permit application, or;
- The breaches of the permit are significant, numerous, persistent and cover an extended period where the permit holder has failed to respond to other methods of enforcement.



4.6 An operator may re-apply for a permit after it has been revoked. However, the permit would only be granted if OPRED were satisfied that the information in connection with the application was not misleading or false, or that the operator had put in place arrangements, such that they will be able to comply with the conditions on the granting of the permit.

Power to Determine Reportable Emissions

4.7 Article 70 of EU Regulation 601/2012 (the Monitoring and Reporting Regulation) imposes upon OPRED a duty to make a conservative estimate of emissions in certain circumstances, including when a person fails to submit a verified annual emissions report by 31 March each year. We will generally recover the cost of making a determination of reportable emissions from the person concerned and that cost is taken into account in the normal fees invoicing.

Appeals Procedure

4.8 Regulation 73 of the 2012 Regulations provides a right of appeal for persons against whom a notice or civil penalty has been awarded. Such an appeal must be submitted within 28 calendar days of the date on which the notice from OPRED was sent to the appellant. Appeals against decisions made by OPRED should be submitted to the First-tier Tribunal. You can find a notice of appeal form and guidance notes [here](#).



Annex A – EU ETS Civil Penalty Flowchart

