



Department  
of Energy &  
Climate Change

# **Amendments to UK Designated National Authority and Designated Focal Point Regulations: An Informal Consultation**

14D/234

JULY 2014



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The consultation can be found on the following website:  
[www.gov.uk/government/publications](http://www.gov.uk/government/publications)

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# General Information

## **Purpose of this consultation**

The Government is seeking views on the proposed amendments to the Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005 (S.I. 2005 No. 2903), the domestic regulations specify the processes to be followed by the UK's Designated National Authority (DNA) and Designated Focal Point (DFP). This consultation is relevant to Clean Development Mechanism (CDM) and Joint Implementation (JI) project developers and other stakeholders with an interest in the CDM or JI. DECC invites interested Parties to submit comments and evidence.

## **Enquiries to:**

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London SW1P 3HQ  
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Email: dna@decc.gsi.gov.uk

## **Territorial extent:**

The proposed amendments that are the subject of this consultation will apply to England, Scotland, Wales and Northern Ireland.

## **How to respond:**

We encourage you to frame your reply in direct response to the questions posed using the response form at Annex 1. However, further comments and evidence are also welcome.

***This consultation will run for 4 weeks until 22.08.2014.*** The short period for consultation reflects the technical nature of the proposed changes and the limited impact on businesses.

Any responses received after the closing date may not be considered.

## **Additional copies:**

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Other versions of the document in Braille, large print or audio-cassette are available on request. This includes a Welsh version. Please contact us under the above details to request alternative versions.

## **Confidentiality and data protection:**

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation (primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the

Environmental Information Regulations 2004).

If you want information that you provide to be treated as confidential please say so clearly in writing when you send your response to the consultation. It would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded by us as a confidentiality request.

We will summarise all responses and place this summary on our website at [www.gov.uk/government/publications](http://www.gov.uk/government/publications). This summary will include a list of names or organisations that responded but not people's personal names, addresses or other contact details.

**Quality assurance:**

This consultation has been carried out in accordance with the Government's Code of Practice on consultation, which can be found here:

<http://www.bis.gov.uk/files/file47158.pdf>

If you have any complaints about the consultation process (as opposed to comments about the issues which are the subject of the consultation) please address them to:

DECC Consultation Co-ordinator  
3 Whitehall Place  
London SW1A 2AW  
Email: [consultation.coordinator@decc.gsi.gov.uk](mailto:consultation.coordinator@decc.gsi.gov.uk)



# 1 Introduction

## Kyoto Protocol

Adopted at the third Conference of the Parties to the UN Framework Convention on Climate Change held in Kyoto, Japan, in December 1997, and having entered into force in February 2005, the Kyoto Protocol requires certain countries (referred to in Annex B to the Kyoto Protocol) to limit or reduce their greenhouse gas emissions. To assist countries to meet their emissions targets, and to encourage the private sector and developing countries to contribute to emissions reduction efforts, the Protocol established three market-based mechanisms - emissions trading, the Clean Development Mechanism (CDM) and Joint Implementation (JI).

Of these three mechanisms, the CDM and JI both provide for the development of mitigation projects for greenhouse gas emissions offsetting. Projects developed under the CDM or JI are credited with emission reduction units which:

- Annex B countries can use to meet their emissions targets under the Kyoto Protocol; or
- Within the EU, operators can use to meet their obligations under the EU Emissions Trading System.

Projects developed under the CDM or JI offer countries a flexible and cost-efficient means of driving emissions reductions or meeting part of their emissions targets under the Kyoto Protocol, while the host country benefits from foreign investment and technology transfer.

For further information about the Kyoto Protocol please refer to:

<http://unfccc.int/resource/docs/convkp/kpeng.pdf>

## Clean Development Mechanism

The CDM is defined in Article 12 of the Kyoto Protocol and allows entities to undertake projects in countries that are party to the Protocol but do not have an emissions target, in order to reduce greenhouse gas emissions and contribute to sustainable development.

To take part in the CDM countries are required to establish a Designated National Authority (DNA), which is a regulatory body responsible for issuing letters of approval (LOA) for CDM project activities. Project proponents must secure a LOA from the DNAs of the host country, where the project will take place, and an Annex 1 country.

For further information about the CDM and the CDM project cycle please refer to:

<http://cdm.unfccc.int/about/index.html>.

Further details of the agreed rules governing the Clean Development Mechanism are laid out in the Marrakech Accords, which can be found at the following link:

[http://unfccc.int/cop7/documents/accords\\_draft.pdf](http://unfccc.int/cop7/documents/accords_draft.pdf)

## Joint Implementation

Joint implementation (JI) is a mechanism defined in Article 6 of the Kyoto Protocol that allows entities to undertake projects in countries that are party to the Protocol and have an emissions target, in order to reduce greenhouse gas emissions.

To take part in JI countries are required to establish a Designated Focal Point (DFP), which is a regulatory body responsible for issuing letters of approval (LOA) relating to JI project activities. Project proponents must secure a LOA from the DFP of the host country and from the DFP of an Annex 1 country.

For further information about JI and the JI project cycle please refer to:

<http://ji.unfccc.int/index.html>.

Further details of the agreed rules governing the Joint implementation are laid out in the Marrakech Accords, which can be found at the following link:

[http://unfccc.int/cop7/documents/accords\\_draft.pdf](http://unfccc.int/cop7/documents/accords_draft.pdf)

## UK DNA and DFP

The UK DNA and DFP were established in 2004. Originally, the Secretary of State for the Environment, Food and Rural Affairs acted as the DNA for the CDM and the DFP for JI and granted letters of approval for projects. Subsequently the Secretary of State for Energy and Climate Change took over this function. However, since 1 June 2011, this function has, in respect of most applications, rested with the Environment Agency (EA). However, the Secretary of State has retained the ability to “call in” applications for determination. The Secretary of State is most likely to exercise this power in respect of applications which are novel, contentious or controversial or which relate to large scale hydro-electric projects.

As the DNA and DFP, the EA is responsible for determining applications and issuing LOAs for projects in accordance with international, EU and domestic requirements. These requirements include Articles 6 and 12 of the Kyoto Protocol, the Marrakech Accords, the Emissions Trading Directive (Directive 2003/87/EC, as amended) and the Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005, which is the domestic legislation governing the DNA and DFP processes in the UK. These regulations lay out the process for making an application for a CDM or JI project to the UK DNA/DFP; the period of time within which a determination must be made on a CDM or JI application; the right of applicants to appeal a decision; and the penalties applied to individuals knowingly providing false or misleading information in relation to a CDM or JI application.

For further information about UK’s DNA and DFP please refer to:

[www.gov.uk/government/publications/guidance-and-proforma-for-clean-development-mechanism-projects](http://www.gov.uk/government/publications/guidance-and-proforma-for-clean-development-mechanism-projects)

## Consultation scope

This consultation seeks views on the Government’s proposals for amending the Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005. These proposed amendments are to:

- Provide for appeals against the refusal of an application for a LOA relating to a CDM or JI project or against any conditions attached to such a LOA to be heard by the First-tier Tribunal rather than the Secretary of State.



- Replace the system of criminal sanctions for offences relating to CDM and JI applications with a civil penalty scheme.

This document describes the proposed changes, how they are intended to work and the effect they will have in practice.

## **What we will do with responses and next steps**

This informal consultation will run for 4 weeks and close on 22.08.2014. Following the close of the consultation, we will consider responses and if appropriate draft any new legislation.

## **How to respond to this consultation**

The Government welcomes responses to the questions posed within this informal consultation. Questions refer to specific proposals to change UK legislation. These questions are captured within blue boxes throughout the document.

If you disagree with any of the proposals within this document and have alternative suggestions, it would be helpful if you can provide supporting analysis to explain your position.

We encourage you to frame your reply in direct response to the questions posed using the response form in the Annex. However, further comments and evidence are also welcome.

# 2 Amendment to the Appeal Procedure

## Background

Regulation 9 of the Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005 provides that a person may appeal against the refusal of an application, made under regulation 5, for a LOA relating to a proposed CDM or JI project activity or against any conditions attached to a LOA made under regulation 7. The appeal procedure is required to ensure that the applicant's civil rights are protected, in line with article 6 of the European Convention on Human Rights (ECHR) which establishes the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Under the existing regulations, appeals rely on the procedure set out in Schedule 2 of the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (2005 Regulations) relating to the EU ETS. The Secretary of State for Energy and Climate Change has responsibility for determining an appeal, although he is able to appoint a third party to determine the appeal, or particular questions arising in the appeal, on his behalf.

In line with the broader Government move towards the use of the First-tier Tribunal (FtT) for appeals against decisions relating to environmental and climate change matters, we propose to introduce a similar system where appeals against the refusal of an application for a LOA or against any conditions attached to an LOA are heard and determined by the FtT. We believe this appeals process will be a more cost-effective and proportionate approach to ensuring appeals are dealt with effectively and in line with the requirements of the ECHR.

## First-tier Tribunal overview

The First-tier Tribunal and the Upper Tribunal were created by the Tribunals, Courts and Enforcement Act 2007. The First-tier Tribunal<sup>1</sup> (FtT) is part of Her Majesty's Courts Service. It has its own procedure rules and hears appeals on a wide range of matters including environmental matters.

The FtT is empowered to deal with a wide range of issues which might form the substance of appeals, and to ensure the cases are dealt with in the interests of justice and in a manner which minimises parties' costs. The composition of a Tribunal is a matter for the Senior President of Tribunals to decide and may include non-legal members with suitable expertise or experience in an appeal in addition to Tribunal judiciary.

The FtT is divided into several different chambers. The General Regulatory Chamber brings together various different jurisdictions of a regulatory nature. The Environment jurisdiction was created fairly recently as a result of the introduction of civil sanctions for various environmental offences under the Environmental Civil Sanctions (England) Order 2010 and the Environmental Civil Sanctions (Miscellaneous Amendments) (England) Regulations 2010.

If the FtT is selected as the appropriate body to hear appeals in these matters then it would operate under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 which provide flexibility for dealing with individual cases. The General Regulatory Chamber rules can be found at: <http://www.justice.gov.uk/tribunals/rules>. Rule 2 of the General Regulatory

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<sup>1</sup> Further details of the First Tier Tribunal procedure can be found at <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/environment/index.htm>

Chamber Rules states its overriding objective as being to deal with a case fairly and justly. This includes dealing with a case in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and resources of the parties. The Rules give the Tribunal judge wide case management powers in order to achieve these objectives.

The Tribunal may also hear an appeal either orally in a court room or determine the matter on the papers only. This latter written procedure is used if both parties agree that the Tribunal may determine the appeal on the papers without holding a full hearing and the Tribunal is satisfied that it can determine the issues without one. Any party to a case has a right to appeal to the Upper Tribunal on points of law arising from a decision of the First-tier Tribunal. The right may only be exercised with the permission of the First-tier Tribunal or the Upper Tribunal. Where permission is given, the further appeal would be made to the Upper Tribunal.

Under the Rules the FtT has the power to award costs against a party where it considers that a party has acted unreasonably in bringing, defending or conducting the proceedings. The Lord Chancellor has the capacity to charge fees for appeals to the FtT, for example an application fee. Where he is proposing to introduce fees he is required to consult the Senior President of Tribunals. Following this, any such proposal would be subject to secondary legislation that would need to be debated and agreed by both Houses of Parliament before it would take effect.

The Tribunal also has powers to prohibit the disclosure or publication of information or documents, and to give a direction prohibiting disclosure of information to a person if the disclosure were likely to cause someone serious harm and it is proportionate to give such a direction.

The FtT system is already used as the appeals process for a number of UK policies managed by DECC. These include: the EU ETS, National Emissions Inventory, and Green Deal.

With regard to the date of commencement, we are proposing to amend the appeals process for CDM and JI applications only once the FtT has established procedures for hearing these appeals.

### Consultation Question

1a	<b>Do you consider that the First-tier Tribunal is the appropriate body to hear and determine appeals against decisions to refuse an application for a LOA or against conditions attached to a LOA?</b>
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### Consultation Question

1b	<b>Do you consider that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of these appeals?</b> <b>The General Regulatory Chamber Rules may be found at:</b> <a href="http://www.justice.gov.uk/tribunals/rules">http://www.justice.gov.uk/tribunals/rules</a>
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# 3 Amendment to the Penalties System

Regulation 13 of the Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005 makes it a criminal offence for a person to make a statement which they know to be false or misleading in a material way or to recklessly make a statement which is false or misleading in a material way in connection with an application relating to a CDM or JI project activity.

A person guilty of an offence under regulation 13 is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding three months, or to both. On conviction on indictment, a person guilty of an offence under regulation 13 is liable to a fine (of no limit) or to imprisonment for a term not exceeding two years, or to both.

A penalty regime is deemed to be necessary to ensure that applicants include truthful and accurate information with their applications, whether that be when the original application is submitted or in response to a request for additional information made pursuant to regulation 6. However, the Government believes that imposing a civil sanction would be more proportionate and can achieve a similar level of deterrence in these circumstances. Imposing a civil penalty would be less of a burden for businesses and individuals and is in line with the Government's better regulation agenda.

For these reasons we propose to amend the current enforcement regime to provide for a more proportionate, less burdensome system based on civil penalties only. As part of this new penalty system we are proposing that the Secretary of State will be able to apply a £1000 civil penalty in cases where information provided in connection with a project application is false or misleading in a material way. This level of penalty is in line with similar regulations governing the provision false or misleading material. We are not specifically consulting on the level of fine, but would welcome any comments. We propose that the Secretary of State should have the ability to exercise discretion in imposing this civil penalty, for example by deciding, in appropriate circumstances, not to impose a penalty, or to reduce the amount of the penalty. We also propose to provide a right of appeal to the FtT where a civil penalty is imposed to enable the recipient to challenge the Secretary of State's decision.

Consultation Question	
2a	<b>Do you agree with our proposal to remove the criminal penalties and establish a regime comprising of civil penalties only?</b>
2b	<b>Do you agree that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of civil penalty appeals?</b> <b>The General Regulatory Chamber Rules may be found at:</b> <a href="http://www.justice.gov.uk/tribunals/rules">http://www.justice.gov.uk/tribunals/rules</a>

# 4 Summary of Consultation Questions

Consultation Question	
1a.	Do you consider that the First-tier Tribunal is the appropriate body to hear and determine appeals against decisions to refuse an application for a LOA or against conditions attached to a LOA?
Consultation Question	
1b.	Do you consider that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of these appeals? The General Regulatory Chamber Rules may be found at: <a href="http://www.justice.gov.uk/tribunals/rules">http://www.justice.gov.uk/tribunals/rules</a>
Consultation Question	
2a.	Do you agree with our proposal to remove the criminal penalties and establish a regime comprising of civil penalties only?
Consultation Question	
2b.	Do you agree that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of civil penalty appeals? The General Regulatory Chamber Rules may be found at: <a href="http://www.justice.gov.uk/tribunals/rules">http://www.justice.gov.uk/tribunals/rules</a>

# Annex: Consultation Response Form

## Consultation

**Amendments to UK Designated National Authority and Designated Focal Point Regulations**

**Please Return by 27.06.2014**

**Global Carbon Markets Team  
Department of Energy & Climate Change  
Floor Area 1  
Kings Buildings, 16 Smith Square**

**London SW1P 3HQ  
Tel: 0300 068 8042**

**You can also submit this form by email:**

**[dna@decc.gsi.gov.uk](mailto:dna@decc.gsi.gov.uk)**

## Respondent Details

<b>Name</b>	
<b>Organisation</b>	
<b>Address</b>	
<b>Town/City</b>	
<b>Postcode</b>	
<b>Telephone</b>	
<b>Email</b>	



<p>Would you like this response to remain confidential?</p>	
<p>If yes please state your reason (this will help should we receive a request for information)</p>	
<p><b>Consultation Question</b></p>	
<p>1a.</p>	<p>Do you consider that the First-tier Tribunal is the appropriate body to hear and determine appeals against decisions to refuse an application for a LOA or against conditions attached to a LOA?</p>
<p>Response</p>	
<p>1b.</p>	<p>Do you consider that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of these appeals? The General Regulatory Chamber Rules may be found at: <a href="http://www.justice.gov.uk/tribunals/rules">http://www.justice.gov.uk/tribunals/rules</a></p>
<p>Response</p>	
<p>2a.</p>	<p>Do you agree with our proposal to remove the criminal penalties and establish a regime comprising of civil penalties only?</p>
<p>Response</p>	
<p>2b.</p>	<p>Do you agree that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of civil penalty appeals? The General Regulatory Chamber Rules may be found at: <a href="http://www.justice.gov.uk/tribunals/rules">http://www.justice.gov.uk/tribunals/rules</a></p>
<p>Response</p>	

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