Environment Agency

Enforcement and Sanctions Guidance for the European Union Emissions Trading System, CRC Energy Efficiency Scheme and Climate Change Agreements

Consultation response document

December 2014

We are the Environment Agency. We protect and improve the environment and make it a better place for people and wildlife.

We operate at the place where environmental change has its greatest impact on people's lives. We reduce the risks to people and properties from flooding; make sure there is enough water for people and wildlife; protect and improve air, land and water quality and apply the environmental standards within which industry can operate.

Acting to reduce climate change and helping people and wildlife adapt to its consequences are at the heart of all that we do.

We cannot do this alone. We work closely with a wide range of partners including government, business, local authorities, other agencies, civil society groups and the communities we serve.

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Summary

In January 2014 we consulted on a proposed Annex for our current Enforcement and Sanctions Guidance covering the EU Emissions Trading System (EU ETS), the CRC Energy Efficiency Scheme (CRC) and Climate Change Agreements (CCAs). The consultation ran until March 2014. We received fourteen responses to the consultation. These came from a range of groups including sector associations, companies, a campaign group, a public sector group and some individuals. This document sets out our response to the consultation.

In general there was agreement on the proposed guidance including the overall approach and the public interest factors that would inform the exercise of our discretion for all three regimes. Most respondents also agreed that our proposed enforcement approach for all three schemes was fair and proportionate. We have therefore finalised and published the Annex to the Enforcement and Sanctions Guidance, taking account of the comments received, and will now use this as the framework for our approach to enforcement for the regimes.

Contents

1. Introduction

Where we have enforcement powers it is our duty, under the Regulators' Compliance Code, to publish an enforcement policy explaining how we intend to use those powers. The Enforcement and Sanctions Guidance explains the Environment Agency's current enforcement framework for all regulatory regimes for which we are responsible. The EU ETS and CRC regimes are touched upon in the current Enforcement and Sanctions Guidance. However, because these regimes have developed since that guidance was published, and we have taken on responsibility for CCAs, we will include more specific guidance to explain what enforcement action can be expected in the event of non-compliance under each of these regimes.

In our development of specific guidance we have consulted on our proposed enforcement approach for the climate change regimes. Our response to the range of issues highlighted in the consultation has been used to finalise our enforcement approach in an Annex to our current Enforcement and Sanction Guidance.

2. How we ran the consultation

We ran the consultation for 10 weeks from 10 January 2014 to 21 March 2014. We published the consultation on our website, sent details of the consultation to participants in the regimes and met with a working group of the UK Emissions Trading Group.

We received 14 responses in total. They came from 7 trade bodies, 2 companies, 1 public sector group, 1 campaign group, 2 members of the public and 1 anonymous response.

3. Summary of key findings

In considering the exercise of our discretion the majority of respondents agreed with the proposed public interest (PI) factors. Nevertheless, in light of comments, we have modified the PI factors to be more explicit that we will also consider the ability to pay and make clear that action taken by an organisation to correct its non-compliance, and the time for corrective action, will be taken into account.

The majority of respondents agreed that the content of the draft guidance accurately reflects the provisions of the legislation. Even so, some responses demonstrated that there is significant and proper public interest in penalties and other significant enforcement actions. As a result we have decided to apply a general presumption across the regimes in favour of publishing information in instances where we impose financial civil penalties. Where we revoke an EU ETS permit or terminate a CCA agreement as a form of enforcement, we will generally also publish equivalent information about this.

CCA penalty setting was queried by a number of respondents. Our response clarifies how penalties will be calculated. In addition our procedure for imposing penalties includes a 'notice of intent' step that will give operators an opportunity to make representations within a reasonable time if they believe the calculation needs amending because the information we hold is not complete.

On the question 'Do you agree that the content of the draft guidance clearly explains our proposed enforcement approach for EU ETS, CRC and CCA?', approximately half of respondents did not agree and highlighted a range of issues which have been addressed in our response.

In order to assist operators and to increase transparency, we have added information to the EU ETS section in relation to stationary installations. For each potential breach we have set out how we are likely to exercise our discretion. For certain penalties in the CRC section, we have clarified our approach for the treatment of new entrants. We have also clarified the discretionary criteria we will use when considering CRC reporting errors.

The majority of respondents agreed that our enforcement approach for all three schemes is fair and proportionate in line with the legislation that it relates to.

4. Responses to questions

Question 1: Are you a participant under the EU ETS, CRC or CCA? If so, please identify all of the schemes that apply to your organisation.

Eight responses, of which:

Three sector associations indicated their members are covered by all three schemes.

Two respondents (one public sector, one private sector) indicated that they represent organisations subject to the EU ETS and CRC.

One respondent (organisation undisclosed) indicated they represent an organisation that was covered by all three schemes.

Two individuals confirmed this question was not relevant to them.

Question 2: Who is your regulator(s)?

Nine responses, of which:

Three respondents had members covered by the Environment Agency, Scottish Environment Protection Agency (SEPA), Northern Ireland Environment Agency (NIEA) and Natural Resources Wales.

One respondent indicated their company's regulators are the Environment Agency and SEPA.

One respondent indicated their company's regulator is the Environment Agency.

Two respondents indicated their regulators were the Department of Energy and Climate Change (DECC) and the Environment Agency (for the CCA regime, the role of scheme administrator and regulator transferred from DECC to the Environment Agency in April 2013).

One respondent indicated their regulators were Local Authorities and the Health and Safety Executive. The remit of these regulators does not extend to the climate change policies referenced in this consultation.

One respondent indicated this question was not relevant to them.

Question 3: Do you agree with the proposed public interest factors set out in the draft guidance for all regimes? If not, please explain why and provide details of any alternatives.

Thirteen responses, of which:

All but two respondents agreed with the proposed public interest (PI) factors as set out in the draft guidance. The two remaining respondents highlighted a range of issues associated with the interpretation and application of the PI factors.

a) How is the relative importance of these factors determined on a case by case basis? and

b) Scope for differences in interpretation.

Our response [a) & b)]:

We believe the development of this guidance, combined with the way the Environment Agency regulates these schemes, supports consistency of interpretation while leaving room to consider case-specific factors as appropriate. As explained in the guidance, we will decide how important each factor is in the circumstances of each case and make an overall judgement. All three schemes are audited and enforced by our central National Trading and Regulatory Services team. In addition, all recommendations to issue civil penalties are overseen by an

Enforcement Panel and subject to confirmation by senior officers. These arrangements help maintain consistency in our interpretation and application of the public interest factors.

c) How the use of this discretion will be recorded; and to what degree, if any, the nature of it or decisions made relating to it will be made publicly available via a public register.

Our response:

Our use of discretion and enforcement decisions will be documented in the case files. As regards the publication of information relating to our enforcement decisions, unlike the Environmental Permitting regime there are no public register provisions for the EU ETS, CRC and CCA regimes.

d) The Environment Agency should publish all penalties including those under the CCA regime even though it is under no obligation to do so under the regulations.

Our response:

We have decided to normally publish penalties across the regimes. Also where we revoke an EU ETS permit or terminate a CCA agreement as a form of enforcement, we will generally also publish equivalent information about this.

e) Publication of penalties should include a press release and a banner on the Environment Agency website.

Our response:

The Environment Agency website was migrated to the GOV.UK website earlier this year. Details of penalties will be published there. We don't believe it is appropriate to issue a press release each time we publish a penalty. We would do so where we believe there is sufficient justification in an individual case.

In view of the support for the PI factors, and subject to the comments above, we have decided to also apply them to our new functions in administering and enforcing the Energy Savings Opportunity Scheme (ESOS). We became responsible for implementing ESOS via the Energy Savings Opportunity Scheme Regulations 2014, which entered into force on 17 July 2014, after the consultation had closed. We will consult on the specific details of our approach to enforcement of ESOS in due course. In the meantime we believe it is appropriate to apply the same PI factors as for the other regimes in the interests of consistency and transparency.

Question 4: Do you agree that the content of the draft guidance accurately reflects the provisions of the legislation in terms of the basis for enforcement action, the powers and duties that are set out, and the scope for discretion? If not, please explain where you think this is not the case for each regime and provide details of any alternatives.

Thirteen responses, of which:

Eleven respondents agreed that the content of the draft guidance accurately reflects the provisions of the legislation.

The two remaining respondents highlighted a range of issues:

a) CCA penalty setting – Improved transparency of the calculation for penalties. Will the Environment Agency use fuels in that calculation which are not subject to the Climate Change Levy?

Our response:

We will calculate the penalty according to the formulae in the CCA Regulations. For ease of calculation and transparency we can only use the information we hold in the CCA register and associated documents. We recognise that in some circumstances these may not contain the full details of what energy consumed in the facility attracted the Climate Change Levy (CCL), and what did not. Information such as this is often regarded as commercially sensitive by operators. Our initial penalty calculations may thus prove inaccurate for target units where there are energy supplies that are not subject to CCL or pay a lower rate of CCL. These are:

- Coke used as a reductant (e.g. coke used in a blast furnace)
- Gas or coal used to fuel a combined heat and power plant
- Electricity used in electrolysis
- Electricity recorded by us as grid electricity which actually comes from a renewable source
- Fuels used in the recycling of steel or aluminium.

To ensure the penalties imposed are correct we will first issue a notice of intent. This will give the operator an opportunity to make representations within a reasonable time – normally 28 calendar days – if they believe the calculation needs amending because the information we hold is not complete. The evidence must be sufficient for us to revise the penalty calculation. If the operator provides any evidence after the 28 day period, we are unlikely to take this into account, unless there are exceptional circumstances. Penalties will be confirmed in a final notice, as appropriate.

b) Potential for inconsistencies and uncertainty in the application of discretion.

Our response:

The response to this point is addressed under question 3.

c) Publish the extent of the infraction on anonymous cases to enable public scrutiny of the penalties imposed.

Our response:

When penalties arise we have no plans to publish the extent of infraction on anonymous cases. However, we do intend to publish details of penalties where we have imposed them, and have included further detail in the guidance to explain this.

d) **EU ETS** - Can we assume that the Small Emitter and Hospital Scheme is outside of this guidance?

Our response:

The guidance covers excluded installations (small emitters and hospitals). We have amended the guidance to make this clearer and included specific information relating to these installations.

e) **EU ETS** - Clarify and simplify the list of offences stipulated in the Greenhouse Gas Emissions Trading Scheme (GGETS) Regulations 2012

Our response:

We have amended the EU ETS guidance to provide further clarity on offences under the GGETS Regulations. In order to assist operators and to increase transparency, we have added information to the EU ETS section in relation to stationary installations. For each potential breach, we have set out how we are likely to exercise our discretion.

As regards simplifying the list of offences we have no scope to do this because they are stipulated in the Regulations.

f) **CRC** – The penalties are much too high for the majority of potential cases.

Our response:

We have no scope to change the maximum penalties as stipulated in the CRC Order. Nevertheless, we do have scope to apply discretion on a case-by-case basis as described in the guidance.

Question 5 - Do you agree that the content of the draft guidance clearly explains our proposed enforcement approach for EU ETS, CRC and CCA? If not, please explain where you think this is not the case for each regime and provide details of any alternatives.

Thirteen responses, of which:

Six respondents agreed the content of the draft guidance clearly explains our proposed enforcement approach for all three schemes.

The remaining respondents highlighted the following range of issues:

a) CCA penalty setting

Our response:

The issues raised have been addressed in our response to Question 4.

b) CCA - More detail requested about how situations will be investigated and the principles used/applied in applying our discretion.

Our response:

The circumstances under which we can impose a penalty in the CCA scheme are limited and should be clear cut. The public interest factors which will inform the exercise of our discretion will apply equally to all regimes, and will be considered on a case-by-case basis.

For further information on our approach refer to our response to Question 4.

c) Complexity of the policy landscape, overlap of policy instruments, impact on energy intensive industry, potential for error when trying to comply.

Our response:

The Environment Agency is responsible for implementing the policy instruments and legislation as specified by Government and Parliament. The guidance is therefore intended to set out a clear, consistent and proportionate enforcement approach for the climate change regimes as currently designed.

Question 6 - Do you agree that our enforcement approach for EU ETS, CRC and CCA is fair and proportionate in line with the legislation that it relates to? If not, please explain where you think this is not the case for each regime and provide details of any alternatives.

Thirteen responses, of which:

Eleven respondents agreed that our enforcement approach for all three schemes is fair and proportionate in line with the legislation that it relates to.

The two remaining respondents highlighted the following range of issues:

a) Recording how discretion has been applied to individual cases. This information should also form part of the publicity about the case.

Our response:

We document all our enforcement cases. Case records include consideration of whether discretion should be applied and to what extent if applicable.

If we decide not to impose penalties for a particular case we do not publicise any information relevant to that case and have no intention to do so in the future.

b) Too much regulation for the energy intensive industry. Organisations can still be covered by all three policy instruments. As a result for small emitters the proposed enforcement approach is not proportionate.

Our response:

This issue is addressed in response to question 5(c) above. In addition, we have modified the public interest factors which inform the exercise of our discretion in order to be more explicit that we will consider the ability to pay.

For relevant ETS offences our enforcement approach must take account of the participant’s emissions and shortfalls in surrendered allowances. If the organisation concerned is a small emitter the emissions-based penalties are already scaled accordingly.

Question 7 - Do you have any other comments on the draft guidance?

Fourteen responses, of which:

Ten respondents had no further comments on the guidance.

One respondent indicated general agreement with the guidance.

The three remaining respondents highlighted the following issues:

a) Public interest factors - the timeliness of corrective action could also be considered as a public interest factor.

Our response:

We have modified the public interest factors to make clear that action taken by an organisation to correct its non-compliance, and the time for corrective action, will be taken into account.

b) There is a need to better explain the concepts behind this topic.

Our response:

The purpose of the guidance is to set out our intended approach to enforcement of the climate change regimes. We acknowledge the ongoing challenge for organisations to understand the schemes we administer and regulate. Feedback on our guidance and helpdesk support helps us to meet customer needs. We have amended the guidance in light of these consultation findings. We are grateful to respondents for taking the time to comment on this consultation.

c) Publication of penalties to include decisions to reduce or waive penalties and the reason for that discretion.

Our response:

In cases where we have waived penalties it would be inappropriate to publish details of the offence and the reason for that discretion.

For penalties that are imposed we intend to normally publish information as set out in the guidance.

d) There should be a much greater commitment to publicising the enforcement action taken.

Our response:

The response to this point is addressed under question 3.

5. Next Steps

Responses to this consultation have be used, as appropriate, to finalise the new Annex for our Enforcement and Sanctions Guidance.

Individuals who wish to follow up their responses, or points made within this document, in more detail are welcome to contact:

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Annex 1 - List of respondents

Member of Public/Company/Organisation
British Calcium Carbonate Federation
British Ceramic Confederation
British Meat Processors Association
British Poultry Council
Chemical Industries Association
EDF Energy
Metal Packaging Manufacturers Association
Minerals Products Association
Sandbag Climate Campaign
The Energy Consortium
WPIF Environmental Ltd
2 Members of the public
1 Anonymous

Annex 2 - Meetings/events held

Meeting/Event	Date
UK Emissions Trading Group meeting – Domestic Measures Working Group	26 February 2014

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