Enforcement and sanctions policy

28 November 2017 Draft document for consultation

We are the Environment Agency. We protect and improve the environment.

Acting to reduce the impacts of a changing climate on people and wildlife is at the heart of everything we do.

We reduce the risks to people, properties and businesses from flooding and coastal erosion.

We protect and improve the quality of water, making sure there is enough for people, businesses, agriculture and the environment. Our work helps to ensure people can enjoy the water environment through angling and navigation.

We look after land quality, promote sustainable land management and help protect and enhance wildlife habitats. And we work closely with businesses to help them comply with environmental regulations.

We cannot do this alone. We work with government, local councils, businesses, civil society groups and communities to make our environment a better place for people and wildlife.

Published by:

Environment Agency
Horizon House, Deanery Road,
Bristol BS1 5AH
Email: enquiries@environment-agency.gov.uk
www.gov.uk/environment-agency

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or our National Customer Contact Centre:
T: 03708 506506

Email: enquiries@environment-agency.gov.uk.

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Introduction

This document sets out the Environment Agency's enforcement and sanctions policy.

The Environment Agency is responsible for enforcing laws that protect the environment. We aim to use our enforcement powers efficiently and effectively to secure compliance. This contributes to our work to create better places for people and wildlife, and support sustainable development.

This document explains:

- the results we want to achieve
- the regulatory and penalty principles we uphold
- the enforcement and sanction options available to us
- how we make enforcement decisions
- the enforcement framework for the climate change schemes and the control of mercury regime

In this document where we refer to a:

- Regulatory Enforcement and Sanctions Act 2008 (RES Act) civil sanction, we mean a RES Act notice, penalty or enforcement undertaking
- climate change civil penalty, we mean a penalty under a climate change scheme - European Union Emissions Trading Scheme (EU ETS), CRC Energy Efficiency Scheme (CRC), Energy Savings Opportunity Scheme (ESOS), Fluorinated Greenhouse Gas regime (F-Gas) and Climate Change Agreements (CCA)
- mercury civil penalty, we mean a civil penalty under the Control of Mercury (Enforcement) Regulations 2017

Outcome focused enforcement

The 4 outcomes we want to achieve are to:

- stop illegal activity from occurring or continuing
- put right environmental harm or damage, also known as restoration or remediation
- bring illegal activity under regulatory control, and so in compliance with the law
- punish an offender and deter future offending by the offender and others

To get the best outcome for the environment and for people, we will use the full range of enforcement and sanctioning options available to us.

Enforcement and sanction regulatory principles

We must follow the requirements of the Regulators' Code. It is a framework for how regulators should engage with those they regulate.

Find out how the Environment Agency meets the Regulators' Code.

The requirements of the code do not apply where:

- we can demonstrate that immediate enforcement action is required to prevent or respond to a serious breach of the law
- following it would defeat the purpose of the proposed enforcement action

We believe in firm but fair regulation. To meet this commitment we apply the following principles when we carry out enforcement activities.

Act proportionately

We will act proportionately when we apply the law. We will take account of and balance the:

- risk posed to people and the environment
- seriousness of the breach of the law
- impact on the environment, people and legitimate business
- cost of taking enforcement action against the benefit of taking it
- impact on economic growth

Have regard to the growth duty

We will have regard to the growth duty and guidance. This means we will only take enforcement action or impose a sanction when we need to and in a proportionate way.

We must protect people and the environment. We will make sure our enforcement action supports rather than hinders legitimate business.

We will not allow operators to pursue economic growth at the expense of protecting people and the environment.

We will deal with non-compliant activity and behaviour appropriately because it harms:

- people and the environment
- businesses that are compliant – it can disrupt competition and act as a disincentive to invest in compliance

Our approach to making decisions on RES Act, climate change and mercury civil penalties (as set out in annexes 1 to 3) takes account of the growth duty.

The decision to start a prosecution and any decisions we make during proceedings are not subject to the growth duty.

Be consistent

Consistency means taking a similar approach in similar circumstances to achieve similar ends. We aim to be consistent in:

- the advice we give
- our response to breaches of the law
- the use of our powers and decisions on whether to prosecute
- how we choose what sanction is appropriate in similar factual circumstances

This does not mean every enforcement decision on what action to take will be exactly the same, as each set of circumstances may differ. Our staff will use their professional judgement and discretion, taking account of many factors, such as the:

- scale of environmental impact
- attitude and actions of individuals and managers of businesses
- history of previous breaches and/or offences

Be transparent

We will make clear to people and businesses we regulate:

- what they have to do to comply with the law
- what they can expect from us
- what breach or offence we think has been or is being committed
- why we intend to take or have taken enforcement action
- their right to make representations or to appeal

This document sets out our policy for dealing with breaches and offences. It shows how we have made sure our actions are understood by those we regulate.

Target enforcement action

We will mainly direct our regulatory effort:

- towards those whose activities cause or could cause the greatest risk of serious environmental damage
- where the risks are least well controlled
- where a breach undermines a regulatory framework
- where we suspect deliberate or organised crime

We will take action against law breakers and those directly responsible for risk or who are best placed to control it.

We will monitor (check) permitted or other activities to assess compliance.

We will categorise incidents and breaches at permitted sites based on one of the following:

- our classification systems that assess the impact
- the potential risk to the environment or human health
- the impact on the integrity of the scheme or regulatory framework

We will prioritise and pursue investigations that involve serious environmental harm or harm to human health, organised crime, overtly criminal activity, substantial illegal gain, threats of violence or other aggravating factors.

Be accountable

We will be responsible for each enforcement decision and action we take and will explain it where appropriate.

Enforcement and sanction penalty principles

When we carry out any enforcement activity we aim to:

- change the behaviour of the offender
- remove any financial gain or benefit arising from the breach
- be responsive and consider what is appropriate for the particular offender and regulatory issue, including punishment and the public stigma that should be associated with a criminal conviction
- be proportionate to the nature of the breach and the harm caused
- take steps to ensure any harm or damage is restored
- deter future breaches by the offender and others

Liability for enforcement action

Establishing liability

Before we decide to start a prosecution case we must:

- meet the test in the Code for Crown Prosecutors, this means we must be satisfied there is a realistic prospect of securing a conviction
- be sure it is the most appropriate enforcement action to take based on the evidence in the case and that it is in the public interest

- consider the resulting implications and consequences

To impose a RES Act civil sanction we must be satisfied beyond reasonable doubt that an offence has been committed.

To accept an enforcement undertaking offer we must have reasonable grounds to suspect that an offence has been committed.

For climate change and mercury civil penalties we need to be satisfied that a breach has occurred on the balance of probabilities (the 'standard of proof' in civil cases) – this means it is more likely than not to have occurred.

When we will prosecute an insolvent company or individual

Where an individual or company is going through an insolvency procedure:

- we can still start or continue to prosecute, where the test under the Code for Crown Prosecutors is met, but we would need to get permission from the court or insolvency practitioner
- we will not normally apply a financial penalty where we have discretion, that is where the penalty is not mandatory
- they are excluded from qualifying for the Energy Savings Opportunity Scheme (ESOS)

Under the CRC Energy Efficiency Scheme if the insolvent body is a company within a group, then the remaining solvent members of that group are responsible for its liabilities.

Taking action against the Crown

The Crown:

- is not criminally liable for any contravention of any provision
- cannot be subject to a RES Act civil sanction
- may be liable to a climate change or mercury civil penalty

We may apply to the High Court for a declaration that any act or omission of the Crown is unlawful. This action is unusual and whether we take it will depend on all of the following:

- the seriousness of the incident or breach
- whether liability is admitted
- the response of the offender

Rights, records and cost recovery

When the Environment Agency will publish enforcement action

Each of the regimes we regulate has its own approach to the publication of enforcement action.

We must publish details of our enforcement action when we are required to by law.

We are required to publish:

- details of enforcement action on a public register for some regimes, for example, environmental permitting
- certain information about penalties for the climate change schemes
- a RES Act civil sanction that has been imposed or an enforcement undertaking offer accepted, unless we consider this to be inappropriate

The Rehabilitation of Offenders Act 1974 (RoOA) requires us to remove published information on convictions and formal cautions after a certain period of time. The time period will depend on the nature of the offence or penalty.

We will meet the requirements of the Data Protection Act 1998 (DPA) by not publishing information on an individual (as opposed to a company) unless required to by law. Public register and other requirements may override this exclusion.

Taking all of this into account, and except where we think ongoing enforcement action may be compromised, we will normally publish details of:

- all criminal convictions
- enforcement undertakings, including those rejected, except where prosecution proceedings are underway
- notices relating to breaches or enforcement other than information notices and notices of intent

We will not publish details of notices under:

- CRC, where we have only used them to allow a participant to buy allowances in a special allocation
- ESOS, where there is an ongoing investigation and until we know that an operator is within the scope of the scheme - we may use an enforcement notice to check if an operator is within scope

For any RES Act, climate change or mercury civil penalty we impose, we will normally publish information on the:

- name of the person we imposed the penalty or sanction upon
- legal requirement that was not complied with
- penalty amount

Where we revoke an EU Emissions Trading Scheme (EU ETS) permit or Climate Change Agreement (CCA) as an enforcement action we will generally publish equivalent information about this.

We will normally publish details of penalties we have imposed for 12 months. Any results of any criminal proceedings will be published as soon as reasonably possible. In civil proceedings we will not publish information until any appeal has been determined or the time for appealing has passed.

After 12 months, we may make information about penalties publicly available under the governments open data rules.

Representations and appeals

When we decide to serve an enforcement or similar notice we will generally already have engaged with those concerned on the breach that caused it.

When we decide to prosecute we will normally tell the offender our reasons for doing so.

When we decide to impose a RES Act civil sanction (except a stop notice), a climate change or mercury civil penalty we will:

- serve a notice of intent
- provide an opportunity to make representations in writing
- give the person 28 days to make representations
- consider the representations received before making our final decision on whether to serve the penalty or the amount
- notify the person of our final decision
- give concise reasons for doing so

For climate change civil penalties involving an additional daily penalty we will not serve the notice of intent until the total available daily penalty is known.

When we decide to take formal enforcement action we will notify the person of their right to appeal. This will include their right to request that we review our decision, where appropriate.

See more information on civil sanction appeals in annex 1.

Victim's right to review

Where we have completed an investigation into a criminal offence and made the decision not to prosecute the responsible party, an identified victim can request that we review that decision. Normally we will know the identity of any victims. We will tell the victim of our decision not to prosecute and advise that they may have that decision reviewed. They will need to inform us within 5 working days if they wish us to review it.

When the Environment Agency can recover costs

Where the law allows, we will always seek to recover the costs of:

- investigations
- enforcement proceedings
- any remedial works we carry out

Enforcement options the Environment Agency can use

We aim to make sure our enforcement response is proportionate and appropriate to each situation. Our first response is usually to give advice and guidance or issue a warning to bring an offender into compliance where possible.

We have a range of civil sanctions available to use for many of the offences we are responsible for enforcing. They were introduced by the Regulatory Enforcement and Sanctions Act 2008 (RES Act), the Environmental Civil Sanctions (England) Order 2010, the Environmental Civil Sanctions (Miscellaneous Amendments) Regulations 2010 and the Control of Mercury (Enforcement) Regulations 2017.

We will normally consider all other options before considering criminal proceedings. Generally, prosecution is our last resort.

Not all breaches are an offence. The legislation specifies whether a breach is an offence or not. This may limit what we can do about a breach.

Find the full list of every breach and offence we regulate and the enforcement action available to us in the Offence Response Options document.

Enforcement options: interventions

Advice and guidance

We can support an individual or a business who has committed an offence or is likely to commit an offence by giving advice and guidance.

This will be without prejudice to (this means, will not affect) any other enforcement action that may be required.

The advice and guidance can be verbal or written and may be recorded. Any continued or further breach may influence our later choice of enforcement action.

Our objective is to provide an opportunity for the operator to return to compliance and stay compliant.

Warnings

We can issue a written warning if we believe an individual or business has committed an offence. This will set out:

- the offence we believe has been committed
- the action(s) we expect to be taken by when
- what will happen if action is not taken

We can do one of the following:

- send a warning letter
- issue a site warning, normally as a result of a compliance visit at a site with an environmental permit

The warning will be kept on record. Any continued or further breach may influence our later choice of enforcement action.

Notices, powers and orders

Many of the regimes we enforce contain powers to serve specific enforcement notices. We may serve these where appropriate. These require the recipient to stop offending or to restore or remediate the environment.

Enforcement options: civil penalties for climate change schemes

Climate change schemes (EU Emissions Trading Scheme, CRC Energy Efficiency Scheme, Energy Savings Opportunity Scheme, the Fluorinated Greenhouse Gas regime and Climate Change Agreements) have a specific civil penalties framework. Read Annex 2: the Environment Agency's approach to applying climate change civil penalties to find out how we work out the penalty for each breach.

Enforcement options: RES Act civil sanctions

We may choose to impose a RES Act civil sanction to get the outcome(s) we want.

RES Act civil sanctions are not available for all offences. Find the full list of every breach and offence we regulate and the enforcement action available to us in the Offence Response Options document.

The following explains where we might use or accept RES Act civil sanctions, the examples are not exhaustive.

Fixed monetary penalties (FMPs)

We may issue FMPs:

- where we have given advice and guidance, it has not been followed and improvements have not been made
- for minor offences or where there is no direct environmental impact, such as paperwork and administrative offences

The FMP is £300 for businesses and £100 for individuals. Paying 50% of the sum due within 28 days of receiving the notice of intent that the penalty will be imposed will clear legal responsibility for the FMP. Or if representations have been made within the 28 day period but a final notice is

served, legal responsibility can still be cleared by paying 50% of the sum due within 28 days of the final notice.

The outcome we want to achieve is a change in the offender's behaviour.

Variable monetary penalties (VMPs)

We may issue VMPs for more serious offences, including:

- when there is evidence of negligence or mismanagement
- when there is an environmental impact
- to remove an identifiable financial gain or saving as a result of the breach
- where it is not in the public interest to prosecute

Read annex 1 to find out how we calculate a VMP.

We may issue a VMP in conjunction with a compliance or restoration notice.

Compliance notices

We may issue a compliance notice where:

- we require the offender to take action to come back into compliance, for example, where an individual or business has regularly submitted data returns as required but stops doing so
- we have given advice and guidance, it is not been followed and improvements have not been made

Our objective is to achieve a change in the offender's behaviour.

We may issue a compliance notice in conjunction with a VMP or restoration notice to change the offender's behaviour and to put right environmental damage.

Restoration notices

This is a formal notice which requires the offender to put right any damage caused by an offence.

The offender will be required to take the steps set out in the notice by the specified date(s) to restore the situation as far as possible to what it would have been if the offence had not been committed.

We may issue a restoration notice when:

- the restoration has not voluntarily been done
- we have given advice and guidance, it has not been followed and the damage has not been put right
- there is no other suitable enforcement notice available

Our objective is to get the environmental harm or damage put right.

We may issue a restoration notice in conjunction with a VMP or a compliance notice.

Stop notices

A stop notice requires an activity to stop immediately. It remains in force until the required actions set out in the notice, to remove or reduce the harm or risk of harm, are completed. We do not have to serve Notice of Intent before we serve a Stop Notice.

We can issue a stop notice when an activity by an individual or business:

- is causing or presents a significant risk of causing serious harm to human health or the environment, including the health of animals and plants
- is committing or likely to commit a specified offence

We can also issue a stop notice when an activity by an individual or business:

- is likely to continue and will cause or will present a significant risk of causing serious harm to human health or the environment, including the health of animals and plants
- is likely to continue or will involve or will be likely to involve a specified offence being committed

Enforcement undertakings

An enforcement undertaking is a voluntary offer by an offender to put right the effects of their offending, its impact on third parties and to make sure it cannot happen again. The Environment Agency must have reasonable grounds to suspect that the offender has committed a specified offence. If we accept the offer it becomes a binding agreement between us and the person who makes the offer. If the offender complies with the undertaking then:

- we cannot prosecute for the original offence
- the offender will not get a criminal record for that offence but we will publish the details on the GOV.UK website and it may be included in the public register

Where it is not possible to fully restore any environmental damage then the offer needs to include some form of:

- environmental benefit or improvement
- compensation for damage to the natural capital, for example money for woodland planting to replace trees used to produce packaging

The offeror must also state the action it will take to ensure future compliance, for example investing in an environmental management system.

See annex 1 for more information, including what we expect an offer to include and how we decide whether to accept it.

Enforcement cost recovery notices (ECRNs)

We will always try to recover the money we have spent on work connected with an offence and imposing a sanction. We can serve an ECRN which will require the offender to pay the actual cost to the Environment Agency. If the offender is unable to pay the amount due for the civil sanction and the ECRN, we may reduce the sanction but are unlikely to reduce the ECRN. This is because we have a duty to protect public money.

We cannot serve an ECRN with a FMP.

Non-compliance penalty notices (NCPNs)

We can serve an NCPN or prosecute if an offender fails to comply with the requirements of a:

- Compliance Notice
- Restoration Notice
- Third Party Undertaking - a payment to someone affected by an environmental incident

We will normally serve an NCPN and determine the amount of the NCPN by assessing:

- what it will cost the offender to fulfil the remaining requirements of the compliance, restoration notice(s) or third party undertaking
- the reasons for the breach
- public interest factors

The Notice will no longer be payable if the requirements of the original compliance notice or restoration notice are complied with or a third party undertaking is fulfilled before the time set for payment.

If an NCPN does not achieve compliance with the original notice we may still prosecute for the original offence.

Enforcement options: criminal proceedings

If the Environment Agency decides to prosecute it will:

- exercise prosecutorial independence
- ensure any case put forward for prosecution meets the test in the Code for Crown Prosecutors

Prosecutorial independence in decision making

To ensure a fair decision-making process, the decision to prosecute must be taken independently of the investigator. This is particularly important where the prosecutor works for the same organisation as the investigator.

The Environment Agency is a non-departmental public body, its power to prosecute is set out in law and is controlled by its Board. When we decide to prosecute we are not influenced by a Government Department or Minister or any third party, it is an independent decision.

The Board delegates authority under the Non-Financial Scheme of Delegation (NFSoD) to start proceedings or to caution to the joint approval of a senior operational manager and a senior lawyer. Both of these roles have separate line management.

The approval must be based on the:

- senior operational manager's decision there is justification to prosecute or caution following the investigation
- senior lawyer's review of the case file and decision that the proposed prosecution or caution meets the test laid down in the Code for Crown Prosecutors

The Environment Agency's Chief Prosecutor supervises conduct of all prosecution cases and our lawyers have the power to stop a case which it is no longer in the public interest to pursue. The Chief Prosecutor reports to the Director of Legal Services and both these roles are independent of operational line management.

Fixed penalty notices (FPNs)

We can use FPNs (not a RES Act civil sanction) for specific offences. They are listed in the Offence Response Options document.

The FPN is a financial penalty and gives the offender the chance to pay a fixed amount of money by a set date. If the penalty is paid by the set time the offender is no longer liable for that offence and no further action will be taken.

We will keep a record of the issue and payment of a FPN. Any continued or further breach may influence our later choice of enforcement action.

If the FPN is not paid we will normally prosecute for the original offence.

Formal caution

We can only use a formal caution where we consider we could bring a prosecution and the offender:

- admits the offence
- consents to be cautioned

We will keep a record of the formal caution. It will be produced in court if the offender is later found guilty of a further offence.

We will use a formal caution to deter future offending.

If the offender will not accept the formal caution we will normally prosecute for the original offence.

Prosecution

We can prosecute a person or business we believe has committed a crime against the legislation we enforce.

The provisions in the legislation state what penalty the courts can apply. This could be a specified maximum fine, unlimited fine or imprisonment.

The decision to prosecute is not taken lightly, we will be sure:

- there is sufficient evidence - we must be sure of a realistic prospect of securing a conviction
- it is in the public interest to commence criminal proceedings

Even then, we will consider if a different response is more appropriate.

Orders imposed by the Court ancillary to prosecution

We can apply for ancillary orders following a conviction. The court imposes these and can include:

- disqualification of a director
- confiscation of assets, under the Proceeds of Crime Act 2002
- a criminal behaviour order
- forfeiture of equipment used to commit the offence
- disqualification from driving
- a compensation order
- vehicle seizure
- a remediation order

Other action we may take after a conviction

If the holder of an environmental permit is convicted, we may review and reconsider their competence to hold that permit. We may give them time to prove their competence or suspend or revoke their permit.

How the Environment Agency makes enforcement decisions

How we make enforcement decisions for climate change schemes is set out in annex 2.

In every other case we will consider all the individual facts and circumstances of the potential breach or offence. We will test the evidence and then weigh up the public interest factors. Then we will make an overall judgement and decide:

- whether to take enforcement action
- how to choose the enforcement option
- which enforcement option we will choose

Our NFSoD sets out the level at which enforcement decisions can be taken.

We will also check whether a regulatory position statement has been published, see Environmental permits: regulatory position statements.

Public interest factors

We must weigh up all the public interest factors.

For each case we will consider the factors and assess how important each one is. The weight of each factor varies, one factor could outweigh a number of others.

Intent

We are more likely to prosecute when an offence has been committed deliberately, recklessly or because of serious negligence.

When an offence has been committed accidentally or is a genuine mistake we are more likely to:

- give advice and guidance
- issue a warning
- impose an available civil sanction

Foreseeability

Where the circumstances leading to an offence could reasonably have been foreseen and no action to avoid or prevent it was taken we will normally:

- impose a sanction higher than advice and guidance
- issue a warning

Environmental effect

We will normally consider a prosecution, formal caution or a VMP where the offence is classified as a Category 1 or 2, under our:

- Common Incident Classification Scheme (CICS)
- Compliance Classification Scheme (CCS)
- Reservoirs Dam Risk Categorisation Scheme

The more serious the environmental effect is the more significant our enforcement response will be. Our choice will be based on the potential and/or actual harm, including the risk, to people, communities and the environment.

We will also consider prosecution, formal caution or a Variable Monetary Penalty where it may not be obvious that an offence has a detrimental environmental impact, but it undermines the environmental objectives of the regime. For example, water abstraction or producer responsibility offences.

Nature of the offence or breach

We will normally prosecute when the offence impacts on our ability to be an efficient and effective regulator, including where:

- Environment Agency staff are obstructed in conducting their duties
- we are targeting a particular type of offending
- we are given false or misleading information

Financial implications

We will normally impose a VMP or prosecute if the offending is motivated by financial gain including:

- undercutting a legitimate business
- making a profit from the illegal activity
- avoiding costs, such as costs saved by not applying for a permit

Deterrent effect

When we choose a sanction we will consider the most appropriate response to achieve:

- specific deterrence of the offender
- general deterrence of others who may be tempted to offend

We want to prevent future offending by both the offender and others.

Previous history and repeat offending

We will check if the offender has a history of non-compliance and/or offending, including the:

- degree, number and nature of the breaches and/or offences
- time elapsed since the previous breach and/or offence

This includes site specific offences and general failures by the offender.

We will normally escalate our enforcement response if previous sanctions have failed to achieve the desired outcome. For example, if we have previously issued a formal caution to encourage a change in behaviour to prevent future offending, and the person commits the same offence again, then we are likely to prosecute or serve a VMP where available.

Attitude

We will normally consider a prosecution or a VMP if the offender:

- has a poor attitude to the offence
- is uncooperative during the investigation
- is uncooperative to the suggested or required remediation

We are likely to apply a lesser sanction, such as advice and guidance, where the offender:

- voluntarily provides us with details of the offence
- reports the matter to us promptly
- has independently remedied the breach

Personal circumstances

We will consider the offender's personal circumstances, including:

- serious ill health
- the ability to pay if the sanction includes a financial penalty or requirement to carry out costly remediation

We may modify our proposed penalty if it would have a significant impact on a public or charitable body's ability to continue to provide their service(s). We will only consider this if the public or charitable body provides evidence to demonstrate this impact.

How we may deal with particular situations

Serious offences

We will normally consider prosecution, subject to public interest factors, if an offence is serious. We may feel it needs to be heard in a public forum.

Features that make an offence serious are when it has:

- been intentional, reckless, negligent or involves outright criminal activity
- caused serious harm (or has the potential to cause such harm) to the environment or to people

Or when the offender has:

- committed large scale and protracted non-compliance with regulatory provisions
- subjected Environment Agency staff to harassment, alarm, distress or fear of violence
- intentionally, recklessly or wilfully made a false or misleading statement or record
- obstructed the Environment Agency in carrying out its duties, thus preventing it from investigating potential criminal activity
- impersonated an Environment Agency officer
- failed to comply with a Stop Notice

Minor breach

We will normally choose to give advice and guidance to help bring a business back into compliance where a minor breach has been committed. We consider a minor breach to be where there is no impact on the environment.

Repeat offending

Continued repeat offending will normally result in us increasing the level of our enforcement response and imposing or seeking a more severe sanction.

We will not normally accept an Enforcement Undertaking for an offence where one has been previously accepted.

Failure to comply with a notice

If a recipient fails to comply with a notice we will normally seek a sanction that is likely to deter and/or punish.

Operating without a permit, licence or other authority

We are likely to impose a sanction that aims to punish and/or deter the offender if the necessary authorisation has not been obtained.

Multiple operations

We will always have regard to the compliance history of an offender, such as repeated breaches of a similar type or demonstration of overall management failure.

Body corporate

Where an offence is as a result of a company's activities, we will usually enforce against the company.

Where an offence is committed by a body corporate as a result of the consent, connivance or neglect of any director, manager, secretary or other officer, that person could also be guilty of an offence. We may enforce against that person.

We can take action against a corporate body, an individual or both. We will use the full range of enforcement options available to us. We may, under the Companies Act emphasise to a court that it has the power to disqualify directors.

Juveniles

We will not normally prosecute a juvenile's first offence.

When the Environment Agency can combine sanctions and offences

It is not normally possible to combine criminal and civil sanctions for the same type of offence unless legislation specifically allows it. We will consider all the circumstances very carefully if we do want to combine sanctions.

Where a number of compliance failures have occurred from the same or related incidents, where it is possible and correct to do so, we will assess all of those failures and try to take a single enforcement response. Our response will match the overall level of offending.

Annex 1: The Environment Agency's position on applying RES Act civil sanctions and accepting enforcement undertakings

We must follow the strict requirements and procedures set out in the legislation. However, the law does not include all that we need to consider when assessing whether to apply a sanction or accept an undertaking.

We must be satisfied beyond reasonable doubt that an offence has been committed before we impose a RES Act civil sanction. When we do decide to impose such a sanction we will apply the same safeguards as we would when we decide to prosecute.

The Environment Agency's procedural safeguards

When we investigate whether an offence has been committed, or is likely to have been committed, we will apply the safeguards as set out in the Police and Criminal Evidence Act 1984.

We will follow the test laid down in the Code for Crown Prosecutors when we assess whether our evidence is sufficient. This includes its strength and if it is clear, logical and convincing. If any of the evidence is ambiguous we will search for the truth. Where there is a direct conflict of evidence we will give the benefit of any uncertainty in favour of the accused.

We will make sure that the recipient of a Notice of Intent understands the case against them. We will set out the alleged offence and the reasons for the proposed sanction.

If we know of material which weakens our case or assists the defence, we will disclose it if it is relevant. If material is so sensitive a judge should rule on its disclosure or admissibility, then we will consider whether we should prosecute instead.

We will review our evidence based on our evaluation of any representations we receive.

We will have regard to victims and third parties (where they are known to us) whose interests have been adversely impacted by an environmental incident. We will try to:

- ensure that affected third parties are appropriately compensated
- encourage offenders to engage with the local community, assess and fully remediate the impacts of the environmental incident

Where we are advised that an offender is to compensate a third party, we will normally seek written confirmation that the offender's made reasonable attempts to compensate the third party as part of the arrangement. We will only proceed with applying a RES Act civil sanction or accepting an Enforcement Undertaking, if:

- it is appropriate in all other circumstances
- the offender has attempted to agree reasonable compensation with the affected third party

If we accept an Enforcement Undertaking we will make it clear that this does not prevent or prejudice the rights of a third party to bring their own civil claim about the incident to which it relates.

Variable Monetary Penalties (VMPs)

You need to read the Sentencing Council's Definitive guideline for the Sentencing of Environmental Offences (referred to as the 'Guideline') with this section. The Guideline explains how to assess a suitable penalty for an environmental offence following a stepped approach. It applies to individual offenders (aged 18 and over) and organisations.

We use a similar stepped approach to calculate a VMP. We have set out the steps we would apply to an organisation to illustrate our approach. We would use the steps in the Guideline for an individual when calculating a VMP for an individual.

Step 1: compensation

We will take account of compensation paid to third parties and victims for:

- personal injury
- loss or damage resulting from an offence

We will use our discretion to reduce the amount of a VMP if compensation has been paid.

Step 2: confiscation

This is not relevant to VMPs. The proceeds of a crime can only be confiscated following a conviction.

Step 3: determining the offence category

We will use culpability (blame) and harm factors when we work out the offence category.

We will use the definitions in the Guideline to assess culpability.

We will use the categories of harm in the Guideline to assess harm. But, as part of our assessment we will use our Common Incident Classification Scheme (CICS) and Compliance Classification Scheme (CCS) classifications as evidence of harm.

Together the culpability and harm factors indicate how serious the offence is. We will use the result to identify our starting point and category range when we assess the appropriate penalty.

Step 4: starting point and category range

When we calculate a VMP we will assess the:

- size of the organisation, by turnover or equivalent
- financial circumstances of an individual

In the Guideline, the starting point for the most serious, deliberate offence by a large organisation is £1 million - that is the top of the scale.

The maximum penalty we can impose using a VMP is £250,000 which is the statutory cap. So we have reduced the starting point by a factor of 4 to reflect the statutory maximum. This applies across all of the tables.

We consider that the maximum penalty for a VMP should be the maximum fine for a Crown Court case, which is sometimes unlimited. So we will restrict this to the statutory cap for VMPs which is £250,000. Where the maximum fine that can be imposed for a particular offence in the Crown Court is less than £250,000, we will reduce the starting point for calculating the penalty at this stage to reflect the lower maximum fine for that offence.

The Guideline includes a summary of aggravating and mitigating factors. We will identify if any combination of these or other relevant factors should result in adjusting the starting point penalty up or down. For example, relevant recent convictions and/or a history of non-compliance are likely to result in us applying a substantial upward adjustment.

We will treat very large organisations (VLOs) in a class of their own. This is in line with how the courts deal with fines for VLOs where applying a mechanistic increase or reduction is not considered helpful. An example of this is the judgment in the case: R v Thames Water Utilities Limited (2015) EWCA Crim 960.

After step 4 we will ‘step back’ and apply the factors set out in steps 5 – 7 to review whether the penalty as a whole is fair and correct. We will adjust as necessary keeping it within the statutory maximum cap.

Step 5: step back - removal of any economic benefit derived from the offending

The penalty can include an amount to cover any obvious financial benefit unlawfully gained by the offender. We will only add this if it does not exceed the maximum penalty we can apply.

Step 6: step back – proportionality

We will check whether the proposed penalty based on turnover is proportionate to the means of the offender. We will balance the need for the penalty to have a real economic impact with the organisation’s ability to pay.

We may, where we receive evidence, allow time for payment or allow payment by instalments.

Step 7: step back – consider other factors that may warrant adjustment

Our calculation will take any other factors into account. For example, matters which came up in the investigation or as a result of representations received.

Step 8: consider any factors that might indicate a reduction, such as assistance to the prosecution

This factor does not apply to calculating a VMP. Though it may have been a factor which influenced the choice of sanction.

Step 9: reduction for guilty pleas

This does not apply for calculating a VMP.

Step 10: ancillary orders

We may adjust the VMP if the offender will face financial expenditure as a result of following a compliance or restoration notice. This includes compliance with any other notice where expenditure directly benefits the environment.

This adjustment is not appropriate if the recipient benefits from the work, such as site improvements.

Step 11: totality principle

We will take account of whether the total VMP is proportionate to the offending behaviour. In particular, we will consider any recovery of costs we have sought and any other discretionary requirements.

Step 12: reasons

We will explain how we calculated the VMP and give our reasons.

Enforcement Undertakings

When the Environment Agency will accept an offer

We are more likely to accept offers when they are offered early and proactively.

Generally, we will only consider accepting an Enforcement Undertaking offer when:

- we are confident the terms of the Enforcement Undertaking will be complied with
- we believe a breach of relevant legislation has occurred
- we consider the Enforcement Undertaking to be the correct regulatory outcome taking into account:
  - the nature of the offence and its impact
  - other forms of enforcement available, to remedy the issues concerned, to the environment and the community
- the offer is above what the company would normally need to do to comply
- the offer is given in good faith
- the offeror makes a positive commitment, at the right company level to stop the offending conduct or alleged breach and to maintain compliance
- the offeror rectifies the consequences of the conduct, including interacting with any third party affected by the offence
- the offer does not contain restrictions on how we may publish its acceptance in cases involving pollution of the environment or harm to human health, it is demonstrated that any necessary remediation or restoration work commenced or will commence at the earliest opportunity

When the Environment Agency will not accept an offer

We will not normally accept an offer:

- for an incident or breach which has been classified under the Compliance Classification Scheme (CCS) or Common Incident Classification Scheme (CICS) as:
  - category 1, unless there is, at most, low culpability
  - category 2, unless there is, at most, negligence
- where we have started legal proceedings
- where the offence was intentional or of the most severe environmental impact, however we will not rule it out, as we will always apply discretion
- where we have already decided that a prosecution is appropriate in the public interest
- made after issue of a VMP Notice of Intent

We will not normally accept an Enforcement Undertaking offer if it contains:

- a clause denying liability
- any clause that sets up defences for possible breach of an Enforcement Undertaking

How the Environment Agency secures consistency when assessing offers

We will establish that:

- the offer includes reasonable payment to cover our costs for the time spent on the offence and assessing the offer, this meets the ‘polluter pays’ principle
- a payment made to a project the Environment Agency is involved with does not contribute to funding its core activity
- the offer of payment to a third party is an unrestricted offer with no benefit to the offeror
- the offer of payment to a third party protects, restores and enhances the natural capital of England and where possible meets the objectives the breached legislation was trying to achieve
- the action in the offer secures environmental improvement and relates to the objectives of the breached legislation, for example, it is for a relevant charity or to address the actual impact
- where the offer relates to an incident that caused adverse environmental impact, it should:

– put right the environmental harm it caused

– achieve equivalent benefit to the environment plus compensation where the environmental harm cannot be restored, we could calculate this by doing a natural capital assessment with the Environment Agency's Natural Capital Assessment calculator for water environment damage

– include a financial contribution to a local and/or related environmental cause or charity

- an offer proposing to contribute to a project to improve the ecological status of water bodies which would be unaffordable without this contribution is carefully considered
- where the breach does not have a direct impact on the environment, such as the packaging waste producer responsibility regime, the offer will protect, restore or enhance England’s natural capital
- an offer to a local authority contains no financial contribution to their core activities

We will consider a wish to pay the offer in instalments when the offeror provides evidence of an inability to pay it outright, such as certified accounts or records

When the offer is accepted

Once an offer has been accepted, it becomes a legally binding written agreement between the offeror and the Environment Agency.

Failure to comply with an Enforcement Undertaking

If an offeror fails to comply, either fully or in part, with an Enforcement Undertaking, we are likely to do one of the following:

- serve a Variable Monetary Penalty, Compliance Notice or Restoration Notice on the offeror
- prosecute for the original offence
- vary or extend the time for complying with an Enforcement Undertaking

Third Party Undertaking (TPU)

A TPU is similar to an Enforcement Undertaking but can only be offered where an offender has already received a Notice of Intent to serve one of the following:

- Variable Monetary Penalty
- Compliance notice
- Restoration notice

A TPU can only be used to make an offer to compensate someone who has been affected by the offence.

Limitations on imposing RES Act civil sanctions

The Environment Agency cannot impose a RES Act civil sanction where:

- that offence is not specified as having a civil sanction available
- that offence does not have that particular civil sanction available
- no offence has been committed
- it is not possible for the offence to be proved beyond reasonable doubt (except enforcement undertakings)
- representations indicate that a defence is available

Specified offences are stated in the Environmental Civil Sanctions (England) Order 2010 (ECSO), the Environmental Civil Sanctions Miscellaneous Amendments (England) Regulations 2010 (ECSR) and the Environmental Permitting (England and Wales) Regulations 2016.

Appeals against RES Act civil sanctions

Where we can impose a RES Act civil sanction our notices will set out rights of appeal. Find guidance on how to appeal to a tribunal against a fine or notice for an environmental offence.

The grounds of appeal against the imposition of a civil sanction will be one of the following:

- decision was based on an error of fact
- decision was wrong in law
- decision was unreasonable
- amount is unreasonable
- any other reason

Annex 2: Climate change schemes: the Environment Agency's approach to applying climate change civil penalties

Applies to European Union Emissions Trading Scheme (EU ETS), CRC Energy Efficiency Scheme (CRC), Energy Savings Opportunity Scheme (ESOS), Fluorinated Greenhouse Gas regime (F Gas) and Climate Change Agreements (CCA) - known as the climate change schemes.

Section A explains the steps we will take to decide whether to impose a civil penalty or to work out the final penalty amount. Within the steps we will assess:

- the nature of the breach
- culpability (blame)
- size of the organisation
- financial gain
- history of non-compliance
- attitude of the non-compliant person
- personal circumstances

Section A also explains when we cannot apply the stepped approach.

Sections B, C, D and E explain how we will initially assess each EU ETS, CRC, ESOS and F Gas breach. These sections explain our normal ‘nature of the breach’ assessment and other enforcement positions specific to the scheme.

The nature of the breach assessment is the seriousness of the breach based on the impact it has on the integrity of the scheme. This means the trust in, transparency, reliability and effectiveness of the scheme. It may include the length of time a person has been required to comply with the law. Maintaining the integrity of the scheme is vital to reduce the UK's contribution to climate change.

For certain F Gas breaches, the nature of the breach assessment also includes the seriousness of the breach based on its environmental effect. Environmental effect may be potential and/or actual harm, including the risk to people, communities and the environment.

The law sets the maximum penalty available for each breach (known as the statutory maximum). Sections B, C, D and E, for each breach, explain our normal assessment and other enforcement positions, including whether we think a penalty should be waived or whether the 'initial penalty amount' (see step 1 in section A) should be the statutory maximum or something lower.

Section F explains our approach to CCA breaches.

Section A: The Environment Agency's penalty setting approach for the climate change schemes

Once we have determined that a person is liable to a civil penalty, where the legal framework allows, we can apply our discretion and decide whether to:

- waive (not apply) the civil penalty
- reduce the civil penalty
- extend the time for payment

We use a stepped approach to make this decision. The steps are based on those in the Definitive Guideline for the Sentencing of Environmental Offences (known as the Guideline). We have adjusted the steps so that they are appropriate for the climate change civil penalties. The Guideline applies to criminal offences with no statutory maximum levels in the Crown Court; therefore we cannot follow it entirely.

We cannot apply the stepped approach to the breaches set out in paragraphs B3.1, B3.4 and section F due to their nature and legal requirements. See our approach to these breaches in those sections.

Where the legislation requires us to apply a mandatory penalty we cannot apply our discretion. Sections B to F set out our approach to mandatory penalties.

How the Environment Agency sets the penalty level

When we can apply our discretion we carry out the following steps to make our decisions:

- Step 1 - check or determine the statutory maximum penalty for the breach
- Step 2 – decide whether to waive the penalty or set the initial penalty amount by assessing the nature of the breach and other enforcement positions in line with Sections B, C, D and E
- Step 3 – if we decide to impose a penalty, work out the penalty starting point and penalty range based on culpability (blame) and size of the organisation
- Step 4 - set the final penalty amount by assessing the aggravating and mitigating factors and adjust the starting point as appropriate

Set the initial penalty amount: steps 1 and 2

We will first check or determine the statutory maximum penalty available for the breach.

We will then consider our normal nature of the breach assessment and other enforcement positions (if applicable), set out for each breach in Sections B, C, D and E. We may decide to waive the penalty. Where we decide to impose a penalty, we will set the initial penalty amount at the statutory maximum or lower.

Work out the penalty starting point and penalty range: step 3

This calculation is based on culpability (blame) and size of the organisation.

We will determine culpability in line with the following categories as set out in the Guideline.

Deliberate

This means one of the following:

- intentional breach of or flagrant disregard for the law by person(s) whose position of responsibility in the organisation is such that their acts/omissions can properly be attributed to the organisation
- deliberate failure by the organisation to put in place and to enforce such systems as could reasonably be expected in all the circumstances to avoid commission of the offence

Reckless

This means one of the following:

- actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken by person(s) whose position of responsibility in the organisation is such that their acts/omissions can properly be attributed to the organisation
- reckless failure by the organisation to put in place and to enforce such systems as could reasonably be expected in all the circumstances to avoid commission of the offence

Negligent

This means failure by the organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence.

Low or no culpability

This means an offence committed with little or no fault on the part of the organisation as a whole, for example by accident or the act of a rogue employee and despite the presence and due enforcement of all reasonably required preventive measures, or where such proper preventive measures were unforeseeably overcome by exceptional circumstances.

We will determine the size of the organisation by its turnover in line with the following categories in the Guideline:

- large - £50 million and over
- medium – between £10 million and £50 million
- small – between £2 million and £10 million
- micro – not more than £2 million

When we assess the turnover for CRC and ESOS, we will consider the turnover or equivalent (such as the annual revenue budget for public bodies) of the ‘participant’.

We will use tables 1 and 2 to work out the penalty starting point and penalty range.

Table 1 shows the penalty factor we will use to calculate the penalty starting point based on the culpability category and size of the organisation. We will apply this to the initial penalty amount.

Table 1

	Size of organisation (based on turnover or equivalent)			
Breach category	**Large**	**Medium**	**Small**	**Micro**

Deliberate	1	0.4	0.1	0.05
Reckless	0.55	0.22	0.055	0.03
Negligent	0.3	0.12	0.03	0.015
Low or no culpability	0.05	0.02	0.005	0.0025

If after applying the penalty factor the starting point is £1,000 or less we will round it up to £1,000. Otherwise the starting point will be too low to reflect the nature of the breach.

Table 2 shows the penalty range factors we will use based on the culpability category and size of the organisation. We will apply this to the initial penalty amount. In step 4, we will normally adjust the penalty starting point within the penalty range.

Table 2

	Size of organisation (based on turnover or equivalent)			
Breach category	**Large**	**Medium**	**Small**	**Micro**
Deliberate	0.45 to statutory maximum	0.17 to statutory maximum	0.045 to 0.4	0.009 to 0.095
Reckless	0.25 to statutory maximum	0.1 to 0.5	0.024 to 0.22	0.003 to 0.055
Negligent	0.14 to 0.75	0.055 to 0.3	0.013 to 0.12	0.0015 to 0.03
Low or no culpability	0.025 to 0.13	0.01 to 0.05	0.0025 to 0.02	0.0005 to 0.005

We have developed the factors in these tables for the climate change penalties because we cannot use the tables in the Guideline. It uses different legislative provisions and a different assessment of harm. Our factors and ranges are derived from the penalty levels under 'harm' category 1 in step 3 of the Guideline. This recognises that 'harm' will already have been considered at the point that the factors are applied. To calculate our penalty factors and ranges, the starting points for each of the different organisation sizes and culpability levels have been divided by £1 million. Our penalty factors cannot exceed 1 because the maximum climate change penalties are set in law and so the ranges are capped.

At the end of step 3 we will have adjusted the initial penalty amount to reflect culpability and the size of the organisation.

Set the final penalty amount: step 4

We may adjust the penalty from the starting point within the penalty range by assessing the following aggravating and mitigating factors:

- financial gain – whether or not a profit has been made or costs avoided as a result of the breach
- history of non-compliance – includes the number, nature and time elapsed since the previous non-compliance(s)
- attitude of the non-compliant person – the person's reaction, including co-operation, self-reporting, acceptance of responsibility, exemplary conduct and steps taken to remedy the problem
- personal circumstances – including financial circumstances, economic impact, ability to pay (only if sufficient evidence is provided) and for a public or charitable body whether the proposed

penalty would have a significant impact on the provision of its service (only if sufficient evidence is provided)

These factors differ to those listed in the Guideline. We have selected applicable factors from the list. We have also taken factors from other steps in the Guideline. We have then adjusted and simplified them so they are relevant to the climate change schemes.

We will normally adjust a penalty within the range but, in some circumstances, we may move outside the range, including waiving the penalty.

At the end of step 4 we will have calculated the final penalty amount.

Examples of final penalty amount calculations

CRC Energy Efficiency Scheme

Breach: failure to provide an accurate annual report in the 2013/14 compliance year contrary to article 76 of the CRC Order 2013.

Penalty: £40 per tCO2 of so much of those supplies or emissions which were inaccurately reported.

- 3,000 tonnes of CO2 were inaccurately reported
- the participant has an annual turnover of £60 million and so is a large organisation
- the culpability of the participant is assessed as reckless

Step 1	Check or determine the statutory maximum penalty available for the breach.	£40 per tCO2 inaccurately reported 3,000 tonnes affected 40 x 3,000 = 120,000 Statutory maximum = £120,000
Step 2	Set the initial penalty amount by assessing the nature of the breach.	Under Section C, paragraph C.3.6, the normal nature of the breach assessment for the 2013/14 compliance year is that we will impose a penalty of £24 per tCO2 inaccurately reported. Initial penalty amount = £72,000
Step 3	Work out the starting point and range for the penalty using the correct factors in Tables 1 and 2.	For a large organisation with reckless culpability, the penalty factor in table 1 is 0.55. The penalty range in table 2 is 0.25 up to the statutory maximum. £72,000 x 0.55 = £39,600 £72,000 x 0.25 = £18,000 Statutory maximum = £120,000 Penalty starting point = £39,600 Penalty range = £18,000 to £120,000
Step 4	Set the final penalty amount by assessing the aggravating and mitigating factors.	Penalty starting point reduced by an appropriate amount to take account of the case-specific mitigating factors. Final penalty amount = **£35,640**

EU Emissions Trading Scheme

Breach: failure to submit a verified emissions report by the statutory deadline contrary to permit condition 2.

Penalty: £3,750. The operator:

- submitted a 'not verified' report
- has an annual turnover of £40 million and so is a medium organisation
- is assessed as negligent culpability

Step 1	Check or determine the statutory maximum penalty available for the breach.	£3,750 (no additional daily penalty applies) Statutory maximum = £3,750
Step 2	Set the initial penalty amount by assessing the nature of the breach.	Under Section B, paragraph B.3.2, the normal nature of the breach assessment is that we impose a penalty of £3,750. Initial penalty amount = £3,750
Step 3	Work out the starting point and range for the penalty using the correct factors in Tables 1 and 2.	For a medium organisation with negligent culpability, the penalty factor in table 1 is 0.22. The penalty range in table 2 is 0.055 to 0.3. £3,750 x 0.22 = £875 £3,750 x 0.055 = £206.25 £3,750 x 0.3 - £1,125 Penalty starting point = £1,000 (lower limit of £1,000 applies) Penalty range = £206.25 to £1,125
Step 4	Set the final penalty amount by assessing the aggravating and mitigating factors.	Penalty starting point increased by an appropriate amount to take account of the case-specific aggravating factors. Final penalty amount = **£1,100**

Section B: EU Emissions Trading Scheme (EU ETS)

Section B explains:

- how we normally assess the 'nature of the breach' for each EU ETS breach
- our additional EU ETS enforcement positions

You must read this with Section A which explains our general civil penalty setting principles for the climate change schemes.

B1: The types of EU ETS civil penalties

Under the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (the GGETS Regulations), we may impose civil penalties for certain breaches. The penalty that applies to each breach is set out in GGETS Regulations 52 to 70. The penalty can be:

- a fixed sum only
- a fixed sum and an additional daily penalty up to a set maximum
- calculated with a formula

The Environment Agency can impose an additional daily penalty for the following breaches - failure to:

- comply with a condition of a permit
- submit or resubmit an application for an emissions plan
- comply with a condition of an emissions plan
- monitor aviation emissions
- report aviation emissions
- return allowances
- comply with an enforcement notice
- comply with an information notice

An additional daily penalty starts to accumulate from the day after the date that the initial notice of civil penalty is served. It stops accumulating on the date the person puts the breach right or the maximum amount payable (if applicable) is reached (read B5 for an explanation of the procedure).

We use the additional daily penalty:

- to encourage timely compliance
- if there is a continuing breach which can be put right

We will not use it if the breach cannot be put right or has already been put right.

We may apply our discretion to the fixed sum and/or the additional daily penalty where the law allows.

B2: When and how the Environment Agency will apply discretion to EU ETS penalties

We cannot apply our discretion to the penalty for failure to surrender sufficient allowances to cover reportable emissions by the statutory deadline (the Excess Emissions Penalty). Read paragraph B3.3 where the Excess Emissions Penalty is explained.

We have a specific approach to applying discretion for:

- the exceedance of emissions targets by excluded installations – read paragraph B3.4
- carrying out a regulated activity without a permit – read paragraph B3.1

Otherwise we will apply discretion as explained in Section A.

B3: Civil penalties for installations and aviation

Paragraphs B3.1 to B3.20 list the GGETS Regulations breaches and state the maximum civil penalty available for each breach.

Each paragraph states the breach and explains our normal ‘nature of the breach’ assessment and other enforcement position (if there is one) for that breach.

Our assessment may state that we will not normally impose a penalty (waive the civil penalty) or it will state the normal ‘initial penalty amount’ (see section A for an explanation).

However, before we set the ‘initial penalty amount’ we will take account of any representations we receive.

B3.1: Carrying out a regulated activity without a permit

GGETS Regulation 52 provides a formula for calculating a penalty for this breach. We must use the formula and follow a Secretary of State's Direction, which tells us how to estimate certain factors in the formula.

Our penalty setting approach

We will normally impose a penalty for this breach.

The formula is A + (B x C) where:

- A is the estimated amount of the costs avoided 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

We must work out the 'total costs avoided' element of the penalty. This is:

- A - avoided monitoring, reporting and verification (MRV) costs plus avoided fees
- B x C - the cost of allowances to cover emissions during the non-compliance period

We may increase the resulting figure by 5% to ensure the penalty exceeds the amount of any economic benefit obtained from the non-compliance. This is known as the 'punitive element' of the penalty.

Normally we will only reduce the 'total costs avoided' element if the operator can demonstrate it has not avoided some or all of these costs. This is because the calculation should reflect all the costs avoided by not having a permit. By paying this sum it puts the operator into the same position as it would have been had it complied.

We will pro-rata the calculation of A (not including the permit variation fee) to take account of the number of days the operator carried out a regulated activity without a permit in any one year. This will be from the start date of the regulated activity in the first year of non-compliance to the effective date of the permit in that year or a following year.

To calculate avoided fees we must include the permit variation fee. But, if a regulated activity at an installation started after 1 January 2013, we will normally reduce the penalty by £430 (the variation fee). This is because the variation fee is intended to cover varying a Phase II permit to a Phase III permit, so if activities started after 1 January 2013, there would have been no Phase II permit to vary. Therefore it is not an avoided fee.

To calculate the MRV element of the costs we will use £8,000 for the first year of non-compliance and for all following years of non-compliance. The Direction suggests using £15,000 for the first year of non-compliance (to account for set up costs) and £8,000 for all following years of non-compliance. We have removed the set up cost element because they are not normally avoided by the operator. An operator must learn about the scheme, invest in systems and pay the permit application fee whether they are applying for a permit on time or later.

We will normally reduce the MRV element of the costs avoided if the operator can demonstrate that for the period of non-compliance it has:

- monitored its annual emission data
- submitted a report
- had the data verified

If an operator fails to hold an EU ETS permit and as a result the installation is captured by the CRC Energy Efficiency Scheme (CRC) for the period of non-compliance, we will normally reduce the total costs avoided element of the penalty by the cost of the CRC allowances purchased by the CRC participant to cover the installation's:

- gas consumption
- electricity consumption during Phase II of CRC only

We will not normally take account of a CRC participant's monitoring and reporting costs incurred through CRC when we determine costs avoided by the operator.

For the punitive element of the penalty, we will apply our discretion as described in section A. The initial penalty amount will be the maximum sum available.

B3.2: Failure to comply with a condition of an EU ETS permit

GGETS Regulation 53 sets the penalty amount for a breach of the majority of permit conditions – they are both of the following:

- £3,750
- an additional £375 for each day the operator fails to comply with the condition following the service of the initial notice of civil penalty, up to a maximum of £33,750

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

Find our normal nature of the breach assessment and other enforcement positions for failing to comply with a condition of:

- a greenhouse gas emissions (GHG) permit
- an excluded installations emissions (EIE) permit

GHG permit conditions

GHG permit: condition 1

The operator must monitor the annual reportable emissions of the installation in accordance with the Monitoring and Reporting Regulation (Commission Regulation (EU) No 601/2012 of 21 June 2012) and the monitoring plan (including the written procedures supplementing that plan).

Our nature of the breach assessment

The monitoring obligations underpin the reporting and surrender requirements and are vital to the integrity of the scheme.

Our nature of the breach assessment will consider how many emissions have not been correctly monitored and the percentage of the installation's annual reportable emissions this number represents.

We will determine the installation category (as defined in Article 19(2) of the Monitoring and Reporting Regulations (MRR)) and the relevant threshold using the figures in this table:

Category of installation	Average verified annual emissions (tCO2)	Threshold
A	≤50,000	≥ 1,000 tCO2 or 10% of annual reportable emissions, whichever is the higher
B	>50,000 - 500,000	≥ 5,000 tCO2 or 5% of annual reportable emissions, whichever is the higher
C	>500,000	≥ 50,000 tCO2 or 2% of annual reportable emissions, whichever is higher

Whether we impose a penalty will depend on whether the emissions affected by a breach are above or below the threshold for that category of installation. If they are below the threshold we will not normally impose a penalty because we will not regard the breach as undermining the integrity of the scheme. If they are above the threshold we will normally impose a penalty. We will normally use the statutory maximum as the initial penalty amount.

Our nature of the breach assessment will check whether an operator has back-up methodologies for monitoring failures. This is likely to determine whether an operator can submit a verified emissions report. If, despite the monitoring breach, an operator is able to submit a verified emissions report, there will be less of an impact on the integrity of the scheme. We will normally:

- for a monitoring breach leading to a 'not verified' emissions report, impose a penalty for the monitoring breach and a penalty for failure to submit a verified emissions report
- for a monitoring breach with a verified emissions report, set the initial penalty amount at 50% of the statutory maximum. We will take account of the time taken to restore compliance and may use an additional daily penalty to do so.

GHG permit: condition 2

The operator must, by 31 March in every year, submit a verified report of its annual reportable emissions made in the previous year to the regulator, in accordance with the Monitoring and Reporting Regulation and the Verification Regulation (Commission Regulation (EU) No 601/2012 of 21 June 2012).

Our nature of the breach assessment

Reporting accurately and on time is vital to the effective operation of the scheme. The deadline for reporting is 31 March. Meeting this deadline allows time to obtain allowances and surrender them by 30 April.

An operator will be in breach of this requirement if it:

- does not submit an emissions report – the most serious breach, which significantly impacts the integrity of the scheme
- submits a 'not verified' emissions report – a serious breach which also significantly impacts the integrity of the scheme because there are likely to be material errors or missing data
- submits a 'verified' emissions report late (after 31 March) – a less serious breach but it still impacts the integrity of the scheme
- submits a 'verified' emissions report which is later found to be inaccurate – see our approach in B3.3

We will normally impose a penalty for the first 3 breaches.

We will normally set the initial penalty amount for the fixed sum and additional daily penalty (if applicable) as shown in this table:

Type of breach	Normal fixed penalty amount	Normal additional daily penalty (where applicable)
No report submitted	£3,750	£375
Submission of a 'not verified' report	£3,750	£375
Submission of a late verified report	£2,750	£275

Our assessment will:

- not take account of the level of emissions or size of the operator because this does not affect how seriously the breach impacts on the integrity of the scheme; however, we will consider the operator's size and financial circumstances in steps 3 and 4 of our stepped penalty setting approach
- consider how long a person has been required to comply with the scheme – we will not be more lenient for the first year an operator has been required to comply with the reporting obligation
- reflect the extent of the lateness of the report in the additional daily penalty amount

We will aim to issue an 'initial notice of civil penalty' (see paragraph B5) within one week of the 31 March deadline to all operators who have not submitted an emissions report.

GHG permit: condition 3

The operator must satisfy the regulator, if an emission factor of zero has been reported in respect of the use of bio liquids, that the sustainability criteria set out in Article 17(2) to (5) of the Renewable Energy Directive have been fulfilled in accordance with Article 18(1) of that Directive.

Our nature of the breach assessment

If an operator fails to satisfy us as required by this condition, we will determine the reportable emissions. We will substitute the emissions factor reported for an emissions factor greater than zero. This power is set out in GGETS Regulation 44(1)(b). We will not normally impose a penalty in these cases, as it does not significantly impact the integrity of the scheme.

We will normally impose a penalty if an operator used a zero emissions factor in its verified annual emissions report and we later found out it had not met the sustainability criteria. We will normally use the statutory maximum as the initial penalty amount.

GHG permit: condition 4

The operator must, by 30 April in each year, surrender a number of allowances in the registry equal to the annual reportable emissions of the installation made in the previous year.

Our approach to penalty setting

Our approach is explained in paragraph B3.3 Failure to surrender allowances.

GHG permit: condition 5

Where an operator proposes to make a significant modification to its monitoring plan under Article 15 of the Monitoring and Reporting Regulation, the operator must apply to the regulator for a variation of its permit at least 14 days prior to making the change or, where this is not practicable, as soon as possible thereafter and such application must:

(a) include a description of the change; and

(b) set out how it affects the information contained in the monitoring plan.

Our nature of the breach assessment

We will not normally impose a penalty if the operator submits an application to vary its permit in time to enable verification of its annual emissions report by 31 March. Doing this will not significantly impact the integrity of the scheme.

Our additional enforcement position

We will normally impose a penalty if an operator repeatedly breaches this condition. We will normally use the statutory maximum as the initial penalty amount.

The operator may be in breach of permit condition 1 if the change to its monitoring plan is not in line with the Monitoring and Reporting Regulation (MRR). An early application will help resolve any issues and avoid potential breach.

GHG permit: condition 6

Where an operator makes a change to its monitoring plan under Article 14 or 58(4) of the Monitoring and Reporting Regulation that is not a significant modification, the operator must notify the regulator by 31 December in the year in which the change occurred and such notification must:

(a) include a description of the change;

(b) set out how it affects the information contained in the monitoring plan; and

(c) explain how the change is in accordance with the Monitoring and Reporting Regulation

Our nature of the breach assessment

We will not normally impose a penalty if an operator fails to notify us of a 'non-significant' change to its monitoring plan as this will not significantly impact the integrity of the scheme.

GHG permit: condition 7

Where the name of the operator changes, the operator must apply to the regulator for a variation of its permit in order to reflect the change as soon as practicable following the change.

Our nature of the breach assessment

We will not normally impose a penalty for breach of this condition as it does not significantly impact the integrity of the scheme. A name change is not a change of legal entity (which requires a permit transfer).

GHG permit: condition 8

Where the operator does not apply at least the tiers required or applies a fall-back methodology pursuant to the Monitoring and Reporting Regulation, the operator must submit a report to the regulator in accordance with the requirements specified in Article 69(1) of the Monitoring and Reporting Regulation by the following deadlines, starting in the case of a new operator with 30 June in the year following that in which the permit is granted and for any other operator, with 30 June 2013:

(a) for a category A installation, by 30 June every four years

(b) for a category B installation, by 30 June every two years

(c) for a category C installation, by 30 June every year

Our nature of the breach assessment

We will normally impose a penalty for this breach. We consider this breach less serious than failing to submit a verified report of annual reportable emissions. But it does impact the integrity of the scheme and may have serious consequences. We will normally set the initial penalty amount at £1,500.

Our additional enforcement position

For an operator's first breach of this condition, we will not normally impose a penalty if we receive the report within 10 working days of the deadline.

GHG permit: condition 9

Where a verification report states outstanding non-conformities or recommendations for improvements as specified in Article 69(4) of the Monitoring and Reporting Regulation, the operator must submit a report to the regulator in accordance with the requirements of that Article by 30 June of the year in which the verification report is issued.

Our nature of the breach assessment

Verifiers can state two types of improvements, a:

- non-conformity – this must be rectified because the operator has not conformed with its plan or the MRR
- recommendation for improvement - the operator must consider the improvement but does not have to implement it because it is a suggestion on how to improve methodology

There is less impact on the integrity of the scheme if an operator fails to submit an improvement report relating to a recommendation for improvement at all or by 30 June than if it fails to submit one relating to a non-conformity.

We will normally impose a penalty for these breaches. We will normally set the initial penalty amount for the fixed sum (or waive the penalty) as shown in this table:

Type of breach	**Normal initial penalty amount**
First failure to submit an improvement report relating to a non-conformity if submitted within 10 working days of the deadline	Waived

Failure to submit an improvement report relating to a non-conformity	£1,500
First failure to submit an improvement report relating to a recommendation	Waived
Subsequent failure to submit an improvement report relating to a recommendation	£1,500

If an operator fails to submit an improvement report relating to a non-conformity in one year and then fails to submit a report relating to a recommendation in a future year, we will normally impose a penalty for the later failure. We will normally set the initial penalty amount as £1,500.

Our assessment will:

- not take account of the level of emissions or size of the operator because it is difficult to identify the proportion of emissions affected by the stated improvements; however, we will consider the operator's size and financial circumstances in steps 3 and 4 of our stepped penalty setting approach
- reflect the extent of the lateness of the report in the additional daily penalty – the normal additional daily penalty amount will be £150 per day

We will issue an 'initial notice of civil penalty' (see paragraph B5) as soon as possible after 10 working days from the deadline.

GHG permit: condition 10

The operator must notify the regulator in accordance with the Monitoring and Reporting Regulation at least 14 days prior to commencement of any of the circumstances in paragraphs (a) to (d) below or, where this is not practicable, as soon as possible thereafter:

(a) where there is a temporary change to its monitoring methodology as specified in Article 23 of the Monitoring and Reporting Regulation;

(b) where tier thresholds are exceeded or equipment is found not to conform to requirements which require corrective action as specified in Article 28(1) of the Monitoring and Reporting Regulation;

(c) where a piece of measurement equipment is out of operation as specified in Article 45 of the Monitoring and Reporting Regulation; and

(d) where an installation with low emissions exceeds the relevant threshold as specified in Article 47(8) of the Monitoring and Reporting Regulation.

Our nature of the breach assessment

We will not normally impose a penalty for breach of this condition because the operator only needs to notify us of a change. It does not significantly impact the integrity of the scheme.

If an operator does notify us of a change to its monitoring and the change could cause it to breach permit condition 1 (a more serious breach), then we will notify them of the potential breach. This will give the operator the opportunity to ensure their monitoring complies with permit condition 1.

GHG permit: condition 11

Except in the case of installations not eligible for an allocation, where a sub-installation has had a qualifying significant capacity reduction, the operator must, by the later of (a) the end of the period of 7 months following the change of capacity, (b) 31 December in the year in which that change occurred or (c) 1 February 2013 ("the relevant date"), submit a notice to the regulator containing:

(a) a statement of the reduced capacity and the installed capacity of the sub-installation after taking into account the capacity reduction; and

(b) a statement that the data under paragraph (a) have been verified except that, where the relevant date is before 30 May 2013, the statement required in (b) above need only be submitted by 30 May 2013.

GHG permit: condition 12

Except in the case of installations not eligible for an allocation, where a sub-installation had a qualifying partial cessation which occurred in any year other than 2012, the operator must, by the later of (a) 31 December in the year in which the reduction occurred or (b) within one month after the date on which it occurred, notify the regulator that a reduction in activity level has occurred, stating the amount of that reduction and the sub-installation to which it applies.

GHG permit: condition 13

Except in the case of installations not eligible for an allocation, where a sub-installation had a qualifying partial cessation which occurred during 2012, the operator must, by 1 February 2013, notify the regulator that a reduction in activity level has occurred, stating the amount of that reduction and the sub-installation to which it applies.

Our nature of the breach assessment for conditions 11, 12 and 13

We will not normally impose a penalty if the operator notifies us of a significant capacity reduction or partial cessation before it is issued with its free allocation of allowances affected by the notification.

In all other cases we will normally impose a penalty as this impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

GHG permit: condition 14

Unless already notified in accordance with other requirements of this permit, the operator must notify the regulator of any planned or effective changes to the capacity, activity level or operation of the installation by 31 December in the year in which the change was planned or has occurred.

Our nature of the breach assessment

We will not normally impose a penalty for breach of this condition. It is unlikely to impact the integrity of the scheme.

GHG permit: condition 15

The operator must keep records of all relevant data and information in accordance with Article 66 of the MRR.

Our nature of the breach assessment

We will normally impose a penalty for this breach. We will normally use the statutory maximum as the initial penalty amount. The operator must be able to provide adequate records. The quality of the operator's data and information impacts the integrity of the scheme.

Excluded installations emissions (EIE) permit conditions

EIE permit conditions 1, 3, 4, 5, 6 and 7 are the same as those in the GHG permit. Our assessments are the same.

EIE permit: condition 2

The operator must, by 31 March in every year, submit to the regulator a report of its annual reportable emissions made in the previous year, in accordance with the relevant provisions of the Monitoring and Reporting Regulation that is either:

(a) verified in accordance with the Verification Regulation, or

(b) accompanied by a notice declaring that:

(i) in preparing the report, the operator has complied with the relevant provisions of the Monitoring and Reporting Regulation;

(ii) the operator has complied with the monitoring plan; and

(iii) the report is free from material misstatements.

Our nature of the breach assessment

An operator will be in breach of this requirement if:

- it does not submit a report
- it submits a 'not self-verified' report - one that does not include a notice declaring the requirements of (b) above
- it submits a report late
- we find the notice submitted with the report is incorrect because the operator has not complied with the relevant provisions of the MRR and its monitoring plan or the report does contain material misstatements

We will normally impose a penalty for all of these breaches because they impact the integrity of the scheme. It is vital that operators report accurately and on time. But the requirement is slightly less significant for EIE permit holders than for GHG permit holders because excluded installations are not required to surrender allowances to cover their emissions.

We will normally set the initial penalty amounts for both the fixed sum and the additional daily penalty (if applicable) as shown in this table:

Type of breach	Normal fixed penalty amount	Normal additional daily penalty (where applicable)
No report submitted	£3,250	£325
Submission of a 'not self-verified' report	£3,250	£325
Submission of a late report	£2,250	£225
Notice is incorrect	£3,250	£325

Our assessment will:

- not take account of the level of emissions or size of the operator because this does not affect how seriously the breach impacts on the integrity of the scheme; however, we will consider the operator's size and financial circumstances in steps 3 and 4 of our stepped penalty setting approach
- consider how long a person has been required to comply with scheme – we will not be more lenient for the first year an operator has been required to comply with the reporting obligation
- reflect the extent of the lateness of the report in the additional daily penalty

We will aim to issue an 'initial notice of civil penalty' (see paragraph B5) within one week of the deadline to all operators who have failed to submit a report.

EIE permit: condition 8

Where the installation does not primarily provide services to a hospital, the operator must notify the regulator if the annual reportable emissions from the installation in any year exceed the maximum amount, by 31 March in the following year.

EIE permit: condition 9

Where the installation primarily provides services to a hospital, the operator must notify the regulator if the installation ceases to do so in any year, by 31 March in the following year.

Our nature of the breach assessment for conditions 8 and 9

Read paragraph B3.7 for our assessment on when an operator fails to notify us that its excluded installation no longer meets the rules for being excluded.

EIE permit: condition 10

The operator must keep records of all relevant data and information in accordance with Article 66 and in relation to any notice submitted under condition 2.

Our nature of the breach assessment

We will normally impose a penalty for this breach. We will normally use the statutory maximum as the initial penalty amount. We audit excluded installations and will require the operator to provide records so that we can confirm the annual emissions report is correct.

EIE permit: condition 11

Unless notification has been given under condition 8 and where the operator operates an installation which primarily provides services to a hospital, the operator must:

(a) maintain records demonstrating that it continues to primarily provide services to a hospital; and

(b) comply with requests from the regulator to inspect those records for the purpose of verifying the accuracy of the records and of the emissions report.

Our nature of the breach assessment

We will not normally impose a penalty for this breach. If an operator cannot demonstrate it primarily provides services to a hospital then it must re-enter EU ETS as a GHG permit holder. The financial and administrative cost of this is higher than the cost of imposing a penalty.

B3.3: Failure to surrender allowances

We are required to impose the Excess Emissions Penalty if an operator or UK administered operator fails to surrender allowances equal to its annual reportable emissions in the Union Registry by the statutory deadline.

GGETS Regulation 54 sets the Excess Emissions Penalty. The starting point for the penalty is the sterling equivalent of €100 for each allowance the person failed to surrender. The amount is converted to sterling by the first rate of conversion to be published in September of the year preceding the scheme year in which the person is liable to the penalty in the C series of the Official Journal of the European Union (see GGETS Regulation 54(7)).

From 2013 onwards, we must adjust this figure as a result of the Harmonised Index of Consumer Prices for the Member States of the European Union (HICP) published by Eurostat. If the last HICP published before the end of April in the year the breach took place shows an average percentage price increase compared with the last HICP published before the end of April 2012, then we will increase the sterling equivalent by the same percentage.

We cannot apply our discretion to this breach because the Excess Emission Penalty is mandatory. The amount of the penalty and the requirement to impose it are set in the EU ETS Directive (2003/87/EC).

However, an operator or UK administered operator may be liable to a reduced penalty if it submitted its verified emissions report (or its emissions are determined by us) for a particular year and later it does all of the following:

- finds out it has under-reported its annual reportable emissions in that report or determination
- corrects the error
- co-operates with us

The penalty is the sterling equivalent of €20 for each allowance it failed to surrender by the statutory deadline. We may apply our discretion to this penalty.

To calculate the €20 per allowance penalty, we must use the same definition of ‘sterling equivalent’ as applies to the Excess Emissions Penalty (see above). In part of the calculation, we must determine the scheme year in which an operator or UK administered operator is liable to the penalty. For under-surrenders relating to emissions in:

- the scheme years before 2013, an operator or UK administered operator is liable to the penalty on 31 January 2014, being the date on which the relevant provisions of the GGETS Regulations came into force
- 2013 onwards, an operator or UK administered operator is liable to the penalty on 30 April in the year in which it failed to surrender sufficient allowances

Our nature of the breach assessment

We will normally impose a penalty where the €20 per allowance penalty applies. We will normally use the statutory maximum as the initial penalty amount.

Our assessment will not take account of the level of unreported emissions compared to the total reportable emissions. It is the most serious breach under the scheme. This breach significantly impacts the integrity of the scheme, regardless of how many emissions have been unreported. Also, the penalty is €20 multiplied by the number of allowances not surrendered (normally the amount of unreported emissions). So the calculation itself already takes account of the level of unreported emissions.

Our additional enforcement position

We will not normally impose a penalty if the statutory maximum penalty for this breach is €1,000 or less when the operator:

- did not deliberately under-report
- had no serious management failure
- put the errors right quickly
- co-operated with us

This is because the cost of imposing the penalty normally outweighs the public interest in imposing it. But we may impose a penalty if the opposite applies, as it may be in the public interest to do so.

If, after submitting a verified emissions report, an operator or UK administered operator finds it has under-reported its emissions, it is likely to also have breached the requirement to:

- monitor emissions in line with the MRR and its monitoring plan
- submit a verified emissions report in line with the MRR and Verification Regulation

This is because, in most cases, incorrect monitoring and reporting will have led to the under-report.

If we impose a penalty for this breach because of an under-report, we will normally waive the penalties for breach of the associated monitoring and reporting requirements. The penalty will be large enough to penalise the operator or UK administered operator and deter other operators or UK administered operators and so is proportionate.

B3.4: Exceeding an emissions target for an excluded installation

Excluded installations are set emissions targets. If the operator's emissions are greater than their target, GGETS Regulation 55 sets a civil penalty. The penalty is (A – B) × C, where:

- A is the amount of annual reportable emissions arising in the scheme year
- B is the emissions target for that year
- C is the carbon price for that year

Our penalty setting approach

When we apply our discretion to this breach we will not use the stepped approach explained in Section A.

We do not think this penalty is a sanction for non-compliance. Rather than surrendering allowances to cover their emissions, excluded installations must make sure that their emissions do not exceed their emissions target. Where an excluded installation exceeds their emissions target the penalty is designed to cover the payment of the excess emissions. The European Commission agreed the Opt-out Scheme based on it delivering equivalent emissions reductions to installations

within the full EU ETS. So the penalty is essential for the Opt-out Scheme to operate effectively and plays an important part in reducing emissions.

We may, in exceptional circumstances, reduce the penalty, for example, if an error in the emissions target is discovered after the compliance deadline.

We may extend the time for payment of a penalty, where payment by the set payment deadline would cause financial hardship.

We will not normally publicise these penalties.

B3.5: Failure to pay a penalty for exceeding an emissions target for an excluded installation

GGETS Regulation 56 sets the civil penalties - they are both of the following:

- 10% of the penalty imposed under Regulation 55
- an additional £150 for each day that the operator fails to pay that penalty following service of the initial notice of civil penalty, up to a maximum of £13,500

Our nature of the breach assessment

We will normally impose a penalty for this breach as it significantly impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

B3.6: Under-reporting of emissions from an excluded installation

GGETS Regulation 57 sets the civil penalty. It is A + (B × C) where:

- A is £3,750
- B is the amount of the unreported emissions
- C is the carbon price for that year

Our nature of the breach assessment

We will not normally impose a penalty for this breach if an operator:

- notifies us that it has under-reported its emissions
- corrects the error
- submits an accurate report
- pays any applicable penalties for breaching its emissions target

In all other circumstances, we will normally impose a penalty for this breach. We will normally use the statutory maximum as the initial penalty amount.

B3.7: Failure to notify when an excluded installation ceases to meet the criteria for being excluded

If an operator no longer meets the criteria for being excluded, it must notify us and re-enter EU ETS as a GHG permit holder. GGETS Regulation 58 sets the penalty for not notifying us.

If an operator does not notify us by 31 March in the relevant year, the penalty is £2,500. For the first and each following year the operator still fails to notify us by 31 October in that year, the penalty is set higher than the cost saved by the operator by not re-entering the EU ETS as a GHG permit holder.

Our nature of the breach assessment

We will normally impose a penalty for this breach as it impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

We will not normally impose a penalty if the operator tells us they no longer meet the exclusion criteria in time for us to notify the operator (under Schedule 5, paragraph 8(1) to the GGETS

Regulations - the regulator notice) and vary its permit, so that it takes effect on 1 January in the scheme year after the year that the regulator notice was given.

B3.8: Failure to notify when an excluded installation has had a significant capacity reduction or partial cessation

If an excluded installation is to re-enter the EU ETS, the operator must notify us of relevant significant capacity reductions or partial cessations at the installation. GGETS Regulation 58A sets the civil penalty for not notifying us – it is £5,000.

Our nature of the breach assessment

We will not normally impose a penalty if the operator notifies us of the significant capacity reduction or partial cessation before it is issued with its free allocation of allowances.

We will normally impose a penalty for this breach in all other cases as it impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

B3.9: Failure to notify when the operator of an excluded installation has suspended the carrying out of regulated activities

If an excluded installation is to re-enter the EU ETS, the operator must notify us if it has suspended carrying out regulated activities at the installation during the relevant period. The civil penalty for not notifying us is set by GGETS Regulation 58B – it is £3,750.

Our nature of the breach assessment

We will not normally impose a penalty for this breach unless the failure to notify results in the issue of allowances to which the installation is not entitled. In that case, we will use the statutory maximum as the initial penalty amount.

B3.10: Failure to surrender a permit

GGETS Regulation 59 sets the civil penalty for this breach – it is £5,000.

Our nature of the breach assessment

We will not normally impose a penalty for this breach if the operator does not gain anything from holding the permit, such as receiving allowances to which it is not entitled.

We will normally impose a penalty if the operator does gain from this breach as it impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

B3.11: Failure to submit or resubmit an application for an emissions plan

A UK administered operator must submit and, if necessary resubmit an application for an emissions plan on time or provide a satisfactory explanation as to why it cannot. GGETS Regulation 60 sets the civil penalty for failing to do this – they are both of the following:

- £1,500
- an additional £150 for each day the application or resubmission of an application is not provided following the service of an initial notice of civil penalty, up to a maximum of £13,500

Our nature of the breach assessment

A UK administered operator performing aviation activities must obtain an emissions plan. This is to make sure its emissions are accurately monitored and reported. We will normally impose a penalty for this breach if:

- the application affects the UK administered operator’s ability to report accurately and on time for the first scheme year in which it becomes a UK aircraft operator

- the UK administered operator submits an emissions report without first applying for an emissions plan

This breach impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

B3.12: Failure to notify the regulator if an emissions plan is not applied for

GGETS Regulation 61 sets the civil penalty for this breach – it is £5,000.

Our nature of the breach assessment

We will normally impose a penalty for this breach because it impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

This requirement is important as it enables us to monitor the UK administered operators on the European's Commission list that have not yet performed aviation activities. We can also check that all UK administered operators that should be complying are doing so.

B3.13: Failure to comply with a condition of an emission plan

GGETS Regulation 62 sets the penalty amount for this breach – they are both of the following:

- £1,500
- an additional £150 for each day the UK administered operator fails to comply with the condition following the service of the initial notice of civil penalty, up to a maximum of £13,500

Emission plan condition 1

Where the emissions plan holder proposes to make a significant modification to its emissions plan under Article 15, the emissions plan holder must apply to the regulator for a variation of its emissions plan at least 14 days prior to making the change or, where this is not practicable, as soon as possible thereafter and such application must:

(a) include a description of the change;

(b) set out how it affects the information contained in the emissions plan; and

(c) explain how the change is in accordance with the Monitoring and Reporting Regulation.

Our nature of the breach assessment

We will not normally impose a penalty if the UK administered operator submits an application to vary its emission plan in time to enable verification of its annual emissions report by 31 March. Doing this will not significantly impact the integrity of the scheme.

Our additional enforcement position

We will normally impose a penalty for this breach if a UK administered operator repeatedly breaches this condition. We will normally use the statutory maximum as the initial penalty amount.

The UK administered operator may be in breach of GGETS regulation 35(1) if the change to its monitoring plan is not in line with the MRR. An early application will help resolve any issues and avoid potential breach.

Emission plan condition 2

Where the emissions plan holder makes a change to its emissions plan under Article 14 or 58(4) that is not a significant modification, the emissions plan holder must notify the regulator by 31 December in the year in which the change occurred and such notification must:

(a) include a description of the change;

(b) set out how it affects the information contained in the emissions plan; and

(c) explain how the change is in accordance with the Monitoring and Reporting Regulation.

Our nature of the breach assessment

We will not normally impose a penalty if a UK administered operator fails to notify us of a 'non-significant' change to its emissions plan as this will not significantly impact the integrity of the scheme.

Emission plan condition 3

Where the name of the emission plan holder changes, the emission plan holder must apply to the regulator for a variation of its emissions plan in order to reflect the change as soon as practicable following the change.

Our nature of the breach assessment

We will not normally impose a penalty for this breach as it does not significantly impact the integrity of the scheme. A name change is not a change in legal entity.

Emission plan condition 4

Where the emissions plan holder uses any of the tools referred to in Article 54(2) and exceeds the threshold referred to in Article 54(1), the emissions plan holder must notify the regulator within 14 days of exceeding the threshold or, where this is not practicable, as soon as possible thereafter.

Our nature of the breach assessment

We will normally impose a penalty for this breach. We will normally use the statutory maximum as the initial penalty amount. It will impact the integrity of the scheme if a UK administered operator does not notify us it has exceeded the small emitter's threshold.

Emission plan condition 5

Where a verification report states outstanding non-conformities or recommendations for improvements as specified in Article 69(4), the emissions plan holder must submit a report to the regulator in accordance with the requirements of that Article by 30 June of the year in which the verification report is issued.

Our nature of the breach assessment

Verifiers can state two types of improvements, a:

- non-conformity – this must be rectified because the UK administered operator has not conformed with its plan or the MRR
- recommendation for improvement - the UK administered operator must consider the improvement but does not have to implement it because it is a suggestion on how to improve methodology

There is less impact on the integrity of the scheme if a UK administered operator fails to submit an improvement report relating to a recommendation for improvement at all or by 30 June than if it fails to submit one relating to a non-conformity.

We will normally impose a penalty for these breaches. We will normally set the initial penalty amount for the fixed sum (or waive the penalty) as shown in this table:

Type of breach	**Normal initial penalty amount**
First failure to submit an improvement report relating to a non-conformity if submitted within 10 working days of the deadline	Waived
Failure to submit an improvement report relating to a non-conformity	£1,500
First failure to submit an improvement report relating to a recommendation	Waived
Subsequent failure to submit an improvement report relating to a recommendation	£1,500

If an UK administered operator fails to submit an improvement report relating to a non-conformity in one year and then fails to submit a report relating to a recommendation in a future year, we will normally impose a penalty for the later failure. We will normally set the initial penalty amount as £1,500.

Our assessment will:

- not take account of the level of emissions or size of the UK administered operator because it is difficult to identify the proportion of emissions affected by the stated improvements; however, we will consider the UK administered operator's size and financial circumstances in steps 3 and 4 of our stepped penalty setting approach
- reflect the extent of the lateness of the report in the additional daily penalty – the normal additional daily penalty amount will be £150 per day

We will issue an 'initial notice of civil penalty' (see paragraph B5) as soon as possible after 10 working days from the deadline.

Emission plan condition 6

The emissions plan holder must keep records of all relevant data and information in accordance with Article 66.

Our nature of the breach assessment

We will normally impose a penalty for this breach. We will normally use the statutory maximum as the initial penalty amount. The UK administered operator must be able to provide adequate records. The quality of the UK administered operator's data and information impacts the integrity of the scheme.

B3.14: Failure to monitor aviation emissions

GGETS Regulation 63 sets the civil penalties for this breach – they are both of the following:

- £1,500
- an additional £150 for each day that the UK administered operator fails to monitor aviation emissions following the service of an initial notice of civil penalty, up to a maximum of £13,500

Our nature of the breach assessment

The monitoring obligations underpin the reporting and surrender requirements and are vital to the integrity of the scheme.

Our nature of the breach assessment will consider how many emissions have not been correctly monitored and the percentage of the UK administered operator's annual reportable emissions this number represents.

We will determine the UK administered operator category and the relevant threshold using the figures in this table:

Category of UK administered operator	Annual reportable emissions (tCO2)	Threshold
A	≤50,000	≥ 1,000 tCO2 or 10% of annual reportable emissions, whichever is the higher
B	>50,000 - 500,000	≥ 5,000 tCO2 or 5% of annual reportable emissions, whichever is the higher
C	>500,000	≥ 50,000 tCO2 or 2% of annual reportable emissions, whichever is higher

The term ‘annual reportable emissions’ means the emissions that a UK administered operator is required to report; this may differ from its total annual emissions.

Whether we impose a penalty will depend on whether the emissions affected by a breach are above or below the threshold for that category of UK administered operator. If they are below the threshold we will not normally impose a penalty because we will not regard the breach as undermining the integrity of the scheme. If they are above the threshold we will normally impose a penalty. We will use the statutory maximum as the initial penalty amount.

Our nature of the breach assessment will check whether a UK administered operator has back-up methodologies for monitoring failures. This is likely to determine whether a UK administered operator can submit a verified emissions report. If, despite the monitoring breach, a UK administered operator is able to submit a verified emissions report, there will be less of an impact on the integrity of the scheme. We will normally:

- for a monitoring breach leading to a ‘not verified’ emissions report, impose a penalty for the monitoring breach and a penalty for failure to submit a verified emissions report
- for a monitoring breach with a verified emissions report, set the initial penalty amount at 50% of the statutory maximum. We will take account of the time taken to restore compliance and may use an additional daily penalty to do so

B3.15: Failure to report aviation emissions

GGETS Regulation 64 sets the civil penalties for this breach – they are both of the following:

- £3,750
- an additional £375 for each day that the UK administered operator fails to monitor aviation emissions following the service of an initial notice of civil penalty, up to a maximum of £33,750

Our nature of the breach assessment

Reporting accurately and on time is vital to the effective operation of the scheme. The deadline for reporting is 31 March. Meeting this deadline allows time to obtain allowances and surrender them by 30 April.

A UK administered operator will be in breach of this requirement if it:

- does not submit an emissions report – the most serious breach, which significantly impacts the integrity of the scheme
- submits a ‘not verified’ emissions report – a serious breach which also significantly impacts the integrity of the scheme because there are likely to be material errors or missing data
- submits a ‘verified’ emissions report late (after 31 March) – a less serious breach but it still impacts the scheme
- submits a ‘verified’ emissions report which is later found to be inaccurate – see our approach in B3.3

We will normally impose a penalty for the first 3 breaches.

We will normally set the initial penalty amount for the fixed sum and additional daily penalty (if applicable) as shown in this table:

Type of breach	Normal initial penalty amount	Normal additional daily penalty (where applicable)
No report submitted	£3,750	£375
Submission of a “not verified” report	£3,750	£375
Submission of a late verified report	£2,750	£275

Our assessment will not take account of the level of emissions or size of the UK administered operator because this does not affect how seriously the breach impacts the integrity of the scheme. However, we will consider the UK administered operator's size and financial circumstances in steps 3 and 4 in our stepped penalty setting approach.

Our enforcement position

For aviation EU ETS, we will not normally issue an 'initial notice of civil penalty' (see paragraph B5) immediately after an UK administered operator commits this breach. Instead, we will usually determine its emissions using Eurocontrol Data. We will then serve a Notice of Determination as soon as possible after the breach. This is to help the UK administered operator comply with the surrender obligation by 30 April.

In these circumstances we will normally impose a fixed sum penalty. We will set the amount to ensure no financial gain is made by not submitting a verified report on time. We will use the statutory maximum as the initial penalty amount because of the cost of verification. We will consider 'financial gain' at step 4 of our stepped penalty setting approach. We may also impose penalties for related breaches, such as a failure to monitor.

In exceptional cases we may use an additional daily penalty, for example, if we are unable to accurately determine the emissions of an UK administered operator that performs large-scale aviation activities using Eurocontrol Data.

B3.16: Failure to provide advice and assistance

GGETS Regulation 65 sets the civil penalty for an aerodrome operator failing to provide reasonable advice and assistance – it is £50,000.

Our nature of the breach assessment

We will only impose a penalty for this breach if an aerodrome operator's behaviour was clearly so unreasonable that it impacted the integrity of the scheme.

B3.17: Failure to comply with a direction relating to an operating ban

GGETS Regulation 66 sets the civil penalty for this breach – it is £50,000.

Our nature of the breach assessment

We will normally impose a penalty for this breach. We will normally use the statutory maximum as the initial penalty amount. Non-compliance with a European Union operating ban is very serious and severely impacts the integrity of the scheme.

B3.18: Failure to return allowances

If an operator or UK administered operator fails to return allowances to which they are not entitled, GGETS Regulation 67 sets the civil penalty – they are both of the following:

- £20,000
- an additional £1,000 for each day the operator or UK administered operator fails to return the allowances following the service of an initial notice of civil penalty

Our nature of the breach assessment

We will normally impose a penalty for this breach. We will normally use the statutory maximum as the initial penalty amount. It significantly impacts the integrity of the scheme.

B3.19: Failure to comply with an information notice

GGETS Regulation 69 sets the civil penalties for this breach – they are both of the following:

- £1,500

- an additional £150 for each day that a person fails to comply with the requirements of the information notice, following service of an initial notice of civil penalty, up to a maximum of £13,500

Our nature of the breach assessment

We will normally impose a penalty for this breach. We will normally use the statutory maximum as the initial penalty amount. Not complying with a request for information impacts the integrity of the scheme.

B3.20: Providing false or misleading information

GGETS Regulation 70 sets the civil penalty for this breach – it is £1,000.

Our nature of the breach assessment

We will normally impose a penalty for this breach. We will normally use the statutory maximum as the initial penalty amount as it impacts the integrity of the scheme.

B4: Requirement to monitor emissions for installations

An operator must monitor its emissions for each reporting year in line with its specific monitoring plan (including the written procedures supplementing that plan) and the MRR.

Meeting the requirements of both the plan and MRR can cause conflict.

For example, sometimes an operator may need to deviate from monitoring at the tier stated in its approved plan. The MRR allows for the operator, where it is not technically feasible to apply its required tier, to apply the highest achievable tier until the conditions for applying the approved tier are restored. If the operator takes action to promptly restore to the approved tier then the MRR does not consider this to be a breach, even though the temporary deviation is not strictly in line with the monitoring plan.

In these circumstances we agree that the MRR overrides the monitoring plan and will not consider there to be a breach of GHG or EIE permit condition 1.

B5: Procedure for imposing penalties

Our general procedure for imposing penalties is set out in the main guidance.

We follow a different procedure when we impose additional daily penalties. See paragraph B1 to find out the breaches for which we can impose these and why we use them.

Where an additional daily penalty applies, we will first serve an initial notice of civil penalty. This will state the:

- particular breach
- fixed sum amount the operator or UK administered operator is liable for
- additional daily penalty amount and that it will escalate from the day this notice is served until the operator or UK administered operator returns to compliance or the maximum amount is reached, if any

This notice is not the final decision, no payment is required and we will not publicise it. We do not apply our discretion at this stage. Once we have determined the total penalty (fixed sum and additional daily penalty amount) we will serve a notice of intent to impose the penalty. At this point the operator or UK administered operator can make representations. Once in receipt of these, we will consider them and set the final penalty amount.

B6: Enforcement notices

We can serve an enforcement notice where we consider any provision of the GGETS Regulations, MRR, permit or aviation emissions plan is:

- contravened
- being contravened

- likely to be contravened

We will generally use these notices:

- to restore compliance
- where the Regulations provide no specific financial penalty for the breach
- to specify actions required to restore compliance
- when the maximum additional daily penalty has been reached and the operator or UK administered operator still fails to comply

We are not likely to use them:

- where we can use an additional daily penalty
- to repeat a deadline to submit an application, report or notification

GGETS Regulation 68 sets the civil penalty amount for failing to comply with an enforcement notice – they are both of the following:

- £20,000
- an additional £1,000 for each day that a person fails to comply with the notice, following the service of an initial notice of civil penalty, up to a maximum of £30,000

Our nature of the breach assessment

We will normally impose a penalty for this breach as it impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

B7: Revocation of permits

We must revoke a permit where an operator fails to apply to surrender its permit in line with the timescales set out in the GGETS Regulations.

We can revoke a permit at any time but will only do so in exceptional circumstances.

When an operator of an excluded installation commits a sufficiently serious breach of the conditions of its permit or fails to pay the penalty under GGETS Regulation 56 within one month, we may:

- revoke the permit in exceptional circumstances
- vary the EIE permit to a GHG permit

We will only revoke a permit in such cases in very exceptional circumstances.

Section C: CRC Energy Efficiency Scheme (CRC)

Section C explains:

- how we normally assess the ‘nature of the breach’ for each CRC breach
- our additional CRC enforcement positions

You must read this with Section A which explains our general civil penalty setting principles for the climate change schemes.

C1 When and how the Environment Agency will apply discretion to CRC penalties

CRC Energy Efficiency Order 2010, Article 94

We may apply our discretion to waive or modify a penalty that we have imposed on a participant. We must be satisfied that the participant has provided us with evidence within a reasonable time and that it took all reasonable steps to do one of the following:

- comply with the relevant provision of the CRC Order
- rectify any failure in compliance as soon as it came to the participant's notice

In addition, in all the other circumstances it is reasonable to waive or modify the civil penalty.

CRC Energy Efficiency Order 2013, Article 72

We may apply our discretion to waive, impose, modify or withdraw a penalty where we consider it appropriate. We will apply our discretion as explained in Section A.

C2 Civil penalties for CRC

Paragraphs C2.1 to C2.7 list the breaches within the CRC legislation and state the maximum civil penalty available for each breach.

Each paragraph states the breach and explains our normal 'nature of the breach' assessment and other enforcement positions (if there is one) for that breach.

Our assessment may state that we will not normally impose a penalty (waive the civil penalty) or it will state the normal 'initial penalty' (see section A for an explanation).

However, before we set the 'initial penalty amount' we will take account of any representations we receive.

C2.1 Failure to maintain records in respect of the information used to compile an annual report or relevant to any designated change

The maximum penalties are set by article 102, CRC Order 2010; article 79, CRC Order 2013 – they are both of the following:

- a financial penalty of £40 per tCO2, of so much of the CRC emissions of the participant in the annual reporting year immediately preceding the year in which the non-compliance is discovered
- publication

Our nature of the breach assessment

We will normally impose a penalty for this breach. We will normally set the initial penalty as follows:

- a financial penalty of £12 per tCO2 (2012/13 compliance year), £24 per tCO2 (2013/14 compliance year), and £40 per tCO2 (2014/15 compliance year onwards)
- publication on the GOV.UK website

For new entrants (those newly joining at the start of a phase), we will normally set the initial penalty at £12 per tCO2 (first compliance year), £24 per tCO2 (second compliance year), and £40 per tCO2 (third compliance year onwards).

C2.2 Failure to register or late registration

The maximum penalties are set by article 95(2), CRC Order 2010; article 73(2), CRC Order 2013) – they are both of the following:

- £5,000, plus £500 for each working day until the application for registration is made, subject to a maximum of 80 working days
- publication

Our nature of the breach assessment

We will normally impose a penalty for this breach. We will normally set the initial penalty as follows:

- a fixed penalty of £5,000
- a daily penalty of £500 for each working day until the application for registration is made, subject to a maximum of 80 working days
- publication on the GOV.UK website

C2.3 Failure to include all the meters for which an organisation is responsible when applying for registration

The maximum penalties are set by article 95(4), CRC Order 2010; article 73(3), CRC Order 2013 - they are both of the following:

- £500 for each meter not reported
- publication

Our nature of the breach assessment

We will normally impose a penalty for this breach. We will normally set the initial penalty as follows:

- £500 for each meter not reported
- publication on the GOV.UK website

C2.4 Failure to provide complete and accurate information when registering

The maximum penalties are set by article 98(2), CRC Order 2010; article 75(2), CRC Order 2013) – they are both of the following:

- £5,000
- publication

Our nature of the breach assessment

We will normally impose a penalty for this breach. We will normally set the initial penalty as follows:

- £5,000
- publication on the GOV.UK website

C2.5 Failure to provide an annual report or late submission of the report

The due date for the submission of annual reports is by the end of the last working day in July after the end of the annual reporting year.

Our overall nature of the breach assessment

We will normally waive the penalty for a participant with zero emissions in the relevant year.

Our assessment will take account of a very low level of emissions.

C2.5.1 Reports provided no more than 40 working days after the due date

The maximum penalties are set by article 97, CRC Order 2010; article 74, CRC Order 2013 – they are all of the following:

- £5,000
- £500 for each working day the report is provided after the due date
- publication

Our nature of the breach assessment

If a participant submits an annual report late but not more than 40 working days late, we will normally impose a penalty. We will set the initial penalty as follows:

- a fixed penalty of £5,000
- a daily penalty of £100 for each working day the report is provided after the due date (2012/13 compliance year), £300 daily rate (2013/14 compliance year) and £500 daily rate (2014/15 compliance year onwards)
- publication on the GOV.UK website

When we apply the daily penalty to new entrants, we will normally set the daily penalty as:

- £100 for each working day the report is provided after the due date (first compliance year)
- £300 daily rate (second compliance year)
- £500 daily rate (third compliance year onwards)

Our additional enforcement position

We will not normally impose a penalty if it is a participant's first breach and a report is submitted less than 10 working days late.

C2.5.2 Reports more than 40 working days after the due date (CRC Order 2010 – Phase 1 April 2010 to March 2014), after the last working day of October (CRC Order 2013 – Phase 2 onwards starting April 2014) or not provided at all

The maximum penalties are:

- £45,000
- the CRC emissions of that participant for the year to which the annual report relates are:
  (a) double the CRC emissions reported in the annual report of the previous year, or
  (b) where no such report exists, double the CRC emissions which we calculate the participant made in the year for which the annual report is not provided
- the participant must immediately acquire and surrender sufficient allowances equal to the CRC emissions which apply under (a) or (b) (or such additional allowances having regard to any allowances surrendered on time for the annual reporting year)
- £40 per tCO2 of so much of the CRC emissions which apply under (a) and (b) but–
- deducting the emissions represented by those allowances (if any) surrendered by the participant on time for the year to which the annual report relates, and
- before the doubling is applied
- blocking – this means to prevent or restrict the operation of a compliance account so the participant can only purchase and surrender allowances - they will not be able to sell allowances until the failure is remedied and any financial penalty is paid
- publication

Where a participant:

- fails to acquire and surrender sufficient allowances equal to the CRC emissions which apply under (a) or (b) (or such additional allowances having regard to any allowances surrendered on time for the annual reporting year); and
- continues in the scheme

those allowances required to be surrendered are to be added to the quantity of allowances required to be surrendered in the next compliance year.

Our nature of the breach assessment

We will normally impose a penalty for this breach. We will normally set the initial penalty as follows:

- a fixed penalty of £45,000
- an additional financial penalty of £12 per tCO2 (2012/13 compliance year), £24 per tCO2 (2013/14 compliance year), £40 per tCO2 (2014/15 compliance year onwards);
- blocking
- publication on the GOV.UK website

For the additional financial penalty, the amount of tCO2 is:

- 1.1 x actual or determined CRC emissions (2012/13 compliance year)
- 1.3 x actual or determined CRC emissions (2013/14 compliance year)
- 1.6 x actual or determined CRC emissions (2014/15 compliance year)
- 2 x actual or determined CRC emissions thereafter

We will only require participants to surrender allowances equal to their actual CRC emissions.

When we apply the additional financial penalties to new entrants, we will normally use the following:

- 1.1 x actual or determined CRC emissions (first compliance year), 1.3 x actual or determined CRC emissions (second compliance year), 1.6 x actual or determined CRC emissions (third compliance year), or 2 x actual or determined CRC emissions (subsequent compliance years)
- the penalty of £12 per tCO2 (first compliance year), £24 per tCO2 (second compliance year), £40 per tCO2 (third compliance year onwards)

C2.6 Failure to provide an accurate annual report

The maximum penalties are set by article 99, CRC Order 2010; article 76, CRC Order 2013 – they are both of the following:

- £40 per tCO2 of so much of those supplies or emissions which were inaccurately reported
- publication

This breach only applies where a participant submits an inaccurate report. The term 'inaccurate', in the CRC Order 2013, means where any of the supplies or emissions reported differ by more than 5% from the supplies or emissions that should have been reported, ignoring any estimation adjustment under Schedule 1 of the CRC Order.

Our nature of the breach assessment

We will normally only impose a penalty where the error in reporting equates to more than 2,000 tCO2. For participants whose total energy use equates to less than 8,000 tCO2, this figure of 2,000 tCO2 will be at least 25% of the total.

For applicable reporting failures, we will normally impose a penalty. We will set the initial penalty as follows:

- £12 per tCO2 of so much of those supplies or emissions which were inaccurately reported (2012/13 compliance year), £24 per tCO2 (2013/14 compliance year), £40 per tCO2 (2014/15 compliance year onwards)
- publication on the GOV.UK website

When we apply the penalty to new entrants, we will normally set the initial penalty as:

- £12 per tCO2 of so much of those supplies or emissions which were inaccurately reported (first compliance year)
- £24 per tCO2 (second compliance year)
- £40 per tCO2 (third compliance year onwards)

Our additional enforcement position

We will normally waive the penalty for participants who identified the error themselves, corrected the error and were co-operative.

C2.7 Failure to surrender sufficient allowances

From 2013 onwards, the due date for surrender of allowances is the last working day of October after the end of the applicable reporting year.

The maximum penalties are set by article 100, CRC Order 2010; article 77, CRC Order 2013 – they are all of the following:

- the participant must immediately acquire and surrender the allowances shortfall
- £40 per tCO2 of so much of the emissions represented by the allowances shortfall
- blocking
- publication

Our nature of the breach assessment

Where a participant fails to surrender sufficient allowances and that failure is apparent at the time compliance is required, we will normally impose a penalty. We will set the initial penalty as follows:

- require the participant to immediately acquire and surrender the allowances shortfall

- apply a penalty of £12 per tCO2 of so much of the emission represented by the allowances shortfall (2012/13 compliance year), £24 per tCO2 (2013/14 compliance year), £40 per tCO2 (2014/15 compliance year onwards)
- blocking
- publication on the GOV.UK website

When we apply the penalties to new entrants, we will normally set the initial penalty as:

- £12 per tCO2 of so much of the emission represented by the allowances shortfall (first compliance year)
- £24 per tCO2 (second compliance year)
- £40 per tCO2 (third compliance year onwards)

Our additional enforcement position

If a participant fails to surrender sufficient allowances by the last working day in October, we must serve an Enforcement Notice so they can buy allowances under a special allocation. We will normally waive the penalty where any of the following apply:

- the participant has complied with the conditions of the Enforcement Notice and it is a first breach of this requirement
- we have determined the maximum penalty to be less than £1,000

We think that the cost of imposing a penalty of this amount outweighs the public interest in imposing it.

We have not set a £1,000 or less level as a set threshold. We will consider all the circumstances and will regard it:

- not to be in the public interest to pursue if the late surrender did not result from a serious management failure, the participant then did surrender the allowances and co-operated with us
- may be in the public interest to pursue despite the cost to the public purse if there is a serious management failure, a second or subsequent breach or lack of co-operation

C3 Publication

For the purposes of the CRC Order, 'publication' means publishing details on the GOV.UK website.

As set out in the main document, where we impose a financial civil penalty, we will normally publish details of it.

C4 Criminal offences

CRC Order 2010 (article 106)

Criminal offences apply when a person:

- makes a statement which that person knows to be false or misleading or recklessly made
- fails to comply with an enforcement notice
- fails or refuses to provide facilities or assistance or to permit any inspection when required to do so by an authorised person
- prevents any other person from appearing before an authorised person or answering a question from an authorised person
- pretends to be an authorised person
- refuses to allow the Environment Agency or an authorised person access to premises for inspection purposes

CRC Order 2013 (article 82)

From 1 April 2014, the only criminal offences that apply are when a person:

- makes a statement which that person knows to be false or misleading or recklessly made
- fails to comply with an enforcement notice
- pretends to be an authorised person
- refuses to allow the Environment Agency or an authorised person access to premises for inspection purposes

We will consider the use of criminal sanctions as explained in the main guidance. These could be:

- a warning
- a formal caution
- prosecution

Section D: Energy Savings Opportunity Scheme (ESOS)

Section D explains our:

- normal 'nature of the breach' assessment for each ESOS breach
- our additional ESOS enforcement positions

You must read this with Section A, which explains our general civil penalty setting principles for the climate change schemes.

D1 When and how the Environment Agency will apply discretion to ESOS penalties

We will apply discretion as explained in Section A.

D2 Civil penalties for ESOS

Paragraphs D2.1 to D2.5 list the breaches within the Energy Savings Opportunity Scheme Regulations 2014 (ESOS Regulations) and state the maximum civil penalties available for each breach.

Each paragraph states the breach and explains our normal 'nature of the breach' assessment and other enforcement positions (if there is one) for that breach.

Our assessment may state that we will not normally impose a penalty (waive the civil penalty) or it will state the normal 'initial penalty amount' (see section A for an explanation).

However, before we set the 'initial penalty amount' we will take account of any representations we receive.

D2.1 Failure to notify

A UK organisation that qualifies for ESOS must notify the Environment Agency that it has complied with its ESOS obligations. ESOS Regulation 43 sets the maximum penalty for failing to do this – they are all of the following:

- up to £5,000
- up to £500 for each working day the responsible undertaking (known as 'organisation') remains in breach, starting on the day after the service of the initial notice of civil penalty notice subject to a maximum of 80 working days
- publication

Our nature of the breach assessment

We will not normally impose a penalty for failure to notify.

This breach is linked with the breach ‘failure to undertake an energy audit’. Usually we will only know if an energy audit has been done if an organisation notifies us. Therefore, it is likely the organisation will comply or fail to comply with both requirements.

We will normally take enforcement action for failure to undertake an energy audit (see D2.3) where an organisation has failed to comply with both requirements.

D2.2 Failure to maintain records

ESOS Regulation 44 sets the maximum penalty for this breach – they are all of the following:

- up to £5,000
- compliance body cost of confirming compliance
- publication
- steps to remedy the breach

Our nature of the breach assessment

We will normally impose a penalty for this breach as it impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

D2.3 Failure to undertake an energy audit

For this breach, and where an organisation’s alternative routes (such as having an ISO 50001:2011 UKAS certified energy management system) do not apply, ESOS Regulation 45 sets the maximum penalty – they are all of the following:

- up to £50,000
- up to £500 for each working day the responsible undertaking remains in breach, starting on the day after the service of the compliance notice subject to a maximum of 80 working days
- publication
- steps to remedy the breach

Our additional enforcement position

In all compliance periods, to bring an organisation into compliance, we will normally issue an enforcement notice. We will normally allow up to 3 months to remedy the failure. We may extend this if the organisation’s request is acceptable.

We will normally issue a compliance notice if we suspect a breach and the organisation has not responded to a previous request for information. Where an organisation does not comply with that notice, we will normally issue an enforcement notice.

Our nature of the breach assessment

Where an organisation does not comply with an enforcement notice, for:

- the first compliance period, or the period a new entrant enters the scheme, we will normally impose a penalty for failing to comply with an enforcement notice (see D2.4).
- subsequent compliance periods we will normally impose a penalty for failing to undertake an energy audit

This breach impacts the integrity of the scheme but we take account of the length of time an organisation has been required to comply with the law. We will normally use the statutory maximum as the initial penalty amount.

Where an organisation does not comply with a compliance notice but complies with the subsequent enforcement notice, we will normally waive the penalty for failing to comply with the compliance notice.

D2.4 Failure to comply with a notice

This breach means failing to provide information or take the steps required by a compliance, enforcement or penalty notice.

ESOS Regulation 46 sets the maximum penalty – they are all of the following:

- up to £5,000
- up to £500 for each working day the responsible undertaking remains in breach, starting on the day after the service of the penalty notice subject to a maximum of 80 working days
- publication

Our nature of the breach assessment

We will normally impose a penalty for this breach as it impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

D2.5 False or misleading statement

This breach means, providing a false or misleading statement when:

- notifying information to the Environment Agency or a compliance body
- providing information required by a compliance, enforcement or penalty notice

ESOS Regulation 47 sets the maximum penalty – they are both of the following:

- up to £50,000
- publication

Our nature of the breach assessment

We will normally impose a penalty for this breach as it significantly impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

D3 Specific Environment Agency enforcement positions

D3.1 Zero energy consumption

Organisations that qualify for ESOS but have zero energy consumption need to declare this by the compliance deadline. If we receive a satisfactory declaration, we will not normally enforce other elements of the scheme.

D3.2 Low energy users

We accept that an organisation needs to make sure its compliance work is proportionate to the potential benefits of the scheme.

If an organisation's energy use is at a domestic level we will not normally enforce the requirement to:

- produce a fully compliant energy audit or alternative route to compliance
- complete a lead assessor review

But the organisation will need to:

- notify us by the compliance deadline and confirm its energy use is at a domestic level or lower
- consider and document opportunities to reduce energy consumption, such as a green deal assessment or display energy certificate
- record its compliance approach in its evidence pack

D4 Procedure for imposing ESOS penalties

Our general procedure for imposing penalties is set out in the main guidance.

Where an additional daily penalty applies for the breaches in D2.1 and D2.4, we follow a different procedure.

We will first serve an initial notice of civil penalty. This will state the:

- particular breach
- the maximum penalty (non daily) the organisation's liable for
- additional daily penalty and that it will accumulate from the day after the date of the notice until the organisation returns to compliance or it reaches its maximum number of days

The notice is not the final decision, no payment is required and we will not publicise it. We will not apply our discretion at this stage. Once we have determined the total penalty (fixed sum and additional daily penalty amount) we will serve a notice of intent to impose the penalty. At this point the organisation can make representations. Once in receipt of these we will set the final penalty amount.

For breach D2.3, the additional daily penalty starts accumulating on the day after service of a compliance notice. We do not issue an initial penalty notice, so our normal procedure applies.

D5 Enforcement and compliance notices

We may serve enforcement notices where we reasonably believe an organisation has failed to comply with the ESOS Regulations.

We may serve compliance notices on an organisation to request information we think is necessary for us to monitor compliance with the ESOS Regulations.

The penalties for failing to comply with either of these notices are set out in D2.3 and D2.4.

Section E: Fluorinated Greenhouse Gases (F Gas)

Section E explains our:

- normal ‘nature of the breach’ assessment for all F Gas breaches
- our additional F Gas enforcement positions

You must read this with Section A, which explains our general civil penalty setting principles for the climate change schemes.

E1 When and how the Environment Agency will apply discretion to F Gas penalties

We will apply discretion as explained in Section A.

E2 Civil penalties for F Gas

We may impose civil penalties for numerous breaches referred to in Regulation 31A of the Fluorinated Greenhouse Gas Regulations 2015 (the F Gas Regulations). They are all of the following:

- failing to comply with any of the provisions of Regulation (EU) No 517/2014 of the European Parliament of the Council on fluorinated greenhouse gases (the 2014 Regulation) set out in Schedule 2 to the F Gas Regulations with the exception of Article 17(1) of the 2014 Regulation
- causing or permitting another person to breach specified provisions of the 2014 Regulation
- failing to comply with specified provisions of certain European Commission Regulations relating to certification, attestation, labelling, fire protections systems and stationary equipment
- failing to comply with various specified provisions of the F Gas Regulations

In total we can impose civil penalties for around 80 breaches. They relate to:

- intentional release of F gas
- placing F gas on the market
- the F gas quota
- the use of F gas
- reporting and record keeping
- fire protection checking

- failure to comply with relevant requirements or notices or to provide assistance
- F gas leakage and recovery

Schedule 4 to the F Gas Regulations sets out the civil penalty that applies to each breach.

Our normal ‘nature of the breach assessment’ (see E2.1) and additional enforcement position (see E2.2) apply to all F Gas breaches.

Our assessment states when we will not normally impose a penalty (waive the penalty) or it explains how we will determine the normal ‘initial penalty amount’ (see section A for an explanation).

However, before we set the ‘initial penalty amount’ we’ll take account of any representations we receive.

E2.1 Our nature of the breach assessment

We will normally impose a civil penalty for all breaches referred to in Regulation 31A of the F Gas Regulations subject to the additional enforcement position (see E2.2).

We will normally use the statutory maximum as the initial penalty amount. This is because the civil penalties in the F Gas Regulations have been set based on the seriousness of the breach taking into account the:

- impact the breach has on the integrity of the scheme
- environmental effect of the breach, where relevant

However, we may decide to use an initial penalty amount lower than the statutory maximum where we consider the breach warrants this, for example when:

- a breach is serious because of its potential for environmental harm but the actual harm caused is much less
- we impose a civil penalty for failure to comply with an enforcement notice and we don’t think the statutory maximum of £200,000 is justified

E2.2 Additional enforcement position

We may not impose a civil penalty where:

- we consider giving advice and guidance will be sufficient to rectify the breach
- punishment or future deterrent is not necessary

If after we have given advice and guidance the breach is not rectified, we may then impose a civil penalty.

Section F: Climate Change Agreements (CCA)

Section F explains our penalty setting approach for CCA financial civil penalties.

CCAs are voluntary agreements between operators and the Environment Agency. They are an incentive to operators to reduce energy use and carbon dioxide emissions. We will always work with operators to achieve compliance. We will only impose a financial civil penalty if the breach undermines the integrity of the scheme.

F1: When and how the Environment Agency will apply discretion to CCA penalties

We may impose a financial civil penalty for the breaches set out in regulation 15(1) of the Climate Change Agreement (Administration) Regulations 2012 (the CCA Regulations). We may decide not to impose a penalty and will apply our discretion by considering:

- the nature of the breach – explained in the introduction of Section A
- culpability (blame) – assessed in line with the categories described in Section A, step 3
- the four aggravating and mitigating factors – set out in Section A, step 4

We do not apply the stepped approach to penalty setting as explained in Section A to CCA penalties.

Where we do decide to impose a penalty we cannot apply discretion on the level of the penalty – the CCA Regulations state how they must be calculated.

F2: How the Environment Agency calculates the penalty amount

For breaches set out in CCA Regulation 15(1)(a), (c) and (d) the penalty will be the greater of £250 or 0.1 x (X – Y), where:

- X is the amount of climate change levy that would have been payable on supplies of taxable commodities to the target unit during the base year if the supplies were not reduced rate supplies
- Y is the amount of levy that would have been payable on supplies of taxable commodities to the target unit during the base year if the supplies were reduced rate supplies

For target units that include greenfield facilities, if we serve a penalty notice within 12 months of the start of an agreement, we will estimate the amount of levy payable.

We will first calculate the penalty amount using the:

- energy use information in the CCA Register for the base year
- rate of the climate change levy and discount for that base year

We will then check if there has been any structural or other changes to the target unit since the agreement was made. See the technical annex of the agreement for a definition of 'structural change'. We will recalculate the amount of the penalty if necessary.

To calculate the penalty we will use the best information we have on the target unit set up at the time of the breach rather than at the time the penalty is imposed.

Operators have the opportunity to provide further information about the target unit in line with the procedure for imposing penalties, as outlined in the main guidance.

For breaches set out in CCA Regulation 15(1)(b) the penalty will be the greater of £250 or £12 per tCO2 equivalent of the difference between the actual emissions and the reported emissions for the target period.

F3: Civil penalties for CCAs

Paragraphs F3.1 to F3.5 list breaches within the CCA Regulations and explain our normal initial assessment for each breach.

However, before we make our final decision we will take account of any representations we receive.

F3.1 Failure to report progress against CCA targets at all or by the specific date

CCA Regulation 15(1)(a) applies if an operator fails to report performance of its target unit on or before 1 May following the end of a target period.

Our assessment

We will normally impose a penalty for this breach. Not reporting performance impacts the integrity of the scheme because there is no evidence of progress towards targets.

If an operator submits a report:

- 10 working days or less late and it is a first breach of this requirement, we will not normally impose a penalty

- more than 10 working days late but before 1 July, there is no history of non-compliance and there are strong mitigating circumstances, we will not normally impose a penalty
- on or after 1 July, we will normally impose a penalty

We will not normally impose a penalty if an operator fails to report its performance when it has terminated its agreement after the end of a target period and before a certification period. But the relevant facilities cannot re-enter the scheme until we are satisfied the target unit has progressed against its target.

We will not certify facilities in target units whose operator does not report its performance for the new certification period.

F3.2 Failure to provide information about progress against a target or compliance with an underlying agreement

CCA Regulation 15(1)(a) applies if an operator does not provide information when requested (such as during an audit) so that we can determine progress for its target unit against its target or compliance with the terms of its underlying agreement.

Our assessment

We will normally impose a penalty for this breach.

This breach impacts the integrity of the scheme, as there is insufficient evidence of the performance of the target unit against the target or compliance with the agreement.

F3.3 Failure to notify that a facility is no longer eligible

CCA Regulation 15(1)(d) applies if an operator does not notify us within 20 working days that a facility may no longer be eligible to be included in the agreement.

Our assessment

This breach is fundamental and significantly impacts the integrity of the scheme. The operator is potentially gaining the benefits of certification to which it is not entitled.

If an operator:

- notifies us more than 20 working days late and it is a first breach of this requirement, we will not normally impose a penalty.
- notifies us more than 20 working days late and it is a second or subsequent breach of this requirement, we will normally impose a penalty, unless all of the following apply:

– there are strong mitigating circumstances for the failure

– the operator satisfies us that it has not claimed the CCA discount on the climate change levy (CCL) since the facility ceased to be eligible or it pays any CCL due

- does not notify us and we discover the breach through another means more than 20 working days after the facility becomes ineligible, we will normally impose a penalty unless one of the following applies:

– the operator provides us with evidence that it has ceased trading

– there are strong mitigating circumstances and the operator satisfies us that it has not claimed the CCA discount on the CCL levy

We will terminate an agreement (or part of the agreement) when we are aware that a facility has ceased to be eligible.

F3.4 Failure to notify us of an error in the base year data

CCA Regulation 15(1)(d) applies if an operator does not notify us within 20 working days that there is an error in their base year data.

Our assessment

If an operator breaches this requirement, their target unit's target will be incorrect and it may have gained benefits to which it is not entitled. It may therefore significantly impact the integrity of the scheme.

If an operator does not benefit from the error, we will not normally impose a penalty.

If an operator benefits from the error, we will normally impose a penalty, subject to the following positions.

If an operator:

- notifies us more than 20 working days late and it is a first breach of this requirement, we will not normally impose a penalty
- notifies us more than 20 working days late, it is a second or subsequent breach of this requirement and there are strong mitigating factors, we will not normally impose a penalty
- in all other circumstances, we will normally impose a penalty

F3.5 Providing inaccurate information in a target period report

CCA Regulation 15(1)(b) applies where an operator provides inaccurate information about progress of its target unit towards its targets in its target period report.

Our assessment

This breach impacts the integrity of the scheme. Inaccurate information may lead to an operator gaining benefits to which it is not entitled.

When an operator discovers an error in its report, it must notify us, correct the error and pay any extra buy-out.

Generally, if an operator has over-reported its target unit's emissions, we will not normally impose a penalty. If an operator has under-reported its target unit is emissions, we will normally impose a penalty.

However, we will apply the following positions - where:

- an under-report of emissions is a first breach of this requirement, we will not normally impose a penalty
- either an over or under-report of emissions relating to one target period is notified to us more than one target period later, we will normally impose a penalty, even if it is a first breach of the requirement - for example, if we are notified in target period 3 or later of an error in target period 1 data, we will normally impose a penalty

F4: Remedial action

As well as the financial penalty we may require the operator to remedy the breach. In the notice of financial civil penalty we serve we must include the steps that need to be taken to remedy the breach and the deadline for doing so.

F5: Failure to comply with a penalty notice

We will normally terminate the underlying agreement, if the operator fails, by the specified deadline to:

- pay the penalty
- remedy the breach

The operator will:

- lose its entitlement to the Climate Change Levy discount until it enters into a new underlying agreement
- not be entitled to recover any discount it has lost in the meantime

If a new operator takes over a facility with unpaid penalties, it will not be able to enter into a new agreement until all outstanding penalties are paid.

F6 Removing access to the CCA register

The Environment Agency can suspend, restrict or terminate access to the CCA Register. See the terms of conditions of use of the Register for when we can do this.

Annex 3: How the Environment Agency enforces the Control of Mercury (Enforcement) Regulations 2017

Under the Control of Mercury (Enforcement) Regulations 2017 (referred to as the Control of Mercury Regulations) breaches under Regulation (EU) 2017/852 are a criminal offence. Others are set out under ‘Breaches for which we can impose a civil penalty'. However, the Control of Mercury Regulations give the enforcing authority the option to impose a civil penalty rather than pursue a criminal sanction.

Annex 3 explains:

- breaches for which we can impose a civil penalty
- breaches that are a criminal offence
- how we will decide which enforcement option to pursue
- how we will calculate the civil penalty
- our nature of the breach assessment
- our additional enforcement position

You must read this annex with the main guidance which explains how we will use our enforcement powers.

Breaches for which we can impose a civil penalty

We may impose civil penalties for the breaches referred to in Regulation (EU) 2017/852 of the Control of Mercury Regulations. They relate to mercury, mercury mixtures, mercury compounds and mercury containing products that are:

- imported
- exported
- used
- converted and stored

We may also impose a civil penalty for failing to comply with an information notice or enforcement notice.

Breaches that are a criminal offence

The breaches of Regulation (EU) 2017/852 and failing to comply with an information or enforcement notices are also criminal offences.

It is also a criminal offence to obstruct and fail to provide assistance or information.

We cannot pursue a criminal offence and impose a civil penalty for the same breach.

How we will decide which enforcement option to take

We will use our initial assessment to work out whether to pursue a criminal offence or impose a civil penalty.

We will also consider aspects of the guidance on How the Environment Agency makes enforcement decisions as appropriate.

Our initial assessment

We will assess:

- the seriousness of the offence based on the actual or potential harm done
- the extent to which a criminal prosecution will deter future offending or be needed to punish
- whether imposing a civil penalty will achieve the outcome we seek to achieve

We will normally impose a civil penalty subject to the additional enforcement position. We will only pursue a criminal prosecution if we think the offence is so serious it warrants this course of action or it is necessary to:

- act as a future deterrent
- punish
- achieve the outcome we are seeking

How we will calculate the civil penalty

If we decide to impose a civil penalty, we will set the penalty using the stepped approach as explained in Section A of Annex 2: The Environment Agency's penalty setting approach to the climate change schemes.

Our normal 'nature of the breach' assessment and additional enforcement position apply to all Control of Mercury Regulations breaches where we decide to impose a civil penalty. Our assessment explains how we will determine the normal 'initial penalty amount' (see section A of Annex 2 for an explanation).

However, before we set the 'initial penalty amount' we will take account of any representations we receive.

Our nature of the breach assessment

The maximum civil penalty amount is up to £200,000. We will normally use the statutory maximum as the initial penalty amount. This is because the civil penalties in the Control of Mercury Regulations have been set based on the seriousness of the breach taking into account:

- the affect the breach has on the integrity of the working of the Regulations
- the environmental effect of the breach, where relevant

However, we may decide to use an initial penalty amount lower than the statutory maximum where we consider the breach warrants this, for example when:

- a breach is serious because of its potential for environmental harm but the actual harm caused is much less
- we impose a civil penalty for failure to comply with an enforcement notice and we don't think the statutory maximum of £200,000 is justified

Additional enforcement position

We may not impose a civil penalty where:

- we consider giving advice and guidance will be sufficient to rectify the breach
- it is not necessary to deter future offending

If after we have given advice and guidance the breach is not put right then we may pursue enforcement action.

How we will use criminal sanctions

If we pursue a criminal sanction, it could be;

- a warning

- a formal caution
- prosecution

For the detail, see the guidance on Enforcement options: criminal proceedings.

Would you like to find out more about us or about your environment?

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