



Department for  
Business, Energy  
& Industrial Strategy

# GOVERNMENT RESPONSE

Government response to the consultation on  
the draft Guidance Document for The  
Offshore Environmental Civil Sanctions  
Regulations 2018

March 2019



**OGL**

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## Exit from the European Union

On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the EU. The United Kingdom will leave the EU on 29 March 2019; until then all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The Government has entered into negotiations with the Union on the terms of its withdrawal, and future relationship with, the Union. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in the future once the UK has left the EU.

## Introduction

The UK Government is committed to ensuring environmental compliance. As part of this commitment, The Offshore Environmental Civil Sanctions Regulations 2018 (the 2018 Regulations) were introduced on 01 October 2018 providing the Department for Business, Energy and Industrial Strategy's Offshore Petroleum Regulator for Environment & Decommissioning (OPRED) with powers to impose financial civil penalties as an alternative to prosecution. The 2018 Regulations are in line with the Government's commitment to move away from unnecessary criminal prosecutions and shift to civil sanctions in accordance with the Macrory principles on regulatory enforcement.

OPRED produced a draft Guidance Document to accompany the 2018 Regulations to ensure that those potentially affected by the introduction of civil sanctions understand the processes that OPRED will follow when applying these.

The Government invited comments via a four-week consultation (20 November to 18 December 2018) on the draft Guidance Document. In total, four responses to the consultation were received with two responses received through the CitizenSpace online portal and two responses by email or post. For email or postal responses, where respondents answered the specific consultation questions, these have been included in the summaries of each of the questions. Where they provided more general comments, their views have been picked up in the additional comments section.

This document summarises the consultation responses by questions. A full list of questions can be found at **Annex A**.

The consultation applied to England, Wales, Scotland and Northern Ireland. Of the 4 responses received, three were from the Offshore Oil and Gas Industry. The full list of organisations that responded can be found at **Annex B**. Please note that the online consultation is not a representative survey and results cannot be statistically generalised to the wider population.

# Summary of responses to the consultation

This section provides a summary of the responses received to each of the questions.

## The Draft Guidance Document for The Offshore Environmental Civil Sanctions Regulations 2018

### **Q1. Are you content with the safeguards in place for OPRED establishing liability for a proposed civil penalty?**

Of the four responses received, the majority were content or neutral with regards to the safeguards OPRED have proposed to have in place when establishing liability for a proposed civil penalty.

Additional comments were provided by respondents which have been considered below.

Further clarification was requested regarding OPRED's robust internal governance arrangements and the criteria for referral of a decision for scrutiny by legal advisers external to OPRED. The internal governance arrangements are clearly explained in the draft Guidance Document and will follow the same process OPRED have been following for the imposition of EU-ETS civil penalties since their introduction. Initially, all cases being considered for a civil penalty will be subject to scrutiny by legal advisers external to OPRED. As the system matures, and external scrutiny confirms that the internal governance arrangements are ensuring a proportionate and fair approach to the imposition of sanctions, cases will be considered for referral to legal advisors on a case by case basis, depending on the facts and circumstances of the alleged breach.

With regards to representations received, a question was raised as to whether the review of these would be conducted by managers who had been involved in the review of the original decision to issue a civil penalty. Managers who review the decision to issue a civil penalty and review representations will not have been involved in the investigation but may be one and the same for both reviews. This is the same process which OPRED have been following for EU ETS civil penalties, and in relation to all enforcement decisions in general, and is therefore consistent across OPRED's enforcement regimes. This approach also allows for internal consistency in decision making.

Clarification was requested as to when OPRED will disclose any information which weakens a case or assists with a defence. OPRED will disclose any such information that it is aware of in the Notice of Intent. If further information comes to OPRED's attention after the Notice of Intent is issued, then this will be disclosed as soon as possible.

It was suggested that OPRED provide, within the Guidance Document, clear explanations of what is regarded as a breach of each Regulation. OPRED do not feel this is necessary as these are existing offences which are clearly defined within each Regulation.

### **Q2. Are you content with OPRED's approach to determining whether a civil sanction is an appropriate enforcement response?**

## Government response to the consultation on the draft Guidance Document for The Offshore Environmental Civil Sanctions Regulations 2018

Of the four responses received, the majority were content or neutral in relation to OPRED's approach to determining whether a civil sanction is an appropriate enforcement response.

Additional comments were provided by respondents which have been considered below.

OPRED again acknowledges industry's desire for a definition of environmental impact, however this is not defined in, nor required by, the relevant regulations. The impact (or lack thereof) of the contravention on the environment will remain as one of the factors OPRED take into account when deciding on the imposition of a civil penalty in each individual case. OPRED will decide how important each factor is on a case by case basis. As was noted above, these decisions will be subject to external legal scrutiny in all initial cases, and where required on a case by case basis thereafter.

It was suggested that in Annex A of the Guidance Document, the reference to aggravating factors be changed to public interest factors. Aggravating/mitigating factors are separate from the public interest factors and play a different role within the decision-making process. As set out at paragraph 1.42 of the guidance, aggravating/mitigating factors are primarily concerned with determining the extent of a variable monetary penalty to be imposed and are only considered after a decision has been made that it would be in the public interest to take enforcement action. As such, the current text will remain. It was also suggested that within the Guidance Document OPRED include text that "the 2018 Regulations will provide a more flexible, proportionate and timely enforcement response in respect of breaches that already amount to criminal offences and would otherwise be considered for prosecution". OPRED will include this text in the introduction section of the Guidance Document.

There is still general concern that civil sanctions could be used in a disproportionate manner by OPRED. OPRED reiterate that civil sanctions are an alternative method of enforcement, which will only be used in the more serious cases which would otherwise be considered for criminal prosecution. In addition, civil sanctions will only be applied in respect of breaches of the offences listed in Annex A of the Guidance Document. If an operator feels that, following the imposition of a civil sanction, this enforcement action is disproportionate, they have a right of appeal to the First-Tier Tribunal.

It was suggested that paragraph 1.16 in the Guidance Document is not relevant and should be removed. OPRED feel that the key principles to enforcement are relevant to this guidance and the paragraph will remain. The text is clear that this is a restatement of the principles set out in the Enforcement Policy.

There was a query as to the grounds on which representations can be made. Representations can be made in any case and information about the right to make representations is included in the Notice of Intent as stated in the Guidance Document. The Notice of Intent will provide the information set out in paragraph 1.22 or 1.33 of the Guidance. Representations will be expected to relate to the matters covered in the Notice. However, OPRED do not feel it is appropriate to specify or limit what the representations can cover. OPRED will consider all representations made in accordance with the process set out within the guidance, in every case prior to taking any enforcement action.

### **Q3. Are you content with the level of detail on the process for imposing fixed monetary penalties contained within the guidance document?**

Respondents were content or neutral in relation to the process for imposing fixed monetary penalties and made the following additional comments.

## Government response to the consultation on the draft Guidance Document for The Offshore Environmental Civil Sanctions Regulations 2018

It was suggested that reference be made to the general criteria for prosecution set out in OPRED's enforcement policy. OPRED will reference this within the Guidance Document.

It was suggested the wording of certain offences be altered; however, the offences are stipulated in the Regulations and OPRED cannot change these.

### **Q4. Are you content with the level of detail on the process for calculating and imposing variable monetary penalties contained within the guidance document?**

The majority of respondents were content or neutral with regard to the process for calculating and imposing variable monetary penalties and made the following additional comments.

Clarification was sought over the classification of "more serious cases" which would be subject to a variable monetary penalty and "serious cases" subject to a fixed monetary penalty. All cases considered for any civil sanction are classified as serious cases in that they would otherwise be considered for prosecution. However, within this classification there will be the "most serious" cases which would be subject to a variable monetary penalty. As such, variable monetary penalties can only be applied to certain offences as shown in Annex A of the Guidance Document. The Guidance Document will be amended to state "most serious cases".

A query was raised as to what level within OPRED, would the final decision on the amount of VMP to be imposed be made. OPRED can confirm this will be at senior management level, consistent with other civil sanction and enforcement decision making processes in general.

A comment was made that there was no adequate explanation as to how the level of VMP will be calculated. OPRED feel that there is sufficient information contained within the Guidance Document to explain the process OPRED will follow.

### **Q5. Are you content that the guidance document contains enough information on variable monetary penalty undertakings and non-compliance penalties?**

Although the majority of respondents were content or neutral in relation to the information regarding the process surrounding variable monetary penalty undertakings and non-compliance penalties, further clarification was sought as to how and when an undertaking would be relevant to breaches of offshore regulations.

The requirement to include a provision to accept an undertaking in the 2018 Regulations, is contained within RESA. OPRED do not envisage that there are many circumstances in which an undertaking would be appropriate for offshore breaches. However, it is up to the person on whom a variable monetary penalty has been imposed, to decide if they feel the offer of an undertaking meets the criteria set out in the Guidance Document. As stated in this document OPRED will, if requested and appropriate, provide feedback on any draft undertaking proposals prior to their formal submission.

It was suggested that OPRED provide examples of undertakings, however this is not appropriate as every case is unique and any undertaking proposed will be decided upon on a case by case basis. More generally, undertakings in respect of breaches of environmental regulations have been applied by other regulators and have included charitable donations dependent on the nature of the damage caused. Such undertakings will be considered where they meet the purposes set out in paragraph 1.47 of the guidance.

### **Q6. Are you content that the guidance document contains enough information about the right to appeal?**

## Government response to the consultation on the draft Guidance Document for The Offshore Environmental Civil Sanctions Regulations 2018

The majority of respondents were content with the level of information regarding the appeals process.

### **Q7. Do you have any other comments?**

General comments/observations were provided and included;

A recommendation that the webpage address of the OPRED public register of enforcement activity be included in the Guidance Document. OPRED will include this in the final Guidance Document.

Clarification was sought as to who can impose civil sanctions offshore. OPRED are the only regulator who can impose civil sanctions offshore.

Further information was requested regarding the information OPRED will publish in the event that a civil sanction is imposed. The Guidance Document clearly states the information which will be published, which will be in line with that currently published by OPRED on its public register of enforcement activity.

## Government Response

The following paragraphs outline our response to the consultation.

OPRED will make arrangements for The Guidance Document to be finalised and published.

The Offshore Environmental Civil Sanctions Regulations 2018 take the form of a domestic Statutory Instrument, which will continue to apply after the UK exits the EU. Any future changes in the law would be subject to Parliamentary scrutiny.



# Annex A – Full Table of Questions

## Consultation Questions

Are you content with the safeguards in place for OPRED establishing liability for a proposed civil penalty?

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Are you content with OPRED's approach to determining whether a civil sanction is an appropriate enforcement response?

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Are you content with the level of detail on the process for imposing fixed monetary penalties contained within the Guidance Document?

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Are you content with the level of detail on the process for calculating and imposing variable monetary penalties contained within the Guidance Document?

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Are you content that the Guidance Document contains enough information on variable monetary penalty undertakings and non-compliance penalties?

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Are you content that the Guidance Document contains enough information regarding the right to appeal?

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Do you have any other comments on the content of the Guidance Document for the Offshore Environmental Civil Sanctions Regulations 2018?

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## Annex B – Organisations that Responded

Apache North Sea Limited

Defra

Oil and Gas UK

Repsol Sinopec Resources UK Limited

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This publication is available from: [www.gov.uk/government/consultations/the-offshore-environmental-civil-sanctions-regulations-2018-draft-guidance](http://www.gov.uk/government/consultations/the-offshore-environmental-civil-sanctions-regulations-2018-draft-guidance)

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