

**A Direction given by the Secretary of State for Energy Security and Net Zero
to the Environment Agency
pursuant to section 40 of the Environment Act 1995**

1 Purpose

- 1.1 This Direction relates to the interpretation of regulation 54(1) of the Greenhouse Gas Emissions Trading Scheme Regulations 2012¹ (“the 2012 Regulations”), as it applied before paragraph (2A) was inserted by the Greenhouse Gas Emissions Trading Scheme (Amendment) (No. 3) Regulations 2019² (“the 2019 Regulations”).
- 1.2 This Direction clarifies whether the Excess Emission Penalty in regulation 54(1) applies to UK administered operators, as defined in regulation 20 of the 2012 Regulations, in relation to a failure to surrender allowances in a ‘recovery year’ to cover a deficit arising from a ‘non-compliance year’, under regulation 42B of the 2012 Regulations.

2 Application of the Excess Emissions Penalty (EEP)

- 2.1 The EEP, set out at regulation 54(1), applies in respect of a person who has failed to surrender sufficient allowances in a scheme year, contrary to regulation 41, for installations, or regulation 42A, for UK administered operators³, of the 2012 Regulations. The EEP is set at the sterling equivalent of 100 Euros (index linked) for each allowance that was not surrendered on time.
- 2.2 Regulation 42A(1), which applies to scheme years 2013 and 2014, states that:
“Subject to paragraphs (3) and (4), by 30th April 2015, a UK administered operator (“A”) must surrender a number of allowances or aviation allowances equal to the sum of A’s annual reportable emissions in the scheme years 2013 and 2014.”
- 2.3 Regulation 42A(2), which applies to each scheme year beginning with 2015, states that: *“Subject to paragraph (3) and regulation 42B, for each scheme year beginning with 2015, A must surrender a number of allowances or aviation allowances equal to A’s annual reportable emissions in that scheme year...”*
- 2.4 Regulation 42B(2), which applies in respect of a deficit arising in relation to the 2013 scheme year onwards, provides that: *“... the amount of allowances or aviation allowances that the UK administered operator is required to surrender*

¹ S.I. 2012/3038.

² S.I. 2019/1440.

under regulation 42A(2) for the recovery year is increased by an amount of allowances or aviation allowances equal to the deficit”.

2.5 The legal duty contained in regulation 42A (to which regulation 54(1) refers) is to surrender allowances equal to the UK administered operator's annual reportable emissions in that scheme year. It is in respect of a failure to comply with that legal duty that the EEP at regulation 54(1) applies. Because the EEP in regulation 54(1) does not itself refer to regulation 42B(2), and regulation 42A(2) states only that it applies 'subject to' regulation 42B there is some ambiguity as to whether regulation 42B(2) falls within the scope of the EEP provisions. Should 42B(2) be interpreted as falling within scope of the EEP provisions, a deficit carried forward from a previous scheme year would need to be included every time when calculating the EEP. This has the potential to result in penalties that are not proportionate, where the EEP is effectively applied to the same surrender obligation multiple times.

3 Direction

3.1 Article 16(1) of Directive 2003/87/EC requires that the rules on penalties laid down by Member States must be effective, proportionate, and dissuasive. The potential for a rolling high-rate penalty to accrue over successive years in respect of the same surrender obligation, particularly absent any application of discretion, would not meet that test, because it could result in a penalty that was disproportionate to the breach.

3.2 Having regard to the matters described above, any deficit that is added to the annual reportable emissions of a UK administered operator under regulation 42B for the purposes of determining its surrender obligation in a scheme year, should not be taken into account when calculating any EEP arising from a failure to surrender sufficient allowances for that scheme year.

3.3 Pursuant to s.40 of the Environment Act 1995, and following consultation with the Environment Agency, the Environment Agency is accordingly directed that, when calculating the Excess Emissions Penalty to be imposed pursuant to regulation 54(1) in respect of a UK administered operator's failure to surrender allowances equal to its annual reportable emissions in a scheme year pursuant to regulation 42A, the legislation must be interpreted as if any increase in the amount of allowances required by regulation 42(B) is disregarded for the purpose of calculating the Excess Emissions Penalty.

4 Commencement and application

4.1 This Direction comes into force on 21 November 2024.

4.2 This Direction does not apply in relation to any failure by an UK administered operator to meet its obligation to surrender allowances after 21 November 2019⁴.

Signed by:

A handwritten signature in black ink, appearing to read 'Ed Miliband', with a long horizontal flourish extending to the right.

The Rt Hon Ed Miliband MP
Secretary of State for Energy Security & Net Zero

⁴ This is because, with amendments that came into force on 21 November 2019, the 2019 Regulations inserted a new paragraph (2A) into regulation 54 of the 2012 Regulations, clarifying that any increase in the annual reportable emissions figure arising from a deficit for the purposes of determining the surrender obligation pursuant to regulation 42B or paragraph 2(5) of Schedule 2 should be disregarded for the purpose of calculating any EEP, and therefore removed the ambiguity addressed by this Direction.