



Department for
Business, Energy
& Industrial Strategy

United Kingdom Emissions Trading Scheme for Offshore Oil and Gas Installations – Civil Penalties Guidance Document

WITHDRAWN

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Chapter 1: General Principles

Introduction

The UK is a global leader in the fight against climate change. We are proud to have been the first country to set legally binding long-term targets to reduce greenhouse gas emissions, and that, in June 2019, the UK became the first major economy in the world to set a 'net zero' greenhouse gas emissions target. We have put clean growth at the centre of our modern Industrial Strategy and our Clean Growth Strategy sets out ambitious policies and proposals that aim to accelerate the pace of clean growth, to deliver increased economic growth and decreased emissions. The creation of a United Kingdom Emissions Trading System (UK ETS) is an essential part of that strategy.

The UK ETS is primarily implemented into UK law by the Greenhouse Gas Emissions Trading Scheme Order 2020 (the 2020 Order). The 2020 Order allows for the imposition of civil penalties in respect of breaches of the trading system. These civil penalties are distinct from the civil penalties under the Offshore Environmental Civil Sanctions Regulations 2018.

This guidance document is designed to set out how the Department for Business, Energy and Industrial Strategy's Offshore Petroleum Regulator for Environment and Decommissioning (OPRED) applies the civil penalties regime under the 2020 Order; how it makes enforcement decisions, the types of enforcement tools available to it, and the processes followed by it. As OPRED is the UK ETS regulator for offshore oil and gas installations only, this guidance document is only relevant to offshore oil and gas installations.

UK ETS and the 2020 Order

The 2020 Order came into force on (date to be inserted) Where conduct gives rise to an offence under the 2020 Order, and the offence occurs after 1 January 2021, OPRED will consider enforcement action based on this guidance document. In limited circumstances, certain provisions of the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (the 2012 Regulations) still apply. Where conduct gives rise to an offence under the 2012 Regulations and the offence occurred before 1 January 2021, the criminal offences in those Regulations will apply. In that case, OPRED will consider enforcement action on that basis, rather than based on this guidance document.

Chapter 2: Enforcement Pathway

The enforcement pathway followed by OPRED when it becomes aware of a potential UK ETS non-compliance is set out at Annex A. In short however, OPRED will undertake the following steps:

1. Investigation;
2. Consideration of appropriateness of enforcement action and potential penalty;
3. Issue Notice of Intent;
4. Consideration of representations and appropriateness of the exercise of discretion;
5. Issue civil penalty notice or formal warning letter

Investigation

This document discusses the civil penalties available under the 2020 Order. OPRED will investigate suspected breaches of the statutory requirements to establish whether or not a person¹ should be made subject to such a civil penalty.

When gathering evidence to establish whether a person has breached the 2020 Order, OPRED will use evidence reasonably available. Alternatively, we may use our statutory investigative powers to require the provision of information to ascertain or confirm certain facts. OPRED's powers to investigate suspected breaches of the statutory requirements are set out in article 39 and article 40 of the 2020 Order. They state that OPRED may;

- At any reasonable time, with reasonable prior notice, board any relevant platform, together with any equipment or material as may be required, and may be accompanied by any other person authorised by the Secretary of State;
- Make such examination and investigation as the inspector considers necessary and may install or maintain monitoring or other apparatus on the relevant platform;
- Direct that any part of the relevant platform be left undisturbed for so long as may be necessary to affect any examination or investigation;
- Take such measures, photographs and copies or record such information as the inspector considers necessary in relation to any examination or investigation;
- Take samples of anything found in or on the relevant platform and of the atmosphere, land, seabed (including its subsoil) or water in the vicinity of the relevant platform;

¹ In the context of OPRED's enforcement work, the "person" who has committed the breach under the 2020 Regulations will normally be the "operator" of the offshore installation, as defined at Regulation 5 of the 2020 Regulations. Generally, the operator is the corporate entity that has control over the operation of the offshore installation.

- Require any person whom the inspector has reasonable cause to believe is able to give information relevant to any examination or investigation to attend at a date and time specified by the inspector; to answer (in the absence of any persons other than those whom the inspector may allow to be present and a person nominated by the individual) such questions as the inspector thinks fit to ask and to sign a declaration of truth of the answers given;
- Require the production of, and inspect and take copies of, any entry in any records which are required to be kept by virtue of this Order; any records which the inspector considers it necessary to see for the purposes of any examination or inspection;
- Require any person to afford the inspector such facilities and assistance with respect to any matter or thing within their control or in relation to which they have responsibilities, as the inspector considers necessary to enable the exercise of any powers provided under the Regulations.

When determining whether there has been a contravention of the 2020 Order, OPRED will judge each matter on a case by case basis, utilising the guidance contained within this document and the more general principles detailed within OPRED's Enforcement Policy. As the UK ETS creates civil penalties, OPRED will apply the civil standard of proof, in that we must be satisfied on the balance of probabilities that a breach of a relevant part of the 2020 Order has been proven, before considering the imposition of a civil penalty.

Consideration of Enforcement Action

Where OPRED is satisfied that there is sufficient evidence to prove that there has been a breach of the 2020 Order, we must consider whether enforcement action is appropriate. To do this we will refer to the principles of enforcement set out in the OPRED Enforcement Policy and listed as follows;

- **Proportionality** – OPRED aims to ensure that the level of enforcement action reflects the seriousness of the breach. The more serious the breach, the more likely a civil penalty will be applied.
- **Targeting** – OPRED aims to ensure regulatory enforcement effort is directed primarily towards those whose activities are the least in line with the 2020 Order. For example, if persons have been subject to previous warnings or enforcement action with no evidence of improvement, or have a history of reportable incidents, the imposition of a civil penalty is more likely.
- **Consistency of approach** – OPRED recognises that consistency cannot be as simple as uniformity and we take into account a number of factors including, but not limited to, the scale of the breach, causal factors and circumstances that gave rise to the breach, including those that arose as the result of something which could not reasonably have been prevented, or was due to something done as a matter of urgency for the purpose of securing the safety of any person. Each situation is unique and there is discretion

within the framework of this policy to exercise professional judgement to ensure appropriate action is taken.

- **Transparency** – OPRED aims to help those being regulated to understand what is expected of them and what they should expect from OPRED. As such we have safeguards to ensure that any civil penalty action is clearly explained within the notice of intent.
- **Accountability** – OPRED is accountable to the Secretary of State, Parliament and to the public for our actions. To achieve this, we have policies and standards against which we can be judged, and an effective and easily accessible mechanism for dealing with comments and handling complaints.

Establishing Liability

OPRED must be satisfied **on a balance of probabilities** that an offence has been committed before a civil penalty under the 2020 Order can be imposed.

OPRED have in place robust internal governance arrangements for enforcement decisions, which ensure that decisions about the use of enforcement action are made at an appropriate level in the organisation. For example, decisions relating to the liability of the potential recipient of a civil penalty will be made by trained investigations officers. These decisions will then be subject to internal scrutiny by managers not directly involved in the investigation. As well as ensuring that liability has been established to the required standard this scrutiny will also ensure that the requirements of the Regulators' Code have been followed and that the decision in relation to liability is proportionate, fair and consistent with decisions taken in relation to similar cases. These arrangements will apply to the application of civil penalties under the 2020 Order.

OPRED will ensure that the recipient of a notice of intent understands the case against them. To achieve this, OPRED will set out the circumstances of the alleged breach to the extent that they are known to us and the reasons for the proposed action.

There are additional safeguards relating to the imposition of civil penalties, these include;

- Any person who receives from OPRED a notice of intent to issue a civil penalty is entitled to submit written representations to OPRED before a final decision is made;
- Any person who receives a civil penalty notice from OPRED following the receipt of a notice of intent, is entitled to appeal against the decision to serve the civil penalty notice, whether or not they have already made representations.

These additional safeguards ensure that there are mechanisms to influence, and where appropriate, challenge the actions of OPRED.

OPRED will carefully consider and weigh any representations received and review our evidence in light of this. Decisions to proceed with a civil penalty in the face of representations to the contrary will be reviewed internally by managers who were not directly involved in the

investigation, however managers who review the decision to issue a civil penalty and review representations may be one and the same for both reviews.

When issuing a civil penalty notice OPRED will always include information on any right to appeal against that notice.

Civil Penalty Notice/Formal Warning Letter

Where OPRED are satisfied that enforcement action is appropriate, a provisional penalty amount will be calculated using the process set out in Chapter 3 below. Following this, a civil penalty notice will generally be served, under article 47. The notice will normally contain the following;

- the grounds for liability;
- the amount of the non-escalating penalty (and, where relevant, how the amount is calculated);
- the date by which the non-escalating penalty must be paid (the “due date”), which must not be less than 28 days after the day on which the notice is given;
- the person to whom payment must be made (which must be either the regulator or the appropriate national authority);
- how payment may be made;
- information about rights of appeal

Consideration of Representations and Exercise of Discretion

The notice will give the person an opportunity to make written representations, usually within 28 calendar days from the date of the notice. The Department must take account of any representations received in response to that notice before making a final decision on the imposition of a penalty. Where an additional daily penalty is appropriate, the Department may choose to serve a civil penalty notice on a person and subsequently provide them with an opportunity to make representations. If representations have not been received within 28 days, and the person has not arranged for an extension of the 28-day deadline with OPRED, then the Department will make a final decision on the imposition of a penalty in the absence of representations.

Where OPRED serves a civil penalty notice and receives representations within the 28-day period allowed, OPRED will consider whether to exercise the discretion given to it under article 48(2) of the 2020 Order.

In general, one or more of the following options may be exercised by OPRED where it is considered appropriate;

- refrain from imposing a civil penalty at all;

- reduce the amount of a civil penalty from that set in the legislation;
- extend the time for payment of a civil penalty;
- withdraw a penalty notice at any time; and
- modify a penalty notice by substituting a lower penalty at any time.

OPRED will consider each breach individually, according to the facts of the case, whilst seeking to ensure consistency in enforcement in accordance with this guidance. We will consider any representations made by the person liable to the penalty prior to making a final decision on the appropriate exercise of our discretion.

In considering the exercise of its discretion, OPRED will have regard to certain public interest factors as follows;

- **General:** The importance of each public interest factor may vary on a case by case basis. Deciding on the public interest is not simply a matter of adding up the number of factors in favour of or against applying a penalty. We will decide how important each factor is in the particular circumstances of each case and make an overall judgement.
- **Intent:** Whether or not the non-compliances were committed deliberately, recklessly or with gross negligence, or were instead the result of an accident or a genuine mistake.
- **Foreseeability:** Whether or not the circumstances leading to the non-compliance could reasonably have been foreseen, and if so, whether any avoiding and/or preventative measures were taken.
- **Nature of the non-compliance:** The extent to which the non-compliance undermines important aspects of the trust in, transparency, reliability and effectiveness of the scheme, taking into account the length of time that a person has been required to comply with the legislation and has taken steps to rectify the situation.
- **Deterrent effect:** The deterrent effect, both on the non-compliant person, and others.
- **Previous history:** Where non-compliance has continued or been repeated despite OPRED taking enforcement action, we will normally increase the level of our enforcement response and impose a more serious or severe sanction.
- **Attitude of the offender:** Whether or not the non-compliant person has a poor attitude towards the non-compliance and/or is uncooperative with the investigation. Conversely, whether the offender has provided the details of the non-compliance voluntarily, or through a self-reporting mechanism, or has independently remedied the non-compliance.

Once a final decision has been made, we will notify the person of this in writing. Where the decision is to impose a civil penalty, a final penalty notice will be issued, under article 47, containing the following;

- the grounds for liability;
- the amount of the non-escalating penalty (and, where relevant, how the amount is calculated);

- the date by which the non-escalating penalty must be paid (the “due date”), which must not be less than 28 days after the day on which the notice is given;
- the person to whom payment must be made (which must be either the regulator or the appropriate national authority);
- how payment may be made;
- information about rights of appeal.

When the level of any additional daily penalty can be determined, a further penalty notice will be served, confirming the total amount due (the further notice). This notice will also specify the date by which the amount due must be paid.

Where OPRED elects to use its discretion and not impose a penalty, a formal letter will be issued advising that we will maintain a record of the contravention for a period of three years and that it may be considered when determining appropriate enforcement action should further contraventions of the 2020 Order occur. The record of the contravention will not be published.

Mandatory penalties

The legislation does not provide discretion in relation to any penalty arising under article 52(2). In those cases, we are required to impose a civil penalty where a breach has been proved on the balance of probabilities and cannot amend the amount.

Insolvency

Where we have discretion over the imposition of a civil penalty, we will not normally impose financial penalties in respect of individuals or corporate entities subject to an insolvency procedure.

Failure to pay a civil penalty

If a person fails to pay a civil penalty, it is recoverable as a civil debt.

Publication of penalties

The 2020 Order impose a requirement to publish the name of an operator against whom a civil penalty has been imposed under article 52(2), unless an appeal is brought and is successful. We may also publish the name of operators who have been awarded civil penalties in respect of other breaches of the 2020 Order. Publication will take place as soon as possible after the expiry of the period for appealing the imposition of a penalty; or when an appeal has been made, after the determination or withdrawal of that appeal.

Generally, we will publish the following information:

- the person on whom the penalty was imposed;
- the legal requirement that was not complied with; and
- the amount of the penalty.

Publication means publishing details on the GOV.UK web-pages.

OPRED will normally publish the details of penalties imposed for a period of 3 years.

Chapter 3: Calculating and Imposing Penalties

Assessing the penalty to be imposed

The level of penalty applicable to each breach is set out in articles 50 to 68 of the 2020 Order. In some cases, a fixed sum only is specified; in others the penalty consists of a fixed sum and an additional daily penalty (up to a prescribed maximum); and in other cases, the penalty must be calculated in accordance with a formula.

Additional daily penalty

An additional daily penalty may apply in respect of the following breaches:

- Failure to comply with a condition of a permit;
- Failure to return allowances;
- Failure to comply with an enforcement notice; and
- Failure to comply with an information notice.

An additional daily penalty may be appropriate if there is a continuing breach which the person could take action to remedy. If the breach cannot be remedied, or if it has already been remedied by the time the initial civil penalty notice is served, an additional daily penalty will not apply.

Where awarded, an additional daily penalty will start to accumulate from the date that the initial civil penalty notice is served and will stop accumulating either after a set period has elapsed, on the date that the person remedies the breach, or on the date that the maximum amount payable (if applicable) has been reached. It is therefore largely a tool to encourage timely compliance.

OPRED may exercise its discretion over either or both elements of the penalty; that is, the fixed sum and the additional daily penalty.

Civil penalties available

This section will give more detailed guidance on the penalties applicable to each breach. OPRED will consider the public interest factors and any representations received before making its final decision.

Article 50 – Carrying out a regulated activity without a permit – Where a regulated activity that is not authorised by a UK ETS permit is carried out at an installation in a scheme year, the operator of the installation is liable to a civil penalty calculated as;

Penalty = CA + (RE x CP), where;

- CA is an estimate of the costs avoided by the operator in the scheme year as a result of carrying out the regulated activity without the authorisation of a permit;
- RE is an estimate of the installation's reportable emissions in the part of the scheme year during which a regulated activity that was not authorised by a permit was carried out;
- CP is the carbon price for the scheme year.

Any penalty imposed must be greater than the amount of any economic benefit gained by the operator as the result of carrying out an unauthorised regulated activity.

Article 51 – Failure to comply with a condition of a permit – Article 51 sets the level of penalty for the breach of the majority of permit conditions as a fixed sum of £20,000, plus £500 additional daily penalty for each day the operator fails to comply with the condition, beginning with the day on which the initial notice is given, up to a maximum of £45,000.

Article 52 – Failure to surrender allowances – Article 52 provides that OPRED must impose a civil penalty where a person fails, by 30 April of the relevant year, to surrender a number of allowances equal to the annual reportable emissions of the installation made in the previous year.

The civil penalty (excess emissions penalty) is £100, multiplied by the inflation factor, for each allowance that the person failed to surrender. This penalty is mandatory, and OPRED have no discretion in imposing this penalty. However, article 52(4) sets out an exception to this mandatory penalty. Where article 52(4) applies, that person is liable to a reduced penalty of £20, multiplied by the inflation factor, for each allowance that the person failed to surrender. OPRED may apply its discretion to reduce or waive a penalty which has been reduced under article 52(4).

This penalty is calculated by multiplying the amount of the civil penalty applicable, £100 or £20 by the amount of allowances a person has failed to surrender. This figure is further adjusted to take into account the inflation factor. The inflation factor is;

Penalty = (CPI2 – CPI1)/CPI1 or 1, whichever is greater, where;

- CPI2 is the consumer prices index for the most recent March for which the consumer prices index is published when the penalty notice is given;
- CPI1 is the consumer prices index for March 2021.

Article 53 – Failure to transfer or surrender allowances where underreporting discovered after transfer – Article 53 sets the level of penalty for this breach as £20, multiplied by the inflation factor for each allowance that the person failed to transfer or surrender. No additional daily penalty is applicable.

Article 58 – Failure to apply to surrender a permit – Article 59 sets the level of penalty for this breach as a fixed sum of £5,000, where a person fails to apply (or apply on time) to surrender a permit.

Article 65 – Failure to comply with an Enforcement Notice – Article 65 sets the level of penalty for this breach as a fixed sum of £20,000, where a person fails to comply, or comply on time, with the requirements of an enforcement notice. An additional daily penalty of £1,000 for each day a person fails to comply following the service of an enforcement notice is applicable, up to a maximum of £45,000.

Article 66 – Failure to comply with an Information Notice – Article 66 sets the level of penalty for this breach as a fixed sum of £5,000, where a person fails to comply, or comply on time, with the requirements of an information notice. An additional daily penalty of £500 for each day a person fails to comply following the service of an information notice is applicable, up to a maximum of £45,000.

Article 67 – Providing false or misleading information – Article 67 sets the level of penalty for this breach as a fixed sum of £50,000, where a person provides false or misleading information.

Article 68 – Refusal to allow access to premises – Article 68 sets the level of penalty for this breach as a fixed sum of £50,000, where a person does not allow the regulator or authorised persons access to the premises.

Chapter 4: Other Enforcement Powers

Enforcement Notices

Article 44 of the 2020 Order specifies that Enforcement Notices may be served when OPRED considers that a person has contravened, is contravening, or is likely to contravene a relevant requirement of the 2020 Order, a condition of an emissions monitoring plan or a permit issued to them. An enforcement notice is primarily used to restore compliance with the relevant provisions.

A notice will contain the following information:

- the fact that OPRED is satisfied a relevant provision has, is, or is likely to be, contravened;
- the circumstances of the contravention;
- the steps which must be taken to remedy the contravention;
- the period within which those steps must be taken; and
- information regarding the right to appeal.

We may use an Enforcement Notice to specify actions required to be taken by an operator to restore compliance, or where an operator has failed to comply with a requirement, even when an additional daily penalty has reached its maximum.

Article 65 of the 2020 Order specifies that, where a person fails to comply with an Enforcement Notice, the civil penalties are;

- £20,000 fixed sum, and;
- £1,000 for each day that a person fails to comply with the notice following the service of a penalty notice up to a maximum of £45,000.

Revocation of Permits

Paragraph 12 of Schedule 6 to the 2020 Order states that OPRED may at any time revoke a permit. We must do so where an operator fails to apply to surrender their permit in accordance with the timescales set out in the 2020 Order. We envisage that this power will otherwise only be exercised in exceptional circumstances including instances where;

- There is evidence of a deliberate attempt to falsify information or mislead for gain, or other reasons, in connection with a permit application, or;
- The breaches of the permit are significant, numerous, persistent and cover an extended period where the permit holder has failed to respond to other methods of enforcement.

Power to Determine Reportable Emissions

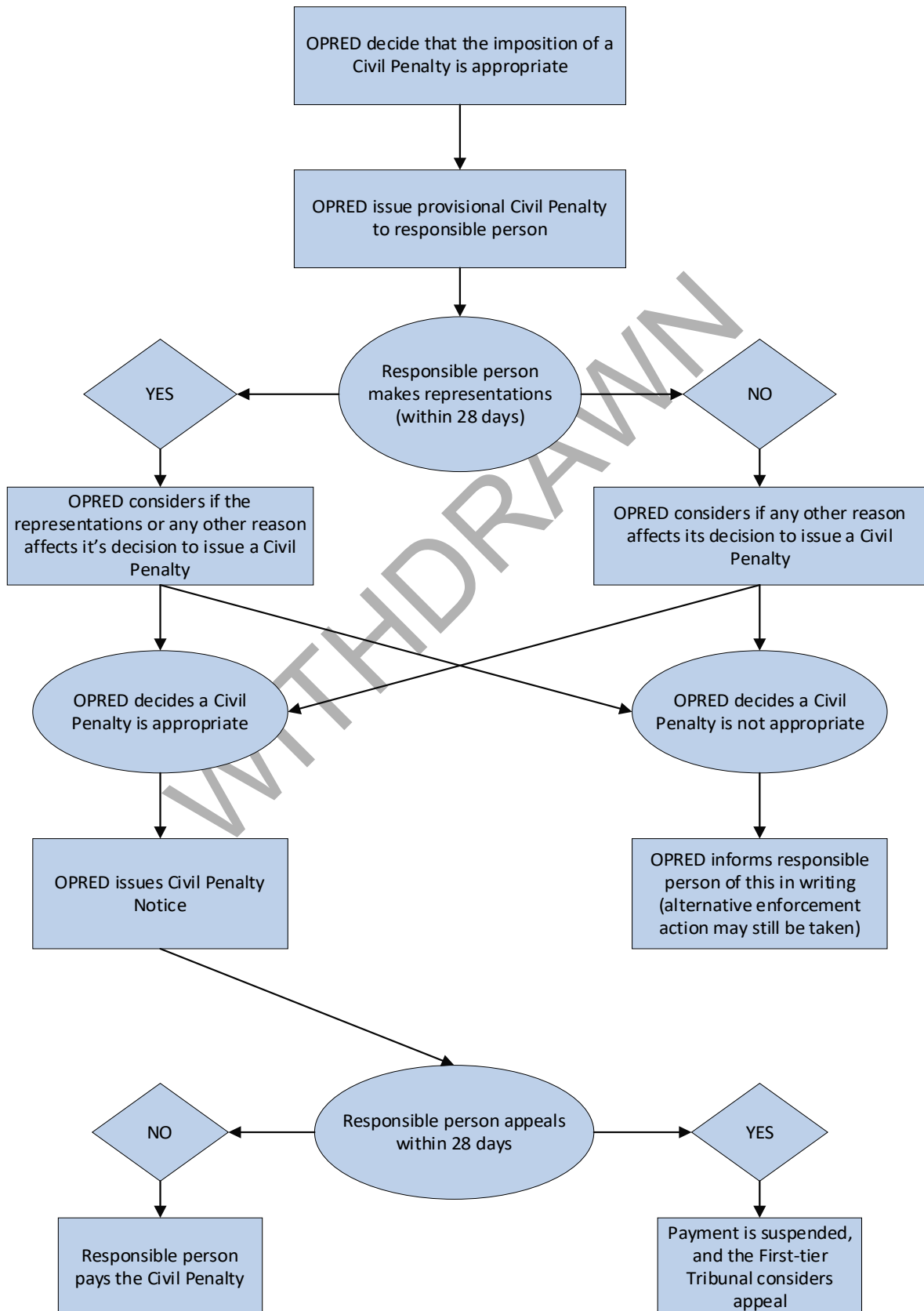
Article 45 of the 2020 Order imposes upon OPRED a duty to make a conservative estimate of emissions in certain circumstances, including when a person fails to submit a verified annual emissions report by 31 March each year. We will generally recover the cost of making a determination of reportable emissions from the person concerned and that cost is taken into account in the normal fees invoicing.

Appeals Procedure

Article 70 of the 2020 Order provides a right of appeal for persons against whom a notice or civil penalty has been awarded. Such an appeal must be submitted within 28 calendar days of the date on which the notice from OPRED was sent to the appellant. Appeals against decisions made by OPRED should be submitted to the First-tier Tribunal. You can find a notice of appeal form and guidance notes [here](#).

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Annex A – UK ETS Civil Penalties Flowchart



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