



Department
of Energy &
Climate Change



Llywodraeth Cymru
Welsh Government



The Scottish
Government



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the Environment
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Amendments to UK greenhouse gas emissions trading scheme and national emissions inventory regulations: a public consultation



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The consultation can be found on DECC's website:
https://www.gov.uk/government/publications?publication_filter_option=consultations

Published by the Department of Energy and Climate Change

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1. General information

Purpose of this consultation

This consultation seeks views on proposed amendments to regulations implementing the EU Emissions Trading System (EU ETS) in the UK and to regulations establishing the system for reporting anthropogenic emissions of greenhouse gases (GHG) under the United Nation Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol (KP). **The consultation runs for 6 weeks until 19 September 2013.**

Objectives and scope of this consultation

This consultation seeks views on the draft Statutory Instrument attached at Annex 2: The Greenhouse Gas Emissions Trading Scheme and National Emissions Inventory (Amendment) Regulations 2013 (the 'proposed Regulations').

The proposed Regulations will amend the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (the '2012 Regulations') and the Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005 (the 'Inventory Regulations') to:

- Clarify the level of civil penalties to be imposed on operators carrying out unauthorised EU ETS activities and the discretion available to regulators to waive or reduce such penalties;
- Bring the penalty for under-reporting EU ETS emissions prior to 2013 into line with the penalty from 2013, enabling regulators to impose a lower level of civil penalty, or even waive a penalty entirely, where operators self-report and surrender the requisite number of allowances;
- Implement the EU's 2013 Registries Regulation¹; and
- Replace the National Emissions Inventory's system of criminal sanctions with a civil penalty scheme and remove the associated power of entry.

We are also taking the opportunity to carry out some minor corrections required to the 2012 Regulations, including typographical errors and erroneous references. We are not specifically consulting on these minor amendments but would welcome any comments.

The 2012 Regulations completed the transposition of Directive 2009/29/EC² of the European Parliament and of the Council ('the revised Directive'), which introduced a number of modifications to EU ETS Phase III (2013-2020) to improve and extend the greenhouse gas emission allowance trading scheme of the Union. These Regulations also consolidated and replaced domestic legislation transposing ETS Directive 2003/87/EC, including the Greenhouse Gas Emissions Trading Scheme Regulations 2005 ('the 2005 Regulations') and the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010 ('the Aviation Regulations'). As

¹ Commission Regulation (EU) No 389/2013 of 2 May 2013 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:122:0001:0059:EN:PDF>

² Directive 2009/29/EC <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0063:0087:EN:PDF>

the Government has previously consulted separately³, we are not seeking views on the changes introduced by the 2012 Regulations.

Territorial extent

Policy responsibility for the EU ETS and the National Emissions Inventory lies with DECC (although policy for aviation emissions is shared with the Department for Transport (DfT)), together with the Northern Ireland Executive, the Scottish Government, and the Welsh Government. References to the Government in this consultation document also cover the Devolved Administrations. The proposed Regulations that are the subject of this consultation will apply in England, Northern Ireland, Scotland and Wales.

Following the transfer of regulatory powers to Natural Resources Wales (NRW) as the new single environmental body for Wales, from April 2013 the EU ETS regulators across the UK are:

England: the Environment Agency (EA)

Scotland: the Scottish Environment Protection Agency (SEPA)

Wales: Natural Resources Wales (NRW)

Northern Ireland: the Chief Inspector⁴ for Northern Ireland

Offshore industry: DECC

Who will this consultation be of interest to?

This consultation will be of particular interest to EU ETS operators and to organisations that report data used in the compilation of the National Emissions Inventory. This consultation is not limited to these stakeholders; any organisation or individual is welcome to respond.

How to respond:

We encourage you to frame your reply in direct response to the questions posed using the response form at Annex 1. However, further comments and evidence are also welcome.

This consultation will run for 6 weeks until 19 September. The short period for consultation reflects the technical nature of the proposed changes and the limited impact on businesses.

Any responses received after the closing date may not be considered. Please send completed forms by email to the DECC EU ETS team at the following address:
euets.consultation@decc.gsi.gov.uk.

The reference for this consultation is: URN 13D/198 - Amendments to UK greenhouse gas emissions trading scheme and national emissions inventory regulations: a public consultation

We are also happy to receive responses by post to the following address:

EU ETS Team
Department of Energy & Climate Change
Area 1A

³ <https://www.gov.uk/government/consultations/transposition-of-eu-directive-2009-29-ec-revising-eu-directive-2003-87-ec-a-public-consultation>

⁴ "Chief inspector" means the chief inspector constituted under regulation 8(3) of the Pollution Prevention and Control Regulations (Northern Ireland) 2003

3 Whitehall Place
London, SW1A 2AW

For consultees in Scotland, Wales or Northern Ireland, please copy your response to:

For Scotland

By email: climate.change@scotland.gsi.gov.uk

By post: Climate Change Division
Scottish Government
1G Dockside Victoria Quay
Edinburgh, EH6 6QQ

Enquiries: 0131 244 7815

For Wales

By email: climate-change@Wales.gsi.gov.uk

By post: Climate Change Branch
Climate Change and Natural Resource Management
Welsh Government
Cathays Park
Cardiff, CF10 3NQ

For Northern Ireland

By email: chris.mcwilliams@doeni.gov.uk

By post: Christopher McWilliams
Environmental Policy Division
Department of the Environment
6th Floor, Goodwood House
44 - 48 May Street
Belfast BT1 4NN

Additional copies

You may make copies of this document without seeking permission. An electronic version can be found at https://www.gov.uk/government/publications?publication_filter_option=consultations

Other versions of the document in Braille, large print or audio-cassette are available on request. Versions written in Welsh can also be made available. Please contact the DECC EU ETS team using the above details to request alternative versions.

Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation

(primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).

If you want information that you provide to be treated as confidential please say so clearly in writing when you send your response to the consultation. It would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded by us as a confidentiality request.

We will summarise all responses and place this summary on our website at https://www.gov.uk/government/publications?publication_filter_option=consultations. This summary will include a list of names or organisations that responded but not people's personal names, addresses or other contact details.

Quality assurance:

This consultation has been carried out in accordance with the Government's Code of Practice on consultation, which can be found here: <http://www.bis.gov.uk/files/file47158.pdf>

If you have any complaints about the consultation process (as opposed to comments about the issues which are the subject of the consultation) please address them to:

DECC Consultation Co-ordinator
3 Whitehall Place
London SW1A 2AW
Email: consultation.coordinator@decc.gsi.gov.uk

Enquiries to

EU ETS Team
Department of Energy & Climate Change,
Area 1A,
3 Whitehall Place,
London, SW1A 2AW
Tel: 0300 068 6197
Email: euets.consultation@decc.gsi.gov.uk

Consultation reference: URN 13D/198 – Amendments to UK greenhouse gas emissions trading scheme and national emissions inventory regulations: a public consultation

2. Amendments to the Greenhouse Gas Emissions Trading Scheme Regulations 2012

The European Union Emissions Trading System (EU ETS)

The EU ETS was introduced in 2005 to help the EU meet its obligation to reduce GHG emissions by 8% below the 1990 level under the Kyoto Protocol (KP). The third phase of the EU ETS, which began on 1 January 2013 and runs to 2020, will deliver a 21% reduction in emissions by 2020 compared to 2005 levels. The scheme covers energy-intensive installations and aircraft operators responsible for around half of the EU GHG emissions.

The EU ETS is based on the 'cap and trade' principle. CO₂ is controlled via a cap that tightens over time, providing a driver for greater energy efficiency and investment in low carbon technology. Participants under the EU ETS are required to monitor and report their emissions and surrender sufficient allowances (EUAs) to cover their emissions in each year. EUAs can be traded and abatement therefore occurs where it is most cost-effective and the overall cost of tackling climate change is lowered.

Implementation of the EU ETS in the UK

Established by EU Directive 2003/87/EC (the 'ETS Directive')⁵ as amended, the scheme has been implemented in Member States through domestic legislation. In 2012 the Government reviewed and consolidated this domestic legislation putting in place the Greenhouse Gas Emissions Trading Scheme Regulations 2012.

The proposed Regulations make a number of changes to the 2012 Regulations and these are set out in detail in the following sections.

Penalty for carrying out an unauthorised activity

It is a breach of the 2012 Regulations to carry out EU ETS activities without a GHG permit. The penalty is set by Regulation 52(2) at the level of the greatest economic benefit that could be gained through carrying out the unauthorised activity, although usually the benefit will be less than this maximum amount. The Regulator has discretion under Regulation 51 to reduce the penalty, but at present this is limited by Regulation 52, which still requires that "*the regulator must ensure that the penalty imposed exceeds the amount of any economic benefit*".

Following review of the penalty regime the Government has determined that the current penalty for carrying out unauthorised activity is not effective from two points of view. On the one hand, there will be circumstances where it would be appropriate for the Regulator to consider imposing a lesser penalty or even to waive it completely, for instance where non-compliance has been inadvertent. On the other hand, the penalty as determined under Regulation 52(2) may already be equal to the maximum benefit, and at present there is no power to increase that amount to ensure that an operator has an incentive to come back into compliance with the scheme. The Government is therefore proposing to amend Regulation 52 to make it clear that the regulator has such a discretion to increase or decrease the penalty.

⁵ Directive 2003/87/EC <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:275:0032:0032:EN:PDF>

The proposed amendment to Regulation 52(3) will enable discretion to be exercised both to increase and to decrease the penalty fixed by Regulation 52(2), as appropriate. As regards extent of an increase, it is intended that this will be specified by a percentage amount specified in the direction that must be given under Regulation 52(4). Regulation 3 of the proposed Regulations will have this effect.

Consultation Question

1. **Do you agree that the proposed amendments to Regulation 52: a) provide for a default civil penalty equal to the economic benefit gained from operating without a permit, with an additional percentage determined through Ministerial Direction; and b) make it clear that the Regulator is able to exercise discretion to waive or reduce penalties where they consider it appropriate to do so?**

Penalties for under-reporting emissions prior to 2013

From 2013, the penalties for EU ETS non-compliance are those set out in the 2012 Regulations, which introduces a more flexible, homogeneous system for Phase III by giving Regulators greater discretion as well as eliminating differences between static installations and aircraft operators. The Government has also moved away from the earlier mixed regime based on both civil penalties and offences and replaced it with a more proportionate one based on civil penalties only.

However, the penalty system for under-reporting of emissions prior to the start of Phase III of the EU ETS on 1 January 2013 remains that established under the 2005 Regulations and the Aviation Regulations, which set out different regimes for static installations and aircraft operators respectively. In particular, static installations are exposed to the mixed regime of fixed civil penalties and offences set out in the 2005 Regulations. Conversely, aircraft operators are only exposed to a system of civil penalties and can benefit from the more flexible regime set out in Regulation 32, which grants Regulators a degree of discretion over the level of the penalty under certain circumstances.

We have identified the opportunity to simplify further and streamline these regimes by eliminating differences between participants across different EU ETS phases. This will also create greater clarity around Regulators' powers. The Government therefore proposes to amend the 2012 Regulations to apply the more flexible system to pre-2013 cases, so that the same penalty regime applies to all cases where emissions have been under-reported, irrespective of timing.

Regulation 4 of the proposed Regulations amends the transitional provisions in the 2012 Regulations to enable this and also extends the power of the Regulator to exercise discretion when issuing penalties. The effect will be to remove the strict liability for a €100tCO₂ penalty and replace it with a discretionary €20tCO₂ penalty in cases where operators voluntarily identify the under-reporting of emissions and surrender the required quantity of allowances.

Consultation Question

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| 2. | Do you agree with our proposed approach to extend the €20 tCO₂ penalty regime already in place for Phase III to operators that self-rectify under-reporting of emissions in previous years, and that the proposed Regulations as drafted give legal effect to it? |
|-----------|---|

Penalty for breaches of the 2005 and Aviation Regulations

We also propose to amend the transitional provisions of the 2012 Regulations to extend the Regulator's power to waive or reduce penalties in relation to all the remaining sanctions that can be issued for breaches of the 2005 Regulations and Aviation Regulations.

Penalties that have been partially repealed in the transition to Phase III include the system of offences set out in the 2005 Regulations, which has been replaced by a system of civil penalties from 2013 onwards. Since the 2005 Regulations do not include powers of discretion, the Regulator does not have the power to reduce or waive these penalties, in marked contrast with our intention to have a more proportionate and flexible penalty system. Regulation 4 (2) (a) of the proposed Regulations will correct this and enable the Regulator to apply the same discretion over all the civil sanctions that can be issued from 2013 onwards.

Equally, some problems with the interpretation of the 2012 Regulations have been identified as the current drafting does not afford the Regulator the power to reduce or waive a penalty issued in cases where an aircraft operator has failed to submit (or submitted late) its verified emissions. Regulations 4(3) and (4) of the proposed Regulations will amend the transitional provisions in the 2012 Regulations to clarify that the power of discretion afforded to the Regulator applies to these penalties.

Consultation Question

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| 3. | Does the proposed drafting clarify that the Regulator has the power to reduce and waive civil penalties for breaches of the 2005 and Aviation Regulations in Phase III? |
|-----------|--|

Registries Regulations

Article 19 of the revised ETS Directive established a European Union-wide Registry for EU ETS Phase III. The provision also required the Commission to adopt a Regulation setting out how such a registry (i.e. the I.T. framework for the ETS that contains accounts for participants where allowances are stored, traded and surrendered) should operate across the EU.

Rules and responsibilities were set out in the Regulation 920/2010 (the 'Registries Regulation 2010')⁶ and Regulation 1193/2011⁷ (the 'Registries Regulation 2011'). The Regulations apply directly in UK law but, to the limited extent necessary, has been transposed into UK legislation by the 2012 Regulations.

In May 2013 the Commission updated the Registries Regulations through Regulation 389/2013, which also repealed the 2010 and 2011 Registries Regulations.

Regulation 5 of the proposed Regulations amends the 2012 Regulations to reflect the changes made to the EU Registries Regulations. As before, the Registry Regulations apply directly in UK law so the amendments in Regulation 5 consist only of consequential changes and updates to references.

⁶ Commission Regulation (No) 920/2010 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:270:0001:0052:EN:PDF>

⁷ Commission Regulation (No) 1193/2011 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:315:0001:0054:EN:PDF>

3. Amendment to the Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005

Background

The United Nation Framework Convention on Climate Change (UNFCCC) requires parties to develop and periodically update national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol.

This was extended by Article 5 of the Kyoto Protocol and Article 4(4) of the EC Monitoring Mechanism Decision No 280/2004/EC⁸, which required Member States to have in place national inventory systems for the estimation of anthropogenic emissions of greenhouse gases by sources and removals of carbon dioxide by sinks.

The Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005 (the 'Inventory Regulations')⁹, which transposed Directive 2004/101/EC (the 'Linking Directive')¹⁰, implemented the national inventory system in the UK by giving the Secretary of State the power to request information for the purpose of preparing a national inventory.

A request under Regulation 10 of the Inventory Regulations can be made of any person and is made by serving a notice. The notice must specify the information required (which can include any information which it is reasonable to require the person to compile) and the timescale for providing the information.

Regulation 11 set out more specific powers and enables the Secretary of State to authorise persons to inspect premises to obtain information to prepare the inventory or verify information provided for the purposed of preparing the national inventory.

Under Regulation 13 of the Inventory Regulations the failure to comply with a notice requesting information, or the provision of false or misleading information, is punishable as a criminal offence.

As part of the Government's commitments under the Red Tape Challenge we propose to replace the criminal sanction in the Inventory Regulations with a civil penalty and to remove the power of entry.

Powers of entry and inspection

Regulation 10 of the proposed Regulations repeals Regulation 11 of the Inventory Regulations and removes the powers of entry and inspection that the Secretary of State can exercise through an authorised person with the purpose of obtaining information for the preparation of the National Emissions Inventory. These powers were introduced to ensure the Government had legal comeback in cases where a legitimate request relating to the preparation of the national

⁸ Decision No 280/2004/EC <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004D0280:EN:NOT>

⁹ SI 2005/2903 <http://www.legislation.gov.uk/ukxi/2005/2903/introduction/made>

¹⁰ Directive 2004/101/EC <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:338:0018:0018:EN:PDF>

inventory was refused. Since the power to request information under Regulation 10 appears sufficient to ensure the UK is able to comply with its obligation under the UNFCCC, we are proposing to repeal the power of entry under Regulation 11.

Consultation Question

4. Do you agree that the powers of entry and inspection are unnecessary and that removing such powers will help to reduce the regulatory burden on businesses?

Enforcement

Regulations 10 and 11 of the proposed Regulations amend the current enforcement regime for failure to provide inventory information by replacing it with a more proportionate, less-burdensome system based on civil penalties only, which also includes the possibility to appeal against the imposition of such a penalty to the First-tier Tribunal.

Penalties

Regulations 11 and 12 of the proposed Regulations repeal the system of offences for providing false or misleading information for the purpose of preparing a national emissions inventory set out in the GHG Inventory Regulations and replace it with a system based on civil penalties only.

The Secretary of State still has the power to request information for the preparation of the National Emissions Inventory. A penalty regime is deemed to be necessary to ensure this power is effective and the UK can comply with its obligations under the UNFCCC. However, the same level of deterrent can be achieved by imposing a civil penalty that is less of a burden for businesses and individuals, in line with the Government's better regulation agenda.

We are proposing a more flexible regime which is also consistent with the one set out for the EU ETS in the 2012 Regulations.

The structure of the system is as follow:

- a) Regulation 14 gives the Secretary of State the power to impose a civil penalty in case where a person fails to comply with a request under Regulation 10 of the Inventory Regulations, or provides false or misleading information for the preparation of a national emissions inventory.
- b) Regulation 16 sets out the liability regime for failure to comply with an information request while Regulation 17 sets out an additional £1000 liability that applies in any cases where the information provided for the preparation of the National Emissions Inventory is false or misleading, irrespective of any previous information request from the Secretary of State.
- c) Regulation 15 gives the Secretary of State the power to reduce these liabilities (or even waive the penalty) if circumstances warrant it.

Consultation Question

5. **Do you agree with our proposed approach to removing criminal penalties and establishing a regime comprising of civil penalties only?**

Appeals

Regulation 12 introduces the right to appeal against the imposition of a civil penalty in relation to the preparation of the National Emissions Inventory. The appeal is required to ensure that operator's civil rights are protected, in line with article 6 of the European Convention on Human Rights (ECHR) which establishes the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Consistent with our approach towards EU ETS appeals in England and Wales, we propose to introduce a similar system where appeals against the imposition of a civil penalty in relation to the preparation of the National Emissions Inventory are heard and determined by the First-tier Tribunal (FtT). This is in line with the broader Government shift towards the use of the FtT for appeals against decisions under environmental and climate policy. We believe this is the most cost-effective, proportionate approach to ensuring appeals are dealt with effectively and in line with the requirement of the ECHR.

The First-tier Tribunal (FtT)

The FtT is empowered to deal with a wide range of issues which might form the substance of appeals, and to ensure the cases are dealt with in the interest of justice and minimising parties' costs. The composition of a Tribunal is a matter for the Senior President of Tribunals to decide and may include non-legal members with suitable expertise or experience in an appeal in addition to Tribunal judiciary.

If the FtT is selected as the appropriate body to hear appeals in these matters then it would operate under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 which provide flexibility for dealing with individual cases and so it is not dealt with in the these draft regulations.. The General Regulatory Chamber rules can be found at: <http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/tribunals-rules-2009-at010411.pdf>. Rule 2 of the General Regulatory Chamber Rules states its overriding objective as being to deal with a case fairly and justly. This includes dealing with a case in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and resources of the parties. The Rules give the Tribunal judge wide case management powers in order to achieve these objectives.

The Tribunal may also hear an appeal either orally in a court room or determined on the papers only. This latter written procedure is used if both parties agree that the Tribunal may determine the appeal on the papers without holding a full hearing and the Tribunal is satisfied that it can determine the issues without one. Any party to a case has a right to appeal to the Upper Tribunal on points of law arising from a decision of the First-tier Tribunal. The right may only be exercised with the permission of the First-tier Tribunal or the Upper Tribunal. Where permission is given, the further appeal would be made to the Upper Tribunal.

Under the Rules the FtT has the power to award costs against a party where it considers that a party has acted unreasonably in bringing, defending or conducting the proceedings.

The Lord Chancellor has the capacity to charge fees for appeals to the FtT, for example an application fee. Where he is proposing to introduce fees he is required to consult the Senior President of Tribunals. Following this, any such proposal would be subject to secondary legislation that would need to be debated and agreed by both Houses of Parliament before it would take effect.

Consultation Question

- | | |
|----|---|
| 6. | Do you consider that the First-tier Tribunal is the appropriate body to hear and determine appeals against decisions to issue a civil penalty for failure to provide inventory information? |
| 7. | <p>Do you consider that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of these appeals against decisions by the Secretary of State? If not, why not?</p> <p>The General Regulatory Chamber Rules may be found at:
 http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm</p> |

Commencement

We are proposing to alter the penalty regime for the National Emissions Inventory only once the FtT has established procedures for hearing appeals. Although we are not specifically consulting on this, we would welcome any comments.

Annex 1: Consultation Response Form

This section only provides a sample response form. Please use the form provided separately when responding to the consultation. It will help us to record and take account of your views.

Consultation		
Amendments to UK greenhouse gas emissions trading scheme and national emissions inventory regulations		
Please Return by 19 September 2013		
<p>EU ETS Team Department of Energy and Climate Change Area 1A 3-8 Whitehall Place London SW1A 2AW</p> <p>You can also submit this form by email: euets.consultation@decc.gsi.gov.uk</p>		
Respondents from Northern Ireland, Scotland and Wales please copy responses to:		
<p>Northern Ireland:</p> <p>Christopher McWilliams Environmental Policy Division Department of the Environment 6th Floor Goodwood House 44-48 May Street Belfast BT1 4NN</p> <p>chris.mcwilliams@doeni.gov.uk</p>	<p>Scotland:</p> <p>Climate Change Division Scottish Government 1G Dockside Victoria Quay Edinburgh EH6 6QQ</p> <p>euets@scotland.gsi.gov.uk</p>	<p>Wales:</p> <p>Climate Change Branch Climate Change and Natural Resources Management Welsh Government Cathays Park Cardiff, CF10 3NQ</p> <p>Climate-change@Wales.gsi.gov.uk</p>
Respondent Details		
Name		
Organisation		
Address		
Town/City		
Postcode		

Telephone	
Email	
Would you like this response to remain confidential?	
If yes please state your reason (this will help should we receive a request for information)	
Consultation Question	
1.	Do you agree that the proposed amendments to Regulation 52: a) provide for a default civil penalty equal to the economic benefit gained from operating without a permit, with an additional percentage determined through Ministerial Direction; and b) make it clear that regulators are able to exercise discretion to waive or reduce penalties where they consider it appropriate to do so?
Response	
2.	Do you agree with our proposed approach to extend the €20 tCO ₂ penalty regime already in place for Phase III to operators that self-rectify under-reporting of emissions in previous years, and that the regulations as drafted give legal effect to it?
Response	
3.	Does the proposed drafting clarify that Regulators have the powers to reduce and waive civil penalties for breaches of the 2005 and Aviation Regulations in Phase III?
Response	
4.	Do you agree that the powers of entry and inspection are unnecessary and that removing such powers will help to reduce the regulatory burden on businesses?

Response	
5.	Do you agree with our proposed approach to removing criminal penalties and establishing a regime comprising of civil penalties only?
Response	
6.	Do you consider that the First-tier Tribunal is the appropriate body to hear and determine appeals against decisions to issue a civil penalty for failure to provide inventory information?
Response	
7.	Do you consider that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of these appeals against decisions by the Secretary of State? If not, why not? The General Regulatory Chamber Rules may be found at: http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm
Response	

Annex 2: Draft Statutory Instrument

STATUTORY INSTRUMENTS

2013 No. 0000

CLIMATE CHANGE

The Greenhouse Gas Emissions Trading Scheme and National Emissions Inventory (Amendment) Regulations 2013

Made - - - - - ** 2013

Laid before Parliament ** 2013

Coming into force in accordance with regulation 1(2) and (3)

The Secretary of State is a Minister designated^(a) for the purposes of section 2(2) of the European Communities Act 1972^(b) in relation to the environment.

In accordance with section 2(4) of the Pollution Prevention and Control Act 1999 (“the 1999 Act”)^(c), the Secretary of State has consulted the Environment Agency, the Natural Resources Body for Wales, the Scottish Environment Protection Agency, and such bodies or persons appearing to the Secretary of State to be representative of the interests of local government, industry, agriculture and small businesses, and such other bodies and persons, as the Secretary of State considers appropriate.

These Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972, and it appears to the Secretary of State that it is expedient for the references to an EU instrument in these Regulations to be construed as references to that instrument as amended from time to time.

Accordingly the Secretary of State, in exercise of the powers conferred by sections 2 and 7(9) of, and Schedule 1 to, the 1999 Act^(d) and by section 2(2) of the European Communities Act 1972, as read with paragraph 1A of Schedule 2 to the European Communities Act 1972^(e), makes the following Regulations^(a):

^(a) S.I. 2008/301.

^(b) 1972 c. 68; section 2(2) was amended by section 27(1)(a) of the Legislative and Regulatory Reform Act 2006 (c. 51) and by section 3(3) of, and Part 1 of the Schedule to, the European Union (Amendment) Act 2008 (c. 7).

^(c) 1999 c. 24; section 2(4) was amended by paragraph 395 of Schedule 2 to the Natural Resources Body for Wales (Functions) Order 2013 (W.S.I. 2013/755 (W. 90)).

^(d) There are amendments to Schedule 1 which are not relevant to these Regulations.

^(e) Paragraph 1A of Schedule 2 was inserted by section 28 of the Legislative and Regulatory Reform Act 2006 (c. 51) and amended by S.I. 2007/1388 and by section 3(3) of, and Part 1 of the Schedule to, the European Union (Amendment) Act 2008 (c. 7).

PART 1

General

Citation and commencement

- 1.—(1) These Regulations may be cited as the Greenhouse Gas Emissions Trading Scheme and National Emissions Inventory (Amendment) Regulations 2013.
- (2) Subject to paragraph (3), these Regulations come into force on ** 2013.
- (3) Regulations 11 and 12 come into force on 31 December 2013.

PART 2

Amendment of the Greenhouse Gas Emissions Trading Scheme Regulations 2012

Interpretation

2. A reference in this Part to a numbered regulation or Schedule is to that regulation of, or Schedule to, the Greenhouse Gas Emissions Trading Scheme Regulations 2012^(b).

Penalty for carrying out an unauthorised activity

- 3.—(1) Regulation 52 (carrying out a regulated activity contrary to regulation 9) is amended as follows.
- (2) In paragraph (2), for “For each” substitute “Subject to paragraph (3), for each”.
- (3) For paragraph (3), substitute—
- “(3) In imposing the penalty, the regulator may increase the amount determined under paragraph (2) by a percentage designed to ensure that the penalty exceeds the amount of any economic benefit that P has obtained as result of the failure to comply with regulation 9.”
- (4) In paragraph (4)(b), for “in accordance with” substitute “under”.

Transitional provisions: penalties

- 4.—(1) In regulation 3 (interpretation), in the definition of “allowance”, for “subject to regulations 54(7) and 82(1)” substitute “subject to regulations 54(7), 82(1) and 87B(5)”.
- (2) In regulation 86 (savings and transitional provisions: the 2005 Regulations)—
- (a) in paragraph (15), after “the following civil penalties apply” insert “(subject to the regulator’s discretion under regulation 51 above)”; and
- (b) in paragraph (18), for “Regulations” substitute “Subject to regulation 87B below, regulations”.
- (3) In paragraph (8) of regulation 87 (savings and transitional provisions: the 2010 Regulations)^(c), for “Subject to regulation 87A below” substitute “Subject to paragraph (8A) and to regulations 87A and 87B below”.

^(a) Under section 57 of the Scotland Act 1998 (c. 46), despite the transfer to the Scottish Ministers of functions in relation to observing and implementing obligations under Community law in respect of devolved matters, any function of the Secretary of State in relation to any matter continues to be exercisable as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972. And similarly, under paragraph 5 of Schedule 3 to the Government of Wales Act 2006 (c. 32), despite the transfer to the Welsh Ministers of functions under section 2 of the 1999 Act so far as exercisable in relation to Wales (except in relation to offshore oil and gas exploration and exploitation), those functions continue to be exercisable by the Secretary of State in relation to Wales for such purposes.

^(b) S.I. 2012/3038, amended by paragraphs 418 to 427 of Schedule 4 to W.S.I. 2013/755 (W. 90) and by S.I. 2013/1037.

^(c) Regulation 87(8) was amended, and regulation 87A inserted, by S.I. 2013/1037.

(4) After regulation 87(8) insert—

“(8A) Regulation 51 above applies in relation to the penalty under regulation 35 of the 2010 Regulations as it applies in relation to the penalty under regulation 64 above.”.

(5) After regulation 87A insert—

“Unreported emissions arising before 2013

87B.—(1) Where paragraph (2) applies, a person (“P”) is not liable to an excess emissions penalty for a failure to surrender allowances in respect of those reportable emissions in a relevant year (“Y”) that—

- (a) were not reported in the verified emissions report submitted for Y, but
- (b) have been determined by the regulator.

(2) This paragraph applies where P, before the regulator serves on P a penalty notice imposing an excess emissions penalty in respect of emissions in Y (or a notice of the regulator’s intention to do so)—

- (a) notifies the regulator that there are reportable emissions not included in the report that has been submitted for Y; and
- (b) has surrendered allowances equal to the reportable emissions for Y as determined by the regulator.

(3) Where paragraph (2) applies, P is liable to the civil penalty of the sterling equivalent of 20 Euros for each allowance that P failed to surrender in respect of the unreported emissions by 30th April in the year following Y.

(4) Regulation 51(1) above applies to a penalty under paragraph (3) as it applies to a penalty under Part 7.

(5) In this regulation—

- (a) “allowance” includes—
 - (i) where the excess emission penalty would arise under the 2010 Regulations, an aviation allowance; and
 - (i) within the limits allowed by regulation 27A of the 2005 Regulations or regulation 26 of the 2010 Regulations, a project credit as defined by regulation 27 of the 2010 Regulations;
- (b) “determined” means determined under regulation 30 of the 2005 Regulations or regulation 22 of the 2010 Regulations;
- (c) “excess emissions penalty” means the penalty under regulation 39 of the 2005 Regulations or regulation 38(1)(a) of the 2010 Regulations;
- (d) “penalty notice” means a notice under regulation 41(2) of the 2005 Regulations or regulation 30(1) of the 2010 Regulations;
- (e) “relevant year” means a calendar year prior to 2013;
- (f) “unreported emissions” means the emissions mentioned in paragraph (1);
- (g) “sterling equivalent” has the meaning given in regulation 54(7) above.”.

Registries

5.—(1) In regulation 3 (interpretation)—

(a) omit the definition of “the Registries Regulation 2011”, and at the appropriate place insert—

““the Registries Regulation 2013” means Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EU) No 920/2010 and No 1193/2011^(a), as amended from time to time;”;

(b) in the definition of “registry account”—

- (i) for “or “excluded”” substitute “, “excluded” or “closed””; and
- (ii) for “Article 9 of the Registries Regulation 2011” substitute “Article 10 of the Registries Regulation 2013”; and

^(a) OJ No L 122, 3.5.2013, p 1.

- (c) in the definition of “the Union Registry” for “2011” substitute “2013”.
- (2) In regulation 8 (Commission Regulations: designations)—
- (a) in paragraph (1), for “2011” substitute “2013”; and
 - (b) for paragraphs (2) to (5) substitute—

“(2) Subject to paragraph (3), the regulator is the competent authority designated by the United Kingdom for the purposes of the Registries Regulation 2013 (other than Articles 25(3) and 34(6)).

(3) The Secretary of State is the competent authority so designated for the purposes of—

 - (a) Article 19;
 - (b) Article 32(2);
 - (c) Article 33(1);
 - (d) Article 34(7); and
 - (e) Article 97(1).”.
- (3) In paragraph (5) of regulation 44 (power to determine reportable emissions), for “Article 32(6) of the Registries Regulation 2011” substitute “Article 35(6) of the Registries Regulation 2013”.
- (4) In paragraph (6)(e) of regulation 45 (provision of information), for “2011” substitute “2013”.
- (5) In regulation 74 (rights of appeal: registries)—
- (a) in paragraph (1)—
 - (i) after “registry administrator” insert “or KP registry administrator”; and
 - (ii) for “2011” substitute “2013”; and
 - (b) for paragraphs (2) to (4) substitute—

“(2) Those provisions are—

 - (a) Article 22(3);
 - (b) Article 24(6);
 - (c) Article 25(3);
 - (d) Article 33(5);
 - (e) Article 34(6).”.
- (6) In regulation 77 (determination of an appeal)—
- (a) for paragraph (2) substitute—

“(2) In determining an appeal under regulation 74, the appeal body may give directions to the registry administrator or the KP registry administrator as to the exercise of their functions under the Registries Regulation 2013”; and
 - (b) in paragraph (3), for “2010 or 2011” substitute “2013”.
- (7) In regulation 79 (interpretation)—
- (a) for paragraph (1) substitute—

“(1) In this Part, a reference to a numbered Article is to that Article of the Registries Regulation 2013.”; and
 - (b) in paragraph (2), for “Article 49” substitute “Article 51(1)” and for “Article 53(1)” substitute “Article 54(1)”.
- (8) In regulation 80 (the Union Registry)—
- (a) omit paragraph (1);
 - (b) in paragraph (2), for “Article 32(2)” substitute “Article 35(2)”;
 - (c) in paragraph (3), for “Articles 32(4) and (5)” substitute “Article 35(4) and (5)”;
 - (d) in paragraph (4), for “Article 14(1) or 15(1)” substitute “Article 16(1) or 17(1)”;
 - (e) in paragraph (6), for “Article 34” substitute “Article 37”;
 - (f) in paragraph (11), for “Article 50(1) or 54(1)” substitute “Article 52(1) or 55(1)”;
 - (g) in paragraph (12), for “Article 50(2) or 54(2)” substitute “Article 52(2) or 55(2)”;
 - (h) in paragraph (16), for “Article 36(3)” substitute “Article 39(3)”.

(9) In paragraph (1) of regulation 81 (the UK Registry), for “Article 3(1) of the Registries Regulation 2010” substitute “Article 5(1)”.

(10) Omit paragraph 81(2).

(11) In regulation 84 (guidance), for “the Registries Regulations 2011 or the Registries Regulations 2010” substitute “the Registries Regulations 2013”.

(12) In paragraph 3(12) of Schedule 4 (permits), for “Article 50(1)(d) or (e) of the Registries Regulation 2011” substitute “Article 52(c) or (d) of the Registries Regulation 2013”.

(13) In paragraph 8(9) and (10) of Schedule 5 (excluded installations), for “2011” substitute “2013”.

(14) Notwithstanding the amendments made by this regulation, until 1st October 2013 the regulator remains the competent authority designated by the United Kingdom for the purposes of Articles 29 to 58 of Commission Regulation (EU) No 920/2010 of 7 October 2010^(a).

Minor amendments

6.—(1) In regulation paragraph (1) of regulation 69 (failure to comply with an information notice), for “notice” substitute “a notice”.

(2) In paragraph 1(5)(b) of Schedule 3 (applications etc.), for “report” substitute “report or notice”.

(3) In paragraph 3(3) of Schedule 5 (excluded installations), for “mention” substitute “mentioned”.

(4) In Schedule 6 (allocation and adjustment of allowances)—

(a) in paragraph 7(7)(b), for “paragraph 11(1)” substitute “paragraph 11(1)(c) and (2)”,

(b) in paragraph 7(9)(c), for “12(1)” substitute “13(1)”; and

(c) in paragraph 11(3), for “sub-paragraph (1)” substitute “sub-paragraph (2)”.

(5) In paragraph 1(2) of Schedule 7 (allocation of aviation allowances), insert at the end “or under the 2009 Regulations”.

(6) In paragraph 2(1) of Schedule 11 (appeals to the Scottish Ministers), for “before the expiry of the period 24 days beginning with” substitute “within 28 days of”.

PART 3

Amendment of the Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005

Interpretation

7. A reference in this Part to a numbered regulation is to that regulation of the Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005^(b).

Review of the Regulations

8. After regulation 1 insert—

“Duty to review these Regulations

1A.—(1) The Secretary of State must from time to time—

(a) carry out a review of these Regulations;

^(a) Commission Regulation (EU) No 920/2010 of 7 October 2010 for a standardised and secured system of registries pursuant to Directive 2003/87/EC of the European Parliament and of the Council and Decision No 280/2004/EC of the European Parliament and of the Council (OJ No L 270, 14.10.2010, p 1).

^(b) S.I. 2005/2903, amended by S.I. 2011/727 and 2012/3038.

- (b) set out the conclusions of the review in a report; and
 - (c) publish the report.
- (2) In carrying out the review the Secretary of State must, so far as is reasonable, have regard to how the Emissions Trading Directive and Decision 280/2004/EC^(a) are implemented in other member States.
- (3) The report must in particular—
- (a) set out the objectives intended to be achieved by the regulatory system established by these Regulations;
 - (b) assess the extent to which those objectives are achieved; and
 - (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.
- (4) The first report under this regulation must be published before the end of the period of five years beginning with the day on which the Greenhouse Gas Emissions Trading Scheme and National Emissions Inventory (Amendment) Regulations 2013 come into force.
- (5) Reports under this regulation are afterwards to be published at intervals not exceeding five years.”.

Notices

9. In regulation 3, for “regulation 4 of the 2005 Regulations” substitute “Schedule 2 to the Greenhouse Gas Emissions Trading Scheme Regulations 2012”.

National inventory: removal of powers of entry

- 10.—(1) Omit regulation 11 (powers of entry).
- (2) In regulation 12 (agreement with devolved administrations on national inventory)—
- (a) after “under regulation 10” omit “and to authorise a person under regulation 11”;
 - (b) after “served in Scotland” omit “or an authorisation authorises the exercise of powers in Scotland”;
 - (c) after “served in Northern Ireland” omit “or an authorisation authorises the exercise of powers in Northern Ireland”; and
 - (d) after “served in Wales” omit “or an authorisation authorises the exercise of powers in Wales”.

National inventory: abolition of criminal offences

11. In paragraph (1) of regulation 13 (offences), omit—
- (a) sub-paragraph (a);
 - (b) paragraphs (ii) and (iii) of sub-paragraph (b); and
 - (c) sub-paragraphs (c) and (d).

National inventory: civil penalties

12. After regulation 13 insert—

^(a) Decision No 280/2004/EC of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol (OJ No L 49, 19.2.2004, p. 1).

“PART 6

Civil penalties

Penalty notices

14.—(1) Where the Secretary of State is satisfied that a person (“P”) is liable to a civil penalty under this Part the Secretary of State must, subject to regulation 15, serve a notice on P (a “penalty notice”).

(2) The penalty notice must specify—

- (a) the regulation under which that liability arises;
- (b) the amount of the civil penalty due;
- (c) whether or not P may be liable to a civil penalty in accordance with regulation 16(2)(b) (an “additional daily penalty”); and
- (e) if P will not be liable to an additional daily penalty, the date by which the penalty for which P is liable must be paid.

(3) Subject to regulation 15, where the Secretary of State is satisfied that P is liable to an additional daily penalty the Secretary of State must, when the amount of that additional daily penalty can be determined, serve a notice on P (an “additional penalty notice”) specifying—

- (a) the total amount of the civil penalties due; and
- (b) the date by which that amount must be paid.

(4) A civil penalty imposed by a penalty notice or an additional penalty notice must be paid to the Secretary of State by the date specified in the notice.

(5) Any such civil penalty is recoverable by the Secretary of State as a civil debt.

Discretion in imposing civil penalties

15. Where the Secretary of State considers it appropriate to do so, the Secretary of State may—

- (a) refrain from imposing a civil penalty under this Part;
- (b) reduce the amount of a penalty (including the amount of an additional daily penalty);
- (c) extend the time for payment specified in the penalty notice or additional penalty notice;
- (d) withdraw a penalty notice or an additional penalty notice;
- (e) modify the notice by substituting a lower penalty.

Failure to comply with a notice under regulation 10(1)

16.—(1) A person (“P”) is liable to the civil penalties in paragraph (2) where P fails to comply (or to comply on time) with the requirements of a notice served under regulation 10(1) (an “information notice”).

(2) The civil penalties are—

- (a) £1,500; and
- (b) £150 for each day that P fails to comply with the requirements of the information notice, following service of a penalty notice, up to a maximum of £13,500.

Providing false or misleading information

17.—(1) Where paragraph (2) applies, a person is liable to the civil penalty in paragraph (3) where that person provides false or misleading information, or makes a statement which is false or misleading in a material particular.

(2) This paragraph applies where the statement is made (or the information is provided) to the Secretary of State in writing for the purpose of preparing a national inventory, whether or not the statement is made (or the information provided) in purported compliance with a requirement imposed by a notice under regulation 10(1).

(3) The civil penalty is £1,000.

Appeals

18.—(1) A person on whom a penalty notice or additional penalty notice has been served under this Part may appeal to the First-tier tribunal.

(2) The bringing of the appeal suspends the effect of the notice pending the final determination or withdrawal of the appeal.

(3) In determining the appeal the First-tier tribunal may—

- (a) affirm or quash the notice; or
- (b) reduce the amount of the penalty imposed by the notice (including the amount of any additional daily penalty).”.

Name

Minister of State

Department of Energy and Climate Change

Date

EXPLANATORY NOTE

(This note is not part of the Regulations)

Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emissions allowance trading within the Community^(a) (“the Directive”) is currently implemented in the United Kingdom by the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (S.I. 2012/3038), which came into force on 1st January 2013 (“the 2012 Regulations”). Those Regulations consolidated (with amendments) and replaced the previous implementing Regulations, namely the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (S.I. 2005/925) and the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010 (S.I. 2010/1996).

Part 2 (regulations 2 to 6) of these Regulations amends provisions of the 2012 Regulations.

Regulation 3 amends regulation 52, which sets out the penalty for operating an installation without a permit. The amendment will enable the regulator to impose a penalty that is greater than the economic benefit of non-compliance as calculated under regulation 52(2), while preserving the full extent of the regulator’s discretion under regulation 51 of the 2012 Regulations.

Regulation 4 amends the transitional provisions of the 2012 Regulations, extending the discretion under regulation 51 to any remaining penalties in respect of breaches of the 2005 or the 2010 Regulations, and aligning the penalty for under-reporting emissions arising before 2013 with the provisions in regulation 54(4) to (6) of the 2012 Regulations (which apply to emissions in 2013 and subsequent years).

Regulation 5 updates the provisions on the Union Registry of EU emissions trading allowances, and the UK Registry of project credits issued under the Kyoto Protocol, in order to take account of the new Commission Regulation on registries.

Regulation 6 makes a number of minor amendments.

Part 3 (regulations 7 to 12) amends provisions of the Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005 (S.I. 2005/2903). Those Regulations deal with the approval of projects

^(a) OJ No L 275, 25.10.2003, p 32: the Directive was amended by European Parliament and Council Directives 2004/101/EC (OJ No L 338, 13.11.2004, p 18), 2008/101/EC (OJ No L 8, 13.1.2009, p 3) and 2009/29/EC (OJ No L 140, 5.6.2009, p 63), and by Regulation (EC) No 219/2009 of the European Parliament and of the Council (OJ No L 87, 31.3.2009, p 109).

under the Kyoto Protocol^(a) and with the preparation of a national inventory of greenhouse gas emissions under Article 4(1)(a) of the United Nations Framework Convention on Climate Change^(b).

Regulation 8 inserts a provision requiring those Regulations to be periodically reviewed.

Regulation 10 removes a power of entry to premises (and connected powers of investigation and enquiry) relating to the preparation of a national inventory.

Regulation 11 abolishes a number of criminal offences relating to the preparation of the national inventory. In place of those offences, *regulation 12* introduces a system of civil penalties modelled on Part 7 of the 2012 Regulations. An appeal against the imposition of a penalty may be made to the First-tier tribunal^(c).

An impact assessment has not been prepared as the instrument is not expected to have any significant impact on the private, voluntary or public sectors. A transposition note setting out how these Regulations implement the relevant provisions of the Directive is annexed to the Explanatory Memorandum published alongside the instrument on the legislation website of The National Archives (<http://www.legislation.gov.uk>).

^(a) Kyoto Protocol to the United Nations Framework Convention on Climate Change (Cm 6485).

^(b) Cm 2833,

^(c) The procedure for appeals to the First-tier Tribunal is provided by the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (S.I. 2009/1976 (L. 20)). Appeals are assigned to the General Regulatory Chamber of the First-tier Tribunal by virtue of article 3(a) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (S.I. 2010/2655).

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URN 13D/198