



Enforcement and Sanctions - Guidance

Operational Instruction 1428_10, Version 3.

We are the Environment Agency. We protect and improve the environment and make it a better place for people and wildlife.

We operate at the place where environmental change has its greatest impact on people's lives. We reduce the risks to people and properties from flooding; make sure there is enough water for people and wildlife; protect and improve air, land and water quality and apply the environmental standards within which industry can operate.

Acting to reduce climate change and helping people and wildlife adapt to its consequences are at the heart of all that we do.

We cannot do this alone. We work closely with a wide range of partners including government, business, local authorities, other agencies, civil society groups and the communities we serve.

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Foreword

This document provides guidance on enforcement and the use of civil and criminal sanctions.

You should read it in conjunction with the:

- [Enforcement and Sanctions – Statement](#); and
- [Offence Response Options](#)

This will give you a complete explanation of our approach to enforcement and sanctioning.

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1 Introduction

This document considers how we make enforcement decisions, the types of tools available to us and associated processes.

We will use the full range of enforcement and sanctioning tools that are available to us, in combination if necessary, to achieve the best outcomes for the environment and for people. This may range, for example, from providing advice and guidance through to prosecution. Within this overall approach, where an offence has been committed we will consider issuing some form of sanction as well as any other preventative or remedial action taken to protect the environment and people. In this document, anything beyond the provision of advice and guidance or a warning is considered to be a sanction, either civil or criminal.

For the purpose of this guidance, a sanction is defined as an enforcement requirement (such as a notice), a binding legal agreement or even a penalty applied by us or a court.

To commence a prosecution we must be satisfied that the case before us meets the test in the [Code for Crown Prosecutors](#), namely that there is a realistic prospect of conviction.

For most sanctions issued under the Regulatory Enforcement and Sanctions Act 2008 (RES Act) there is a higher burden of proof, namely that we must be satisfied beyond reasonable doubt that an offence has been committed before we can issue a sanction. In respect of Enforcement Undertakings received under that Act we must have reasonable grounds to believe that an offence has been committed before we can accept the offer. In such cases we will still want to be in a position to establish that an offence has been committed in case further enforcement action is necessary where an offender fails to comply with the undertaking.

1.1.1 Action against the Crown

No contravention by the Crown of any provision will make the Crown criminally liable, nor can the Crown be made the subject of a RES Act civil penalty. However, the Environment Agency may apply to the High Court for a declaration that any act or omission of the Crown is unlawful. This is an unusual course to take and whether we do so will depend upon:

- the gravity of the incident or breach;
- whether liability is admitted; and
- the response of the body concerned.

1.1.2 Costs

Where the law allows, we will always seek to recover the costs of investigation and enforcement proceedings. Where we have carried out remedial works, we will seek to recover the full costs incurred from those responsible in accordance with the 'polluter pays' principle. Detailed provisions concerning costs arising from RES Act civil sanctions are set out below.

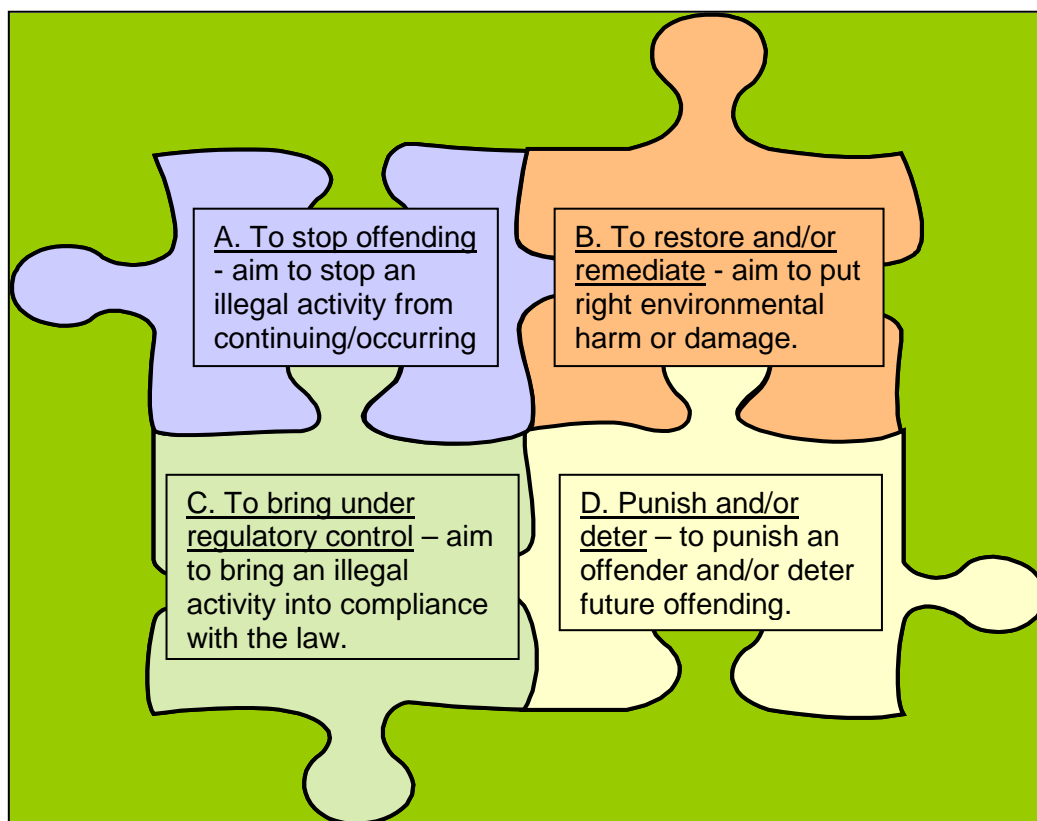
1.1.3 Penalty Principles

When considering the appropriate course of action to address offending and to ensure compliance, we aim to follow the penalty principles set out in the Macrory Review:

- aim to change the behaviour of the offender;
- aim to eliminate any financial gain or benefit from non-compliance;
- be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
- be proportionate to the nature of the offence and the harm caused;
- aim to restore the harm caused by regulatory non-compliance, where appropriate; and
- aim to deter future non-compliance.

2 Outcome focused-enforcement

We can use the sanctions that are available to us to achieve environmental outcomes. The outcomes we seek can be divided into four general types:



The enforcement and sanctioning tools available to us to achieve the desired outcomes (in addition to the provision of advice and guidance and warnings detailed below) include the following. Note that some can be used in combination to contribute to achieving more than one outcome. The terms used below are defined and further explained below.

2.1 Tools to stop offending - Box A

Injunctions

An injunction is an order of a court directing an individual (or company) to either:

- stop a particular activity (a prohibitory injunction); or
- carry out a particular activity (a mandatory injunction).

Failure to comply with an injunction is treated as a contempt of court and is punishable by an unlimited fine and/or up to two years' imprisonment.

Court Order under the Environmental Permitting (England and Wales) Regulations 2010 (EP Regulations)

- This is similar to an injunction.

Notices

- Stop Notice;
- Suspension notice;
- Groundwater prohibition notice;
- Anti-pollution works notice.

2.2 Tools to restore or remediate - Box B

Notices

- Restoration Notice;
- Enforcement notice;
- Notice to remove waste;
- Anti-pollution works notice.

Powers

- Under the EP Regulations 2010, power to seek a regulation 44 remediation order;
- Acceptance of an Enforcement Undertaking or acceptance of a Third Party Undertaking. This can include restitution to adversely affected third parties and communities.

2.3 Tools to bring under regulatory control - Box C

Notices

- Compliance Notice;
- Enforcement notice;
- Suspension notice;
- Anti-pollution works notice;
- Revocation of an environmental permit; and
- Variation of permit conditions.

Powers

- Acceptance of an Enforcement Undertaking.

2.4 Tools to deter and/or punish - Box D

- Criminal Sanctions.
- Variable Monetary Penalties, Fixed Monetary Penalties.

3 General enforcement responses

3.1 Advice and guidance - compliance assistance

We aim to provide advice and guidance to assist an operator or individual to come back into compliance at any point. In the context of enforcement, we will normally provide advice and guidance after an offence is committed or where we consider that an offence is likely to be committed. Where we provide compliance assistance of this type it is without prejudice to any other enforcement response that may be required. This compliance assistance may be either verbal or written, but will be recorded. In the event of continued or further non-compliance(s) this may influence the subsequent choice of response.

We will also seek, where possible, to achieve a lasting solution to the problem that caused offences to be committed.

3.2 Warnings

A warning is a written notification that we believe an offence has been committed. The notification can be either:

- a warning letter; or
- a site warning that is normally issued on-site or otherwise as a result of a compliance visit to a permitted site or activity.

It will be recorded and may, in the event of further non-compliance, influence subsequent choice of sanction.

Warnings can be used to achieve any of the four types of environmental outcome that we might seek.

3.3 Non-RES notices, powers and orders

Many of the regimes we enforce already contain powers to serve specific enforcement notices which require the recipient to stop offending, to restore or remediate an affected environment or to come into compliance with regulatory requirements. These existing provisions may be used wherever appropriate.

Examples of these notices, powers and orders include:

- Environmental Permitting (England and Wales) Regulations 2010 (EP Regulations):
 - Notices: Variation notice (regulation 20), Enforcement notice (regulation 36), Suspension notice (regulation 37), Revocation notice (regulation 22), Groundwater prohibition notice (Schedule 22, paragraph 9);
 - Court order: Enforcement by the High Court (regulation 42);
 - Remediation powers: Power to prevent or remedy pollution and recover costs (regulation 57), Power to dispose of radioactive waste (Schedule 23, part 3, paragraph 4), Orphan sources (Schedule 23, part 4, paragraph 8).

- Environmental Protection Act 1990:
 - Notice to remove waste (Section 59 and 59Z).
- Water Resources Act 1991 S161A-D:
 - Anti-pollution works notice.

The RES Act 2008 has created notice powers to complement the existing notices, particularly to provide powers to require an offender to stop the unlawful activity, to bring the activity into regulatory compliance and to restore damage that has been done. These new notices, namely Stop, Compliance and Restoration Notices, have been made available in order to address situations not capable of being dealt with by the notices described in the paragraph above.

3.4 Criminal sanctions

3.4.1 Fixed Penalty Notices (FPNs)

A Fixed Penalty Notice is a financial penalty for an offence, imposed by the regulator, which if unpaid can be dealt with by way of prosecution in the criminal courts. FPNs are available to us for a limited number of offences.

Where a Fixed Penalty Notice is served, payment of the penalty discharges the liability. Where this happens a record of the payment of the FPN will be kept and treated in the same way as a record arising from a warning.

Where a Fixed Penalty Notice is imposed by us but not paid, the recipient will normally be prosecuted for the original offence.

3.4.2 Formal caution

A formal caution is the written acceptance by an offender that he has committed an offence and may only be used where a prosecution could properly have been brought. To this extent it differs from a warning as described above, which is simply a record and warning about an offence that has been or may be committed. The formal caution is a formal recorded criminal sanction which will be produced in court if there is further offending. It differs from the imposition of a civil sanction as the circumstances which led to the offence have been considered to be appropriate for a prosecution and, indeed, a repetition of similar offending would be likely to lead to such a response. Formal cautions are intended to be a specific deterrent to an offender and are suitable for cases where, although a prosecution could be initiated, other factors mitigate against this. We must however consider the test under the Code for Crown Prosecutors, namely whether there is sufficient evidence and also the public interest factors involved.

Where a formal caution is not accepted we will normally prosecute for the original offence.

3.4.3 Prosecution

The sanction of prosecution is available for all criminal offences by law. The legislation which establishes the penalty provisions gives the courts considerable scope to punish offenders and to deter others. In some cases imprisonment and unlimited fines may be imposed.

Where we decide that a criminal sanction is appropriate we will assess the case in accordance with the requirements of the [Code for Crown Prosecutors](#) before commencing a prosecution.

We recognise prosecution is a serious matter which should only be embarked upon after full consideration of the implications and consequences. Where it is decided that a prosecution is the most appropriate choice of sanction, we must meet the test set out in the Code for Crown Prosecutors, to determine whether there is sufficient evidence and be satisfied that the prosecution is in the public interest. We must then make a decision as to whether prosecution is an appropriate response or whether an alternative to prosecution may be more appropriate. The factors that will influence this assessment are set out in further detail in section 3 of the [Defra/WAG Civil Sanctions for environmental offences guidance document](#).

3.4.4 Orders imposed by the Court ancillary to prosecution

The Code for Crown Prosecutors requires us to apply for compensation and ancillary orders, such as anti-social behaviour orders and confiscation orders, in all appropriate cases. Listed below are the ancillary orders that a court may make following a conviction:

- disqualification of directors;
- confiscation of assets - Proceeds of Crime Act 2002;
- anti-social behaviour orders;
- forfeiture of equipment used to commit the offence;
- disqualification from driving;
- compensation;
- vehicle seizure;
- remediation – under the Environmental Permitting Regulations.

We may also consider a person's competence to be the holder of some Environmental Permitting Regulation permits or the desirability of a person continuing to be a registered waste carrier or broker.

3.5 RES Act Civil Sanctions

In some cases the outcome may be best delivered by a civil sanction made available under the RES Act. Note that civil sanctions are not available for all offences – see the Offence Response Options document. The following illustrates the sorts of circumstances where civil sanctions might be used or accepted. As such the examples are not exhaustive:

3.5.1 Fixed Monetary Penalties (FMPs)

These are fixed penalties which will be most suitable for offences with minor or no direct environmental impact, such as paperwork and administration offences. They will be most appropriate where advice and guidance has failed to secure the necessary improvements. Fixed Monetary Penalties are set at £300 for business and £100 for individuals, with discounts for early payment. They may be used for offences where a low-level monetary penalty is more likely to change the offender's behaviour and encourage future compliance for example because advice and guidance has failed.

They can be issued for minor offences that need some kind of enforcement action but which, depending on the public interest factors, may not be serious enough to warrant a prosecution.

3.5.2 Variable Monetary Penalties (VMPs)

These are monetary penalties which we can impose directly for more serious offences. We will follow the published methodology ([see Annex 1](#)) to set the level of the VMP. Variable Monetary Penalties may be used instead of criminal sanctions for offences where imposing a financial penalty may change offender behaviour and deter others and/or lead to faster resolution. A Variable Monetary Penalty does not carry the stigma of a criminal conviction. It may also provide a saving for the recipient in avoiding the need to pay for representation, and enable the recipient to offer a Third Party Undertaking to make restitution to adversely affected third parties, including local communities.

This may include, for example, cases where there has been more significant environmental damage but other factors indicate that imposing a Variable Monetary Penalty may be appropriate. Variable Monetary Penalties will also be used, where appropriate, to remove an identifiable financial gain or saving resulting from the non-compliance. We may choose to use VMPs where there is evidence of negligence and mismanagement.

3.5.3 Compliance Notices

These require the offender to come back into compliance. They may be used in a case where the offender has previously been in compliance with a requirement, such as regularly submitting returns, but is currently not fulfilling their obligations. The notice should ensure that the offender takes action to stop the non-compliance, addresses the underlying causes and comes back into compliance. They may be used where previous advice or guidance to encourage compliance has not been followed and a formal notice has become necessary to ensure compliance. They can be combined with a Variable Monetary Penalty and a Restoration Notice.

3.5.4 Restoration Notices

These require the offender to take steps to put right any damage caused as a result of the non-compliance and address any harm. These notices can be used where damage has been caused to the environment and the action and work needed to address the damage can be identified and carried out by the offender. They may be used where restoration has not been undertaken voluntarily or we consider that a formal notice is necessary to ensure it is undertaken. They may be used where there is no other suitable enforcement notice available and where previous advice or guidance to encourage restoration has not been followed. They can be combined with a Variable Monetary Penalty and a Compliance Notice.

3.5.5 Stop Notices

A Stop Notice can be used in two sets of circumstances:

- to immediately stop an activity that is causing, or presents a significant risk of causing, serious harm to human health or the environment and where a specified offence is being, or is likely to be, committed;
- to immediately stop an activity that is likely to be carried on that will cause, or will present a significant risk of causing, serious harm to human health or the

environment, and the activity likely to be carried on involves or will be likely to involve a specified offence being committed.

3.5.6 Enforcement Undertakings (EUs)

These are legally binding voluntary agreements offered by those who may have committed an offence and accepted by us. An Enforcement Undertaking can be accepted from a person where we have reasonable grounds to suspect that a specified offence has been committed. They will only be accepted where we have sufficient confidence that the terms of the EU will be delivered. We are more likely to accept them when they are offered early. We will be unlikely to accept an Enforcement Undertaking where we have already decided that a prosecution is required in a particular case. Equally we will be unlikely to accept an EU when we are already in discussion as to the level of a Variable Monetary Penalty in a particular case.

The terms of the Enforcement Undertaking will normally contain an element of restoration as well as steps to ensure future compliance such as long-term investment in environmental management systems. Enforcement Undertakings should encourage legitimate business operators to make amends, come into compliance and prevent recurrence. See [Annex 2](#) for more information about Enforcement Undertakings and the Offence Response Options document for the offences they are available.

3.6 Other Civil Sanctions

The Climate Change Regimes (CRC Energy Efficiency Scheme, the EU Emissions Trading System, the Climate Change Agreements Scheme and the Energy Savings Opportunity Scheme) have a different civil sanctions framework. Guidance on how we will apply these sanctions is contained in Annex 4.

In relation to the Landfill Allowance scheme, the legislation requires suspected non-compliance to be reported to the Secretary of State.

4 Choosing the appropriate response

When we are considering our response to an offence there will normally be a range of possible sanctioning responses available for us to use.

RES Act civil sanctions are not available for all offences and, where they are available, not all of the civil sanctions can be applied. Similarly non-RES Act notices, powers and orders are not available for all offences. A list of all available sanctions for each offence is contained within our Offence Response Options (ORO) document.

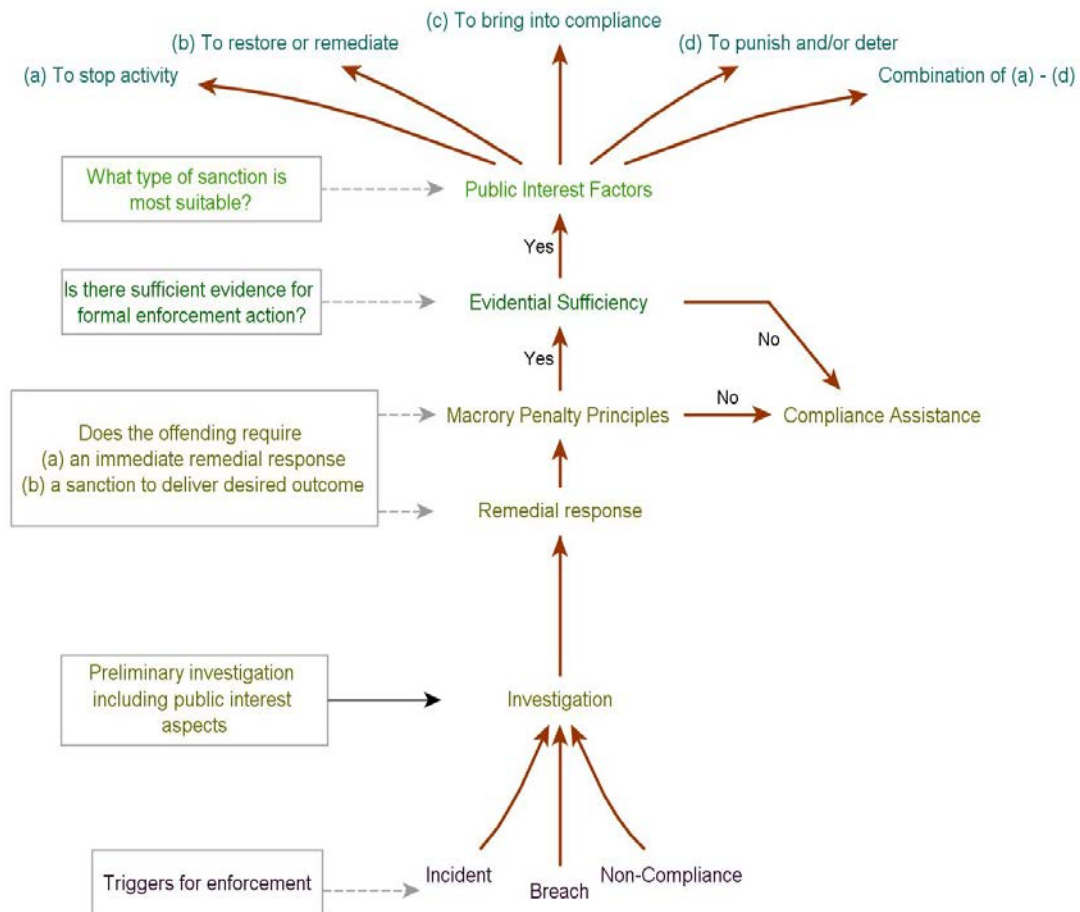
When considering the choice of sanction, we will also consider whether a regulatory position statement has been published for that offence. Regulatory position statements, where available, are set out in the ORO.

First we will consider the outcome that we are seeking to achieve in accordance with our commitment to outcome-focused regulation. We will consider what immediate action is needed as a response to protect the environment, such as the need to immediately serve a notice, and whether further action is then required to secure the desired outcomes. See Figure below.

Where we consider that advice and guidance has not or will not achieve the necessary outcome, and that some form of sanction (either criminal or civil) is required to secure that outcome, then we will consider the facts against public interest factors (set out below) in order to decide what type of sanction to impose.

Where the circumstances leading to the offence could reasonably have been foreseen, and adequate avoiding and/or preventative measures were not taken, the response will normally give rise to a sanction beyond advice and guidance or issuing a warning.

Sanction decision tree



4.1 Public Interest Factors

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 and against applying a sanction. We will decide how important each factor is in the circumstances of each case and make an overall judgement. Consideration of these factors will normally indicate the appropriate sanction(s) likely to produce the desired outcome. These outcomes may include lasting compliance with the law, redress for environmental harm and obtaining a good and lasting benefit for the environment, affected local communities and ensuring a level playing field for businesses and others.

4.1.1 Intent

Offences that are committed deliberately, recklessly or with gross negligence are more likely to result in prosecution. Where an offence was committed as a result of an accident or a genuine mistake this is more likely to result in the use of advice and guidance, warning or an available civil sanction.

4.1.2 Foreseeability

Where the circumstances leading to the offence could reasonably have been foreseen, and no avoiding and/or preventative measures were taken, the response will normally be to impose a sanction beyond advice and guidance or the issuing of a warning.

4.1.3 Environmental effect

The response will address the potential and actual harm to people and the environment. Normally where an offence is classified under the Common Incident Classification Scheme (CICS) or Compliance Classification Scheme (CCS) (or the equivalent under the Reservoirs Dam Risk Categorisation Scheme) as category 1 or 2 we would consider a prosecution, formal caution or a Variable Monetary Penalty. Certain offences are of a type designed to prevent environmental harm, for example particular abstraction offences. Where such an offence could give rise to either a category 1 or 2 CCS or CICS incident we would normally consider a prosecution, formal caution or a Variable Monetary Penalty.

4.1.4 Nature of the offence

Where the offending impacts on our ability to be an efficient and effective regulator, for instance where our staff are obstructed in the conduct of their duties, where we are targeting a particular type of offending or where we are provided with false or misleading information, we will normally prosecute.

4.1.5 Financial implications

Where legitimate business is undercut, or where profits are made or costs are avoided, such as costs saved by not obtaining a permit, this will normally lead to the imposition of a Variable Monetary Penalty or a prosecution. This will include offences motivated by financial gain.

4.1.6 Deterrent effect

When choosing a sanction we will consider the deterrent effect, both on the offender and others. Prosecutions, because of their greater stigma if a conviction is secured, may be appropriate even for minor non-compliances where they might contribute to a greater level of overall deterrence.

Where the use of a sanction is likely to reduce future self-reporting of offences or non-compliance, a different sanction may be appropriate.

4.1.7 Previous history

The degree of offending and/or non-compliance (including site-specific offending or generic failures by the offender) will be taken into account. We will normally escalate our enforcement response where previous sanctions have failed to achieve the desired outcome. For example, where a formal caution has previously been used to deal with offending but has failed to encourage behaviour change and prevent a repeat of the offending, it is likely that the offender will be prosecuted or, where available, a Variable Monetary Penalty will be served.

4.1.8 Attitude of the offender

Where the offender has a poor attitude towards the offence and/or is uncooperative with the investigation or remediation, this will normally mean that we consider a prosecution or a Variable Monetary Penalty. Conversely, where the offender provides us with the details of an offence voluntarily or through a self-reporting mechanism, we will take this into account when deciding on a sanction or whether advice and guidance will suffice.

4.1.9 Personal circumstances

We will consider the personal circumstances of the offender (for example if the offender is suffering from a serious illness). A first offence by a juvenile will not normally result in prosecution.

When we are considering a sanction that incorporates a financial penalty or a requirement to perform costly remediation we will carefully consider the offender's ability to pay. Where that consideration indicates the penalty is beyond the offender's ability to pay it will be modified to place it within the reach of the offender.

We will not normally apply a Fixed Monetary Penalty or a Variable Monetary Penalty (unless there is significant financial gain) to an offence where a person is receiving Common Agricultural Policy (CAP) payments that are expected to be reduced by reason of failure to comply with the relevant cross compliance requirements, but we may still apply other civil or criminal sanctions.

4.2 Other public interest considerations

4.2.1 Serious offences

When we are dealing with overt criminality, gross negligence or reckless behaviour or where the seriousness of an offence requires that it be heard in a public forum, we will normally choose to prosecute.

We will normally consider prosecution, subject to a consideration of the public interest factors, where either:

- the offending has been intentional, reckless or grossly negligent or involves outright criminal activity;
- the offending has created serious harm (or has the potential to cause such harm) to the environment or to people;
- there has been large-scale and protracted non-compliance with regulatory provisions;
- our staff have been subject to harassment, alarm, distress or fear of violence;
- intentionally, recklessly or wilfully making a false or misleading statement or record;
- we have been obstructed in our duties and this obstruction has prevented the investigation of potentially criminal activity or an offender has impersonated an Environment Agency officer; or
- where an offender has failed to comply with a Stop Notice.

4.2.2 Minor breaches

When we are dealing with minor breaches of a permit condition where there is no environmental impact, we will normally choose to provide advice and guidance to help the business back into compliance.

4.2.3 Repeat offending

Where offending has continued or been repeated despite us taking enforcement action we will normally increase the level of our enforcement response and impose a more serious or severe sanction.

4.2.4 Failure to comply with a notice

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

4.2.5 Operating without a permit, licence or other authority

Where a person has failed to obtain the necessary authorisation, then we are more likely to impose a sanction that is likely to punish and/or deter.

4.2.6 Multiple site operations

We will always have regard to the compliance history of an offender. We will not normally take account of offences committed on another of an operator's sites unless they are of a similar type or demonstrate an overall management failure on the part of the operator.

4.2.7 Offences by bodies corporate

We will take enforcement action against those persons responsible for the offence. Where a company is involved, it will be usual practice to enforce against the company where the offence resulted from the company's activities. However, where an offence has been committed by a body corporate and is attributable to the consent, connivance or neglect of any director, manager, secretary or other officer, that person can be guilty of an offence and is liable to be the subject of enforcement action for that offence. In such circumstances we will take action against the most appropriate body (corporate and/or individual) or in combination, using the full range of the enforcement tools at our disposal. In appropriate cases, we will consider seeking disqualification of directors under the Companies Act.

4.2.8 Combining sanctions

Other than where specifically allowed by the legislation it is not normally possible to combine criminal and civil sanctions for the same offending. Combinations of sanctions will in some circumstances be possible but careful regard must be had to the relevant legislative provisions. For instance, the RES Act 2008 allows us to impose Variable Monetary Penalties, Restoration and Compliance Notices for the same offence. Where it appears desirable to use a combination of sanctions we will carefully consider the extent to which this is lawful and appropriate. For regimes which involve annual registration and compliance such as those established by Producer Responsibility

obligations, where we choose a civil sanction response, we will endeavour to reflect all compliance failures by choosing one civil sanction option, which most fairly characterises the offences arising, rather than issuing a number of sanctions for each compliance period.

4.3 Other notices, powers and orders

Many of the regimes that we enforce already contain powers to serve specific enforcement notices which require the recipient to stop offending, to restore or remediate an affected environment or to come into compliance with regulatory requirements. These existing provisions may be used wherever appropriate.

5 Procedures for RES Act civil sanctions

The RES Act sets out highly prescriptive requirements and procedures for regulators wishing to use civil sanctions. These are expanded by the:

- Environmental Civil Sanctions (England) Order 2010 (ECSO); and
- Environmental Civil Sanctions Miscellaneous Amendments (England) Regulations 2010 (ECSR).

The legislation does not set out all of the considerations which arise in relation to proceedings which are alternatives to criminal sanctions. We believe that we must be demonstrably fair and judicious in the way that we administer our civil sanctions regime. Accordingly, we will adopt high levels of propriety throughout our procedures in respect of the use of these civil sanctions. We will ensure that an offender who receives a Notice of Intent for a civil sanction has similar safeguards to an offender who has been prosecuted. We will ensure that the safeguards inform our considerations in the use of administrative penalties as set out below.

In carrying out our investigation as to whether or not an offence has been committed, or is likely to be committed, we will apply the safeguards laid down by the Police and Criminal Evidence Act 1984.

When assessing our evidence as to whether an offence has been committed we will carefully assess the weight and cogency of all of the evidence to satisfy ourselves that an offence has been made out in accordance with the relevant test. We will take into account any weaknesses and ambiguities in our evidence and strive to search for the truth so far as possible in relation to any such ambiguities. In the event of a direct conflict of evidence we will construe any uncertainty in favour of the accused.

We will ensure that the recipient of a Notice of Intent has a clear statement of the facts behind the proposed sanction or details of the evidence upon which we rely so that he will understand the case against him. We will detail the offence alleged, date and time of commission and the circumstances of the offence to the extent that they are known to us.

If at any time we are in possession of material which undermines our case or assists the offender we will disclose that material in accordance with the interests of justice. If we find that there is material which is so sensitive that a judge should rule on the issue of its disclosure or admissibility then we will consider whether it is more appropriate to proceed by way of prosecution rather than administrative sanction.

We will carefully consider and weigh any representations we receive and review our evidence in light of these. Decisions to proceed with a civil sanction in the face of representations to the contrary will only be made by a separate reviewing lawyer and manager.

We will have regard to the interests of victims and third parties whose interests have been adversely impacted by an environmental incident. We will attempt to ensure that, in accordance with the 'polluter pays' principle, third parties are compensated appropriately when a civil sanction is imposed or an Enforcement Undertaking accepted. We will encourage offenders to engage with the local community and to assess and remediate fully the impacts of an environmental incident.

Where we receive information from an offender that a third party is to be compensated we will require evidence, usually by confirmation in writing, that the third party is satisfied with the compensation arrangements. Only where we believe it to be

appropriate in all the circumstances will we proceed with a civil sanction, including an Enforcement Undertaking, without some attempt having clearly been made to agree reasonable compensation with a directly affected third party.

In accepting an Enforcement Undertaking we will make it clear that this does not forestall or prejudice the rights of third parties to bring their own civil claims in relation to the incident to which the undertaking relates.

5.1 Enforcement Cost Recovery Notices (ECRNs)

We may serve Enforcement Cost Recovery Notices requiring payment of our costs up to the time of imposition of most civil sanctions. We will always seek to recover our costs in accordance with the 'polluter pays' principle and will attempt to assess our actual and necessary costs associated with the imposition of the sanction and recover these from the relevant offender.

An Enforcement Cost Recovery Notice may not be served where a Fixed Monetary Penalty is imposed as the legislation does not allow this. Where an Enforcement Undertaking is offered we are not entitled to require payment of our costs but we will look more favourably upon Enforcement Undertakings which offer a contribution towards the costs associated with an alleged offence and the acceptance of the undertaking through to its discharge under a completion certificate.

While we may reduce the amount of a civil sanction by reason of an offender's inability to pay the amount due we are unlikely to reduce the amount of an Enforcement Cost Recovery Notice. This is because the Enforcement Cost Recovery Notice should reflect the actual costs associated with the offending and the sanction imposed and because of our duty to protect the public purse.

There is a right of appeal against the imposition of an Enforcement Cost Recovery Notice as provided for by the relevant Statutory Instruments.

5.2 Non-compliance Penalties (NCPs)

We are entitled to impose a Non-Compliance Penalty where an offender fails to comply with a Compliance Notice, Restoration Notice or Third Party Undertaking. This is the case even where a Variable Monetary Penalty is also imposed for the relevant offence. We will attempt to assess the real cost of complying with the original sanction or Third Party Undertaking and will base our Non-Compliance Penalty on this assessed cost. We will then take into account the reasons for the non-compliance in assessing what proportion or percentage of that cost should be imposed by way of a Non-Compliance Penalty. If the failure to comply is deliberate then the percentage is likely to be greater. If the failure arises because of facts and circumstances beyond the offender's control then the percentage will be smaller. Because any such failure is likely to be fact specific we will apply the public interest criteria to decide what percentage payment is appropriate by way of a Non-Compliance Penalty.

For Compliance Notices and Restoration Notices we can prosecute for non-compliance with a notice or serve a Non-Compliance Penalty. In normal circumstances we would choose to either impose a Non-Compliance Penalty or prosecute depending on the particular circumstances of the non-compliance. Where a Non-Compliance Penalty is served but this does not bring about compliance with the original notice we may still prosecute for the original offence.

If the requirements of the original sanction or Third Party Undertaking are complied with before the time set for payment of the Non-Compliance Penalty, the penalty falls. We would have regard to the desirability of reducing the amount of a Non-Compliance Penalty if its imposition led to prompt and comprehensive proposals for compliance with the terms of the original notice.

The relevant Civil Sanctions Statutory Instruments provide a right of appeal against the imposition of a Non-Compliance Penalty.

6 Appeals

Enforcement action (specifically the imposition of a sanction) can normally be appealed either through the criminal court process or as a result of specific appeal provisions. Our notices set out the rights of appeal which apply in the specific circumstances of each sanction or provision. When considering any type of appeal against enforcement and sanctioning action it will usually be appropriate for the recipient to obtain independent legal advice.

6.1 Appeals against RES Act sanctions

RES Act sanctions cannot be imposed in the following circumstances:

- where that offence is not specified as having a RES Act sanction available;
- where that offence does not have that particular RES Act sanction available;
- where no offence has been committed;
- where it is not possible for the offence to be proved beyond reasonable doubt; or
- where representations indicate that a defence is available.

References to specified offences mean those that are specified under the Environmental Civil Sanctions (England) Order 2010 (ECSO) and the Environmental Civil Sanctions Miscellaneous Amendments (England) Regulations 2010 (ECSR).

Where a RES Act sanction can be imposed, our notices will set out rights of appeal. These are very far ranging. The First Tier Tribunal has issued forms and guidance in respect of such appeals and these are available from their website (<http://www.justice.gov.uk/forms/hmcts/tax-and-chancery-upper-tribunal>).

Generally, the grounds of appeal against the imposition of a RES Act sanction are as follows:

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

These are set out in more detail at [Annex 3](#) below.

6.1.1 Compensation provisions - Stop Notices

Where a Stop Notice has been served we must compensate a person if, as a result of the service of the notice or the refusal of a completion certificate, that person has suffered loss, and:

- we withdraw or amend the Stop Notice because the decision to serve it was unreasonable or any step specified in the notice was unreasonable;
- we are in breach of our statutory obligations;

- the person successfully appeals against the Stop Notice and the Tribunal finds that our service of the notice was unreasonable; or
- the person successfully appeals against the refusal of a Completion Certificate and the Tribunal finds that our refusal was unreasonable.

In these circumstances compensation should cover loss including exceptional costs resulting from the service of the Stop Notice (for example, legal or expert advice). A person who wishes to claim compensation must do so in writing to the address which appears on the Stop Notice with which they have been served.

Any dispute over whether compensation should be paid, or over the amount of any such compensation, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties to the dispute or, in default of agreement, a person will have the right of appeal to the First Tier Tribunal against our decision not to provide compensation or against the amount of compensation.

The compensation scheme is without prejudice to a person's rights to seek redress through the Ombudsman, judicial review or civil litigation.

Annex 1: Variable Monetary Penalty methodology

1. General principles

1.1 When we may use a Variable Monetary Penalty (VMP)

Under our Enforcement and Sanctions Statement and Enforcement and Sanctions Guidance, Variable Monetary Penalties may be used for specific offences especially where the imposition of a financial penalty may change offender behaviour and deter others. This may include, for example, cases where although there has been significant environmental damage requiring restoration imposing a VMP is also appropriate. Variable Monetary Penalties will also be used to remove an identifiable financial benefit or saving resulting from non-compliance, where appropriate. We may also want to use them where there is evidence of negligence and mismanagement, but this is not sufficient to warrant prosecution.

1.2 Government guidance

The Government has issued guidance to regulators on how they must calculate Variable Monetary Penalties [\[Defra/WAG guidance\]](#).

This methodology follows that guidance. It is important to note that:

- Variable Monetary Penalties have to be calculated individually for each offence and the starting point for the deterrent component (see below) for each offence has to be individually determined.
- Where more than one offence is committed, a separate VMP may be imposed at the same time for each offence.
- The total payment under any single VMP may not exceed £250,000.

1.3 Overview of components of a Variable Monetary Penalty

Variable Monetary Penalties have three components:

- i. Financial benefit component – to remove financial benefit from the offence including:
 - avoided costs such as permit fees;
 - operating savings arising from being non-compliant e.g. equipment, staff, consultants; and
 - financial gain arising from operating at lower costs.
- ii. Deterrent component – based on one of three starting points determined by the characteristics of the offence, which is then adjusted according to aggravating and mitigating factors. The three starting points are:
 - a) the financial benefit from (i);
 - b) the costs required to comply with a restoration notice;
 - c) the maximum criminal fine a magistrate's court could impose for the specific offence where there is neither significant restoration nor significant financial benefit.

The deterrent component is added to the financial benefit to:

- change the behaviour of the offender;
 - act as a general deterrent to others to help to improve compliance overall; and
 - reassure those that do comply that the non-compliant have not secured any
 - advantage from offending.
- iii. Deduction component – to reduce the penalty by some of the costs incurred by the offender.

The basic calculation is: **(Financial benefit + Deterrent) – Deductions = VMP**

Where: Deterrent = £ (Starting point x Total aggravating factor) – £ (Total mitigation)

1.4 We calculate the Variable Monetary Penalty in the following stages:

We assess and estimate each starting point relevant to the offence:

- the financial benefit gained by the offender in committing the offence;
- the costs required to comply with a restoration notice; and
- the maximum criminal fine a magistrate's court could impose for the specific offence where there is neither significant restoration nor significant financial benefit.

We choose the starting point for the deterrent component depending upon the nature of the offence. We will usually choose the one with the highest value, unless there are reasonable grounds for choosing a lower value.

We assess the aggravating factors and the mitigating factors and use them to modify the chosen starting point to give us the Variable Monetary Penalty total. Some aggravating factors may be such as to indicate the use of a prosecution rather than a civil sanction such as a Variable Monetary Penalties.

We consider deductions, the costs incurred by the offender that can be taken into account to reduce the penalty.

We calculate the Variable Monetary Penalty for the Notice of Intent we shall serve on the offender. We include the final amount payable, after any written representations have been made, in the Final Notice.

We provide more detail on each of the components in section 2.

2. Calculating and estimating the components

2.1 Estimating financial benefit

Variable Monetary Penalties aim to remove any direct financial benefit from an offence including:

- avoided costs;
- operating savings; and (where applicable)
- any gain made as a direct result of the offence.

Financial benefit will not always be an identifiable feature of a case. For example, in some water pollution cases there may be strict liability for the case but very little obvious gain. However even in these cases there may be some avoidance, for example alarms not installed and maintained, inadequate bunding or security measures not installed. These failures will be investigated and any costs avoided will be considered as financial benefit.

The boxes below outline how we may identify financial benefit.

Avoided costs:

While what may constitute financial benefit cannot be specified for all cases, it would include all avoided costs where these can be identified and estimated.

These costs, which may include fees, registrations, taxes (for example landfill, unless they are being recovered by the relevant authority), will be assessed and estimated and if disputed or otherwise necessary, we will seek evidence of them from the offender.

Operating savings:

We will assess and estimate operating costs such as administration, staff, consultants and set-up costs and if disputed or otherwise necessary, we will seek evidence of them from the offender.

We will base any relevant set-up costs on either current set-up costs or costs at the time of the offending, whichever is the highest.

This prevents any advantage from deferring operational costs until such time as technologies and operational practices are cheaper, or obtaining an advantage from interest on non-expended sums or tax differentials.

Other financial gains:

We can assess other aspects of the financial benefit where these are obvious or they can be readily calculated or estimated, and where their removal addresses any competitive advantage that offenders have gained as a direct result of the offending. This may include the return on money not invested in plant, equipment or training, or profit accrued as a result of the non-compliance.

This may be the case where, for example, the operation is intrinsically and wholly linked to the offence, such as operating a waste management facility without obtaining a permit, and where the business could not have been set up and continued other than by offending.

Wherever possible we will base the calculation of financial gain on evidence.

Offenders can be required by powers under Schedule 2 1(6) Environmental Civil Sanctions Order 2010 to provide the information necessary to determine a proportionate VMP, including financial information.

If they fail to comply with this requirement, we will estimate the financial benefit based on the evidence we have, or based on similar cases or industry practices.

Offenders also have a chance to make representations at the Notice of Intent stage.

2.2 Choosing the starting point for the Deterrent component

The choice will depend on the characteristics of the offence. Reference should be made in each case to the Enforcement and Sanctions Guidance.

To reflect the seriousness of the offence, the starting point for determining the deterrent component will be that which is the most significant in terms of characterising the offence. This is likely to be the starting point with the highest value.

Each case is decided on its individual merits, allowing for discretion to be applied in cases such as those where, despite severe environmental damage, only limited restoration can practicably be undertaken (hence low cost), or where a large number of relatively minor or technical offences could give rise to a disproportionate penalty should the statutory maximum be used.

We acknowledge that no two cases are the same and that they will often contain several elements. We cannot therefore prescribe the exact circumstances where each starting point will be used or for which offence a starting point will be used. However the characterisation of the offending, and hence choice of starting point, can be broadly determined as follows.

2.3 Cases that are characterised by financial benefit

This will include cases where offending behaviour generates significant financial benefit in comparison to the restoration costs if present (where this is required by notice) or the available statutory maxima. Whilst it is ultimately our estimate it should, where possible, be determined with evidence directly from the offender or from industry associations and professional bodies to give a degree of certainty.

Example: A failure to register under the Producer Responsibility (Packaging) Regulations will typically involve three offences for each year where the registration is not made. One of these offences will be the failure to purchase Packaging Recovery Notes to, for example, the value of £10,000. The statutory maximum for the offence is £5,000. In this example the offence is characterised as one of financial benefit, and the financial benefit is also the starting point of highest value. Financial benefit will therefore form the basis for the calculation of the deterrent component for this specific offence.

Note: Restoration costs will typically not apply to cases of this nature.

2.4 Cases characterised by restoration costs

This will be the starting point for calculating the deterrent component where there is environmental damage resulting in costs from the issue of a Restoration Notice¹ that are significant when compared to any financial benefit from the offence or the available statutory maxima.

Restoration costs

Use of restoration costs as a starting point only extends to those associated with restoring the position to that which it would have been if the offence had not been committed. It does not include restoring or repairing infrastructure. Costs incurred by us in restoring the environment² are excluded from the penalty calculation.

We do not include costs incurred by the offender voluntarily as this would act as a disincentive for voluntary restoration and restitution to adversely affected third parties. They may however be taken into account in the deductions component.

The restoration costs associated with the notice must be determined with some certainty, either because they have already been carried out (where specified in a Notice), or where they are the result of the specification in a Notice and costed (and these costs are accepted) by the offender.

We do not take historic contamination into account. We will only take account of costs that we can demonstrate arose from the commission of the offence.

In the first place we will rely on the costs assessed for the restoration notice.

If no costs have been assessed for the restoration notice, we will base the level of assessment we carry out on whether the outcome of the assessment is likely to have a significant impact on the level of the penalty.

Calculating restoration costs will not always be straightforward as it can require the use of economic valuation methodologies. Undertaking individual valuation studies for every case will not be practical. The general approach we will follow is to use a progressive assessment methodology that moves from qualitative to quantitative to monetary assessment as necessary.

1 A restoration notice here includes a RES Act Restoration Notice, Anti Pollution Works Notices under s161A Water Resources Act 1991 or an s59 EPA 1990 Waste removal notice.

2 Costs incurred by the Environment Agency for restoration can only be recovered via specific statutory costs recovery notice (e.g. s161 Water Resources Act 1991) where a relevant power exists, and do not form part of the penalty calculation.

Where a particular type of impact may be significant enough to affect the level of the penalty, it should first be described in quantitative terms and then, if possible, in monetary terms. Government guidance on valuation will be used for the quantification.

Example: A long-running chronic oil pollution affecting several kilometres of a local stream is finally traced to a company where an unbunded industrial oil storage facility is found to be the cause. The financial benefit is estimated to be the cost of building a bund around and is a few hundred pounds, but in preparing the service of a restoration notice we estimate the restoration costs to be £75,000. This case is therefore clearly characterised by the cost of restoration rather than the financial benefit. The maximum criminal fine assessed is less than the assessed restoration costs and so we do not use it in this case. Hence we use the restoration costs as the starting point for calculating the deterrent. We then apply aggravating and mitigating factors and deduct the offender's relevant assessed costs.

2.5 Cases where the maximum criminal fine a magistrates court could impose for the specific offence is used

This will be the starting point for calculating the deterrent component where the financial benefit and/or restoration costs are either not present, cannot be ascertained with any certainty or are not a significant feature of the case (i.e. where they are less than the statutory maximum available).

This will be the maximum penalty that can be applied in a magistrates' court for the offence committed. We must be satisfied that we have the evidence to prove each individual offence beyond reasonable doubt, and care will be taken to distinguish between a single continuing offence (such as failure to have a permit) and periodic repeated failures (such as failure to provide annual returns).

Example: Due to a failure to register, a series of summary offences (penalty £5,000 each) are committed over six years. The offences, however, have very little financial benefit to the offender and no direct environmental impact, hence no restoration costs. The offending behaviour is best characterised by the length and number of offences, therefore the starting point for the deterrent component of each VMP (as each offence would have an individual VMP, should more than one be applied) will be the maximum criminal fine. We will then apply aggravating and mitigating factors and deduct the offender's relevant assessed costs.

3. Aggravating and mitigating factors

After the starting point is chosen, it will then be adjusted to reflect the individual circumstances of the case as broken down into aggravating and mitigating features.

Aggravating features will be assessed and scored, and their scores added to make a multiplying factor. This will be multiplied by the starting point to make the aggravated penalty. This multiplier cannot exceed a maximum of four times the starting point.

Similarly, mitigating features will reduce the deterrent component. Mitigating features will be assessed and scored as percentages, which will then be added to give a total percentage reduction in the aggravated penalty. Application of mitigating features will normally allow up to an 80% reduction of the deterrent element, but the regime can allow for 100% reduction in exceptional circumstances.

The aggravating and mitigating factors are calculated as follows:

Total aggravating factor = Sum of assessed individual aggravating factors (with a maximum total of 4)

Total mitigating factor = Sum of assessed individual mitigating factors (Percentage of starting point)

Total mitigation = £ (Starting point x Total aggravating factor) x Total mitigating factor

3.1 Aggravating factors

The following factors will be scored using scales described under each factor. These scores will be added. There will be a maximum score of 4. A '0' denotes that the factor is entirely absent. Normally more than one factor must be present before the maximum overall multiplier can be applied.

3.2 Blameworthiness

Blameworthiness or culpability will be assessed on a sliding scale to ensure that there is fairness to the offender and differentiation between offences. The score for this factor is selected from the following whole numbers scale to best fit the case.

Multiplier to be applied	Explanation
x 3	Deliberate offence. However it is anticipated that prosecution will be the normal outcome for deliberate acts.
x 2	Reckless offence. For acts that are committed intentionally without regard for the consequences and or the environmental harm that results.
x 1	Negligent offence. For offences committed where the offender was in a position to stop or prevent the offence but failed to recognise the danger or have the correct procedures in place.
x 0.1	Low/no culpability. For offences that occur as a result of a genuine accident rather than the absence of prudent preventative measures, or where adequate preventative measures and procedures were in place but were overcome by exceptional events.

3.3 History

Previous offences will be relevant to the current offence. These may relate to the specific site (for example a permit breach where there have been previous similar breaches at that site) or they may relate to the offender in which case they may indicate management or corporate failures.

The score for this factor is selected from the following whole numbers scale to best fit the case.

Multiplier to be applied	Explanation
x 3	Previous conviction, Stop notice or Suspension notice for offences occurring within the last three years. However it is anticipated that prosecution will be the normal outcome where this is the case.

x 2	Previous formal caution, Variable Monetary Penalty or issue of any other notice (other than Stop or Suspension notices) for offences occurring within the last two years. This encompasses earlier admissions to previous offences, long-running offending behaviour and non-RES Act notices.
x 1	Previous written warnings or Fixed Monetary Penalties, warning letter or five or more site warnings for offences occurring within the last two years.
x 0	No previous offences. Factor absent.

3.4 Attitude

This factor accounts for the offender's attitude to and actions following the offence. It includes lack of prompt action to eliminate or reduce the risk of damage resulting from regulatory non-compliance and lack of cooperation with us in investigating the offence, assessing the damage or assessing a proportionate Variable Monetary Penalty. The score for this factor is selected from the following whole numbers scale to best fit the case.

Multiplier to be applied	Explanation
x 3	Despite knowledge, no action was taken to stop the offending or stop significant/serious environmental damage, refusal to cooperate with the investigation, assessment or remediation. These types of factors would normally warrant prosecution but we will allow an element of flexibility, for example for dealing with companies where it is difficult to assess corporate knowledge.
x 1.5	Partial, insufficient or incomplete action was taken to stop the offence and prevent harm from occurring or continuing and/or there was some co-operation but this was not full and voluntary. For example where prompt action would have prevented the offending continuing or damage from occurring or persisting. Where information had to be required or compelled rather than offered, assistance or cooperation with remediation was delayed or only partial.
x 0	Prompt action which immediately stops the offending, full and frank cooperation with the investigation and remediation. Factor absent, for example when immediate remedial measures, training, process or policy changes are undertaken, or there is complete cooperation with the investigation and/or remedial activity.

3.5 Foreseeability and risk of environmental harm

This factor considers whether the offending or any resulting environmental harm could have been foreseen by the offender and how effectively the environmental risks and their consequences were being managed. Where the risk of harm or the actual impact can be accurately assessed, we will base our assessments on our systems including the Common Incident Classification Scheme (CICS)/Compliance Classification Scheme (CCS). Note that CCS scores must be final ones reflecting the potential/actual impact, not initial assessments.

This factor therefore takes into account any actual impacts arising from the offence. The score is selected from the following whole numbers scale to best fit the case.

Multiplier to be applied	Explanation
x 4	Where the offence was obvious and bound to occur without action or where there was a confirmed Category 1 CCS/CICS breach or incident. Incidents and breaches of this nature would normally warrant prosecution, but we will allow an element of flexibility for exceptional cases.
x 3	Where the offence, while not obvious, was bound to occur without the required or reasonable measures put in place or where there was a confirmed Category 2 CCS/CICS breach or incident confirmed score.
x 2	Where the offence occurs and results in a Category 3 CCS/CICS confirmed score.
x 1	Category 4 CCS/CICS confirmed score. This will include those cases where there is no environmental impact but where the offence was a foreseeable consequence of inaction.
x 0	Where the offending was unforeseeable. Factor absent. This will include cases which have arisen as a result of third party intervention that could not have been reasonably foreseen, for example isolated vandalism or the actions of a disgruntled employee.

3.6 Ignoring previous advice and guidance

This factor will be applied where advice and/or guidance have previously been given to an offender, or where specific codes of practice apply to the sector (for example Code of Good Agricultural Practice, Best Available Technology). The score is selected from the following whole numbers scale to best fit the case.

Multiplier to be applied	Explanation
x 2	Where advice for avoiding or mitigating the offence has been given to the offender and not followed. This will include breaches of a permit condition where a Notice has been served requiring provisions that would have directly impacted or prevented the offence or its consequences, and failure to follow direct advice, for example pollution prevention following a site assessment.
x 1	Where codes of practice or standard technologies exist relating to the activity from which the offence arose but were not (or only partly) followed or implemented. This will include failure to install industry-standard equipment which would prevent the offence occurring or the impact of the offence, or use of inferior equipment or outdated equipment.
x 0	Where codes of practice documents or standard technologies exist which were followed. This will include cases where this was implemented or where advice and guidance were followed but failed to prevent the offence from occurring.

3.7 Calculating the multiplier

Where a single factor of the highest value (4) is present, this will represent the maximum aggravating factor and no others need to be considered.

Where several factors are present we will add them up, but they are capped at a maximum of four times the starting sum.

The deterrent component is multiplied by the aggravating multiplier before mitigating factors and deductions are considered.

4. Mitigating factors

The deterrent component is then reduced to take into account any mitigating factors. Where present, each applicable mitigating factor is scored and awarded a percentage reduction. These are fixed percentage numbers for most of the mitigating factors, except factors 4.6 'Personal circumstances' and 4.7 'Case-specific features', which are whole number percentages within a maximum range.

Where a factor is not present or there is insufficient evidence, the score will be 0%. These percentage scores are then added together and applied to the deterrent component (after the application of the aggravating factors). The normal maximum deduction that can be applied will be 80%. In cases where there are exceptional or unique case factors the deduction can be increased to 100% of the deterrent component.

4.1 Preventative measures: 10%

Deduction	Explanation
10%	Voluntary effective preventative measures that were put in place prior to the offence occurring. This will take into account, for example, infrastructure, management systems and training that was not required as part of a permit or industry standard.

4.2 Cooperation with the Environment Agency: maximum 10%

The following percentages can be added together to produce a maximum of 10% where both are present.

Deduction	Explanation
5%	Voluntary and full cooperation in investigation and assessment of a proportionate VMP: deduction. This will apply to actions taken following the discovery of an offence, such as investigating the circumstances that led to it, attending interviews and providing records.
5%	Voluntary and prompt cooperation in remediation: deduction. This will apply where environmental impact has arisen from the offence.

4.3 Self reporting: 20%

Deduction	Explanation
20%	Immediate and voluntary reporting of regulatory non-compliance. This will apply where the offence is unknown to us and is reported promptly by the offender.

4.4 Immediate and voluntary remediation and restoration: maximum 20%

The following accounts for voluntary works only. Works required by the relevant notice are deductible from the final overall figure (see deductions below).

Deduction	Explanation
20%	Complete remediation and restoration undertaken without requirement. This will apply where works are undertaken voluntarily without formal requirement and they restore the environment as far as possible to that which existed prior to the offence.
10%	Partial remediation and restoration undertaken without requirement. This will apply where works are undertaken which partially restore the position, but where additional works could be done but have not been done, for example because the offender considers the cost of doing so will only achieve minimal benefit.

4.5 Attitude to the offence: maximum of 10%

Deduction	Explanation
10%	Prompt action taken to stop the offence and prevent a recurrence. The maximum will apply where both factors are present, for example prompt remedial action, management instructions, procedures, infrastructure and/or training which will effectively prevent the recurrence.
5%	Prompt action to stop the offence. Where prompt action is taken to stop the offence but where further action to prevent a recurrence is either not taken or not a factor of the offence.

4.6 Personal circumstances: 10%

Deduction	Explanation
0%-10% (Whole percentages only)	Where the personal circumstances of the offender mitigate the cause of the offence or its effects. This will apply where the age, physical or mental capability of the offender affects their ability to physically react or deal with the offence promptly or to mitigate its effects, or where it may have had some bearing on the circumstances of the offence being committed. While it will be presumed not to apply in a case, where evidence is forthcoming a discretionary deduction can be made depending on the personal circumstances and how closely related their impact was to the offence.

4.7 Case-specific factors: 20%

Deduction	Explanation
0%-20% (Whole percentages only)	Other case-specific mitigating features: this will only apply in rare cases where there are unusual or unique case factors and can be applied on a discretionary basis from 1-20%. It allows us to account for factors which are unanticipated but which would tend to mitigate the cause of the offence or its effects.

5. Overall penalty figure

The overall penalty is the sum of the financial benefit plus the deterrent component after the application of the aggravating and mitigating features. It may then be subject to further adjustment by way of relevant deductions.

6. Deductions

Finally, the overall penalty can be reduced by such costs incurred by the offender as are solely related to the offence. These costs will be based on evidence supplied by the offender where necessary. Where evidence is not voluntarily forthcoming, this attitude to the offence will be reflected as an aggravating feature and in the loss of any relevant mitigating allowance.

These costs include:

- the costs of complying with a Compliance notice;
- the costs to the offender of any restoration undertaken as a result of the serving of a Restoration notice;
- any costs recovered by us from the offender using an Enforcement Cost Recovery notice;
- a discretionary deduction to account for (and encourage) voluntary restoration and repayment;
- payments to compensate those affected as part of a Third Party Undertaking (TPU).

6.1 The costs of complying with a Compliance notice

Where a Compliance notice is served in relation to a specific offence, the costs of actions taken to comply with it will be deducted, where evidence is provided by the

offender. The costs could include the costs of capital investment, contracted services and additional staff time required above and beyond that which would have been applied under normal circumstances.

6.2 The costs of complying with a Restoration notice

Where a RES Act Restoration notice or other legislative specific Restoration notice (for example Anti Pollution Works notice) has been served in relation to a specific offence, the cost of actions to comply with a Restoration notice, either evidenced by the offender or estimated by us, will be deducted. The costs could include the costs of actual restoration works, administrative costs and the costs of monitoring. Where this includes future works to be undertaken, the costs will be assessed and agreed by us before they are deducted; where this is uncertain we will make a fixed estimate.

6.3 The costs recovered through an Enforcement Cost Recovery Notice

Where a RES Act Enforcement Cost Recovery notice (ECRN) is served, the total, where paid, will be deducted from the overall Variable Monetary Penalty prior to issue of the VMP. The ECRN may include our legal, expert, or administrative costs incurred up to the point at which the Variable Monetary Penalty is imposed.

6.4 An amount to reflect a voluntary Third Party Undertaking

We will deduct an amount to reflect the amount expended by the offender in recompensing third parties affected by the offence. This will be accounted for at a rate of £1 deduction for every £1 spent. Only that aspect of the Third Party Undertaking that is directly related to restitution for the specific offence will be taken into account, and the undertaking must be to an unconnected third party (that is, not subsidiaries or relations).

6.5 An amount to reflect any other costs resulting from the offence that the regulator considers are justified

This allows, for example, for a deduction for voluntary works undertaken. It is at our discretion and must be based on evidence from the offender that the costs were incurred, related directly to the offence and were necessary or of environmental (including preventative work at the offending premises) or public benefit.

Annex 2: Enforcement Undertakings

1. Criteria for accepting and rejecting Enforcement Undertaking offers

1.1 General Considerations

Generally we will only consider accepting an Enforcement Undertaking (EU) offer when:

- we believe that a breach of relevant legislation has occurred; and
- we consider the Enforcement Undertaking to be an appropriate regulatory outcome having regard to the significance of the issues concerned to the environment and the community.

Where the relevant offence to which your offer relates, involves pollution of the environment or harm to human health, we would expect and look more favourably upon your offer, if you can demonstrate that any necessary remediation or restoration work commenced at the earliest opportunity.

1.2 We will not normally accept an offer:

- for a Category 1 offence, or where we have commenced legal proceedings;
- in cases involving intent or of the most severe environmental impact, (but we do not rule it out, as discretion will always apply);
- where we have already determined that a prosecution is appropriate in the public interest;
- which is made after representations (negotiations) over the amount of a Variable Monetary Penalty following a Notice of Intent (this is to prevent attempts to negotiate an assessed Variable Monetary Penalty down and then to have it replaced at the last minute by an Enforcement Undertaking).

1.3 Factors we will consider when deciding whether an Enforcement Undertaking is an appropriate regulatory outcome include:

- whether we feel the person is likely to comply with it in the light of their compliance history;
- the nature of the offence and the regulatory impact of the undertaking compared to that of other forms of enforcement remedy;
- the prospects of securing a timely and satisfactory environmental outcome where this is in the public interest.

1.4 We will seek to ensure that Enforcement Undertakings and their development, implementation and monitoring are cost neutral to the Environment Agency.

We would welcome and look more favourably upon an Enforcement Undertaking offer containing actions that the person will contribute towards the costs we have necessarily incurred up to the time we may accept this offer and for any subsequent compliance monitoring and discharge activities.

Please note that in all cases where the offence legislation allows, we will pursue cost recovery in accordance with the 'Polluter Pays' Principle.

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

- a clause denying liability;
- any clause that sets up defences for possible non-compliance with an Enforcement Undertaking.

1.6 Additional considerations

We will only accept an Enforcement Undertaking offer when the person makes a positive commitment to:

- stop the particular conduct or alleged breach that concerns the Environment Agency; and
- not recommence that conduct.

An Enforcement Undertaking offer must also set out how the person will:

- address the conduct the Environment Agency is concerned about;
- prevent that conduct occurring again; and
- rectify the consequences of the conduct, including interacting with any third party affected by the offence.

2. Examples of what could be included in an Enforcement Undertaking offer

Your Enforcement Undertaking offer should contain actions to:

- secure that the offence does not continue or recur;
- restore the position to what it would have been if the offence had not been committed;
- benefit any person affected by the offence (including the payment of a sum of money); or
- secure equivalent benefit or improvement to the environment, where restoration of the harm arising from the offence is not possible.

Your offer must include at least one of the above or it will be rejected.

Examples of actions which may form part of your offer includes:

- training of staff;
- undertaking works to prevent a recurrence (including undertaking pollution studies and pollution reduction programs); and
- implementing a program to improve your overall compliance with the legislation.

We would wish to see the following elements included in an internal compliance program:

- details of the monitoring and reporting mechanisms the person will adopt;
- demonstrable Board and senior management commitment to, and involvement with, the entire program;
- the assignment of responsibility for the compliance program to a named senior manager of the person;
- the development and dissemination throughout the organisation of a clear compliance policy;
- the identification of compliance issues and operating procedures for compliance;
- the development and delivery of a compliance training program to key personnel groups within the organisation;

- the establishment of permanent procedural checking and monitoring mechanisms, such as nominating a compliance officer and procedures to prevent future breaches and to ensure that any potential breaches are not only averted but also reported to senior management;
- the commitment to an independent audit of the compliance program at regular intervals (usually annually), for a specified period (usually 3 years);
- a requirement to report to us at a specified time on the steps taken to implement the compliance program.

The Enforcement Undertaking may also include:

- the name of a senior manager who is responsible for monitoring and complying with the undertaking; and
- the name of an Environment Agency officer to whom the contact officer must report.

Generally, the person giving the undertaking will be responsible for:

- monitoring how the undertaking is implemented; and
- reporting this to the Environment Agency in the specified manner.

The way the person giving the undertaking proposes to do this must be set out in the Enforcement Undertaking offer and we must be satisfied that this is adequate. In resolving any matter we want to find ways to redress the offence.

3. Acceptance of your offer

Once your offer has been accepted, it becomes a legally binding written agreement between you and the Environment Agency. As such, we can enforce against the actions you have offered.

4. Varying or extending an Enforcement Undertaking

An Enforcement Undertaking may be varied, or the period within which the action(s) must be completed may be extended, if both parties agree in writing. Applications should be made in writing to either of the addresses shown in Part 5 of the 'Enforcement Undertaking Offer form'.

We will only consider an application by you to vary or extend your EU, if we receive it before the original completion date(s) and you can demonstrate you have taken reasonable steps to comply.

Applications received after the relevant completion date(s) will normally be refused.

5. Discharging an Enforcement Undertaking

Once you believe you have fully complied with the Enforcement Undertaking, you can apply for a Completion Certificate at any time. Applications should be made in writing to either of the addresses shown in Part 5 of the 'Enforcement Undertaking Offer form'.

You must include sufficient information with your application to help us determine whether or not the undertaking has been fully complied with and whether or not we can issue a completion certificate. This may include documentary evidence, such as receipts or technical reports on works completed.

We will also require evidence demonstrating that all affected third parties have received any monies owing to them as part of your offer.

If you fail to provide such information, we can require it from you under written notice and may decide not to issue a certificate.

We will allow those with accepted Enforcement Undertakings to present to us on agreed terms, where necessary. We are also considering the approach of other regulators in presenting improvements.

In some cases, we may also consider it appropriate to issue a completion certificate without the need for us to visit the site, where we have received an application in writing containing sufficient information for us to assess compliance along with a signed declaration from a senior person (e.g. Owner, Director, Board Member etc) in the organisation confirming that all actions contained in the Enforcement Undertaking have been fully complied with. For example, where we have received an electronic copy of an Environmental Monitoring Plan.

Once we have assessed your application, we will make a decision whether or not to issue a Completion Certificate and give you written notice within 14 calendar days of our receipt of your application, by either:

- issuing you with a Completion Certificate; or
- serving a Refusal Notice on you, outlining the reasons for our decision not to issue a certificate.

We may also revoke a completion certificate, if we believe it was granted on the basis of inaccurate, incomplete or misleading information. You will then be regarded as not having complied with the Enforcement Undertaking.

6. Enforcement and sanctioning response

Failing to comply (either fully or in part) with an Enforcement Undertaking is likely to result in one of the following responses:

- serving a Variable Monetary Penalty, Compliance notice or Restoration notice on you; or
- prosecuting you for the original offence.

7. Enforcement Undertakings and Third Party Undertakings

As seen above, the Enforcement Undertaking can be used in a range of situations. The Third Party Undertaking (TPU), however, is more limited in its application and has a much narrower scope. The TPU can only be offered in a situation where an offender has already received a Notice of Intent to serve one of the following; a Variable Monetary Penalty, a Compliance notice or a Restoration notice. They can only be used to make an offer to compensate someone who has been affected by the offence.

Annex 3: Grounds of Appeal for RES Act sanctions

Introduction The grounds of appeal for the individual RES Act sanctions are listed below.

Fixed Monetary Penalties (FMPs)

- That the decision was based on an error of fact;
 - That the decision was wrong in law;
 - That the decision was unreasonable;
 - Any other reason.
-

Variable Monetary Penalties

- That the decision was based on an error of fact;
 - That the decision was wrong in law;
 - That the amount of the penalty is unreasonable;
 - In the case of a non-monetary requirement, that the nature of the requirement is unreasonable;
 - That the decision was unreasonable for any other reason;
 - Any other reason.
-

Compliance and restoration notices

- That the decision was based on an error of fact;
 - That the decision was wrong in law;
 - In the case of a non-monetary requirement, that the nature of the requirement is unreasonable;
 - That the decision was unreasonable for any other reason;
 - Any other reason.
-

Non-compliance penalties

- That the decision to serve the notice was based on an error of fact;
 - That the decision was wrong in law;
 - That the decision was unfair or unreasonable for any reason;
 - That the amount of the penalty was unreasonable;
 - Any other reason.
-

Enforcement Cost recovery notices

- Against our decision to impose the requirement to pay costs;
 - Against our decision as to the amount of those costs;
 - Any other reason.
-

Enforcement Undertaking completion certificate

- That the decision to not to issue a certificate was based on an error of fact;
 - That the decision was wrong in law;
 - That the decision was unfair or unreasonable;
 - That the decision was wrong for any other reason.
-

Stop notices

- That the decision was based on an error of fact;
 - That the decision was wrong in law;
 - That the decision was unreasonable;
 - That any step specified in the notice is unreasonable;
 - That the person has not committed the offence and would not have committed it had the stop notice not been served;
 - That the person would not, by reason of any defence, have been liable to have been convicted of the offence had the Stop Notice not been served;
 - Any other reason.
-

Stop notice completion certificate

- That the decision to not to issue a completion certificate was based on an error of fact;
 - That the decision was wrong in law;
 - That the decision was unfair or unreasonable;
 - That the decision was wrong for any other reason.
-

Compensation

A person may appeal against a decision not to award compensation or the amount of compensation:

- On the grounds that our decision was unreasonable;
 - On the grounds that the amount offered was based on incorrect facts;
 - For any other reason.
-

Annex 4: Climate Change Regimes – Civil Sanctions

European Union Emissions Trading System, CRC Energy Efficiency Scheme, Climate Change Agreements and Energy Savings Opportunity Scheme

SECTION A: General principles

A.1 Introduction

The legislation relating to the EU Emissions Trading System (EU ETS), the CRC Energy Efficiency Scheme (CRC), Climate Change Agreements (CCA) and the Energy Savings Opportunity Scheme (ESOS) provide civil penalties for certain breaches under these schemes. These civil penalties are distinct from the civil penalties under the Regulatory Enforcement and Sanctions (RES) Act 2008 and so, for clarity, this annex covers the climate change schemes only.

A.2 Application of this guidance to the schemes

This guidance applies to the EU ETS, CRC and CCA regimes. It has been finalised after consultation with participants in these schemes and other stakeholders. We also intend to apply the general principles of this guidance – and in particular the public interest factors – in considering our enforcement response under the ESOS Regulations 2014. We may supplement the guidance in due course with further detail. The following paragraphs set out the specific application of this guidance for EU ETS, CRC and CCA.

A.2.1 EU ETS

The Greenhouse Gas Emissions Trading Scheme Regulations 2012 (the GGETS Regulations 2012) came into force on 1 January 2013. From that date, certain provisions of earlier legislation – the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (the GGETS Regulations 2005) and the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010 (the Aviation Regulations) – also still apply. The following points explain the breaches under these Regulations to which this guidance applies:

For stationary installations:

- Generally, the civil penalties in the GGETS Regulations 2012 apply to breaches of those Regulations and permit conditions occurring on or after 1 January 2013. This will include the failure to submit a verified report of 2012 reportable emissions by 31 March 2013. In relation to the failure to surrender sufficient allowances to cover emissions before 1 January 2013, the civil penalties in the GGETS Regulations 2005 apply. This guidance applies to all of these breaches.
- Generally, where an offence under the GGETS Regulations 2005 occurred before 1 January 2013, the criminal offences in those Regulations apply. We will consider enforcement action for these offences on that basis, rather than under this guidance.

For aviation:

- Generally, the civil penalties in the GGETS Regulations 2012 apply to breaches of those Regulations and emissions plan conditions occurring on or after 1 January 2013. In relation to the failure to submit a verified report of 2012 aviation emissions by 31 March 2013, the penalty in the earlier Aviation

Regulations applies but we may exercise the discretion in regulation 51 of the GGETS Regulations 2012 in respect of this breach. In relation to the failure to surrender sufficient allowances to cover emissions before 1 January 2013, the civil penalties in the Aviation Regulations apply. This guidance applies to all of these breaches.

- The guidance does not apply to any other breach occurring before 1 January 2013. Instead, the relevant civil penalties and discretionary provisions are set out in the Aviation Regulations. The 'EU ETS Aviation – Guidance on Civil Penalties' applies to those breaches:

http://webarchive.nationalarchives.gov.uk/20131108051347/http://www.environment-agency.gov.uk/static/documents/Business/EU_ETS_Aviation_Civil_Penalties_Guidance.pdf

A.2.2 CRC

- The CRC Energy Efficiency Scheme Order 2010 (the CRC Order 2010) applies in relation to the first phase under that Order (April 2010 to 31 March 2014), subject to the amendments contained in the CRC Energy Efficiency Scheme (Amendment) Order 2011 and Schedule 9 to the CRC Energy Efficiency Scheme Order 2013 (the CRC Order 2013).
- The CRC Energy Efficiency Scheme Order 2013 (as amended by the CRC Energy Efficiency Scheme (Amendment) Order 2014) applies in relation to the initial phase under the CRC Order 2013, i.e. from 1 April 2014.

This guidance applies to breaches under both phases. In relation to the first phase under the CRC Order 2010, we are also required to have regard to statutory guidance available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/48007/1170-guidance-civil-penalties-crc-order-2010.pdf.

Where there is a change in the legislative provisions between the CRC Order 2010 and the CRC Order 2013, specific reference is made to the different provisions. Where there is no change, reference is made to 'the CRC Order'.

A.2.3 CCA

- The Climate Change Agreements (Administration) Regulations 2012 (the CCA Regulations) came into force on 1 October 2012. This guidance applies to breaches under those Regulations.

A.3 Establishing liability

The penalties under the GGETS Regulations 2005 and 2012, the Aviation Regulations, the CRC Order 2010 and 2013 and the CCA Regulations are civil penalties.

We will investigate breaches of the statutory requirements to establish whether or not a person is liable to a civil penalty.

We will apply the civil standard of proof to the penalties, meaning that we must be satisfied on the balance of probabilities that a person is liable.

In gathering evidence to prove that a person is liable to a civil penalty, we will use evidence reasonably available to us.

We may use our powers to require information to ascertain or confirm certain facts.

A.4 Discretion

Where we determine that a person is liable to a civil penalty, we will consider whether it is appropriate to exercise our discretion.

Sections B to D below explain the discretion available to us in each scheme. In general, one or more of the following options may be available to us. We may:

- (a) refrain from imposing a civil penalty at all
- (b) reduce the amount of a civil penalty from that set in the legislation
- (c) extend the time for payment of a civil penalty
- (d) withdraw a penalty notice at any time
- (e) modify a penalty notice by substituting a lower penalty at any time

We will consider each matter on a case-by-case basis, according to the facts of each case, whilst seeking to ensure consistency in accordance with this guidance. We will take into account any representations made by the person liable to the penalty to determine the appropriate exercise of our discretion.

In considering the exercise of our discretion, we will take account of 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 and against applying a penalty. We will decide how important each factor is in the circumstances of each case and make an overall judgement.
Intent	Whether or not the non compliances are committed deliberately, recklessly or with gross negligence, or are 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 no 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 schemes, taking into account the length of time that a person has been required to comply with the legislation and taken to put the situation right.
Financial implications	Whether or not legitimate business is undercut, or profits are made or costs are avoided, such as costs saved by not obtaining a permit.
Deterrent effect	The deterrent effect, both on the non compliant person, and others.

Previous history	Where non compliance has continued or been repeated despite us taking enforcement action we will normally increase the level of our enforcement response and impose a more serious or severe sanction.
<hr/>	
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 or not the offender provides us with the details of a non compliance voluntarily or through a self-reporting mechanism or has independently remedied the non-compliance.
<hr/>	
Personal circumstances	We may consider the personal circumstances of the non compliant person, including their ability to pay.
<hr/>	
Multiple site operations	We will always have regard to the compliance history of a non compliant person. Where we are dealing with site-specific enforcement issues, we will not normally take account of non compliance committed on another of an operator's sites unless they are of a similar type or demonstrate an overall management failure on the part of the operator.

A.5 Mandatory penalties

There are some breaches for which the legislation does not provide any discretion. Sections B to D below explain these penalties for each of the schemes as appropriate.

A.6 Other enforcement tools

Section A of this guidance applies to the imposition of civil penalties. We have a number of other enforcement tools available to us. Since these vary between the schemes, they are explained in sections B to D below.

A.7 Insolvency

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

However, under the joint and several liability provisions of the CRC Order, if the insolvent entity is a company within a group, its liabilities will be the responsibility of any remaining solvent members of that group.

A.8 Publication of penalties

The various climate change schemes provide for different approaches to the publication of civil penalties.

Generally, when we impose a penalty we will publish the following information about it:

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

Where we revoke an EU ETS permit or terminate a CCA agreement as a form of enforcement, we will generally also publish equivalent information about this.

We will normally publish details of penalties for 12 months. We will not publish information until any appeal has been determined or the time for appealing has passed.

A.9 Procedure for imposing penalties

Where we consider it may be appropriate to impose a penalty, we will first serve a notice of intent giving the person an opportunity to make representations within a reasonable time. We will take account of any representations received in response to that notice, before making our final decision.

As regards a 'reasonable time' we will normally consider this to be 28 calendar days.

Once we have made a final decision, we will notify this, and where we impose a penalty, we will provide a summary of reasons for doing so. We will also notify the person of their right to appeal.

In the case of EU ETS penalties, where a daily rate penalty is available, a slightly different procedure may apply as described in Section B of this Annex.

A.10 Failure to pay a civil penalty

If a person fails to pay a civil penalty, it is recoverable as a civil debt. In the case of failure to pay a CCA penalty, the agreement may be terminated.

SECTION B: EU Emissions Trading Scheme

B.1 Assessing amount of penalty

The level of penalty applicable to each breach is set out in regulations 52 to 70 of the GGETS Regulations 2012. In some cases, a fixed sum only is specified; in some cases 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. Where we consider it may be appropriate to impose a penalty, the sum specified in (or calculated in accordance with) the GGETS Regulations 2012 will generally be our starting point. If applicable, we will then consider whether or not it is appropriate to exercise our discretion under regulation 51, to reduce or waive that penalty.

Additional daily penalty

An additional daily penalty may apply to the following breaches:

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

An additional daily penalty starts to accumulate from the date that the initial civil penalty notice is served and stops accumulating on the date that the person either remedies the breach or the maximum amount payable (if applicable) has been reached. It is therefore largely a tool to encourage timely compliance.

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.

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

B.2 The nature of our discretion

As explained in Section A of this annex, where penalties apply (other than in relation to the penalty for failure to surrender sufficient allowances to cover reportable emissions) we have discretion to reduce or waive them.

We do not have any discretion over the €100/tonne penalty for failure to surrender sufficient allowances (see B.3.3 below).

We will exercise our discretion in accordance with the public interest factors set out in Section A.

B.3 Civil penalties for installations

Sections B.3 to B.7 apply to stationary installations operated by Greenhouse Gas Emissions (GHG) Permit and Excluded Installation Emissions (EIE) Permit holders. They list the civil penalties within the GGETS Regulations 2012 for which we have developed a generic enforcement approach. They explain how we are likely to exercise our discretion and, in particular, how we will consider the public interest factor 'nature of the non compliance' in relation to each breach. We will take account of all public interest factors and any representations received before making our final decision.

Aviation is dealt with separately in section B.8.

B.3.1 Carrying out a regulated activity without a permit

Regulation 52 of the GGETS Regulations 2012 sets out a formula for the calculation of this penalty. The Department for Energy and Climate Change (DECC) has also directed us as to how we must estimate certain factors affecting the calculation. The Direction is available at <https://www.gov.uk/government/publications/direction-from-the-secretary-of-state-on-calculating-penalties-for-operating-an-eu-ets-activity-without-a-permit>.

Our approach

This is a fundamental aspect of the scheme and we will normally apply a penalty for this breach.

B.3.2 Failure to comply with a condition of a permit

Regulation 53 of the GGETS Regulations 2012 sets the level of penalty for the breach of the majority of permit conditions as a fixed sum of £3,750 plus £375 for each day that the operator fails to comply with the condition following service of a penalty notice, up to a maximum of £33,750. The penalty for failing to comply with a condition requiring notification of a qualifying significant capacity reduction or a qualifying partial cessation is set at £5,000.

We regard breaches of certain permit conditions more seriously than others. For example, we will normally consider the failure to comply with permit conditions requiring the submission of verification reports as very serious due to the fact that the requirement to submit a verification report is central to the effectiveness of the scheme. Failure to comply with permit conditions on monitoring, reporting and notification can vary significantly in terms of severity.

We have developed a generic approach for managing breaches of permit conditions for GHG and EIE permit holders. The permit conditions and our approach are presented in Tables 1 and 2 below.

Table 1: Permit Conditions and our approach for Greenhouse Gas Emissions Permit Holders

Greenhouse Gas Emissions Permit Holders

Condition 1: *The operator must monitor the annual reportable emissions of the installation in accordance with the Monitoring and Reporting Regulation³ and the monitoring plan (including the written procedures supplementing that plan)*

Our approach

When assessing the severity of a breach of permit condition 1 we will look at the level of emissions that have been affected as a result of the breach. If the emissions affected were below the following thresholds, we will not normally apply a penalty;

- Category C installations: 50,000 tCO₂ or 2% of annual reportable emissions (whichever is higher)
- Category B installations: 5,000 tCO₂ or 5% of annual reportable emissions (whichever is higher).
- Category A installations: 1,000 tCO₂ or 10% of annual reportable emissions (whichever is higher).

'Category A, B and C installations' has the meaning given in Article 19(2) of the Monitoring and Reporting Regulation.

We have chosen these thresholds because it is our view that breaches below these thresholds are likely to have a very minor (if any) impact on the environment and will not undermine the integrity of the scheme. We will normally apply a penalty where emissions affected are above the thresholds.

Condition 2: *The operator must, by 31 March in every year, submit a verified report of its annual reportable emissions made in the previous year to the regulator, in accordance with the Monitoring and Reporting Regulation and the Verification Regulation⁴.*

Our approach

This requirement is central to the effectiveness of the scheme. Where an annual report is submitted late, we will normally apply a penalty.

Condition 3: *The operator must satisfy the regulator, if an emission factor of zero has been reported in respect of the use of bio liquids, that the sustainability criteria set out in Article 17(2) to (5) of the Renewable Energy Directive have been fulfilled in accordance with Article 18(1) of that Directive.*

Our approach

If an operator fails to satisfy us in accordance with this condition, we will determine the reportable emissions in respect of the use of bioliquids pursuant to regulation 44(1)(b) of the GGETS Regulations 2012. In these circumstances, we are likely to substitute an emissions factor of greater than zero for the factor reported. We will not normally apply a penalty in relation to the breach of this condition in those circumstances.

If an operator used a zero emissions factor in its annual emissions report (and that

³ Commission Regulation (EU) No 601/2012 of 21 June 2012

⁴ Commission Regulation (EU) No 920/2010 of 21 June 2012

report was verified) but at a later date we found out it had not met the sustainability criteria, we will normally apply a penalty.

Condition 4: *The operator must, by 30 April in each year, surrender a number of allowances in the registry equal to the annual reportable emissions of the installation made in the previous year.*

Our approach

The penalty for the failure to surrender allowances is explicitly covered by regulation 54 and is explained in paragraph B.3.3 below headed 'Failure to surrender allowances'.

Condition 5: *Where an operator proposes to make a significant modification to its monitoring plan under Article 15 of the Monitoring and Reporting Regulation, the operator must apply to the regulator for a variation of its permit at least 14 days prior to making the change or, where this is not practicable, as soon as possible thereafter and such application must:*

- (a) *include a description of the change; and*
- (b) *set out how it affects the information contained in the monitoring plan.*

Our approach

This permit condition requires the operator to apply to vary its permit to reflect changes to monitoring arrangements. The adequacy of monitoring is captured under permit condition 1. Consequently, providing the operator applies for a variation regarding the significant change within the compliance year and in time to ensure that its monitoring plan is correct to enable verification of the annual report by 31 March, we will not normally apply a penalty.

If the change to monitoring arrangements is not in accordance with the Monitoring and Reporting Regulation, this may result in a breach of permit condition 1. It is therefore advisable for an operator to apply for a variation to its permit to reflect those changes as soon as possible so that any issues can be resolved and any potential breach avoided.

Condition 6: *Where an operator makes a change to its monitoring plan under Article 14 or 58(4) of the Monitoring and Reporting Regulation that is not a significant modification, the operator must notify the regulator by 31 December in the year in which the change occurred and such notification must:*

- (a) *include a description of the change;*
- (b) *set out how it affects the information contained in the monitoring plan; and*
- (c) *explain how the change is in accordance with the Monitoring and Reporting Regulation.*

Our approach

The Monitoring and Reporting Regulation does not require the regulator to approve minor changes. Consequently, we will not normally apply a penalty for failure to notify us of a non significant change to the monitoring plan.

Condition 7: *Where the name of the operator changes, the operator must apply to the regulator for a variation of its permit in order to reflect the change as soon as practicable following the change.*

Our approach

This condition refers to a change of name only of an operator and not a change of legal entity (which will require a permit transfer). The seriousness of this breach is therefore generally low and we will not normally apply a penalty for this failure.

Condition 8: *Where the operator does not apply at least the tiers required or applies a fall-back methodology pursuant to the Monitoring and Reporting Regulation, the operator must submit a report to the regulator in accordance with the requirements specified in Article 69(1) of the Monitoring and Reporting Regulation by the following deadlines, starting in the case of a new operator with 30 June in the year following that in which the permit is granted and for any other operator, with 30 June 2013:*

- (a) for a category A installation, by 30 June every four years*
- (b) for a category B installation, by 30 June every two years*
- (c) for a category C installation, by 30 June every year*

Our approach

This requirement is important to the effectiveness of the scheme and a breach is therefore serious. But we generally consider it less serious than the failure to submit a verified report of annual reportable emissions.

The breach is for failure to submit this report by the prescribed deadline. In relation to the first breach of this condition, we will not normally apply a penalty where the report is received within 10 working days of the deadline.

Condition 9: *Where a verification report states outstanding non-conformities or recommendations for improvements as specified in Article 69(4) of the Monitoring and Reporting Regulation, the operator must submit a report to the regulator in accordance with the requirements of that Article by 30 June of the year in which the verification report is issued.*

Our approach

These requirements are important to the effectiveness of the scheme and a breach is therefore serious. But we generally consider it less serious than the failure to submit a verified report of annual reportable emissions.

The breach is for failure to submit this report by the prescribed deadline. In relation to the first breach of this condition, we will not normally apply a penalty where the report is received within 10 working days of the deadline.

Condition 10: *The operator must notify the regulator in accordance with the Monitoring and Reporting Regulation at least 14 days prior to commencement of any of the circumstances in paragraphs (a) to (d) below or, where this is not practicable, as soon as possible thereafter:*

- (a) where there is a temporary change to its monitoring methodology as specified in Article 23 of the Monitoring and Reporting Regulation;*
- (b) where tier thresholds are exceeded or equipment is found not to conform to requirements which require corrective action as specified in Article 28(1) of the Monitoring and Reporting Regulation;*
- (c) where a piece of measurement equipment is out of operation as specified in Article 45 of the Monitoring and Reporting Regulation; and*

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

Our approach

This breach is about failure to notify us of various changes to monitoring and is therefore different from permit condition 1 which deals with failures to monitor in accordance with the Monitoring and Reporting Regulation. Consequently, we will not normally apply a penalty for a breach of this condition.

However, where a notification indicates a potential breach of permit condition 1, we will respond to the operator notifying them of the potential breach. This will enable them, if appropriate, to resume normal operation promptly or change their process to ensure compliance with permit condition 1.

Condition 11: *Except in the case of installations not eligible for an allocation, where a sub-installation has had a qualifying significant capacity reduction, the operator must, by the later of (a) the end of the period of 7 months following the change of capacity, (b) 31 December in the year in which that change occurred or (c) 1 February 2013 (“the relevant date”), submit a notice to the regulator containing:*

- (a) *a statement of the reduced capacity and the installed capacity of the sub-installation after taking into account the capacity reduction; and*
- (b) *a statement that the data under paragraph (a) have been verified except that, where the relevant date is before 30 May 2013, the statement required in (b) above need only be submitted by 30 May 2013.*

Condition 12: *Except in the case of installations not eligible for an allocation, where a sub-installation had a qualifying partial cessation which occurred in any year other than 2012, the operator must, by the later of (a) 31 December in the year in which the reduction occurred or (b) within one month after the date on which it occurred, notify the regulator that a reduction in activity level has occurred, stating the amount of that reduction and the sub-installation to which it applies.*

Condition 13: *Except in the case of installations not eligible for an allocation, where a sub-installation had a qualifying partial cessation which occurred during 2012, the operator must, by 1 February 2013, notify the regulator that a reduction in activity level has occurred, stating the amount of that reduction and the sub-installation to which it applies.*

Our approach to conditions 11, 12 and 13

We will not normally apply a penalty where we are notified of the significant capacity reduction or partial cessation before the operator is issued with their free allocation of allowances affected by the notification.

Condition 14: *Unless already notified in accordance with other requirements of this permit, the operator must notify the regulator of any planned or effective changes to the capacity, activity level or operation of the installation by 31 December in the year in which the change was planned or has occurred.*

Our approach

Notifications covered by this condition are not likely to be central to the effectiveness of the scheme. We will not normally apply a penalty for a breach of this condition.

Condition 15: *The operator must keep records of all relevant data and information in accordance with Article 66 of the MRR.*

Our approach

In instances where an operator is unable to provide adequate records we will normally apply a penalty for a breach of this condition.

Table 2: Permit conditions and our approach for Excluded Installations Emissions Permit Holders

Excluded Installations Emissions Permit

Permit conditions 1, 3, 4, 5, 6 and 7 are the same in the Excluded Installations Emissions (EIE) permit as they are in the Greenhouse Gas Emissions (GHG) permit. Consequently for these permit conditions our enforcement approach is the same as described in Table 1.

The remaining EIE permit conditions are different and are listed within this table with our enforcement approach.

Condition 2: *The operator must, by 31 March in every year, submit to the regulator a report of its annual reportable emissions made in the previous year, in accordance with the relevant provisions of the Monitoring and Reporting Regulation that is either:*

- (a) *verified in accordance with the Verification Regulation, or*
- (b) *accompanied by a notice declaring that:*
 - (i) *in preparing the report, the operator has complied with the relevant provisions of the Monitoring and Reporting Regulation;*
 - (ii) *the operator has complied with the monitoring plan; and*
 - (iii) *the report is free from material misstatements.*

Our approach

This requirement is central to the effectiveness of the scheme. Where an annual report is submitted late, we will normally apply a penalty.

Condition 8: *Where the installation does not primarily provide services to a hospital, the operator must notify the regulator if the annual reportable emissions from the installation in any year exceed the maximum amount, by 31 March in the following year.*

Condition 9: *Where the installation provides services to a hospital, the operator must notify the regulator if the installation ceases to do so in any year, by 31 March in the following year.*

Our approach for conditions 8 and 9

The penalty for the failure by an excluded installation to notify us where it no longer meets the exclusion criteria is covered by regulation 58 of the GGETS Regulations 2012. Our approach is explained in section B.3.7 below.

Condition 10: *The operator must keep records of all relevant data and information in accordance with Article 66 and in relation to any notice submitted under condition 2*

Our approach

We will normally apply a penalty where an operator is unable to provide records in relation to the requirement of condition 10. This is because we will be auditing excluded installations and will require the records to enable us to verify that the annual emissions report is correct.

Condition 11: *Unless notification has been given under condition 8 and where the operator operates an installation which primarily provides services to a hospital, the operator must:*

- (a) *maintain records demonstrating that it continues to primarily provide services to a hospital; and*
- (b) *comply with requests from the regulator to inspect those records for the purpose of verifying the accuracy of the records and of the emissions report.*

Our approach

Where an operator is unable to demonstrate that they primarily provide services to a hospital, they will need to re-enter EU ETS as a Greenhouse Gas Emissions Permit holder. The financial and administrative cost of this outweighs the cost of imposing a penalty for breaching this condition. Consequently, we will not normally apply a penalty for breach of this condition.

B.3.3 Failure to surrender allowances

Regulation 54 of the GGETS Regulations 2012 (and the related provision in the GGETS Regulations 2005) provides that we must impose a civil penalty where a person fails, by 30 April of the relevant year, to surrender a number of allowances in the registry equal to the annual reportable emissions of the installation made in the previous year. The civil penalty is the sterling equivalent of €100 for each allowance that the person failed to surrender (the excess emissions penalty). The penalty is mandatory and flows from the EU ETS Directive (2003/87/EC). Regulation 51(2) provides that we have no discretion in imposing this penalty.

However, regulation 54 sets out one exception to this mandatory penalty. If an operator satisfies the criteria set out below, that person is liable to a reduced penalty of €20 for each allowance that the operator failed to surrender and we have discretion to reduce or waive that penalty.

The criteria are that, before we serve a notice on the person imposing an excess emissions penalty in respect of emissions in that year (or a notice of our intention to do so), that person must:

- notify us that there are annual reportable emissions not included in the report that has been submitted for that year;
- request us to make a determination of its annual reportable emissions for that year; and
- surrender allowances equal to the reportable emissions as so determined.

Our approach

In instances where the operator meets the criteria for the €20 per allowance penalty, we will normally apply a civil penalty up to this level.

B.3.4 Exceeding an emissions target for an excluded installation

Excluded installations are not required to surrender allowances. Instead they are set emissions targets. If the operator's emissions are greater than their target, regulation

55 of the GGETS Regulations 2012 sets a civil penalty. The penalty is $(A - B) \times C$, where—

A is the amount of annual reportable emissions arising in the scheme year;

B is the emissions target for that year; and

C is the carbon price for that year.

Our approach

Rather than a sanction for non-compliance, this penalty is designed to facilitate the payment for excess emissions. It is akin to the CRC requirement to purchase allowances equivalent to the participant's annual emissions and the buy-out fee for operators that under-achieve against their CCA target.

In addition, the Small Emitter and Hospital Opt-out Scheme was agreed by the European Commission on the basis that it delivered equivalent emissions reductions as the Greenhouse Gas Emissions Permit Holders. The application of this penalty is an important driver in reducing greenhouse gas emissions.

Consequently, we will normally apply a penalty for breaches of an emissions target. However, due to their particular nature described above, as an exception to our general approach to publication (see section A.8) we will not normally publish information about these penalties.

B.3.5 Failure to pay a penalty for exceeding an emissions target for an excluded installation

Regulation 56 of the GGETS Regulations 2012 imposes an additional civil penalty for excluded installations that fail to pay their penalty for breaching their emissions target. The civil penalties are—

(a) 10% of the penalty imposed under regulation 55; and

(b) £150 for each day that the operator fails to pay that penalty following service of a penalty notice in respect of the penalty under sub-paragraph (a), up to a maximum of £13,500.

Our approach

We will normally apply a penalty for this breach.

B.3.6 Under-reporting of emissions from an excluded installation

Where an operator under reports its emissions, they are liable to a civil penalty. The civil penalty is $A + (B \times C)$ where—

A is £3,750;

B is the amount of the unreported emissions;

C is the carbon price for that year.

Our approach

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

emissions target, we will not normally apply a penalty for this breach. In all other circumstances we will normally apply a penalty for this breach.

B.3.7 Failure to notify when an excluded installation ceases to meet the criteria for being excluded

If an operator ceases to meet the criteria for being excluded, it will re-enter EU ETS as a Greenhouse Gas Emissions permit holder. Where the operator fails to notify us that it no longer meets the exclusion criteria, regulation 58 of the GGETS Regulations 2012 specifies a civil penalty that is designed such that the operator will be required to pay a penalty equivalent to the costs saved by the operator by not re-entering the EU ETS as a Greenhouse Gas Emissions permit holder.

Our approach

Providing that an operator informs us that they no longer meet the exclusion criteria in time for us to vary their permit and enable them to re-enter EU ETS in the timeframes of the GGETS Regulations 2012, we will not normally apply a penalty for this breach. However, where an operator has failed to notify us and has therefore avoided entering into EU ETS, we will normally apply a penalty for this breach.

B.3.8 Failure to surrender a permit

Under regulation 59 of the GGETS Regulations 2012, the penalty for failure to surrender a permit is £5,000.

Our approach

Providing the operator does not gain anything from holding the permit, i.e. hold/receive allowances for which it is not entitled, we will not normally apply a penalty for this breach. Where the operator does gain from this breach, we will normally apply a penalty.

B.3.9 Failure to comply with an information notice

Regulation 69 of the GGETS Regulations 2012 specifies a civil penalty where a person fails to comply with a notice served under regulation 45(2) (an 'information notice'). The civil penalties are—

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

Our approach

We will normally apply a penalty for this breach.

B.3.10 Providing false or misleading information

Where a person provides false or misleading information they are liable under regulation 70 of the GGETS Regulations 2012 to a civil penalty of £1,000.

Our approach

Providing false or misleading information can undermine the integrity of the scheme. Consequently, we will normally apply a civil penalty for this breach.

B.4 Requirement to monitor emissions

For installations, permit condition 1 requires operators to monitor their annual reportable emissions in accordance with the Monitoring and Reporting Regulation (MRR) and the monitoring plan (including the written procedures supplementing that plan).

We acknowledge that, in some circumstances, there may be a conflict between the strict requirements of the monitoring plan and the MRR. For example, an operator may temporarily deviate from monitoring at the required tier as stated in its monitoring plan. However, Article 23 of the MRR states that, where it is not technically feasible to apply the tier, the operator must apply the highest achievable tier until the conditions for application of the approved tier have been restored. In these cases, the operator must take all necessary measures to allow the prompt restoration of the approved tier. In this example, the temporary deviation is not strictly in accordance with the monitoring plan but, as long as all necessary measures are taken to allow the prompt restoration of the situation, the MRR does not treat this as a breach.

In these cases, our position is that, if an operator is compliant with the MRR, this overrides the requirements of the monitoring plan and we will view the monitoring plan in light of the MRR. We will therefore not consider there to be a breach of permit condition 1 or regulation 35(1).

B.5 Procedure for imposing penalties

The general procedure for imposing penalties is set out in section A of this annex.

In EU ETS, we also have the enforcement tool of the additional daily penalty, as explained in section B.1 above. Where an additional daily penalty is appropriate, we may serve a civil penalty notice on a person and subsequently provide them with an opportunity to make representations as to why the civil penalty should be waived or modified. A civil penalty notice must state the regulation under which the liability arises, the amount of the penalty due (and, where applicable, how that amount is calculated) and whether or not a person may be liable to an additional daily penalty (the initial notice). If the person will not be liable to an additional civil penalty, the initial notice must also specify the date by which the penalty must be paid.

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

B.6 Enforcement notices

Enforcement notices may be served where we consider that a person has contravened, is contravening or is likely to contravene any provision of the GGETS Regulations 2012, the MRR, a permit or an aviation emissions plan. Enforcement notices are generally used to restore compliance.

In relation to installations, we are unlikely to use enforcement notices just to repeat a deadline for submission of an application, report or notification, particularly where an additional daily penalty may be used to bring the person into compliance.

However, it may be appropriate to serve enforcement notices to specify actions required to be taken by a person to restore compliance or where a person has still failed to comply with a requirement, even when an additional daily penalty has reached its maximum.

Regulation 68 of the GGETS Regulations 2012 specifies that, where a person fails to comply with an enforcement notice, the civil penalties are:

- (a) £20,000; and
- (b) £1,000 for each day that the person fails to comply with the notice following service of a penalty notice up to a maximum of £30,000.

B.7 Revocation of permits

Regulation 14 of the GGETS Regulations 2012 states that we may at any time revoke a permit. We must do so where an operator fails to apply to surrender its permit in accordance with the timescales set out in the Regulations.

In relation to our general power to revoke permits, we will only exercise this power in exceptional circumstances.

Schedule 5, paragraph 8(3) of the GGETS Regulations 2012 applies where the operator of an excluded installation has (a) committed a sufficiently serious breach of the conditions of its permit, or (b) failed to pay the penalty imposed under regulation 56 within one month. In these cases, we have two options; we may either revoke the permit or vary the excluded installation emissions permit to a greenhouse gas emissions permit. We will only revoke a permit in such a case, in very exceptional circumstances.

B.8 Civil penalties in aviation

There have been a number of recent changes to European and domestic legislation in relation to Aviation EU ETS, and international policy in relation to the reduction of aviation emissions is currently in a period of significant development. Consequently, it has not been possible to finalise the details of our approach to enforcement for this version of the Guidance. However, we intend to supplement the guidance in due course by including more detailed information about our approach to penalties under the GGETS Regulations 2012 (and related amending regulations). Until we are able to do this we will apply the legislative requirements and the general principles set out in this guidance (in particular the public interest factors) when considering and imposing penalties in relation to Aviation EU ETS.

SECTION C: CRC Energy Efficiency Scheme

C.1 The nature of our discretion

Under the CRC legislation we may impose a civil penalty in accordance with the provisions of the CRC Order. We therefore have discretion not to do so.

Further, once we have decided that a penalty is appropriate, we have discretion to reduce the amount of the financial penalty as set out below.

We will exercise our discretion in accordance with the public interest factors set out in Section A.

C.2 Deciding whether to waive, impose or reduce a penalty

CRC Order 2010

Under article 94 we may apply our discretion to waive or modify a penalty that has been imposed on a participant where we are satisfied that the participant has provided evidence to us within a reasonable time that:

- (a) they took all reasonable steps—
 - to comply with the relevant provision of the CRC Order; or
 - to rectify any failure in compliance as soon as it came to the participant's notice; and
- (b) in all the other circumstances it is reasonable to waive or modify the civil penalty.

CRC Order 2013

Under article 72(1) we may apply our discretion to waive, impose or modify a penalty where we consider it appropriate. Where at any time before a financial penalty is due to be paid we cease to be satisfied that the person is liable for that penalty, under article 72(2) we may serve a notice on that person to withdraw the penalty or modify the penalty notice by substituting a lower financial penalty.

C.3 Calculating the amount of penalty

C.3.1 Failure to maintain records in respect of the information used to compile an annual report or relevant to any designated change

The maximum penalty (article 102, CRC Order 2010; article 79, CRC Order 2013) is:

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

Our approach

Where there has been a failure to maintain records in respect of the information used to compile an annual report or relevant to any designated change we will normally apply the following penalties:

- a financial penalty up to a maximum of £12 per tCO₂ (2012/13 compliance year), £24 per tCO₂ (2013/14 compliance year), and £40 per tCO₂ (2014/15 compliance year onwards); and

- publication

As regards the application of the calculated financial penalty to new entrants (those newly joining at the start of a new scheme), we will normally apply it as follows:

- a financial penalty up to a maximum of £12 per tCO₂ (first compliance year), £24 per tCO₂ (second compliance year), and £40 per tCO₂ (third compliance year onwards)

C.3.2 Failure to register or late registration

The maximum penalty (article 95(2), CRC Order 2010; article 73(2), CRC Order 2013) is:

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

Our approach

Where there has been a failure to register or the participant does so late, we will normally apply penalties, if applicable, as follows:

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

C.3.3 Failure to include all the meters for which an organisation is responsible when applying for registration

The maximum penalty (article 95(4), CRC Order 2010; article 73(3), CRC Order 2013) is:

- £500 for each meter not reported; and
- publication

Our approach

Where there has been a failure to include all the meters for which an organisation is responsible when applying for registration, we will normally apply penalties, if applicable, as follows:

- apply a penalty of up to a maximum of £500 for each meter not reported; and
- publication

C.3.4 Failure to provide complete and accurate information when registering

The maximum penalty (article 98(2), CRC Order 2010; article 75(2), CRC Order 2013) is:

- £5,000; and
- publication

Our approach

Where there has been a failure to provide complete and accurate information when registering we will normally apply penalties as follows:

- apply the penalty of up to £5,000; and
- publication

C.3.5 Failure to provide an annual report or late submission of the report

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

C.3.5.1 Reports provided no more than 40 working days after the due date

The maximum penalty (article 97, CRC Order 2010; article 74, CRC Order 2013) is:

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

Our approach

Where an annual report is submitted late but not more than 40 working days late, we will normally apply the following penalties:

- the penalty of up to £5,000;
- a daily penalty of up to a maximum of £100 for each working day the report is provided after the due date (2012/13 compliance year), £300 daily rate (2013/14 compliance year) and £500 daily rate (2014/15 compliance year onwards); and
- publication

Providing it is a first breach, we will not normally apply a penalty if a report is submitted less than 10 working days late.

As regards the application of the daily penalty to new entrants, we will normally apply the daily penalty as follows:

- a daily penalty of up to a maximum of £100 for each working day the report is provided after the due date (first compliance year), £300 daily rate (second compliance year) and £500 daily rate (third compliance year onwards).

C.3.5.2 Reports more than 40 working days after the due date (CRC Order 2010), after the last working day of October (CRC Order 2013) or not provided at all

The maximum penalty is:

- £45,000;
- the CRC emissions of that participant for the year to which the annual report relates are—
 - (a) double the CRC emissions reported in the annual report of the previous year; or
 - (b) where no such report exists, double the CRC emissions which we calculate the participant made in the year for which the annual report is not provided;
- the participant must immediately acquire and surrender sufficient allowances equal to the CRC emissions which apply under (a) or (b) (or such additional allowances having regard to any allowances surrendered on time for the annual reporting year);
- £40 per tCO₂ of so much of the CRC emissions which apply under (a) and (b) but—
 - deducting the emissions represented by those allowances (if any) surrendered by the participant on time for the year to which the annual report relates; and

- before the doubling is applied;
- blocking⁵; and
- publication

Where a participant-

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

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

Our approach

Where an annual report is provided more than 40 working days after the due date (CRC Order 2010 - Phase 1 April 2010 to March 2014), or after the last working day of October (CRC Order 2013 - Phase 2 onwards starting April 2014), or is not provided at all, we will normally apply the following penalties:

- the penalty of up to £45,000;
- 1.1 x actual or determined emissions to be surrendered (2012/13 compliance year), 1.3 x actual or determined emissions (2013/14 compliance year), 1.6 x actual or determined emissions (2014/15 compliance year), or 2 x actual or determined emissions thereafter;
- a financial penalty up to a maximum of £12 per tCO₂ (2012/13 compliance year), £24 per tCO₂ (2013/14 compliance year), £40 per tCO₂ (2014/15 compliance year onwards);
- blocking; and
- publication

As regards the application of the calculated financial penalties to new entrants, we will normally apply them as follows:

- 1.1 x actual or determined emissions to be surrendered (first compliance year), 1.3 x actual or determined emissions (second compliance year), 1.6 x actual or determined emissions (third compliance year), or 2 x actual or determined emissions (subsequent compliance years);
- a financial penalty up to a maximum of £12 per tCO₂ (first compliance year), £24 per tCO₂ (second compliance year), £40 per tCO₂ (third compliance year onwards).

C.3.6 Failure to provide an accurate annual report

The maximum penalty (article 99, CRC Order 2010; article 76, CRC Order 2013) is:

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

⁵ 'Blocking' means to prevent or restrict the operation of a compliance account so that the participant can only purchase and surrender allowances. They will not be able to sell allowances until the failure is remedied and any financial penalty is paid.

For the purposes of the CRC Order, “inaccurate” means where any of the supplies reported differ by more than 5% from the supplies or emissions which should have been reported, ignoring any estimation adjustments under Schedule 1 of the CRC Order.

Our approach

Where a participant provides an inaccurate annual report, we will normally exercise our discretion to the extent that we will only apply a penalty where the error in reporting equates to more than 2,000 tCO₂. For participants whose total energy use equates to less than 8,000 tCO₂, this figure of 2,000 tCO₂ will be at least 25% of the total.

For applicable reporting failures we will normally apply the following penalties:

- a maximum penalty of £12 per tCO₂ of so much of those supplies or emissions which were inaccurately reported (2012/13 compliance year), £24 per tCO₂ (2013/14 compliance year), £40 per tCO₂ (2014/15 compliance year onwards); and
- publication

As regards the application of the calculated financial penalty to new entrants, we will normally apply it as follows:

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

C.3.7 Failure to surrender sufficient allowances

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

The maximum penalty (article 100, CRC Order 2010; article 77, CRC Order 2013) is:

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

Our approach

Where a participant fails to surrender sufficient allowances and that failure is apparent at the time compliance is required, we will normally apply the following:

- require the participant to immediately acquire and surrender the allowances shortfall;
- apply a maximum £12 per tCO₂ of so much of the emission represented by the allowances shortfall (2012/13 compliance year), £24 per tCO₂ (2013/14 compliance year), £40 per tCO₂ (2014/15 compliance year onwards);
- blocking; and
- publication

As regards the application of the calculated financial penalties to new entrants, we will normally apply it as follows:

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

C.4 Publication

For the purposes of the CRC Order, 'publication' means publishing details on the CRC web-pages, www.gov.uk/crc-energy-efficiency-scheme-evidence-audits-and-penalties.

Our approach

In accordance with the guidance in Section A, where we impose a financial civil penalty we will normally publish details of it.

C.5 Criminal offences

CRC Order 2010 (article 106)

Criminal offences apply in relation to: (1) a person making a statement which that person knows to be false or misleading or recklessly made; (2) failing to comply with an enforcement notice; (3) failing or refusing to provide facilities or assistance or to permit any inspection when required to do so by an authorised person; (4) preventing any other person from appearing before an authorised person or answering a question from an authorised person; (5) pretending to be an authorised person; or (6) refusing to allow the Environment Agency or an authorised person access to premises for inspection purposes.

CRC Order 2013 (article 82)

From 1 April 2014, the only criminal offences are in relation to: (1) a person making a statement which that person knows to be false or misleading or recklessly made; (2) failing to comply with an enforcement notice; (3) pretending to be an authorised person; or (4) refusing to allow the Environment Agency or an authorised person access to premises for inspection purposes.

We will consider the use of criminal sanctions in accordance with the guidance in the main body of the Enforcement and Sanctions and Guidance.

SECTION D: Climate Change Agreements

D.1 Our approach

The civil sanction penalty regime for CCAs was introduced at the start of the current CCA scheme. It offers more flexibility and is a more graduated regime than that which existed under the earlier scheme. We will take account of its relative novelty in the early stages of this current phase.

In recognition of the voluntary nature of the CCA regime and its intent, we will always seek to work with operators to achieve the best outcome for the environment, and will impose a financial penalty only as a last resort and in order to ensure that the scheme is not undermined.

D.2 The nature of our discretion

Under the CCA Regulations (regulation 15(1)) we may impose a financial penalty for certain breaches. We have the discretion not to impose a penalty and will decide whether or not to do so based on the public interest factors set out in section A. However, once we have decided that a penalty is appropriate, we have no discretion as to how much that penalty should be: the Regulations prescribe formulae for calculating penalties.

D.3 Calculating the amount of penalty

In most cases (regulation 15(1)(a), (c) and (d), and (2)), the penalty will be the greater of:

- (a) £250; or
- (b) $0.1 \times (X - Y)$, where X represents the amount of climate change levy that will have been payable on supplies of taxable commodities to the target unit during the base year if the supplies were not reduced rate supplies, and where Y represents the amount of levy that will have been payable on supplies of taxable commodities to the target unit during the base year if the supplies were reduced rate supplies.

For target units that include greenfield facilities we will use our reasonable estimation of the amount of levy payable if the penalty notice is served during the 12 month period following the start of the agreement.

We will initially calculate the amount of the penalty using the energy use information contained within the CCA Register for the base year and the rate of the climate change levy and discount for that base year. We will then check whether there have been any structural or other changes to the target unit since the agreement was made and recalculate the amount of the penalty if necessary. The penalty calculation will be based on the best available information that we hold that applies to the target unit, as structured at the time of the breach that resulted in the penalty. Operators have the opportunity to provide further information in accordance with the procedure for imposing penalties, outlined in Section A of this annex.

Where an operator provides inaccurate information in response to the administrator's request following the end of a target period (regulation 15(1)(b) and (3)), regarding whether progress towards meeting the target is, or is likely to be, taken to be satisfactory, the penalty will be the greater of:

- (a) £250; or

- (b) £12 per tCO₂ equivalent of the difference between the actual emissions and the reported emissions for the target period.

D.4 Remedial action

In addition to the financial penalty, we may require the operator to remedy the breach which gave rise to the penalty (regulation 16(b)).

D.5 Failure to comply with a penalty notice

If the operator fails, by the specified deadline, either to pay the penalty or to carry out the required remedial action, we will normally terminate the underlying agreement (regulation 18(4)). The operator will lose its entitlement to Climate Change Levy discount until it enters into a new underlying agreement; and it will not be entitled to recover any discount it has lost in the meantime. The financial penalty is also recoverable as a civil debt (regulation 15(4)).

Where there are unpaid penalties, an operator who takes over a facility will not be able to enter into a new agreement covering the facility until all outstanding penalties have been paid.

D.6 Other mechanisms under the CCA regime

We aim to take a reasonable and proportionate approach at all times, relying primarily on operators' co-operation. The CCA regime is a voluntary scheme, and we will normally seek to avoid imposing sanctions. However, in order to be fair to all participants we must ensure that the rules are followed. In addition to financial penalties, we may in certain circumstances:

- suspend access to the CCA Register (regulation 7);
- terminate an underlying agreement entirely (regulation 18(3), (4) and (5)).

We may suspend or restrict access to the CCA Register where we believe that the account holder or person appointed by the account holder is in breach of the administrative rules governing the use of the Register. We may also suspend or restrict access if we believe there is a threat to the security of the Register, or that it may be used in connection with a criminal offence.

Schedule 1 to an Underlying Agreement contains the Rules governing the operation of the Climate Change Agreement. If an operator contravenes the Rules, we have the power (which we will exercise only as a last resort) to terminate the agreement (regulation 18(3) and (4)).

Agreements may also be terminated for reasons other than a breach of the rules of an agreement. This includes termination of an agreement for a company in financial difficulty as a requirement of state aid rules, and administrative terminations to facilitate the smooth running of the scheme. These are not penalties, or part of our enforcement role. Similarly, where an operator chooses not to pay the buy-out fee by the date specified in our notice, we will issue a variation to the reduced rate certificate that entitles an operator to the discount on the Climate Change Levy. This will remove the operator's entitlement to that discount.

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