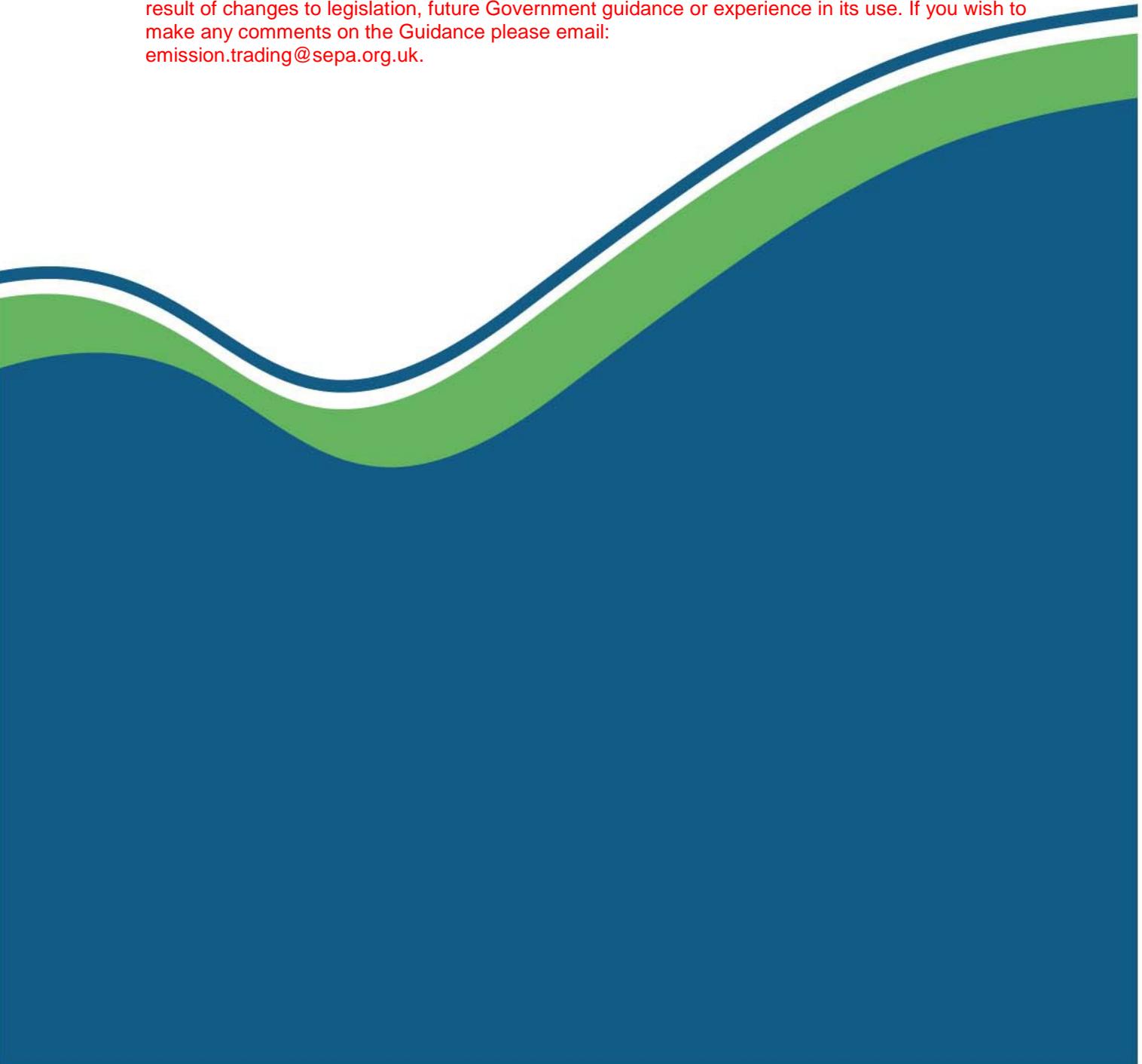


## **Guidance on the use of enforcement action for the CRC Energy Efficiency, ESOS and Greenhouse Gas Emissions Trading Schemes March 2017**

This guidance is intended for use by SEPA and by those whom we regulate. It could change as a result of changes to legislation, future Government guidance or experience in its use. If you wish to make any comments on the Guidance please email: [emission.trading@sepa.org.uk](mailto:emission.trading@sepa.org.uk).

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## 1. Purpose

This guidance has been published to explain how we will use enforcement powers under:-

- the CRC Energy Efficiency Scheme Order 2013 (“the CRC Order”)
- the Energy Saving Opportunity Scheme Regulations 2014 (“the ESOS Regulations”),  
or
- the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (“the ETS Regulations”).

It is directed at any person (including a business or public body) who is subject to the requirements of the CRC Order, the ESOS Regulations or the ETS Regulations and for whom we are the enforcing authority.

The aim of this guidance is to make clear what enforcement action we can take in respect of a person who is responsible for non-compliance with the requirements of the CRC Order, the ESOS Regulations or the ETS Regulations (in this document they are referred to as the “**responsible person**”) and the circumstances under which different types of enforcement action might be appropriate.

This guidance supports our Enforcement Policy <http://www.sepa.org.uk/regulations/enforcement/> which sets out our approach to enforcement, and which is based on the five better regulation principles of -

Proportionality  
Consistency (fairness and legal correctness)  
Transparency  
Accountability  
Targeted (efficient, effective and evidence based).

These principles and the principle of taking a timely approach form the foundations of our approach to enforcement and this guidance.

## **2. Background**

### **2.1 Why SEPA needs enforcement powers**

As Scotland's principal environmental regulator, one of our most important roles is to protect and improve the environment, health and wellbeing of the people of Scotland. One way in which we do this is by using both our regulatory powers and our advisory role to tackle climate change and to help Scotland's businesses and organisations move to a low carbon economy. We assess compliance with and, where necessary, enforce national legislation (which often implements European Directives or EU Regulations) that aims to reduce greenhouse gas emissions and to improve energy efficiency.

Where a responsible person fails to comply with the conditions of their permit or with the applicable legislative requirements or fails to obtain a permit when one is required we need to be able to take action to rectify this. In this guidance we refer to these failures as non-compliance.

Ideally, we will seek to work with the responsible person (that is, the person responsible for the non-compliance) and use advice and guidance to achieve our enforcement outcomes. However, there are situations where this type of partnership approach will not secure our desired enforcement outcomes and another form of enforcement action is appropriate or required from the outset.

### **2.2 Our approach to enforcement**

Regulation is about changing behaviour, in a way that generates positive outcomes for the environment, communities and the economy. In individual cases where we identify non-compliance with the requirements of the CRC Order, the ESOS Regulations or the ETS Regulations the outcomes we seek to achieve are:

- to secure compliance with regulatory requirements, to bring the activity under regulatory control and stop non-compliance;
- to address any financial benefits attributable to the non-compliance;
- to deter future non-compliance;
- to ensure a level regulatory playing field;
- to maintain the integrity of the relevant scheme in order to deliver the desired outcomes of reducing greenhouse gas emissions and improving energy efficiency.

### **2.3 The types of enforcement action available**

The form of enforcement action, or combination of enforcement actions, which we use to achieve our enforcement outcomes, will differ depending on the nature of the non-compliance, the harm caused and the compliance history of the responsible person. The action which we expect to deliver our enforcement outcome(s) most

effectively, and in a proportionate way, will normally be the appropriate enforcement action for us to use.

HOWEVER, in certain circumstances the legislation may require us to take a specific form of enforcement action.

Further guidance on how we make enforcement decisions can be found in the [enforcement decision making](#) section 11 of this guidance.

## 2.4 Enforcement action that we can take

The table below sets out the different enforcement tools that are available to us under the CRC Order, the ESOS and ETS Regulations together with an overview of the circumstances in which it may be appropriate to use them.

It should be noted that this is not a hierarchy of enforcement actions or a series of sequential enforcement steps. We will take whatever action is most appropriate to achieve our outcomes, particularly to change behaviour. In general, we are not limited to choosing one type of enforcement action and in some circumstances a combination of enforcement actions may be appropriate.

**Table A: The different types of enforcement actions available to SEPA**

Enforcement Action	Role of the enforcement action	When would its use be appropriate?
<b>Advice and guidance including warning letters (<i>in response to non-compliance</i>)</b>	To inform and raise awareness and where it is the most appropriate tool to achieve our desired outcome(s). This may be done when we give a written 'warning' about non-compliance.	Where there is a minor non-compliance, and there is no evidence of deliberate, repeat or continued offending.  Where a change in behaviour will result from giving the responsible person a better understanding of what needs to be done to comply with their obligations.  At all stages irrespective of any other enforcement action that we consider appropriate.
<b>Final Warning Letters</b>	To raise awareness of non-compliance and as a final attempt to change behaviour without using a statutory notice or imposing a civil penalty.  To make it clear to the responsible person that a failure to take preventative steps to stop the non-compliance is likely to result in further enforcement action.	Where we consider that the threat of further enforcement action being taken is needed.  Advice and guidance on how to comply with obligations will also be provided.

<p><b>Statutory Notices</b></p>	<p>Different statutory notices fulfil different roles, depending on the circumstances of the non-compliance. Their availability is dependent on the precise wording of the relevant legislation.</p> <p>The Notices we can use are:</p> <p>An <b>enforcement notice</b> - useful if remedial steps or preventative steps need to be taken to address non-compliance.</p> <p>A <b>revocation notice</b> – has the effect that the permit ceases to authorise the carrying out of a regulated activity.</p>	<p>To specify the steps that need to be taken to remedy the non-compliance or to ensure that a non-compliance does not occur. For example</p> <ul style="list-style-type: none"> <li>- In cases where a responsible person is operating an ETS installation without a permit, this might include a requirement to cease operating.</li> <li>- In order to facilitate compliance with the CRC Energy Efficiency Scheme we may need to serve an enforcement notice to enable a participant who has failed to comply with their surrender obligations to request a special allocation of allowances.</li> <li>- We may revoke an ETS permit if an operator has failed to pay their subsistence fees or may be required to do so where we consider that installation has ceased operation.</li> </ul>
<p><b>Civil Penalty Notices</b></p>	<p>To change behaviour, deter future non-compliance and punish more significant non-compliance. They may be used to remove financial benefit (money made or costs avoided) as a result of the non-compliance</p>	<p>Liability to a civil penalty, calculated in accordance with the relevant legislation, arises in respect of specific non-compliances. For most civil penalties (but not all) we have discretion to waive or reduce the penalty.</p>
<p><b>Prosecution (Reporting matters to the Crown Office and Procurator Fiscal Service (COPFS) for consideration of prosecution)</b></p>	<p>To punish significant and serious offending. Prosecution is a strong deterrent for future non-compliance.</p>	<p>There are no criminal offences under the ETS or ESOS Regulations. The potential offences under the CRC Order include offences relating to the provision of false or misleading information or failure to comply with an enforcement notice.</p>

### **3. Examples of non-compliances that may lead to enforcement action**

#### Under the CRC Order:-

- Failure to register;
- Failure to disclose information on registration;
- Failure to submit an annual report on time;
- Failure to provide accurate information or notifications (in relation to registration or designated change);
- Submission of Inaccurate annual reports; or
- Failure to surrender allowances.

#### Under the ESOS Regulations:-

- Failure to comply with a requirement of the ESOS Regulations;
- Failure to notify the scheme administrator of compliance;
- Failure to maintain records; or
- Failure to undertake an energy audit.

#### Under the ETS regulations:-

- Contravention or likely contravention of a provision of a permit, the Regulations, the Monitoring and Reporting Regulation or an aviation emissions plan;
- Late submissions of emissions or improvement reports;
- Under-surrender of allowances;
- Failure to monitor the annual reportable emissions of the installation;
- Failure to apply for a variation of the permit;
- Operating without a permit;
- Failure to surrender a permit; or
- Exceeding an emissions target.

## **4. How the use of enforcement actions is governed**

We have robust internal governance arrangements for enforcement decisions which ensure that decisions about the use of enforcement action are made consistently and at an appropriate level in the organisation.

From time to time we may publish regulatory position statements on our web site. Where relevant we will consider these in deciding if, or what, enforcement action may be appropriate.

### **Other safeguards**

There are statutory appeal mechanisms in the relevant legislation for challenging any formal enforcement action which we may take.

In addition, if we consider that you are the responsible person liable to a civil penalty we will make you aware of this and we will give you an opportunity to explain why you believe you are not liable to the penalty, or why the proposed penalty should be waived or reduced, before we make a final decision. The types of factors that we generally take into account when making our decision are listed in Appendix C – [Civil Penalties](#)

A responsible person who receives a civil penalty notice from us will still be entitled to appeal against the decision to serve the penalty notice, whether or not they have already made representations.

When we issue a statutory notice or a civil penalty notice, we always include information on any right of appeal against that notice.

## **5. How SEPA determines which enforcement action is appropriate**

We will collect the facts and/or evidence about the non-compliance before making a decision on what enforcement action(s) may be appropriate.

The form of enforcement action which we use will differ depending on:

- the enforcement outcome(s) we are seeking to achieve;
- the significance of the non-compliance dependent on the Enforcement Factors.

There may also be circumstances where we have a statutory duty to take a specific type of enforcement action. For example Regulation 51 of the ETS Regulations prescribes circumstances in which we are required to issue a civil penalty.

## **6. Who can action be taken against?**

Under the CRC Order enforcement action may be directed at individual participants or groups of undertakings. The CRC Order provides that individual members of a group can be held jointly and severally liable for non-compliance by the group.

Under the ESOS Regulations enforcement action will be directed at the responsible undertaking (that is the relevant undertaking which, in terms of the Regulations, is responsible for a participant's compliance with the scheme).

Under the ETS Regulations enforcement action can be taken against an operator or the holder of the permit or a UK administered aircraft operator. There are circumstances where a permit holder may be assigned liability for non-compliances by previous operators.

## **7. Combining the different types of enforcement action**

We may combine different types of enforcement action where we consider this will achieve the desired enforcement outcomes.

However, there may be circumstances where legislation prevents us from combining enforcement actions. For example the ETS Regulations prevent the imposition of a civil penalty for a failure to comply with a condition of an excluded installation emissions permit if the failure also gives rise to a penalty for under-reporting of emissions in accordance with Regulation 57.

## **8. Publishing and Publicising Information**

We are required to publish the name of any person who is subject to a mandatory penalty imposed under the ETS Regulations. Publication may also be an element of a penalty imposed under the CRC Order or the ESOS Regulations. In those circumstances the legislation prescribes the information which must be published and when it may be published. The CRC Order and ESOS Regulations also specify where it must be published and the period (1 year) for which it must be published (although we do have discretion to waive or extend that time period).

Generally we will report details of enforcement actions on our website and also in the annual enforcement report.

We may publicise the use of particular enforcement actions in other ways when we consider it would be appropriate for the purpose of securing one or more of our enforcement outcomes.

The information we will publish, and how it will be published, is set out in our Communicating Penalties and Undertakings Policy, available on the SEPA website <http://www.sepa.org.uk/regulations/enforcement/>.

ETS Excluded Installations – Under the ETS Regulations (Schedule 5 paragraph 5) an operator participating in the small emitters and hospital opt-out scheme (“an excluded installation”) is required not to exceed an annual emissions target.

The UK Government has confirmed that the Regulators are under no obligation to publish the details of operators who are liable to these penalties.

However, SEPA considers that penalties imposed for exceeding emissions targets are enforcement action as defined in this Guidance and information relating to such penalties will be published but only in our annual enforcement report.

## **9. How SEPA will evaluate the effectiveness of our approach to enforcement**

We will review this guidance and our governance procedure and make any necessary amendments in light of experience.

We will also review the circumstances in which the various enforcement actions have been used and how effective they were in achieving the desired enforcement outcome(s).

## **10. Cost recovery**

In certain circumstances we are entitled to recover the costs of carrying out enforcement action or the costs of work we carry out preparatory to taking enforcement action.

## **11. Enforcement Decision Making**

### **Choosing what enforcement action we will take**

When we identify or become aware of a potential non-compliance we will undertake an investigation, appropriate to the circumstances, to collect the available evidence regardless of what any eventual enforcement action may be. Any enforcement action we take must be supported by sufficient evidence.

Having identified through investigation that a non-compliance has occurred, the enforcement outcomes we will seek to achieve are one or more of the following:

- to secure compliance with regulatory requirements, to bring the activity under regulatory control and stop non-compliance;
- to address any financial benefits attributable to the non-compliance;
- to deter future non-compliance;
- to ensure a level regulatory playing field;
- to maintain the integrity of the relevant scheme in order to deliver the desired outcomes of reducing greenhouse gas emissions and improving energy efficiency.

For any non-compliance there may be a number of different enforcement outcomes we want to achieve. Having identified the outcomes we will then identify what enforcement action is required to secure the desired outcome(s).

In deciding which action to take we will consider how effective that action will be at achieving our desired outcomes together with the significance of the non-compliance which is assessed using our enforcement factors. Further guidance on these can be found in [What are the enforcement factors](#) section 12 of this guidance.

The choice of enforcement action is not simply determined by applying a set of prescriptive rules that depend on the combination of factors involved. Instead we will decide how important each factor is in the circumstances of each case, based on the evidence available.

By taking into account all these factors and how effective enforcement action is expected to be in the individual circumstances; we make an informed and reasoned judgement about which enforcement action or combination of enforcement actions is:

- most likely to produce the desired outcome(s),
- is proportionate to the significance of the non-compliance.

In any event and taking into account all the circumstances of the case we must be satisfied that whatever action we take is reasonable.

Example:

We will consider which enforcement action, or combination of actions, would best change behaviour in light of the responsible person's behaviour towards the non-compliance.

If the responsible person provides us with the details of a non-compliance voluntarily or through a self-reporting mechanism and takes steps to rectify it then we may consider that advice and guidance might be an appropriate response – depending on other factors. For example, if a reporting deadline is missed, but the responsible person advises SEPA of the potential non-compliance, submits the report within an agreed timeframe after the due date and provides a reasonable explanation for the failure to comply, SEPA is likely to consider the use of advice and guidance or a warning letter rather than imposing a penalty.

However, if the responsible person does not co-operate with the investigation or does not take steps available to them to rectify the non-compliance then we may consider that advice and guidance is unlikely to change their behaviour – depending on the other factors - and another type of enforcement action is necessary. Similarly if the responsible person has missed a reporting deadline on a previous occasion and received warning letter then more formal enforcement action may be appropriate.

Table B below indicates the most common outcomes associated with each enforcement action. This table is indicative only because we will consider the facts of

each individual case when deciding which enforcement action(s) are likely to be effective at delivering the outcomes for an individual case.

**Table B: Enforcement actions and their principal outcomes**

	Restore mechanisms to reduce greenhouse gas emissions to meet climate change objectives	Secure compliance	Deter future non-compliance	Remove financial benefit
Advice and guidance	√	√	√	
Final Warning letter/warning letter		√	√	
Statutory Notice – Enforcement notice	√	√	√	
Statutory Notice – Revocation Notice		√		
Variation of permit conditions		√		
Civil Penalty			√	√
Criminal sanctions (where available)			√	√

## 12. What Are The Enforcement Factors?

To determine what enforcement action, or combination of actions, is most appropriate or proportionate to secure the outcome(s), we will review the evidence against our enforcement factors. In all cases we will consider:

- intent;
- foreseeability;
- impact;
- financial implications;
- deterrent effect;
- previous history.

However, this is not an exclusive list and depending on the particulars of an individual case other factors may have to be considered. Using the facts and or evidence we will decide how important each factor is in the circumstances of each case.

### **Intent**

We will consider the following questions to help determine the level of intent:

- Was the non-compliance committed deliberately, recklessly or with negligence?
- Was the non-compliance proactively reported to SEPA?
- Was any false or misleading information provided?
- Has the responsible person worked constructively with SEPA to rectify the non-compliance and mitigate any harm?
- Has the responsible person cooperated fully and helpfully with our investigation?
- Was the responsible person aware of their legal obligations i.e. were they aware of permit requirements, or have they had correspondence, information or previous SEPA warnings or discussion?
- Was the non-compliance the result of a genuine accident or exceptional events?

### **Foreseeability**

Here, we will consider the following questions:

- Could the circumstances leading to the non-compliance reasonably have been foreseen?
- Was the responsible person aware of the risks associated with the activity, and the preventative measures that might have been taken?
- Were preventative measures taken or not taken?

Where the circumstances could have reasonably been foreseen we will normally apply a form of enforcement action beyond advice and guidance or the issuing of a warning letter.

HOWEVER - Where emissions from an excluded installation in the ETS scheme exceed the emissions target for the installation we will consider that this non-

compliance could have been foreseen and the presumption will be that a penalty should be imposed for the full amount calculated in accordance with Regulation 55 of the ETS Regulations.

### **Impact**

In assessing impact we will consider:

- The extent and significance of the non-compliance
- Whether steps have been taken to mitigate the effect of the non-compliance
- Whether the non-compliance undermines important aspects of the transparency, reliability and effectiveness of the relevant scheme or trust in it, 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**

We will ask the following questions when determining the level of financial benefit:

- Is legitimate business being undercut?
- Has revenue accrued or have costs been avoided, such as costs saved by not obtaining a permit or registering as a participant?

### **Deterrent effect**

We will consider the deterrent effect, both on the responsible person and others, when choosing which form of enforcement action is most appropriate.

### **Previous history**

We will consider how well the responsible person has responded to advice and guidance, or other enforcement actions that we have taken in the past.

We will also take into account the degree of previous non-compliance (including site-specific non-compliance or previous non-compliance by the responsible person).

We will also have regard to our compliance assessment scheme (CAS), where appropriate, and previous enforcement actions taken against the responsible person, including in other legal regimes such as PPC (Pollution Prevention and Control) and CAR (Controlled Activities Regulation).

We will also take into account the general attitude of the responsible person towards meeting their regulatory obligations and SEPA in general. For example, in the past has the responsible person worked proactively and constructively with SEPA?

Where non-compliance has continued or been repeated, despite us taking enforcement action, we will normally change our enforcement response to pursue a more effective course of enforcement action.

### **Other circumstances**

In most cases we will also consider whether, in all the circumstances of the case, it is reasonable to take a particular form of enforcement action. However in some cases we may be required to take a particular form of enforcement action.

## **Appendices - The Different Types of Enforcement Tools**

### ***Appendix A. Final Warning Letters***

#### **What is a final warning letter?**

A final warning letter is a written warning about a particular non-compliance. It provides a reasonable opportunity for the responsible person to address that non-compliance and take preventative steps to stop the non-compliance from continuing or recurring.

It provides a final chance for the responsible person to change their behaviour and come into compliance before we take further enforcement action.

If we issue a final warning letter, we will be clear about the steps to be taken to rectify or prevent further non-compliance in order to avoid further enforcement action.

A final warning letter might say, for example,

Any further/continued non-compliance is likely to result in enforcement action being taken against you by SEPA. Such enforcement action could include the imposition of a civil penalty.

#### **When a final warning letter may be used**

A final warning letter may be an appropriate response in circumstances where:

- Advice and guidance, or other warnings, has not been effective;
- Giving a final warning is expected to change the behaviour of the responsible person;
- We consider that the responsible person should be given an opportunity to remedy the non-compliance or to take preventative steps to ensure that the non-compliance does not recur. This may apply where, for example, there is no history of offending; or
- A monetary penalty is not required to change the behaviour of the responsible person.

#### **When SEPA will not use a final warning letter**

We may take enforcement action, where it is appropriate to do so, without issuing a final warning letter. A final warning letter is not a prerequisite to us taking another form of enforcement action, including imposing a civil penalty.

We will not use a final warning letter in circumstances where:

- A notice of intent to impose a civil penalty will be served;

- A final warning letter has previously been issued to the same responsible person for a similar non-compliance;
- Advice and guidance alone is likely to change the behaviour of the responsible person and the threat of further enforcement action is unnecessary; or
- Where there has been financial benefit to the operator and another enforcement action is needed to remove this benefit.

In addition, there will be circumstances where it is not appropriate to use a final warning letter. This will be determined when reviewing the circumstances of the non-compliance against our [enforcement factors](#) described in section 12 of this guidance.

## **Appendix B - Statutory Notices**

### **What is a statutory notice?**

A statutory notice is a formal notice, served by us, requiring the responsible person to take (or cease to take) action to address the non-compliance. It will inform the recipient what they need to do and failure to comply with requirements of the notice may attract a civil penalty or it may be a criminal offence.

The responsible person may wish to seek independent legal advice if we serve a statutory notice on them.

### **When a statutory notice may be used**

A statutory notice may only be used where the relevant legislation permits this.

Generally, a statutory notice is used when we wish to specify the measures to be taken to prevent, stop or remedy non-compliance.

The statutory notices we can use include:

- **Enforcement notices** - identifying a contravention or likely contravention of the ETS Regulations, the Monitoring and Reporting Regulations, a permit or an aviation emissions plan (regulation 43 of the ETS Regulations) OR identifying a failure to comply with a provision of the CRC Order (Article 69 of the CRC Order) OR identifying a failure to comply with a requirement of the ESOS Regulations and, in each case, requiring steps to be taken.
- **Revocation notices** - revoking a permit under the ETS Regulations.

### **What to expect in a statutory notice**

A statutory notice will usually state the legislation which allows SEPA to issue the notice, and will specify the grounds on which SEPA is issuing the notice. This is likely to include the details of the contravention that SEPA has identified. The statutory notice will also set out:

- who needs to take action;
- the steps to be taken;
- a date by which the steps must be taken;
- whether or not an appeal can be made (see below).

The notice may also set out the consequences of the notice and/or the consequences of failing to comply with the notice.

## **Example – CRC**

A Notice requiring a participant to surrender allowances from its compliance account to its cancellation account equal to its CRC emissions for a specified year would:

- Specify the legislation which allows SEPA to issue the notice e.g. Article 69 of the CRC Energy Efficiency Scheme Order 2013.
- Specify the name and address of the person who is required to comply with the notice i.e. who needs to take action.
- Confirm that SEPA is satisfied that the recipient has failed to surrender allowances equal to all its CRC emissions for a specified scheme year.
- Require the participant to surrender a number of allowances from its compliance account to its cancellation account to make up the shortfall between the amount surrendered and the amount which should have been surrendered i.e. the steps to be taken, and by when.
- Explain that failing to comply with the notice is a criminal offence and, in addition, SEPA may itself take the steps required and then recover the cost of doing that i.e. the consequences of the failure to comply with the notice.

## **Appealing against a statutory notice**

Information explaining how to appeal a statutory notice will be included with the notice.

## **Can SEPA recover costs it has incurred in investigating non-compliance and issuing a statutory notice?**

In general - No. But we do have the power to charge for a determination of reportable emissions under Regulation 44 of the ETS Regulations which may be a precursor to enforcement action. We also charge a fee if we revoke a permit issued under the ETS Regulations.

## **Combining the use of different types of enforcement action**

A statutory notice may be used alone or in conjunction with other enforcement action to secure our enforcement outcomes.

## **When is a statutory notice not likely to be used?**

We are unlikely to use a statutory notice in circumstances where a civil penalty notice has been or may be imposed which achieves the same outcomes in a particular case.

## **Appendix C - Civil Penalties**

### **What is a civil penalty?**

The penalties under the CRC Order, ESOS Regulations and ETS Regulations are civil penalties. The civil penalties under the ETS Regulations are solely financial (except for those arising under Regulation 54(1)) and civil penalties under the CRC Order and the ESOS Regulations include financial, publication<sup>1</sup> and blocking<sup>2</sup> penalties (or a combination of these). The maximum potential penalty for each type of non-compliance is set out in the legislation.

Before imposing a civil penalty we must be satisfied that we have enough evidence that the responsible person has committed the non-compliance to which the penalty relates.

### **Discretion**

In circumstances where a person is liable to a civil penalty we will consider whether we can exercise discretion to waive or reduce the penalty. Generally, the CRC Order, ESOS Regulations, and ETS Regulations empower us to exercise discretion but there are some non-compliances under the ETS Regulations for which a penalty is mandatory i.e. the legislation does not allow the exercise of discretion.

One or more of the following options may be available to us in applying discretion:

- (a) waive the penalty
- (b) reduce the amount of penalty;

Where we have the power to do so we will apply our discretion in two ways –

Firstly we will consider whether the imposition of a penalty is an appropriate enforcement action having regard to the enforcement outcome we wish to achieve and the enforcement factors as described in the [enforcement decision making](#) section 11 of this guidance.

Secondly if we decide that the imposition of a penalty is justified we will calculate the maximum potential penalty in accordance with the relevant legislation and we will then consider whether there are any mitigating factors which justify a reduction of the maximum potential penalty or even waiving it entirely.

At this stage we will notify you, in writing, that we intend to issue a penalty notice to you. Our notification (Notice of intent) will contain -

- a description of the non-compliance giving rise to the liability;

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<sup>1</sup> “Publication” Although there are differences between the publication provisions in the CRC and ESOS regimes, generally publication involves publishing on a publicly accessible website details of the name of the person who has incurred the penalty, the failure for which the penalty has been imposed and the amount of any financial penalty. Publication will normally be for a period of one year but SEPA has discretion to extend publication periods.

<sup>2</sup> “Blocking” means preventing or restricting the operation of your CRC account

- details of the maximum potential penalty to which you are liable and how it is calculated;
- any factors we are already aware of that might justify a reduction in the maximum penalty;
- an invitation to make representations to SEPA before we make the final decision to serve a penalty notice;
- details of the time period within which to make representations – this will normally be 28 days.

Your representations may include information:

- that the alleged non-compliance did not occur or that you are not responsible for it;
- that there is a defence available;
- that the amount of the penalty is incorrect;
- that there are mitigating factors which indicate that the amount of the penalty should be reduced or waived;
- regarding the likely financial impact of the penalty or your ability to pay it and could include proposing an alternative payment strategy. For example, this might involve staged or regular instalments.

### **Mitigating factors**

The mitigating factors which we are likely to consider will usually fall into one or more of the following categories -

- intent;
- foreseeability;
- impact;
- financial implications;
- deterrent effect;
- previous history.

These are the same as our [enforcement factors](#) - see section 12 for further detail on these. However, this is not an exhaustive list and depending of the particulars of an individual case there may be other factors which you believe we should consider before we make a final decision. Using the facts and or evidence we will decide how important each factor is in the circumstances of each case.

### **Excluded installations – Annual Emissions Target Exceedance**

Under the ETS Regulations (Schedule 5 paragraph 5) an operator participating in the small emitters and hospital opt-out scheme (“an excluded installation”) is required not to exceed an annual emissions target. If an operator of an excluded installation exceeds their emissions target the Operator is liable to a civil penalty (Regulation 55).

The UK Government has advised that the amount of the civil penalty reflects the cost that the operator would have incurred if it had been required to surrender allowances equal to the difference between the emissions of the installation and its target, if it participated in the full EU ETS. It is therefore an 'equivalent measure', as required by the Directive.

In light of this, cases where the operator of an excluded installation has breached the emissions target for the installation, we consider that there is very little that the operator can offer in mitigation. However the operator might, for example, seek to persuade us that the breach was not foreseeable as it arose from data errors and through resolving the data error a breach had not occurred.

## Frequently Asked Questions

### I have received a penalty notice – how do I pay it?

Details on how to pay the penalty will be provided in the letter accompanying the notice. The penalty notice will also specify the date by which the penalty must be paid.

### I want to appeal against a penalty or enforcement notice – what do I do?

Information on how to appeal including the time limit for submitting an appeal will be attached to the Notice. Appeals should be submitted to:

Scottish Government Directorate for Planning and Environmental Appeals,  
4 The Courtyard,  
Callendar Business Park,  
Callendar Road,  
Falkirk,  
FK1 1XR  
Tel: 01324 696400  
Email: [DPEA@gov.scot](mailto:DPEA@gov.scot)

Guidance on how appeals are processed can be found here <http://www.gov.scot/Topics/Environment/Appeals>

### What could happen if I fail to comply with an enforcement notice?

If you fail to comply with an enforcement notice issued under the ETS Regulations we may issue a civil penalty. Failure to comply with an enforcement notice issued under the CRC Order is a criminal offence.

### What will happen if I don't pay a penalty?

SEPA can take action to recover the penalty using civil debt recovery procedures. In some cases a failure to pay the penalty on time (or at all) may also lead to liability to a further civil penalty.

### What will SEPA do with the penalty I pay?

We are required to pass any penalty paid to us to the Scottish Government.