

Annex 1 – proposed changes to Section D of Annex 2 to the ESP

Section D: Energy Savings Opportunity Scheme (ESOS)

Section D explains our:

- normal 'nature of the breach' assessment for each ESOS breach
- our additional ESOS enforcement positions

You must read this with section A, which explains our general civil penalty setting principles for the climate change schemes.

D1 When and how the Environment Agency will apply discretion to ESOS penalties

We will apply discretion as explained in [section A](#).

D2 Civil penalties for ESOS

Paragraphs D2.1 to D2.5 list the breaches within the Energy Savings Opportunity Scheme Regulations 2014 (ESOS Regulations) and state the maximum civil penalties available for each breach. Unless otherwise stated, references to regulations are to the ESOS Regulations.

Each paragraph states the breach and explains our normal 'nature of the breach' assessment ~~and other enforcement positions (if there is one)~~ for that breach.

Our nature of the breach assessment may state that we will not normally impose a penalty (waive the civil penalty) or it will state the normal 'initial penalty amount' (as explained in [section A](#)).

However, before we set the initial penalty amount we will take account of any representations we receive - see [sections 6.2 ESP](#) and [D4 below](#).

D2.1 Failure to notify

A UK organisation that qualifies for ESOS must notify the Environment Agency that it has complied with its ESOS obligations (regulation 29). ~~ESOS~~ Regulation 43 sets the maximum ~~penalty penalties~~ for failing to do this – ~~they are all of the following~~:

- an initial penalty of up to £5,000;
- a daily penalty of up to £500 for each working day the responsible undertaking (~~known as 'organisation'~~) remains in breach, starting on the day after the service of the initial penalty notice of civil penalty notice subject to a maximum of 80 working days; and
- the publication penalty.

Our nature of the breach assessment

We **will** ~~not~~ normally impose a penalty for failure to notify, whether an organisation has also failed to undertake an energy audit (see section D2.3) or not. Notification is a key requirement of the ESOS, and failure to comply impacts the scheme's integrity. We will normally take the statutory maximum as the initial penalty amount.

~~This breach is linked with the breach 'failure to undertake an energy audit'. Usually we will only know if an energy audit has been done if an organisation notifies us. Therefore, it is likely the organisation will comply or fail to comply with both requirements.~~

~~If the organisation has also failed We will normally take enforcement action for failure to undertake an energy audit, we will normally impose a penalty for that failure as well (see D2.3) where an organisation has failed to comply with both requirements.~~

D2.2 Failure to maintain records

Regulation 28 requires responsible undertakings to maintain records. ~~ESOS~~ Regulation 44 sets the maximum ~~penalties~~ esy for failing to do so ~~this breach – they are all of the following~~:

- an initial penalty of up to £5,000;
- a sum representing the cost to the compliance body ~~cost~~ of confirming that the responsible undertaking has compliance ~~complied with the Scheme~~;
- the publication penalty; and
- any steps the compliance body requires the responsible undertaking to take ~~steps to~~ remedy the breach.

Our nature of the breach assessment

We **will** normally impose a penalty for this breach, as it impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

D2.3 Failure to undertake an energy audit

~~Chapter 3 of Part 4 requires responsible undertakings to undertake an energy audit, where alternative routes to compliance (in Part 6) do not apply. For this breach, and where an organisation's alternative routes (such as having an ISO 50001:2011 UKAS certified energy management system) do not apply, ESOS Regulation 45 sets the maximum penalty— they are all of the following:~~

- ~~an initial penalty of~~ up to £50,000;
- ~~a daily penalty of~~ up to £500 for each working day the responsible undertaking remains in breach, starting on the day after the service of the **compliance notice**, subject to a maximum of 80 working days;
- ~~the~~ publication ~~penalty; and~~
- ~~any~~ steps ~~the compliance body requires the responsible undertaking to take, including conducting or completing an ESOS assessment,~~ to remedy the breach.

Our additional enforcement position

Our nature of the breach assessment

~~Undertaking an energy audit is a key requirement of ESOS. This breach impacts on the integrity of the ESOS, and we **will** therefore normally issue a penalty for failure to undertake an energy audit. Subject to the next paragraph, We will normally use the statutory maximum as the initial penalty amount.~~

~~For new entrants to ESOS, in the compliance period in which they first enter the scheme, we will normally impose a lower initial penalty of up to £5,000 for failure to undertake an energy audit. (In subsequent compliance periods the responsible undertaking will no longer be a~~

new entrant, and we will therefore normally use the statutory maximum as the initial penalty amount.)

~~In all compliance periods, to bring an organisation into compliance, we will normally issue an enforcement notice. We will normally allow up to 3 months to remedy the failure. We may extend this if the organisation's request is acceptable.~~

~~We will normally issue a compliance notice if we suspect a breach and the organisation has not responded to a previous request for information. Where an organisation does not comply with that notice, we will normally issue an enforcement notice.~~

~~Our nature of the breach assessment~~

~~Where an organisation does not comply with an enforcement notice, for:~~

~~the first compliance period, or the period a new entrant enters the scheme, we will normally impose a penalty for failing to comply with an enforcement notice (see D2.4).~~

~~subsequent compliance periods we will normally impose a penalty for failing to undertake an energy audit~~

~~This breach impacts the integrity of the scheme but we take account of the length of time an organisation has been required to comply with the law. We will normally use the statutory maximum as the initial penalty amount.~~

~~Where an organisation does not comply with a compliance notice but complies with the subsequent enforcement notice, we will normally waive the penalty for failing to comply with the compliance notice.~~

D2.4 Failure to comply with a notice

This breach means failing to provide information or take the steps required by a compliance, enforcement or penalty notice.

~~ESOS~~ Regulation 46 sets the maximum penalties iesy ~~they are all of the following:~~

- an initial penalty of up to £5,000;
- a daily penalty of up to £500 for each working day the responsible undertaking remains in breach, starting on the day after the service of the penalty notice, subject to a maximum of 80 working days; and
- the publication penalty.

Our nature of the breach assessment

We **will** normally impose a penalty for this breach as it impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

D2.5 False or misleading statement

This breach means, providing a false or misleading statement when:

- notifying information to the Environment Agency or a compliance body
- providing information required by a compliance, enforcement or penalty notice

~~ESOS~~ Regulation 47 sets the maximum penalties ~~– they are both of the following:~~

- up to £50,000; and
- the publication penalty.

Our nature of the breach assessment

We **will** normally impose a penalty for this breach as it significantly impacts the integrity of the scheme. We will normally use the statutory maximum as the initial penalty amount.

D3 Specific Environment Agency enforcement positions

D3.1 Zero energy consumption

Organisations that qualify for ESOS but have zero energy consumption need to declare this by the compliance deadline. If we receive a satisfactory declaration, we will not normally enforce other elements of the scheme.

D3.2 Low energy users

We accept that an organisation needs to make sure its compliance work is proportionate to the potential benefits of the scheme.

If an organisation's energy use is at a domestic level we will not normally enforce the requirement to:

- produce a fully compliant energy audit or alternative route to compliance
- complete a lead assessor review

But the organisation will need to:

- notify us by the compliance deadline and confirm its energy use is at a domestic level or lower
- consider and document opportunities to reduce energy consumption, such as a green deal assessment or display energy certificate
- record its compliance approach in its evidence pack

D4 Procedure for imposing ESOS penalties

We will normally impose a penalty for each separate breach of the ESOS Regulations. Our general procedure for imposing penalties is set out in our [ESP](#).

Where an additional daily penalty applies for the breaches in D2.1 and D2.4, we follow a different procedure. We will first serve an initial notice of civil penalty. This will state the:

- particular breach;
- the maximum initial penalty ~~(non-daily) for which~~ the organisation's responsible undertaking is liable; ~~and for~~
- the amount of the additional daily penalty, and that it will accumulate from the day after the date of the notice, until the organisation-responsible undertaking returns to compliance, or it reaches the statutory ~~its~~ maximum number of working days (80).

The notice is not the final decision, no payment is required at this point, and we will not publicise it. We will not apply our discretion at this stage. Once we have determined the total penalty (~~fixed initial~~ sum and ~~additional~~ daily penalties ~~amount~~) we will serve a notice of intent to impose the penalty, setting out our proposed final penalty amount. At this point the organisation can make representations, which we will take into account in determining - ~~Once in receipt of these we will set~~ the final penalty ~~amount~~.

For breach D2.3, the additional daily penalty starts accumulating on the day after service of a compliance notice. We do not issue an initial penalty notice, so our normal procedure applies.

D5 Enforcement and compliance notices

~~We may serve enforcement notices where we reasonably believe an organisation has failed to comply with the ESOS Regulations.~~

~~We may serve compliance notices on an organisation to request information we think is necessary for us to monitor compliance with the ESOS Regulations.~~

~~The penalties for failing to comply with either of these notices are set out in D2.3 and D2.4.~~