



Oil & Gas
Authority

Consultation on proposed Financial Penalty Guidance

The OGA's Guidance as to the matters to which it will have regard when determining the amount of the financial penalty to be imposed by a financial penalty notice under the Energy Act 2016, section 45

Date of publication: 3 October 2016

Closing date: 3 November 2016

The consultation and Impact Assessment can be found on the OGA's website: <https://www.ogauthority.co.uk/>

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General information

Purpose of this consultation

Further to the provisions of the Energy Act 2016 regarding the introduction of the power for the OGA to give sanctions notices, the purpose of this consultation is fulfil the requirement on the OGA to consult such persons as it considers appropriate prior to issuing guidance on the matters to which it will have regard when determining the amount of the financial penalty to be imposed by a financial penalty notice. The OGA has elected to meet this requirement by means of a public consultation to be conducted between the dates below.

Issued: 3 October 2016

Respond by: 3 November 2016

Territorial extent

The territorial extent refers to offshore waters as defined in Part 2, chapter 1 paragraph 18 of the Energy Act 2016, meaning waters comprising the territorial seas of the United Kingdom and the sea in any area for the time being designated under section 1(7) of the Continental Shelf Act 1964.

Responding to this Consultation

The OGA invites written views and comments on the proposed guidance, to be made by 5pm on 3 November 2016.

The OGA has produced a coversheet for responses (see Annex 2) and asks that you complete and send one with your response which should speed up our processing of responses, and help to maintain confidentiality where appropriate.

The OGA's preferred means of response for this consultation is by email: financial.penalty.guidance@ogauthority.co.uk

Alternatively, you can respond by post to:
Simon Churchfield
The Oil and Gas Authority
AB1 Buildings
48 Huntly Street
Aberdeen
AB10 1SH

Representative groups are asked to give a summary of the persons or organisations they represent when they respond.

Additional copies

Other versions of the document in Braille, large print, audio or Welsh can be made available on request. Please contact us using the 'enquiries' details to request alternative versions.

Confidentiality and data protection

The OGA will aim to publish its response to this consultation and all submissions received within 12 weeks after this consultation closes.

If you think any part of your response should be kept confidential, please place such part(s) in a separate annex to your response and include your reasons why this part of your response should not be published. For example, this may include information such as your personal background and experience. Therefore, if you want your personal details to remain confidential, please provide them in your coversheet only, so that the OGA does not have to edit your response.

If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this.

Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to the OGA to use for its regulatory remit. The OGA's approach on intellectual property rights is explained further on its website at: <https://www.ogauthority.co.uk/>

Quality assurance

This consultation has been carried out in principle with the government's consultation principles.

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

OGA Consultation Co-ordinator
21 Bloomsbury Street
London
WC1B 3HF
Email: matthew.garland@ogauthority.co.uk

Introduction

1. The Energy Act 2016 (“**the 2016 Act**”) received Royal Assent on 12 May 2016. Among other provisions, the 2016 Act gives new powers to the Oil and Gas Authority (“**OGA**”)¹ to give sanction notices for failure to comply with a petroleum-related requirement², including the power to impose financial penalties. These powers were commenced on 1 October 2016.
2. In accordance with section 59 of the 2016 Act, the OGA has issued a statement of its proposals for the procedure it proposes to follow in relation to enforcement decisions for sanction notices. The procedure can be found on the OGA website³.
3. Section 45 of the 2016 Act requires that the OGA must issue guidance as to the matters to which it will have regard when determining the amount of the financial penalty to be imposed by a financial penalty notice. Before issuing the guidance, the OGA must consult such persons as it considers appropriate.
4. This consultation document invites comments on the proposed guidance. The proposed guidance can be found at Annex1, and the detail of the matters to which the OGA proposes to have regard when determining the amount of financial penalty is set out in paragraphs 19-22 of that guidance.

¹ The OGA was created initially as an Executive Agency of the Government. It has been incorporated as a Government Company and the 2016 Act vests the OGA as an independent regulator with the Secretary of State’s petroleum licensing functions under the 1998 Act transferred to the OGA along with the additional powers as recommended by the Wood Review.

The Wood Review final report can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471452/UKCS_Maximising_Recovery_Review_FINAL_72pp_locked.pdf

² Energy Act 2016, section 42(3)

³ OGA website is at: <https://www.ogauthority.co.uk/>

Consultation questions

Responses, along with supporting evidence, are invited to the consultation questions:

1. Do you think the aims of the financial penalty as set out at paragraph 20 of the proposed guidance are appropriate?
2. Are there other “matters to which OGA will have regard” not in the proposed guidance that should be included to ensure the level of financial penalty is effective, dissuasive and proportionate?
3. Are there “matters to which OGA will have regard” in the proposed guidance that are not relevant to ensuring the level of financial penalty is effective, dissuasive and proportionate?
4. Does the proposed guidance need further explanation or expansion? If so, do you have any suggestions as to what additional details would be relevant?
5. Do you consider that guidance of this nature is likely to have a negative impact upon a specific section of the industry? If so, why?
6. Do you have any other comments on any aspect of the proposed guidance?

Next steps

5. Following the end of the consultation period at 5pm, 3 November 2016, the OGA intends to publish a statement 12 weeks after the consultation closes. In that statement we will give reasons for our decisions and give an account of how the responses received helped shape those decisions, and any resultant changes to the proposed guidance.
6. The 2016 Act⁴ then requires that the proposed guidance is laid before both Houses of Parliament before being implemented. The OGA therefore intends to publish a further statement at that time, confirming the implementation of the guidance.
7. The guidance will be kept under review and be revised as appropriate in the light of further experience and developing law and practice, and any change to the OGA's powers and responsibilities. Where any such revisions are proposed, the OGA is again required to consult such persons as it considers appropriate and lay the proposed revised guidance before Parliament.

⁴ Section 45(5)

Regulatory Impact Assessment and Equality Impact Assessment

8. The proposed financial penalty guidance, as set out in Annex 1, is considered unlikely to represent a major change in the activities we carry out. We would still assess penalties for failure to comply with a petroleum-related requirement on the basis of a consideration of all the relevant circumstances and with the consideration that any financial penalty determined should be effective, proportionate and act as a deterrent.
9. We also consider that the impact of our proposals on those we regulate should be relatively small and, in the case of compliant persons, there should be no impact. This is because it is the regulated person's responsibility to operate in compliance with regulatory requirements and laws, regardless of the approach taken by the OGA to determining the amount of any financial penalties it imposes. The OGA, therefore, does not expect that its proposals will lead to any cost increases or material impact on regulated persons who comply with their regulatory obligations.
10. The OGA also has a general duty under the Equality Act 2010 in carrying out its functions to have due regard to the need to:
 - eliminate unlawful discrimination, harassment and victimisation;
 - advance equality of opportunity between different groups; and,
 - foster good relations between different groups.
11. Further details can be found at <https://www.equalityhumanrights.com/en/equality-act/equality-act-2010>

Annex 1

Proposed Financial Penalty Guidance

The OGA's Guidance on the matters to which it will have regard when determining the amount of the financial penalty to be imposed by a financial penalty notice.

Energy Act 2016, section 45(2)

Annex 1

Scope and Purpose of this Guidance

1. This document provides guidance as to the matters to which the Oil and Gas Authority (“**OGA**”) will have regard when determining the amount of the financial penalty to be imposed by a financial penalty notice given pursuant to the Energy Act 2016 (“**the 2016 Act**”).
2. The guidance is not a substitute for any regulation or law and is not legal advice.
3. The guidance will be kept under review and be revised as appropriate in the light of further experience and developing law and practice, and any change to the OGA’s powers and responsibilities. If the OGA proposes to revise this guidance, it will follow the procedure referred to in paragraph 18.

Introduction

4. The 2016 Act received Royal Assent on 12 May 2016. Among other provisions, the 2016 Act gives new powers to the OGA to give sanction notices for failure to comply with a petroleum-related requirement, including the power to impose financial penalties. These powers were commenced on 1 October 2016.
5. Section 59 of the 2016 Act requires that the OGA must issue a statement of its proposals for the procedure it proposes to follow in relation to enforcement decisions. The procedure can be found on the OGA website.
6. The OGA is required to “issue guidance as to the matters to which it will have regard when determining the amount of the financial penalty to be imposed by a financial penalty notice”. Before issuing the guidance, the OGA must consult such persons as it considers appropriate. This document sets out that guidance.

Context

7. In June 2013 the then Secretary of State for Energy and Climate Change, Edward Davey, asked Sir Ian Wood to conduct an independently led review of the United Kingdom Continental Shelf (“UKCS”) oil and gas recovery, specifically looking at how economic recovery could be maximised. Sir Ian published his report on 24 February 2014 and made four key recommendations to maximise economic recovery from the UKCS⁵. In addition to the production of a strategy for achieving MER UK, the report recommended that the OGA be created and be given the power to impose a range of sanctions including change of operator and termination of the licence should companies fail to comply with their obligations.
8. The Wood Review recommendations were the subject of a consultation process and a response from government that was published in November 2014 under the title “Implementing the Wood Review Recommendations”⁶. In the response, the Government confirmed its intention to implement graduated sanction powers including financial penalties that would apply to breaches of licence conditions and the other obligations arising from the recommendations.

⁵ The report can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471452/UKCS_Maximising_Recovery_Review_FINAL_72pp_locked.pdf

⁶ The response can be read in full at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/414444/Call_for_Evidence_Govt_Response-FINAL_120315.pdf

Annex 1

9. Amendment of the Petroleum Act 1998 (“**the 1998 Act**”) by the Infrastructure Act 2015 (“**the 2015 Act**”) established in law the principal objective of maximising economic recovery of UK petroleum (“**MER UK**”) and required the production of one or more strategies for enabling the principal objective to be met (“**MER UK strategy**”)⁷.

The MER UK strategy includes a number of Safeguards, and the Central and Supporting Obligations, Required Actions and Behaviours of the MER UK strategy should be read subject to those safeguards.

Sanction Notices

10. Part 2, Chapter 5 (sections 42 to 60) of the 2016 Act details the circumstances under which the OGA is empowered to give sanction notices and the process to be followed (including in relation to any appeal). Sanction notices can be issued where a person has failed to comply with one of three petroleum-related requirements. These are⁸:
- 10.1. a duty imposed under section 9C of the 1998 Act to act in accordance with the MER UK strategy;
 - 10.2. a term or condition of an offshore licence; and
 - 10.3. a requirement imposed on a person by or under the 2016 Act which is sanctionable in accordance with Chapter 5 of the 2016 Act⁹.
11. There are four forms of sanction notice — enforcement notices (section 43), financial penalty notices (sections 44-46), revocation notices (section 47) and operator removal notices (section 48).

Financial Penalty Notices

12. Sections 44, 45 and 46 of the 2016 Act set out the details of financial penalty notices that are relevant to this guidance, and are summarised in paragraphs 13, 14 and 15 below.
13. Section 44 defines a financial penalty notice as a notice which gives details of the failure to comply with the specified petroleum-related requirement and requires, among other things, the person(s) to pay to the OGA the amount of financial penalty specified in the notice before the end of the period specified in the notice (which must not be less than 28 days). It may also, where appropriate, require the person(s) to remedy the failure to comply with the petroleum-related requirement within a timeframe specified in the notice.
14. Section 45 limits the amount of the financial penalty to £1 million. The Secretary of State may by regulations amend that limit to an amount not exceeding £5 million.

⁷ Petroleum Act 1998 (as amended), section 9A. The current MER UK strategy can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509000/MER_UK_Strategy_FINAL.pdf

⁸ Energy Act 2016, section 42(3)

⁹ See: Energy Act 2016, sections 21(6), 23(9), 24(4), 25(4) (Disputes); 28(4), 31(8), 33(3)(b), 34(4), 35(5) (Information and Samples); 38(10), 39(4), 40(5) (Meetings); 43(4), 48(8) & 57(4) (Sanctions); and section 87B of the Energy Act 2011 (as amended by section 70 of the Energy Act 2016) (failure to provide information under section 87 of Energy Act 2011).

Annex 1

15. Section 46 provides that if a financial penalty notice is given to two or more persons, those persons are jointly and severally liable to pay the penalty under it. The payment is recoverable as a civil debt if it is not paid before the end of the period specified for payment. Money received by the OGA under a financial penalty notice must be paid into the Consolidated Fund¹⁰.

Requirement to consult before issuing guidance

16. Section 45(4) of the 2016 Act requires the OGA to consult “such persons as it considers appropriate” before issuing guidance as to the matters to which it will have regard when determining the amount of financial penalty to be imposed by a financial penalty notice. These matters are described in paragraphs 19 to 22 below, along with an explanation of why they are considered to be relevant.

17. On 3 October 2016 the OGA issued its proposed guidance for consultation. Following the end of the consultation period, the OGA carefully considered the views and comments expressed in the responses received and published a statement on [date] setting out its decisions in relation to the proposed guidance, and its reasons for those decisions. The OGA decided [explain what action, if any, the OGA decided to take following consultation]. The proposed guidance was then laid before both Houses of Parliament and [describe outcome]. This guidance is the result of that process.

Matters for Determining the Amount of Financial Penalty

18. The guidance is less example-based than the financial penalty guidelines published by some other regulators due to the OGA’s lack of previous history in

the imposition of financial penalty notices. However, further to section 45(3) of the 2016 Act, the guidance may be revised and updated in due course, subject to further consultation¹¹.

19. The matters to which the OGA will have regard when determining the level of financial penalty are intended to be consistent with the principles of best regulatory practice. In adopting these principles, the OGA has considered the approach taken by other regulators¹², though noting the difference in their regulatory objectives from the OGA’s.

20. The OGA considers that any financial penalty determined should be among other things:

20.1. Effective in addressing the underlying cause of the failure to comply;

20.2. Dissuasive of future failure to comply, either by the person or, further to publication of the penalty notice, other persons in similar circumstances; and

20.3. Proportionate to the significance of the failure in the context of the petroleum-related requirement and the impact on the relevant persons.

¹⁰ The Consolidated Fund is the Government’s general bank account and does not benefit the OGA directly.

¹¹ Revision of the guidance will be in accordance with the provisions of subsections 45(3)-(6) of the Energy Act 2016

¹² For example; Health and Safety Executive Enforcement Management Model: <http://www.hse.gov.uk/enforce/emm.pdf>; Environment Agency Enforcement and Sanctions Guidance: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468315/LIT_5551.pdf; ofgem REMIT Penalties Statement: https://www.ofgem.gov.uk/sites/default/files/docs/2015/06/remit_penalties_statement_23_june_2015_1.pdf; and Ofcom Penalty Guidelines: <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>

Annex 1

21. The OGA may also take into account when determining the amount of the financial penalty matters relating to the specific circumstances of the failure to comply including, but not limited to:
- 21.1.** Specific criteria relevant to adjust the starting figure of any financial penalty such as:
- 21.1.1. Any gain (financial or otherwise) made by the person(s) or any connected body as a consequence of the failure to comply;
- 21.1.2. The degree of harm caused, or increased cost incurred, by the failure to comply;
- 21.1.3. The severity of the failure to comply in the context of the petroleum-related requirement;
- 21.1.4. The extent to which the person(s) may have sought to benefit from the failure to comply;
- 21.1.5. The extent to which parties have followed industry Codes of Practice¹³ where these are relevant to the causes of their failure to comply; and
- 21.1.6. The duration of the contravention;
- 21.2.** Mitigating circumstances and/or behaviours associated with the failure to comply with the petroleum-related requirement such as:
- 21.2.1. Action taken by the person(s) in advance to address the failure to comply;
- 21.2.2. Previous conduct by the person with respect to this and other the petroleum related requirements;
- 21.2.3. The presence of internal mechanisms/processes intended to prevent the failure to comply; and
- 21.2.4. Co-operation with the OGA's investigation; and
- 21.3.** Aggravating circumstances and/or behaviours associated with the failure to comply with the petroleum related requirement such as:
- 21.3.1. Persistent inaction to address the failure to comply;
- 21.3.2. Previous conduct by the person with respect to this and other the petroleum related requirements;
- 21.3.3. Absence of internal mechanisms / processes to prevent the failure to comply; and
- 21.3.4. Evidence of senior management involvement in support of the failure to comply.
22. The OGA, having considered the factors listed above (to the extent they are relevant) and any other circumstances relevant to the particular facts under consideration, will determine an appropriate financial penalty – and where any representations have been made in response to a sanction warning notice¹⁴, the OGA will have regard to them in determining the amount of financial penalty to be imposed in a sanction notice.

¹³ For example, the Infrastructure Code of Practice and the Commercial Code of Practice

¹⁴ Energy Act 2016, section 49

Annex 2

Response Coversheet



Consultation: Proposed Financial Penalty Guidance

- Matters to which the OGA will have regard when determining the amount of financial penalty to be imposed by a financial penalty notice
- Energy Act 2016, section 45(2)(a)

To: Simon Churchfield, The Oil & Gas Authority, AB1 Buildings, 48 Huntly Street, Aberdeen, AB10 1SH

Your Details

Name:

Company/Organisation:

Position:

E-mail address:

Address:

Representing:

Confidentiality

Please tick below if you consider any part of your response is confidential, giving your reasons why:

Nothing	<input type="checkbox"/>	Name/contact details/position	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Company/organisation	<input type="checkbox"/>
Part of the response If there is no separate annex, which parts?	<input type="checkbox"/>		

If you want any part of your response, your name or your organisation to be kept confidential, can the OGA still publish a reference to the contents of your response including (for any confidential parts) a general summary that does not disclose the specific information or enable you to be identified? **YES / NO**

Declaration

I confirm that the correspondence supplied with this coversheet is a formal consultation response that the OGA can publish, except as indicated above.

However, in supplying this response, I understand that the OGA may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations.

If I have sent my response by email, the OGA can disregard any standard e-mail text about not disclosing email contents and attachments.

The OGA may wish to publish responses on receipt. If your response is non-confidential (in whole or in part), but you would prefer us to publish your response only once the consultation has ended, tick here.

Name:

Signed: