



Oil & Gas
Authority

Response to the consultation on the proposed financial penalty guidance

Consultation Response:
20 March 2017

This response can be found on the OGA's website:

www.ogauthority.co.uk/

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General information

Purpose of this consultation

This document sets out the OGA's response to the consultation on the proposed guidance as to the matters to which it will have when determining the amount of the financial penalty to be imposed by a financial penalty notice under the Energy Act 2016, section 45. This consultation ran from 3 October 2016 to 3 November 2016.

Territorial extent

The territorial extent refers to offshore waters as defined in Part 2, chapter 1 section 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.

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.

Quality assurance

This consultation has been carried out in accordance 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 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 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 is required to consult such persons as it considers appropriate.
4. The consultation on the guidance regarding financial penalties commenced on 3 October 2016 and closed on 3 November 2016.
5. A total of seven responses were received from oil companies and trade associations. There were no responses from individual members of the public. A full list of respondents is given in Annex 1.

¹ The OGA was created initially as an Executive Agency of the UK Government. It was incorporated as a Government Company on 1 October 2016 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: 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: www.ogauthority.co.uk/

Response to the consultation

6. Of the seven responses received, four were essentially supportive of the guidance as it was presented with no change. While generally supportive, the remaining three responses additionally proposed or suggested some changes to the guidance.
7. Table 1 below presents a summary of the changes to the guidance proposed or suggested by the respondents along with the OGA's response.
8. Further to this consultation process, the OGA intends to continue a dialogue with Industry on the practical application of this guidance.

Consultation Question 1: Do you think the aims of the financial penalty as set out in paragraph 20 of the proposed guidance are appropriate?

Consolidated change proposed or suggested	OGA Response
While the aims of the financial penalty are clear and appropriate, some respondents requested the deletion of "among other things" in paragraph 20 on the basis that it introduced uncertainty around what, in addition to the stated points, should be considered.	While "effective", "dissuasive" and "proportionate" are stated as 'aims' for a financial penalty in paragraph 20, it is not an exhaustive list (hence the reference to "other things"). For example, when exercising its powers, the OGA would have in mind more generally its statutory powers/duties.

Consultation Question 2: Are there other “matters to which the 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??

Consolidated change proposed or suggested	OGA Response
<p>One of the criteria discussed at an early stage was the potential impact of levying financial penalties on the confidence of investors in the UKCS. The criterion should be re-introduced into the guidance.</p>	<p>The new regulatory framework was designed to ensure that industry has confidence in the regulatory process. Therefore the OGA considers that the level of financial penalty should not have an adverse impact on investor confidence.</p>
<p>As the OGA can impose a combination of sanctions for the same breach, there should be explicit consideration as to whether the sanctions to be levied are, in totality, proportionate.</p>	<p>A financial penalty notice can be issued in combination with another sanction notice. Paragraph 38 of the Sanction Procedure states that the OGA’s aim is that any sanction should be among other things effective, dissuasive and proportionate.</p>
<p>It would be more appropriate that paragraph 21.1.3* should refer to the harm caused in relation to the Principal Objective [* We believe this point should refer to 21.1.2]</p>	<p>The principal objective is a primary driver for the OGA. The assessment of the harm caused relates to the suspected failure to comply with the particular petroleum-related requirement in question.</p>
<p>In paragraph 21.1.3 there should be reference to the nature of the petroleum-related requirement in question so that a distinction is made between the breach of “administrative” obligations and the breach of more substantive obligations.</p>	<p>In response to the feedback we have changed paragraph 21.1.3 of the guidance to clarify the link between the failure to comply and the specific petroleum-related requirement (see revised guidance).</p>

Consultation Question 2 continued...	
It is more appropriate for paragraph 21.1.5 to refer to the failure to comply, and not the 'relevant to causes' of the failure to comply.	In response to the feedback we have changed paragraph 21.1.5 as proposed (see revised guidance).
We suggest that the mitigating and aggravating factors set out in paragraphs 21.2.2 and 21.3.2 should be more appropriately and fairly characterised as, respectively, the absence or presence of previous sanctioned breaches of petroleum-related requirements	The mitigating and aggravating circumstances are broader than the absence or presence of previous sanctioned breaches. In our view, it is appropriate to also consider the evidence of broader conduct and behaviour of the persons with respect to with this and other petroleum-related requirements.
When the OGA considers factors such as the degree of harm caused, or increased cost incurred, by the failure to comply we hope that consideration will be given to direct and indirect harm.	The level of financial penalty will take account of the degree of harm on a case by case basis.
We note that behaviours will be considered in mitigation, but it does not appear that bad behaviours are expressly taken into consideration. We believe this should be expressly stated to be the case. We acknowledge that elements of bad behaviour will be captured in the factors in paragraph 21.3	The MER UK Strategy clearly identifies the required actions and behaviours of relevant persons. Behaviour divergent from the obligations of the Strategy may constitute a sanctionable failure in its own right.

Consultation Question 3: Are there “matters to which the OGA will have regard” in the proposed guidance that are not relevant to ensuring the level of financial penalty is effective, dissuasive and proportionate?

Consolidated change proposed or suggested	OGA Response
<p>We note that behaviours will be considered in mitigation, but it does not appear that bad behaviours are expressly taken into consideration. We believe this should be expressly stated to be the case.</p>	<p>The MER UK Strategy clearly identifies the required actions and behaviours of relevant persons. Behaviour divergent from the obligations of the strategy may constitute a sanctionable failure in its own right.</p>
<p>In paragraph 20.2. we do not support the reference to a ‘dissuasive effect’ on other parties in similar circumstances. We believe the relevant party should be sanctioned based on its own circumstances.</p>	<p>The dissuasive effect of a regulatory penalty is a key principle of effective regulation. The OGA believes that a penalty that is effective in addressing a failure to comply will also, after publication, be dissuasive for other persons failing to comply for the same or similar reasons.</p>

Consultation Question 4: Does the proposed guidance need further explanation or expansion? If so, do you have any suggestion as to what additional details would be relevant?

Consolidated change proposed or suggested	OGA Response
<p>To avoid inconsistency and aid transparency, clarity, possibly in the form of illustrative examples, clarity is required on how the OGA will determine the base level of financial penalties which apply for particular breaches, i.e. before factoring in mitigating and aggravating circumstances.</p>	<p>Per paragraph 18 of the guidance, the OGA believes that fabricating a scenario with an associated financial penalty without the complete context of a real case may subsequently constrain the OGA's ability to ensure actual penalties are effective, dissuasive and proportionate to the specific circumstances. The guidance provides clarity on the matters to which the OGA will have regard when determining the level of financial penalty, and (as set out in paragraph 3 of the guidance) the OGA will review the guidance in due course once a measure of experience has been gained and appropriate details of cases have been published.</p>
<p>The OGA should provide more clarity on what it would expect to see in regards of the mechanisms/processes parties should have in place to prevent the failures to comply.</p>	<p>The OGA believes it is up to each relevant person to consider the processes that are appropriate for their organisation to adopt to underpin delivery of their legal obligations.</p>
<p>Given the current industry climate, there are times where the OGA needs to be flexible as there are often good reasons why licence commitments do not get fulfilled. The OGA needs to be prepared to consider alternatives, for instance the shifting of commitments to other licences, accepting undertakings to fulfil commitments in the future, or recognising where other commitments have been exceeded, and allowing some credit.</p>	<p>The OGA recognises that flexibility on licence commitments may, in certain circumstances, be consistent with the principal objective, and the MER UK Strategy makes provision for this. However if, having taken into account all relevant circumstances, it is found that there has been a failure to comply, the OGA does not believe that these circumstances are directly relevant to the determination of the appropriate level of financial penalty.</p>

Consultation Question 5: Do you consider that guidance of this nature is likely to have a negative impact upon a specific section of the industry? Is so, why?

All respondents considered that the guidance would likely not have a negative impact on industry where it is applied consistently and transparently in accordance with the guidance.

Consultation Question 6: Do you have any other comments on any aspect of the proposed guidance?

Consolidated change proposed or suggested	OGA Response
The OGA may wish to make reference to the safeguards within the final document.	Paragraph 9 of the guidance already makes direct reference to the safeguards within the MER UK Strategy.

Regulatory Impact Assessment and Equality Impact Assessment

- 9. Regulatory and equality impact assessments were included in the original consultation⁴. No responses were received with regard to either the regulatory or equality impact.
- 10. The OGA does not expect that the guidance will lead to any cost increases or material impact on any compliant relevant person.

⁴ The original consultation document can be found at: www.ogauthority.co.uk/media/2757/oga_financial_penalty_r.pdf

Next steps

11. In response to the feedback received during the consultation, as summarised in Table 1 previous, the OGA has made some changes to the guidance.
12. The 2016 Act⁵ requires that the guidance is laid before each House of Parliament. This has been done.
13. The guidance can be found on the OGA website.
14. 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.

⁵ Section 45(5)

Annex 1: Respondents to the consultation

List of respondents to the consultation on the proposed guidance as to the matters to which the OGA will have regard when determining the amount of the financial penalty to be imposed by a financial penalty notice given pursuant to the 2016 Act.

Oil Companies	Trade Associations
Suncor Energy UK Ltd Chevron North Sea Limited Shell U.K. Limited Nexen Petroleum U.K. Limited EnQuest plc	Oil & Gas UK Oil and Gas Independents' Association

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