

Draft Regulations laid before Parliament under section 2(8) and (9)(d) of the Pollution Prevention and Control Act 1999 and paragraph 2(2) of Schedule 2 to the European Communities Act 1972, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2011 No. 0000

CLIMATE CHANGE

**The Greenhouse Gas Emissions Trading
Scheme (Nitrous Oxide) Regulations 2011**

Made - - - - 2011

Coming into force in accordance with regulation 1(1)

The Secretary of State is a Minister designated⁽¹⁾ for the purposes of section 2(2) of the European Communities Act 1972⁽²⁾ in relation to the environment.

In accordance with section 2(4) of the Pollution Prevention and Control Act 1999 (“the 1999 Act”)⁽³⁾, the Secretary of State has consulted the Environment Agency, the Scottish Environment Protection Agency, and such bodies or persons appearing to the Secretary of State to be representative of the interests of local government, industry, agriculture and small businesses, and such other bodies and persons, as the Secretary of State considers appropriate.

In accordance with section 2(8) and (9)(d) of the 1999 Act and paragraph 2(2) of Schedule 2 to the European Communities Act 1972, a draft of these Regulations has been laid before, and approved by a resolution of, each House of Parliament.

These Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972, and it appears to the Secretary of State that it is expedient for the references to an EU instrument in these Regulations to be construed as references to that instrument as amended from time to time.

Accordingly the Secretary of State, in exercise of the powers conferred by section 2 of and Schedule 1 to the 1999 Act⁽⁴⁾ and by section 2(2) of the European Communities Act 1972, as read with paragraph 1A of Schedule 2 to the European Communities Act 1972⁽⁵⁾, makes the following Regulations⁽⁶⁾:

(1) [SI 2008/301](#).
(2) [1972 c. 68](#); section 2(2) was amended by section 27(1)(a) of the Legislative and Regulatory Reform Act 2006 ([c. 51](#)) and by section 3(3) of, and Part 1 of the Schedule to, the European Union (Amendment) Act 2008 ([c. 7](#)).
(3) [1999 c. 24](#).
(4) There are amendments to Schedule 1 which are not relevant to these Regulations.
(5) Paragraph 1A of Schedule 2 was inserted by section 28 of the Legislative and Regulatory Reform Act 2006 and amended by [S.I. 2007/1388](#) and by section 3(3) of, and Part 1 of the Schedule to, the European Union (Amendment) Act 2008.
(6) Under section 57 of the Scotland Act 1998 ([c. 46](#)), despite the transfer to the Scottish Ministers of functions in relation to observing and implementing obligations under Community law in respect of devolved matters, any function of the Secretary of State in relation to any matter continues to be exercisable as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972. And similarly, under paragraph 5 of Schedule 3 to the Government of Wales Act 2006 ([c. 32](#)), despite the transfer to the Welsh Ministers of functions under section 2 of the 1999 Act so far as exercisable in relation

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Greenhouse Gas Emissions Trading Scheme (Nitrous Oxide) Regulations 2011, and come into force on the day after the day on which they are made.

(2) In these Regulations, “the 2005 Regulations” means the Greenhouse Gas Emissions Trading Scheme Regulations 2005(7).

Specification of an amended approved national allocation plan

2.—(1) For the purposes of the 2005 Regulations, the document entitled “EU Emissions Trading Scheme: Approved Phase II National Allocation Plan 2008-2012”(8), as amended and published by the Secretary of State on the day on which these Regulations are made, is specified as the approved national allocation plan for the five year period beginning on 1st January 2008.

(2) Regulation 2 of the Greenhouse Gas Emissions Trading Scheme (Miscellaneous Provisions) Regulations 2007(9) is revoked.

Amendments of the Greenhouse Gas Emissions Trading Scheme Regulations 2005

3.—(1) The 2005 Regulations are amended as follows.

(2) In regulation 2(1)(10), for the definition of “approved NAP regulations” substitute—

““approved NAP regulations” means, in relation to a scheme phase, regulations in force made by the Secretary of State specifying as the approved national allocation plan—

- (a) a national allocation plan developed for that scheme phase which has not been rejected by the European Commission or in relation to which the European Commission has accepted amendments in accordance with Article 9(3) of the Directive(11); or
- (b) a plan previously so specified which has been amended pursuant to an approval given by the European Commission under Article 24 of the Directive.”.

(3) In regulation 21(2)(12)—

(a) for sub-paragraph (a) substitute—

“(a) be based upon the approved national allocation plan for the relevant phase;”;

and

(b) in sub-paragraph (b), for “the national allocation plan” substitute “that plan”.

(4) After regulation 22(1)(13) insert—

“(1A) However, an operator of an installation may not apply to the regulator under paragraph (1) for an allocation of allowances in respect of the production of nitric acid if any such production has been carried out at the installation prior to 30th June 2010.”.

to Wales (except in relation to offshore oil and gas exploration and exploitation), those functions continue to be exercisable by the Secretary of State in relation to Wales for such purposes.

(7) [SI 2005/925](#); relevant amendments are noted below.

(8) See the website of the Department of Energy and Climate Change at <http://www.decc.gov.uk/publications/>

(9) [SI 2007/1096](#).

(10) Regulation 2(1) was amended by [SI 2005/2903](#), [2006/737](#), [2007/3433](#) and [2010/1513](#).

(11) Directive [2003/87/EC](#) of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive [96/61/EC](#) (OJ No L 275, 25.10.2003, p 32). The Directive is amended by European Parliament and Council Directives [2004/101/EC](#) (OJ No. L 338, 13.11.2004, p 18), [2008/101/EC](#) (OJ No L 8, 13.1.2009, p 3) and [2009/29/EC](#) (OJ No L 140, 5.6.2009, p 63), and by Regulation (EC) No [219/2009](#) of the European Parliament and of the Council (OJ No L 87, 31.3.2009, p 109).

(12) Regulation 21 was amended by [SI 2007/3433](#).

(13) Regulation 22 was amended by [SI 2006/737](#) and [2007/3433](#).

- (5) In regulation 27A(14), after paragraph (2) insert—
- “(2A) An operator may not use CERs or ERUs to comply with an obligation relating to emissions of nitrous oxide.”.
- (6) In Part 1 of Schedule 1—
- (a) at the end of the first column of the table, insert “4.3 Activities of installations for the production of nitric acid”; and
- (b) at the corresponding place in the second column, insert “Nitrous oxide”.

Transitional provisions

- 4.—(1) In this regulation—
- (a) any reference to a numbered regulation is to that regulation of the 2005 Regulations;
- (b) “activities” means the activities of an installation in so far as they result in emissions;
- (c) “application” means an application made for the purposes of paragraph (3);
- (d) “commencement date” means the day on which these Regulations come into force;
- (e) “deferred date” means—
- (i) the day on which the application is determined, or
- (ii) if no application is made, the last day of the period of 4 weeks beginning with the commencement date;
- (f) “emissions” means emissions of nitrous oxide;
- (g) “installation” means an installation for the production of nitric acid;
- (h) “permit” and “variation of a permit” mean a greenhouse gas emissions permit (or a variation of such a permit) by virtue of which the carrying out of activities is authorised; and
- (i) “reportable emissions”, “annual reportable emissions” and “Monitoring and Reporting Decision” have the meanings given by regulation 2(1).
- (2) Paragraphs (3) and (4) apply where activities were being carried out at an installation immediately before the commencement date.
- (3) If, within a period of 4 weeks beginning with the commencement date, the operator of the installation applies for a permit under regulation 8 or for the variation of a permit under regulation 14, regulation 7 does not apply in relation to the activities until that application is determined (and regulation 7 does not in any event so apply during that period of 4 weeks).
- (4) During the period beginning with the commencement date and ending with the deferred date, the operator must monitor any reportable emissions from the installation in accordance with the Monitoring and Reporting Decision; and any requirement in the permit to submit a report of annual reportable emissions, or to surrender allowances equal to such emissions, applies to reportable emissions during that period as it applies to such emissions after the deferred date.
- (5) Any failure to comply with an obligation under paragraph (4) is to be treated, for the purposes of the 2005 Regulations, as a failure to comply with the conditions of a permit.
- (6) This paragraph applies where the operator of an installation has—
- (a) monitored the reportable emissions from the installation in accordance with the Monitoring and Reporting Decision during a period beginning before the commencement date;

(14) Regulation 27A was inserted by [SI 2005/2903](#).

- (b) at the time of the operator's application, notified the regulator of a wish to receive an allocation that is calculated in accordance with paragraph (8); and
 - (c) provided the regulator with such information concerning the monitoring of those emissions as the regulator may reasonably request.
- (7) Where paragraph (6) does not apply, the number of allowances to be allocated under

regulation 21 for emissions of the installation in the year 2011 is $X(1 - \frac{Y}{275})$, where—

- (a) X is the number of allowances that would otherwise be allocated for the emissions in 2011 in accordance with the approved national allocation plan, and
- (b) Y is the number of days in the period beginning with 1st April 2011 and ending with the day before the commencement date.

(8) Where paragraph (6) applies—

- (a) the number of allowances to be allocated under regulation 21 for emissions of the

installation in the year 2011 is $X(1 - \frac{Z}{275})$, where—

- (i) X is the number of allowances that would otherwise be allocated for the emissions in 2011 in accordance with the approved national allocation plan, and
 - (ii) Z is the number of days in the period beginning with 1st April 2011 and ending with the day before the commencement date, other than any day (“early monitoring day”) during which the monitoring referred to in paragraph (6)(a) has taken place; and
- (b) any requirement in the permit to submit a report of annual reportable emissions, or to surrender allowances equal to such emissions, applies to reportable emissions taking place on an early monitoring day as it applies to such emissions after the deferred date.

Saving provision

5. Except in relation to the allocation of allowances in respect of emissions of nitrous oxide from an installation for the production of nitric acid, any reference in the 2005 Regulations to the date on which the approved NAP regulations in relation to the second scheme phase enter into force continues to be a reference to 1st May 2007⁽¹⁵⁾.

Date

Name
Minister of State
Department of Energy and Climate Change

(15) This is the date on which the Greenhouse Gas Emissions Trading Scheme (Miscellaneous Provisions) Regulations 2007 came into force (see regulation 2(2) of these Regulations).

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations exercise an option provided by Article 24 of Directive [2003/87/EC](#) of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community (“the Directive”). The Directive is implemented, as regards installations in the United Kingdom, by the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (“the 2005 Regulations”)([16](#)).

The Emissions Trading Scheme (“ETS”) established under the Directive at present applies only to emissions of carbon dioxide from the activities specified in Annex I to the Directive. From 1st January 2013, Annex I will be replaced by a new version of that Annex which includes, in particular, the emission of nitrous oxide (N₂O) from the production of nitric acid([17](#)). Under Article 24 of the Directive, however, a Member State may already apply emission allowance trading in accordance with the Directive to greenhouse gases and activities that are not yet listed in Annex I, provided that it obtains the approval of the European Commission. Where both the activity and the gas concerned are not yet listed in Annex I, the Commission’s approval is subject to the comitology procedure laid down by Article 5a of Decision [1999/468/EC](#)([18](#)). The United Kingdom made an application to include in the ETS nitrous oxide emissions from the production of nitric acid, and following the outcome of that procedure the Commission adopted its approval decision on April 2011. In giving its approval, the Commission also agreed to consequential amendments of the relevant approved national allocation plan; this is the plan that lays down the amounts of greenhouse gas allowances that are allocated to different installations within the United Kingdom for the second phase of the ETS (2008-2012).

Regulation 2 specifies that plan as so amended, for the purposes of the definition of “approved national allocation plan” in regulation 2(1) of the 2005 Regulations, and revokes in consequence regulation 2 of the Greenhouse Gas Emissions Trading Scheme (Miscellaneous Provisions) Regulations 2007([19](#)).

Regulation 3(2) and (3) amends regulations 2(1) and 21(2) of the 2005 Regulations to take into account that new specification.

Regulation 3(4) makes provision in relation to the new entrant reserve (as defined in regulation 2(1) of the 2005 Regulations) in the case of nitric acid production.

Regulation 3(5) ensures that project credits under the Kyoto Protocol([20](#)) may not be used to fulfil an obligation to surrender allowances for nitrous oxide emissions.

Regulation 3(6) amends the table in Schedule 1 to the 2005 Regulations so that it now includes an entry for the emission of nitrous oxide from the production of nitric acid.

(16) [SI 2005/925](#); relevant amendments are noted above.

(17) See Article 1.30 of, and Annex I to, Directive [2009/29/EC](#); and see the transitional provision in Article 3.

(18) Council Decision [1999/468/EC](#) laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ No L 184, 17.7.1999, p. 23); Article 5a was inserted by Council Decision [2006/512/EC](#) (OJ No L 200, 2.7.2006, p 11).

(19) [SI 2007/1096](#).

(20) Cm. 6485. Under Articles 6 and 12 of that Protocol to the UN Framework Convention on Climate Change, for the purpose of meeting its commitments under Article 3 of the Protocol, a Party included in Annex I may use emission reduction units (ERUs) resulting from projects aimed at reducing emissions (or enhancing sinks) of greenhouse gases, or make use of certified emissions reductions (CERs). Under Article 11a of the Directive, Member States are permitted to allow operators to use such units up to a percentage of the allocation of allowances to each installation.

Draft Legislation: This is a draft item of legislation. This draft has since been made as a UK Statutory Instrument: The Greenhouse Gas Emissions Trading Scheme (Nitrous Oxide) Regulations 2011 No. 1506

Regulation 4 contains transitional provisions. These ensure that an operator who has already begun nitric acid production before the commencement of these Regulations has a period of grace during which to apply for a corresponding permit, or variation of a permit, under the 2005 Regulations. Furthermore, an operator who has monitored emissions of nitrous oxide from 1st April 2011 will be able to receive its full allocation of allowances under the national allocation plan; otherwise the allocation for 2011 is reduced to take into account the emissions that cannot be accounted for between 1st April 2011 and the commencement date.

Regulation 5 contains a saving provision.

A full impact assessment of the costs and benefits of this instrument is available from the Department of Energy and Climate Change's National Climate Change Division (telephone 0300 060 4000), and is published alongside the instrument and its Explanatory Memorandum on the legislation website of The National Archives (<http://www.legislation.gov.uk>). A transposition note setting out how these Regulations implement the relevant provisions of the Directive is annexed to that Explanatory Memorandum.