EXPLANATORY MEMORANDUM TO
THE GREENHOUSE GAS EMISSIONS TRADING SCHEME (AMENDMENT) AND NATIONAL EMISSIONS INVENTORY (AMENDMENT) REGULATIONS 2014

2014 No. 3075

1. This explanatory memorandum has been prepared by the Department of Energy and Climate Change and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1. This instrument amends the Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005 ("**the 2005 Amendment Regulations**"), which govern the process for submitting and approving applications relating to Clean Development Mechanism ("**CDM**") and Joint Implementation ("**JI**") projects under the Kyoto Protocol ("**KP**").

2.2. The amendments made by this instrument transfer the function of determining appeals relating to CDM and JI project applications from the Secretary of State to the First-tier Tribunal; replace a criminal sanction relating to CDM/JI project applications with a civil penalty; introduce a new right of appeal in connection with the civil penalty and make a number of minor amendments to simplify and clarify those parts of the 2005 Amendment Regulations relating to CDM/JI project applications, including to remove redundant provisions.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. The Regulations are being made under section 2(2) of the European Communities Act 1972 and section 56(1) and (2) of the Finance Act 1973.

3.2. The Regulations replace, and in doing so modify, Part 3 of the 2005 Amendment Regulations. They also modify the related enforcement provisions in Parts 5 and 6 of the 2005 Amendment Regulations. Since these Regulations modify provisions which implement EU obligations and/or deal with matters arising out of such obligations, we are satisfied that section 2(2) can be relied upon here.

3.3. Regulation 5(8) to (10) of the 2005 Amendment Regulations was inserted by S.I. 2011/727 using a combination of the powers in section 56(1) and (2) of the Finance Act 1973 and section 2(2) of the European Communities Act 1972. The former was relied upon to the extent that fees for project applications were payable to the Secretary of State during the period from 6th April 2011 to 31st May 2011. The latter was relied upon to the extent that fees for project applications were payable to the Environment Agency during the period from 1 June 2011 to 6th April 2012. Regulation 5(8) to (10) is now redundant and so section 56(1) and (2) of the Finance Act 1973 is being relied on to revoke the part of the provision which required fees to be paid to the Secretary of State.

4. Legislative Context

4.1. The United Nations Framework Convention on Climate Change ("**UNFCCC**") and the KP set out a range of measures in relation to climate change. Articles 6 and 12 of the KP set out provisions in relation to the "flexible mechanisms" which enable Parties (and private entities) to invest in projects which reduce carbon emissions and generate carbon credits in respect of every tonne of carbon reductions which result from those projects. Those credits can be used for compliance with the emission reduction obligations under the KP and can also be traded between countries and private entities.

4.2. The flexible mechanisms include the CDM, whereby countries listed in Annex 1 to the UNFCCC ("**A1 Countries**") or private entities invest in projects in countries which are not listed in Annex 1) and JI, whereby A1 Countries or private entities invest in projects in other A1 Countries). The rules governing the operation of the flexible mechanisms are set out in Articles 6 and 12 of the KP (in relation to JI and CDM respectively) with the detail being set out in "decisions" taken by the Parties to the KP (in this case, those decisions are referred to as "the Marrakech Accords"[1]).

4.3. The rules governing JI require that the relevant project has been "approved" by the Parties involved. The rules also provide that certain A1 Countries may authorise private entities to participate in JI projects. Such approval and/or authorisations where applicable are granted through a "Designated Focal Point" ("**DFP**").

4.4. The rules governing CDM require that the Parties involved in a CDM project must approve participation in the project. The rules also provide that certain A1 Countries may authorise private entities to participate in CDM projects. Such approval and/or authorisation is granted through a "Designated National Authority" ("**DNA**").

4.5. EU Law imposes obligations in relation to the approval and authorisation of project activities. In particular, Article 11b of Directive 2003/87/EC[2] ("**EU ETS Directive**") imposes various requirements in relation to how and which types of projects a DNA or DFP may approve or grant authorisation in respect of. These provisions are transposed in Part 3 of the 2005 Amendment Regulations. A Supplementary Transposition Note explaining how the transposition of articles in the EU ETS Directive relating to the KP's project mechanisms (in Part 3 of the 2005 Amendment Regulations) has been altered by the Regulations is attached to this Memorandum.

5. Territorial Extent and Application

5.1. This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1. As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1. The 2005 Amendment Regulations (in particular Part 3) govern the way in which the UK DNA and DFP manage the processes of approving and granting authorisation for projects under the CDM and JI. The UK DNA and DFP functions are carried out by the Environment Agency. The 2005 Amendment Regulations set out the requirements for project approval and authorisation, including that applications should be submitted to the Environment Agency; the requirement to provide further information on request; and requirements relating to the independent verification of information submitted in connection with an application . In broad terms the requirements for submitting an application in relation to the CDM and JI are; submission of a Project Design Document describing the project, a declaration of compliance with the relevant rules and procedures, and a copy of the host country's letter of approval. The Regulations provide that the Environment Agency will make approval decisions within a period of two months (or such longer period as may be agreed with the

[1] Decision 3/CMP.1.

[2] OJ No L 275, 25.10.03, 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), by Regulations (EC) No 219/2009 of the European Parliament and of the Council (OJ No L 87, 31.3.2009, p 109) and Regulation (EU) No 421/2014 of the European Parliament and of the Council (OJ No L 129, 30.4.2014, p 1) and by Decision No 1359/2013/EU of the European Parliament and of the Council (OJ No L 343, 19.12.2013, p 1).

applicant in writing) and that applicants have the right to appeal. The Environment Agency will make decisions in accordance with the international rules relating to the CDM/JI and with the additional EU requirements in the EU ETS Directive. The 2005 Amendment Regulations require the Environment Agency to consult the Secretary of State in respect of certain types of application (such as those that the Environment Agency considers to be novel or contentious or applications relating to large hydro-electric power projects) and the Secretary of State is able to require the Environment Agency to refer an application to the Secretary of State for determination.

7.2. The Department has identified a number of areas where the process for approving/authorising participation in CDM/JI projects can be improved / streamlined. These relate, in particular, to the way in which appeals relating to CDM/JI project applications are processed and to the penalty regime to ensure the provisions are in line with broader Government policy in this area. These Regulations therefore make the following amendments to the existing 2005 Amendment Regulations:

a) They transfer the function of determining appeals relating to CDM/JI project applications from the Secretary of State to the First-tier Tribunal ("**FtT**");
b) They replace the criminal sanction (for the provision of false or misleading information) with a civil penalty and introduce a new right of appeal to the FtT in connection with the civil penalty.
c) They remove the redundant text on fees levels.
d) They make a number of minor amendments to update and simplify the drafting.

Consolidation

7.3. The majority of the changes referred to in paragraph 7.2 relate to provisions in Part 3 of the 2005 Amendment Regulations. To improve clarity, the Department has decided to replace the existing Part 3 with a new Part rather than to make changes to the existing provisions. However, to minimise the impact on stakeholders, the Department has, in the new provisions, adopted a similar structure and approach to the existing provisions and has only made changes where necessary.

7.4. *First Tier Tribunal (FtT)*

7.4.1. Regulation 9 of 2005 Amendment Regulations provides that a person may appeal against the refusal of an application, made under regulation 5, relating to CDM or JI project activity or against any conditions attached to an approval . The appeal procedure is required to ensure that the applicant's civil rights are protected, in line with article 6 of the European Convention on Human Rights, which establishes the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

7.4.2. The Secretary of State for Energy and Climate Change has responsibility for determining an appeal, although the Secretary of State is able to appoint a third party to determine the appeal, or particular questions arising in the appeal, on his behalf. In line with the broader Government move towards the use of the FtT for appeals against decisions relating to environmental and climate change matters, these Regulations introduce a system where appeals are heard and determined by the FtT. In relation to a determination to refuse an application, the FtT may affirm the determination or quash the determination and remit it to the decision maker (either the Environment Agency or the Secretary of State). In relation to a determination to attach a condition to an approval or authorisation, the FtT may affirm or vary the determination or quash the determination and remit it to the decision maker (the Environment Agency or the Secretary of State).

7.4.3. The Department considers that this appeals process will be a more cost-effective and proportionate approach to ensuring appeals are dealt with effectively and in line with the requirements of the ECHR.

7.5. *Replacing Criminal with Civil Penalties*

7.5.1. Regulation 13 of the 2005 Amendment Regulations make it a criminal offence for a person to make a statement which they know to be false or misleading in a material way in connection with an application relating to a CDM or JI project activity.

7.5.2. A penalty regime is deemed to be necessary to ensure that applicants include truthful and accurate information with their applications, whether that be when the original application is submitted or in response to a request for additional information. Government believes that imposing a civil sanction would achieve a similar level of deterrence in these circumstances and would be more proportionate. Imposing a civil penalty would be less of a burden for businesses and individuals and is in line with Government's better regulation agenda.

7.5.3. These amendments therefore replace the existing criminal sanction (contained in Regulation 13) with a civil penalty. The civil penalty will be set at £1000, this level of penalty is consistent with similar regimes such as the National Emissions Inventory Regulations 2005. The right of appeal that already exists in regulation 18 of the 2005 Amendment Regulations will apply to the imposition of this new civil penalty. This right of appeal will also be to the FtT. Where the appropriate, the regulator imposing the civil penalty (either the Environment Agency or the Secretary of State) will have the discretion to: refrain from imposing a civil penalty, reduce the amount of a penalty, extend the time for payment, withdraw a penalty notice or modify the penalty notice.

7.6. *Remove the redundant text on fees levels*

7.6.1. Since April 6th 2012, fees for CDM and JI project applications submitted to the Environment Agency have been governed by a charging scheme prescribed by the Environment Agency pursuant to powers in the Environment Act 1995. Fees for these applications are, therefore, no longer governed by the 2005 Amendment Regulations themselves. This has subsequently rendered text on charging provisions redundant. Removing redundant regulation text on fee charging is simply an administrative change to simplify the legislation.

7.7. *A number of minor amendments*

Through the replacement of Part 3, the Department has made a number of minor amendments to ensure clarity and consistency. For example, the new Part 3 no longer contains gender specific references to the Secretary of State and many of the references to "the Secretary of State" have been changed to "the Environment Agency" to reflect more clearly the changes made by S.I. 2011/727.

7.8. *Transitional arrangements*

The amendments made by the Regulations will not apply to applications received by the Environment Agency before the Regulations come into force. The existing legislation (as in force immediately before these Regulations come into force) will continue to apply to those applications.

8. Consultation outcome

8.1. Due to the technical nature of the amendments, a formal consultation was not required. The Department launched an informal consultation from the 22nd July 2014 until 22nd August 2014. The Department received one informal response which was supportive of the proposed amendments.

9. Guidance

9.1. DECC and the Environment Agency have produced guidance on the process for making and approving applications relating to CDM and JI project activities. This guidance will be updated to ensure it reflects the amendments made to the 2005 Amendment Regulations by this instrument.

10. Impact

10.1. A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

10.2. The impact on the public sector is that appeals will now be administered by Her Majesty's Courts and Tribunals Service via the Tribunal system, rather than by the Secretary of State. The FtT system is a more cost effective and streamlined appeal system which will result in an improved service.

11. Regulating small business

11.1. The Department has not put in place any additional requirements or taken specific action related to small businesses. The Department believes that the overall impacts of this legislation will not be significant and will not disproportionally impact small businesses.

12. Monitoring & review

12.1. The proposed amendments to the appeal process aim to result in all appeals being administered by the Tribunals system in a manner that is more cost efficient and proportionate in comparison to the existing arrangements.

12.2. The proposed amendments to the penalty regime aim to ensure all penalties issued are proportionate and less burdensome for businesses and individuals.

12.3. Regulation 1A of the 2005 Amendment Regulations requires the Secretary of State to review those Regulations periodically and to set out the conclusions of the review in a report and for that report to be published. In particular, the report will consider the objectives that the 2005 Amendment Regulations seek to achieve and the extent to which those objectives have been achieved. In addition, regulation 3 of S.I. 2011/727 places a further obligation on the Secretary of State to review Part 3 of the 2005 Amendment Regulations periodically.

13. Contact

13.1. Mr Tomas De Staic at the Department of Energy & Climate Change can answer any queries regarding the instrument, Tel: 0300 068 8042 or email: tomas.destaic@decc.gsi.gov.uk.