

2011 No. 765

CLIMATE CHANGE

**The Aviation Greenhouse Gas Emissions Trading Scheme
(Amendment) Regulations 2011**

<i>Made</i>	- - - -	<i>14th March 2011</i>
<i>Laid before Parliament</i>		<i>15th March 2011</i>
<i>Coming into force</i>	- -	<i>25th March 2011</i>

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

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

Accordingly the Secretary of State, in exercise of the powers conferred by section 2(2) of that Act, as read with paragraph 1A of Schedule 2 to the European Communities Act 1972^(c), makes the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Aviation Greenhouse Gas Emissions Trading Scheme (Amendment) Regulations 2011 and come into force on 25th March 2011.

(2) In these Regulations, “the 2010 Regulations” means the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010^(d).

Amendment of the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010

2. The 2010 Regulations are amended as follows.

3.—(1) In regulation 2—

(a) in the definition of “UK operator”, after “means” insert “(subject to regulation 2A)”; and

(a) S.I. 2008/301.

(b) 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). 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.

(c) 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.

(d) S.I. 2010/1996.

- (b) after the definition of “UKAS” insert—
- ““unlisted operator” means a person who is—
 - (a) not identified in the Commission list; and
 - (b) the operator or owner of an aircraft used to perform an aviation activity.”.
- (2) After regulation 2 insert—

“UK operator: power to designate

2A.—(1) This paragraph applies where the Secretary of State is satisfied that, under Article 18a(1) of the EU ETS Directive^(a), the United Kingdom is to be regarded as the administering Member State in respect of an unlisted operator (“P”).

(2) Where paragraph (1) applies Secretary of State must—

- (a) designate P as an operator to whom these Regulations apply; and
- (b) give notice to P of that designation.

(3) From the date of service of the notice under paragraph (2), P is to be treated as a UK operator for the purposes of these Regulations and of the 2009 Regulations.

(4) Before making a designation under paragraph (2), the Secretary of State must consult—

- (a) P;
- (b) the relevant regulator;
- (c) the relevant authority; and
- (d) such other persons as the Secretary of State considers appropriate.

(5) For the purposes of paragraph (4)—

- (a) the relevant regulator is the person who will be the regulator of P if the designation is made; and
- (b) the relevant authority is a person (other than the Secretary of State) who will then be the authority in relation to P.

(6) Consultation undertaken before the commencement of the Aviation Greenhouse Gas Emissions Trading Scheme (Amendment) Regulations 2011 constitutes as effective compliance with paragraph (4) as if undertaken after that commencement.

(7) A designation under paragraph (2)—

- (a) must (subject to paragraph (8)) be revoked by the Secretary of State if paragraph (1) no longer applies in relation to P, and
- (b) ceases to have effect once that P is identified in the Commission list,

but this is without prejudice to any specification of P in that list as an operator to be administered by the United Kingdom.

(8) A designation may not be revoked solely because P has ceased to perform an aviation activity.

(9) Paragraphs (2)(b), (3) and (4) apply to the revocation of a designation as they apply to the designation itself, except that the reference in paragraph (3) to being treated as a UK operator is to be read (subject to the proviso in paragraph (7)) as a reference to no longer being so treated.

(a) Article 18a was inserted by Directive 2008/101/EC of the European Parliament and of the Council (OJ No. L 8, 13.1.2009, p. 3).

Application to be designated as UK operator

2B.—(1) An unlisted operator (“Q”) may apply to the Secretary of State to be designated as a UK operator.

(2) Where such an application is made the Secretary of State must, after consulting the relevant persons—

- (a) designate Q in accordance with regulation 2A(1) and (2); or
- (b) refuse the application and give notice to Q of that refusal.

(3) For the purposes of paragraph (2) the relevant persons are—

- (a) the person who will be the regulator of Q if the designation is made;
- (b) a person (other than the Secretary of State) who will then be the authority in relation to Q; and
- (c) such other persons as the Secretary of State considers appropriate.

(4) If within 12 weeks of receiving the application the Secretary of State does not give notice to Q under paragraph (2)(b) or under regulation 2A(2)(b), the application is deemed to be refused.

(5) An application under this regulation must be in writing and be accompanied by evidence that the United Kingdom is to be regarded as the administering Member State in respect of Q.”.

4.—(1) In regulation 3(2) of the 2010 Regulations—

- (a) for “the UK operator” substitute “the person”; and
- (b) after “a UK operator” insert “or an unlisted operator”.

(2) In regulation 52—

(a) after paragraph (5) insert—

“(5A) A person may appeal to the Secretary of State where the Secretary of State has—

- (a) given a notice to that person under regulation 2A(2), or
- (b) refused an application made by that person under regulation 2B(1), by notice or deemed refusal under regulation 2B(2)(b) or (4),

and where such an appeal is made the Secretary of State must reconsider the decision in question and may affirm or quash the notice or deemed refusal.”;

- (b) in paragraph (7), for “(2) or (3)(a)” substitute “(2), (3)(a) or (5A)(b)”;
- (c) in paragraph (8), for “(4) or (5)” substitute “(4), (5) or (5A)(a)”.

(3) In regulation 53—

- (a) in paragraphs (1) and (2), for “paragraph (4)” substitute “paragraph (4) or (5)”;
- (b) after paragraph (2) insert—

“(2A) Where an appeal is brought under regulation 52(5A), the Secretary of State must appoint a person—

- (a) to exercise on the Secretary of State’s behalf, with or without payment, the function of determining the appeal; or
- (b) for the purpose of holding a hearing and making a report in relation to the appeal in accordance with paragraph 4 of Schedule 2 to the Greenhouse Gas Emissions Trading Scheme Regulations 2005(a) (as applied by paragraph (5) of this regulation).”;

- (c) at the end of paragraph (3) insert “or (2A)(a)”;
- (d) after paragraph (4) insert—

(a) S.I. 2005/925; Schedule 2 was amended by S.I. 2006/737 and 2007/3433.

“(5) Where an appeal against a notice or deemed refusal is brought under regulation 52(5A), Schedule 2 to the Greenhouse Gas Emissions Trading Scheme Regulations 2005 applies to that appeal as it applies to an appeal brought under regulation 33(3)(a) of those Regulations, but as if—

- (a) any reference (in whatever form) to the sending of documents to the regulator were omitted;
- (b) the reference in paragraph 1(2)(e) to a copy of any decision or notice were a reference to particulars of the notice or deemed refusal;
- (c) the reference in paragraph 2(1)(f) to the period of two months for the giving of notice of appeal were a reference to the period of 24 days beginning with the date that the notice or deemed refusal takes effect;
- (d) the reference in paragraph 3(3)(b) to the location of the installation concerned were omitted;
- (e) the reference in paragraph 3(3)(c) to describing the decision or notice were a reference to giving particulars of the notice or deemed refusal;
- (f) the reference in paragraph 4(4)(a) to a newspaper circulating in the locality in which the installation is operated were a reference to an appropriate international aviation publication; and
- (g) the reference in paragraph 4(10) to paragraph 4(5) of Schedule 3 were a reference to paragraph 4(5) of Schedule 4 to these Regulations.”.

(4) In regulation 55, after the existing provision (which becomes paragraph (1)) insert—

“(2) Paragraph (1) applies to information provided to the Secretary of State under regulation 2B(5) as it applies to information provided to a regulator under these Regulations; and for that purpose the reference in paragraph (1)(a)(ii) to being necessary for the regulator to perform its functions is to be read as a reference to being necessary for the Secretary of State to perform functions under regulation 2B.”.

(5) In regulation 60—

- (a) in paragraph (5)(a), after “2 to 7” insert “, as modified by paragraph (5A)”; and
- (b) after paragraph (5) insert—

“(5A) In regulation 2, in the definition of “UK operator”, after “means” insert “(subject to regulation 2A of the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010)”.”.

(6) In Schedule 4 to the 2010 Regulations—

- (a) in paragraph 1, in the definitions of “appointed person” and “appointment”, after “regulation 53(2)(a)” insert “or (2A)(a)”; and
- (b) after that provision (which becomes sub-paragraph (1)) insert—

“(2) In the case of an appointment under regulation 53(2A)(a), any reference in this Schedule to the appeal body is to be read as a reference to the Secretary of State.”;
- (c) in paragraph 4(1), for “the regulator or any person whose civil rights are to be determined in the appeal” substitute “any person whose civil rights are to be determined in the appeal or (except the case of an appointment under regulation 53(2A)(a) the regulator”;
- (d) at the end of paragraph 4(5)(c) insert “(or, in the case of an appointment under regulation 53(2A)(a), with that reference omitted)”; and
- (e) in paragraph 5(1), after “regulation 53(2)(a)” insert “or (2A)(a)”.

Greg Barker
Minister of State

Date 14th March 2011

Department of Energy and Climate Change

EXPLANATORY NOTE

(This note is not part of the Regulations)

Directive 2003/87/EC of the European Parliament and of the Council^(a) (“the EU ETS Directive”) established a scheme for greenhouse gas emission trading within the European Union, and was transposed in the United Kingdom by the Greenhouse Gas Emissions Trading Scheme Regulations 2005^(b). The EU ETS Directive was amended, in particular, by Directive 2008/101/EC of the European Parliament and of the Council^(c) (“the Aviation ETS Directive”) so as to include aviation activities in the scheme.

These Regulations amend the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010^(d) (“the 2010 Regulations”), which transpose the Aviation ETS Directive in the United Kingdom. That Directive was previously transposed in part by the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009^(e) (“the 2009 Regulations”), which were revoked by the 2010 Regulations with a number of savings and transitional provisions. In particular, by virtue of those provisions, Part 2 of the 2009 Regulations (which provides for applications for a free allocation of emission allowances) continues to have effect in relation to the first two trading periods of the scheme, namely 2012 and 2013 to 2020.

Article 3 of the EU ETS Directive, as amended, contains a definition of “aircraft operator”, and Article 18a(1) sets out criteria for determining which Member State should regulate the operator as its “administering Member State”. By Article 18a(3), the European Commission is required to publish and regularly update a list of aircraft operators, specifying the administering Member State for each one. The existing definition of “UK operator”, in regulation 2 of both the 2009 and the 2010 Regulations, has the effect that an operator who is not on the Commission’s list cannot be treated as a UK operator for the purposes of either set of Regulations.

Regulation 3(1) amends the definition of “UK operator” in regulation 2 of the 2010 Regulations to take account of the Secretary of State’s duty under the new regulation 2A (see below), and inserts a new definition of “unlisted operator”.

Regulation 3(2) inserts new regulations 2A and 2B. Regulation 2A gives the Secretary of State a duty in certain cases to designate a person as someone who is to be treated as a “UK operator” for the purposes both of the 2009 and the 2010 Regulations. The duty arises where the operator is not mentioned in the Commission’s list, but the Secretary of State is satisfied that the operator meets the criteria in Article 18a(1) for being administered by the United Kingdom. Before making a designation, the Secretary of State must consult the persons mentioned in regulation 2A(4). A designation must be revoked where the Secretary of State ceases to be so satisfied, and in any event ceases to have effect once the operator is included on the Commission’s list. Regulation 2B allows someone to apply to the Secretary of State to be designated under regulation 2A.

Regulation 4(1) makes consequential amendments to regulation 3 of the 2010 Regulations.

The amendments made by *regulation 4(2) and (3)* enable an appeal to be made against a designation (or revocation) made under the new regulation 2A, or against a refusal of an application under the new regulation 2B. Appeal is for reconsideration of the decision by the Secretary of State; but if such an appeal is made the Secretary of State must either appoint a person to determine the appeal, or appoint a person to hold a hearing and make recommendations.

Regulation 4(4) to (6) makes further consequential amendments to the 2010 Regulations.

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

(a) OJ No L 275, 25.10.03, p. 32.

(b) S.I. 2005/925, amended by S.I. 2005/2903, 2006/737, 2007/465, 2007/1096, 2007/3433 and 2010/1513.

(c) OJ No. L 8, 13.1.2009, p. 3.

(d) S.I. 2010/1996.

(e) S.I. 2009/2301.

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 EU ETS Directive is annexed to that Explanatory Memorandum.

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