

# Guidance on Penalties under the Climate Change Response Act 2002

16 December 2020

The New Zealand Emissions Trading Scheme (ETS) is the primary method for New Zealand to meet international obligations to reduce greenhouse gas emissions.

The Environmental Protection Authority (EPA) administers the ETS and operates the New Zealand Emissions Trading Register. The Ministry for Primary Industries (MPI) manages the ETS for forestry under delegation from the EPA.

Accurate and timely reporting of emissions and removal activities is critical for safeguarding the integrity of the ETS, and to help New Zealand meet its emission reduction targets.

To improve the compliance regime of the ETS, recent changes have been made to the penalties that apply under the Climate Change Response Act 2002 (CCRA).<sup>1</sup> This document describes the changes and provides guidance on how the EPA and MPI will apply these penalties.<sup>2</sup>

Our aim is to provide guidance to participants<sup>3</sup> so they are aware of their obligations and have the necessary information to comply.

## Purpose of this guidance

The guidance describes:

- the circumstances in which penalties apply under the CCRA<sup>4</sup>
- the factors to be considered when applying and calculating penalties.

## Scope

This guidance applies from 1 January 2021.

This guidance does **not** apply to a person who, before **1 January 2021**<sup>5</sup> —

- fails to surrender or repay units by the due date
- fails to submit an emissions return or annual or closing allocation adjustment
- submits an incorrect emissions return, allocation application, or allocation adjustment.

The requirements as they were on 31 December 2020 will apply to these circumstances.

<sup>1</sup> <https://www.mfe.govt.nz/more/briefings-cabinet-papers-and-related-material-search/cabinet-papers/nz-ets-tranche-two-1>

<sup>2</sup> Throughout these guidelines reference is made to the EPA. MPI is responsible for undertaking several functions in relation to forestry participants, and where relevant, references to the EPA are also intended to include MPI.

<sup>3</sup> For the purposes of this guidance, the term “participant” is intended to include all references to person as stated in sections 134, 134A-D of the CCRA.

<sup>4</sup> Relates to penalties applied under sections 134, 134A-D of the CCRA.

<sup>5</sup> Schedule 1AA of the CCRA.

A further exception from this guidance also applies to failures to surrender or repay units where the obligation results from certain forestry activities. This is described in appendix 1.

## The Penalties

There are two categories of penalties:<sup>6</sup>

- a 'surrender/repayment penalty' which applies where a person fails to surrender or repay units by the due date<sup>7</sup>
- 'reporting penalties' which apply where a person:
  - fails to submit an emissions return or allocation adjustment by the due date<sup>8</sup>
  - submits an incorrect emissions return or provides incorrect information in an allocation application or adjustment<sup>9</sup>.

If a person fails to submit an emissions return or an allocation adjustment by the due date, we will give a notice requiring the emissions return or allocation adjustment to be submitted within 20 working days. If the person submits within that period, no penalty will apply.

## How penalties are calculated

Where a penalty applies, the amount is calculated using the calculations set out in the CCRA.<sup>10</sup> The calculations are included in appendix 2, and are summarised below.

### Surrender/repayment penalty

For penalties resulting from a failure to surrender or repay units by the due date,<sup>11</sup> the calculation is:

- the number of units the person failed to surrender or repay, multiplied by
- the price in dollars of carbon per tonne on the due date, multiplied by
- a factor of three.

There is no ability to reduce the penalty. The person is also required to surrender or repay the units in addition to paying the penalty.

### Reporting penalties

For reporting penalties the calculation is:

- one of the following, depending on the penalty being calculated:
  - for penalties for failing to submit an emissions return,<sup>12</sup> the person's emissions or removals in tonnes
  - for penalties for failing to submit allocation adjustment by the due date,<sup>13</sup> the number of units that the person is liable to surrender/repay or is entitled to receive

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<sup>6</sup> <https://www.mfe.govt.nz/reforming-nzets-compliance-and-infringements>

<sup>7</sup> Section 134 of the CCRA.

<sup>8</sup> Section 134A and section 134B (respectively) of the CCRA.

<sup>9</sup> Section 134C and section 134D (respectively) of the CCRA.

<sup>10</sup> Sections 134, 134A, 134B, 134C and 134D of the CCRA.

<sup>11</sup> Section 134 of the CCRA.

<sup>12</sup> Section 134A of the CCRA

<sup>13</sup> Section 134B of the CCRA

- for penalties for submitting an incorrect emissions return,<sup>14</sup> the lesser of: the person's emissions/removals as amended; and the difference between the emissions/removals before and after amendment
- for penalties for providing incorrect information in an allocation application/adjustment,<sup>15</sup> the lesser of: the total number of units the person is liable to surrender/repay or is entitled to receive under the changed decision; and the number of units that the person is now liable to surrender/repay or is no longer liable to surrender/repay

multiplied by;

- the price in dollars of carbon per tonne on the due date; multiplied by
- a culpability factor.

If a person:

- fails to submit an emissions return,<sup>16</sup> or
- submits an incorrect emissions return,<sup>17</sup>

we may assess the matters that should have been in the emissions return<sup>18</sup> or amend the emission return.<sup>19</sup> The outcome of the assessment or amendment will inform the calculation of any penalty.

If a person:

- fails to submit an allocation adjustment,<sup>20</sup> or
- submits incorrect information in an allocation application or adjustment,<sup>21</sup>

we will make a decision on the allocation adjustment<sup>22</sup> or reconsider a decision on an allocation application or adjustment.<sup>23</sup> The outcome of the decision or reconsideration will inform the calculation of any penalty.

Before applying a reporting penalty, we must be satisfied that a person did not take 'reasonable care'; ie, if a person is considered to have taken 'reasonable care', a penalty will not be applied.

## What is the culpability factor?

The culpability factor, in the calculation for reporting penalties, is divided into three levels linked to a person's behaviour (table 1). The levels are, a person:

- did not take reasonable care

<sup>14</sup> Section 134C of the CCRA

<sup>15</sup> Section 134D of the CCRA

<sup>16</sup> Section 134A of the CCRA. Note: if a person fails to submit an emissions return by the due date, a notice will be given requiring the person to submit the emissions return within 20 working days. The notice also informs the person that if the return is not submitted within this period the EPA will make an assessment under section 121 of the CCRA and a penalty may apply. If the emissions return is not submitted within the 20 working days, the EPA will proceed with the assessment under section 121.

<sup>17</sup> Section 134C of the CCRA.

<sup>18</sup> Under section 121 of the CCRA.

<sup>19</sup> Under section 120 of the CCRA.

<sup>20</sup> Section 134B of the CCRA. Note: if a person fails to submit an allocation adjustment by the due date, a notice will be given requiring the person to submit the allocation adjustment within 20 working days. The notice also informs the person that if the allocation adjustment is not submitted within this period the EPA will make a decision under section 86B(4) of the CCRA and a penalty may apply. If the allocation adjustment is not submitted within the 20 working days, the EPA will proceed with the decision under section 86B(4).

<sup>21</sup> Section 134D of the CCRA.

<sup>22</sup> Under section 86B(4) of the CCRA.

<sup>23</sup> Under section 86C of the CCRA.

- was grossly careless
- knowingly failed.

The amount of the penalty depends on the level of culpability. The penalty increases as the level of culpability moves from ‘person did not take reasonable care’, through to ‘person knowingly failed’.

The culpability factor also considers whether the person voluntarily disclosed to the EPA the failure (eg, to submit an emissions return or allocation adjustment), or error (eg, that the emissions return or allocation adjustment was incorrect).

If the culpability factor is lower, the amount of the penalty will be less.

**Table1: Culpability factors\***

Person’s level of culpability*	Did person voluntarily disclose failure or error to EPA before being informed of it by EPA?	Culpability factor**
Person did not take reasonable care	Yes	0.1
	No	0.2
Person was grossly careless	Yes	0.2
	No	0.4
Person knowingly failed	Yes	1.0
	No	1.0

\* As listed in sections 134A, 134B, 134C and 134D of the CCRA for reporting penalties. The culpability factor for a participant is the greatest culpability factor that the EPA is satisfied applies in this table.

\*\* The culpability factor is part of the arithmetical equation that determines the overall penalty.

## How we decide the culpability factor

We will consider the circumstances of each case and will make a decision taking into account the factors described below. The factors are not exhaustive, not all factors will be relevant in every circumstance, nor is any one factor determinative.

### Reasonable care

In determining whether reasonable care was taken, we will ask what a reasonable person in the shoes of the participant would have done. Factors we will consider include, but are not limited to:

- the complexity of the legal requirements

For example, if an emissions return includes an error, and if the error involves an established, relatively straightforward requirement of the CCRA, that error might suggest a failure to take reasonable care.

- the likelihood and seriousness of the consequences regarding the failure or error

For example, not taking appropriate steps where the consequences of failure or error are serious and/or where it is likely that the failure or error will occur, will support a finding of failure to take reasonable care.

- whether appropriate precautions to ensure compliance were taken given the size and nature of the business

For example, it would be reasonable for a larger business to have an employee who is responsible for emissions reporting or to seek expert advice when required.

- the record keeping practices and procedures

For example, a failure to keep appropriate records or to have appropriate procedures in place will support a finding of failure to take reasonable care.

- expert advice relied on, or the failure to obtain expert advice where a reasonable person would have done so
- past investigations or compliance issues

For example, whether the person has failed in this particular way before which will support a finding of failure to take reasonable care.

- arithmetical errors

The presence of these errors may indicate a failure to take reasonable care, but alone are not conclusive.

### Gross carelessness

In determining whether a person was grossly careless, we will again ask what a reasonable person would have done in the shoes of the participant. There must have been conduct that created a high risk of non-compliance, where the risk would have been foreseen by a reasonable person in the circumstances. The carelessness must have been flagrant. In addition to those factors relevant to the failure to take reasonable care, relevant factors for gross carelessness that we will consider, include but are not limited to:

- the participant's circumstances, including their skills, experience and understanding of the applicable legal requirements
- the degree of risk taken

For example, if a reasonable person in the shoes of the participant would have known that the conduct would likely result in an incorrect emissions return, that would support a finding of gross carelessness.

- the seriousness of the consequences if the risk eventuated

For example, if a reasonable person in the shoes of the participant would have foreseen that if the conduct led to an inaccurate emissions return it would lead to a large discrepancy in reported emissions, this would support a finding of gross carelessness.

### Knowing failure

We will consider whether the person knew or appreciated the risk that the emissions return or allocation adjustment would be late or incorrect, but decided to continue regardless. Relevant factors include but are not limited to:

- if the 'person' is a body corporate, whether there is evidence that a director or employee of the body corporate had knowledge of the risk that the return would be late or incorrect, and whether that employee is sufficiently senior that their knowledge can be attributed to the body corporate
- where the person failed to submit an emissions return by the due date, whether for example, there is evidence that the person chose not to file the return to avoid a requirement to surrender emissions units.

### Voluntary disclosure

For voluntary disclosure to be taken into account when assessing the culpability factors, the disclosure must be made before we have informed the person of the failure or error.

## Accruing interest on a penalty

Where a penalty is applied, we will give a notice informing the person of the amount to be paid. The person will have **20 working days** to pay.<sup>24</sup> If payment is not received within this time period, interest will accrue from the date the penalty was due (as specified in the notice) until the penalty and any interest is paid in full.<sup>25</sup>

Where a penalty is applied for failing to surrender or repay units by the due date, interest will accrue until the penalty is paid in full **and** the outstanding units have been surrendered or repaid.<sup>26</sup>

## Deferred payment arrangements for penalties

A person may request to enter into a deferred payment arrangement.<sup>27</sup> We will consider all requests, and the person's financial position on the date the request was made.

Interest will accrue from the date the penalty was due (specified in the notice) until the penalty and any interest is paid in full.<sup>25</sup>

## Request for review of decision (right of review)

A person who is affected by, and dissatisfied with, a penalty decision of the EPA<sup>28</sup> may request that we review our decision.<sup>29</sup>

## Publication of non-compliance

For each reporting year, we are required to publish the names of people issued a penalty during that year and for any penalty issued in the previous year that is still outstanding<sup>30</sup>.

The information published includes the name of the person the penalty was issued to, the amount and the date the penalty was due or paid in full. These details will be published for all penalties relating to failure to surrender or repay units. For penalties relating to reporting failures, this information will be published where the behaviour was in the higher culpability levels of 'grossly careless' and 'knowingly failed'.<sup>31</sup>

## Further information

If you have questions, contact us at [emissionstrading@epa.govt.nz](mailto:emissionstrading@epa.govt.nz) or phone 0800 climate (option 2) or 0800 254 628 (option 2).

If you have questions related to forestry, contact MPI at [climatechange@mpi.govt.nz](mailto:climatechange@mpi.govt.nz) or phone 0800 climate (option 3) or 0800 254 628 (option 3).

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<sup>24</sup> Under section 135 of the CCRA.

<sup>25</sup> Under section 137(2) of the CCRA. Note: under section 137(6) of the CCRA, the EPA may remit all or part of an amount of interest that has accrued if the EPA is satisfied that it would be manifestly unfair or unjust to impose all, or that part, of the amount.

<sup>26</sup> Under section 137(3) of the CCRA.

<sup>27</sup> Under section 135A of the CCRA.

<sup>28</sup> Under sections 134A, 134B, 134C and 134D of the CCRA.

<sup>29</sup> Under section 144 of the CCRA.

<sup>30</sup> Under section 89(1A) of the CCRA and in relation to failures or errors made before 1 January 2021 according to Schedule 1AA of the CCRA.

<sup>31</sup> Qualifying penalty as described in section 89(1C) of the CCRA.

# Appendix 1

Clause 17 of Schedule 1AA provides an exception for the failure to surrender or repay units where the obligation to surrender or repay units is derived from forestry activities and where certain other criteria apply (as described below). This guidance does not apply to these circumstances.

## **17 Penalties for forestry activities before 2023 with liability for lower amounts**

1. This clause applies if—
  - a. new section 134 would otherwise apply to the person (because they have failed to surrender or repay units by a due date); and
  - b. that liability to surrender or repay the units resulted from—
    - i. a forestry activity carried out before 1 January 2023; and
    - ii. 1 or more of the following things in relation to the forestry activity:
      - A. an emissions return with an emissions return period and under which the average liability per year of that period is less than 25,000 units:
      - B. an emissions return without an emissions return period and under which the liability is less than 25,000 units:
      - C. any other requirement in this Act (for example, the requirement to repay units under section 125 or any requirement to surrender units equal to a unit balance) and under which the liability is less than 25,000 units.

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## Appendix 2: Penalty calculation

Penalty (relevant section of CCRA)	Calculation	
Penalty for failing to surrender or repay units by due date (section 134)	$3 \times a \times b$	where— <b>a</b> is the number of units that the person failed to surrender or repay by the due date <b>b</b> is the price, in dollars, of carbon per tonne on the due date, as set by or in accordance with regulations made under section 30W
Penalty for failing to submit emissions return by due date (section 134A)	$a \times b \times c$	where— <b>a</b> is the person's emissions or removals in tonnes (whichever applies) <b>b</b> is the price, in dollars, of carbon per tonne on the due date, as set by or in accordance with regulations made under section 30W <b>c</b> is the culpability factor (see table 1)
Penalty for failing to submit annual or closing allocation adjustment by due date (section 134B)	$a \times b \times c$	where— <b>a</b> is the number of units that the person— (i) is liable to surrender or repay; or (ii) is entitled to receive <b>b</b> is the price, in dollars, of carbon per tonne on the due date, as set by or in accordance with regulations made under section 30W <b>c</b> is the culpability factor (see table 1).
Penalty for submitting incorrect emissions return (section 134C)	$a \times b \times c$	<b>Activities relating to post-1989 forestry</b> where— <b>a</b> is the lesser of— a) the person's emissions or removals under the emissions return, as amended; and b) the difference between (whichever applies)— i. the person's emissions under the emissions return before and after amendment; or ii. the person's removals under the emissions return before and after amendment; or iii. the person's emissions and removals under the emissions return before and after amendment, with the emissions converted to a negative number <b>b</b> is the price, in dollars, of carbon per tonne on the due date, as set by or in accordance with regulations made under section 30W

		<p><b>c</b> is the culpability factor (see table 1).</p> <p><b>Other activities</b></p> <p>where—</p> <p><b>a</b> is the lesser of—</p> <ul style="list-style-type: none"> <li>a) the person’s emissions or removals under the emissions return, as amended; and</li> <li>b) whichever of the following applies: <ul style="list-style-type: none"> <li>i. the difference between the person’s emissions under the emissions return before and after amendment; or</li> <li>ii. the difference between the person’s removals under the emissions return before and after amendment</li> </ul> </li> </ul> <p><b>b</b> is the price, in dollars, of carbon per tonne on the due date, as set by or in accordance with regulations made under section 30W</p> <p><b>c</b> is the culpability factor (see table 1).</p>
<p>Penalty for providing incorrect information in allocation application or adjustment</p> <p>(section 134D)</p>	<p><math>a \times b \times c</math></p>	<p>where—</p> <p><b>a</b> is the lesser of—</p> <ul style="list-style-type: none"> <li>a) the total number of units the person is liable to surrender or repay, or is entitled to receive, under the decision, as changed; and</li> <li>b) the number of units that the person— <ul style="list-style-type: none"> <li>i. is now liable to surrender or repay as additional units, or is no longer entitled to receive, as a result of the change (if subsection (2)(a) applies); or</li> <li>ii. is no longer liable to surrender or repay, or is now entitled to receive as additional units, as a result of the change (if subsection (2)(b) applies)</li> </ul> </li> </ul> <p><b>b</b> is the price, in dollars, of carbon per tonne on the due date, as set by or in accordance with regulations made under section 30W</p> <p><b>c</b> is the culpability factor (see table 1).</p>

## Disclaimer

The information in this document is guidance only and is not a substitute for, or in any way an alteration to, New Zealand law, or other official requirements. It does not constitute legal advice, and users should seek advice from qualified professionals before taking any action as a result of information obtained from this document.

Examples included in this guidance are illustrative only. Each matter must be evaluated on its facts. The factors noted in this guidance are not exhaustive, not all factors will be relevant in every circumstance, nor is any one factor determinative.