

Final Business and Regulatory Impact Assessment

Title

The Reservoirs (Enforcement etc.) (Scotland) Order 2016 ("the Order")

Purpose and intended effect

This Business and Regulatory Impact Assessment has been prepared to assess the costs and benefits of introducing the Reservoirs (Enforcement etc.) (Scotland) Order 2016.

- **Background**

Reservoirs in Scotland with a capacity of 25,000 or more cubic metres are currently regulated by local authorities under the Reservoirs Act 1975 ("the 1975 Act").

From 1 April 2016, these reservoirs will instead be regulated by SEPA under a new regime under Part 1 of the Reservoirs (Scotland) Act 2011 ("the 2011 Act"). The new regime will improve the regulation of reservoirs in Scotland by moving to a system which takes account of the risks that each reservoir poses to public safety.

The new regime is being commenced in two stages so that larger reservoirs with capacity of 25,000 cubic metres or more are brought under the new regime from 1 April 2016, whereas smaller reservoirs with capacity of between 10,000 and 25,000 cubic metres are being brought under the new regime at a later date.

Stage 1 will apply to some 670 controlled reservoirs. Over half of all controlled reservoirs in Scotland are owned by the major utilities: Scottish Water, SSE and Scottish Power. A number of reservoirs are owned by governmental or quasi-governmental bodies, namely local authorities, Scottish Canals and the Forestry Commission. Approximately 250 reservoirs are owned by a variety of private estates, individuals, trusts and community groups such as angling clubs.

A number of sections in the 2011 Act have been commenced and Regulations which create a detailed framework for the implementation of the 2011 Act have already been brought into force.

The next stage of the implementation process is to bring forward an Order to provide for civil enforcement measures that can be used by SEPA. Currently, under the 1975 Act, local authorities have limited enforcement options available to them. They can issue an enforcement notice requiring undertakers to take action where it appears that the undertaker has not complied with certain sections of the 1975 Act.

Alternatively, if the undertaker fails to comply with an enforcement notice, they can be prosecuted for an offence under the 1975 Act. The maximum fine on summary conviction for certain offences under the 1975 Act is £10,000, but fines tend to be much lower in practice.

The 2011 Act sets out the actions that are considered to be offences in terms of non-compliance with the 2011 Act and the penalties that can be imposed on conviction. It also allows for enforcement notices to be issued for certain offences. There are provisions in the Regulatory Reform (Scotland) Act 2014 which give SEPA additional powers to impose fixed and variable financial penalties in relation to offences under the 2011 Act and to accept enforcement undertakings if the requirements of the 2011 Act are not complied with.

In addition, the 2011 Act enables the Scottish Ministers to, by order, confer extra powers on SEPA to enforce the new regime by means of:

stop notices - to prohibit a reservoir manager from carrying on an activity until specified steps have been taken,

restraint notices - to require a reservoir manager to take steps within a specified period to secure that an offence does not continue or recur, or

restoration notice - to require a reservoir manager to take steps within a specified period to secure that the position is so far as possible restored to what it would have been if an offence had not been committed.

The Order confers these extra powers on SEPA, and makes connected provision for the recovery of expenses reasonably incurred by SEPA. The extra powers will provide SEPA with a better range of enforcement tools to tackle non-compliance and help create a level playing field for business. The Order also makes further provision in relation to reviews and appeals under the 2011 Act. The proposal is that appeals will be administered by the Scottish Government's Directorate of Planning and Environmental Appeals.

- **Objective**

The objective is to introduce proportionate, more effective sanctions which will be fairer to reservoir managers who are practicing a good approach to complying with the legislation and which will be tougher on those who are not.

- **Rationale for Government intervention**

The aim of the new regulatory regime being introduced under the 2011 Act is to protect public safety. The Scottish Government believes that this would be best achieved by trying to change non-complaint behaviour rather than by pursuing criminal prosecution.

SEPA will be expected to take a proportionate view of each offence committed under the 2011 Act and will be expected to consider the full range of civil sanctions before deciding whether an offence is serious enough to merit the use of stop notices, Enforcement Notices and criminal prosecution. Criminal prosecution remains an option to be considered for more serious or repeat offences.

The Order provides further enforcement tools for SEPA to use when regulating

reservoir safety and provide a route of appeal against statutory notices provided for under the Order and the 2011 Act.

Consultation

- **Within Government**

SEPA and the Scottish Government's Directorate of Planning and Environmental Appeals were consulted on the draft Order. Feedback from the discussions and internal consultation informed the development of the proposals set out in the consultation document

- **Public Consultation**

The 2011 Act requires that before making an order in relation to stop notices and enforcement notices the Scottish Ministers consult such organisations which are representative of persons substantially affected by the making of the proposed Order and any other persons as the Scottish Ministers consider appropriate.

A draft of the Order was subject to a formal public consultation between 28 September 2015 and 4 December 2015. All reservoir owners affected by the proposals were consulted. SEPA, the Institution of Civil Engineers, Scottish Water and other industry representatives were also separately consulted. 14 responses were received and most respondents were content with the proposals.

A number of drafting changes were to the Order in light of the comments received from SEPA and other consultees. It was noted by a couple of consultees that stop notices and further enforcement measures were not applicable for all offences under the Act and the Order was amended so that that stop notices and further enforcements could only be issued for certain specific offences

- **Business**

All reservoir owners affected by the proposals were consulted during the process.

Options

Option 1 - Do nothing

Option 2 – Introduce the Reservoirs (Enforcement etc.) (Scotland) Order 2016

Sectors and groups affected

Reservoir managers, reservoir owners, reservoir panel engineers, companies employing reservoir panel engineers and SEPA will be affected by these proposals.

Benefits

Option 1 - Do nothing

There are no benefits in maintaining the status quo.

Option 2 – Introduce the Reservoirs (Enforcement etc.) (Scotland) Order 2016

The majority of the supporting legislation which transfers the regulatory powers for reservoir safety to SEPA has already been commenced. Allowing SEPA to issue stop notices and enforcement notices provides them with a wider range of tools as part of a graduated and proportionate approach to enforcement. It will ensure sufficient flexibility to deal appropriately with the range of offences arising under the 2011 Act.

Improved enforcement creates a level playing field and will benefit those businesses who typically comply with regulations. This is because companies with a less desirable approach to compliance are more likely to have had reduced operating costs as a result of not complying with legislation.

The proposals also provide a route of appeal against any statutory notices provided for under the Order and the 2011 Act. An appeals system is an integral and essential part of any system of sanctions.

Costs

Option 1 - Do nothing

There are no additional costs in maintaining the status quo.

Option 2 – Introduce the Reservoirs (Enforcement etc.) (Scotland) Order 2016

Costs to Business

An Equality Impact Assessment and BRIA were prepared for the Reservoir (Scotland) Bill.

<http://www.gov.scot/Topics/People/Equality/18507/EQIASearch/ReservoirSafety>

<http://www.gov.scot/Topics/Environment/Water/16922/resconsult/BRIA>

Currently, under the 1975 Act, local authorities have limited enforcement options available to them. They can issue an enforcement notice requiring undertakers to take action where it appears that the undertaker has not complied with certain sections of the 1975 Act. Alternatively, or if the reservoir manager fails to comply with an enforcement notice, they can be prosecuted for an offence under the 1975 Act. The maximum fine on summary conviction, for certain offences under the 1975 Act is £10,000 but fines tend to be much lower in practice.

Local authorities currently issue a small number of warning letters and enforcement notices each year to reservoir managers to bring them into compliance with the 1975 Act but rarely proceed to criminal prosecution.

It is intended that SEPA will take over the full regulatory function from local authorities in Scotland in April 2016. The 2011 Act makes available to SEPA a

number of enforcement and sanctioning tools in addition to enforcement notices and criminal prosecution.

There are provisions in the Regulatory Reform (Scotland) Act 2014 which also gives SEPA powers to impose fixed and variable financial penalties in relation to offences under the 2011 Act and to accept enforcement undertakings if the requirements of the 2011 Act are not complied with.

SEPA will be expected to take a proportionate view of each offence committed under the 2011 Act and will consider the full range of civil sanctions before deciding whether an offence is serious enough to merit the use of enforcement notices and criminal prosecution. The aim of this approach to enforcement action is to change non-complaint behaviour rather than pursuing criminal prosecution. There will be no costs on reservoir owners who comply with the 2011 Act.

The main costs will be on those who are non-compliant with the 2011 Act and on whom SEPA imposes an enforcement measure as a result of their action or inaction. The Order will confer powers on SEPA to enable it to secure compliance with the 2011 Act in an effective and proportionate way. The Order is not expected to impose any costs on reservoir managers beyond those that reservoir managers would be expected to incur in complying with the requirements of the 2011 Act.

There may be direct costs on reservoir managers on whom the measures are served in terms of the administrative costs of co-operating with any sanctions and of taking any measures required by the sanctions. However, these are expected to be similar to the costs associated with enforcement action under the 1975 Act.

Additional costs to reservoir managers may arise from measures taken as a result of restoration notices or, where stop notices are used, actions taken to stop an activity which presents a significant risk of causing an uncontrolled release of water. The impact of a stop notice or restoration notice being given will depend on the individual circumstances and is difficult to predict. These costs will only fall on those reservoir managers who are taking actions which affect the safety of the reservoir or who have undertaken some action that is in breach of the 2011 Act.

The 2011 Act provides for rights to appeal to the Scottish Ministers against certain enforcement decisions and notices. The proposal is that appeals to the Scottish Ministers under provisions in the Order will be administered by the Scottish Government's Directorate of Planning and Environmental Appeals. There is no fee for lodging an appeal and parties to environmental appeals are expected to pay their own expenses. Most environmental appeals are determined by written submission which is usually the quickest, simplest and most cost effective way of deciding an appeal.

There are currently between five to ten appeals per year in relation to regulatory decisions made by SEPA under other environmental legislation. The number of appeals expected under the Order is likely to be no more than 1 or 2 per year.

The costs of undertaking enforcement action by SEPA - warning letters, caution letters, Procurator Fiscal files etc. was included in the BRIA prepared for the Bill.

This estimated that the additional enforcement work as a result of commencing the 2011 Act would cost in the range of £15,000 - £32,000. This Order will enable SEPA to use a broader range of enforcement action and, therefore, to be more effective as a regulator. There will be no further costs on SEPA as a result of introducing the Order.

Scottish Firms Impact Test

Businesses were invited to comment on the implications of the Order during the formal consultation process. Small businesses raised concerns about the implications of the new regime that was being introduced under the 2011 Act and the implications in relation to the change of regulator from local authorities to SEPA. Concerns were primarily about the cumulative impact of the changes and no specific impacts as a result of the provisions to allow for stop notices or other enforcement measures in the Order were identified. It was recognised by businesses that the main costs will be on those who are non-compliant with the 2011 Act and on whom SEPA imposes an enforcement measure as a result of their action or inaction.

The Scottish Government will continue to work closely with stakeholders to ensure that they are provided with guidance and information on the new regime. In particular, SEPA is required to publish guidance about the use of the powers conferred on it by the Order.

Competition Assessment

Reservoirs are managed for a variety of purposes including drinking water, energy production, fishing, tourism and flood risk management.

No effects on competition were identified and it remains the Scottish Government's view that the legislation will have no impact upon commercial competition.

Test run of business forms

The Order will not introduce any new business forms.

Legal Aid Impact Test

Option 1 - Do nothing

There will be no impact on the Legal Aid fund with this option.

Option 2 – Introduce the Reservoirs (Enforcement etc.) (Scotland) Order 2016

Introducing the Order will provide SEPA with further enforcement powers which are designed to ensure SEPA can carry out its regulatory function effectively to ensure that reservoirs in Scotland pose minimum risk to public safety.

The impact of these enforcement measures in relation to the application for legal aid from individuals is likely to be very limited. This is because most of the controlled reservoirs which are currently regulated under the 1975 Act belong to large organisations which own multiple sites. Over half of all controlled reservoirs are

owned by the major utilities: Scottish Water, SSE and Scottish Power. A number of reservoirs are owned by governmental or quasi-governmental bodies, namely local authorities, Scottish Canals and the Forestry Commission.

Approximately 250 reservoirs are owned by a variety of private estates, individuals, trusts and community groups such as angling clubs. It is expected that the use of stop notices and other enforcement measures will be rare. The proposals include an appeal mechanism whereby reservoir managers can appeal to Scottish Ministers. However, if an appeal fails, the reservoir manager may seek to overturn the decision through the court system and may seek Legal Aid to pursue this aim.

Enforcement, sanctions and monitoring

SEPA will be the enforcement authority for the proposed regime. Scottish Ministers will remain responsible for intervening where it is evident that legislation is not being complied with.

Implementation and delivery plan

It is proposed that the Order will come into force on 1st April 2016 when it is intended that SEPA will assume its regulatory role for reservoirs in Scotland.

- **Post-implementation review**

The Scottish Government is committed to reviewing this legislation within 10 years of it coming in to force to ensure that it is fit for purpose and fulfils its intention to provide a proportionate regulatory framework for reservoir safety in Scotland.

Summary and recommendation

The recommended option is option 2 - Introduce the Reservoirs (Enforcement etc.) (Scotland) Order 2016.

This option is recommended as it provides the framework which allows SEPA to carry out its full regulatory function under the 2011 Act while ensuring that enforcement measures are proportionate and cost effective.

Declaration and publication

I have read the business and regulatory impact assessment and I am satisfied that, (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

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Minster for the Environment, Climate Change and Land Reform

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