

POLICY NOTE

THE RESERVOIRS (ENFORCEMENT ETC.) (SCOTLAND) ORDER 2016

S.S.I. 2016/161

1. The above instrument is made in exercise of the powers conferred by, in particular, sections 69(7) and (8), 73 to 76, 82 to 85, 87, 88 and 114(2)(b) of the Reservoirs (Scotland) Act 2011 and sections 20 to 32, 53 and 58(1) and (2) of the Regulatory Reform (Scotland) Act 2014. The instrument is subject to the affirmative procedure.

Policy Objectives

2. The Reservoirs (Enforcement etc.) (Scotland) Order 2016 (“the Order”) confers powers on the Scottish Environment Protection Agency (“SEPA”) so that it can enforce Part 1 of the Reservoirs (Scotland) Act 2011 (“2011 Act”) in an effective and proportionate way.
3. From 1 April 2016, reservoirs in Scotland with a capacity of 25,000 or more cubic metres will be regulated by SEPA under a new regime provided for in Part 1 of the 2011 Act. For a transitional period, the new regime will apply only to reservoirs with a capacity of 25,000 or more cubic metres. At some point, the new regime will be extended so that it also applies to reservoirs with a capacity of between 10,000 and 25,000 cubic metres.
4. Under the new regime, SEPA will regulate each reservoir having regard to the risk that each reservoir poses to public safety. In particular, SEPA will be responsible for ensuring that reservoir managers comply with the duties imposed on them under the new regime.
5. The Order confers powers SEPA to enforce Part 1 of the 2011 Act by means of stop notices and further enforcement measures, and the recovery of expenses. In particular:

Stop notices

- Schedule 1 to the Order empowers SEPA to, by “stop notice”, prohibit a reservoir manager of a controlled reservoir from carrying on an activity specified in the notice until the reservoir manager has taken steps specified in the notice.
- A stop notice may only be given if SEPA reasonably believes that the activity presents a significant risk of causing an uncontrolled release of water from the reservoir or that it involves or is likely to involve the commission of certain specific offences under the Act.
- If a reservoir manager suffers loss as a result of a stop notice which is later withdrawn by SEPA or is quashed on appeal then the reservoir manager make a claim for compensation.
- Schedule 4 to the Order also amends the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 (“the 2015 Order”) so that, where a reservoir manager fails to comply with a stop notice, SEPA may exercise its powers under the

2015 Order to impose fixed or variable monetary penalty, or to accept an enforcement undertaking.

Further enforcement measures

- Schedule 2 to the Order empowers SEPA to, by “restoration notice” or “restraint notice”, impose on a reservoir manager of a controlled reservoir further enforcement measures in relation to an offence under section 42(1)(e) of the Act (failure to comply with a preliminary certificate or a final certificate).
- A restoration notice or restraint notice may only be given if SEPA is satisfied beyond a reasonable doubt that the reservoir manager had committed that particular offence.
- A restoration notice is a notice which requires particular steps to be taken within a set period to secure that the position is so far as possible restored to what it would have been if the offence under section 42(1)(e) of the Act had not been committed.
- A restraint notice is a notice which requires particular steps to be taken within a set period to secure that the offence under section 42(1)(e) of the Act does not continue or recur.
- SEPA may accept an undertaking from the reservoir manager as to action to be taken by the manager to benefit any person affected by the offence under section 42(1)(e) of the Act. Where SEPA accepts any such undertaking, it must take this into account before making any final decision whether to impose further enforcement measures.

Recovery of expenses

- Schedule 3 to the Order enables SEPA to require a reservoir manager who has been given a stop notice or is subject to a further enforcement measure to pay the amount of any expenses reasonably incurred by SEPA in relation to the giving of the notice or imposition of the measure. This is consistent with the ‘polluter pays’ principle.
6. Schedules 5 and 6 of the Order make further provision in relation to reviews and appeals under the 2011 Act. Appeals to Scottish Ministers may be determined on the basis of written submissions or oral hearings. The Scottish Ministers may appoint persons to administer and report on aspects of the appeals, albeit the Scottish Government's Directorate for Planning and Environmental Appeals is likely to administer most appeals.
 7. The Order also makes ancillary provision in relation to notices, guidance, recovery of payments and the payment of penalties. In particular, SEPA is required to publish guidance about the use of these powers conferred on it by the Order.

Consultation

8. The policy proposals were discussed with key stakeholders before the Order was drafted. A draft of the Order was subject to a formal public consultation. All reservoir managers 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.

9. A number of drafting changes were made 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.

Impact Assessments

10. An Equality Impact Assessment (EQIA) was carried out prior to introduction of the Reservoirs (Scotland) Bill. No equality impacts were identified. A copy of the EQIA is available on the Scottish Government website ([EQIA](#)).

Financial Effects

11. A business and regulatory impact assessment has been prepared. The findings indicate that any additional burden upon business, charities or voluntary bodies is not likely to be significant. The Order confers 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.
12. There may costs on reservoir managers on whom stop notices or further enforcement measures are imposed. However, these will be broadly similar to the costs associated with enforcement action taken by local authorities under the Reservoirs Act 1975.
13. This Order enables SEPA to use a broader range of enforcement action, and will allow SEPA to be more effective as a regulator. There will be no additional costs on SEPA's current costs of enforcement.

**Environmental Quality Division
Scottish Government
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