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STATUTORY INSTRUMENTS

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**2017 No. 1200**

**The Control of Mercury (Enforcement) Regulations 2017**

**PART 4**

**Enforcement specific to Scotland**

**Application of this Part**

**25.** This Part applies to enforcement—

- (a) in Scotland, and
- (b) in respect of offshore installations in the Scottish offshore area (see paragraphs 1 and 4 of Schedule 2).

**Enforcement notices**

**26.—**(1) SEPA may give a person an enforcement notice if condition A or B is met.

(2) An enforcement notice is a notice requiring the person to take action (including to stop doing any thing).

(3) Condition A is that SEPA is of the opinion that the person has failed or is failing to comply with the relevant provision or provisions.

(4) Condition B is that SEPA is of the opinion that the person is likely to fail to comply with the relevant provision or provisions.

(5) The action which SEPA may require the person to take is any one or more of the following—

- (a) action to ensure compliance with the relevant provision or provisions in question;
- (b) action to remediate any environmental damage attributable to the non-compliance in question;
- (c) action to remove or mitigate any risk of non-compliance with the relevant provision or provisions in question.

(6) An enforcement notice must state—

- (a) the matters constituting the failure or likelihood of failure,
- (b) the action which must be taken under paragraph (5),
- (c) the period (the “compliance period”) within which the action must be taken,
- (d) that there is a right to appeal against the enforcement notice and how that right may be exercised, and
- (e) the consequences of failing to comply with the enforcement notice (see regulations 27, 31, 32 and 41 which relate to action to ensure compliance, court proceedings, monetary penalties and offences respectively).

(7) SEPA may withdraw an enforcement notice by informing the person to whom it was given in writing.

(8) A person to whom an enforcement notice is given may appeal to the Scottish Ministers against it on one or more of the following grounds—

- (a) that the decision to give the enforcement notice was based on an error of fact;
- (b) that the decision was wrong in law;
- (c) that the nature of what is required by the enforcement notice is unreasonable;
- (d) that the decision was unreasonable for any other reason;
- (e) any other ground.

### **Action by SEPA to ensure compliance with enforcement notices**

**27.**—(1) This regulation applies where—

- (a) SEPA has given an enforcement notice to a person, and
- (b) SEPA is of the opinion that the person has not carried out one or more of the actions referred to in the enforcement notice within the compliance period (see regulation 26(6)(c)).

(2) SEPA may take any of the following action (whether the same as or different to any action referred to in the enforcement notice)—

- (a) action to ensure compliance with the relevant provision or provisions in question;
- (b) action to remediate any environmental damage attributable to the non-compliance in question;
- (c) action to remove or mitigate any risk of non-compliance with the relevant provision or provisions in question.

(3) If SEPA proposes that any of the action under paragraph (2) be taken on any premises, sections 108, 108A, 109 and 110 of, and Schedule 18 to, the EA 1995 (as they apply in Scotland) apply but as if—

- (a) in section 108 there were a reference to the purpose of taking action to ensure compliance with a relevant provision or provisions referred to in an enforcement notice at the end of the list of purposes in subsection (1);
- (b) in section 108 there were a reference to taking action to ensure compliance with a relevant provision or provisions referred to in an enforcement notice at the end of the list of powers in subsection (4);
- (c) in paragraph 6(1) of Schedule 18 the reference in the words before paragraph (a) to any power conferred by section 108(4)(a) or (b) or (5) of this Act included a reference to the power conferred by virtue of sub-paragraph (b) above.

### **Recovery of enforcement costs**

**28.**—(1) SEPA may give a person a costs recovery notice if condition A or B is met.

(2) A costs recovery notice is a notice requiring the person to pay SEPA's costs.

(3) Condition A is that the SEPA has given the person an enforcement notice.

(4) Condition B is that SEPA has taken action to ensure compliance with an enforcement notice under regulation 27.

(5) In paragraph (2), the reference to costs is a reference—

- (a) if condition A is met, to any costs relating to preparing and giving the enforcement notice, and
- (b) if condition B is met, to any costs relating to the action taken,

and includes a reference to the costs of any related investigation or expert advice (including legal advice).

- (6) The costs must be paid by the person within the period (the “payment period”)—
  - (a) of 56 days beginning with the day on which the costs recovery notice is given, where the costs recovery notice has not been appealed under paragraph (11);
  - (b) of 28 days beginning with the day on which the appeal has been determined or withdrawn, where the costs recovery notice has been appealed under paragraph (11);
  - (c) of so many days as the Scottish Ministers may specify, where the costs recovery notice has been appealed under paragraph (11) and the Scottish Ministers have so specified.
- (7) The costs recovery notice must state—
  - (a) the amount of the costs which must be paid,
  - (b) in general terms, how those costs have arisen,
  - (c) the payment period,
  - (d) how payment must be made,
  - (e) the consequences of failing to make payment within the payment period (see paragraph (9)), and
  - (f) that there is a right to appeal against the costs recovery notice and how that right may be exercised.
- (8) Following the payment period, SEPA may recover the costs referred to in the costs recovery notice and any related interest under regulation 29 as a civil debt.
- (9) The costs are recoverable as if they were payable under an extract registered decree arbitral bearing a warrant for execution issued by a sheriff of any sheriffdom.
- (10) SEPA may withdraw a costs recovery notice given by it by informing the person to whom it was given in writing.
- (11) A person to whom a costs recovery notice is given may appeal to the Scottish Ministers against it on one or more of the following grounds—
  - (a) that the decision to give the costs recovery notice was based on an error of fact;
  - (b) that the decision was wrong in law;
  - (c) that some or all of the costs were not incurred or were unnecessarily incurred;
  - (d) any other ground.

### **Late payment interest**

**29.**—(1) If a person fails to pay the costs referred to in a costs recovery notice in full within the payment period, interest is payable on the outstanding amount.

(2) Interest falls to be paid at a rate of 8% per annum calculated on a daily basis for the period beginning with the day after the last day of the payment period and ending on the day payment is made or recovered.

(3) The total amount of interest payable is not to exceed the amount of costs in question.

### **Further provision about appeals**

- 30.**—(1) Following an appeal under regulation 26(8) or 28(11), the Scottish Ministers may—
- (a) cancel the notice;
  - (b) vary the notice;

- (c) confirm the notice;
  - (d) take any action which SEPA is empowered to take in relation to the failure referred to in the notice;
  - (e) remit any decision relating to the notice to SEPA.
- (2) A determination of an appeal by the Scottish Ministers is final.
- (3) The Scottish Ministers may—
- (a) appoint a person to exercise any function under this regulation on the Scottish Ministers' behalf, or
  - (b) refer a matter relating to the exercise of any function under this regulation to a person the Scottish Ministers may appoint for that purpose.
- (4) An enforcement notice which is the subject of an appeal is not suspended pending the Scottish Minister's decision on the appeal.
- (5) A costs recovery notice which is the subject of an appeal is suspended pending the decision of the Scottish Ministers.
- (6) Schedule 3 sets out further provision about appeals to the Scottish Ministers.

#### **Enforcement by the courts**

**31.**—(1) SEPA may start proceedings in a court of competent jurisdiction to secure a remedy against a person if any of the conditions A to C are met.

(2) Condition A is that SEPA is of the opinion that the person has failed or is failing to comply with a relevant provision or provisions.

(3) Condition B is that SEPA is of the opinion that the person is likely to fail to comply with a relevant provision or provisions.

(4) Condition C is that SEPA is of the opinion that the person has failed or is failing to comply with all or part of an enforcement notice.

#### **Monetary penalties, costs recovery and enforcement undertakings**

**32.**—(1) The Environmental Regulation (Enforcement Measures) (Scotland) Order 2015(1) is amended as follows.

(2) At the end of the table in Schedule 4 (which relates to relevant offences and fixed penalty amounts) insert—

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“The Control of Mercury (Enforcement) Regulations 2017

Regulation 41(1) (non-compliance with a relevant provision)	YES	YES	YES	MEDIUM
Regulation 41(2) (non-compliance with an enforcement notice)	YES	YES	YES	MEDIUM
Regulation 41(3) (non-compliance with an information notice)	YES	YES	YES	LOW
Regulation 41(4) (giving information which is false or misleading)	YES	NO	NO	HIGH

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(1) S.S.I. 2015/383, amended by S.S.I. 2016/161; there are other amending instruments but none is relevant.

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Regulation 41(5) (failing to produce a document or record)	YES	NO	NO	LOW”
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