



Reservoirs (Scotland) Act 2011

2011 asp 9

PART 1

RESERVOIRS

CHAPTER 9

CIVIL ENFORCEMENT, EMERGENCY POWERS AND FURTHER OFFENCES

Other civil enforcement measures

78 Enforcement undertakings

- (1) The Scottish Ministers may by order make provision—
 - (a) as to the acceptance by SEPA of an enforcement undertaking from a reservoir manager of a controlled reservoir in a case where SEPA has reasonable grounds to suspect that the manager has committed an offence under this Part,
 - (b) for the acceptance of the undertaking to have the consequences in subsection (5).
- (2) Before making an order under subsection (1), the Scottish Ministers must consult in accordance with section 86.
- (3) An “enforcement undertaking” is an undertaking to take such action as may be specified in the undertaking before the end of such period as may be so specified.
- (4) The action specified in an enforcement undertaking must be—
 - (a) action to secure that the offence does not continue or recur,
 - (b) action to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed,
 - (c) action (including the payment of a sum of money) to benefit any person adversely affected by the offence,
 - (d) action of a description specified in the order.

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- (5) The consequences in this subsection are that, unless the reservoir manager from whom the undertaking is accepted has failed to comply with the undertaking or any part of it—
- (a) the reservoir manager may not at any time be convicted of the offence in respect of the act or omission to which the undertaking relates,
 - (b) SEPA may not impose on the manager any fixed monetary penalty which it would otherwise have power to impose by virtue of section 79(1) in respect of the act or omission,
 - (c) SEPA may not impose on the manager any further enforcement measure which it would otherwise have power to impose by virtue of section 82(1) in respect of the act or omission.
- (6) Provision under subsection (1) may in particular include provision—
- (a) as to the procedure for entering into an undertaking,
 - (b) as to the terms of an undertaking,
 - (c) as to the publication of an undertaking by SEPA,
 - (d) as to the variation of an undertaking,
 - (e) as to the circumstances in which a reservoir manager may be regarded as having complied with an undertaking,
 - (f) as to the monitoring by SEPA of compliance with an undertaking,
 - (g) as to the certification by SEPA that an undertaking has been complied with,
 - (h) allowing an application for a review by SEPA before an appeal to the Scottish Ministers against refusal to give such certification,
 - (i) in a case where a reservoir manager has given inaccurate, misleading or incomplete information in relation to the undertaking, for the manager to be regarded as not having complied with it,
 - (j) in a case where a reservoir manager has complied partly but not fully with an undertaking, for the part-compliance to be taken into account in the imposition of any criminal or other sanction on the manager,
 - (k) extending any period within which criminal proceedings may be instituted against a reservoir manager in respect of the offence in the event of breach of an undertaking or any part of it,
 - (l) for the creation of offences,
 - (m) for any offence created to be triable only summarily,
 - (n) for any offence created—
 - (i) which is committed in relation to a controlled reservoir which is, at the time the offence is committed, a high-risk reservoir to be punishable on conviction by a fine not exceeding level 5 on the standard scale,
 - (ii) which is committed in relation to any other controlled reservoir to be punishable on conviction by a fine not exceeding level 4 on the standard scale,
 - (o) for it to be a defence to a charge in proceedings for an offence created by the order for a person to show both—
 - (i) that the failure to comply with the requirements concerned was as a result of either an accident which could not reasonably have been foreseen or natural cause or force majeure which was exceptional and could not reasonably have been foreseen, and
 - (ii) that the person took all practicable steps to prevent an uncontrolled release of water from the reservoir, took all practicable steps as soon

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as was reasonably practicable to rectify the failure and provided particulars of the failure to SEPA as soon as practicable after the failure arose.

79 Fixed monetary penalties

- (1) The Scottish Ministers may by order make provision about the imposition by SEPA of fixed monetary penalties on reservoir managers of controlled reservoirs in relation to offences under this Part.
- (2) Before making an order under subsection (1), the Scottish Ministers must consult in accordance with section 86.
- (3) Provision under subsection (1) must provide that—
 - (a) fixed monetary penalties may be imposed only where SEPA is satisfied beyond reasonable doubt that a reservoir manager has committed an offence under this Part,
 - (b) fixed monetary penalties are to be imposed by notice,
 - (c) the amount of the penalty which can be imposed in relation to an offence may not exceed the maximum amount of the fine that may be imposed on summary conviction for the offence.
- (4) A fixed monetary penalty is a requirement to pay to SEPA a penalty of a specified amount (with payment attracting the results mentioned in paragraphs (a) and (b) of section 81(2)).
- (5) For the purposes of this section and section 80 “specified” means specified in an order made under subsection (1).

80 Fixed monetary penalties: procedure

- (1) Provision under section 79(1) must secure the results in subsection (2).
- (2) The results are that—
 - (a) where SEPA proposes to impose a fixed monetary penalty on a reservoir manager, it must give the manager a notice of what is proposed (a “notice of intent”) which complies with subsection (3),
 - (b) the notice of intent also offers the manager the opportunity to discharge the manager’s liability for the fixed monetary penalty by payment of a specified sum (which must be less than or equal to the amount of the penalty),
 - (c) if the manager does not so discharge liability—
 - (i) the manager may make written representations and objections to SEPA in relation to the proposed imposition of the fixed monetary penalty,
 - (ii) SEPA must at the end of the period for making representations and objections decide whether to impose the fixed monetary penalty,
 - (d) where SEPA decides to impose the fixed monetary penalty, the notice imposing it (“the final notice”) complies with subsection (5),
 - (e) the reservoir manager on whom a fixed monetary penalty is imposed may appeal to the Scottish Ministers against the decision to impose it.
- (3) To comply with this subsection, the notice of intent must include information as to—
 - (a) the grounds for the proposal to impose the fixed monetary penalty,

- (b) how payment to discharge the liability for a fixed monetary payment may be made,
 - (c) the effect of payment of the sum referred to in subsection (2)(b),
 - (d) the right to make written representations and objections,
 - (e) the circumstances in which SEPA may not impose the fixed monetary penalty,
 - (f) the period within which liability for the fixed monetary penalty may be discharged, which must not exceed the period of 28 days beginning with the day on which the notice of intent was given,
 - (g) the period within which representations and objections may be made, which must not exceed that period of 28 days.
- (4) Provision to secure the result in subsection (2)(c)(ii)—
- (a) must secure that SEPA may not decide to impose a fixed monetary penalty on a reservoir manager where it is satisfied that the manager would not, by reason of any defence, be liable to be convicted of the offence in relation to which it was imposed,
 - (b) may include provision for other circumstances in which SEPA may not decide to impose a fixed monetary penalty.
- (5) To comply with this subsection the final notice must include information as to—
- (a) the grounds for imposing the penalty,
 - (b) how payment may be made,
 - (c) the period within which payment must be made,
 - (d) any early payment discounts or late payment penalties,
 - (e) rights of appeal,
 - (f) the consequences of non-payment.
- (6) Provision to secure the result in subsection (2)(e) must secure that the grounds on which a reservoir manager may appeal against a decision of SEPA include that—
- (a) the decision was based on an error of fact,
 - (b) the decision was wrong in law,
 - (c) the decision was unreasonable.
- (7) Provision to secure the result in that subsection may include provision about the determining by or under the order of a fee, and the charging of any fee so determined, in connection with an appeal and may require the return of a fee paid in relation to an appeal which is upheld.

81 Fixed monetary penalties: criminal proceedings and conviction etc.

- (1) Provision under section 79(1) must secure that, in a case where a notice of intent referred to in section 80(2)(a) is given to a reservoir manager—
- (a) no criminal proceedings for the offence to which the notice relates may be instituted against the manager in respect of the act or omission to which the notice relates before the end of the period in which the manager may discharge liability for the fixed monetary penalty pursuant to section 80(2)(b),
 - (b) SEPA may not before the end of that period give a stop notice to or impose a further enforcement measure on the manager in respect of the act or omission giving rise to the notice,
 - (c) if the manager so discharges liability—

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- (i) the manager may not at any time be convicted of the offence to which the notice relates in relation to that act or omission,
 - (ii) SEPA may not give a stop notice to or impose a further enforcement measure on the manager in respect of that act or omission.
- (2) Provision under section 79(1) must also secure that, in a case where a fixed monetary penalty is imposed on a reservoir manager—
 - (a) the manager may not at any time be convicted of the offence in relation to which the penalty is imposed in respect of the act or omission giving rise to the penalty,
 - (b) SEPA may not give a stop notice to or impose a further enforcement measure on the manager in respect of the act or omission giving rise to the penalty.

82 Further enforcement measures

- (1) The Scottish Ministers may by order make provision about the imposition by SEPA on reservoir managers of controlled reservoirs of one or more further enforcement measures in relation to offences under this Part.
- (2) Before making an order under subsection (1), the Scottish Ministers must consult in accordance with section 86.
- (3) Provision under subsection (1)—
 - (a) must provide that further enforcement measures—
 - (i) may be imposed only where SEPA is satisfied beyond reasonable doubt that a reservoir manager has committed an offence under this Part,
 - (ii) may not be imposed on a reservoir manager on more than one occasion in relation to the same act or omission,
 - (iii) are to be imposed by notice,
 - (b) may provide that further enforcement measures may be imposed in addition to any requirement referred to in section 65(2) or 69(2).
- (4) A further enforcement measure is any of the following—
 - (a) a requirement to pay to SEPA a penalty of such amount as SEPA may in each case determine (but not exceeding the maximum fine for which a person convicted of the offence concerned may be made liable on summary conviction),
 - (b) a requirement to take such steps as SEPA may specify, within such period as it may specify, to secure that the offence does not continue or recur,
 - (c) a requirement to take such steps as SEPA may specify, within such period as it may specify, to secure that the position is so far as possible restored to what it would have been if the offence had not been committed.
- (5) For the purposes of this Part—
 - a “variable monetary penalty” means a requirement referred to in subsection (4)(a),
 - a “restraint notice” means a requirement referred to in subsection (4)(b),
 - a “restoration notice” means a requirement referred to in subsection (4)(c).

83 Further enforcement measures: procedure

- (1) Provision under section 82(1) must secure the results in subsection (2).
- (2) The results are that—
 - (a) where SEPA proposes to impose a further enforcement measure on a reservoir manager, it must give the manager a notice of what is proposed (a “notice of intent”) which complies with subsection (3),
 - (b) the reservoir manager may make written representations and objections to SEPA in relation to the proposed imposition,
 - (c) after the end of the period for making such representations and objections, SEPA must decide whether to—
 - (i) impose the further enforcement measure (with or without modifications),
 - (ii) impose any other further enforcement measure which SEPA may impose,
 - (d) where SEPA decides to impose a further enforcement measure, the notice (the “final notice”) complies with subsection (6),
 - (e) the reservoir manager on whom a further enforcement measure is imposed may appeal to the Scottish Ministers against the decision to impose it.
- (3) To comply with this subsection, the notice of intent must include information as to—
 - (a) the grounds for the proposal to impose the further enforcement measure,
 - (b) the right to make representations and objections,
 - (c) the circumstances in which SEPA may not impose the further enforcement measures,
 - (d) the period within which representations and objections may be made, which must not exceed the period of 28 days beginning with the day on which the notice of intent is given.
- (4) Provision to secure the result in subsection (2)(c)—
 - (a) must secure that SEPA may not decide to impose a further enforcement measure on a reservoir manager where it is satisfied that the manager would not, by reason of any defence, be liable to be convicted of the offence in relation to which it was imposed,
 - (b) may include provision for other circumstances in which SEPA may not decide to impose a further enforcement measure.
- (5) Provision to secure the result in subsection (2)(c) must also include provision for—
 - (a) the reservoir manager to whom the notice of intent is given to be able to offer an undertaking as to action to be taken by the manager (including the payment of a sum of money) to benefit any person affected by the offence,
 - (b) SEPA to be able to accept or reject such an undertaking,
 - (c) SEPA to take any undertaking so accepted into account in its decision.
- (6) To comply with this subsection the final notice must include information as to—
 - (a) the grounds for imposing the further enforcement measure,
 - (b) where the further enforcement measure is a variable monetary penalty—
 - (i) how payment may be made,
 - (ii) the period within which payment must be made,
 - (iii) any early payment discounts or late payment penalties,

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- (c) rights of appeal,
 - (d) the consequences of non-compliance.
- (7) Provision to secure the result in subsection (2)(e) must secure that the grounds on which a reservoir manager may appeal against a decision of SEPA include the following—
- (a) that the decision was based on an error of fact,
 - (b) that the decision was wrong in law,
 - (c) in the case of a variable monetary penalty, that the amount of the penalty is unreasonable,
 - (d) in the case of a restraint notice or a restoration notice, that the nature of the requirement is unreasonable,
 - (e) that the decision was unreasonable for any other reason.
- (8) Provision to secure the result in that subsection may include provision about the determining by or under the order of a fee, and the charging of any fee so determined, in connection with an appeal and may require the return of a fee paid in relation to an appeal which is upheld.

84 Further enforcement measures: criminal proceedings and conviction

- (1) Provision under section 82(1) must secure the result in subsection (2) in any of the following cases—
- (a) where a further enforcement measure is imposed on a reservoir manager,
 - (b) where an undertaking referred to in section 83(5) is accepted from a reservoir manager.
- (2) The result is that the reservoir manager may not at any time be convicted of the offence in respect of the act or omission giving rise to the further enforcement measure or undertaking except in a case mentioned in subsection (3).
- (3) The case is where each of the following applies—
- (a) a restraint notice or restoration notice is imposed on the manager, or an undertaking referred to in section 83(5) is accepted from the manager,
 - (b) no variable monetary penalty is imposed,
 - (c) the manager fails to comply with the restraint notice, restoration notice or undertaking.
- (4) Provision under section 82(1) may for the purposes of the case referred to in subsection (3) extend any period within which criminal proceedings may be instituted against the reservoir manager.

85 Further enforcement measures: enforcement

- (1) Provision under section 82(1) may include provision for a reservoir manager to pay a monetary penalty (a “non-compliance penalty”) to SEPA if the manager fails to comply with any of the following—
- (a) a restraint notice or restoration notice imposed on the manager,
 - (b) an undertaking referred to in section 83(5).
- (2) Provision pursuant to subsection (1) may—
- (a) specify the amount of the non-compliance penalty,

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- (b) provide for the amount to be calculated by reference to criteria specified by order by the Scottish Ministers,
- (c) provide for the amount to be determined by SEPA,
- (d) provide for the amount to be determined in any other way,

but may not specify an amount which exceeds, or make provision under which the amount may be calculated or determined so as to exceed, the maximum fine for which a person convicted of the offence concerned may be made liable on summary conviction.

- (3) Provision pursuant to subsection (1) must secure that—
 - (a) the non-compliance penalty is imposed by notice given by SEPA,
 - (b) the reservoir manager on whom it is imposed may appeal to the Scottish Ministers against the notice.
- (4) Provision pursuant to subsection (3)(b) must secure that the grounds on which a reservoir manager may appeal against a notice referred to in that subsection include the following—
 - (a) that the decision to give the notice was based on an error of fact,
 - (b) that the decision was wrong in law,
 - (c) that the decision was unfair or unreasonable for any reason (including, in a case where the amount of the non-compliance penalty was determined by SEPA, that the amount was unreasonable).
- (5) An order under section 82(1) may provide that where a reservoir manager on whom a non-compliance penalty is imposed does not pay the penalty, the penalty is recoverable as if it were payable under an extract decree arbitral bearing a warrant for execution issued by the sheriff for any sheriffdom.