

UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) ACT 2021

EXPLANATORY NOTES

OVERVIEW AND BACKGROUND

Part 2 – Environment

Chapter 2 – Environmental governance

Compliance notices

Section 31 - Compliance notice

137. Section 31 sets out the circumstances in which Environmental Standards Scotland may issue compliance notices to public authorities. The compliance notice process is designed to remedy failures by public authorities to comply with environmental law when exercising their regulatory functions (as defined by section 46(1)). There are two conditions that Environmental Standards Scotland must consider to be met before it may issue a compliance notice. The first condition in subsection (1) is that, in exercising its regulatory functions, a public authority is failing to comply with environmental law, or has failed to comply with environmental law and it is likely that the failure will be repeated or be continued. The second condition in subsection (1) is that the failure has caused, is causing or is at risk of causing environmental harm.
138. Subsection (2) defines a compliance notice as a notice requiring the public authority to whom it is issued to take the steps set out in the notice in order to address its failure to comply with environmental law.

Section 32 - Restrictions on issuing a compliance notice

139. Section 32 provides that Environmental Standards Scotland may not issue a compliance notice in respect of certain failures to comply with environmental law. Firstly, it may not issue a notice in respect of a failure arising out of any decision taken by a public authority in the exercise of its regulatory functions in relation to a particular person or case. This restriction ensures that compliance notices are not used as a means to review individual regulatory decisions or as a substitute appeal process. Secondly, it may not issue a notice in respect of a failure arising out of particular conduct that has already been the subject of an improvement report. This would cover the instance where the failure had already been identified as a systemic issue, either across a range of public bodies, or structurally in the funding or guidance given to the body. Any compliance notice issued in breach of either of these restrictions will not have any effect.

Section 33 - Content of a compliance notice

140. Section 33 sets out the required contents of a compliance notice. It must contain a statement of the grounds for issuing the notice, specifically: the regulatory function of the public authority to which the alleged failure to comply with environmental law

relates; the relevant provision of environmental law, and the alleged conduct that has led Environmental Standards Scotland to conclude that the public authority is failing to comply with environmental law or has failed to comply with environmental law and the failure is likely to be repeated or continue. In addition, Environmental Standards Scotland must include in the notice: its reasons for reaching its conclusion; information on the environmental harm or risk of environmental harm being caused, or having been caused, by the alleged failure, and the steps that the public authority must take to address its failure to comply with environmental law.

141. A compliance notice must also contain the following details: the date of issue of the notice; the timescales within which the required steps are to be taken (not less than 28 days from the date on which the notice is issued, meaning that the steps cannot be required to be taken before expiry of the 21-day appeal period specified in section 36(2)(a)); information about the person to whom, and as to how and by when, any representations about the notice may be made; information regarding the right to appeal, including timescales for this as well as an explanation of the consequences of the public authority failing to comply with the requirements of the notice.

Section 34 - Variation of a compliance notice

142. Section 34 makes provision for Environmental Standards Scotland to vary a compliance notice by extending the compliance period referred to in section 33(1)(d). A compliance notice may be varied by Environmental Standards Scotland at any time before expiry of the compliance period by writing to the public authority to whom the compliance notice was issued. The variation of the compliance notice does not affect the date of its issue for the purpose of section 36(2)(a) (which imposes a 21-day time limit on appealing against a compliance notice).

Section 35 - Withdrawal of a compliance notice

143. Section 35 allows for Environmental Standards Scotland to withdraw a compliance notice at any time before completion of the steps that are to be taken to comply with the requirements of the notice by giving notice in writing to that effect to the public authority to whom the compliance notice was issued.

Section 36 - Appeal against a compliance notice

144. Section 36 provides for appeal to a sheriff against a compliance notice. Subsection (1) sets out the grounds for a public authority which has received a compliance notice to appeal against any such notice. A public authority may appeal against a compliance notice on the following grounds: that it has not conducted itself in the manner stated in the notice; that the alleged conduct specified in the notice does not constitute a failure to comply with environmental law or, as the case may be, a failure to comply with environmental law that will likely continue or be repeated, or that the alleged failure is not causing, or has not caused, environmental harm or a risk of environmental harm.
145. Subsection (2) states that an appeal must be made with 21 days of the date of issue of the notice, or it may be made later with the sheriff's permission. Subsection (3) provides for the sheriff to give permission under subsection (2) for an appeal to be made after the expiry of the 21-day period only if the sheriff is satisfied that the public authority has good reason for not making the appeal within the 21-day time limit. Subsection (4) states that the sheriff may cancel the compliance notice or confirm the notice, either with or without modifications. Where an appeal is made under this section, the period set under section 33(1)(d) for compliance with the notice is suspended until the appeal is finally determined or withdrawn. Onward appeals against a sheriff's decision will follow the routes of appeal set out in Part 5 of the Court Reform (Scotland) Act 2014.

These notes relate to the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (asp 4) which received Royal Assent on 29 January 2021

Section 37 - Failure to comply with a compliance notice

146. This section provides for Environmental Standards Scotland to report to the Court of Session any case where a public authority fails, without reasonable excuse, to comply with a compliance notice. The Court of Session after receiving a report under this section, and hearing any evidence or representations on the matter, may make such an order for enforcement as it considers appropriate or deal with the matter as if it were a contempt of the Court, or both.