



2015 CHAPTER 8

PART 6

CIVIL ENFORCEMENT, EMERGENCY POWERS AND FURTHER OFFENCES

PROSPECTIVE

Other civil enforcement measures

Enforcement undertakings

81.—(1) The Department may by regulations make provision—

- (a) as to the acceptance by it of an enforcement undertaking from a reservoir manager of a controlled reservoir in a case where the Department has reasonable grounds to suspect that the manager has committed an offence under this Act,
- (b) for the acceptance by it of the undertaking to have the required consequences of acceptance (see subsection (5)).

(2) Before making regulations under subsection (1), the Department must consult in accordance with section 90.

(3) An “enforcement undertaking” is a written 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 one or more of the following—

- (a) action to secure that the offence does not continue or recur,

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- (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) such other action as may be described in the regulations.

(5) The “required consequences of acceptance” 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) the Department may not impose on the manager any fixed monetary penalty in respect of the act or omission which it would otherwise have power to impose by virtue of section 83(1),
- (c) the Department may not impose on the manager any variable monetary penalty in respect of the act or omission which it would otherwise have power to impose by virtue of section 86(1).

Regulations as to enforcement undertakings: further provision

82 Regulations under section 81(1) may in particular include provision—

- (a) as to the procedure for entering into an undertaking,
- (b) as to the terms and conditions of an undertaking,
- (c) as to the publication by the Department of an undertaking,
- (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 the Department of compliance with an undertaking,
- (g) as to the certification by the Department that an undertaking has been complied with,
- (h) allowing an application for a review by the Department against refusal by it to give such certification,
- (i) as to a right of appeal to the Water Appeals Commission against a decision in a review,
- (j) for the grounds of any such appeal to include that—
 - (i) the decision was based on an error of fact,
 - (ii) the decision was wrong in law,
 - (iii) the decision was unreasonable,
- (k) for the Commission to have power to confirm or quash the decision,

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- (l) conferring powers of entry on any person duly authorised in writing by the Department in connection with its functions under the regulations,
- (m) 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,
- (n) 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 on the manager of any criminal or other sanction,
- (o) 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,
- (p) as to the creation of offences,
- (q) for any offence created to be triable only summarily,
- (r) 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-consequence 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,
- (s) for any defences to a charge in proceedings for such an offence to include in particular a defence for the person to show both—
 - (i) that the failure to comply with the requirement 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 as was reasonably practicable to rectify the failure and provided particulars of the failure to the Department as soon as practicable after the failure arose.

Fixed monetary penalties

83.—(1) The Department may by regulations make provision about the imposition by it of fixed monetary penalties on reservoir managers of controlled reservoirs in relation to offences under this Act.

(2) Before making regulations under subsection (1), the Department must consult in accordance with section 90.

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(3) A “fixed monetary penalty” is a requirement to pay to the Department a penalty of a specified amount (with payment attracting the results mentioned in paragraphs (a) and (b) of section 85(2)).

(4) Regulations made under subsection (1) must provide that—

- (a) a fixed monetary penalty may be imposed only where the Department is satisfied beyond reasonable doubt that a reservoir manager has committed an offence under this Act,
- (b) a fixed monetary penalty is to be imposed by notice served on the reservoir manager concerned,
- (c) the amount of the penalty which may 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.

(5) For the purposes of this section, and section 84, “specified” means specified in regulations made under subsection (1).

Fixed monetary penalties: procedure etc.

84.—(1) Regulations made under section 83(1) must secure the results mentioned in subsection (2).

(2) The results are that—

- (a) where the Department proposes to impose a fixed monetary penalty on a reservoir manager, it must serve on the manager a notice of what is proposed (a “notice of intent”) which complies with subsection (3),
- (b) the notice of intent must also offer 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 the Department in relation to the proposed imposition of the fixed monetary penalty,
 - (ii) the Department must at the end of the period for making representations and objections decide whether to impose the fixed monetary penalty,
- (d) where the Department decides to impose the fixed monetary penalty, the notice imposing it (“the final notice”) must be served on the reservoir manager and comply with subsection (5),
- (e) the reservoir manager on whom a fixed monetary penalty is imposed may appeal to the Water Appeals Commission against the decision to impose it.

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- (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 penalty may be made,
 - (c) the effect of payment of the specified sum,
 - (d) the right to make written representations and objections,
 - (e) the circumstances in which the Department 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 served,
 - (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 referred to in subsection (2)(c)(ii)—
- (a) must secure that the Department 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 the Department 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, including the grounds of appeal, the procedure for making an appeal and the period within which an appeal may be made,
 - (f) the consequences of non-payment.
- (6) Provision to secure the result in subsection (2)(e) must—
- (a) secure that the grounds on which a reservoir manager may appeal against a decision of the Department include that—
 - (i) the decision was based on an error of fact,
 - (ii) the decision was wrong in law,
 - (iii) the decision was unreasonable,
 - (b) secure that the Commission may confirm or quash the decision.

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(7) Regulations under section 83(1) may provide that, where a fixed monetary penalty remains unpaid after the expiry of the period for payment of the penalty, it is recoverable as if it were payable under a court order.

Fixed monetary penalties: criminal proceedings and conviction etc.

85.—(1) Regulations made under section 83(1) must secure that, in a case where a notice of intent referred to in section 84(2)(a) is served on 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 84(2)(b),
- (b) the Department may not, before the end of that period, serve a stop notice or impose a variable monetary penalty on the manager in respect of that act or omission,
- (c) if the manager so discharges liability—
 - (i) the manager may not at any time be convicted of the offence in respect of that act or omission,
 - (ii) the Department may not serve a stop notice on the manager in respect of the act or omission.

(2) Regulations made under section 83(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 respect of the act or omission giving rise to the penalty,
- (b) the Department may not serve a stop notice or impose a variable monetary penalty on the manager in respect of the act or omission giving rise to the penalty.

Variable monetary penalties

86.—(1) The Department may by regulations make provision about the imposition by it of variable monetary penalties on reservoir managers of controlled reservoirs in relation to offences under this Act.

(2) Before making regulations under subsection (1), the Department must consult in accordance with section 90.

(3) A “variable monetary penalty” is a requirement to pay to the Department a penalty of such amount as it 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).

(4) Regulations made under subsection (1)—

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- (a) must provide that variable monetary penalties—
 - (i) may be imposed only where the Department is satisfied beyond reasonable doubt that a reservoir manager has committed an offence under this Act,
 - (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 served on the reservoir manager concerned,
- (b) may provide that variable monetary penalties may be imposed in addition to any requirement referred to in section 67(2) or 71(2).

Variable monetary penalties: procedure etc.

87.—(1) Regulations made under section 86(1) must secure the results mentioned in subsection (2).

(2) The results are that—

- (a) where the Department proposes to impose a variable monetary penalty on a reservoir manager, it must serve on 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 the Department in relation to the proposed imposition,
- (c) after the end of the period for making such representations and objections, the Department must decide whether to impose the variable monetary penalty (with or without modifications),
- (d) where the Department decides to impose a variable monetary penalty, the notice (the “final notice”) must be served on the reservoir manager and comply with subsection (6),
- (e) the reservoir manager on whom a variable monetary penalty is imposed may appeal to the Water Appeals Commission 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 variable monetary penalty,
- (b) the right to make representations and objections,
- (c) the circumstances in which the Department may not impose the variable monetary penalty,
- (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 was served.

(4) Provision to secure the result in subsection (2)(c)—

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- (a) must secure that the Department may not decide to impose a variable 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 the Department may not decide to impose a variable monetary penalty.
- (5) Provision to secure the result in subsection (2)(c) must also include provision for—
- (a) the reservoir manager on whom the notice of intent is served to be able to offer a written 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) the Department to be able to accept or reject such an undertaking,
 - (c) the Department 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 variable monetary 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, including the grounds of appeal, the procedure for making an appeal and the period within which an appeal may be made,
 - (f) the consequences of non-payment.
- (7) Provision to secure the result in subsection (2)(e) must—
- (a) secure that the grounds on which a reservoir manager may appeal against a decision of the Department include that—
 - (i) the decision was based on an error of fact,
 - (ii) the decision was wrong in law,
 - (iii) the amount of the variable monetary penalty was unreasonable,
 - (iv) the decision was unreasonable for any other reason,
 - (b) secure that the Commission may confirm or quash the decision.
- (8) Regulations under section 86(1) may provide that, where a variable monetary penalty remains unpaid after the expiry of the period for payment of the penalty, it is recoverable as if it were payable under a court order.

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Variable monetary penalties: criminal proceedings and conviction

88.—(1) Regulations made under section 86(1) must secure the result mentioned in subsection (2) where—

- (a) a variable monetary penalty is imposed on a reservoir manager,
- (b) an undertaking referred to in section 87(5) is accepted from a reservoir manager (whether or not a variable monetary penalty is also imposed).

(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 variable monetary penalty or undertaking, except where the following applies—

- (a) an undertaking referred to in section 87(5) is accepted from the manager,
- (b) the manager fails to comply with the undertaking.

(3) Regulations under section 86(1) may, for the purposes of the circumstances referred to in paragraphs (a) and (b) of subsection (2), extend any period within which criminal proceedings may be instituted against the reservoir manager.

Undertaking referred to in section 87(5): enforcement

89.—(1) Regulations under section 86(1) may include provision for a reservoir manager to pay a monetary penalty (a “non-compliance penalty”) to the Department if the manager fails to comply with an undertaking referred to in section 87(5).

(2) The regulations—

- (a) may specify the amount of the non-compliance penalty and provide for the amount to be—
 - (i) determined by the Department or determined in any other way,
 - (ii) calculated by reference to criteria specified in the regulations, but
- (b) 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 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 complying with subsection (4), served by the Department on the reservoir manager,
- (b) the reservoir manager on whom it is imposed may appeal to the Water Appeals Commission against the notice.

(4) To comply with this subsection, the notice must include information as to—

- (a) the amount of the penalty,

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- (b) how the amount is determined or calculated,
 - (c) the undertaking that has not been complied with,
 - (d) how payment of the penalty may be made,
 - (e) the right of appeal, including the grounds of appeal, the procedure for making an appeal and the period within which an appeal may be made,
 - (f) the consequences of non-payment.
- (5) Provision conferring a right of appeal must—
- (a) secure that the grounds on which a reservoir manager may appeal against a notice referred to in subsection (3)(a) include the following—
 - (i) that the decision to give the notice was based on an error of fact,
 - (ii) that the decision was wrong in law,
 - (iii) that the decision was unreasonable (including that the amount was unreasonable),
 - (b) secure that the Commission may confirm or quash the decision.
- (6) Regulations under section 86(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 a court order.

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