



## 2015 CHAPTER 8

### PART 6

#### CIVIL ENFORCEMENT, EMERGENCY POWERS AND FURTHER OFFENCES

PROSPECTIVE

##### *Enforcement of commissioning of engineers*

##### **Enforcement notice: commissioning of engineers**

**67.—**(1) This section applies in relation to a controlled reservoir where it appears to the Department that—

- (a) the reservoir manager is required by section 25(2) to commission a supervising engineer, but no supervising engineer is for the time being commissioned,
- (b) the reservoir manager is required by section 34(1) to commission an inspecting engineer, but no inspecting engineer is for the time being commissioned,
- (c) the reservoir manager is required by section 43(2)(a) to commission a construction engineer, but no construction engineer is for the time being commissioned.

(2) The Department may by notice (“the notice”) served on the reservoir manager of the reservoir require the manager—

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- (a) to commission the relevant engineer before the end of the period of 28 days beginning with the day on which the notice is given (unless the reservoir manager has already commissioned the relevant engineer),
- (b) before the expiry of such period as is specified in the notice, to give notice to the Department of the commissioning (whether it was made before or after the notice was given).

(3) In subsection (2)(a) and sections 69 and 70, “the relevant engineer” is a supervising engineer, an inspecting engineer or (as appropriate) a construction engineer.

#### **Offence: failure to comply with notice under section 67(2)**

**68.**—(1) Failure to comply with the requirements of a notice by the Department under the following sections is an offence—

- (a) section 67(2)(a) (requirement to commission supervising engineer, inspecting engineer or construction engineer),
- (b) section 67(2)(b) (notice to Department of commissioning).

(2) A reservoir manager guilty of an offence under subsection (1)(a) or (b) is liable—

- (a) on conviction on indictment to imprisonment for a term not exceeding 2 years, or to a fine, or to both,
- (b) on summary conviction to imprisonment for a term not exceeding 6 months, or to a fine not exceeding the statutory maximum, or to both.

#### **Commissioning of engineer by Department**

**69.**—(1) The Department may commission a relevant engineer where—

- (a) it has by notice under section 67(2) required a reservoir manager to do so,
- (b) the reservoir manager has failed to do so.

(2) Any commissioning of a relevant engineer under this section is to be treated for the purposes of this Act as if the commissioning were by the reservoir manager under section 25(2), 34(1) or 43(2)(a).

(3) The commissioning of a relevant engineer under this section—

- (a) has no effect if the reservoir manager has already commissioned a relevant engineer,
- (b) terminates with effect from the date of the subsequent commissioning of a relevant engineer by the reservoir manager.

(4) If the Department considers it appropriate to do so, it may by notice served on the reservoir manager require the manager to pay the Department such amount of the costs reasonably incurred by it in pursuance of the exercise of its powers under this section as is specified in the notice.

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(5) Subject to section 76, the reservoir manager must pay the amount of any costs so incurred and specified in such notice.

**Commissioning by the Department: engineers' reports, certificates, recommendations etc.**

**70** Where the Department commissions a relevant engineer under section 69, the following are to be given to the Department (instead of being given to the reservoir manager) and copied to the reservoir manager, not later than 28 days after being given to the Department—

- (a) where the relevant engineer is a supervising engineer, any notice under section 26(2)(a) or (g), recommendation under section 26(3) or statement under section 26(5) by the supervising engineer,
- (b) where the relevant engineer is an inspecting engineer, any inspection report, interim inspection compliance certificate or inspection compliance certificate by the inspecting engineer,
- (c) where the relevant engineer is a construction engineer, any safety report, safety measure certificate, preliminary certificate, construction certificate or final certificate by the construction engineer.

PROSPECTIVE

*Enforcement of taking of safety measures*

**Enforcement notice: safety measures**

**71.—(1)** This section applies in relation to a controlled reservoir where it appears to the Department that the reservoir manager has failed to comply with—

- (a) the manager's duty under section 36(1) (to ensure compliance with a direction in an inspection report or a pre-commencement safety recommendation),
- (b) the manager's duty under section 46(1) (to ensure compliance with a direction in a safety report).

(2) The Department may by notice served on the reservoir manager require the manager to comply with the duty before the end of the period specified in the notice.

(3) The Department must consult an engineer commissioned by it under this section about the period to be specified in the notice.

(4) An engineer may be commissioned under this section, or section 73, if the engineer is a member of a panel of reservoir engineers established

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under section 102 who may (by virtue of an order under that section) be commissioned under this section or section 73 in relation to the reservoir.

(5) Notice under subsection (2) must—

- (a) specify the measure that the Department requires to be taken,
- (b) state the Department's reasons for considering that this section applies,
- (c) specify any particular steps the Department considers must be taken as respects the measures.

(6) If the Department considers it appropriate to do so, it may by notice served on the reservoir manager require the manager to pay the Department such amount of the costs reasonably incurred by it in connection with consultation under this section as is specified in the notice.

(7) Subject to section 76, the reservoir manager must pay the amount of any costs so incurred and specified in such notice.

**Offence: failure to comply with notice under section 71(2)**

**72.—**(1) Failure to comply with a notice by the Department under section 71(2) is an offence.

(2) A reservoir manager guilty of an offence under subsection (1) is liable—

- (a) on conviction on indictment to imprisonment for a term not exceeding 2 years, or to a fine, or to both,
- (b) on summary conviction to imprisonment for a term not exceeding 6 months, or to a fine not exceeding the statutory maximum, or to both.

PROSPECTIVE

*Department arranging taking of safety measures*

**Department's power to arrange taking of safety measures**

**73.—**(1) This section applies where the Department has by notice under section 71(2) required a reservoir manager to take a measure and the reservoir manager has failed to do so.

(2) The Department may arrange for the taking of the measure under the supervision of an engineer commissioned by it under this section.

(3) Where the engineer is satisfied that the measure has been taken, the engineer must give a certificate to that effect to the Department.

(4) A certificate given under subsection (3) in respect of a measure which is the subject of a direction referred to in section 35(4)(a)(ii) (direction in inspection report to ensure taking of measure in interests of safety of reservoir),

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or in respect of a pre-commencement safety recommendation, has effect as if it were an interim inspection compliance certificate or (as appropriate) an inspection compliance certificate.

(5) A certificate given under subsection (3) in respect of a direction in a safety report as to a measure referred to in section 45(1)(a) (measure in interests of safety of reservoir) has effect as if it were a safety measure certificate.

(6) If the Department considers it appropriate to do so, it may by notice served on the reservoir manager require the manager to pay the Department such amount of the costs reasonably incurred by it in making arrangements under this section as is specified in the notice.

(7) Subject to section 76, the reservoir manager must pay the amount of any costs so incurred and specified in such notice.

PROSPECTIVE

*Conviction of certain offences involving safety matters: further remedies*

**Offence under section 39(1) or 53(1)(a): further remedies**

**74.—**(1) This section applies where a reservoir manager is convicted of an offence under—

- (a) section 39(1) (failure to ensure compliance with direction in inspection report or pre-commencement safety recommendation),
- (b) section 53(1)(a) (failure to comply with direction in safety report).

(2) The court may, in addition to or instead of imposing any penalty that may be imposed under section 39(2) or 53(2) order the reservoir manager to take such steps as may be specified in the order, before the expiry of such period as is so specified—

- (a) to secure compliance with the direction or recommendation concerned,
- (b) to secure the remedying or mitigating of the effects of the failure to comply with the direction or recommendation.

(3) The court may—

- (a) on an application made before the end of the period specified under subsection (2), by order extend the period to such extended period as is specified in the order,
- (b) on an application made before the end of the extended period, by order further extend the period to such further extended period as is specified in the order,

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- (c) by order grant further extensions of the latest period specified by it by order under paragraph (b), on an application made before the end of the latest period.

PROSPECTIVE

*Department's powers in emergency*

**Emergency powers**

**75.—**(1) This section applies where it appears to the Department that immediate action is needed to protect persons or property against an escape of water from a controlled reservoir (whether or not the reservoir is in use).

(2) The Department may take any measures that it considers necessary—

- (a) to remove or reduce the risk to persons or property,
- (b) to mitigate the effect of an escape of water.

(3) The Department must—

- (a) commission an engineer to make recommendations about any measures to be taken under this section,
- (b) arrange for the measures to be taken under the supervision of the commissioned engineer.

(4) An engineer may be commissioned under this section if the engineer is a member of a panel of reservoir engineers established under section 102 who may (by virtue of an order under that section) be commissioned under this section in relation to the reservoir.

(5) The Department must serve notice on the reservoir manager of the measures to be taken under this section.

(6) Notice under subsection (5)—

- (a) must be served as soon as is reasonably practicable (which may be after any works have begun), but
- (b) is not required if the Department is unable after reasonable enquiry to ascertain the name and address of the reservoir manager and the works have commenced.

(7) If the Department considers it appropriate to do so, it may by notice served on the reservoir manager require the manager to pay the Department such amount of the costs reasonably incurred by it in relation to the exercise of its powers under this section as is specified in the notice.

(8) Subject to section 76, the reservoir manager must pay the Department the amount of any costs so incurred and specified in such notice.

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## PROSPECTIVE

*Recovery of costs under section 69, 71, 73 or 75: appeal***Recovery of costs under section 69, 71, 73 or 75: appeal**

**76.—**(1) A reservoir manager required by virtue of notice served by the Department under section 69(4), 71(6), 73(6) or 75(7) to pay the Department's costs referred to in the section may appeal to the Water Appeals Commission against—

- (a) the Department's decision to require the manager to pay the costs,
  - (b) the Department's decision as to the amount of the costs.
- (2) The Commission may confirm, quash or vary the decision.

## PROSPECTIVE

*Stop notices***Stop notices**

**77.—**(1) The Department may by regulations make provision as to the serving by it of stop notices on reservoir managers of controlled reservoirs.

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

(3) A stop notice is a notice prohibiting a reservoir manager of a controlled reservoir from doing any of the following until the manager has taken the steps specified in the notice—

- (a) carrying on an activity specified in the notice,
- (b) permitting the carrying on by another of an activity so specified.

(4) Regulations under subsection (1) may confer power to serve a stop notice only in relation to a case where either—

- (a) the reservoir manager is carrying on the activity, or the activity is being carried on by another with the permission of the manager, and the Department reasonably considers that the activity as so carried on either—
  - (i) presents a risk to the safety of the reservoir that may result in an uncontrolled release of water from it, or
  - (ii) involves or is likely to involve the commission of an offence under this Act,

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or

- (b) the Department considers that the reservoir manager is likely to carry on, or permit the carrying on of, the activity and that the activity as likely to be so carried on either—
  - (i) will present a risk to the safety of the reservoir that may result in an uncontrolled release of water from it, or
  - (ii) will involve, or is likely to involve, the commission of an offence under this Act.

(5) Where the regulations confer power to serve a stop notice in a case where the Department reasonably considers as is specified in subsection (4)(a)(i) or (b)(i) (risk to safety)—

- (a) the Department must, before it exercises the power—
  - (i) at its own expense commission an engineer who is a member of a panel of reservoir engineers established under section 102 who may (by virtue of an order under that section) be commissioned under this section in relation to the reservoir,
  - (ii) take into account any recommendation made by the engineer about the stop notice,
- (b) the steps specified in any such stop notice (in pursuance of subsection (3)) must be steps to remove or reduce the risk referred to in subsection (4) (a)(i) or (b)(i).

(6) For the purposes of this section, permission includes acquiescence; and references to “permitting” and “permit” are to be construed accordingly.

### **Stop notices: content and procedure**

**78.**—(1) Regulations made under section 77(1) must secure the results in subsection (2) in a case where a stop notice is served.

- (2) The results are that—
  - (a) the stop notice must include information as to the matters specified in subsection (3),
  - (b) the reservoir manager on whom the notice is served may appeal to the Water Appeals Commission against the decision to serve it,
  - (c) where, after serving the stop notice, the Department is satisfied that the manager has taken the steps specified in the notice, the Department must give a certificate to that effect (a “completion certificate”),
  - (d) the stop notice ceases to have effect on the giving of a completion certificate,
  - (e) the reservoir manager on whom the stop notice is served may at any time apply for a completion certificate,



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- (f) the Department must make a decision as to whether to give a completion certificate before the end of the period of 14 days beginning with the day on which the application for the certificate is made,
  - (g) the reservoir manager on whom the stop notice is served may appeal to the Water Appeals Commission against a decision not to give a completion certificate,
  - (h) a stop notice in respect of which an appeal referred to in paragraph (b) or (g) is made continues to have effect pending a decision being made in the appeal.
- (3) The matters referred to in subsection (2)(a) are—
- (a) the grounds for serving the stop notice,
  - (b) rights of appeal,
  - (c) the consequences of non-compliance with the stop notice.
- (4) Provision pursuant to subsection (2)(b) must—
- (a) secure that the grounds on which a reservoir manager may appeal against a decision of the Department to serve a stop notice include that—
    - (i) the decision was based on an error of fact,
    - (ii) the decision was wrong in law,
    - (iii) the decision was unreasonable,
    - (iv) any step specified in the notice is unreasonable,
  - (b) secure that the Commission may confirm, quash or vary the decision.
- (5) Provision pursuant to subsection (2)(g) must—
- (a) secure that the grounds on which a reservoir manager may appeal against a decision of the Department not to give a completion certificate 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.

#### **Stop notices: compensation**

- 79** Provision under section 77(1)—
- (a) must include provision for the Department to compensate the reservoir manager for loss suffered as the result of the serving of the stop notice,
  - (b) may provide for compensation only—
    - (i) in cases specified by the regulations,
    - (ii) in relation to descriptions of loss so specified,

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- (c) must secure that the reservoir manager on whom the stop notice is served may appeal to the Water Appeals Commission against the following—
  - (i) a decision of the Department not to award compensation,
  - (ii) a decision of the Department as to the amount of the compensation,
- (d) must secure that the Commission may confirm, quash or vary the decision.

#### **Stop notices: enforcement**

**80.—(1)** Regulations under section 77(1) may provide that, where a reservoir manager on whom a stop notice is served does not comply with it, the manager commits an offence and is liable—

- (a) on summary conviction, to imprisonment for a term not exceeding 6 months, or to a fine not exceeding £20,000, or to both,
- (b) on conviction on indictment—
  - (i) for a first such offence, to imprisonment for a term not exceeding 12 months, or to a fine, or to both,
  - (ii) for any subsequent such offence, to imprisonment for a term not exceeding 2 years, or to a fine, or to both.

**(2)** Regulations made under section 77(1) must provide that it is a defence to a charge in proceedings for an offence created by the regulations for the person to show both—

- (a) that the failure to comply with the stop notice 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
- (b) that the person—
  - (i) took all practicable steps to prevent an uncontrolled release of water from the reservoir,
  - (ii) took all practicable steps as soon as was reasonably practicable to rectify the failure,
  - (iii) provided particulars of the failure to the Department as soon as practicable after the failure arose.

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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,
- (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).

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### **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,
  - (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

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- 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.

(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).

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### **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.

(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)—

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- (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.
- (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,

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- (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)—
  - (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—



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- (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)—
- (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.

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(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.

#### **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.

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### **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,
- (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.

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(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.

PROSPECTIVE

*Miscellaneous*

**Consultation in relation to regulations under sections 77(1), 81(1), 83(1) and 86(1)**

**90.**—(1) The consultation required by sections—

- (a) 77(2) (stop notices),
- (b) 81(2) (enforcement undertakings),
- (c) 83(2) (fixed monetary penalties),
- (d) 86(2) (variable monetary penalties),

is consultation with the organisations and persons mentioned in subsection (2).

(2) The persons are—

- (a) such organisations as appear to the Department to be representative of persons substantially affected by the making of the proposed regulations,
- (b) such other persons as the Department considers appropriate.

**Recovery by the Department of certain costs**

**91.**—(1) Regulations under section 77(1), 81(1) or 86(1) may include provision for the Department, by notice served on a reservoir manager on whom a stop notice is served, from whom an enforcement undertaking is accepted or on whom a variable monetary penalty is imposed, to require the reservoir manager to pay the amount of any costs reasonably incurred by the Department in relation to (and up to the time of) the service of the notice, acceptance of the undertaking or imposition of the penalty.

(2) In subsection (1), the reference to “costs” includes in particular—

- (a) investigation costs,
- (b) administration costs,
- (c) costs of obtaining expert advice, including legal advice.

(3) Provision pursuant to subsection (1) must—

- (a) secure that the reservoir manager required to pay the costs may appeal to the Water Appeals Commission against the following—
  - (i) the Department's decision to impose the requirement to pay costs,

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- (ii) the Department's decision as to the amount of the costs,
- (b) secure that the Commission may confirm, quash or vary the decision.

### **Publication of enforcement action**

**92.**—(1) Except as provided in subsection (2), the Department may publish such information as it considers appropriate as regards cases in which it has—

- (a) commissioned a supervising engineer, an inspecting engineer or a construction engineer under section 69,
- (b) arranged for the taking of any measure under section 73,
- (c) served a stop notice by virtue of section 77(1),
- (d) imposed a fixed monetary penalty by virtue of section 83(1),
- (e) imposed a variable monetary penalty by virtue of section 86(1).

(2) The Department may not publish information as regards a case falling within paragraph (c), (d) or (e) of subsection (1) where the stop notice, fixed monetary penalty or variable monetary penalty has been imposed but overturned on appeal.

### *Powers of entry*

#### **Powers of entry**

**93.**—(1) Any person duly authorised in writing by the Department may, at any reasonable time for any of the purposes in subsection (2), enter—

- (a) land on which a controlled reservoir is situated,
  - (b) land on which a structure or area, which is to be treated by virtue of section 2(2) for the purposes of this Act as a controlled reservoir, is situated,
  - (c) land on which the Department considers there is a structure or area in relation to which the Department is considering making regulations under section 2(3),
  - (d) land on which a structure or area which previously at any time has been a controlled reservoir is situated,
  - (e) neighbouring or other land through which access is required in order to enter any land referred to in paragraphs (a) to (d).
- (2) The purposes are to carry out an inspection, survey or other operation—
- (a) to determine whether any provision of this Act applies,

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- (b) for the purpose of assisting the Department in giving a reservoir designation or a review, periodic re-assessment or appeal as regards a reservoir designation,
- (c) to determine whether a direction under section 26(4)(a) (supervision: direction to carry out visual inspection) has been complied with,
- (d) to determine—
  - (i) whether a measure directed in an inspection report or a pre-commencement safety recommendation has been taken (whether before or after the giving of an enforcement notice under section 71),
  - (ii) the period to be specified in a notice under that section,
- (e) to determine whether a measure directed in a safety report has been taken,
- (f) to determine whether the reservoir manager of a controlled reservoir is complying with the requirements of a preliminary certificate or final certificate,
- (g) to determine whether the records required by sections 37 or 58 are being maintained,
- (h) to determine whether any incident is being reported in accordance with regulations under section 56,
- (i) to determine whether a flood plan is being prepared in accordance with regulations under section 57,
- (j) for the purposes of section 73 (Department's power to arrange taking of safety measures),
- (k) to determine what (if any) emergency measures should be taken under section 75, or for any purpose connected with taking such measures,
- (l) to determine whether a stop notice should be served,
- (m) to assess whether any offence under this Act may be being, or has been, committed,
- (n) for the purposes of section 97 (assessment of compensation or reinstatement works).

### **Warrants authorising entry**

**94.—**(1) A lay magistrate may by warrant authorise any person entitled to exercise a right of entry under section 93 to do so, if necessary using reasonable force, in accordance with the warrant.

(2) A warrant may be granted under this section only if the lay magistrate is satisfied on a complaint on oath as to both of the following—

- (a) that there are reasonable grounds for the exercise of the right in relation to the land concerned,

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- (b) that any of the following applies—
  - (i) the conditions in subsection (3) are satisfied,
  - (ii) the land is unoccupied,
  - (iii) the case is one of urgency.
- (3) The conditions referred to in subsection (2)(b)(i) are—
  - (a) that the person applying for the warrant has given notice under section 95(2)(a) of the person's intention to exercise the right,
  - (b) that the notice period has expired,
  - (c) that either—
    - (i) permission to exercise the right in relation to the land has been refused, or
    - (ii) such a refusal is reasonably expected.
- (4) For the purposes of subsection subsection (3)(c)(i), permission to exercise the right is to be regarded as having been refused if no reply is received within a reasonable period to a request to exercise the right.
- (5) A warrant granted under this section—
  - (a) does not entitle a person to use force against an individual,
  - (b) continues in force until the purpose for which the warrant was issued has been fulfilled or, if earlier, the expiry of such period as the warrant may specify.

#### **Powers of entry: supplementary**

- 95.—**(1) A right to enter land conferred by section 93 includes a right, subject in the case of a right exercisable in accordance with a warrant to the terms of the warrant, to—
- (a) take on to the land such other persons and such materials and equipment (including machinery and vehicles) as may be reasonably required for the purposes of assisting the persons,
  - (b) do anything else which is reasonably required in order to fulfil the purpose for which entry is taken.
- (2) Except for a purpose referred to in section 93(2)(k), a person may not demand entry to land which is occupied unless either—
- (a) at least 7 days' notice has been served on the occupier, or
  - (b) the entry is authorised by a warrant under section 94.
- (3) Notice under subsection (2)(a) must—
- (a) specify the purpose for which entry is required,
  - (b) specify so far as practicable the nature of any proposed works on the land.

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(4) A person authorised by virtue of section 93 to enter land must on request produce written evidence of the authorisation.

### **Offence: preventing or obstructing entry**

**96.—**(1) Any person who wilfully prevents or obstructs another person entitled to enter land by virtue of section 93 (whether or not by virtue of a warrant under section 94) commits an offence.

(2) A person guilty of an offence under subsection (1)—

- (a) in relation to a controlled reservoir which is, at the time the offence is committed, a high-consequence reservoir is liable on summary conviction to a fine not exceeding level 5 on the standard scale,
- (b) in relation to any other controlled reservoir is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

### **Compensation**

**97.—**(1) Subject to subsection (7), the Department must pay compensation in accordance with this section where subsection (2) or (4) applies.

(2) This subsection applies where, in the exercise of a right to enter land conferred by section 93 (whether or not under a warrant under section 94) any of the following occurs—

- (a) any land, other than land which is occupied by the reservoir manager, is damaged,
- (b) the enjoyment of any land, other than land which is so occupied, is disturbed.

(3) Compensation under subsection (1) in respect of the damage or disturbance, where subsection (2) applies, is to be paid to—

- (a) a person with an interest in the land,
- (b) a person whose enjoyment of the land is disturbed.

(4) This subsection applies where in the exercise of a right to enter land conferred by section 93 (whether or not under a warrant under section 94), land occupied by the reservoir manager is damaged and the reservoir manager is not disqualified from claiming compensation.

(5) The reservoir manager of a controlled reservoir is disqualified from claiming compensation under subsection (1) in either of the following circumstances—

- (a) the exercise of the right was for the purposes of section 73,
- (b) the exercise of the right was for the purpose of taking measures under section 75 and the reservoir manager had not taken all practicable steps to prevent an escape of water from the reservoir.



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(6) Compensation under subsection (1) in respect of the damage, where subsection (4) applies, is to be paid to the reservoir manager.

(7) The Department may agree to secure the reinstatement or partial reinstatement of the land instead of payment of compensation under subsection (1), or a combination of such reinstatement and compensation; and subject to subsection (10) any such agreement reached with a person referred to in subsection (2), or the reservoir manager, is binding on the parties to it.

(8) If the Department considers it appropriate to do so it may, in the circumstances mentioned in subsection (9), by notice served on the reservoir manager require the manager to pay the Department such amount of the following as is specified in the notice—

- (a) any compensation payable under this section,
- (b) any costs reasonably incurred by the Department in relation to such compensation or an agreement under subsection (7),

(9) The circumstances are where the damage or disturbance concerned occurred in the exercise of a right to enter land in either of the circumstances referred to in paragraph (a) or (b) of subsection (5).

(10) Any dispute as to a right of compensation under this section, the amount of any such compensation or costs incurred by the Department in relation to such compensation, or costs incurred by it in relation to an agreement under subsection (7), is to be determined by the Lands Tribunal.

PROSPECTIVE

*Reasonable facilities, information and assistance*

**Affording of reasonable facilities to engineers**

**98.**—(1) The reservoir manager of a controlled reservoir must, on being requested by a relevant engineer, provide the engineer with all reasonable facilities the engineer may seek in connection with the exercise of the engineer's powers and duties under this Act.

(2) The reservoir manager—

- (a) must, on being requested by a relevant engineer, make available to the engineer—
  - (i) where the reservoir is a high-consequence reservoir or a medium-consequence reservoir, the record maintained by the manager under section 37,
  - (ii) the record maintained by the manager under section 58,

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- (b) must on being so requested provide a relevant engineer with such further information or particulars as the engineer may require, in such form and manner and by such time as the engineer may by notice require.

(3) For the purposes of this section, a “relevant engineer” is a supervising engineer (including a nominated representative of a supervising engineer under section 26(7)(a) who is acting as such in the event of the supervising engineer being unavailable), an inspecting engineer, any other qualified engineer or a construction engineer commissioned for the time being in relation to the reservoir.

#### **Power of the Department to require information and assistance from reservoir managers**

**99.**—(1) The reservoir manager of a controlled reservoir must, on being requested by the Department, provide the Department with such information and assistance as it may reasonably seek in connection with the exercise of its powers and duties under this Act.

(2) The reservoir manager in particular—

- (a) must, on being requested by the Department, make available to it the records referred to in section 98(2)(a),
- (b) must, on being so requested, provide the Department with such further information or particulars as the Department may require, in such form and manner and within such period of time, as the Department may by notice served on the reservoir manager require.

#### **Offences: sections 98 and 99**

**100.**—(1) A reservoir manager of a controlled reservoir who fails, without reasonable excuse, to comply with any of the following requirements commits an offence—

- (a) the requirements of section 98 (affording of reasonable facilities to engineers),
- (b) the requirements of section 99 (provision of information and assistance to the Department).

(2) A reservoir manager of a controlled reservoir who does any of the following commits an offence—

- (a) intentionally alters, suppresses or destroys any document, information or particulars which the person has been required by virtue of either of those sections to produce,
- (b) for the purposes of either of those sections knowingly or recklessly provides any document which is, or any information or particulars which are, false or misleading in a material respect.

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- (3) A reservoir manager guilty of an offence under subsection (1) or (2)—
- (a) in relation to a controlled reservoir which is, at the time the offence is committed, a high-consequence reservoir is liable on summary conviction to a fine not exceeding level 5 on the standard scale,
  - (b) in relation to any other controlled reservoir is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

#### **Power to require information and assistance from others**

**101** The Department may by notice require a district council, any other body established or constituted under a statutory provision or any other person to provide it, within such period of time as may be so specified, with such information and assistance as it reasonably considers it needs in connection with any of the following purposes—

- (a) enabling the Department to serve or give any notice which it is authorised or required by this Act to serve or give,
- (b) enabling the Department to exercise its powers and duties under this Act,
- (c) enabling the Department to assess who is, or has been, the reservoir manager of a controlled reservoir.

**Status:**

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**Changes to legislation:**

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