

## SCHEDULE 2

Article 4

### FURTHER ENFORCEMENT MEASURES

#### **Power to impose further enforcement measures**

**1.—**(1) SEPA may by notice impose on a reservoir manager of a controlled reservoir one or more further enforcement measures in relation to an offence under section 42(1)(e) (failure to comply with preliminary certificate or final certificate) of the Act.

(2) A further enforcement measure—

- (a) may be imposed on a reservoir manager only where SEPA is satisfied beyond reasonable doubt that the reservoir manager has committed an offence under section 42(1)(e) of the Act; and
- (b) may not be imposed on a reservoir manager on more than one occasion in relation to the same act or omission.

(3) A further enforcement measure may be imposed in addition to any requirement referred to in—

- (a) section 65(2) (enforcement notice: appointment of engineer) of the Act; or
- (b) section 69(2) (enforcement notice: safety and other measures) of the Act.

(4) In this Schedule—

“further enforcement measure” means—

- (a) 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; or
- (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;

“restoration notice” means a notice under sub-paragraph (1) which imposes a requirement to take such steps as SEPA may specify, within such period as it may specify, to secure (whether in whole or in part) that the position is so far as possible restored to what it would have been if the offence had not been committed; and

“restraint notice” means a notice under sub-paragraph (1) which imposes a requirement to take such steps as SEPA may specify, within such period as it may specify, to secure (whether in whole or in part) that the offence does not continue or recur.

#### **Notice of intent**

**2.—**(1) Where SEPA proposes to impose a further enforcement measure on a reservoir manager, it must give the reservoir manager a notice in writing of what is proposed (a “notice of intent”).

(2) 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 written representations and objections;
- (c) the circumstances in which SEPA may not impose the further enforcement measure; and
- (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.

### **Representations and objections**

3. A reservoir manager to whom a notice of intent is given may, within the period mentioned in the notice within which representations and objections may be made, make written representations and objections to SEPA in relation to the proposed imposition of the further enforcement measure.

### **Undertakings**

4.—(1) A reservoir manager to whom a notice of intent (in relation to a proposal to impose a further enforcement measure) is given under paragraph 2 may offer an undertaking (an “FEM undertaking”) as to action to be taken by the reservoir manager (including the payment of a sum of money) to benefit any person affected by the offence to which the proposal relates.

(2) SEPA may accept or reject an FEM undertaking.

### **Decision to impose a further enforcement measure**

5.—(1) After the end of the period for making representations and objections under paragraph 3, SEPA must, having had regard to any such representations or objections, decide whether to impose—

- (a) the further enforcement measure (with or without modifications); or
- (b) any other further enforcement measure which SEPA may impose.

(2) SEPA must take an FEM undertaking accepted under paragraph 4(2) into account in its decision.

(3) SEPA may not decide to impose a further enforcement measure on a reservoir manager where it is satisfied that the reservoir manager would not, by reason of any defence, be liable to be convicted of the offence in relation to which it was imposed.

(4) Where SEPA proposes, pursuant to sub-paragraph (1)(b), to impose any other further enforcement measure, the provisions of this Schedule (including paragraphs 2 and 3) apply in relation to that further enforcement measure as they apply in relation to any other such measure.

### **Final notice**

6.—(1) Where SEPA decides, pursuant to paragraph 5(1)(a), to impose a further enforcement measure on a reservoir manager (by notice under paragraph 1), the restoration notice or restraint notice (the “final notice”) which is to impose that further enforcement measure must—

- (a) be given by SEPA to the reservoir manager; and
- (b) include information as to—
  - (i) the grounds for imposing the further enforcement measure;
  - (ii) rights of appeal; and
  - (iii) the consequences of non-compliance.

(2) SEPA may not give a final notice if the permitted period has expired.

(3) In sub-paragraph (2), “the permitted period” is the period of 6 months beginning with the day after the final day on which written representations may be made in relation to the notice of intent which was given in relation to the further enforcement measure in question.

(4) The permitted period may be extended by agreement in writing between SEPA and the reservoir manager to whom the notice of intent was given.

## **Appeals**

7.—(1) A reservoir manager on whom a further enforcement measure is imposed may appeal to the Scottish Ministers against the decision to impose it.

(2) The appeal must be made within a period of 28 days beginning with the day on which the final notice (to which the appeal relates) was given to the reservoir manager under paragraph 6.

(3) The appeal may be made on any ground including that—

- (a) the decision was based on an error of fact;
- (b) the decision was wrong in law;
- (c) the nature of a requirement imposed by the measure is unreasonable; or
- (d) the decision was unreasonable for any other reason.

(4) Where an appeal is made under this paragraph in relation to a decision to impose a further enforcement measure, the further enforcement measure is suspended from the day on which the appeal is made until the day on which the appeal is determined or withdrawn.

## **Criminal proceedings and conviction**

8.—(1) Sub-paragraph (2) applies where—

- (a) a further enforcement measure is imposed on a reservoir manager; or
- (b) an FEM undertaking from a reservoir manager is accepted under paragraph 4(2).

(2) 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 FEM undertaking, except in a case mentioned in sub-paragraph (3).

(3) The case is where both of the following apply—

- (a) a restraint notice or restoration notice is imposed on the reservoir manager, or an FEM undertaking from the reservoir manager is accepted under paragraph 4(2); and
- (b) the reservoir manager fails to comply with, as the case may be, the restraint notice, the restoration notice or the FEM undertaking in question.

(4) For the purposes of the case referred to in sub-paragraph (3), where SEPA by notice (a “non-compliance notice”) informs the reservoir manager that the reservoir manager has failed to comply with the restraint notice, the restoration notice or the FEM undertaking referred to in sub-paragraph (3)(b), the period within which criminal proceedings may be instituted against the reservoir manager (for an offence in respect of the act or omission giving rise to the further enforcement measure or FEM undertaking) is extended by a period of 6 months beginning with the day on which SEPA gave the non-compliance notice to the reservoir manager.

## **Non-compliance penalties**

9.—(1) SEPA may impose a non-compliance penalty on a reservoir manager of a controlled reservoir (“the reservoir”) if the reservoir manager fails to comply with—

- (a) a restoration notice or a restraint notice imposed on the reservoir manager; or
- (b) an FEM undertaking from the reservoir manager which is accepted under paragraph 4(2).

(2) A “non-compliance penalty” is a requirement to pay a monetary penalty to SEPA.

(3) The amount of the monetary penalty (“the amount”) is—

- (a) where the reservoir is a high risk reservoir, £1000; and
- (b) where the reservoir is not a high risk reservoir, £600.

(4) A non-compliance penalty may only be imposed by notice (“a non-compliance penalty notice”) given by SEPA.

(5) The notice must include information as to—

- (a) the grounds for imposing the non-compliance penalty;
- (b) the amount of the penalty;
- (c) how payment may be made;
- (d) the period within which payment must be made;
- (e) rights of appeal; and
- (f) the consequences of non-payment.

(6) 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 by the sheriff for any sheriffdom.

### **Appeals against non-compliance penalties**

**10.**—(1) A reservoir manager on whom a non-compliance penalty is imposed by notice (under paragraph 9) may appeal to the Scottish Ministers against the notice.

(2) The appeal must be made within a period of 28 days beginning with the day on which the non-compliance penalty (to which the appeal relates) was imposed on the reservoir manager.

(3) The appeal may be made on any ground including that—

- (a) the decision to give the notice was based on an error of fact;
- (b) the decision was wrong in law; or
- (c) the decision was unfair or unreasonable for any other reason.

(4) Where an appeal is made under this paragraph, the non-compliance penalty is suspended from the day on which the appeal is made until the day on which the appeal is determined or withdrawn.

### **Payment requirements for non-compliance penalties**

**11.**—(1) Subject to sub-paragraph (2), a reservoir manager on whom a non-compliance penalty is imposed by notice, must pay to SEPA the amount of the penalty specified in the notice within a period of 56 days beginning with the day on which the notice was given to the reservoir manager or such longer period as SEPA may specify in the notice.

(2) In the case of an appeal, any penalty which falls to be paid (whether because the penalty was upheld or because the appeal was withdrawn) is payable within whichever of the following periods ends later—

- (a) the period referred to in sub-paragraph (1);
- (b) the period of 28 days beginning with the day on which the appeal is determined or withdrawn; or
- (c) such period as the Scottish Ministers may, in determining the appeal, specify.