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SCOTTISH STATUTORY INSTRUMENTS

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**2016 No. 19**

**The Water Environment (Remedial Measures) (Scotland) Regulations 2016**

**PART 1**

Interpretation etc.

**Citation and commencement**

1. These Regulations may be cited as the Water Environment (Remedial Measures) (Scotland) Regulations 2016 and come into force on 1st April 2016.

**Interpretation**

2.—(1) In these Regulations—

“the 2004 Regulations” means the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004(1);

“the 2011 Regulations” means the Water Environment (Controlled Activities) (Scotland) Regulations 2011(2);

“appropriate person” means the Scottish Ministers, a responsible authority or Network Rail;

“the Act” means the Water Environment and Water Services (Scotland) Act 2003;

“artificial structure” means any structure or item (including a bridge, canal, culvert, fitting, pipe, rail-crossing, road, wall and any connected or related apparatus);

“environmental objective” means any of the environmental objectives set out (as a summary or otherwise) in a river basin management plan;

“hydromorphological characteristics” include hydrological regimes, river continuity, morphological conditions and tidal regimes;

“information notice” is to be construed in accordance with regulation 9;

“land” includes land covered by water, and any works, plant or fixed machinery, building or other structure in, on or over land;

“Network Rail” includes Network Rail Infrastructure Limited and an associated company of Network Rail Infrastructure Limited which holds property for railway purposes, and for the purpose of this definition “associated company” means any company which is (within the meaning of section 1159 of the Companies Act 2006(3)) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;

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(1) S.I. 2004/99, as amended by S.I. 2005/2035, S.I. 2008/1097, S.I. 2011/556, S.I. 2011/1043, S.S.I. 2011/228 and S.S.I. 2013/1675.

(2) S.S.I. 2011/209, as amended by S.S.I. 2013/176, S.S.I. 2013/323 and S.S.I. 2015/211.

(3) 2006 c.46.

“Network Rail Infrastructure Limited” means Network Rail Infrastructure Limited, a company limited by shares and incorporated under the Companies Act 1985<sup>(4)</sup>, whose registered company number is 02904587;

“responsible authority” means any public body or office holder designated as a responsible authority for the purposes of section 2 of the Act<sup>(5)</sup>;

“remedial measures” means action (which may include the carrying out of operations or works in relation to any land or body of water) with a view to—

- (a) improving the hydromorphological characteristics of a body of water; or
- (b) restoring (in full or in part) the hydromorphological characteristics that, in the opinion of SEPA, a body of water (other than an artificial water body) would have if those characteristics had not been changed as a result of physical alterations by human activity;

“remedial measures notice” is to be construed in accordance with regulation 3;

“revocation notice” is to be construed in accordance with regulation 7;

“river basin management plan” means, as the case may be—

- (a) a river basin management plan approved by the Scottish Ministers under section 13 (including that section as applied by section 14(4)) of the Act<sup>(6)</sup>;
- (b) a river basin management plan for the Solway Tweed River Basin District approved under paragraph 10 of Schedule 1 to the 2004 Regulations;

“serve” means serve in writing and “served” is to be construed accordingly;

“Solway Tweed River Basin District” means the area identified as a river basin district by regulation 3(1) of the 2004 Regulations; and

“variation notice” is to be construed in accordance with regulation 6.

(2) Where anything under these Regulations is to be done “in writing” that includes an electronic communication, as defined in section 15(1) of the Electronic Communications Act 2000<sup>(7)</sup> which is capable of being reproduced (and “written” is to be construed accordingly).

## PART 2

### Notices to improve or restore characteristics of bodies of water

#### Remedial measures notice

**3.—(1)** SEPA may serve a remedial measures notice on an appropriate person requiring that person to undertake such remedial measures as may be specified in the notice.

(2) SEPA may serve the notice only if it is satisfied that—

- (a) the appropriate person owns, manages, maintains or is otherwise responsible for an artificial structure which, by virtue of its impact on the hydromorphological characteristics of a body of water, is likely to prevent or delay the achievement of an environmental objective;

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(4) 1985 c.6.

(5) S.S.I. 2011/368, as amended by S.S.I. 2015/323.

(6) The objectives which are required to be set under section 9(1)(a)(i) of the Act are (by virtue of section 9(7) of the same Act) those required to comply with Article 4 (environmental objectives) and paragraphs 2 and 3 of Article 7 (requirements in relation to water used for the abstraction of drinking water) of [Directive 2000/60/EC](#) (OJ L 327, 22.12.2000, p.1), as amended by Decision No [2455/2001/EC](#) (OJ L 331, 15.12.2001, p.1), [Directive 2008/32/EC](#) (OJ L 81, 20.3.2008, p.60), [Directive 2008/105/EC](#) (OJ L 348, 24.12.2008, p.84), [Directive 2009/31/EC](#) (OJ L 140, 5.6.2009, p.114) and [Directive 2013/39/EU](#) (OJ L 226, 24.8.2013, p.1).

(7) 2000 c.7. Section 15 was amended by paragraph 158 of Schedule 17 to the Communications Act 2003 (c.21).

- (b) it is necessary or expedient to require the appropriate person to undertake the remedial measures for the purposes of facilitating the achievement of that objective; and
  - (c) the measures specified in the notice are necessary and proportionate for those purposes.
- (3) The notice may be served on more than one appropriate person.

#### **Content of notice**

- 4.—(1) Each notice served under this Part must—
- (a) identify the appropriate person on whom it is served (“recipient”);
  - (b) specify—
    - (i) the remedial measures which require to be undertaken;
    - (ii) the date by (or period within) which each measure must be completed;
    - (iii) any improvements to the hydromorphological characteristics which the measures are intended to facilitate; and
    - (iv) the environmental objectives which the measures are intended to facilitate; and
  - (c) inform the recipient of the right of appeal against the notice under regulation 16.
- (2) The notice must not require a remedial measure to be undertaken (or commenced) within the period of 2 months beginning with the day on which the notice was served.
- (3) Where the notice is served on more than one appropriate person, it must—
- (a) identify each recipient; and
  - (b) specify whether each remedial measure is to be undertaken—
    - (i) by an individual recipient and, if so, which recipient; or
    - (ii) jointly by two or more recipients and, if so, which recipients.

## **PART 3**

### **Notices under Part 2: further provision**

#### **Prior consultation**

- 5.—(1) Before serving a remedial measures notice, SEPA must consult each—
- (a) appropriate person on whom the notice is to be served; and
  - (b) other person as appears to SEPA likely to be substantially affected by the notice.
- (2) Each person must be consulted on the details of the proposed notice in such manner as SEPA considers appropriate with a view to—
- (a) bringing the proposed notice to the attention of the person; and
  - (b) inviting any such person who wishes to make representations to do so in writing to SEPA within a period of 28 days beginning with the date on which they were consulted.
- (3) SEPA must have regard to any representations it receives by virtue of paragraph (2)(b) before deciding to serve the notice.

### **Variation notice**

6.—(1) SEPA may vary a remedial measures notice (as varied in accordance with any variation notice) (“the principal notice”) by serving a variation notice on each appropriate person on whom the principal notice was served.

(2) The variation notice must—

- (a) identify the principal notice; and
- (b) specify—
  - (i) the variation to the principal notice;
  - (ii) the date on which the variation takes effect (which must be at least 28 days after the date on which the variation notice is received by the appropriate person); and
  - (iii) the reason for the variation.

(3) The variation takes effect on the date specified in the variation notice (and this may be before, on or after a date specified in the principal notice by which a measure must be undertaken).

### **Revocation notice**

7.—(1) SEPA may revoke (in whole or in part) a remedial measures notice (as varied in accordance with any variation notice) (“the principal notice”) by serving a revocation notice on each appropriate person on whom the principal notice was served.

(2) The notice served under paragraph (1) must—

- (a) identify the principal notice; and
- (b) specify—
  - (i) in the case of a partial revocation, the part of the principal notice which is revoked;
  - (ii) the date on which the revocation takes effect; and
  - (iii) the reasons for the revocation.

(3) Where a principal notice is revoked under paragraph (1), the principal notice (or, in the case of a partial revocation, the part of the principal notice which is revoked) ceases to have effect from the date specified in the revocation notice on which the revocation takes effect.

(4) Where a revocation notice wholly revokes the principal notice (or the remaining parts of it), any variation notice which varied the principal notice is also revoked.

## **PART 4**

### **Enforcement powers**

#### **Powers and duty to monitor, enforce etc.**

8.—(1) SEPA must monitor compliance with, and enforce the provisions of, these Regulations.

(2) SEPA may secure the carrying out, through such persons as it considers appropriate, of such examination and investigation as it considers necessary for the purpose of discharging its functions under these Regulations.

(3) In regulation 31(5) of the 2011 Regulations—

- (a) in sub-paragraph (c), remove the word “and”; and
- (b) at the end insert—  
“; and

(e) the Water Environment (Remedial Measures) (Scotland) Regulations 2016.”.

### **Power to obtain information**

9.—(1) Subject to paragraph (2), SEPA may serve an information notice on any person requiring that person to provide SEPA, within such period and in such form and manner as may be specified in the notice, with such information as SEPA reasonably considers necessary for the purposes of enabling it to perform any function under these Regulations.

(2) The information which a person may be required to furnish under paragraph (1) may include information which, although it is not in the possession of that person or would not otherwise come into the possession of that person, is information which it is reasonable to require that person to obtain for the purposes of complying with the information notice.

(3) SEPA may vary or revoke an information notice by serving, on the person on whom the information notice was served, a further notice varying or, as the case may be, revoking it.

### **Enforcement by the courts**

10. If SEPA is of the opinion that proceedings for an offence under regulation 11(1)(a) or (b) would afford an ineffectual remedy against a person who has failed to comply with a requirement of—

- (a) a remedial measures notice; or
- (b) a variation notice,

it may take proceedings in any court of competent jurisdiction for the purpose of securing compliance with that notice.

## **PART 5**

### **Offences**

#### **Offences**

11.—(1) It is an offence for an appropriate person to—

- (a) fail to comply with the requirements of a remedial measures notice;
- (b) fail to comply with the requirements of a variation notice;
- (c) fail to comply with the requirements of an information notice.

(2) It is an offence for a person to—

- (a) obstruct an authorised person in the exercise of that person’s powers under regulation 31(4) of, and Schedule 6 to, the 2011 Regulations;
- (b) fail to comply with any requirement imposed in the exercise of an authorised person’s powers under regulation 31(4) of, and Schedule 6 to, the 2011 Regulations;
- (c) fail or refuse to provide facilities or assistance or any information or to permit any inspection reasonably required by an authorised person in the exercise of that authorised person’s powers or duties under or by virtue of regulation 31(4) of, and Schedule 6 to, the 2011 Regulations;
- (d) prevent any other person from appearing before an authorised person, or answering any question to which an authorised person may require an answer, pursuant to regulation 31(4) of, and Schedule 6 to, the 2011 Regulations;

- (e) pretend to be a person authorised in accordance with regulation 31(4) of the 2011 Regulations;
- (f) make a statement which that person knows to be false or misleading in a material particular, or recklessly to make a statement which is false or misleading in a material particular, if the statement is made in purported compliance with a requirement to furnish any information imposed by or under any provision of these Regulations; or
- (g) cause or permit any other person to commit an offence under paragraph (1) or subparagraphs (a) to (f) of this paragraph.

(3) For the purposes of this regulation, “authorised person” means a person who is authorised under regulation 31(4) of the 2011 Regulations to exercise the powers specified in Part I of Schedule 6 to the 2011 Regulations in accordance with the requirements of Parts 2 and 3 of that Schedule for the purpose of discharging any of SEPA’s functions under these Regulations.

### **Defences**

**12.** It is a defence for an appropriate person charged with an offence under regulation 11(1)(a) or (b) to show that—

- (a) the acts or failures alleged to constitute the offence were a result of natural causes or force majeure which are exceptional or could not reasonably have been foreseen; or
- (b) the person does not own, manage, maintain or is not otherwise responsible for the artificial structure in relation to which the remedial measures notice or variation notice was served.

### **Penalties**

**13.** A person who commits an offence under regulation 11 is liable—

- (a) on summary conviction to—
  - (i) a fine not exceeding the statutory maximum;
  - (ii) imprisonment for a term not exceeding 12 months; or
  - (iii) both; or
- (b) on conviction on indictment to—
  - (i) a fine;
  - (ii) imprisonment for a term not exceeding 2 years; or
  - (iii) both.

### **Offences by bodies corporate**

**14.—(1)** Where—

- (a) an offence under these Regulations has been committed by a body corporate or a Scottish partnership or other unincorporated association; and
- (b) it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of—
  - (i) a relevant individual; or
  - (ii) an individual purporting to act in the capacity of a relevant individual,

the individual as well as the body corporate, Scottish partnership or unincorporated association commits an offence and is liable to be proceeded against and punished accordingly.

(2) In paragraph (1), “relevant individual” means—

- (a) in relation to a body corporate—

- (i) a director, manager, secretary or other similar officer of the body; or
- (ii) where the affairs of the body are managed by its members, a member;
- (b) in relation to a Scottish partnership, a partner;
- (c) in relation to an unincorporated association other than a Scottish partnership, a person who is concerned in the management or control of the association.

### **Power of court to order offence to be remedied**

**15.**—(1) If—

- (a) a person is convicted of an offence under regulation 11(1)(a) or (b); and
- (b) it appears to the court that it is in the power of that person to undertake the remedial measures specified in the remedial measures notice or the variation notice, as the case may be, in relation to which the person is convicted of the offence,

the court may, in addition to, or instead of, imposing any punishment, order the person, within such time as may be fixed by the order of the court, to take such steps as may be specified in that order for complying with the remedial measures notice or the variation notice, as the case may be.

(2) Before making such an order, the court must have regard to any representations by SEPA as to the steps required for taking the measure.

(3) The time fixed by an order of the court under paragraph (1) may be extended or further extended by a further order of the court on an application made before the end of the time originally fixed or extended under this paragraph, as the case may be.

## **PART 6**

### **Appeals**

#### **Appeals to the Scottish Ministers**

**16.** A person, other than the Scottish Ministers, who is aggrieved by a requirement imposed on the person by—

- (a) a remedial measures notice; or
- (b) a variation notice,

may appeal to the Scottish Ministers against the notice.

#### **Determination of appeals**

**17.** On determining an appeal made under regulation 16, the Scottish Ministers may either quash or affirm the notice, and if they affirm it, they may do so in its original form or with such modifications as they may think fit.

#### **Effect of notices etc. during consideration of appeal**

**18.** Where an appeal is made under regulation 16, the effect of the notice which is being appealed against is suspended until the day following the day on which the appeal is finally determined or withdrawn.

### Appeals – miscellaneous

19. The Schedule, which makes provision for procedures for appeals made under regulation 16, has effect.

## PART 7

### General

#### Application to the Crown

20. These Regulations do not bind the Crown.

#### Consequential amendments

21. In Schedule 1 to the Water Environment (Relevant Enactments and Designation of Responsible Authorities and Functions) (Scotland) Order 2011(8), after the last entry, insert—

“The Water Environment (Remedial Measures) (Scotland) Regulations 2016.”.

22.—(1) Regulation 44 of the 2011 Regulations (offences) is amended as follows.

(2) In paragraph (1), for “It” substitute “Subject to paragraph (1A), it”.

(3) After paragraph (1) insert—

“(1A) Paragraph (1)(e) to (i) does not apply in relation to a person authorised in accordance with regulation 31(4) to exercise the powers specified in Part 1 of Schedule 6 in accordance with the requirements of Parts 2 and 3 of that Schedule where the powers are to be exercised for the purposes of discharging any of SEPA’s functions under regulation 31(5) (e).”.

St Andrew’s House,  
Edinburgh  
13th January 2016

*AILEEN McLEOD*  
Authorised to sign by the Scottish Ministers