

2023 No. 1046

ENVIRONMENTAL PROTECTION, ENGLAND

**The Environmental Permitting (England and Wales)
(Amendment) (England) (No. 2) Regulations 2023**

Made - - - - 26th September 2023

Coming into force - - 1st December 2023

The Secretary of State makes these Regulations in exercise of the powers conferred by—

- (a) sections 2 and 7(9) of, and paragraph 17 of Schedule 1 to, the Pollution Prevention and Control Act 1999(a) (“the 1999” Act);
- (b) section 61 of, and paragraph 26 of Schedule 8 to, the Water Act 2014(b) (“the 2014 Act”), and
- (c) sections 36, 42, 53 to 55, 62, 63 and 65 of the Regulatory Enforcement and Sanctions Act 2008(c) (“the 2008 Act”).

In accordance with section 66 of the 2008 Act, the Secretary of State is satisfied that the Environment Agency will act in accordance with the principles referred to in section 5(2) of that Act in exercising the powers in these Regulations.

In accordance with section 2(4) of the 1999 Act and section 61(5) of the 2014 Act, before making these Regulations the Secretary of State has consulted—

- (a) the Environment Agency;
- (b) the Natural Resources Body for Wales;
- (c) such bodies or persons as appear to the Secretary of State to be representative of the interests of local government, industry, agriculture and small businesses; and
- (d) such other bodies and persons as the Secretary of State considers appropriate.

A draft of this instrument has been approved by a resolution of each House of Parliament pursuant to section 62(3) of the 2008 Act.

Citation, commencement, extent, application and interpretation

1.—(1) These Regulations may be cited as the Environmental Permitting (England and Wales) (Amendment) (England) (No. 2) Regulations 2023 and come into force on 1st December 2023.

(a) 1999 c. 24. Section 2 was amended by section 62 of the Water Act 2014 (c. 21) and by S.I. 2013/755 (W. 90). Relevant amendments to Schedule 1 applying in relation to England and Wales were made by section 105 of the Clean Neighbourhoods and Environment Act 2005 (c. 16) and by S.I. 2015/664 and 2023/149.

(b) 2014 c. 21. Section 61(3).

(c) 2008 c. 13. Section 42(6) was amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015 (S.I. 2015/664).

(2) These Regulations extend to England and Wales but apply in relation to England and the sea adjacent to England out as far as the seaward boundary of the territorial sea only.

(3) In these Regulations, “the principal Regulations” means the Environmental Permitting (England and Wales) Regulations 2016^(a).

Amendment of the principal Regulations

2. The principal Regulations are amended in accordance with the following provisions.

Amendment of regulation 39 (penalties and enforcement undertakings)

3. In regulation 39, after paragraph (6) insert—

“(7) Schedule 26A (Variable monetary penalties (England)) has effect.”.

Insertion of Schedule 26A

4. After Schedule 26 insert new Schedule 26A as set out in the Schedule to these Regulations.

26th September 2023

Rebecca Pow
Parliamentary Under Secretary of State
Department for Environment, Food and Rural Affairs

SCHEDULE

Regulation 4

Insertion of Schedule 26A into the principal Regulations

“SCHEDULE 26A

Regulation 39(7)

Variable monetary penalties (England)

PART 1

Variable monetary penalties: procedure

Power to impose a variable monetary penalty

1.—(1) The Agency may by notice impose on a person a requirement to pay to the Agency a monetary penalty of such amount as the Agency may determine (“a variable monetary penalty”) in relation to a relevant offence which is committed in England on or after 1st December 2023.

(2) The Agency may only impose a variable monetary penalty where it is satisfied beyond reasonable doubt that the person has committed the offence.

(3) In this Schedule, “a relevant offence” means an offence specified in regulation 38.

(4) A variable monetary penalty must not be imposed on a person in relation to a relevant offence where—

(a) S.I. 2016/1154.

- (a) a variable monetary penalty has already been imposed on that person in relation to the same act or omission which gave rise to the offence; or
- (b) the Agency has accepted an enforcement undertaking under paragraph 1 of Schedule 26 in relation to the same act or omission, unless the person from whom the undertaking is accepted has failed to comply with the undertaking, or any part of it.

(5) Before serving a notice relating to a variable monetary penalty, the Agency may require a person to provide such information as is reasonable to establish the amount of any financial benefit arising as a result of the offence.

(6) The Agency may impose a variable monetary penalty of—

- (a) any amount, in relation to an offence under regulation 38(1) to (4); or
- (b) an amount not exceeding the maximum amount of the fine which may be imposed on summary conviction, in relation to an offence committed by an establishment or undertaking under regulation 38(5).

Notice of intent to impose a variable monetary penalty

2.—(1) Where the Agency proposes to impose a variable monetary penalty on a person, it must first serve on that person a notice of what is proposed (a “notice of intent”).

(2) The notice of intent must include information as to—

- (a) the grounds for imposing the variable monetary penalty;
- (b) the amount of the variable monetary penalty proposed;
- (c) the right to make representations and objections;
- (d) the circumstances in which the Agency may not impose the variable monetary penalty; and
- (e) the right to make representations and objections within 28 days beginning with the day on which the notice of intent was received.

Making representations and objections

3.—(1) A person on whom a notice of intent is served may, within 28 days beginning with the day on which the notice was received, make written representations and objections to the Agency in relation to the imposition of the variable monetary penalty.

(2) If the notice of intent is served other than by post, the date that the person receives the notice is to be taken as—

- (a) the date that the email containing the notice was sent to the person, if served by email; or
- (b) the date that the notice is delivered to the person, if served by another method.

Offering a third party undertaking

4.—(1) A person on whom a notice of intent is served may offer the Agency an undertaking as to action to be taken by that person (including the payment of a sum of money) to benefit any third party affected by the offence (a “third party undertaking”).

(2) The Agency may accept or reject such a third party undertaking.

(3) If the Agency accepts the third party undertaking, it must also take that undertaking into account in making a decision in relation to the imposition of a variable monetary penalty.

Procedure for imposition of a variable monetary penalty

5.—(1) Subject to sub-paragraph (2), after the end of the period for making representations and objections, the Agency must decide whether to impose the variable monetary penalty, with or without modifications.

(2) The Agency may not impose a variable monetary penalty on a person where it is satisfied that the person would not, by reason of any defence, be liable to be convicted of the offence to which the notice relates.

(3) Where the Agency decides to impose a variable monetary penalty, it must send to the person a notice imposing the variable monetary penalty (a “final notice”) including the information specified in paragraph 6.

Final notice

6. A final notice must specify—

- (a) the grounds for imposing the variable monetary penalty;
- (b) the amount of the penalty;
- (c) the method by which it can be paid;
- (d) the period within which payment must be made;
- (e) the grounds on which the person on whom the penalty is imposed may appeal; and
- (f) the consequences of failing to comply with the requirements of the final notice.

Variable monetary penalties: criminal proceedings and conviction

7.—(1) This paragraph applies where the Agency has, in relation to a relevant offence—

- (a) imposed a variable monetary penalty on a person; or
- (b) accepted a third party undertaking from a person.

(2) The person referred to in sub-paragraph (1)(a) or (b) may not at any time be convicted of an offence in relation to the same act or omission for which the variable monetary penalty was imposed or the third party undertaking accepted, except in the case referred to in sub-paragraph (3).

(3) A case is within this sub-paragraph if—

- (a) no variable monetary penalty is imposed on the person;
- (b) a third party undertaking is accepted from the person; and
- (c) the person fails to comply with the third party undertaking.

(4) Where sub-paragraph (3) applies, summary proceedings in relation to the offence which gave rise to the third party undertaking may be instituted at any time within the period of six months beginning with the date on which the Agency notified the person of their failure to comply with the third party undertaking.

Variable monetary penalties: enforcement cost recovery notice

8.—(1) The Agency may require a person served with a final notice in accordance with paragraph 5(3) to pay the costs incurred by the Agency in relation to the variable monetary penalty.

(2) The costs which may be recovered are those incurred by the Agency up to the time that a final notice was served on the person and may include in particular—

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

(3) The Agency may recover the costs referred to in paragraph (2) by serving a notice requiring payment (“an enforcement cost recovery notice”) on the person.

(4) An enforcement cost recovery notice must—

- (a) specify the amount to be paid and the method by which it may be paid;
- (b) specify the period within which payment must be made, which must not be less than 28 days;
- (c) include statements—
 - (i) that the Agency may on request be required to provide a detailed breakdown of the costs specified; and
 - (ii) that the person is not liable to pay any costs that they can show to have been unnecessarily incurred;
- (d) specify the grounds on which the person served with the notice may appeal; and
- (e) specify the consequences of failure to pay the amount required within the specified period.

(5) The person on whom the notice is served may require the Agency to provide a detailed breakdown of the amount of the costs.

(6) The person is not liable to pay any costs which they can show to have been unnecessarily incurred.

(7) The Agency may at any time, in writing, withdraw an enforcement cost recovery notice or reduce the amount specified in the notice.

PART 2

Non-compliance penalties and recovery of penalties and costs

Non-compliance penalty

9.—(1) If a person fails to comply with a third party undertaking accepted by the Agency in accordance with paragraph 4(2), the Agency may serve a notice on that person imposing a monetary penalty (“a non-compliance penalty”) in relation to the offence to which the third party undertaking relates.

(2) The amount of the non-compliance penalty must be determined by the Agency in accordance with sub-paragraph (3).

(3) The amount of the non-compliance penalty must be a percentage of the costs of fulfilling the requirements or the remaining requirements of the third party undertaking, up to a maximum of 100%.

(4) The notice referred to in paragraph (1) must include information as to—

- (a) the grounds for imposing the non-compliance penalty;
- (b) the amount of the penalty;
- (c) the method by which it can be paid;
- (d) the period within which payment must be made, which must not be less than 28 days; and
- (e) the grounds on which the person served with the notice may appeal.

(5) The Agency may at any time withdraw a notice imposing a non-compliance penalty by sending written confirmation of the withdrawal to the person on whom the notice was served.

Power to recover a variable monetary penalty or non-compliance penalty

10.—(1) After the end of the period for payment of—

- (a) a variable monetary penalty;
- (b) a non-compliance penalty; or
- (c) costs specified in an enforcement cost recovery notice,

the Agency may recover from the person on whom the penalty was imposed, or the notice served, the amount of the penalty or costs.

(2) The amount of the penalty or costs may be recovered as a civil debt, or, on the order of the court, as if payable under a court order.

PART 3

Appeals

Variable monetary penalties: appeals

11.—(1) A person may appeal to the First-tier Tribunal against a decision by the Agency to impose a variable monetary penalty by service of a final notice.

(2) An appeal under this paragraph may be made on the grounds that—

- (a) the decision was based on an error of fact;
- (b) the decision was wrong in law;
- (c) the amount of the penalty was unreasonable;
- (d) the decision was unreasonable for any other reason.

(3) Where a person appeals under this paragraph, the effect of the final notice to which the appeal relates is suspended until the appeal is finally determined.

Non-compliance penalty and enforcement cost recovery notice: appeals

12.—(1) A person may appeal to the First-tier Tribunal against a decision by the Agency to impose a non-compliance penalty or to serve an enforcement cost recovery notice.

(2) An appeal under sub-paragraph (1) may be made on the grounds that—

- (a) the decision to impose the penalty or serve the notice was based on an error of fact;
- (b) the decision was wrong in law;
- (c) the amount of the penalty or costs is unreasonable;
- (d) the decision was unreasonable for any other reason.

(3) Where a person appeals under sub-paragraph (1), the effect of the decision or notice to which the appeal relates is suspended until the appeal is finally determined.

Powers of the First-tier Tribunal on appeal

13. On an appeal against a decision by the Agency to impose a variable monetary penalty or non-compliance penalty or to serve an enforcement cost recovery notice, the First-tier Tribunal may—

- (a) withdraw the penalty or notice;
- (b) confirm the Agency's decision to impose the penalty or serve the notice;
- (c) vary the amount of the penalty or the amount specified in the enforcement cost recovery notice;
- (d) take any of the steps that the Agency could take in relation to the act or omission which gave rise to the penalty or notice; or
- (e) remit the decision to impose the penalty or serve the notice, or any matter relating to the decision, to the Agency for reconsideration.

PART 4

Guidance

Guidance as to the use of civil sanctions and cost recovery

- 14.**—(1) The Agency must—
- (a) publish guidance about its use of variable monetary penalties, non-compliance penalties and enforcement cost recovery notices; and
 - (b) revise the guidance where appropriate.
- (2) Before publishing guidance or revised guidance, the Agency must consult—
- (a) such bodies or persons as appear to the Agency to be representative of the interests of local government, industry, agriculture and small businesses; and
 - (b) such organisations as appear to the Agency to be substantially affected by the proposals.
- (3) In the case of a variable monetary penalty, the guidance must include information as to—
- (a) the circumstances in which a variable monetary penalty is likely to be imposed;
 - (b) the circumstances in which it may not be imposed; and
 - (c) the rights to make representations and objections and to appeal.
- (4) In the case of a non-compliance penalty or an enforcement cost recovery notice, the guidance must include information as to—
- (a) how the Agency will exercise the power to impose a non-compliance penalty and the power to recover costs;
 - (b) how it will determine the amount to be recovered; and
 - (c) the rights to make representations and objections and to appeal.
- (5) The Agency must have regard in exercising its functions to the guidance or revised guidance published in accordance with this paragraph.

PART 5

Publication of reports

Publication of enforcement action

- 16.**—(1) The Agency must from time to time publish reports specifying —
- (a) the cases in which a variable monetary penalty has been imposed on a person; and
 - (b) the cases in which a third party undertaking has been accepted from a person.
- (2) In sub-paragraph (1)(a), the reference to cases in which a variable monetary penalty has been imposed does not include cases where a variable monetary penalty has been imposed but was overturned on appeal.
- (3) This paragraph does not apply in cases where the Agency considers that publication would be inappropriate.”

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations apply in relation to England and amend the Environmental Permitting (England and Wales) Regulations 2016 (“the principal Regulations”) (S.I. 2016/1154), which make

provision for the Environment Agency (“the Agency”) to employ a range of civil sanctions in dealing with offences. These Regulations add to the Agency’s existing powers by allowing the Agency to impose a variable monetary penalty (“VMP”) of any amount in respect of offences under regulation 38 of the principal Regulations which are committed on or after 1st December 2023, other than those offences committed by an establishment or undertaking under regulation 38(5), where the amount of a VMP cannot exceed the fine which may be imposed on summary trial.

Regulation 4 inserts Schedule 26A into the principal Regulations. Part 1 of Schedule 26A deals with the procedure for the imposition of a VMP, including the possibility for the offender to offer a third party undertaking, which the Agency may or may not accept. The Agency also has the power to recover costs from a person on whom a VMP is imposed by serving an enforcement cost recovery notice in accordance with paragraph 8 of Schedule 26A.

Part 2 of Schedule 26A provides power for the Agency to impose a non-compliance penalty where a person fails to comply with a third party undertaking that they have given to the Agency. This Part also permits the Agency to recover the amount of a VMP, non-compliance penalty or the costs specified in an enforcement cost recovery notice as a civil debt, or on the order of the court, where the offender fails to pay the required amount within the allotted time.

Part 3 allows an offender to appeal to the First-tier Tribunal against the imposition of a VMP, non-compliance penalty or enforcement cost recovery notice, and sets out the powers available to the Tribunal in dealing with an appeal.

Part 4 requires the Agency to publish guidance in relation to its use of VMPs, the factors it will consider in determining the amount of a VMP and its use of enforcement cost recovery notices and non-compliance penalties.

Part 5 requires the Agency to publish reports specifying the cases in which a VMP has been imposed and the cases in which a third party undertaking has been accepted. This requirement does not apply where the Agency considers that publication would be inappropriate.

An impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sectors is foreseen.

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