
STATUTORY INSTRUMENTS

2017 No. 1200

The Control of Mercury (Enforcement) Regulations 2017

PART 2

Civil enforcement in England and Wales

Application of this Part

- 7.—(1) This Part applies to civil enforcement—
- (a) in England and in respect of offshore installations in the English offshore area (see paragraphs 1 and 3 of Schedule 2), and
 - (b) in Wales.

Enforcement notices

8.—(1) An enforcing authority may give a person an enforcement notice if condition A or B is met.

(2) An enforcement notice is a notice requiring the person to take action (including to stop doing any thing).

(3) Condition A is that the enforcing authority is of the opinion that the person has failed or is failing to comply with a relevant provision or provisions.

(4) Condition B is that the enforcing authority is of the opinion that the person is likely to fail to comply with a relevant provision or provisions.

(5) The action which the enforcing authority may require the person to take is any one or more of the following—

- (a) action to ensure compliance with the relevant provision or provisions in question;
- (b) action to remediate any environmental damage attributable to the non-compliance in question;
- (c) action to remove or mitigate any risk of non-compliance with the relevant provision or provisions in question.

(6) An enforcement notice must state—

- (a) the matters constituting the failure or likelihood of failure,
- (b) the action which must be taken under paragraph (5),
- (c) the period (the “compliance period”) within which the action must be taken,
- (d) that there is a right to appeal against the enforcement notice and how that right may be exercised, and
- (e) the consequences of failing to comply with the enforcement notice (see regulations 9, 10, 18 and 41 which relate to action to ensure compliance, civil penalties, civil proceedings and offences respectively).

(7) An enforcing authority may withdraw an enforcement notice given by it by informing the person to whom it was given in writing.

(8) A person to whom an enforcement notice is given may appeal to the First-tier Tribunal against it on one or more of the following grounds—

- (a) that the decision to give the enforcement notice was based on an error of fact;
- (b) that the decision was wrong in law;
- (c) that the nature of what is required by the enforcement notice is unreasonable;
- (d) that the decision was unreasonable for any other reason;
- (e) any other ground.

Action by authority to ensure compliance with enforcement notices

9.—(1) This regulation applies where—

- (a) an enforcing authority has given an enforcement notice to a person, and
- (b) the enforcing authority is of the opinion that the person has not carried out one or more of the actions referred to in the enforcement notice within the compliance period (see regulation 8(6)(c)).

(2) The enforcing authority may take any of the following action (whether the same as or different to any action referred to in the enforcement notice)—

- (a) action to ensure compliance with the relevant provision or provisions in question;
- (b) action to remediate any environmental damage attributable to the non-compliance in question;
- (c) action to remove or mitigate any risk of non-compliance with the relevant provision or provisions in question.

(3) If the enforcing authority proposes that any of the action under paragraph (2) be taken on any premises, the provisions referred to in paragraphs (4) and (5) (which relate to powers of enforcing authorities and persons authorised by them and related matters) apply but as if modified in the way shown.

(4) Where the Agency proposes to take the action, sections 108, 109 and 110 of, and Schedule 18 to, the EA 1995 (as they apply in England) apply but as if—

- (a) in section 108 there were a reference to the purpose of taking action to ensure compliance with a relevant provision or provisions referred to in an enforcement notice at the end of the list of purposes in subsection (1);
- (b) in section 108 there were a reference to taking action to ensure compliance with a relevant provision or provisions referred to in an enforcement notice at the end of the list of powers in subsection (4);
- (c) in paragraph 6(1) of Schedule 18 the reference in the words before paragraph (a) to any power conferred by section 108(4)(a) or (b) or (5) of this Act included a reference to the power conferred by virtue of sub-paragraph (b) above.

(5) Where NRW proposes to take the action, sections 108, 109 and 110 of, and Schedule 18 to, the EA 1995 (as they apply in Wales) apply but as if—

- (a) in section 108 there were a reference to the purpose of taking action to ensure compliance with a relevant provision or provisions referred to in an enforcement notice at the end of the list of purposes in subsection (1);

- (b) in section 108 there were a reference to taking action to ensure compliance with a relevant provision or provisions referred to in an enforcement notice at the end of the list of powers in subsection (4);
- (c) in paragraph 6(1) of Schedule 18 the reference in the words before paragraph (a) to any power conferred by section 108(4)(a) or (b) or (5) of this Act included a reference to the power conferred by virtue of sub-paragraph (b) above.

Civil penalties

10.—(1) An enforcing authority may give a person a civil penalty notice if condition A or B is met.

(2) A civil penalty notice is a notice requiring the person to pay a civil penalty.

(3) Condition A is that the enforcing authority is satisfied, on the balance of probabilities, that the person has failed or is failing to comply with a relevant provision.

(4) Condition B is that the enforcing authority is satisfied, on the balance of probabilities, that the person has failed or is failing to fully comply with an enforcement notice or information notice.

(5) An enforcing authority may determine the amount of civil penalty in respect of a failure but the amount must not exceed £200,000.

(6) A civil penalty notice must not be given to a person in respect of a failure—

- (a) where the enforcing authority has started criminal proceedings against the person under regulation 41 for the failure and those proceedings have not concluded, or
- (b) where the person has been convicted of an offence under regulation 41 for the failure.

(7) A civil penalty notice must state—

- (a) the matters constituting the failure,
- (b) the amount of the civil penalty,
- (c) how payment must be made,
- (d) the period (the “payment period”) within which payment must be made, which must not be less than the period of 28 days beginning with the day on which the civil penalty notice is given,
- (e) that there is a right to appeal against the civil penalty notice and how that right may be exercised,
- (f) the consequences of failing to make payment within the payment period (see regulation 41 which relates to offences and paragraph (9)).

(8) Regulation 11 sets out action which must be taken by an enforcing authority before a civil penalty notice can be given by the enforcing authority.

(9) Following the payment period, the enforcing authority may recover the civil penalty (and any interest payable under regulation 12)—

- (a) as a civil debt, or
- (b) on the order of the court, as if payable under a court order.

(10) An enforcing authority may withdraw a civil penalty notice given by it by informing the person to whom it was given in writing.

(11) A person to whom a civil penalty notice is given may appeal to the First-tier Tribunal against it on one or more of the following grounds—

- (a) that the decision to give the civil penalty notice was based on an error of fact;
- (b) that the decision was wrong in law;

- (c) that the amount of the civil penalty is unreasonable;
- (d) that the decision was unreasonable for any other reason;
- (e) any other ground.

Further provision about civil penalties

- 11.**—(1) An enforcing authority must not give a civil penalty notice to a person unless—
- (a) the enforcing authority has given a notice (a “notice of intent”) to the person stating that it proposes to give a civil penalty notice to the person, and
 - (b) the period for representations referred to in paragraph (6) has expired.
- (2) A notice of intent must state—
- (a) the matters constituting the failure to comply with the relevant provision in question or the enforcement notice or information notice,
 - (b) the maximum amount of the civil penalty,
 - (c) that the civil penalty will be payable within a period specified in the civil penalty notice, which must not be less than 28 days beginning with the day on which the civil penalty notice is given,
 - (d) that there is a right to make representations against the notice of intent and how that right may be exercised (see paragraphs (3) to (6)), and
 - (e) that the enforcing authority has power to vary the amount of civil penalty referred to in the notice.
- (3) A person to whom a notice of intent is given may make representations to the enforcing authority about the proposal to give a civil penalty notice to the person.
- (4) The right to make representations includes (but is not limited to) the right to make representations about the amount of civil penalty which the enforcing authority has power to determine under regulation 10(5).
- (5) The representations must be in writing.
- (6) The representations must be given to the enforcing authority within a period of 28 days beginning with the day on which the notice of intent was given.
- (7) An enforcing authority may withdraw a notice of intent by informing the person to whom it was given in writing.
- (8) An enforcing authority must pay any civil penalty and interest under regulation 12 into the Consolidated Fund.

Civil penalties: late payment interest

- 12.**—(1) If a person fails to pay a civil penalty in full within the payment period (see regulation 10(7)(d)), interest is payable on the outstanding amount.
- (2) Interest falls to be paid at a rate of 8% per annum calculated on a daily basis for the period beginning with the day after the last day of the payment period and ending on the day payment is made or recovered.
- (3) The total amount of interest payable is not to exceed the civil penalty in question.

Recovery of enforcement costs

- 13.**—(1) An enforcing authority may give a costs recovery notice to a person if any of conditions A to C are met.

- (2) A costs recovery notice is a notice requiring the person to pay the enforcing authority's costs.
- (3) Condition A is that the enforcing authority has given the person an enforcement notice.
- (4) Condition B is that the enforcing authority has taken action to ensure compliance with an enforcement notice under regulation 9.
- (5) Condition C is that the enforcing authority has given the person a civil penalty notice.
- (6) In paragraph (2), the reference to costs is a reference—
 - (a) if condition A is met, to any costs relating to preparing and giving the enforcement notice,
 - (b) if condition B is met, to any costs relating to the action taken, and
 - (c) if condition C is met, to any costs relating to preparing and giving the civil penalty notice,and includes a reference to the costs of any related investigation or expert advice (including legal advice).
- (7) The costs must be paid by the person within the period (the "payment period") of 28 days beginning with the day on which the costs recovery notice is given.
- (8) The costs recovery notice must state—
 - (a) the amount of the costs which must be paid,
 - (b) in general terms, how those costs have arisen,
 - (c) the payment period,
 - (d) how payment must be made,
 - (e) the consequences of failing to make payment within the payment period (see paragraph (9)), and
 - (f) that there is a right to appeal against the costs recovery notice and how that right may be exercised.
- (9) Following the payment period, the enforcing authority may recover the costs referred to in the costs recovery notice and any related interest under regulation 14—
 - (a) as a civil debt, or
 - (b) on the order of the court, as if payable under a court order.
- (10) An enforcing authority may withdraw a costs recovery notice given by it by informing the person to whom it was given in writing.
- (11) A person to whom a costs recovery notice is given may appeal to the First-tier Tribunal against it on one or more of the following grounds—
 - (a) that the decision to give the costs recovery notice was based on an error of fact;
 - (b) that the decision was wrong in law;
 - (c) that the amount of the costs is unreasonable;
 - (d) that the decision was unreasonable for any other reason;
 - (e) any other ground.

Enforcement costs: late payment interest

- 14.**—(1) If a person fails to pay the costs referred to in a costs recovery notice in full within the payment period (see regulation 13(7)), interest is payable on the outstanding amount.
- (2) Interest falls to be paid at a rate of 8% per annum calculated on a daily basis for the period beginning with the day after the last day of the payment period and ending on the day payment is made or recovered.
 - (3) The total amount of interest payable is not to exceed the amount of costs in question.

Further provision about appeals

15.—(1) Following an appeal under regulation 8(8), 10(11) or 13(11), the First-tier Tribunal (the “Tribunal”) may—

- (a) cancel the notice;
- (b) vary the notice;
- (c) confirm the notice;
- (d) take any action which the enforcing authority is empowered to take in relation to the failure referred to in the notice;
- (e) remit any decision relating to the notice to the enforcing authority.

(2) A civil penalty notice or costs recovery notice which is the subject of an appeal is suspended pending the decision of the Tribunal.

(3) An enforcement notice which is the subject of an appeal is not suspended pending the Tribunal’s decision on the appeal.

Multiple enforcement

16.—(1) An enforcing authority may give (whether or not at the same time)—

- (a) an enforcement notice, and
- (b) a civil penalty notice,

to the same person in respect of the same failure to comply with a relevant provision.

(2) An enforcing authority must not (except in the circumstances described in paragraph (3)) give a civil penalty notice under regulation 10(3) to the same person more than once for the same failure.

(3) If a civil penalty notice is given to a person under regulation 10(3) but subsequently withdrawn, the enforcing authority may give a further civil penalty notice to the person for the failure described in the original notice.

(4) An enforcing authority must not (except in the circumstances described in paragraph (5)) give a civil penalty notice under regulation 10(4) to the same person more than once for the same failure.

(5) If a civil penalty notice is given to a person under regulation 10(4) but subsequently withdrawn, the enforcing authority may give a further civil penalty notice to the person for the failure described in the original notice.

Publication of civil enforcement

17.—(1) Each enforcing authority must from time to time publish reports about cases in which civil penalty notices have been given.

(2) A report must, for each civil penalty notice which has been given, state—

- (a) the person to whom the notice was given,
- (b) the nature of the breach, and
- (c) the amount of the penalty.

(3) An enforcing authority must not publish information under this regulation about a civil penalty notice unless the appeal period referred to in the civil penalty notice has ended.

(4) An enforcing authority must not publish information under this regulation about a civil penalty notice which is the subject of an appeal under regulation 8(8), 10(11) or 13(11) before the appeal is decided.

(5) An enforcing authority must not publish information under this regulation about a civil penalty notice which has been withdrawn or cancelled.

Civil proceedings

18.—(1) An enforcing authority may (subject to paragraph (5)) start proceedings in the County Court or the High Court to secure a remedy against a person if any of conditions A to C are met.

(2) Condition A is that the enforcing authority is of the opinion that the person has failed or is failing to comply with a relevant provision or provisions.

(3) Condition B is that the enforcing authority is of the opinion that the person is likely to fail to comply with a relevant provision or provisions.

(4) Condition C is that the enforcing authority is of the opinion that the person has failed to comply with all or part of an enforcement notice.

(5) Before starting proceedings under this regulation the enforcing authority must be of the opinion that any other remedy under these Regulations would be ineffectual.