

Draft Order laid before the Scottish Parliament under section 114(4) of the Reservoirs (Scotland) Act 2011 and section 58(3) of the Regulatory Reform (Scotland) Act 2014 for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2016 No.

ENFORCEMENT

ENVIRONMENTAL PROTECTION

FLOOD RISK MANAGEMENT

WATER SUPPLY

The Reservoirs (Enforcement etc.) (Scotland) Order 2016

Made - - - - - *2016*

Coming into force - - - - - *1st April 2016*

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The Scottish Ministers make the following Order in exercise of the powers conferred by sections 69(7) and (8), 73 to 76, 82 to 85, 87, 88 and 114(2)(b) of the Reservoirs (Scotland) Act 2011(a) and sections 20 to 32, 53 and 58(1) and (2) of the Regulatory Reform (Scotland) Act 2014(b) and all other powers enabling them to do so.

In accordance with sections 73(2), 82(2) and 86 of the Reservoirs (Scotland) Act 2011, they have consulted the persons and organisations mentioned in section 86(2) of that Act.

In accordance with section 114(4) of the Reservoirs (Scotland) Act 2011 and section 58(3) of the Regulatory Reform (Scotland) Act 2014, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament(c).

PART 1
INTRODUCTORY

Citation and commencement

1. This Order may be cited as the Reservoirs (Enforcement etc.) (Scotland) Order 2016 and comes into force on 1st April 2016.

Interpretation

2.—(1) In this Order—

“the 2015 Order” means the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015(d);

“the Act” means the Reservoirs (Scotland) Act 2011;

“by notice” means by notice in writing;

(a) 2011 asp 9, amended by the Regulatory Reform (Scotland) Act 2014 (asp 3), schedule 3, paragraph 13.

(b) 2014 asp 3.

(c) The powers to make this Order are exercised together by virtue of section 33(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10). This Order is subject to the affirmative procedure by virtue of section 33(3) of that Act.

(d) S.S.I. 2015/383.

“expenses recovery notice” is to be construed in accordance with paragraph 1 of Schedule 3;
“FEM undertaking” is to be construed in accordance with paragraph 4(1) of Schedule 2;
“further enforcement measure” has the meaning given in paragraph 1(4) of Schedule 2;
“non-compliance penalty” has the meaning given in paragraph 9(2) of Schedule 2;
“non-compliance penalty notice” is to be construed in accordance with paragraph 9(4) of Schedule 2;
“notice of intent” is to be construed in accordance with paragraph 2 of Schedule 2;
“restoration notice” has the meaning given in paragraph 1(4) of Schedule 2;
“restraint notice” has the meaning given in paragraph 1(4) of Schedule 2; and
“stop notice” is to be construed in accordance with paragraph 1(1) of Schedule 1.

(2) Where anything under this Order is to be done “in writing” that includes an electronic communication, as defined in section 15(1) of the Electronic Communications Act 2000^(a), which is capable of being reproduced (and “written” is to be construed accordingly).

PART 2

ENFORCEMENT MEASURES

Stop notices

3. Schedule 1 makes provision as to the giving by SEPA of stop notices to reservoir managers of controlled reservoirs.

Further enforcement measures

4. Schedule 2 makes provision about the imposition by SEPA on reservoir managers of controlled reservoirs of one or more further enforcement measures.

Recovery of expenses

5. Schedule 3 makes provision for the recovery of expenses reasonably incurred by SEPA in relation to the giving of a stop notice or the imposition of further enforcement measures.

Monetary penalties and undertakings

6. Schedule 4 makes provision which amends the 2015 Order so that the powers conferred by that Order to impose fixed and variable monetary penalties and to accept enforcement undertakings may be exercised in relation to the offence created by paragraph 6 of Schedule 1.

PART 3

REVIEWS AND APPEALS

Enforcement notices: reviews and appeals

7. Schedule 5 makes provision allowing a reservoir manager to whom notice is given under section 69(2) of the Act (enforcement notice: safety and other measures)—

- (a) to apply to SEPA for a review of its decision to give the notice; and
- (b) to appeal to the Scottish Ministers against the decision to give the notice.

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

Appeals: further provision

8. Schedule 6 makes further provision in relation to appeals in connection with the following provisions of the Act—

- (a) section 69 (enforcement notice: safety and other measures);
- (b) section 74 (stop notices: procedure);
- (c) section 75 (stop notices: compensation);
- (d) section 83 (further enforcement measures: procedure);
- (e) section 85 (further enforcement measures: enforcement); and
- (f) section 88 (recovery by SEPA of expenses).

PART 4

MISCELLANEOUS

Notices: supplementary provision

9.—(1) SEPA may, at any time, by notice given to the reservoir manager—

- (a) withdraw (in whole or in part)—
 - (i) a stop notice;
 - (ii) a restraint notice;
 - (iii) a restoration notice;
 - (iv) a non-compliance penalty notice; or
 - (v) an expenses recovery notice; or
- (b) with the consent of the reservoir manager, amend the steps specified in—
 - (i) a stop notice;
 - (ii) a restraint notice; or
 - (iii) a restoration notice,so as to reduce the amount of work necessary to comply with the notice or, where applicable, to extend a period specified in the notice for the taking of any such step; or
- (c) reduce the amount specified in—
 - (i) a non-compliance penalty notice; or
 - (ii) an expenses recovery notice.

(2) In paragraph (1), “the reservoir manager” means a reservoir manager who was given the stop notice, restraint notice, restoration notice, non-compliance penalty notice or expenses recovery notice in question.

Guidance about the use of powers

10. SEPA must publish guidance about the use of the powers conferred on it by this Order.

Recovery of payments

11. SEPA may recover as a civil debt any—

- (a) non-compliance penalty; or
- (b) expenses required to be paid under an expenses recovery notice.

Payment of penalties

12. Where, by virtue of this Order, SEPA receives any sum in respect of a non-compliance penalty, SEPA must pay it to the Scottish Ministers.

St Andrew's House,
Edinburgh
Date

Name
A member of the Scottish Government

SCHEDULE 1

STOP NOTICES

Article 3

Stop notices

1.—(1) SEPA may by notice (a “stop notice”) prohibit a reservoir manager of a controlled reservoir from carrying on an activity specified in the notice until the reservoir manager has taken the steps specified in the notice.

(2) The stop notice must be given by SEPA to the reservoir manager.

(3) A stop notice may only be given in relation to a case where the reservoir manager is carrying on the activity and either—

- (a) SEPA reasonably believes that the activity as carried on by the reservoir manager presents a significant risk of causing an uncontrolled release of water from the reservoir; or
- (b) SEPA reasonably believes that the activity as carried on involves or is likely to involve the commission of an offence under one or more of the following provisions of the Act—
 - (i) section 42(1)(a) (failure to give notice of proposed relevant works);
 - (ii) section 42(1)(b) (failure to appoint construction engineer);
 - (iii) section 42(1)(d) (failure to comply with direction as to taking of safety measure in safety report);
 - (iv) section 42(1)(e) (failure to comply with preliminary certificate or final certificate); or
 - (v) section 52(1)(c) (failure to comply with direction as to taking of measure in inspection report).

Information to be included

2. A stop notice must include information as to—

- (a) the grounds for giving the notice;
- (b) rights of appeal; and
- (c) the consequences of non-compliance.

Appeals

3.—(1) A reservoir manager to whom a stop notice is given may appeal to the Scottish Ministers against the decision of SEPA to issue it.

(2) The appeal must be made within a period of 21 days beginning with the day on which the stop notice (to which the appeal relates) was given to the reservoir manager under paragraph 1.

(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 decision was unreasonable;
- (d) any step specified in the notice is unreasonable;
- (e) the reservoir manager has not committed the offence and would not have committed it had the stop notice not been given; or
- (f) the reservoir manager would not, by reason of any defence, have been liable to be convicted of the offence had the stop notice not been given.

(4) An appeal under this paragraph does not suspend the stop notice to which it relates.

Completion certificates

4.—(1) Where, after giving a stop notice to a reservoir manager, SEPA is satisfied that the reservoir manager has taken the steps specified in the notice, SEPA must give a certificate to that effect (a “completion certificate”).

(2) The stop notice ceases to have effect on the giving of a completion certificate.

(3) The reservoir manager to whom the stop notice is given may at any time apply for a completion certificate.

(4) SEPA must make a decision as to whether to give a completion certificate before the end of a period of 14 days beginning with the day on which the application for the certificate was made.

(5) Where SEPA decides to give a completion certificate, it must give the completion certificate to the reservoir manager within a period of 14 days beginning with the day of that decision.

(6) Where SEPA decides not to give a completion certificate, it must give the reservoir manager notice in writing of that decision within a period of 14 days beginning with the day of that decision.

(7) The reservoir manager to whom the stop notice is given may appeal to the Scottish Ministers against a decision not to give a completion certificate.

(8) The appeal must be made within a period of 14 days beginning with the relevant day.

(9) 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; or
- (c) the decision was unfair or unreasonable.

(10) For the purposes of sub-paragraph (7), a failure by SEPA, before the end of a period of 28 days beginning with the day on which the application for the certificate was made, to—

- (a) make a decision as to whether to give the certificate; and
- (b) comply with, as the case may be, sub-paragraph (5) or (6),

is to be treated as a decision not to give the completion certificate in question.

(11) In sub-paragraph (8), “the relevant day”—

- (a) in a case where sub-paragraph (10) applies, is the first day on which the failure in question is treated as a decision not to give the completion certificate; and
- (b) in other cases, is the day on which the reservoir manager is, in accordance with sub-paragraph (6), given notice of the decision not to give a completion certificate.

Compensation

5.—(1) Subject to sub-paragraph (2), where a reservoir manager suffers loss as the result of the issue of a stop notice, the reservoir manager may make a claim for compensation.

(2) Sub-paragraph (1) applies only in the case where the loss suffered by the reservoir manager as the result of the issue of a stop notice is attributable to a requirement imposed by the stop notice which is either subsequently—

- (a) withdrawn because SEPA decides that the requirement should not have been imposed when the notice was given; or
- (b) quashed by the Scottish Ministers, on determining an appeal under paragraph 3(1).

(3) The claim for compensation must—

- (a) be made in writing to SEPA;
- (b) detail the loss suffered by the reservoir manager as the result of the issue of the stop notice;
- (c) specify the amount of compensation claimed in respect of that loss; and

(d) be made within a period of 2 months beginning with the date on which the loss was suffered.

(4) Where a reservoir manager makes a claim for compensation, SEPA must, within a period of 28 days beginning with the day on which the claim is made, make a decision—

(a) as to whether or not to award compensation; and

(b) if the decision is to award compensation, as to the amount of the compensation.

(5) SEPA must, within a period of 14 days beginning with the day on which it makes a decision under sub-paragraph (4), give the reservoir manager notice of the decision in writing and where the decision is not to award compensation or, as the case may be, to award an amount of compensation which is less than the amount claimed, it must give reasons for that decision.

(6) The reservoir manager may appeal to the Scottish Ministers against—

(a) a decision of SEPA not to award compensation; or

(b) a decision of SEPA as to the amount of the compensation.

(7) The appeal must be made within a period (“the appeal period”) of 2 months beginning with the relevant day.

(8) Where the reservoir manager is, in accordance with sub-paragraph (5), informed of a decision of SEPA to award an amount of compensation and—

(a) no appeal is made under sub-paragraph (6) within the appeal period; or

(b) any such appeal is withdrawn before the end of the appeal period,

SEPA must pay to the reservoir manager the amount within a period of 28 days beginning with the day after the last day of the appeal period.

(9) Where—

(a) an appeal is made under sub-paragraph (6) within the appeal period; and

(b) on determining the appeal, the Scottish Ministers—

(i) affirm a decision of SEPA to award an amount of compensation (“the affirmed amount”); or

(ii) otherwise direct SEPA to award an amount of compensation (or an alternative amount) (“the directed amount”),

SEPA must pay to the reservoir manager the affirmed amount or, as the case may be, the directed amount, within a period of 28 days beginning with the day after the day on which the Scottish Ministers affirm the decision to award the affirmed amount or, as the case may be, otherwise direct SEPA to award the directed amount.

(10) For the purposes of sub-paragraph (6), a failure by SEPA, before the end of the period of 42 days beginning with the day on which the claim (to which the appeal relates) is made, to—

(a) make a decision—

(i) as to whether or not to award compensation; and

(ii) if the decision is to award compensation, as to the amount of the compensation; and

(b) comply with sub-paragraph (5),

is to be treated as a decision of SEPA not to award compensation.

(11) In sub-paragraph (7), “the relevant day”—

(a) in a case where sub-paragraph (10) applies, is the first day on which the failure in question is treated as a decision of SEPA not to award compensation; and

(b) in other cases, is the day on which SEPA, in accordance with sub-paragraph (5), gives the reservoir manager notice of the decision in question.

Offence and penalties

6. Where a reservoir manager to whom a stop notice is given does not comply with it, the reservoir manager commits an offence and is liable on summary conviction—

- (a) in the justice of the peace court, to imprisonment for a term not exceeding 60 days, or to a fine not exceeding level 4 on the standard scale, or to both; or
- (b) in the sheriff court—
 - (i) for a first such offence, to imprisonment for a term not exceeding 3 months, or to a fine not exceeding the prescribed sum (within the meaning of section 225(8) of the Criminal Procedure (Scotland) Act 1995(a)), or to both; and
 - (ii) for any subsequent such offence, to imprisonment for a term not exceeding 6 months, or to the fine mentioned in sub-head (i), or to both.

Defence

7. It is a defence to a charge in proceedings for an offence under paragraph 6 for the reservoir manager 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 reservoir manager—
 - (i) took all practicable steps to prevent an uncontrolled release of water from the reservoir; and
 - (ii) took all practicable steps as soon as was reasonably practicable to rectify the failure; and
 - (iii) provided particulars of the failure to SEPA as soon as practicable after the failure arose.

(a) 1995 c.46.

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.

EXPENSES RECOVERY NOTICES

Expenses recovery notices

1.—(1) SEPA may by notice (an “expenses recovery notice”) require a reservoir manager to whom a stop notice is given or on whom a further enforcement measure is imposed, to pay the amount of any expenses reasonably incurred by SEPA in relation to (and up to the time of) the giving of the notice or (as the case may be) imposition of the measure.

(2) In sub-paragraph (1), “expenses” include in particular—

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

(3) The expenses recovery notice must be given by SEPA to the reservoir manager.

(4) The expenses recovery notice must specify—

- (a) the grounds for giving the notice;
- (b) the amount to be paid;
- (c) how this payment may be made;
- (d) the period within which the payment must be made;
- (e) that the reservoir manager to whom the notice is given may request SEPA to provide a detailed breakdown of the amount to be paid (unless such a breakdown was previously given by SEPA to the reservoir manager);
- (f) rights of appeal; and
- (g) consequences of non-payment.

(5) Where a reservoir manager requests SEPA to provide a detailed breakdown of the amount to be paid (and no such a breakdown was previously given by SEPA to the reservoir manager), SEPA must take such steps as are reasonable to ensure that a detailed breakdown of the amount to be paid is given to the reservoir manager within a period of 21 days beginning with the day on which SEPA received the request.

Appeals against expenses recovery notices

2.—(1) A reservoir manager who is required (by virtue of an expenses recovery notice) to pay expenses under paragraph 1 may appeal to the Scottish Ministers against—

- (a) the decision of SEPA to impose the requirement to pay expenses; and
- (b) the decision of SEPA as to the amount of the expenses.

(2) An appeal under this paragraph must be made within the period of 28 days beginning with—

- (a) the day on which the expenses recovery notice was given to the reservoir manager; or
- (b) where the reservoir manager requests a detailed breakdown of the amount to be paid and no such a breakdown was previously given by SEPA to the reservoir manager, the day on which that breakdown was given to the reservoir manager.

(3) Where an appeal is made under this paragraph, the expenses recovery notice 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 expenses recovery notices

3.—(1) The amount to be paid by a reservoir manager under an expenses recovery notice must, unless sub-paragraph (3) applies, be paid to SEPA within a period of 56 days beginning with the day the notice was given to the reservoir manager, or such longer period as SEPA may specify in the notice.

(2) Where sub-paragraph (3) applies, the amount to be paid by the reservoir manager under an expenses recovery notice must be paid to SEPA within whichever of the following periods ends later—

- (a) the period (if any) specified in the notice;
- (b) a period of 56 days beginning with the day on which the notice was given to the reservoir manager;
- (c) a period of 28 days beginning with the day on which the appeal is determined or withdrawn; or
- (d) such modified period as the Scottish Ministers, in determining the appeal, may specify.

(3) This sub-paragraph applies where, in relation to an expenses recovery notice—

- (a) an appeal is made in accordance with paragraph 2 against a decision of SEPA—
 - (i) to impose the requirement to pay expenses; or
 - (ii) as to the amount of the expenses,and the Scottish Ministers, in determining the appeal, uphold the decision; or
- (b) an appeal is made under paragraph 2 and the appeal is withdrawn.

SCHEDULE 4

Article 6

MONETARY PENALTIES AND UNDERTAKINGS

Amendment of the 2015 Order

In the table in Schedule 4 (relevant offences and fixed penalty amounts) to the 2015 Order, after the final row insert (as a new row and in the appropriate columns)—

“The Reservoirs (Enforcement etc.) (Scotland) Order 2016(a)

Paragraph 6 of Schedule 1 (failure to comply with stop notice)	YES	YES	YES	HIGH”
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(a) S.S.I. 2016/XXX.

SCHEDULE 5

Article 7

ENFORCEMENT NOTICES: REVIEWS AND APPEALS

Reviews of decisions to give notice under section 69(2) of the Act

1.—(1) A reservoir manager to whom a notice (“the notice”) is given under section 69(2) of the Act, may apply to SEPA for a review of its decision to give the notice.

(2) The application—

- (a) must be made in writing; and
- (b) must be given to SEPA within a period of 28 days beginning with the day on which the notice was given to the reservoir manager.

(3) On receipt of any such application, SEPA must as soon as practicable—

- (a) review its decision to give the notice; and
- (b) decide whether to—
 - (i) confirm the notice;
 - (ii) confirm the notice with modifications; or
 - (iii) withdraw the notice.

(4) SEPA must by notice (a “decision notice”) inform the applicant of its decision under sub-paragraph (3)(b).

(5) The decision notice must include information as to—

- (a) SEPA’s decision under sub-paragraph (3)(b);
- (b) the reasons for its decision; and
- (c) rights of appeal.

(6) Where, under sub-paragraph (1), a reservoir manager applies to SEPA for a review of its decision to give a notice under section 69(2) of the Act, the notice is suspended from the day on which the application is made until the day on which the applicant is, under sub-paragraph (4), informed of SEPA’s decision (in respect of the application).

Appeals against decisions to give notice under section 69(2) of the Act

2.—(1) A reservoir manager to whom a notice (“the notice”) is given under section 69(2) of the Act may, subject to sub-paragraph (2), appeal to the Scottish Ministers against the decision of SEPA to give the notice.

(2) An appeal may be made under sub-paragraph (1) only if—

- (a) the reservoir manager applied under paragraph 1 for a review of the decision of SEPA to give the notice; and
- (b) a decision notice was given under paragraph 1(4) informing the reservoir manager of SEPA’s decision to confirm the notice (with or without modifications).

(3) The appeal must be made within a period of 28 days beginning with the day on which the applicant was informed under paragraph 1(4) of the decision to which the appeal relates.

(4) The appeal may be made on any grounds including that—

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

(5) The “notice of appeal” (construed in accordance with paragraph 1(1) of Schedule 6) must include—

- (a) a statement of the grounds of appeal;
- (b) a copy of the notice given by SEPA under section 69(2) of the Act to which the appeal relates; and
- (c) a copy of the safety report or, as the case may be, the inspection report containing the direction to which the notice given by SEPA relates.

(6) Where, under paragraph 2(1), a reservoir manager appeals against a decision of SEPA to give a notice under section 69(2) of the Act, the notice is suspended from the day on which the appeal is made until the day on which the appeal is determined or withdrawn.

SCHEDULE 6

Article 8

APPEALS: FURTHER PROVISION

Notice of appeal

1.—(1) An appeal under any the following provisions (“the appeal”) must be made by notice (“notice of appeal”) to the Scottish Ministers—

- (a) paragraph 3(1) of Schedule 1 (appeals in relation to stop notices);
- (b) paragraph 4(7) of Schedule 1 (appeals in relation to completion certificates);
- (c) paragraph 5(6) of Schedule 1 (appeals in relation to compensation);
- (d) paragraph 7(1) of Schedule 2 (appeals in relation to further enforcement measures);
- (e) paragraph 10(1) of Schedule 2 (appeals in relation to non-compliance penalties);
- (f) paragraph 2(1) of Schedule 3 (appeals in relation to expenses recovery notices); and
- (g) paragraph 2(1) of Schedule 5 (appeals against enforcement notices).

(2) The notice of appeal must (in addition to any other information required) include—

- (a) the name and contact details of the reservoir manager or, where there is more than one reservoir manager of the controlled reservoir to which the appeal relates, the name and contact details of each reservoir manager and the person (if any) representing them;
- (b) any relevant correspondence between the appellant and SEPA.

(3) The appellant must, at the same time as making any such appeal to the Scottish Ministers, send a copy of the notice of appeal to SEPA.

(4) The appellant may withdraw the appeal by notice to the Scottish Ministers.

(5) The appellant must, at the same time as sending any such withdrawal notice to the Scottish Ministers, send a copy of the notice to SEPA.

Representations by SEPA

2.—(1) SEPA must, within a period of 21 days beginning with the day on which it receives a copy of the notice of appeal, make representations in writing to the Scottish Ministers.

(2) SEPA’s representations must include—

- (a) representations as to matters which should be taken into account in determining the appeal; and
- (b) a copy of any documents relating to those matters which are relevant to the appeal.

(3) SEPA must, at the same time as making representations under sub-paragraph (1), send a copy of those representations to the appellant.

Representations by the appellant

3.—(1) The appellant may, within a period of 14 days beginning with the day on which the appellant receives a copy of any representations made by SEPA under paragraph 2, make representations in writing to the Scottish Ministers in respect of SEPA’s representations.

(2) The appellant’s representations may include—

- (a) representations as to matters which should be taken into account in determining the appeal; and
- (b) a copy of any documents relating to those matters which are relevant to the appeal.

(3) The appellant must, at the same time as making any such representations to the Scottish Ministers, send a copy of those representations to SEPA.

Appointment of reporter

4.—(1) The Scottish Ministers may, in relation to an appeal to the Scottish Ministers under any of the provisions referred to in paragraph 1(1), appoint a person (“a reporter”) to—

- (a) exercise, on their behalf, their functions under paragraph 6(2), 7 or 8; or
- (b) advise them on such matters in relation to the appeal (which may include advice on how it ought to be determined) as they may specify.

(2) If the Scottish Ministers appoint a reporter in relation to the appeal, they must notify the appellants and SEPA of the name of the reporter and the functions to be performed by the reporter.

Appointment of advisor

5.—(1) The Scottish Ministers may appoint a person (“an advisor”) to advise a reporter on such matters (in relation to the appeal) as the Scottish Ministers may specify.

(2) For the purposes of advising the reporter on the matters so specified, an advisor may sit with the reporter at any hearing (in relation to the appeal) held under paragraph 8.

(3) If the Scottish Ministers appoint an advisor in relation to the appeal, they must notify the appellants and SEPA of the name of the advisor and the matters on which the advisor is to advise the reporter.

Determination of appeal without further representation or information

6.—(1) If the Scottish Ministers consider that no further representation or information is required to enable the appeal to be determined, they may determine the appeal without further procedure.

(2) If the Scottish Ministers consider that further procedure is necessary to determine the appeal, they may determine the manner in which that further procedure is to be conducted.

Further representations or information

7.—(1) If the Scottish Ministers consider that further representations should be made or further information should be provided by means of written submissions, the Scottish Ministers may request further representations or information by notice to the reservoir manager and SEPA.

(2) The notice must—

- (a) set out the matters on which such further representations or information is requested; and
- (b) specify the date by which such further representations or information are to be submitted to the Scottish Ministers.

(3) Any further representations made or information to be provided (the “further information”) to the Scottish Ministers in response to the notice must be given by the reservoir manager or, as the case may be, SEPA by the date specified in the notice, and—

- (a) where further information is given by the reservoir manager to the Scottish Ministers—
 - (i) the reservoir manager must give a copy of the further information to SEPA; and
 - (ii) SEPA may, within a period of 14 days beginning with the day on which SEPA is given a copy of the further information, give to the Scottish Ministers comments on the further information; and
- (b) where further information is given by SEPA to the Scottish Ministers—
 - (i) SEPA must give a copy of the further information to the reservoir manager; and
 - (ii) the reservoir manager may, within a period of 14 days beginning with the day on which the reservoir manager is given a copy of the further information, give to the Scottish Ministers comments on the further information.

Hearings

8.—(1) In determining the appeal, the Scottish Ministers may afford the appellant and SEPA an opportunity of appearing before and being heard by them (or, as the case may be, a reporter).

(2) A hearing held under sub-paragraph (1) may, if the Scottish Ministers so decide, be held wholly, or held to any extent, in private.

(3) If the Scottish Ministers cause a hearing to be held under sub-paragraph (1), they must give the appellant and SEPA at least 28 days' written notice (or such shorter period of notice as they may agree with the appellant and SEPA) of the date, time and place fixed for the holding of the hearing.

(4) In the case of a hearing which is to be held wholly or partly in public, the Scottish Ministers must, at least 21 days before the date fixed for the holding of the hearing publish a copy of the notice mentioned in sub-paragraph (3) in a newspaper circulating in the locality in which the controlled reservoir (to which the matters appealed relate) is located.

(5) The Scottish Ministers may vary the date fixed for the holding of any hearing and sub-paragraphs (3) and (4) apply to the variation of a date as they applied to the date originally fixed.

(6) The Scottish Ministers may vary the time or place for the holding of a hearing and must give such notice of any such variation as appears to them to be reasonable.

(7) The persons entitled to be heard at any hearing are the appellant (and the person, if any, representing them) and SEPA.

(8) Nothing in sub-paragraph (7) prevents the Scottish Ministers from permitting any other person to be heard at the hearing and such permission must not be unreasonably withheld.

(9) Where a reporter is appointed (under paragraph 4(1)) to exercise the functions of the Scottish Ministers under this paragraph, the reporter must give a report in writing ("the report") to the Scottish Ministers after the conclusion of any hearing held by the reporter under this paragraph.

(10) The report under sub-paragraph (9) must include—

- (a) a detailed summary of the representations made at the hearing;
- (b) an evaluation of those representations by the reporter; and
- (c) the advice (including any conclusions and recommendations) of the reporter as to how the appeal ought to be determined, or the reasons for not making any such recommendations.

Determination of appeal

9.—(1) The Scottish Ministers must give to the reservoir manager—

- (a) notice in writing ("the decision notice") of—
 - (i) their determination of the appeal; and
 - (ii) their reasons for that determination; and
- (b) where paragraph 8(9) applies in relation to the appeal, a copy of the report given to Scottish Ministers under that paragraph ("the report").

(2) Where sub-paragraph (1)(b) applies, the Scottish Ministers must determine the appeal having regard to the report.

(3) The Scottish Ministers must, at the same time as giving the decision notice under sub-paragraph (1), send to SEPA a copy of the notice and, if a hearing was held, a copy of the report.

(4) On determining an appeal against—

- (a) a decision of SEPA—
 - (i) to issue a stop notice under paragraph 1 of Schedule 1;
 - (ii) to impose a further enforcement measure by restoration notice or by restraint notice under paragraph 1 of Schedule 2; or
 - (iii) to give a notice under section 69(2) (enforcement notice: safety and other measures) of the Act,

the Scottish Ministers may affirm or quash the decision (or any part of it) and may affirm or quash the notice (or any part of it), and if they affirm the notice (or part of it) they may do so in its original form or with such modifications as they think fit;

(b) a decision of SEPA under paragraph 4 of Schedule 1 not to give a completion certificate, the Scottish Ministers may affirm or quash the decision, and if they quash the decision they may also direct SEPA to give the appellant a completion certificate in such terms as they think fit;

(c) a decision of SEPA under paragraph 5(4) of Schedule 1—

(i) not to award compensation; or

(ii) as to the amount of compensation,

the Scottish Ministers may affirm or quash the decision, and if they quash the decision they may also direct SEPA to award compensation or, as the case may be, as to the amount of compensation to be awarded;

(d) a notice (imposing a non-compliance penalty) under paragraph 9 of Schedule 2, the Scottish Ministers may affirm or quash the notice (or any part of it), and if they affirm the notice (or part of it) they may do so in its original form or with such modifications as they think fit; or

(e) a decision of SEPA (by virtue of an expenses recovery notice) under paragraph 1 of Schedule 3—

(i) to impose a requirement to pay expenses; or

(ii) as to the amount of the expenses,

the Scottish Ministers may affirm or quash the decision (or any part of it) and may affirm or quash the notice (or any part of it), and if they affirm the notice (or part of it), they may do so in its original form or with such modifications as they think fit.

(5) Where the Scottish Ministers affirm a notice (or part of it) with modifications under sub-paragraph (4)(a), (d) or (e), they may direct SEPA to make those modifications to the notice.

(6) Where the Scottish Ministers direct SEPA to make modifications to a notice (“the relevant notice”) under sub-paragraph (5), SEPA may, by notice given to the reservoir manager who was given the relevant notice, make those modifications to the relevant notice.

(7) For the purposes of these Regulations, where SEPA modifies a notice in accordance with sub-paragraph (6), a reference to the notice is to be treated as a reference to the notice as modified.

(8) Where SEPA takes action pursuant to, and in accordance with, a direction under sub-paragraph (4) or (5) the action in question may not be appealed to the Scottish Ministers.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order confers additional powers on the Scottish Environment Protection Agency (“SEPA”) to enable it to enforce the requirements of the Reservoirs (Scotland) Act 2011 (“the Act”) and makes connected provision.

Part 1 makes general provision in relation to citation, commencement and interpretation.

Part 2 makes provision in relation to stop notices, further enforcement measures, recovery of expenses, fixed monetary penalties, variable monetary penalties and enforcement undertakings as follows—

- article 3 and Schedule 1 make provision as to the giving by SEPA of stop notices to reservoir managers of controlled reservoirs. In particular, paragraph 1 of Schedule 1 empowers SEPA to, by notice (a “stop notice”), prohibit a reservoir manager of a controlled reservoir from carrying on an activity specified in the notice until the reservoir manager has taken steps specified in the notice. A stop notice may only be given if SEPA reasonably believes that the activity presents a significant risk of causing an uncontrolled release of water from the reservoir or that it involves or is likely to involve the commission of certain specified offences under sections 42(1) and 52(1) of the Act;
- article 4 and Schedule 2 make provision about the imposition by SEPA on reservoir managers of controlled reservoirs of one or more further enforcement measures. In particular, paragraph 1 of Schedule 2 empowers SEPA to, by notice (a “restoration” or “restraint” 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) of the Act (failure to comply with a preliminary certificate or a final certificate). A restoration or restraint notice may only be given if SEPA is satisfied beyond a reasonable doubt that the reservoir manager had committed that particular offence. A restoration notice is a notice which requires particular steps to be taken within a set period to secure that the position is so far as possible restored to what it would have been if the offence under section 42(1)(e) of the Act had not been committed. A restraint notice is a notice which requires particular steps to be taken within a set period to secure that this offence does not continue or recur;
- article 5 and Schedule 3 make provision for the recovery of expenses reasonably incurred by SEPA in relation to the giving of a stop notice or the imposition of further enforcement measures by means of a restoration notice or a restraint notice; and
- article 6 and Schedule 4 amend the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 (“the 2015 Order”) so that, where a reservoir manager fails to comply with a stop notice, SEPA may also exercise its powers under the 2015 Order to impose fixed or variable monetary penalty, or to accept an enforcement undertaking.

Part 3 and Schedules 5 and 6 make further provision in relation to reviews and appeals under the Act, and Part 4 makes ancillary provision in relation to notices, guidance, recovery of payments and the payment of penalties.

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