

RESERVOIRS (SCOTLAND) ACT 2011

EXPLANATORY NOTES

THE ACT – SECTION BY SECTION

Part 1 – Reservoirs

Chapter 9 – Civil Enforcement, Emergency Powers and Further Offences

Section 65 – Enforcement notice: appointment of engineer

99. This section enables SEPA to serve an enforcement notice requiring the reservoir manager to appoint a construction, inspecting or supervising engineer, and notify SEPA of that appointment. Subsection (3) defines “the relevant appointment” for the purposes of sections 67 and 68.

Section 66 – Offence: failure to comply with notice under section 65(2)

100. This section makes it an offence not to comply with notices under section 65(2). Subsection (2) sets out the penalties for anyone committing an offence under this section.

Section 67 – Appointment of engineer by SEPA

101. This section enables SEPA to appoint a relevant engineer where the reservoir manager has failed to do so. This section applies when a notice served under Section 65 has not been complied with. SEPA will be able to reclaim any expenses directly from the reservoir manager.

Section 68 – Appointment by SEPA: engineer’s report, certificates, recommendations etc

102. This section applies when SEPA have made an appointment under Section 67. Any reports, statements or certificates are to be first given to SEPA by the relevant engineer, and subsequently copied to the reservoir manager no more than 28 days later. Paragraph (a) allows for the safety measure certificate to be provided by the construction engineer to SEPA where SEPA has appointed the construction engineer.

Section 69 – Enforcement notice: safety and other measures

103. This section enables SEPA to serve an enforcement notice where a reservoir manager has failed to comply with the direction in either a safety report (under section 36(1)) or an inspection report (under section 48(1)). SEPA’s enforcement notice should specify a timeframe within which the reservoir manager must comply, the reasons for considering that this section applies and any steps SEPA consider must be taken to take the measure. A timeframe specified under subsection (2) should only be specified after consultation with a panel engineer under subsection (3).
104. Subsection (7) enables the Scottish Ministers by order to provide for reservoir managers to apply to SEPA for a review of its decision to give an enforcement notice and to

appeal to the Scottish Ministers against a decision by SEPA to give an enforcement notice. Subsection (8) requires any order to specify the time period within which any review or appeal may be made where the order gives the right of review or appeal. It also enables the Scottish Ministers to make further provision in relation to reviews and appeals under this section.

Section 70 – Offence: failure to comply with notice under section 69(2)

105. This section makes it an offence not to comply with a notice under section 69(2) except where the reservoir manager has a right of review or appeal under an order under section 69 and the period for making an application for a review or an appeal has not yet expired or a request for a review or appeal has been made but it has not yet been withdrawn or determined. Subsection (4) sets out the penalties for anyone committing an offence under this section.

Section 71 – SEPA’s power to arrange taking of safety and other measures

106. This section creates powers for SEPA to appoint a relevant engineer to oversee compliance with a measure previously specified in a report. This section applies when a notice served under section 69(2) has not been complied with. Subsection (4) requires the reservoir manager to pay any reasonably incurred expenses incurred by SEPA under this section.

Section 72 – Offences under section 42(1)(d) and 52(1)(c): further remedies

107. **Section 72** enables the court, where a manager has committed an offence through failure to comply with directions in either a safety or inspection report, to order the reservoir manager to comply with the direction and to undertake any mitigating or remedial work deemed appropriate. Subsection (3) enables the court to extend the period for undertaking such work.

Section 73 – Stop notices

108. This section enables the Scottish Ministers by order to allow SEPA to issue a stop notice to a reservoir manager. Subsection (3) defines a stop notice as a notice which contains instructions to a reservoir manager to stop an activity which SEPA believes could cause damage to the structure, or could cause any other kind of infringement. Subsection (4) lists the circumstances in which a stop notice can be issued. Before SEPA can issue a stop notice to someone carrying out an activity which SEPA believes presents a significant risk of causing an uncontrolled release of water from the reservoir but which is not an offence, subsection (5) requires SEPA to appoint an engineer from a panel established under section 27 at its own expense and take into account any recommendations made by the engineer appointed. It also requires SEPA to specify only steps to remove or reduce the risk of an uncontrolled release of water in any such stop notice and to notify the Scottish Ministers as soon as reasonably practicable of each occasion on which such a notice is given.

Section 74 – Stop notices: procedure

109. This section specifies the procedural conditions which a Ministerial order under section 73 establishing stop notices must include. Subsection (2) covers appeals and completion certificates following the issue of a stop notice. Subsection (3) specifies what information must be provided in any stop notice. Subsections (4) and (6) specify circumstances in which the reservoir manager is entitled to appeal to the Scottish Ministers against a stop notice and a completion certificate respectively. Subsection (5) enables the Scottish Ministers to provide for SEPA to charge a fee in relation to appeals under this section which is returnable if the appeal is upheld.

Section 75 – Stop notices: compensation

110. This section requires a Ministerial order under section 73 establishing stop notices to allow SEPA to provide financial compensation to a reservoir manager who has been negatively affected by a stop notice. Subsection (2) specifies that this must be ordered by the Scottish Ministers. Subsection (3) allows a reservoir manager to appeal to the Scottish Ministers against either a negative decision to compensate, or against how much money is awarded.

Section 76 – Stop notices: enforcement

111. This section allows a Ministerial order under section 73 establishing stop notices to create an offence not to comply with a stop notice and sets out the corresponding liabilities of anyone committing such an offence.

Section 77 – Emergency powers

112. This section enables SEPA to take emergency action to prevent an uncontrolled release of water that would cause harm to people or property. Subsection (2) enables SEPA to take any necessary action to prevent such an event, or to limit the effects. Subsection (3) requires SEPA to take any such measures in consultation with a panel engineer. Subsection (5) requires SEPA to notify the reservoir manager of any measures deemed necessary under this section.

Section 78 – Enforcement undertakings

113. This section enables the Scottish Ministers to make provision by order allowing SEPA to receive an enforcement undertaking from a reservoir manager. Enforcement undertakings allow reservoir managers who may have committed an offence under the Act to agree with SEPA that the reservoir manager will take such steps to rectify the situation as may be agreed in exchange for immunity from prosecution. Subsection (3) defines “enforcement undertaking” for the purposes of the Act. Subsection (4) specifies the necessary contents of such an undertaking. Subsection (5) specifies the subsequent immunity from sanctions that a reservoir manager would receive, unless the reservoir manager does not deliver the promises specified in the undertaking. Subsection (6) lists the matters which in particular the Scottish Ministers may provide for in an order under subsection (1).

Section 79 – Fixed monetary penalties

114. This section allows the Scottish Ministers to make provision by order about the imposition of fixed monetary penalties on reservoir managers in relation to offences under Part 1. Subsection (2) requires the Scottish Ministers to consult with representative organisations and such other persons the Scottish Ministers consider appropriate under section 86 before making an order under this section. Subsection (3) lists the conditions required by provisions in any order made under subsection (1).

Section 80 – Fixed monetary penalties: procedure

115. This section sets out the process that must be followed when a fixed monetary penalty is issued. Subsection (2) allows a reservoir manager to initially pay a lesser amount of money to prevent a fixed monetary penalty from subsequently being issued. Subsection (3) specifies what information must be included in any notification to the reservoir manager. Subsection (4) requires the order under section 79(1) to include provision for SEPA not to impose a fixed monetary penalty if SEPA are either satisfied that the reservoir manager would not by reason of defence be liable to be convicted of the related offence or due to other circumstances. Subsection (5) lists the required contents of any final notice under this section. Subsection (6) sets out the circumstances under which a reservoir manager can appeal to the Scottish Ministers against a decision under this

section. Subsection (7) enables the Scottish Ministers to provide for the charging of a fee in relation to appeals under this section which is returnable if the appeal is upheld.

Section 81 – Fixed monetary penalties: criminal proceedings and conviction etc

116. This section sets out a reservoir owner's immunity from further proceedings upon payment of a fixed penalty. Subsection (2) specifies that this includes the issuing of stop notices or further enforcement measures.

Section 82 – Further enforcement measures

117. Subsection (1) enables the Scottish Ministers to make provisions in an order in relation to offences under this Part regarding the imposition of any further enforcement measures in the event of non-compliance. Further enforcement measures may include variable monetary penalties (which will be punitive), restraint notices (which may require a reservoir manager to take steps to avoid recurrence of an offence), and restoration notices (which may require reservoir managers to take restorative action to rectify the consequences of an offence). Subsection (2) requires the Scottish Ministers to consult with relevant organisations and other bodies it considers appropriate before making an order under this section. Subsection (3) specifies the conditions which further enforcement measures may be taken. Subsection (4) and (5) define what is meant by further enforcement measures.

Section 83 – Further enforcement measures: procedure

118. This section details steps that SEPA must take when taking further enforcement measures, which must be provided for in an order under section 81(1). Subsection (2) sets out a reservoir manager's right to appeal on receipt of a notice of SEPA's intent to take further measures. Subsection (3) specifies what information must be included in any notification of further action. Subsection (4) sets out the circumstances where SEPA may decide not to impose further enforcement measures. Subsection (5) requires provision in the order under section 81(1) to enable SEPA to accept or reject enforcement undertakings from the reservoir manager in relation to the offence. Subsection (6) specifies what information must be included in any final judgement. Subsection (7) sets out a reservoir manager's right to appeal to the Scottish Ministers on receipt of a final notice. Subsection (8) enables the Scottish Ministers to provide for the charging of a fee in relation to appeals under this section which is returnable if the appeal is upheld.

Section 84 – Further enforcement measures: criminal proceedings and conviction

119. This section sets out a reservoir manager's immunity from further proceedings upon acceptance and completion of an enforcement undertaking. Subsection (3) sets out cases which are the exception to this condition.

Section 85 – Further enforcement measures: enforcement

120. This section enables an order under section 81(1) to allow SEPA to charge a reservoir manager a financial penalty if there is a case of non-compliance with a restraint notice, restoration notice or further enforcement undertaking. Subsection (2) details the conditions under which such a penalty may be issued. Subsection (3) requires the non-compliance penalty to be imposed by notice and that the reservoir manager can appeal to the Scottish Ministers against the notice and subsection (4) sets out the grounds for appeal against such a penalty by a reservoir manager.

Section 86 – Consultation in relation to orders under sections 73(1), 78(1), 79(1) and 82(1)

121. This section requires SEPA to consult relevant bodies before invoking provisions to issue stop notices, enforcement undertakings, fixed monetary penalties or further

enforcement measures. Subsection (2) sets out the people and organisations that should be consulted.

Section 87 – Guidance on the use of stop notices, fixed monetary penalties or further enforcement measures

122. This section requires the Scottish Ministers to ensure the orders providing for the use of stop notices, enforcement undertakings, fixed monetary penalties and further enforcement measures by SEPA require SEPA to publish guidance about the use of these powers in each order.

Section 88 – Recovery by SEPA of expenses

123. This section allows SEPA to reclaim costs incurred in issuing stop notices or imposing further enforcement measures. Subsection (2) defines what can be included in these expenses. Subsection (3) sets out the reservoir manager’s right to appeal to the Scottish Ministers against SEPA’s decision to reclaim costs. Subsection (4) enables the Scottish Ministers to provide for the charging of a fee in relation to appeals under this section which is returnable if the appeal is upheld.

Section 89 – Guidance: appeals

124. This section requires the Scottish Ministers to publish guidance on the process of making appeals under sections 69, 74, 75, 78, 80, 83, 85 and 88.

Section 90 – Publication of enforcement action

125. This section enables the Scottish Ministers by order to require SEPA to publish specified information regarding enforcement action including the non-appointment of engineers, the failure to take measures in the interests of safety, the issuing of stop notices, the issuing of fixed monetary penalties or the issue of further enforcement notices. Subsection (3) specifies that information must not be published where a stop notice, fixed monetary penalty or further enforcement notice has been successfully appealed.

Section 91 – Powers of entry

126. This section creates powers for SEPA to enter land for the purposes of carrying out some of their functions under the Act. The power to enter land includes a power to enter buildings by virtue of the definition of “land” in the Interpretation and Legislative Reform (Scotland) Act 2010, which includes buildings and other structures. Subsection (2) lists SEPA’s activities to which this power of entry applies.

Section 92 – Warrants authorising entry

127. This section enables a sheriff or justice of the peace to grant a warrant to any person entitled to exercise a power of entry under section 91 to do so. A warrant allows the person authorised to use reasonable force but does not allow the use of force against individuals (see subsections (1) and (4)(a)).
128. Subsections (2) and (3) set out the circumstances in which a warrant may be granted. These require the sheriff or justice of the peace to be satisfied by evidence on oath that there are reasonable grounds for seeking entry to the land, that permission to enter has been refused or a refusal is reasonably expected, the land is unoccupied, or where the case is urgent. Where the case is not urgent and a warrant is sought on the basis that permission to enter has been refused or a refusal is expected then the applicant, SEPA must first have given notice that they intend to enter the land and the notice period must have expired. The notice periods are set out in section 92(3) and 93(3)(a).

Section 93 – Powers of entry: supplementary

129. This section sets out additional scenarios when entry to land may be required. Subsection (1) applies the right to enter land in an emergency to any surrounding land as well. Subsection (2) sets out what additional materials and equipment can be taken onto the land in question. Subsection (3) details the approval that must be granted in cases other than when there is emergency work involved. Subsection (4) sets out what details must be included in any notice of entry.

Section 94 – Offence: preventing or obstructing entry

130. This section sets out that impeding entrance of a person appointed by SEPA under section 91 to land constitutes an offence. Subsection (2) sets out the maximum applicable penalty for such an offence.

Section 95 – Compensation

131. This section sets out scenarios where SEPA must pay compensation to landowners where SEPA has exercised the right to enter land under section 91 and damages subsequently occur. Subsection (1) describes the scenarios which would render SEPA liable to pay compensation. Subsection (2) details who is entitled to compensation from SEPA in such circumstances. Subsection (3) determines that the Lands Tribunal for Scotland is responsible for ordering compensation. Subsection (4) sets out how such expenditure is to be treated from the SEPA point of view.

Section 96 – Reports by SEPA to the Scottish Ministers

132. This section requires SEPA to report to the Scottish Ministers about the steps it has taken to secure compliance with Part 1 of the Act. Subsection (2) gives the Scottish Ministers the power to direct SEPA as to the timing and content of the reports.

Section 97 – Affording of reasonable facilities to engineers

133. This section requires reservoir managers of controlled reservoirs to provide any relevant engineer with reasonable facilities in connection with the engineers functions under Part 1 of the Act. Subsection (2) requires the reservoir manager to make their records and other information available in the form, manner and timing specified by the engineer to the relevant engineer when requested.

Section 98 – Power of SEPA to require information and assistance

134. This section requires the reservoir manager of controlled reservoirs to provide SEPA with any information and assistance reasonably sought in connection with SEPA's functions under Part 1 of the Act. Subsection (2) requires the reservoir manager to make their records available to SEPA when requested. Subsection (3) requires the reservoir manager to provide any further information reasonably requested by SEPA in the manner and form specified by SEPA.

Section 99 – Offences: sections 97 and 98

135. This section makes it an offence for a reservoir manager to fail to comply with sections 97 and 98. Subsection (2) sets out the liabilities of anyone committing an offence under this section.