
SCOTTISH STATUTORY INSTRUMENTS

2016 No. 19

**ENVIRONMENTAL PROTECTION
WATER**

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

Made - - - - - *13th January 2016*
Laid before the Scottish
Parliament - - - - - *15th January 2016*
Coming into force - - - - - *1st April 2016*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 20, 22 and 36(2) and (3) of, and Schedule 2A to, the Water Environment and Water Services (Scotland) Act 2003⁽¹⁾ and section 2(2) of the European Communities Act 1972⁽²⁾ and all other powers enabling them to do so.

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- (1) [2003 asp 3](#). Section 22 was amended by section 109(1) of the Reservoirs (Scotland) Act 2011 ([asp 9](#)), and Schedule 2A was inserted by section 109(2) of that Act. Section 22(1) is also modified by [S.I. 2004/99](#) to have effect as if the reference to 'environmental objectives set out in river basin management plans' included references to environmental objectives set out in any river basin management plan for the Solway Tweed River Basin District approved under [S.I. 2004/99](#).
- (2) [1972 c.68](#). Section 2(2) was amended by the Scotland Act 1998 ([c. 46](#)) ("the 1998 Act"), Schedule 8, paragraph 15(3) (which was amended by section 27(4) of the Legislative and Regulatory Reform Act 2006 ([c.51](#)) ("the 2006 Act")). Section 2(2) was also amended by section 27(1)(a) of the 2006 Act and by the European Union (Amendment) Act 2008 ([c.7](#)), Schedule, Part 1. The functions conferred upon the Minister of the Crown under section 2(2), insofar as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act. Section 2(2) is cited to enable (so far as may be necessary to supplement the other powers cited) provision to be made in relation to a responsible authority for the purposes of implementing, or enabling the implementation of, obligations arising out of or under [Directive 2000/60/EC](#) of the European Parliament and of the Council establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p.1), as amended by Decision No [2455/2001/EC](#) (OJ L 331, 15.12.2001, p.1), [Directive 2008/32/EC](#) (OJ L 81, 20.3.2008, p.60), [Directive 2008/105/EC](#) (OJ L 348, 24.12.2008, p.84), [Directive 2009/31/EC](#) (OJ L 140, 5.6.2009, p.114) and [Directive 2013/39/EU](#) (OJ L 226, 24.8.2013, p.1) and for the purposes of dealing with matters arising out of or related to any such obligations.

PART 1

Interpretation etc.

Citation and commencement

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

Interpretation

2.—(1) In these Regulations—

“the 2004 Regulations” means the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004(3);

“the 2011 Regulations” means the Water Environment (Controlled Activities) (Scotland) Regulations 2011(4);

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

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

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

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

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

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

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

“Network Rail” includes Network Rail Infrastructure Limited and an associated company of Network Rail Infrastructure Limited which holds property for railway purposes, and for the purpose of this definition “associated company” means any company which is (within the meaning of section 1159 of the Companies Act 2006(5)) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;

“Network Rail Infrastructure Limited” means Network Rail Infrastructure Limited, a company limited by shares and incorporated under the Companies Act 1985(6), whose registered company number is 02904587;

“responsible authority” means any public body or office holder designated as a responsible authority for the purposes of section 2 of the Act(7);

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

(a) improving the hydromorphological characteristics of a body of water; or

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

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

(5) 2006 c.46.

(6) 1985 c.6.

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

- (b) restoring (in full or in part) the hydromorphological characteristics that, in the opinion of SEPA, a body of water (other than an artificial water body) would have if those characteristics had not been changed as a result of physical alterations by human activity;
- “remedial measures notice” is to be construed in accordance with regulation 3;
- “revocation notice” is to be construed in accordance with regulation 7;
- “river basin management plan” means, as the case may be—
- (a) a river basin management plan approved by the Scottish Ministers under section 13 (including that section as applied by section 14(4)) of the Act(8);
 - (b) a river basin management plan for the Solway Tweed River Basin District approved under paragraph 10 of Schedule 1 to the 2004 Regulations;
- “serve” means serve in writing and “served” is to be construed accordingly;
- “Solway Tweed River Basin District” means the area identified as a river basin district by regulation 3(1) of the 2004 Regulations; and
- “variation notice” is to be construed in accordance with regulation 6.

(2) Where anything under these Regulations is to be done “in writing” that includes an electronic communication, as defined in section 15(1) of the Electronic Communications Act 2000(9) which is capable of being reproduced (and “written” is to be construed accordingly).

PART 2

Notices to improve or restore characteristics of bodies of water

Remedial measures notice

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

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

- (a) the appropriate person owns, manages, maintains or is otherwise responsible for an artificial structure which, by virtue of its impact on the hydromorphological characteristics of a body of water, is likely to prevent or delay the achievement of an environmental objective;
- (b) it is necessary or expedient to require the appropriate person to undertake the remedial measures for the purposes of facilitating the achievement of that objective; and
- (c) the measures specified in the notice are necessary and proportionate for those purposes.

(3) The notice may be served on more than one appropriate person.

Content of notice

4.—(1) Each notice served under this Part must—

- (a) identify the appropriate person on whom it is served (“recipient”);

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

(9) [2000 c.7](#). Section 15 was amended by paragraph 158 of Schedule 17 to the Communications Act 2003 (c.21).

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

PART 3

Notices under Part 2: further provision

Prior consultation

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

Variation notice

- 6.—(1) SEPA may vary a remedial measures notice (as varied in accordance with any variation notice) (“the principal notice”) by serving a variation notice on each appropriate person on whom the principal notice was served.
- (2) The variation notice must—
- (a) identify the principal notice; and
 - (b) specify—
 - (i) the variation to the principal notice;
 - (ii) the date on which the variation takes effect (which must be at least 28 days after the date on which the variation notice is received by the appropriate person); and
 - (iii) the reason for the variation.

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

Revocation notice

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

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

(a) identify the principal notice; and

(b) specify—

(i) in the case of a partial revocation, the part of the principal notice which is revoked;

(ii) the date on which the revocation takes effect; and

(iii) the reasons for the revocation.

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

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

PART 4

Enforcement powers

Powers and duty to monitor, enforce etc.

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

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

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

(a) in sub-paragraph (c), remove the word “and”; and

(b) at the end insert—

“; and

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

Power to obtain information

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

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

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

Enforcement by the courts

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

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

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

PART 5

Offences

Offences

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

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

(2) It is an offence for a person to—

- (a) obstruct an authorised person in the exercise of that person’s powers under regulation 31(4) of, and Schedule 6 to, the 2011 Regulations;
- (b) fail to comply with any requirement imposed in the exercise of an authorised person’s powers under regulation 31(4) of, and Schedule 6 to, the 2011 Regulations;
- (c) fail or refuse to provide facilities or assistance or any information or to permit any inspection reasonably required by an authorised person in the exercise of that authorised person’s powers or duties under or by virtue of regulation 31(4) of, and Schedule 6 to, the 2011 Regulations;
- (d) prevent any other person from appearing before an authorised person, or answering any question to which an authorised person may require an answer, pursuant to regulation 31(4) of, and Schedule 6 to, the 2011 Regulations;
- (e) pretend to be a person authorised in accordance with regulation 31(4) of the 2011 Regulations;
- (f) make a statement which that person knows to be false or misleading in a material particular, or recklessly to make a statement which is false or misleading in a material particular, if the statement is made in purported compliance with a requirement to furnish any information imposed by or under any provision of these Regulations; or
- (g) cause or permit any other person to commit an offence under paragraph (1) or subparagraphs (a) to (f) of this paragraph.

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

Defences

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

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

Penalties

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

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

Offences by bodies corporate

14.—(1) Where—

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

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

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

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

Power of court to order offence to be remedied

15.—(1) If—

- (a) a person is convicted of an offence under regulation 11(1)(a) or (b); and

- (b) it appears to the court that it is in the power of that person to undertake the remedial measures specified in the remedial measures notice or the variation notice, as the case may be, in relation to which the person is convicted of the offence,
- the court may, in addition to, or instead of, imposing any punishment, order the person, within such time as may be fixed by the order of the court, to take such steps as may be specified in that order for complying with the remedial measures notice or the variation notice, as the case may be.
- (2) Before making such an order, the court must have regard to any representations by SEPA as to the steps required for taking the measure.
- (3) The time fixed by an order of the court under paragraph (1) may be extended or further extended by a further order of the court on an application made before the end of the time originally fixed or extended under this paragraph, as the case may be.

PART 6

Appeals

Appeals to the Scottish Ministers

16. A person, other than the Scottish Ministers, who is aggrieved by a requirement imposed on the person by—
- (a) a remedial measures notice; or
 - (b) a variation notice,
- may appeal to the Scottish Ministers against the notice.

Determination of appeals

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

Effect of notices etc. during consideration of appeal

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

Appeals – miscellaneous

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

PART 7

General

Application to the Crown

20. These Regulations do not bind the Crown.

Consequential amendments

21. In Schedule 1 to the Water Environment (Relevant Enactments and Designation of Responsible Authorities and Functions) (Scotland) Order 2011(**10**), after the last entry, insert—

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

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

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

(3) After paragraph (1) insert—

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

St Andrew’s House, Edinburgh
13th January 2016

AILEEN McLEOD
Authorised to sign by the Scottish Ministers

SCHEDULE

Regulation 19

Procedures in connection with appeals to the Scottish Ministers

1. A person who wishes to appeal to the Scottish Ministers under regulation 16 must give to the Scottish Ministers written notice of the appeal together with the documents specified in paragraph 2 and must at the same time send to SEPA a copy of that notice together with copies of the documents specified in paragraph 2(a) and (d).
2. The documents specified in this paragraph are—
 - (a) a statement of the grounds of appeal;
 - (b) a copy of any relevant correspondence between the appellant and SEPA;
 - (c) a copy of the notice which is the subject matter of the appeal; and
 - (d) a statement indicating whether the appellant wishes the appeal to be in the form of a hearing or to be disposed of on the basis of written representations.
3. An appellant may withdraw an appeal by notifying the Scottish Ministers in writing, and must send a copy of that notification to SEPA.
4. Subject to paragraph 5, notice of appeal in accordance with paragraph 1 is to be given—
 - (a) in relation to an appeal against a remedial measures notice, before the expiry of the period of two months beginning with the day on which the notice was served; and
 - (b) in relation to an appeal against a variation notice, before the expiry of the period of 28 days beginning with the day on which the notice was served.
5. The Scottish Ministers may in a particular case allow notice of appeal to be given after the expiry of the period mentioned in paragraph 4.
6. Subject to paragraph 9, SEPA must, within 14 days of receipt of the copy of the notice of appeal sent in accordance with paragraph 1, give notice of it to—
 - (a) any person who made representations to SEPA with respect to the subject matter of the appeal; and
 - (b) any person who appears to SEPA to be affected or likely to be affected by, or have an interest in, the subject matter of the appeal.
7. A notice given under paragraph 6 must—
 - (a) state that the notice of appeal has been given;
 - (b) state the name of the appellant and the address of the site to which the notice being appealed against applies;
 - (c) describe the notice to which the appeal relates; and
 - (d) state that representations with respect to the appeal may be made to the Scottish Ministers in writing by any recipient of the notice within a period of 21 days beginning with the date of the notice and that copies of any representations so made will be furnished to the appellant and to SEPA.
8. SEPA must, within 14 days of giving a notice under paragraph 6—
 - (a) notify the Scottish Ministers of the persons to whom and the date on which the notice was given; and
 - (b) indicate whether it wishes the appeal to be in the form of a hearing or to be disposed of on the basis of written representations.
9. In the event of an appeal being withdrawn, SEPA must give notice of the withdrawal to every person to whom notice was given under paragraph 6.

Hearing procedure

10. Before determining an appeal under regulation 16, the Scottish Ministers may afford the appellant and SEPA an opportunity of appearing before and being heard by a person appointed by them (“the appointed person”) and they must do so in any case where a request is made by the appellant or SEPA to be so heard.

11. A hearing held under paragraph 10 may, if the appointed person so decides, be held wholly, or held to any extent, in private.

12. If the Scottish Ministers cause a hearing to be held under paragraph 10, 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.

13. 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—

- (a) publish a copy of the notice given under paragraph 12 in a newspaper circulating in the locality in which the artificial structure which is the subject of the remedial measures notice or the variation notice, as the case may be, is located; and
- (b) serve a copy of that notice on every person mentioned in paragraph 6 who has made representations to the Scottish Ministers.

14. The Scottish Ministers may vary the date fixed for the holding of any hearing and paragraphs 12 and 13 apply to the variation of a date as they applied to the date originally fixed.

15. The Scottish Ministers may also 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.

16. The persons entitled to be heard at any hearing are the appellant and SEPA.

17. Nothing in paragraph 16 prevents the appointed person from permitting any other persons to be heard at the hearing and such permission must not be unreasonably withheld.

18. After the conclusion of a hearing, the appointed person must make a report to the Scottish Ministers in writing which must include the conclusions and recommendations of that person or the reasons for not making any recommendation.

Procedure for written representations

19. Where the appeal is to be disposed of on the basis of written representations, SEPA must submit any written representations to the Scottish Ministers not later than 28 days after receiving a copy of the documents specified in paragraph 2(a) and (d).

20. The appellant must make any further written representations by way of reply to any representations made by SEPA not later than 28 days after the date of submission of those representations by SEPA under paragraph 19.

21. Any written representations made by the appellant or SEPA must bear the date on which they are submitted to the Scottish Ministers.

22. When SEPA or the appellant submits any written representations to the Scottish Ministers they must at the same time send a copy of them to the other party.

23. The Scottish Ministers must send to the appellant and SEPA a copy of any written representations made to them by the persons mentioned in paragraph 6 and must allow the appellant and SEPA a period of not less than 14 days in which to make written representations on them.

24. The Scottish Ministers may in a particular case—

- (a) set later time limits than those mentioned in paragraphs 19, 20 and 23;

- (b) require exchanges of written representations between the parties in addition to those mentioned in paragraphs 19 and 20.

Determination and publication of appeal

25. The Scottish Ministers must give notice to the appellant of their determination of the appeal and their reasons for that determination, and must provide the appellant with a copy of any report made under paragraph 18.

26. The Scottish Ministers must at the same time send a copy of the notice of the determination of the appeal, their reasons for that determination and a copy of any report made under paragraph 18 to SEPA and to any person who made representations to the Scottish Ministers during the appeal.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations provide for SEPA to serve a notice (“a remedial measures notice”) on an “appropriate person” requiring that person to undertake specified remedial measures (regulation 3). An “appropriate person” means the Scottish Ministers, Network Rail or any public body or office holder designated as a “responsible authority” by an order under section 2 of the Water Environment and Water Services (Scotland) Act 2003.

SEPA may only serve a remedial measures notice if satisfied that—

- (a) the appropriate person owns, manages, maintains or is otherwise responsible for an artificial structure which by virtue of its detrimental impact on the characteristics of a body of water is likely to prevent or delay the achievement of an environmental objective;
- (b) it is necessary or expedient for the purposes of facilitating the achievement of that objective for that person to undertake the remedial measures; and
- (c) the measures specified in the remedial measures notice are necessary and proportionate for those purposes.

It is an offence to fail to comply with a remedial measures notice (regulation 11). A person who has been served a remedial measures notice may appeal to the Scottish Ministers against the notice (regulation 16).

No business and regulatory impact assessment has been prepared for these Regulations as no significant change is foreseen to the existing impacts upon business, charities or voluntary bodies.