

The Environmental Damage Regulations

Preventing and Remedying Environmental Damage

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Welsh Assembly Government



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Introduction

The Environmental Damage (Prevention and Remediation) Regulations come into force in England on 1 March 2009, and the Environmental Damage (Prevention and Remediation) (Wales) Regulations came into force on 6 May 2009 in Wales. Similar regulations will be put in force in Northern Ireland and Scotland.

This booklet provides an overview of what the new regulations in England and Wales require and how they operate. In particular it may be useful for businesses, public authorities, community groups and the public.

It provides a brief and basic overview of the regulations, outlining

- what the Regulations are
- when they apply
- roles and responsibilities
- who the enforcing authorities are
- how the Regulations operate
- requirements for remediation
- appeals
- relation to existing legislation

The Guidance on the Environmental Damage Regulations will provide readers with more detailed information on the operation of the Regulations:

England:

<http://www.defra.gov.uk/environment/liability/index.htm>

Wales:

<http://wales.gov.uk/topics/environmentcountryside/epq/liability/?lang=en>

What are the Environmental Damage Regulations?

The Environmental Damage Regulations implement the European Directive on Environmental Liability.

They are based on the 'polluter pays principle' so those responsible prevent and remedy environmental damage, rather than the taxpayer paying.

'Environmental damage' has a specific meaning in the Regulations, **covering only the most serious cases**. Existing legislation with provisions for environmental liability remains in place.

The emphasis, in the first instance, is on the business or other 'operator' identifying when there is an imminent threat or actual damage and taking immediate action.

Enforcing authorities (hereafter: authorities) must determine whether there is environmental damage and decide on the necessary remedial measures.

Environmental liability is only a 'backstop'. The emphasis should be on proactively putting in place appropriate pollution prevention measures so that imminent threats and damage do not arise.



When do the Regulations apply?

The Regulations only apply to damage after the Regulations come into force, and they only apply to operators of economic activities.

'Environmental damage' only refers to:

- Adverse effects on the integrity of a Site of Special Scientific Interest (SSSI) or on the conservation status of species and habitats protected by EU legislation outside SSSIs
- Adverse effects on surface water or groundwater consistent with a deterioration in the water's status (Water Framework Directive term)
- Contamination of land that results in a significant risk of adverse effects on human health

There is liability without the need to show fault for activities in Schedule 2 of the Regulations. Broadly, these include: activities requiring Environmental Permits (EP); discharges to water; groundwater discharges; water abstraction or impoundment; using pesticides, biocides or dangerous substances; using and releasing Genetically Modified Organisms; transporting dangerous goods.

There is also liability where an operator has intended to cause damage or has been negligent but only for damage to SSSIs or EU species or habitats.

There are certain exemptions such as damage caused by acts of terrorism or natural disasters or damage falling within certain international conventions (e.g. oil pollution).

Roles and responsibilities

Operators **must**:

- Take steps to prevent damage or further damage and notify the authority
- Provide information and undertake preventive and remedial measures as required by the authority
- Submit proposals for remediation
- Pay costs claimed by the authority in relation to 'environmental damage'

Interested parties **may**:

- Notify authorities of imminent threats or damage with supporting information

Authorities **must**:

- Establish whether damage is 'environmental damage' and identify a responsible operator
- Serve a remediation notice taking account of any measures proposed by the operator

Authorities **may**:

- Take steps to prevent or remedy damage
- Require information or action from operators



Who are the Enforcing Authorities?

Environment Agency for:

Damage caused by operations regulated by the Environment Agency under the Environmental Permitting Regulations

Damage to EU species and habitats in the sea caused by operations regulated by the Environment Agency

Damage to water caused by activities regulated by Local Authorities under the Environmental Permitting Regulations (*enforcing remediation requirements in Part 3 of the regulations only*)

Damage caused by other operations to:

- water
- species and habitats in water but not in the sea

Marine and Fisheries Agency for England and Welsh Ministers for Wales for:

Damage to EU species and habitats and SSSIs in the sea other than where the operation is regulated by the Environment Agency.

Countryside Council for Wales (in Wales) and Natural England (in England) for:

Damage to EU species and habitats on land or to a SSSI (except where an operation is regulated under Environmental Permitting Regulations).

Damage to EU species and habitats on land or to a SSSI caused by operations regulated by Local Authorities under the Environmental Permitting Regulations (*enforcing remediation requirements in Part 3 of the regulations only*)

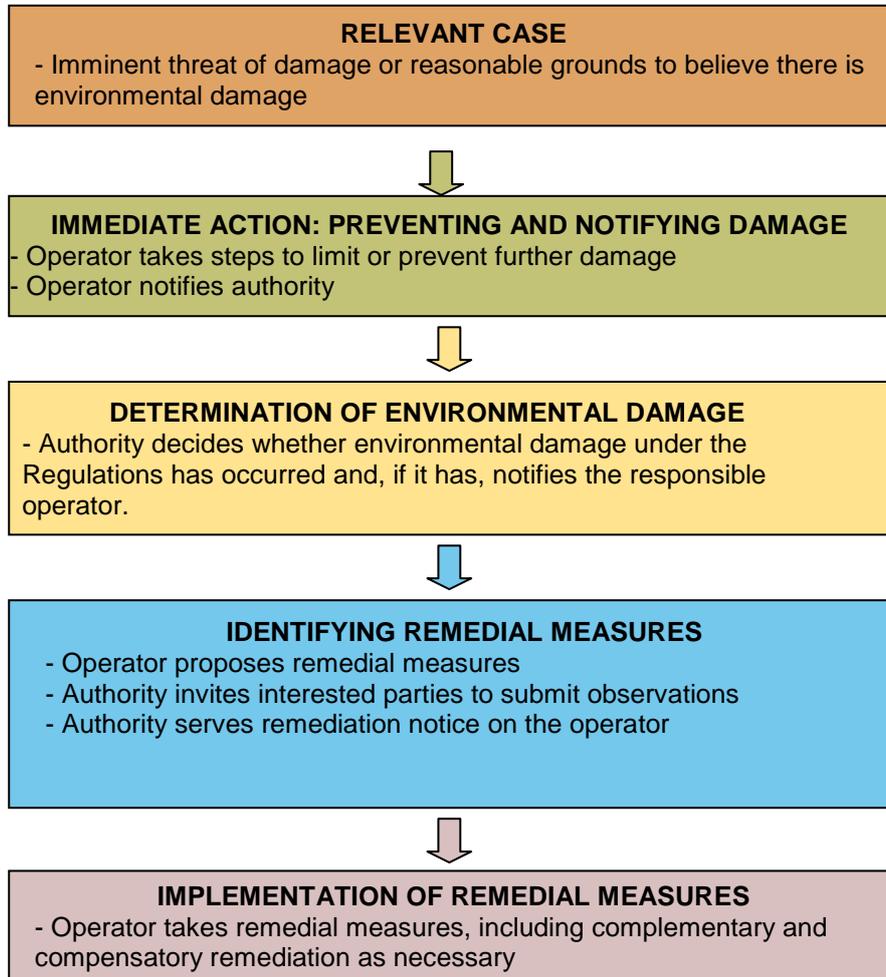
Local Authorities for:

Damage caused by operations regulated by Local Authorities under the Environmental Permitting Regulations (*enforcing preventive requirements in Part 2 of the regulations*)

Damage to land caused by operations regulated by Local Authorities under the Environmental Permitting Regulations (*enforcing remediation requirements in Part 3 of the regulations*)

Damage to land other than SSSIs for activities other than those regulated under the Environmental Permitting Regulations.

Operation of the Regulations



Requirements for remediation

For damage to SSSIs or EU species and habitats and damage to water, the approach is more comprehensive than in existing legislation. It consists of:

- **primary remediation** which is measures to restore the damage itself
- **complementary remediation** which is measures, including at alternative sites, to compensate for where primary remediation does not fully restore the damage

- **compensatory remediation** which is measures to compensate for the losses of natural resources while the damage is being restored

For damage to land remediation consists of removing or controlling contaminants so that the land no longer poses any significant risk of adversely affecting human health.



Appeals

When the authority determines that there is 'environmental damage' and notifies the operator the operator may appeal within 28 days. Grounds for appeal include that:

- the activity did not cause the damage
- the authority has unreasonably decided that the damage is 'environmental damage'
- the damage was the result of an act of a third party

- the operator was not at fault or negligent and the emission or event was: authorised and in accordance with a permit, or in accordance with the state of scientific knowledge (this ground for appeal is not available in Wales for damage caused by GMOs)

Operators may also appeal against a remediation notice on the grounds that the contents of the remediation notice are unreasonable.



Relation to existing legislation

Existing legislation with provisions for environmental liability remains in place. It may apply when cases fall outside the Regulations or, in some cases, in addition to the Regulations.

Some principles:

- When imminent threats or damage fall within the Regulations, the Regulations must apply
- Other provisions remain in place to address damage outside the Regulations
- Where other provisions go further the additional aspects may apply in addition to the Regulations

- Most other legislation contains powers. Authorities will exercise judgement so as not to duplicate the requirements of the Regulations where using powers

- Operators should ensure that they are aware of their responsibilities under other legislation as well as the Regulations.

Some of the main pieces of relevant legislation are listed on the back of this booklet.



Some key pieces of existing legislation containing liability provisions:

COMAH Regulations 1999
Environmental Permitting Regulations 2007
Part IIA of the Environmental Protection Act 1990
Water Act 2003
Water Resources Act 1991
Wildlife and Countryside Act 1981

Contact details for Enforcing Authorities:

Countryside Council for Wales: 0845 1306 229

Environment Agency: 08708 506 506
(Incident hotline: 0800 807060)

Local Authorities:

<http://www.direct.gov.uk/en/DI1/Directories/Localcouncils/index.htm>

Marine and Fisheries Agency:

<http://www.mfa.gov.uk/contact/hq.htm#marinepollution>

Welsh Assembly Government (for damage to species and habitats in the marine environment in Wales):

Marine@wales.gsi.gov.uk

Natural England: 0845 600 3078