Environmental Liability (Scotland) Regulations 2009

A Quick Guide

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About this Quick Guide

1. This Quick Guide aims to provide readily accessible help on the broad requirements of the Environmental Liability (Scotland) Regulations 2009. The Regulations transpose the provisions of the EU Environmental Liability Directive 2004/35/CE (ELD) into law in Scotland. The Guide is aimed at those carrying out activities that may cause imminent threats of significant damage or actual significant damage and others who need a ready reference to the intended operation of the legislation. For more detail, especially for professional advisers and the authorities responsible for overseeing the operation of the Regulations, please see the Regulations and the Technical Guidance.

2. The Guide describes the main provisions of the Regulations and the way in which they are intended to work. It attempts to make clear the relationships between those who may cause damage, the competent authorities and others; and it describes in summary some procedures that can help make things go smoothly. It also explains where to go for more help.

The Environmental Liability (Scotland) Regulations 2009

3. Many activities are regulated so as to protect the environment, often based upon European-wide rules applied by all Member States. Some such rules control or enforce certain actions or behaviour and some can require repair of damage done to the environment. The Environmental Liability (Scotland) Regulations 2009 add prevention and remediation requirements for the most significant cases.

4. The obligation to repair damage is put upon those causing it and they are expected to honour that obligation responsibly as a matter of course – as if paying a debt owed to the environment itself. They must put right what has gone wrong or, if that is not possible, provide some equivalent benefit. During the period until damage is repaired in full, some interim effort may be required as well.

5. An important point to note is that the Regulations only apply when something has ‘gone wrong’ and there is an imminent threat or actual ‘environmental damage’ within the scope of the Regulations. The emphasis should be on reducing risks to the environment so that imminent threats and environmental damage do not arise. Those running businesses and other operations can reduce the likelihood of ever falling under the Regulations’ requirements by effective management of environmental risks.

6. Every year there are thousands of cases of damage to the environment. The Regulations require action in response to the most significant cases, covering specific types of damage to protected species and natural habitats, damage to water or risks to human health from contamination of land. They apply to both imminent threats and actual cases of damage. Where threats arise, those responsible must take immediate action to prevent the damage occurring; and they must put right significant damage where it does occur.
7. The Regulations get damage put right rather than penalise those responsible. Those responsible for damaging activities are required to meet the cost of prevention and repair. The onus is on the responsible operator to take action in the first place in order to curtail any further damage and to report the relevant details to the appropriate competent authority (“the authority”). The authorities are responsible for overseeing the effective operation of the Regulations and have powers under the Regulations to take action and recover their costs.

8. Existing legislation that also addresses damage to the environment remains in place. Operators should ensure they are aware of their responsibilities under existing legislation as well as the new Regulations.

**What ‘environmental damage’ means**

9. The Regulations do not cover all types of damage to the environment. They relate only to damage or threat of damage which meets or exceeds the criteria set out in the Regulations.

10. In those criteria for damage, liability under the Regulations is triggered by ‘significant’ adverse effects or risks, not just by any everyday event. The trigger levels are taken mainly from procedures already established for the EU protection of birds, habitats and water bodies. So if you deal with any of those regimes, the explanations below should be familiar to you.

**Damage to species and habitats**

11. Damage to ‘protected species and natural habitats’ is damage that ‘has significant adverse effects on reaching or maintaining the favourable conservation status (FCS) of certain species and habitats identified in existing EU legislation (hereafter called ‘European habitats and species’)

**Damage to water**

12. Damage to ‘water’ is damage that ‘significantly adversely affects any or all of the ecological status, chemical status, quantitative status and/or ecological potential of the waters concerned.’

**Land damage**

13. Damage to ‘land’ is ‘land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction in, on or under land of substances, preparations, organisms or micro organisms’.

**Human health**

14. Any damage is significant if it has a proven effect on human health.
What activities are covered

15. The Regulations apply to activities regulated under the EU legislation listed in Annex III of the ELD that cause damage to European habitats and species, water and land, irrespective of whether the operator intended to cause damage or was negligent, or by any other activity that causes damage to European habitats and species but only where the operator intended to cause the damage or was negligent.

16. ‘Activity’ should be interpreted as ‘any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character’. This could include eg private enterprises, public sector enterprises - schools, hospitals or government departments or agencies; and voluntary or privately organised activities.

17. Someone who undertakes an activity in a purely personal or domestic context for example would not be considered to be an operator. Liability of operators cannot revert to authorities in any circumstances although authorities may take action as a last resort.

Exclusions

18. The ELD regime acknowledges existing regimes and circumstances. So the following circumstances, among others, are excluded completely from the operation of the regulations.

- Events or incidents that took place before the date on which these Regulations came into force
- Damage arising from activities that ceased before that date
- Armed conflict, civil war, insurrection or hostilities
- Natural disasters of exceptional, inevitable and irresistible character
- Pollution of a diffuse character where it is not possible to establish a casual link between the damage and the activities of individual operators
- National defence and international security activities
- Where there is already liability under:
  - the Civil Liability Convention for Oil Pollution Damage 1992
  - the International Oil Pollution Compensation Fund Convention 1992
  - the Civil Liability for Bunker Oil Pollution Damage Convention 2001
  - radioactivity from an activity covered by the Treaty on the European Atomic Energy Community
  - radioactivity due to an incident or activity where liability or compensation falls within the scope of the Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960 and the Brussels Supplementary Convention 1963
Roles and responsibilities

General

19. The key roles will be those of the operator and the competent authority. The civil law approach imposes obligations to prevent damage or to make good damage actually caused. The authority’s role is initially to be informed and, where necessary, to agree or direct the actions proposed by an operator.

20. Ongoing disputes may be taken to the Sheriff.

Duty to take preventive measures

21. Where there is, or a reasonable suspicion of, an imminent threat of environmental damage as defined in Regulation 4, operators must take steps to prevent damage occurring. This may involve simply the operator’s normal risk management or, in particular circumstances, may need additional work to secure the activity under threat. There is no leeway here and no defences: the operator must act. However, this is also the key to the whole Regulations. There is still time to act to prevent damage occurring and so avoid extra work and costs. What information to give and to whom are detailed in the technical guidance.

22. Authorities may become aware of possible imminent threats of ‘environmental damage’ other than by being notified by responsible operators, for example, as a result of a request for action by an interested party. Where this is the case the operator may need to provide relevant information to the authority, depending on the circumstances.

Duty to take immediate action

23. Where prevention work has been overcome or otherwise there are reasonable grounds to believe that ‘environmental damage’ is occurring, operators must

- immediately take steps to control, contain and prevent further damage; and
- as soon as possible thereafter, notify the authority of all relevant details.

24. Failure to comply with the Regulations and take the appropriate action is an offence.

Duty to assess damage

25. In co-operation with the authority as required, operators must assess the facts and nature of damage or imminent threat and carry out any assessments directed by the authority. The operator knows his operation best and is expected to give full and frank information about events.

26. There may be some level of uncertainty as to whether ‘environmental damage’ exists or whether these Regulations apply to the operator. Operators may not immediately have sufficient information to make a definitive judgement. Action is
required where there are reasonable grounds to believe that an activity has caused damage, taking account of the uncertainty. Where operators are in doubt they are advised to take a precautionary approach and take immediate action.

**Duty to identify remedial measures**

27. Where there is damage operators must identify the necessary remedial measures and submit them without delay to the authority for approval unless the authority has taken the appropriate action itself.

**Duty to undertake remedial action**

28. In the event that environmental damage has occurred the operator must immediately notify the appropriate authority and take the necessary measures to control, contain or remove if possible the damage. The operator must carry out remedial measures in accordance with the Regulations.

29. Failure to comply with the Regulations and take the appropriate action is an offence.

**Duties of authorities**

**Duty to investigate**

30. When the authority has been notified of an imminent threat or of actual damage, the authority must carry out investigations

- to establish the responsible activity and operator
- to assess the damage or imminent threat.

31. Authorities shall recover costs incurred in enforcing action for cases that prove to be imminent threats or ‘environmental damage’. Where the authority takes preventive or remedial action itself, it shall recover its costs from the responsible operator where known, except where it is satisfied an exception from the liability to costs applies under the Regulations.

**Powers of authorities**

**Power to take steps to prevent, contain or remedy ‘environmental damage’**

32. As a means of last resort the authority may itself take action where the responsible operator:

- cannot be found;
- has failed to comply with a duty under these Regulations;
- has proved to the satisfaction of the authority it is not responsible under the Regulations to pay the cost.

33. However, the primary responsibility rests with the operator. Intervention by an
authority is more likely to be to prevent or control damage than to assume the role of longer-term remediation.

**Powers of entry**

34. Authorities are given appropriate powers of entry to undertake their roles under these Regulations.

**Who is the authority?**

35. To make policing the Regulations simply there are three designated competent authorities which may require other public bodies to provide them with any support they feel necessary.

- European species or natural habitats other than in the marine environment, Scottish Natural Heritage (SNH),
- water (up to 3 nautical miles offshore) and land affected by Schedule 1 activities, Scottish Environment Protection Agency (SEPA)
- European species or natural habitats in the marine environment, Marine Scotland (MS)

**Identifying remedial measures**

36. The operator has a duty to put right what has gone wrong or, if that is not possible, provide some equivalent benefit. During the period until damage is repaired in full, some interim effort may be required as well. A judgement needs to be made about the remediation appropriate to certain damage. That can be a financial equivalent or an equivalent in resource or service replaced, a process familiar to economists or accountants. The resource equivalency model tends to be more appropriate for repair of environmental resources damaged, although a financial value may be suitable where the resource is difficult to quantify.

**Implementation of remedial measures**

37. An operator who causes environmental damage must without delay inform the appropriate competent authority giving details of the circumstances which caused the damage. The operator must then take all practical action to contain and prevent any further damage to the environment. The operator must also submit details of the action he intends to take to remediate the damage to the competent authority for approval.

**Disputes**

38. An operator may make representations to the Sheriff against some requirements imposed by the authority. The operator must lodge an appeal to the Sheriff within 28 days or the period specified by the authority on receipt of the decision relating to that requirement. The determination of the Sheriff on an appeal will be final.
Cost recovery

39. Subject to any relevant exceptions, the authority shall recover the costs it has incurred from the operator responsible for the damage or the imminent threat of damage. They include costs incurred in relation to preventive or remedial measures, including costs incurred by a public body acting at the competent authority’s request, and costs arising from co-operation with other Member States and parts of the United Kingdom.

In certain circumstances, there may be a reasonable exception in accordance with the Regulations, such as:

- Compliance with an instruction from a public authority, e.g. emergency measures.
- In certain instances when operating fully to the terms of a permit or licence.
- In certain instances when operating to the limits of the state of scientific or technical knowledge.
- Where the operator demonstrated that the damage was the result of an act of a third party and occurred despite the fact that he (the operator) had taken all appropriate safety measures.

Offences and penalties

40. If an offence under the Regulations is committed by a corporate body or by certain representatives of that corporate body the representative as well as the corporate body will be liable for prosecution. Similarly if a partner of a Scottish partnership commits an offence under the Regulations then the partner along with the partnership is liable:

41. In the case of a limited liability partnership any member of that partnership or any person acting on behalf of the partnership shall be liable for prosecution.

Requests for action

42. Any person who is affected or likely to be affected by ‘environmental damage’; or who otherwise has a sufficient interest may notify the appropriate authority of any ‘environmental damage’ which is being, or has been caused or of which there is an imminent threat of damage occurring. Those with sufficient interest include non-governmental organisations promoting environmental protection.

43. The authority will not need to take any further action if in its opinion the information does not disclose any genuine imminent threat or ‘environmental damage’. Therefore sufficient information should be provided to show that there is plausibly an imminent threat or ‘environmental damage’.

44. The authority may ask for further information about the imminent threat of damage, or of the possible ‘environmental damage’.

Before taking any decision, the authority must, if practicable:
i) notify the responsible operator concerned of the notification and the accompanying information; and
ii) request the operator to submit his comments on the information

**Interface with other regimes**

45. Some principles can be established for when other legislation may apply:

- When damage or imminent threats fall within the scope of the Regulations, the Regulations must be applied (because they place direct duties on operators to prevent and remedy damage).
- Other environmental legislation remains in place.