

EXPLANATORY MEMORANDUM TO
THE ENVIRONMENTAL LIABILITY (PREVENTION AND
REMEDICATION) REGULATIONS (NORTHERN IRELAND) 2009

[SR. 2009 No. 252]

1. Introduction

- 1.1. This Explanatory Memorandum has been prepared by the Department of the Environment to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.
- 1.2. The Statutory Rule is made under Section 2(2) of the European Communities Act 1972 and is subject to the negative resolution procedure.

2. Purpose

- 2.1. The Statutory Rule will transpose the provisions of the EC Environmental Liability Directive (2004/35/EC) with regard to the prevention and remedying of environmental damage. The Regulations impose obligations on operators of economic activities to prevent, limit or remediate environmental damage. The Regulations apply only to the more serious cases of environmental damage and are in addition to existing environmental legislation.

3. Background

- 3.1. Directive 2004/35/EC has the objective of making operators of activities which cause environmental damage financially liable for that damage (the 'polluter pays' principle). The Regulations apply to serious environmental damage to land, water and to species and habitats. They cover not only species and habitats protected by the Birds and Habitats Directives but also any other species and habitats protected in Areas of Special Scientific Interest (ASSIs). They impose duties on operators of economic activities to take immediate steps to prevent damage if there is an imminent threat, and to control damage which is occurring so as to limit its effects. Operators of activities listed in Schedule 2 of the Regulations will be liable for damage caused by them whether or not they are at fault, whereas operators of any other activities can also be liable for damage to species and habitats, but only if they are at fault or were negligent.
- 3.2. Once environmental damage has occurred, the Regulations introduce procedures for the establishment of appropriate remedial measures. Operators will be expected to propose remedial measures themselves, and there will then be consultation with interested parties before a remediation notice is served. In the case of damage to water or species and habitats, these measures will include not only 'primary' remediation (for example, cleaning up the contaminated site), but also complementary remediation (cleaning up an alternative site if the damaged site cannot be fully restored), and compensatory remediation (carrying out other measures to provide alternative natural resources to compensate for the time during which the damaged site remains in its damaged state). The whole package of measures (primary, complementary or compensatory) will be carried out

by the operator responsible for the damage. Detailed criteria for deciding the overall remedial package are set out in Schedule 4 of the Regulations. In cases where the operator cannot be identified or is otherwise unable to perform the required duties, the enforcing authority may carry out any necessary work and claim the costs back from the operator.

- 3.3. The Regulations contain certain defences. For example, an operator may not be liable for damage caused if it can be shown that the operation was within the conditions of a permit listed in Schedule 3, or if the damage was the result of an act of a third party which occurred despite appropriate safety precautions.
- 3.4. The Regulations apply to damage caused after they come into operation. In addition, certain incidents or activities will be exempt from the Regulations. For example, oil pollution damage is covered by international conventions and is therefore outside the scope of these regulations, as is damage caused by radioactivity.
- 3.5. Responsibility for enforcing the Regulations will lie with the Department of the Environment. In practice, this means that enforcement will be carried out by the Northern Ireland Environment Agency (NIEA).
- 3.6. Across Northern Ireland, there are in the region of 300 cases of damage to the environment every year that result in enforcement actions and the Regulations are expected to cover less than 1% of these. Where the Regulations apply they are likely to require higher standards of remediation than under existing legislation. Estimated costs per case could range from an average of £22,000 for damage to ASSIs to an average of £105,000 for water damage. Costs for very serious cases could be far in excess of this.
- 3.7. Directive 2004/35/EC took longer to be concluded than is usual. During the course of its negotiation it gave rise to a great deal of interest and discussion, partly as a result of the fact that it covers some of the same ground as the controversial 'superfund' legislation in the USA. Following the agreement of the Directive in 2004 there continued to be high level of public interest in the implementation. The Department has involved stakeholders throughout the implementation process and listened carefully to their views. Two public consultations have been held (see paragraph 4.1 below).
- 3.8. Legislation to penalise and require remediation for damage to the environment does already exist in Northern Ireland. This legislation includes the Water (Northern Ireland) Order 1999, the Wildlife (Northern Ireland) Order, the Environment (Northern Ireland) Order 2002 and the Pollution Prevention and Control Regulations (Northern Ireland) 2003. In some respects, this legislation already fulfilled the policy requirements of the Directive. For example, operators who cause damage can be required to take steps to remediate that damage. Having carefully considered the options, the Department decided to make separate Regulations which will supplement existing legislation. It was considered inappropriate to 'gold plate' the Directive by extending all its requirements (for example complementary and compensatory remediation) to all damage covered by

existing legislation, some of which is well below the thresholds in the Directive. On the other hand, the Department was also reluctant to lose the considerable bulk of protection afforded by existing legislation which is not provided by the Directive, again because of the damage thresholds. A consolidation of the various regimes was therefore considered inappropriate. Implementation by way of amendment to existing legislation would have been cumbersome and difficult to understand, and would in any event not have been capable of fully transposing the Directive without freestanding Regulations as well. Implementation through non-legislative means was not considered appropriate in this case.

4. Consultation

- 4.1. A first consultation on the main policy approaches to implementing the Directive was carried out between November 2006 and February 2007. A second consultation was carried out between March and May 2009. In addition, the Department has consulted interested stakeholders from time to time throughout the course of the work. The Enforcing Authority has also been extensively involved. Responses to the first consultation were divided: business was generally supportive of the Department's approach and NGOs were critical. The second consultation invited comments on more detailed points of implementation in the light of the draft Regulations, and the majority of comments were in support of the Department's approach. A number of helpful comments were made on the draft Regulations.

5. Equality Impact

- 5.1. The policy was screened to determine if it was necessary to carry out an Equality Impact Assessment before the first public consultation in 2006. This screening exercise indicated that there was no reason to believe that any of the Section 75 groups would be more likely to be affected by the transposition of the Directive than any other group.

6. Regulatory Impact

- 6.1. The Regulatory Impact Assessment estimates that the Regulations will increase costs to business by around £723,800 per annum, (including an administrative burden of £25,900 per annum). The main sectors facing costs will be agriculture (58% of total costs), waste (12%), water (9%) and manufacturing (8%).
- 6.2. The enforcing authority will also face increased costs of about £231,000 per annum.
- 6.3. The legislation applies to small business. The Department is unable to minimise the effects of an incident on small businesses because of the requirements to comply fully with European Law. However, every effort has been, and will be made to communicate to small businesses the nature of their obligations under the regulations. Because of the nature of the damage thresholds, it is anticipated that the number of incidents will be very few each year. Of these a number may affect small businesses, in particular farmers. It is therefore important for small businesses to understand the main provisions of the regulations. Once they have done

so, the regulations will not impose any significant day to day regulatory burdens.

7. Financial Implications

- 7.1. Costs and benefits are outlined in the attached Regulatory Impact Assessment but it is estimated that the net impact of transposition of the Directive will not be significant - in the region of £241,000.

8. Section 24 of the Northern Ireland Act 1998

- 8.1. The Department considers that the Statutory Rule will be compliant with the European Convention on Human Rights.

9. EU Implications

- 9.1. The Regulations implement Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. A transposition note is at Annex 2. The Regulations are essentially a minimum transposition of the Directive with one exception - after careful consideration of consultation responses the Department has decided to exercise its discretion to extend the same level of protection to nationally protected species and habitats in Areas of Special Scientific Interest (ASSIs) declared under Article 28(1) of the Environment (Northern Ireland) Order 2002.

10. Parity or Replicatory Measure

- 10.1. These Regulations essentially replicate the Environmental Damage (Prevention and Remediation) Regulations 2009 in England and are similar to the equivalent legislation in Scotland and Wales. The Scottish Regulations differ in that they do not allow the "permit" or "state of knowledge" defences where damage has been caused by GMO activities nor do they extend to cover sites of special scientific interest (SSSIs), reflecting different existing legislation and the weight of consultation responses. The Welsh regulations take a similar approach in respect of GMOs but, like England and Northern Ireland, their Regulations extend to SSSIs. The Northern Ireland Regulations reflect existing Departmental policy on GMOs.

11. Additional Information

- 11.1. Dr Jennifer Stewart at the Department of the Environment Tel: 028 9025 4744 or email: jennifer.stewart@doeni.gov.uk can answer any queries regarding the Regulations.

ENVIRONMENTAL LIABILITY DIRECTIVE – NI TRANSPOSITION NOTE

Article	Objective	Implementation	Responsibility
2.1	Definition of environmental damage	Regulation 3	
2.2	Definition of 'damage'	Regulation 2	
2.3	Definition of protected species and natural habitats	Regulation 2	
2.4	Definition of conservation status	Schedule 1 paragraphs 2 and 3	
2.5	Definition of waters	Not defined in isolation but included in definition of "environmental damage" in Regulation 3.	
2.6	Definition of operator	Regulation 2	
2.7	Definition of activity	Regulation 2	
2.8	Definition of emission	Not necessary	
2.9	Definition of imminent threat	Regulation 2	
2.10	Definition of preventive measures	Not necessary	
2.11	Definition of remedial measures	Not necessary	
2.12	Definition of natural resource	Regulation 2	

Article	Objective	Implementation	Responsibility
2.13	Definition of services	Regulation 2	
2.14	Definition of 'baseline condition'	This term is not used explicitly but see Schedules 1 and 4	
2.15	Definition of recovery	Not necessary	
2.16	Definition of 'costs'	Regulations 12 and 21	
3	Imposes strict liability on annex III activities and fault based liability on other activities causing biodiversity damage	Regulation 3 and Schedule 2.	
4	Situations in which Directive does not apply (exceptions)	Regulations 4 and 5	
5.1	Duty on operator to take preventive action	Regulation 9	Operator
5.2	Duty to notify in cases of imminent threat	Regulation 9	Operator
5.3	Enforcing authority can require information	Regulation 27	Enforcing authority
5.3 (b)	Enforcing authority power to require action to deal with imminent threat	Regulation 9	Enforcing authority
5.3 (c)	Enforcing authority power to give instructions	Regulation 9	Enforcing authority

Article	Objective	Implementation	Responsibility
5.3 (d) and 6.2 (b) and (e)	Enforcing authority power to take necessary measures	Regulation 11	Enforcing authority
6.1(a)	Operator duty to inform enforcing authority and take steps to control environmental damage	Regulation 10	Operator
6.1(b)	Duty to take remedial measures	Regulation 17	Operator
6.2 (a)	Enforcing authority may require additional information	Regulation 10(2)(b) and 27	Enforcing authority
6.2 (c) and (d)	Enforcing authority may require operator to take measures	Regulation 10	Enforcing authority
6.3	Power for enforcing authority to take necessary measures	Regulation 11	Enforcing authority
7.1	Operator to submit remedial measures	Regulation 15	Operator
7.2	Enforcing authority to decide on appropriate remedial measures	Regulation 17(2)	Enforcing authority
7.3	Enforcing authority may decide which instance of damage should be remediated first	Regulation 17(2)	Enforcing authority

Article	Objective	Implementation	Responsibility
7.4	Enforcing authority must consult on remedial package	Regulation 17(1)	Enforcing authority
8.1	Operator to bear the costs of preventive and remedial measures	Duties in regulations 9,10 and 17 coupled with provisions in regulations 12 and 21	Operator
8.2	Recovery of costs	Regulations 21 and 28	Enforcing authority
8.3 (a)	Damage caused by third parties	Regulation 16(2)(f)	
8.3(b)	Compliance with an instruction from a public authority	Regulations 13 and 16(2)(c)	
8.4 (a)	Permit defence	Regulation 16(2)(d) and Schedule 3	
8.4 (b)	State of knowledge defence	Regulation 16(2)(e)	
9	Cost allocation in cases of multi-party causation	Regulation 15 and 24.	
10	Limitation period for recovery of costs	Regulation 23	
11.1	Enforcing authority	Regulation 8	
11.2	Enforcing authority duty to identify operator and assess damage	Regulations 14, 15 and 17	Enforcing authority

Article	Objective	Implementation	Responsibility
11.2	Operator duty to supply information to allow enforcing authority to assess damage and determine remedial measures	Regulation 27	Operator
11.3	Enforcing authority can arrange for others to take remedial measures	Remediation can be carried out by contractors, no provision in the regulations required.	
11.4	Notices to contain grounds on which they are based	Regulations 15 and 17 and non-statutory Guidance	
12	Interested party requests for action	Regulation 22	
13	Review procedures	No specific provision necessary. Judicial Review will be available.	
14	Financial security	No provision in the regulations	
15	Cooperation with other member states	No provision in the regulations	
17	Temporal application	Regulation 6	
Annex I	Criteria for assessing significance of damage	Schedule 1	

Article	Objective	Implementation	Responsibility
Annex II	Guidance for choosing remedial measures	Schedule 4	
Para 1	Definitions of primary, compensatory and complementary remediation and of interim losses	Schedule 4	
Annex III	Activities for which strict liability applies.	Schedule 2	