

Draft Regulations laid before the Scottish Parliament under section 36(6) of the Water Environment and Water Services (Scotland) Act 2003, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2005 No.

ENVIRONMENTAL PROTECTION

The Contaminated Land (Scotland) Regulations 2005

Made - - - - *2005*

Coming into force in accordance with regulation 1(2) and (3)

The Scottish Ministers, in exercise of the powers conferred on them by section 20 of, and schedule 2 to, the Water Environment and Water Services (Scotland) Act 2003^(a) and of all other powers enabling them in that behalf, and after consulting the persons specified in section 21(1) of that Act, hereby make the following Regulations, a draft of which has, in accordance with section 36(6) of that Act, been laid before and approved by resolution of the Scottish Parliament:

Citation, commencement and extent

- 1.—(1) These Regulations may be cited as the Contaminated Land (Scotland) Regulations 2005.
- (2) Regulation 2(3)(d) and (e) shall come into force on the day after the day on which these Regulations are made.
- (3) Except as specified in paragraph (2), these Regulations shall come into force on 1st April 2006.
- (4) These Regulations extend to Scotland only.

Amendment of the Environmental Protection Act 1990

- 2.—(1) The Environmental Protection Act 1990^(b) is amended as follows.
- (2) In each of the following provisions, for “controlled waters” wherever the expression occurs substitute “the water environment”—
 - section 78A(7)(b)(i),
 - section 78C(10)(b),
 - section 78E(4)(b),
 - section 78G(4),
 - section 78H(4),
 - section 78J(2),
 - section 78J(3) (where the expression appears for the second time),
 - section 78N(3)(a),

^(a) 2003 asp 3, as amended by section 66 of, and paragraph 6 of Schedule 2 to, the Anti-Social Behaviour etc. (Scotland) Act 2004 (asp 8) and S.S.I. 2005/348 (regulation 3).
^(b) 1990 c.43. Part IIA was inserted by section 57 of the Environment Act 1995 (c.25).

section 78YB(2A)(a),
section 78YB(2B)(a),
section 78YC.

(3) In section 78A (Preliminary)–

- (a) in subsection (2), in the definition of “contaminated land”, for paragraph (b) substitute–
 - “(b) significant pollution of the water environment is being caused or there is a significant possibility of such pollution being caused.”.
- (b) in subsection (4), for “Harm”, substitute–
 - “Subject to sub-section (4A), “harm””;
- (c) after subsection (4) insert–
 - “(4A) “Harm”, in relation to the water environment has the same meaning as in section 20(6) of the Water Environment and Water Services (Scotland) Act 2003.”;
- (d) in sub-section (5),
 - (i) in paragraph (a), after “harm” insert “or pollution of the water environment”;
 - (ii) in paragraph (b), after “harm” insert “or of significant pollution of the water environment”; and
 - (iii) delete paragraph (c);
- (e) in sub-section (6),
 - (i) in paragraph (a), after “systems” insert “or substances which may give rise to pollution;”;
 - (ii) in paragraph (b), after “places” insert “or of the water environment, or different degrees of pollution”; and
 - (iii) after “significant harm” insert “or of significant pollution”;
- (f) in subsection (7)(a)(ii), for “any controlled waters”, substitute “the water environment”;
- (g) in subsection (7)(b), for “waters”, where it first appears, substitute “the water environment”;
- (h) in subsection (7)(b)(i), before “pollution” insert “significant”;
- (i) in subsection (7)(b)(ii), for “waters to their” substitute “water environment to its”;
- (j) in subsection (7)(c), for “waters” substitute “the water environment”;
- (k) in subsection (8)–
 - (i) for “Controlled waters are” substitute “The water environment is”; and
 - (ii) delete from “pollution” to the end, and substitute “significant pollution of the water environment is being caused or there is a significant possibility of such pollution being caused”.
- (l) in subsection (9)–
 - (i) delete the definitions of–
 - (aa) “controlled waters”; and
 - (bb) “pollution of controlled waters”; and
 - (ii) insert in the appropriate places–
 - ““pollution”, in relation to the water environment, means the direct or indirect introduction, as a result of human activity, of substances into the water environment, or any part of it, which may give rise to any harm”; and
 - ““the water environment” has the same meaning as in section 3 of the Water Environment and Water Services (Scotland) Act 2003”;

- (4) In section 78C (Identification and designation of special sites)–
- (a) for subsection (10)(a)(ii) substitute–
 - “(ii) serious pollution of the water environment would or might be caused;”; and
 - (b) in subsection (10)(b), before “pollution” insert “significant”.
- (5) In section 78E (Duty of enforcing authority to require remediation of contaminated land etc.)–
- (a) in subsection (2), for “waters” substitute “the water environment”;
 - (b) in subsection (4)(b), after “or” insert “of the”; and
 - (c) in subsection (5)(b), for “is, or waters are ” substitute “, or the water environment is”.
- (6) In section 78G (Grant of, and compensation for, rights of entry etc.)–
- (a) in subsection (2), for “waters” substitute “water environment”;
 - (b) in subsection (3)(a), for “waters” substitute “water environment”; and
 - (c) for subsection (7), substitute–
 - “(7) In this section, “relevant land or water environment” means–
 - (a) the contaminated land in question;
 - (b) the water environment affected by that land; or
 - (c) any land adjoining or adjacent to that land or water environment.”.
- (7) In section 78J (Restrictions on liability relating to the pollution of the water environment)–
- (a) in subsection (2), for “any waters” substitute “the water environment”;
 - (b) in subsection (3)(a), for “any controlled waters” substitute “the water environment”;
 - (c) in subsection (3)(b), for “such waters” substitute “the water environment”; and
 - (d) in subsection (3), for “or waters” substitute “or the water environment”.
- (8) In section 78K (Liability in respect of contaminating substances which escape to other land)–
- (a) in subsection (3)–
 - (i) for “or waters” in both places it occurs, substitute “or the water environment”;
 - (ii) for “is being caused” to “likely to be caused” substitute “, or significant pollution of the water environment, is being caused, or there is a significant possibility of such harm or pollution being caused”; and
 - (b) in subsection (4), for “is being caused” to “likely to be caused” substitute “, or significant pollution of the water environment, is being caused, or there is a significant possibility of such harm or pollution being caused”.
- (9) In section 78N (Powers of the enforcing authority to carry out remediation)–
- (a) in subsection (1), for “waters” substitute “the water environment”; and
 - (b) for subsection (5) substitute–
 - “(5) In this section “relevant land or water environment” means–
 - (a) the contaminated land in question;
 - (b) the water environment affected by that land; or
 - (c) any land adjoining or adjacent to that land or that water environment.”.
- (10) In section 78X (Supplementary provisions)–
- (a) in subsection (1)–
 - (i) for paragraph (b), substitute “(b) significant pollution of the water environment, is being caused, or there is a significant possibility of such pollution being caused;”; and

- (ii) for “is being caused ” to “likely to be caused”, substitute “, or significant pollution of the water environment, is being caused, or there is a significant possibility of such harm or pollution being caused”; and
 - (b) in subsection (2), for “is being caused” to “likely to be, caused” substitute “, or significant pollution of the water environment, is being caused, or there is a significant possibility of such harm or pollution being caused”.
- (11) In section 78YB (Interaction of this Part with other enactments)–
- (a) in subsection (1)(b), for “pollution of controlled waters” substitute “significant pollution of the water environment”;
 - (b) after subsection (1), insert–
 - “(1A) A remediation notice shall not be served if and to the extent that it appears to the enforcing authority that–
 - (a) the significant harm (if any); and
 - (b) the significant pollution of the water environment (if any),
 by reason of which the contaminated land in question is such land, is as a result of an activity to which–
 - (a) the Water Environment (Controlled Activities) (Scotland) Regulations 2005 apply; and
 - (b) enforcement action may be taken in relation to that activity.”; and
 - (c) in subsection (2), for “pollution of controlled waters” substitute “significant pollution of the water environment”.
- (12) For section 79(1B) (statutory nuisances)(a), substitute–
- “(1B) Land is in a “contaminated state” for the purposes of sub-section (1A) above if, and only if, it is in such a condition, by reason of substances in, on or under the land, that–
- (a) significant harm is being caused or there is a significant possibility of such harm being caused; or
 - (b) significant pollution of the water environment is being caused or there is a significant possibility of such pollution being caused;
- and in this subsection “harm”, “pollution” in relation to the water environment, “substance” and “the water environment” have the same meanings as in Part IIA of this Act.”.

Amendment of the Contaminated Land (Scotland) Regulations 2000

3.—(1) The Contaminated Land (Scotland) Regulations 2000(b) are amended as follows.

(2) For regulation 3 (Pollution of controlled waters), substitute–

“**3.** For the purposes of regulation 2(1)(a), this regulation applies to land where–

- (a) the water environment which is, or is intended to be, used for the supply of drinking water for human consumption is being affected by the land and, as a result, requires a treatment process or a change in such a process to be applied to it before use, so as to be regarded as wholesome within the meaning of Part VIA of the Water (Scotland) Act 1980;
- (b) waters are being affected by the land and, as a result, those waters do not meet or are not likely to meet the criterion for classification applying to the relevant description of waters specified in regulations made under section 30B of the Control of Pollution Act 1974; or

(a) Section 79(1B) was inserted by the Environment Act 1995 (c.25), Schedule 22, paragraph 89(3).
 (b) S.S.I. 2000/178, as amended by S.S.I. 2000/323.

- (c) the water environment is being affected by the land and–
 - (i) any of the substances by reason of which the pollution of the water environment is being or is likely to be caused falls within any of the families or groups of substances listed in Schedule 1 to these Regulations; and
 - (ii) the water environment, or any part of the water environment, is contained within underground strata which comprise wholly or partly Devonian Sandstones or Permo-Triassic Sandstones.”.

(3) In each of the following provisions, for “controlled waters” wherever the expression occurs, substitute “the water environment”–

regulation 5(2),

regulation 7(1)(h) and (j), and

in Schedule 2 (Remediation Notice), in the form of remediation notice.

(4) In Schedule 4 (registers)–

(a) for paragraph 2(c) substitute–

“(c) the significant harm or significant pollution of the water environment by reason of which the contaminated land in question is contaminated land;” and

(b) for paragraph 13(c) substitute–

“(c) any steps of which the authority has knowledge, carried out under section 27, or by means of enforcement action (within the meaning of section 78YB(2C)) towards remedying any significant harm or significant pollution of the water environment by reason of which the land in question is contaminated land.”.

Authorised to sign by the Scottish Ministers

St Andrew’s House,
Edinburgh

2005

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, which extend to Scotland only, amend Part IIA of the Environmental Protection Act 1990 (c.43) (“the 1990 Act”) and the Contaminated Land (Scotland) Regulations 2000 (S.S.I. 2000/178) (“the 2000 Regulations”) in light of the Water Environment and Water Services (Scotland) Act 2003 (asp 3) (“the 2003 Act”).

Part IIA of the 1990 Act establishes a regime for contaminated land in Scotland, and requires local authorities to identify and secure the remediation of contaminated land in their area.

The 2000 Regulations provide for the circumstances in which contaminated land requires to be designated as a special site, and provides for a remediation regime in that regard.

The 2003 Act gave effect to Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy (O.J. No. L 327, 22.12.2000, p.1). Section 20 of the 2003 Act enables the Scottish Ministers to make regulations for or in connection with regulating any activity for the purposes of protection of “the water environment”.

Both Part IIA to the 1990 Act, and the 2000 Regulations, make provision in relation to the pollution of “controlled waters”. In so far as contaminated land is a source of pollution of controlled waters, it is necessary to amend the relevant provisions of Part IIA of the 1990 Act and the 2000 Regulations to align the contaminated land regime provided for thereunder with the requirements of the 2003 Act. The amendments accommodate a change in terminology from “controlled waters” to “the water environment” to ensure consistency of approach in the operation of the pollution control regime as provided for under the 2003 Act, with the provisions of Part IIA of the 1990 Act which concern contaminated land as a source of pollution of the water environment. Similar amendments are made to the 2000 Regulations to ensure consistency of approach in the designation of special sites under those Regulations with the pollution control regime provided for under the 2003 Act.

Regulation 1(2) makes provision to commence regulation 2(3)(d) and (e) to enable amended Guidance to be laid and considered by the Parliament, and subject to that consideration, the remaining amendments shall come into force on 1st April 2006.

Regulation 2(3)(a) amends the definition of contaminated land (section 78A(2) of the 1990 Act) by introducing a requirement that pollution be “significant” or likely to be “significant” in relation to the water environment. Consequential amendments are made to Part IIA of the 1990 Act, for example, to section 78A(5)(b) and (6) (regulation 2(3)(d)(ii) and 2(3)(e)(iii)).

Regulation 2(3)(c) inserts a definition of “harm” in relation to the water environment with reference to the definition in section 20(6) of the 2003 Act.

Regulation 2(11)(b) inserts a new subsection (1A) into section 78YB of the 1990 Act, such that a remediation notice shall not be served where land would otherwise be remediated by virtue of enforcement action under the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (S.S.I. 2005/348).

Part III of the 1990 Act makes provision in relation to statutory nuisances, and section 79(1) makes provision in relation to the matters that constitute “statutory nuisances”. Section 79(1A) provides that land in a contaminated state, and which therefore falls to be regulated under Part IIA of the 1990 Act, does not comprise a statutory nuisance for the purposes of section 79(1).

Regulation 2(12) makes equivalent amendment of the provisions of section 79(1B) of the 1990 Act on the definition of “contaminated state” to those in Part IIA of the 1990 Act.

The Regulatory Impact Assessment in relation to these Regulations has been placed in the library of the Scottish Parliament and a copy can be obtained from the SEPA Sponsorship and

Waste Division, Scottish Executive Environment and Rural Affairs Department (SEERAD),
Victoria Quay, Leith, Edinburgh, EH6 6QQ.

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