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WELSH STATUTORY INSTRUMENTS

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**2009 No. 995**

**The Environmental Damage (Prevention  
and Remediation) (Wales) Regulations 2009**

**PART 1**

Introductory provisions

**Title, commencement and application**

1.—(1) The title of these Regulations is the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009. They come into force on 6 May 2009.

(2) These Regulations apply in relation to Wales and the areas specified in regulation 6.

**Interpretation**

2.—(1) In these Regulations—

“activity” (“*gweithgaredd*”) means any economic activity, whether public or private and whether or not carried out for profit;

“groundwater” (“*dŵ r daear*”) means all water that is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil;

“local authority” (“*awdurdod lleol*”) means a county council or a county borough council;

“natural habitat” (“*cynefin naturiol*”) means—

- (a) the habitats of species mentioned in Article 4(2) of, or Annex I to, Council Directive [79/409/EEC](#) on the conservation of wild birds<sup>(1)</sup> or listed in Annex II to Council Directive [92/43/EEC](#) on the conservation of natural habitats and of wild fauna and flora<sup>(2)</sup>;
- (b) the natural habitats listed in Annex I to Council Directive [92/43/EEC](#); and
- (c) the breeding sites or resting places of the species listed in Annex IV to Council Directive [92/43/EEC](#);

“natural resource” (“*adnoddyn naturiol*”) means—

- (a) protected species;
- (b) natural habitats;
- (c) species or habitats on a site of special scientific interest for which the site has been notified under section 28 of the Wildlife and Countryside Act 1981<sup>(3)</sup>;
- (d) water; and

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(1) OJ No L 103, 25.4.1979, p. 1 as last amended by Council Directive [2008/102/EC](#), OJ No L 323, 3.12.2008, p. 31).

(2) OJ No L 206, 22.7.1992, p. 7 as last amended by Council Directive [2006/105/EC](#) (OJ No L 363, 20.12.2006, p. 368).

(3) [1981 c. 69](#). Part II of the Act (which includes section 28) was inserted by Schedule 9 to the Countryside and Rights of Way Act [2000 \(c. 37\)](#) and subsequently amended by Schedule 11 to the Natural Environment and Rural Communities Act [2006 \(c. 16\)](#).

(e) land;

“operator” (“*gweithredwr*”) means a person who operates or controls an activity, the holder of a permit or authorisation relating to that activity or the person registering or notifying such an activity;

“protected species” (“*rhywogaethau a warchodir*”) means the species mentioned in Article 4(2) of Council Directive [79/409/EEC](#) or listed in Annex I to that Directive or Annexes II and IV to Council Directive [92/43/EEC](#);

“services” (“*gwasanaethau*”) means the functions performed by a natural resource for the benefit of another natural resource or the public;

“Wales” (“*Cymru*”) has the meaning given under section 158 of the Government of Wales Act 2006(4).

(2) Unless otherwise defined in these Regulations, expressions used in Directive [2004/35/EC](#) of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage(5) have the same meaning in these Regulations.

(3) In relation to the deliberate release and placing on the market of genetically modified organisms, “operator” (“*gweithredwr*”) and “responsible operator” (“*gweithredwr cyfrifol*”) includes—

- (a) the holder of a relevant consent issued under Directive [2001/18/EC](#) of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms(6);
- (b) the holder of a relevant consent for the deliberate release of genetically modified organisms granted by the Welsh Ministers under section 111(1) of the Environmental Protection Act 1990(7); or
- (c) the holder of a relevant authorisation issued under Regulation (EC) No [1829/2003](#) of the European Parliament and of the Council on genetically modified food and feed(8).

### References to Community instruments

3. Reference in these Regulations to Community instruments are references to those instruments as amended from time to time.

### Meaning of “environmental damage”

4.—(1) These Regulations apply in relation to the prevention and remediation of environmental damage; and “environmental damage” (“*difrod amgylcheddol*”) is damage to—

- (a) protected species or natural habitats, or a site of special scientific interest,
- (b) surface water or groundwater, or
- (c) land,

as specified in this regulation.

(2) Environmental damage to protected species or natural habitats or a site of special scientific interest means damage of a kind specified in Schedule 1.

(4) [2006 c. 32](#).

(5) OJ No L 143, 30.4.2004, p. 56 as amended by Directive [2006/21/EC](#) (OJ No L 102, 11.4.2006, p. 15).

(6) OJ No L 106, 17.4.2001, p. 1 as last amended by Directive [2008/27/EC](#) of the European Parliament and of the Council (OJ No L 81, 20.3.2008, p. 45).

(7) [1990 c. 43](#).

(8) OJ No L 268, 18.10.2003, p. 1 as last amended by Regulation (EC) No [298/2008](#) of the European Parliament and of the Council (OJ No L 97, 9.4.2008, p. 64).

(3) Environmental damage to surface water means damage to a surface water body classified as such pursuant 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<sup>(9)</sup> such that—

- (a) a biological quality element listed in Annex V to that Directive,
- (b) the level of a chemical listed in the legislation in Annex IX or a chemical listed in Annex X to that Directive, or
- (c) a physicochemical quality element listed in Annex V to that Directive,

changes sufficiently to lower the status of the water body in accordance with Directive [2000/60/EC](#) of the European Parliament and of the Council (whether or not the water body is in fact reclassified as being of lower status).

(4) Environmental damage to groundwater means any damage to a body of groundwater such that its conductivity, level or concentration of pollutants changes sufficiently to lower its status pursuant to Directive [2000/60/EC](#) of the European Parliament and of the Council (and for pollutants Directive [2006/118/EC](#) of the European Parliament and of the Council on the protection of groundwater against pollution and deterioration<sup>(10)</sup>) (whether or not the body of groundwater is in fact reclassified as being of lower status).

(5) Environmental damage to land means contamination of land by substances, preparations, organisms or micro-organisms that results in a significant risk of adverse effects on human health.

### **Environmental damage to which these Regulations apply**

**5.—**(1) These Regulations apply in relation to environmental damage if it is caused by an activity in Schedule 2.

(2) In the case of environmental damage to protected species or natural habitats or a site of special scientific interest the Regulations also apply in relation to environmental damage caused by any other activity if the operator—

- (a) intended to cause environmental damage; or
- (b) was negligent as to whether environmental damage would be caused.

### **Areas of application**

**6.—**(1) The damage must be in an area specified in the following table—

Type of damage	Area in which these Regulations apply
Damage to water	Wales and all water up to one nautical mile seaward from the baseline in Wales
Damage in a site of special scientific interest	Wales
Damage to protected species or natural habitats	Wales
Damage to land	Wales

(2) In this regulation, “the baseline” means the baselines from which the breadth of the territorial sea is measured for the purposes of the Territorial Sea Act 1987<sup>(11)</sup>.

<sup>(9)</sup> OJ No L 327, 22.12.2000, p. 1 as last amended by Directive [2008/105/EC](#) of the European Parliament and of the Council (OJ No L 348, 24.12.2008, p. 84).

<sup>(10)</sup> OJ No L 372, 27.12.2006, p. 19.

<sup>(11)</sup> [1987 c. 49](#).

**Other legislation**

7.—(1) These Regulations are without prejudice to any other enactment concerning damage to the environment.

(2) They are without prejudice to the right of an operator to limit liability in accordance with the Convention on Limitation of Liability for Maritime Claims 1976<sup>(12)</sup>.

**Exemptions**

8.—(1) These Regulations do not apply in relation to—

- (a) damage that took place before the coming into force of these Regulations;
- (b) damage that takes place after that date, or is threatened after that date, but is caused by an incident, event or emission that took place before that date; or
- (c) damage caused by an incident, event or emission that takes place after that date if it derives from an activity that took place and finished before that date.

(2) They do not apply in relation to environmental damage caused by—

- (a) an act of terrorism;
- (b) an exceptional natural phenomenon, provided the operator of the activity concerned took all reasonable precautions to protect against damage being caused by such an event;
- (c) activities the sole purpose of which is to protect from natural disasters;
- (d) an incident in respect of which liability or compensation falls within the scope of—
  - (i) the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage;
  - (ii) the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage<sup>(13)</sup>; or
  - (iii) the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001<sup>(14)</sup>;
- (e) activities the main purpose of which is to serve national defence or international security;
- (f) radioactivity from an activity covered by the Treaty establishing the European Atomic Energy Community or caused by an incident or activity in respect of which liability or compensation falls within the scope of the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy and the Brussels Supplementary Convention of 31 January 1963; or
- (g) damage caused in the course of commercial sea fishing if all legislation relating to that fishing was complied with.

(3) They only apply to environmental damage caused by pollution of a diffuse character if it is possible to establish a causal link between the damage and specific activities.

**Exemption from damage to water**

9.—(1) Damage to water does not include—

- (a) damage caused by new modifications to the physical characteristics of a surface water body,

<sup>(12)</sup> The Convention is set out in Schedule 7 to the Merchant Shipping Act 1995 (c. 21).

<sup>(13)</sup> Both these conventions were implemented in the Merchant Shipping Act 1995 (c. 21).

<sup>(14)</sup> Implemented in the Merchant Shipping Act 1995 by amendments made to that Act by S.I.2006/1244.

- (b) an alteration to the level of a body of groundwater pursuant to Directive [2000/60/EC](#) of the European Parliament and of the Council, or
- (c) deterioration from high status to good status of a body of surface water resulting from new sustainable human development activities pursuant to that Directive,

if all the conditions in paragraph (2) are fulfilled.

(2) The conditions are—

- (a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;
- (b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 of Directive [2000/60/EC](#) of the European Parliament and of the Council and the objectives are reviewed every six years;
- (c) the reasons for those modifications or alterations are of overriding public interest, or the result of the damage is outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development; and
- (d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means.

#### **Enforcing authorities under the Environmental Permitting (England and Wales) Regulations 2007**

**10.**—(1) These Regulations are enforced in accordance with this regulation if the damage is caused by an installation, waste operation or mobile plant that requires a permit or registration under the Environmental Permitting (England and Wales) Regulations 2007(**15**).

(2) If the Environment Agency is responsible for granting the permit, they are enforced by the Environment Agency in all cases.

(3) If the local authority is responsible for granting the permit—

- (a) Part 2 is enforced by the local authority;
- (b) Part 3 is enforced by—
  - (i) the local authority if the damage is to land;
  - (ii) the Environment Agency if the damage is to water;
  - (iii) Countryside Council for Wales if the damage is to natural habitats or protected species or a site of special scientific interest.

#### **Enforcing authorities in other cases**

**11.**—(1) If the damage is caused by an activity that does not require a permit or registration under the Environmental Permitting (England and Wales) Regulations 2007 these Regulations are enforced in accordance with the following table.

<i>Type of environmental damage</i>	<i>Area of damage</i>	<i>Enforcing authority</i>
Damage to water—		Environment Agency

<i>Type of environmental damage</i>	<i>Area of damage</i>	<i>Enforcing authority</i>
Damage to protected species or natural habitats or a site of special scientific interest—	land	Countryside Council for Wales
	water but not in the sea <sup>(1)</sup>	Environment Agency
	the sea	— if the damage is due to an activity authorised by the Environment Agency, the Environment Agency; — otherwise the Welsh Ministers
Damage to land—		Local authority

(1) “Sea” includes—

- (a) any area submerged at mean high water spring tide; and
- (b) each of the following, so far as the tide flows at mean high water spring tide—
  - (i) every estuary or arm of the sea; and
  - (ii) the waters of any channel, creek, bay or river.

(2) The Welsh Ministers may give directions to an enforcing authority of a general or specific character with respect to the carrying out of its functions under these Regulations.

(3) An enforcing authority must comply with a direction given to it under these Regulations.

### **Enforcement**

**12.**—(1) If there is more than one type of damage, so that there is more than one enforcing authority, these Regulations are enforced by any or all of the specified enforcing authorities.

(2) An enforcing authority may enter into an arrangement with any other enforcing authority to act on its behalf.