Draft Regulations laid before the Scottish Parliament under paragraph 2(2) of Schedule 2 to the European Communities Act 1972, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2009 No.

ENVIRONMENTAL PROTECTION

The Environmental Liability (Scotland) Regulations 2009

Made - - - -	*2009*
Coming into force - -	*2009*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of, and paragraph 1A of Schedule 2 to, the European Communities Act 1972(**a**) and all other powers enabling them to do so.

These Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972 and it appears to the Scottish Ministers that it is expedient for the references to the Community instruments referred to in these Regulations to be construed as references to those instruments as amended from time to time.

In accordance with paragraph 2(2) of Schedule 2 to that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

Citation, commencement and extent

1. These Regulations–

(a) may be cited as the Environmental Liability (Scotland) Regulations 2009;

(b) come into force on the day after the day on which they are made; and

(c) extend to Scotland only.

Interpretation

2.—(1) In these Regulations, except where the context otherwise requires–

"activity" means 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;

"Directive 79/409/EEC" means Council Directive of 2nd April 1979 on the conservation of wild birds(**b**);

(**a**) 1972 (c.68). Section 2(2) was relevantly amended by paragraph 15(3) of Schedule 8 to the Scotland Act 1998 (c.46), ("the 1998 Act") and by section 27(1) and (2) of the Legislative and Regulatory Reform Act 2006 (c.51), ("the 2006 Act"). Paragraph 1A of Schedule 2 was inserted by section 28 of the 2006 Act. The functions conferred upon the Minister of the Crown under section 2(2) of the European Community Act 1972, insofar as exercisable within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act.

(**b**) O.J. No. L 103, 25.4.1979, p.1, as last amended by Council Directive 2008/102/EC (O.J. No. L 323, 3.12.2008, p.31).

"Directive 92/43/EEC" means Council Directive of 21st May 1992 on the conservation of natural habitats and of wild fauna and flora(**a**);

"Directive 2000/60/EC" means the Directive of the European Parliament and of the Council of 23rd October 2000 establishing a framework for Community action in the field of water policy(**b**);

"Directive 2001/18/EC" means the Directive of the European Parliament and of the Council of 12th March 2001 on the deliberate release into the environment of genetically modified organisms(**c**);

"enactment" has the meaning assigned to it in section 126(1) (interpretation) of the Scotland Act 1998(**d**);

"environmental damage" means damage falling within regulation 4;

"genetically modified organisms" has the meaning assigned to it by Directive 2001/18/EC;

"protected species and natural habitats" means–

(a) the species mentioned in Article 4(2) of Directive 79/409/EEC or listed in Annex I to that Directive or the species listed in Annexes II and IV to Directive 92/43/EEC; and

(b) the habitats of species mentioned in Article 4(2) of Directive 79/409/EEC or listed in Annex I to that Directive or the habitats of species listed in Annex II to Directive 92/43/EEC or the natural habitats listed in Annex I to Directive 92/43/EEC and the breeding sites or resting places of the species listed in Annex IV to Directive 92/43/EEC;

"waters" means all waters which comprise "the water environment" within the meaning of section 3(2) of the Water Environment and Water Services (Scotland) Act 2003(**e**).

(2) Unless otherwise defined in these Regulations, an expression used in Directive 2004/35/CE of the European Parliament and of the Council of 21st April 2004 on environmental liability with regard to the prevention and remedying of environmental damage(**f**) has the same meaning in these Regulations as it has in that Directive.

(3) A reference in these Regulations to anything done in writing or produced in written form includes a reference to an electronic communication (as defined in section 15 of the Electronic Communications Act 2000(**g**)) which has been recorded in written form and is capable of being reproduced in that form.

References to community legislation

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

Application

4.—(1) Subject to regulation 5, these Regulations apply in relation to–

(a) damage to protected species and natural habitats if–

(i) it has significant adverse effects on reaching or maintaining the favourable conservation status of the protected species or natural habitat; and

(ii) it is caused by an activity listed in Schedule 1 or by the fault or negligence of an operator whilst carrying on any other activity;

(**a**) O.J. No. L 206, 22.7.1992, p.7, as last amended by Council Directive 2006/105/EC (O.J. No. L 363, 20.12.2006, p.368).
(**b**) O.J. No. L 327, 22.12.2000, p.1, as last amended by Directive 2008/105/EC (O.J. No. L 348, 24.12.2008, p.84).
(**c**) O.J. No. L 106, 17.4.2001, p.1, as last amended by Directive 2008/27/EC (O.J. No. L 81, 20.3.2008, p.45).
(**d**) 1998 c.46.
(**e**) 2003 asp 3 ("the 2003 Act"). Section 3(2) of the 2003 Act defines "the water environment" as meaning "all surface water, ground water and wetlands". "Surface water", "ground water" and "wetland" are defined, respectively in section 3(3), (4) and (5) of the 2003 Act, and associated definitions are also defined in that section.
(**f**) O.J. No. L 143, 30.4.2004, p.56, as amended by Directive 2006/21/EC (O.J. No. L 102, 11.4.2006, p.15).
(**g**) 2000 c.7, section 15 was relevantly amended by paragraph 158 of Schedule 17 to the Communications Act 2003 (c.21).

(b) water damage, caused by an activity listed in Schedule 1, which is any damage that significantly adversely affects any or all of the–

(i) ecological status;

(ii) chemical status;

(iii) quantitative status;

(iv) ecological potential,

of the waters concerned with the exception of adverse effects where Article 4(7) of Directive 2000/60/EC applies;

(c) land damage, caused by an activity listed in Schedule 1, which is any 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.

(2) Paragraphs (3) to (5) apply in relation to assessing whether damage has significant adverse effects for the purposes of paragraph (1)(a)(i).

(3) The significance of any damage has to be assessed by reference to–

(a) the conservation status of the protected species or natural habitat at the time of the damage;

(b) the services provided by the amenities they produce; and

(c) their capacity for natural regeneration.

(4) Any damage is significant if it has a proven effect on human health.

(5) The significance of any effects has to be assessed with reference to the baseline condition with significant adverse changes thereto being determined by means of measurable data such as–

(a) the number of individuals, their density or the area covered;

(b) the role of the particular individuals or of the damaged area in relation to the species or to the habitat conservation and the rarity of the species or habitat (assessed at the relevant level whether local, regional or higher, including the European Community);

(c) the capacity of the species for propagation, its viability or the capacity of the habitat for natural regeneration;

(d) the capacity of the species or habitat to recover within a short time of the damage being caused to a condition which leads to its state at the time of the damage or better without any intervention other than increased protection measures.

Exemptions

5. These Regulations do not apply to–

(a) in relation to damage to protected species and natural habitats, previously identified adverse effects resulting from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC;

(b) environmental damage or an imminent threat of such damage caused by–

(i) an act of armed conflict, hostilities, civil war or insurrection;

(ii) a natural phenomenon of exceptional, inevitable and irresistible character; or

(iii) pollution of a diffuse character where it is not possible to establish a causal link between the damage and the activities of individual operators;

(c) environmental damage or an imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of–

(i) the International Convention of 27th November 1992 on Civil Liability for Oil Pollution Damage;

(ii) the International Convention of 27th November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage(**a**); or

(iii) the International Convention of 23rd March 2001 on Civil Liability for Bunker Oil Pollution Damage(**b**);

(d) radioactivity from an activity covered by the Treaty establishing the European Atomic Energy Community(**c**) or caused by an incident or activity in respect of which liability or compensation falls within the scope of the Paris Convention of 29th July 1960 on Third Party Liability in the Field of Nuclear Energy and the Brussels Supplementary Convention of 31st January 1963(**d**);

(e) activities–

(i) the main purpose of which is to serve national defence or international security; or

(ii) the sole purpose of which is to protect from natural disasters;

(f) damage caused by an emission, event or incident that took place before the coming into force of these Regulations;

(g) damage caused by an emission, event or incident that occurs after the coming into force of these Regulations which results from a specific activity that took place and finished before that date;

(h) damage resulting from the release of genetically modified organisms if more than 75 years have passed since the release; or

(i) damage not falling within paragraph (h) if more than 30 years have passed since the emission, event or incident occurred which resulted in the damage.

Other legislation

6. These Regulations are without prejudice to–

(a) the right of any responsible operator to limit liability in accordance with the Convention on Limitation of Liability for Maritime Claims 1976(**e**); and

(b) any other enactment concerning damage to the environment.

Competent authority

7.—(1) For the purposes of these Regulations, the competent authority in relation to instances of environmental damage or an imminent threat of such damage–

(a) to protected species or natural habitats in the territorial sea or coastal water (within the meaning of section 3(8) of the Water Environment and Water Services (Scotland) Act 2003), is the Scottish Ministers;

(b) to protected species or natural habitats in any other place, is Scottish Natural Heritage; and

(c) to waters or land, is the Scottish Environment Protection Agency.

(2) In relation to environmental damage of the type defined in regulation 4(1)(a), the competent authority shall decide whether or not the damage has occurred or will occur as a result of the fault or negligence of an operator.

(3) Where–

(a) more than one instance of environmental damage has occurred; and

(**a**) Both these conventions were implemented by Part VI, Chapters III and IV of the Merchant Shipping Act 1995 c.21.
(**b**) Implemented in the Merchant Shipping Act by amendments made to that Act by the Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulations 2006 (S.I. 2006/1244).
(**c**) A consolidated version of the Treaty can be found at http://eur-lex.europa.eu/en/treaties/index.htm.
(**d**) Copies of these can be found at www.nea.fr/.
(**e**) The Convention is set out in Schedule 7 to the Merchant Shipping Act 1995, c.21.

(b) the competent authority is unable to ensure the remedial measures are taken at the same time,

the competent authority shall determine which instance of environmental damage is to be remedied first.

(4) When determining which incidence of environmental damage is to be remedied first for the purposes of paragraph (3), the competent authority shall have regard to the following matters–

(a) the nature, extent and gravity of the instances of environmental damage concerned;

(b) the possibility of natural recovery; and

(c) any risk to human health.

(5) Before making a determination under paragraph (3), the competent authority shall, if practicable, consult–

(a) any interested person (as defined in regulation 14(1)); and

(b) the owner or occupier of the land upon which, or any waters in respect of which, remedial measures are to be taken.

(6) A person consulted under paragraph (5) may make representations to the competent authority within such time limit as specified by the authority to the person and the competent authority shall take into account any representations in making its determination.

(7) Any decision taken by a competent authority under these Regulations which imposes requirements as to preventive or remedial measures on an operator shall–

(a) be notified to the relevant operator;

(b) state the grounds on which it is based; and

(c) advise the operator of any available appeal and any time limit to which such an appeal is subject.

Assistance by public bodies

8.—(1) A competent authority may impose a requirement on a public body to take preventive or remedial measures under these Regulations where it appears to the competent authority that–

(a) those measures need to be taken as a matter of urgency; and

(b) the public body is better able than the competent authority to take the measures.

(2) A public body must comply with a requirement imposed under paragraph (1).

(3) The costs of a public body in complying with a requirement under paragraph (1) are to be met by the competent authority which imposed the requirement.

(4) When requested to do so, a public body must provide a competent authority with any advice or information which that body is able to give which would assist the competent authority in carrying out its functions under these Regulations.

(5) Any decision taken by a competent authority under paragraph (1) shall–

(a) be notified to the relevant public body; and

(b) state the grounds on which it is based.

Powers of entry and inspection

9.—(1) Any person authorised in writing by a competent authority for the purpose of carrying out its functions under these Regulations may exercise the powers specified in paragraph (2).

(2) The powers which an authorised person may exercise under paragraph (1) are–

(a) to enter at any reasonable time (or, in an emergency, at any time and, if need be, by force) any premises which the person has reason to believe it is necessary to enter;

(b) on entering any premises by virtue of sub-paragraph (a), to–

(i) be accompanied by any other person duly authorised by the competent authority and, if the authorised person has reasonable cause to apprehend any serious obstruction in the execution of the duty, a constable; and

(ii) have any equipment or materials required for any purpose for which the power of entry is being exercised;

(c) to make such examination and investigation as may in any circumstances be necessary;

(d) as regards any premises which the person has power to enter, to direct that those premises or any part of them, or anything in them, shall be left undisturbed (whether generally or in particular respects) for so long as is reasonably necessary for the purpose of any examination or investigation under sub-paragraph (c);

(e) to take such measurements and photographs and make such recordings as the person considers necessary for the purpose of any examination or investigation under sub-paragraph (c);

(f) to take samples, or cause samples to be taken, of any articles or substances found in or on any premises which the person has power to enter, and of the air, water or land in, on, or in the vicinity of, the premises;

(g) in the case of any article or substance found in or on any premises which the person has power to enter, to cause it to be dismantled or subjected to any process or test (but not so as to damage or destroy it, unless that is necessary);

(h) in the case of any such article or substance as is mentioned in sub-paragraph (g), to take possession of it and detain it for so long as is necessary for all or any of the following purposes–

(i) to examine it, or cause it to be examined, and to do, or cause to be done, to it anything which there is power to do under that sub-paragraph;

(ii) to ensure that it is not tampered with before examination of it is completed;

(iii) to ensure that it is available for use as evidence in any proceedings for an offence under these Regulations;

(i) to require any person whom the authorised person has reasonable cause to believe to be able to give any information relevant to any examination or investigation under sub-paragraph (c) to answer (in the absence of persons other than a person nominated by that person to be present and any persons whom the authorised person may allow to be present) such questions as the authorised person thinks fit to ask and to sign a declaration of the truth of the answers;

(j) to require the production of, or where the information is recorded in computerised form, the furnishing of extracts from, any records which it is necessary for the person to see for the purposes of an examination or investigation under sub-paragraph (c) and to inspect and take copies of, or of any entry in, the records;

(k) in order to determine whether any provision of these Regulations has been complied with–

(i) to carry out experimental borings or other works on the premises; and

(ii) to install, keep or maintain monitoring and other apparatus on the premises;

(l) to require any person to afford such facilities and assistance with respect to any matters or things within that person's control or in relation to which that person has responsibilities as are necessary to enable the authorised person to exercise any of the powers conferred by this regulation.

(3) Except in an emergency, in any case where it is proposed to enter any premises used for residential purposes, or to take heavy equipment on to any premises which are to be entered, any entry by virtue of this regulation shall only be effected–

(a) after the expiration of at least seven days' notice of the proposed entry given to a person who appears to the authorised person in question to be in occupation of the premises in question; and

(b) either–

(i) with the consent of a person who is in occupation of those premises; or

(ii) under the authority of a warrant by virtue of Schedule 2.

(4) Except in an emergency, where an authorised person proposes to enter any premises and–

(a) entry has been refused and that person apprehends on reasonable grounds that the use of force may be necessary to effect entry; or

(b) that person apprehends on reasonable grounds that entry is likely to be refused and that the use of force may be necessary to effect entry,

any entry on to those premises by virtue of this regulation shall only be effected under the authority of a warrant by virtue of Schedule 2.

(5) An authorised person who proposes to exercise the power conferred by paragraph (2)(g) in the case of an article or substance found on any premises, shall, if so requested by a person who at the time is present on and has responsibilities in relation to those premises, cause anything which is to be done by virtue of that power to be done in the presence of that person.

(6) Before exercising the power conferred by paragraph (2)(g) in the case of any article or substance, an authorised person shall consult–

(a) such persons having duties on the premises where the article or substance is to be dismantled or subjected to the process or test; and

(b) such other persons,

as appear to the authorised person appropriate for the purpose of ascertaining what dangers, if any, there may be in doing anything which that person proposes to do or cause to be done under the power.

(7) No answer given by a person in pursuance of a requirement imposed under paragraph (2)(i) shall be admissible in evidence against that person in any criminal proceedings.

(8) Nothing in this regulation shall be taken to compel the production by any person of a document if that person would on grounds of legal professional privilege be entitled to withhold production on an order for the production of documents in an action in the Court of Session.

(9) Schedule 2 shall have effect with respect to the powers of entry and related powers which are conferred by this regulation.

(10) In this regulation–

"articles or substances" includes flora and fauna;

"emergency" means a case in which it appears to the authorised person in question that there is an immediate risk of environmental damage and that immediate entry to any premises is necessary to verify the existence of that risk, to ascertain the cause of that risk or to effect a remedy;

"premises" includes any land, vehicle, vessel or mobile plant.

Preventive measures

10.—(1) In the event of an imminent threat of environmental damage caused by an activity, the operator of that activity must without delay take the necessary preventive measures.

(2) If, notwithstanding the taking of preventive measures, an imminent threat of environmental damage remains, the operator must as soon as practicable notify the competent authority of the circumstances of the threat.

(3) In the absence of any notification by an operator, if a competent authority has reasonable grounds for believing that there is an imminent threat of environmental damage it may require an operator to provide information about the threat.

(4) The competent authority may, at any time–

(a) require an operator to provide it with such additional information as may be required by it following notification of a threat under paragraph (2); or

(b) require an operator to take the necessary preventive measures.

(5) Where an operator–

(a) fails to comply with the requirements of paragraph (1) or (4)(b);

(b) cannot be identified; or

(c) is not required to pay the costs in accordance with these Regulations,

the competent authority instead of the operator may itself take preventive measures.

(6) Failure by an operator to comply with any of the requirements of paragraphs (1) to (4) without reasonable excuse is an offence.

Identification and determination of remedial measures

11.—(1) This regulation applies where environmental damage has occurred.

(2) The relevant operator shall identify, in accordance with Schedule 3, potential remedial measures and shall submit them without delay to the competent authority for approval, unless the competent authority has taken action under regulation 12(4).

(3) If an operator fails to submit potential remedial measures in accordance with paragraph (2), then the competent authority shall require an operator to do so.

(4) As soon as practicable after the receipt of potential remedial measures submitted for approval in terms of paragraph (2) or (3) and before approving remedial measures, the competent authority shall, if practicable, consult–

(a) any interested person (as defined in regulation 14(1)); and

(b) the owner or occupier of the land upon which, or any waters in respect of which, the potential remedial measures are to be carried out.

(5) A person consulted under paragraph (4) may make representations to the competent authority within such time limit as is specified by that authority to the person and the competent authority shall take into account any representations in making its determination for the purposes of paragraph (6).

(6) Following consultation the competent authority shall determine which remedial measures shall be implemented and shall inform the operator accordingly.

(7) Failure by an operator to comply with the requirements of paragraph (2) or (3) without reasonable excuse is an offence.

Operator to take remedial action

12.—(1) In the event that environmental damage has occurred, an operator must immediately–

(a) notify the competent authority of the circumstances of the damage;

(b) take all practicable steps to control, contain, remove or otherwise manage any contaminants or any other damage factors in order to limit or prevent further environmental damage and adverse effects on human health or further impairment of services; and

(c) on approval being given by the competent authority in accordance with regulation 11, take the necessary remedial measures.

(2) In the absence of any notification by an operator, if a competent authority has reasonable grounds for believing that environmental damage has occurred, it may require the operator to provide information about the damage.

(3) The competent authority may, at any time–

(a) require an operator to provide it with supplementary information on any environmental damage that has occurred following notification under paragraph (1)(a);

(b) take, require an operator to take, or give an operator instructions concerning, all practicable steps to immediately control, contain, remove or otherwise manage any contaminants and any other damage factors in order to limit or prevent further environmental damage and adverse effects on human health or further impairment of services;

(c) require an operator to take the necessary remedial measures.

(4) Where an operator–

(a) fails to comply with the requirements placed on it by paragraph (1) or (3)(b) or (c);

(b) cannot be identified; or

(c) is not required to pay the costs in accordance with these Regulations,

the competent authority instead of an operator may itself take the necessary remedial measures but only as a means of last resort.

(5) Failure by an operator to comply with the requirements of paragraphs (1) to (3) without reasonable excuse is an offence.

Appeals and interim measures

13.—(1) The operator may appeal to the sheriff on questions of fact and law if aggrieved by a requirement imposed under–

(a) regulation 10(4)(b);

(b) regulation 12(3)(b); or

(c) regulation 12(3)(c).

(2) An appeal to the sheriff under paragraph (1) shall be by way of summary application.

(3) The period within which an appeal under paragraph (1) may be brought shall be 28 days from the date after the date of intimation of the decision containing the requirement an operator is desiring to appeal.

(4) The sheriff in determining an appeal may–

(a) confirm the decision of the competent authority;

(b) quash the decision and, where the sheriff considers that the competent authority has acted unreasonably in imposing the requirement which is the subject of the appeal, order the competent authority to reimburse any costs incurred in complying with the requirement;

(c) remit the decision to the competent authority for re-determination; or

(d) make such other order as the sheriff thinks just.

(5) The sheriff's determination on an appeal is final.

(6) Subject to paragraph (7), the bringing of an appeal under paragraph (1) removes the need to comply with the requirement which is the subject of the appeal until the appeal has been withdrawn or finally determined by the sheriff.

(7) Paragraph (6) does not apply where–

(a) in the opinion of the competent authority there is an imminent risk to human health, or an imminent threat of environmental damage; and

(b) the competent authority has notified the operator of this opinion when imposing the requirement in question.

Request for action and review

14.—(1) In this regulation "interested person" means–

(a) any person who–

(i) is affected or likely to be affected by environmental damage; or

(ii) otherwise has a sufficient interest; or

(b) a non governmental organisation promoting environmental protection.

(2) An interested person may submit any observations to the competent authority in relation to an instance of environmental damage or an imminent threat of such damage and request the competent authority to take action under these Regulations.

(3) A request from an interested person under paragraph (2) shall be–

(a) made in writing; and

(b) accompanied by any relevant information and data supporting any observation made under that paragraph in relation to the environmental damage or imminent threat of such damage.

(4) Upon receipt by a competent authority of a request under paragraph (2) it shall determine whether or not it is satisfied that the request and the accompanying observation demonstrate in a plausible manner that the environmental damage or an imminent threat of such damage exists and, in the event that–

(a) it is so satisfied, the procedure specified in paragraphs (5) and (6) shall be followed; or

(b) it is not so satisfied, it shall notify the person who made the request under paragraph (2) of its decision and the reasons for it.

(5) Where a competent authority is satisfied under paragraph (4) in relation to a request made under paragraph (2) it shall notify the operator of the request, provide it with a copy of the accompanying information and invite the operator to respond with any representations.

(6) After having had regard to any representations made to it by an operator, the competent authority shall notify–

(a) the person who made the request under paragraph (2); and

(b) the operator,

of its decision regarding the request and provide reasons for it.

Co-operation between competent authorities

15.—(1) Where, in the opinion of the competent authority, an instance of environmental damage or an imminent threat of such damage arises from an activity carried on in Scotland and affects or is likely to affect the territory of–

(a) another Member State; or

(b) another part of the United Kingdom,

the competent authority shall–

(i) co-operate with the relevant competent authority of that Member State or part of the United Kingdom;

(ii) provide all such information as may be required by that competent authority in relation to damage or imminent threat of such damage;

(iii) consider using its powers under regulation 10(5) or regulation 12(4) in the event that preventive or remedial measures are not taken by the operator; and

(iv) notify the Scottish Ministers.

(2) Where a competent authority is aware of–

(a) an occurrence, or imminent threat, of environmental damage in Scotland as a result of an activity specified in Schedule 1; or

(b) an occurrence, or imminent threat, of environmental damage in Scotland as a result of any other activity where the occurrence or imminent threat has arisen as a result of the fault or negligence of the operator of the activity,

and the activity is carried on otherwise than in Scotland, the competent authority shall as soon as possible notify the Scottish Ministers.

(3) Where the Scottish Ministers receive a notification under paragraph (2) in relation to an activity carried on outside the United Kingdom, they may–

(a) notify the Commission of the matter;

(b) notify the relevant competent authority of the Member State in question of the matter; and

(c) make recommendations as to the preventive measures or remedial measures required.

(4) Where, in the opinion of the competent authority, the damage specified in paragraph (2) is likely to affect the territory of one or more other parts of the United Kingdom, the competent authority shall as soon as possible notify the relevant competent authority of that part of the United Kingdom.

(5) The requirement imposed on the competent authority in paragraphs (1)(iv) and (2)(b) to notify the Scottish Ministers shall not apply where the competent authority is the Scottish Ministers.

Grant of, and compensation for, rights of entry

16.—(1) Any person whose consent is required before any measures required by these Regulations may be carried out must grant, or join in granting, such rights in relation to any land or waters as will enable the relevant person to carry out such measures.

(2) Before requiring any such consent in terms of paragraph (1), the relevant person shall reasonably endeavour to consult every person who appears to it–

(a) to be the owner or occupier of any such land or waters; and

(b) to be a person who might be required by paragraph (1) to grant or join in granting any rights.

(3) Subject to paragraph (4), the relevant person shall compensate a person who grants, or joins in granting, any rights required by paragraph (1), where that person sustains damage as a consequence thereof.

(4) The relevant person must pay compensation under paragraph (3) only if–

(a) the person gives notice of a claim to the relevant person, stating the grounds of the claim and the amount claimed, and

(b) the notice is given in accordance with Schedule 4.

(5) Schedule 4 shall have effect in relation to compensation under this regulation.

(6) In this regulation, "the relevant person" means–

(a) an operator;

(b) a person acting on behalf of an operator; or

(c) the competent authority.

Costs

17.—(1) Subject to paragraphs (2) and (3), the competent authority shall recover from the operator who has caused the damage or the imminent threat of damage, the costs it has incurred in relation to preventive or remedial measures taken under these Regulations and any costs incurred by it under regulation 8(3) or 15(1).

(2) An operator shall not be required to bear the cost of preventive or remedial measures if it demonstrates that the environmental damage or the imminent threat of such damage–

(a) was caused by a third party despite the fact that appropriate safety measures were in place; or

(b) resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities.

(3) An operator is not required to pay the costs of remedial measures taken under these Regulations if it demonstrates that it was not at fault or negligent and that the environmental damage was caused by–

(a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation granted in relation to an activity in Schedule 1; or

(b) an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time of the emission or activity.

(4) Paragraph (3) shall not apply where the damage was caused by the release of genetically modified organisms.

(5) Where the circumstances referred to in paragraph (2) apply, an operator who incurs any costs under these Regulations may recover those costs from the relevant third party or public authority as appropriate.

(6) Proceedings for recovery of costs may be initiated by a competent authority not more than 5 years after whichever is the later of the dates specified in paragraph (7).

(7) Those dates are–

(a) the date on which the competent authority completed any relevant measures taken under these Regulations;

(b) the date on which the competent authority identified the responsible operator.

Allocation of costs

18.—(1) Where the activities of more than one operator have resulted in an instance of, or the imminent threat of, environmental damage, the competent authority shall determine the responsibility of the operators for the costs of the environmental damage.

(2) The competent authority may determine the operators' responsibility on the following basis:–

(a) percentage split;

(b) jointly and severally;

(c) with reference to a particular area or period of time; or

(d) in such other manner as it deems appropriate.

(3) The competent authority may, at any time, require the operators concerned to provide such information as may be required by it for the purpose of determining the operators' responsibility for costs.

(4) Failure by an operator to comply with the requirements of paragraph (3) without reasonable excuse is an offence.

Penalties

19. A person guilty of an offence under these Regulations shall be liable–

(a) on summary conviction to a fine not exceeding the statutory maximum or to imprisonment for a term not exceeding twelve months or both; or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding two years or both.

Offences by bodies corporate

20. Where an offence under these Regulations is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of–

(a) any director, manager, secretary or other similar officer of the body corporate; or

(b) any person who was purporting to act in any such capacity,

that person as well as the body corporate is to be deemed to be guilty of that offence and is liable to be proceeded against and punished accordingly.

Offences by Scottish partnerships

21. Where an offence under these Regulations is committed by a Scottish partnership (other than a limited liability partnership) and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, that partner as well as the partnership is to be deemed guilty of that offence and is liable to be proceeded against and punished accordingly.

Offences by limited liability partnerships

22. Where an offence under these Regulations is committed by a limited liability partnership and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any member of that partnership or person who was purporting to act as such, that member or person as well as the limited liability partnership, is to be deemed guilty of that offence and is liable to be proceeded against and punished accordingly.

Authorised to sign by the Scottish Ministers

St Andrew's House,
Edinburgh

2009

SCHEDULE 1

Regulation 4(1)

ACTIVITIES FOR THE PURPOSES OF REGULATION 4(1)

1. The operation of installations subject to permit in pursuance of Council Directive 2008/1/EC of 15th January 2008 concerning integrated pollution prevention and control(**a**) and Council Directive 96/61/EC of 24th September 1996 concerning integrated pollution prevention and control(**b**) with the exception of installations or parts of installations used for research, development and testing of new products and processes.

2. Waste management operations, including the collection, transport, recovery and disposal of waste and hazardous waste, including the supervision of such operations and after-care of disposal sites, subject to permit or registration in pursuance of Directive 2006/12/EC of the European Parliament and of the Council of 5th April 2006 on waste(**c**) and Council Directive 91/689/EEC of 12th December 1991 on hazardous waste(**d**).

The operation of landfill sites under Council Directive 1999/31/EC of 26th April 1999 on the landfill of waste(**e**) and the operation of incineration plants under Directive 2000/76/EC of the European Parliament and of the Council of 4th December 2000 on the incineration of waste(**f**).

This does not include the spreading of sewage sludge from urban waste water treatment plants, treated to an approved standard, for the purposes of agriculture (within the meaning of regulation 2 of the Sludge (Use in Agriculture) Regulations 1989)(**g**).

3. All discharges into inland surface water, which require prior authorisation in pursuance of Council Directive 2006/11/EC of 15th February 2006 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community(**h**).

4. All discharges of substances into groundwater which require prior authorisation in pursuance of Council Directive 80/68/EEC of 17th December 1979 on the protection of groundwater against pollution caused by certain dangerous substances(**i**).

5. The discharge or injection of pollutants into surface water or groundwater which require a permit, authorisation or registration in pursuance of Directive 2000/60/EC.

6. Water abstraction and impoundment of water subject to prior authorisation in pursuance of Directive 2000/60/EC.

7. Manufacture, use, storage, processing, filling, release into the environment and onsite transport of–

(a) dangerous substances as defined in Article 2(2) of Council Directive 67/548/EEC of 27th June 1967 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous substances(**j**);

(**a**) O.J. No. L 24, 29.1.2008, p.8.
(**b**) O.J. No. L 257, 10.10.1996, p.26 as last amended by Regulation (EC) No. 166/2006 (O.J. No. L 33, 4.2.2006, p.1).
(**c**) O.J. No. L 114, 27.4.2006, p.9 as last amended by Directive 2008/98/EC (O.J. No. L 312, 22.11.2008, p.3).
(**d**) O.J. No. L 377, 31.12.1991, p.20 as last amended by Directive 2008/98/EC (O.J. No. L 312, 22.11.2008, p.3).
(**e**) O.J. No. L 182, 16.7.1999, p.1 as last amended by Regulation (EC) No. 1137/2008 (O.J. No. L 311, 21.11.2008, p.1).
(**f**) O.J. No. L 332, 28.12.2000, p.91 as corrected in O.J. No. L 145, 31.5.2001, p.52 and as last amended by Regulation (EC) No. 1137/2008 (O.J. No. L 311, 21.11.2008, p.1).
(**g**) S.I. 1989/1263.
(**h**) O.J. No. L 64, 4.3.2006, p.52.
(**i**) O.J. No. L 20, 26.1.1980, p.43 as amended by Directive 91/692/EEC (O.J. L 377, 31.12.1991, p.48).
(**j**) O.J. No. L 196, 16.8.1967, p.1 as last amended by Regulation (EC) No. 1272/2008 (O.J. No. L 353, 31.12.2008, p.1).

(b) dangerous preparations as defined in Article 2(2) of Directive 1999/45/EC of the European Parliament and of the Council of 31st May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations(**a**);

(c) plant protection products as defined in Article 2(1) of Council Directive 91/414/EEC of 15th July 1991 concerning the placing of plant protection products on the market(**b**);

(d) biocidal products as defined in Article 2(1)(a) of Directive 98/8/EC of the European Parliament and of the Council of 16th February 1998 concerning the placing of biocidal products on the market(**c**).

8. Transport by road, rail, inland waterways, sea or air of dangerous goods or polluting goods as defined either in Annex A to Council Directive 94/55/EC of 21st November 1994 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road(**d**) or in the Annex to Council Directive 96/49/EC of 23rd July 1996 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by rail(**e**) or as defined in Council Directive 93/75/EEC of 13th September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods(**f**).

9. Any contained use, including transport, involving genetically modified micro-organisms as defined by Council Directive 90/219/EEC of 23rd April 1990 on the contained use of genetically modified micro-organisms(**g**).

10. Any deliberate release into the environment, transport and placing on the market of genetically modified organisms as defined by Directive 2001/18/EC.

11. Transboundary shipment of waste within, into or out of the European Union, requiring an authorisation or prohibited in the meaning of Council Regulation (EC) No. 1013/2006 of 14th June 2006 on shipments of waste(**h**).

12. The management of extractive waste pursuant to Directive 2006/21/EC of the European Parliament and of the Council of 15th March 2006 on the management of waste from extractive industries(**i**).

(**a**) O.J. No. L 200, 30.7.1999, p.1 as last amended by Regulation (EC) No. 1272/2008 (O.J. No. L 353, 31.12.2008, p.1).
(**b**) O.J. No. L 230, 19.8.1991, p.1 as last amended by Directive 2008/127/EC (O.J. No. L 344, 20.12.2008, p.89).
(**c**) O.J. No. L 123, 24.4.1998, p.1 as last amended by Directive 2008/31/EC (O.J. No. L 81, 20.3.2008, p.57).
(**d**) O.J. No. L 319, 12.12.1994, p.7 as last amended by Directive 2006/89/EC (O.J. No. L 305, 4.11.2006, p.4).
(**e**) O.J. No. L 235, 17.9.1996, p.25 as last amended by Directive 2006/90/EC (O.J. No. L 305, 4.11.2006, p.6).
(**f**) O.J. No. L 247, 5.10.1993, p.19 as last amended by Directive 2002/84/EC (O.J. No. L 324, 29.11.2002, p.53).
(**g**) O.J. No. L 117, 8.5.1990, p.1 as last amended by Commission Decision 2005/174/EC (O.J. No. L 59, 5.3.2005, p.20).
(**h**) O.J. No. L 190, 12.7.2006, p.1, as last amended by Commission Regulation (EC) No. 669/2008 (O.J. No. L 188, 16.7.2008, p.7).
(**i**) O.J. No. L 102, 11.4.2006, p.15.

SCHEDULE 2

Regulation 9

SUPPLEMENTARY PROVISIONS IN RESPECT OF POWERS OF ENTRY AND INSPECTION

Interpretation

1. In this Schedule–

(a) "justice" means a sheriff, stipendiary magistrate or justice of the peace;

(b) "premises" includes any land, vehicle, vessel or mobile plant; and

(c) "relevant power" means a power conferred by regulation 9 including a power exercisable by virtue of a warrant under this Schedule.

Warrants

2.—(1) If it is shown to the satisfaction of a justice on sworn information in writing–

(a) that there are reasonable grounds for the exercise in relation to any premises of a relevant power; and

(b) that one or more of the conditions specified in sub-paragraph (2) is fulfilled in relation to those premises,

the justice may by warrant authorise a competent authority to designate a person who shall be authorised to exercise the power in relation to those premises, in accordance with the warrant and, if need be, by force.

(2) The conditions mentioned in sub-paragraph (1)(b) are–

(a) that the exercise of the power in relation to the premises has been refused;

(b) that such a refusal is reasonably apprehended;

(c) that the premises are unoccupied;

(d) that the occupier is temporarily absent from the premises and the case is one of urgency; or

(e) that an application for admission to the premises would defeat the object of the proposed entry.

(3) In a case where paragraph (3) of regulation 9 applies, a justice shall not issue a warrant under this Schedule by virtue only of being satisfied that the exercise of a power in relation to any premises has been refused, or that a refusal is reasonably apprehended, unless also satisfied that the notice required by that paragraph has been given and that the period of that notice has expired.

(4) Every warrant under this Schedule shall continue in force until the purposes for which the warrant was issued have been fulfilled.

Evidence of authority

3. A person designated as the person who may exercise a relevant power shall produce evidence of that designation and other authority before exercising the power.

Admissibility of information

4.—(1) Subject to regulation 9(7), information obtained in consequence of the exercise of a relevant power, with or without the consent of any person, shall be admissible in evidence against that or any other person.

(2) Without prejudice to the generality of sub-paragraph (1), information obtained by means of monitoring or other apparatus installed on any premises in the exercise of a relevant power, with or without the consent of any person in occupation of the premises, shall be admissible in evidence in any proceedings against that or any other person.

Securing of premises

5. A person who, in the exercise of a relevant power, enters on any premises which are unoccupied or whose occupier is temporarily absent shall leave the premises as effectually secured against trespassers as they were on entry.

Compensation

6.—(1) Where any person exercises any power conferred by regulation 9(2)(a) or (b), it shall be the duty of the competent authority under whose authorisation that person acts to make full compensation to any person who has sustained loss or damage by reason of–

(a) the exercise by that person of that power; or

(b) the performance of, or failure of that person to perform, the duty imposed by paragraph 5.

(2) Compensation shall not be payable by virtue of sub-paragraph (1) in respect of any loss or damage if compensation is payable in respect of that loss or damage by virtue of any other enactment.

(3) A person exercising any power conferred by regulation 9(2)(a) or (b) shall not be liable in any civil or criminal proceedings for anything done in the purported exercise of any relevant power if the court is satisfied that the person acted in good faith.

SCHEDULE 3

Regulation 11(2)

REMEDIATION OF ENVIRONMENTAL DAMAGE

PART I

Application of Part I

1. This Part applies to remediation of damage to natural resources other than land.

Definitions

2. In this Part–

(a) "primary remediation" means any remedial measure which returns the damaged natural resources or impaired services to, or towards, baseline condition;

(b) "complementary remediation" means any remedial measure taken in relation to natural resources or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources or services;

(c) "compensatory remediation" means any action taken to compensate for interim losses of natural resources or services that occur from the date of damage occurring until primary remediation has achieved its full effect; and

(d) "interim losses" means losses which result from the fact that the damaged natural resources or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the primary or complementary measures have taken effect; and does not include financial compensation to the public.

Objectives

3.—(1) Environmental damage, in relation to water, protected species or natural habitats, shall be effected by the restoration of the environment to its baseline condition by–

(a) primary remediation;

(b) complementary remediation; and

(c) compensatory remediation.

(2) Where primary remediation does not result in the restoration of the environment to its baseline condition, then complementary remediation will be undertaken, and compensatory remediation will be undertaken to compensate for the interim losses.

Risk to human health

4. The remedying of environmental damage, in relation to damage to water, protected species or natural habitats, shall result in the removal of any significant risk of human health being adversely affected.

Identification of remedial measures

5.—(1) In relation to primary remediation, actions to restore the natural resources and services towards baseline condition on an accelerated time-frame, or through natural recovery, shall be considered.

(2) In relation to complementary and compensatory remediation–

(i) if possible, complementary and compensatory remedial measures must provide natural resources or services of the same type, quality and quantity as those damaged;

(ii) where this is not possible, similar but different natural resources or services must be provided (for example, by offsetting a reduction in the quality of natural resources or services by increasing their quantity);

(iii) where this is not possible, different natural resources or services may be provided, and the remedial measures must have the same monetary valuation as the lost natural resources or services;

(iv) if valuation of the lost natural resources or services is practicable, but valuation of the remedial measures cannot be made within a reasonable time or at a reasonable cost, then remedial measures may be provided whose cost is equivalent to the estimated monetary value of the lost natural resources or services;

(v) in the case of complementary remediation at a new site, where possible and appropriate this site should be geographically linked to the damaged site.

Choice of remediation

6.—(1) The reasonable remedial options should be evaluated, using best available technologies, based on the following criteria–

(a) the effect of each option on public health and safety;

(b) the cost of implementing the option;

(c) the likelihood of success of each option;

(d) the extent to which each option will prevent future damage, and avoid collateral damage as a result of implementing the option;

(e) the extent to which each option benefits to each component of the natural resource or service;

(f) the extent to which each option takes account of relevant social, economic and cultural concerns and other relevant factors specific to the locality;

(g) the length of time it will take for the restoration of the environmental damage to be effective;

(h) the extent to which each option achieves the restoration of the site of the environmental damage; and

(i) the geographical linkage to the damaged site.

(2) When evaluating the different identified remedial options, primary remedial measures that do not fully restore the damaged water or protected species or natural habitat to baseline or that restore it more slowly can be chosen. This decision can be taken only if the natural resources or services foregone at the primary site as a result of the decision are compensated for by increasing complementary actions to provide a similar level of natural resources or services as were foregone. This will be the case, for example, when the equivalent natural resources or services could be provided elsewhere at a lower cost. These additional remedial measures shall be determined in accordance with the rules set out in paragraph 5(2).

(3) The competent authority may at any time decide that no further remedial measures should be taken if–

(a) the remedial measures already taken secure that there is no longer any significant risk of adversely affecting human health, water or protected species and natural habitats; and

(b) the cost of the remedial measures that should be taken to reach baseline condition or similar level would be disproportionate to the environmental benefits to be obtained.

PART II

1. This Part applies to damage to land.

2. The necessary measures shall be taken to ensure, as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its current use or approved future use at the time of the damage, no longer poses any significant risk of adversely affecting human health.

3. The presence of such risks shall be assessed through risk-assessment procedures taking into account the characteristic and function of the soil, the type and concentration of the harmful substances, preparations, organisms or micro-organisms, their risk and the possibility of their dispersion.

4. Use shall be ascertained on the basis of any enactment relating to land use, or other relevant enactments, in force, when the damage occurred.

5. If the use of the land is changed, all necessary measures shall be taken to prevent any adverse effects on human health.

6. If there are no enactments which are relevant for the purposes of paragraph 4, the nature of the relevant area where the damage occurred, taking into account its expected development, shall determine the use of the specific area.

7. A natural recovery option, that is to say an option in which no direct human intervention in the recovery process would be taken, shall be considered.

SCHEDULE 4

Regulation 16

COMPENSATION

Interpretation

1. In this Schedule–

"the Act" means the Land Compensation (Scotland) Act 1963(**a**);

"the grantor" means the person who grants, or joins in granting, any rights under regulation 16, and

"relevant interest" means an interest in land in respect of which rights are granted in terms of regulation 16.

Period for making an application

2. An application for compensation shall be made before the expiry of a period of 12 months beginning with the date of completion of the measures required to be carried out in respect of which compensation is claimed.

Manner of making an application

3.—(1) An application for compensation must be made in writing to the person to whom the right was granted.

(2) The application must contain–

(a) a copy of the grant of rights in respect of which the grantor is applying for compensation;

(b) a description of the exact nature of any interest in land in respect of which compensation is applied for; and

(c) a statement of the amount of compensation applied for, distinguishing the amounts applied for under each of sub-paragraphs (a) to (c) of paragraph 4 and showing how the amount applied for under each sub-paragraph has been calculated.

Loss and damage for which compensation payable

4. Compensation shall be payable for loss and damage of the following descriptions–

(a) any depreciation in the value of any relevant interest to which the grantor is entitled which results from the grant of the right;

(b) any loss or damage sustained by the grantor which is attributable to the grant of the right or the exercise of it; and

(c) the amount of any valuation and legal costs reasonably incurred by the grantor in granting the right and in the preparation of the application for and the negotiation of the amount of compensation.

Basis on which compensation assessed

5.—(1) The rules set out in section 12 of the Act (rules for assessing compensation)(**b**) shall, so far as applicable and subject to any necessary modifications, have effect for the purpose of assessing any compensation as they have effect for the purpose of assessing compensation for the compulsory acquisition of an interest in land.

(**a**) 1963 c.51.
(**b**) Section 12 has been amended by Schedules 17 and 19 to the Planning and Compensation Act 1991 (c.34).

(2) Where the relevant interest in respect of which any compensation is to be assessed is subject to a standard security (within the meaning of section 9 of the Conveyancing and Feudal Reform (Scotland) Act 1970(**a**))–

(a) the compensation must be assessed as if the interest were not subject to that security; and

(b) no compensation shall be payable in respect of the interest of the creditor (as distinct from the interest which is subject to the security).

Determination of disputes

6. Any question of disputed compensation shall be referred to and determined by the Lands Tribunal for Scotland.

(**a**) 1970 c.35. Section 9 has been amended by paragraph 30(6) of and Schedule 13 to the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) and by paragraph 4(2) of Schedule 14 to the Title Conditions (Scotland) Act 2003 (asp 9).

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement Directive 2004/35/CE of the European Parliament and Council on environmental liability with regard to the prevention and remedying of environmental damage.

They apply to environmental damage to protected species, natural habitats, water and land (regulation 4).

They provide that, for certain economic activities, where there is an imminent risk of environmental damage, the responsible operator must take steps to prevent it. If environmental damage has occurred the responsible operator must prevent further damage (regulations 10 to 12).

Competent authorities are designated and these bodies have certain duties and powers (regulations 7 to 12, 14, 15, 17 and 18).

The Regulations provide for interested parties being able to request a competent authority to take action in certain circumstances (regulation 14).

The Regulations make provision as to who bears the costs of carrying out any preventive or remedial measures (regulation 17).

Breach of certain provisions of the Regulations is an offence punishable either on summary conviction or indictment (regulation 19).

The Schedules to the Regulations set out the occupational activities covered (Schedule 1), supplementary provisions in respect of powers of entry (Schedule 2), remediation measures (Schedule 3), and compensation provisions in relation to grants of entry (Schedule 4).

A Transposition Note and Partial Regulatory Impact Assessment (RIA) have been prepared in connection with these Regulations and placed in the Scottish Parliament Information Centre. Copies of the RIA can be obtained from the Scottish Government, Enterprise and Industry Division, Meridian Court, Cadogan Street, Glasgow, G2 6AT. Copies of the Transposition Note can be obtained from the Scottish Government, Environmental Quality Directorate, Victoria Quay, Edinburgh, EH6 6QQ.

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