

# **A guide to the Environmental Damage (Prevention and Remediation) Regulations 2009**

A Guest Article by Greg Davies  
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### Could your business be affected by pollution?

It's the large-scale environmental catastrophes such as BP's damaged oil pipeline in the Gulf of Mexico that hit the headlines, but businesses of all sizes must take responsibility – both financially and practically – if their activities damage the environment.

This article looks at the Environmental Damage (Prevention and Remediation) Regulations 2009, which have been in force since 1 March 2009.

The regulations themselves are a result of the implementation of European Directive 2004/35/CE on environmental liability. They are based on the principle of "the polluter pays", where those responsible for a pollution incident – rather than the taxpayer – are required to prevent and, where necessary, remedy any environmental damage caused.

### What do the regulations include?

The scope of the regulations is UK-wide. The emphasis is on the "operator" identifying where or when there is an imminent threat or actual damage to the environment, and taking immediate action.

Under the regulations, environmental damage is considered as any of the following:

- serious damage to surface or ground water
- serious damage to EU protected natural habitats or species
- contamination of land with a significant risk of harm to human health.

The regulations are not retrospective and will only be applied to damage caused after the date of implementation.

### Where do the responsibilities lie?

Responsibility for enforcement of the regulations is divided between the Home Nations, with England and Wales, Scotland and Northern Ireland utilising primarily the Environment Agency (EA), Scottish Environmental Protection Agency (SEPA) and Northern Ireland Environmental Agency (NIEA) respectively.

In terms of activities, an "operator" is identified as a business in its broadest

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sense, in that it applies to “operators of economic activities”. This would include, among others:

- private businesses
- construction and demolition companies
- waste management companies
- charitable and voluntary organisations
- the public sector (hospitals, schools, government departments, etc.).

Within their undertakings, operators must:

- take steps to actively prevent damage to the environment
- where damage has occurred:
  - prevent any further damage occurring
  - notify and provide information to the relevant authority (depending on the area you are in that could be the EA, SEPA or NIEA)
  - undertake any further preventative or remedial measures as instructed by the authority
  - submit proposals for remediation
  - be responsible for paying the costs for the above works.

If the damage occurs to water, a Site of Special Scientific Interest (SSSI) or EU species and habitat, possibly three different remediation options could be imposed:

1. **Primary remediation** – this would be the measures to restore the damage itself.
2. **Complementary remediation** – whereby alternative sites may be needed, for example if the primary remediation activities do not fully restore the initial environmental damage caused.
3. **Compensatory remediation** – in essence, measures to compensate for the damage caused while it is being restored/resolved.

There are grounds to appeal a charge of environmental damage by an authority

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under the regulations, but this must be carried out within 28 days of the initial notification. Grounds for any appeal could include:

- The activity did not cause the damage.
- The authority has unreasonably decided that the damage caused is “environmental damage”.
- The damage was the result of an act by a third party.
- The operator was not at fault or negligent and the emission was permit authorised or in accordance with the state of scientific knowledge.

### **What do the regulations mean for you?**

When considering the effect these regulations have on your business, you must look at your activities, their location, the potential for pollution and the potential damage that pollution could cause.

For those with formal environmental management systems – ISO 14001 or the EU’s Eco-Management and Audit Scheme (EMAS) – in place, at least part of this should have been done. Your list of relevant legislation will need to be amended, however, to include these regulations.

If you have no formal environmental management processes in place, you will need to establish whether, and to what extent, your activities could cause any environmental damage.

You will need to consider not just your main business activities, but also potentially incidental aspects such as oil storage locations, interceptors, chemical usage and waste materials.

Any EA permits or water discharge notices you have in place should also be considered, and the information used to assess your current situation and, therefore, future potential actions.

### **Designed as a deterrent**

In summary, these regulations are designed to be a further deterrent to those who will not take a proactive approach to fulfilling their environmental obligations. They are putting the financial driver at the heart of this deterrent, and one where the remediation costs could significantly outweigh any fines that might otherwise have been imposed.

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### **What should you be doing to protect your business?**

1. Identify your organisation's activities and where these could lead to pollution occurring.
2. Establish what environments might be affected should a pollution event occur.
3. Consider the preventative measures you could put in place to eliminate the risk.
4. Consider the control measures you could put in place to reduce the risk (change process, substitute chemicals, systems of work, etc.).
5. Make sure you have appropriate and sufficient control equipment and emergency equipment present (bunds, interceptors, spill kits, etc.) and that these are maintained correctly.
6. Where required (e.g. if you are ISO 14001 accredited), ensure that your applicable legislation is updated.
7. Check any discharge notices or permits you have in place, that you are up to date with them, and that you are still in compliance with their requirements.
8. If you feel you may need specialist help, make sure you go and get it.

*Greg Davies*

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If you would like more information on any of the points covered in this Guest Article, please contact **TCii** on **020 7099 2621**.