

2009 No. 3104

WATER RESOURCES, ENGLAND AND WALES

The Water Resources Act 1991 (Amendment) (England and Wales) Regulations 2009

Made - - - - - *25th November 2009*
Laid before Parliament *1st December 2009*
Laid before the National Assembly for Wales *1st December 2009*
Coming into force - - - *22nd December 2009*

The Secretary of State is designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to the environment(b).

The Welsh Ministers are designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to water resources(c).

The Secretary of State in relation to England, and the Welsh Ministers in relation to Wales, make these Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972.

Title, extent and commencement

1. These Regulations—
 - (a) may be cited as the Water Resources Act 1991 (Amendment) (England and Wales) Regulations 2009;
 - (b) extend to England and Wales only; and
 - (c) come into force on 22nd December 2009.

Amendment of the Water Resources Act 1991

2. The Water Resources Act 1991(d) is amended as follows.
- 3.—(1) Section 93 (water protection zones) is amended as follows.
 - (2) For subsection (1) substitute—

“(1) Where the appropriate national authority considers that either or both of subsections (2) and (2A) is satisfied in relation to any area, it may by order make provision—

(a) 1972 c.68.
(b) S.I. 2008/301.
(c) S.I. 2003/2901. The functions conferred on the National Assembly for Wales by means of that Order are now exercisable by the Welsh Ministers, by virtue of section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006 (c.32).
(d) 1991 c.57.

- (a) designating that area as a water protection zone; and
 - (b) regulating the carrying on in that zone of such activities as may be specified or described in the order.”.
- (3) After subsection (1) insert—
 - “(1A) An order under this section may regulate activities carried on in a water protection zone by—
 - (a) prohibiting or restricting the carrying on of those activities in the zone; or
 - (b) imposing requirements on persons who carry on those activities in the zone to take such steps as may be specified or described in the order.
 - (1B) The power under subsection (1A)(b) is exercisable only for the purpose of enabling the United Kingdom to comply with its obligations under the Water Framework Directive in relation to any applicable environmental objectives.”.
- (4) In subsection (2)—
 - (a) the words “(subject to subsection (3) below)” are repealed; and
 - (b) for “Secretary of State” substitute “appropriate national authority”.
- (5) After subsection (2), insert—
 - “(2A) For the purposes of subsection (1) this subsection is satisfied in relation to any area if it is appropriate, with a view to preventing or limiting any harm that is being or is likely to be caused to controlled waters, to regulate the carrying on in that area of activities which the appropriate national authority considers are likely to result in such harm.
 - (2B) In subsection (2A) “harm” means any adverse impact on the condition of any hydromorphological quality element affecting the controlled waters that would be likely to prevent the achievement of any environmental objectives applicable to those waters (whether by itself or in combination with other factors), other than an adverse impact caused by the entry into controlled waters of any poisonous, noxious or polluting matter.
 - (2C) In subsection (2B) “environmental objectives” and “hydromorphological quality element” have the same meaning as in the Water Framework Directive.”.
- (6) Subsection (3) is repealed.
- (7) For paragraph (a) of subsection (4) substitute—
 - “(a) confer power on the Agency to determine for the purposes of the order—
 - (i) the circumstances in which the carrying on of any activities is prohibited or restricted;
 - (ii) the circumstances in which any requirement to take steps is imposed on persons who carry on activities;
 - (iii) the activities to which any such prohibition or restriction or any such requirement (as the case may be) applies.”.
- (8) For paragraph (c) substitute—
 - “(c) provide that a contravention of a prohibition or restriction contained in the order or of a condition of a consent given for the purposes of any such prohibition or restriction or a failure to comply with a requirement to take steps contained in the order shall be an offence;”.
- (9) In paragraph (f) of subsection (4), for “Secretary of State” substitute “appropriate national authority”.
- (10) After subsection (4) insert—
 - “(4A) The maximum penalties for an offence created by subsection 4(c) shall not exceed—
 - (a) on summary conviction, a term of imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum (or both); and

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

(11) For subsection (5), substitute—

“(5) In this section, “appropriate national authority” means—

- (a) in relation to England, the Secretary of State; and
- (b) in relation to Wales, the Welsh Ministers.

(6) The power to make an order under this section shall be exercisable by statutory instrument subject—

- (a) in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament; and
- (b) in the case of an order made by the Welsh Ministers, to annulment in pursuance of a resolution of the National Assembly for Wales,

but neither the Secretary of State nor the Welsh Ministers shall make such an order except on an application made by the Agency in accordance with Schedule 11 to this Act and otherwise in accordance with that Schedule.

(7) In this section—

“England” includes the territorial sea adjacent to England not forming any part of Wales and “Wales” has the meaning given by section 158(1) of the Government of Wales Act 2006;

“the Water Framework Directive” means Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy(a).”.

4. Sections 94 and 95, subsection (2) of section 96 and Schedule 12 are repealed.

5. For sections 161 and 161A substitute—

“Restoration and improvement works for controlled waters

Anti-pollution works and operations

161.—(1) This section applies where it appears to the Agency that any poisonous, noxious or polluting matter or any waste matter is or has been present in, or is likely to enter, any controlled waters.

(2) In a case where the matter appears to be or to have been present in the controlled waters, the Agency shall be entitled to carry out works and operations for any of the following purposes—

- (a) removing or disposing of the matter;
- (b) remedying or mitigating any pollution caused by its presence in the waters; or
- (c) restoring (so far as it is reasonably practicable to do so) the waters, including any flora and fauna dependent on the aquatic environment of the waters, to their state immediately before the matter became present in the waters.

(3) In a case where the matter appears to be likely to enter the controlled waters, the Agency shall be entitled to carry out works and operations for the purpose of preventing it from doing so.

(4) The Agency shall be entitled to carry out investigations for the purpose of establishing any of the following—

- (a) the nature of the matter,
- (b) the source of the matter;

(a) OJ No L327, 22.12.2000, p.1. Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy.

- (c) the nature and effects of any pollution caused or likely to be caused by the presence of the matter; and
 - (d) the identity of any responsible persons.
- (5) Without prejudice to the power of the Agency to carry out those investigations, the powers conferred by subsection (2) or (3) shall only be exercisable in a case where—
- (a) the Agency considers it necessary to carry out forthwith any works or operations falling within that subsection; or
 - (b) it appears to the Agency, after reasonable enquiry, that no responsible person can be found on whom to serve a works notice.
- (6) In this section “responsible person” means a person who has caused or knowingly permitted the matter—
- (a) to be present in the controlled waters; or
 - (b) to be at a place from which it was likely, in the opinion of the Agency, to enter the controlled waters.

Other works and operations in respect of harm to controlled waters

161ZA.—(1) This section applies where it appears to the Agency that any controlled waters are being or have been harmed, or are likely to be harmed, by any event, process or other source of potential harm (and it is immaterial whether the source of potential harm has been identified).

(2) In this section “harm” means any adverse impact on the condition of any hydromorphological quality element affecting the controlled waters that would be likely to prevent the achievement of the environmental objectives applicable to the controlled waters (whether by itself or in combination with other factors), other than an adverse impact caused by the entry into or presence in those waters of any poisonous, noxious or polluting matter or waste matter.

(3) In subsection (2) “environmental objectives” and “hydromorphological quality element” have the same meaning as in the Water Framework Directive.

(4) The Agency shall be entitled to carry out works and operations for any of the following purposes (so far as it is reasonably practicable to achieve them)—

- (a) removing the source of potential harm;
- (b) preventing any harm or further harm being caused to the controlled waters;
- (c) in a case where the controlled waters are being or have been harmed—
 - (i) remedying or mitigating the effects of the harm;
 - (ii) restoring the waters, including any flora and fauna dependent on the aquatic environment of the waters, to their state immediately before any harm was caused.

(5) The Agency shall be entitled to carry out investigations for the purpose of establishing any of the following—

- (a) the source of any harm or potential harm to the controlled waters;
- (b) the nature and effects of any harm caused or likely to be caused to those waters; and
- (c) the identity of any responsible persons.

(6) Without prejudice to the power of the Agency to carry out those investigations, the powers conferred by subsection (4) shall only be exercisable in a case where—

- (a) the Agency considers it necessary to carry out forthwith any works or operations falling within that subsection; or
- (b) it appears to the Agency, after reasonable enquiry, that no responsible person can be found on whom to serve a works notice.

(7) In this section “responsible person” means a person who has caused or knowingly permitted—

- (a) any harm to be caused to the controlled waters; or
- (b) a source of potential harm to exist that is likely, in the opinion of the Agency, to cause harm to the controlled waters.

Works and operations for improving controlled waters

161ZB.—(1) This section applies where it appears to the Agency that—

- (a) the condition of any hydromorphological quality element affecting any controlled waters is unsatisfactory; and
- (b) it is possible to improve the hydromorphological quality element by carrying out works or operations.

(2) For the purposes of this section the condition of a hydromorphological quality element affecting the controlled waters is unsatisfactory if (whether by itself or in combination with other factors) if it is likely to prevent the waters from achieving the applicable environmental objectives.

(3) In this section “environmental objectives” and “hydromorphological quality element” have the same meaning as in the Water Framework Directive.

(4) The Agency shall be entitled to carry out works and operations for the purpose of improving the condition of the hydromorphological quality element in question with a view to achieving (or contributing to the achievement of) the applicable environmental objectives.

(5) The Agency shall be entitled to carry out investigations for the purpose of establishing why the condition of the hydromorphological quality element in question is unsatisfactory.

(6) Without prejudice to the power of the Agency to carry out those investigations, the powers conferred by subsection (4) shall only be exercisable if it appears to the Agency that it is unable to secure that the necessary works or operations are carried out by exercising its powers under section 161 or 161ZA or by serving a works notice on any responsible person.

Sections 161 to 161ZB: supplementary

161ZC.—(1) Nothing in sections 161 to 161ZB shall entitle the Agency to impede or prevent the making of any discharge in pursuance of a consent given under Chapter 2 of Part 3 of this Act.

(2) Where the Agency carries out any works, operations or investigations under any of the powers conferred by section 161 or 161ZA it shall, subject to subsection (3), be entitled to recover the expenses reasonably incurred in doing so from any responsible person (within the meaning of the section conferring the powers in question).

(3) No expenses are recoverable from a person for any works, operations or investigations in respect of water from an abandoned mine or an abandoned part of a mine which that person permitted to enter any controlled waters or to reach a place from which it was likely, in the opinion of the Agency, to enter any controlled waters.

(4) Subsection (3) does not apply to the owner or former operator of any mine or part of a mine if the mine or part in question became abandoned after 31st December 1999.

(5) Subsections (3B) and (3C) of section 89 apply in relation to subsections (3) and (4) as they apply in relation to subsections (3) and (4A) of that section.

(6) Nothing in sections 161, 161ZA and 161ZB—

- (a) derogates from any right of action or other remedy (whether civil or criminal) in proceedings instituted otherwise than under any of those sections; or

(b) affects any restriction imposed by or under any other enactment, whether public local or private.

(7) In this section—

“expenses” includes costs;

“mine” has the same meaning as in the Mines and Quarries Act 1954;

“works notice” means a notice under section 161A.

(8) In sections 161, 161ZA and 161ZB and this section “controlled waters” has the same meaning as in Part 3 of this Act and in sections 161ZA and 161ZB, and “Water Framework Directive” has the same meaning as in section 93(7) of this Act.

Notices requiring persons to carry out works and operations

161A.—(1) Where it appears to the Agency that—

(a) any poisonous, noxious or polluting matter or any waste matter is or has been present in, or is likely to enter, any controlled waters (so that section 161 applies), or

(b) any controlled waters are being or have been harmed, or are likely to be harmed, by any event, process or other source of potential harm (so that section 161ZA applies),

the Agency shall be entitled to serve a works notice on any responsible person.

(2) In this section “responsible person” has the same meaning as in section 161 or 161ZA) (as the case may be).

(3) For the purposes of this section a works notice is a notice requiring the person on whom it is served to carry out such works or operations as may be specified in the notice.

(4) The works or operations that may be so specified are works or operations which may be carried out under section 161(2) or (3) or section 161ZA(4) (as the case may be).

(5) Where the Agency has carried out any such investigations as are mentioned in sections 161(4) or 161ZA(5) and serves a works notice on a responsible person in connection with the matters to which the investigations relate it shall (unless the notice is quashed or withdrawn) be entitled to recover from that person the costs or expenses reasonably incurred in carrying out those investigations.

(6) The appropriate national authority may, if it thinks fit in relation to any person, give directions to the Agency as to whether or how it should exercise its powers under this section or section 161AA.

(7) In this section and sections 161AA and 161AB “controlled waters” has the same meaning as in Part 3 of this Act.

Works notices: form etc

161AA.—(1) A works notice—

(a) must specify the periods within which the person on whom it is served is required to do each of the things specified in the notice; and

(b) is without prejudice to the powers of the Agency to carry out any works or operations under section 161(5)(a) or 161ZA(6)(a).

(2) Before serving a works notice on any person, the Agency shall reasonably endeavour to consult that person concerning the works or operations which are to be specified in the notice.

(3) The appropriate national authority may by regulations make provision for or in connection with—

(a) the form or content of works notices;

- (b) requirements for consultation, before the service of a works notice, with persons other than the person on whom that notice is to be served;
- (c) steps to be taken for the purposes of any consultation required under subsection (2) or regulations made by virtue of paragraph (b); or
- (d) any other steps of a procedural nature which are to be taken in connection with or in consequence of the service of a works notice.

(4) A works notice shall not be regarded as invalid or as invalidly served by reason only of a failure to comply with the requirements of subsection (2) or of regulations made by virtue of paragraph (b) of subsection (3).

(5) In this section and section 161A, “appropriate national authority” means—

- (a) in relation to England, the Secretary of State; and
- (b) in relation to Wales, the Welsh Ministers.

(6) The power to make regulations under this section shall be exercisable by statutory instrument subject—

- (a) in the case of regulations made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament; and
- (b) in the case of regulations made by the Welsh Ministers, to annulment in pursuance of a resolution of the National Assembly for Wales.

(7) In this section,—

- (a) paragraph (1) of section 219 does not apply; and
- (b) in paragraph (2) of that section, references to “the Ministers” or the “the Secretary of State” shall be taken to be references to the appropriate national authority.

Works notices: exceptions etc

161AB.—(1) Nothing in section 161A shall entitle the Agency to require the carrying out of any works or operations which would impede or prevent the making of any discharge in pursuance of a consent given under Chapter 2 of Part 3 of this Act.

(2) No works notice shall be served on any person requiring him to carry out any works or operations in respect of water from an abandoned mine or an abandoned part of a mine which that person permitted to enter any controlled waters or to reach a place from which it was likely, in the opinion of the Agency, to enter any controlled waters.

(3) Subsection (2) does not apply to the service of a notice on the owner or former operator of any mine or part of a mine if the mine or part in question became abandoned after 31st December 1999.

(4) Subsections (3B) and (3C) of section 89 apply in relation to subsections (2) and (3) as they apply in relation to subsections (3) and (4A) of that section.

(5) In this section “mine” has the same meaning as in the Mines and Quarries Act 1954.”

Amendment of the Anti-Pollution Works Regulations 1999

6.—(1) Regulation 2 of the Anti-Pollution Works Regulations 1999(a) is amended as follows.

(2) For paragraphs (a) and (b), substitute—

“(a) in the case of—

- (i) a potential pollution incident, describe the nature of the risk to controlled waters, identifying the controlled waters which may be affected and the place from which the matter in question is likely to enter those waters, and

(a) S.I. 1999/1006.

(ii) harm which is likely to be caused to controlled waters, describe the nature of the risk to controlled waters which may be affected and the event, process or other source which is likely to cause that harm;

(b) in the case of—

(i) an actual pollution incident, describe the nature and extent of the pollution, identifying the controlled waters affected by it, and

(ii) actual harm which is caused to controlled waters, describe the nature and extent of the harm,

in each case identifying the controlled waters which have been affected by the pollution incident or harm;”

(3) In paragraph (f), for “section 161” substitute “sections 161(4) and 161ZA(5)”.

Transfer of Functions

7. Nothing in the amendments and repeals made by these Regulations in sections 93, 94, 95, 96, 161 and 161A of the Water Resources Act 1991 affects functions under any other provision of that Act that have been transferred by or under the Government of Wales Act 1998(a) or the Government of Wales Act 2006(b).

Huw Irranca-Davies

Parliamentary Under Secretary of State

Department for Environment, Food and Rural Affairs

23rd November 2009

Jane Davidson

Minister for Environment, Sustainability and Housing, one of the Welsh

25th November 2009
Ministers

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Water Resources Act 1991 (“the Act”) by making some changes to the power to designate Water Protection Zones (“WPZ”) together with the powers to undertake anti-pollution works and serve notices to undertake such works. The purpose being to ensure that England and Wales are able properly to comply with the obligations imposed by Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy. The Regulations amend the Act in the following ways—

— amending section 93 by—

- extending controls on activities to include to those which cause harm to controlled waters in addition to activities which risk or cause pollution, and
- requiring that the Secretary of State in England or the Welsh Ministers in Wales, be satisfied that it is necessary to regulate activities which the Secretary of State or the Welsh Ministers consider are likely to result in the pollution of, or harm to, controlled waters before making a WPZ order, and

(a) 1998 c.38.

(b) 2006 c.32.

- revoking section 93(2) to remove the exception in relation to nitrates and revoking sections 94, 95, 96(2) and Schedule 12 in consequence;
- substituting new sections 161 to 161AB for sections 161 to 161A for the purpose of—
 - extending controls on activities to include those which cause harm to controlled waters, and
 - enabling the Environment Agency to carry out works where the condition of any hydromorphological quality element of any controlled waters is unsatisfactory;
- making consequential amendments to the Anti-Pollution Works Regulations 1999/1006.

A full impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.