

**Environment, Marine and Fisheries Group (EMFG)  
Protocol on the recovery of costs under the Environmental Liability (Prevention and  
Remediation) Regulations (NI) 2009**

## **1. Introduction**

The Environment, Marine and Fisheries Group (EMFG), which incorporates the Northern Ireland Environment Agency (NIEA), is part of the Department of Agriculture, Environment and Rural Affairs ('the Department'). The Department, through the EMFG as the enforcing authority, intends to recover costs incurred in relation to any preventative and remedial actions taken pursuant to the Environmental Liability (Prevention and Remediation) Regulations (NI) 2009 (ELR), including the costs of measures taken on its behalf.

The purpose of this protocol is to set out EMFG's approach for recovering all reasonable costs incurred; in the prevention of environmental damage, in preventing further environmental damage, in the assessment of environmental damage<sup>1</sup>, and/or in the undertaking of remedial action where EMFG has assessed environmental damage has occurred.

## **2. Legislation**

EMFG intends to recover its costs in cases where an operator has been identified and where the incident is within the scope of The Environmental Liability (Prevention and Remediation) Regulations (NI) 2009 (ELR).

Within ELR there are a number of regulations that empower the EMFG<sup>2</sup> to undertake preventative or remedial actions and to subsequently recover reasonable costs for the actions taken. These powers are contained within Parts 2 and 3 of ELR.

Costs are defined at regulation 21(3) of ELR as administrative, legal and enforcement costs and costs of data collection.

## **3. Aims and Objectives**

This protocol aims to ensure that staff, operators and stakeholders are aware of the position of intent to recover costs under ELR.

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<sup>1</sup> *Environmental damage as defined in regulation 3 of The Environmental Liability (Prevention and Remediation) Regulations (NI) 2009*

<sup>2</sup> *Regulation 8 of The Environmental Liability (Prevention and Remediation) Regulations (NI) 2009 details the enforcing authority as the Department of the Environment. On 25<sup>th</sup> February 2016 the powers of the Department of the Environment were transferred to the Department of Agriculture, Environment and Rural Affairs (DAERA) under Article 8 of The Departments (Transfer of functions) Order (NI) 2016. As a division and legal part of DAERA all references to the Department in the ELR can be read as references to the EMFG.*

To reaffirm that EMFG practices fair regulatory principles and aims to achieve the following objectives when considering cost recovery proceedings under ELR;

- a) To ensure that all incidents are assessed to ascertain if they meet the criteria to pursue cost recovery and that there is a clear, transparent, auditable recording system for the justification and decisions to pursue or not pursue cost recovery in each instance;
- b) To ensure that in cases where the criteria for cost recovery is met that proceedings to initiate this cost recovery commence within the statutory time limits defined in ELR;
- c) To ensure that the operator liable for the activity which caused or contributed to the environmental damage is clearly notified that EMFG intends to recover the costs in the dealing with the incident. This notification must always be made in writing to the operator; and
- d) To ensure there is a system implemented to record all actions instigated, outcomes of all actions and monies received related to all incidents of cost recovery.

#### **4. The Polluter Pays Principle**

This EMFG protocol supports the Departmental enforcement strategy (<https://www.daera-ni.gov.uk/sites/default/files/publications/dard/dard-enforcement-policy.pdf>), particularly that ‘we will always seek to recover appropriate costs and, where possible, ensure that the polluter pays’.

The Polluter Pays Principle informs the EMFG’s approach to cost recovery under ELR. It states that an operator, as defined in the legislation<sup>3</sup>, whose activities cause environmental damage or the imminent threat of such damage, is to be held financially liable. The Polluter Pays principle is also the overarching principle of the EU Environmental Liability Directive (2004/35/EC) and the EU Waste Framework Directive (2008/98/EC).

#### **5. ELR definition of environmental damage**

Environmental damage to land, surface waters, ground waters, marine waters, protected species, natural habitats and Areas of Special Scientific Interest are defined in regulation 3 of ELR, with the damage to species and protected areas further detailed in Schedule 1 to the Regulations.

Incidents of damage refer to damage as defined as a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.

ELR only applies in instances where the EMFG determines that there is either the threat of environmental damage occurring or where it has already occurred.

#### **6. Statutory powers available to EMFG under ELR for cost recovery**

##### **6.1 Statutory powers available to EMFG under ELR Part 2 - Preventing environmental damage**

Statutory powers are available in ELR part 2 to prevent environmental damage and prevent further environmental damage. Where the EMFG uses its powers to undertake measures to ensure that any

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<sup>3</sup> Regulation 2(2) of ELR

duty of an operator, required under ELR part 2, is met, regulation 12 imposes liability on an operator for the EMFG's reasonable costs incurred in discharging a power exercised under regulation 11. This includes reasonable costs involved in preparing a notice or in monitoring compliance with a notice.

## **6.2 Statutory powers available to EMFG under ELR Part 3 - Remediation of environmental damage**

ELR part 3 imposes a duty on the EMFG to establish whether or not environmental damage has occurred, which must be carried out before any further steps under part 3 are carried out.

If environmental damage is established, EMFG shall notify the operator(s) that they are responsible or have contributed to environmental damage and that they are required to submit proposals for the remediation of the damage. Following this process EMFG can issue a remediation notice to the operator(s).

In the exercise of its statutory duties under ELR part 3, and if the EMFG uses its powers to carry out reasonable works, regulation 21(1) imposes liability on an operator for the costs incurred by the EMFG in;

- (a) assessing whether the damage is environmental damage,
- (b) establishing who is the operator,
- (c) establishing what remediation is appropriate( which includes consultations); and
- (d) monitoring the remediation, both during and after the work.

Regulation 21(2) imposes liability on the operator for the costs of the EMFG for any action taken further to regulation 20, i.e. any reasonable works, unless an appeal is successful or the operator is not liable for the action taken.

## **7 Criteria for pursuing costs under the ELR**

The following criteria will be assessed by the EMFG when determining whether to pursue costs under ELR;

- (a) Where the EMFG has taken measures to assess if damage is environmental damage, and/or if the EMFG has taken preventative or remedial actions due to environmental damage;
- (b) Where the EMFG is satisfied that it can adduce sufficient evidence to identify the operator responsible for the environmental damage on the balance of probability;
- (c) It is possible to commence the recovery of costs before a period of 5 years has elapsed since the completion of the measures to which the proceedings relate or the operator liable to carry out the measures is identified, whichever is later; and
- (d) Where the EMFG can provide evidence to account for the costs incurred.

If all the above conditions are met then an application for costs may be made incorporating all costs. As previously outlined regulation 21(3) defines costs and the EMFG considers the following is within the scope of this definition;

- Staff costs associated with the incident
- Resource costs including necessary equipment
- Monitoring and sampling costs both statutory and investigation

- Consultants costs
- Contractor costs

## **8 Desired outcomes of this protocol**

- A robust and consistent approach by EMFG for recovering costs associated with incidents of environmental damage or those incidents of damage that may lead to environmental damage;
- To support the roles and responsibilities of the operator in preventing environmental damage; and
- Effective application of the Polluters Pays Principle to increase the level of cost recovery by the EMFG.

## **9 Contacts**

Any queries in relation to this protocol should be directed to the- **EMFG**

*Address:* Klondyke Building, Cromac Avenue, Gasworks Business Park, Malone Lower, Belfast, BT7 2JA

*Email:* [WRU.Queries@daera-ni.gov.uk](mailto:WRU.Queries@daera-ni.gov.uk)

*Phone:* 0300 200 7856