

STATES OF JERSEY



DRAFT WATER POLLUTION (AMENDMENT No. 3) (JERSEY) LAW 201-

Lodged au Greffe on 24th January 2017
by Minister for the Environment

STATES GREFFE



Jersey

DRAFT WATER POLLUTION (AMENDMENT No. 3) (JERSEY) LAW 201-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Minister for the Environment has made the following statement –

In the view of the Minister for the Environment, the provisions of the Draft Water Pollution (Amendment No. 3) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Deputy S.G. Luce of St. Martin**

Minister for the Environment

Dated: 23rd January 2017

REPORT

Background

Under the Water Pollution (Jersey) Law 2000 (“the Law”), the Minister for the Environment (“the Minister”) acting as the regulator, has the objective, in carrying out his functions under the Law, of improving the quality of water in and around Jersey. This is to be achieved by the prevention, control, reduction and elimination of pollution of controlled waters.

Under the Law, “pollution” includes the introduction directly or indirectly into controlled waters of any substance, or energy, where its introduction results or is likely to result in –

- (a) a hazard to human health or water supplies;
- (b) harm to any living resource or aquatic ecosystem;
- (c) damage to any amenity; or
- (d) interference with any legitimate use of controlled waters.

Note: “controlled waters” include inland waters, groundwater and coastal waters.

The Law has, since its implementation, enabled the Minister (via Parts 4 and 5) to make significant progress in improving the quality of Jersey’s controlled waters. Part 4 of the Law deals with the pollution offences and defences. The primary offence under Article 17(1) is of causing or knowingly permitting pollution of controlled waters. There are further provisions under Part 5 of the Law to authorise, control and limit discharges to controlled waters using a system of discharge permits and certificates.

However, the Law’s powers to prevent, control, reduce or eliminate pollution of controlled waters under Parts 4 and 5 are contingent on the source of the pollution being a point source rather than a diffuse form of pollution.

Point source pollution is characterised by having a source, pathway and receptor. It is therefore also characterised by having an identifiable polluter and a measurable impact on controlled waters. Being able to demonstrate these elements to a high level of proof are a necessary requirement of the pollution offence under Article 17(1).

The “Challenges for the Water Environment in Jersey” Report produced by the States of Jersey’s Department of the Environment in 2014, however, found that pollutants that come from diffuse sources were mainly responsible for the Island’s waters being predominantly of moderate rather than good status. Diffuse water pollution can be caused by a variety of activities that have no specific point of discharge and no specific point of impact. Moreover, diffuse pollution has a cumulative effect that may individually be relatively small, but collectively can be extensive and significant.

Consequently, the (draft) Water Management Plan for 2017–2021, being a 5-year plan to address some of the challenges for the water environment of Jersey, has identified a need for controls to be imposed on certain activities that are associated with inputs of diffuse pollutants that have a detrimental impact on the quality of controlled waters.

Part 3 of the Law, which has not yet been implemented, gives the Minister the powers to set water quality objectives. Under the Law as it currently stands, to meet these objectives the States may by Regulations designate land in Jersey as Water Catchment Management Areas and specify conditions for the prevention, control, reduction or elimination of pollution in controlled waters in those Areas. The Minister can subsequently impose those conditions by means of a Water Catchment Management

Order in order to achieve these objectives. In this way potentially polluting activities can be controlled and regulated.

Therefore, the unused provisions in Part 3 of the Law would enable suitable controls to limit diffuse pollution to be put in place.

However, in order to do this it is first necessary to make some appropriate Amendments to the primary legislation.

The draft amending Law

Basically, the draft amending Law facilitates and simplifies the process of implementing the requisite controls that already exists under Part 3 of the Law. In summary, the amending Law (if enacted) will mean that in future, controls on activities that can cause diffuse pollution will be introduced solely by Ministerial Orders, rather than as at present via a combination of States' Regulations and Ministerial Orders, which is considered to be unnecessarily cumbersome and a protracted process. However, the ability of the Minister to impose such controls will be subject to important safeguards, namely –

- Proposals to introduce Water Management Orders (“WMOs”) will have to be publicly advertised, and those with concerns will have the opportunity to make representations to the Minister beforehand. This is in addition to the existing requirement under the Law that the Minister must consult with other Ministers and stakeholders before introducing WMOs.
- The range of activities that the Minister will be able to control via WMOs that were previously to be specified by States' Regulations are now contained in the Law itself. These controls are limited to those set out in the new Article 14(2), which can only be subsequently changed by States' Regulations.
- Finally, a new defence of “due diligence” will apply in respect of the offence of contravening WMOs. This defence is linked to compliance with an Approved Code of Practice under Article 16 of the Law, which provides practical guidance to those involved with the use and application of fertilisers.

Financial and manpower implications

The amending Law, when enacted, will not have any financial or manpower implications for the States. It is envisaged, however, that the implementation of the Orders pursuant to the amending Law will require 1 FTE to deal with advice and regulatory activity, which has been proposed in the Water Management Plan for Jersey 2017–2021.

Human Rights

The notes on the human rights aspects of the draft Law in the **Appendix** have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX TO REPORT

Human Rights Note on the Draft Water Pollution (Amendment No. 3) (Jersey) Law 201-

These Notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

The Law regulates the use of property and could thus be seen within the general scope of Article 1 of Protocol 1 (“the peaceful enjoyment of his possessions”). The requirement to undertake training for those involved in matters relevant to water pollution from fertilisers, the keeping of records and the making of returns, which might conceivably be seen in terms of Article 8 (“protection of private life”).

However, it is plainly important, particularly on a small Island, to ensure that water is well managed and not polluted. The substantive requirements under the Law will be imposed by Order, and thus be made according to law. If unreasonable, such Orders can be challenged, not least in the States Assembly in the ordinary course of events. The penalties for non-compliance are the same as in the predecessor legislation. The predecessor legislation required a process of engagement with affected parties before Orders were made. That requirement has been dispensed with, which facilitates the making of general Orders – and, indeed, those Orders may cover the entire Island if it is thought useful to do so.

It is noted that the right to compensation from reduction in land value due to the making of Orders is maintained, see Article 45 of the Water Pollution (Jersey) Law 2000, which is subject to minor consequential amendments of no substantive consequence.

In short, even if the regulation of fertilisers and ancillary matters could be seen as falling within the umbrella of European Convention protections, the Law itself is proportionate. This is without prejudice to the need for Orders themselves not to be disproportionately intrusive. However, given the sensitive and technical nature of the subject-matter, the Courts would permit decision-makers the broadest margin of appreciation, and the Minister would be free to apply the precautionary principle when making Orders, i.e. that any measurable risk is too great.

Explanatory Note

This Law would amend the Water Pollution (Jersey) Law 2000 (the “Law”) to change the provisions with respect to water management. These have never had effect because the requisite Regulations and Order under the existing provisions have never been made.

Article 1 provides for the Law to be amended by this Law.

Article 2 substitutes definitions of the new terms “Water Management Area” and “Water Management Order” instead of “Water Catchment Management Area” and “Water Catchment Management Order”. The new terms are substituted also in Article 8 of the Law by *Article 3* and in Article 9 by *Article 4*.

Article 5 adds a proposal to make a Water Management Order to the public notice proposals in Article 10 of the Law. These require publication of a notice of a proposal to make the Order and the affording of an opportunity for a person to make representations in respect of it.

Article 6 removes the reference to Article 15 in Article 13(a) of the Law, reflecting the fact that the Minister will no longer have functions under this Article.

Article 7 substitutes new Articles 14 and 15 of the Law. Instead of the power for the Minister by Order to designate any land as a Water Catchment Area, there is now power for the Minister by Order to designate all or any land in Jersey to be part of a Water Management Area in respect of which certain conditions may be imposed. Instead of these conditions having to be specified in Regulations made by the States, the conditions are specified in Article 14(2) with a power for the States to amend the conditions by Regulations. The provisions requiring notice to be given to every landowner are deleted because of the amendment made by Article 5. The offence provision is modified and a defence of due diligence is added.

Article 8 amends Article 45 of the Law in a way that is consequential on the other changes made.

Article 9 names the Law and provides for it to come into force 7 days after it is registered.



Jersey

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Arrangement

Article

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Jersey

DRAFT WATER POLLUTION (AMENDMENT No. 3) (JERSEY) LAW 201-

A LAW to amend further the Water Pollution (Jersey) Law 2000.

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Water Pollution (Jersey) Law 2000 amended

The Water Pollution (Jersey) Law 2000¹ is amended in accordance with the following provisions of this Law.

2 Article 1 amended

In Article 1(1) for the definitions “Water Catchment Management Area” and “Water Catchment Management Order” there shall be substituted the following definitions –

“ ‘Water Management Area’ means a geographical area designated by a Water Management Order;

‘Water Management Order’ means an Order made under Article 14(1)”.

3 Article 8 amended

For Article 8(2)(d) there shall be substituted the following sub-paragraph –

“(d) Water Management Areas and Water Management Orders;”.

4 Article 9 amended

In Article 9(2)(a) the word “Catchment” shall be deleted.

5 Article 10 amended

In Article 10(1) after sub-paragraph (a) there shall be inserted the following sub-paragraph –

“(aa) a proposal to make a Water Management Order;”.

6 Article 13 amended

In Article 13(a) for the words “Articles 14, 15 and 16” there shall be substituted the words “Articles 14 and 16”.

7 Articles 14 and 15 substituted

For Articles 14 and 15 there shall be substituted the following Articles –

“14 Water Management Orders

- (1) The Minister may by an Order known as a “Water Management Order” –
 - (a) designate all or any land in Jersey to be part of one or more geographical areas for the purposes of this Law, to be known as ‘Water Management Areas’; and
 - (b) impose in respect of –
 - (i) a Water Management Area, or
 - (ii) any part of such an Area,restrictions and requirements on business activities or operations for the prevention, control, reduction or elimination of pollution in controlled waters or of the risk of pollution in controlled waters.
- (2) However, the restrictions and requirements that the Minister may impose in a Water Management Order must consist of or relate to any of the following –
 - (a) the importation, sale or purchase of fertilizers;
 - (b) the storage of fertilizers;
 - (c) measures concerned with or that implement the planning, and management of the use of fertilizers;
 - (d) the calibration of equipment to be used for the application of fertilizers;
 - (e) the application or use of fertilizers on land, including the permitted concentration of fertilizers, the times of the year when fertilizers may be used and any geographical, terrestrial or meteorological conditions affecting their use;
 - (f) the establishing of protection zones in the vicinity of controlled waters where the application or use of fertilizers may be restricted or prohibited;
 - (g) soil management measures;
 - (h) the training of individuals involved in any relevant matter;

- (i) the keeping of adequate records to be available for inspection by the Minister in relation to any relevant matter; or
- (j) the making of returns to the Minister in respect of any relevant matter.

(3) The States may by Regulations amend paragraph (2) so as to amend any matter to which a restriction or requirement must consist of or relate to.

(4) In this Article –

‘fertilizer’ means a chemical or natural substance that is added to soil to improve its productivity;

‘relevant matter’ means a matter mentioned in paragraph (2)(a) to (g).

15 Contravention of Water Management Orders

- (1) A person who intentionally contravenes a Water Management Order is guilty of an offence and liable to imprisonment for 2 years and to a fine.
- (2) Where a person is charged with an offence under paragraph (1) it shall be a defence for the person to prove that he or she took all reasonable precautions and exercised due diligence to avoid the commission of the offence.
- (3) For the purposes of paragraph (2) –
 - (a) the fact that a person conforms in a material way to an approved code of practice is admissible as evidence that the person is conducting himself or herself reasonably and with due diligence in that way; and
 - (b) the fact that a person fails in a material way to conform to an approved code of practice is admissible as evidence that the person is not conducting himself or herself reasonably and with due diligence in that way.”.

8 Article 45 amended

In Article 45 –

- (a) for paragraph (1)(a) there shall be substituted the following sub-paragraph –
 - “(a) any person with a proprietary interest in any land suffers any loss by way of reduction in the value of the person’s interest or by way of the disturbance of business carried on by the person on that land, in consequence of a Water Management Order; or”;
- (b) in paragraph (5)(b) for the words “condition in respect of land by a Water Catchment Management Order” there shall be substituted the words

“restriction or requirement in respect of land by a Water Management Order”.

9 Citation and commencement

This Law may be cited as the Water Pollution (Amendment No. 3) (Jersey) Law 201- and shall come into force on the 7th day after its registration.

¹ *chapter 27.800*