

Explanatory Memorandum to the Environmental Damage (Prevention and Remediation) (Amendment) (Wales) Regulations 2015

This Explanatory Memorandum has been prepared by Natural Resources Department and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Environmental Damage (Prevention and Remediation) (Amendment) (Wales) Regulations 2015 and I am satisfied that the benefits outweigh any costs.

Carl Sargeant
Minister for Natural Resources

17 June 2015

1. Description

This instrument amends the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (“the 2009 Regulations”).

Regulation 2 of this instrument amends the 2009 Regulations to implement the changes to the Environmental Liability Directive introduced by Article 38 of the Offshore Safety Directive (OSD) (2013/30/EU¹) and amending Directive 2004/35/EC.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

None

3. Legislative background

The Regulations are to be made pursuant to section 2(2) of the European Communities Act 1972 (ECA). The ECA allows for a choice of procedure pursuant to which the Regulations are to be made. Ministerial agreement has been given to use the negative procedure. This is appropriate as the discretion of the Welsh Ministers over the content of the subordinate legislation is limited given that we are transposing an EU law obligation.

Section 59 of the Government of Wales Act 2006 (GOWA) enables Welsh Ministers to be designated for the purposes of section 2 (2) of the European Communities Act 1972 (the ECA 1972).

Section 2 (2) of the ECA 1972 enables designated Ministers or departments to implement EU obligations and rights.

Article 3 of European Communities (Designation) (No2) Order 2014 designates the Welsh Ministers for the purposes of section 2(2) of the ECA 1972 in relation to the prevention and remedy of environmental damage.

4. Purpose & intended effect of the legislation

The OSD aims to reduce the potential for major accidents relating to offshore oil and gas activities, limit their impact on the environment and coastal economies and further improve safety standards for offshore workers. Department of Energy & Climate Change (DECC), working closely with the Health and Safety Executive (HSE) as the lead regulator, are responsible for transposing the great majority of the OSD by the deadline of 19 July 2015.

However, Article 38 of the OSD applies to all activities offshore, not just those relating to oil and gas. In essence, it extends the scope of the Environmental Liability Directive (2004/35/EC) (ELD) so as to include damage to marine waters as defined in the Marine Strategy Framework Directive (Directive 2008/56/EC). The

¹ [Directive 2013/30/EU on safety of offshore oil and gas operations and amending Directive 2004/35/EC](#)

ELD was transposed in Wales by the Welsh Ministers pursuant to the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (the 2009 Regulations). Article 3 of European Communities (Designation) (No2) Order 2014 (Designation Order) enables the Welsh Ministers to transpose Article 38 of the OSD out to a limit of 12 nautical miles measured from coastal baselines. The Secretary of State is responsible for transposition of Article 38 in the area beyond 12 nautical miles.

It is necessary for the Welsh Ministers to amend the 2009 Regulations in order to transpose Article 38.

The ELD requires operators (which includes the holders of permits and persons that control economic activities) to prevent environmental damage and, if such damage is caused, to remedy it to the standards set out in the ELD. Under the 2009 Regulations, there are three types of environmental damage: land; water; and protected species, natural habitats or a Site of Special Scientific Interest (SSSI).

In so far as water is concerned, environmental damage under the 2009 Regulations means a significant adverse effect on the status of a body of surface water or groundwater as defined by the Water Framework Directive and only applies to surface waters and ground waters within the land mass of Wales and the sea up to a limit of one nautical mile measured from coastal baselines in Wales. To transpose Article 38 of the OSD, the scope of the 2009 Regulations needs to be expanded to include a new, additional type of damage: environmental damage to marine waters. This is defined in the Marine Strategy Framework Directive (MSFD) to mean damage such that the environmental status of the marine waters is significantly adversely affected. The instrument is intended to amend the 2009 Regulations so as to transpose the Article 38 of the OSD.

5. Consultation

Welsh Government consulted upon how the 2009 Regulations will be amended to extend their scope to marine waters and explain the division of responsibilities in enforcing the new arrangements. Respondents were asked whether they had any comments on how government proposed to transpose Article 38 of the OSD in the way described.

In conjunction with Defra, Welsh Government ran an eight week consultation from 28 July to 21 September 2014. Comments were sought from operators involved in offshore activities and other relevant stakeholders operating within the marine environment. Over 200 organisations in England and Wales were alerted to the consultation exercise. Nine responses were received: two from companies in the offshore oil and gas industry; three from Non-Governmental Organisations (NGOs); three from regulators; and one from a private consultant. There was broad support for the proposals. Not all respondents commented on all the proposals. A list of respondents is available below. The Government response to the consultation as well as a summary of the consultation responses is available at [annex 1](#).

Respondents to the consultation:

- ConocoPhillips UK
- Environment Agency
- Jan Brooke
- Joint Nature Conservation Committee
- Marine Management Organisation
- Natural Resources Wales
- Oil & Gas UK
- RSPB
- Wildlife and Countryside Link

The guidance supporting the new Regulations will be updated to reflect their wider scope and will be available in advance of the transposition deadline, 19 July 2015.

PART 2 – REGULATORY IMPACT ASSESSMENT

In developing the UK Impact Assessment, Defra held a workshop with a number of representatives from regulators and the business sector to determine the potential additional liability from implementing Article 38 of the OSD. The discussion focused on the likelihood of an incident occurring that would trigger the high thresholds of environmental damage to marine water; and the potential additional liability for those businesses operating offshore.

Neither business representatives nor regulators could think of any case in the past 50 years that would have triggered the new threshold. The workshop concluded that it was extremely unlikely that an event would occur which would be caught by the extended MSFD definition but which would not already be caught by the existing ELD definition. The average probability of such an event occurring in the **UK** in a year was considered to be between 0 (i.e. never) and 0.02 (i.e. a once every fifty years event).

There would be some small familiarisation costs associated with businesses understanding the regulatory requirements.

The conclusions from the meeting were fed into the central Impact Assessment being prepared by DECC/HSE on behalf of the UK.

Were such an event to occur, there would be a cost to business to address the damage caused. Evidence from across the EU suggests that the cost for addressing damage has ranged from £2,000 to £2.1 million, with the latter taken as the upper estimate for potential costs. Given the average probability identified above, the estimated average annual cost to business in the **UK** is between £0 and £42,000.

Since the impacts identified in the paras above are at the UK level, the probability of an event occurring in Wales (and therefore the estimated average annual cost) would be expected to be even lower.

A copy of the Impact Assessment is available at [annex 2](#).