

SL(5)327 – The Environmental Damage (Prevention and Remediation) (Wales) (Amendment) (EU Exit) Regulations 2019

Background and Purpose

These Regulations make amendments to the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (S.I. 2009/995) (W.81) (the “2009 Regulations”). These changes are being made in exercise of the powers conferred by paragraph 1(1) of Schedule 2 to the European Union (Withdrawal) Act 2018, to address failures of retained EU law to operate effectively following the UK’s withdrawal from the European Union.

Procedure

Negative.

Technical Scrutiny

One point is identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing order 21.2 (v) - that for any particular reason its form or meaning needs further explanation

Regulation 2(4) amends paragraph 1(1)(e) of Schedule 1 to the 2009 Regulations, so as to substitute a reference to “or European Union-wide” with “national or in their natural range”. It is unclear whether national is a reference to Wales, or to the UK.

Paragraph 1(1)(e), before amendment by this instrument, states as follows:

1.— Damage to protected species and natural habitats

(1) In the case of protected species or natural habitat (other than damage on a site of special scientific interest to which paragraph 4 applies) the damage must be such that it has a significant adverse effect on reaching or maintaining the favourable conservation status of the protected species or natural habitat taking into account—

...(e) the role of the particular individuals or of the damaged area in relation to the species or to the habitat conservation and the rarity of the species or habitat assessed at the relevant level whether local, regional or European Union-wide; ...

No definition of “national” is provided in the 2009 Regulations or in these Regulations. The Explanatory Memorandum accompanying these Regulations also does not explain what “national” means in this context. Paragraph 4.8 of the Explanatory Memorandum states as follows:

4.8 The changes made to ensure that it operates effectively include the removal of references to the “EU”, “Union” and “the Commission” and replaced with “the United Kingdom”. It also removes a reference to assessing environmental damage in Schedule 1 by replacing “European wide”, with “national or in their natural range”.



Merits Scrutiny

The following point is identified for reporting under Standing Order 21.3 in respect of this instrument.

1. Standing Order 21.3(ii) - that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly

A draft of these Regulations was laid before the Assembly for sifting in accordance with paragraph 4 of Schedule 7 to the European Union (Withdrawal) Act 2018. The Committee agreed that the negative procedure was the appropriate procedure for these Regulations.

Implications arising from exiting the European Union

The 2009 Regulations will become part of retained EU law on exit day, having been made under section 2(2) of the European Communities Act 1972.

Government Response

The Committee has raised a reporting point under Standing Order 21.2(v) requiring further clarification on whether the term 'national' in the amending regulations refers to Wales or the UK.

Welsh Government lawyers discussed and considered this point at length with DEFRA counterparts. In short, we consider 'national' to refer to the UK, with the term 'regional' which precedes that term, meaning Wales.

It was considered appropriate to amend the term 'European Union-wide' by including a reference to 'natural range' to reflect the changes made to the regulations which transpose the Habitats Directive. It is acknowledged that 'natural range' goes beyond the UK and potentially the EU; although it is also considered that it is no more difficult to make assessments on that level than it is on a EU level. Therefore, it was considered necessary to bridge the gap between 'regional' (which we considered to be Wales) and 'natural range', hence the inclusion of 'national' which is considered to be the UK.

In practice, we do not consider that the range of considerations to be taken into account under paragraph 1(1)(e) is reduced and the change in terminology will not affect how this is undertaken in practice.

Legal Advisers

Constitutional and Legislative Affairs Committee

26 February 2019

