EXPLANATORY MEMORANDUM TO

THE OFFSHORE ENVIRONMENTAL CIVIL SANCTIONS REGULATIONS 2018

2018 No. XXXX

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy's Offshore Petroleum Regulator for Environment and Decommissioning (OPRED) and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument will allow OPRED to impose civil sanctions on offshore companies ("operators") engaged in hydrocarbon-related activities within the regulated zone (the United Kingdom Continental Shelf and relevant UK territorial waters) who breach specified existing environmental legislation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The draft instrument was**: (i)** laid before Parliament in draft on 29 March 2018; and **(ii)** debated by both Houses.

3.2 The instrument will enter into force on the next Common Commencement Date of 1 October 2018.

Other matters of interest to the House of Commons

3.3 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

4.1 The Secretary of State has existing powers to create criminal offences under article 2 of The Merchant Shipping (Oil Pollution Preparedness, Response and Cooperation Convention) Order 1997; sections 2 and 3 of The Pollution Prevention and Control Act 1999; and section 2(2) of The European Communities Act 1972. These powers have already been exercised to create criminal offences and no changes to existing criminal offences are proposed. The Secretary of State now proposes to provide for civil sanctions as an alternative to criminal prosecution in relation to these offences.

4.2 For offences created under article 2 of The Merchant Shipping (Oil Pollution Preparedness, Response and Cooperation Convention) Order 1997 and sections 2 and 3 of The Pollution Prevention and Control Act 1999 the Secretary of State will exercise the same powers, as expanded by section 62 of The Regulatory Enforcement and Sanctions Act 2008 (RESA), to provide for financial civil sanctions (the RESA offences). For the purposes of the offences created under section 2(2) of the European Communities Act 1972 the Secretary of State will exercise the same power to provide for financial civil sanctions (the ECA offences).

4.3 In relation to both the RESA offences and the ECA offences the process will be the same to ensure consistency. Therefore the instrument complies with the requirements relevant to an instrument made by virtue of section 62 of RESA. Each of the offences for which provision has been made to impose civil sanctions is an offence which is triable both summarily and on indictment. None of the penalties allowed in the instrument breach the limits imposed by RESA.

4.4 The instrument makes provision for civil sanctions; it does not create any new offences. In relation to the ECA offences, civil sanctions are not covered by the restriction on the exercise of the use of section 2(2) of the European Communities Act 1972 in paragraph 1(d) of Schedule 2 to that Act. That restriction applies to the creation of new criminal offences.

5. Extent and Territorial Application

5.1 The instrument extends to the whole of the United Kingdom.

5.2 The instrument applies to the "regulated zone" which ostensibly means the areas that consist of**:**

(a) the area of sea within the seaward limits of the UK territorial sea, other than the Scottish inshore region (as defined in Section 322 of the Marine and Coastal Access Act 2009); and

(b) the area of sea within the limits of the UK sector of the Continental Shelf.

6. European Convention on Human Rights

6.1 Claire Perry, Minister of State for Energy and Clean Growth, has made the following statement regarding Human Rights**:**

In my view the provisions of the Offshore Environmental Civil Sanctions Regulations 2018 are compatible with the Convention rights.

7. Policy background

7.1 Other enforcement methods available to OPRED at present are detailed in the relevant legislation and include; the serving of an Enforcement or Prohibition Notice, Revocation of Permit and referral to the relevant authorities for consideration of Prosecution. Prosecutions are costly and time consuming and ultimately, the decision whether to bring criminal proceedings lies with external prosecuting authorities, not OPRED.

7.2 The need for the instrument has arisen due to a number of contraventions of environmental Regulations going unpunished as a result of OPRED's lack of a proportionate enforcement response. The introduction of instrument will provide a more flexible, timely and proportionate enforcement tool by conferring on OPRED the power to impose civil sanctions on operators who are found to have breached existing environmental Regulations.

7.3 The introduction of civil penalties under the instrument will help to ensure that OPRED has the ability to provide a sufficient and proportionate deterrent against non-compliance and tackle the behaviour of those operators who continue to perform poorly or ignore their environmental responsibilities

7.4 The new enforcement measures will help to prevent the non-compliance from becoming persistent and their introduction will ensure that the enforcement measures available to OPRED are consistent with those available to onshore environmental regulators in the UK. The instrument does nothing to change the burden or standard of proof in relation to the offences, so civil sanctions will only be imposed where OPRED is satisfied that a prosecution could have been pursued.

7.5 OPRED however considers that the power to impose civil sanctions should not be seen to undermine the enforcement process or the seriousness of the offences involved. Therefore the instrument does not remove the criminal offences or the ability to prosecute the most serious cases.

7.6 Furthermore, the instrument will contribute to OPRED's aim of ensuring that offshore hydrocarbon-related activities are carried out in a safe, clean and environmentally sound manner. To this end, the principle objective of the instrument will be to achieve a high-level of operator compliance with environmental Regulations. Due to the consultation conducted in January/February, it is also the case that the offshore hydrocarbons sector is aware of the intention to enact the instrument.

Consolidation

7.7 Consolidation of legislation is not relevant to the instrument.

8. Consultation outcome

8.1 OPRED conducted a 4 week consultation on a draft of the instrument. A total of 13 responses were received with the majority being from the offshore hydrocarbons sector.

8.2 OPRED published the Government Response to the consultation on Xx March 2018 addressing the comments received and also giving an undertaking to publish a Guidance Document for instrument and update OPRED's Enforcement Policy.

8.3 A number of minor amendments were made to the instrument as a result of the consultation. An additional 7 days has been given to respond to the notice of intent. Amendments have been made in relation to appeals to ensure that an appeal can be brought for any reason and to confirm that where the commission of an offence is an issue requiring determination, OPRED must prove that offence according to the same burden and standard of proof as in a criminal prosecution

9. Guidance

9.1 OPRED will make available, by 1 November 2018, a Guidance Document on the instrument and the Secretary of State's use of the powers contained in the instrument. OPRED's Enforcement Policy will also be updated (i.e. to further clarify specific elements relating to the existing policy and reflect the introduction of the instrument). These documents will be subject to consultation and if necessary, OPRED would be willing to hold meetings with the offshore hydrocarbons sector to discuss the application of the instrument and aspects appertaining to the revised guidance. The instrument does not alter the existing Enforcement Policy - it gives OPRED the ability to impose civil sanctions as an enforcement option. Nevertheless, OPRED agrees that this is the right time to review the guidance and ensure that it is clear and comprehensive.

10. Impact

No Impact Assessment is required for the instrument as it will not alter existing criminal offences or place extra burdens on the offshore hydrocarbons sector.

11. Regulating small business

11.1 The instrument will apply to a small number of businesses meeting the "small firms" definitions that are engaged in offshore hydrocarbon-related activities.

11.2 It is important to note that environmental compliance is not proportionate to business size. The potential for poorly managed risks leading to an incident with environmental impacts is the same for small businesses as it is for large international companies.

11.3 With respect to the offshore hydrocarbons sector more generally, in the light of previous offshore incidents with environmental impacts (e.g. the Deepwater Horizon disaster in the Gulf of Mexico in 2010) and the subsequent close scrutiny of the UK offshore industry, it is crucial that all businesses operating offshore, regardless of size, are subject to the same regulatory framework to ensure that they continue to provide a high level of protection for the marine environment.

12. Monitoring & review

12.1 Section 67 of RESA provides for the Secretary of State to review the instrument as soon as practicable after the instrument has been in force for 3 years. In light of this requirement, and because the instrument does not have a significant regulatory impact on business, the Secretary of State hereby publishes a statement under Section 28(2)(a) of the Small Business Enterprise and Employment Act 2015 that it is not appropriate to make provision for further review in the instrument.

13. Contact

13.1 Sarah McLean at the Department for Business, Energy and Industrial Strategy's Offshore Petroleum Regulator for Environment and Decommissioning, Tel: 01224 254134 or e-mail: Sarah.McLean@beis.gov.uk can answer any queries regarding the instrument.