EXPLANATORY MEMORANDUM TO

THE OFFSHORE CHEMICALS (AMENDMENT) REGULATIONS 2010

2010 No.

AND

THE OFFSHORE PETROLEUM ACTIVITIES (OIL POLLUTION PREVENTION AND CONTROL) (AMENDMENT) REGULATIONS 2010

2010 No.

1. This explanatory memorandum has been prepared by the Department of Energy and Climate Change (DECC) and is laid before Parliament by Command of Her Majesty.

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

2. Purpose of the Instruments

2.1 The Offshore Chemicals (Amendment) Regulations 2010 ("the Chemicals Regulations 2010") and Offshore Petroleum Activities (Oil Pollution Prevention and Control) (Amendment) Regulations 2010 ("the Oil Regulations 2010") will amend, respectively, the Offshore Chemicals Regulations 2002 ("the Chemicals Regulations 2002") and the Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005 ("the Oil Regulations 2005") for the purpose of making changes to the regulatory framework for offshore chemicals and oil pollution, prevention and control. The key change is in the Chemicals Regulation 2010, to ensure that enforcement action can be taken in respect of non-operational emissions of chemicals, such as accidental leaks or spills.

2.2 The Chemicals Regulations 2010 and Oil Regulations 2010 also contain a number of more minor changes to the Chemicals Regulations 2002 and the Oil Regulations 2005, including changes to reflect the devolution settlement for Wales and to streamline the procedure for renewing or transferring permits, as well as changes to make the two regulatory frameworks more consistent.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Both the Chemicals Regulations 2010 and the Oil Regulations 2010 will come into force on the day after being made. This is a shorter period than might usually be expected for an instrument which creates a criminal offence, but DECC considers that the short time period is justifiable in this case, in view of the importance of being able to take action in relation to offshore pollution incidents, and also the high level of awareness of the proposed changes amongst those affected. As set out in paragraphs 4.2 and 4.3 below, the new offence provision in the Chemicals Regulations 2010 is intended to ensure that appropriate enforcement action can be taken in relation to leaks and spills of offshore chemicals (in relation to the Oil Regulations 2010, as set out below, the changes simply restructure the existing offence provisions, and do not

criminalise any new behaviour). There are a relatively small number of companies engaged in offshore activities in the UK, all of whom should be aware of the coming into force of these provisions, as the companies and their industry association, Oil and Gas UK, have been closely consulted about the creation of the new offence (see paragraphs 8.1 and 8.2), and DECC's Offshore Inspectorate has continued to work with industry since the gap in enforcement powers was identified to ensure that prompt action is taken if a leak or spill of chemicals occurs.

3.2 In addition to the general awareness of the changes made by these Regulations amongst those affected, DECC intends to notify companies as soon as both sets of Regulations have been made that they will come into force the next day. It will do this by emailing its designated contacts in companies which currently hold offshore chemicals permits, and by highlighting the change by placing an alert on the login and news pages of the online system which it maintains for use by offshore companies, the Oil Portal.

4. Legislative Context

4.1 The Chemicals Regulations 2002 regulate the use and discharge of chemicals in offshore petroleum activities, while the Oil Regulations 2005 regulate the discharge of oil from offshore installations. The recent Energy Act 2008 (Consequential Modifications) (Offshore Environmental Protection) Order 2010[1] extended both regulatory regimes to installations used for the offshore storage of natural gas, offshore unloading of Liquefied Natural Gas (LNG) and the offshore storage of carbon dioxide for the purpose of its permanent disposal.

4.2 Both sets of Regulations are made under section 2 of the Pollution Prevention and Control Act 1999 ("the 1999 Act"). Regulations made under that provision are subject to the negative resolution procedure unless they are the first Regulations made under that section, they create an offence or increase the penalty for an existing offence or amend or repeal any provision of an Act (see subsections (7) to (9) of the 1999 Act). As set out below, the Chemicals Regulations 2010 and the Oil Regulations 2010 create a new offence related to the release of an offshore chemical or oil, and both are therefore subject to the affirmative resolution procedure.

4.3 Under the Chemicals Regulations 2002, it is an offence to discharge chemicals used in offshore petroleum activities without a permit. A permit can only be granted in respect of discharges of chemicals which occur during day-to-day oil and gas production, as a discharge is limited to "an operational release of offshore chemicals". This narrow definition means that it is not currently an offence under these Regulations to emit chemicals other than in the course of normal operations, for example as a result of leaks from faulty equipment or spills arising through negligence or poor maintenance. Consequently, enforcement action cannot, at present, be taken under the Chemicals Regulations 2002 in respect of such emissions. In some cases it may be possible to take enforcement action in relation to non-operational emissions of chemicals under the Food and Environmental Protection Act 1985, but there are cases where neither regime would currently apply. The Chemicals Regulations 2010 remedy this by amending the Chemicals Regulations 2002 to

[1] S.I. 2010/1513.

prohibit the release of offshore chemicals (regulation 6), and make the contravention of this provision an offence (regulation 20(a)). The definition of "discharge" is amended to cover any intentional emission of an offshore chemical, and a new definition of "release" is inserted which catches all other emissions (regulation 4(a) and (f)). The effect of these changes is that the Chemicals Regulations 2002 will in future cover the use and discharge of offshore chemicals (which are prohibited unless made in accordance with the terms and conditions of a permit), and releases of chemicals, which are always prohibited.

4.4 The same considerations do not apply to the Oil Regulations 2005, as it is already possible to take enforcement action under that framework in respect of oil spills. However, to ensure that the two regimes are as consistent as possible, the Oil Regulations 2010 amend the 2005 Regulations to mirror the changes to the chemicals regime, by creating the same distinction between the discharge of oil (which is prohibited unless made in accordance with the terms and conditions of a permit), and the release of oil, which is always prohibited.

4.5 A number of other more minor changes are made to both the Chemicals Regulations 2002 and Oil Regulations 2005, in particular to simplify the two regimes and make them more consistent, as set out in paragraphs 7.3 and 7.4 below. In addition, the Chemicals Regulations 2010 and the Oil Regulations 2010 contain some changes necessary to make the regimes compatible with the devolution settlement for Wales. The Chemicals Regulation 2002 and the Oil Regulations 2005 are amended to reflect the transfer of responsibility for most pollution prevention and control matters to the Welsh Ministers by the National Assembly for Wales (Transfer of Functions) Order 2005[2] (see regulation 4(g) and (h) of the Chemicals Regulations 2010 and regulation 4(h) and (i) of the Oil Regulations 2010). The power to make regulations under the 1999 Act in respect of offshore oil and gas exploration and exploitation is reserved, where 'offshore' is defined to mean the territorial sea, but with the exclusion of 'relevant territorial waters' within the meaning of section 104(1)(a) of the Water Resources Act 1991 (the area within three miles of the baseline from which the territorial sea adjacent to Wales is measured). The amendments therefore make clear that the Regulations only apply within a 'relevant area' which extends to the territorial sea adjacent to Wales but excludes the first three miles of those waters.

5. Territorial Extent and Application

5.1 These Regulations extend to the whole of the United Kingdom. They apply to:

- those parts of the sea adjacent to England from the low water mark to the landward baseline of the territorial sea;
- Scottish and Welsh controlled waters, namely the territorial waters adjacent to the United Kingdom, except parts of the sea out to three miles from the baselines from which the territorial sea adjacent to Scotland and Wales is measured (for which the Scottish and Welsh Ministers respectively are responsible)[3]; and

[2] S.I. 2005/1958; those functions were subsequently transferred to the Welsh Assembly Ministers by the Government of Wales Act 2006.

[3] The terms 'Scottish controlled waters' and 'Welsh controlled waters' are defined in the Regulations by reference to the Control of Pollution Act 1974 and the Water Resources Act 1991 respectively. The area which constitutes Scottish controlled waters can be altered by an order made under s.30A(5) of the Control of Pollution Act 1974 (c.40), and there is an equivalent provision in relation to Welsh controlled waters in s.104(4) of the

- to the sea in any area designated within the meaning of section 1(7) of the Continental Shelf Act 1964.

6. European Convention on Human Rights

Charles Hendry, the Minister of State for Energy, has made the following statement regarding Human Rights**:**

In my view the provisions of the Offshore Chemicals (Amendment) Regulations 2010 and the Offshore Petroleum Activities (Oil Pollution Prevention and Control) (Amendment) Regulations 2010 are compatible with the Convention rights.

7. Policy Background

7.1 The 1999 Act gives the Secretary of State the power to make measures to control and prevent pollution. The UK as a contracting party to OSPAR (the Oslo / Paris Convention for the protection of the marine environment of the North East Atlantic) is obligated to implement its Decisions and Recommendations in respect of offshore oil and gas exploration, development and production activities. OSPAR Decision 2000/02 on a Harmonised Mandatory Control System for reducing the use and discharge of offshore chemicals, was implemented through the Chemicals Regulations 2002, which require any person wishing to use or discharge an offshore chemical to obtain a permit from the Secretary of State. The Oil Regulations 2005 provided for the phasing out of the system of exemptions under the Prevention of Oil Pollution Act 1971 and the replacement of that system by a permit system. The Oil Regulations 2005 also introduced more wide-ranging monitoring and investigation powers, and measures designed to achieve a 15% reduction target (by 2006) in the amount of dispersed oil discharged in produced water, as required by OSPAR Recommendation 2001/1 on the management of produced water from offshore installations.

7.2 The amending Regulations contain a key change which is important as it addresses a gap in the current regimes for the regulation of the use of chemicals in offshore activities. As explained in paragraph 4.3, the current wording of the Chemicals Regulations 2002 only covers “discharges” of offshore chemicals which take place in day-to-day petroleum activities, and it is therefore not presently possible to prosecute under those Regulations for emissions that occur through non-operational emissions, such as accidental or negligent spills. By prohibiting the release of offshore chemicals, the Chemicals Regulations 2010 will make it possible to take enforcement action, including the power to issue enforcement and prohibition notices to prevent incidences of releases arising or to stipulate steps for remedying any pollution which has been caused by breaches of the Regulations, and to potentially mount prosecutions where releases have occurred (subject to a possible defence, as set out at paragraph 7.7 below). Although non-operational emission of oil would already constitute an offence under the Oil Regulations 2005, the Oil Regulations 2010 amend those Regulations to distinguish between discharges and releases, and to create a specific offence of releasing oil, in order to ensure that the two regimes remain as consistent as possible, and therefore technically also create a new offence. The

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Water Resources Act 1991. However, to date neither power has been exercised in respect of waters in the territorial sea.

number of prosecutions under the two new offences is expected to be very small (one or two per annum) as having the additional powers is expected to act as a sufficient deterrent and, in any event, regulatory compliance by offshore companies is usually high.

7.3 As set out in paragraph 4.5 above, the Regulations contain a number of more minor changes. A key purpose of the proposed amendments is to simplify the two regimes and ensure that they are consistent, making them easier to administer and for offshore companies to understand and comply with. A number of the changes make the regime more robust (e.g. in relation to the Secretary of State's information gathering powers). The main elements of these changes to the Chemicals Regulations 2002 and the Oil Regulations 2005 are as follows.

7.4 A number of changes are made to the procedures for applying for a permit or varying its terms and conditions, and to what can be included in a permit. So changes are made to ensure that applications for a permit to discharge oil are subject to similar publicity requirements as apply to a permit to use or discharge offshore chemicals (regulation 9 of the Oil Regulations 2010). Both the oil and chemicals regimes are amended to ensure that conditions of permits can stipulate measures to be taken to prevent or limit the consequences of any incident affecting the environment, not just those arising by accident (regulation 7 of the Chemicals Regulations 2010 and regulation 7 of the Oil Regulations 2010). Changes are made to both regimes to simplify the consents process for renewing and varying permits or transferring them to new permit holders (regulations 10 to 12 of the Chemicals Regulations 2010 and regulations 11 and 13 of the Oil Regulations 2010). One noteworthy change to the process of renewal and variation is the removal of the requirement in the Chemicals Regulations 2002 for consultation of a number of statutory consultees (see the definition of 'consultation parties' in regulation 2 of those Regulations). While such bodies must continue to be consulted in relation to the grant of a new permit, experience has shown that the renewal or variation of a permit will often not lead to any change in the environmental impact of the permit holder's activities, and therefore that consultation is unnecessary. Where in practice a renewal or variation could change the environmental impact, the Government will continue to consult these bodies on an informal basis. The Secretary of State will in future be subject to the same obligation to keep a public register of oil permits as for offshore chemical permits (regulation 15 of the Oil Regulations 2010).

7.5 A number of changes are made to clarify what the fees charged by the Secretary of State in relation to the administration of the regulatory regimes can cover. For example, at present regulation 8 of the Chemical Regulations 2002 and regulation 6 of the Oil Regulations 2005 refer to charging fees in respect of "the grant of a permit", but the amending Regulations clarify that fees can be charged in respect of an application for a permit (whether or not the application is subsequently granted) (see regulation 8 of the Chemicals Regulations 2010 and regulation 10 of the Oil Regulations 2010).

7.6 Changes are also made to the provisions for monitoring compliance with both regimes. The existing information gathering power in regulation 15 of the Chemicals Regulations 2002 is extended so that information can be obtained from a wider range of persons and in relation to a wider range of incidents capable of affecting the

7.7 The enforcement powers under both regimes are also amended. There are two changes in particular that are noteworthy:

- First, there are amendments to ensure that the defences available to a person who is charged with an offence under regulation 16 of the Oil Regulations 2005 and regulation 18 of the Chemicals Regulations 2002 are clear and consistent. At the moment, regulation 16(2) of the Oil Regulations 2005 provides that a person charged with an offence has a defence if the contravention or failure could not reasonably have been prevented or was done as a matter of urgency for safety reasons. The defence is available in relation to the offence of discharging oil without a permit, but also offences relating to failure to comply with notices or to provide information. It is qualified by regulation 16(3), as it is not available where the thing done was not a necessary and reasonable act, or if its necessity arose as a result of fault on the part of the defendant. In contrast, while a similar defence is available under regulation 18(2) of the Chemicals Regulations 2002, it is only available in relation to a prosecution for the use or discharge of an offshore chemical without a permit, and is not qualified. Regulation 21 of the Oil Regulations 2010 and regulation 20 of the Chemicals Regulations 2010 make the two defences consistent. The effect of the changes is that the defence covers not only discharge or use without a permit but also releases, but is not available in relation to failures to comply with notices or provide information, since such cases should not give rise to circumstances in which necessity or urgency would justify a contravention. The Chemicals Regulations 2002 are qualified so that, as for the oil regime, the defence is not available to a person whose fault led to the failure.

- Second, in future it will only be possible to bring prosecutions by or with the consent of the Secretary of State or the relevant Director of Public Prosecutions (regulation 20(c) of the Chemicals Regulations 2010 and regulation 21(e) of the Oil Regulations 2010). The purpose of these amendments is to ensure that anyone contemplating bringing a private prosecution in relation to contraventions of these regimes can only do so with consent.

7.8 A number of other more minor changes are also made to the Chemicals Regulations 2002 and the Oil Regulations 2005. For example, as the permit holder may not always be the operator of an offshore installation, provision is made in a number of places to clarify whether obligations are imposed on the permit holder, the operator or both.

The wider policy context

7.9 The Secretary of State made a commitment in the Annual Energy Statement (under Action 10)[4] to carry out a review of the UK offshore regime as soon as the

[4] http://www.decc.gov.uk/assets/decc/what%20we%20do/uk%20energy%20supply/237-annual-energy-statement-2010.pdf

detailed analysis of the factors which caused the Gulf of Mexico (GoM) oil spill incident has taken place. This will look at how the root causes of the Gulf incident can be protected against and determine what more, if anything, needs to be done to reinforce further the Department's regulatory approach. Additionally, DECC are participating in a review commissioned by Oil & Gas UK (the oil and gas industry's leading trade association) of the UK's offshore environmental regulations. This began before the GoM incident, and a report is due later in 2010, when the Department will consider any recommendations for further simplification of the offshore regulatory regime. Since the GoM incident, Oil & Gas UK have also set up the Oil Spill Prevention and Response Advisory Group (OSPRAG) to review the UK's ability to prevent and respond to oil spills (DECC are again participating in this process). It would be inappropriate to pre-empt either the GoM root cause analysis or the Oil & Gas UK review.

7.10 The Chemicals Regulations 2002 implement international law obligations under OSPAR. While the changes are probably not essential to comply with that regime, they do ensure that our regime is more consistent with OSPAR principles.

Consolidation

7.11 DECC intends to place consolidated versions of the Chemicals Regulations 2002 and Oil Regulations 2005 on its Oil & Gas website (at: https://www.og.decc.gov.uk/environment/ocr2002.htm and https://www.og.decc.gov.uk/environment/opaoppcr.htm respectively) in time for the coming into force of the amendments.

8. Consultation Outcome

8.1 A twelve-week consultation on the proposed Chemicals Regulations 2010 and Oil Regulations 2010 was carried out from 24 July to 16 October 2009. This involved stakeholders from the offshore oil and gas industry, trade associations, environmental non-Governmental Organisations (NGOs), the Centre for Environment, Fisheries and Aquaculture Science, Environment Agency, Marine Scotland, Joint Nature Conservation Committee, Scottish Environment Protection Agency and Maritime and Coastguard Agency, and other Government Departments. Eleven responses were received which supported the amending Regulations. Oil & Gas UK submitted the most detailed response and after further discussions with them all points raised were resolved during discussions this year. None of the issues raised during the consultation required any substantive changes to the draft amending Regulations. As environmental issues affecting offshore oil and gas are a reserved matter the Devolved Administrations only needed to be and were kept informed.

8.2 DECC's response to the consultation is available on the Department's Main Consultation and Oil and Gas websites at**:** http://www.decc.gov.uk/en/content/cms/consultations/offshore_regs/offshore_regs.aspx and https://www.og.decc.gov.uk/consultations/index.htm.

9. Guidance

9.1 The existing Guidance Notes are in the process of being revised in the light of the Chemicals Regulations 2010 and Oil Regulations 2010. Subject to Parliamentary approval of the Regulations, the revised Guidance Notes (which formed part of the consultation package on the proposed Regulations) will be made available in parallel with the amending Regulations' entry into force towards the end of the year. Copies of the updated Guidance Notes will be placed on DECC's Oil and Gas website at**:** https://www.og.decc.gov.uk/environment/ocr2002.htm and https://www.og.decc.gov.uk/environment/opaoppcr.htm.

10. Impact

10.1 No Impact Assessments are necessary for the proposed Chemicals Regulations 2010 and Oil Regulations 2010 as they will not add to the cost impact on business. This has been agreed with industry. Accordingly, the assessments made by the Regulatory Impact Assessments (RIAs) in 2002 and 2005 for the two existing Regulations still stand. These RIAs can be accessed at**:** https://www.og.decc.gov.uk/environment/ocr2002.htm and https://www.og.decc.gov.uk/environment/opaoppcr_reg.htm respectively).

11. Regulating Small Business

11.1 The Regulations apply to a very small number of small businesses.

11.2 Of the seventy-two companies who are active in offshore activities in the UK, the vast majority are part of large multi-national companies - with only a very small number meeting the "small firms" definition i.e. having a turnover not exceeding £6.5 million and balance sheet assets up to £3.26 million. These particular companies would only be one of several co-venturers on licensed fields. Where there are several such co-venturers, they make an agreement among themselves governing existing and future operations. Such an agreement is commonly called a Joint Operating Agreement (JOA). Creating or amending a JOA effectively entails the apportionment of operational costs and associated commercial benefits between the parties - usually based on the percentage of a licensed field held by each party and their available resources. However, none of them would be solely responsible for undertaking or meeting the full costs of activities related to oil and gas production. In view of this, the proposed amending 2010 Regulations would have no disproportionate impacts on those companies that fall within the `small firms' definition.

12. Monitoring and Review

12.1 The main success criterion for the amendments will be that they make it possible, where appropriate, to bring prosecutions in respect of unlawful releases of offshore chemicals. In addition, the Regulations are expected to make the regimes for the control and prevention of pollution from oil and offshore chemicals more consistent, and therefore simpler to administer and for companies to understand and comply with. As set above, there is an ongoing review of offshore environmental regulation expected to report later this year, and the Government has also committed to carry out a review in the light of analysis of the GoM incident. More generally, the implementation of the changes made by these Regulations will be monitored on an ongoing basis.

13. Contact

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