EXPLANATORY MEMORANDUM TO

THE ENVIRONMENTAL DAMAGE (PREVENTION AND REMEDIATION) (ENGLAND) (AMENDMENT) REGULATIONS 2017

2017 No. 1177

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of the instrument is to amend the Environmental Damage (Prevention and Remediation) (England) Regulations 2015[1] (the "ED Regulations").

2.2 The principal amendments have the effect of devolving enforcement responsibility under the EU Environmental Liability Directive (2004/35/EC – the "ELD")[2], in Welsh offshore areas, from the Secretary of State to Welsh Ministers.

2.3 The instrument also amends the ED Regulations (in relation to England only) to remove an unnecessary procedural step; and to correct a flaw in the transposition of the Directive.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The ED Regulations 2015 transpose the ELD. They came into force on 19 July 2015.

4.2 The ELD forms part of the EU's legal framework for the protection of the environment, and the remediation of "environmental damage". ("Environmental damage" is not any damage, but has to be significant to be subject to the Directive.) The Directive establishes, on the basis of the "polluter pays" principle, a framework for the prevention or remediation of "environmental damage". An operator that is likely to cause, or has caused "environmental damage" must prevent or remediate that damage (as appropriate), and is liable for related costs. The aim of the Directive is to reduce the potential for significant damage to the environment by incentivising operators to prevent it.

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[1] 2015/810 as amended by 2015/1391.

[2] Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage.

4.3 The ELD did not originally apply to damage to marine waters. Its transposition was a devolved matter, and each part of the UK transposed the Directive by its own set of regulations. In England this was originally effected by the Environmental Damage (Prevention and Remediation) Regulations 2009[3] (the "2009 Regulations").

4.4 Article 38 of the Offshore Safety Directive (2013/30/EU – the "OSD") extended the scope of application of the ELD to damage to marine waters. Member States had to transpose the OSD, including its amendment of the ELD, by 19 July 2015. By that time the 2009 Regulations had been amended by 11 other statutory instruments, so the opportunity was taken to consolidate and replace them, at the same time as transposing the OSD, in the form of the ED Regulations.

4.5 When the ELD was extended to apply to damage to marine waters, the Secretary of State retained responsibility for enforcement in relation to damage in all UK offshore areas other than Scottish offshore areas. (Scotland gained executive responsibilities in Scottish offshore waters in 2010.)

4.6 Because Scottish Ministers do not have legislative competence to regulate out to 200 miles off the Scottish coast, provision for Scottish Ministers to have enforcement responsibility in Scottish offshore areas had to be made in the (English) ED Regulations.

4.7 When the Silk Commission on devolution in Wales published its final recommendations in 2014 (following extensive consultation), these included a proposal (recommendation 18) to extend Welsh Ministers' existing responsibilities for marine conservation and licensing in the Welsh inshore area to the offshore area. The Government committed to implementing that proposal in its response to the Silk Commission[4], following cross-party consultations. This instrument fulfils the Government's commitment in relation to the Directive.

4.8 As Welsh Ministers do not have legislative competence to regulate out to 200 miles off the Welsh coast, provision has to be made once again in the ED Regulations.

4.9 This instrument also makes two sets of further, relatively minor amendments.

4.9.1 First, regulation 18(1)(c) of the ED Regulations provides that an (English) operator that has caused "environmental damage" for the purposes of the Directive must submit proposals to remediate that damage, but only after having been formally notified by the enforcing authority that it must do so. This formal notification serves no practical purpose and is not required by the ELD (or Scottish transposing legislation). We have decided to remove the requirement for notification, which will mean English operators have to submit proposals "without delay", once the regulator has confirmed that "environmental damage" has been caused. This has the benefit of bringing greater consistency between English and Scottish transposing legislation.

4.9.2 Second, regulation 4(2) of, and paragraph 5 of Schedule 1 to the ED Regulations provide that "environmental damage" does not include damage caused by an activity expressly authorised by regulators in accordance with (among other legislation) Part 2 of the Wildlife and Countryside Act 1981 (the "WCA"). When we transposed the ELD, we extended the same level of protection afforded to "European sites"

[3] 2009/153.

[4] Paragraph 2.4.1 of *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (February 2015, Cm 9020)

(regulated by Directives) to all domestic sites of special scientific interest (SSSI). Some SSSIs, but not all, are also European sites. It was thought at the time that this was a practical way of giving effect to Article 2(1) (a) of the ELD. Article 2(1)(a) excludes from the definition of "environmental damage" any damage caused to protected species and natural habitats by acts that have been expressly authorised in accordance with the Habitats Directive (92/43/EEC)[5].

4.9.3 Any WCA consent granted in relation to a SSSI, which was granted after that SSSI had already become a European site, will have been assessed in accordance with the Habitats Directive. However, we have identified that, in a small number of cases, this transposition inadvertently created an implementation deficit.

4.9.4 Where a WCA consent was issued in relation to a SSSI, before that SSSI became a European site, when that SSSI also became subject to the Habitats Directive the consent should in principle have been reviewed, to ensure that it delivered the relevant requirements. If the regulator was satisfied that the consent delivered the requirements, any damage the activities caused, after our implementation of the ELD, would not be "environmental damage".

4.9.5 This review did not, however, happen in all cases. Some holders, which obtained consents with no expiry date, have been able to continue to rely on the consent, over twenty years later, even if what would otherwise constitute "environmental damage" has been caused. The Government has recognised the issue and decided to rectify it, for SSSIs that are also European sites. This instrument makes no change in respect of the effect of WCA consents, in relation to operations on SSSIs that are not also European sites.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

(A) Devolution to Wales

7.1 This instrument fulfils the Government's commitment to implement, in relation to the ELD, recommendation 18 of the Silk Commission. The Government has accepted that it is appropriate for existing executive responsibilities in the Welsh inshore area to be extended to the offshore area. This also reflects, but does not go beyond, the devolution of offshore responsibilities in Scotland.

7.2 We have worked closely with Welsh Government officials in drafting the instrument.

(B) Other amendments

[5] Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora.

7.3 At the same time, we are taking this opportunity to make further, minor amendments to the ED Regulations. These affect England only.

7.4 First, we are removing an unnecessary legal requirement, in order to improve clarity, efficiency and consistency between England and Scotland. In Scotland, where environmental damage has occurred, the liable operator must identify potential remedial measures and submit them to the regulator "without delay". There is no requirement in the ELD for notification of the need to act, and the proposed amendment makes the English and Scottish approaches consistent.

7.5 The amendment will have no additional costs or practical impact on businesses.

7.6 The second set of amendments relates to the definition of "environmental damage". The ELD does not aim to go beyond other EU nature conservation measures. It therefore excludes from its key definition of "environmental damage" any damage caused by an activity, the environmental impact of which has already been assessed and authorised under the Habitats Directive (92/43/EEC).

7.7 When the UK transposed the ELD, the Regulations included a list of environmental consents which were thought to comply with Habitats Directive requirements. Possession of such a consent would mean that if the activity caused any damage to the environment, that damage would not be "environmental damage" for the purposes of the ELD. This list included consents granted under the WCA. In some cases, such consents were granted without an expiry date, and the appropriate review was not undertaken when the SSSI concerned subsequently became a European site. This amendment means that the holder of a WCA consent that has no expiry date, for a SSSI that became a European site after the consent was granted, and which has not been reviewed, will no longer be excluded from the ELD definition of "environmental damage", until such time as the regulator has reviewed the consent.

7.8 This amendment will have little or no immediate impact on businesses. As this amendment corrects an implementation deficit that should never have existed, it does not represent an extension of regulation. We believe only a few owners of grouse moors in England will be affected.

7.9 In these few cases, in the longer term the change could mean that activities such as the burning of blanket bog, where that can be shown to be damaging, could have to cease or result in enforcement action being taken under the ED Regulations. However, that is by no means a foregone conclusion. This amendment does not automatically prevent blanket bog burning. Rather, it requires a proper assessment of the activity's environmental impact. If, having considered such an assessment, the regulator approves the practice, it can continue, and any damage it causes will not be "environmental damage" for ELD purposes.

Consolidation

7.10 This is the second amendment of the ED Regulations. Against the background of EU exit, we do not intend to consolidate the ED Regulations at this time. We will review the situation following EU exit.

8. Consultation outcome

8.1 The primary purpose of this instrument is to bring offshore enforcement responsibilities under the ELD in Wales into line with inshore responsibilities. The Silk Commission consulted extensively in preparing its recommendations, and the

Government engaged in further, cross-party consultations before agreeing to implement the recommendation. As this measure has no significant impact, but is a re-allocation of executive responsibilities, we have not consulted further.

8.2 The other amendments will have no practical impact, or are a necessary correction to an implementation deficit with no immediate or automatic practical impact. We have therefore not consulted on them.

9. Guidance

9.1 Guidance on the Regulations is available at: https://www.gov.uk/government/publications/environmental-damage-prevention-and-remediation-regulations-2009-guidance-for-england-and-wales. We will review and update this guidance at the earliest opportunity. We will also review and revise as appropriate the existing Memorandum of Understanding between regulators.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies from devolution of enforcement responsibilities to Welsh Ministers.

10.2 The impact on the public sector is a transfer of regulatory responsibility from the Secretary of State to Welsh Ministers.

10.3 There is no impact on business, charities or voluntary bodies in England from removing the unnecessary additional step before operators submit proposals for remediation.

10.4 There is no immediate impact on business, charities or voluntary bodies in England from the correction of the implementation deficit. A few operators of grouse moors in England may be affected. Operators who currently hold a non-time limited WCA consent that has not been reviewed for the purposes of the Habitats Directive will need to request an updated written consent from the regulator. If the regulator, having considered that assessment, gives its consent, the activity may continue (subject to any conditions the regulator may impose). Only if the activity is unacceptable under the Habitats Directive will it have to cease.

10.5 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses but is unlikely to add to their existing regulatory burden.

11.2 We do not propose any measures to minimise the impact of the requirements on small businesses.

12. Monitoring & review

12.1 In view of the minimal impact of this instrument, we do not consider it proportionate to make provision for review.

13. Contact

13.1 Duncan Mitchell at the Department of Environment, Food and Rural Affairs, email: duncan.mitchell@defra.gsi.gov.uk can answer any queries regarding the instrument.