EXPLANATORY MEMORANDUM TO

THE ENVIRONMENTAL DAMAGE (PREVENTION AND REMEDIATION) (ENGLAND) (AMENDMENT) REGULATIONS 2019

2019 No. 1285

1. Introduction

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

2. Purpose of the instrument

2.1 This instrument amends the Environmental Damage (Prevention and Remediation) (England) Regulations 2015 (SI 2015 No 810) (the "2015 Regulations"). It introduces a requirement for enforcing authorities to report each established case of environmental damage to the Secretary of State.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is England and:

- as regards damage to surface water and groundwater, waters up to one nautical mile seaward from the baseline in England;
- as regards damage to marine waters, territorial waters and offshore marine waters adjacent to England and offshore marine waters adjacent to the territorial waters of Scotland, Wales and Northern Ireland; and
- as regards damage to protected species or natural habitat, anywhere within marine waters up to the limit of the Exclusive Economic Zone and areas of the seabed out to the limits of the continental shelf.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 The 2015 Regulations transpose the EU Environmental Liability Directive (2004/35/EC) (the "Directive"). The Directive establishes a framework based on the "polluter pays principle" to prevent and remedy "environmental damage".

6.2 Article 18 of the Directive required Member States to report to the EU Commission on their experiences gained in the application of the Directive, by 30 April 2013. The report was required to include the information specified in Annex VI to the Directive. The UK has complied with its Article 18 obligations.

6.3 The EU Commission has developed a multi-annual work programme for the years 2017 to 2020 ("Making the Environmental Liability Directive More Fit For Purpose"), based on the action plan set out in its Article 18 report (COM(2016) 204 final). The EU Commission identified the need to improve the evidence base for the evaluation of the Directive as the first of its three priority areas for the work programme.

6.4 Article 18 of, and Annex VI to the Directive were amended by Article 3 of Regulation (EU) 2019/1010 of the European Parliament and of the Council on the alignment of reporting obligations in the field of legislation related to the environment.

6.5 Article 18 of the Directive, as amended, requires the EU Commission to collect certain information from Member States on their experiences gained in the application of the Directive. The information which the EU Commission must collect is set out in Annex VI to the Directive, as amended, and includes the type of environmental damage, the date of the occurrence or discovery of the damage, and a description of the activity causing the damage.

6.6 The EU Commission must collect the relevant information by 30 April 2022 and every five years thereafter. The EU Commission must carry out an evaluation of the Directive and publish it before 30 April 2023, and every five years thereafter.

6.7 Regulation 17 of the 2015 Regulations requires an enforcing authority, where damage has been caused and there are reasonable grounds for believing that it is, or may be environmental damage, to establish whether or not it is environmental damage. Once the enforcing authority has established that the damage is, in fact, environmental damage, regulation 18 requires the enforcing authority to notify the responsible operator.

6.8 Regulation 2 of this instrument inserts a new regulation 18A into the 2015 Regulations. This requires enforcing authorities to notify the Secretary of State, as soon as reasonably practicable after serving notification on a responsible operator under regulation 18, of the relevant environmental damage. This new requirement applies only where the notification to the responsible operator has been served after regulation 18A has come into force. It does not require enforcing authorities to notify the Secretary of State of environmental damage covered by notifications served before the entry into force of this instrument. The notification provided to the Secretary of State under the new regulation must include the type of environmental damage, the date on which the environmental damage occurred or was discovered, the activity which caused the environmental damage, and such other information as the Secretary of State may reasonably request.

7. Policy background

What is being done and why?

7.1 The new Article 18 obligation, which entered into force on 26 June 2019, is placed on the EU Commission, but Member States will need to supply the Annex VI information to the EU Commission. The UK therefore needs to begin gathering data on confirmed cases of environmental damage as soon as possible.

7.2 In England, the 2015 Regulations already place a duty on enforcing authorities to assess damage, identify and notify the responsible operator, and require proposals for remediation of the damage. Depending on the type and location of the damage, the enforcing authorities for England include the Environment Agency, the relevant local authority, the Marine Management Organisation, and Natural England. In addition, the Secretary of State has enforcement responsibilities for offshore oil and gas-related activities in marine areas (such as the UK Continental Shelf); and for other activities in some marine areas. In carrying out their existing duties under the 2015 Regulations, enforcing authorities will already collect the information specified in the new regulation 18A of the 2015 Regulations.

7.3 In order to comply with the requirements of the amended Directive, all enforcing authorities must be required to report established cases of environmental damage promptly and consistently to the Secretary of State. A mandatory requirement, to report each time an enforcing authority establishes a new case of environmental damage (confirmed by the service of a notification on the responsible operator), will ensure that comprehensive data is obtained. Collating this data will also assist the Secretary of State in carrying out statutory reviews of the 2015 Regulations in accordance with regulation 35.

7.4 This instrument places no additional duties on the enforcing authority beyond reporting the specified information to the Secretary of State, and then only where it has first established that environmental damage has been caused.

7.5 Enforcing authorities are not required to report on any further developments in the case, such as a successful appeal. In practice, Defra will, however, liaise closely with enforcing authorities in relation to cases of environmental damage.

8. European Union (Withdrawal) Act 2018/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 This instrument makes only a minor amendment to the 2015 Regulations and consolidation is not appropriate at this time.

10. Consultation outcome

10.1 There has been no public consultation on this instrument. This instrument introduces no changes in policy or impact on businesses or the public that would make consultation appropriate.

10.2 Implementation of the Directive is a devolved matter, and this instrument amends the law in relation to England (and the marine areas listed in paragraph 4) only. We are

liaising with the Devolved Administrations with a view to delivering a consistent approach across the UK.

11. Guidance

11.1 Guidance is already available at: https://www.gov.uk/government/publications/environmental-damage-prevention-and-remediation-regulations-2009-guidance-for-england-and-wales. Defra will consider making appropriate amendments to this guidance to reflect this instrument.

11.2 Defra will consider in particular providing guidance on (i) how the Secretary of State will use any information provided under the new requirement in the context of any appeals overseen by the Secretary of State; and (ii) how Defra will liaise with enforcing authorities when they make notifications under the new requirement.

12. Impact

12.1 There is no impact on business, charities or voluntary bodies.

12.2 There is no significant impact on the public sector. The UK as a whole encounters very few cases of environmental damage. Where an enforcing authority does establish that environmental damage has been caused, this instrument does not require it to take any additional action, other than to notify the Defra Secretary of State and communicate the minimal information set out in the new regulation 18A of the 2015 Regulations. This will involve minimal officer time and costs. We have consulted relevant Government departments, including submitting a New Burdens Assessment in relation to local authorities to the Ministry of Housing, Communities and Local Government.

12.3 An Impact Assessment has not been prepared for this instrument because it has no impact on business and no significant impact on the public sector.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to mitigate regulatory burdens on small businesses, because this instrument does not alter them.

14. Monitoring & review

14.1 In view of the minimal impact of this instrument, we do not consider it proportionate to make provision for review. Regulation 35 of the 2015 Regulations already requires the Secretary of State to carry out periodic reviews of the 2015 Regulations.

15. Contact

15.1 Duncan Mitchell at the Department for Environment, Food and Rural Affairs (telephone: 07887 821369) or email: duncan.mitchell@defra.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Sarah Swash, Deputy Director for EU Exit and Environmental Regulations at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.3 Rebecca Pow MP, Under Secretary of State for Environment and Rural Opportunities at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.