EXPLANATORY MEMORANDUM TO

THE MARINE WORKS (ENVIRONMENTAL IMPACT ASSESSMENT) (AMENDMENT) REGULATIONS 2015

2015 No. 446

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 this instrument is to amend the Marine Works (Environmental Impact Assessment) Regulations 2007[1] (MWR) to:

- provide that where the Natural Resources Body for Wales (the NRW) is the regulator[2] responsible for licensing certain marine works in Wales, it will also be the appropriate authority[3] responsible for assessing the environmental impacts of those works;

- make supplementary amendments arising from the inclusion of the NRW as an appropriate authority, including the ability for the NRW's reasonable costs incurred in its capacity as appropriate authority to be recovered by means of fees set by the Welsh Ministers; and

- to update references in the MWR to reflect Directive 2011/92/EU[4] of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment, as adopted.

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

3.1 None

4. Legislative Context

4.1 The United Kingdom's obligations under the Environmental Impact Assessment Directive 85/337/EEC (the EIA Directive) in relation to certain marine works are transposed through the MWR, as amended by the Marine Works (Environmental Impact Assessment) (Amendment) Regulations 2011[5]. The MWR define who the appropriate

[1] SI 2007/1518, as amended.
[2] "Regulator" is defined in regulation 2(1) of the MWR
[3] "Appropriate authority" is defined in regulation 2(1) of the MWR.
[4] OJ No L 26; 28.1.2012, p1.
[5] SI 2013/755 also amended the MWR to include the NRW in the definition of "the nature conservation bodies" in regulation 2(1).

authority is, i.e. the body responsible for the exercise of environmental impact assessment (EIA) functions in different circumstances in England, Wales, Northern Ireland and Scotland. The MWR also set out the procedure for assessing the environmental impact of certain marine works before they are licensed by the regulator responsible for marine licensing. Directive 2011/92/EU codifies and repeals Directive 85/337/EC (as amended)[6]. This instrument amends the MWR to update references to the EIA Directive to reflect the 2011 Directive, as adopted.

4.2 The Natural Resources Body for Wales (Establishment) Order 2012[7], established a new statutory body, the NRW, and provided for its purpose, membership, procedure, financial governance and initial functions. On 1 April 2013 an Order[8] was made to include provisions about the modification and transfer of environmental functions to the NRW. The general effect of these amendments is that Welsh devolved functions of the Environment Agency and the Forestry Commissioners and nearly all the functions of the Countryside Council for Wales, are modified and transferred to the NRW making them the regulators. This also includes certain licensing functions of the Welsh Ministers relating to the environment.

4.3 Since vesting of the NRW in April 2013, the Welsh Government has delegated marine licensing functions under Part 4 of the Marine and Coastal Access Act 2009 (MCAA) to the NRW through the Marine Licensing (Delegation of Functions) (Wales) Order 2013[9] (Delegation Order) making the NRW the licensing authority for certain licensing decisions in the Welsh inshore region. In doing so, due to the definition of "appropriate authority" in the MWR, the Secretary of State reverted to being the appropriate authority in relation to a regulatory approval (a marine licence, for the purposes of this amendment) given by the NRW[10].

4.4 This instrument amends the MWR to:

- provide for the NRW to be the appropriate authority responsible for carrying out EIA functions, where it is the regulator responsible for marine licensing;

- to allow the NRW's reasonable costs incurred in its capacity as appropriate authority to be recovered by means of fees to be determined by the Welsh Ministers. The Welsh Ministers can currently determine fees where the Welsh Ministers are the appropriate authority. This instrument will allow Welsh

[6] Directive 2011/92/EU was amended in 2014 by Directive 2014/52/EU of the European Parliament and of the Council of 16th April 2014 (OJ No. L124, 25.4.2014, p.1), which is required to be transposed by 16th May 2017, but (pending such transposition, and by virtue of the exclusion of section 20A of the Interpretation Act 1978 (c.30)), the definition of "the EIA Directive" as amended by this instrument is to be construed without reference to the amending Directive.
[7] SI 2012/1903.
[8] The Natural Resource Body for Wales (Functions) Order 2013 (SI 2013/755).
[9] SI 2013/414.
[10] Some of the EIA functions were delegated to the MMO under an agreement made under s. 14 of the Marine and Coastal Access Act 2009.

Ministers to determine fees where either the Welsh Ministers or the NRW are the appropriate authority;

- replace regulation 10A, which sets out the procedure (where the Marine Management Organisation (MMO) is the appropriate authority) for determining that an EIA is not required where the exemption in Article 2(4) of Directive 2011/92/EU (for exceptional cases) is justified. Under existing regulation 10A, the MMO is not able to apply the exemption without a direction from the Secretary of State to the effect that the exemption can be justified in accordance with Article 2(4). New regulation 10A sets out the procedure to be followed where either the MMO or the NRW is the appropriate authority.

4.5 A Transposition Note for this instrument can be found an Annex 1 to this document.

5. Territorial Extent and Application

5.1 This instrument extends to the United Kingdom. Regulations 3(b) and 5 apply to the United Kingdom.

5.2 Regulations 3(a) and 4 of this instrument relate to the NRW being an appropriate authority and, as such, only apply in relation to Wales as the NRW has marine licensing functions in relation to the Welsh inshore region only.

5.3 Regulation 6 substitutes a new regulation 10A, which only applies where the MMO or the NRW are the appropriate authority, and consequently only applies in relation to England and Wales. Regulation 7 amends regulation 28 of the MWR, which applies to court procedure in Scotland.

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

7.1 The key purpose of the 1985 EIA Directive was to ensure that projects likely to have significant effects on the environment, for example ports and renewable energy projects are made subject to an EIA prior to their authorisation under licensing legislation. The MWR (as amended), which transposed that Directive, provide that the appropriate authority is responsible for considering whether certain activities require an EIA and, for those that do, whether to consent to an activity on the basis of its impact on the environment. Where such consent is refused, a marine licence for the activity cannot be granted by the appropriate licensing authority (referred to as the regulator in the MWR). The 1985 EIA Directive was codified and repealed by Directive 2011/92/EU. Regulations 3(b), 5, 6, and 7 of this instrument update references to reflect the 2011

Directive, as adopted. The 2011 Directive was amended by Directive 2014/52/EU, which is required to be transposed by 16th May 2017, but (pending such transposition, and by virtue of the exclusion of section 20A of the Interpretation Act 1978 (c.30)), the definition of "the EIA Directive" as amended by this instrument is to be construed without reference to the amending Directive.

7.2 This instrument also amends the MWR to reflect that, where the NRW is the regulator responsible for licensing certain marine works in the Welsh inshore region, it will also be the appropriate authority responsible for EIA functions. Regulation 3(a) amends the definition of "appropriate authority" in regulation 2(1) of the MWR to include reference to the NRW. Regulation 4 amends regulation 3(4)(d) of the MWR to allow Welsh Ministers to determine fees in respect of the NRW's reasonable costs incurred in its capacity as appropriate authority. Currently, regulation 3(4)(d) of the MWR allows Welsh Ministers to determine fees only where Welsh Ministers are the appropriate authority. To date, in Wales, the only fees set in relation to the MWR functions are in relation to monitoring costs. Fees that can be charged for monitoring under the MWR are set out in the NRW website[11]. Other marine licensing fees are charged under the MCAA. A fees review for the marine licensing system is currently underway in Wales and revised fees will be set by the Welsh Ministers following consultation. This will include setting fees under the MWR.

7.3 The NRW is a Welsh Government Sponsored Body that was formed in April 2013. It was set up largely to take over the functions of the Countryside Council for Wales, Forestry Commission Wales and the Environment Agency in Wales, as well as certain Welsh Government functions. The main purpose of the NRW is to ensure that the environment and natural resources of Wales are sustainably maintained, sustainably enhanced and sustainably used now and in the future. By virtue of the Delegation Order, NRW undertake the role of marine licensing authority under Part 4 of the MCAA in the Welsh inshore region.

7.4 As a Regulator its purpose is to protect people and the environment including marine, forest and waste industries, and prosecuting those who breach the regulations that they are responsible for. It will therefore be the regulator and the appropriate authority under the MWR and will carry out the EIA consents and decision making for the marine licences it has responsibility for considering.

8. Consultation outcome

8.1 No consultation is required for the purpose of this amending this Regulation as no changes are being made to the policy.

8.2 A consultation on secondary legislation took place in July 2010 in England. The consultation covered a number of instruments being introduced in England where the Secretary of State is the licensing authority and where the functions of the new licensing system were being delegated to the MMO. The consultation sought views on changes

[11] http://naturalresourceswales.gov.uk/apply-and-buy/marine-licensing/marine-licence-fees/?lang=en

proposed to the existing regulations (including the MWR) to reflect the new marine licence requirements under Part 4 of the MCAA. The devolved administrations for Wales, Northern Ireland and Scotland consulted separately on how they would fulfil their licensing responsibilities under the MCAA.

8.3 A more detailed consultation specifically on the MWR on 2 December 2010. The consultation sought views from stakeholders on proposed amendments to national regulations (including MWR) implementing requirements under the EIA Directive and Habitats Directive relating to the approval of marine projects. This was as a consequence of a new marine licensing system being introduced in April 2011 under the Marine and Coastal Access Act 2009 (MCAA) and the Marine (Scotland) Act 2010 (MSA). The consultation also sought stakeholders' views on the fee provisions currently in the MWR (as amended by SI 2011/735). No concerns were raised by stakeholders on this. The amendments made to regulation 3(4)(d) of the MWR by this instrument do not represent a substantive policy change since Welsh Ministers will continue to set fees and may only do so after consultation envisaged in regulation 3(5) of the MWR. For the purpose of that consultation impact assessments were prepared by Defra, Welsh Assembly Government, Department of Environment Northern Ireland, and Scottish Executive.

8.4 There were no significant policy changes from the outcome of both the consultations.

8.5. Under the existing MWR there is a requirement at regulation 3(5) which states that before any fee can be determined, the appropriate authority is required to carry out consultation on the level of fees proposed. The current monitoring fees that relate to the MWR were established under the previous marine licensing regimes (Food and Environment Protection Act, 1985 and Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (Wales) Regulations 2007).

8.6 For the purpose of policy clearance on the proposed amendments, and following advice sought from Parliamentary & Cabinet Business Team, no Cabinet Committee clearance is required if no changes are made to the policy as long at the Devolved Administrations and relevant Government Departments have been consulted. The Devolved Administrations and OGDs have been consulted and no issues were raised. We have also consulted Treasury on the policy clearance at regulation 4 and have received clearance.

9. Guidance

9.1 The NRW and the MMO will publish a short statement to operators via their Stakeholder Forum Groups.

10. Impact

10.1 An Impact Assessment is not required for the purpose of this Regulation as it has no impact on business, charities or voluntary bodies. An Impact Assessment was

previously carried out when the 2007 Regulations were made and is attached to the Explanatory Memorandum at:
http://www.legislation.gov.uk/uksi/2007/1518/memorandum/contents

11. Regulating small business

11.1 The legislation creates no new burdens on small business.

12. Monitoring & review

12.1 This instrument and the MWR may be reviewed in connection with transposition of the 2014 EIA Directive. The transposition deadline for this Directive is 16 May 2017.

13. Contact

Philip Stamp at the Department for Environment, Food and Rural Affairs, Tel: 020 7238 4607 or email: philip.stamp@defra.gsi.gov.uk can answer any queries regarding the instrument. Alternative contact:

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