

# Consultation on Amending the Environmental Liability (Scotland) Regulations 2009 in Scotland to Transpose Article 38 of the Offshore Safety Directive 2013

## Consultation Report

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## Executive Summary

1. The Scottish Government consulted on a draft order to amend the Environmental Liability (Scotland) Regulations 2009. The consultation ran for 8 weeks from 18<sup>th</sup> February 2015 to 14<sup>th</sup> April 2015 and received 4 responses.
2. The purpose of the amendment is to implement Article 38 of Directive 2013/30/EU on the safety of offshore oil and gas operations (OSD). Article 38 extends the scope of the Environmental Liability Directive (2004/35/EC) in the marine environment in relation to marine waters. This transposition in relation to Scottish Territorial Waters forms part of a UK wide exercise to implement the OSD.
3. None of the responses received have resulted in changes to the draft Order. However there have been minor drafting improvements made. These do not change the effect of the Order. This revised Order will be laid before the Scottish Parliament to take effect on 19 July 2015.

## Background

4. Scottish Ministers sought comments on proposals to transpose Article 38 of Directive 2013/30/EU<sup>1</sup> on the safety of offshore oil and gas operations (OSD). Article 38 has extended the scope of the Environmental Liability Directive (2004/35/EC)<sup>2</sup> into the marine environment in relation to marine waters. The Scottish Government produced draft Environmental Liability (Scotland) Amendment Regulations 2015 to transpose Article 38 in Scottish territorial waters which were published as part of the consultation document<sup>3</sup>.
5. The Department for Environment, Food, and Rural Affairs and the Welsh Assembly Government undertook separate consultation exercises in July 2014 on corresponding legislation in relation to marine waters off England and Wales<sup>4</sup>.
6. This consultation also forms part of the wider transposition of the OSD, the principal responsibility for which rests with UK Department of Energy and Climate Change (DECC)<sup>5</sup> and the Health and Safety Executive (HSE)<sup>6</sup>. A related consultation exercise has been run by them to transpose the other parts of the OSD by the deadline of 19 July 2015.
7. The OSD aims to reduce the potential for major accidents relating to offshore oil and gas activities and limit their impacts on the environment and coastal economies and further improve safety standards for offshore workers. It will apply to existing and future offshore installations/operations in waters under Member States' jurisdiction.

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<sup>1</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:178:0066:0106:EN:PDF>

<sup>2</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0035&from=EN>

<sup>3</sup> <http://www.gov.scot/Resource/0047/00470191.pdf>

<sup>4</sup> [https://consult.defra.gov.uk/better-regulations/amending-the-environmental-damage-regulations-2009/supporting\\_documents/environmentaldamageconsultdoc.pdf](https://consult.defra.gov.uk/better-regulations/amending-the-environmental-damage-regulations-2009/supporting_documents/environmentaldamageconsultdoc.pdf)

<sup>5</sup> <https://www.gov.uk/government/consultations/the-implementation-of-directive-201330eu-on-the-safety-of-offshore-oil-and-gas-operations>

<sup>6</sup> <http://www.hse.gov.uk/consult/condocs/cd272.htm>

## The consultation

8. The consultation ran for 8 weeks from 18<sup>th</sup> February 2015 to 14<sup>th</sup> April 2015 and received 4 responses. These responses were received from Oil and Gas UK, the Scottish Environment Protection Agency, Scottish Environment Link, and an individual.
9. Responders had a choice of methods to submit their responses. They could do so in writing by post, writing by email, or through the Citizen Space platform<sup>7</sup>. Three responders opted to submit by email, and one used Citizen Space.
10. The consultation asked 5 questions;
  1. Do you have any comments on the way in which we propose to transpose Article 38 of the OSD?
  2. Do you have any views on the likelihood of potential damage in marine waters affecting their environmental status as defined under the MSFD?
  3. What do you consider to be the potential costs to industry should damage to marine waters occur that triggers action under the amendment Regulations?
  4. Do you have any other comments on the proposed transposition of Article 38 of the OSD?
  5. What do you consider to be the potential benefits for marine waters under the 2009 Regulations, following the proposed amendments?
11. Chapters 4 to 8 set out the responses to the questions and the Government response in a we asked, you said, we did format. All of the responses to the questions are published verbatim in these chapters. Therefore they are not published separately.

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<sup>7</sup> [https://consult.scotland.gov.uk/marine-scotland/amending-the-environmental-liability/consult\\_view](https://consult.scotland.gov.uk/marine-scotland/amending-the-environmental-liability/consult_view)

## Question 1

12. We asked, "Do you have any comments on the way in which we propose to transpose Article 38 of the OSD?"
13. You said;
14. Oil and Gas UK said, "The transposition of Article 38 is straightforward and we agree with the transposition and the allocation of enforcing authorities. There are, however, significant issues with the application of the Directive requirements to the marine environment that will require discussion and development of effective guidance."
15. Scottish Environment Protection Agency said, "SEPA supports the Scottish Government proposed transposition of Article 38 of the Off-shore Oil and Gas Safety Directive and has no major concerns. Given that aspects of the Directive are reserved matters we understand DECC will ensure transposition of those reserved aspects (eg Article 7 on financial liability of operators and licences of offshore oil and gas operations for environmental damage)."
16. Scottish Environment Link said, "The proposals seem practical and the extension of the ELD into marine waters will ideally prompt marine users to re-assess their safety measures and ensure fail-safe measures are in place so that their activities limit the potential for environmental damage."
17. The individual said, "The transposition is good because social cost and other related pollution can not only be consider. There some valuable substances that should be taking into environment liability in these we have oil and gas, chemicals and some other natural resources because it can be source of revenue for government and means of benefit to the environs involve."
18. We did;
19. The Scottish Government intends for the Order to take effect on 19 July 2015. There has been some minor drafting changes. These do not change the intended effect of the version that formed part of the consultation.

## Question 2

20. We asked, “Do you have any views on the likelihood of potential damage in marine waters affecting their environmental status as defined under the MSFD?”

21. You Said;

22. Oil and Gas UK said, “This question is very difficult to answer and appears to rest upon the definition of ‘environmental damage’ and how the enforcing authority will establish if damage is ‘environmental damage’ in marine waters. The ELD defines ‘damage’ as a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly. (A ‘natural resource’ means protected species and habitats, water and land).

However, for the ‘damage’ to be ‘environmental damage’ the ELD states that there must be significant adverse effects – to the conservation status of protected species or habitats covered by the Habitats Directive, or to the ecological, chemical or quantitative status of water bodies covered by the Water Framework Directive (out to 1nm).

Article 38 extends the definition to damage that significantly adversely affects the environmental status of marine waters covered by the Marine Strategy Framework Directive. Note that ‘waters’ includes the water column, seabed and subsoil and that ‘environmental status’ is determined by the indicators of Good Environmental Status, as defined in MSFD.

Following a release of contamination to the marine environment and after the operator has notified the enforcing authority, there is a requirement for the enforcing authority to establish whether environmental damage has occurred i.e. that there has been a significant adverse change. The first is to determine the baseline against which an adverse change could be measured. In theory, baselines exist for European protected sites, nearshore water bodies and through the initial assessments made against the MSFD indicators. However, the scale of natural variability of the relevant indicators over time will require several years of monitoring to fully assess. This is important because the ELD specifically states that ‘negative variations that are smaller than natural fluctuations’ do not have to be classified as significant damage.

The MSFD GES indicators have been established for regional sea areas and detecting a measurable adverse change, attributable to a contamination event, over such an area could be difficult.”

23. Scottish Environment Protection Agency said, “SEPA agrees with the conclusions in the consultation document that on the basis of experience to date, and the extent of damage required to impact environmental status under MSFD, there is a low likelihood of such damage.

Water damage, as defined in the Environmental Liability (Scotland) Regulations 2009 (“the regulations”) is restricted to activities listed in Schedule 1 to the regulations. Various industries have the potential to cause damage in the marine environment, should failures or accidents occur. These include: fisheries, shipping, oil and gas (including unconventional gas and underground coal gasification), aquaculture, engineering, dredging and dumping. Some of these activities may fall outwith the scope of Schedule 1 to the regulations.”

24. Scottish Environment Link said, “SE LINK have welcomed the measures that Marine Scotland (the Scottish Government) have put in place to help Scotland achieve GES by 2020. As the proposed amendments to the Regulations are preventative in nature, it is difficult to assess how they will actively contribute to the GES objectives under the MSFD. It could be argued that the amendments will help to stop Scotland from not achieving GES.”
25. The individual said, “What I felt is that water should be protected against any means of pollution because its usefulness beyond what we see to it.”
26. We did;
27. The Scottish Government agrees that an incident would need to be catastrophic to trigger action under the Regulations.

### Question 3

28. We asked, “What do you consider to be the potential costs to industry should damage to marine waters occur that triggers action under the amendment Regulations?”

29. You said;

30. Oil and Gas UK said, “Although we have stated above that it is unlikely that ELD requirements would be invoked, there are some uncertainties that could result in significant cost to industry.

Firstly, there is the requirement to establish whether environmental damage has occurred. Whilst this is the responsibility of the enforcing authority, the costs will fall to the operator. It is well known that surveys in the marine environment are very expensive, particularly when trying to assess change in multiple indicators. There is currently no indication of how much survey effort (and hence cost) an enforcing authority would expend, particularly where there could be stakeholder pressure to carry on surveying until some adverse effect was found. Such an open ended cost could be difficult to insure and as such, protocols should be developed and agreed to provide appropriate cost controls.

Should the ELD requirements for remediation and compensation be triggered, it is almost certain that in the offshore marine environment natural remediation would be the primary remediation option. This again will require significant survey effort to ascertain whether or not the damaged natural resources have returned to the baseline condition. Given the uncertainties around baseline conditions and natural variability, an operator could be forced to undertake a rapid post spill sampling programme to establish a baseline against which the natural remediation could be measured, at significant potential cost.

ELD requires complementary or compensatory remediation to be undertaken when the primary remediation does not result in full restoration or if it will take a long time. What this means in practice for the offshore marine environment is entirely unknown but could take the form of biodiversity offsetting i.e. the provision of another natural resource of some equivalence at another location. Without effective guidance on what this might entail, it is very difficult to cost or provide for in insurance.”

31. Scottish Environment Protection Agency did not comment.

32. Scottish Environment Link said, "Experience from the terrestrial environment gives opportunities to improve what has come before. The issue of restoration bonds for open cast coal mines became highly politicised and controversial since the collapse of the industry in 2010. The concept of restoration or insurance bonds paid into by companies and used in the event of significant environmental damage is something to be explored if the proposed Regulations are to be adopted. There are lessons to be learned from the failures of restoration bonds but the principles can work in the marine environment.

A further test might be how much it would cost if the companies operating were legally obliged to insure against the costs of environmental damage and a calculation by insurance company brokers of the risk. Marine industries have an obligation to inflict as little environmental damage as is possible whilst carrying out their day-to-day operations; this is reflected in the Scottish Government's policy that marine industries must operate within environmental limits, as required by s.3 of the Marine (Scotland) Act 2010. In an event which triggers actions under the proposed Regulations, in the first instance, the costs of any immediate action required to limit the damage (for example, in the case of an oil spill) should be met by the individual, company or organisation responsible for the environmental damage.

Depending on the scale and impact of the environmental damage, and the effect the damage has on ecosystem function, habitats and species, an investigation into the causes of the damage and an indication of responsibility should take place. Pending this investigation, a suitable course of action should be taken in which an agreed outcome of how to repair the damage caused is agreed by marine stakeholders (including environmental NGOs) and reparations from those responsible to the Scottish Government should be agreed, along with a timeframe indicating when compensation should be paid and how long the restorative work is expected to take.

For this to work, it is imperative that data on the health of the marine environment is regularly collected and collated - especially in areas where marine industries operate. A collated record of assessments of marine industry operations and their potential to harm the environment should be published - this information should already be available through Appropriate Assessments and Environmental Impact Assessments."

33. The individual said, "Discharging of waste chemicals."

34. We did;

35. The Scottish Government notes the uncertainty regarding potential costs. We will seek to address some of these uncertainties through joint guidance with other enforcing authorities. This in turn would enable potential cost estimates to be made by Industry, and suitable insurance sought for this purpose.

#### Question 4

36. We asked, “Do you have any other comments on the proposed transposition of Article 38 of the OSD?”
37. You said;
38. Oil and Gas UK said, “Whilst we appreciate that the transposition is required, it would have been preferable to have had draft guidance or at least an indication of thinking from the enforcing authorities on practical implementation. Despite the low risk to the majority of operators this lack of information is creating uncertainty around whether they will be required to make financial provision.”
39. Scottish Environment Protection Agency said, “You are referred to SEPAs response to the HSE consultation on the Off-shore Safety Directive. The SEPA, SNH and Marine Scotland joint working protocol will require minor revision in the light of the proposed regulations.”
40. Scottish Environment Link made no comment
41. The individual made no comment.
42. We did;
43. The Scottish Government recognises the need for practical guidance. Our intention is to work with other enforcing authorities and stakeholders to deliver this. Marine Scotland will work with SEPA and SNH to revise the joint working protocol accordingly.

## Question 5

44. We asked, “What do you consider to be the potential benefits for marine waters under the 2009 Regulations, following the proposed amendments?”
45. You said;
46. Oil and Gas UK said, “The offshore oil and gas exploration and production industry on the UKCS is highly regulated with respect to health and safety, asset integrity and the environment. This regulation, together with industry initiatives, drives behaviours that mitigate against a major incident. It is unlikely that there are any significant additional steps that would be taken as a result of the requirements of the ELD.”
47. Scottish Environment Protection Agency said, “SEPA agrees that marine waters should be afforded the same protection under Environmental Liability as Water Framework Directive waters. It is appropriate where environmental damage to MSFD waters has occurred, that the environment is restored and where restoration cannot be achieved, compensatory measures should be undertaken. This may provide additional incentive for operators to maintain high standards of pollution prevention and control and to make appropriate financial security arrangements.”
48. Scottish Environment Link said, “The proposed amendments should act as a prompt to marine industries and users to re-evaluate their safety procedures and ensure that all necessary environmental checks are in place. SE LINK welcome these amendments as they act as preventative measures which can help to stop significant environmental damage occurring.
49. The individual said, “It will promote fish farming and promote water safety for any form of consumption from any sector of economy.”
50. We did;
51. The Scottish Government agrees that the offshore oil and gas industry is well regulated. We also agree that safeguarding against the risk of major incidents is preferable to having to clean up afterwards. It is also noted that in some cases compensatory measures may be required, and that suitable financial security arrangements should be made by operators.

## **BUSINESS AND REGULATORY IMPACT ASSESSMENT**

Previous Impact Assessment (IA) work suggests the following activities have the potential to cause damage in the marine environment: fisheries, shipping, activities releasing contaminants on land, contaminants from the oil and gas industries, mariculture, litter, disturbance, engineering operations and dredging and dumping.

The ELD only requires action where a business or other operator has caused – or is imminently about to cause - significant environmental damage. Evidence to date suggests this happens very rarely. In the five years between 2009 and 2014 since the 2009 Regulations came into force, there have been only three cases of inland freshwater water damage in the UK and none in coastal waters. By comparison there

are likely to be fewer applicable cases on average in the area out to 12 nautical miles because of reduced levels of economic activity there and given the greater difficulty in monitoring, detecting and enforcing damage. This assessment also reflects the fact that no case of damage to species and habitats in the marine environment has yet fallen under the ELD. This suggests that damage to water out to 12 nautical miles might happen once in 10 years or less across the UK. More detail on this is contained within the DECC/HSE IA which accompanies the consultation covering the wider transposition of the OSD.

Remediation requirements under the ELD are triggered by a measurable adverse change. For waters subject to the WFD this change must be sufficient to lower the status or prevent an improvement in status of the water body as defined in the WFD. The concept of good environmental status contained within the MSFD is wider than that in the WFD as it includes additional descriptors relating to commercial fish, some aspects of biodiversity and the introduction of marine litter and energy (including underwater noise). The 11 MSFD descriptors are:

- biological diversity;
- non-indigenous species;
- commercially exploited fish and shellfish;
- food webs;
- human-induced eutrophication;
- sea floor integrity;
- hydrographical conditions;
- contaminants;
- contaminants in fish and other seafood;
- marine litter; and
- and the introduction of energy (including underwater noise).

Adverse change in the status of a WFD water body can be more readily assessed than measuring changes to status for MSFD at the level of sub-regional sea areas (The sub-regional seas comprise the Greater North Sea and the Celtic Seas). Additionally, damage to marine waters would have to be significant at the sub-regional seas scale to trigger action under the ELD.

If such damage does arise there are likely to be costs under existing arrangements to address the damage, depending on the nature and extent of the damage caused. Opportunities to directly and actively restore damage will be limited in the marine environment and the measures required will therefore largely be to compensate for the damage. As there may be limited opportunities to take such compensatory measures in the marine environment other appropriate measures may sometimes have to be taken elsewhere. The main costs are therefore likely to relate to paying for environmental improvements.

It is difficult to be certain but there is a possibility that the proposed amendments to the 2009 regulations may deliver additional benefits to the marine environment if operators take additional steps to ensure that incidents are less likely to take place in future through enhancements to their plans to comply with the ELD provisions relating to biodiversity.

