

POLICY NOTE

THE ENVIRONMENTAL LIABILITY (SCOTLAND) AMENDMENT REGULATIONS 2015

SSI 2015/214

The above instrument was made in exercise of the powers conferred by section 2(2) of, and paragraph 1A of Schedule 2 to, the European Communities Act 1972 and all other powers enabling them to do so. The instrument is subject to negative procedure.

Policy Objectives

The instrument amends the Environmental Liability (Scotland) Regulations 2009 (“the 2009 Regulations”) in order to transpose Article 38 of the EU Offshore Safety Directive.

The 2009 Regulations transposed the Environmental Liability Directive (ELD) in Scotland to implement the “polluter pays” principle whereby an operator has a duty to avert damage occurring or, where damage does occur, a duty to reinstate the environment. Remedial requirements under the ELD are triggered by a measurable adverse change in environmental status as described in the EU Water Framework Directive (WFD) or the EU Birds and Habitats Directives.

The 2009 Regulations enable the protection of marine habitats and species out to 12 nautical miles (via the biodiversity provisions of the ELD) and maintenance of good water quality out to 3 nautical miles. The recent changes to EU legislation via the EU Offshore Safety Directive (OSD) require us to amend the current domestic legislation by 19 July 2015.

The aim of the OSD is to reduce the potential for major accidents relating to offshore oil and gas activities and limit their impacts on the environment and coastal economies. Article 38 of the OSD amends the ELD by extending the existing definition of “water damage” by including additional descriptors used under the Marine Strategy Framework Directive (MSFD) and broadening the geographical scope of the definition of “water damage” in the ELD to make it consistent with the MSFD.

The instrument amends the existing definition of water damage in the 2009 Regulations to include any damage that significantly adversely affects the environmental status of the marine waters as defined by the EU Marine Strategy Framework Directive.

The instrument also provides that Scottish Ministers are the competent authority for the additional requirements relating to water damage introduced by Article 38 of the OSD for devolved matters.

The instrument has been drafted to incorporate an ambulatory reference to the MSFD which should alleviate the need for further legislation if the Directive is amended. Any amendments made to the MSFD may be found on the EUR-Lex website, a link to the homepage of which is attached here <http://eur-lex.europa.eu/homepage.html>

Consultation

A public consultation took place from 18 February to 14 April 2015. Four responses were received from Oil and Gas UK, the Scottish Environment Protection Agency, Scottish Environment Link and an individual. None of the responses received required changes to the draft Order.

Oil & Gas UK proposed that UK-wide guidance should be prepared and we are in discussion with the other UK administrations with a view to ensuring that consistent guidance on these new EU requirements are produced for operators.

Further information is provided in the consultation report published on the Scottish Government website.

Impact Assessments

No equality impact assessment was undertaken as there are no equality impact issues given the provisions of Article 38 of OSD are not targeted at particular communities or individuals and the provisions are unlikely to affect any communities or individuals disproportionately.

Financial Effects

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. 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.

Scottish Government
Marine Scotland
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