

POLICY NOTE

THE MARINE ENVIRONMENT (EU EXIT) (SCOTLAND) (AMENDMENT) REGULATIONS 2019

SSI 2019/55

The above instrument was made in exercise of the powers conferred by paragraphs 1(1) and (3) of schedule 2 of the European Union (Withdrawal) Act 2018. The instrument is subject to negative procedure.

Purpose of the Regulations: The Marine Environment (EU Exit) (Scotland) (Amendment) Regulations 2019 (“the Regulations”) amend domestic legislation relating to marine planning, licensing, and conservation to make the necessary corrections to ensure that the law continues to operate effectively when the UK leaves the European Union (EU).

Part 2 of the Regulations amend primary legislation, the Marine (Scotland) Act 2010.

Part 3 of the Regulations amends deficiencies in subordinate legislation.

Policy Objectives

Where practical and appropriate, European legislation is being retained in UK law on the UK’s exit from the EU. In the fields of marine planning, licensing and conservation, the Scottish Government and other devolved administrations plan to retain the current standards set out in EU legislation and EU-derived domestic legislation. Therefore the aim is to ensure, following a ‘no deal’ United Kingdom exit from the European Union, the continued and proper regulation of marine activities within Scotland. The instrument is required to achieve this and provide continuity for businesses and users of Scotland’s seas.

Upon exit day a number of technical corrections are required. The objective of the instrument is to ensure the operability of Scotland’s marine planning, licensing and conservation framework.

This instrument does not introduce any policy changes.

Explanation of the law being amended by the Regulations

Amendments to primary legislation

The Marine (Scotland) Act 2010

The Marine (Scotland) Act 2010 (“The Act”) created a new legislative and management framework for the marine environment in Scottish Territorial Waters. The Act created a new system of marine planning to manage the competing demands of the use of the sea whilst protecting the marine environment, created a system of licensing with the aim of reducing the regulatory burden for key sectors, and included powers to establish marine protected areas to protect natural and cultural marine features. The Act also introduced a new regime for the conservation of seals and gave powers for Scottish marine enforcement officers to ensure compliance with the new licensing and conservation measures.

The Regulations make amendments to the definition of third country vessel and a reference to EU obligations in the Act which would not operate effectively following exit of the European Union. They also revoke a provision to create higher than normal penalties for offences in transpositions of the Habitats Directive¹. This power has never been utilised and will no longer be required as the powers to transpose the Habitats Directive are revoked by the European Withdrawal Act 2018. However this does not affect any existing offences and associated penalties, such as those under The Conservation (Natural Habitats, &c.) Regulations 1994 (as amended) which apply in Scottish Territorial Waters.

Amendments to subordinate legislation

The Marine Licensing (Exempted Activities) (Scottish Offshore Region) Order 2011

This Order specifies activities which are not to need a marine licence, or not to need a marine licence if conditions specified in the Order are satisfied. It applies to activities within the Scottish offshore region (within the meaning of section 322(1) of the Marine and Coastal Access Act 2009) in respect of which the Scottish Ministers are the marine licensing authority. Activities in that region in respect of which the Scottish Ministers are not the licensing authority are specified in section 113(3) of the 2009 Act.

The Regulations amend this Order in relation to the definitions of waste, non-hazardous waste and third country vessel, and the conditions to be satisfied in connection with exempt activities. Waste is defined by reference to provisions in the Environmental Protection Act 1990 which is amended for EU exit purposes by the Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019; inserting section 75A. Non-hazardous waste is defined as waste which is not waste within the meaning of regulation 2 of the Special Waste Regulations 1996. That regulation is substituted for EU exit purposes by Part 4 of the the Environment (EU Exit) (Scotland) (Amendment etc.) Regulations 2019². These amendments ensure a consistent approach is taken across legislation to deficiencies arising in relation to the Waste Framework Directive³.

The Marine Licensing (Exempted Activities) (Scottish Inshore Region) Order 2011

This Order specifies activities which are not to need a marine licence, or not to need a marine licence if conditions specified in the Order are satisfied. It applies to the Scottish marine area

¹ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

² S.S.I. 2019/26.

³ Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing certain Directives

(within the meaning of section 1 of the Marine (Scotland) Act 2010) which is basically the UK territorial sea adjacent to Scotland. The Scottish Ministers are responsible for granting marine licences in that area (as well as in Scottish offshore waters – governed by the Marine and Coastal Access Act 2009).

The Regulations amend this Order in relation to the definitions of waste, non-hazardous waste and third country vessel, and the conditions to be satisfied in connection with exempt activities. These amendments mirror those made for the Marine Licensing (Exempted Activities) (Scottish Offshore Region) Order 2011 described above.

The Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017

The 2017 Regulations implemented the EIA Directive⁴ in relation to regulatory approvals required before certain projects may be taken forward in Scotland’s marine environment.

The 2017 Regulations impose procedural requirements in relation to the consideration of applications for such regulatory approvals by the Scottish Ministers. All projects in schedule 1 require an environmental impact assessment (EIA). Projects in schedule 2 require an EIA if they are likely to have significant effects on the environment. Projects which require an EIA are referred to in the Regulations as “EIA projects”.

The Regulations amend the 2017 Regulations in relation to definitions, references and expressions which would not operate effectively after exit from the EU. In particular, references to Member States and other EEA States are amended, and references to European Directives are adjusted where they would no longer operate effectively to provide they refer to retained EU law (which will include that which implemented those Directives). These amendments are consistent with EU exit deficiency amendments that have been made to UK Marine Works EIA regulations⁵ to ensure that they operate effectively together. This helps provide consistency of approach between reserved and devolved functions in Scottish Waters.

⁴⁴ Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 2014/52/EU.

⁵ The Marine Works (Environmental Impact Assessment) Regulations 2007 (S.I. 2007/1518) as amended by the Environment, Food and Rural Affairs (Environmental Impact Assessment) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/25).

Reasons for and effect of the proposed change or changes on retained EU law

The amendments remedy deficiencies arising from the withdrawal of the United Kingdom from the European Union by updating, replacing or removing EU references, including references to EU instruments, which will become redundant or will no longer be appropriate on or after exit day.

These minor technical changes to marine environment legislation correct legislative deficiencies arising as a result of the UK leaving the EU. They have been made to ensure that the legislation continues to operate effectively following EU Exit on 29 March 2019.

Statements required by European Union (Withdrawal) Act 2018

Statement that in their opinion Scottish Ministers consider that the Regulations do no more than is appropriate

The Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham, has made the following statement:

“In my view the Marine Environment (EU Exit) (Scotland) (Amendment) Regulations 2019 do no more than is appropriate. This is the case because the amendments are being made only to ensure, following a ‘no deal’ United Kingdom exit from the European Union, continued and effective functioning of the legislation being amended and do not introduce policy change.”

Statement as to why the Scottish Ministers consider that there are good reasons for the Regulations and that this is a reasonable course of action

The Cabinet Secretary for Environment, Climate Change and Land Reform, Mrs Roseanna Cunningham, has made the following statement:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. We must ensure that the relevant marine environmental legislation continue to operate after the UK leaves the EU, in order to protect Scotland’s marine environment and enable sustainable development. Amendments are technical in nature to ensure legislative operability only.”

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Cabinet Secretary for Environment, Climate Change and Land Reform, Mrs Roseanna Cunningham, has made the following statement:

“In my view the Marine Environment (EU Exit) (Scotland) (Amendment) Regulations 2019 does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

Statement that Scottish Ministers have, in preparing the Regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

The Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham, has made the following statement:

“In my view the Marine Environment (EU Exit) (Scotland) (Amendment) Regulations 2019 have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the Regulations, had due regard to the guidance principles on the environment and animal welfare

The Cabinet Secretary for Environment, Climate Change and Land Reform, Mrs Roseanna Cunningham, has made the following statement:

“In my view the Marine Environment (EU Exit) (Scotland) (Amendment) Regulations 2019 have had due regard to the need to the guiding principles on the environment and animal welfare as derived from the equivalent principles provided for in Articles 13 and 191(2) in Titles II and XX respectively of the Treaty on the Functioning of the European Union.”

Statement explaining the effect (if any) of the Regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

This heading is not applicable

An indication of how the Regulations should be categorised in relation to the significance of the change proposed.

Low – The amendments are technical in nature to allow continuity of law and do not amount to a change in policy.

Statement setting out the Scottish Ministers’ reasons for their choice of procedure

Negative procedure is considered appropriate as these minor and technical amendments do no more than is necessary to ensure that the legislation continues to operate effectively following the UK’s exit from the EU. The regulations do not include provisions which fall within paragraph 1 (2) of schedule 7 of the European Union (Withdrawal) Act 2018.

Further information

Consultation

This instrument does not amount to a change in policy and is being made to avoid deficiencies arising as a result of the UK's withdrawal from the EU. There has been no formal public consultation regarding this instrument. We have engaged with DEFRA and other UK administrations on the content of equivalent UK Statutory Instruments, where similar technical amendments are being made. Changes are considered essential to ensure legislative operability on day one of the UK's exit from the EU.

Impact Assessments

Full impact assessments have not been prepared for this instrument because it is aimed at preserving the effect of the current regulatory regimes once the UK leaves the EU. The current amendments do not alter the Scottish Government's current environmental policies and priorities and, therefore, do not have a significant impact of the environment. The impact on business, charities or voluntary bodies is expected to be minimal.

Financial Effects

The Cabinet Secretary for Environment, Climate Change and Land Reform confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has minimal effect on the Scottish Government, local government or on business.

Scottish Government
Marine Scotland Directorate

20 February 2019