

**EXPLANATORY MEMORANDUM TO
THE ENVIRONMENTAL DAMAGE (PREVENTION AND REMEDIATION)
(ENGLAND) REGULATIONS 2015**

2015 No. 810

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 instrument consolidates the Environmental Damage (Prevention and Remediation) Regulations 2009, as amended¹. It also contains additional provisions to transpose Article 38 of the Offshore Safety Directive (OSD) (2013/30/EU)².

These Regulations will come into force on 19 July 2015. The Department of Climate Change (DECC) leads on the wider transposition of the OSD.

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

3.1 None.

4. Legislative Context

4.1 The Environmental Damage (Prevention and Remediation) Regulations 2009 (“the ED Regulations”) transposed the Environmental Liability Directive (ELD) (2004/35/EC)³. The ED Regulations came into force on 1 March 2009 and have since been amended by 11 other statutory instruments. This instrument will consolidate all of those amendments, revoking two of the instruments (S.I. 2009/3275 and S.I. 2010/587).

4.2 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. Article 38 of the OSD, which this instrument transposes, extends the scope of the ELD to include water damage as defined in the Marine Strategy Framework Directive 2008/56/EC (MSFD)⁴. The transposition deadline of the OSD is 19 July 2015.

¹ S.I. 2009/153 as amended by 2009/3275; 2010/587; 2010/675; 2010/2221; 2011/556, 2011/988, 2011/1043, 2011/2131; 2012/630, 2012/ 2897; and 2013/755.

² [Directive 2013/30/EU on safety of offshore oil and gas operations and amending Directive 2004/35/EC.](#)

³ [Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage](#)

⁴ [Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy \(Marine Strategy Framework Directive\)](#)

4.3 This instrument re-transposes Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage.

5. Territorial Extent and Application

5.1 This instrument applies in England and to waters and seabed out to the limits of the exclusive economic zone (approximately 200 miles offshore) and the continental shelf, including offshore marine waters measured from the baseline in Wales and in the Scottish zone. Separate sets of regulations transpose the requirements of the ELD, as amended, in each of the Devolved Administrations.

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 ELD has the objective of making operators of activities which cause environmental damage financially liable for that damage (the ‘polluter pays’ principle). The ED Regulations apply to serious environmental damage to land, water and to species and habitats. They cover both species and habitats protected by the Birds and Habitats Directives and any other species and habitats protected on Sites of Special Scientific Interest (SSSIs). They impose duties on operators of economic activities to take immediate steps to prevent damage if there is an imminent threat, and to control damage which is occurring so as to limit its effects.

7.2 Once environmental damage has occurred, the ED Regulations contain procedures for establishing appropriate remedial measures. In the case of damage to water or species and habitats, these measures include not only ‘primary’ remediation (for example, cleaning up the contaminated site), but also complementary remediation (cleaning up an alternative site if the damaged site cannot be fully restored), and compensatory remediation (carrying out other measures to provide alternative natural resources to compensate for the time during which the damaged site remains in its damaged state). The operator has to agree appropriate measures with the regulator and pay for them to be undertaken.

7.3 For the purposes of water damage, the ED Regulations currently apply to all water up to 1 nautical mile seaward from the baseline in England. For the purposes of protected species and natural habitats, the ED Regulations already apply out to the seabed of the continental shelf around the UK, and to the waters in the Renewable Energy Zone, which extends approximately 200 miles out to sea around the UK.

7.4 Article 38 of the OSD amends the ELD to extend its geographical scope to include damage which significantly adversely affects the environmental status of marine waters, as defined in the MSFD. In effect, the current geographical limit to water damage will be extended beyond coastal waters to cover all marine waters under the jurisdiction of Member States.

7.5 This new instrument sets out the enforcing authority arrangements for taking action in respect of environmental damage, allocating responsibilities in English

waters to the Environment Agency, the Marine Management Organisation and the Secretary of State. A Memorandum of Understanding between the various parties will be revised to underpin the arrangements. The Regulations also contain provisions on enforcing authorities in Scottish offshore waters as the Scottish Ministers do not have legislative competence to regulate out to 200 miles off the Scottish coast.

8. Consultation

8.1 A public consultation ran from 28 July to 21 September 2014 on the transposition of Article 38 the OSD to extend the scope of the ELD offshore. Nine responses were received.

8.2 Respondents were broadly supportive of the proposals with some seeking clarity around the allocation of enforcement responsibilities, the definition of operator, the nature of the potential liability and how remediation might be carried out offshore.

8.3 The key changes made following responses to the consultation include: adjusting the regulations to provide greater clarity as to the roles of the respective enforcing authorities, underpinned by a proposed revision to the existing Memorandum of Understanding between the bodies; and a proposal to clarify, in guidance, the definition of “operator” to take account of offshore oil and gas operators and licensees. A summary of respondents’ comments to the consultation and the Government response to them can be found at <https://www.gov.uk/government/consultations/environmental-liability-directive-extending-the-scope-into-offshore-waters>

9. Guidance

9.1 The guidance supporting the ED Regulations will be updated to reflect their wider scope.

10. Impact

10.1 There is no comprehensive time series data of damage in the marine environment. Defra therefore held a workshop with a dozen of the best placed regulator and business representatives to review the potential for additional liability. The conclusions, based on current understanding of definitions, were that it was extremely unlikely that any cases will be caught by the MSFD definition (i.e. damage in marine waters). Neither business representatives nor regulators could think of any case in the past 50 years that would have triggered the definition. It was even less likely that a case would be caught by MSFD that would not already be caught by the existing ELD definition. These conclusions have been fed into the wider Impact Assessment produced by DECC and the HSE on transposition of the Offshore Safety Directive more generally. This can be found at www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation applies to all operators operating within scope of the Regulations in England and in offshore waters beyond 12 nautical miles from the baseline in Wales and in offshore waters in the Scottish zone.

12. Monitoring and review

12.1 The instrument contains a provision requiring the Secretary of State to carry out a review of these ED Regulations within five years after they come into force and within every five years after that.

12.2 The report will set out the objectives intended to be achieved by the regulatory system established by these Regulations, assess the extent to which those objectives have been achieved, and assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

13. Contact

13.1 Eddie Bailey at the Department for Environment, Food and Rural Affairs
Tel: 0207 238 6294 or e-mail: eddie.bailey@defra.gsi.gov.uk can answer any queries regarding the instrument.