

**EXPLANATORY MEMORANDUM TO
THE WORKS DETRIMENTAL TO NAVIGATION (POWERS AND DUTIES OF
INSPECTORS) REGULATIONS 2018**

2018 No. 436

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument will confer powers on Inspectors in BEIS's Offshore Petroleum Regulator for Environment and Decommissioning ("OPRED") to check compliance by offshore companies ("operators") with Consents to Locate, which are granted by OPRED under Part 4A of the Energy Act 2008 as instituted by section 314 of the Marine and Coastal Access Act 2009. Conditions of these Consents include obligations to, amongst other things, maintain navigational aids and ancillary equipment on offshore installations and vessels ("offshore facilities") engaged in hydrocarbon-related activities within the regulated zone (the United Kingdom Continental Shelf and relevant UK territorial waters).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The instrument is subject to the Affirmative Resolution procedure. The draft instrument was: (i) laid before Parliament on 18 January 2018; and (ii) debated and approved by both Houses.
- 3.2 Taking into account the critical need for, and core objective of, the instrument - as described in paragraphs 4.3 and 7.1 to 7.5 below - they will enter into force on the day after they are made and, if feasible, either prior to, or (if apposite) beyond, the next Common Commencement Date of 6 April 2018.

Other matters of interest to the House of Commons

- 3.3 The territorial application of the Works Detrimental to Navigation (Powers and Duties of Inspectors) Regulations 2018 - as outlined in paragraphs 5.1 and 5.2 below - is such that the instrument will not be subject to certification for English votes purposes.

4. Legislative Context

- 4.1 Consents to Locate are required under Section 82A of Part 4A of the Energy Act 2008 before activities that are likely to result in obstruction or danger to navigation are carried out at sea by oil and gas operators. A key condition of Consents to Locate is the obligation on operators to maintain properly functioning navigational aids and ancillary equipment on offshore facilities (i.e. lighting, signage and other signals to

warn shipping of the presence of offshore facilities in low visibility conditions). Other offshore operations to which the requirements of Consents to Locate apply include the construction, alteration, maintenance, improvement, dismantling or abandonment of any works; and the deposit or removal of any substance or article. In addition, Article 60 of the UN Convention of the Law of the Sea requires the UK to ensure that permanent means for giving warning of the presence of offshore facilities are maintained by operators.

- 4.2 Section 82N(1) of Part 4A of the 2008 Act gives the Secretary of State the power to appoint Inspectors to ensure compliance by operators with the conditions of Consents to Locate. Sections 82N(3) & (5) provide the Secretary of State with the power to make Regulations setting out the powers and duties of Inspectors and to create criminal offences. Regulations are subject to the Affirmative Resolution procedure.
- 4.3 Therefore, pursuant to Sections 82N(1), (3) & (5) of Part 4A of the 2008 Act, the Works Detrimental to Navigation (Powers and Duties of Inspectors) Regulations 2018 will close a 'gap in enforcement provisions' by conferring on OPRED Inspectors powers to board / access offshore facilities to proactively inspect and investigate breaches of the conditions of Consents to Locate.

5. Extent and Territorial Application

- 5.1 The instrument extends to the whole of the United Kingdom.
- 5.2 The instrument applies to the "regulated zone" as defined in Section 82Q of Part 4A of the Energy Act 2008 which ostensibly means the areas that consist of:
 - (a) the area of sea within the seaward limits of the UK territorial sea, other than the Scottish inshore region (as defined in Section 322 of the Marine and Coastal Access Act 2009); and
 - (b) the area of sea within the limits of the UK sector of the Continental Shelf.

6. European Convention on Human Rights

- 6.1 Richard Harrington, the Minister for Energy and Industry, has made the following statement regarding Human Rights:

In my view the provisions of the Works Detrimental to Navigation (Powers and Duties of Inspectors) Regulations 2018 are compatible with the Convention rights.

7. Policy background

What is being done and why

- 7.1 The need for the instrument has arisen due to a number of incidents from 2015 onwards whereby some operators failed to resolve within a reasonable timeframe (e.g. no more than a few days at most) serious non-compliances with the conditions of Consents to Locate (primarily the obligation to maintain functional navigational aids) - despite continued pressure being exerted by OPRED.
- 7.2 Whilst such incidents have eventually been resolved by way of protracted negotiations with operators, this is not an ideal situation as the potential risk to shipping of collision with an offshore facility remains until such time as properly functioning navigational aids are reinstated. Without express powers to board / access offshore facilities and conduct inspections plus investigations, OPRED is currently reliant upon the cooperation of operators, or evidence generated from third parties (e.g. the Trinity

House Lighthouse Service and Maritime and Coastguard Agency), in order to: (i) gather evidence to establish whether Consents to Locate requirements have been breached; and (ii) encourage operators to revert to compliance. OPRED's lack of express inspection and investigation powers dramatically reduces its capability to take formal enforcement action to force operators to expediently return to compliance with the obligations of Consents to Locate. It is in large part due to this that OPRED has been unable to take formal enforcement action under Part 4A of the 2008 Act to rectify any contraventions.

- 7.3 Moreover, OPRED also examined whether it would be feasible to use any extant inspection powers / powers of entry under other offshore environmental legislation to resolve breaches by operators of the requirements of Consents to Locate. The conclusion was that other powers would not provide a sound legal basis for the purposes of legitimately enabling inspections to be conducted to address such non-compliances.
- 7.4 Accordingly, pursuant to Part 4A of the Energy Act 2008, the introduction of the instrument would provide OPRED's Inspectors with the powers to investigate and enforce compliance by operators with the obligations of the Consents to Locate regime - especially those pertaining to the need to maintain properly functioning navigational aids and ancillary equipment; thereby reducing the potential risk of collisions occurring between offshore facilities and other vessels. Even though the risk of a collision remains low, the human, environmental and economic impact of a collision could be high.
- 7.5 Furthermore, the instrument will contribute to OPRED's aim of ensuring that offshore hydrocarbon-related activities are carried out in a safe, clean and environmentally sound manner. To this end, the principle objective of the instrument will be to achieve a high-level of operator compliance with the conditions of Consents to Locate through: (a) offshore inspections; (b) the investigation of breaches; (c) the deployment of enforcement notices available under Part 4A of the 2008 Act; and (d) the imposition of penalties where proportionate. Due to a targeted consultation in April 2017 (see paragraph 8.1 below), it is also the case that the offshore hydrocarbons sector is aware of the intention to enact the instrument.

Consolidation

- 7.6 Consolidation of legislation is not relevant to the Works Detrimental to Navigation (Powers and Duties of Inspectors) Regulations 2018.

8. Consultation outcome

- 8.1 OPRED conducted a 4 week targeted consultation with the offshore hydrocarbons sector on a draft of the Works Detrimental to Navigation (Powers and Duties of Inspectors) Regulations. Responses were received from Oil & Gas UK and Apache North Sea Ltd.
- 8.2 OPRED replied to both consultees on 27 June 2017 addressing their comments and also giving an undertaking to publish updated guidance on the Consents to Locate regime (see paragraph 9.1 below). One issue of substance did arise as a result of the consultation in relation to the collection of evidence. Some other enforcement legislation allows Inspectors to take only copy documents as evidence in investigations. The instrument would allow Inspectors to take original documents.

8.3 For the purposes of enforcing the Consents to Locate regime, it was OPRED's opinion that the ability to obtain original documents (where correct to do so) would be required to comply with the legal obligation to gather the "best evidence" available should it be necessary to pursue criminal proceedings against non-compliant operators. On that basis, OPRED decided to retain the power to seize original documents in the instrument, but took account of industry concerns by caveating it with sensible limitations on the use of the power (as exists in some other regulatory regimes).

9. Guidance

9.1 Further to the consultation, it is OPRED's intention to make available, as soon as possible after the instrument has entered into force, updated guidance on the Consents to Locate regime (i.e. to further clarify specific elements relating to the existing regime and reflect the introduction of the instrument). If necessary, OPRED would be willing to hold meetings with the offshore hydrocarbons sector to discuss the application of the instrument and aspects appertaining to the revised guidance. The instrument does not alter the existing Consents to Locate regime - it gives OPRED the ability to independently investigate breaches. Nevertheless, OPRED agrees that this is the right time to review the guidance and ensure that it is clear and comprehensive.

10. Impact

10.1 No Impact Assessment is required for the instrument as it will not change the existing requirements of the Consents to Locate regime or place extra burdens on the offshore hydrocarbons sector. However, OPRED would be able to charge the offshore sector for inspections conducted under the instrument and for other regulatory services associated with Consents to Locate by virtue of relevant provisions contained within the Pollution Prevention and Control (Fees) (Miscellaneous Amendments and other Provisions) Regulations 2015 as amended by the Pollution Prevention and Control (Fees) (Miscellaneous Amendments) (No. 2) Regulations 2016 - both of which were respectively supported by an Impact Assessment and Regulatory Triage Assessment. The estimated annual cost to each offshore operator would be £2,900.

11. Regulating small business

- 11.1 The instrument will apply to a small number of businesses meeting the "small firms" definitions that are engaged in offshore hydrocarbon-related activities.
- 11.2 It is important to note that the risk of major hazards is not proportionate to business size. The potential for poorly managed risks leading to a significant incident with detrimental safety and environmental impacts is the same for small businesses as it is for large international companies.
- 11.3 With respect to the offshore hydrocarbons sector more generally, in the light of previous offshore major accidents (e.g. the Deepwater Horizon disaster in the Gulf of Mexico in 2010) and the subsequent close scrutiny of the UK offshore industry, it is crucial that all businesses operating offshore, regardless of size, are subject to the same regulatory framework to ensure that they continue to provide a high level of protection for the marine environment.

12. Monitoring & review

- 12.1 Regulation 8 provides for periodic (i.e. 5 yearly) reviews of the instrument in line with Section 28(2)(a) of the Small Business Enterprise and Employment Act 2015.

13. Contact

- 13.1 David Foskett at the Department for Business, Energy and Industrial Strategy, Tel: 0300 068 6063 or e-mail: David.Foskett@beis.gov.uk can answer any queries regarding the instrument.