

EXPLANATORY MEMORANDUM TO
THE MARINE LICENSING (EXEMPTED ACTIVITIES) (AMENDMENT) ORDER
2019

2019 No. 893

1. Introduction

- 1.1 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 This instrument amends the Marine Licensing (Exempted Activities) Order 2011 (“the 2011 Exemptions Order”), which exempts certain activities from the need to have a marine licence under Part 4 of the Marine and Coastal Access Act 2009 (“the 2009 Act”). It applies in relation to activities for which the Secretary of State is the appropriate licensing authority under section 113 of that Act. This Order amends provision relating to the conditions for eight existing exemptions and introduces three new ones.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument corresponds to those areas, within the UK marine licensing area, in respect of which the Secretary of State is the appropriate licensing authority for the purposes of section 113 of the 2009 Act.
- 4.3 The UK marine licensing area (defined in section 66(4) of the 2009 Act) covers all UK marine waters apart from Scottish inshore waters, where a separate regime applies. In addition, certain activities are licensable wherever carried out if they are carried out by British vessels, vehicles, aircraft, marine structures or floating containers or if the vessels etc. have been loaded in the UK.
- 4.4 The Secretary of State is the appropriate licensing authority:
- (a) in relation to the Scottish offshore region, in respect of certain reserved matters specified in Schedule 5 to the Scotland Act 1998 (c. 46), and certain activities within the subject matter of Part 6 of the Merchant Shipping Act 1995 (c. 21);

- (b) in relation to Wales, the Welsh inshore region and the Welsh offshore region, in respect of the exploration for, or production of, petroleum, certain defence activities (as defined in section 113(9)), and, in relation to the Welsh offshore region, certain activities within the subject matter of Part 6 of the Merchant Shipping Act 1995;
- (c) in relation to Northern Ireland and the Northern Ireland inshore region, in respect of certain excepted matters by virtue of paragraph 4 of Schedule 2 to the Northern Ireland Act 1998 (c. 47) relating to the defence of the realm; and
- (d) for the remainder of the UK marine licensing area.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 Part 4 of the 2009 Act provided for a new marine licensing system. This regulates the activities specified in section 66 of that Act including, in particular, the making of deposits at sea, removals of objects from the seabed, dredging and construction works. The Secretary of State has then delegated licensing (and enforcement) functions to the Marine Management Organisation (MMO) by means of the Marine Licensing (Delegation of Functions) Order 2011 (S.I. 2011/627).
- 6.2 Section 74 of the 2009 Act enables the licensing authority to make orders exempting, with or without conditions, specified activities from the need to have a marine licence under Part 4 of the Act. In deciding whether or not to make an Order under section 74, the licensing authority must consider the need to protect the environment, the need to protect human health, the need to prevent interference with other legitimate uses of the sea and any other factor that the licensing authority considers relevant.
- 6.3 This instrument is being made to amend the 2011 Exemptions Order to reduce burdens, where appropriate, and to ensure that risks to the marine area are well managed.

7. Policy background

What is being done and why?

- 7.1 The marine licensing system in Part 4 of the 2009 Act has a broad scope covering deposits, dredging, construction works as well as removals from the seabed. This allows for consistent decision-making about what activities may be carried out at sea. However, this broad scope also means that the system covers some activities that are already regulated under other legislation or are low risk. While several activities have been exempted from the requirement to hold a marine licence in respect of certain activities by the 2009 Act, most exemptions from this requirement are specified in the 2011 Exemptions Order.
- 7.2 The 2011 Exemptions Order has made provision for a range of exemptions. They fall into several groups:
 - (i) activities for the safety of vessels or human lives;
 - (ii) activities that are regulated under other legislation;
 - (iii) activities taken to prevent pollution;

- (iv) operational defence activities;
- (v) certain types of maintenance by relevant bodies – for example the maintenance of harbour works by harbour authorities; and
- (vi) routine low risk activities.

7.3 Marine licensing exemptions were last reviewed in 2013 and, as a consequence, a range of amendments were then made to the 2011 Exemptions Order. The Government has recently conducted another review of the exemptions, with the aim of reducing burdens, where appropriate, as well as ensuring that any risks to the marine area are well managed.

7.4 In particular, there has been a significant amount of interest in marine litter and the numerous actions of the Government to address this issue. This instrument includes measures for the removal by divers of abandoned, discarded or lost fishing gear from the marine environment – a major source of marine pollution.

7.5 This instrument further amends the 2011 Exemptions Order by introducing the following three new exemptions, the purpose of which is to:

- (i) permit divers to remove marine litter and abandoned, discarded or lost fishing gear from the marine environment during the course of diving activities. Currently under the 2009 Act it is a licensable activity to use a vehicle, vessel, aircraft, marine structure or floating container to remove a substance or object from the seabed in the UK marine area.
- (ii) permit Harbour Authorities to carry out activities to remove marine debris and litter from their jurisdiction. Harbour Authorities are currently only able to use vehicles or vessels to remove such items without a licence where they present an immediate risk of obstruction or danger to navigation;
- (iii) exempt in-water cleaning of lightly-fouled vessels whilst achieving good biosecurity practice. Currently, in-water cleaning of vessels requires a marine licence because it involves the deposit of a substance into the marine environment from a vessel. The Government believes that the gentle cleaning of lightly-fouled vessels will bring only a low risk to the marine environment and that the exemption will help to raise awareness that more heavily-fouled vessels, which bring an increased risk of spreading invasive non-native species, should be removed from the water for cleaning.

7.6 The instrument also amends the existing exemptions by:

- (i) clarifying, by providing specific examples, which types of scientific instruments the Government considers are most likely to cause obstruction or danger to navigation in the marine environment. The purpose of doing so is to provide greater clarity for those intending to deploy such instruments, thus enabling them to better assess whether a marine licence is needed in respect of a particular deployment;
- (ii) exempting all local authorities and the Secretary of State for Defence from the need to hold a licence in respect of any activities carried on, by, or on behalf of a coast protection authority to maintain any coast protection works. Most local authorities are coast protection authorities but not all so the extension of this existing exemption will allow local authorities to maintain infrastructure without a licence. The amendments also clarify what is meant by coast protection works;

- (iii) removing the current requirement for the Environment Agency to secure approval from the MMO prior to undertaking emergency works in response to flood or flood risk, and replacing it with a requirement to notify the MMO within 7 days of those works commencing. This would allow the Agency to focus on the emergency response while allowing the MMO to maintain an oversight of the works;
- (iv) extending the existing exemption, that allows local authorities to remove litter, seaweed or dead animals from beaches, to cover the wider intertidal area. The addition of the reference to the intertidal area extends the area in which a local authority may undertake such removal activities across a wider area than a beach;
- (v) removing the current requirement for harbour and lighthouse authorities to provide prior notice to the MMO when laying or removing moorings or aids to navigation. The Government thinks it disproportionate to require these authorities to notify the MMO when carrying out activity under this exemption;
- (vi) amending the current exemption for laying and removing temporary markers so that the requirement to provide prior notice to the MMO applies only to markers in place for longer than 24 hours but less than 28 days. The current requirement to provide prior notice where markers are in place for less than 24 hours is thought by the MMO to be too onerous.
- (vii) extending the current exemption for diver trails within restricted areas to cover wrecks and other heritage assets protected by different Acts of Parliament because such assets are protected by other legislation;
- (viii) clarifying the scope of the existing exemption for the emergency inspection or repair of cables and pipelines, to remove a requirement for prior notice to be given to the MMO, and replacing it with a requirement to notify the MMO within 24 hours of commencement of the works. This will allow the planning and commencement of such works to take place rapidly but also provide an appropriate safeguard for the MMO to intervene if it thinks it appropriate to do so.

8. European Union (Withdrawal) Act 2018/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

- 9.1 There are no current plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

- 10.1 The Government consulted between November and December 2018 on a set of possible modifications to the 2011 Exemptions Order. Many are small, technical changes and so a 6-week consultation period was considered sufficient to allow all affected to comment. A further, short consultation with all those who responded to the consultation and other organisations who might be affected was undertaken between 28 January and 1 February 2019 to correct an error and address an ambiguity in the original consultation document. The consultation as a whole included options for

reducing the burden of licensing on divers and harbour authorities in removing marine litter and abandoned, discarded and lost fishing gear from the marine environment.

- 10.2 There were 280 responses to the Government's consultation exercise drawn from a range of sectors including business, recreational, regulatory and non-governmental organisations. Respondents were generally very supportive of the overall objective of exempting low risk activities and reducing burdens whilst still maintaining a high level of environmental protection.
- 10.3 Some respondents were fully in favour of the proposed modifications and new exemptions, appreciating the reduction in the cost and time burden and stating it was important to be able to focus on the projects which required more detailed assessment or control. Other respondents were in favour of the approach in principle, but had some clarifications or queries, for example on the operation of notification conditions or definitions.
- 10.4 There were a number of suggestions for additional exemptions or widening the scope of what was proposed to other matters or to other organisations.
- 10.5 Given the high level of support for the majority of the proposals, the Government does not consider that modifications to its proposals are required in this instance.
- 10.6 However, the Government also consulted on whether the current exemption for shellfish propagation and cultivation should be dis-applied for new or extended shellfish farms, in order to rectify the current disparity where shellfish farming is not afforded the same level of scrutiny as other industries/activities with similar levels of impact. This potentially disadvantages industry, the environment and other sea users and can have implications for navigational safety.
- 10.7 Responses relating to the proposals in respect of the shellfish exemption were less supportive than other proposals within the consultation document. 35% of respondents supported the proposal. The shellfish industry voiced concerns in relation to the potential additional regulatory burden in an already complicated regulatory landscape. Therefore we have decided to focus on clarifying the existing regulatory regime, before revisiting the dis-application of the exemption.
- 10.8 A full summary of the consultation responses and the Government's response to them can be found at <https://www.gov.uk/government/consultations/marine-licensing-proposed-changes-to-exemptions>

11. Guidance

- 11.1 The MMO has published detailed guidance on Gov.UK on the need for a marine licence and the exemptions that are available. This is available at <https://www.gov.uk/guidance/do-i-need-a-marine-licence> and <https://www.gov.uk/government/publications/marine-licensing-exempted-activities>. These pages will be updated as necessary to reflect the changes being made by this instrument by the time it comes into force.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is set out in a Regulatory Triage Assessment (RTA). The RTA shows that there are no additional costs estimated. This is because these measures are mostly deregulatory, low-cost to Government and are

desired by stakeholders, with the exception of the disapplication of the shellfish exemption which has been removed from the measure following consultation.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the expected impacts arising from this instrument do not meet the threshold required to produce one.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

13.3 The basis for the final decision on what action to take to assist small businesses is that no additional regulatory burden will be placed upon small businesses. This is because the proposed dis-application of the exemption relating to shellfish propagation and cultivation – the only amendment estimated to lead to a monetary impact – has been removed from this measure. Small businesses were consulted by means of the public consultation and meetings were held both before the consultation and during it with those most likely to be negatively affected (shellfish businesses). Some small businesses carrying out small-scale, low risk activities such as diving operations will benefit from the proposed exemptions in avoiding the administrative burdens, time delay and application fees required to obtain a marine licence.

14. Monitoring & review

14.1 Whilst there is no formal review requirement in respect of the operation of this instrument, we anticipate scoping the potential need for a further review of marine licensing exemptions before the end of 2020. This will include discussions with those who regulate the application of the exemptions and those who are affected by them.

14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Thérèse Coffey, Parliamentary Under Secretary of State for the Department for Environment, Food and Rural Affairs has made the following statement:

‘I consider that inserting a review provision is not appropriate because there is not expected to be a significant regulatory impact on business (greater than +/-£5 million net annualised). It would not be proportionate to do so.’

15. Contact

15.1 Richard Edgell or Niall Malone at the Department for Environment, Food and Rural Affairs. Telephone: 0208 415 2492 or 0208 026 6831 email: richard.edgell2@defra.gov.uk or niall.malone@defra.gov.uk can be contacted with any queries regarding the instrument.

15.2 Simon Brockington, Deputy Director for Marine Environment, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.3 Thérèse Coffey, Parliamentary Under Secretary of State for Environment and Rural Life Opportunities at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.