

Environmental damage: extending the Environmental Liability Directive into marine waters

Consultation on amending the Environmental Liability
(Scotland) Regulations 2009 in Scotland to transpose
Article 38 of the Offshore Safety Directive 2013

February 2015

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Introduction

1.1 Scottish Ministers are seeking comments on proposals to transpose Article 38 of Directive 2013/30/EU¹ on the safety of offshore oil and gas operations (OSD). Article 38 has extended the scope of the Environmental Liability Directive (2004/35/EC)² into the marine environment in relation to marine waters. The Scottish Government has produced draft Environmental Liability (Scotland) Amendment Regulations 2015 that will transpose Article 38 in Scottish territorial waters.

1.2 Defra and the Welsh Assembly Government undertook separate consultation exercises in July 2014 on corresponding legislation in relation to marine waters off England and Wales. This can be found at https://consult.defra.gov.uk/better-regulations/amending-the-environmental-damage-regulations-2009/supporting_documents/environmentaldamageconsultdoc.pdf

1.3 This consultation also forms part of the wider transposition of the OSD, the principal responsibility for which rests with UK Department of Energy and Climate Change (DECC) and the Health and Safety Executive (HSE). A related consultation exercise has been run by them to transpose the other parts of the OSD by the deadline of 19 July 2015. This can be found at https://www.gov.uk/government/publications?publication_filter_option=consultations

1.4 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.

1.5 Please return comments to:

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1.6 In line with Scottish Government policy we will publish a summary of the responses we receive to this consultation.

1.7 This consultation will run for 8 weeks from 17th February to 13th April 2015.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:178:0066:0106:EN:PDF>

² <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0035&from=EN>

The proposals

2.1 Article 38 of the OSD extends the offshore scope of the Environmental Liability Directive (ELD). The ELD is transposed in Scotland by the Environmental Liability (Scotland) Regulations 2009 (“the 2009 Regulations”)³. The ELD already applies to, amongst other things, damage affecting protected habitats and species in Scottish territorial waters out to 12 nautical miles (by the 2009 Regulations) and to such damage in the Scottish offshore region, i.e. from 12 to 200 nautical miles (by the Environmental Damage (Prevention and Remediation) Regulations 2009) and damage to waters covered by the Water Framework Directive (WFD) (2000/60/EC)⁴ and by the current domestic regime.

2.2 Waters covered under the WFD include coastal waters which extend up to 1 nautical mile seaward from the baseline from which the territorial sea off Scotland is measured. Under the domestic regime the 2009 Regulations provide that coastal waters extend to 3 nautical miles from the baseline, consistent with provision made under the Water Environment and Water Services (Scotland) Act 2003. WFD and the 2009 Regulations also cover transitional waters which are bodies of water in the vicinity of river mouths which are partly saline in character as a result of their proximity to coastal water but which is also substantially influenced by freshwater flows.

2.3 Specifically, Article 38 of the OSD amends Article 2(1)(b) of the ELD to extend, via sub-paragraph (ii) below, the geographical scope of the ELD to include damage to marine waters, as defined in the Marine Strategy Framework Directive (MSFD) (2008/56/EC)⁵ as follows:

“water damage”, which is any damage that significantly adversely affects:

(i) The ecological, chemical or quantitative status or the ecological potential, as defined in Directive 2000/60/EC [the WFD], of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies; or

(ii) The environmental status of the marine waters concerned, as defined in Directive 2008/56/EC, in so far as particular aspects of the environmental status of the marine environment are not already addressed through Directive 2000/60/EC.”

2.4 Marine waters are defined in the MSFD as:

(a) Waters, the seabed and subsoil on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area where a Member State has and/or exercises jurisdictional rights, in accordance with the UNCLOS7, with the exception of waters adjacent to the countries and territories mentioned in Annex II to the Treaty and the French Overseas Departments and Collectivities; and

³ <http://www.scotland.gov.uk/Resource/Doc/211199/0084245.pdf>

⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0060&from=EN>

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:164:0019:0040:EN:PDF>

(b) Coastal waters as defined by Directive 2000/60/EC, their seabed and subsoil, in so far as particular aspects of the environmental status of the marine environment are not already addressed through that Directive or other Community legislation.

2.5 In effect, the current geographical limit to water damage will be extended beyond coastal waters covered by the WFD (the Directive provides the seaward extent to be one nautical mile from the baseline from which the breadth of the territorial sea is measured) and beyond the current limit of the 2009 Regulations which, consistent with the approach taken in the Water Environment and Water Services (Scotland) Act 2003, provide that the seaward limit of coastal waters is three nautical miles seaward from the baseline in Scotland) to cover all marine waters (as defined by the MSFD) under the jurisdiction of Member States. In coastal waters, environmental damage will also be extended to cover the MSFD descriptors not already covered by WFD (see paragraph 3.3 below).

2.6 Annex 1 contains draft Amendment Regulations that are proposed to be made to the 2009 Regulations necessary to make this change to cover all Scottish territorial waters. We propose to amend regulations 2 and 4 of the 2009 Regulations to extend the definition of water damage. It is proposed that the 2009 Regulations, as amended, will not apply to damage that significantly affects the environmental status of marine waters caused by an emission, event or incident which took place before the Amendment Regulations come into force (19th July 2015) or to such damage to those waters caused by an emission, event or incident that occurs after the Amendment Regulations come into force resulting from a specific activity that took place and finished before that date.

Competent authorities

2.7 We propose to amend regulation 7 of the 2009 Regulations to give effect to the following enforcing authority arrangements:

- The SEPA would continue to enforce against water damage under WFD (surface waters, groundwater, transitional waters and coastal waters) up to 3 nautical miles seaward from the baseline in Scotland; and
- Scottish Ministers would be the enforcing authority in relation to damage which significantly affects the environmental status of marine waters under the MSFD out to 12 nautical miles from the baseline in Scotland and in coastal waters, other than where the damage is already addressed in coastal waters under WFD and domestic legislation for which SEPA is the enforcing authority.

2.8 Currently SEPA is the competent authority for damage to water in the sea out to 3 nautical miles off the Scottish coastline. That will remain the case. In addition to its responsibilities as the competent authority in relation to damage to marine species and habitats out to 12 nautical miles, Marine Scotland will also assume responsibility on behalf of Scottish Ministers for damage to waters from the coast out to 12 nautical miles under MSFD. As Scottish Ministers do not have legislative competence to make provision in respect of water damage to offshore marine waters (beyond 12 nautical miles to the limit of the Scottish exclusive economic zone) provision is being made in Defra's equivalent transposing Regulations for Scottish

Ministers to have enforcement powers in relation to damage to marine waters in that area. These would mirror those the Scottish Ministers currently have as the competent authority for damage to marine species and habitats from 12 nautical miles out to the limit of the Scottish exclusive economic zone.

Question 1: do you have any comments on the way in which we propose to transpose Article 38 of the OSD as set out above?

Impact

3.1 Previous 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.

3.2 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. More detail on this is contained within the DECC/HSE IA which accompanies the consultation covering the wider transposition of the OSD.

3.3 Remediation requirements under the ELD are triggered by a measurable adverse change. For waters subject to the WFD this change must be sufficient to lower the status or prevent an improvement in status of the water body as defined in the WFD. The concept of good environmental status contained within the MSFD is wider than that in the WFD as it includes additional descriptors relating to commercial fish, some aspects of biodiversity and the introduction of marine litter and energy (including underwater noise). The 11 MSFD descriptors are:

- biological diversity;
- non-indigenous species;
- commercially exploited fish and shellfish;
- food webs;
- human-induced eutrophication;
- sea floor integrity;
- hydrographical conditions;
- contaminants;
- contaminants in fish and other seafood;
- marine litter; and

- and the introduction of energy (including underwater noise).

3.4 Adverse change in the status of a WFD water body can be more readily assessed than measuring changes to status for MSFD at the level of sub-regional sea areas (The sub-regional seas comprise the Greater North Sea and the Celtic Seas). Additionally, damage to marine waters would have to be significant at the sub-regional seas scale to trigger action under the ELD.

3.5 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. Opportunities to directly and actively restore damage will be limited in the marine environment and the measures required will therefore largely be to compensate for the damage. As there may be limited opportunities to take such compensatory measures in the marine environment other appropriate measures may sometimes have to be taken elsewhere. The main costs are therefore likely to relate to paying for environmental improvements.

3.6 It is difficult to be certain but there is a possibility that the proposed amendments to the 2009 regulations may deliver additional benefits to the marine environment if operators take additional steps to ensure that incidents are less likely to take place in future through enhancements to their plans to comply with the ELD provisions relating to biodiversity.

Question 2: do you have any views on the likelihood of potential damage in marine waters affecting their environmental status as defined under the MSFD?

Question 3: what do you consider to be the potential costs to industry should damage to marine waters occur that triggers action under the proposed amended Regulations?

Question 4: do you have any other comments on the proposed transposition of Article 38 of the OSD?

Question 5: what do you consider to be the potential benefits for marine waters under the 2009 Regulations, following the proposed amendments?

ANNEX 1: THE ENVIRONMENTAL LIABILITY (SCOTLAND) AMENDMENT REGULATIONS 2015

SCOTTISH STATUTORY INSTRUMENTS

2015 No.

ENVIRONMENTAL PROTECTION

The Environmental Liability (Scotland) Amendment Regulations 2015

<i>Made</i>	- - - -	2015
<i>Laid before the Scottish Parliament</i>		2015
<i>Coming into force</i>	- -	19th July 2015

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of, and paragraph 1A of Schedule 2 to, the European Communities Act 1972(a) and all other powers enabling them to do so.

These Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972 and it appears to the Scottish Ministers that it is expedient for the reference to the Directive of the European Parliament and of the Council of 17th June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)(b) to be construed as a reference to that instrument as amended from time to time.

Citation and commencement

1. These Regulations may be cited as the Environmental Liability (Scotland) Amendment Regulations 2015 and come into force on 19th July 2015.

Amendments

2. The Environmental Liability (Scotland) Regulations 2009(c) are amended in accordance with regulations 3 to 8.

(a) 1972 c.68. Section 2(2) was amended by the Scotland Act 1998 (c. 46) (“the 1998 Act”), Schedule 8, paragraph 15(3) (which was amended by section 27(4) of the Legislative and Regulatory Reform Act 2006 (c. 51) (“the 2006 Act”). Section 2(2) was also amended by section 27(1)(a) of the 2006 Act and by the European Union (Amendment) Act 2008 (c. 7), Schedule, Part 1. Paragraph 1A of Schedule 2 was inserted by section 28 of the 2006 Act. The functions conferred upon the Minister of the Crown under section 2(2), insofar as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act.

(b) OJ L 164, 25.6.2008, p. 19.

(c) S.S.I. 2009/266, as amended by S.I. 2011/1043, S.I. 2011/2131 and S.S.I. 2011/116.

3. In regulation 2(1) (interpretation)—

- (a) after the definition of “Directive 2001/18/EC”, insert—
““Directive 2008/56/EC” means the Directive of the European Parliament and of the Council of 17th June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)(a);”;
- (b) after the definition of “genetically modified organisms”, insert—
““marine waters” means waters classified as marine waters pursuant to Directive 2008/56/EC;”; and
- (c) for the definition of “waters”, substitute—
““water environment” has the meaning assigned to it by section 3(2) of the Water Environment and Water Services (Scotland) Act 2003(b).”.

4. For regulation 4(1)(b) (application), substitute—

- “(b) water damage, caused by an activity listed in Schedule 1, which is—
 - (i) any damage that significantly adversely affects any or all of the—
 - (aa) ecological status;
 - (bb) chemical status;
 - (cc) quantitative status;
 - (dd) ecological potential,of the water environment with the exception of adverse effects where Article 4(7) of the Directive 2000/60/EC applies; or
 - (ii) any damage that significantly adversely affects the environmental status of marine waters, in so far as particular aspects of the environmental status of the marine environment are not already addressed through Directive 2000/60/EC;”.

5. In regulation 5 (exemptions)—

- (a) after paragraph (f), insert—
“(fa) environmental damage of the type defined in regulation 4(1)(b)(ii) to marine waters caused by an emission, event or incident that took place before 19th July 2015;”; and
- (b) after paragraph (g), insert—
“(ga) environmental damage of the type defined in regulation 4(1)(b)(ii) to marine waters caused by an emission, event or incident that occurs on or after 19th July 2015 which results from a specific activity that took place and finished before that date;”.

6. In regulation 7 (competent authority)—

- (a) in paragraph (1)(b) omit “and”;
- (b) for paragraph (1)(c), substitute—
“(c) to land or, in relation to environmental damage of the type defined in regulation 4(1)(b)(i), the water environment, is the Scottish Environment Protection Agency; and”;
- (c) after paragraph (1)(c), insert—
“(d) to marine waters, in relation to environmental damage of the type defined in regulation 4(1)(b)(ii), is the Scottish Ministers.”; and
- (d) in paragraph (5)(b), for “any waters” substitute “the water environment or marine waters”.

(a) OJ L 164, 25.6.2008, p. 19.

(b) 2003 asp 3 (“the 2003 Act”). Section 3(2) of the 2003 Act defines “the water environment” as meaning “all surface water, ground water and wetlands”. “Surface water”, “ground water” and “wetland” are defined, respectively in section 3(3), (4) and (5) of the 2003 Act, and associated definitions are also defined in that section.

7. In regulation 11(4)(b) (identification and determination of remedial measures) for “any waters” substitute “the water environment or marine waters”.

8. In regulation 16 (grant of, and compensation for, rights of entry)—

- (a) in paragraph (1), for “land or waters” substitute “land, the water environment or marine waters”; and
- (b) in paragraph (2)(a), for “land or waters” substitute “land, the water environment or marine waters”.

A member of the Scottish Government

St Andrew’s House,
Edinburgh
[] 2015

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Environmental Liability (Scotland) Regulations 2009 (“the 2009 Regulations”) which implemented Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage.

These Regulations implement Article 38 of Directive 2013/30/EU of the European Parliament and of the Council of 12th June 2013 on the safety of offshore oil and gas operations which amends Directive 2004/35/EC. Article 38 of Directive 2013/30/EU extends the definition of “environmental damage” to include damage that significantly adversely affects the environmental status of marine waters as defined in Directive 2008/56/EC of the European Parliament and of the Council establishing a framework for community action in the field of marine environmental policy, in so far as particular aspects of the environmental status of the marine environment are not already addressed through Directive 2000/60/EC of the European Parliament and of the Council of 23rd October 2000 establishing a framework for Community action in the field of water policy.

Regulation 4 amends regulation 4 of the 2009 Regulations to extend the application of the 2009 Regulations to include damage that significantly adversely affects the environmental status of marine waters as defined in Directive 2008/56/EC, in so far as particular aspects of the environmental status of the marine environment are not already addressed through Directive 2000/60/EC.

Regulation 5 amends regulation 5 of the 2009 Regulations to provide that those Regulations, as amended, do not apply to environmental damage of the type defined in regulation 4(1)(b)(ii) of the 2009 Regulation to marine waters caused by an emission, event or incident that took before 19th July 2015 or such damage caused to those waters by an emission, event or incident that occurs on or after 19th July 2015 which results from a specific activity that took place and finished before that date.

Regulation 6(a) to (c) amends regulation 7 of the 2009 Regulations to provide that the Scottish Ministers are, for the purpose of those Regulations, as amended, the competent authority in relation to instances of environmental damage of the type defined in regulation 4(1)(b)(ii) of the 2009 Regulations or in relation to an imminent threat of such damage to marine waters.

Consequential amendment to the 2009 Regulations are made by regulations 3, 6(d), 7 and 8.

A Transposition Note and Business and Regulatory Impact Assessment (BRIA) have been prepared in connection with these Regulations and placed in the Scottish Parliament Information Centre. Copies of the BRIA can be obtained from []. Copies of the Transposition Note can be obtained from [].



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