



Department
for Environment
Food & Rural Affairs

Environmental damage: extending the Environmental Liability Directive into marine waters

**Consultation on amending the Environmental
Damage (Prevention and Remediation)
Regulations 2009 in England and Wales to
transpose Article 38 of the Offshore Safety
Directive 2013**

**A summary of responses to the consultation and
government response**

December 2014



Llywodraeth Cymru
Welsh Government



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Background

1.1 Government¹ ran a consultation exercise² from 28th July to 21st September 2014 seeking comments on proposed amendments to the Environmental Damage (Prevention and Remediation) Regulations 2009³ and the Environmental Damage (Prevention and Remediation) Wales Regulations 2009⁴ to transpose Article 38 of Directive 2013/30/EU on the safety of offshore oil and gas operations (OSD)⁵.

1.2 Article 38 has extended the scope of the Environmental Liability Directive (2004/35/EC)⁶ to cover all damage to marine waters. In effect, the current geographical limit to water damage will be extended beyond coastal waters covered by the Water Framework Directive (WFD) (up to one nautical mile seaward from the baseline in England and Wales) to cover all marine waters (as defined by the Marine Strategy Framework Directive (MSFD⁷)). In coastal waters, environmental damage will also be extended to cover the MSFD descriptors that measure environmental status in accordance with that Directive, not already covered by WFD.

1.3 Department of Energy and Climate Change (DECC) and Health and Safety Executive (HSE) are responsible for the wider transposition of the OSD. They ran a parallel consultation exercise to transpose the rest of the OSD by the deadline of 19 July 2015.

1.4 We sought comments on how we proposed to:

- Extend the scope of the domestic legislation to reflect the extension of the existing Environmental Liability Directive into offshore marine waters;
- Specify the division of responsibilities of the various competent authorities in enforcing the new arrangements;
- Possibly make a technical amendment to ensure the definition of an operator includes offshore oil and gas operators and licensees;

¹ Unless otherwise indicated, 'Government' should be taken to mean both the UK Government and the Welsh Government.

² [Consultation on amending the Environmental Damage \(Prevention and Remediation\) Regulations 2009 in England and Wales to transpose Article 38 of the Offshore Safety Directive 2013](#)

³ S.I. 2009/153 as amended.

⁴ S.I. 2009/995 as amended.

⁵ [Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC.](#)

⁶ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the **prevention** and **remedying** of environmental damage.

⁷ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).

- Assess any potential costs to industry where serious incidents happening offshore are likely to trigger action under the Environmental Liability Directive;
- Seek any other comments on the proposed transposition of Article 38.

1.4 We are grateful to respondents for taking the time to consider and comment on the proposals set out in the consultation document.

Analysis of the responses

2.1 We sought comments from operators involved in offshore activities and other relevant stakeholders operating within the marine environment. We alerted over 200 organisations in England and Wales to the consultation exercise.

2.2 We received nine responses: two from companies in the offshore oil and gas industry; three from Non-Governmental Organisations (NGOs); three from regulators; and one from a private consultant. Not all respondents commented on all the proposals as the following analysis indicates. A list of respondents is at annex 1.

Summary of the views of respondents and government response

2.3 The consultation document set out how we proposed to amend the Environmental Damage (Prevention and Remediation) Regulations 2009 (EDR) (and Welsh equivalent) to reflect the extension of the definition of water damage as laid down in the MSFD. We then set out the proposed split in responsibilities between the various regulators as enforcing authorities. We asked whether respondents had any comments on how we proposed to transpose article 38 of the OSD in the way described.

Extension of the definition of water damage

2.4 Eight respondents made specific comments on this: two from companies; three from NGOs; and three from regulators.

2.5 Respondents were broadly supportive of the proposals. Two NGOs expressed a view that it was essential to place the highest environmental and safety standards on all offshore operators and extend this out to the limits of sea areas under English and Welsh jurisdiction.

2.6 One regulator sought clarity on whether the revised marine waters and baseline would be taken from the low water mark in accordance with UNCLOS or from the high water springs under the Marine and Coastal Access Act 2009. Another suggested a drafting amendment to the way in which the revised scope of the Regulations was to be framed.

Government response

2.7 This amendment of the EDR will rely upon the definition of marine waters set out in the MSFD which makes reference to UNCLOS. We consider that references to ‘the baseline’ in the amended regulations will be consistent with this and do not consider there to be a need to provide further definition of this term.

Roles of enforcing authorities

2.8 Five respondents made specific comments on the allocation of responsibilities between enforcing authorities in their areas of jurisdiction: three from NGOs, one from regulators and one from a company.

2.9 One NGO sought greater clarity on the responsibilities for addressing damage to marine waters in England and Wales beyond 12 nautical miles where the Secretary of State would be the enforcing authority i.e. who would actually deal with the incident. The NGO noted that there would be a greater need for regional co-ordination between the UK and other EU Member States to ensure adequate monitoring and mitigation measures were taken.

2.10 Two NGOs requested further explanation on how responsibility might be allocated between regulators where an incident crossed different jurisdictional boundaries; and how resources would be allocated to investigate and deal with an incident.

2.11 One operator asked whether the implementing legislation would be extended to cover the Isle of Man.

Government response

2.12 The allocation of responsibilities will be reviewed in the light of comments and confirmed in the final set of Regulations. The existing Memorandum of Understanding between the national enforcement bodies will be revised to reflect the division of responsibilities.

2.13 The Isle of Man is not covered by this implementing legislation as it is not part of a Member State and therefore not subject to EU Directives. They appear to have 12 nautical miles of territorial waters which means that anything beyond that will be covered by the EDR.

Operator liability

2.14 Under the EDR, the “operator” is liable for the prevention and remediation of environmental damage. The definition of “operator” is “the person who operates or controls such an activity, including the holder of a permit or authorisation relating to that activity, or the person registering or notifying such an activity”. However, Article 7 of the OSD requires that the licensee is the body that should be financially responsible for this. We asked for

views on whether the definition of operator would adequately capture licensees in the offshore oil and gas industries.

2.15 Five respondents made specific comments on these proposals: one from a company; three from NGOs; and one from a regulator.

2.16 One operator suggested that, for the sake of clarity, reference be made in the EDR amendment to the draft Offshore Petroleum Licensing (OSD) Regulations 2015 which place the financial liability for environmental damage on the licensee as set out in those Regulations.

2.17 A regulator confirmed that they did not wish for any change to the current definition of “operator” that might limit the implementation of the Regulations. Nevertheless, they welcomed the opportunity to extend the definition to take account of offshore oil and gas operators and licensees.

2.18 One NGO thought that it might prove difficult to ascertain who might be a “responsible operator” where activities are unlicensed; and whether it might be sensible to include sub-contractors as potential responsible operators, in line with the polluter pays principle.

2.19 Another NGO felt that the licence arrangements under the Petroleum Act already provided clarity. However, another NGO recommended a technical amendment to clarify this point and ensure the correct transposition of Article 7 of the OSD.

Government response

2.20 Whilst we will not be changing the definition of ‘operator’ in any way that might limit enforcement of EDR, we will look to amend it so as to clarify the applicability of the regime to licensees, providing additional explanation in guidance.

Impact

3.1 Government sought views on the likelihood and potential costs of an incident triggering the threshold for marine water damage under the ELD. We asked for views on the likelihood of potential damage in marine waters affecting their environmental status as defined under the MSFD; the potential costs to industry, should damage to marine waters occur, that triggers action under the Regulations; and whether respondents had any other comments on the proposed transposition of Article 38 of the OSD.

3.2 Seven respondents made specific comments on these proposals: one from a company; three from NGOs; two from regulators; and one from a consultant.

3.3 One operator said it was difficult to envisage an incident occurring offshore in the oil and gas sector that would trigger the ELD/MSFD threshold of environmental damage. They sought clarity on the requirement to establish whether environmental damage had occurred; the nature of an operator’s liability for any costs incurred; and guidance on how

remediation in the offshore marine environment would be undertaken and whether an operator would be required to make financial provision.

3.4 One NGO said they were working with partners to develop approaches to measure likely potential damage in marine waters affecting their Good Environmental Status (GES) under the MSFD. They thought that it would prove difficult to quantify potential costs as the scope of assessing damage and monitoring would vary. They sought guidance on how remediation in the offshore marine environment would be undertaken.

3.5 One regulator agreed that while certain activities had the potential to cause damage in the marine environment, they thought it would be more difficult to understand the scale of impact on the GES descriptors' status. They believed that significant environmental damage was rare in the offshore marine environment and envisaged significant challenges to monitoring, detecting and enforcing offshore damage.

3.6 One regulator and a consultant sought clarification on whether the WFD already goes out to 12 nautical miles with regards to chemical status.

3.7 Two NGOs recommended that the UK should adopt an approach whereby 'significant' thresholds would not require there to be 'serious' or 'severe' impacts, simply 'measurable', 'important' damage. They requested clarity on linking damage to an operator; widening the ELD to include improved management; monitoring and raising public awareness; and clarifying how funding would be allocated for any remediation measures.

Government response

3.8 In order to explore further the potential costs and benefits of the extension of the ELD into marine waters, Defra hosted a workshop with business representatives to discuss, among other things, the likelihood of potential damage caused by different activities affecting environmental status as defined under the MSFD. The conclusion of the workshop was that it was extremely unlikely that any case would be caught by the MSFD definition; and even less likely that a case would be caught by MSFD that would not already be caught by the existing ELD definition. These conclusions will be fed into the final Impact Assessment being prepared by DECC/HSE on the transposition of the OSD as a whole.

3.9 Some comments relating to the description of what constituted damage, in effect lowering the threshold, go beyond the scope of the consultation and are noted. Changes to the ELD would be required to bring these into effect or would gold plate existing requirements if introduced directly into domestic legislation.

3.10 Government confirms that chemical status already extends out to 12 nautical miles under the WFD.

3.11 Government will amend its guidance to reflect the extension of the ELD into offshore marine waters.

Forward look

4.1 Government will proceed to transpose Article 38 of the OSD by the transposition deadline of 19 July 2015, working closely in tandem with DECC, taking the opportunity to consolidate the Environment Damage (Prevention and Remediation) Regulations 2009, as amended, in England. The Regulations contain a clause providing for a review of them to be conducted in or by 2020. Welsh Government will proceed to make their own set of transposing Regulations, also to come into effect by July 2015.

Annex 1: List of respondents to the consultation

ConocoPhillips UK
Environment Agency
Jan Brooke
Joint Nature Conservation Committee
Marine Management Organisation
Natural Resources Wales
Oil & Gas UK
RSPB
Wildlife and Countryside Link