

EXPLANATORY MEMORANDUM TO

THE MARINE ENVIRONMENT (AMENDMENT) (EU EXIT) REGULATIONS 2018

2018 No. 1399

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Department for Environment, Food & Rural Affairs and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument is made in exercise of the powers conferred by section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018 in order to ensure that UK and EU legislation relating to the marine environment, in particular marine strategy, will continue to be operable after the UK leaves the EU.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The Marine Strategy Framework Directive (the MSFD) requires the UK to put in place the necessary measures to achieve or maintain good environmental status in the marine environment by 2020.

The Marine Strategy Regulations 2010 were made under section 2(2) of the European Communities Act 1972 and transpose the requirements of the MSFD into UK law.

Commission Decision (EU) 2017/848 sets out the criteria and methodological standards to be used for the purposes of determining good environmental status, and specifications and standardised methods for monitoring and assessment.

The Marine and Coastal Access Act 2009 (the MCAA) established provisions for the management and protection of the marine and environment. The relevant provisions are in Part 3 (Marine Planning) which sets out requirements for a UK Marine Policy Statement and marine plans, Part 4 (Marine Licensing) which sets out the marine licensing regime, Part 5 (Nature Conservation) which sets out a power to create Marine Conservation Zones and a duty to contribute to a UK network of marine sites, and Part 8 (Enforcement) which sets out enforcement powers for enforcing requirements across licensing, nature conservation and fishing.

The Marine Licensing (Exempted Activities) Order 2011 was made in exercise of powers under section 74 of the MCAA and sets out exemptions to otherwise licensable activities.

Why is it being changed?

- 2.3 The changes made by the instrument are necessary to ensure that the current legislation continues to operate effectively after we leave the EU. The changes include the replacement of references to “Member States” with references to the UK or to an appropriate UK body, the replacement of references to “Community

legislation” or “EU law” with references to “retained EU law”, and the replacement of requirements to notify or report to the Commission with requirements to report publicly. The changes also ensure that cross references to the MSFD, and other EU legislation, will continue to work after exit.

What will it now do?

- 2.4 The instrument will ensure that the legislation described above (2.2) will operate effectively in the UK after we leave the EU.

3. Matters of special interest to Parliament

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

- 3.1 The Marine Environment (Amendment) (EU Exit) Regulations 2018 were presented to the Sifting Committees for consideration on 20th November 2018. On 5th December 2018 the Sifting Committees agreed with the Government that this instrument does not have to have a debate in parliament, though one may still occur. The instrument will therefore remain subject to the negative resolution procedure.

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)

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 varies and is dependent on the application of the legislation that is being amended, as follows:
- The application of regulation 2 varies and is dependent on the application of the provision that is being amended¹.
 - Regulations 3, 5, 6, 7, 8, 9, 10, 11 and 12 apply to the marine strategy area. This area includes territorial seas, including coastal waters as defined by the Water Framework Directive (Directive 2000/60/EC), and offshore waters out to the limits of the UK’s renewable energy zone. The marine strategy area also includes areas of the UK’s Continental Shelf beyond the renewable energy zone, but for these areas the instrument only applies to the seabed and not the water column above it.
 - Regulation 4 applies wherever the Secretary of State is the licensing authority under Part 4 of the MCAA. The UK marine licensing area 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. The appropriate licensing authority is defined in section 113 of the MCAA. Licensing in Welsh inshore and offshore² waters, Northern Ireland

¹ The Explanatory Notes to the MCAA, Section 323: Extent (paragraphs 830 to 842), comment on the application of the relevant Parts of the MCAA.

² Following the commencement of section 46 of the Wales Act 2017 on 1 April 2018, the Welsh Ministers are the appropriate licensing authority for the Welsh offshore region.

inshore waters and Scottish offshore waters has been devolved except for the reserved matters specified in section 113. Other than where responsibility has been devolved, the Secretary of State is the licensing authority. The Secretary of State has then delegated licensing (and enforcement) functions to the Marine Management Organisation by means of the Marine Licensing (Delegated Functions) Order 2011.

5. European Convention on Human Rights

5.1 Parliamentary Under Secretary of State for the Environment and Rural Affairs, Thérèse Coffey MP has made the following statement regarding Human Rights:

‘In my view the provisions of the Marine Environment (Amendment) (EU Exit) Regulations [2018] are compatible with the Convention rights’.

6. Legislative Context

6.1 The legislative context for this instrument is summarised in paragraph 2.2. A summary of the types of amendment made to the current legislation is set out in paragraph 2.3, with other types of amendments summarised below.

6.2 The amendments made to the MCAA include:

- the amendment of section 60(8) to reflect amendments to devolution legislation under Part 3 of Schedule 3 to the European Union (Withdrawal) Act 2018
- the removal of section 141(6), which is spent, and the related removal of the definition of “third country vessel” (which would require amendment, as set out below, if retained)
- the amendment of section 244(1) to provide that EU Member State (and Gibraltar) vessels will be treated as “third country vessels” for the purposes of the enforcement of nature conservation legislation under sections 237 and 243 after the UK leaves the EU; there will be no longer be any basis for treating such vessels differently.

6.3 The amendments made to the Marine Strategy Regulations 2010 include:

- the inclusion of a new interpretive provision in new regulation 2(6), so that for the purposes of the Regulations the requirements of the MSFD mean the requirements of the MSFD in so far as they are not reflected in the Regulations or Commission Decision (EU) 2017/848, and as read with the necessary modifications.
- the inclusion of a reference to Commission Decision (EU) 2017/848 in regulation 5(1), to clarify the connection between the Regulations and the Decision (and further the inclusion of new Article 1(2) of the Decision, to clarify that regulation 7(3) of the Regulations applies to the Decision).
- the removal of regulation 17 on Commission notifications and reports; the notification deadlines for regulations 17(1)(a) to (e) have passed and the notifications under regulation 17(1)(g) and (h) are no longer relevant; the notifications under regulation 17(1)(f) will be made as public reports pursuant to the public participation provisions in regulation 18; the notifications to OSPAR under regulation 17(3) will be made pursuant to the public participation provisions in regulation 18, by virtue of regulation 18(8); and the

reporting requirements under regulation 17(2) are moved to new regulation 14(13).

- the amendment of regulation 18 consequential to the amendment of Regulation provisions relating to Commission notifications and reports, including regulation 17
- the amendment of regulation 19 (Directions to, and assistance from, public authorities); the Department does not consider that this constitutes the amendment of “a power to legislate” for the purposes of paragraph 1(2)(d) of Part 1 of Schedule 7 to the European Union (Withdrawal) Act 2018. The Marine Strategy Regulations 2010 are made under section 2(2) of the European Communities Act 1972 and section 2(2) regulations are unable to “confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal”. The Department therefore considers that only directions of a non-legislative character can be made under regulation 19.
- the amendment of paragraph 5 of Part 1 of Schedule 1 to reflect amendments to devolution legislation under Part 3 of Schedule 3 to the European Union (Withdrawal) Act 2018.
- the inclusion of a schedule of MSFD modifications, to ensure all cross references to the MSFD in the Regulations are read with the appropriate modifications; the modifications are similar to the amendments summarised in paragraph 2.2, and also provide for the removal of references to provision made pursuant to the procedure in Article 25(3) MSFD (provision will be made in accordance with the instrument described in paragraph 6.6).

6.4 The amendments made to the Marine Licensing (Exempted Activities) Order 2011 comprise the amendment of article 37(2) to provide that EU Member State (and Gibraltar) vessels will be treated as “third country vessels” for the purposes of the exemption after the UK leaves the EU; there will be no longer be any basis for treating such vessels differently.

6.5 The amendments made to Commission Decision (EU) 2017/848 include:

- the replacement of references to “Member States” with references to the appropriate UK authority(ies) specified in the relevant provision of the Marine Strategy Regulations 2010.
- the removal of references to “Union cooperation”; after the UK leaves the EU such cooperation will take place at regional or subregional level (through OSPAR mechanics), as currently provided in the Decision.
- the replacement of requirements to agree at Union level with requirements for the appropriate UK authority(ies) to agree, or with requirements to agree through regional or subregional cooperation.
- the amendment or modification of references to non-marine EU legislation, to reflect the amendments made by other instruments introduced by the Department (and other Government Departments) under section 8 of the European Union (Withdrawal) Act 2018.
- the inclusion of a schedule of MSFD modifications, to ensure all cross references to the MSFD in the Decision are read with the appropriate modifications; the modifications are similar to the amendments summarised in paragraph 2.2, and also provide for the removal of references to provision

made pursuant to the procedure in Article 25(3) MSFD (provision will be made in accordance with the instrument described in paragraph 6.6).

- 6.6 In addition to this instrument the Department will also introduce an instrument which transfers functions of the European Commission under the MSFD to the appropriate UK authority where appropriate, and an instrument which amends Parts 1 (The Marine Management Organisation) and 8 (Enforcement (fishing)) of the MCAA.

7. Policy background

What is being done and why?

- 7.1 The amendments to the MCAA, the Marine Strategy Regulations 2010, the Marine Licensing (Exempted Activities) Order 2011 and Commission Decision (EU) 2017/848 (set out in paragraphs 2.3 and 6) are being made to correct operability deficiencies which, if not corrected, would mean that the UK would be unable to maintain the current levels of marine environmental protection. The changes made by the instrument are necessary to ensure that the current legislation continues to operate effectively after we leave the EU.
- 7.2 In addition, the amendments to the Marine Strategy Regulations 2010 and Commission Decision (EU) 2017/848 are being made on a UK-wide basis in order to maintain the existing UK wide framework for marine strategy. This will ensure continuity and consistency of marine environmental monitoring and standards throughout UK waters. This will ensure continuity and consistency of marine environmental monitoring and standards throughout UK waters. The amendments will mean the UK will continue to work cooperatively with other countries within the same marine region or sub-region, to develop our marine strategy. This coordination is being achieved through the Regional Seas Conventions, which for the UK is the OSPAR Convention.
- 7.3 Failure to update and operationalise the legislation underpinning the monitoring, standards, and reporting framework on the environmental status of our seas, creates a risk of reputational harm in the UK from stakeholders, as well as on the international environmental stage, and could potentially leave us open to judicial review.

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

- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The instrument is also made under the power in paragraph 21 of Schedule 7 to that Act to make supplementary, incidental, consequential, transitional, transitory or saving provision (including provision re-stating any retained EU law in a clearer or more accessible way). In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 None.

10. Consultation outcome

- 10.1 This instrument has not been subject to formal consultation.
- 10.2 The Devolved Administrations (Scottish Government, DAERA and Welsh Government) have been consulted on the amendments contained in the instrument, and they are content with the approach being taken.
- 10.3 The Department has conducted informal consultation with Natural England, the Marine Management Organisation, the Joint Nature Conservation Committee and the Centre for Environment, Fisheries and Aquaculture Science.
- 10.4 The Department has also engaged informally with stakeholders including the Wildlife Trusts, Crown Estate, Client Earth, Marine Conservation Society, Royal Society for the Protection of Birds, Association of British Ports, Energy UK, Sea-bed Users and Development Group, and Wildlife and Countryside Link.

11. Guidance

- 11.1 No guidance is required since the instrument makes the minimum changes necessary to ensure the continuity of existing marine environmental protection post EU Exit.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 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 SI maintains existing regulatory standards.
- 12.4 The legislation included in this instrument will still apply when we leave the EU. This will provide the maximum possible certainty and continuity to businesses, workers and consumers across the UK so that they can have confidence that they will not be subject to unexpected changes on the day we leave the EU.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that Defra will continue to review legislation to ensure that all relevant EU marine environment legislation is captured. If further EU legislation is identified it will be submitted as separate legislation.
- 14.2 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

- 15.1 Martin Adams at the Department for Environment, Food and Rural Affairs Telephone: 02080 261474 or email: Martin.Adams@DEFRA.gsi.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Gemma Harper, Deputy Director for Marine at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

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

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

| Statement | Where the requirement sits | To whom it applies | What it requires |
|------------------|---|--|--|
| Sifting | Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7 | Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI | Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees |
| Appropriate-ness | Sub-paragraph (2) of paragraph 28, Schedule 7 | Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 | A statement that the SI does no more than is appropriate. |
| Good Reasons | Sub-paragraph (3) of paragraph 28, Schedule 7 | Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 | Explain the good reasons for making the instrument and that what is being done is a reasonable course of action. |
| Equalities | Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7 | Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 | Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010. |
| Explanations | Sub-paragraph (6) of paragraph 28, Schedule 7 | Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs | Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law. |

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|---|--|---|--|
| Criminal offences | Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7 | Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence | Set out the 'good reasons' for creating a criminal offence, and the penalty attached. |
| Sub-delegation | Paragraph 30, Schedule 7 | Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument. | State why it is appropriate to create such a sub-delegated power. |
| Urgency | Paragraph 34, Schedule 7 | Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7. | Statement of the reasons for the Minister's opinion that the SI is urgent. |
| Explanations where amending regulations under 2(2) ECA 1972 | Paragraph 13, Schedule 8 | Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA | Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law. |
| Scrutiny statement where amending regulations under 2(2) ECA 1972 | Paragraph 16, Schedule 8 | Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA | Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid. |

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement(s)

- 1.1 The Parliamentary Under Secretary of State for the Environment and Rural Affairs, Thérèse Coffey MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Marine Environment (Amendment) (EU Exit) Regulations 2018 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.

- 1.2 This is the case because this instrument addresses only technical deficiencies in retained EU legislation and EU derived UK legislation that will arise from withdrawal; it does not change the substantive policy.

2. Appropriateness statement

- 2.1 Parliamentary Under Secretary of State for the Environment and Rural Affairs, Thérèse Coffey MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Marine Environment (Amendment) (EU Exit) Regulations 2018 does no more than is appropriate”.

- 2.2 This is the case because: the instrument makes only the necessary technical drafting changes to retained EU legislation and EU derived domestic legislation required to maintain continuity and operability of marine environmental protection following the UK’s withdrawal from the EU.

3. Good reasons

- 3.1 The Parliamentary Under Secretary of State for the Environment and Rural Affairs, Thérèse Coffey MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 3.2 These are: to ensure that the current legislation continues to operate effectively after we leave the EU, so that the UK can maintain current levels of marine environmental protection. The instrument makes the minimum changes necessary to ensure that cross references to the MSFD, and other EU and EU derived UK legislation, will continue to work after exit.

4. Equalities

- 4.1 The Parliamentary Under Secretary of State for the Environment and Rural Affairs, Thérèse Coffey MP has made the following statement:

“The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

- 4.2 Parliamentary Under Secretary of State for the Environment and Rural Affairs, Thérèse Coffey MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, Thérèse Coffey MP have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010”.

5. Explanations

- 5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.