

Explanatory Memorandum to the Environmental Damage (Prevention and Remediation) (Wales) (Amendment) (No.2) Regulations 2015.

This Explanatory Memorandum has been prepared by the Department for Natural Resources and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Environmental Damage (Prevention and Remediation) (Wales) (Amendment) (No.2) Regulations 2015.

Carl Sargeant AM

Minister for Natural Resources

24 November 2015

1. Description

This instrument amends the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (“the 2009 Regulations”) to reflect changes made to the Environmental Liability Directive (2004/35/EC) (“the ELD”) and UK legislation since the 2009 Regulations came into force. The 2009 Regulations transpose the ELD in relation to Wales.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

Paragraph 3 of this Memorandum explains that these Regulations are made in reliance on section 2(2) of the European Communities Act 1972 (“the ECA 1972”). By virtue of section 59(3) of the Government of Wales Act 2006, the Welsh Ministers are to determine whether an instrument made in exercise of the section 2(2) powers is to be subject to the negative or affirmative procedure.

As these Regulations make only technical amendments, namely to update legislative references in consequence of changes to the ELD and UK legislation, the Welsh Ministers have determined that these Regulations should follow the negative resolution procedure and is subject to annulment of the National Assembly for Wales.

3. Legislative background

Section 59 of the Government of Wales Act 2006 (“GOWA 2006”) enables the Welsh Ministers to be designated for the purposes of section 2 (2) of the ECA 1972. Section 2 (2) of the ECA 1972 enables designated Ministers or departments to implement EU obligations and rights.

Article 3 of European Communities (Designation) (No2) Order 2014 designates the Welsh Ministers for the purposes of section 2(2) of the ECA 1972 in relation to the prevention and remedy of environmental damage.

These Regulations are made by the Welsh Ministers in relation to that designation, in reliance on section 2(2) of the ECA 1972 as read with paragraph 1A of Schedule 2 to that Act.

As outlined in paragraph 2 of this Memorandum, this instrument follows the negative procedure and is subject to annulment of the National Assembly for Wales.

4. Purpose & intended effect of the legislation

The purpose of this instrument is to update the 2009 Regulations which continue to transpose the requirements of the ELD. In particular, these Regulations keep the transposition of the ELD fully up to date by making amendments to the 2009 Regulations in consequence of various EU level amendments of the ELD. The Regulations therefore ensure a full

transposition of the ELD in Wales from the date this instrument comes into force.

The ELD established a common framework for liability with a view to preventing and remedying environmental damage, specifically:-

- damage to habitats and species protected by EC law;
- damage to species or habitats on a site of special scientific interest (SSSI) for which the site has been notified;
- damage to water resources and land contamination which presents a threat to human health.

The ELD reinforces the “polluter pays” principle making operators in prescribed cases financially liable for prevention or remediation of any environmental damage arising from an incident. It provides enforcement authorities wider powers to recover costs from responsible operators, but only in cases where environmental damage, or an imminent threat of such, is established and the operator is liable.

Changes have been made to the ELD since it came into force and the 2009 Regulations are amended by these Regulations as follows:

- the definitions of natural habitat and protected species in regulation 2 has been changed to refer to the most recent Directive 2009/147/EEC on the conservation of wild birds;
- update Schedule 1 (Damage to protected species, natural habitats and sites of special scientific interest) with a reference to The Conservation of Habitats and Species Regulations 2010;
- update Schedule 2 (Activities causing damage) to:-
 - (a) replace references to repealed Directives with the most recent references including:-
 - Directive 2010/75/EU on Industrial Emissions;
 - Directive 2006/118/EC on the protection of groundwater against pollution and deterioration;
 - Directive 2008/68/EC on the inland transport of dangerous goods and;
 - EU Regulation No. 528/2012 concerning making available on the market and use of biocidal products;
 - (b) insert a reference to Council Directive 2009/31/EC on Carbon Capture and Geological Storage (CCSD).

5. Consultation

A consultation has not been carried out as these are minor and technical changes to the 2009 Regulations that update references to EU Directives and Regulations. Natural Resources Wales and local authorities, in their role as enforcing authorities under the 2009 Regulations have been informed of these changes.

6. Regulatory Impact Assessment (RIA)

The Welsh Ministers' RIA code stipulates that an RIA is not required where there are routine technical amendments that are necessary to update the regulations and also where amendments have no major policy impact. As such, an RIA has not been carried out. There is no impact on business nor on the statutory duties (sections 77 -79 GOWA 2006) or statutory partners (sections 72-75 GOWA 2006).