

The Marine Environment (Amendment) (EU Exit) Regulations 2018 Notification to the Scottish Parliament of Scottish Ministers' Intention to consent to UK legislative proposals on the areas of devolved competence

Title of instrument

The Marine Environment (Amendment) (EU Exit) Regulations 2018.

Instrument and summary of proposal

The Marine Environment (Amendment) (EU Exit) Regulations 2018 (“the Regulations”) address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. These amendments will ensure that domestic legislation and directly applicable EU legislation is operable in the event that the UK leaves the EU in March 2019 without a withdrawal agreement or deal.

The Regulations amend primary and subordinate domestic legislation and directly applicable EU legislation that will form part of domestic law after the UK’s exit from the EU.

The Scottish Ministers’ consent is not required in relation to the amendments made by the Regulations, to the Marine and Coastal Access Act 2009 (“MACAA”). Some provisions of MACAA relating to fisheries are being amended in a different exit SI, the Fisheries (Amendment) (EU Exit) Regulations 2019, the notification for which went to the Scottish Parliament on 2 November 2018. The amendments made to MACAA by these Regulations are to provisions relating to the marine environment in the Scottish offshore region (12-200nm). The marine environment in the Scottish offshore region is not devolved. Therefore the amendments made by these Regulations to MACAA could not be made in an SSI, so the Scottish Ministers’ consent is not required.

Two pieces of subordinate legislation are being amended by the Regulations. It is only the amendments made to one of these, the Marine Strategy Regulations 2010 (“MSR 2010”), that require consent because the other piece of subordinate legislation contains provisions that amend reserved matters.

The directly applicable EU law being amended by the Regulations is a Commission Decision. Both the Commission Decision and MSR 2010 apply to both the Scottish inshore (0-12nm) and offshore regions, without distinction, as do the amendments in these Regulations to these enactments. The Scottish Ministers’ consent is required in relation to these amendments but only so far as they apply to the Scottish inshore region as these are the only amendments that the Scottish Ministers could include in an SSI.

Amendments include technical changes to replace references to “Member States” with reference to the UK or appropriate body, to ensure cross references to EU legislation continue to work, and to replace requirements to notify or report to the European Commission with requirements to report publically.

The Regulations are made under the European Union (Withdrawal) Act 2018, are subject to the negative procedure in the UK Parliament and are expected to be laid before the sifting committee in draft on 20 December 2018. The Regulations have been drafted in preparation for the UK leaving the EU without a withdrawal agreement or deal.

What is to be amended?

A list of the legislative instruments covered by the Regulations is provided in Annex A.

Summary of proposals and how these correct deficiencies

1. The Marine Strategy Regulations 2010 (“MSR 2010”)

MSR 2010 transposes the Marine Strategy Framework Directive (2008/56/EC) (the “Directive”). When transposing the Directive in 2010 the four administrations agreed to a single transposition for the whole of the UK (more detail on which is below). It follows that MSR 2010 applies to the Scottish inshore region and the Scottish offshore region (as well as the rest of the UK’s inshore and offshore waters). It therefore contains provisions that relate to both reserved and devolved matters. The Scottish Ministers’ consent is only required in relation to the provisions in the Regulations which amend provisions in MSR 2010 applying to the Scottish inshore region and only to the extent that they so apply (most provisions apply without distinction to both the inshore and offshore regions).

The amendments to MSR 2010 in these Regulations are generally technical changes to ensure the provisions remain operable following exit. For example, a new schedule has been inserted into MSR 2010 setting out “read as” modifications to the Directive, to ensure all cross references to the Directive are read with the appropriate modifications. For example, the modifications remove or amend references to “Member States” and change references to other EU directives to references to the relevant legislation in the UK which transposed those directives.

The Regulations also replace obligations requiring reports to be sent to the European Commission with obligations to publish said reports instead.

2. Commission Decision (EU) 2017/848 (the “Decision”)

The Decision sets out detailed and specific requirements regarding the implementation of certain aspects of the Directive. It follows that it sets out how certain obligations in MSR 2010 are to be carried out. More specifically, the Decision lays down criteria and methodological standards on good environmental status of marine waters and specifications and standardised methods for monitoring and assessment.

The amendments to the Decision reflect the UK-wide approach taken in MSR 2010 and the deficiencies are being corrected to align obligations under the Decision with the related obligations in MSR 2010. The Decision therefore contains provisions that relate to both reserved and devolved matters. As with the amendments to MSR 2010, the Scottish Ministers’ consent is only required in relation to the provisions in the Regulations which amend provisions in the Decision applying to the Scottish inshore

region and only to the extent that they so apply (most provisions apply without distinction to both the inshore and offshore regions).

The proposed amendments are generally fixing references which will no longer make sense following exit. There are also some more technical changes to replace certain functions that are currently undertaken at European Union level. These changes are moving the function to the correct level in practice which means that there should be no material change in how the decision is implemented within the UK as a whole.

For example:

- References to “Member States” are replaced with references to the appropriate UK authority(ies) specified in the relevant provision of MSR 2010.
- References to “Union cooperation” are removed or amended to ensure that co-operation remains at alternative regional or sub-regional levels.

Requirements to agree something at Union level are replaced with requirements for the appropriate UK authority(ies) to agree it, or with requirements to reach agreement through regional or sub-regional cooperation.

Categorisation of significance of proposals

Category A. The amendments do not constitute a change of policy but are technical corrections ensuring operability, and which maintain the current devolution settlement.

Impact on environmental and animal welfare guiding principles

Addressing the deficiencies ensures continued adherence to the environmental principles established in EU and international law. In maintaining the current approach to the marine environment the Regulations maintain the existing level of environmental protection.

The amendments retain the existing a co-operative framework in place through which the four administrations collaborate in the delivery of the Marine Strategy. There is also a strong interaction with other contracting parties of the OSPAR Convention for the protection of the marine environment in the North-east Atlantic in order to provide a framework for tackling cross-boundary issues with neighbouring countries. These mechanisms for the protection of the environment are maintained.

Impact on Devolved Area

This is a complex area of devolution. Marine planning, licensing, and conservation are legislatively devolved for the Scottish inshore region (0-12nm), but only executively devolved in Scottish offshore waters (12-200nm). Fisheries and aquaculture are generally devolved in the Scottish Zone (0-200nm), whilst maritime safety, shipping, oil and gas activity, and ship to ship oil transfer licensing are all reserved. This complex arrangement is a key reason for the four administrations agreeing to a single transposition of the Directive, applicable to the whole of the UK. The alternative would have been for there to have been a transposition for Scottish Territorial Waters and a

separate one at UK level to apply in offshore waters. This would have resulted in a potentially incoherent system.

As a consequence, MSR 2010 contains specific provisions to protect the devolved settlement. These protective provisions require the Secretary of State to obtain consent from the Scottish Ministers before making changes to the marine strategy or exercising a function for the purpose of giving effect to the requirements of the Marine Strategy Framework Directive, which affect or are likely to affect the exercise of any devolved function.

Functions that are presently carried out by either the Commission, Member States or by the Secretary of State reporting to the Commission, are reallocated to appropriate UK authorities, based on the current approach to division of responsibilities taken in MSR 2010. For example, where the Secretary of State reported on behalf of the UK to the Commission regarding a function allocated to a devolved administration, the provision is being amended to require devolved administrations to publish a public report instead. In some cases, the amendments result in the Secretary of State carrying out a function that may affect a devolved policy area. This is due to a UK-wide approach being taken in respect of that function in MSR 2010 and reflects current practice. For example, in terms of MSR 2010, the Secretary of State in consultation with the devolved policy authorities must determine the characteristics of good environmental status for marine areas. Provisions in the Decision relating to the determination of good environmental status which previously put requirements on Member States are being amended to put those requirements on the Secretary of State, in consultation with the devolved policy authorities. This is consistent with existing legislation and current practice. The protective provisions will also apply to ensure that such if functions affect or are likely to affect the exercise of any devolved function, the Scottish Ministers' consent is required.

Scottish Ministers are satisfied that the UK Government's proposals protect the existing framework, allow for the continuation of existing cooperative framework and fully protect the devolution settlement.

Summary of Stakeholder engagement/consultation

The Department for Environment, Food and Rural Affairs (DEFRA) has consulted with the devolved administrations of Scotland, Wales and Northern Ireland regarding this instrument. DEFRA has not carried out formal consultation external to government.

The amendments do not amount to a change in policy and have no material effect on how the Marine Strategy Framework Directive will function in the UK following EU exit, and as such the Scottish Government has not undertaken any separate stakeholder engagement.

Any other impact assessments

We have discussed the need for an impact assessment with the UK Government and on the basis that these amendments do not infer any policy changes we have concluded that there is not a requirement to undertake an impact assessment.

Summary of reasons for Scottish Ministers proposing to consent to UK Ministers legislating

The Regulations are necessary to address failures of domestic legislation and directly applicable EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. These deficiencies require to be fixed to allow the continued operation of that legislation after exit day. This will ensure continuity in efforts to achieve good environmental status in our marine environment.

The regulations will enable the continuation of the successful collaborative arrangements between the four administrations in efforts to achieve good environmental status in the marine environment. In the view of ministers they do not change current policy and protect the existing devolution settlement.

Intended Laying date

It is expected that this will be laid before the UK Parliament for sifting on 20 November 2018. We do not yet have a confirmed date for the regulations to be made but we are working with Defra on the basis no EU Exit SIs will proceed to be made (for negative procedure SIs), or laid in draft (for affirmative SIs), until after they have been through the consent process as agreed with the Scottish Parliament.

Does the Scottish Parliament have 28 days to scrutinise?

Yes

Information about any time dependency associated with the proposal?

It is essential that the Regulations are in force on the day Scotland, as part of the UK, exits the EU in the event of a no deal scenario to ensure that legislation is operable and that there is a system in place to allow the continued implementation of the marine strategy.

Any significant financial implication?

There are no material costs associated with the Regulations.

ANNEX A – LIST OF LEGISLATION AMENDED BY THE REGULATIONS

Primary Legislation

- Marine and Coastal Access Act 2009

Secondary Legislation

- The Marine Strategy Regulations 2010
- The Marine Licensing (Exempted Activities) Order 2011

EU Legislation

- Commission Decision (EU) 2017/848 of 17 May 2017 laying down criteria and methodological standards on good environmental status of marine waters and specifications and standardised methods for monitoring and assessment, and repealing Decision 2010/477/EU