Explanatory Memorandum to The Environmental Damage (Prevention and Remediation)(Wales)(Amendment)(EU Exit) Regulations 2019.

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

Cabinet Secretary/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)(EU Exit) Regulations 2019.

I have made the statements required by the European Union (Withdrawal) Act 2018. These statements can be found in Part 2 of the annex to this memorandum.

Lesley Griffiths
Minister for Environment, Energy and Rural Affairs
13 February 2019

PART 1
1. Description

1.1. These Regulations make amendments to the Environmental Damage (Prevention and Remediation)(Wales) Regulations 2009. These amendments are to ensure that the statute book remains functional following the UK's exit from the EU and will address deficiencies in domestic legislation arising from EU Exit.

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

2.1 This instrument is being made using the power conferred by section 11 of and paragraph 1(1) of Schedule 2 to, the European Union (Withdrawal) Act 2018 ("the 2018 Act").

2.2 As set out in the Ministerial statement in Annex 2 of this Explanatory Memorandum it is proposed that the instrument be subject to negative procedure. The instrument makes minor and technical changes and as such should be subject to annulment.

2.3 The Constitutional and Legislative Affairs Committee considered the regulations for sifting on 7 January 2019 and approved that the "appropriate procedure for these Regulations is the negative resolution procedure." It is, therefore, confirmed that the instrument will follow the negative procedure. A copy of the Committee's report can be found here.

3. Legislative background

3.1 This instrument is being made using the power conferred by section 11 and paragraph 1(1) of Schedule 2 to the 2018 Act 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.

4. Purpose and intended effect of the legislation

What did any relevant EU law do before exit day?

4.1 The Environmental Damage (Prevention and Remediation)(Wales) Regulations 2009 implement Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. Directive 2004/35 has the objective of making operators of activities which cause damage financially liable for that damage (the 'polluter pays' principle).

4.2 The Regulations apply to serious environmental damage to land, water and to species and habitats. They cover not only species and habitats

protected by the Birds and Habitats Directives but also any other species and habitats protected on Sites of Special Scientific Importance (SSSIs) They impose duties on operators of economic activities to take immediate steps to prevent damage if there is an imminent threat, and to control damage which is occurring so as to limit its effects.

4.3 Operators of activities listed in Schedule 2 of the regulations will be liable for damage caused by them whether or not they are at fault, whereas operators of any other activities can also be liable for species and habitat damage, but only if they are at fault (that is, if they intended to cause damage or were negligent).

4.4 Once environmental damage has occurred, the Regulations introduce procedures for the establishment of appropriate remedial measures. Operators will be expected to propose remedial measures themselves, and there will then be consultation with interested parties before a remediation notice is served.

4.5 In the case of damage to water or species and habitats, these measures will include not only 'primary' remediation (for example, cleaning up the contaminated site), but also complementary remediation (cleaning up an alternative site if the damaged site cannot be fully restored), and compensatory remediation (carrying out other measures to provide alternative natural resources to compensate for the time during which the damaged site remains in its damaged state).

4.6 The whole package of measures (primary, complementary or compensatory) will be carried out by the operator responsible for the damage. Detailed criteria for deciding the overall remedial package are set out in Schedule 4 of the regulations. In cases where the operator cannot be found or is otherwise unable to perform his duties, the enforcing authority has a power to carry out any necessary work and to claim its costs back from the responsible operator. Responsibility for enforcing the regulations lies with Natural Resources Wales and Local Authorities.

Why is it being changed?

4.7 The minor and technical changes made by the instrument are necessary to ensure that the 2009 Regulations continues to operate effectively following the UK's withdrawal from the European Union.

4.8 The changes made to ensure that it operates effectively include the removal of references to the "EU", "Union" and "the Commission" and replaced with "the United Kingdom". It also removes a reference to assessing environmental damage in Schedule 1 by replacing "European wide", with "national or in their natural range".

4.9 Schedule 2 is also amended to clarify that any activity being authorised or prohibited, operated or managed by a permit or registration under an

EU Directive will continue after exit day under any EU retained law which transposed any of these Directives.

What will it now do?

4.10 The instrument will ensure that the assessment of environmental damage and the liability on operators to pay for that damage under the regulations and the Directive 2004/35/CE 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 continues to be operable and enforceable in Wales after we leave the EU.

5. Consultation

5.1 As there is no policy change, no public consultation was undertaken. The purpose of the instrument is solely to enable the current legislative and policy framework to remain unchanged by the withdrawal of the United Kingdom from the European Union.

6. Regulatory Impact Assessment (RIA)

6.1 An RIA has not been conducted as these are minor technical changes necessary as a result of the UK's withdrawal from the EU. A public consultation was not required because no policy changes are being made via this statutory instrument. As this instrument relates to maintaining existing legislation after EU Exit there is no, or no significant, impact on business, charities or voluntary bodies. There is no, or no significant, impact on the public sector.

Annex [x]
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 of the Welsh Ministers under the 2018 Act. The table also sets out those statements that may be required of Ministers of the Crown under the 2018 Act, which the Welsh Ministers have committed to also provide when required. The required statements can be found in Part 2 of this annex.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(7) and 4(3), Schedule 7 *Paragraph 3(7) (anticipated to be a requirement on Welsh Ministers in Standing Orders)*	The Welsh Ministers exercising powers in Part 1 of Schedule 2 to make a Negative SI Paragraph 3(7) applies to Ministers of the Crown, but Welsh Ministers have committed to make the same statement	A statement to explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation of the CLA Committee (as sifting committee)
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have committed to make the same statement when 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	Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have	A statement to explain the good reasons for making the instrument and that what is being done is a reasonable course of action.

		committed to make the same statement when exercising powers in Schedule 2	
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2	A statement to explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. A statement 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 77	Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2	A statement to 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.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2	A statement setting out the 'good reasons' for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Applies to Ministers of the Crown exercising powers in sections 18(1), 9 and paragraph 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved	A statement to explain why it is appropriate to create such a sub-delegated power.

		Authority. Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2 or paragraph 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority	
Urgency	Sub-paragraph (2) and (8) of paragraph 7, Schedule 7	Welsh Ministers exercising powers in Part 1 of Schedule 2 but using the urgent procedure in paragraph 7 of Schedule 7	A statement that the Welsh Ministers are of the opinion that it is necessary to make the SI using the urgent procedure and the reasons for that opinion.

Part 2

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

1. Sifting statement(s)

The Minister for Environment, Energy and Rural Affairs, Lesley Griffiths, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the The Environmental Damage (Prevention and Remediation)(Wales)(Amendment)(EU Exit) Regulations 2019 should be subject to annulment in pursuance of a resolution of the National Assembly for Wales (i.e. the negative procedure)”. This is the case because the changes being made are technical in nature and make no substantive changes to how Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 operate.

2. Appropriateness statement

The Minister for Environment, Energy and Rural Affairs has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the The Environmental Damage(Prevention and Remediation)(Wales)(Amendment)(EU Exit) Regulations 2019 does no more than is appropriate”. This is the case because all the changes being made are solely in order to address deficiencies arising from EU exit.”

3. Good reasons

The Minister for Environment, Energy and Rural Affairs 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”. This is because the provisions ensure that protections provided by the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 continue to be operable after the UK leaves the European Union.

4. Equalities

4.1 The Minister for Environment, Energy and Rural Affairs has made the following statement(s) “The [draft] 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 The Minister for Environment, Energy and Rural Affairs has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

4.3 “In relation to the instrument, I, Lesley Griffiths, 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 paragraph 4 (Purpose & intended effect of the legislation) of the main body of this explanatory memorandum.

6. Criminal offences

Not applicable/required.

7. Legislative sub-delegation

Not applicable/required.

8. Urgency

Not applicable/required.