

EXPLANATORY MEMORANDUM TO

THE SCOTLAND ACT 1998 (TRANSFER OF FUNCTIONS TO THE SCOTTISH MINISTERS ETC.) ORDER 2019

2019 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by The Department for Business, Energy and Industrial Strategy for the Office of the Secretary of State for Scotland and is laid before Parliament by Command of Her Majesty.
- 1.2 This Memorandum contains information for the Joint Committee on Statutory Instruments in respect of the draft Scotland Act 1998 (Transfer of Functions to the Scottish Ministers) Order 2018.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to confirm the effect of previous legislation with respect to the Scottish part of the Renewable Energy Zone (REZ) re the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No.2) Order 2006 (S.I. 2006/1040) (“the 2006 Order”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Order is made in exercise of the powers conferred by sections 30 (3), 63(1)(b) and 113(3) of the Scotland Act 1998 (“the Scotland Act”). The instrument is, by virtue of Schedule 7 to the Scotland Act, subject to Type A procedure and is subject to the affirmative resolution procedure in both Houses of the UK Parliament and in the Scottish Parliament.
- 3.2 Section 30(3) of the Scotland Act provides that Her Majesty may by Order in Council specify functions which are to be treated, for such purposes of that Act as being functions which are exercisable in or as regards Scotland. This is known as a “paving provision”. Accordingly, that power can be used to assist the transfer of functions to the Scottish Ministers by specifying the extent to which functions are to be treated as exercisable in or as regards Scotland. In this case the provisions made under section 30(3) regarding the making of environmental impact assessment regulations in connection with applications for consent under section 36 of the Electricity Act 1989 (“the 1989 Act”) for the construction, extension and operation of generating stations in the Scottish part of the Renewable Energy Zone (“REZ”) will be treated as being functions exercisable in or as regards Scotland. The Scottish part of the REZ is designated by the Renewable Energy Zone (Designation of Area) (Scottish Ministers) Order 2005 (SI 2005/3153).
- 3.3 Section 63(1)(b) of the Scotland Act confers a power on Her Majesty to provide by Order in Council for any functions of a UK Minister of the Crown, so far as they are exercisable in or as regards Scotland, to be exercisable by the Scottish Ministers concurrently with the Minister of the Crown. Any function of a UK Minister of the

Crown, including a power to make subordinate legislation, so far as it is exercisable in or as regards Scotland, can be the subject of an Order under section 63.

- 3.4 The Order therefore provides that a Minister of the Crown's functions under the European Communities Act 1972, designated to them under the European Communities (Designation) Order 2008 (S.I. 2008/301), and exercisable in relation to assessing the effects on the environment of the construction, extension or operation of generating stations under section 36 of the 1989 Act in the Scottish part of the REZ, are exercisable concurrently with the Scottish Ministers.

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)

- 3.5 The powers under which this instrument is made cover the entire United Kingdom and the territorial application of this instrument is limited to the Scottish Part of the REZ.

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 is the Scottish Part of the REZ.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State for Scotland has made the following statement regarding Human Rights:

“In my view the provisions of the draft Scotland Act 1998 (Transfer of Functions to the Scottish Ministers) Order 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Developers who plan to construct, extend or operate an electricity generating station must first obtain a consent under section 36 of the 1989 Act. If they want to vary this consent, they must apply for a variation under section 36C of that Act. The generation, transmission, distribution and supply of electricity are reserved matters under Schedule 5, Part II, section D1 of the Scotland Act. The 2006 Order transfers to the Scottish Ministers consent functions for such generating stations in respect of Scotland including the Scottish part of the REZ.
- 6.2 Before a consent/variation can be granted, Directive 2014/52/EU (amending Directive 2011/92/EU) - “the EIA Directive”, requires there to be an assessment of the environmental effects of the generating station, if these are likely to be significant. This instrument ensures that the Scottish Ministers have EIA Directive functions concurrent with those of a Minister of the Crown in respect of the Scottish part of the REZ.

7. Policy background

What is being done and why?

- 7.1 The effect of this instrument is to confirm that Scottish Ministers have certain functions, concurrent with those of a Minister of the Crown, relating to the assessment of environmental effects under the EIA Directive in respect of the Scottish part of the REZ. ensuring that the UK meets its obligations to fully transpose this Directive.

7.2 This instrument is to be laid at a similar time to another instrument, the Regulatory Reform (Scotland) Act (Consequential Modifications) Order 2018 which amends the 1989 Act so to extend the statutory appeals procedure for consent applications made under section 36 of the 1989 Act to apply where the infrastructure is situated in the Scottish part of the REZ. This ensures alignment with section 36 applications in Scottish internal waters and in the territorial sea adjacent to Scotland and other applications in relation to such infrastructure. This Explanatory Memorandum should be read in conjunction with the EM to that instrument.

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

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 There is no intention to consolidate this instrument with another instrument.

10. Consultation outcome

10.1 A consultation exercise has not been conducted as this instrument confirms the existing law and does not introduce any new measures.

11. Guidance

11.1 No guidance has been produced as this instrument does not introduce any new measures.

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 this instrument does not introduce any new measures.

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 instrument will achieve its policy objective of confirming the law and therefore monitoring and review are not required.

15. Contact

15.1 Mandy King at the Department for Business, Energy and Industrial Strategy. telephone 0300 068 5673 or email mandy.king@beis.gov.uk can answer any queries regarding the instrument.

15.2 Emily Bourne, Director of Energy Development and Resilience at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt Hon Claire Perry, MP at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.