

## **EXPLANATORY MEMORANDUM TO**

### **THE WATER ENVIRONMENT AND WATER SERVICES (SCOTLAND) ACT 2003 (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2006**

**2006 No.1054 (S.10)**

**1.** This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments and the House of Lords Committee on the Merits of Statutory Instruments.

#### **2. Description**

2.1 This Order, made under section 104 of the Scotland Act 1998 (“the 1998 Act”), seeks to make amendments to Scots law on reserved matters in consequence of the Water Environment and Water Services (Scotland) Act 2003 (“the 2003 Act”), and the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (“the 2005 Regulations”), made under section 20 of the 2003 Act.

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

3.1 This Order is to be made in exercise of the powers conferred by sections 104, 112(1) and 113 of the 1998 Act. The Order is, by virtue of Schedule 7 to that Act, subject to affirmative resolution procedure in both Houses of the UK Parliament. Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament, which contains provisions that are necessary or expedient in consequence of any Act of the Scottish Parliament; or various classes of subordinate legislation made by the Scottish Parliament.

3.2 The Order makes amendments to the Electricity Act 1989 (“the 1989 Act”), the Finance Act 1996 and the Landfill Tax Regulations 1996. The Scottish Parliament does not have the legislative competence to make such amendments. Tax and electricity are matters reserved by Sections A1 and D1 of Schedule 5 to the 1998 Act. The amendments are expedient to ensure the interaction of consents granted under the 1989 Act and authorisations granted under the new regulatory regime under the 2005 Regulations, and to update tax legislation in light of the new enforcement regime under those Regulations.

3.3 This Order extends to Scotland only. The amendments relate firstly to the interaction of the 1989 Act provisions and the new regulatory regime under the 2005 Regulations and secondly, to the effect of notices served under the 2005 Regulations on the landfill tax regime. As the 2005 Regulations only extend to Scotland these amendments only require to extend to Scotland.

#### **4. Legislative Background**

4.1 Section 36 of the 1989 Act provides that consent may be granted for the construction, development and operation of generating stations.

4.2 Schedule 5 of the 1989 Act provides for authorisation to be given for the abstraction and diversion of water for the purposes of the construction, extension or operation of generating stations. Such authorisation is given by order under paragraph 2 of Schedule 5 and

that order can provide for compulsory acquisition of rights relating to the abstraction, diversion and use of water.

4.3 The functions of granting consents under section 36 of the 1989 Act or of making orders under Schedule 5 of that Act were executively devolved to the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

4.4 Paragraph 5 of Schedule 9 of the 1989 Act makes provision in relation to the function of the Fisheries Committee: Scotland. They are to give advice and assistance relating to the effect on fisheries or fish stock of generating stations wholly or mainly driven by water. This advice is to be given to the Scottish Ministers and any person who is engaged in or proposing to engage in the operation of such as generating station. In particular they must be consulted and may make recommendations in respect of an application for consent under section 36 of the 1989 Act.

4.5 The 2003 Act transposed the requirements of the Water Framework Directive (Directive 2000/60/EC) into Scots law, and established a framework to protect and improve the ecological status of Scotland's water environment. The 2005 Regulations, made under the 2003 Act, will come into force from 1 April 2006. The 2005 Regulations will introduce controls to regulate the impact of controlled activities on Scotland's water environment. Responsibility for implementing the 2005 Regulations will fall to the Scottish Environment Protection Agency ("SEPA"), and will include determining appropriate conditions in respect of Scottish hydro-power activities.

4.6 As a consent or order granted under the 1989 Act could conflict with an authorisation granted by SEPA under the 2005 Regulations, the Order reconciles the two regimes by requiring the Secretary of State to consult with SEPA and by providing that authorisations under the 2005 Regulations should have ultimate primacy as regards 'matters relating to the protection of the water environment'. The requirement to consult SEPA is to be transferred to the Scottish Ministers by way of a separate Order under section 63 of the 1998 Act. In order to provide an integrated approach which takes account of the requirements of the Water Framework Directive, and to ensure that industry and the Scottish Ministers do not receive conflicting advice, the Order also provides for the Fisheries Committee: Scotland to consult with SEPA on matters relating to the protection of the water environment, before making recommendations in relation to applications for consent under section 36 of the 1989 Act.

4.7 Conflict with authorisations granted by SEPA under the 2005 Regulations could also arise in respect of existing consents or orders granted under the 1989 Act or other similar permissions in relation to electricity generation granted prior to the 1989 Act. Accordingly provision is made that in such cases the authorisations under the 2005 Regulations should again have ultimate primacy as regards matters relating to the protection of the water environment.

4.8 The amendments to the Finance Act 1996 and the Landfill Tax Regulations 1996 relate to a new regime for remedying adverse impact on the water environment imposed under the 2005 Regulations. This new regime will replace action previously taken under section 46A of the Control of Pollution Act 1974 from 1<sup>st</sup> April 2006. The amendments provide that works carried out in compliance with enforcement notices served under the 2005 Regulations requiring remedial works are treated in the same way as notices under the Control of Pollution Act 1974 for landfill tax purposes. The Order therefore inserts a reference to

regulation 28 of the 2005 Regulations in section 43A(4) of the 1996 Act and regulation 33(4) of the 1996 Regulations respectively.

## **5. Extent**

5.1 The Order extends to Scotland only.

## **6. European Convention on Human Rights**

6.1 The Parliamentary Under Secretary of State for Scotland has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the draft Water Environment and Water Services (Scotland) Act 2003 (Consequential Provisions and Modifications) Order 2006 are compatible with the Convention rights.

## **7. Policy Background**

7.1 The 2003 Act transposed the requirements of the Water Framework Directive (Directive 2000/60/EC) into Scots law, and established a framework to protect and improve the ecological status of Scotland's water environment, whilst also protecting the social and economic needs of those who depend upon it.

7.2 The 2005 Regulations introduce risk-based and proportionate controls to regulate the impact on Scotland's water environment of controlled activities – for example, abstraction, impoundment, building and engineering works, and point source discharges. Certain controlled activities have historically been regulated to varying degrees and via disparate legislative regimes. In accordance with the principles of Better Regulation, the Scottish Executive is therefore conducting a phased and prioritised review of existing legislation to deliver the objectives set out in the Policy Statement<sup>1</sup> which accompanied the 2005 Regulations; namely to –

- prevent duplicate and potentially conflicting regulatory control;
- ensure an integrated and holistic approach to the protection of Scotland's water environment; and
- ensure transparent regulation.

7.3 This Order amends the 1989 Act to ensure that the advice of SEPA 'on matters relating to the protection of the water environment' is obtained and regard is had to that advice before a consent is given or orders are made in relation to the construction, extension or operation of generating stations. Provision is also made for consents and orders already granted under the 1989 Act (and similar existing permissions for electricity generating stations already in place prior to this Order coming into force) which contain provisions which may prove incompatible with an authorisation issued under the 2005 Regulations. In such cases the consent or order under the 1989 Act (or the existing permission) is to be treated as if it were modified as necessary to be consistent with the authorisation under the 2005 Regulations. Finally, in relation to the 1989 Act, the Order requires the Fisheries Committee: Scotland to consult with SEPA about 'matters relating to the protection of the water environment' before making recommendations about granting consent under section 36 of that Act for the construction, development and operation of generation stations.

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<sup>1</sup> A copy of the policy statement may be obtained at:  
<http://www.scotland.gov.uk/Publications/2005/05/0995747/57481>

7.4 The amendments to the Finance Act 1996 and the Landfill Tax Regulations 1996 are expedient, as described in paragraph 4.4, to provide that works carried out in compliance with enforcement notices served under the 2005 Regulations requiring remedial works are to be treated as taxable for landfill tax purposes.

## **8. Impact**

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies. Whilst it deals with the regulation of Industry, it has no affect itself upon these businesses.

8.2 There will be no impact on the public sector.

## **9. Contact**

Alasdair Smith at the Scotland Office, telephone 0207 270 6756 or e-mail: [alasdair.smith@scotland.gsi.gov.uk](mailto:alasdair.smith@scotland.gsi.gov.uk), can answer any queries regarding the instrument.