EXPLANATORY MEMORANDUM TO

THE OZONE-DEPLETING SUBSTANCES AND FLUORINATED GREENHOUSE GASES (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs ("Defra") and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 This instrument is being made in order to address deficiencies in retained EU law relating to restrictions on the use of ozone depleting substances and fluorinated greenhouse gases to ensure the legislation continues to operate effectively at the point at which the UK leaves the EU, if there is no withdrawal agreement.

Explanations

What did any relevant EU law do before exit day?

2.2 Regulation (EC) No 1005/2009 on substances that deplete the ozone layer (the ODS Regulation) and Regulation (EU) No 517/2014 on fluorinated greenhouse gases (the F-gas Regulation) restrict the use of ozone depleting substances (ODS) and fluorinated greenhouse gases (F-gases) respectively, in order to protect the ozone layer and mitigate climate change.

2.3 The ODS Regulation bans all ODS, with derogations for essential uses and where no technically feasible alternatives are available. Producers and users of ODS must apply to the European Commission each year for a quota which, if granted, sets a quantitative limit on the amount they can use for certain permitted uses. All imports and exports of ODS between the EU and third countries must be licenced by the Commission and companies must report to the Commission on their use of ODS annually. Through the ODS Regulation, the EU and the UK comply with their legally binding UN obligations under the Montreal Protocol on Substances that Deplete the Ozone Layer.

2.4 The F-gas Regulation requires a 79% cut in the use of hydrofluorocarbons (HFCs), which are the main group of F-gases and are potent greenhouse gases, between 2015 and 2030 in order to mitigate climate change. The Regulation is phasing down the amount of HFCs that can be placed on the EU market by allocating steadily-reducing quotas to HFC producers and importers. This quota allocation process is the main mechanism by which the EU and the UK will meet their international obligations to phase down HFCs under the Kigali Amendment to the Montreal Protocol, which comes into force in 2019.

2.5 The Regulation also bans F-gases in certain applications and sets requirements for leak checks, leakage repairs and recovery of used gas. In addition, all technicians handling F-gases must be trained in their safe use and be certified. Member States are required to recognise valid F-gas certificates issued elsewhere in the EU.

Why is it being changed?

2.6 This instrument transfers powers and functions from the European Institutions (including the European Commission and European Environment Agency) to the Secretary of State, devolved Ministers and appropriate UK regulatory bodies, so that the requirements of the ODS and F-gas Regulations can continue to operate in the UK after EU exit, if there is no withdrawal agreement. This will deliver the Government's objectives of maintaining the same environmental outcomes and minimising disruption to businesses, by retaining the requirements of the ODS and F-gas Regulations in UK law while correcting operability deficiencies. It will also maintain the contribution that the Regulations are making to meeting UK domestic carbon budgets under the UK Climate Change Act 2008.

What will it now do?

2.7 The instrument corrects operability deficiencies in the EU Regulations, in particular by giving the UK and devolved administrations (DAs) the power to establish and administer HFC and ODS quotas in the UK, to operate import and export licensing and to establish UK reporting systems for ODS and F-gas usage.

2.8 In practice, the UK Government and DAs have agreed to single UK-wide quota systems which, in the event of the UK leaving the EU with no deal, will be administrated by the Environment Agency from 29 March 2019. The DAs have the power to establish and operate separate systems if they choose to diverge in the future but, before diverging, an Administration must consult the others.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

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)

3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

3.3 The powers under which this instrument is made cover the entire United Kingdom (see section 24 of the European Union (Withdrawal Act) 2018) and the territorial application of this instrument is not limited either by the Act or by the instrument.

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 United Kingdom.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State for the Environment, Thérèse Coffey MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Ozone-Depleting Substances and Fluorinated Greenhouse Gases (Amendment etc.) (EU Exit) Regulations 2019 are compatible with the Convention rights".

6. Legislative Context

6.1 The instrument amends Regulation (EC) No 1005/2009 on substances that deplete the ozone layer and Regulation (EU) No 517/2014 on fluorinated greenhouse gases, and related EU implementing acts, by returning powers and functions exercised by the European Commission to the Secretary of State and devolved Ministers, or to regulators where these entail administrative or operational functions. Where certain powers are reserved under the Devolution Acts, for example, matters relating to imports and exports from the UK or to the UK's relationship with other countries, the powers are returned only to the Secretary of State or the Environment Agency. Powers and functions that are not reserved are given concordantly to the Secretary of State and devolved Ministers (defined as the "appropriate authority") or to relevant regulatory bodies in each part of the UK (defined as the "appropriate regulator"). The detailed arrangements for long term cooperation between the UK Government and DAs will be agreed through a Memorandum of Understanding.

6.2 Specifically, the main changes to the ODS and F-gas Regulations are:

- Where relevant, references to "the Union" have been replaced with "any part of the United Kingdom" and references to the EU market have been replaced with the UK market.

- Provisions relating to the EU-wide quota, licensing and reporting systems have been amended to enable the UK and DAs to set up their own systems.

- The F-gas baseline reference period (used to set quota levels) has been changed to 2015-2017 because we do not have the necessary UK data for the baseline period of 2009-2012 used by the EU F-Gas Regulation.

- Maximum limit values for the use and emission of certain ozone depleting substances have been reduced to 12.4% of the EU values, on the basis that when the EU regulation was made in 2009, the population of the UK comprised 12.4% of the population of the EU.

- The Environment Act 1995 will be amended by separate regulations, yet to be made, to include a charging power, provided by Schedule 4 paragraph 1 of the European Union (Withdrawal) Act 2018, to enable the Environment Agency, Natural Resources Body for Wales and Scottish Environment Protection Agency to recover the cost of operating quota, licensing and reporting systems from the businesses using them. From 29 March 2019, the Environment Agency will be operating UK-wide systems, so will be the only body using this power, unless and until the DAs establish their own systems. Cost recovery is an established practice in line with the "polluter pays" principle and will ensure the new system is adequately resourced and minimises the additional burden upon the taxpayer.

- The EU mechanism for allocating quotas and the format for companies to report on their use of ODS and F-Gases will not be replicated in the UK as different IT systems will be established here. The provisions for determining this mechanism and format will, therefore, be an administrative function with the details to be published by the Secretary of State to reflect the content of the UK IT systems once those are completed in early 2019.

- The Secretary of State will have a power to increase each company's HFC quota in the event that it becomes apparent that in splitting the EU28 quota the UK receives a share that does not accurately reflect our current supply, leaving the UK with less supply than would have been the case had the UK not left the EU. This may occur, for example, if some EU suppliers who had been placing gas on the UK market choose not to apply for UK quota (retaining their full EU quota for sale in the EU27). The Government intends to use this power only if any supply shortfall is sufficiently large that there is a high probability of significant impact on refrigerant supplies for critical sectors which rely heavily on cooling to function, such as healthcare, food production/supply and IT data centres. This power would not be used to increase UK supply beyond what it would have been were the UK to remain in the EU. The power would only be used to restore a significant UK shortfall due to exit and will expire after two years.

- The Regulation will allow EU quota authorisations (which permit businesses to import products and equipment pre-charged with HFCs) issued prior to EU exit to be used in the UK market instead of the EU market, subject to certain conditions. Some companies have purchased EU quota authorisations several years in advance, with the intention of using them in the UK, and would be financially disadvantaged if they were no longer able to do so. This will also reduce the risk that UK HFC supply is below where it would have been had the UK not left the EU.

- The UK will continue to recognise the validity of F-gas training certificates issued in the EU to enable technicians who hold EU certificates to continue working in the UK.

6.3 Other miscellaneous technical changes have been made to the Regulations to correct deficiencies arising from retention of the EU provisions in UK law.

7. Policy background

What is being done and why

7.1 Under the Montreal Protocol on Substances that Deplete the Ozone Layer, ODS have largely been phased out in developed countries. ODS are permitted only in essential applications where no alternatives are available, such as fire extinguishers in ships and aircraft, laboratory and analytical uses, and as feedstock for other chemicals. Their use is tightly controlled and monitored: imports and exports must be licenced and annual reports on production and consumption must be submitted to the UN Ozone Secretariat. At present, the European Commission undertake most of these control functions on behalf of the UK, including submitting aggregated EU data to the UN Ozone Secretariat.

7.2 F-gases largely replaced ODS and although F-gases do not harm the ozone layer they are powerful greenhouse gases. They are used in refrigeration, air-conditioning, insulation foams, electrical equipment, aerosol sprays, medical inhalers, solvents, fire extinguishers and other industrial applications. The 2016 Kigali amendment to the Montreal Protocol requires developed countries to begin to phase down HFCs (the main group of F-gases) from January 2019. The EU had decided to take action before agreement was reached at the UN and began reducing the use of F-gases from 2015. The emission reductions that the F-gas Regulation will deliver are factored into the

UK's carbon budget calculations and emissions reduction targets under the UK Climate Change Act 2008.

7.3 The UK will continue to restrict the use of ODS and to phase down the use of F-gases after EU exit in March 2019 by transferring as closely as possible the requirements of the ODS and F-gas Regulations into UK law. This will enable us to continue to meet international and domestic obligations in a way that minimises disruption to business. Failure to make this Statutory Instrument would mean there would be no controls on the use of ODS and F-gases. This would be very damaging to the environment, would put the UK in breach of its legally binding obligations under the Montreal Protocol, and would impact negatively on domestic emissions reductions targets under the UK Climate Change Act 2008.

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

8.1 This instrument is being made using the power in section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018 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. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 No consolidation is required.

10. Consultation outcome

10.1 The Government has published technical guidance on how the ODS and F-Gas systems will operate in the UK if there is no withdrawal agreement. Defra officials have also conducted targeted engagement with industry, including the relevant sector trade bodies, EU quota holders, equipment manufacturers and environmental groups. Defra also contacted all EU28 HFC quota holders requesting data on how much gas they placed on the UK market. The data provided by those companies wishing to continue placing F-gas on the UK market will be used to calculate their new UK quota.

10.2 The DAs were consulted throughout the development of this instrument and agreement on its provisions was reached in October 2018.

10.3 Defra consulted HM Government of Gibraltar, since Gibraltar is also part of the EU ODS and F-gas quota and reporting systems until it leaves the EU. The Government of Gibraltar has informed Defra that they intend to transfer the ODS and F-gas Regulations into domestic law separately, which will maintain Gibraltar's environmental controls and compliance with the requirements of the Montreal Protocol.

10.4 No other Crown Dependency or Overseas Territory of the UK is subject to the EU ODS or F-gas Regulations.

11. Guidance

11.1 The Government published a technical notice on 13 September 2018 summarising how a "no deal" EU exit would affect businesses using and trading ODS and F-gases.

This publication can be found here: https://www.gov.uk/government/publications/using-and-trading-in-fluorinated-gases-and-ozone-depleting-substances-if-theres-no-brexit-deal. It explains that while most of the provisions of the EU Regulations will stay the same, separate UK ODS and HFC quota systems will be established. More detailed guidance on how the new UK quota systems will operate will be issued to businesses before the end of 2018 by Defra and the Environment Agency. This will explain what businesses need to do to join the new UK ODS and HFC quota systems. The new UK quota, licensing and reporting IT systems will be operational during the first quarter of 2019 and accompanying guidance will be published on how to use them.

11.2 The Environment Agency will consult before deciding whether to proceed with charges on businesses to use the UK quota, licencing and reporting systems. If The Environment Agency proceeds with charging, it will publish guidance explaining how charges will apply.

12. Impact

12.1 In most cases, the requirements of the EU Regulations will remain unchanged, with no additional impact on UK business, charities or voluntary bodies. For those aspects where changes must be made, the total aggregate impact is estimated at £560,000 per annum. This estimate comprises the extra administrative burdens on businesses as a result of applying and reporting under separate UK quota, licencing and reporting systems (£60,000) and the charges which the Environment Agency may decide to levy to recover its administrative costs for running the UK systems (£500,000).

12.2 The additional costs on the public sector to maintain IT operations, which will not be recovered through charges, is approximately £200,000 per annum. This estimate will be revisited in more detail once the full life model for the IT system is available.

12.3 A full Impact Assessment has not been prepared for this instrument because the estimated business impact is below the £5m threshold.

13. Regulating small business

13.1 This instrument applies to activities that are undertaken by small businesses (employing up to 50 people). For most businesses, there is no additional regulatory burden because the requirements remain the same as under the EU ODS and F-gas Regulations. Small businesses producing or importing ODS or F-gases will have the extra administrative burden associated with using the new quota, licensing and reporting systems and may be charged by the Environment Agency for using the new systems. All charges issued by the Environment Agency must meet the requirements of HM Treasury's Managing Public Money guidance and are not expected to affect small businesses disproportionately.

13.2 Many F-gas certified technicians work for small businesses. As the UK will continue to recognise F-gas qualifications issued in EU Member States, technicians certified in the EU can continue working in the UK without needing to re-certify with a UK certification body.

14. Monitoring & review

14.1 The F-Gas Regulation stipulates that the European Commission must review the Regulation by 2022. This review requirement will be maintained in UK law with the

review conducted by the Secretary of State or devolved administrations. This review will be used, in particular, to assess the need for further action in light of the availability of alternative chemicals and in order to meet the Montreal Protocol Kigali Amendment requirement to phase down HFCs by 85% by 2036, which goes beyond the EU Regulation phase down of 79% by 2030.

14.2 As this instrument is made under the European Union (Withdrawal Act) 2018, no other review clause is required.

15. Contact

15.1 Davinder Lail at the Department for Environment, Food and Rural Affairs can be contacted with any queries regarding the instrument. Telephone: 020 8026 3026 email: Davinder.Lail@defra.gov.uk

15.2 Fiona Harrison at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.3 Dr Thérèse Coffey MP, Parliamentary Under Secretary of State for the Environment at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

Annex

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 under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly 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	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State 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 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	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	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

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

1. Appropriateness statement

1.1 The Parliamentary Under Secretary of State for the Environment, Thérèse Coffey MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"*In my view the Ozone-Depleting Substances and Fluorinated Greenhouse Gases (Amendment etc.) (EU Exit) Regulations 2019 does no more than is appropriate*".

1.2 This is the case because this instrument retains all the requirements of the EU ODS and F-gas Regulations, making changes only for continued operability in line with the provisions of the European Union (Withdrawal) Act 2018.

2. Good reasons

2.1 The Parliamentary Under Secretary of State for the Environment, Thérèse Coffey MP, 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*".

2.2 These are necessary to ensure operability of the retained EU legislation in UK law, in order for the UK to maintain compliance with domestic and international obligations to protect the ozone layer and mitigate climate change.

3. Equalities

3.1 The Parliamentary Under Secretary of State for the Environment, Thérèse Coffey MP, has made the following statement:

"*The 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*".

3.2 The Parliamentary under Secretary of State, for the Environment, Thérèse Coffey MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"*In relation to the instrument, I, Thérèse Coffey MP 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*".

4. Explanations

The explanations statement has been made in section 2 of the main body of this explanatory memorandum.