EXPLANATORY MEMORANDUM TO

THE RENEWABLES OBLIGATION (AMENDMENT) ORDER 2011

2011 No. [XXXX]

1. This explanatory memorandum has been prepared by the Department of Energy and Climate Change and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument amends the Electricity Act 1989 and the Renewables Obligation Order 2009 (the "2009 Order") to transpose some of the requirements of Directive 2009/28/EC (the "Renewables Directive"). This instrument also makes a number of other amendments to the 2009 Order to enable the 20 year maximum support period for certain offshore generating stations to run in a number of phases, and to require certain generators using solid biomass or biogas to report against greenhouse gas emission and land use sustainability criteria.

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

3.1 The Joint Committee should note that while the amendments made by this instrument to the 2009 Order apply to England and Wales only, there are complementary Orders in Scotland and Northern Ireland which together in effect create a UK wide renewables obligation.

3.2 The amendments made by this instrument to the Electricity Act 1989 extend to Great Britain as sections 32 to 32M of that Act are a reserved matter.

3.3 The European Commission are in the process of assessing this instrument for the purpose of providing state aids approval. We anticipate that we will receive this approval before this instrument is made.

4. Legislative Context

4.1 The powers under section 2(2) of the European Communities Act 1972 (as read with paragraph 1A of Schedule 2 to that Act) are used to make the following provisions of this instrument: article 2, that part of article 3(2) which inserts a definition of "Renewables Directive", article 13 and article 16. The remainder of the instrument is made using powers conferred by sections 32 to 32K of the Electricity Act 1989.

4.2 Under section 32 of the Electricity Act 1989, Scottish Ministers make any Renewables Obligation Order for Scotland. To date this has been made in terms virtually identical to the England and Wales Order. It is intended that a Renewables Obligation (Scotland) Amendment Order 2011 will come into force on the same date as this instrument.

4.3 Articles 52-55 of the Energy (Northern Ireland) Order 2003 (2003 No 419, NI 6) substituted by the Energy (Amendment) Order (Northern Ireland) 2009 (S.R. 2009 No. 35) replicate the provisions of sections 32 to 32M of the Electricity Act 1989. A Northern Ireland Renewables Obligation Order was made using these powers. It is intended that a Renewables Obligation (Amendment) Order (Northern Ireland) 2011 Order will come into force on the same date as this instrument.

4.4 This instrument implements articles 17 to 19 of the Renewables Directive. These articles impose sustainability criteria that bioliquids must meet before they may be used to measure compliance with renewable energy obligations and before they may be eligible for financial support for their consumption. A transposition note is annexed.

4.5 Articles 17 to 19 of the Renewables Directive contain a number of provisions enabling the European Commission to adopt measures to supplement and amend the sustainability criteria imposed by the directive. In some cases the sustainability criteria imposed by the Renewables Directive require Commission measures in order to be effective. In the absence of the Commission measures, the instrument has not been able to transpose these elements of the Renewables Directive (as identified in the transposition note).

4.6 Schedule A1 to the 2009 Order as inserted by the instrument transposes the greenhouse gas emission criteria for bioliquids and cross refers to Annex 5 to the Renewables Directive wherever possible, so that the future Commission measures amending that Annex, as envisaged by the directive, can be automatically taken into account. References to Annex 5 to the Renewables Directive also appear in article 54 and in Schedule A2 to the 2009 Order as inserted by the instrument. These references relate to the greenhouse gas emissions from solid biomass and biogas and so do not need to automatically take into account future Commission measures amending Annex 5 to the Renewables Directive.

4.7 The sustainability criteria imposed by articles 17 to 19 of the Renewables Directive harmonise the sustainability criteria for bioliquids and prevent Member States from imposing their own additional sustainability criteria on bioliquids for compliance with renewable energy obligations or eligibility for financial support. As a maximum harmonisation directive we have not defined many of the terms left undefined by the Renewables Directive, and we have often closely followed those definitions which were set out in the directive. Creating our own definitions would risk over or under-implementation, which would breach the directive. Ofgem will produce guidance on the sustainability criteria, making use of work which is being carried out between Member States across Europe.

4.8 The Scotland and Northern Ireland Orders will implement articles 17 to 19 of the Renewables Directive for the renewables obligations in Scotland and Northern Ireland. A separate instrument will be made by the Secretary of State to implement articles 17 to 19 of the Renewables Directive for the Renewable Transport Fuel Obligation.

4.9 The Renewables Directive does not impose sustainability criteria on solid biomass or biogas. In the “Report from the Commission to the Council and the European Parliament on sustainability requirements for the use of solid and gaseous biomass sources in electricity, heating and cooling” (COM (2010)11) the European Commission recommended that where Member States impose sustainability criteria, they should be in almost all respects the same as the sustainability criteria imposed by the Renewables Directive for bioliquids.

4.10 The method for calculating greenhouse gas emissions for biomass set out in Schedule 3A to the 2009 Order as inserted by the instrument follows the recommendations of the Commission Report by adopting the methodology set out in the Renewables Directive but with the modifications to that methodology recommended by the Commission Report (pages 8 and 9 and Annex 1 to the Commission Report). Part 2 of Schedule 3B to the 2009 Order as inserted by the instrument adopts the default greenhouse gas emissions for the production of biomass contained in Annex 2 to the Commission Report. The Commission Report is published at http://ec.europa.eu/energy/renewables/bioenergy/sustainability_criteria_en.htm

5. Territorial Extent and Application

5.1 This instrument extends to England and Wales only, with the exception of article 2 which also extends to Scotland. Article 2 of this instrument amends section 32M of the Electricity Act 1989.

5.2 Similar Orders will be laid before the Scottish Parliament and the Northern Ireland Assembly.

6. European Convention on Human Rights

6.1 Charles Hendry, Minister of State for the Department of Energy and Climate Change has made the following statement regarding Human Rights:

6.2 In my view the provisions of the Renewables Obligation (Amendment) Order 2011 are compatible with the Convention rights

7. Policy background

- ***What is being done and why***

7.1 The Renewables Directive has set binding targets for Members States to source a proportion of their total energy from renewable sources. The renewables obligation ("RO") is the Government's main policy measure to incentivise the deployment of large scale renewable electricity technologies.

7.2 This instrument amends the 2009 Order to change the way in which the 20 year maximum support period is calculated for certain offshore wind generating stations (so that they can receive RO support in phases). We are also introducing new reporting requirements against greenhouse gas and land use sustainability criteria for generating stations using solid biomass and biogas. Both of these changes are necessary to maintain ongoing investor confidence in the RO and to ensure the continued deployment of renewable electricity generation capacity.

7.2 In addition the instrument amends the Electricity Act 1989 and the 2009 Order to implement articles 17 to 19 of the Renewables Directive. These changes introduce sustainability criteria for bioliquids and ensure that all bioliquids fall within the definition of renewable sources.

Offshore Wind Phasing

7.3 When the RO was introduced in 2002, the original end date for support was 2027. However, in light of the 2020 targets and the need to encourage investment in renewables up to, and beyond, 2020, the end date for support was extended to 2037. A

limit of 20 years support for accredited generating stations was introduced in parallel (subject to the 2037 end date) to avoid overcompensation.

7.4 Under the 2009 Order, the 20 year maximum support period runs from the date of the accreditation of the generating station (or in the case of additional capacity it runs from the date on which that additional capacity first formed part of the generating station).

7.5 A generating station can only accredit under the RO once it has been commissioned. Even after accreditation, the capacity of the generating station as accredited might take an extended period of time to be fully constructed and fully operational. This period can be particularly long for offshore windfarms, which usually construct their wind turbines consecutively (or in blocks) over the course of several years. Although the generating station could accredit as soon as the first wind turbine is operational, this would mean that wind turbines brought into operation later would receive less than the full 20 years support. If the generating station wanted the full 20 years support for all of its wind turbines, it could wait until they are all operational before accrediting, but this would mean that it was not receiving ROCs for the electricity generated before accreditation.

7.6 This instrument enables offshore wind generating stations accrediting after 31st March 2011 to register their turbines in phases. Each phase would be eligible for up to 20 years support, subject to the end date for the RO of 31st March 2037. The generators will be able to register up to five phases of turbines over a maximum period of five years.

7.7 For offshore wind generating stations accrediting after 31st March 2011, a minimum number of turbines, equivalent to 20% of the accredited capacity of the station will have to be registered in the first phase. There will be no minimum size for subsequent phases.

7.8 Offshore wind generating stations will be accredited in the same way as at present. There will be a new requirement for operators of offshore wind generating stations accrediting after 31st March 2011 to register each turbine before they can receive ROCs for the electricity generated by that turbine.

7.9 Offshore wind generating stations adding turbines additional to their accredited capacity after 31st March 2011 must also register those turbines in order to receive ROCs for the electricity those turbines generate. These turbines can also be registered in up to five phases over a maximum period of five years.

Solid Biomass and Biogas Sustainability Criteria

7.10 All generators over 50kw using solid biomass or biogas will be required to report against greenhouse gas emissions criteria and land use sustainability criteria. Generators using waste, biomass wholly derived from waste, landfill gas or sewage gas will be exempt from providing this information (and the other information required under article 54 of the 2009 Order).

7.11 These new reporting requirements follow calls from a number of stakeholders for clarity over the introduction of sustainability criteria for solid biomass and biogas. Investors suggested that uncertainty about whether such criteria would be introduced and how it would apply, acted as a barrier to investment in biomass projects.

7.12 Our intention is that generators over 1MW will need to comply with the greenhouse gas emissions criteria and the land use sustainability criteria from 1st April 2013 in order to be eligible for ROCs for electricity generated from solid biomass or biogas. We have not included this requirement in the instrument at this time, so that we can take into account experience gained from reporting against the sustainability criteria and any developments at EU level, before amending the RO in 2013 to include this requirement.

Bioliquid Sustainability Criteria

7.13 The Renewables Directive requires that bioliquids used to generate electricity must meet the sustainability criteria set by the directive in order to be eligible for financial support or to count towards compliance with renewable energy obligations. Eligibility for receipt of ROCs for electricity generated from bioliquids is therefore to be dependent upon demonstrating that the sustainability criteria, as set out in the Renewables Directive, have been met. Generators are required to have an independent audit to verify that their data and systems for demonstrating compliance with the sustainability criteria are accurate, reliable and protected against fraud.

7.14 The sustainability criteria set by the Renewables Directive are a maximum harmonisation measure. The Renewables Directive prevents the refusal, on other sustainability grounds, to take in account bioliquids which comply with the sustainability criteria set out in the directive. This instrument amends the definition of "fossil fuel" in section 32M(1) of the Electricity Act 1989, to remove bioliquids produced directly or indirectly from fossil fuel from the scope of the definition.

7.15 As a consequence bioliquids produced directly or indirectly from fossil fuel will fall within the definition of renewable sources set out in that section. This is in line with the Renewables Directive which treats all bioliquids as a renewable source of energy.

7.16 A further consequence is that bioliquids produced directly or indirectly from fossil fuel will become eligible for receipt of ROCs. A new definition, "fossil derived bioliquid", is inserted into the 2009 Order, and changes are made to ensure that fossil derived bioliquids are generally eligible for support in the same circumstances as other bioliquids. However, the level of support will vary depending upon which band (if any) in Schedule 2 of the 2009 Order the generating station using the fossil derived bioliquid falls into.

7.17 Recognising that part of the energy content of a fossil derived bioliquid will have come from fossil fuel, provision is made for determining what proportion of the fossil derived bioliquid is to be regarded as being derived from or composed of fossil fuel. By virtue of Part 5 of the 2009 Order, ROCs will be issued in respect of a proportion only of the electricity generated from the fossil derived bioliquid.

- ***Consolidation***

7.18 This Order amends the 2009 Order, which has been previously amended by the Renewables Obligation (Amendment) Order 2010 (SI 2010/1107). An informal consolidated text is available on the Department's website at http://www.decc.gov.uk/en/content/cms/consultations/ro/ro.aspx

8. Consultation outcome

8.1 We carried out a 12 week consultation exercise between July 2010 and October 2010 with 80 responses received. Feedback has generally been supportive of our policy

changes. A summary of responses has been published on the Department's website at http://www.decc.gov.uk/en/content/cms/consultations/ro/ro.aspx

9. Guidance

9.1 Ofgem, who administer the renewables obligation, publish guidance documents for different categories of generator wishing to benefit from the renewables obligation. Ofgem will issue guidance as to how the new requirements for registering offshore wind turbines will work in practice. Ofgem will also issue guidance on calculating greenhouse gas emissions and guidance on the land use sustainability criteria. DECC, Ofgem and the Environment Agency will also develop a tool that can be used to calculate the greenhouse gas emissions.

10. Impact

10.1 The impact on business, charities or voluntary bodies is only applicable if they act as either generators of eligible renewable electricity or as licensed suppliers. The cost of chain of custody certification is estimated to be between £700-2,500 per year for individual biomass producers. When operators have to show actual GHG savings, costs could be 10-20% higher, implying an additional cost of £70-£500 pa per biomass producer for GHG certification alone. Solid biomass and biogas generators are not obliged to undertake annual audited feedstock accounting, however were they to choose to undergo these procedures, this could lead to costs of £15,000 for large operators and £1,500 for small operators. Generators using bioliquids will have to verify the sustainability of their feedstock's on annual basis which is estimated to cost £15,000 per annum for large operators and £1,500 per annum for small operators, In addition to the costs of verification some additional administrative burden of around £500 per annum per operator may also be expected. The introduction of offshore wind phasing should not add any additional costs to generators, and only marginal additional costs to licensed suppliers. We would expect suppliers to pass these costs to consumers.

10.2 The impact on the public sector is an increase in the verification and administrative costs of the RO, as a result of the additional reporting requirements for solid biomass and biogas generators. These costs fall to Ofgem, the scheme administrators, who in turn recoup administrative costs from the RO buyout fund, which electricity suppliers are required to pay into each year if they do not produce the required number of Renewable Obligation Certificates (ROCs) as set by the RO. Estimates for the Renewable Transport Fuel Obligation (RFTO) suggest that Ofgem might incur initial IT and staff costs of around £1million, whether this full cost would be incurred for solid biomass and biogas depends on the precise scheme design and any savings from learning that could be made. The additional reporting requirements for bioliquids will result in some additional verification and administrative costs for Ofgem. Implementing the scheme may incur initial IT and staff costs of around £1million, ongoing staff requirements may be estimated at approximately £75,000 per year initially, increasing to £125,000 per annum. Allowing phasing of offshore wind support might add marginally to Ofgem's administration costs.

10.3 Two Impact Assessments have been produced, one relating to offshore wind phasing and one relating to solid biomass and biogas sustainability criteria and bioliquids sustainability criteria. Both Impact Assessments are attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact on small business, generators under 50 kilowatts using solid biomass or biogas are exempt from the new reporting requirements on greenhouse gas emissions and land use. The majority of small businesses are likely to operate generators with a declared net capacity of less than 50 kilowatts. The introduction of the new reporting requirements for solid biomass and biogas on greenhouse gas emissions and land use follows calls from industry for clarity on this issue.

11.3 The new requirements imposed on generators using bioliquids implement the Renewables Directive, which does not contain any exceptions for small business. Whilst the total amount of subsidy received depends on the amount of generation, the compliance costs would not be expected to vary with the size of the operator to the same degree. This would represent a potential disadvantage for small firms who could face similar costs in return for less overall support compared to larger operators. The magnitude of costs related to administration and verification however would not appear to be unreasonably high when compared to the likely amount of ROC support that even small installations would be entitled to.

11.4 Offshore wind generating stations are large and expensive projects which are invariably owned by large businesses or consortium. Small businesses acting as renewable energy generators are therefore unlikely to be impacted by the introduction of registration for offshore wind turbines. Small businesses involved in licensed electricity supply should also not experience any additional burden from the introduction of registration for offshore wind turbines

12. Monitoring & review

12.1 Review will take place as part of ongoing policy development and stakeholder consultation. Article 22(1) of the Renewables Directive requires the UK to submit a report to the European Commission on progress in the promotion and use of energy from renewable sources by 31 December 2011, and every two years thereafter (up to 31 December 2021).

13. Contact

Carolyn Potts at the Department of Energy and Climate Change, Tel: 0300 068 6157 or email: Carolyn.Potts@decc.gsi.gov.uk can answer any queries regarding this instrument.