EXPLANATORY MEMORANDUM TO

THE STORAGE OF CARBON DIOXIDE (AMENDMENT AND POWER TO MODIFY) (EU EXIT) REGULATIONS

2018 No. XXXX

1. Introduction

1.1 This explanatory memorandum has been prepared by The Department for Business, Energy & Industrial Strategy and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 The instrument amends secondary legislation which forms part of the United Kingdom's implementation of Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide ("the CCS Directive"). It addresses failures of retained EU law to operate effectively and other deficiencies arising due to the United Kingdom's withdrawal from the European Union. The instrument also makes two minor amendments unrelated to the United Kingdom's withdrawal from the European Union correcting outdated and incorrect cross-references.

Explanations

What did any relevant EU law do before exit day?

2.2 The CCS Directive establishes a legal framework for the environmentally safe geological storage of carbon dioxide. It covers all carbon dioxide storage in geological formations in the EU and the entire lifetime of storage sites. As explained in section 6.1 this instrument amends three regulations forming part of UK's implementation of the CCS Directive.

Why is it being changed?

2.3 It is the Government's stated ambition to have the option to deploy carbon capture, usage and storage (CCUS) at scale during the 2030s, subject to costs coming down sufficiently. Pursuant to this ambition, it is necessary to ensure the regulatory regime for geological storage of carbon dioxide remains functional following the United Kingdom's withdrawal from the EU.

2.4 Without this instrument, in the scenario that the UK leaves the EU without a deal, the UK licensing regime for geological storage of carbon dioxide will cease to function adequately, as outlined in section 7.2 to 7.5. This would prevent CCUS projects in areas where the Storage of Carbon Dioxide (Licencing etc) Regulations 2010 (S.I. 2010/2221) ("Licencing Regulations") apply from proceeding.

2.5 The changes being made by this instrument will retain the option for geological storage of carbon dioxide to be undertaken domestically during the 2020s or thereafter, should it become desirable.

What will it now do?

2.6 As laid out in sections 7.7 to 7.10 the regulatory regime relating to geological storage of carbon dioxide will continue to operate similarly to the way it did before the UK left the European Union.

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 is England, Wales, Scotland, and Northern Ireland. The provisions which amend the Storage of Carbon Dioxide (Licencing etc) Regulations 2010 (S.I. 2010/2221) and the provision contained in Part 4 only apply to Scotland in relation to cross-border storage sites regulated by the Oil and Gas Authority ("OGA").

4. Extent and Territorial Application

4.1 The amendments made by this instrument have the same territorial extent and application as the legislation it amends. The territorial extent of the legislation is the UK. The application of the legislation is as set out below:

- The Storage of Carbon Dioxide (Licensing etc) Regulations 2010: With one exception, the regulations apply in respect of licences issued by the OGA. Regulation 9 applies in respect of licences issued by any licensing authority within the meaning of section 18(2) of the Energy Act 2008 (i.e., the OGA, the Scottish Ministers, Welsh Ministers or the Department of Enterprise, Trade and Investment in Northern Ireland).
- The Storage of Carbon Dioxide (Termination of Licences) Regulations 2011: The regulations apply in respect of licences issued by the Oil and Gas Authority or the Scottish Ministers.
- The Storage of Carbon Dioxide (Access to Infrastructure) Regulations 2011: Regulation 12 (the only regulation amended by this instrument) applies in respect of infrastructure for which the relevant authority is the Secretary of State, the Infrastructure Planning Commission's Council or a Panel of the Infrastructure Planning Commission (appointed under section 65 of the Planning Act 2008), the Scottish Ministers or Welsh Ministers.

4.2 The territorial extent and application of Part 4 of the instrument is England, Wales, Scotland, and Northern Ireland. Part 4 only applies in Scotland in relation to cross-border storage sites regulated by the Oil and Gas Authority.

5. European Convention on Human Rights

5.1 The Minister of State for Energy and Clean Growth (Claire Perry MP) has made the following statement regarding Human Rights:

5.2 "In my view the provisions of the Storage of Carbon Dioxide (Amendment etc.) (EU Exit) Regulations 2018 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument amends three regulations which form part of the UK's implementation of the CCS Directive to preserve the functionality of the existing CCS licencing regime.

- The Storage of Carbon Dioxide (Licencing etc) Regulations 2010 (S.I. 2010/2221) govern the licencing of geological storage of carbon dioxide, including the obligations of operators of a storage sites whilst storage activities are taking place and after the site is closed.
- The Storage of Carbon Dioxide (Termination of Licence) Regulations 2011 (S.I. 2011/1483) establish a process allowing licensees to apply to terminate their licence and transfer ongoing obligation in relation to the storage site to the state, once a storage site has been closed for a minimum period (normally 20 years).
- The Storage of Carbon Dioxide (Access to Infrastructure) Regulations 2011 (S.I. 2011/2305) establish a regime allowing for access to infrastructure for the purposes of carbon capture and storage.

6.2 Section 18 of the Energy Act 2008 designates different CCS licencing authorities for different areas within the UK. Scotland and Northern Ireland have separate licencing regulations which apply in areas where Scottish Ministers or the Department of Enterprise, Trade and Investment are the licencing authority: the Storage of Carbon Dioxide (Licencing etc) (Scotland) Regulations 2011 (S.S.I 2011/24); and the Storage of Carbon Dioxide (Licencing etc.) Regulations (Northern Ireland) 2015 (S.R 2015 no. 387). This instrument does not amend either of these regulations.

6.3 The regulations the instrument amends contain references to obligations under legislation implementing: Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2013 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 956/61/EC (i.e. the EU Emissions Trading Scheme); Directive 2004/35/EC 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 (i.e. the Environmental Liability Directive); and Council Directive 85/337/EEC (i.e. the Environmental Impact Assessment Directive). These references have been amended to ensure that they continue to attach to this legislation as it forms part of UK domestic law after EU Exit.

6.4 Article 29 of the CCS Directive permits the European Commission to amend Annexes I and II to the Directive to adapt them to technical and scientific progress. The new power in Part 4 of the instrument which allows the Sectary of State to modify the requirements of these annexes in relation to storage sites regulated by the OGA is intended to be a UK domestic equivalent to the European Commission's power.

7. Policy background

What is being done and why?

7.1 The Government sees an opportunity in the UK in becoming a global technology leader in CCUS and has the ambition to have the option of deploying CCUS at scale during the 2030s, subject to costs coming down sufficiently. Maintaining an effective fit for purpose licensing regime for geological storage is necessary to support this

opportunity as it will enable the safe long-term storage of carbon dioxide and is therefore a necessary condition for the effective deployment of CCUS.

7.2 As explained at section 6.1, this instrument amends regulations which form part of the United Kingdom's implementation of the CCS Directive. It addresses failures of retained EU law to operate effectively and other deficiencies arising due to the United Kingdom's withdrawal from the European Union. The instrument also corrects two cross-references.

7.3 Without this instrument, in the scenario that the UK leaves the EU without a deal, the UK licensing regime for geological storage of carbon dioxide will cease to function adequately, preventing CCUS projects in areas where the Storage of Carbon Dioxide (Licencing etc) Regulations 2010 (S.I. 2010/2221) from proceeding.

7.4 In particular, the regulations would restrict geological storage of carbon dioxide to the territory of a Member State, preventing storage within the United Kingdom; define requirements and obligations with reference to EU derived regimes which have changed as a result of EU Exit; require consultation with the European Commission in relation to licencing decisions; and require obligations under EU Legislation no longer applicable to the UK to be taken into account when making decisions about access to infrastructure.

7.5 The United Kingdom's withdrawal from the EU will also mean that references to the technical annexes to the CCS Directive, which relate to storage site characterisation and monitoring, will be to the version of these annexes which existed on exit day. Article 29 of the CCS Directive provides the European Commission with a power to amend these technical annexes to adapt them to scientific and technical progress. It is appropriate for the Secretary of State to have an equivalent power to update the domesticated version of these technical annexes.

7.6 To ensure that the regulatory regime for the geological storage of carbon dioxide continues to operate effectively once the UK is outside of the EU, amendments are required to fix deficiencies in this legislation. These fixes are explained below.

7.7 Part 2 of the instrument addresses the issues described in section 7.4 by: permitting storage permits to be granted in relation to storage complexes within the UK (including cross-border storage complexes where subject to a cross-boundary cooperation agreement with the relevant neighbouring state); preserving connections to other EU derived regimes to the extent they continue to form part of UK domestic law (including domestic replacements for regimes which cease to function due to EU Exit); removing requirements relating to the licencing authority's obligation to consult with the European Commission; and removing a redundant reference to obligations under EU legislation when evaluating access requests.

7.8 Part 3 of the instrument corrects two cross-references, ensuring the existing regime is functioning as intended immediately prior to exit day.

7.9 Part 4 of the instrument will allow the Secretary of State to update technical requirements relating to storage site characterisation and monitoring to adapt them to scientific and technical progress. This power will be subject to restrictions (comparable to those which apply to the European Commission) which mean that amendments to these technical requirements may not adversely affect the standard of monitoring or level of safety provided for by the requirements.

7.10 As some CCS licencing requirements are defined with reference to obligations under other EU derived regimes (such as obligations under legislation implementing the EU Emissions Trading Scheme), changes made to these regimes in the context of the UK's withdrawal from the EU will have a corresponding effect on associated requirements under the CCS licencing regime. As noted, this instrument preserves existing connections to these EU derived regimes (including domestic replacements for these regimes) to the extent they continue to form part of UK domestic law.

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 of 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 Part 2 of the Annex to this Explanatory Memorandum.

8.2 Alongside the EU (Withdrawal) Act 2018 powers the instrument is also being made under section 2(2) of the European Communities Act 1972, which provides for Ministers to make regulations for the purposes of implementing EU obligations of the United Kingdom, to correct two cross-references in S.I. 2010/2221 (a cross-reference to a superseded EU Directive, and a typographical error in a cross-reference to a provision in another regulation).

9. Consolidation

9.1 There are no plans for consolidation.

10. Consultation outcome

10.1 The Department for Business, Energy and Industrial Strategy has not undertaken a public consultation in relation to this instrument but has engaged with the Oil and Gas Authority and devolved administrations about the proposed changes.

11. Guidance

11.1 No guidance is necessary.

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 it makes only minor changes to address deficiencies in retained EU law. The impact on businesses and the public sector is limited to minor familiarisation costs.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

13.3 The instrument implements amendments to the regulations relating to the geological storage of carbon dioxide that would otherwise no longer operate effectively once the

UK has left the EU in order to help smooth the transition for all businesses, irrespective of their size.

14. Monitoring & review

14.1 No specific monitoring arrangements are needed.

14.2 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Nathan Wyatt at the Department for Business, Energy and Industrial Strategy Telephone: 0207 215 0409 or email: nathan.wyatt@beis.gov.uk can be contacted with any queries regarding the instrument.

15.2 Matthew Taylor, Deputy Director for Clean Electricity, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister of State for Energy and Clean Growth, Claire Perry MP at the Department for Business, Energy and Industrial Strategy 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	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create 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 Minister of State for Energy and Clean Growth (Claire Perry MP) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Storage of Carbon Dioxide (Amendment Etc.) (EU Exit) Regulations 2018 does no more than is appropriate".

1.2 This is the case because the instrument goes no further than what is appropriate to ensure the regulatory regime relating to geological storage of carbon dioxide continues to function effectively once the UK has left the EU (including by allowing for the possibility of future updates to technical requirements to reflect scientific learning and technical progress.)

2. Good reasons

2.1 The Minister of State for Energy and Clean Growth (Claire Perry 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:

- Ensuring that the legislation regulating the geological storage of carbon dioxide continues to function effectively once the UK has left the EU;
- Ensuring that the technical requirements applicable to storage sites regulated by the Oil and Gas Authority can be updated as appropriate in response to scientific learning and technical progress.

3. Equalities

3.1 The Minister of State for Energy and Clean Growth (Claire Perry MP) 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."

3.2 The Minister of State for Energy and Clean Growth (Claire Perry MP) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, Claire Perry 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

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