EXPLANATORY MEMORANDUM TO

THE SCOTLAND ACT 1998 (TRANSFER OF FUNCTIONS TO THE SCOTTISH MINISTERS ETC.) ORDER 2025

2025 No. 135

1 Introduction

1.1 This explanatory memorandum has been prepared by the Office of Secretary of State for Scotland and is laid before Parliament by Command of His Majesty.

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

2 Declaration

2.1 Ian Murray, Secretary of State for Scotland at the Office of Secretary of State for Scotland confirms that this Explanatory Memorandum meets the required standard.

2.2 Louise Nicholls, Deputy Director for Constitutional Policy at the Office of Secretary of State for Scotland confirms that this Explanatory Memorandum meets the required standard.

3 Contact

3.1 Nathan Lappin at the Office of Secretary of State for Scotland. Telephone: 07759 527 509 or email: Nathan.Lappin@ukgovscotland.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4 Overview of the Instrument

What does the legislation do?

4.1 The UK operated a system of environmental impact assessment (“EIA”) in reliance on the power conferred by section 2(2) the European Communities Act 1972 ("the 1972 Act"). As a consequence of the repeal of the 1972 Act, the power to make EIA regulations under section 2(2) of that Act was lost. The UK Government took powers in the Levelling-up and Regeneration Act 2023 (“the 2023 Act”) to make environmental outcomes report (“EOR”) regulations, intended to replace EIA regulations. This Order transfers EOR regulation making functions under Chapter 1 of Part 3 (planning data) and Part 6 (environmental outcome reports) of the 2023 Act (and related ancillary functions), in relation to the assessment of the effects on the environment in connection with applications for consent, approval or variation of consent for electricity generating stations (under sections 36 and 36C of the Electricity Act 1989 (“the 1989 Act”)) in Scotland and the Scottish part of the Renewable Energy Zone (“REZ”)1, and associated overhead line infrastructure (under section 37 of the 1989 Act) in Scotland, to the Scottish Ministers. These functions will be exercisable concurrently with the Secretary of State. Scottish Ministers will require to consult with the Secretary of State before exercising any functions by virtue of this Order.

[1] The Scottish part of the REZ is designated by the Renewable Energy Zone (Designation of Area) (Scottish Ministers) Order 2005 (SI 2005/3153).

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is UK-wide.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is Scotland and the Scottish part of the REZ.

5 Policy Context

What is being done and why?

5.1 Developers who plan to construct, extend or operate an electricity generating station in Scotland or the Scottish part of the REZ, and install or keep installed overhead lines in Scotland, must first obtain consent from the Scottish Ministers under sections 36 or 37 of the 1989 Act. If they want to vary this consent, they must apply for a variation under section 36C or 37(3) of that Act, as appropriate.

5.2 The generation, transmission, distribution and supply of electricity are reserved matters under Schedule 5, Part II, section D1 of the Scotland Act 1998 ("the Scotland Act"). However, by virtue of the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (SI 1999/1750) ("the 1999 Order"), Scottish Ministers received executive devolution over various aspects of the 1989 Act including section 36 (consent required for construction etc. of generating stations), section 36C (variation of consents under section 36), section 37 (consent required for overhead lines).

5.3 Before a consent, approval or variation of consent to electricity works can be granted by the Scottish Ministers, EIA regulations made under section 2(2) of the 1972 Act require there to be an assessment of the environmental effects of the consent, approval or variation, which has been applied for, if these are likely to be significant. The function of making EIA regulations under section 2(2) of the 1972 Act, in relation to electricity works consenting, was executively devolved to the Scottish Ministers by virtue of the 1999 Order, the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2006 (SI 2006/1040) and confirmed through the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2019 (SI 2019/964). In Scotland, the relevant EIA regulations are the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (SI 2017/101.

5.4 As a result of the repeal of the 1972 Act, the power in section 2(2) of that Act can no longer be relied upon by the Scottish Ministers. The UK Government took powers in the 2023 Act to introduce a new system of EORs to replace EIAs. The relevant powers, in Chapter 1 of Part 3and Part 6 of the 2023 Act, were conferred on the devolved administrations concurrently with the Secretary of State where those administrations had existing legislative or executive competence. As the Scottish Ministers' function of making EIA regulations in relation to electricity works consenting in Scotland and the Scottish part of the REZ depended on powers deriving from the 1972 Act, these became inoperable on repeal of the 1972 Act with effect from 31 December 2020, and the 2023 Act did not confer replacement functions in this respect on the Scottish Ministers. The UK Government committed to addressing this anomaly by making a transfer of functions Order under powers in the Scotland Act. This Order is being made to fulfil that commitment.

What was the previous policy, how is this different?

5.5 Since the repeal of the 1972 Act became effective, the Scottish Ministers have lost the function of making EIA regulations in respect of electricity works consenting in Scotland and the Scottish part of the REZ. The effect of this Order is to reinstate the Scottish Ministers' function of making environmental assessment regulations in respect of electricity works consenting in these areas by enabling Scottish Ministers to make regulations under the 2023 Act.

6 Legislative and Legal Context

How has the law changed?

6.1 The law has changed to give Scottish Ministers the function of making regulations under Chapter 1 of Part 3 and Part 6 of the 2023 Act in relation to the assessment of the effects on the environment in connection with applications for consent, approval or variation of consent for electricity generating stations (under sections 36 and 36C of the 1989 Act) in Scotland or in the Scottish REZ area and associated overhead line infrastructure in Scotland (under section 37 of the 1989 Act), to replace the lost function of making EIA-regulations in the same respect.

6.2 This Order is made in exercise of the powers conferred by sections 30(3), 63(1)(b) and (3), and 113(4) and (5) of the Scotland Act. The Order 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.

6.3 Section 30(3) of the Scotland Act provides that His 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. Article 2 of this Order provides that regulation making functions under Part 6 of the 2023 Act in relation to the assessment of the effects on the environment in connection with applications for consent, or variation of consent, under sections 36 and 36C of the 1989 Act regarding electricity generating stations in the Scottish part of the REZ, are to be treated as being functions which are exercisable in or as regards Scotland.

6.4 Section 63(1)(b) of the Scotland Act confers a power on His 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 a Minister of the Crown, and section 63(3) provides for transferred functions to be exercisable after consultation with a Minister of the Crown or other person. Article 3 of this Order provides that certain functions under Chapter 1 of Part 3 and Part 6 are to be exercisable by the Scottish Ministers concurrently with the Secretary of State. Scottish Ministers may exercise a function by virtue of article 3 only after consulting the Secretary of State.

6.5 Article 4 of this Order modifies provisions of Chapter 1 of Part 3, Part 6 of and Schedule 24 to the 2023 Act so that for the purposes of functions exercisable by the Scottish Ministers by virtue of this Order certain references are to be read as though the Scottish Ministers were acting as a devolved authority.

Why was this approach taken to change the law?

6.6 This is the only possible approach to make the necessary changes, with the exception of specific provisions or amendments through UK primary legislation.

7 Consultation

Summary of consultation outcome and methodology

7.1 No consultation was required.

7.2 This was a commitment to the Scottish Government made by the Minister of State, Department for Levelling Up, Housing and Communities during the passage of the 2023 Act through Parliament.

Part Two: Impact and the Better Regulation Framework

8 Impact Assessment

8.1 A full Impact Assessment has not been prepared for this instrument because the Order relates to maintenance of existing regulatory standards.

Impact on businesses, charities and voluntary bodies

8.2 There is no, or no significant, impact on business, charities or voluntary bodies.

8.3 The legislation does not impact small or micro businesses.

8.4 There is no, or no significant, impact on the public sector.

9 Monitoring and review

What is the approach to monitoring and reviewing this legislation?

9.1 The approach to monitoring this legislation is that as its purpose is to allow the Scottish Ministers to concurrently exercise specified functions, no formal review or monitoring is considered necessary.

9.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 the Secretary of State for Scotland has made the following statement: "There is no need for review or monitoring as the Order does not regulate businesses."

Part Three: Statements and Matters of Particular Interest to Parliament

10 Matters of special interest to Parliament

10.1 This Order is made to fulfil a commitment made by the Minister of State for Levelling up, Housing and Communities on 17th October 2023.

10.2 This Order comes into force on the day after it is made, as provided for by article 1(1). The Order confers regulation-making (and ancillary) functions on Scottish Ministers, which they may exercise at their discretion. It imposes no duties or obligations and requires no change in behaviour. Therefore, early commencement is considered justified.

11 European Convention on Human Rights

11.1 The Secretary of State for Scotland has made the following statement regarding Human Rights:

"In my view the provisions of the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2025 are compatible with the Convention rights."

12 The Relevant European Union Acts

12.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").