**EXPLANATORY MEMORANDUM TO**

**THE SCOTLAND ACT 2016 (COMMENCEMENT No. 4, TRANSITIONAL AND SAVINGS) REGULATIONS 2017**

**2017 No. 300 (C. 28)**

## 1. Introduction

1.1 This explanatory memorandum has been prepared by The Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

## 2. Purpose of the instrument

2.1 Section 62 of the Scotland Act 2016 ("the Scotland Act") amends certain sections of the Energy Act 2004 ("the Energy Act"). These sections contain functions ("the Energy Act functions") to (a) set safety zones around offshore renewable energy installations in Scottish Waters or in a Scottish part of a Renewable Energy Zone and (b) to require developers to prepare costed decommissioning programmes for submission to and approval by those Ministers in respect of those installations (including the power to require financial security for decommissioning, powers to review the programme, and power, should the responsible party default, to ensure that the programme is carried out). An offshore renewable energy installation has the same meaning as given in the Energy Act (section 104) and includes offshore wind, wave and tidal energy installations, subject to certain limitations set out in the Act. The Energy Act functions ensure that the relevant international obligations of a Coastal State such as the UK are delivered, including those under the UN Convention on the Law of the Sea.

2.2 The Scotland Act 2016 (Commencement No. 4, Transitional and Savings) Regulations 2017 ("the regulations") transfers the Energy Act functions to the Scottish Ministers.

## 3. Matters of special interest to Parliament

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

3.1 None.

***Other matters of interest to the House of Commons***

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

## 4. Legislative Context

4.1 This instrument is made under section 71 and 72 of the Scotland Act. Regulation 3 brings into force section 62 of that Act which (a) amends sections 95 (safety zones around renewable energy installations) and 96 (prohibited activities in safety zones), (b) amends Chapter 3 (decommissioning of offshore installations) of Part 2 of the Energy Act and (c) makes consequential amendments to other sections of the Energy Act, on 1st April 2017.

4.2 Transitional and savings provisions in regulation 4 are made to enable Chapter 3 of Part 2 of the Energy Act to continue to apply after that date as unamended by section 62 in respect of certain existing installations (as defined in regulation 5 of the regulations) until such an installation reaches its relevant date. Regulation 6 determines when an installation reaches its relevant date by reference to specific conditions that must be met. Once an installation reaches its relevant date, the saving provision in regulation 4(1) ceases to apply in respect of that installation.

## 5. Extent and Territorial Application

5.1 The extent of this instrument is to the United Kingdom.

5.2 The territorial application of this instrument is to the United Kingdom.

## 6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## 7. Policy background

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

7.1 Although the international conventions governing safety zones around, and decommissioning of, offshore renewable energy installations, remain at UK level, all offshore renewable energy installations for which such responsibilities transfer to the Scottish Ministers have received, or will have received, the relevant development consent and marine licence from the Scottish Ministers following a seabed lease or exclusivity agreement from the Crown Estate. As of 1 April 2017 (when the Scottish Ministers assume responsibility for the administration of Crown Estate assets in Scotland), Crown Estate revenues provided by the sites will be paid into the Scottish Consolidated Fund. The policy of transferring the Secretary of State's Energy Act functions to the Scottish Ministers is therefore based on the policy position that it is more appropriate for the remaining parts of the process – Government oversight of decommissioning requirements and setting of safety zones – to also be administered by the Scottish Ministers.

7.2 A Concordat was signed between the Secretary of State and Scottish Ministers in February 2017, setting out practical arrangements for the transfer of the Secretary of State's Energy Act functions in relation to the decommissioning of offshore renewable energy installations to the Scottish Ministers under the Scotland Act. This Concordat operates in accordance with the principles outlined in the Memorandum of Understanding on Intergovernmental Relations and Supplementary Agreements between the UK Government, Scottish Government, Welsh Government and the Northern Ireland Executive. Whilst the Concordat does not constitute a formal 'contract', these regulations are designed to give effect to the agreements contained in the Concordat. At the commencement date of 1 April 2017 there will be a number of existing offshore renewable energy installations in Scottish waters. Some of these are expected to decommission within the next few years, with the UK Government already having been responsible for decommissioning requirements for the majority of the operational life of the installation. Others are still in the development pipeline. Therefore, the regulations distinguish between short-term wave and tidal installations and longer-term installations (primarily windfarms and tidal arrays). The regulations

ensure that Energy Act functions in relation to the decommissioning of short-term installations only transfer when certain conditions are met:

7.3 The Energy Act functions relating to safety zones will transfer to the Scottish Ministers on 1st April 2017 without exception.

7.4 In relation to all future offshore renewable energy installations where construction (other than the initial laying of cables in anticipation of construction) has not started by 1st April 2017, the Energy Act functions relating to decommissioning of offshore renewable energy installations will, on 1 April 2017, transfer to the Scottish Ministers.

7.5 In relation to offshore renewable energy installations constructed (above the initial laying of cabling) by 1 April 2017 and expected to decommission on or after 1 January 2023, the Energy Act functions transfer to the Scottish Ministers only when a decommissioning programme approved by the Secretary of State is in place. Where financial securities were required by 1 April 2017, these must also be in place before transfer takes place.

7.6 There is a small group of offshore renewable energy installations constructed before 1 April 2017 which are currently expected to decommission before 1 January 2023. The default position is that the Secretary of State's Energy Act functions will not be transferred to the Scottish Ministers for these installations. However, the owners of some of these installations intend to extend their operation past the current planned decommissioning date. The Secretary of State will retain Energy Act functions for these offshore renewable energy installations until such point as the continuation of the project is confirmed and an approved decommissioning programme and financial securities are in place.

7.7 In the above explanation, references to installations being due to decommission before, on or after 1st January 2023 refer to the end dates in marine licences for short-term wave and tidal devices as at 1st April 2017. (Projects not due to decommission before 2023 are typically windfarms and tidal arrays with expected decommissioning dates from the late 2030s onwards, and are categorised differently in the regulations as set out above).

## 8. Consultation outcome

8.1 A consultation has not been run on the regulations.

## 9. Guidance

9.1 The Department for Business, Energy and Industrial Strategy has published guidance in respect of the way it exercises the Energy Act functions.[1] The Department will not issue guidance in relation to the carrying out of Energy Act functions by the Scottish Ministers as it is for the Scottish Ministers to implement their own policy, within the boundaries of the Energy Act. However, the Concordat provides for both the UK Government and Scottish Ministers to continue to seek to implement a coherent UK-wide approach to decommissioning. It also contains a commitment that 'where either administration is considering taking a more risk-averse approach which would be likely to increase the costs of a site, they should give due weight to the potential impact on bills / investment, and any impact on existing subsidy contracts.'

[1] https://www.gov.uk/government/publications/decommissioning-offshore-renewable-energy-installations

## 10. Impact

10.1 There is no impact on business, charities or voluntary bodies as a result of these regulations as the Energy Act functions remain the same.

10.2 The impact on the public sector is that administrative costs of requesting and approving decommissioning programmes etc. will transfer to the Scottish Government, although the impact on the public sector overall would not be increased.

10.3 An Impact Assessment has not been prepared for this instrument.

## 11. Regulating small business

11.1 The relevant legislation applies to activities that are undertaken by small businesses. There is no impact however on the regulation of small businesses by this legislation as it simply transfers Energy Act functions from the Secretary of State to the Scottish Ministers.

## 12. Monitoring & review

12.1 The Concordat includes a commitment that 'both administrations will continue to seek to implement a coherent UK-wide approach to decommissioning'. Therefore ongoing contact is expected on the working arrangements put in place by the Concordat.

## 13. Contact

13.1 Daniel Halpern at the Department for Business, Energy and Industrial Strategy Telephone: 0300 068 6862 or email: OREIDecommissioning@beis.gov.uk can answer any queries regarding the instrument.