EXPLANATORY MEMORANDUM TO

THE UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) ACT 2021 (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2021

2021 No. 760

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Office of the Secretary of State for Scotland and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order makes provision in consequence of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ("the 2021 Act"), which makes provision in connection with the withdrawal of the United Kingdom from the European Union. In particular, it establishes an environmental governance body, Environmental Standards Scotland (ESS), as a body corporate and sets out its functions and powers.

2.2 The Order will make ESS part of the Scottish Administration. Accordingly, ESS will be a Non-Ministerial Office accountable to the Scottish Parliament. The Order provides that the Crown Suits (Scotland) Act 1857 does not apply to ESS with the effect that the Lord Advocate cannot sue or be sued in place of ESS. The Order amends the House of Commons Disqualification Act 1975 ("the 1975 Act") to add ESS to the list of bodies whose members are disqualified from being members of the House of Commons.

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.

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

"In my view the provisions of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (Consequential Provisions and Modifications) Order 2021 are compatible with the Convention rights."

6. Legislative Context

6.1 The 2021 Act received Royal Assent on 29 January 2021, having been passed by the Scottish Parliament on 22 December 2020.

6.2 The 2021 Act makes provision in connection with the withdrawal of the United Kingdom from the European Union. In relation to environmental matters it establishes guiding principles on the environment in domestic law. The domestic principles are derived from the equivalent principals, and integration requirement, provided for in Article 11 of Title II and Article 191(2) of Title XX of the Treaty on the Functioning of the European Union.

6.3 The 2021 Act also establishes an environmental governance body, ESS, which will assume governance functions to enforce compliance by the Scottish Ministers and public authorities in Scotland, other than reserved bodies, with environmental law, and provide oversight of the effectiveness of environmental law. The Act confers powers on ESS to monitor public authorities compliance with environmental law, the effectiveness of environmental law, and how it is implemented. ESS has the power to investigate whether a public authority is failing (or has failed) to comply with environmental law, as well as any question about the effectiveness of environmental law or whether it is (or has been) implemented or applied effectively. ESS has the power to take appropriate action to secure a public authority's compliance with environmental law, and to secure improvement in the effectiveness of environmental law or how it is implemented or applied.

6.4 This Order will make ESS part of the Scottish Administration. Accordingly, ESS will be a Non-Ministerial Office accountable to the Scottish Parliament. The Order provides that the Crown Suits (Scotland) Act 1857 does not apply to ESS with the effect that the Lord Advocate cannot sue or be sued in place of ESS. It will also add the body to the list of bodies whose members are disqualified from being members of the House of Commons under the 1975 Act.

7. Policy background

What is being done and why?

7.1 Section 104 of the Scotland Act 1998 enables provisions to be made that are necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament. This Order makes provisions that are necessary and expedient in consequence of the establishment of ESS by the 2021 Act.

7.2 Articles 2 and 3 of the Order make ESS part of the Scottish Administration, and provide for its designation as a non-ministerial office that is independent from Scottish Ministers but accountable to the Scottish Parliament.

7.3 Article 3 disapplies the Crown Suits (Scotland) Act 1857. The default position is that every action to be instituted in Scotland on behalf of, or against, an organisation in the Scottish Administration may be lawfully raised in the name of, or directed against, the Lord Advocate. In order to safeguard the independence of ESS from the Scottish Government it is deemed necessary to disapply the Crown Suits (Scotland) Act 1857 so that the Lord Advocate, a member of the Scottish Government, cannot be sued in place of ESS.

7.4 Article 4 disqualifies members of ESS from being members of the House of Commons. This will require an entry to be inserted in Part 2 of Schedule 1 to the

House of Commons Disqualification Act 1975. This will help ensure the independent basis of ESS's work in line with the 2021 Act.

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

8.1 This instrument is not being made under the European Union (Withdrawal) Act 2018. However, it relates to the withdrawal of the United Kingdom from the European Union because it is in consequence of the 2021 Act, which makes provision in connection with the withdrawal of the United Kingdom from the European Union.

9. Consolidation

9.1 Though the Order amends primary legislation, the modification is minor and its effect is simply to add ESS to the list of bodies in the 1975 Act whose members are disqualified from being members of the House of Commons. Therefore no consolidation is required.

10. Consultation outcome

10.1 There has been no consultation exercise specific to this Order, as the Order simply provides the required mechanism for ESS to be made part of the Scottish Administration, to disapply the Crown Suits Act 1857 as described and to ensure ESS's members cannot also hold membership of the House of Commons.

10.2 However, a public consultation on environmental principles and governance was carried out by the Scottish Government in 2019. The findings of this consultation fed directly into the policy development of the environmental sections of the 2021 Act. The responses indicated there was a strong consensus for environmental governance measures to be put in place following EU exit.

11. Guidance

11.1 This Order stands alone and guidance is not 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 no impact on the private or voluntary sectors is foreseen.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Order is consequential upon the 2021 Act. No formal monitoring or review is considered necessary.

14.2 The Order does not include a statutory review provision 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."

15. Contact

15.1 Arthur Halfhide at the Office of the Secretary of State for Scotland (Telephone: 07557896644 or email: arthur.halfhide@scotlandoffice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Rachel Irvine or Alison Evans (job share), Deputy Directors for Constitutional Policy, at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Secretary of State for Scotland at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.