

EXPLANATORY MEMORANDUM TO
THE SCOTLAND ACT 1998 (TRANSFER OF FUNCTIONS TO THE
SCOTTISH MINISTERS ETC.) (NO. 2) ORDER 2006

2006 No.

1. This Explanatory Memorandum has been prepared by the Department for Trade and Industry and is laid before the UK Parliament by Command of Her Majesty. This Memorandum contains information for the Joint Committee on Statutory Instruments in respect of the draft Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2006.

2. Description

2.1 This Order allows for the transfer of certain functions of UK Ministers to the Scottish Ministers. It does so by using the powers available at section 63 of the Scotland Act 1998 (“the 1998 Act”). The powers transferred in this Order relate to consent under section 36 of the Electricity Act 1989 (and related schedules), which is required by developers who plan to construct, extend or operate an electricity generating station.

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

3.1 This Order is made in exercise of the powers conferred by sections 30(3), 63, 113 and 124(2) of the 1998 Act. The Instrument 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.

3.2 Section 63(1)(a) of the Scotland Act 1998 confers a power on Her 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 instead of the UK Minister of the Crown. This is known as “executive devolution”.

3.3 Any function whether statutory or non-statutory of a UK Minister of the Crown, including a power to make subordinate legislation, so far as it is exercisable in or as regards Scotland, can be the subject of an Order under section 63.

3.4 Section 30(3) of the Scotland Act provides that Her Majesty may by Order in Council specify functions which are to be treated, for such purposes of that Act as may be specified, as being, or as not being, functions which are exercisable in or as regards Scotland. 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. This is known as a “paving provision”. In this case s30(3) ensures that the effect of this Order extends to the waters of the part of the UK Renewable Energy Zone adjacent to Scotland, which stretch outwards from the limit of the 12 mile territorial waters.

4. Legislative background

4.1 Developers who plan to construct, extend or operate an electricity generating station must first obtain a consent under section 36 of the Electricity Act 1989. The generation, transmission, distribution and supply of electricity are reserved matters under Schedule 5, Part II, section D1 of the Scotland Act 1998. However, the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (SI 1999/1750) executively devolved section 36 consent functions (with related Schedules) to the Scottish Ministers.

4.2 Section 93(1) of the Energy Act 2004 confirmed the applicability of section 36 to territorial waters. It also amended Schedule 8 of the Electricity Act (which makes detailed provision in respect of the section 36 consent process), by adding a new section, 7A, in respect of the role of local planning authorities, to take account of situations where no part of the generating station for which a section 36 application is being made is within the jurisdiction of a local planning authority, for example when the generating station is to be located offshore in territorial waters. The Energy Act confirmed that in such cases the local planning authority cannot force a public inquiry to be held if it sustains an objection to the application.

4.3 The Energy Act 2004 also extended the section 36 consents regime to the UK Renewable Energy Zone. This is an area of water around the UK, beyond territorial waters, where the UK is able to exercise its rights under the United Nations Convention on the Law of the Sea to develop wind and water resources for the production of energy. The extent of the UK Renewable Energy Zone was established in the Renewable Energy Zone (Designation of Area) Order 2004 (SI 2004/2668) and is based upon the co-ordinates set out in the Schedule to the Merchant Shipping (Prevention of Pollution) (Limits) Regulations 1996 (SI 1996/2128) (as amended by the Merchant Shipping (Prevention of Pollution) (Limits) Regulations 1997 (SI 1997/506)).

4.4 This Transfer of Functions Order has the effect of revoking the original 1999 transfer of s36 functions in SI 1999/1750 and then, one day later, re-transferring to Scottish Ministers the section 36 consent functions, as amended by the Energy Act, in respect of Scotland and the territorial waters adjacent to Scotland and extending these consent functions to a defined part of the Renewable Energy Zone beyond Scottish territorial waters (as set out in the Renewable Energy Zone (Designation of Area) (Scottish Ministers) Order 2005 (SI 2005/3153)).

4.5 Section 36 of and Schedule 5 to the 1989 Act are also to be amended by the Water Environment and Water Services (Scotland) Act 2003 (Consequential Provisions and Modifications) Order 2006 made under section 104 of the Scotland Act 1998, which will be laid before Parliament shortly and come into force on 1st April 2006. The amendments will require Ministers, as part of the section 36 consent process, to consult with the Scottish Environment Protection Agency (SEPA) on hydro-electric and other stations powered by water located in Scotland. In addition Ministers will be required to take into consideration the effect on the water

environment in relation to such stations. This Order therefore also transfers to the Scottish Ministers the function of consulting with SEPA in relation to such consents and the requirement to have regard to the purposes of Part 1 of the Water Environment and Water Services (Scotland) Act 2003 (which transposed the Water Framework Directive 2000/60/EC in relation to Scotland).

5. Extent

5.1 This Order has UK extent.

6. European Convention on Human Rights

6.1 The Minister of State for Energy has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

“In my view the provisions of the draft Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2006 are compatible with the Convention rights.”

7. Policy background

7.1 This Transfer of Functions Order has the effect of consolidating within one statutory instrument, and within the Scottish Executive’s powers, a full set of section 36 consent functions for generating stations in respect of the Scottish mainland and offshore, so that applicants and stakeholders who have an interest in a particular development have a single focal point within the Scottish Executive. If this transfer of functions were not to take place the result would be that UK Ministers would be responsible for section 36 functions in respect of generating stations in the UK Renewable Energy Zone, whereas consent functions in respect of generating stations in the territorial waters adjacent to Scotland would rest with Scottish Ministers. This fragmentation would be undesirable, particularly where an offshore generating station such as a wind farm were to straddle territorial waters and the Renewable Energy Zone, as applications would have to be made to both the Secretary of State and the Scottish Ministers.

7.2 The amendments made under the Water Environment and Water Services (Scotland) Act 2003 (Consequential Provisions and Modifications) Order 2006 will require Ministers, as part of the section 36 consent process, to consult with the Scottish Environment Protection Agency (SEPA) on hydro-electric and other stations powered by water. In addition Ministers will be required to take into consideration the effect on the water environment in relation to such stations. These functions relate to generating stations located in Scotland and will be performed after this Order comes into effect by the Scottish Ministers.

8. Impact

8.1 A regulatory impact assessment in relation to the transfer of section 36 consent functions is attached. No regulatory impact assessment is necessary in respect of the function of consulting with the Scottish Environmental Protection Agency as these amendments do not in themselves generate any costs.

8.2 The Scottish Ministers will have additional section 36 consent functions in respect of generating stations in the designated part of the Renewable Energy Zone. However, no applications for such consents are currently in prospect and the financial impact on the Scottish Executive of handling any future applications is expected to be minimal. Applicants to operate devices in the Renewable Energy Zone will be charged the appropriate consent fee which reimburses the Scottish Executive for work carried out in processing section 36 applications.

9. Contact

9.1 Cathy Allen at the Department of Trade and Industry Tel 020 215 0479 or e-mail: cathy.allen@dti.gsi.gov.uk can answer any queries regarding the instrument.