

EXPLANATORY MEMORANDUM TO

THE SCOTLAND ACT 2016 AND ONSHORE PETROLEUM (CONSEQUENTIAL, TRANSITIONAL AND SAVING PROVISIONS AND MODEL CLAUSES) REGULATIONS 2018

2018 No. 56

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy (“BEIS”) and is laid before the House of Commons by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The purpose of this statutory instrument is threefold. Firstly, it makes amendments consequential on the transfer of functions for onshore petroleum licensing currently exercised by the Oil and Gas Authority (“the OGA”) or the Secretary of State to Scottish Ministers, as provided for by sections 49 and 71 of the Scotland Act 2016. Secondly, it prescribes the model clauses relating to reserved matters which are to be included in petroleum licences granted by Scottish Ministers. Thirdly, it amends the line dividing the seaward and landward areas around Great Britain for purposes of petroleum licensing generally to align it with that used in defining the Scottish onshore area under the Scotland Act 2016. This statutory instrument will commence immediately after the commencement of section 48 of the Scotland Act 2016.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 In order to commence the devolution of onshore petroleum licensing to Scottish Ministers, two separate instruments are required. An affirmative SI which made consequential amendments to taxation legislation was debated in Parliament in November 2017 (The Scotland Act 2016 (Onshore Petroleum) (Consequential Amendments) Regulations 2018). This negative SI is the second instrument: a set of negative regulations under sections 49 and 71 of the Scotland Act 2016 and section 4 of the Petroleum Act 1998, to make provisions for Scottish Ministers to be responsible for onshore petroleum licensing in Scotland.
- 3.2 With the exception of Part 3 of the affirmative SI, it is our intent to commence both instruments at the same time, along with the Commencement regulations for sections 47 and 48 of the Scotland Act 2016, which is under the responsibility of Scotland Office. Part 3 of the affirmative SI makes amendments consequential on provision in the Wales Act 2017 and will commence at the same time as the relevant provisions in that Act.

Other matters of interest to the House of Commons

- 3.3 As this instrument is subject to negative resolution 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 being made to make amendments and modifications to the existing regime for the licensing of petroleum consequent on clauses 47 and 48 of the Scotland Act 2016, which devolve responsibility within the “Scottish onshore area” (as defined in section 47 of that Act).
- 4.2 The secondary legislation relevant to the licensing of petroleum in landward areas in Great Britain consists of the Hydrocarbons Licensing Directive Regulations 1995 (S.I. 1995/1434), which implements Council Directive 94/22/EC on the conditions for advertising and granting and the terms of petroleum licences; the Petroleum Licensing (Exploration and Production) (Landward Areas) Regulations (S.I. 2014/1686), which prescribe the model clauses for incorporation in petroleum licences for landward areas; the Petroleum Licensing (Applications) Regulations 2015 (S.I. 2015/766), which set out the requirements for applications for petroleum licences; and the Oil and Gas Authority (Fees) Regulations 2016 (S.I. 2016/904), which make provision for the fees which the Oil and Gas Authority may charge for different types of applications and activities.
- 4.3 This instrument amends those instruments to reflect the revised competence of the Secretary of State and the OGA. Using the power in s4(1B) Petroleum Act 1998 (which is inserted by s48 of the Scotland Act 2016 and will be commenced at the same time as these regulations), this instrument sets out the model clauses relating to reserved matters to be included in licences granted by Scottish Ministers. The instrument also substitutes a new definition of the line dividing landward and seawards areas for the purposes of petroleum licensing for consistency with the definition of “Scottish onshore area”.
- 4.4 In addition, this instrument amends the four existing licences in the Scottish onshore area (which incorporate the model clauses in the Petroleum Licensing (Exploration and Production) (Seaward and Landward Areas) Regulations 2004 (S.I. 2004/352), since replaced by the 2014 regulations) to reflect the transfer of functions to the Scottish Ministers and, with one exception, modifies the secondary legislation relevant to petroleum licensing in landward areas so that it applies in relation to licences in respect of areas within the Scottish onshore area (with appropriate modifications) until such time as the Scottish Ministers make their own legislation. The exception is the Oil and Gas Authority (Fees) Regulations 2016, which is not modified so as to apply in relation to licences in the Scottish onshore area because the regulations were made under section 12 of the Energy Act 2016 (c.20) and the charging power which has been transferred to Scottish Ministers is that in section 188 of the Energy Act 2004 (c.20).

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is 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 The Scotland Act 2016 implements the Smith Commission Agreement by devolving a range of powers to the Scottish Parliament and Scottish Government. As recommended by the Smith Commission, it was agreed that powers related to onshore oil and gas licensing, except for consideration payable, would be devolved to Scotland. This was set out sections 47, 48 and 49 of the Scotland Act 2016.
- 7.2 While the Scottish Government already holds responsibility for the planning and environmental aspects of the onshore oil and gas regime, the intent is to provide it with greater control over the development of such resources in onshore Scotland by devolving the UK's licensing regime in current form to Scottish Ministers. This will provide Scottish Ministers with the powers to administer the existing onshore oil and gas licensing regime in Scotland, and create a bespoke licensing regime if they wish.
- 7.3 The only functions related to onshore oil and gas licensing in Scotland that will remain reserved to the UK are those relating to consideration in the form of taxation type payments imposed on licensees under petroleum licences and the power for the Secretary of State to revoke a licence for non-payment.
- 7.4 This instrument makes consequential amendments to relevant oil and gas licensing legislation to reflect the transfer of functions of onshore oil and gas licensing in Scotland to Scottish Ministers and the resulting limitation of the competence of the Secretary of State and the Oil and Gas Authority to England and offshore. This is achieved in Part 2 of this statutory instrument.
- 7.5 Part 2 of this statutory instrument disapplies the relevant legislation in relation to licences granted by Scottish Ministers (except in so far as it remains relevant for reserved purposes, such as prescribing model clauses relating to consideration).
- 7.6 Part 2 of this statutory instrument also amends the dividing line between landward areas and seaward areas (currently set out in Schedule 1 of the Petroleum Licensing (Applications) Regulations 2015), which determines whether a licence incorporates the landward area or seaward area model clauses, so that it aligns with that used to establish the "Scottish onshore area".
- 7.7 In addition to consequential amendments, the instrument prescribes the model clauses relating to reserved matters, such as consideration, for inclusion in any future licences granted by Scottish Ministers. This ensures that the Secretary of State's rights in relation to reserved matters are protected, including the right to revoke licences for non-payment of consideration. This is also included in Part 2 of the statutory instrument.
- 7.8 Part 3 of this statutory instrument deals primarily with what will be devolved matters and makes transitional modifications to the legislation relevant to onshore licensing to enable Scottish Ministers to use it until they make their own. This is done by way of transitional modification (rather than textual amendment), as the intention is for Scottish Ministers to introduce their own legislation in due course, but allows Scottish

Ministers the necessary time to introduce their own legislation governing tendering and applying for licences and the model clauses to be included in relation to devolved matters. Scottish Ministers will need to introduce their own legislation if they wish to charge fees, however, because the existing legislation is made under a different power to that which has been transferred and therefore it cannot be modified to apply in relation to licences in the Scottish onshore area.

- 7.9 This statutory instrument also modifies four existing landward area licences (PEDL 133, PEDL 158, PEDL 162 and PEDL 163), to reflect the transfer of functions to Scottish Ministers and include the reserved model clauses prescribed by the Secretary of State relating to reserved matters, such as consideration.
- 7.10 Once the Scotland Act 2016 provisions concerning onshore oil and gas are fully in force, onshore oil and gas licensing in Scotland will be the responsibility of Scottish Ministers and they will be responsible for granting and administering relevant licences.

Consolidation

- 7.11 There are no plans to consolidate this legislation at this time.

8. Consultation outcome

- 8.1 There has been no specific consultation on the technical measures in this instrument, but BEIS officials have worked closely with Scottish Government officials to develop the policy and prepare the statutory instrument.
- 8.2 The provisions in the Scotland Act 2016 were set out in the Command Paper; Scotland in the United Kingdom: An enduring settlement. This followed the agreement contained in the Smith Commission Report on devolving further powers to Scotland. The Command Paper put forward draft legislative proposals, shared with the Scottish Government prior to publication, to help inform the legislative basis of the Smith Commission Agreement and subsequently the basis of the Scotland Bill. In preparing the report, engagement with Scottish organisations and communities resulted in receiving over 18,000 submissions from the public and more than 400 from civic groups. The UK Government also set up a stakeholder group of representative bodies from across Scotland to help inform their drafting and to clarify the divisions of powers between Holyrood and Westminster.

9. Guidance

- 9.1 These are technical amendments relating to or adapting existing powers and functions and as such no specific guidance is planned on this particular instrument. However, The Oil and Gas Authority has clearly communicated to the two existing licence holders who are affected, ahead of commencement of these provisions.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is expected to be minimal as there is no material change to secondary legislation.
- 10.2 Four existing landward area licences will be amended to reflect the transfer of functions to Scottish Ministers and include the reserved model clauses prescribed by the Secretary of State relating to reserved matters, such as consideration. As the amendments transfer existing powers and functions (and in relation to the reserved

model clauses, adapt existing provisions), the instrument should have no impact on licence holders.

- 10.3 The impact on the public sector is minimal for the UK Government, the Oil and Gas Authority and for the Scottish Government as it is limited to the activities anticipated in devolving onshore licensing to the Scottish Government, as set out in the Scotland Act 2016.
- 10.4 An Impact Assessment has not been prepared for this instrument, as there is expected to be no direct cost to business from these regulations. A similar transfer was considered in the Impact Assessment which accompanied the Energy Bill 2015. This outlined that it is reasonable to assume that transferring these existing functions will result in zero negligible cost to business relative to existing arrangements.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 11.3 If only functions in relation to large businesses were transferred, it would not give effect to the new devolution settlement.

12. Monitoring & review

- 12.1 A review provision, as required by section 28 of the Small Business, Enterprise and Employment Act 2015, is not appropriate in these regulations because the SI does not make new regulatory provision. The SI only changes the identity of the regulatory body, not the nature of the functions.

13. Contact

- 13.1 Timothy Cox at the Department for Business, Energy and Industrial Strategy
Telephone: 0207 215 1716 or email timothy.cox@beis.gov.uk can answer any queries regarding the instrument.