

Explanatory Memorandum to:

- 1) The Electricity (Offshore Generating Stations) (Applications for Consent) (Wales) Regulations 2019.**
- 2) The Electricity (Offshore Generating Stations) (Variation of Consents) (Wales) Regulations 2019.**
- 3) The Electricity (Offshore Generating Stations) (Inquiries Procedure) (Wales) Regulations 2019.**
- 4) The Electricity Works (Environmental Impact Assessment) (England and Wales) (Amendment) (Wales) Regulations 2019.**
- 5) The Electricity (Offshore Generating Stations) (Safety Zones) (Application Procedures and Control of Access) (Amendment) (Wales) Regulations 2019.**

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the:

- 1) The Electricity (Offshore Generating Stations) (Applications for Consent) (Wales) Regulations 2019;
- 2) The Electricity (Offshore Generating Stations) (Variation of Consents) (Wales) Regulations 2019;
- 3) The Electricity (Offshore Generating Stations) (Inquiries Procedure) (Wales) Regulations 2019;
- 4) The Electricity Works (Environmental Impact Assessment) (England and Wales) (Amendment) (Wales) Regulations 2019; and
- 5) The Electricity (Offshore Generating Stations) (Safety Zones) (Application Procedures and Control of Access) (Amendment) (Wales) Regulations 2019.

Julie James

Minister for Housing and Local Government

20 February 2019

PART 1

1. Description

1.1 Sections 39 to 41 of the Wales Act 2017 (“the 2017 Act”) among other things, devolve to the Welsh Ministers:

- responsibility for the consenting of offshore generating stations in Welsh waters with a capacity up to and including 350MW; and
- other associated functions such as the ability to extinguish public rights of navigation and provision relating to safety zones around renewable energy installations.

These provisions will be fully commenced on 1 April 2019.

1.2 As a result of amendments to the Electricity Act 1989 (“the 1989 Act”) and the Planning Act 2008 (“the 2008 Act”) made by the 2017 Act the Welsh Ministers are the appropriate (consenting) authority in relation to applications made after 1 April 2019 under sections 36 and 36C of the 1989 Act relating to generating stations (or proposed generating stations) in Welsh waters (as defined in section 36 of the 1989 Act) which have or will have a capacity not exceeding 350MW.

1.3 The Electricity (Offshore Generating Stations) (Applications for Consent) (Wales) Regulations 2019 make provision about the grant of consents under section 36 of the 1989 Act (“ a section 36 consent”) in relation to generating stations in respect of which the Welsh Ministers are the appropriate authority. These Regulations include provision about the making of applications, service and publicity requirements, the circumstances in which public inquiries are to be held and the scope of public inquiries where there is more one or more relevant planning authority. They also make consequential amendments to the Conservation of Habitats and Species Regulations 2017.

1.4 The Electricity (Offshore Generating Stations) (Variation of Consents) (Wales) Regulations 2019 make provision about applications to vary a section 36 consent under section 36C of the 1989 Act where the Welsh Ministers are the appropriate authority. These Regulations include provision about what must be included in or accompany a variation application, notification and publicity requirements, when public inquiries are to be held and the withdrawal of variation application. They also revoke the Electricity Generating Stations (Variation of Consents) (England and Wales) Regulations 2013 in so far as they apply to an application to the Welsh Ministers under section 36C of the 1989 Act.

- 1.5 The Electricity (Offshore Generating Stations) (Inquiries Procedure) (Wales) Regulations 2019 make provision about inquiries caused to be held by the Welsh Ministers in relation to applications under sections 36 and 36C of the 1989 Act.
- 1.6 The Electricity Works (Environmental Impact Assessment) (England and Wales) (Amendment) (Wales) Regulations 2019 amend the Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2017 to provide the Welsh Ministers are the 'relevant authority' where an application under section 36 or 36C of the 1989 Act is made (or to be made) to the Welsh Ministers. They also amend the meaning of consultation body and insert reference to the Electricity (Offshore Generating Stations) (Variation of Consents) (Wales) Regulations 2019 in two regulations.
- 1.7 The Electricity (Offshore Generating Stations) (Safety Zones) (Application Procedures and Control of Access) (Amendment) (Wales) Regulations 2019 make minor amendments to the Electricity (Offshore Generating Stations) (Safety Zones) (Application Procedures and Control of Access) Regulations 2007 to reflect the change in responsibilities from the Secretary of State to the Welsh Ministers for declaring safety zones in Welsh waters.

2. Matters of special interest to the Constitutional and legislative Affairs Committee

- 2.1 There are no matters of special interest to the Constitutional and Legislative Affairs Committee.

3. Legislative Background

Electricity Act 1989 SIs

The Electricity (Offshore Generating Stations) (Applications for Consent) (Wales) Regulations 2019

- 3.1 These Regulations are made in exercise of the powers conferred on the Welsh Ministers by sections 36(8A) (which is inserted into section 36 by paragraph 47 of Schedule 6 to the 2017 Act) and 60 of the 1989 Act.
- 3.2 Section 36(8A) gives the Welsh Ministers power to make provision about the grant of consents under section 36 of the 1989 Act in relation to generating stations in respect of which they are the appropriate authority.

3.3 Section 60 of the 1989 Act contains supplemental powers in relation to regulations made under Part 1 of the 1989 Act, regulations made under section 36(8A) of the 1989 Act are made under Part 1 of that Act.

3.4 These Regulations are made using the negative resolution procedure.

The Electricity (Offshore Generating Stations) (Variation of Consents) (Wales) Regulations 2019

3.5 These Regulations are made in exercise of the powers conferred on the Welsh Ministers by section 36C(2) and (6) (as amended by section 39(12) of the 2017 Act) and 60 of the 1989 Act.

3.6 Section 36C(2) and (6) give the Welsh Ministers power to make provision about the variation of a consent under Section 36 of the 1989 Act relating to generating stations (or proposed generating stations) in Welsh waters that do not or will not when constructed or extended exceed 350MW.

3.7 As mentioned at paragraph 3.3 above section 60 of the 1989 Act contains supplemental powers in relation to regulations made under Part 1 of the 1989 Act, regulations made under section 36C of the 1989 Act are regulations made under Part 1 of that Act.

3.8 These Regulations are made using the negative resolution procedure.

The Electricity (Offshore Generating Stations) (Inquiries Procedure) (Wales) Regulations 2019

3.9 These Regulations are made in exercise of the powers conferred on the Welsh Ministers by sections 36(8A), 36C(2) and (6) and 60 of the 1989 Act. These provisions are described at paragraphs 3.1 to 3.8 above.

3.10 These Regulations are made using the negative resolution procedure.

The Electricity Works (Environmental Impact Assessment) (England and Wales) (Amendment) (Wales) Regulations 2019

3.11 These Regulations are made in exercise of the powers conferred on the Welsh Ministers by sections 36(8A), 36C(2) and (6) and 60 of the 1989 Act. These provisions are described at paragraphs 3.1 to 3.8 above.

3.12 These Regulations are made using the negative resolution procedure.

Energy Act 2004 SI

The Electricity (Offshore Generating Stations) (Safety Zones) (Application Procedures and Control of Access) (Amendment) (Wales) Regulations 2019

- 3.13 These Regulations are made in exercise of the powers conferred on the Welsh Ministers by sections 96 and 192 of, and paragraph 4(1) of Schedule 16 to, the Energy Act 2004 (“the 2004 Act”).
- 3.14 Section 41 of the 2017 Act amends sections 95, 96 and 104 of the Energy Act 2004 to enable the Welsh Ministers to exercise functions in relation to declaring safety zones around offshore renewable energy installations with a capacity of up to 350MW in Welsh waters.
- 3.15 Sections 95-98 of, and Schedule 16 to, the 2004 Act make provision for safety zones applying to offshore renewable energy installations. The essence of a safety zone is it is a criminal offence for vessels to enter or remain in a safety zone unless permitted to do so by means of a safety zone notice issued by the appropriate Minister (in Welsh waters, the Welsh Ministers).
- 3.16 Section 96 prohibits vessels from entering or remaining in a safety zone and carrying out activities except where permitted to do so by a notice declaring a safety zone. Section 41 of the Wales Act 2017 amends section 96 so that the Welsh Ministers can make regulations setting out general permissions allowing vessels to enter any safety zone and carry out activities. This is in addition to any individual permissions granted in the notice declaring that safety zone.
- 3.17 Section 192 sets out supplemental powers in relation to regulations made under the Energy Act 2004.
- 3.18 Schedule 16 to the Energy Act 2004 sets out the process for applying for a safety zone notice under section 95. Paragraph 4(1) of Schedule 16, among other things, enables the Welsh Ministers to prescribe the circumstances where notice should be served on persons specified either in regulations or in directions.
- 3.19 These Regulations are made using the negative resolution procedure.

4. Purpose and Effect

- 4.1 The Wales Act 2017 (Commencement No.4) Regulations 2017 fully commences the relevant sections of the 2017 Act, in relation to the consenting of generating stations in Welsh waters up to and including 350MW, on 1 April 2019.

- 4.2 Section 36 of the 1989 Act has historically been the relevant consenting route for offshore generating stations in Welsh waters between 1MW and 100MW, albeit decisions are made by the Marine Management Organisation on behalf of the Secretary of State prior to 1 April 2019. For offshore generating stations of between 100MW and 350MW, developers have been required to obtain a Development Consent Order under the 2008 Act. The 2017 Act makes amendments to the 1989 Act and the 2008 Act which apply the section 36 consent process under the 1989 Act to offshore generating stations in Welsh waters (as defined in section 36 of the 1989 Act) which have or will have a capacity not exceeding 350MW. The Welsh Ministers will be the appropriate consenting authority for such consents.
- 4.3 The procedure for determining applications for a section 36 consent is currently set out at Schedule 8 of the 1989 Act, along with accompanying regulations. As a consequence of the 2017 Act, Schedule 8 will not apply to applications made to the Welsh Ministers. The purpose of the following SIs made under the 1989 Act is to provide a procedure for applications for section 36 consents and variation of section 36 consents. For continuity and to provide a known operable process, it is intended to restate with minor amendments the existing procedures for such applications.

Electricity Act 1989 SIs

The Electricity (Offshore Generating Stations) (Applications for Consent) (Wales) Regulations 2019

- 4.4 Schedule 8 of the 1989 Act (amongst other matters) sets out the procedure for applications for section 36 consents. This is supplemented by the Electricity (Offshore Generating Stations) (Applications for Consent) Regulations 2006. As a consequence of paragraph 8(1A) of Schedule 8 to the 1989 Act (as inserted by the Wales Act 2017), Schedule 8 will not apply to applications to the Welsh Ministers. The 2006 Regulations were made under powers in Schedule 8. Therefore, the procedures in Schedule 8 and the 2006 Regulations will not apply to applications for a section 36 consent made to the Welsh Ministers.
- 4.5 The Electricity (Offshore Generating Stations) (Applications for Consent) (Wales) Regulations 2019 make provision about the grant of section 36 consents Act to construct, extend or operate an offshore generating station. They make equivalent provision to relevant provisions in Schedule 8 to the 1989 Act and the 2006 Regulations with minor amendments to reflect the Welsh Ministers' role as appropriate (consenting) authority.

- 4.6 The purpose of these Regulations is purely for operability and will not introduce new policy or changes to the existing procedure followed in relation to applications under section 36 of the 1989 Act. This approach provides continuity for those developments between 1MW and 100MW which would be dealt with under the 1989 Act. Some minor changes are required to reflect the consenting role being undertaken by the Welsh Ministers and to reflect the existence of different consultation bodies in Wales.

The Electricity (Offshore Generating Stations) (Variation of Consents) (Wales) Regulations 2019

- 4.7 The Electricity (Offshore Generating Stations) (Variation of Consents) (England and Wales) Regulations 2013 (“the 2013 Regulations”) set out the procedure for applications to vary a section 36 consent under section 36C of the 1989 Act. Prior to amendments made to sections 36 and 36C of the 1989 Act by the 2017 Act all applications under section 36C were made to the Marine Management Organisation or the Secretary of State.
- 4.8 The Electricity (Offshore Generating Stations) (Variation of Consents) (Wales) Regulations 2019 make provision about applications to the Welsh Ministers under section 36C of the 1989 Act where the Welsh Ministers are the appropriate (consenting) authority. They make equivalent provision to the 2013 Regulations with minor amendments to reflect the Welsh Ministers’ role as appropriate (consenting) authority. The Regulations will not introduce new policy or changes to the existing procedure followed in relation to applications under section 36C of the 1989 Act.

The Electricity (Offshore Generating Stations) (Inquiries Procedure) (Wales) Regulations 2019

- 4.9 The Electricity Generating Stations and Overhead Lines (Inquiries Procedure) (England and Wales) Rules 2007 (“the 2007 Rules”) set out the procedure where an inquiry is caused to be held by the Secretary of State into an application under sections 36 of the 1989 Act. The 2007 Rules are applied (with modifications) to an inquiry into a section 36C application by the 2013 Regulations.
- 4.10 The Electricity (Offshore Generating Stations) (Inquiries Procedure) (Wales) Regulations 2019 set out the procedure to be followed where the Welsh Ministers cause an inquiry to be held into an application under section 36 or 36C of the 1989 Act. They make equivalent provision to that found in the 2007 Rules with minor amendments to reflect the Welsh Ministers’ role as appropriate (consenting) authority.

The Electricity Works (Environmental Impact Assessment) (England and Wales) (Amendment) (Wales) Regulations 2019

- 4.11 The effect of these Regulations is to amend the Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2017 to provide the Welsh Ministers are the ‘relevant authority’ where an application under section 36 or 36C of the 1989 Act is made (or to be made) to the Welsh Ministers. A number of minor amendments are also made. The amendments have been made a result of the amendments to section 36 and 36C of the 1989 Act by the 2017 Act to reflect the Welsh Ministers new consenting role under those provisions.

Energy Act 2004 SI

The Electricity (Offshore Generating Stations) (Safety Zones) (Application Procedures and Control of Access) (Amendment) (Wales) Regulations 2019

- 4.12 The Electricity (Offshore Generating Stations) (Safety Zones) (Application Procedures and Control of Access) Regulations 2007 (“the 2007 Regulations”) set out procedural requirements in respect of a safety zone application, as well as prescribing categories of vessels and activities permitted in safety zones.
- 4.13 The purpose of these Regulations is to make amendments to the 2007 Regulations for operability and to reflect the change in responsibilities where the Welsh Ministers are the appropriate Minister.
- 4.14 The effect of the Regulations is to provide that the Welsh Ministers do not need to be notified of a safety zone application in Welsh waters where they are the appropriate Minister, and they set out additional vessels permitted in safety zones where they are the appropriate Minister.

5. Consultation

- 5.1 A 12 week consultation ran from 30 April to 23 July 2018 on changes to the consenting of infrastructure in Wales. The consultation was drawn to the attention of a wide range of stakeholders including LPAs, generating station operators and their representatives, businesses, planning consultants, interest groups and other public sector agencies. A total of 47 responses were received.
- 5.2 Question 4 related to proposed arrangements for offshore generating stations. A number of respondents, while agreeing with the logic of the approach in the short-term, commented the long term vision must be to unify consenting

regimes on and offshore. A number of respondents commented the interaction between the consent under the Electricity Act 1989 and the associated marine licence must be reviewed by the Welsh Government, to ensure a good level of service, concurrent decision and to reduce duplication of workload. In response, it is intended to continue to work with Natural Resources Wales to establish appropriate working arrangements.

- 5.3 A summary of the consultation responses is available at:

<https://beta.gov.wales/changes-approval-infrastructure-development> .

6. Regulatory Impact Assessment

- 6.1 The requirement for a Regulatory Impact Assessment (“RIA”) has been assessed against the RIA code for subordinate legislation. In this instance, an RIA was not considered necessary.
- 6.2 These statutory instruments are made as a consequence of sections 39 to 41 of the 2017 Act insofar as they affect the devolution of the consenting of offshore generating stations. These sections will be fully commenced on 1 April 2019.
- 6.3 The Electricity (Offshore Generating Stations) (Applications for Consent) (Wales) Regulations 2019, the Electricity (Offshore Generating Stations) (Variation of Consents) (Wales) Regulations 2019 and the Electricity (Offshore Generating Stations) (Inquiries Procedure) (Wales) Regulations 2019 make equivalent provision to relevant provisions of the Schedule 8 to the 1989 Act, the 2006 Regulations, the 2013 Regulations and the 2007 Rules with minor amendments to reflect the Welsh Ministers consenting role. The Electricity (Offshore Generating Stations) (Safety Zones) (Application Procedures and Control of Access) (Amendment) (Wales) Regulations 2019 and the Electricity Works (Environmental Impact Assessment) (England and Wales) (Amendment) (Wales) Regulations 2019 make minor amendments to the procedure in relation safety zones under section 95 of the Energy Act 2004 and to the Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2017.
- 6.4 Accordingly, as these statutory instruments comprise routine technical and consequential amendments to the existing procedures under the 1989 Act and the Energy Act 2004 which have no policy impact, no RIA is required.
- 6.5 The 2017 Act, which made amendments to the 1989 Act, the 2004 Act and 2008 Act, however, was accompanied by an RIA which assessed the costs

and benefits of the devolution of energy consenting functions under the 1989 Act and the 2004 Act.

6.6 The RIA which accompanied the 2017 Act during its passage is available at:

https://webarchive.nationalarchives.gov.uk/20160611073307/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/527740/Wales_Bill_impact_assessment.pdf .