

ENERGY ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Sustainability and Renewable Energy Sources

Chapter 2: Offshore Production of Energy

Section 84: Exploitation of areas outside the territorial sea for energy production

239. This section vests in Her Majesty the rights of the UK in Part V of UNCLOS only as regards the production of energy from water or winds. Section 104(2) makes it clear that the reference to energy from water includes the production of energy from both currents and tides. The rights vested encompass exploration activities and exploitation of these renewable energy resources and related purposes. The most important such purpose is the transmission and distribution of the electricity generated using water and wind power to markets onshore. Part V of UNCLOS includes rules about establishing the breadth of the exclusive economic zone. The section contains a power to designate by an Order in Council the extent of a Renewable Energy Zone around the UK to be established in accordance with the rules laid down in UNCLOS. The Renewable Energy Zone is the area within which the UK is able to exercise its rights to produce energy from water or winds.

Section 85: Application of criminal law to renewable energy installations

240. This section provides a power to establish, by Order in Council, criminal jurisdiction over any “renewable energy installation” in a Renewable Energy Zone and over the waters within a safety zone declared pursuant to section 95. A “renewable energy installation” is defined in section 104, subsections (3) to (5). This section also provides for an Order in Council to extend the jurisdiction of the police in relation to offences which might have been committed on, under or above a renewable energy installation or in waters within a safety zone.
241. An Order in Council may extend not only to renewable energy installations in a Renewable Energy Zone but also to those in tidal waters and parts of the sea in or adjacent to Great Britain up to the limits of the territorial sea. The intention is that an Order in Council will ensure uniformity of criminal jurisdiction for all renewable energy installations in the waters covered.

Section 86: Prosecutions

242. This section makes provision for the prosecution of criminal offences which might have been committed on, under or above a renewable energy installation in tidal waters, the territorial sea or the Renewable Energy Zone or on, under or above such of these waters that at the time of the alleged offence were within a safety zone. It excludes offences created by or under a number of statutes which have their own prosecuting regimes. The section provides that the consent of the Director of Public Prosecutions or the Director of Public Prosecutions for Northern Ireland is required before proceedings for an offence are brought in England and Wales, and Northern Ireland respectively.

No provision is necessary in respect of Scotland as the consent of the Lord Advocate is needed for all prosecutions.

Section 87: Application of civil law to renewable energy installations

243. This section enables civil law to be applied by Order in Council to renewable energy installations and to cables which are, will be or were used for carrying electricity to or from such an installation. The Order in Council can specify which part of the law in force in the United Kingdom is to apply and can also make provision for which courts (defined to include tribunals and regulatory bodies) are to have jurisdiction.

Section 88: Orders in Council under sections 85 and 87

244. Sections 85 and 87 apply to renewable energy installations wholly or partly in Scottish offshore waters including the Scottish part of the Renewable Energy Zone designated under section 84(5). An Order in Council could potentially cover civil or criminal law matters which are wholly reserved under the Scotland Act 1998, wholly devolved or a mix of both. Section 88 sets out the parliamentary procedure to be followed, depending on the subject matter of the Order in Council. In the case of wholly reserved matters the Order in Council would be subject to the negative resolution procedure in the Westminster Parliament. Where the Order in Council deals with wholly devolved matters then it would be subject to an annulment in pursuance of a resolution of the Scottish Parliament. Where the Order in Council includes both reserved and devolved matters it would need to be subject to the procedures of both the Westminster and Scottish Parliaments.

Section 89: Activities offshore requiring 1989 Act licences

245. Section 4 of the Electricity Act 1989 prohibits the generation, transmission, distribution and supply of electricity to any premises without a licence (section 135 of this Act amends section 4 in respect of transmission activities requiring a licence while section 145(2) also amends section 4 to include the participation in the operation of an electricity interconnector as a licensable activity). Section 5 of that Act gives a power to the Secretary of State to grant exemptions from this licensing requirement and section 6 provides for the issue of licences. This section amends section 4 of the Electricity Act so that the prohibitions (and licensing and exemption regime) also apply in a Renewable Energy Zone and confirms that the regime applies in the territorial sea adjacent to Great Britain.

Section 90: Modification of licence conditions for offshore transmission and distribution

246. This section empowers the Secretary of State to modify the standard conditions of transmission and distribution licences (and make incidental, consequential or transitional changes to particular transmission or distribution licences) and associated codes. This power will enable the Secretary of State to reflect in standard licence conditions the different environment offshore, for example the differences in engineering involved in putting cables in the sea rather than on land. The power is only exercisable within 18 months of the commencement of the section.

Section 91: Extension of transmission licences offshore

247. Section 135 amends section 4 of the Electricity Act by replacing the prohibition on transmission of electricity with a prohibition on participation in the transmission of electricity. Section 135(3) provides that coordinating and directing the flow of electricity onto and over a transmission system constitutes participation. This section enables the Secretary of State to modify a transmission licence in force at the commencement of the section which authorises a person to co-ordinate and direct the flow of electricity so it applies offshore to the extent set out in section 91(2).

Section 91(4) also gives the Secretary of State power to modify standard conditions of any electricity licence or a particular electricity licence for incidental, consequential or transitional purposes. The power is only exercisable within 18 months of the commencement of the section.

Section 92: Competitive tenders for offshore transmission licences

248. This section inserts a new section 6C into the Electricity Act 1989 to enable GEMA to make regulations setting out the process to be followed by it in awarding offshore transmission licences by competitive tender. There were no offshore transmission licences in force at the time of the passing of this Act.

Section 93: Consents for generating stations offshore

249. The effect of subsection (1) is to extend the requirement for consent to the construction, extension or operation of a generating station as set out at section 36 of the Electricity Act 1989 to a generating station in a Renewable Energy Zone and to confirm that the regime applies in territorial waters adjacent to Great Britain.
250. Schedule 8 to the Electricity Act 1989 sets out detailed provisions about the operation of the section 36 licensing regime. Subsection (2) introduces new provisions to cater for situations where the generating station for which a consent is required is not within the area of a relevant planning authority. Schedule 8 to the Electricity Act provides at the moment that where a relevant planning authority maintains an objection to an application for a section 36 consent, the Secretary of State must arrange for a public inquiry to be held. This Schedule was drawn up before marine generating stations were a reality and its effect in regard to such generating stations is not wholly clear. The new provisions make it clear that the requirement for a public inquiry following an objection by a local planning authority does not apply where none of the places to which the application for section 36 consent relates is within the area of a relevant planning authority. The subsection goes on to provide for situations where the section 36 application relates to places which are partially within the jurisdiction of one or more relevant planning authorities.

Section 94: Application of regulations under 1989 Act offshore

251. Section 29 of the Electricity Act 1989 provides for regulations to be made relating to the supply and safety of electricity. Section 30 of that Act provides for electrical inspectors to be appointed and describes their role. This section extends these provisions to a Renewable Energy Zone and confirms their application to the territorial sea adjacent to Great Britain.

Sections 95 to 98: Safety zones for installations

252. These sections give a discretionary power to the Secretary of State to issue a notice declaring one or more safety zones around a renewable energy installation. The Secretary of State has the flexibility to declare a safety zone as appropriate for the main stages of the life of renewable energy installation - the construction, extension and decommissioning phases, which are relatively short, as well as the longer operational phase. A notice can be issued where the renewable energy installation is at the proposal stage in regard to its construction, extension, operation or decommissioning or equally when these activities are in progress.
253. They also give the Secretary of State the flexibility to state in the notice which activities are prohibited within a safety zone or how such matters are to be determined, and which vessels may enter or remain in the safety zone or carry on prohibited activities. Determinations under a safety zone notice may be made by the Secretary of State or delegated to some other person.

254. **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. The Secretary of State also has the power to 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.
255. **Section 97** makes it an offence for a vessel to enter or remain in a safety zone and for activities to be carried on there unless permission has been given in an individual safety notice or regulations made by the Secretary of State. The section sets out certain defences. Section 98 extends criminal responsibility to certain persons other than the master or owner of the vessel who were responsible for the commission of the offence.

Sections 99 and 100: Navigation and public rights of navigation

256. These sections introduce a new section, section 36A, into the Electricity Act 1989 whereby the Secretary of State or Scottish Ministers (within their respective competence) have the power to make a declaration extinguishing public rights of navigation. The power applies only where the generating station is to be located in territorial waters adjacent to Great Britain and other tidal waters up to the low water mark. Section 100 applies in cases where a section 36 consent has been granted before the commencement of section 99.
257. The declaration relates only to public rights of navigation which apply to the site of the renewable energy installation. There is various provision in respect of the effect of the declaration on rights of navigation, when it takes effect and the information which the declaration has to give. It is important that the declaration becomes known to those with an interest and subsection (6) of new section 36A of the Electricity Act 1989, as inserted by section 99, places an obligation on the Secretary of State to ensure that this happens.
258. Subsection (2) of section 99 integrates the process for applying for a declaration with the process for a section 36 consent, as set out in Schedule 8 of the Electricity Act 1989. Subsection (3) of section 99 excludes the functions in the new sections 36A and 36B of the Electricity Act from the principal objectives and general duties of the Secretary of State set out in sections 3A to 3C of that Act.
259. **Section 99** also introduces a second new section, section 36B, into the Electricity Act 1989 which places certain duties on the Secretary of State or Scottish Ministers in relation to navigation when exercising their section 36 powers. Subsection (1) of section 36B requires the Secretary of State and Scottish Ministers to refuse to grant a section 36 consent where a generating station is likely to cause interference with the use of recognised sea lanes essential to international navigation. The term “use of recognised sea lanes essential to international navigation” is defined at section 36B(7).
260. Where in the judgment of the Secretary of State or Scottish Ministers there would be no interference with the use of recognised sea lanes essential to international navigation, subsection (2) requires them then to have regard to the nature of any obstruction or danger to navigation in deciding whether to grant a section 36 consent and, if a consent is granted, what conditions may be included in the consent. Under subsections (3) and (4) (a) the Secretary of State and Scottish Ministers must take into account the cumulative impact of generating stations in the area which have already been consented to and those which are likely to be consented to in making their assessment of the effect on the safety of navigation, as well as how they have or will exercise their powers in regard to the extinguishment of public rights of navigation. The Secretary of State must also take account of how he has or will exercise his powers under the Act in respect of safety zones and decommissioning (subsection (4)(b)).
261. As subsection (2) of section 36B provides the same safeguards as a consent under section 34 of the Coast Protection Act 1949, generating stations which are granted a section 36 consent after the commencement of these provisions do not require a Coast Protection Act consent. This disapplication of the requirement for a section 34 Coast

Protection Act consent applies in Scotland only if Scottish Ministers so provide by order made by a statutory instrument and approved by the Scottish Parliament.

Section 101: Application of civil aviation regulations to renewable energy installations

262. By virtue of section 60(3) of the [Civil Aviation Act 1982 \(c.16\)](#) the Civil Aviation Authority may regulate, by means of an Air Navigation Order, aircraft on or in the neighbourhood of offshore oil and gas installations and the lighting of such installations for safety purposes. Section 106 of the 1982 Act states that an Order made under section 60 extends to territorial waters. Section 101 enables the Civil Aviation Authority to regulate (a) aircraft on or in the neighbourhood of a renewable energy installation in a Renewable Energy Zone and (b) the lighting of such an installation.

Section 103: Other amendments consequential on Chapter 2 of Part 2

263. The [Submarine Telegraph Act 1886 \(c.49\)](#) brought into effect the 1884 Submarine Telegraphs Convention for the protection of submarine telegraph cables. Section 8 of the [Continental Shelf Act 1964 \(c.29\)](#) extended the provisions of the Act to cover other submarine cables and pipelines. Additionally the 1964 Act extended the Submarine Telegraph Act to cover pipelines only in the territorial sea. Subsection (1) extends the Submarine Telegraph Act to all submarine cables under the territorial sea and to waters in an area designated under section 1(7) of the Continental Shelf Act.
264. It may be the case that there is an overlap between sites which are most suitable for the exploration and exploitation of renewable energy sources on the one hand and petroleum resources on the other. Subsection (4) enables the Secretary of State to take the generation of electricity and related activities into account in exercising or performing the powers and duties conferred or imposed on him by or under the Petroleum Act 1998. Conversely the Secretary of State will take into account the exploration for or exploitation of petroleum resources in the exercise of the powers available to him in regard to the generation of electricity from renewable resources, although no legislative changes are necessary in this case.