

# **ENERGY ACT 2008**

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## **EXPLANATORY NOTES**

### **Part 3: Decommissioning of Energy Installations**

#### **Chapter 2: Offshore Renewables Installations**

##### **Summary and Background**

308. The Government has stated its commitment to ensuring that renewable generation plays an increasing role in the UK's energy mix. It is anticipated that a large proportion of the renewable electricity in the future will be generated offshore – the reforms of the Renewables Obligation as set out in Part 2 of this Act are intended to support this growth. As a signatory to the United Nations Convention on the Law of the Sea (UNCLOS), the Government has international obligations to ensure that redundant offshore installations are removed from the seabed to ensure safety of navigation and to ensure the protection of fisheries and the rest of the marine environment.
309. In line with the “polluter pays” principle, sections 105 to 114 of the [Energy Act 2004 \(c.20\)](#) introduced a statutory decommissioning scheme for offshore wind and marine energy installations. Under the scheme, once developers of offshore renewable installations have been given or are likely to be given a statutory consent to construct and operate a generating station, the Secretary of State has the power to issue a notice requiring them to submit a decommissioning programme (as set out in section 105 of the 2004 Act) and eventually require them to carry the programme out. It has been a condition of recent statutory consents that the construction of an offshore renewable energy installation (OREI) may not commence until a decommissioning programme has been submitted for approval. The Energy Act 2004 also sets out penalties and conditions in case of failure to submit a programme acceptable to the Secretary of State or failure to implement the programme.
310. The new provisions are intended to strengthen this scheme by:
- Enabling the Secretary of State, in certain circumstances, to issue a decommissioning notice to an associate (for example, a parent company) of the developer. This follows practice in the offshore oil and gas sector (see section 30(1) (e) of the Petroleum Act 1998). It seeks to ensure that the costs of decommissioning can be met without recourse to the taxpayer in cases where the developer does not have the financial resources to meet those costs but the associate does. Provided the associate has adequate financial resources, the new power will enable the Secretary of State to approve a decommissioning plan that would otherwise have had to be rejected if it had come from a developer with inadequate financial resources of its own.
  - Putting protection in place for funds put aside for decommissioning, to ensure that those funds will only be available for that purpose and will not be available for distribution to the general body of creditors in the event of the person responsible for decommissioning becoming insolvent.

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- Providing the Secretary of State with additional powers to require information from developers and associated companies to ensure that there is sufficient information to enable an assessment of whether the developer or associate has the financial capacity to meet its decommissioning obligations.

For the purposes of the provisions in this Chapter of the Act, a company (“A”) is an associate of another company (“B”) if A controls B or if a third company controls both A and B.

## **Commentary on Sections**

### ***Section 69: Decommissioning notices relating to offshore renewable energy installations***

311. This section amends the decommissioning regime for offshore renewable installations as set out in the Energy Act 2004 by enabling the Secretary of State to serve a decommissioning notice on an associate of a developer requiring the associate to submit a decommissioning programme. This power can only be used if the Secretary of State is not satisfied that adequate arrangements have been made by the developer.
312. *Subsections (1) to (3)* amend section 105 of the Energy Act 2004, adding associates of those persons set out in section 105(1) of the Energy Act 2004 into the list of persons from whom the Secretary of State may require a decommissioning programme.
313. *Subsection (4)* inserts a new section 105A (Section 105 notices: supplemental) into the Energy Act 2004. This new section details the circumstances in which the Secretary of State can issue a notice to an associate, requiring an associate to submit a decommissioning programme. This can only be done (subject to the exceptions specified in section 105A(2)) where the Secretary of State has already served a notice on a person listed in section 105(2)(a) and if, having done so, the Secretary of State is not satisfied that adequate arrangements, including financial arrangements, have been made by the recipient of that notice to carry out the decommissioning programme satisfactorily. The exceptions in section 105A(2) are that there has been a failure by the person with primary responsibility for the installation to comply with a notice served under section 105(2), or, the Secretary of State has rejected a programme submitted by such a person pursuant to such a notice.
314. The provisions in new section 105A(3) to (8) set out the test for determining whether one body corporate is associated with another. In essence, one body corporate is associated with another if one of them controls the other or if a third body corporate controls both of them. The tests of control in various different situations are contained in *subsections (4) to (8)*. The principal cases dealt with are where the body controlled is a company (*subsection (4)*) and where the body controlled is a limited liability partnership (*subsection (5)*).
315. *Subsection (5)* of section 66 (which adds a new *subsection (3A)* to section 108 of the Energy Act 2004) clarifies that, when carrying out of a review of an approved decommissioning programme under section 108 of the Energy Act 2004, the bodies on whom the Secretary of State can impose a decommissioning liability on include associates of someone who is already subject to a decommissioning liability.

### ***Section 70: Security for decommissioning obligations***

316. This section inserts a new section 110A (Protection of funds held for purposes of decommissioning) and a new section 110B (Directions to provide information about protected assets) into the Energy Act 2004.
317. New section 110A applies to any security which has been provided in relation to the carrying out of an approved decommissioning programme or for compliance with the conditions of its approval. This is designed to ensure that, in the event of insolvency

of a person responsible for decommissioning an OREI, the funds set aside for meeting those liabilities remain available for decommissioning and are not available to the general body of creditors. This protection applies where funds have been set aside in a secure way (such as a trust or other arrangement) for meeting obligations under a decommissioning programme.

318. To enable this, section 110A(3) states that the security is to be used in accordance with the trust or other arrangements under which the security has been set up. Section 110A(4) disapplies any provision of the Insolvency Act 1986, the Insolvency (Northern Ireland) Order 1989 or any other enactment or rule of law where its operation would prevent or restrict the security being used for the purpose for which it was set up (meeting decommissioning liabilities).
319. New section 110B is intended to ensure that creditors and potential future creditors of a person responsible for a decommissioning programme are aware of any decommissioning funds protected by section 110A. The Secretary of State may direct that information regarding relevant security arrangements is published by the person responsible for the decommissioning programme (for example, in the financial pages of that person's website). This will ensure that informed decisions can be made by creditors and potential future creditors. Section 110B(3) enables the Secretary of State, or a creditor of the person responsible for a decommissioning programme, to apply for a court order to ensure compliance with a direction and under section 110B(4), the court may order the security provider to take steps to comply with the direction. Sections 110B(5) and (6) provide definitions of the terms "the protected assets", "security provider", and "the court" for the purposes of this section.
320. *Subsection (2)* widens the interpretation of security to include insurance, for the purposes of funds which will be protected from creditors in the event of insolvency. This brings the definition of security in offshore renewables in line with the regimes for nuclear and oil and gas decommissioning.

### ***Section 71: Provision of information to Secretary of State***

321. This section inserts a new section 112A (Power of Secretary of State to require information and documents) into the Energy Act 2004. This new section will replace the existing information-gathering provisions in section 105(9) and sections 107(5) to (7) of the Energy Act 2004, which enable the Secretary of State to require information from the recipient of a notice requiring the submission of a decommissioning programme. The information which may be required under the existing provisions includes, for example:

- information and specifications relating to the location of the OREI;
- information and documents relating to the financial affairs of the recipient; and
- details of the security which they propose to provide for the purpose of decommissioning.

The existing provisions also enable the Secretary of State to require the recipient of a notice to provide such information as the Secretary of State requires to prepare his own decommissioning programme. The developer can then be required to implement that decommissioning programme.

322. The new section 112A allows the Secretary of State to require persons who are, or may in future be, subject to decommissioning obligations to provide certain information or documents to assist the Secretary of State in exercising his functions under Chapter 3 of Part 2 of the Energy Act 2004 (decommissioning of OREIs). These functions include making a judgement on the suitability and financial viability of the proposals contained in a decommissioning programme, for example financial projections, banking models and electricity generation forecasts.

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323. Under section 112A(2), the Secretary of State can require information from the person on whom notice has been served under section 105(2)(a) (those with principal responsibility for the installation, such as the developer), an associate of such a person, or a person who has been made subject to a decommissioning liability under the review procedure in section 108(3)(b) of the Energy Act 2004.
324. *Subsection (3)* of the new section 112A enables the Secretary of State to require information about:
- the place where the OREI is or will be situated;
  - the OREI and an associated electric line;
  - in certain circumstances, details of an associate;
  - the financial affairs of the person receiving the notice for information and, in certain circumstances, the financial affairs of an associate;
  - the proposed security in relation to carrying out the decommissioning programme;
  - in certain circumstances, the name and address of any person whom the recipient of the notice believes to be an associate.
325. *Subsection (4)* of new section 112A allows the Secretary of State to require information in connection with a function under section 107(1) or (4) of the Energy Act 2004. Those provisions allow the Secretary of State to prepare his own decommissioning programme where one has not been submitted or has been rejected, and to require the relevant person to provide security in relation to the carrying out of the programme. In this case the type of such information is not limited to the categories detailed in section 112A(3), but should be information which the Secretary of State considers is necessary or expedient for the purpose of exercising those functions.
326. Under *subsections (6) and (7)* of new section 112A, the notice requiring the information must specify the documents or information (or the description of documents or information) to which it relates. The recipient of the notice is required to provide the information within the period specified in the notice.
327. *Subsection (8)* of new section 112A makes it an offence for a person to fail to comply with the notice without a reasonable excuse. Section 113 of the Energy Act 2004 sets out the sanctions that would apply if an offence was committed under *subsection (8)*. These are:
- on summary conviction, a fine not exceeding the statutory maximum; or
  - on conviction on indictment, imprisonment for a term not exceeding two years or an unlimited fine, or both.
328. *Subsection (9)* of new section 112A makes it an offence to disclose information obtained by virtue of a notice issued under new section 112A of the Energy Act 2004, unless the disclosure is:
- made with the consent of the person who provided the information; or
  - for the purpose of a function under this Chapter of the Energy Act, the Electricity Act 1989 or Part 4 of the Petroleum Act 1998; or
  - required by or under another piece of legislation.