

ENERGY ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Chapter 1: Nuclear Decommissioning

Section 1: The Nuclear Decommissioning Authority

37. [Section 1](#) provides for the establishment of the NDA as a body corporate and makes it clear that it is not to be treated as a body enjoying Crown status, privilege or immunity or (with one exception mentioned below) as exercising functions on behalf of the Crown.

Section 2 and Schedule 1: Constitution of NDA

38. [Section 2](#) deals with the membership of the NDA and the basis on which members are to be appointed. It should be read in conjunction with Schedule 1 which contains more detailed provisions on terms of appointment and the basis on which the NDA is to conduct its business.
39. The section essentially provides for an NDA board of not less than seven and no more than thirteen members of which the majority must be non-executive members. This reflects the Government's view that the role of the board should be to challenge the executive management team to do better and to hold it to account for its performance. Subsections (8) and (9) are specifically designed to ensure, so far as practicable, that the non-executive majority is maintained at all times.
40. The non-executive members will consist of a Chairman and up to eleven other persons (depending upon how many executive members are appointed). The Government intends that all appointments will be made by open competition under the rules set out by the Office of the Commissioner for Public Appointments ("OCPA"). The Chairman will be appointed by the Secretary of State. Other non-executives will be appointed by the Secretary of State after consultation with the Chairman. The Secretary of State will consult Scottish Ministers before making these appointments.
41. The executive members will consist of a Chief Executive (appointed by the non-executive members subject to the approval of the Secretary of State) and where the Secretary of State so provides up to a maximum of three other persons appointed by the non-executives after consultation with the Chief Executive. Again, appointments will be made following open competition carried out on an open and transparent basis. The Secretary of State will consult Scottish Ministers before approving the appointment of the Chief Executive. Subsection (6) provides that the requirement to consult Scottish Ministers may be satisfied by consultation that took place wholly or partly before the commencement of section 2.
42. All these provisions are designed to ensure that final decisions on the NDA's strategy and annual work plans (see notes to sections 11 to 13 below), rules of procedure and delegation of functions are taken by the Board and are not effective unless a majority of members present are non-executives. The procedure during the initial period (as defined) is set out in Schedule 1, paragraph 4.

Section 3: Designated responsibilities

43. **Section 3** sets out the principal functions of the NDA and arrangements for the NDA to be given designated responsibility for particular installations, sites or facilities. In line with the White Paper (Cm. 5552), the prime function is the decommissioning and cleaning up of designated nuclear installations and designated nuclear sites. The definitions of ‘nuclear site’ and ‘person with control’ are to be found in section 36 and other key terms are defined in section 37. Decommissioning and cleaning up are defined broadly in section 37(1) to include dealing with anything that needs to be removed so that the site or installation is suitable to be used for other purposes and to include the construction of any new facilities which might be required for achieving it. “Installation” is defined in section 37 to include buildings, structures and “apparatus”, and a “nuclear installation” to mean an installation on a principal nuclear site plus any pipes, conduits and other apparatus connected to it that are not on the principal nuclear site, but not including an installation comprised in an NDA facility.
44. Section 3 is framed in general terms so that, in addition to the BNFL and UKAEA sites described in the White Paper, the Government could in future give the NDA responsibility for the decommissioning and cleaning up of Ministry of Defence sites and, with the consent of the company concerned, also give it responsibility for securing the decommissioning and cleaning up of sites operated by companies in the private sector. This last point reflects both recent experience with BE and responses to the White Paper which suggested that it would be in the public interest if the NDA’s responsibilities could go wider than public sector civil nuclear liabilities as proposed in the White Paper.
45. Paragraph (a) of subsection (1) covers the operation of Magnox nuclear power stations pending the commencement of their decommissioning. Paragraph (d) covers the operation of designated facilities for treating, storing, transporting and disposing of hazardous material. “Hazardous material” includes nuclear matter and radioactive waste. The note on section 37 contains more detail on the definition of ‘hazardous material’. Paragraph (d) will include the operation of BNFL’s Thermal Oxide Reprocessing Plant (“THORP”), the Sellafield MOX Plant (“SMP”) and other commercial plants and facilities at Sellafield, which, as the White Paper explained, for regulatory and operational reasons, has to be managed as a single, integrated site. “Treating” includes reprocessing and manufacturing fuel (see the definition of “treat” in section 37) to cover some of the operational installations which will fall under the responsibility of the NDA, such as THORP and SMP. Many facilities will include buildings, structures or apparatus and accordingly “facility” in paragraph (d) is defined in section 37 to include an installation (see note on section 37 below). This means that installations contained in facilities on principal nuclear sites can be designated for decommissioning under subsection (1)(b) or, if they are comprised in NDA facilities, under subsection (1)(f), see below. “Facility” also includes a business or undertaking so, for example, the NDA could be given responsibility for operating the BNFL subsidiary which transports nuclear fuel and spent fuel. No decision has yet been taken on that. Subsection (1)(d) also covers the low level waste disposal site at Drigg.
46. Paragraph (e) of subsection (1) is intended to cover situations where the NDA has responsibility for treating, storing and disposing of nuclear matter, radioactive waste or contaminated matter which is not necessarily on a nuclear site which is the responsibility of the NDA.
47. Paragraph (f) of subsection (1) covers the decommissioning of installations which form part of facilities which the NDA has had responsibility for operating under subsection (1)(d). Such installations are not included in the definition of ‘nuclear installation’ and cannot therefore be designated under subsection (1)(b). Disposal facilities do not currently require a licence under the [Nuclear Installations Act 1965 \(c.57\)](#), and it is conceivable that certain kinds of treatment or storage facilities may not be licensable. The Act therefore provides for the cleaning-up of a category of principal

nuclear site on which there is a treatment, storage or disposal facility that has been operated by the NDA but which is not on a licensed or Crown site. “Nuclear site” is defined in section 36.

48. Subsection (2) explains by way of a cross reference that the NDA can only discharge its responsibilities under section 3 by carrying out its duties under sections 15 and 16.
49. Subsection (3) provides that designation of an installation, site or facility or for the treatment, storage, transportation or disposal of matter or waste is achieved by means of a direction given by the Secretary of State to the NDA.
50. Subsection (4) provides that the NDA can only be given responsibility for installations, sites or facilities which are controlled by a Crown appointee, the UKAEA, a publicly owned nuclear company (for example, BNFL) (or the wholly owned subsidiary of such a company), the NDA itself, or otherwise where the person with control of that installation, site or facility has given his consent.
51. Subsection (5) requires directions to cite the specific provision in subsection (1) under which a designation is being made. Subsection (6) requires the NDA to decommission all installations on a principal nuclear site designated for cleaning-up, unless the designation specifically provides otherwise.
52. Subsection (7) requires the Secretary of State to lay a copy of every direction containing a designation before Parliament and to publish it subject, in both cases, to the exclusion of any material which, in his view, should – under subsection (9) – be withheld in the interests of national security.

Section 4: Additional responsibilities under designating directions

53. **Section 4** enables the Secretary of State to give the NDA certain additional responsibilities when, or after, making a designation under section 3.
54. Subsection (1) is aimed at a situation in which the NDA is responsible for operating an installation or facility on a site which it does not have responsibility for cleaning-up and which it needs to be able to manage.
55. When the NDA has responsibility in relation to a principal nuclear site, subsection (2) enables the NDA to be given responsibility for operating or managing research facilities, general facilities on the site (e.g. car parks, etc), land which is occupied together with the site by a person with control (e.g. land owned by BNFL in the vicinity of its sites) and facilities on such land (e.g. the visitor centre at Sellafield, offices, research laboratories, etc). There are some research facilities on principal nuclear sites, for example the BNFL Technology Centre at Sellafield.
56. Subsection (3) limits the nature of these additional responsibilities the NDA can be given to ones that will assist it in carrying out functions it already has or ones which are incidental to that purpose.
57. Where the NDA is given responsibility under section 3(1) or 4(2)(a), (b) or (d) for the operation of an installation or facility, it will by implication have power to do anything it needs to do in order to operate the installation or facility concerned, including building or replacing anything on which the operation depends. Because the designation under section 3(1)(e) is in respect of particular matter or waste, the NDA may need to be able to build and operate an installation or facility to be able to deal with it, and subsection (4) contains the necessary power.

Section 5: Supplemental provisions of designating directions

58. **Section 5** makes additional provisions in relation to the terms of directions which may be given under section 3.

59. Subsection (1) provides that a designation may be made to come into force at a later date. This means a designation could have effect for certain purposes under the Act before the NDA has to carry out the principal function concerned. For example, when the NDA is first established, designations of BNFL and UKAEA will be made so that the NDA can begin preparing its annual plan in readiness for its first year of operation, expected to begin on 1 April 2005. The designations will come into force on that date. Where the NDA is given responsibility for installations, sites or facilities owned by what is currently a private sector company, subsections (2) and (3) allow for the possibility that the company concerned may be required to pay for work carried out by, or on behalf of, the NDA. The expectation would be that, insofar as funds were available to pay for such work, either an upfront payment would be made to public funds or a direction would require appropriate ongoing charges to be imposed by the NDA.
60. Subsections (4) and (5) provide for the modification or revocation of directions by a further direction given by the Secretary of State. As in the case of section 3(4), any such direction may only be given where the installation, site or facility concerned belongs to the Crown, UKAEA or BNFL, a company which is currently publicly owned, the NDA, or with the consent of the person with control. A direction giving the NDA responsibility for the decommissioning of an installation or clean up of a principal nuclear site may, under subsections (6) and (7), only be revoked if the Secretary of State is satisfied that the NDA has fully discharged its responsibilities.

Section 6: Designations relating to Scotland

61. Section 6 provides for Scottish Ministers to act with or be consulted by the Secretary of State when making, varying or removing directions which give the NDA responsibilities in Scotland.
62. Subsection (2) sets out the cases in which Scottish Ministers act jointly with the Secretary of State in respect of sites in Scotland. The subsection draws a distinction not made elsewhere between licensable sites and other principal nuclear sites. As well as sites which require a licence under the Nuclear Installations Act 1965 and sites which would require a licence if they did not belong to the Crown, this category includes a site on which there is a fusion reactor (there is only one site with a fusion reactor in the UK which is in England). Directions in respect of sites that are not licensable will be given jointly by the Secretary of State and Scottish Ministers.
63. Subsection (3) requires Scottish Ministers to be consulted by the Secretary of State where directions relate to giving, removing or varying certain NDA responsibilities in respect of licensable sites in Scotland.

Section 7: Supplemental functions

64. Section 7 gives the NDA other functions to the extent that it considers these appropriate. As foreshadowed in the White Paper, these include the carrying out and promotion of research into matters relating to its functions; raising the profile of nuclear decommissioning through the provision of information; educating and training persons about those matters. Subsection (1)(e) also provides for the encouragement and support of initiatives to promote socio-economic development or that produce other environmental benefits for communities living near its sites, recognising that in some areas the NDA will be a major contributor to local economic activity and, consistent with its principal functions, will have a role to play in local socio-economic and environmental development.
65. The function in subsection (2) is required as a consequence of the restructuring plan for British Energy ("BE") under which the Government has given certain undertakings underwriting the cost of decommissioning and clean up of BE sites (subject to approval of the agreement by the European Commission). The intention is that, in order to safeguard the interests of the taxpayer, the NDA should have the capacity to act as the nominee of the Secretary of State under the terms of the agreements with BE

and generally to ensure that BE's decommissioning plans and the basis on which it operates its stations and subsequently carries out decommissioning and clean up of its sites are such as to minimise any call on public funds. Subsection (3) enables the Secretary of State to require NDA to meet the costs of such an agreement so that all Government's responsibilities in respect of nuclear clean up can be managed within the same framework.

66. Subsection (4) additionally gives the NDA the functions where required to do so by the Secretary of State of providing advice (generally or in relation to a particular installation site or facility) either to the Secretary of State or to third parties where the NDA has particular expertise in respect of its functions (set out in subsection (5)). Scottish Ministers can also require such advice to be given to them as far as Scotland is concerned. The NDA can also provide general advice to the Secretary of State or Scottish Ministers on its own initiative where the NDA thinks it appropriate.
67. Subsection (6) ensures that the NDA's principal functions, defined in section 3(1), are not to be adversely affected by the carrying out of any of the NDA's supplemental functions under subsection (1) or by its giving general advice. This duty on the NDA does not apply where the Secretary of State is requiring the NDA to act on his behalf under subsection (2) or (3) or where the Secretary of State or Scottish Ministers require advice.
68. Where the NDA is required to provide advice to Scottish Ministers without the agreement of the Secretary of State the NDA can charge them for the advice given.

Section 8: Special functions in relation to pensions etc.

69. **Section 8** gives the NDA particular functions in respect of (a) establishing and maintaining a pension scheme covering employees of organisations involved in decommissioning and clean up activities, and other employees in the nuclear industry who are of such a description as may be designated by the Secretary of State; and (b) administering a compensation scheme covering those employees. At present BNFL administers a compensation scheme on behalf of the nuclear industry. The NDA will have power to participate in such a scheme under its general powers but the power to administer is necessary in case the members of the scheme decide at any time that the NDA is best placed to administer it.
70. Subsection (2) identifies those employees who can benefit from such schemes. In addition to UKAEA employees and those employed for the purposes of carrying out NDA functions, the Secretary of State can designate others employed in the nuclear industry who can so benefit, after consultation with the NDA (subsection (3)).

Section 9: General duties when carrying out functions

71. **Section 9** places a duty on the NDA, in carrying out its functions, to do all the things specified in subsections (1), (2), (3), (4) and (6).
72. Subsection (1) requires the NDA to have particular regard both to relevant Government policy, including that of devolved administrations (defined in subsections (7) and (8) respectively), and to the regulatory framework in respect of the environment, health and safety, and nuclear security (as defined in subsections (9) and (10)). This underlines the importance of decommissioning and clean up being carried out safely, securely, cost effectively and in ways which protect the environment. The definition of "nuclear security" is adapted from and consistent with the provisions on security in section 77 of the Anti-Terrorism, Crime and Security Act 2001.
73. Subsection (2) also requires the NDA to promote the development of a competitive market for clean up and other contracts; to ensure the availability of a skilled workforce capable of sustaining its work programmes over the long term; and to secure the adoption of good practice across its sites.

74. By virtue of paragraph (d) of subsection (2) the NDA is required to secure best value for the taxpayer within this overall framework, but not at the expense of its other duties in subsections (1) and (2).
75. Subsection (3) places a duty on the NDA to consider and act in the overall public interest in decisions on operating its facilities and managing its sites. So, for example, the NDA should seek to obtain value for the taxpayer from any asset it owns but for which it no longer has a use.
76. Subsections (4) and (5) require the NDA, in carrying out its function under section 7(1) (e), to support and encourage activities benefiting the social and economic life of local communities, to have regard, in particular, to the extent to which the previous operator was supporting such activities before designation of a site to the NDA, and to consider the obligations that should be imposed on its site operators or management contractors in respect of such activities.
77. Subsection (6) places a duty on the NDA, before entering into any contract in relation to a site, installation or facility to require its proposed contractors to produce their procurement strategy for carrying out work under the contract, and to consider the likely effect on the economic life of the local community of implementing this strategy.

Section 10: Powers for carrying out functions

78. **Section 10** gives the NDA the general and specific powers it requires to carry out its functions. In addition to the general powers, in subsection (1), some particular powers are identified in subsection (2) which might not be thought to fall within its general powers in the absence of a specific mention. They are included because they are or may become a necessary part of the NDA's activities. The power to operate power stations is for the NDA to be able to operate, besides the Magnox stations that will be designated under section 3(1), the Combined Heat and Power station at Fellside which provides essential steam and electricity to the Sellafield site and the Maentwrog hydroelectric station which is located on the lake which supplies a Magnox decommissioning site. The power to hold a nuclear site licence is there as a fall back lest it is decided that the NDA must take more direct responsibility for the work on any site. The NDA would of course need to demonstrate it met all the requirements of a site licensee before it could secure a licence from the Nuclear Installations Inspectorate of the Health and Safety Executive.
79. Other powers covered by subsection (2) include those to make grants or loans for the benefit of socio-economic development or other activities that produce other environmental benefits or for research into decommissioning and clean-up; and to use facilities on its sites for carrying out research for third parties and in this respect or otherwise to generate funds which will ultimately contribute to the resources to be made available to the NDA. In order to carry out its functions, the NDA may exercise its statutory powers itself or contract with others to do things on its behalf. The section does not empower the NDA to do anything which is not required for the purpose of, or in connection with, the carrying out of its functions.
80. Subsection (3) gives the NDA power to charge for work done in relation to sites, installations or facilities for which it is not itself financially responsible (for the definition of financial responsibility see section 21) subject to the approval of Ministers either under the initial designation or otherwise.

Section 11 and Schedule 2: Strategy for carrying out functions

81. **Section 11** places a duty on the NDA, once established, to prepare a strategy for carrying out its functions and to keep that strategy under review. Whenever the NDA is given a new responsibility for securing the decommissioning or clean up of an installation or site, it must review the relevance of its strategy for that purpose and, if need be, revise its strategy accordingly (subsection (2)).

82. Under Schedule 2, the strategy must be approved by the Secretary of State and, in respect of responsibilities given to the NDA jointly under section 6, by Scottish Ministers. Schedule 2 sets out various procedural arrangements for preparing and revising the NDA's strategy including timing; consultation by the NDA as part of the process of preparing or revising its strategy; approval of the strategy by the Secretary of State, and publication of the strategy once approved. Further information can be found at the notes to Schedule 2.

Section 12: Contents of strategy

83. **Section 12** sets out various requirements regarding the matters the strategy is to address and the basis on which it must address them. The key requirements are that the strategy must:
- cover both the decommissioning and clean up of the installations and sites for which the NDA is responsible and its strategy for operating installations and facilities whilst they remain operational (subsection (1));
 - set out the NDA's objectives in relation to the decommissioning and clean up of the various installations and sites for which it is responsible, including the condition to which sites are to be restored, and how, and over what period and at what estimated cost, it intends to achieve those objectives (subsections (4) to (7));
 - set out the NDA's priorities, and how it intends to promote a skilled workforce, competition, good practice, and encourage or support activities benefiting the socio-economic or environmental development of communities near its installations and sites, as well as the rationale for its strategy (subsection (2)). It must also set out how the NDA intends to publicise its strategy, engage in stakeholder dialogue, and listen to external views (subsection (3)).
84. Subsection (9) requires the strategy to take account of sites, installations and facilities which have been designated, but which have yet to become the responsibility of the NDA by that designation entering into force.

Section 13 and Schedule 3: Annual plans

85. **Section 13** requires the NDA, for each financial year, to prepare a plan showing how it intends to carry out its functions during the year in question and to submit it to the Secretary of State and Scottish Ministers for approval. Scottish Ministers' approval is needed in respect of responsibilities given to the NDA jointly with the Secretary of State under section 6. The plan will relate directly to the NDA's strategy – i.e. the plan will set out the basis on which the NDA proposes to implement its strategy in the twelve months concerned.
86. Subsection (2) requires the plan to be submitted for approval not less than three months before the start of the financial year in question. Subsections (3) and (4) specify certain matters which the plan must cover in relation respectively to decommissioning and clean up and the operation of installations and facilities. Subsection (5) requires that the plan must also set out all the activities of significance that the NDA proposes to carry on during the year in question in relation to its other functions. Subsection (6) gives the Secretary of State power to direct the NDA to deal with other matters in its plan for any financial year. Subsection (7) ensures that in preparing its annual plan the NDA can anticipate it taking on responsibility for other sites, installations or facilities for which a designation is due to come into force in that year.
87. **Schedule 3** deals with various matters relating to the preparation and revision of annual work plans, in particular as regards consultation with stakeholders, approval of plans by the Secretary of State, the publication of plans once approved, and their laying before Parliament and the Scottish Parliament by the Secretary of State and Scottish Ministers. The provisions are very similar to those in Schedule 2, including the requirement that

the Secretary of State must consult Scottish Ministers on any proposals for sites in England and Wales relating to the non-processing treatment, storage or disposal of hazardous material that would have an effect on the management of hazardous material or availability of a site in England and Wales for the treatment, storage or disposal of hazardous material located in Scotland. The main difference between Schedule 3 and Schedule 2 is that, given that work plans will implement an approved strategy, paragraph 2(2) of the Schedule leaves open the possibility, in cases where a plan is revised in year, of the NDA only consulting those stakeholders directly affected by the changes proposed before submitting the revised plan for approval. As with Schedule 2, the method of consultation is left for the NDA to decide with its stakeholders.

Section 14: Annual reports

- 88. **Section 14** deals with the preparation and publication of the NDA's annual report.
- 89. Subsection (1) requires the NDA to produce an annual report on the discharge of its responsibilities and the carrying out of its other functions as soon as reasonably practicable after the end of the year in question and to send it to the Secretary of State and Scottish Ministers.
- 90. The report must cover all the matters specified in subsection (3) and any others which the NDA may be directed to cover by the Secretary of State after consulting the Scottish Ministers. Subsection (5) requires that the report must also deal separately with activities in respect of decommissioning and clean up and operational installations and facilities such as the Magnox stations, THORP and SMP. This reflects the commitment in the White Paper to provide specific information on the performance of Magnox, THORP and SMP and the rationale for keeping them open.
- 91. Subsections (6) and (7) require the Secretary of State to lay the NDA's report before Parliament and to publish it in the manner which, in his opinion, is most appropriate for bringing it to the attention of stakeholders. Subsection (8) requires the report to be laid before the Scottish Parliament. Under subsection (9), the Secretary of State may exclude anything before laying and publishing the report which he considers to be against the interests of national security, or which relates to the private affairs of an individual or the commercial interests of a particular body of persons where publication of such information would seriously and prejudicially affect the interests of that individual or body.

Section 15: Duty to decommission and clean up installations and sites

- 92. **Section 15** sets out what the NDA has to do in order to discharge a responsibility it is given under section 3 for decommissioning or cleaning-up. It puts a specific duty on the NDA to take all such steps as it considers appropriate for securing the implementation of its approved strategy and annual work plan in respect of each of the installations and sites which it has designated responsibility for decommissioning and cleaning up. This includes achieving the objectives set out in the strategy under section 12(4) and (5), for each installation or site. Where a site is a contaminated site rather than a principal nuclear site (for definitions see section 37), the duty is subject to such directions as the Secretary of State may make in respect of the discharge of the NDA's responsibilities for such sites (subsection (3)). Such directions are to be given jointly with Scottish Ministers in respect of sites in Scotland. Thus the Secretary of State cannot give the NDA directions as to how the NDA is to carry out its main decommissioning and cleaning up task on principal nuclear sites. This is to be up to the NDA, subject to the need for the Secretary of State to approve the strategy and annual plan under sections 11 and 13 respectively.

Section 16: Duties to operate installations and provide treatment, etc

- 93. **Section 16** places duties on the NDA in respect of its responsibilities for the operation of installations and facilities, including any under section 4(2), the treatment,

storage, transportation or disposal of hazardous material under section 3(1)(e) and the management of any land under section 4(1) or (2). The NDA is to carry out these tasks in accordance with such general and specific directions as may be given to it by the Secretary of State and, where there was a joint designation, Scottish Ministers. The NDA must also act in accordance with its approved strategy and annual plan.

Section 17: Duty to use installations etc for purposes of NDA

94. **Section 17** puts a duty on the person with control (see section 36) of a designated principal nuclear site, a designated nuclear installation, a designated facility situated in or on a principal nuclear site, or a designated installation comprised in an NDA facility, not to use or dispose of that site, installation or facility except in order to discharge the NDA's responsibilities in relation to it or to enable the person with control to comply with relevant statutory and regulatory requirements. For the purposes of this section, disposal covers granting a lease or licence of the site or contracting to do so (subsection (9)). This section does not mean that a site, installation or facility cannot be used or disposed of where the NDA has given its consent (subsection (3)). In a case where the site, installation or facility has been transferred to the NDA, the person with control has a right under subsection (4) to use them for those two purposes, without the need for any further permission from the NDA.
95. Except where the NDA otherwise directs or where the NDA is charging for the work it is doing, subsection (5) further requires the person with control to pay to the NDA any sums and other benefits received as a consequence of operating the site, installation or facility or the disposal of an interest or right in relation to the site, installation or facility. The main purpose of this provision is to ensure that where the NDA is funding the operation of installations such as THORP, SMP and Magnox stations, it also receives the income provided. It could also include sums received by way of rents and disposal of surplus assets. Section 22(3) requires the NDA in turn to pay the money received to the Secretary of State. This section does not impose any obligations on the persons in control of contaminated sites.
96. Subsections (6) and (7) provide that where a management contract or other agreement is in force between the NDA and a person with control or its owner, fulfilling the terms of the agreement by definition facilitates the discharge of the NDA's responsibilities.
97. Both the duty under subsection (2) and the right under subsection (4) apply to interests or rights in the installation, site or facility and subsection (8) extends those to anything located on the site, e.g. vehicles, a business or undertaking operated from the site and intellectual property.

Section 18: Directions by NDA to the person with control

98. **Section 18** places a duty on the person with control of a designated principal nuclear site, a nuclear installation, a facility situated in or on a principal nuclear site, or an installation comprised in an NDA facility to prepare such plans for the discharge of the NDA's responsibilities in relation to that site, installation or facility as the NDA may direct; submit them to the NDA for approval; and comply with any further directions the NDA may give in accordance with the provisions of subsection (3).
99. These directions may cover any related site which is designated under section 19 in relation to the principal nuclear site or installation or facility concerned. Where the person with control of an installation, site or facility is a company subsection (4) ensures that the person holding the majority of the voting rights in that company (for example the parent company of a site management company) is required to comply with NDA directions aimed at securing the compliance of the person/company with control of the site. Subsection (5) provides that directions may only be given by the NDA for the purpose of giving effect to its strategy and annual work plans. Under subsection (6), the NDA may also issue directions regarding consultation by the person with control on the preparation of plans for the site, installation or facility concerned. The expectation is

that consultation will be carried out on a similar basis to that required in the preparation of the NDA's strategy and annual work plans and involve the same parties.

100. Subsection (7) makes express provision to the effect that no direction given by the NDA may authorise a contravention by the person with control of the statutory requirements which apply to the operation of an installation or site. Consequently, any purported direction by the NDA that would, if the person with control were to give effect to it, place him in breach of any regulatory requirements would be unlawful.

Section 19: Designation as a related site for the purpose of section 18

101. **Section 19** enables the Secretary of State to designate a contaminated site (see section 36 for the definition) as being related to a principal nuclear site or an installation or facility on such a site – a 'related site' (paragraph (a) of subsection (1)). Such a site is then brought within the scope of section 18 and the person with control of the principal nuclear site (or the installation or facility on such a site which caused the contamination) can be subject to directions for the related site as well. By virtue of subsection (2), this can only happen in situations where the contamination, whether radioactive or chemical, has been caused, directly or indirectly, by activities in, or connected to the particular principal nuclear site or the installation or facility on such a site (subsection (4)), which must also be the responsibility of the NDA under a direction. The activity could have taken place before the principal nuclear site was used for nuclear purposes. A number of such sites had previous military or other uses that may be responsible for contamination. As with designations in respect of the NDA's principal functions (section 3(4)), a direction making a site a related site can only be made where the person with control is a Crown appointee, the UKAEA, a publicly owned company or the NDA, or where the person with control has given consent (paragraph (d) of subsection (2)).

Section 20: Duty to comply with directions under section 18

102. **Section 20** sets out the basis on which the duty to comply with directions given under section 18 applies and that it is enforceable by civil proceedings primarily for an injunction or, in Scotland, an interdict. Subsection (3) makes it clear that the duty is subject to the NDA discharging its financial responsibilities for the installation or site concerned. Subsection (4) provides for the disapplication of the duty to the extent that there is a contract in place between the NDA and the operator. This provides for flexibility as the parties to the contract can decide which aspects of their relationship contract should govern and which directions should govern.

Section 21: Financial responsibilities of NDA

103. **Section 21** gives the NDA financial responsibility for the decommissioning, operation or cleaning up of installations, facilities, sites or related sites which, at the time the relevant designation is made under section 3, are controlled by one of the persons listed in subsection (2). From that point, the NDA is responsible for the future costs of carrying out its responsibilities. It is primarily intended to ensure that the fact that the NDA will be assuming responsibility for the cost of decommissioning and cleaning-up will mean that the costs will not have to be shown on the balance sheet of BNFL or any successor companies holding a site licence.
104. Where the NDA has financial responsibility but is not itself the person with control of an installation, site or facility, subsection (3) provides that the person with control is not to be or become liable for the costs of doing anything the NDA has to do to discharge its responsibilities for decommissioning, cleaning-up or operation. Subsection (5) makes it clear that this does not mean that the person with control will not be liable to make payments under, for example, contracts it enters into with third parties. Subsection (4) prohibits the NDA from charging the person with control when the NDA has financial responsibility and provides that the person with control does not have to make any

financial provision for meeting costs for which the NDA has financial responsibility. This would include making provision for any future costs in the accounts of the person with control. The effect of subsection (4) with subsection (6) is to require the NDA to put the person with control in funds to meet the costs it incurs in meeting regulatory obligations (as authorised or required by section 17), as well as the costs of complying with directions given by the NDA under section 18. Subsection (9) makes the provisions of section 21 subject to a contract in place between the NDA and the person with control of the installation, site or facility or a body corporate of which that person is a subsidiary.

105. Where the NDA is given responsibility for an installation, facility or site without it including financial responsibility under subsections (1) and (2), a payment could be required by the Secretary of State under section 5(2) on making the designation or the NDA could charge for the work under section 5(3) or section 10(3). However, if no charge is made under either of those provisions, the NDA will carry the cost of the work itself. Subsection (10) makes it clear that the NDA can also carry the financial burden in cases where it does not have financial responsibility under this section.

Section 22: Expenditure and receipts of NDA

106. **Section 22** sets out how the NDA is to be put in funds and arrangements for handling any income it generates.
107. Subsection (2) enables the Secretary of State to fit the payment of grants to the requirements of the NDA so that it has the funds it needs as and when required.
108. Subsection (3) requires all sums received by the NDA other than by grant from the Secretary of State to be paid to the Secretary of State who, under subsection (4), is required to pay them into the Consolidated Fund. Section 31 provides the mechanism by which these sums are credited to contribute to future decommissioning and clean up costs. This covers income from operating nuclear installations such as THORP, SMP and Magnox, and charges to third parties, whether for decommissioning work carried out on their behalf or for the use of other facilities or land which are the responsibility of the NDA.
109. Subsection (5) requires the Secretary of State to have regard, in particular, to the extent to which he considers that the NDA should exercise its power to make grants or loans to benefit the social or economic life of communities or that produce other environmental benefits in order to mitigate the effects of the cessation of the operation of a designated installation.
110. While it will be important that the NDA operates any income generating facilities in the most beneficial way, this must not distract the NDA from its principal task of decommissioning and clean up. In the interest of transparency therefore any income the NDA generates itself will be clearly separated from the grant it receives from Government. It follows that the resources available to the NDA to carry out its functions will derive principally from grants provided by the Secretary of State in line with its agreed strategy and annual plans.

Section 23: Borrowing by the NDA

111. **Section 23** sets out the framework for the NDA to borrow from the Secretary of State. This is principally to enable the NDA to support the carrying on of normal business practices which optimise the contractual arrangements which are necessary to support the decommissioning, clean up and operational activity of the persons with control of designated sites, installations and facilities which it funds.
112. Subsections (4) and (5) allow the NDA to borrow from other sources so that it could consider entering into PFI arrangements for particular projects, subject to the approval of the Secretary of State and the Treasury.

Sections 24 and 25: Limit on NDA borrowing and Government guarantees for NDA borrowing

113. **Section 24** limits the capacity of the NDA to borrow to £2 billion, the limit which applies to BNFL in the **Atomic Energy Act 1971 (c.11)**. In view of the long timescales involved in nuclear clean up, the Secretary of State can amend that limit by order. Section 25 provides that the Secretary of State may guarantee borrowing by the NDA with the approval of the Treasury.

Section 26: Accounts of NDA

114. **Section 26** establishes the framework for NDA financial reporting in accordance with the usual rules governing non-departmental public bodies (“NDPBs”). It requires the NDA to keep proper accounts and accounting records and prepare an annual statement of accounts in accordance with requirements laid down by the Secretary of State with the approval of the Treasury. The accounts must be audited by the Comptroller and Auditor General (“C&AG”) and, together with the C&AG’s report, laid before Parliament.
115. The NDA’s accounts will show income from and expenditure on operational plant such as THORP, SMP and Magnox separately from income and expenditure on decommissioning and clean up. The DTI will be seeking views from stakeholders before final decisions are taken on requirements to be made as to accounting treatments and the presentation of the NDA’s accounts.

Section 27 and Schedule 4: Tax exemption for NDA activities

116. **Section 27** allows for the exemption from corporation tax, with appropriate safeguards, of certain activities carried on by or on behalf of the NDA. The main activities to be considered for exemption from corporation tax are those which count as a trade for tax purposes but are undertaken by or on behalf of the NDA where such activities are closely intertwined with decommissioning and clean up work and are likely to be loss-making for tax. For the NDA, under normal tax rules, the work of decommissioning and clean up will not in itself count as a trade for tax purposes. (Although subject to section 30, provisions for such work arising from current income generating activities may be taken into account in calculating the profit or loss from those activities for tax purposes.)
117. Under subsection (1), trading income from exempt activities of the NDA or an NDA company is not taxed, nor can the exempt activities give rise to tax losses. To be exempt the activities need to be specified in regulations. Subsection (2) gives effect to Schedule 4, which makes further, detailed provisions for the exemption. Further information can be found in the notes to that Schedule.
118. The exempt activities are defined in subsection (3) and are activities covered by section 3(1) and which are also specified in Treasury regulations. Activities that could be covered by the exemption include THORP and SMP at Sellafield, which are likely to be loss-making for tax and where any activity that could in theory be taxable is intimately bound up with the wider decommissioning and clean up activities on the Sellafield site. Other trading activities, such as electricity generation, are more clearly separable from decommissioning and clean up, and more likely to be profitable for tax, so the intention is that such activities will not be specified in Treasury regulations and so will remain taxable.
119. An NDA company is defined in subsection (4) as either a wholly owned subsidiary of the NDA, or alternatively as a relevant site licensee. This is so that any tax exemption is given only to NDA subsidiaries or site licensee companies linked to the NDA carrying out trades that include and are intimately bound up with nuclear legacy decommissioning and clean up activities. In such cases the cost and effort of ascertaining the tax position (where losses would be likely) would be disproportionate.

It is Government's intention that private companies will not be able to realise tax-free profits through the tax exemption. The intention is that regulations to allow exemption will only apply where the detail of the arrangements with the site licensee companies carrying on the activity is such that any losses or profits would in economic terms be the NDA's.

120. Subsection (5) lists the conditions to be met if a company is to qualify as a relevant site licensee company. These include holding a nuclear site licence and where a management contract is in force with the NDA, the contract is with the company in question or with its parent. Conditions to be specified in Treasury regulations will also have to be met for a company to qualify as a relevant site licensee company. The specified conditions will be drafted so as to ensure that where shares of site licensee companies are held by management contractors, the contractor cannot extract any profits or utilise any losses in respect of the exempt activities of the site licensee company.
121. Subsection (6) requires the agreement of the Secretary of State for any Treasury regulations made under subsection (3)(b) specifying activities exempt from corporation tax or subsection (5)(d) setting out conditions that need to be met for a company to qualify as a relevant site licensee. Subsection (7) explains that the regulations are to be made under the negative resolution procedure in the House of Commons.
122. Various definitions are given in subsection (8), including those for "management contract", "trading income" and "trading losses".
123. Subsection (9) specifically concerns the tax treatment of trade credits under the loan relationships and derivative contracts legislation. Where, but for particular tax rules, they would be regarded as trading receipts, and the trade in question is exempted, the credits themselves are exempted.
124. Subsection (10) ties this section to the corporation tax legislation.

Section 28: Taxation of NDA activities chargeable under Case VI of Schedule D

125. **Section 28** confirms that the income generating activities of the NDA will be taxed under Case I of Schedule D, rather than Case VI of Schedule D, under section 18 of the **Income and Corporation Taxes Act 1988 (c.1)**. This is being introduced in case the contractual relationships between the NDA and site licensee companies are such that the income generating activities of the NDA would be taxable under Case VI under the general tax rules. Taxing the income from significant activities, such as electricity generation, under Case VI would cause difficulties. This is because the tax sections in this Act have been drafted on the assumption that the NDA would be carrying on a trade for tax purposes, and Case VI does not have the comprehensive computational rules in the same way that Case I does.
126. Subsections (1) and (2) confirm that taxable activities carried out by the NDA when fulfilling its functions under section 3(1)(a), (d) or (e) are taxed under Case I, unless there is specific tax legislation (other than section 18 of the Income and Corporation Taxes Act 1988) to tax them under Case VI.
127. Subsections (3) and (4) provide for any activities to be treated together as part of the same trade or of another "real" trade being carried on by the NDA, unless specific tax legislation requires the activity to be treated as carried on as part of a separate trade.
128. Subsection (5) ties this section to the corporation tax legislation.

Section 29: Disregard for tax purposes of cancellation etc of provisions

129. This section provides that the accounting entries made by a publicly-owned BNFL site licensee company arising from the initial recognition of the NDA taking responsibility for nuclear clean-up and decommissioning liabilities are not included in the tax

computation ("a disregard"). This disregard would only apply to the initial accounting entries made on the undertaking of responsibility.

130. Without this provision the accounting credit arising in these circumstances would increase the taxable profits (or reduce the tax-allowable losses) of the BNFL company in which the credit was made. Where the NDA has taken responsibility by virtue of a direction under section 3 (thereby causing the site licensee to recognise an asset to match its liabilities) the site licensee may recognise in its accounts subsequent change in the estimated value of the NDA's undertaking to pay for nuclear clean-up and decommissioning. The disregard will not apply to these accounting changes nor to the actual expenditure to which they relate. These subsequent changes would lead to accounting entries for the decommissioning liability and the right to recover sums from the NDA, which would match one another. This matching treatment would be followed for tax without the need for a special rule.
131. Subsections (1) and (2) define the circumstances in which the "disregard" applies. Subsection (3) sets out the disregard itself.
132. Subsection (4) ensures that it is only the accounting entries caused by the NDA acquiring responsibility for decommissioning and cleaning-up, or by the transfer of property etc to the NDA or a subsidiary of the NDA under a nuclear transfer scheme under section 39, that are to be disregarded.
133. Subsection (5) contains definitions and subsection (6) ties this section to the corporation tax legislation.

Section 30: Disregard for tax purposes of provisions recognised by NDA

134. **Section 30** introduces a new section for the NDA that mirrors the effect of the new section introduced by section 29 for BNFL. The disregard in section 30 applies to the NDA so that the entries recognised in its accounts immediately on taking responsibility for BNFL's nuclear liabilities would not be brought into account for tax purposes. As for section 29, the disregard would not apply to any subsequent change in estimated value of the expenditure to which it relates.
135. Subsections (1) and (2) set out the circumstances in which the "disregard" applies. Subsection (3) sets out the disregard itself. The disregard applies only to entries relating to nuclear sites where the nuclear site licence is held by BNFL or a wholly owned subsidiary.
136. Subsection (4) restricts the disregard to accounting entries for the first recognition of the provision in the accounts of the NDA.
137. Subsection (5) contains definitions and subsection (6) ties this section to the corporation tax legislation.

Section 31: Establishment and maintenance of the Account

138. **Section 31** establishes a statutory account – the Nuclear Decommissioning Funding Account – as the basis for funding all of the NDA's activities. The aim is to enable the NDA to plan ahead effectively and put long term contracts in place by demonstrating the availability of funding on a rolling basis over a period of ten years or more.
139. The provision is intended to give confidence to the market that resources will be available to support substantial programmes of work over a period of years, and thereby should encourage competition for clean up contracts and help to build confidence in the NDA and in its programmes.
140. Subsection (2) provides for the opening balance of the Account to be determined by the Secretary of State with the consent of the Treasury. The intention is to ensure it is

sufficient to support the NDA's programme over the first 10 year period. The opening balance will be the sum total of:

- the value of BNFL's Nuclear Liabilities Investment Portfolio (which, under section 42 of the Act will be transferred to the Secretary of State and paid into the Consolidated Fund – see paragraphs 160 and 161 below);
 - the value of the Magnox Undertaking of 1998 at the time it is extinguished by section 43 of the Act (see paragraphs 162 and 163 below);
 - an additional sum from Government to drive forward the decommissioning and clean up programme as effectively and efficiently as possible.
141. Thereafter, the Account will be held by the Secretary of State who, under section 22, will receive all income passed to the NDA for payment into the Consolidated Fund and provide grants to the NDA. The Account will record all such receipts and grants as credits or debits respectively. Any money generated by the NDA in operating installations such as THORP, SMP or Magnox will therefore be identified as a contribution to the funding of the decommissioning and clean up programme. Subsection (4) also provides for the Account to be credited by any amounts received by the Secretary of State on the NDA's behalf and by interest on the balance in the account.
142. The annual contribution will be the largest and most important of the credits to the Account. The intention is that it should be set at a level which ensures that the balance of the Account is kept at a sufficient level to support a rolling ten year programme for the NDA. Subsections (6) and (7) require the Secretary of State to publish a policy statement explaining how the annual contribution is to be determined so as to prevent the balance of the Account falling below a minimum defined level determined by the Secretary of State with the consent of the Treasury. The Secretary of State will be accountable to Parliament for the implementation of this policy and the operation of the Account as a whole.

Section 32: Examination of the Account

143. **Section 32** makes provision for the Comptroller and Auditor General ("C&AG") to examine the operation of the Account and the application of the policy for determinations of the Government's annual contribution. The aim is to ensure that the operation of the Account is subject to independent scrutiny. The C&AG's report is to be based on a statement by the Secretary of State setting out the credits and debits made to the account for the period of the statement. The C&AG must lay copies of the statement and of his report before Parliament.

Section 33: Validity of transactions

144. **Section 33** provides that a contract which is entered into by the NDA is not invalidated by conduct of the NDA which is outside its powers or contravenes the duties imposed on the NDA by section 7(6) or 9 or a direction given by the Secretary of State under the Act. The section also stipulates that contractors are not required to enquire or see whether the transaction being entered into constitutes or involves such conduct or contraventions. Potential contractors will not therefore have to concern themselves with checking whether the Act has been complied with by the NDA before entering into a contract.

Section 34: Amendment of Schedule 12 to Electricity Act 1989

145. **Section 34** makes two detailed amendments to Schedule 12 of the Electricity Act 1989, which allows the Secretary of State to give financial assistance in connection with cleaning-up after nuclear activities. The first brings the scope of Schedule 12 (which already covers the decommissioning of an installation licensable under the Nuclear Installations Act 1965) into line with the concepts of decommissioning and cleaning up

of nuclear installations and principal nuclear sites under this Act. The second provides that the Secretary of State's power to give financial assistance under Schedule 12 does not apply where the NDA has financial responsibility under section 21 of this Act.

Section 35: Power to modify Chapter 1 of Part 1

146. [Section 35](#) gives the Secretary of State a power, by order subject to affirmative resolution of both Houses, to modify the provisions of sections 2, 11, 12 and 13 and their related Schedules on the constitution of the NDA and the process for approving the NDA's strategy and annual plans. It provides the flexibility to make any amendments to those provisions which might be necessary or desirable without having to secure the Parliamentary time needed for primary legislation. The Secretary of State must consult Scottish Ministers before making an order and cannot modify the functions of Scottish Ministers without their consent.

Section 36: Meaning of “nuclear site” etc and “person with control”

147. [Section 36](#) defines key concepts for the designation and control of sites, installations and facilities. Subsection (2) defines the two types of nuclear site which are the basis in section 3(1)(c) for the NDA's responsibilities for clean up: principal nuclear sites and contaminated sites. The powers of the NDA and the duties on the persons with control of sites depend on their categorisation. The principal differences are in the application of sections 17 and 18 which only apply in relation to principal nuclear sites or facilities thereon. Subsection (3) defines the person with control of an installation, site or facility in a range of specific cases.
148. A “principal nuclear site” includes sites licensed under the [Nuclear Installations Act 1965 \(c.57\)](#); sites which would require a licence were the licensing requirements to apply to the Crown; non-licensed sites on which there is situated a facility for which the NDA has responsibility; sites where there are nuclear fusion research installations (the only existing one is the UKAEA site at Culham); and sites which are still contaminated as a result of nuclear activities (defined in subsection (5)) carried out on the site during or before the time when it fell within one of the preceding classes of site which could include for example, old military ordnance.
149. Contaminated sites can either have been contaminated as a result of a range of activities in, on, or related to a nuclear installation, principal nuclear site or NDA facilities (subsection (5)) or are the location of hazardous material. The contamination can be either radioactive or chemical in nature. This means that the NDA can potentially take responsibility for sites which are not principal nuclear sites but which have been contaminated from a range of sources connected with the nuclear industry. An example would be where pipe-lines discharging radioactive waste have leaked onto adjoining land.
150. There is a third category of site, a “related site”, which is a particular type of contaminated site. This is dealt with separately in section 19.

Section 37: General interpretation of Chapter 1 of Part 1

151. Subsection (1) defines terms used in this Part of the Act. The definitions of “cleaning up” and “decommissioning” are drawn very broadly to include removing any substance or material (i.e. not just hazardous material) that needs to be removed in order to make the site or installation suitable for other purposes. What the other purpose should be for a particular site will be determined by the objectives for it set out in the strategy. Hazardous material is defined to include “nuclear matter” within the meaning of the Nuclear Installations Act 1965, “radioactive waste” within the meaning of the Radioactive Substances Act 1993 (see subsection (7)) and things that have been contaminated as a result of nuclear activities, as defined in section 36. It should be noted that the definition of “treat” in relation to hazardous material includes both the manufacture of nuclear fuel and the reprocessing of spent fuel. It is also worth noting

that for the purposes of the Act a “facility” includes any, or all, of an installation, an undertaking or a business, and any vehicles or other property used for the purposes of an undertaking or business. Subsections (3) and (4) define a publicly owned company.

- “Nuclear material” is defined in section 26 of the [Nuclear Installations Act 1965 \(c.57\)](#) to mean—
 - (a) “(a) any fissile material in the form of uranium metal, alloy or chemical compound (including natural uranium), or of plutonium metal, alloy or chemical compound, and any other fissile material which may be prescribed [by regulations made by the Secretary of State]; and
 - (b) any radioactive material produced in, or made radioactive by exposure to the radiation incidental to, the process of producing or utilising any such fissile material as [mentioned in paragraph (a)];”.
 - (c) The power to except types of matter from the definition in the Nuclear Installations Act 1965 is disregarded by section 37(7).
- “Radioactive waste” is defined in section 2 of the [Radioactive Substances Act 1993 \(c.12\)](#) to mean “waste which consists wholly or partly of—
 - (a) a substance or article which, if it were not waste, would be radioactive material; or
 - (b) a substance or article which has been contaminated in the course of the production, keeping or use of radioactive material, or by contact with or proximity to other waste falling within paragraph (a) or this paragraph.”.
- “Radioactive material” is defined in section 1 of the Radioactive Substances Act 1993 to mean (broadly) anything which is not waste but which is a substance possessing a degree of radioactivity as set out in Schedule 1 to that Act, or a substance which is radioactive—
 - (a) due to a process of nuclear fission (or other process of subjecting a substance to bombardment by neutrons or to ionising radiations);
 - (b) in consequence of the disposal of radioactive waste; or
 - (c) by way of contamination in the course of the application of a process to some other substance.