

# **ENERGY ACT 2008**

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## **EXPLANATORY NOTES**

### ***Chapter 2: Importation and Storage of Combustible Gas***

#### **Summary and Background**

13. In 2004, the UK was virtually self-sufficient in the production of natural gas for heating, electricity and business processes. However, gas production from the UK Continental Shelf (UKCS) is declining and it is expected that the UK will be reliant on imported gas to meet well over half of demand by 2020. Without sufficient and timely new storage and import infrastructure, there will be increased risks of a tight gas supply demand balance in the UK in the future. This could result in high UK gas prices during periods of peak demand and a higher risk of involuntary interruptions.
14. Companies have already responded to declining UK gas production by investing in new gas storage and import infrastructure. However, as the UK's production declines, additional investment will be needed in gas infrastructure. Companies investing in the UK have sought a clear and stable regulatory framework to reduce the uncertainty, delays and costs associated with the UK's consenting processes.
15. The UK's current legislative regime offshore was chiefly designed for licensing oil and gas production. It therefore does not easily lend itself to the types of gas supply projects that the UK will need to come on-stream as indigenous production of natural gas declines.
16. As a result, there is no single piece of legislation that explicitly covers offshore gas supply activities. Consents have to be sought under a number of pieces of legislation, creating complexity and uncertainty for the investor. Developers may require consents under some or all of the following pieces of existing legislation (this list may not be exhaustive):
  - The Petroleum Act 1998
  - The Food and Environment Protection Act 1985
  - The Coast Protection Act 1949
  - The Transport and Works Act 1992.
17. This Part of the Act creates a new regulatory framework specifically designed for offshore gas storage and Liquefied Natural Gas unloading projects. The regime is intended to simplify the consenting process, reduce the administrative burdens on developers and create certainty over the legal operation and construction of new facilities. The aim is to encourage timely investment in offshore gas supply infrastructure and to contribute to security of supply in the longer term.
18. As part of simplifying the consenting processes for offshore gas storage and Liquefied Natural Gas unloading projects, the proposals in this Act will disapply the requirement on developers to apply separately for a licence under the [Food and Environment](#)

[Protection Act 1985 \(c.48\)](#) to inject gas into the seabed, except where functions under that Act are exercised by the devolved administrations in Scotland, Wales or Northern Ireland. Sections 21, 23 and 24 of the Petroleum Act 1987 provide for the automatic establishment of safety zones around oil and gas installations and set out offences and the applicable penalties in connection with such safety zones. [Paragraph 4](#) of Schedule 1 to this Act extends those provisions to installations used for offshore gas storage and Liquefied Natural Gas unloading projects.

## **Commentary on Sections**

### Activities requiring a licence

#### ***Section 2: Prohibition on unlicensed activities***

19. This section prohibits specified activities from being carried out, except in accordance with a licence granted under section 4.
20. *Subsection (3)* specifies the activities for which such a licence is required. These include the use of a “controlled place” (as defined in *subsection (4)*) for gas storage or unloading; the recovery of the gas stored; the conversion of natural features (such as salt domes) for use as storage space; and related exploration activities. Such activities also include the establishment and subsequent maintenance of installations (which by section 16 may be fixed or floating structures) for those purposes. However, by *subsection (2)*, a licence will not be required for any activity falling within section 3.
21. *Subsection (4)* defines “gas” and “controlled place” for those purposes. By contrast to the definition in Chapter 1, “gas” is limited to combustible substances, and must consist wholly or mainly of the substances listed or other substances which may be specified by order. An order specifying a substance for these purposes is subject to negative resolution procedure (see section 94). A “controlled place” is any place within the limits of the territorial sea adjacent to the United Kingdom, (the territorial sea extends 12 nautical miles from baselines established under the [Territorial Sea Act 1987 \(c. 49\)](#)), or within a Gas Importation and Storage Zone designated under section

#### ***Section 3: Exception for activities carried on partly on land etc***

22. This section ensures that a licence under this Chapter is not required for certain activities which relate to developments which are liable to be subject to planning control (in particular under the [Town and Country Planning Act 1990 \(c. 8\)](#)). As a result, the risk of double regulation will be avoided in such cases. The excluded activities are:
  - the establishment or maintenance of a gas unloading installation which extends at least in part into a controlled place (as defined in [section 2\(4\)](#)), and the unloading of gas to the installation in that place (see [subsection \(1\)\(a\) and \(d\)](#));
  - the conversion of a natural feature (such as a salt dome), which is only partly within a controlled place, the remainder being under land ([subsection \(1\)\(b\)](#)); and
  - the storage (and subsequent recovery) of gas at a place which similarly is only partly within a controlled place

However, such activities are excluded only where they relate to a development which can be expected to be subject to planning control. Thus in the case of a gas unloading installation, the installation must be permanently connected with land by a structure which provides access at all times and for all purposes; in the case of the conversion of a natural feature, the conversion operations must take place wholly or mainly on, over or under land; and in the case of storage and recovery of gas, the injection of the gas must take place on land. For those purposes, “land” means land above the low water mark (in Scotland), or within England or Wales (“England” and “Wales” are defined in Schedule 1 to the [Interpretation Act 1978 \(c. 30\)](#)).

### Licensing

#### **Section 4: Licences**

23. This section allows the Secretary of State to grant licences for the purposes of this Chapter. Such a licence will permit, under the terms and conditions laid down in the licence, the carrying on of one or more of the activities mentioned in section 2. However, in order to make use of the sea, the seabed or spaces under the seabed for the purpose of these activities, an operator would in addition have to obtain a lease or (outside the territorial sea) authorisation from The Crown Estate, who administer the relevant rights to the offshore area vested under section 1 (or, within the territorial sea, vested in the Crown under common law). *Subsection (2)* accordingly allows the geographical coordinates covered by the licence to be linked to those covered by the lease or authorisation from The Crown Estate (see also section 6(2)).

#### **Section 5: Applications**

24. This section gives the Secretary of State the power to make regulations about the making of applications for licences. The regulations will be subject to negative resolution procedure (see section 105). In particular, the regulations may set out:
- who can apply for a licence;
  - requirements that must be satisfied by or in relation to the licence applicant;
  - how the application for a licence must be made;
  - the information which an application must contain and any accompanying documents;
  - an application fee.

#### **Section 6: Terms and conditions**

25. This section enables the Secretary of State to determine the terms and conditions of a licence. *Subsection (2)* allows the commencement and duration of the licence to be linked to that of the corresponding lease or authorisation from The Crown Estate.
26. *Subsection (3)* allows a licence to permit the licence holder to transfer the licence to another person or to include another person as a party to the licence, subject to any conditions set out in the licence.
27. The conditions of the licence may, under *subsection (4)*, also include a requirement for the licence holder to obtain the prior consent of the Secretary of State or another person (such as the Health and Safety Executive) for acts specified in the licence. This could include, for example, a requirement for such consent for the drilling of a well. The licence may provide for the consent itself to be subject to conditions. *Subsection (5)* makes it clear that one of those conditions might be the modification of the licence in a specified respect.

#### **Section 7: Model clauses**

28. This section enables the Secretary of State to set out model clauses. Model clauses are standard sets of terms and conditions, which (subject to *subsection (3)*) will be incorporated in all licences. Such model clauses will be prescribed by regulations subject to negative resolution procedure (see section 105). By virtue of section 104 it will be possible to set out different model clauses for different cases. For instance, sets of model clauses made for gas storage may differ from those for unloading of Liquefied Natural Gas.
29. *Subsection (3)* enables the Secretary of State to omit or modify one or more of the model clauses in the case of any particular licence.

#### **Enforcement**

### ***Section 8: Offence to carry on unlicensed activities***

30. *Subsection (1)* makes it an offence for a person to carry on any activity listed in section 2 unless that person has a licence, or is a person (such as a contractor or sub-contractor) who carries on the relevant activity on behalf of a person with a licence. However, by *subsection (3)*, this is subject to the exception provided by section 3. *Subsection (2)* makes it an offence to cause or permit another person to commit the offence (for instance, by getting a contractor to do so). *Subsection (4)* sets out the penalties for any person found guilty of an offence under this section. These are a fine of up to the statutory maximum (currently £5,000 in England, Wales and Northern Ireland and £10,000 in Scotland) on summary conviction or an unlimited fine for conviction on indictment.

### ***Section 9: Offences relating to licences***

31. Once a licence has been granted, it will also be an offence to breach certain of its provisions. *Subsection (1)* specifies breaches which will give rise to an offence, and gives the Secretary of State a power to specify by order (subject to negative resolution procedure – see section 105) further kinds of breaches that will amount to an offence. Other enforcement powers will be available in respect of breaches of licences which are not criminal offences: see in particular section 10. The breaches attracting criminal penalties under the present section include:
- the carrying on of an activity such as a drilling operation, without first obtaining the prior consent specified by the licence (whether from the Secretary of State or another person whose consent is required);
  - the breach of any conditions attached to such a consent;
  - the failure to keep records, give a notice, or make a return or report, as required by the licence.
32. The licence holder will be liable for offences under the licence, even where the act or omission in question results from the behaviour of, for example, a contractor. However, *subsection (2)* provides that the licence holder will have a valid defence if it can show that it exercised due diligence in trying to avoid committing the relevant offence. In the case where the contractor was responsible for a breach, the licence holder would have to show that it had exercised due diligence in choosing and supervising the behaviour of the contractor.
33. *Subsections (3)* and *(4)* make it an offence for a person knowingly or recklessly to make a false statement in order to obtain a licence, or any required consent, or to fail to disclose information which that person knows, or ought to know, to be relevant to a licence application or to that consent.
34. *Subsection (5)* sets out the penalties for the offences in *subsections (1)*, *(3)* and *(4)*: a fine of up to the statutory maximum (currently £5,000 in England, Wales and Northern Ireland and £10,000 in Scotland) on summary conviction, or an unlimited fine for conviction on indictment.

### ***Section 10: Secretary of State's power of direction***

35. Where there has been a breach of a licence, this section enables the Secretary of State to direct that the licence holder takes appropriate steps to remedy the breach. For example, if the licence requires equipment to be maintained to a good standard, a direction may require the equipment to be repaired or replaced. *Subsection (3)* requires the Secretary of State to consult the licence holder before a direction is given.
36. If the licence holder fails to comply with the direction, the Secretary of State may, under *subsections (4)* to *(8)*, ensure that the necessary action is taken, at the expense of the licence holder and (if so directed) with the latter's assistance.

37. *Subsection (9)* ensures that this section does not affect any provision made by the licence itself for its enforcement (for instance, the licence may itself give the Secretary of State powers of direction in certain circumstances).

***Section 11: Failure to comply with a direction under section 10***

38. *Subsection (1)* of this section provides that a failure to comply with a direction under section 10 is a criminal offence, unless the accused proves due diligence was exercised in trying to avoid committing the offence. The penalties are set out in *subsection (2)*: a fine of up to the statutory maximum (currently £5,000 in England, Wales and Northern Ireland and £10,000 in Scotland) on summary conviction, or an unlimited fine for conviction on indictment.

***Section 12: Injunctions restraining breaches of section 2(1)***

39. This section gives the Secretary of State the power to apply to the court for an injunction to prevent, or require the cessation of, activities prohibited by section 2(1). For example, where there is evidence that a gas unloading activity is taking place without a licence, the Secretary of State may apply for an injunction requiring the operator to cease the activity until a licence is obtained. This power is in addition to any other powers the Secretary of State may have under this Chapter.

***Section 13: Inspectors***

40. *Subsections (1) and (2)* of this section allow the Secretary of State to appoint persons to act as inspectors to assist in carrying out the Secretary of State's functions under this Chapter, and enable the inspectors to be remunerated.
41. *Subsection (3)* gives the Secretary of State the power to make regulations (subject to negative resolution procedure – see section 105) setting out the powers and duties of the inspectors and of any other person acting on the directions of the Secretary of State in connection with a function under this Chapter (such persons may include, for example, surveyors or other contractors instructed by the Secretary of State). These are likely to include, for example, powers of entry and investigation and the right to take samples. *Subsection (5)* enables such regulations to create criminal offences (for example it might be an offence to obstruct an inspector in the exercise of functions under the regulations). Such offences will attract the penalty of a fine of up to the statutory maximum (currently £5,000 in England, Wales and Northern Ireland and £10,000 in Scotland) or such lesser amount as is specified in the regulations, on summary conviction, or an unlimited fine on conviction on indictment.

***Section 14: Criminal proceedings***

42. *Subsection (1)* ensures that an offence arising by virtue of the provisions of this Chapter may be prosecuted in any part of the United Kingdom, regardless of the offshore location at which the offence may have been committed.
43. *Subsections (3) and (4)* ensure that prosecutions for such offences alleged to have been committed in a controlled place (i.e. within the territorial sea or a Gas Importation and Storage Zone) may be brought only by the Secretary of State (or by a person authorised by the Secretary of State), or by or with the consent of the Director of Public Prosecutions (or the Director of Public Prosecutions for Northern Ireland). Such provision is unnecessary in relation to Scotland as there all prosecutions are brought by or on behalf of the Lord Advocate. *Subsection (5)* provides that the same restrictions will apply to any prosecution for an offence created by regulations under section 13 except that references to a person authorised by the Secretary of State are to be read as references to an inspector.

Supplementary

***Section 15: Interaction with the petroleum licensing requirements***

44. In some cases the storage of gas will require a petroleum licence, under section 3 of the Petroleum Act 1998, as well as a licence under section 4 of the Act. This is because the geological feature in which the gas is stored (for instance, a depleted hydrocarbon field) may itself contain indigenous petroleum. As a result, petroleum will be “produced” when it mixes with gas that is recovered from the store. In the case of other geological features, the amounts of hydrocarbons present may be negligible. This section provides a means whereby the holder of a gas storage licence can be assured that a petroleum licence will not also be necessary. Thus, if the Secretary of State is satisfied that the amount of hydrocarbons present is insignificant (see *subsection (4)*), a direction may be given under *subsection (2)* which makes it clear that there is no requirement for a petroleum licence.
45. *Subsection (5)* requires such a direction to be revoked if circumstances change; but *subsection (6)* then ensures that the licence holder is allowed a period of grace before the revocation takes effect. A period will be allowed that is sufficient to enable the licence holder to apply for a petroleum licence, or to negotiate to obtain rights under an existing licence.
46. *Subsection (7)* requires the licence holder to be consulted before a direction is given or revoked.