

ENERGY ACT 2008

EXPLANATORY NOTES

Part 3: Decommissioning of Energy Installations

Chapter 1: Nuclear Sites: Decommissioning and Clean-Up

Summary and Background

224. In *Meeting the Energy Challenge: A White Paper on Nuclear Power*, published in January 2008, the Government confirmed its view that it would be in the public interest to give energy companies the option of investing in new nuclear power stations. As well as ensuring operators are responsible for the costs of decommissioning of any new nuclear power station, and waste management and disposal during the lifetime of the station, this Chapter of the Act sets out the framework for accumulating monies to pay for the costs of decommissioning and waste management.
225. In the White Paper, the Government re-confirmed its commitment to put in place a legislative framework to ensure that energy companies which operate new nuclear power stations accumulate funds to cover their full decommissioning costs and their full share of waste management costs. It will be a prerequisite for energy companies seeking to construct any new nuclear power stations in the future to fulfil this requirement.
226. This legislation forms part of a package of measures announced in the Nuclear White Paper to facilitate the building of new nuclear power stations. The measures announced in the Nuclear White Paper include:
- running a Justification process, which is an EU requirement, to demonstrate that the benefits of new nuclear processes outweigh any health detriment;
 - running a Strategic Siting Assessment to develop criteria for developing the suitability of sites for new power stations;
 - conducting a formal Strategic Environmental Assessment in accordance with the SEA Directive¹; and
 - conducting a Generic Design Assessment of nuclear power station designs.
227. This Chapter of the Act contains the legislative framework for requiring that funded decommissioning programmes be submitted for approval. It also sets out how the programmes will be approved and monitored, and establishes offences for non-compliance with the legislation. It provides for regulations and guidance in relation to the preparation, content, implementation and modification of programmes. Any potential operator will have to submit a funded decommissioning programme which will have to consist of two elements.

¹ Directive 2001/42/EC, of June 2001 on the assessment of the effects of certain plans and programmes on the environment (O.J. L197, 21.7.2001, p30)

228. Firstly, the operator must set out the technical steps it will take to manage and dispose of radioactive waste and spent fuel, and to decommission the power station and clean-up the site. Second, the operator must also provide (i) prudent estimates of the costs of decommissioning and clean-up and – to the extent prescribed by order – of the cost of management of waste during the operation of the installation; and (ii) for how it will accrue monies to cover the costs of decommissioning and clean-up that it has identified and, again where prescribed by order, the costs of management of waste. The Act also provides that where the Secretary of State enters into an agreement for the disposal of relevant hazardous material that is or is required to be the subject of a funded decommissioning programme, the agreement may include provision for a fee to be paid to the Secretary of State.
229. In line with other regulatory activities in the nuclear energy sector, such as those relating to safety (under the Nuclear Installations Act 1965), the Government will publish guidance relating to funded nuclear decommissioning programmes. Section 54 requires the Secretary of State to publish guidance in relation to factors which it may be appropriate to consider when deciding whether to approve a programme or approve a modification to a programme. The Secretary of State may also issue guidance about the preparation, content, modification and implementation of funded decommissioning programmes. In contrast to guidance issued by the Health and Safety Executive in relation to certain of its functions under the 1965 Act, this guidance must be laid before Parliament.
230. If the nuclear site operator does not follow the guidance in formulating a funded decommissioning programme, this will not necessarily mean that the Secretary of State will reject the programme. Where a submitted programme does not conform to the factors set out in the guidance, the operator will have to demonstrate that the proposals meet the overall objectives of ensuring that the operator makes prudent provision to cover its costs of decommissioning and long term waste management and disposal, whenever these liabilities arise. As long as an operator can demonstrate this, a funded decommissioning programme could still be approved. The guidance will not prescribe the arrangements that operators must put in place, but rather it will set out factors which it may be appropriate for the Secretary of State to consider in the circumstances referred to, to assist operators in understanding how these objectives could be met to his satisfaction

Commentary on Sections

Funded decommissioning programmes

Section 45: Duty to submit a funded decommissioning programme

231. This section requires a person applying for a nuclear site licence, for a site where they intend to construct or operate a new nuclear power station (that is a nuclear power station constructed after commencement of this section), to notify the Secretary of State and submit a funded decommissioning programme for approval. It also requires a person to submit a funded decommissioning programme for approval if they intend to operate a new nuclear power station to which this section previously applied. The effect of this provision is to ensure that when a site operator changes after the site has been constructed and the power station is operating, the new site operator will be required to submit a funded decommissioning programme. *Subsection (4)* explains that a “funded decommissioning programme” is a programme which makes provision for certain technical matters (for example, the activities involved in decommissioning a relevant nuclear power station) and provision for how certain of those technical matters (“the designated technical matters”) are to be financed.
232. *Subsection (5)* specifies what the technical matters are, namely:
- how hazardous material (which includes radioactive waste) will be treated, stored, transported and disposed of during the operation of the power station,

*These notes refer to the Energy Act 2008 (c.32)
which received Royal Assent on 26 November 2008*

- how the power station will be decommissioned at the end of its life,
 - how the site is to be cleaned up, and
 - any activities by way of preparation for decommissioning and clean-up.
233. *Subsection (6)* gives the Secretary of State the power to prescribe by order (subject to the affirmative resolution procedure – see section 105) which of the matters referred to in the first or fourth bullet above are designated technical matters, which by operation of *subsection (4)* means the matters which are required to be financed by the programme. By contrast, the decommissioning and clean-up of power stations and sites must always be financed by the programme.
234. *Subsection (7)* says that a funded decommissioning programme must contain:
- details of the steps to be taken in relation to the technical matters described in *subsection (5)*
 - estimates of the likely costs incurred carrying out the designated technical matters described in *subsection (6)*
 - details of how financial security will be provided in relation to those costs.
235. *Subsections (8) and (9)* allow the Secretary of State to charge a person who submits a programme a fee for any costs incurred by the Secretary of State in relation to the consideration of the programme, and in particular the costs of obtaining advice in relation to the programme or information required in relation to the programme under section 52(4). Regulations made under section 54 will allow the Secretary of State to set out how that fee is to be calculated and when it is to be paid.

Section 46: Approval of a programme

236. This section creates powers for approving a funded decommissioning programme and places certain duties on the Secretary of State before a programme can be approved or rejected. *Subsection (1)* provides that only the Secretary of State can approve or reject a programme. *Subsection (2)* gives the Secretary of State the power to require modifications to the programme or approve it subject to conditions. *Subsection (3)* allows obligations to be placed on bodies corporate associated with the operator, such as a parent company, by way of a modification of the programme under *subsection (2)* as part of the approval. *Subsection (4)* requires that the Secretary of State's powers to approve or reject a programme must be exercised with the aim of securing that prudent provision is made for the technical matters (including prudent financial provision for the designated technical matters).
237. *Subsections (5) and (6)* require that before deciding whether to approve or reject a funded decommissioning programme the Secretary of State must consult the following bodies on those aspects of the programme, and of any modifications which it is proposed to make or conditions it is proposed to impose, which relate to their functions:
- The Health and Safety Executive,
 - The Environment Agency, and
 - The Department of the Environment for Northern Ireland.
238. *Subsection (7)* requires that the operator and other persons who have obligations under the programme, or will have obligations following the proposed modification, be given the opportunity to make representations on any proposals to modify the programme or impose conditions made by the Secretary of State. *Subsection (8)* provides that, if the Secretary of State rejects a programme, the operator must be given reasons for the rejection. *Subsection (9)* requires the Secretary of State to act without

unreasonable delay in reaching a decision as to whether to approve or reject a funded decommissioning programme.

239. *Subsection (10)* provides that a reference to a site operator in this section also refers to a person who has applied for a nuclear site licence in circumstances where the application has not yet been determined.

Section 47: Prohibition on use of site in absence of approved programme

240. This section creates an offence where a person with a nuclear site licence for a site uses the site, or permits another person to use the site, by virtue of the licence without an approved funded decommissioning programme in place (*subsections (1) and (2)*).

241. *Subsection (3)* sets out the penalties for the offences above:

- on summary conviction to a fine not exceeding the statutory maximum (currently £5,000 in England, Wales and Northern Ireland); or
- on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both.

Modification of approved programmes

Section 48: Modification of approved programme

242. This section allows for a funded decommissioning programme to be modified once it has been approved, and allows for the modification of any condition attached to the programme. This section gives the Secretary of State flexibility to amend a decommissioning programme, for example to reflect advances in decommissioning technologies or where cost estimates change.

243. *Subsections (1) and (2)* provide that the Secretary of State, the site operator and any other person who has obligations under the programme can propose a modification to the programme. Where a modification is proposed by a person who falls into the last category it requires the consent of the site operator.

244. *Subsection (3)* allows obligations or additional obligations to be placed on (or removed from) bodies corporate associated with the operator, such as a parent company. *Subsection (4)* enables a modification to be made which places conditions on the approval even if the funded decommissioning programme was originally approved unconditionally.

Section 49: Procedure for revising approved programme

245. This section establishes the procedure for making a modification to an approved funded programme. *Subsection (1)* makes it clear that this section is subject to regulations made under section 50.

246. *Subsection (2)* requires a proposal to make a modification to be in writing. If the proposal is made by the Secretary of State, written notice must be given to the site operator. If the proposal is made by any other person, written notice must be given to the Secretary of State.

247. *Subsections (3) and (4)* allow the Secretary of State to charge the site operator a fee in relation to the consideration of the proposal, and, in particular, the costs of obtaining advice in relation to the proposal or in relation to information required in relation to the proposal in accordance with section 52(4). The manner in which this fee is to be calculated and the time for its payment are to be set out in regulations under section 54.

248. *Subsection (5)* states that the operator or any other person with obligations under a programme (or who would have obligations as a result of the proposed modification), must be given the opportunity to respond in writing to any proposal by the Secretary of State to make a modification.

249. *Subsection (6)* gives the Secretary of State the power to decide whether a modification should be made. The Secretary of State must give notice of the decision and reasons for it to every person who has obligations under the programme or will have obligations as a result of the modification. Under *subsection (7)*, any decision as to whether to make a modification must be made with the aim of securing that prudent provision is made for the technical matters (including the financing of the designated technical matters).
250. *Subsection (8)* requires the Secretary of State, before deciding whether to make a modification, to consult with the Health and Safety Executive, the Environment Agency, and the Department of the Environment for Northern Ireland.

Section 50: Power to disapply section 49

251. This section provides the Secretary of State with the power to make regulations, (subject to the negative resolution procedure - see section 105), to disapply section 49 in relation to modifications proposed by a person other than the Secretary of State, as set out in *subsection (1)*.
252. Before making any such regulations, the Secretary of State must consult with the Health and Safety Executive, the Environment Agency and the Department of the Environment for Northern Ireland.
253. *Subsection (3)* allows regulations under *subsection (1)* to categorise modifications by reference to their financial consequences, including by reference to the cumulative financial effect of a number of modifications over a given period. Regulations might, therefore, set out that any operational changes which have a financial impact below a certain amount within a specified period of time are to be exempt from the requirements of section 49).
254. *Subsection (4)* provides that when the site operator modifies the plan in accordance with the regulations (so that the modification procedure in section 49 does not apply), it must notify the Secretary of State in the manner specified in the regulations.

Section 51: Time when modification takes effect

255. This section sets out when a modification to a funded decommissioning programme takes effect. Where a modification is made in line with the process set out in section 49, the modification takes effect at the time specified in the notice given to the operator of the Secretary of State's decision that the modification is to be made. That time must not be before that notice is given (*subsection (4)*).
256. Where a modification is made by a site operator under regulations disapplying the standard process (i.e. in line with *subsection (1)* of section 50), the modification takes effect at the time specified in the notice given by the operator to the Secretary of State in the manner set out in the regulations made under section 54. The time specified in the notice cannot be earlier than the time when the notice is given (*subsection (4)*).

Information

Section 52: Provision of information and documents

257. This section sets out the Secretary of State's powers to obtain information from the site operator and other persons with obligations under a funded decommissioning programme, and in certain circumstances, from bodies corporate associated with the site operator. The two circumstances in which the Secretary of State can require information and documentation are:
- after a funded decommissioning programme has been submitted, but prior to approval (Condition A), or

- when a modification, which is subject to the standard approval processes as set out in section 48, has been proposed but the Secretary of State has not yet decided whether the modification should be made (Condition B).
258. *Subsections (4) and (6)* set out the procedure the Secretary of State must follow when requesting information or documents from the site operator or person with obligations under the programme. The Secretary of State must specify when the documents or information are to be made available and the form in which information is required.
259. *Subsection (5)* provides that the Secretary of State may obtain information from the site operator and any other person with obligations under the programme. In addition, in a case where Condition A applies, the Secretary of State may obtain information from any body corporate associated with the site operator, if the Secretary of State is considering imposing an obligation on the body, by way of a modification of the programme, at the time he approves it under section 46. In a case where Condition B applies, the Secretary of State may obtain information from a person who would have obligations if the proposed modification were made.
260. *Subsection (7)* provides that the Secretary of State can only request such information and documents which he considers necessary for the purposes of making a decision in relation to a case which falls within Condition A or B.
261. *Subsections (8) and (9)* allow the Secretary of State to apply to the High Court for a court order where a person has failed to comply with the Secretary of State's request. If the application is successful, the court may order a person to comply with the requirement. *Subsection (10)* provides that references to a site operator in this section also refer to a person who has applied for a nuclear site licence where the application has not yet been determined.

Section 53: Power to review operation of programme

262. This section gives the Secretary of State the power to review an approved funded programme and, as part of this, to request information about the programme from the site operator or any other person who has obligations under the programme. The power can be used at any stage in the programme's life, including any period up until the point at which the site is returned to the agreed end state and the waste disposed of as defined by the decommissioning programme. The power is only applicable to information relevant to a particular site.
263. *Subsection (3)* provides that the Secretary of State may only request information for the purpose of determining whether:
- the programme is being complied with;
 - it will be possible for the persons with obligations under the programme at a point in the future to comply with them;
 - the programme makes prudent provision for the technical matters (including the financing of the designated technical matters) (as defined in section 45).
264. *Subsection (5)* authorises the Secretary of State to require information from the site operator, any other person with obligations under an approved programme or a body corporate associated with the site operator, for the purpose of enabling the Secretary of State to decide whether to propose a modification under section 48 or the nature of any modification to be proposed. The information can be required if the Secretary of State has reason to believe that:
- the programme is not being complied with
 - it will not be possible for obligations under the programme arising at a future date to be complied with

- the programme does not make prudent provision for the matters mentioned in subsection (3)(c).
265. *Subsection (6)* allows the Secretary of State to charge a fee to the site operator for the costs incurred in obtaining advice in relation to the information obtained. *Subsection (7)* provides the fee must be paid at the time determined in regulations under section 54.
266. *Subsections (8) and (9)* allow the Secretary of State to apply to the High Court for a court order where a person has failed to comply with the Secretary of State's request. If the application is successful the court may order a person to comply with the requirement.

Regulations and guidance

Section 54: Nuclear decommissioning: regulations and guidance

267. This section provides the Secretary of State with the power to make regulations (subject to the negative resolution procedure - see section 105), about the preparation, content and implementation of a funded decommissioning programme; and about the modification of such programmes.
268. *Subsection (2)* sets out a number of matters which such regulations may, in particular, contain. These include (in subsection (a)) the technical matters as set out in section 45:
- how hazardous waste (which includes radioactive waste) will be managed during the operation of the power station and disposed of at the end of the power station's life,
 - how the power station will be decommissioned at the end of its life,
 - how the site is to be cleaned up.
269. *Subsection (2)(b)* enables the regulations to cover the manner in which the estimation of costs of the technical matters identified in *subsection 2(a)* are arrived at, and how such estimates are to be verified (including the possibility for third party verification).
270. *Subsection (2)(c)* enables regulations to cover the financing of the designated technical matters, including security arrangements. *Subsection 2(d)* enables regulations to be made about payments, from funds held or accumulated for this purpose, to the site operator or another person.
271. *Subsections (2)(e)* enables regulations to set out how the Secretary of State can request information from persons with obligations under a funded decommissioning programme. *Subsection (2)(f)* enables regulations to set out the fees to be charged to recover costs which the Secretary of State incurs in obtaining advice in relation to that information
272. *Subsections (2)(g) and (h)* enable the regulations to deal with how fees payable under this Chapter are to be determined and when they are to be paid.
273. The regulations may make it an offence to contravene specified provisions of the regulations. *Subsection (4)* states that any offence must set out the nature of the offence and the sanction. The regulations must not authorise a summary offence which provides for a sanction of imprisonment or a fine exceeding the statutory maximum, or an indictable offence which provides for imprisonment for a term exceeding two years.
274. *Subsection (5)* allows the Secretary of State to publish guidance about the preparation, content, modification and implementation of a funded decommissioning programme.
275. *Subsection (6)* creates a duty on the Secretary of State to publish guidance on factors which it may be appropriate to consider when deciding whether to approve or modify a programme or the conditions attached to a programme.

276. *Subsection (7)* creates a duty on the Secretary of State to have regard to guidance in force under this section, when taking decisions in relation to operators' funded decommissioning programmes. Guidance may relate to the matters referred to in *subsections (2)(a) to (e)*. The power to publish the guidance may be exercised in order to issue revised guidance.
277. *Subsections (8) and (9)* provide that, before making regulations or publishing guidance, the Secretary of State must consult the Health and Safety Executive, the Environment Agency and the Department of the Environment for Northern Ireland, so far as the regulations or guidance relate to the roles and responsibilities of those bodies.
278. *Subsection (10)* sets out that any guidance published under this Chapter must be laid before Parliament.

Section 55: Funded decommissioning programmes: verification of financial matters

279. This section provides that regulations may be made under section 54 that allow the Secretary of State to rely on a third party verification of the financial estimates of the costs of designated technical matters and/or the verification of the prudence of any provision to fund those matters.

Protection of decommissioning funds

Section 56: Protection of security under approved programme

280. This provision is designed to ensure that in the event of the insolvency of the person responsible for a funded decommissioning programme or a person with obligations under that programme, the monies set aside for meeting the decommissioning costs or cleaning-up the site (and any other designated technical matters) remain available for that purpose and are not available to the general body of creditors. The protection in the event of insolvency applies where funds have been set aside in a trust or other arrangement for meeting the obligations under an approved programme.
281. *Subsection (3)* provides that the term "security" has a wide meaning for the purpose of funds which will be protected from creditors in the event of insolvency. The list is non-exhaustive.
282. In order to protect the security, *subsection (5)* 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 and other relevant liabilities).

Enforcement

Section 57: Offence to fail to comply with approved programme

283. This section makes it an offence for a site operator or persons associated with the operator (such as a parent company), to fail to comply with their obligations under an approved funded decommissioning programme, unless they prove that they exercised due diligence to avoid committing the offence.
284. *Subsection (3)* sets out the sanctions in the event of a prosecution:
- on summary conviction, a fine not exceeding the statutory maximum (currently £5,000 in England, Wales and Northern Ireland); or
 - on conviction on indictment, imprisonment for a term not exceeding two years or a fine, or both.

Section 58: Secretary of State's power of direction

285. This section provides the Secretary of State with the power to direct a person with obligations under an approved funded decommissioning programme to take action that the Secretary of State considers necessary or appropriate in the following circumstances:
- if it has been shown that the person failed to comply with any obligations imposed by the programme
 - if the person has been engaged in unlawful conduct which the Secretary of State considers may affect the programme. *Subsection (2)* defines unlawful conduct and *subsection (3)* specifies that a person can only be considered to have been engaged in unlawful conduct on the conclusion of any appeal process.
286. *Subsection (4)* sets out that the Secretary of State can direct a person with obligations under a funded decommissioning programme to take the steps which he considers necessary or appropriate to comply with obligations under the programme.
287. *Subsection (5)* imposes a duty on the Secretary of State to consult with the Health and Safety Executive, the Environment Agency and the Department of the Environment for Northern Ireland prior to giving a direction, insofar as the direction relates to one or more of their statutory functions.
288. *Subsections (6) and (7)* allow the Secretary of State to apply to the High Court for a court order where the Secretary of State believes that a person has failed to comply with a direction. If the application is successful the court may order the person to comply with the requirement.

Section 59: Offence of further disclosure of information

289. This section allows for the disclosure of information obtained by virtue of section 52(4) or 53(2) or 53(5), or regulations under section 54(2)(e), only if that information is:
- disclosed as a result of section 63 or any other function under this Chapter; or
 - disclosed with the consent of the person who originally provided the information; or
 - information obtained by the Health and Safety Executive under section 63 and disclosed for the purposes of its functions under the [Nuclear Installations Act 1965 \(c. 57\)](#); or
 - information obtained by environmental agencies under section 63 and disclosed for the purposes of the functions of those agencies under the [Radioactive Substances Act 1993 \(c.12\)](#).

Section 60: Offence of supplying false information

290. This section creates an offence of knowingly or recklessly supplying information which is false or misleading in a material respect.
291. *Subsection (2)* sets out the sanctions in the event of a prosecution:
- on summary conviction, a fine not exceeding the statutory maximum, (currently £5,000 in England, Wales and Northern Ireland); or
 - on conviction on indictment, imprisonment for a term not exceeding two years or a fine, or both.

Section 61: Restriction on prosecutions under this Chapter

292. This section sets out how prosecutions generated by an offence under this Chapter are to be initiated. This includes proceedings that may be instigated for any new offences

created by regulations under section 54. Proceedings may be instituted by the Secretary of State, or in England and Wales the Director of Public Prosecutions, or in Northern Ireland the Director of Public Prosecutions for Northern Ireland.

Miscellaneous

Section 62: Power to apply this Chapter to other nuclear installations.

293. This section allows the Secretary of State, by order (subject to the affirmative resolution procedure – section 105), to modify section 45 (duty to submit a funded decommissioning programme) so that it applies to persons who apply for a nuclear site licence of a description specified in the order. *Subsection (2)* sets out that these sites must be sites where the person intends to build a nuclear installation for a purpose connected with the generation of electricity, or where such an installation has already been constructed (in circumstances where a programme was previously required) which that person intends to operate.

Section 63: Co-operation with other public bodies

294. This section allows the Secretary of State to require certain public bodies (the Health and Safety Executive, the Environment Agency and the Department of the Environment for Northern Ireland) to assist him in discharging his duties under this Chapter of the Act.

295. *Subsections (3) and (4)* allow the Secretary of State and the relevant public bodies to share information which relates to a person listed in *subsection (5)* with each other, if any of them consider that the information they hold is relevant to a function of either the Secretary of State under this Chapter or to a function of the relevant public bodies in relation to a programme.

296. *Subsection (6)* provides that disclosure under this section may not be prevented by any other restrictions on the disclosure of such information by the persons concerned.

297. *Subsection (7)* provides that references to a site operator in this section also refer to the person who has applied for a nuclear site licence but where the application has not yet been determined.

Section 64: Continuity of obligations

298. This section provides that the obligations on an operator (or former operator) under a decommissioning programme remain until the Secretary of State explicitly releases them from their obligations, even if it no longer holds a site licence.

299. *Subsection (4)* sets out that the Secretary of State can release the operator from some or all of their obligations under a programme. In releasing the operator, the Secretary of State may release it from:

- all of the former site operator's obligations or only specified obligations;
- its obligations in relation to part of, or the whole site;
- its obligations in relation to all nuclear installations on a site, or only to specified installations.

300. *Subsection (5)* provides that the power in *subsection (3)* applies in relation to any other person with obligations under the programme as it applies to the site operator. *Subsection (6)* provides that this section does not affect the obligations under this Chapter of any other person who applies for and is granted a nuclear site licence in relation to the site referred to.

Section 65: Amendment of Nuclear Installations Act 1965

301. Section 1(3) of the Nuclear Installations Act 1965 makes it an offence to install or operate a nuclear installation without a site licence issued by Health and Safety Executive. This section makes it clear that even if the operator complies with section 1(1) of the 1965 Act, he may nonetheless commit an offence if he fails to comply with section 47.

Section 66: Disposal of hazardous material

302. This section provides that where the Secretary of State enters into an agreement for the disposals of relevant hazardous material that is associated with a funded decommissioning programme, the agreement may include provision for a fee to be paid to the Secretary of State.
303. *Subsection (2)* requires that the Secretary of State have the consent of Treasury in relation to the fee prior to entering into such an agreement.
304. *Subsection (3)(a)* allows for the fee to include an amount set by the Secretary of State to take account of any uncertainty with the costs associated with the obligations related to the disposal of waste that might fall on the Secretary of State when entering into such an agreement. These obligations might include the costs associated with maintaining interim waste disposal stores should the repository not be available on time, for example. It can also include the costs associated with maintaining the repository once waste from new build has been placed in it.
305. *Subsection (3)(b)(i)* provides that a proportion of the fee may cover the costs of the design and construction of the repository whilst *subsection (3)(b)(ii)* allows a proportion of the fee to be set in relation to the uncertainty associated with the construction of a repository in which hazardous material is to be disposed of. In this context expenditure incurred in connection with “design and construction” might also include expenditure on related research and development, but it is not restricted only to those activities.

General

Section 67: Meaning of “associated”

306. This section sets out the test for determining whether one body corporate is associated with another.

Section 68: Interpretation

307. The definitions for ‘cleaning-up’ a site and ‘decommissioning’ an installation are taken from section 37 of the Energy Act 2004. These definitions cover the treatment, storage, transportation and disposal of hazardous material. They describe other matters, activities and substances that need to be dealt with, carried out or removed when making the site or installation suitable to be used for other purposes.

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.
 - 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.

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. *Undersubsections (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.

Chapter 3: Oil and Gas Installations

Summary and Background

329. The UK has benefited from indigenous reserves of oil and gas from the North Sea for many decades, but international obligations and public expectations mean that redundant facilities must be abandoned (commonly referred to as “decommissioned”) with a proper regard for the safety, environmental, social and economic impacts. Part 4 of the Petroleum Act 1998, which consolidated provisions from the Petroleum Act 1987, sets out the statutory scheme for the abandonment of oil and gas facilities. Under the abandonment regime, the Secretary of State can serve notices on those persons with an interest in an offshore installation or pipeline, requiring them to submit an abandonment programme for his approval. The parties to the programme are then responsible, jointly and severally, for carrying out the work.
330. Under the Petroleum Act 1998, the Secretary of State currently has a power to require parties to put in place financial security if he is concerned about their ability to carry out an abandonment programme, but this provision only applies once a programme has been approved. It is standard practice to draw up programmes at the end of the life of a field when there is greater certainty of available technologies. In circumstances where it becomes apparent that financial security is required during the earlier stages of field life, because there is doubt about the parties’ ability to carry out a programme, the Secretary of State currently cannot require that security be put in place.
331. Since the regime was originally established in 1987 there have been changes in business practices in the oil and gas industry, such as increasing participation by smaller players which have fewer assets and as such bring increased risks that they might not be able to meet their decommissioning liabilities. Moreover, experience has shown that it has not always been possible to share liabilities equitably between the parties responsible for any installation or pipeline.
332. This Chapter of the Act amends Part 4 of the Petroleum Act 1998. Part 4 of the Petroleum Act 1998 makes provision about the preparation of abandonment

programmes; the persons who may submit a programme; the approval, the consequences of a failure to submit and the revision of a programme; the duty to carry out a programme; the information required; and the regulations, offences and penalties which apply in relation to an abandonment programme. The new provisions will amend the regime by:

- Enabling the Secretary of State to make all the relevant parties liable for the decommissioning of an installation or pipeline.
- Giving the Secretary of State power to require decommissioning security at any time during the life of an oil or gas field if the risks to the taxpayer are assessed as unacceptable.
- Protecting the funds put aside for decommissioning, so in the event of insolvency of the relevant party, the funds remain available to pay for decommissioning and the taxpayers' exposure is minimised.

Commentary on Sections

Section 72: Persons who may be required to submit abandonment programmes

333. Section 29 of the [Petroleum Act 1998 \(c. 17\)](#) enables the Secretary of State to issue a notice which requires a person to submit an abandonment programme, and sets out when the abandonment programme must be provided and what it must contain. The notice can also require that the person pay a fee to the Secretary of State to cover the costs of approving the programme. Section 30 of the Petroleum Act 1998 sets out the persons who may be required to submit an abandonment programme. These persons may include, for example, a licensee under the Petroleum Act 1998, or the Petroleum (Production) Act 1934, or a member of a joint operating agreement. This section makes amendments to section 30 to extend the range of persons who may be given a notice under section 29, and who may therefore be required to submit an abandonment programme.
334. *Subsection (2)(a)* inserts a new *paragraph* into section 30(1) of the Petroleum Act 1998. This extends the regime to include licensees who have transferred an interest in the licence to another party without the prior approval of the Secretary of State.
335. *Subsections (2)(b) and (3)* amend *paragraphs (1)(e) and (2)(c)* of section 30 of the Petroleum Act 1998, to substitute references to “company” with “body corporate”. This ensures that a limited liability partnership can be served with a notice under section 29, as an associated party.
336. *Subsection (4)* amends *subsection (5)(b)* of section 30 of the 1998 Act. *Subsection (5)(b)* provides that a person who may be required to submit a programme includes a person who is already carrying on certain activities (such as exploitation of mineral resources) on an offshore installation. The amendment will extend these provisions so that they also apply to persons who *intend* to carry on such activities in the future.
337. *Subsection (5)* substitutes five new subsections for section 30(8) of the Petroleum Act 1998 and *subsection (6)* amends section 30(9) of that Act. These provisions set out the test for determining whether, for the purpose of section 30, one company is associated with another. The effect of the amendments and the new subsections is to substitute references to “company” with “body corporate” and to provide the test for whether one body corporate is associated with another. The purpose of these provisions is to bring limited liability partnerships within the scope of the association provisions of section 30 and, therefore, treat them as persons which may be served with a section 29 notice.
338. Petroleum exploration and extraction licences issued under either the Petroleum Act 1998 or the Petroleum (Production) Act 1934 can be divided by the licensees at a commercial level into separate sub-areas. As a result, where oil and/or gas installations are located in a sub-area some of the licensees may have no commercial interest in

a particular sub-area, and therefore no interest in an installation within that sub-area. Paragraphs (b) and (c) of section 30(1) of the Petroleum Act 1998 give the Secretary of State the power to make all licensees and parties to joint operating or similar agreements jointly and severally liable for decommissioning every installation in the licensed area regardless of whether they benefit or have the potential to benefit from the particular installation. *Subsection (7)* inserts four new subsections into section 31 of the Petroleum Act 1998 preventing the Secretary of State from serving a decommissioning obligation on licensees and parties to joint operating (or similar) agreements if they have never been entitled to derive a relevant financial or other benefit from a particular installation within a sub-area of the licensed area.

339. As a result of the new subsection (A1) of section 31, if a person has never been entitled to derive any benefit, whether financial or other, from the installation, the Secretary of State will no longer be able to give a notice under section 29 to that person if they fall within paragraphs (b) or (c) of section 30(1) and have never been within paragraphs (a), (ba), (d) or (e). Subsections (B1) and (C1) specify that a relevant financial or other benefit will not arise as a result of using the installation for purposes other than those for which it is, or is to be, established or maintained, for example processing hydrocarbons from another field in the same licence area. In addition by virtue of subsection (D1) of section 31, a person that is within paragraph (e) of section 30(1) by virtue of his association to a person exempted by the new provision will be similarly exempt.
340. *Subsection (8)* extends the above provision to section 34 of the Petroleum Act 1998. Section 34 specifies the persons that may be given a duty to carry out an approved abandonment programme. As a result of the new subsection it will not be possible to propose that a licensee or party to a joint operating (or similar) agreement should be added as a party to the programme if that person has never been entitled to derive any benefit from the installation covered by the programme and has never been within paragraphs (a), (ba), (d) or (e) of section 30(1).

Section 107 and Schedule 5: Minor and consequential amendments

341. *Paragraph 10* of Schedule 5 (Minor and consequential amendments) extends the class of persons that can be given a duty to carry out an approved abandonment programme to include licensees who have transferred an interest in the licence to another party without the prior approval of the Secretary of State. This is in line with section 72 subsection (2) (a) of the Energy Act which adds a new paragraph to section 30(1) of the Petroleum Act 1998 to extend the regime to include licensees who have transferred an interest in the licence to another party without the prior approval of the Secretary of State.
342. *Paragraph 11* of Schedule 5 (Minor and consequential amendments) inserts text into section 45 of the Petroleum Act 1998 (Interpretation of Part 4) so that the definition of “submarine pipeline” includes a pipeline which is intended to be established. This enables notices under section 29 to be served for submarine pipelines prior to installation, mirroring the existing requirements for offshore installations.

Section 108 and Schedule 6: Repeals

343. *Section 108* and Schedule 6 makes a further amendment to section 31(1) of the Petroleum Act 1998 (section 29 notices: supplementary provisions) and section 34(3) (revision of programmes) of the Petroleum Act 1998. *Subsection (1)* of section 31 provides that the Secretary of State may not give a notice under section 29 to certain persons specified in section 30(1) if the Secretary of State has been and continues to be satisfied that adequate arrangements (including financial arrangements) have been made by other persons so specified. Similarly, section 34(3) provides that the Secretary of State shall not propose that certain persons specified in section 30(1) shall be given a duty to secure that an approved abandonment programme is carried out unless it appears to him that one of the current parties has or may default. The effect of the new provisions is to provide that these limitations will no longer apply to persons

specified in *paragraph (d)* of section 30 (1) (a person who owns any interest in an installation otherwise than as security for a loan). There is increasing use of floating production systems where the ownership may change during the life of the field, and this amendment takes account of this change in practice, and enables the abandonment risk to be spread to new owners with an interest in an installation.

Section 73: Financial resources etc

344. This section clarifies the information which may be required to satisfy the Secretary of State of a person's ability to fund its abandonment obligations, or potential obligations. It also makes provision to bring forward the time when the Secretary of State may require a person to take relevant action (such as providing financial security, for example a letter of credit), in order to reduce the financial risk to the taxpayer.
345. *Subsection (2)* substitutes three new subsections for *subsection (1)* of section 38 of the Petroleum Act 1998. Section 38 sets out that the Secretary of State can, by issuing a notice, require specified financial information and documents (for example up to date management accounts) in relation to an abandonment programme. It also creates an offence for non-compliance with the notice and for knowingly providing false information. The purpose of the amendments is to widen the circumstances in which the Secretary of State may give such a notice, to allow information to be obtained for the purpose of enabling the Secretary of State to determine whether he wishes to impose an abandonment obligation on a person by serving a notice under section 29 or by adding that person to an existing approved abandonment programme (and making them subject to the obligations within that programme).
346. *Subsections (3) and (4)* make amendments to *subsection (2)* of section 38 of the Petroleum Act 1998 and insert a new *subsection (2A)*. This provision allows the Secretary of State to require more specific information which could include:
- a detailed estimate of the costs of the abandonment;
 - predictions of future revenue;
 - the costs and benefits of any plans for further development;
 - up to date management accounts.
347. Such information can be required only from persons who have been served with a notice under section 29, or are under a duty to carry out an abandonment programme (see section 36 of the Petroleum Act 1998). This amendment allows the Secretary of State to obtain information at an earlier stage to assess whether to require financial security. Under the existing section 38 the provision of such information cannot be required prior to the approval of an abandonment programme.
348. *Subsection (5)* substitutes new *subsections (4) and (4A)* for section 38(4) of the Petroleum Act 1998. These enable the Secretary of State, after consulting the Treasury, to require action (including the provision of financial security, such as a letter of credit) to be taken by a person who has been served with a notice under section 29 of that Act or who has a duty to carry out an abandonment programme, where the Secretary of State is not satisfied that the person is capable of carrying out the programme. This addresses a perceived limitation whereby the Secretary of State currently has the ability to require such action only following the approval of an abandonment programme. By enabling the Secretary of State to require action once a notice under section 29 has been served, which may be well in advance of programme approval, this should enable higher risk projects to be secured for tax payer protection purposes from the start of the development (for example, when the reservoir has yet to prove itself).
349. *Subsection (6)* provides for it to be an offence to disclose information obtained under section 38(1) or (2) of the Petroleum Act 1998 without the consent of the person who provided it, unless the disclosure of the information is required for the purposes of

the exercise of the Secretary of State's functions under that Act or another piece of legislation. Section 40 of the Petroleum Act 1998 sets out the penalties that apply if an offence is committed under *subsection (6)* and 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.

Section 74: Protection of abandonment funds from creditors

350. This section inserts two new sections into the Petroleum Act 1998 after section 38, to protect funds set aside for the purposes of decommissioning in the event of insolvency.

New section 38A: Protection of funds set aside for the purposes of abandonment programme

351. This section is designed to ensure that, in the event of the insolvency of a person responsible for an abandonment programme or a person with obligations under that programme, the funds set aside for meeting those liabilities remain available for abandonment and are not available to the general body of creditors. The protection in the event of insolvency applies where any funds have been set aside in a secure way (such as a trust or other arrangement which was established on or after 1 December 2007) for meeting obligations under an abandonment programme. This provision applies whether the security is established before or after the programme's approval, as long as it is clear in the arrangement that it has been established to secure the obligations under the programme.

352. *Subsection (4)* provides that the term "security" has a wide meaning for this purpose. The list is non-exhaustive.

353. *Subsection (6)* specifically disapplies any provision of the Insolvency Act 1986, the Insolvency (Northern Ireland) Order 1989 or any other enactment or rule of law the operation of which would prevent or restrict the security being used for the purpose for which it was set up (meeting abandonment liabilities). *Subsection (7)* extends the meaning of "enactment" to include Acts of the Scottish Parliament.

New section 38B: Directions to provide information about protected assets

354. This section is intended to ensure that creditors and potential future creditors of a person responsible for an abandonment programme are aware of any abandonment funds affected by the new powers to disapply insolvency legislation. The publication of information regarding relevant security arrangements will enable informed decisions to be made by creditors and potential future creditors. *Subsections (1) and (2)* therefore set out that the Secretary of State may give a direction to a person responsible for an abandonment programme to publish details of the fund or other arrangement at the time and in the manner specified by the Secretary of State (for example in the financial pages of that person's website). *Subsection (3)* enables the Secretary of State or a creditor of the person responsible for the abandonment programme to apply for a court order to ensure compliance with a direction.

Chapter 4: Wells

Summary and Background

355. This Chapter inserts new provisions into Part 5 of the [Petroleum Act 1998 \(c. 17\)](#) (the "1998 Act") for the purpose of securing the proper abandonment of wells. In particular, there is a power to require the provision of financial information and to issue a notice, after consulting the Treasury, requiring the person who receives it to take action within a stated period. This power may be used to ensure that where the Secretary of State is

not satisfied that a person will be capable of plugging and abandoning a well there is, nevertheless, financial security in place for this purpose.

Commentary on Sections

Section 75: Information about decommissioning of wells

356. This section inserts a new section 45A at the beginning of Part 5 of the 1998 Act.

New section 45A: Abandoned wells

357. *Section 45A* gives the Secretary of State a power to require a person who has drilled or started drilling a well to provide information about that person's financial affairs within a specified period of time. The section also allows the Secretary of State, under certain circumstances defined below, to require the person to take specified action. The relevant wells are those drilled pursuant to a petroleum licence (defined in *subsection (10)* as a licence under section 2 of the Petroleum (Production) Act 1934, or section 3 of the Petroleum Act 1998) or a licence under section 4 of the Act (gas storage and unloading licences).

358. *Subsection (2)* gives the Secretary of State a power to issue a notice requiring a person to provide specified information or documents relating to their financial affairs. *Subsection (3)* provides that this notice must specify the time allowed for this information to be provided.

359. *Subsection (4)* sets out the circumstances in which a further notice can be given under *subsection (5)*; that is where:

- having received the information or documents requested in the original notice (the notice given under *subsection (2)*), the Secretary of State is not satisfied that the person will be capable of plugging and abandoning a well; or
- a person has failed to provide the information or documents requested in the original notice, within the specified period.

360. *Subsection (5)* provides a power for the Secretary of State, after consulting the Treasury, to give a person a notice setting out the action that person must take within the specified period. By implication, such action may include the provision of financial security for the purpose of ensuring that a person will be capable of plugging and abandoning a well when required to do so by the terms of a licence.

361. Before giving a notice to a person under *subsection (5)*, *subsection (6)* requires that the Secretary of State gives that person an opportunity to make written representations as to whether such a notice should be given.

362. *Subsection (7)* makes it an offence for a person to fail to comply with a notice issued under either *subsection (2)* or *subsection (5)*, unless that person can prove he exercised due diligence to avoid the failure.

363. *Subsection (8)* provides that a person found guilty of this offence is liable:

- on summary conviction, to a fine not exceeding the statutory maximum (currently £5,000 in England, Wales and Northern Ireland and £10,000 in Scotland); and
- on conviction on indictment, to an unlimited fine, or a maximum of two years imprisonment, or both.

364. *Subsection (9)* applies section 41 of the 1998 Act (apart from *subsection (5)*) in relation to prosecutions for offences under this section. Section 41 of the 1998 Act provides that:

- in England and Wales, proceedings may only be instituted by the Secretary of State (or a person authorised by the Secretary of State) or by the Director of Public

*These notes refer to the Energy Act 2008 (c.32)
which received Royal Assent on 26 November 2008*

Prosecutions (or with the consent of the Director of Public Prosecutions); and in Northern Ireland, proceedings cannot be instituted except by the Secretary of State (or by a person authorised by the Secretary of State) or by the Director of Public Prosecutions for Northern Ireland (or with the consent of the Director of Public Prosecutions for Northern Ireland);

- where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary, or other similar officer of the body corporate (or any person purporting to act in any such capacity) that person will also be liable to be prosecuted and punished accordingly; and
- where the affairs of a body corporate are managed by its members, and an offence committed by such a body corporate is proved to have been committed with the consent or connivance of, or is attributable to any neglect on behalf of, such a member in connection with that member's functions of management, such a member will be liable to be prosecuted and punished as if the member were the director of the body corporate.