

ENERGY ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Security of Energy Supplies

Chapter 3: Upstream Petroleum Infrastructure

Section 82: Acquisition of rights to use upstream petroleum infrastructure

214. This section sets out the procedure for where a person who has previously sought to secure access to a relevant pipeline or facility by application to the owner, but who has not been able to reach agreement with the owner, may apply to the Secretary of State for a notice granting that access. It sets out: the circumstances within which an access dispute may be resolved by the Secretary of State; the considerations the Secretary of State must take into account when deciding how to deal with the application; and the process the Secretary of State must follow.
215. *Subsections (1) to (3)* set out the scope of the dispute resolution procedure, including the persons involved, the types of infrastructure addressed and its geographical extent.
216. *Subsection (4)* allows a person who has previously sought to secure access to a relevant pipeline or facility by application to the owner, but who has not been able to reach agreement with the owner, to apply to the Secretary of State for a notice granting that access.
217. Under *subsection (5)*, the Secretary of State may not consider such an application unless satisfied that the applicant and owner have had a reasonable time in which to reach an agreement.
218. *Subsection (6)* requires that the Secretary of State must first consider whether the application should be adjourned to enable further negotiation, considered further, or rejected. In the event that he decides to give it further consideration, he must give an opportunity to be heard to the applicant and the owner, to anyone with usage rights in the pipeline or facility, to the Health and Safety Executive and such other persons as he considers appropriate.
219. *Subsection (7)* lists a number of matters which the Secretary of State must, so far as relevant, take into account in giving further consideration to such an application; including the capacity which may reasonably be made available, incompatibilities of technical specification, the reasonable needs of the owners, and the interests of other parties.
220. *Subsection (8)* provides that the Secretary of State may only issue an access notice if satisfied that it will either not prejudice the reasonable expectations of the owners and their associates, or the exercise of existing rights by other parties in respect of conveyance or processing (*subsection (9)*); or that the notice contains provision for compensation to be paid to any person who suffers loss as a result of any such prejudice (*subsection (10)*).

*These notes refer to the Energy Act 2011 (c.16)
which received Royal Assent on 18 October 2011*

221. *Subsections (11) and (12)* provide for any such notice to contain such provision as the Secretary of State thinks necessary to secure the applicant an effective right of access and any appropriate ancillary rights; to regulate the charges for the right granted; to allow the owner to recover payments by way of consideration for any right granted; and to permit assignment of the right.
222. *Subsection (13)* provides that a notice under subsection (11) must be given to both the owner and the applicant, and, in the event that it contains any compensation provision under subsection (10), to any person with relevant rights; and does not come into force unless accepted by the applicant within the time specified.
223. *Subsection (19)* defines the ‘owner’ of any upstream infrastructure for the purposes of this section and section 83.

Section 83: Power of Secretary of State to give a notice under section 82(11) on own initiative

224. This section sets out the new process by which the Secretary of State may issue an access notice on his or her own initiative.
225. *Subsection (1)* limits the use of the power to situations in which an access application has been made to an owner, but the owner and the applicant do not reach agreement on the application. Where it applies, *subsection (2)* allows the Secretary of State to issue an access notice, but subject to section 82(8) above, and to the two following subsections.
226. Under *subsection (3)*, the Secretary of State may not issue such a notice unless satisfied that the applicant and owner have had a reasonable time in which to reach an agreement (as in section 82); but must further be satisfied that there is no reasonable prospect of them doing so.
227. Under *subsection (4)* the Secretary of State must, in considering whether to exercise the power, take into account the matters specified in section 82(7) and also give an opportunity to be heard to the persons identified in section 83(5).

Section 84: Compulsory modification of upstream petroleum infrastructure

228. This section deals with compulsory modifications to the infrastructure in question, where it appears that these will be necessary to give effect to an access right sought under section 82.
229. *Subsection (1)* provides that the section applies where an application has been made to an owner, and the Secretary of State is considering whether to give an access notice under section 82(11).
230. *Subsection (2)* enables the Secretary of State to issue a notice requiring modifications to the pipeline or facility in question, where it appears to him that this can and should be done in order to increase the capacity of the pipeline or facility, or to connect to the applicant’s pipeline.
231. *Subsection (3)* provides that such a notice must: specify the modifications to be made and the recompense due to the owner; require the applicant to make appropriate arrangements to secure payment of these sums; require the owner to make the modifications if the payment arrangements are made; and authorise the owner to recover the relevant sums from the applicant when the modifications are made.
232. *Subsection (4)* provides that the notice may also provide for compensation for any loss which may be incurred by other users as a result of the making of the modifications; and *subsection (5)* provides that a notice containing any such provision is to be given to any person with relevant rights, as well as to the owner and the applicant.

233. *Subsection (7)* provides that before giving such a notice, the Secretary of State must take into account the matters specified in 82(7), and must give an opportunity to be heard to the persons specified in *subsection (8)*.
234. *Subsection (10)* defines the ‘owner’ of any upstream infrastructure for the purposes of this section – it should be noted that this definition is more limited than that which applies in sections 82 and 83.

Section 85: Variation of notices under sections 82 and 84

235. This section allows for variation of notices under sections 82 and 84 once they have been issued, enabling amendments to be made to a notice without having to restart the dispute resolution procedure from the beginning.
236. *Subsection (1)* allows the persons to whom notice is given to agree to, vary or set aside the notice.
237. *Subsection (2)* allows the Secretary of State to vary a notice on the application of one of the persons to whom it has been given.
238. *Subsection (3)* provides that he may do so only if satisfied that it is necessary to resolve a dispute about the notice between its recipients.
239. *Subsection (4)* requires the Secretary of State to give an opportunity to be heard to the persons specified in the subsection.

Section 86: Publication of notices and variations

240. This section allows the Secretary of State to publish any access notice, modification notice or variation notice, in whole or in part or in summary. But before doing so, he must give an opportunity to be heard to the persons to whom the notice has been given and to such other persons as he considers appropriate (*subsection (3)*).

Section 87: Powers of Secretary of State to require information

241. This section gives the Secretary of State new powers to require information about the progress of access negotiations.
242. *Subsection (1)* provides that where the Secretary of State has reason to believe that an application for access to upstream petroleum infrastructure has been made, he may require either the applicant or the owner to confirm this.
243. *Subsection (2)* allows the Secretary of State to require any applicant or owner to provide such information as he may specify, in order for him to decide whether to exercise any function under sections 82, 83 and 84, and if so, how.
244. *Subsections (3) and (4)* provide analogous powers to require information from anyone seeking a variation of an access notice, and from the other person to whom the notice in question was given.
245. *Subsection (5)* confirms that the information which may be required includes financial information.
246. *Subsection (6)* requires the Secretary of State not to disclose information supplied under this section except with the consent of the person who supplied it, or in accordance with his or her statutory obligations.

Section 88: Enforcement

247. This section provides for the enforcement of the requirements imposed in this Chapter.
248. *Subsections (1) to (3)* create a new offence, for the giving of false information to the Secretary of State for the purpose of influencing the exercise of his functions under this

Chapter. This offence can be committed either when a person knows or believes the information in question is false, or is reckless as to whether the information is false. A person guilty of such an offence is liable to a fine not exceeding level five on the standard scale (currently £5000 in England, Wales and Scotland).

- 249. *Subsections (4) to (6)* make related provision for proceedings, and for offences by bodies corporate, in relation to that offence.
- 250. *Subsection (7)* provides that the duty of a person to comply with an access notice or a modification notice is a duty owed to any person who may be affected by a failure to comply with it.
- 251. *Subsection (8)* provides that any such duty may be enforced by a person to whom it is owed, as if it were a contractual right.
- 252. *Subsection (9)* provides that the duty of a person to comply with an information request under section 87 is enforceable by civil proceedings by the Secretary of State.

Section 89: Minor, consequential and supplemental provision

- 253. This section, and Schedule 2 to the Act, provide for various matters which are consequential or supplemental to the main provisions of this Chapter.
- 254. The Schedule amends the parts of the Petroleum Act 1998 and the Pipelines Act 1962 which set out the current regime for third party access to offshore pipelines, and for onshore pipelines, respectively, so that they no longer apply to upstream petroleum infrastructure within the scope of this Chapter. They do however continue in effect so far as other pipelines are concerned (in particular, the 1962 Act continues in effect with respect to onshore pipelines which are not upstream petroleum pipelines). The Schedule therefore provides amendments which are necessary to ensure that the new regime does not conflict with the existing regime.
- 255. The Schedule also provides for the repeal of certain provisions of the Gas Act 1995 and the Energy Act 2008, which are entirely subsumed by the new provision in this Chapter.

Section 90: Interpretation

- 256. This section provides definitions for various terms used in the Chapter. The definitions of ‘upstream petroleum pipeline’, ‘gas processing facility’ and ‘oil processing facility’ are of particular importance, being central to the scope of the Chapter – see section 82(1), etc. These three definitions in turn depend on the meaning of other terms defined in this section. The definition of ‘payments’ is also of note since it allows for payment to be given in money or money’s worth – in other words, it provides for payments in kind.

Section 91: Meaning of “associate” for the purposes of section 82

- 257. This section provides the definition of “associate” in section 82.