

**EXPLANATORY MEMORANDUM TO
THE STORAGE OF CARBON DIOXIDE (ACCESS TO INFRASTRUCTURE)
REGULATIONS 2011**

2011 No. 2305

1. This explanatory memorandum has been prepared by the Department of Energy and Climate Change and is laid before Parliament by Command of her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 These Regulations are part of the transposition of Directive 2009/31/EC of the European Parliament and of Council of 23 April 2009 on the Geological Storage of Carbon Dioxide (the “Directive”). They implement the requirements in Articles 21 & 22 of the Directive relating to third party access to infrastructure for the transport and storage of carbon dioxide on a fair and transparent basis.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 The Regulations will come into force on the day after being made. This is a shorter period than might usually be expected for an instrument which creates a criminal offence, but DECC considers that the short time period is justifiable in this case, in order that the Regulations can be brought into force as soon after the transposition deadline for the Directive as possible and in light of the high level of awareness of the proposed new regime among those affected.

- 3.2 There are a very small number of companies engaged in carbon capture and storage activities in the UK, all of whom should be aware of the coming into force of these provisions, as the companies and their industry association, the Carbon Capture and Storage Association have been closely consulted about the creation of the new offence (see paragraphs 8.1 and 8.2).

4. **Legislative Context**

- 4.1 The Directive places obligations on Member States to introduce measures to:
 - permit carbon dioxide storage sites;
 - require new combustion power stations to be constructed Carbon Capture Ready (CCR);

- facilitate third party access to infrastructure for the transport and storage of carbon dioxide.

Part 1, Chapter 3, of the Energy Act 2008 (“the Act”) provides for a licensing regime governing the permanent storage of CO₂. CCR requirements have been incorporated through guidance under Section 36 of the Electricity Act 1989.

4.2 The Directive requires Member States to ensure that third parties are able to obtain fair and open access to transport networks and storage sites. The Directive requires the arrangements to be transparent and non-discriminatory. They must also ensure that if an operator refuses to give access to a third party on grounds of lack of capacity, or lack of connection, then the operator makes the necessary enhancements where it is economically viable, or when a potential customer is willing to pay for these enhancements, providing doing so does not have a detrimental impact on the integrity of the pipeline or storage site.

4.3 Part 3 of the Petroleum Act 1998, the Pipe-lines Act 1962 and the Planning Act 2008 all establish requirements for consent to be obtained from the appropriate authority for the construction of a carbon dioxide pipeline. Pipelines on land that do not require consent under any of those Acts may require planning permission under part 3 of the Town and Country Planning Act 1990 or Part 3 of the Town and Country Planning (Scotland) Act 1997.

4.4 The Petroleum Act 1998 and the Pipe-lines Act 1962 also provide for third parties to secure access to pipelines. This instrument amends those Acts so that pipelines for the transport of carbon dioxide to a storage site are removed from their scope in this regard and are instead subject to a specific regime for carbon capture and storage infrastructure which reflects the requirements of the Directive.¹ The new regime is similar in most respects to the existing arrangements under the Petroleum Act 1998 and the Pipelines Act 1962, but applies to storage sites as well as pipelines conveying carbon dioxide.

4.5 The Localism Bill provides for the abolition of the Infrastructure Planning Committee (IPC) and the transfer of its functions under the Planning Act 2008 in relation to nationally significant infrastructure projects to the Secretary of State. These Regulations confer powers and duties on the IPC only while it retains those functions under the Planning Act 2008: once the functions are transferred, the relevant powers and duties will be conferred on the Secretary of State instead

4.6 A Transposition Note has been prepared and is attached as an annex to this Memorandum.

¹ The Energy Bill 2011 also contains amendments to the Petroleum Act 1998 and the Pipe-lines Act 1962 and a new third party access regime for certain petroleum pipelines. That new regime will not apply to carbon dioxide pipelines within the scope of this instrument.

5. Territorial Extent and Application

5.1 This instrument extends to the United Kingdom. It applies to pipelines and storage sites onshore in Great Britain (including its internal waters). It also applies to pipelines in the territorial sea adjacent to the United Kingdom and the area of the Continental Shelf and to storage sites in the territorial sea and in the area extending beyond the territorial sea that has been designated as a Gas Importation and Storage Zone.² The Regulations are being laid with the agreement of Scottish Ministers and Welsh Ministers. This instrument does not apply to storage sites or pipelines in Northern Ireland (including the adjacent internal waters).

6. European Convention on Human Rights

6.1 The Minister of State at the Department of Energy and Climate Change, Charles Hendry, has made the following statement regarding Human Rights:

In my view the provisions of the Storage of Carbon Dioxide (Access to Infrastructure) Regulations 2011 are compatible with the Convention rights.

7. Policy Background

7.1 The Government is implementing a number of policies to stimulate the demonstration and deployment of Carbon Capture and Storage (CCS). It has announced its intention to support 4 commercial scale demonstration projects and has allocated £1bn in capital to the first of those. The intention is that construction of the first project will start in 2014/15. The Government has also taken steps to enable CCS, including by creating the legal framework to permit the storage of carbon dioxide beneath the seabed.

7.2 The Regulations are intended encourage the development of CCS infrastructure and third party access to existing infrastructure (where there is spare capacity available) in a way that responds to demand without imposing an unnecessary burden on those investing in pipelines. It is based on established arrangements in the upstream oil and gas sector and nationally significant pipelines.

8. Consultation Outcome

8.1. A consultation was undertaken on a draft of these Regulations between 10 December 2010 and 4 February 2011. This was shorter than the standard 12 week consultation period, but was justified as the requirements of the Directive had been in the public domain for some time and was consulted on extensively during its negotiation.

² Designated under section 1(5) of the Energy Act 2008 by the Gas Storage and Importation Zone (Designation of Area) Order 2009 (SI 2009/223). Provisions of the Marine and Coastal Access Act 2009 not yet in force will provide that the Gas Importation and Storage Zone is the area designated under that Act as the exclusive economic zone, unless a different area is specified by an Order in Council.

8.2. A Government's response to the consultation was issued in April 2011. As a result of the consultation the Regulations were modified to clarify how any spare capacity in a storage site should be calculated and also the requirements for reporting spare capacity.

9. Guidance

9.1. DECC will publish guidance to set out the approach the appropriate authority would take if asked to make a determination over access and the principles against which financial terms would be determined. A draft for consultation will be published later this year. This is expected to be well in advance of the need to make any determination.

10. Impact

10.1 The principal impact will be on the CCS industry allowing it to develop without undue delays as a result of a party refusing access to a competitor. The benefits of such to the CCS industry were described in the CCS Impact Assessment for 'A framework for Development of Clean Coal'; the present value of the benefits was estimated to be £4.8-14 billion. The impact on charities or voluntary bodies will be zero, as projects will be taken forward by commercial organisations.

10.2 The impact on the public sector will only arise in the event that the appropriate authority makes a determination. This will be accommodated this within existing resources.

10.3 The final Impact Assessment is available at http://www.decc.gov.uk/en/content/cms/consultations/ccs_3rd_party/ccs_3rd_party.aspx

11. Regulating Small Business

11.1 The legislation applies to carbon dioxide transport and storage site operators irrespective of size. However, because of the scale of these activities it is unlikely that SME's will be significantly affected by the obligations in the Regulations.

12. Monitoring & Review

12.1 The Secretary of State will review the Regulations as they apply to his functions and will publish a report before the fifth anniversary of the day on which this instrument comes into force. The review will not extend to an assessment of the Regulations as they apply to pipelines and storage sites in Scotland, or to any function exercised by the Scottish Ministers. Feedback from industry will also be sought to ensure that the Regulations have not been burdensome to business and have operated on a fair and transparent basis.

13. Contact

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