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

ENERGY ACT 2008

EXPLANATORY NOTES

Part 1, Chapter 1: Gas Importation and Storage Zones

Summary and Background

6. The United Nations Convention on the Law of the Sea 1982 (UNCLOS) is an international agreement which defines the rights and responsibilities of nations in their use of the world's oceans. Under Part V of UNCLOS, coastal states can claim rights within an area, known as the exclusive economic zone, which forms part of the area of the continental shelf and extends from the edge of the 12 nautical miles limit of the territorial sea for a further distance of 188 nautical miles. Within this area, the coastal state can claim exclusive sovereign rights over all natural resources, including storage space under the seabed. Under this Chapter, the UK will claim rights relating to the unloading and storage of gas, and to related exploration activities. This is a precursor to the regulatory regimes to be established under Chapters 2 and 3 of Part 1, relating to the importation and storage of combustible gas, and storage of carbon dioxide.

Commentary on Sections

Section 1: Exploitation of areas outside the territorial sea for gas importation and storage

7. Article 56(1) of UNCLOS provides that the rights of the coastal state in respect of the exclusive economic zone include, amongst other things, the exploration and exploitation of the seabed and its subsoil, and the waters above it. It also provides jurisdiction for the establishment and use of installations and structures in the area.

8. The United Kingdom has previously claimed a number of rights under Article 56(1), but has not yet claimed rights in relation to the unloading and storage of gas. The purpose of this section is to claim those rights, by providing for their ownership to be vested in the Crown within areas designated as "Gas Importation and Storage Zones".

9. *Subsection (1)* vests in the Crown the rights defined by *subsections (2)* and *(3)*. The rights are those relating to the following activities:

   a) unloading gas to installations or pipelines;

   b) storing gas, whether or not it is intended to be recovered; and

   c) exploring for suitable sites for the purpose of "(a)" or "(b)".

10. S*ubsections (4)* and *(6)* define what is meant by "gas" for these purposes. The definition covers, in particular, both combustible gases (for the purposes of activities within Chapter 2 of this Part – Importation and storage of combustible gas), and carbon dioxide (for the purposes of activities within Chapter 3 – Storage of carbon dioxide).

11. *Subsection (5)* provides for Her Majesty to make an Order in Council designating an area as a Gas Importation and Storage Zone. Such Orders will be subject to negative resolution procedure (see section 94).

12. This approach reflects the one taken in section 84 of the Energy Act 2004 (c.20) (exploitation of areas outside the territorial sea for energy production) to establish Renewable Energy Zones for the purpose of offshore renewable electricity projects such as offshore wind farms.

Chapter 2: Importation and Storage of Combustible Gas

Summary and Background

13. In 2004, the UK was virtually self-sufficient in the production of natural gas for heating, electricity and business processes. However, gas production from the UK Continental Shelf (UKCS) is declining and it is expected that the UK will be reliant on imported gas to meet well over half of demand by 2020. Without sufficient and timely new storage and import infrastructure, there will be increased risks of a tight gas supply demand balance in the UK in the future. This could result in high UK gas prices during periods of peak demand and a higher risk of involuntary interruptions.

14. Companies have already responded to declining UK gas production by investing in new gas storage and import infrastructure. However, as the UK's production declines, additional investment will be needed in gas infrastructure. Companies investing in the UK have sought a clear and stable regulatory framework to reduce the uncertainty, delays and costs associated with the UK's consenting processes.

15. The UK's current legislative regime offshore was chiefly designed for licensing oil and gas production. It therefore does not easily lend itself to the types of gas supply projects that the UK will need to come on-stream as indigenous production of natural gas declines.

16. As a result, there is no single piece of legislation that explicitly covers offshore gas supply activities. Consents have to be sought under a number of pieces of legislation, creating complexity and uncertainty for the investor. Developers may require consents under some or all of the following pieces of existing legislation (this list may not be exhaustive):

- The Petroleum Act 1998
- The Food and Environment Protection Act 1985
- The Coast Protection Act 1949
- The Transport and Works Act 1992.

17. This Part of the Act creates a new regulatory framework specifically designed for offshore gas storage and Liquefied Natural Gas unloading projects. The regime is intended to simplify the consenting process, reduce the administrative burdens on developers and create certainty over the legal operation and construction of new facilities. The aim is to encourage timely investment in offshore gas supply infrastructure and to contribute to security of supply in the longer term.

18. As part of simplifying the consenting processes for offshore gas storage and Liquefied Natural Gas unloading projects, the proposals in this Act will disapply the requirement on developers to apply separately for a licence under the Food and Environment Protection Act 1985 (c.48) to inject gas into the seabed, except where functions under that Act are exercised by the devolved administrations in Scotland, Wales or Northern Ireland. Sections 21, 23 and 24 of the Petroleum Act 1987 provide for the automatic establishment of safety zones around oil and gas installations and set out offences and the applicable penalties in connection with such safety zones. *Paragraph 4* of

Schedule 1 to this Act extends those provisions to installations used for offshore gas storage and Liquefied Natural Gas unloading projects.

Commentary on Sections

Activities requiring a licence

Section 2: Prohibition on unlicensed activities

19. This section prohibits specified activities from being carried out, except in accordance with a licence granted under section 4.

20. *Subsection (3)* specifies the activities for which such a licence is required. These include the use of a "controlled place" (as defined in *subsection (4)*) for gas storage or unloading; the recovery of the gas stored; the conversion of natural features (such as salt domes) for use as storage space; and related exploration activities. Such activities also include the establishment and subsequent maintenance of installations (which by section 16 may be fixed or floating structures) for those purposes. However, by *subsection (2)*, a licence will not be required for any activity falling within section 3.

21. *Subsection (4)* defines "gas" and "controlled place" for those purposes. By contrast to the definition in Chapter 1, "gas" is limited to combustible substances, and must consist wholly or mainly of the substances listed or other substances which may be specified by order. An order specifying a substance for these purposes is subject to negative resolution procedure (see section 94). A "controlled place" is any place within the limits of the territorial sea adjacent to the United Kingdom, (the territorial sea extends 12 nautical miles from baselines established under the Territorial Sea Act 1987 (c. 49)), or within a Gas Importation and Storage Zone designated under section

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

22. This section ensures that a licence under this Chapter is not required for certain activities which relate to developments which are liable to be subject to planning control (in particular under the Town and Country Planning Act 1990 (c. 8)). As a result, the risk of double regulation will be avoided in such cases. The excluded activities are:

- the establishment or maintenance of a gas unloading installation which extends at least in part into a controlled place (as defined in *section 2(4)*), and the unloading of gas to the installation in that place (see *subsection (1)(a) and (d)*);
- the conversion of a natural feature (such as a salt dome), which is only partly within a controlled place, the remainder being under land (*subsection (1)(b)*); and
- the storage (and subsequent recovery) of gas at a place which similarly is only partly within a controlled place

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

Licensing

Section 4: Licences

23. This section allows the Secretary of State to grant licences for the purposes of this Chapter. Such a licence will permit, under the terms and conditions laid down in the licence, the carrying on of one or more of the activities mentioned in section 2.

However, in order to make use of the sea, the seabed or spaces under the seabed for the purpose of these activities, an operator would in addition have to obtain a lease or (outside the territorial sea) authorisation from The Crown Estate, who administer the relevant rights to the offshore area vested under section 1 (or, within the territorial sea, vested in the Crown under common law). *Subsection (2)* accordingly allows the geographical coordinates covered by the licence to be linked to those covered by the lease or authorisation from The Crown Estate (see also section 6(2)).

Section 5: Applications

24. This section gives the Secretary of State the power to make regulations about the making of applications for licences. The regulations will be subject to negative resolution procedure (see section 105). In particular, the regulations may set out:

- who can apply for a licence;
- requirements that must be satisfied by or in relation to the licence applicant;
- how the application for a licence must be made;
- the information which an application must contain and any accompanying documents;
- an application fee.

Section 6: Terms and conditions

25. This section enables the Secretary of State to determine the terms and conditions of a licence. *Subsection (2)* allows the commencement and duration of the licence to be linked to that of the corresponding lease or authorisation from The Crown Estate.

26. *Subsection (3)* allows a licence to permit the licence holder to transfer the licence to another person or to include another person as a party to the licence, subject to any conditions set out in the licence.

27. The conditions of the licence may, under *subsection (4)*, also include a requirement for the licence holder to obtain the prior consent of the Secretary of State or another person (such as the Health and Safety Executive) for acts specified in the licence. This could include, for example, a requirement for such consent for the drilling of a well. The licence may provide for the consent itself to be subject to conditions. *Subsection (5)* makes it clear that one of those conditions might be the modification of the licence in a specified respect.

Section 7: Model clauses

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

29. *Subsection (3)* enables the Secretary of State to omit or modify one or more of the model clauses in the case of any particular licence.

Enforcement

Section 8: Offence to carry on unlicensed activities

30. *Subsection (1)* makes it an offence for a person to carry on any activity listed in section 2 unless that person has a licence, or is a person (such as a contractor or sub-contractor) who carries on the relevant activity on behalf of a person with a licence. However,

by *subsection (3)*, this is subject to the exception provided by section 3. *Subsection (2)* makes it an offence to cause or permit another person to commit the offence (for instance, by getting a contractor to do so). *Subsection (4)* sets out the penalties for any person found guilty of an offence under this section. These are a fine of up to the statutory maximum (currently £5,000 in England, Wales and Northern Ireland and £10,000 in Scotland) on summary conviction or an unlimited fine for conviction on indictment.

Section 9: Offences relating to licences

31. Once a licence has been granted, it will also be an offence to breach certain of its provisions. *Subsection (1)* specifies breaches which will give rise to an offence, and gives the Secretary of State a power to specify by order (subject to negative resolution procedure – see section 105) further kinds of breaches that will amount to an offence. Other enforcement powers will be available in respect of breaches of licences which are not criminal offences: see in particular section 10. The breaches attracting criminal penalties under the present section include:

- the carrying on of an activity such as a drilling operation, without first obtaining the prior consent specified by the licence (whether from the Secretary of State or another person whose consent is required);
- the breach of any conditions attached to such a consent;
- the failure to keep records, give a notice, or make a return or report, as required by the licence.

32. The licence holder will be liable for offences under the licence, even where the act or omission in question results from the behaviour of, for example, a contractor. However, *subsection (2)* provides that the licence holder will have a valid defence if it can show that it exercised due diligence in trying to avoid committing the relevant offence. In the case where the contractor was responsible for a breach, the licence holder would have to show that it had exercised due diligence in choosing and supervising the behaviour of the contractor.

33. *Subsections (3)* and *(4)* make it an offence for a person knowingly or recklessly to make a false statement in order to obtain a licence, or any required consent, or to fail to disclose information which that person knows, or ought to know, to be relevant to a licence application or to that consent.

34. *Subsection (5)* sets out the penalties for the offences in *subsections (1), (3) and (4)*: a fine of up to the statutory maximum (currently £5,000 in England, Wales and Northern Ireland and £10,000 in Scotland) on summary conviction, or an unlimited fine for conviction on indictment.

Section 10: Secretary of State's power of direction

35. Where there has been a breach of a licence, this section enables the Secretary of State to direct that the licence holder takes appropriate steps to remedy the breach. For example, if the licence requires equipment to be maintained to a good standard, a direction may require the equipment to be repaired or replaced. *Subsection (3)* requires the Secretary of State to consult the licence holder before a direction is given.

36. If the licence holder fails to comply with the direction, the Secretary of State may, under *subsections (4)* to *(8)*, ensure that the necessary action is taken, at the expense of the licence holder and (if so directed) with the latter's assistance.

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

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

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

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

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

Section 13: Inspectors

40. *Subsections (1) and (2)* of this section allow the Secretary of State to appoint persons to act as inspectors to assist in carrying out the Secretary of State's functions under this Chapter, and enable the inspectors to be remunerated.

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

Section 14: Criminal proceedings

42. *Subsection (1)* ensures that an offence arising by virtue of the provisions of this Chapter may be prosecuted in any part of the United Kingdom, regardless of the offshore location at which the offence may have been committed.

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

Supplementary

Section 15: Interaction with the petroleum licensing requirements

44. In some cases the storage of gas will require a petroleum licence, under section 3 of the Petroleum Act 1998, as well as a licence under section 4 of the Act. This is because the geological feature in which the gas is stored (for instance, a depleted hydrocarbon field)

may itself contain indigenous petroleum. As a result, petroleum will be "produced" when it mixes with gas that is recovered from the store. In the case of other geological features, the amounts of hydrocarbons present may be negligible. This section provides a means whereby the holder of a gas storage licence can be assured that a petroleum licence will not also be necessary. Thus, if the Secretary of State is satisfied that the amount of hydrocarbons present is insignificant (see *subsection (4)*), a direction may be given under *subsection (2)* which makes it clear that there is no requirement for a petroleum licence.

45. *Subsection (5)* requires such a direction to be revoked if circumstances change; but *subsection (6)* then ensures that the licence holder is allowed a period of grace before the revocation takes effect. A period will be allowed that is sufficient to enable the licence holder to apply for a petroleum licence, or to negotiate to obtain rights under an existing licence.

46. *Subsection (7)* requires the licence holder to be consulted before a direction is given or revoked.

Chapter 3: Storage of Carbon Dioxide

Summary and Background

47. Carbon Capture and Storage (CCS) is a process involving the capture of carbon dioxide from the burning of fossil fuels, its transportation, and storage in secure spaces, such as geological formations, including under the seabed. CCS can be applied to a range of industrial processes including coal-fired and gas-fired electricity generation. It has the potential to reduce carbon dioxide emissions of standard coal-fired generation by up to 90%. The Stern Review[1] highlighted the potential role that CCS could play in tackling climate change, with the potential to contribute up to as much as 28% of global carbon dioxide mitigation by 2050. However, CCS has not yet been applied to commercial-scale electricity generation.

48. The Government is committed to the development of CCS with electricity generation. The Government launched a competition in November 2007 to support a CCS demonstration project in the UK. This will be one of the first demonstrations anywhere in the world. The objective is for the demonstration project to be operational by 2014. The demonstration cannot proceed without an appropriate legislative regulatory regime being in place.

49. Most of the activities involved in CCS are standard industrial processes and can be readily regulated by established legislation. However, permanent storage of carbon dioxide is a novel activity, and existing legislation to control depositions below the surface of the land and seabed is not well suited to licensing the storage of carbon dioxide. This Chapter of the Act establishes a framework for the licensing of carbon dioxide storage and the enforcement of the licence provisions. It also applies existing offshore legislation (for example the decommissioning legislation in the Petroleum Act 1998) to offshore structures used for the purposes of carbon dioxide storage. Chapter 1 of Part 1, amongst other things, asserts the UK's rights to the use of the offshore sub-surface space for the storage of carbon dioxide.

50. The framework is limited to the offshore area. This is due to the fact that this area is likely to be of primary interest to developers in the short-term. Moreover, storage of carbon dioxide onshore requires amendment of existing EU Directives. Whilst such amendment forms part of the Commission's proposal for a Directive on the geological storage of carbon dioxide presented in January 2008, the details of any Directive finally adopted will be a matter for agreement within the EU Council and the European Parliament. Whilst the agreed text of the Directive is expected to cover both onshore and offshore areas, there is a risk that the Directive may not be agreed in time to fit in

1 *The Stern Review – The Economics of Climate Change*, Nicholas Stern, 2006

with the timeframe of the CCS demonstration project. The provisions in this Chapter are intended to provide sufficient flexibility for the EU regime to be readily implemented once agreed at the European level in relation to the offshore area.

51. Following a Legislative Consent Motion agreed by the Scottish Parliament, the provisions of this Chapter apply to the territorial sea adjacent to Scotland (0 to 12 nautical miles) where the Scottish Ministers will have the relevant legislative, licensing and enforcement powers. The practical arrangements as well as any cross-boundary issues arising in connection with the provisions of this Chapter to that area are intended to be addressed in a Memorandum of Understanding to be entered into between the Secretary of State and the Scottish Ministers.

Commentary on Sections

Activities requiring a licence

Section 17: Prohibition on unlicensed activities

52. This section prohibits the following activities from being carried out, except in accordance with a licence granted under section 18:

- storage of carbon dioxide with a view to its permanent disposal;
- conversion of a natural feature (for example, a saline aquifer) for such storage;
- exploration for a carbon dioxide storage site; and
- establishment or maintenance of an installation for any of those purposes.

Temporary storage of carbon dioxide will also require a licence, if such temporary storage is an interim measure prior to its permanent disposal.

53. *Subsection (3)* sets out the area within which activities are subject to those controls. It consists of the territorial sea adjacent to the United Kingdom (the territorial sea extends 12 nautical miles from baselines established under the Territorial Sea Act 1987 (c. 49)), together with any area designated as a Gas Importation and Storage Zone (see section 1).

Licensing

Section 18: Licences

54. This section allows the licensing authority (or any authority to which the relevant function has been transferred under section 34) to grant licences for the purposes of this Chapter. The licensing authority in relation to the activities of storage, conversion or exploration within the territorial sea adjacent to Scotland is the Scottish Ministers; otherwise, the licensing authority is the Secretary of State. However, where the activity concerned is only partly within Scottish territorial waters (for instance where a carbon dioxide store straddles the boundary between Scottish and English territorial waters) the licensing authority may be either the Scottish Ministers or the Secretary of State. In such a case, references to the "licensing authority" are to be construed as references to the Authority that exercises the relevant power to grant a licence or to consider a licence application. The licensing authority for an installation will always be the Authority that licensed the activity for which the installation is maintained or established.

55. A licence granted under section 18 will permit, under the terms and conditions laid down in the licence, the carrying out of one or more of the activities mentioned in section 17. However, in order to make use of the sea, the seabed or spaces under the seabed for the purpose of these activities, an operator would in addition have to obtain a lease or authorisation from The Crown Estate, who administer the relevant rights to the offshore area. *Subsection (3)* accordingly allows the geographical coordinates covered by the licence to be linked to those covered by the lease or authorisation from The Crown Estate (see also section 20 (4)).

Section 19: Requirements relating to grant of licences

56. This section gives the licensing authority the power to make regulations (subject to negative resolution procedure – see section 105) prescribing the conditions that the applicant may be required to meet in order to obtain a licence, as well as any other requirements that must be satisfied prior to the licence being granted. In particular, the regulations may set out:

- who can apply for a licence;
- how the application for a licence must be made;
- the information which an application must contain and any accompanying documents;
- an application fee; and
- a requirement for the applicant to provide financial security (such as a letter of credit, a fund held on trust, or another form of security) in respect of any obligations arising in connection with the licensed activities.

The obligations in relation to which financial security may be required are not restricted to those laid down by the licence, and may take into account, for example, any liabilities that may arise in connection with a carbon dioxide store (such as any liability that may arise under the EU Emissions Trading Scheme). While such security may not be needed in every case, the intention of requiring such a security would be to protect the public purse against the risk of the licensee failing to meet its obligations arising from its activities under the licence. Where a financial guarantee is required, then it will be required as a condition of the licence being granted, and not as a condition of making an application.

Section 20: Terms and conditions

57. This section gives the licensing authority (or an authority to which the relevant function has been transferred under section 34) a power to grant licences on such terms and conditions as that licensing authority thinks fit. The licensing authority's discretion is, however, subject to its power under section 21 to prescribe, by regulations (subject to the negative resolution procedure – see section 105), the provisions which must be contained in a licence.

58. By*subsection (3)* a licence may include provisions about the following matters (amongst other things):

- the financial security that may be required (in addition to the security required under section 19), or the release of any existing financial security during the licensing period (for instance to reflect a change of circumstances, such as an improvement in the operator's financial standing);
- a power to allow the licensing authority to review or (after consulting the licence holder) to modify the licence;
- a power to prevent, or enable the licensing authority to prevent the licence holder, in specified circumstances (such as where there is evidence to suggest that the store poses a significant environmental risk), from carrying on an activity (for example, the continued injection of carbon dioxide).

59. In addition to imposing conditions on the process of injecting carbon dioxide, the licence may also impose obligations on the licence holder after the activity of carbon dioxide injection has permanently ceased. Therefore licences will be able to cover both a period during which injection is taking place, and a subsequent period, during which it is expected the stability of the store would have to be demonstrated through monitoring and other activities prior to termination of the licence.

60. *Subsection (4)* ensures that the commencement and duration of the licence can be linked to that of the corresponding lease or authorisation from The Crown Estate.

61. *Subsection (5)* ensures that a licence can include an authorisation for the transfer of the licence to another person or the inclusion of another person as a party to the licence, subject to any conditions set out in the licence. Such conditions might for instance include obtaining the prior consent of the licensing authority for such a transfer.

62. *Subsections (6)* and *(7)* ensure that provisions in the licences can include conditions to obtain consent from the licensing authority (or an authority to which the relevant function has been transferred under section 34) for specified acts or omissions. Such consent may itself be granted subject to conditions.

Section 21: Content of licences: regulations

63. This section gives the licensing authority the power to make regulations (subject to negative resolution procedure – see section 105) about the terms and conditions which must be included in licences to be granted under section 18.

Enforcement

Section 22: Offence to carry on unlicensed activities

64. This section makes it an offence for a person to carry out any of the activities listed in section 17 unless that person has a licence issued under section 18, or is a person (such as a contractor or sub-contractor) who carries out the relevant activity on behalf of a licensed person. It is also an offence to cause or permit such unlicensed activities to be carried out (for example by getting a contractor to do so).

65. *Subsection (3)* sets out the penalties for those offences (on summary conviction, a fine not exceeding £50,000 and, on conviction on indictment, imprisonment for a term not exceeding two years or an unlimited fine, or both). These penalties are set at the same level as those in Part 2 of the Food and Environment Protection Act 1985 (c. 48) (FEPA), as amended by the Environmental Protection Act 1990 (c. 43).

66. *Subsection (4)* provides, however, for a lesser penalty in circumstances where the activities in question are limited to exploration (rather than for instance the activity of carbon dioxide storage). On summary conviction, a person will be liable 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.

Section 23: Offences relating to licences

67. Once a licence has been granted, it will also be an offence to breach certain of its provisions. *Subsection (1)* specifies breaches which will give rise to an offence, and gives the licensing authority a power to specify by order (subject to the negative resolution procedure – see section 105) further kinds of breaches of licences that will amount to an offence. Other enforcement powers will be available in respect of breaches which are not criminal offences: see in particular section 24. The breaches attracting criminal penalties under the present section include:

- doing something that requires the licensing authority's consent, without obtaining such consent (for example, where the regulatory authority's consent is required before commencing injection of carbon dioxide); and
- a failure to keep records, notify, or make a return or report, as required by the licence.

68. Only the licence holder will be liable for offences under this section, including where the act or omission in question results from the behaviour, for example, of a contractor. However, *subsection (2)* provides that licence holder will have a defence if it can show that it exercised due diligence in trying to avoid committing the offence. In

circumstances where the contractor was responsible for a breach, the licence holder would have to show, for example, that it had exercised due diligence in supervising the behaviour of the contractor.

69. *Subsections (3)* and *(4)* set out the penalties for those offences. These are identical to those for undertaking a licensable activity without a licence (section 22 (3)) (a fine not exceeding £50,000 and, on conviction on indictment, imprisonment not exceeding two years or an unlimited fine, or both; and lesser penalties in relation to exploration activities: on summary conviction, 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, an unlimited fine).

70. *Subsections (5)* and *(6)* create offences where a person knowingly or recklessly makes a false statement in order to obtain a licence, or any required consent, or fails to disclose information which that person knows, or ought to know, to be relevant to a licence application or to that consent. *Subsection (7)* sets out the penalties for the offences in *subsections (5)* and *(6)*: on summary conviction, the person found guilty of the offence would be liable to a fine not exceeding the statutory maximum (currently £5,000 in England, Wales and Northern Ireland and £10,000 in Scotland), or, on conviction on indictment, an unlimited fine.

Section 24: Licensing authority's power of direction

71. Where there has been a breach of a licence condition, this section enables the licensing authority (or an authority to which the relevant function has been transferred under section 34), to direct that the licence holder takes appropriate steps to remedy the breach. For example, if the licence requires equipment to be maintained to a good standard, a direction may require the equipment to be repaired or replaced. *Subsection (3)* requires the licence holder to be consulted before a direction is made.

72. If the licence holder fails to comply with the direction, the licensing authority (or the Authority to which the function is transferred), may, under*subsections (4)* to *(8)*, ensure that the necessary action is taken, at the expense of the licence holder, and (if so directed) with the latter's assistance.

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

Section 25: Failure to comply with a direction under section 24

74. *Subsection (1)* of this section provides that a failure to comply with a direction under section 24 is a criminal offence, with the penalties set out in *subsection (2)*: a fine of up to the statutory maximum (currently £5,000 in England, Wales and Northern Ireland and £10,000 in Scotland) on summary conviction, or an unlimited fine for conviction on indictment.

Section 26: Injunctions restraining breaches of section 17(1)

75. This section gives the Scottish Ministers (or an authority to which the relevant function has been transferred under section 34) the power to apply to the Court of Session for an interdict to restrain any actual or apprehended breach of section 17(1) in relation to a controlled place within the territorial sea adjacent to Scotland. In the case of any other such actual or apprehended breach, it gives the Secretary of State (or an authority to which the relevant function has been transferred under section 34) the power to apply to the High Court for an injunction or the Court of Session for an interdict.

76. For example, where there is evidence that a carbon dioxide storage-related activity is being carried out without a licence within the territorial sea adjacent to Scotland, the Scottish Ministers may apply to the Court of Session for an interdict requiring

the operator to cease the activity. The Secretary of State, similarly, may apply for an injunction to the High Court (or, where appropriate, for an interdict to the Court of Session) where he becomes aware that such unlicensed activities are being carried out, for instance, in a place outside UK territorial waters but within a Gas Importation and Storage Zone designated under section 1. The powers created by this section are in addition to any other powers the Scottish Ministers or the Secretary of State may have under this Chapter.

Section 27: Inspectors

77. *Subsections (1)* and *(2)* of this section allow the Secretary of State or (by *subsection (6)*) the Scottish Ministers, or an authority to which the relevant function has been transferred under section 34, to appoint persons to act as inspectors to assist in the carrying out of their functions under this Chapter, and enable the inspectors to be remunerated.

78. *Subsection (3)* gives the Secretary of State or (by *subsection (6)*) the Scottish Ministers the power to make regulations (subject to the negative resolution procedure – see section 105) setting out the powers and duties of the inspectors, and of any other person acting on their directions in connection with a function under this Chapter (such persons may include, for example, surveyors or other contractors instructed by the Secretary of State or the Scottish Ministers). These are likely to include, for example powers of entry, investigation and the right to take samples.

79. *Subsection (5)* enables such regulations to create criminal offences (for example it might be an offence to obstruct an inspector in the exercise of functions under the regulations). Such offences would attract the penalty of a fine not exceeding the statutory maximum (currently £5,000 in England, Wales and Northern Ireland and £10,000 in Scotland) or such lesser amount as is specified in the regulations, on summary conviction or, on conviction on indictment, an unlimited fine.

Section 28: Criminal proceedings

80. *Subsection (1)* ensures that an offence arising by virtue of the provisions of this Chapter may be prosecuted in any part of the United Kingdom, regardless of the offshore location at which the offence may have been committed.

81. *Subsections (3) and (4)* ensure that prosecutions for such offences alleged to have been committed in a controlled place (i.e. within the territorial sea or a Gas Importation and Storage Zone) may be brought only by the Secretary of State or a person authorised by the Secretary of State (or an authority to which the relevant function has been transferred under section 34 or a person authorised by such an authority), or by or with the consent of the Director of Public Prosecutions (or the Director of Public Prosecutions for Northern Ireland). Such provision is unnecessary in relation to Scotland, as there all prosecutions are brought by or on behalf of the Lord Advocate.

82. *Subsection (5)* provides that the same restrictions procedure will apply to any prosecution for an offence created by regulations under section 27, except that references to a person authorised by the Secretary of State (or by an authority to which the relevant function has been transferred under section 34) are to be read as references to an inspector.

Registration

Section 29: Requirement for public register

83. This section requires the Secretary of State (or an authority to which the relevant function has been transferred under section 34) to maintain a register containing prescribed information relating to all licences granted under this Chapter, and enables the Secretary of State to prescribe the information that must be included in the register. The information to be included will be prescribed by regulations (subject to the negative

resolution procedure – see section 105), and might for example include details of licences issued, revoked or modified, and of any enforcement action taken in relation to those licences. However, provision is made by *subsections (2) to (5)* for certain information to be excluded from the register. Such information may be excluded by the licensing authority (or an authority to which the function has been transferred under section 34) on the grounds of commercial sensitivity. However, the function of excluding information on national security grounds is given only to the Secretary of State, even where the information relates to a licence granted by the Scottish Ministers. By *subsection (6)* there will be free public access to the register, but a charge may be made for obtaining copies (which would have to reflect the costs of providing them).

84. This section is similar to section 14 of Food and Environment Protection Act 1985 (c.48) (FEPA), which requires the licensing authority to compile and keep certain particulars of FEPA licences and to make them available for public inspection.

Abandonment of offshore installations

Section 30: Abandonment of installations

85. *Subsection (1)* applies the provisions of Part 4 of the Petroleum Act 1998 to offshore structures that are installed for the purposes of carbon dioxide storage activities. As a result, the operators of such installations will be required to decommission them in a timely manner after operations have permanently ceased. By*subsection (2)*, the functions under Part 4 of that Act are to be exercised by the Scottish Ministers in the case of carbon dioxide storage installations licensed by them under this Chapter, and the Scottish Ministers have the power, by regulations subject to negative resolution procedure (see section 105), to make any appropriate modifications of the provisions of Part 4 of the Petroleum Act 1998 as they apply to such installations. By *subsection (3)* the powers of the Scottish Ministers under *subsection (2)* do not extend to installations used for Enhanced Oil Recovery (see the Note to section 33). By *subsection (4)* the Secretary of State has the power to make such regulations modifying Part 4 as it applies to any carbon dioxide storage installation not licensed by the Scottish Ministers.

Termination of the licence

Section 31: Termination of licence: regulations

86. This section gives the licensing authority the power to make regulations (subject to negative resolution procedure – see section 105) setting out the circumstances under which a licence may be terminated (which may be in addition to any termination provisions already contained in the licence). The regulations would also be able to require the licensing authority (or an authority to which the relevant function has been transferred under section 34) to take on the responsibility (including any financial liability) for the management of a carbon dioxide store on or after the termination of a licence. The intention is that regulations will, in particular, set out the conditions (in addition to any licence provisions) that must be met before the Secretary of State, or the said authority, can consent to the termination of a licence.

87. *Subsection (3)* ensures that any provisions of a licence granted under section 18 which relate to the termination of the licence are subject to the provisions made by such regulations.

Miscellaneous

Section 32: Safety zones

88. Sections 21, 23 and 24 of the Petroleum Act 1987 provide for the automatic establishment of safety zones around oil and gas installations and set out offences and the applicable penalties in connection with such safety zones. This section extends those provisions to installations used for carbon dioxide storage. Such safety zones are areas extending 500 metres around the installation, from which vessels are prevented from entering or remaining except in accordance with regulations made by the Secretary of

State or a consent given by the Health and Safety Executive. The penalty for such an offence is a fine not exceeding the statutory maximum (currently £5,000 in England, Wales and Northern Ireland and £10,000 in Scotland) on summary conviction and, on conviction on indictment, imprisonment not exceeding two years or an unlimited fine, or both.

Section 33: Enhanced petroleum recovery: power to make orders

89. Carbon dioxide can be used to improve the recovery of hydrocarbon production in a process known as Enhanced Oil Recovery (EOR) (which may also be applied to the recovery of natural gas). *Subsection (1)* ensures that the provisions of this Chapter do not extend to the use of carbon dioxide for the purpose of EOR, unless they are so extended by an order made by the Secretary of State (subject to negative resolution procedure – see section 105). The intention is to use this power, for example, to ensure that the requirements of this Chapter extend to operators undertaking an EOR activity if those operators wish to claim credits under the EU Emissions Trading Scheme (once carbon dioxide storage projects are included in that scheme). In the circumstances defined by an order under this subsection, a licence under section 18 would be required, as well as an authorisation (or, within the territorial sea, a lease) from The Crown Estate. (The latter requirement would not, however, apply in a case covered by *subsection (3)*.)

90. *Subsection (3)* provides that the Secretary of State may, by the same order and, for example, for the purpose indicated above, extend the application of this Chapter to EOR activities carried out in the area of the Continental Shelf, as defined in section 1(7) of the Continental Shelf Act 1964, where the area in question falls outside any area designated as a Gas Importation and Storage Zone.

Section 34: Power of Secretary of State etc to transfer functions

91. This section gives the Secretary of State or (by *subsection (8)*) the Scottish Ministers the power to transfer to another authority (which must be a public body, for example the Marine Fisheries Agency (or the Marine Management Organisation (MMO) once established) any of the functions conferred on them by this Chapter, with the exception of powers to make regulations or orders. Such a transfer may be made to several different authorities, either of different functions or of the same function in respect of different places. For example, one or more authorities may be given the function of granting licences in respect of all the activities covered by the Chapter, or just some of the activities. This allows flexibility in the choice of the regulatory authorities for carbon dioxide storage. Any transfer of functions under this section will be made by order subject to negative resolution procedure (see section 105).

92. *Subsection (4)* ensures that an order transferring functions to another authority may also provide for the financing of that authority's exercise of the transferred functions, and may require fees collected by the Authority to be paid into the Consolidated Fund (or, in the case of fees collected by authorities exercising functions transferred by the Scottish Ministers, the Scottish Consolidated Fund). The order may also modify section 188 of the Energy Act 2004, and regulations made under that section, in order to reflect the fact that certain functions have been transferred to another authority. That section gives the Secretary of State the power to collect charges in respect of the performance of certain energy-related functions, and is amended by *paragraph 13* of Schedule 1 to the Act so as to include functions of the Secretary of State under Chapters 2 and 3 of this Part, and to extend it to functions of the Scottish Ministers under Chapter 3.

93. *Subsections (5) and (6)* give the Secretary of State or (by *subsection (8)*) the Scottish Ministers a power of direction in relation to the exercise of functions by the authority to which they have been transferred. Before that power of direction is exercised, there is an obligation to consult with the authority concerned *(subsection (7))*.

Section 35: Interpretation

94. *Subsection (1)* contains definitions of terms used in Chapter 3. *Subsection (2)* provides that, for the purposes of that Chapter, the boundary of the territorial sea adjacent to Scotland is determined in accordance with provision made by an Order in Council under section 126(2) of the Scotland Act 1998 (apportionment of sea areas). For example, if the Order in Council provides one set of boundaries of the Scottish territorial sea for a specific purpose (e.g. fisheries) and then a different set of boundaries for all "residual" purposes, then, for the purposes of Chapter 3, the boundaries defined for the "residual" purposes would apply. Alternatively, if the Order in Council defines the boundaries specifically for the purposes of Chapter 3, or generally for all purposes of the Scotland Act 1998, that provision would apply.

Chapter 4:General Provisions about Gas Importation and Storage

Section 36 and Schedule 1: Chapters 2 and 3: consequential amendments

95. *Paragraphs 1* to *3* of the Schedule amend section 7A of the Food and Environment Protection Act 1985 ("FEPA"), which excludes certain matters relating to offshore pipelines and installations from the requirements of Part 2 of FEPA (which regulates deposits in the sea and under the seabed), and make a consequential amendment to section 24. The effect of the amendments is to ensure that the exclusion extends to all activities for which a licence is required under Chapter 2 or Chapter 3 of this Part. In relation to Chapter 2, that exclusion applies to the territorial sea (i.e. up to 12 nautical miles) adjacent to England, and to waters beyond the territorial sea, other than waters within which the Scottish Ministers have functions under Part 2 of FEPA. In relation to Chapter 3, that exclusion applies to the territorial sea adjacent to England and Scotland, and to waters beyond the territorial sea.

96. *Paragraph 4* amends the provisions of the Petroleum Act 1987 relating to automatic establishment of safety zones, to ensure that such zones are also established around all installations used for the purposes of the activities under Chapter 2 of this Part. Such safety zones are areas extending 500 metres around the installation, from which vessels are prevented from entering or remaining except in accordance with regulations made by the Secretary of State or a consent given by the Health and Safety Executive. A similar extension is made, for the purposes of Chapter 3 of this Part, by section 32.

97. *Paragraphs 6 and 7* amend section 11 of the Petroleum Act 1998 to ensure that the power to apply civil law (such as the law of tort) to offshore installations extends to all installations used for the purposes of Chapter 2 or Chapter 3 of this Part.

98. The new subsections (4A) and (4B) of section 11, inserted by *paragraph 7(g)* of the Schedule, ensure that the power under that section cannot be used in relation to carbon dioxide storage activities in waters in or adjacent to Scotland up to the seaward limits of the territorial sea, with the exception of activities which involve injection of carbon as part of Enhanced Oil Recovery.

99. *Paragraph 8* amends section 13 of the Petroleum Act 1998 to provide that the boundary of internal waters or territorial sea adjacent to Scotland is determined in accordance with provision made by an Order in Council under section 126(2) of the Scotland Act 1998 (apportionment of sea areas). For example, if the Order in Council provides one set of boundaries of the Scottish territorial sea for a specific purpose (e.g. fisheries) and then a different set of boundaries for all "residual" purposes, then, for the purposes of Part 2 of the Petroleum Act 1998, the boundaries defined for the "residual" purposes would apply. Alternatively, if the Order in Council defines the boundaries specifically for the purposes of Part 2 of Petroleum Act 1998, or generally for all purposes of the Scotland Act 1998, that provision would apply.

100. *Paragraph 9* amends the definition of "gas" for the purposes of Part 3 of that Act, in order to ensure consistency with the definition in section 2 of this Act (which defines the kinds of gases that are licensable for offshore gas storage and unloading).

101. *Paragraph 11* amends section 44 of the Petroleum Act 1998 to ensure that the provisions of Part 4 of that Act (which relate to the decommissioning of offshore installations including for example, obligations to remove the facilities completely after the permanent cessation of the facilities' operations) apply to all installations used for the purposes of activities under Chapter 2 of this Part. *Paragraph 10* makes corresponding amendments to section 30 of the Petroleum Act 1998, which sets out who will be required to submit a programme for such decommissioning to the Secretary of State. Similar provision is made, for the purposes of Chapter 3 of this Part, by section 30 of this Act.

102. *Paragraph 12* amends section 47A of the Petroleum Act 1998, which was inserted by the Energy Act 2004. At present, that section enables the Secretary of State to have regard to matters connected with the offshore generation of electricity (for instance by means of wind farms) in exercising functions under the Petroleum Act 1998. The amendment made by this paragraph will permit the Secretary of State to have regard also to activities licensed under Chapter 2 or 3 of this Part. A corresponding provision is not needed in relation to the Secretary of State's functions under Chapter 2 or 3 themselves, since in that case there are no existing licence holders who could claim to have a legitimate expectation that other offshore activities would not be taken into account in exercising the relevant functions.

103. *Paragraph 13* amends section 188 of the Energy Act 2004 to ensure that regulations made under that section (which are subject to negative resolution) can impose charges to fund the Secretary of State's functions in connection with activities under Chapters 2 and 3 of this Part, or the functions of the Scottish Ministers in connection with activities under Chapter 3. The regulations would be able to fix amounts that appear to be appropriate having regard to the costs that are likely to be incurred in carrying out the relevant functions, to be paid by the persons (within *subsection (3)* of that section) who are specified in the regulations. Where any of the Secretary of State's or the Scottish Ministers' functions under Chapter 3 are transferred to another authority under section 34, an order under that section can modify the operation of section 188 of the 2004 Act (see section 34(4)(c) and (8)).

Part 2: Electricity from Renewable Sources

The Renewables Obligation

Summary and Background

104. This Part of the Act deals with the changes proposed to the Renewables Obligation. The Renewables Obligation (RO) was introduced in 2002 to stimulate growth of electricity generation from renewable sources. The support currently provided under the RO does not differentiate between renewable technologies. It is the main policy measure for supporting the development of renewable electricity across Great Britain and Northern Ireland. In Great Britain the RO operates under the Electricity Act 1989 (c.29) with separate orders in England and Wales (the Renewables Obligation Order 2006 (SI No 2006/1004), as amended by the Renewables Obligation (Amendment) Order 2007 (SI No 2007/1078)), and in Scotland (the Renewables Obligation (Scotland) Order 2007 (Scottish SI No 2007/267)). These, together with a parallel measure in Northern Ireland (the Renewables Obligation Order (Northern Ireland) 2007 (S.R.2007/104), made under Articles 52 to 56 of the Energy (Northern Ireland) Order 2003 (S.I. 2003/419 (N.I.6))) provide for consistent Obligations in all three jurisdictions.

105. Under the existing regime, licensed electricity suppliers in the relevant part of Great Britain have a "renewables obligation" to produce to the Gas and Electricity Markets Authority ("the Authority"), before a specified day, certain evidence regarding the

supply to customers in Great Britain of electricity generated by using renewable sources. The evidence required is in the form of renewables obligation certificates ("ROCs") currently issued by the Authority to renewable electricity generators on the basis of 1ROC/MWh of renewable electricity. The generator can then sell these ROCs to suppliers with the electricity or separately. The Renewables Obligation Order in England and Wales and the one in Scotland set out the proportion of the electricity supplied by an electricity supplier that must be sourced from renewable sources.

106. As an alternative to providing ROCs, electricity suppliers may discharge their renewables obligations (either fully or partially) by making buy-out payments to the Authority. Payments made into the buy-out fund are redistributed at the end of the obligation period to suppliers who have produced ROCs, on a pro-rata basis. The obligation level has been deliberately set higher than the expected amount of renewables generation to be deployed in order to ensure there is a market for ROCs. This will mean some suppliers pay the buyout price for at least some of their obligation. The redistribution of the buyout fund in this way is intended further to promote competition between suppliers in supplying more electricity from renewables sources, and therefore to promote further investment in renewables generation.

107. The existing legislation also provides for suppliers who do not comply with the RO by the specified day to be treated as having subsequently discharged the RO if they make late buyout payments, together with escalating interest into a late payments fund.

108. It also makes provision for requiring suppliers to make payments to the Authority to cover some or all of an un-recovered shortfall in the buy-out fund caused, for example, by the insolvency of a supplier with an obligation who cannot make payments into the buyout fund. Where this occurs, additional sums are then required from the remaining electricity suppliers to cover the amounts that would have been paid by the insolvent supplier. This process is known as mutualisation.

109. As already mentioned, Northern Ireland has enacted legislation which is analogous to the provisions of the Electricity Act 1989 creating the RO. That legislation requires Northern Ireland suppliers to produce, as evidence, Northern Ireland Renewables Obligation Certificates ("NIROCs") issued by the Northern Ireland equivalent of the Authority, the Northern Ireland Authority for Utility Regulation. ROCs issued in Northern Ireland are also recognised in Great Britain and can be used by GB suppliers to discharge their obligations. Similarly ROCs issued under the two GB orders can be used by suppliers to fulfil the Northern Ireland RO.

110. The Government's proposed reform of the RO in Great Britain in the Act is designed to bring forward more renewables generation by increasing the effectiveness of the RO. The proposals enable the Secretary of State to increase support to some forms of renewable generation, while reducing subsidy to others.

111. The proposals will:

- Allow the Renewables Obligation to be banded to provide different levels of support for different technologies based on their cost and other considerations specified in the Act.
- Change the obligation to one in which suppliers must present a specified number of renewables obligation certificates (ROC), rather than supply a specified percentage of their electricity from renewable sources.
- Maintain the rights of most existing generating stations to claim 1ROC/1MWh once banding is introduced.
- Provide for the bands to be reviewed periodically or where a specified condition triggers a review.

- Provide for a mechanism to prevent a price crash in the event of an anticipated oversupply of ROCs.
- Require biomass operators to provide information to the Authority on the source of biomass fuels and what steps they have taken to ensure its sustainability.
- Allow generating stations using both fossil fuel and renewable sources (e.g. energy from waste plants) to claim ROCs only for the proportion of electricity generated by the renewable source.
- Enable the Authority to recover the costs of administering the RO from the buyout fund.

112. The Act transfers the functions of the Secretary of State under section 37 to the Scottish Ministers. In the past, the RO has been executively devolved to the Scottish Ministers by an Order in Council under section 63 of the Scotland Act 1998. In order to maintain the current devolution settlement, the new powers taken in relation to the RO need to be transferred to Scottish Ministers in so far as they apply to Scotland. This transfer of functions on the face of the Act has the same effect as if the powers had been transferred to the Scottish Ministers by an Order under section 63 of the Scotland Act 1998.

113. The detail of the changes will be covered in secondary legislation made under the new sections 32 to 32M of the Electricity Act 1989. The orders will be subject to a statutory consultation process.

114. Since the RO was first introduced in 2002, there have been a number of subsequent changes to the primary legislation (made by the Energy Act 2004 and the Climate Change and Sustainable Energy Act 2006) intended to improve the way that the RO works. However as has been indicated by the Committee of Public Accounts[2] and by the Government Review of the RO[3] there is scope for further increases in efficiency of the RO as a mechanism. The reforms proposed in this Act are intended to restructure the way the RO works while maintaining its overall aims. In practice there will continue to be an obligation on suppliers to present certificates to the Authority or to pay a penalty. The buy-out fund will continue to be recycled in order to promote competition in the renewables market. As there have been a number of previous changes to the primary legislation, the Government has also taken the opportunity through the Act to recast the existing legislation so that it is easier for the reader to follow.

Commentary on Sections

Section 37: The Renewables Obligation

115. Section 37 substitutes sections 32 to 32M in the Electricity Act 1989 in place of sections 32 to 32C. The new sections incorporate all amendments made to the Renewables Obligation (RO) in primary legislation since 2002, as well as the further additions and amendments proposed by this Act.

New section 32

116. New section 32 defines the RO and provides a power for the Secretary of State and the Scottish Ministers to make a renewables obligation order detailing how the RO will operate in practice. The process for Parliamentary approval in the Westminster and Scottish Parliaments of the order by affirmative resolution is set out in sections 32L(2) and (3).

117. *Subsection(6)* sets out the new obligation which may be imposed on electricity suppliers in the relevant part of Great Britain. The existing obligation requires specified electricity suppliers to provide evidence of the supply of a certain *quantity of electricity* from

2 http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmselect/cmpubacc/413/413.pdf
3 http://www.dti.gov.uk/energy/sources/renewables/policy/renewables-obligation/key-stages/2005-6-review/page18365.html

renewable sources. The new obligation requires electricity suppliers to submit a certain *number of ROCs* during a specified period. The number of ROCs to be submitted will be calculated in respect of the total amount of electricity of any kind (i.e. renewable or non-renewable) supplied by a given supplier in that period.

New section 32A

118. New section 32A enables an order to specify how the level of the obligation is to be set. In particular, the order will:

- specify how the number of ROCs which an electricity supplier must produce to the Authority for a given period is to be calculated;
- allow scope to provide that ROCs issued in respect of electricity generated from different renewable sources or different types of generating station can only be used to discharge the obligation up to a certain number or a certain proportion of a supplier's obligation (this allows for a cap on the contribution made by particular technologies such as co-firing of biomass by coal-fired power stations);
- determine how the amount of electricity supplied by electricity suppliers to customers is to be calculated. The size of a supplier's individual obligation is generally based on its electricity sales.

119. *Subsection (3)* provides that suppliers cannot produce the same ROC more than once as evidence of complying with the obligation.

120. *Subsection (6)* provides, among other things, for the order to enable suppliers to 'bank' a specified number of ROCs acquired during a current obligation period which can then be presented to the Authority in a later obligation period. This power is to allow suppliers to hold over ROCs where, for example, for business process reasons they do not manage to present ROCs by the due date or if they have more ROCs than they need to meet their obligation for a given period. The order can specify the proportion or numbers of ROCs that may be held back for any period.

New section 32B

121. New section 32B provides for the issue of ROCs by the Authority. It enables the order to set out the criteria for their issue. Section 32B also sets out what ROCs are to certify. *Subsection (3)* provides for a ROC to certify that the amount of electricity stated in the certificate is from a renewable source and that it has been supplied to customers in Great Britain or the part of Great Britain stated in the certificate. It also sets out a number of alternative matters which ROCs may be required to certify.

122. *Subsections (5), (6)* and *(8)* provide for ROCs to be issued in respect of total quantities of renewable electricity generated by more than one generator, which facilitates the issue of ROCs to agents acting for small generators.

123. *Subsections (7)* and *(8)* allow ROCs to be issued where renewable electricity has been generated but not sold through a licensed supplier in accordance with 32B(3) so long as that electricity has been used in a *permitted way*.

124. *Subsections (9)* and *(10)* set out what is meant by *permitted way*. This is where (i) the electricity which has been generated has been used by the operator of the generating station; (ii) where electricity is provided through a private wire network to customers (for example where a generator supplies electricity to customers on a neighbouring industrial estate); (iii) where the electricity has been provided to an electricity network in circumstances where its supply to customers cannot be demonstrated (for example, where a small generator produces excess electricity which it is unable to consume and the electricity automatically "spills" onto an electricity network). The definition of a private wire network is set out in *subsection (11)*.

New section 32C

125. New section 32C allows the order to exclude specified renewable sources or descriptions of generating stations from eligibility for ROCs, or to confine such eligibility to a proportion of electricity from specified sources. For example, large hydroelectric plants that have been running for over fifty years can compete in the wholesale electricity market without any additional incentive from the RO.

126. *Subsection (4)* provides for generating stations using both fossil fuel and renewable sources to be able to claim ROCs only for the proportion of electricity generated by the renewable source. The order will specify how the proportion is to be calculated, and the consequences for issuing ROCs to a generating station where it uses more than a certain proportion of fossil fuel during a period.

127. *Subsection (8)* replicates provisions in the existing legislation for the RO. It requires the order to preclude the issue of ROCs in certain circumstances where the Northern Ireland Authority is not satisfied that the electricity has been supplied to customers in Northern Ireland.

New section 32D

128. New section 32D creates a new power to enable the Secretary of State, through the order, to set bands. Changing the obligation in this way will enable different levels of support to be provided to different technologies and, in particular, will enable the order to provide higher levels of support for less mature, emerging technologies, such as offshore wind and biomass.

129. *Subsection (1)* provides that the order may specify how much electricity each ROC is to certify as having been supplied. In particular, (as *subsection (2)* explains) the amount may vary as between different types of renewable sources or technologies. So a ROC issued in respect of "Source A" could certify a different amount of electricity from a ROC issued in respect of "Source B", based on the band in which that particular technology or renewable source is placed

130. This banding power will thus allow for different technologies and renewable sources to be awarded ROCs for either greater or lesser amounts of electricity. For example, the Secretary of State and the Scottish Ministers may decide that a generating station using a certain renewable source or technology will have to generate 0.5 MWh of electricity to get 1 ROC. Equally the Secretary of State and the Scottish Ministers may decide that other generating stations using another renewable source or technology will have to generate 4 MWh of electricity in order to qualify for 1 ROC.

131. *Subsection (4)* sets out the matters to which the Secretary of State and the Scottish Ministers must have regard before setting bands in the order, namely:

a) the costs associated with generating electricity from renewable sources and the cost of transmitting or distributing that electricity;

b) the income that generators using renewable sources receive from generating electricity or from activities associated with the generation of electricity;

c) the impact of the exemption from the Climate Change Levy for those generators;

d) the likely impact of the proposed banding in securing the growth and development of renewables generation and associated industries;

e) the likely effect of the proposed banding on the number of ROCs issued by the Authority and the impact on the ROC market and on consumers;

f) the potential contribution of electricity generated from each of the various renewable sources to the attainment of any target relating to the generation of

energy generally, or of electricity in particular, which arises from a target imposed by, for example, an EU Directive.

132. *Subsections (7)* and *(8)* provide that after the first order with banding provision is made, any subsequent order with banding provision cannot be made except where a review of banding is carried out in accordance with the terms of the order.

133. The purpose of allowing the bands to be reviewed is to ensure that they can be amended to reflect changes in the costs of technologies in the marketplace as markets mature. *Subsection (8)* provides that the order can authorise the Secretary of State and the Scottish Ministers to review the bands at: (a) intervals set out in the order or (b) where one or more specified conditions are met. This could, for example, enable the Secretary of State and the Scottish Ministers to review the bands on an "emergency" basis. An emergency review may be triggered if there is an unforeseen significant change, for example, in the marketplace (for example, to grid connection costs); a new support scheme is introduced; a new technology comes forward, or there is over-compliance with the obligation.

New section 32E

134. New section 32E introduces a power to make transitional provisions in relation to existing projects once a renewables obligation order containing banding provision is introduced. For example, it may be desirable to protect existing investments by enabling most existing generating stations which have been financed under the Renewable Obligation Order 2006 to continue to be awarded 1ROC/1MWh once banding is introduced. *Subsections (1)* to *(3)* provide that transitional provision may be made either when banding is first introduced or when it is revised.

135. *Subsections (4) (5)and (6)* provide that, for generating stations which are in receipt of statutory grants and are specified in the order, the banding provisions may be made conditional on giving up any entitlement to grant (and repaying sums paid under it). Provision might be made, for example, whereby the operator would have a choice between keeping the grant and continuing to receive 1 ROC/MWh for its generation or returning the grant and receiving more ROCs per MWh once banding is introduced. *Subsection (9)* defines the meaning of statutory grant.

New section 32F

136. New section 32F provides for an electricity supplier to be able to discharge its renewables obligation (to the extent provided for by the order) by presenting Northern Ireland Renewable Obligation Certificates which are issued by the Northern Ireland Authority for Utility Regulation ("the Northern Ireland authority"). The Northern Ireland authority administers the RO in Northern Ireland. The practical effect of this provision is that it allows the obligation in Great Britain to work alongside the obligation in Northern Ireland thereby providing a single market for ROCs across Great Britain and Northern Ireland.

New section 32G

137. New section 32G provides for the order to make provision for electricity suppliers to discharge their obligation by paying a 'buyout' price to the Authority. *Subsection (1) (b)* provides for late payments made by electricity suppliers to the Authority to be used towards discharging the obligation too. *Subsection (2)* provides for the buyout price to be determined through the order and *subsection (3)* allows the buyout price to be linked to, for example, the Retail Price Index.

138. *Subsections (5)* to *(8)* provide that an order can make arrangements to require electricity suppliers to make additional payments where there is a shortfall in the amount due into the buyout fund for a particular obligation period. These additional payments are referred to in the current renewables obligation order as mutualisation payments. They

arise in circumstances where an electricity supplier cannot fulfil its obligation and is unable to make a buyout payment; for example, if a supplier goes into administration. Additional sums are then required from the remaining electricity suppliers to cover the amounts that would have been paid by the insolvent supplier. *Subsections (9)* and *(10)* define shortfall for these purposes.

New section 32H

139. *Subsection (1)* requires that payments made to the Authority in respect of the buyout fund and late payment fund be paid to electricity suppliers using an allocation system specified in the order. *Subsection (2)* allows for these payments to not be made where the money in the fund is instead used for the purposes set out in Section 32I (which relates to the recovery of the Authority's costs in administering the RO). *Subsection (3)* allows for these payments to be made to specified categories of electricity supplier only.

140. *Subsection (4)* allows an order to specify that if certain circumstances are met, monies in the late payment fund will be held over till a later period. This is intended to provide for situations where, typically, sums in the late payment fund are so small that the bank charges incurred by the electricity suppliers of receiving this money would be larger than the amounts received. In this situation the payments could be postponed, for instance, until the following year and paid out with the money for that year. The order may specify the amounts which may trigger such a carry over.

New section 32I

141. New section 32I is a new power which enables the order to specify that a proportion of the money received into the buyout fund and late payment fund from electricity suppliers can be used by the Authority to cover some or all of its costs of administering the RO in England, Wales and Scotland. Money from the buyout fund could also be used by the Authority to make payments to the Northern Ireland authority to cover some or all of the costs incurred by that authority of administering the RO in Northern Ireland.

New section 32J

142. New section 32J enables the order to provide for the Authority to require electricity suppliers and others (who may include electricity generators and agents acting on behalf of generators) to provide certain information in relation to their participation in the RO.

143. *Subsection (3)* introduces a new power which allows the order to require operators of stations generating electricity wholly or partly from biomass to provide information relating to the biomass. This information could, for example, relate to the source of the biomass and the circumstances under which it is grown. The purpose of this provision is to enable the Authority to gather and make public information on sustainability. If generators fail to provide the information in the time and form specified, the Authority may be empowered to postpone the issue of ROCs until such time as the information has been provided, or not to issue ROCs at all.

New sections 32K and 32L

144. New section 32K enables the order to make general provisions about a number of matters, including transitional provisions. New section 32L concerns the procedure for making an order and requires the Secretary of State and the Scottish Ministers to consult the Authority, the National Consumers Council, electricity suppliers subject to the RO, appropriate electricity generators and such other persons as the Secretary of State considers appropriate before making an order. As at present, both the order for England and Wales and the order for Scotland will be subject to affirmative resolution procedure. In addition, there is a statutory requirement to consult before the power is exercised.

New Section 32M

145. New Section 32M provides definitions for various terms within the preceding sections, including a definition of what constitutes a renewable energy source. That definition, in *subsection (1)*, includes 'waste of which not more than a specified proportion is fossil fuel' as a renewable source for these purposes.

146. *Subsection (2)* enables the order to define 'waste' and say how the fossil fuel element of waste is to be determined. The provision is designed to enable energy from waste generators to benefit from the renewables obligation by making it easier for them to claim ROCs in respect of the non fossil fuel element contained in waste.

Section 38: Section 37: supplemental provision

147. *Subsection (1)* of section 38 enables the requirement to consult under section 32L of the Electricity Act 1989 (as inserted by section 37) to be satisfied by consultation which takes place before commencement of section 37 or the passing of the Act.

148. *Subsections (2) and (3)* of section 38 enable the making of consequential amendments to certain references to Northern Ireland legislation contained in sections 32 to 32M. The Government anticipates that these references will need to be updated if the Northern Ireland legislation is amended to take account of changes made by this Act.

Section 39: Existing savings relating to section 32 of the Electricity Act 1989

149. Section 39 amends section 67(1)(c) of the Utilities Act 2000. This provision confers on the Secretary of State a power to modify, preserve, replace or otherwise deal with arrangements made pursuant to non fossil fuel obligation (NFFO) orders under section 32 of the Electricity Act 1989 in its original form. The amendment clarifies that the Secretary of State's powers under this provision extends to any arrangements which have replaced the original arrangements.

Section 40: The Northern Ireland renewables obligation

150. *Subsection (1)* of section 40 amends section 121 of the Energy Act 2004. Section 121 permits the Authority to carry out, on behalf of the Northern Ireland Authority, functions conferred on the Northern Ireland authority under or for the purposes of Articles 52 to 55 of the Energy (Northern Ireland) Order 2003. These functions relate to the administration of the RO in Northern Ireland. The amendments made by this section ensure that the Authority can continue to act on behalf of the Northern Ireland authority even if Articles 52 to 55 are amended by an order under Article 56. Article 56 confers power to amend Articles 52 to 55 to reflect any changes made to the corresponding legislation for Great Britain.

151. *Subsection (2)* ensures that the power in Article 56 of the Energy (Northern Ireland) Order 2003 to amend articles 52 to 55 of that Order, extends to making provision corresponding to the amendments made by section 37 (i.e. the new sections 32 to 32M of the Electricity Act 1989).

152. *Subsection (3)* applies where an order is made under Article 56 amending articles 52 to 55 of the Energy (Northern Ireland) Order 2003, and, by virtue of changes made by that order, a Northern Ireland Renewables Obligation Order is made under Article 52 of the Energy (Northern Ireland) Order 2003 ("the NI RO order"). It provides that the consultation requirements which have to be satisfied before the NI RO order is made may be satisfied by consultation carried out before the Article 56 order came into force or this Act was passed.

Feed-in Tariffs for Small-Scale Generation of Electricity
Summary and Background

153. 'Small-scale low-carbon electricity' generation is the generation of electricity from renewable or low carbon sources such as wind turbines, solar photovoltaic panels and micro combined heat and power (micro CHP). The benefits of encouraging small scale electricity generation include:

- Reduced transmission and distribution losses because the electricity is generated close to where it is used;
- businesses, communities and households can move from being passive users of electricity to active users who are more aware of energy generation and usage. This can promote behaviour changes such as increased energy efficiency and reduced energy demand; and
- the potential of the built environment can be harnessed for the deployment of renewables, such as rooftops and brown field sites.

154. Although renewable small scale electricity generators are eligible to claim Renewable Obligation Certificates (ROCs) under the Renewables Obligation (RO), key stakeholders have advised that many of these smaller generators, such as households and community players (for whom electricity generation is not their primary purpose), can be deterred by the administrative burdens of claiming and selling ROCs. To encourage these smaller generators up to a maximum capacity cap of 5MW, this element of the Act would enable a system of feed-in tariffs to be introduced. Such a system would work in tandem with the RO which is bringing forward larger scale renewable electricity.

155. The purpose of a feed-in tariff system would be to incentivise households, businesses, and community groups to generate low-carbon electricity. This can be achieved by making a fixed payment for each kilowatt hour of electricity generated from an eligible small-scale low-carbon source, to be passed onto such a generator or in some cases, potentially offering a payment up-front for the electricity 'deemed' to have been generated. We would expect this to encourage potential generators to make the necessary upfront capital investment in generating equipment, because they would have increased certainty of the payback from their investment.

Commentary on Sections

Section 41: Power to amend licence conditions etc: feed-in tariffs

156. *Subsection (1)* gives the Secretary of State the power to modify electricity supply and distribution licences (as well as standard conditions incorporated in licences, documents maintained in accordance with the conditions of licences or agreements that give effect to those documents) to introduce a scheme (that will be known as "feed-in tariffs") to encourage small-scale low-carbon generation of electricity. S*ubsection (2)* sets out the purposes for which modifications are to be made under the power.

157. *Subsection (2)(a)* states that the modifications in *subsection (1)* may be made for establishing feed-in tariffs for small scale low-carbon electricity generation, or for making arrangements for the administration of such a scheme. *Subsection (2)(b)* states that these modifications may also be made to require that electricity generated by small scale generators is able to enter the distribution network. *Subsection (2)(c)* also allows the Secretary of State to modify the documents referred to in subsection (1) to require the holder of a licence to make arrangements relating to matters referred to in subsection (2)(a) and (b). This is to facilitate the establishment and operation of the feed in tariff scheme.

158. *Subsection (3)* sets out some of the kinds of modifications which could be made under this section to the documents described in *subsection (1)*.

159. Under *subsection (3)(a),* modifications may require holders of electricity supply licences to make a payment to small-scale low-carbon generators or a payment to the Authority to be passed onto such generators. *Subsection (3)(b)* states that the

modifications can provides for how a payment under *subsection (3)(a)* is to be calculated.

160. *Subsection (3)(c)* allows for degression rates, where the tariffs to be paid to new installations would decrease over time. These degression rates could be set in anticipation of technology improvement or cost reductions, and may therefore differ for different technologies and at different sizes of installation.

161. *Subsection (3)(d)* allows the modifications to provide for circumstances where feed-in tariff payments will not be made or where reduced payments will be made. For instance, it is intended that generators will not be entitled to claim "double incentives", such as both feed-in tariffs and ROCs for the same electricity generation.

162. There may be situations where, subsequent to making a payment under subsection *(3)(a)*, an error is discovered, such as a payment being made in error or a generator being overpaid as a result of error in administration or in cases of miscalculation. In such circumstance, *subsection (3)(e)* allows for payments to be recovered from generators.

163. *Subsection (3)(f)* allows the modifications to require the holder of a supply licence or distribution licence to pay a levy to the Authority at specified times. *Subsection (3)(g)* allows provision to be made as to how this levy may be calculated. *Subsection (3)(h)* allows the holder of an electricity supply or distribution licence to receive a payment from the Authority. These subsections allow modifications to ensure that costs of tariffs paid out are redistributed fairly across all suppliers. The calculation in *subsection (3)(g)* could include, for example, consideration of the number of small-scale low-carbon generators a supplier services or the amount of electricity generated by small-scale low-carbon generators as a proportion of the total amount of electricity supplied to all customers. Funding for any such redistribution would come from the levy specified at *subsection (3)(f)*.

164. *Subsection (4)* provides definitions of the main terms used in the section. In particular, "the Authority" is defined as the Gas and Electricity Markets Authority and "small-scale low-carbon generator" is defined as the owner of plant used or intended to be used for small-scale low carbon generation. In turn, "small-scale low-carbon generation" is defined as the use, for the generation of electricity, of any plant which relies on the energy sources and technologies listed at *subsection (5)* and which does not exceed the maximum capacity (to be specified by order).

165. *Subsection (4)* puts an upper capacity cap of 5 megawatts on the level which can be specified as the maximum capacity for small-scale low-carbon generation plant under the Order. Beneath this maximum capacity cap the Secretary of State has the power to set a "specified maximum capacity" for small scale low carbon feed-in tariffs by order.

166. *Subsection (5)* sets out the sources of energy and technologies that are eligible for feed-in tariff payments for the generation of small-scale low-carbon electricity. These are biomass, biofuels, fuel cells, photovoltaics, water (including waves and tides), wind, solar power, geothermal sources and non-renewable micro combined heat and power systems with an electrical capacity of up to 50 kilowatts.

167. *Subsection (6)* provides that the list of sources of energy and technologies provided by *subsection (5)* can be modified by order which will be subject to the affirmative resolution procedure (see section 105), thereby enabling the Secretary of State to modify the list in the future. This gives the Secretary of State the flexibility to modify *subsection (5)*, for example if technological developments bring forward new low carbon technologies that the Secretary of State wished to receive feed-in tariffs. In this Act, by virtue of section 106, the power to modify includes the concepts of amending, adding to, revoking or repealing.

168. *Subsection (7)* provides that the power in *subsection (1)* may be exercised generally, only in relation to specified cases or subject to exceptions and also allows for the powers to be exercised differently. *Subsection 7(c)* gives the Secretary of State a power to make

any incidental, supplemental, consequential or transitional modifications that may be required. This mirrors the general provision relating to subordinate legislation made under powers in this Act and thus applies similar concepts to the licence modification power to enable the feed-in tariff scheme. *Subsection (8)* further clarifies the scope of the licence modification power.

Section 42: Power to amend licence conditions etc: procedure

169. This section sets out the procedure that the Secretary of State must comply with in order to exercise the modification powers conferred by section 41.

170. *Subsection (1)* obliges the Secretary of State, before making modifications, to consult the holders of licences being modified, the Gas and Electricity Markets Authority and others as he considers appropriate. *Subsection (2)* specifies that this consultation requirement may be satisfied by consultation either before or after the passing of the Act.

171. *Subsections (3)* and (*4)* provide that before making modifications to any of the documents in *section 41(1)*, the Secretary of State must lay the draft modifications before Parliament and allow a period of 40 days for either House of Parliament to reject the draft. *Subsection (5)* states that if Parliament does not reject the draft modifications then the Secretary of State may proceed to make those proposed modifications, and under *subsection (7)* he must publish details of any modifications as soon as reasonably practicable. S*ubsection (6)* makes it clear that if Parliament rejects the draft modifications the Secretary of State may, if he wishes, lay a revised draft in front of Parliament. *Subsections (8) and (9)* outline how the 40 day period is to be calculated. This process mirrors the negative resolution procedure.

Section 43 Feed-in tariffs: supplemental

172. Section 43 makes three supplemental provisions in relation to the modification power conferred by section 41. *Subsection (1)* ensures that any modifications made to a standard licence condition under the new power do not prevent any other part of the condition from being a standard condition.

173. *Subsection (2)* ensures that where licence modifications are made to standard licence conditions, the Gas and Electricity Markets Authority must make the same modifications for the purpose of future licences, and also must publish those modifications.

174. *Subsection (3)(a)* is an order making power for the Secretary of State to make provisions conferring functions either on the Authority or the Secretary of State, or both, in connection with the administration of any scheme established through section

175. *Subsection (3)(b)* allows the Secretary of State to make consequential amendments to provisions made by or under an Act (including Acts of the Scottish Parliament) as he considers appropriate in consequence of any provision made under *subsection (3)(a)* or under the section 41 power more generally. Orders made under section 43(3)(a) are subject to the negative resolution procedure (see section 105), whereas orders made under section 43(3)(b) are subject to the affirmative resolution procedure if they contain provision to modify an Act or an Act of the Scottish Parliament, and negative resolution procedure in other cases (see section 105).

Offshore Electricity Transmission

Summary and Background

176. The Government is putting in place a framework intended to encourage the development of generation of electricity from offshore renewable energy sources, for example offshore generating stations driven by wind. Offshore generating stations tend to consist of a device (for example, wind turbines placed on towers driven into the

seabed) which powers a generator to convert the (wind) energy into electricity. These offshore generating stations will need to connect to the main onshore electricity network (transmission and distribution) in order for the electricity generated to be supplied to end-users, including domestic consumers.

177. Electricity transmission generally constitutes the movement of electricity around a national grid system using high voltage networks, whilst electricity distribution generally constitutes the delivery of electricity on local low voltage networks to end users.

178. The Energy Act 2004 provides powers for the Secretary of State to make changes to the codes, agreements and licences – which regulate onshore electricity transmission and distribution – for the purposes of regulating offshore electricity transmission and distribution.

- Since the Energy Act 2004 was passed, the Government has been working with the Gas and Electricity Markets Authority ("the Authority") to establish an offshore transmission licensing regime to regulate:
- the conveyance of electricity along high voltage lines offshore (defined in the 2004 Act as those with a nominal voltage of 132kV or more), and
- associated plant and equipment which connect offshore generating stations to the onshore electricity network.
- the high voltage lines and associated plant and equipment together make up the "transmission assets".

179. The overall objective of the regulatory regime for these transmission assets is to enable large amounts of electricity from renewable sources generated offshore to connect to the onshore electricity network in a safe, economic and efficient manner, whilst maintaining the integrity of the electricity system as a whole.

180. To date, the transmission assets for offshore generating stations have been built and operated by generator-developers.

181. The new offshore transmission regime will:

- require the transmission assets to be owned and operated by a separate licensed entity (not the generator).
- extend National Grid's role as the onshore transmission system operator offshore.
- introduce a competitive tender process for determining to whom the Authority will grant a transmission licence to build, maintain and finance the transmission assets for a project. The Authority will make regulations under section 6C of the Electricity Act 1989 to enable it to run competitive tender processes and determine the successful bidders. The regulations will need to be approved by the Secretary of State. The Government anticipates that the Authority will consult on the way in which these provisions will be implemented, before the regulations under section 6C are made.

182. The new offshore transmission regime will come into force on commencement of section 89 (which makes changes to the Electricity Act 1989 so that certain activities offshore require a licence) and section 180 (which adds a new definition of "high voltage line" in the Electricity Act 1989) of the Energy Act 2004. From that date, those participating in offshore transmission will require a licence.

183. In addition to the powers contained in the Energy Act 2004 for offshore transmission, two further areas have been identified where powers are necessary to ensure the effective operation of the new licensing regime.

184. The Authority's new function of carrying out tender exercises will cause it to incur additional costs beyond those incurred in exercising its existing functions. The Act contains new provisions relating to cost recovery. These will ensure that the Authority is able to use alternative mechanisms to cover its costs in running the tender process. These will include mechanisms to ensure commitment to the tender process from different parties.

185. The combination of the offshore generating station and the transmission assets are described in these explanatory notes as the "offshore project". Some of the earliest projects for which a tender exercise for an offshore transmission licence will be required are offshore projects where the generator-developer will either:

- have funded and already built the transmission assets; or
- have funded and be part way through building the transmission assets; or
- be ready to construct the assets (in that it has all necessary funding in place to do so),

at the time the offshore transmission regime comes into force.

186. These offshore projects will require the transfer of property, rights and liabilities (which might include the transmission assets) from the existing owner (e.g. the generator-developer) to the successful bidder (as a result of the tender exercise for an offshore transmission licence) in order for that successful bidder to be able to perform its licence and statutory functions. For offshore projects where the transmission assets will have already been built when the new regime comes into force, and where a transfer to the successful bidder has not taken place by that time, a generator-developer will be "stranded" since it will not be authorised to convey its electricity lawfully to the onshore network. Although in the majority of cases it is anticipated that the transfer will be agreed via commercial negotiations between the parties, the Government considers that a mechanism is needed to cover the possibility of such negotiations failing. This will enable the Government to ensure that property is transferred in a fair, timely and effective way, and avoid generator-developers being "stranded". The Act enables the Authority to make a property scheme in those cases.

187. There is an amendment to the definition of "relevant offshore line", which is set out in section 180(2) of the Energy Act 2004 (which has not yet been commenced), and will be inserted into section 64 of the Electricity Act 1989. The amendment to this definition through the Act clarifies that any line built for the purpose of transmitting electricity from an offshore generating station and which is wholly or partly in internal waters, the territorial sea or an area designated under section 1(7) of the Continental Shelf Act 1964 (which currently includes the Renewable Energy Zone) is a "relevant offshore line", even if only a small proportion of the line is situated offshore. The definition in section 180(2) of the Energy Act 2004 is being repealed.

Commentary on Sections

Section 44 and Schedule 2: Offshore electricity transmission and property schemes

188. This section and Schedule amend Part 1 of the Electricity Act 1989 so as to confer on the Authority:

- power to recover costs related to competitive tenders for determining to whom offshore electricity transmission licences will be granted, and
- power to make property schemes to transfer property, rights and liabilities from the existing owner to the successful bidder for an offshore transmission licence.

189. *Subsection (2)* inserts a new section 6D into the Electricity Act 1989. It supplements section 6C which (as mentioned in the summary and background above) gives the Authority the power to make regulations to enable it to run competitive tender processes and determine the successful bidders. These regulations can include provisions about the process the Authority will follow in making such determinations.

190. New section 6D of the Electricity Act 1989 gives the Authority the ability, in making regulations under section 6C, to create new mechanisms to recover its costs in carrying out and administering tender exercises, including the ability to:

- seek payments from the participants in a tender exercise to cover its tender costs for a particular tender exercise (this is set out in section 6D(1)(a)). The participants are identified in sections 6D(2) to (4), being:
  - — a person who made a connection request to a transmission system or, if a project connects to shore at 132kV, a distribution system; this may include the generator-developer; and
  - — applicants for the offshore transmission licence.
- require the person who made a connection request to pay a deposit of an amount set by the Authority or require that person to provide other such security in respect of the Authority's tender costs (such as a letter of credit or bond) as the Authority agrees (set out in section 6D(1)(b)). The Authority will also accept payment of the deposit or other such security by an approved party, for example a parent company. This power could be used to obtain a financial commitment from a generator-developer to the tender process. For example, the Authority could use this power on the basis that such security would only be realised if the generator-developer withdrew from the tender exercise before the process was complete.
- require costs incurred by the Authority, in assessing the expenditure which has been incurred – or which in the Authority's view ought to have been incurred if done in an economic and efficient manner – on certain assets, to be met by the owner of the assets – see section 6D(1)(c). The Authority will need to undertake such assessments in cases where transmission assets need to be transferred to the offshore transmission licence holder from, for example, the generator-developer. The assessment will enable the Authority to determine the appropriate transfer value of assets for the purpose of arrangements between the parties for the transfer itself, and also for the purpose of calculating the offshore transmission licence holder's regulated revenue stream. This power applies to projects which are eligible for a property transfer scheme under the new Schedule 2A for the Electricity Act 1989. More details on how this property transfer scheme will operate and the specific circumstances in which interested parties can apply are given below;
- set out the timing of payments under these provisions;
- provide mechanisms for refunding payments to, or withholding payments (or deposits or other security) from, the persons providing the payments; and
- specify the consequences for the tender exercise or any participant in it should that participant fail to make a specified payment, or provide deposits or security, as required in new *subsection (1) (a*) or *(b).*

191. The Authority's tender costs will include the costs which are incurred in relation to a specific tender exercise and an appropriate proportion of costs incurred in relation to tender exercises generally (and which are not specific to that tender exercise). The detail of how amounts will be determined will be set out in the regulations but they would reflect the direct and indirect costs of running tender exercises.

192. New section 6D(5) prevents the Authority from recovering costs that are greater than those that it has incurred in carrying out each specific tendering exercise (with the proviso that it can also still recover in each case an appropriate proportion of costs incurred in relation to tender exercises generally). At any particular time during a tender exercise the Authority may hold amounts which exceed the amount of its tender costs. However, at the end of the exercise, it must ensure (for example, by making refunds) that it retains no more than its tender costs. In other words, the Authority's powers to recover costs are cost-reflective.

193. New section 6D(6) and (7) would enable the Authority to charge for an assessment of whether someone wishing to participate in a tender exercise would be able to meet specified requirements (which might include, for example, general technical competence to undertake the activity of offshore transmission) before a tender exercise takes place.

194. New section 6D(9) provides for all payments received by the Authority in respect of the tender exercises to be paid into the Consolidated Fund

195. *Subsection (3)* clarifies the scope of the regulatory regime for offshore transmission as set out in the Electricity Act 1989. It aims to make clear that the regime encompasses all offshore lines of 132 kilovolts or more which are:

- built wholly or mainly for the purpose of conveying electricity generated by an offshore generating station, and
- wholly or partly in an area of GB internal waters, an area of the territorial sea adjacent to the United Kingdom or an area designated under section 1(7) of the Continental Shelf Act 1964.

196. The definition of "relevant offshore line" is set out in section 180(2) of the Energy Act 2004 (which has not yet been commenced). Once commenced, the definition will be inserted into section 64 of the Electricity Act 1989. Section 64 of the Electricity Act contains the definition of "high voltage line" which is used to determine which electricity lines are considered, and regulated, as transmission lines.

197. *Subsection (3)* amends the definition of "relevant offshore line" so that any line built for the purpose of transmitting electricity from an offshore generating station is a "relevant offshore line", even if only a small proportion of the line is situated offshore. The definition in section 180(2) of the Energy Act 2004 is being repealed.

198. Without such an amendment through the Act, the definition of "high voltage line" in section 64 of the Electricity Act 1989 (once amended by the Energy Act 2004) would not cover a line of 132 kilovolts connecting an offshore generating station to the onshore grid in England and Wales, if the majority of the electric line was onshore. This is because such lines would not fall within the definition of "relevant offshore line" as set out in the Energy Act 2004. Such a line would therefore not be regulated as transmission.

199. *Subsection (3)* also extends the definition of "relevant offshore line" so as to include electric lines which are located within GB internal waters (in addition to lines located in the territorial sea adjacent to the United Kingdom and an area designated under section 1(7) of the Continental Shelf Act 1964 (which currently covers the Renewable Energy Zone)). As a result of this amendment, electric lines which are located in internal waters and which convey electricity from an offshore generating station will be categorised as "high voltage lines", i.e. transmission, if they *are* 132 kilovolts or more. Without this amendment, any such lines located in England and Wales would only be "high voltage lines" if they had a nominal voltage of *more than* 132 kilovolts. This amendment will not affect the treatment of lines in internal waters which do not convey electricity from an offshore generating station, for example a line which forms part of an onshore system and which crosses internal waters to connect one side of a river estuary to another.

Property Schemes

200. S*ubsection (4)* introduces Schedule 2, which gives effect to a new Schedule (Schedule 2A) to the Electricity Act 1989, (see also the new section 6E to that Act inserted at the end of *subsection (2)*). The new Schedule enables the Authority, in certain circumstances, to make a scheme transferring property, rights and liabilities from the existing owner to the successful bidder for an offshore transmission licence. The Authority can only make provision in such a scheme where it is necessary or

expedient for the purposes of the successful bidder performing its licence and statutory functions as an offshore transmission licence holder. The property scheme could, for example, include the transfer of electrical plant equipment together with rights and liabilities which are necessary for operation of the transmission system.

Scheme making power

201. *Paragraphs 1(1)* and *(3)* of Schedule 2A sets out a limit on the situations in which the power for the Authority to make a property scheme under this Schedule is available. The Schedule applies in cases where there is a tender exercise to select an offshore transmission licence holder, and the transmission system (or part of it) is transferred, or needs to transfer, to the successful bidder. The new Schedule does not apply where the successful bidder or its affiliate constructs or installs the relevant transmission assets (or where it procures the construction or installation of transmission assets by another party, e.g. a sub-contractor).

202. *Paragraph 1(2)* enables the Authority, upon application, to make a property scheme which transfers property, rights and liabilities to the successful bidder.

203. *Paragraph 2* sets out other provisions which may be included in a scheme, for example, provisions creating joint interests or rights in property between the asset owner and the successful bidder. A scheme may also provide for compensation to be paid to the parties and to third parties who are affected by the scheme (that is, a person whose consent would be required to the making of the provision if there was no scheme – see *paragraph 38(2)*).

Applications for schemes

204. *Paragraphs 3* to *10* set out rules governing applications for a property scheme including: the timing of applications; the giving of notice of an application to relevant persons; and the making of representations on an application to the Authority.

205. *Paragraph 3* states the parties who may apply for a scheme, namely the preferred bidder, the successful bidder or an asset owner. The definitions of preferred bidder and successful bidder are set out in *paragraphs 35* and *36*. In essence, a preferred bidder is a particular person to whom the Authority has announced it will grant the offshore transmission licence if certain matters are resolved to the Authority's satisfaction.

Timing of applications

206. Section 92 of the Energy Act 2004 gives the Authority the power to run competitive tender processes for the purpose of identifying to whom to award an offshore transmission licence. Under *paragraph 5* of this new Schedule, applications for a property scheme must be made within 4 years of section 92 of the Energy Act 2004 coming into force. However, the Secretary of State may by order extend the period for applications by a maximum of a further 3 years in respect of specific projects or groups of projects.

Notifying the non-applicant party

207. Notice of an application must be given to the non-applicant party (i.e. whichever of the asset owner and preferred or successful bidder has not made the application for a scheme) (*paragraph 6*) and also to any third parties who may be affected by the scheme (*paragraph 7*). There is also a requirement for the Authority to publish notice of the application (*paragraph 8*).

208. The non-applicant party may modify the application by adding further property, rights or liabilities to be considered by the Authority for inclusion in the scheme (*paragraph 9*). If the application is modified, there are further requirements for notice to be given

to the other party and affected third parties. There are also publication requirements in relation to a modification notice (*paragraph 10*).

209. The parties and third parties are given the opportunity to make representations to the Authority on an application and any modifications to it.

Restricting or withdrawing the application

210. Under *paragraph 11*, the applicant and the non-applicant party may jointly withdraw an application in whole or in part. This situation may typically arise if the parties have successfully negotiated the transfer of property, rights and liabilities before a property scheme has been made. If this is done, the Authority may require the applicant or the non-applicant party to pay costs incurred by either the Authority or any third party in connection with the application.

The Authority's functions in relation to applications

211. *Paragraph 12* contains provisions governing the Authority's consideration of an application. The Authority must consider the application on the basis of whether a property scheme is necessary or expedient for the performance of the successful bidder's functions as offshore transmission licence holder. The paragraph also sets out a procedure for the Authority to propose alternative arrangements in cases where it decides that the proposed treatment of particular property, rights or liabilities is not necessary or expedient, but that some other kind of provision should be made. For example, the Authority might decide that transfer of ownership of a particular piece of equipment was not justified, as the granting of access rights would be sufficient. Before making alternative arrangements, the Authority must inform the parties and affected third parties, who have the opportunity to make representations to the Authority on the proposal.

212. In order to ensure that property is not transferred prematurely, *paragraph 13* provides that the Authority may not make a scheme until:

- the offshore transmission licence has been awarded to the successful bidder; and
- the System Operator (described as the co-ordination licence holder in the Schedule) issues a notice of completion to the Authority in respect of the relevant transmission system. (Some large projects are being built in phases, with a working transmission system being in place as each phase of the generating station is completed, so that electricity can be transmitted to shore as and when each phased part of the project is ready. For such projects, it is envisaged that separate completion notices might be issued in respect of the transmission systems in place for each phase (and ultimately form part of a larger transmission system for the entire project once all phases had been completed).

Terms of a property scheme

213. *Paragraphs 14* and *15* set out rules governing the terms of a property scheme. In particular, the Authority may not set terms which adversely affect a third party (that is, a party whose consent would normally be required to the proposed provision if made other than by a property scheme but who has not consented to it) unless it concludes that it is necessary or expedient for the performance of the successful bidder's functions. In such a case, it must also consider including provision for compensation to be paid to the adversely affected third party. In addition, a scheme can include a requirement for the successful bidder and/or asset owner to pay costs incurred in connection with the scheme by each other, the Authority and affected third parties.

214. Any decisions by the Authority on terms which relate to financial matters (for example, compensation to be paid) must be on the basis of what is fair. Decisions on other

matters must be on the basis of what the Authority considers is appropriate in all the circumstances of the case.

Additional powers of the Authority

215. Under *paragraph 16(1)*, the Authority may require certain persons to provide it with information and assistance in connection with the Authority's functions in relation to the property scheme power. *Sub-paragraph (2)* allows the Authority to seek information in respect of any provision of a property scheme (or proposed scheme) from any other person, as may be necessary. For instance, if information or assistance provided by a person under *sub-paragraph (1)* alerts the Authority to relevant information held by someone else (e.g. a parent company), the Authority would be able to approach that person for a copy of that document. The Authority is also able to engage consultants to advise it for the purposes of making a property scheme under this Schedule (*paragraph 17*).

Notification of property scheme

216. *Paragraph 18* sets out the provisions for notification and publication of a scheme once made, including notification of affected third parties.

Refusal of application or part of an application

217. *Paragraph 19* sets out a requirement for the Authority to notify the parties and affected third parties of any decision to refuse an application for a scheme in whole or in part. If it refuses an application (in whole or in part), the Authority may direct the parties to pay costs incurred in connection with the application by each other, the Authority or affected third parties.

Effect of property scheme

218. *Paragraphs 20* and*21* provide for the transfers and other matters provided for in a scheme to take place by operation of law, according to the terms specified by the Authority, subject to any statutory requirements for registration of a particular transaction. *Paragraph 22* provides that where compensation is payable to a person, it may be recovered by that person if unpaid.

Review of determinations

219. *Paragraphs 23* to *27* provide for appeals against the Authority's determinations in relation to an application. Affected parties can appeal to the Competition Appeal Tribunal within 21 days of the scheme being made and coming into force or, if the scheme has not yet been made, the determination being made (*paragraph 23*). The Competition Appeal Tribunal has discretion to allow an appeal which is lodged after the 21 day period has expired.

220. *Paragraphs 24* to *27* set out the types of order the Competition Appeal Tribunal may make having considered an appeal. The Tribunal has, among other things, the power to overturn or amend the Authority's determination of any property scheme, or require the Authority to reconsider any financial matter.

Interim arrangements pending review of determination

221. *Paragraphs 28* to *32* provide for the Tribunal to have the power to make interim arrangements (such as the suspension of a scheme, or the granting of interim access to property included in a scheme) pending the outcome of an appeal. For example, if a successful bidder is appealing the Authority's decision not to transfer a particular asset, it could apply to the Tribunal for emergency interim access to that asset.

Appeal on a point of law

222. *Paragraph 33* provides a further appeal to the Court of Appeal or Court of Session on a point of law.

Change of asset owner

223. If transmission assets are transferred to a new asset owner after an application is made, paragraph 34 ensures that any reference in the Schedule to the asset owner applies to the new asset owner.

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 Directive[4] ; 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.

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

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4 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)

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,
- 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 trial and 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. Under*subsections (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 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.

Part 4: Provisions Relating to Oil and Gas

Petroleum Licensing

Summary and Background

365. Section 76 makes amendments to Part 1 of the Petroleum Act 1998 (the "1998 Act") (which concerns the licensing of petroleum exploration and extraction). These amendments give the Secretary of State new powers relating to the unconsented transfer of rights or benefits under petroleum licences. Section 77 and Schedule 3 amend various model clauses of petroleum licences granted pursuant to the 1998 Act or the Petroleum (Production) Act 1934 (c.34) (the "1934 Act"). The amendments to model clauses are intended to ensure the more efficient management of the licence and to ensure that suspended petroleum wells are properly abandoned including:

- a power of partial revocation of a licence in the event of, for example, the insolvency of one, but not all, of the persons constituting the licensee;
- a new obligation for the licensee to provide contact details to the Minister; and
- a new power to require a licensee to plug and abandon a well which has been suspended for at least one month.

Commentary on Sections

Section 76: Transfers without the consent of the Secretary of State

366. Petroleum licences issued under the 1934 Act and the 1998 Act grant a licensee the right to search, bore for or get petroleum. Under the terms of certain petroleum licences issued under the 1998 Act or the 1934 Act, the licensee must obtain the Secretary of State's prior written consent before assigning or transferring any right or benefit in the licence. Nevertheless, such rights or benefits are sometimes transferred without the Secretary of State's prior consent having been obtained.

367. This section inserts three new sections after section 5 of the 1998 Act dealing with transfers of rights in a licence, or rights or benefits derived from such rights, (other than by way of security for a loan) which have not received the Secretary of State's prior consent (an "unconsented transfer"). The three new sections are:

- 5A Rights transferred without consent of the Secretary of State
- 5B Information
- 5C Offences under section 5B: supplemental

New section 5A : Rights transferred without consent of the Secretary of State

368. Where there has been an unconsented transfer, *subsection (2)* gives the Secretary of State a power to issue a notice to both the transferor and the transferee directing that the right or benefit in the licence revert back to the transferor from a date specified in the notice. That date must not be earlier than the date the notice is given (*subsection (3)*).

369. During the period of the transfer the transferee will take any rights to search for, bore for or get petroleum which have in fact been transferred. The transferee will therefore

effectively take any petroleum extracted or monies received in respect of any such petroleum (and consequently will be responsible for any tax liabilities associated with such petroleum or monies). The transferor will nevertheless remain liable for any obligations arising under the licence. Following a direction under *subsection (2)* the assigned rights and benefits will revert back to the transferor from the date specified in the notice (and consequently any associated tax liabilities which relate to the ownership of petroleum may apply to the transferor as from that time). Under *subsection (4)*, the Secretary of State must notify both the transferor and the transferee of any proposal to issue a notice under *subsection (2)* and the Secretary of State must also give both parties a reasonable opportunity to make representations.

370. Under *subsection (5)*, a notice under *subsection (2)* must be issued within 3 months of the Secretary of State learning of the unconsented transfer.

New section 5B: Information

371. For the purpose of enabling the Secretary of State to determine whether an unconsented transfer has occurred, *subsection (1)* of Section 5B allows the Commissioners for Her Majesty's Revenue and Customs (the "Commissioners") to disclose to the Secretary of State information relating to the transfer of rights granted under petroleum licences.

372. Under *subsection (3)*, information disclosed under this section may only be further disclosed:

- for the purposes of enabling the Secretary of State to determine whether an unconsented transfer has occurred – but only with the consent of the Commissioners (which may be general or specific);
- pursuant to a court order; or
- with the consent of the person(s) to whom the information relates.

373. Under *subsection (4)*, a person commits an offence if he discloses information – except in circumstances set out under *subsection (3)* – which specifies the identity of the person to whom the information relates, or from which that person's identity can be deduced.

374. *Subsection (5)* provides a defence to a person who is charged with an offence under *subsection (4)*. The defence applies where a person charged proves that they reasonably believed either that the disclosure of the information was lawful, or that the information had already and lawfully been made available to the public.

375. Under *subsection (6)*, a person found guilty of unlawfully disclosing the information 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), a maximum of 12 months in prison, or both; or
- on conviction on indictment, to an unlimited fine, a maximum of 2 years' imprisonment, or both.

New section 5C: Offences under section 5B: supplemental

376. *Section 5C* makes further provision in respect of proceedings brought in England and Wales and Northern Ireland for offences committed under section 5B.

377. S*ubsection (1)* provides that in England and Wales no proceedings for an offence under section 5B may be instituted except by the Director of Revenue and Customs Prosecutions, or with the consent of the Director of Public Prosecutions. S*ubsection (2)* provides that in Northern Ireland no proceedings can be instituted except by the Commissioners or with the consent of the Director of Public Prosecutions for Northern Ireland.

378. *Subsection (3)* provides that the maximum term of imprisonment that can be imposed on summary conviction in Northern Ireland is 6 months rather than 12 months.

379. *Subsection (4)* provides that if the offence is committed in England and Wales before commencement of section 282 of the Criminal Justice Act 2003 (c.44), the maximum imprisonment on summary conviction is 6 months rather than 12 months.

Section 77: Model clauses of petroleum licences & Schedule 3: Petroleum Licences: Amendments to Model Clauses

380. This section, together with Schedule 3, amends the secondary legislation containing model clauses for certain existing licences granted under the 1934 Act or the 1998 Act ("relevant licences"), with the effect that new clauses, and amendments to existing clauses, will be included in relevant licences from the date that the relevant provisions of the Schedule come into force. In other words, this section amends all existing licences that contain the relevant model clauses we are amending (as set out in the Schedule).

381. *Subsection (2)* provides that relevant licences granted under the 1934 Act or the 1998 Act and which are still in existence immediately before the relevant provisions of the Schedule come into force, will also contain the relevant model clauses as set out in the Schedule. *Subsection (3)* ensures that the new provisions will also be inserted into existing licences which incorporate modified or amended versions of the model clauses (including cases where particular model clauses have been omitted). *Subsection (7)* provides that where any provision is added to the terms of an existing licence by this section and Schedule, the Secretary of State and the licensee may nevertheless agree to alter or delete the provisions by deed.

382. The amendments contained in the Schedule are as follows:

Provision of contact details to Minister

383. The Schedule inserts clauses into relevant licences which require licensees to provide the Minister with contact details for the person to whom notices, directions and other documents under the licence are to be sent.

384. If the licensee fails to comply, the licensee may be served with a notice which requires the provision of such details within a month. The notice will also inform the licensee that if there is a failure to provide the information required within the one month time limit, the Minister will treat the licensee as having supplied the contact details which the Minister has specified in the notice. It is the licensee's responsibility to ensure that the contact details held by the Minister are up to date.

The power to issue a notice to plug and abandon a well

385. The Schedule also inserts clauses into relevant licences which give the Minister the power to issue a notice requiring the licensee to plug and abandon a well which has been suspended for a period of at least a month. The licensee will be required to plug and abandon the well within the period set out in the notice.

386. A notice requiring a licensee to plug and abandon a well under this section must be given more than one month before the natural expiry or termination of the licensee's rights in relation to the licence.

387. *Subsection (4)* of section 77 provides that the power to require that a suspended well be plugged and abandoned cannot be exercised in relation to a well where drilling started before the relevant provisions of the Schedule come into force.

Revocation on change of control

388. Under the terms of existing model clauses of relevant licences, the Minister may revoke a licence whenever there is a change of control in a licensee in circumstances where:

- the Minister serves notice on the licensee stating that the Minister intends to revoke the licence unless a further change in the control of the licensee as is specified in the notice takes place within a period of three months; and
- that further change does not take place within that period.

389. The existing model clauses of relevant licences provide that there is a change of control (hence requiring the consent of the Secretary of State) whenever a person has control of the licensee who did not have control of the licensee when the licence was *originally* granted. The Schedule extends this by providing that where rights have been assigned, there will also now be said to be a change of control whenever a person takes control over an assignee who did not control that assignee when the rights were assigned.

390. *Subsection (5)* of section 74 provides that this extended power of revocation only applies if the change of control occurred after the relevant provisions of the Schedule come into force.

The power of partial revocation

391. The Schedule also inserts clauses into relevant licences which apply when more than one person holds the licence. Whilst the Minister already has the power to revoke the entire licence in the circumstances set out below (on account of the licence being joint and several in nature) this provision supplements that power by giving the Minister a power to revoke the interests of one or more, rather than all, of the persons which are the licensee. This power applies where:

- the person or persons concerned become bankrupt or insolvent;
- there is a change of control of the person or persons concerned and the person or persons fail to take steps to address the Minister's objections to that change in control; or
- the person or persons concerned cease to have a fixed place of business in the UK from which operations under the licence are carried out.

392. Obligations and liabilities arising before the partial revocation of an interest in a licence are not affected by the partial revocation.

393. Where a licence interest is revoked in relation to one person on the licence, the person whose interest has been revoked remains jointly and severally liable for any obligations arising before the partial revocation takes place. After partial revocation, the rights, obligations and liabilities associated with the licence continues to have effect in respect of all the remaining persons on the licence. In practice, the Secretary of State would expect to consult the non-defaulting parties before exercising this power of partial revocation.

394. *Subsection (5)* of section 77 provides that the power of partial revocation only applies if the event happens after the relevant provisions of the Schedule come into force.

Third Party Access
Summary and Background

395. The Government considers that access to infrastructure on fair and reasonable terms is crucial to maximising the economic recovery of the UK's oil and, particularly, gas. This is because many fields on the UK Continental Shelf (UKCS) and in the territorial sea do not contain sufficient reserves to justify their own infrastructure, but are economic as satellite developments utilising existing infrastructure.

396. There is a voluntary "Infrastructure Code of Practice" (*The Code of Practice on Access to Upstream Oil and Gas Infrastructure on the UK Continental Shelf*) which sets out principles and procedures to guide all those involved in negotiating third-party access

to oil and gas infrastructure on the UK Continental Shelf. There is existing legislation in the Acts listed below under which, if a third party is unable to agree satisfactory terms of access with the owner of most upstream infrastructure, the third party seeking such access can – and under the terms of the Infrastructure Code of Practice is obliged to - make an application to the Secretary of State to decide whether access should be granted and, if so, on what terms:

- The Pipe-lines Act 1962 (c.58)
- The Gas Act 1995 (c.45)
- The Petroleum Act 1998 (c.17)

397. In the existing regulatory framework there are gaps in the coverage of the Secretary of State's powers to determine third party access that mean some parts of the upstream petroleum infrastructure are not covered. "Upstream infrastructure" refers to infrastructure relating to the production of oil and gas including transportation and processing required to get it into a saleable state. Downstream infrastructure refers to facilities such as oil refineries and the distribution and storage network required to get oil products and gas to consumers. Gaps in the legislation exist, for example, in relation to access to oil processing facilities, certain gas processing facilities and services associated with pipelines. This means that a party seeking access to all links in the chain of the infrastructure would currently be able to ask the Secretary of State to determine a dispute over only certain parts of it. The legislation can only be wholly effective as a backstop if it covers the entire range of upstream infrastructure. If it did so, the Secretary of State would be able to be a more effective arbiter in situations where interested parties cannot reach commercial agreement.

398. The Act extends the existing regime so that, if he is requested to intervene in the case of disputes over third party access, the Secretary of State will have the power to determine third party access rights to all upstream petroleum infrastructure.

Commentary on Sections

Section 78: Third party access to infrastructure

399. This section extends the scope of definitions in the existing legislation, so that parts of the upstream petroleum infrastructure not currently covered by the third party access regulatory regime are brought within their scope.

400. *Subsection (1)* amends section 66(1) of the Pipe-lines Act 1962 (c.58) (interpretation) to expand the definitions of:

- "Gas processing operation" to include separating, purifying, blending, odorising or compressing gas to convert it into a form in which a purchaser is willing to accept delivery from a seller, or to enable the gas to be delivered to another place either inside or outside Great Britain. The expanded definition also covers the loading of gas for the purpose of enabling the processed gas to be transported to another place (whether inside or outside Great Britain) either at a facility carrying out gas processing operations (as described above) or where the gas has been piped from such a facility.
- "Terminal" to include oil processing facilities (oil processing facilities are defined at section 78)
- "Upstream petroleum pipe-line" to include apparatus, works and services that are associated with the operation of a pipe-line or network. As a result, the new definition captures services used for operating upstream petroleum pipelines which are not currently part of the third party access regulatory regime.

The effect of the expanded definitions is to increase the scope of the Secretary of State's powers over third party access to upstream petroleum pipe-lines provided by section 10E of the Pipe-lines Act 1962 (c58).

401. *Subsection (2)* amends subsection (6) of section 12 of the Gas Act 1995 (c.45) (acquisition of rights to use gas processing facilities) to expand the definition of:

- "Gas processing operation" to include separating, purifying, blending, odorising or compressing gas to convert it into a form in which a purchaser is willing to accept delivery from a seller, or to enable the gas to be delivered to another place either inside or outside Great Britain. The expanded definition also covers the loading of gas for the purpose of enabling the processed gas to be transported to another place (whether inside or outside Great Britain) either at a facility carrying out gas processing operations (as described above) or where the gas has been piped from such a facility.

402. *Subsection (2)* also amends subsection (7) of section 12 of the Gas Act 1995 to expand the definition of:

- "Associate" to bring it in line with the new provisions covering third party access to oil processing facilities in this Act. The definition of associate is set out in section 79 and is explained in the detailed commentary to that section. These changes ensure the definition of associate is consistent across the whole of the third party access regime for upstream petroleum infrastructure.

The effect of the expanded definitions is to increase the scope of the Secretary of State's powers over third party access to gas processing facilities under section 12 of the Gas Act 1995 (c 45).

403. *Subsections (3)* and *(4)* amend sections 26 and 28 of the Petroleum Act 1998 (c.17) respectively. *Subsection (3)* amends section 26 ("meaning of pipeline") so as to expand the scope of the definition of a pipe-line to include services (for example the provision of fuel or power needed to operate third party equipment on or from the host facility) as well as the apparatus and works associated with a pipe-line.

404. *Subsection (4)* amends section 28 (interpretation of Part 3) in two ways, expanding the definitions of:

- "Gas processing operation" so as to bring it into line with the changes in the Pipe-lines Act 1962 and the Gas Act 1995 described above, i.e. to include separating, purifying, blending, odorising or compressing gas to convert it into a form in which a purchaser is willing to accept delivery from a seller, or to enable the gas to be delivered to another place either inside or outside Great Britain. The expanded definition also covers the loading of gas for the purpose of enabling the processed gas to be transported to another place whether inside or outside Great Britain, either at a facility carrying out gas processing operations (as described above) or where the gas has been piped from such a facility.

- "Terminal" to include oil processing facilities (oil processing facilities are defined at *subsection (4)(b)*).

The effect of the expanded definitions is to increase the scope of the Secretary of State's powers over third party access to controlled petroleum pipelines under section 17F of the Petroleum Act 1998.

Section 79: Modification of pipelines

405. This section inserts two new sections after subsection 10F of the Pipe-lines Act 1962 (c.58) (reducing necessity for constructing additional pipe-lines):

- 10G which provides for compulsory modifications of pipe-lines by way of notice; and
- 10H which concerns enforcement of such a notice.

These additions are modelled on the Secretary of State's powers under section 16 of the Petroleum Act 1998, under which he can issue a notice requiring the modification of controlled pipelines (which in the context of section 16 of the Petroleum Act 1998 means pipelines which are offshore). As with the third party access regime under that Act, this power is only exercisable on application by a person other than the owner of the pipeline. Failure to comply with a notice issued under section 16 is an offence and a similar offence will be included in the new additions to the Pipe-lines Act 1962.

406. The section will therefore give the Secretary of State powers under the Pipe-lines Act 1962 in relation to upstream petroleum pipelines equivalent to those the Secretary of State already has under section 16 of the Petroleum Act 1998 for controlled pipelines offshore.

New Section 10G: Compulsory modifications of pipelines

407. This section gives the Secretary of State the power to issue a pipeline modification notice in respect of upstream petroleum pipelines, on the application of a person other than the owner. A notice can be issued to the applicant and owner of the pipeline only if the Secretary of State is satisfied that the capacity of the pipeline can be increased by modifying the apparatus and works associated with the pipeline, or that the pipeline can and should be modified by installing junctions to connect it to other pipelines. A modification notice also covers any changes, substitutions, or additions in relation to apparatus and works associated with the pipeline. (see *subsection (5)*).

408. *Subsection (3)* sets out that the notice must:

- Specify the modifications that the Secretary of State thinks should be made.
- Specify the sums or method of determining the sums which the Secretary of State thinks should be paid to the owner by the applicant to pay for the costs of carrying out the modifications.
- Require the applicant to make arrangements to ensure those sums will be paid to the owner if the owner carries out the modifications or satisfies the Secretary of State that they will be carried out.
- Specify the period in which those financial arrangements must be made.
- Require the owner to carry out the modifications within a period specified in the notice.
- Authorise the owner to recover the sums from the applicant if the works are carried out or the Secretary of State is satisfied that they will be carried out.

409. Furthermore, before issuing the notice *subsection (4)* requires the Secretary of State to give the owner of the pipe-line an opportunity to be heard.

410. *Subsection (6)* clarifies that if a pipeline is offshore (i.e. it falls into the section 14 Petroleum Act 1998 definition of "controlled pipeline"), the modification provisions under that Act will apply (see section 16 Petroleum Act 1998) instead of the provisions under this new section 10G of the Pipe-lines Act 1962.

New section 10H: Enforcement

411. This section makes it an offence for an owner to fail to comply with a "pipe-line modification notice" issued under new section 10G. A person found guilty of such an offence is, as set out in new *subsection (2)*, liable to:

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

412. *Subsection (3)* provides a person in proceedings for prosecution of the offence with a defence, if the person can prove he exercised due diligence in trying to comply with the pipe-line modification notice.

413. *Subsection (4)* states that proceedings can be instigated only by the Secretary of State (or a person authorised by the Secretary of State) or by or with the consent of the Director of Public Prosecutions

414. *Subsections (5)* to *(7)* provide that if it can be proved that an offence committed by a body corporate was attributable to any actions of or failure to act by, or was done with the consent or involvement of any director, manager, secretary, member, or other similar officer of the body corporate (or any person who was purporting to act as one) that person (as well as the body corporate) will be liable for the offence and can be prosecuted accordingly.

415. In addition to inserting the two new sections 10G and 10H into the Pipe-lines Act 1962, section 79 also inserts a new *subsection (5)* into the current section 10F (supplemental provision relating to third party access). This requires the Secretary of State, before issuing a pipe-line modification notice:

- to give the person who applied for the notice details of the modifications the Secretary of State is proposing, and
- to give the person an opportunity to make an application for third party access to upstream petroleum pipelines (covered by section 10E of that Act) if they have not already agreed these terms.

Section 80: Third party access to oil processing facilities

416. This section sets out the process of dispute resolution for third party access to oil processing facilities. It specifies the steps that need to have been taken before the applicant can apply to the Secretary of State for directions, as well as what the Secretary of State may do if these initial steps do not enable the applicant and owner involved to reach a consensus themselves. *Subsection (2)* explains the extent of this provision; it applies only to oil processing facilities situated in Great Britain and the territorial sea adjacent to Great Britain (including areas of the sea designated under section 1(7) of the Continental Shelf Act 1964).

417. *Subsections (3)* and *(4)* require the applicant to apply to the owner of the oil processing facilities by a notice specifying the nature of the access they are seeking. This should include the period of time over which the applicant wants petroleum processed by the facility in question, the kind of petroleum to be processed at the facility, and the quantities of petroleum the applicant wants processed by the facility.

418. If the applicant and the owner cannot reach an agreement on the application, *subsection (5)* allows the applicant to apply to the Secretary of State for directions securing the access required (as set out in the applicant's original notice to the owner of the oil processing facilities). S*ubsection (6)* provides that the Secretary of State may not consider such an application unless satisfied that the parties have had a reasonable time to reach an agreement.

419. When considering an application, the Secretary of State must, according to *subsection (7)*, decide whether the application needs to be adjourned to give the parties further time to negotiate, considered further or rejected. The applicant must then be notified of the Secretary State's decision. If the Secretary of State decides to consider the

application further, then notice must be given to the persons set out below (as set out in *subsection (8)*) and give them the opportunity to be heard in relation to the application:

- the owner of the oil processing facility;
- any person who has a right to have petroleum processed at the facility; and
- the Health and Safety Executive.

420. *Subsection (9)* provides that the Secretary of State may give directions (the terms of which are set out under section 81) on an application for third party access, if satisfied that they will not prejudice:

- the efficient operation of the oil processing facility;
- the processing of petroleum by the facility of quantities of petroleum which the owner or an associate of the owner requires (or may be reasonably expected to require) to be processed for the purposes of their own business; or
- the processing of petroleum by the facility by other people with a right to have their petroleum processed by the facility.

Section 81: Directions under section 80: supplemental

421. This section describes the terms of the directions for third party access that may be made by the Secretary of State in relation to an application from a third party seeking access to an oil processing facility under section 80.

422. The Secretary of State may, under *subsection (1)*, issue directions that:

- specify the terms on which the Secretary of State considers the owner of the oil processing facilities should enter into an agreement with the applicant for access to the facilities for all or any of the purposes listed in *subsection (2)* (see paragraph below for a description of this list);
- specify the sums (or method for working out the sums) that should be paid by the applicant to the owner by way of consideration for the right to use the oil processing facilities; and
- require the owner to enter into an agreement with the applicant if the applicant pays (or agrees to pay) the sums within a specified period. The specified period will be stated in the directions.

423. *Subsection (2)* sets out the purposes for which the Secretary of State can specify terms in directions made under *subsection (1)*:

- securing to the applicant the right of having petroleum processed at the oil processing facility;
- securing that the applicant is not stopped from exercising that right;
- regulating the charges which can be made for the right to access the oil processing facility;
- securing any ancillary or incidental rights for the third party that the Secretary of State believes are necessary or expedient. For example, the right to have their pipeline connected to the oil terminal by the owner.

424. *Subsection (3)* sets out that in order to consider an application made to him for directions about third party access to an oil processing facility (under section 80(5)), the Secretary of State can issue a notice requiring the owner of the infrastructure or the applicant to supply information relevant to the application.

425. *Subsection (4)* states that this information may include financial information relevant to the owner's or applicant's activities in terms of oil processing operations.

426. *Subsection (5)* provides that any information obtained by the Secretary of State with respect to *subsection (3)* may not be disclosed unless either the person who provided the information has consented, or the Secretary of State is required to disclose it by, or under, an enactment.

427. *Subsections (6)* and *(7)* set out that the Secretary of State can enforce compliance with any directions made relating to third party access of oil processing facilities through civil proceedings i.e. the Secretary of State can apply to the High Court or Court of Session in Scotland for an injunction (or interdict) requiring compliance with the Secretary of State's direction. The court that imposes the injunction will be responsible for the enforcement of that injunction. The reason that this section only focuses on oil processing facilities is that these are the only areas that are new on the face of the Act – all other infrastructure is (at least partially) covered in other Acts.

428. *Subsection (8)* provides definitions of terms used in the new third party access regime for oil processing facilities:

- "Oil processing operations" are defined as including:
  - the blending or other treatment of petroleum required to produce stabilised crude oil and other hydrocarbon liquids to the point at which a seller could reasonably make delivery to a purchaser;
  - receiving or storing this stabilised crude oil and these hydrocarbon liquids piped from a facility carrying out oil processing operations (as described above) before taking them elsewhere; and
  - loading stabilised crude oil and these hydrocarbon liquids piped from a facility carrying out either of the oil processing operations described above in order to transport it elsewhere.
- "Oil processing facility" is any facility that carries out these oil processing operations and which is situated in Great Britain, in the territorial sea adjacent to Great Britain, or in areas of the sea designated under section 1(7) of the Continental Shelf Act 1964;
- "Owner" is defined as any person occupying or controlling an oil processing facility including a lessee.
- "Petroleum" has the meaning given by section 1 of the Petroleum Act 1998 i.e. mineral oils, relative hydrocarbon or natural gas in its natural condition. This definition also includes petroleum which has been processed.

Section 82: Meaning of "associate"

429. This section defines "associate" for the purposes of section 80, which relates to applications from a third party for a right of access to have petroleum processed by an oil processing facility.

430. For a person to be an associate of the owner either or both need to be bodies corporate. The meaning of "body corporate" is broader than a limited company and includes limited liability partnerships (LLP). The section sets 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.

Part 5: Miscellaneous

Duties of Gas and Electricity Markets Authority

Summary and Background

431. The Electricity Act 1989 and Gas Act 1986 set out the general duties of the Secretary of State and the Authority. These general duties are formed in a hierarchy of a primary duty and a number of secondary duties and other issues which they must keep under consideration in exercising their primary duty. The primary duty is to protect consumers through competition where appropriate.

432. Prior to this Act, the formulation of secondary duties placed the need to ensure security of supply, and that licence holders are able to finance their activities at the top of the list of secondary duties. The duty to promote sustainable development was added near the end of that list. However, since that time, sustainability has been growing in importance in energy policy. The Act makes amendments to the duties to reflect this, to put sustainability and security of supply on an equal footing in the hierarchy of secondary duties.

Commentary on Sections

Section 83: Duties of the Gas and Electricity Markets Authority

433. This section amends the duties of the Secretary of State and the Authority in sections 4AA of the Gas Act 1986 and 3A of the Electricity Act 1989 in two ways.

434. *Subsection (1)* amends subsection 4AA(1) of the Gas Act to add the words "existing and future" before "consumers" in the principal objective set out in this section. The principal objective requires the Secretary of State and the Authority, in carrying out their functions under Part 1 of the Gas Act, to protect the interests of consumers wherever appropriate by promoting effective competition. This section emphasises the need for the Secretary of State and the Authority to take the needs of tomorrow's consumers into account as part of the principal objective.

435. Section 4AA(2)(b) of the Gas Act specifies the issues which the Secretary of State and the Authority must have regard for in carrying out their functions in the manner best calculated to further the principal objective. *Subsection (1)* inserts a new provision into this section of the Gas Act, requiring the Secretary of State and the Authority to have regard to the need to contribute to the achievement of sustainable development. This has the effect of moving the sustainable development duty up the "hierarchy" of secondary duties and means that the Secretary of State and the Authority will need to consider sustainable development, as well as security of energy supply and licensees' ability to finance activities, under section 4AA(2).

436. *Subsection (2)* makes the same changes to the principal objective in section 3A(1) of the Electricity Act and inserts the same provision concerning sustainability at section 3A(2)(b) of the Electricity Act.

437. Schedule 5 repeals the existing sustainability duty in section 4AA(5)(ba) of the Gas Act and section 3A(5)(ba) of the Electricity Act.

Transmission Systems

Summary and Background

438. Electricity generators (including new renewable energy generators) are facing significant delays in obtaining access to the transmission system and the system is not being used as efficiently as possible. The backlog of generators waiting for a connection date is affecting Great Britain's ability to meet security of supply concerns and sustainability targets including the 2020 renewable energy targets set by Europe. There is currently in excess of 45GW of new generating capacity in the transmission

grid access queue (compared to around 80GW already connected) with some generators being informed that they must wait until 2022 for connection to the transmission system.

439. The Government has been undertaking work to address these problems. The 2007 Energy White Paper committed the Government and the Authority to consider these issues in a review of transmission access. The final report of the Transmission Access Review was published in June 2008. It concluded that there was a need for significant reform of the licence conditions and industry codes which set the framework for the running of the transmission system by National Grid in Great Britain.[5] The main industry code which regulates access to the transmission network is the Connection and Use of System Code (CUSC) and at present it does not facilitate timely access to the network. The Security and Quality of Supply Standard (SQSS) and CUSC together regulate the planning and operation of the transmission system and at present do not ensure efficient use of the system.[6]

440. As a result of the Transmission Access Review report, industry has been tasked with developing proposals to reform industry codes to improve the allocation of access rights and the efficient use of the network. The current aim is for the changes to be implemented from April 2009, with some of the more complex reforms being made from April 2010.

441. Due to the importance of these negotiations being completed in a timely manner, the Government made clear in the Transmission Access Review report that if Industry and the Authority did not make sufficient progress by the end of the year then Government would "*consider options for wider reform (including legislation) to bring about the necessary changes in the context of its Renewable Energy Strategy and wider energy policy goals*". The following sections provide the Secretary of State with powers to amend the appropriate licences and industry codes should the industry process fail.

Commentary on Sections

Section 84: Power to amend licence conditions etc: transmission systems

442. This section gives the Secretary of State the power to modify, for the purposes described below:

- a particular electricity generation, transmission, distribution or supply licence (*subsection (1)(a)*);
- standard licence conditions of those types of electricity licence (*subsection (1)(b));* and
- documents maintained under the licence conditions of relevant electricity licences – for example, industry codes *(subsection (1)(c))*.

443. *Subsection* (2) sets out the scope of the modification power. The power may only be exercised for the purpose of facilitating access to and/or efficient use of a transmission system in Great Britain or offshore waters.

444. *Subsections (3)(a) and (c)* allow the modification power to be exercised differently in different cases or circumstances. This could, for example, allow the Secretary of State to make different modifications in relation to generation under development and generation that is already connected to the network.

445. *Subsection (3)(d)* makes provision for the Secretary of State to make any incidental, supplementary, consequential or transitional modifications to licence conditions or documents of the kind mentioned in *subsection (1)(c)*.

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5 http://www.berr.gov.uk/files/file46774.pdf

6 Note that there are no significant problems in terms of physical connection to the network i.e. connecting a line between a wind farm and the grid, the problems instead relate to getting the subsequent commercial right to access and use the transmission network from National Grid.

446. By virtue of *subsection* (4) the modification power may not be exercised after the end of the period of 2 years beginning with the day on which *subsection (1)* comes into force. *Subsection (1)* comes into force on such day as is appointed by order of the Secretary of State (see *section 110(2)*).

447. *Subsection (5)* ensures that, where the power under *subsection (1)* to make modifications is exercised, certain general provisions of the Electricity Act 1989 which are relevant to this power are applicable. For example, the modifications can require the licence holder to comply with directions by the Secretary of State or the Authority as to specified matters.

Section 85 *Power to amend licence conditions etc: transmission systems: Procedure*

448. This section sets out the procedure that the Secretary of State must comply with in order to exercise the modification powers conferred by section 84 (Power to amend licence conditions etc: transmission systems). *Subsection (1)* obliges the Secretary of State, before making modifications, to consult the holders of licences being modified, the Authority and others as appropriate. *Subsection (3)* requires the Secretary of State to publish any modifications which are made.

Section 86 *Power to amend licence conditions etc: transmission systems: supplemental*

449. This section makes three supplemental provisions in relation to the modification power conferred by section 84 (Power to amend licence conditions etc: transmission systems). *Subsection (1)* ensures that any modifications made to a standard licence condition under the new power would not affect the remainder of that standard licence condition.

450. *Subsection (2)* ensures that where licence modifications are made to standard licence conditions, the Authority must make the same modifications for the purpose of future licences, and also must publish those modifications. Schedule 4 amends sections 33(1) of the Utilities Act 2000 so that any standard conditions which are modified under section 84 (Power to amend licence conditions etc: transmission systems) are incorporated as standard conditions for licences of that type.

451. *Subsection (3*) is an order making power for the Secretary of State to make consequential amendments to provisions made by or under an Act (including Acts of the Scottish Parliament) as he considers appropriate. Section 105(2) provides that such orders will be subject to the affirmative procedure.

Energy Reports

Summary and Backrgound

452. This element of the Act deals with statutory obligations to report on a variety of energy related subjects. As the energy market has developed and diversified in recent years, various initiatives and legislative changes have resulted in a growing number of requirements on the Secretary of State to produce annual reports.

453. Many of these requirements remain valid; however, some have been superseded or are not aligned with ongoing developments in the context of energy and climate change policy. One example in the climate change context is the new requirement for a carbon budget reporting system which is being introduced through the Climate Change Act 2008. The Act amends the existing statutory provisions imposing energy-related reporting obligations placed on the Secretary of State.

Commentary on Sections

Section 87: *Energy reports and Schedule 5*: *Repeals*

454. Section 1 of the Sustainable Energy Act 2003 (c.30) ("2003 Act") requires the Secretary of State to report annually on progress towards sustainable energy aims. The four energy

goals set out in the 2003 Energy White Paper *Our Energy Future – creating a low carbon economy* are:

- to put the UK on a path to cut carbon dioxide emissions by some 60% by about 2050, with real progress by 2020;
- to maintain the reliability of energy supplies;
- to promote competitive markets in the UK and beyond, helping to raise the rate of sustainable economic growth and to improve productivity; and
- to ensure that every home is adequately and affordably heated.

455. The requirements concerning publication of the report on progress towards these energy goals, including when and what it must include, are set out in section 1 of the 2003 Act. This section has since been amended, in particular by section 81 of the Energy Act 2004. The amendment made by that section requires more detailed reporting, as the Secretary of State considers appropriate, on the development or bringing into use of certain energy sources and technologies listed in that Act.

456. *Subsection (1)* of this section changes the reporting period from 24 February until 23 February each year, to each year beginning with 1 January and ending with 31 December. In consequence of that change, the section also changes the publication date so as to requires the annual report to be published between the period 1 January and 31 October following the reporting period to which it relates.

457. *Subsection (1)* also removes the requirement to include detail on specific energy sources and technologies. The effect is that the report will focus on progress toward meeting the four main energy policy goals, rather than the detail of developments in smaller more specialised, technology-specific areas of the energy sector. The Sustainable Energy Act 2003 (sections 2 and 3) and Housing Act 2004 (s217(1)) both contain provisions regarding energy efficiency in residential accommodation. *Subsection (1)* also removes the requirement to report on progress toward (but not the duty to designate or publish) the energy efficiency aims in the 2003 Act.

458. The repeals in Schedule 5 include repeals which are necessary because of the effect of section 87. Section 18 of the Climate Change and Sustainable Energy Act 2006 (c.19) is also repealed as the obligation is now spent.

Smart Meters

Summary and Background

459. In *Meeting the Energy Challenge: A White Paper on Energy* (May 2007) the Government indicated the importance it placed on improving the information energy customers receive about their energy use. Improved information will enable them to better manage, and take action to reduce, their energy consumption, and as a result reduce their carbon emissions. In this context the Government set out the potential for smart meters to provide, amongst other things, accurate, real time information to consumers about their energy consumption.

460. An announcement was made in the 2008 Budget setting out the Government's intention to mandate a roll out of "smart meters" to medium-sized businesses over the next five years. A further announcement was made in October 2008,, which confirmed the Government's intention to proceed with a roll out of "smart meters" to domestic customers. Sections 88 to 91 will allow for these roll-outs to be mandated. The sections would also allow for a roll-out of smart meters to smaller business in the future, if the Government decides to proceed with a roll-out for that segment..

461. The power in section 88 will allow the Secretary of State to modify electricity distribution and supply licences and gas transporter, shipper and supply licences, or documents made under licence conditions, to require the licence holder to install,

or facilitate the installation of, smart meters. As is common practice in regulating these parts of the electricity and gas sectors the intention is to specify the detail of the requirements being placed on licensees and other relevant arrangements, through modified licence conditions and/or amendments to the agreements and codes entered into under the licences.

462. Provision is made for Parliamentary scrutiny. In addition to requirements for the Secretary of State to consult relevant licensees, the Gas and Electricity Markets Authority and any other appropriate persons, there is a requirement on the Secretary of State to lay the draft modifications in Parliament and allow a period of 40 days in which either House of Parliament can reject the draft conditions.

463. In addition to the licence modification power in Section 88, section 91 and Schedule 4 enable the Secretary of State to create new licensable activities in relation to providing, installing or operating smart meters or related infrastructure under the Gas and Electricity Acts by affirmative order. These licences may be used to centralise some, or all, aspects of smart metering provision if that is deemed necessary to ensure their efficient installation across Great Britain. The power may, for example, be used to ensure that a centralised communications infrastructure is put in place to support smart metering.

464. Section 91 and Schedule 4 allow for the geographic scope of a licence to be restricted – for instance to provide for regional delivery of smart meters – if required. The order may provide for either the Secretary of State or the Authority to award the licences and Schedule 4 includes power for the Secretary of State to make regulations for a competitive tendering process for purposes of identifying to whom these licences will be awarded.

465. It is expected that the existing licensing framework and metering provisions in the Electricity and Gas Acts would be applied to the new licensable activities, for example: the prohibition on unlicensed activities in section 4 of the Electricity Act and section 5 of the Gas Act; the procedures for modification of licences in sections 11 to 15 of the Electricity Act and sections 23 to 27 of the Gas Act; and the enforcement powers in sections 25 to 28 of the Electricity Act and sections 28 to 32 of the Gas Act.

Commentary on Sections

Section 88: Power to amend licence conditions etc: smart meters

466. This section gives the Secretary of State the power to modify, for the purposes described below:

- a particular electricity distribution or supply licence (*subsection (1)(a)*)
- a gas transporter, shipper or supply licence (*subsection (1)(c)*)
- standard licence conditions of those types of gas and electricity licence (*subsections (1)(b) and (1)(d).*
- documents maintained under the licence conditions of relevant gas and electricity licences – for example, industry codes *(subsection (1)(e)).*

467. *Subsection* (2) sets out the scope of the modification power. It may only be exercised for the purpose of:

- requiring licence holders to provide or install, or facilitate the provision, installation or operation of, a meter of a particular kind; or
- requiring licence holders to make arrangements relating to such matters.

468. *Subsection (3)* sets out an inclusive list of various types of modifications that may be made under the new power. These include the technical specifications of the meter and

provisions to allow two way communications between energy suppliers/distributors and meters installed in business or domestic premises (see *paragraphs (a)* and *(j)*).

469. *Paragraph (l)* makes provision for the Secretary of State to set a date from which the modification(s) come into force. This would, for example, allow the Secretary of State to set a time limit for the roll-out of smart meters.

470. *Subsection (4)(a)* allows the modification power to be exercised to make different provision in relation to different classes of customer (for example domestic, small business or medium/larger businesses). *Subsection (4)(d)* makes provision for the Secretary of State to make any incidental, supplementary, consequential or transitional modifications to licence conditions or documents of the kind mentioned in *subsection (1)(e)*.

471. By virtue of *subsection* (5) the modification power may not be exercised after the end of the period of 5 years beginning with the day on which *subsection (1)* comes into force. *Subsection (1)* comes into force on the passing of the Act (see *section 99(1)*).

472. *Subsection (6)* ensures that, where the power under *subsection (1)* to make modifications is exercised, certain general provisions of the Gas and Electricity Acts which are relevant to this power are applicable – so that, for example, the modifications can include a requirement for the licence holder to comply with directions by the Secretary of State or the Gas and Electricity Markets Authority as to specified matters.

473. *Subsection (7)* states that references to a meter in any part of section 81 also include visual display units or other devices associated with or ancillary to the meter.

Section 89: Power to amend licence conditions etc: Procedure

474. This section sets out the procedure that the Secretary of State must comply with in order to exercise the modification powers conferred by section 88. *Subsection (1)* obliges the Secretary of State, before making modifications, to consult the holders of licences being modified, the Gas and Electricity Markets Authority and others as appropriate. This consultation may take place before or after the passing of the Act. *Subsections (3) and (4)* state that before making modifications the Secretary of State must lay the draft modifications before Parliament and allow a period of 40 days for either House of Parliament to reject the draft.

Section 90: Smart meters: supplemental and Schedule 5: minor and consequential amendments

475. This section makes three supplemental provisions in relation to the modification power conferred by section 88. *Subsection (1)* ensures that any modifications made to a standard licence condition under this power do not prevent any other part of the condition from being a standard condition. This means that the remainder of the standard condition will be subject to the rules relating to standard conditions under the Gas and Electricity Acts. *Subsection (2)* ensures that where licence modifications are made to standard licence conditions, the Gas and Electricity Markets Authority must make the same modifications for the purpose of future licences, and also must publish those modifications. Schedule 5 amends sections 33(1) and 81(2) of the Utilities Act 2000 so that any standard conditions which are modified under section 88(1) are incorporated as standard conditions for licences of that type.

476. *Subsection (3)* is an order making power for the Secretary of State to make consequential amendments to provisions made by or under an Act (including Acts of the Scottish Parliament) as he considers appropriate.

Section 91 and Schedule 4: Licensing of activities relating to smart meters

477. Part 1 of Schedule 4 inserts the following new sections into the Gas Act 1986:

- 41HA New licensable activities: smart meters
- 41HB Section 41HA: supplemental
- 41HC Competitive tendering for licences for new licensable activities

478. Part 2 of Schedule 4 inserts the following new sections into the Electricity Act 1989:

- 56FA New licensable activities: smart meters
- 56FB Section 41HA: supplemental
- 56FC Competitive tendering for licences for new licensable activities

Part 1: Gas

Section 41HA: New licensable activities: smart meters

479. This section gives the Secretary of State an order-making power to both create new licensable activities under section 41C of the Gas Act 1986 in relation to smart metering and to order that such new licensable activities shall cease to be licensable.

480. *Subsection (2)* provides that once activities become licensable, it will be an offence under section 5(1) of the Gas Act to undertake them without a licence.

481. *Subsection (3)* sets out the scope of the licensing power and that it may only be used to make licensable some or all of the activities connected with the provision, installation or operation of smart meters or related infrastructure or services. This could include, for example, the communications infrastructure for smart meters. *Subsection (4)* provides for the definition of "smart meters" to be set out in the order.

482. *Subsection (5)* makes provision for the order to include any necessary consequential, transitional, incidental or supplementary changes to primary legislation. This will enable the Secretary of State to add any new licensable activities to the current list of licensable activities in sections 5(1) and 7 of the Gas Act and to make other amendments necessary to ensure that the new licences fit within the existing statutory framework. Such changes could include making a provision similar to section 81(1) of the Utilities Act 2000 to specify how any new standard conditions are to come into effect and/or be suspended; and amending section 81(2) of the Utilities Act so that any modified standard conditions are incorporated as standard conditions for licences of that type. It is envisaged that the existing licensing framework and metering provisions in the Gas Act will be applied to the new licensable activities including, for example, the procedures for modification of licences in sections 23 to 27 of the Gas Act and the enforcement powers in sections 28 to 32 of the Gas Act.

483. *Subsection (5)(c)* makes provision for the order to specify the standard conditions for any new licensable activities and to modify any existing standard conditions of licences.

484. *Subsection (6)* sets out a further non-inclusive list of the type of provisions which an order creating new licensable activities could contain. This includes provision restricting the geographic scope of licences which would, for example, facilitate national or regional licensing of smart metering activities (*paragraphs (a)* and *(b)*). The order could also confer functions of the Secretary of State or the Authority which would, for example, enable the conferral of the general licensing powers in section 7B(4) to (11) of the Gas Act on the Secretary of State so that he can determine the general licence conditions for any new licences created under these powers *(paragraph (e))*.

485. *Subsection (7)* makes provision for the Secretary of State to specify how long an order will remain in force which could limit the period during which any smart metering activities are licensable.

Section 41HB Section 41HA: supplemental

486. This section sets out the procedure with which the Secretary of State must comply when making an order under section 41HA(1). *Subsection (1)* obliges the Secretary of State to consult the Authority and others as appropriate before making an order. By virtue of *subsection (2)*, the power to make an order may not be exercised after the end of the period of 5 years beginning with the day on which section 41HA(1) comes into force. Section 41HA(1) comes into force on the passing of the Act (see *Section 110(1)*).

487. *Subsection (3)* provides that the affirmative procedure will apply to the order and that it will not come into force unless approved by resolution of each House of Parliament (see also *Schedule 5* amending section 64(2) of the Gas Act).

488. *Subsection (4)* gives the Secretary of State certain supplemental powers contained in sections 47(1) to (3) of the Gas Act when making any order under section 41HA(1). These include a power to make provision for the determination of any questions of fact or law which may arise in giving effect to the order; prescribing time-limits within which things are to be done; and providing for matters under the order to be determined by specified persons and in accordance with specified procedures.

Section 41HC: Competitive tendering for licences for new licensable activities

489. This section gives the Secretary of State power to make regulations providing for the award of licences for new licensable activities connected with the provision of smart meters, by the Secretary of State or the Authority following a competitive tender procedure.

490. *Subsection (3)* sets out a non-inclusive list of the type of provisions which the regulations may include. The regulations may provide for the licences to be awarded by either the Secretary of State or the Authority (*paragraph (a)*); and may prescribe the necessary procedures for the tender process, including publication of an invitation to tender and the conditions and any restrictions governing the making of applications (*paragraphs (b) to (f)*).

491. The regulations may also make provision concerning how the applications for licences are to be considered and determined. In particular, the regulations may authorise or require the Secretary of State or the Authority to have regard to an applicant's suitability in relation to both gas and electricity activities when awarding a licence for new activities under the Gas Act (*paragraphs (g) and (h)*). The regulations may also confer functions on either the Secretary of State or the Authority in relation to the conduct of the tender (*paragraph (i)*).

492. *Subsection (4)* gives the Secretary of State power to make provision for the Secretary of State or the Authority to recover the costs of running the tender and to specify the consequences of any failure to make payment. This could, for example, give the Secretary of State power to require applicants to make payments to cover the costs of running the tender and ending their participation in the tender, and if necessary ending the tender exercise, in the event of any failure to comply. *Subsection (6)* states that any sums received by the Secretary of State or the Authority will be paid into the Consolidated Fund.

493. The regulations would be subject to the negative resolution procedure.

Part 2: Electricity

Section 56FA New licensable activities: smart meters

494. Section 91 gives the Secretary of State an order-making power to both create new licensable activities under section 56A of the Electricity Act in relation to smart metering and to order that such new licensable activities shall cease to be licensable.

495. *Subsection (2)* provides that once activities become licensable, it will be an offence under section 4(1) of the Electricity Act to undertake them without a licence.

496. *Subsection (3)* sets out the scope of the licensing power and it may only be used to make licensable some or all of the activities connected with the provision, installation or operation of smart meters or related infrastructure or services. This could include, for example, the communications infrastructure for smart meters. *Subsection (4)* provides for the definition of "smart meters" to be set out in the order.

497. *Subsection (5)* makes provision for the order to include any necessary consequential, transitional, incidental or supplementary changes to primary legislation. This will enable the Secretary of State to add any new licensable activities to the current list of licensable activities in sections 4(1) and 6(1) of the Electricity Act and to make other amendments necessary to ensure that the new licences fit within the existing statutory framework. Such changes could include making a provision similar to section 33(2) of the Utilities Act 2000 to specify how any new standard conditions are to come into effect and/or be suspended; and amending section 33(1) of the Utilities Act so that any modified standard conditions are incorporated as standard conditions for licences of that type.

498. It is envisaged that the existing licensing framework and metering provisions in the Electricity Act will be applied to the new licensable activities including, for example, the procedures for modification of licences in sections 11 to 15 of the Electricity Act and the enforcement powers in sections 25 to 28 of the Electricity Act.

499. *Subsection (5)(c)* makes provision for the order to specify the standard conditions for any new licensable activities and to modify any existing standard conditions of licences.

500. *Subsection (6)* sets out a further non-inclusive list of the type of provisions which an order creating new licensable activities could contain. This includes provision restricting the geographic scope of licences which would, for example, facilitate national or regional licensing of smart metering activities (*paragraphs (a) and (b)*). The order could also confer functions of the Secretary of State or the Authority which would, for example, enable the conferral of the general licensing powers in section 7 of the Electricity Act on the Secretary of State so that he can determine the general licence conditions for any new licences created under these powers.

501. *Subsection (7)* makes provision for the Secretary of State to specify how long an order will remain in force which could limit the period during which any smart metering activities are licensable.

Section 56FB: section 56FA:supplemental

502. This section sets out the procedure with which the Secretary of State must comply when making an order under section 56FA(1).

503. *Subsection (1)* obliges the Secretary of State to consult the Authority and others as appropriate before making an order. By virtue of *subsection (2)*, the power to make an order may not be exercised after the end of the period of 5 years beginning with the day on which section 56FA(1) comes into force. Section 56FA(1) comes into force on the passing of the Act (see *section 110(1)*.

504. *Subsection (3)* provides that the affirmative procedure will apply to the order and it will not come into force unless approved by resolution of each House of Parliament (see also *Schedule 5* amending section 106(2)(b) of the Electricity Act).

505. *Subsection (4)* gives the Secretary of State certain supplemental powers contained in section 60 of the Electricity Act when making any order under section 56FA(1). These include power to make provision for the determination of any questions of fact or law which may arise in giving effect to the order; prescribing time-limits within which things are to be done; and providing for matters under the order to be determined by specified persons and in accordance with specified procedures.

Section 56FC: Competitive tendering for licences for new licensable activities

506. This section gives the Secretary of State power to make regulations providing for the award of licences for new licensable activities by the Secretary of State or the Authority following a competitive tender procedure.

507. *Subsection (3)* sets out a non-inclusive list of the type of provisions which the regulation may include. The regulations may provide for the licences to be awarded by either the Secretary of State or the Authority (*paragraph (a)*); and may prescribe the necessary procedures for the tender process including publication of an invitation to tender and the conditions and any restrictions governing the making of applications (*paragraphs (b) to (f)*).

508. The regulations may also make provision concerning how the applications for licences are to be considered and determined. In particular, the regulations may authorise or require the Secretary of State or the Authority to have regard to an applicant's suitability in relation to both gas and electricity activities when awarding a licence for new activities under the Gas Act (*paragraphs (g) and (h)*). The regulations may also confer functions on either the Secretary of State or the Authority in relation to the conduct of the tender (*paragraph (i)*).

509. *Subsection (4)* gives the Secretary of State power to make provision for the Secretary of State or the Authority to recover the costs of running the tender and to specify the consequences of any failure to make payment. This could, for example, give the Secretary of State power to require applicants to make payments to cover the costs of running the tender and ending their participation in the tender, and if necessary ending the tender exercise, in the event of any failure to comply. *Subsection (6)* states that any sums received by the Secretary of State or the Authority will be paid into the Consolidated Fund.

510. The regulations would be subject to the negative resolution procedure.

Gas and Electricity Meters

Summary and Background

511. This element of the Act transfers certain statutory functions relating to gas and electricity meters from the Gas and Electricity Markets Authority (the Authority) to the Secretary of State. These are legal metrology functions: they relate to the legal mechanisms for ensuring the accuracy of meters. The intention is that these functions will in future be performed by the National Weights and Measures Laboratory, an executive agency of the Department for Innovation, Universities and Skills.

512. Administrative responsibility for the technical metering functions and staff was transferred by a Memorandum of Understanding between the Authority and the NWML in 2006. The effect of the sections in this part of the Act is to complete the process of transferring these functions, by putting the existing administrative arrangements on a statutory footing.

513. The Authority regulates the gas and electricity markets in Great Britain. It is currently responsible for, amongst other things, gas and electricity meter approvals, certification (electricity) and stamping (gas) of new meters, the appointment of meter examiners and disputed meter accuracy testing.

514. The National Weights and Measures Laboratory (NWML) has a remit to ensure UK measurement is accurate, fair and legal. Acting on behalf of the Secretary of State, NWML currently has similar responsibilities to those which the Authority has in respect of gas and electricity meters for other measuring instruments, such as weighing machines, fuel pumps and water meters.

515. The Authority recovers the costs of performing its metrological functions through a licensing fee charged to network operators. The costs of performing these functions accounts for only a small part (under 2%) of the costs recovered in this way. It is proposed that when the Act transfers these functions to the Secretary of State, the

costs incurred by the NWML in performing these functions should continue to be recovered as part of the licensing fee paid by network operators. An amendment to the relevant network operators' licence conditions is therefore required in order to allow the Authority to pass the recovered funds to the NWML.

516. On completion of the transfer, the NWML will have responsibility for the standards and accuracy of gas and electricity meters. However, the Authority will retain its current responsibilities for smart and pre-payment metering policy will remain with the Authority, since they relate to the regulation and strategy for where, when and how these types of meter are used. The NWML will cover whether these types of meter measure accurately.

Commentary on Sections

Section 92: Gas meters

517. Section 17 of the Gas Act 1986 (c. 44) sets out existing requirements on the use of gas meters and specifies that no meter shall be used for ascertaining the quantity of gas supplied unless it has been stamped by an appointed meter examiner. It further sets out the requirements and responsibilities of those meter examiners when examining and stamping meters, and provides for their remuneration. Section 17 also allows for regulations to be made by the Authority which relate to, amongst other things:

- the prescribed standards meters must satisfy to be stamped, which include the performance requirements and routes to demonstrating conformity;
- how and why meter approvals are revoked and the process that has to be followed if, for example, a design defect is found when meters are used in service; and
- what happens when meter accuracy is disputed, including the circumstances when meters can be re-examined, the standards the meter should meet and the actions of the meter examiner following the re-examination.

518. *Subsection (1)* transfers to the Secretary of State the Authority's functions under section 17 of the Gas Act 1986 (c. 44) and certain regulations relating to gas meters made under that section or under section 2(2) of the European Communities Act 1972 ("gas meter regulations", as defined in *subsection (5)*). *Subsection (2)* ensures that references to the Authority, in section 17 of the 1986 Act or in gas meter regulations, will be read as references to the Secretary of State.

519. *Subsections (3)* and *(4)* will ensure that existing regulations made under section 17 of the 1986 Act, and other regulatory actions of the Authority in relation to meters, have effect as if made or done by the Secretary of State.

520. The combination of the changes set out in*subsections (1)* to *(4)* transfers the responsibility for the functions (including the power to make regulations) under section 17 to the Secretary of State. This formally transfers these responsibilities from the Authority to the NWML.

Section 93: Section 92: consequential amendments

521. This section makes amendments to section 17 of the Gas Act 1986 (c.44) which are consequential on the transfer of functions from the Authority to the Secretary of State and relate to meter examiners.

522. Meter examiners are currently appointed by the Authority (in future, by the Secretary of State) under section 17. Examiners carry out much of the technical work done under that section and gas meter regulations. At present, most meter examiners are not civil servants.

523. By inserting a new *subsection (7A)* into section 17, *subsection (4)* makes provision for the Secretary of State to contribute towards the remuneration and pensions of non-civil

service meter examiners and the maintenance of the equipment they use to perform their statutory functions. The new subsection provides clarity about payments to non-civil servant meter examiners (and, in some cases, their employers) in respect of the carrying out of statutory functions.

Section 94 and Schedule 5: Power to amend licence conditions: gas

524. In transferring these legal metrology functions, it is necessary to ensure that the NWML can recover the costs of carrying out the transferred functions. To make this possible, licence payment conditions need to be modified to allow the Authority to recover funds from the licence fee and pass them to the NWML.

525. This section therefore gives the Secretary of State the power to modify gas transporter licence conditions under sections 7 and 8 of the Gas Act 1986 (c.44). Section 7 covers the requirements for licensing gas transporters, whilst section 8 covers standard conditions of such licences.

526. The effect of the section is that, following licence modifications made by the Secretary of State, the Authority will be able to recover from gas transporters costs incurred by the NWML in respect of functions in relation to gas meters, and pay those costs into the Consolidated Fund.

527. There are a number of checks and balances built into the section by virtue of *subsections (4)* to (*9*). They require the Secretary of State to consult licence holders, the Authority and any other persons as appropriate before making licence modifications. The Secretary of State must also publish the modifications, and ensure that the modifications made apply to all future licences.

528. *Subsection (9)* has the effect that modifications can only be made to licence conditions by the Secretary of State for six months after *subsection (1)* comes into force. The deadline is to provide certainty to the gas transporters that the power will only be used once for the purpose of allowing the Authority to recover funds and pass them onto NWML. Given the technical nature, it is not considered appropriate to detail the licence modification on the face of the Act.

529. *Paragraph 14* of Schedule 5 makes amendments to the Utilities Act 2000 (c.27) which are consequential on the transfer of functions from the Authority to the Secretary of State.

Section 95: Electricity meters

530. Schedule 7 to the Electricity Act 1989 (c.29) describes, amongst other things, how electricity meters must be examined and certified. The Schedule further sets out requirements in relation to electricity meter examiners. The Schedule allows the Authority to make regulations which relate to, for example:

- the requirements new meter designs must meet to be approved, which include the performance and routes to demonstrating conformity;
- the requirements on manufacturers or repairers when submitting meters for certification which include meter performance, testing equipment and reporting; and
- audit arrangements for manufacturers and repairers when seeking authorisation to self certify meters.

531. *Subsection (1)* transfers to the Secretary of State the Authority's functions under Schedule 7 (other than *paragraph 12*) to the Electricity Act 1989 (c.29) and certain regulations relating to electricity meters made under that Schedule or under section 2(2) of the European Communities Act 1972 ("electricity meter regulations", as defined in *subsection (5)*). *Subsection (2)* ensures that references to the Authority in Schedule 7

to the Electricity Act will be read as references to the Secretary of State. The omission of *paragraph 12* to Schedule 7 from the transfer means that the Authority will continue to have responsibility for policy decisions about how and when pre-payment meters should be used.

532. *Subsections (3)* and *(4)* will ensure that existing regulations made at any time under Schedule 7 to the Electricity Act, and other regulatory actions of the Authority in relation to meters, have effect as if made or done by the Secretary of State.

Section 96: Section 95: consequential amendments

533. This section makes amendments to Schedule 7 to the Electricity Act 1989 (c.29) which are consequential on the transfer of functions from the Authority to the Secretary of State.

534. Meter examiners are appointed by the Authority (in future, by the Secretary of State) under Schedule 7. Examiners carry out much of the technical work done under that Schedule and electricity meter regulations. At present, most meter examiners are not civil servants.

535. By inserting a new *paragraph 4(2A*) into Schedule 7, *subsection (4)(b)* makes provision for the Secretary of State to contribute towards the remuneration and pensions of non-civil service meter examiners and the maintenance of the equipment they use to perform their statutory functions. The new paragraph is to provide clarity about payments to non-civil servant meter examiners (and, in some cases, their employers) in respect of the carrying out of statutory functions.

536. *Paragraph 12* of Schedule 7 allows the Authority to make regulations which permit sums owed to be recovered from customers using a pre-payment meter. This power will remain with the Authority. As such, policy decisions on how and when pre-payment meters should be used will continue to rest with the Authority, although the NWML will be responsible for the accuracy of pre-payment meters.

Section 97 and Schedule 5 : Power to amend licence conditions: electricity

537. In transferring these legal metrology functions, it is necessary to ensure that the NWML can recover the costs of carrying out these transferred functions. To make this possible, licence payment conditions therefore need to be modified to allow the Authority to recover funds from the licence fee and pass them through the Consolidated Fund to the NWML.

538. This section therefore allows the Secretary of State to modify electricity transmission and distribution licence conditions under section 6(1)(b) or (c) and section 8A of the Electricity Act 1989 (c.29). Section 6(1)(b) covers the requirements for licensing electricity transmitters and section 6(1)(c) covers the requirements for licensing electricity distributors, whilst section 8A covers standard conditions of such licences.

539. It has the effect that following licence modifications, the Authority will be able to recover from electricity transmission and distribution operators costs incurred by the NWML in respect of functions in relation to electricity meters, and pay those costs into the Consolidated Fund.

540. There are a number of checks and balances built into the section by virtue of *subsections (4)* to (*9)*. They require the Secretary of State to consult licence holders, the Authority and any other persons as appropriate before making licence modifications, which must be published, and ensure those modifications apply to all future licences.

541. *Subsection (9)* has the effect that modifications can only be made to licence conditions by the Secretary of State for 6 months after *subsection (1)* comes into force. The deadline is to provide certainty to the gas transporters that the power will only be used once for the purpose of allowing the Authority to recover funds and pass them onto

NWML. Given the technical nature of the licence modification, it is not considered appropriate to set it out on the face of the Act.

542. *Paragraph 13* of Schedule 5 makes amendments to the Utilities Act 2000 (c.27) which are consequential on the transfer of functions from the Authority to the Secretary of State.

Connection Offer Expenses

Summary and Background

543. New developments such as retail parks or housing projects require connections to the local electricity distribution network. When assessing the capital costs of such developments, developers need to know how much such a connection would cost and can request a network connection offer from the relevant Distribution Network Operator. The Distribution Network Operator is required, under the Electricity Act 1989, to provide a network connection offer following such a request. When providing the connection offer, the Distribution Network Operator will incur costs, for example, in determining the most appropriate point of connection to its network, designing the connection to the network and assessing what upstream changes need to be made to provide the load requested.

544. Until 2008, the practice was that Distribution Network Operators charged persons making connection requests up front for the costs incurred when providing network connection offers[7]. However, following a complaint lodged with the Authority about this practice, legal advice confirmed that the Electricity Act 1989 only permitted Distribution Network Operators to recover these costs if an actual connection to the network was made. Since this issue came to light, the Authority has required Distribution Network Operators to change their charging methodologies to remove all elements of up front charging and bring them in line with the statutory arrangements. However, this means that because there are instances where connection offers are made but no connection is established, the Distribution Network Operators are unable to recoup all of their costs. Examples of such scenarios are, where developers make speculative requests about developments that do not then go forward, or where a third party connections provider requests an offer on a speculative basis. It is envisaged that without the ability to charge up front, that Distribution Network Operators may pass their assessment and design costs onto all users of the network, rather than those who cause these costs to be incurred.

545. This section will amend the Electricity Act 1989 to allow for up front charging in certain circumstances to allow Distribution Network Operators to recoup the costs of providing network connection offers.

Commentary on Sections

Section 98: Costs connected with making an offer of connection

546. Section 16 of the Electricity Act 1989 states that a Distribution Network Operator is under a duty to make connections to the distribution system in specified circumstances. Section 16A of the Electricity Act 1989 states that when a third party requests a connection from an electricity distributor, the distributor is required to provide a network connection offer. Section 19 of the Electricity Act 1989 enables the electricity distributor to recover costs reasonably incurred in providing a network connection. The provision does not, however, entitle Distribution Network Operators to charge for work carried out, and expenses incurred, for network connection offers where a connection is not subsequently made.

547. *Subsection (2)* of section 98 addresses this problem by inserting new subsections (4A) to (4C) into section 16A of the Electricity Act 1989.

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7 The practice of levying upfront charges was reflected in each DNOs' Connection Charging Methodology that are approved by the Authority.

548. *Subsection (4A) of the Electricity Act 1989* provides the Secretary of State with a power to make regulations entitling a Distribution Network Operator to request (to such extent as is reasonable in the circumstances) payment of expenses incurred when making network connection offers under section 16A(5) of the Electricity Act 1989. The power may only be exercised after consultation with the Authority.

549. *Subsection (4B)* states that the kind of expenses recoverable will be specified in regulations and, consistent with section 19(1) of the Electricity Act 1989, must have been reasonably incurred. The combined effect of subsections (4A) and (4B) is that a Distribution Network Operator may only request payment of his expenses if it is reasonable to do so.

550. *Subsection (4C)* provides scope for the regulations to specify circumstances under which an electricity distributor is not entitled to require payment and how expenses reasonably incurred are to be calculated.

Electricity Safety

Summary and Background

551. This element of the Act relates to electricity safety standards, which are aimed at protecting the general public and consumers from danger. The purpose is to allow for stronger sanctions where there is a breach of electricity safety standards and also to complete the implementation of a recommendation made by Philip Hampton in his March 2005 report, *Reducing Administrative Burdens: Effective Inspection and Enforcement*.

552. In October 2006, following the Hampton report, there was an administrative transfer of the responsibility for electricity safety standards, from the Secretary of State to the Health and Safety Executive (HSE) which provided for the HSE to exercise functions on the Secretary of State's behalf. Electricity safety standards are set out in the Electricity Safety, Quality and Continuity Regulations 2002 (S.I. 2002/2665) (as amended) (made under the Electricity Act 1989 (c.29)), and include such things as the correct minimum height of overhead lines, appropriate controls on the use of underground cables, and earthing of metalwork.

553. This element of the Act formalises the administrative transfer and creates a consistent approach to the enforcement of safety regulation by giving overall responsibility to one regulatory body. This is in line with the wider Hampton recommendation for HSE to become the overall regulator for safety matters, to reduce the administrative burden of more than one regulator having similar functions.

554. The changes also allow HSE inspectors to use the sanctions available to them under the Health and Safety at Work etc. Act 1974, when enforcing electricity safety standards. These sanctions are considered by the government to better reflect the seriousness of a breach of electricity safety standards and are the same as sanctions available for a breach of other safety legislation enforced by the HSE.

555. The Electricity Safety, Quality and Continuity Regulations 2002 deal with issues of both electricity safety and security of supply. This element of the Act deals only with electricity safety. Responsibility for regulating security of supply will remain with the Secretary of State.

Commentary on Sections

Section 99: Electricity Safety

556. Section 29 of the Electricity Act 1989 allows the Secretary of State to make regulations relating to electricity safety and supply. The regulations relating to electricity safety and security of electricity supply that are made under section 29, are the Electricity Safety, Quality and Continuity Regulations 2002 (as amended). Part 1 of the Health and Safety

at Work etc. Act 1974 sets out provisions for the purpose of enabling the Health and Safety Executive (HSE) to secure the health, safety and welfare of persons.

557. This section makes section 29 of the Electricity Act 1989 (c.29), and regulations made under it, existing statutory provisions under Part 1 of the Health and Safety at Work etc. Act 1974 (c.37), so far as they relate to safety. This has the effect that section 29 and any associated Regulations will be considered as always having existed as statutory provisions of the Health and Safety at Work etc. Act 1974.

558. The effect of this section is to pass responsibility for electricity safety standards, including the inspection and enforcement of them, from the Secretary of State to the HSE. This therefore gives the HSE the power to amend those electricity safety standards should it see fit.

559. By making section 29 an existing statutory provision, HSE inspectors will be able to use existing statutory powers, available under the Health and Safety at Work etc. Act 1974 (c. 37), to prosecute for a breach of electricity safety standards. This provides an alternative, stronger sanction than any of those available under the Electricity Safety, Quality and Continuity Regulations 2002.

560. The sanctions available under the regulations are, on summary conviction, a fine not exceeding level 5 on the standard scale for each breach (currently £5,000 in England, Wales and Northern Ireland and £10,000 in Scotland). Once section 29 is made an existing statutory provision, the maximum sanction would be a £20,000 fine, on summary conviction, or an unlimited fine, on conviction on indictment. This is in line with existing health and safety penalties.

561. The Health and Safety at Work etc. Act 1974 also allows for prosecution for non-compliance where an Improvement Notice under section 21 or a Prohibition Notice under section 22 has been issued. Where there has been non-compliance with an enforcement notice, inspectors could prosecute on indictment with an unlimited fine or 2 years imprisonment, or both.

562. Section 15 of the Health and Safety at Work etc. Act 1974 gives the Secretary of State the power to make health and safety regulations. *Subsection (2)* of this section sets out that regulations made under section 15 of the Health and Safety at Work etc. Act 1974 can remove or amend section 29 of the Electricity Act 1989, or any regulations made under it, or make new regulations that could have been made under section 29.

Renewable Heat Incentives

Summary and Background

563. Renewable heat is heat generated from renewable sources such as the sun, the heat in the ground and in the air, and biomass fuels such as wood from sustainable sources or biogas produced from biogenic waste. At present such heat meets only 0.6% of UK heat demand. The Renewable Energy Strategy ("RES") consultation document published in June 2008 suggested that this may need to rise to around 14% in 2020 if the UK is to meet the projected overall renewable energy target of 15% for UK. Historically in the UK there has been little impetus for a renewable heat sector to emerge, due to the availability of large reserves of indigenous oil, coal and gas. The analysis which underpinned the RES consultation showed that without financial support very little renewable heat can be expected to come on line before 2020.

564. Renewable electricity generation has long been supported by existing financial support instruments in the UK, such as the Renewables Obligation. However, there have been no equivalent mechanisms to support renewable heat. This section of the Act gives the Secretary of State power to introduce a financial incentive mechanism for renewable heat – the Renewable Heat Incentive ("RHI").

565. The purpose of the RHI is to stimulate a market for renewable heat by making support payments to the owners of renewable heat generation systems, proportionate to the

amount of measured heat output delivered. It would essentially be a 'feed-in-tariff', though this is a shorthand way of describing it. In the UK heat is usually produced for immediate local use, and as there is no national heat network, it is not generally 'fed in' to a network and certainly not a nationwide one. The RHI will be funded via a levy on designated suppliers of fossil fuels supplied for the purpose of generating heat.

566. The RHI would be the only mechanism of its kind across Europe. A delivery framework and administrative and financial systems will need to be established to enable the RHI to be deployed. The enabling powers are broad enough to allow the detail of the scheme to be developed fully at a later stage following consultation. The provisions also allow flexibility to determine payment processes, levels of payments and to further identify who will be eligible to receive RHI payments.

Commentary on Sections

Section 100 *Renewable Heat Incentives*

567. This section gives the Secretary of State power to make regulations to establish a financial support mechanism for renewable heat which will be known as the Renewable Heat Incentive (the "RHI").

568. *Subsection (1)* gives powers to the Secretary of State to make regulations:

- To establish a scheme to provide financial incentives to encourage and facilitate the development of renewable heat.
- about the administrative and financial arrangements for a RHI scheme.

569. *Subsection* **(***2)* provides further details about the scope of the Secretary of State's regulation making power. It also contains provisions relating to the administration of the RHI concerning the making of payments and the collection of levies.

570. *Subsection (2)(a)* specifically enables the Secretary of State or the Authority to make payments (or require designated fossil fuel heat suppliers to make payments) to three listed categories of recipient in specified circumstances.

571. *Subsection (2)(a)(i)* provides that owners of plant used for the generation of renewable heat will be eligible to receive RHI payments. The section permits an owner to qualify for the RHI payment even in the event that they are not actually operating the plant themselves. This flexibility allows for third parties to operate in the renewable heat market: for example, a landlord who owns plant will be eligible for a payment even if the plant is actually operated by the tenant of the property. "Owner" is defined in *subsection (3)* to include a person who has acquired plant under a hire purchase agreement, a conditional sale agreement or any similar arrangement where title to the plant does not pass immediately.

572. *Subsection (2)(a)(ii)* provides that producers of biogas or biomethane will also be eligible to receive RHI payments. This provision therefore allows the RHI regulations to reward the production of renewable fuels as well as the generation of renewable heat itself. This would allow the Secretary of State to encourage and facilitate the development of the biogas/biomethane sectors

573. *Subsection (2)(a)(iii)* provides that producers of biofuels for the purpose of generating heat will be eligible to receive RHI payments.

574. *Subsection (2)(b)* provides that the regulations can make provision about the calculation of the RHI payments described in *subsection 2(a)*. This is a broad and flexible provision allowing the Secretary of State to take account of different circumstances in setting the level of payments to various parties.

575. *Subsection (2)(c)* provides that the regulations can make provision about the circumstances in which payments might be recovered. For example, this would enable

the Secretary of State or the Authority to make provision to recover funds that may have been paid out by mistake. .

576. *Subsection (2)(d)* provides that the regulations may make provision requiring that specified information from designated fossil fuel suppliers be provided to the Secretary of State or the Authority.

577. *Subsection (2)(e)* provides that the regulations can require designated fossil fuel suppliers to pay a levy to the Secretary of State or the Authority.

578. *Subsection (2)(f)* provides that the Secretary of State may make regulations to calculate the level of the levy.

579. *Subsection (2)(g)* provides that the regulations can allow payments to be made to fossil fuel suppliers in specified circumstances. For example, this could allow the Secretary of State or the Authority to redistribute funds collected via levies to fossil fuel suppliers, or to return funds to them.

580. *Subsection (2)(h)* provides that the regulations can make provisions about the enforcement of obligations under the RHI. These may include a power allowing the Secretary of State or the Authority to impose financial penalties, which could be used, for example, to ensure that levy payments are made in accordance with the regulations.

581. *Subsection (2)(i)* provides that the regulations may confer functions on the Secretary of State or the Authority (or both) relating to the establishment, administration or financing of the RHI scheme.

582. *Subsection (3)* sets out the definitions of specific terms referred to in this section of the Act and which are central to the RHI. In particular, the definitions provide as follows:

- they specify that the administrative Authority for the RHI, will be the Gas and Electricity Markets Authority;
- they explain what is meant by the terms: biogas, biofuel, and biomethane. Subsection (3) also provides a definition of one of the underlying constituent materials; biomass. ;
- they provide a definition of “designated fossil fuel supplier”. These are the suppliers who, under the RHI may be required, amongst other things, to make payments to owners of plant used to generate renewable heat and pay a levy. The definition provides that they are a specified class of fossil fuel suppliers (as provided by regulations) and, in any other case, (i.e. if not provided by regulations) all fossil fuel suppliers.
- they define “fossil fuel” by means of a list of fuels, including, for example, coal and petroleum products
- they define “fossil fuel supplier” as a person who supplies fossil fuel to consumers for the purpose of generating heat. This will therefore exclude electricity suppliers or suppliers of renewable fuels. It will also exclude those who are supplying fossil fuels for purposes other than generating heat.
- they define the `owner’ of plant (see above). As mentioned above, in some cases third parties, for example large energy companies. may wish to finance the deployment of such heat plant in customers’ properties;
- “plant” is defined as including any equipment, apparatus or appliance.
- the definition of “renewable generation of heat” provides that renewable heat is heat generated by means of a source of energy or technology listed at subsection (4).

603. *Subsection (4)* sets out the sources of energy and technologies referred to above in the definition of renewable generation of heat. These are: biomass, biofuels, fuel cells,

water (including waves and tides), solar power, geothermal sources, heat from air, water or the ground and combined heat and power systems – but only if the system's energy source is from a renewable energy source as defined by section 32M of the Electricity Act 1989 (c.29) (this has the effect of excluding combined heat and power systems which are powered by fossil fuels). None of the sources of energy or technology are limited by capacity, meaning that all scales of plant which generate renewable heat from such a source or technology may be eligible to receive a RHI payment.

604. *Subsection (5)(a)* allows for the list of energy sources as defined in *subsection (4)* to be modified by regulations. The Government's intention is to modify the list as technological developments bring forward new technologies capable of making a contribution to the renewable heat sector. In this Act, by virtue of section 106, the power to modify includes the concepts of amending, adding to, revoking or repealing.

605. *Subsection (5)(b)* allows for the definitions of biogas and biomass as listed in *subsection 3* to be modified by regulations.

606. *Subsection (6)* allows for regulations to specify that particular activities do or do not constitute the generation of heat for the purposes of defining the generation of heat from biofuels in *subsection (2)(a)(iii)* and the definition of "fossil fuel heat supplier" generally.

607. *Subsection (7)* requires the Secretary of State to secure the agreement of Scottish Ministers before making regulations in relation to Scotland which are within the legislative competence of the Scottish Parliament. It also requires the Secretary of State to consult Scottish Ministers on all other aspects of any regulations which apply to Scotland before they can be made.

607. Regulations made under the RHI power are subject to affirmative resolution by virtue of section 105 of the Act.

Nuclear Information

Summary and Background

583. This element of the Act and *paragraph 21* of Schedule 5 propose minor legislative changes to ensure that the civil nuclear security regulator, the Office for Civil Nuclear Security (OCNS), is able to carry out its functions effectively. The proposed changes update the legislation to reflect recent changes in the nuclear sector. Those recent changes are:

- The use of subcontracting following restructuring of the nuclear industry, made possible by the Energy Act 2004; and,
- the administrative transfer in April 2007 of the OCNS to the Health and Safety Executive to sit alongside the civil nuclear safety regulator, the Nuclear Installations Inspectorate (NII).

584. The amendments in this element of the Act will ensure there are sufficiently serious sanctions available for those attempting to steal sensitive nuclear information. Minor and consequential amendments also re-establish the OCNS's ability to gain access to Civil Nuclear Police Authority premises following its transfer from the Department for Business, Enterprise & Regulatory Reform to the Health and Safety Executive.

Commentary on Sections

Section 101: Security of sensitive nuclear information

585. This section relates to the securing of sensitive nuclear information pertaining to uranium enrichment. Previously, such information could only be kept on licensed nuclear sites which also held a permit to undertake the enrichment of uranium. Restructuring of the nuclear industry following the Energy Act 2004 means that

sensitive nuclear information pertaining to uranium enrichment may now be taken, and stored, away from those licensed sites (for example, at research facilities).

586. To ensure the security of that sensitive nuclear information, there is already appropriate legislation in place which applies to anyone lawfully holding such information, and which prohibits disclosure of it by that person. However, the sanctions available against persons stealing or attempting to steal such information from premises which are not licensed to undertake uranium enrichment, are only those available for the offences of burglary or theft.

587. The Government does not feel these sanctions are strong enough. This is because theft and onward dissemination to others of information pertaining to uranium enrichment has implications for national security.

588. The overall effect of the section is to allow the offences and stronger sanctions that exist under the Official Secrets Acts to be used to prosecute persons stealing or attempting to steal sensitive nuclear information from designated premises. The section achieves this through a number of steps that are set out below.

589. The Anti-Terrorism, Crime and Security Act 2001 (c.24) makes provisions about terrorism and security. This section adds a new section, 80A, to the 2001 Act.

New section 80A Extension of the Official Secrets Acts to certain places

590. *Subsection (1)* of this new section provides that certain premises holding sensitive nuclear information, should be deemed as belonging to, or used for the purposes of, the Crown. This will allow the Secretary of State to make an order designating those premises holding uranium enrichment technology as "prohibited places" by virtue of section 3(c) of the Official Secrets Act 1911 (c.28). *Subsection (1)* is a necessary part of the section because only premises belonging to, or used for the purposes of, the Crown may be designated as "prohibited places" under section 3(c) of the Official Secrets Act 1911.

591. The overall effect of designating these premises as prohibited places is to extend the Official Secrets Acts' offences and sanctions to persons gaining entry, or attempting to gain entry, to those premises.

592. The penalty for breach of the Official Secrets Act 1911 (c.28), by virtue of section 8(1) of the Official Secrets Act 1920 (c.75), is a custodial sentence of not less than 3 years and not more than 14 years. Section 1(2) of the Official Secrets Act 1911 sets out that in prosecuting persons under the Act, it is not necessary to prove that a person broke into that "prohibited place" for a purpose which would adversely affect the security interests of the State. Once orders are made by the Secretary of State designating certain premises as prohibited places, the protection afforded by section 1(2) will apply. This reflects the potential impact on national security.

Paragraph 21 of Schedule 5: Energy Act 2004 (c.20)

593. The Energy Act 2004 (c.20) established the Civil Nuclear Constabulary to protect civil nuclear sites and nuclear materials. The Civil Nuclear Police Authority was established at the same time to ensure the Civil Nuclear Constabulary carries out its policing functions effectively and efficiently.

594. *Paragraph 2* of Schedule 13 to the Energy Act 2004 (c.20) sets out the directions which the Secretary of State may give to the Civil Nuclear Police Authority. These include making sure the Civil Nuclear Constabulary completes tasks as it is required, and allowing authorised persons access to Civil Nuclear Police Authority premises. *Paragraph 2(1)(h)* of that Schedule provides that "officers of the Secretary of State's department" are authorised to access Civil Nuclear Police Authority premises for the purposes of enabling them to monitor and inspect their activities.

595. Until the Office for Civil Nuclear Security was transferred to the Health and Safety Executive in April 2007, it was a division of the then Department of Trade and Industry and as such, its inspectors were "officers of the Secretary of State's department". This meant they had a statutory right to access Civil Nuclear Police Authority premises. This right of access is necessary to allow them to ensure the security of all licensed civil nuclear sites and sensitive nuclear information wherever it may be, including on Civil Nuclear Police Authority premises. However, when the regulator transferred to the Health and Safety Executive in April 2007, they ceased to be "officers of the Secretary of State's department". As a result, they no longer have an automatic right of access to Civil Nuclear Police Authority premises.

596. To rectify this, *paragraph 21* of Schedule 5 substitutes "persons authorised by the Secretary of State" for "officers of the Secretary of State's department". The effect of the paragraph is that the civil nuclear security regulator can once again access Civil Nuclear Police Authority premises, since the Secretary of State will issue a letter specifically confirming that officers of the OCNS are authorised persons.

Application of General Duties

Section 102: Application of general duties to functions relating to licences

597. Section 92 provides that in exercising any of the powers under this Act to amend licences granted under the Electricity Act 1989 and Gas Act 1986, the Secretary of State is bound by the general duties set out in Part 1 of each of those Acts. It thus ensures consistency with the existing statutory framework for the electricity and gas sectors.

598. *Subsections (2) and (4)* specify that these general duties apply when the Secretary of State is exercising his modification powers under the following sections:

- Sections 41 to 43, in relation to the introduction of a feed-in tariff for small scale low carbon electricity generation;
- Sections 84 to 86, in relation to directing changes to electricity transmission system licences and codes with the aim of helping to ensure timely and efficient access for electricity generation projects, including renewables;
- Sections 88 to 91, in relation to the introduction of smart meters; and
- Sections 95 and 98 in relation to recovering from licensees the costs of meter accuracy services for which the Secretary of State is taking over responsibility from the Gas and Electricity Markets Authority.

Part 6: General

Commentary on Sections

Section 103: Offences by bodies corporate etc

599. This section sets out the attribution of responsibility for offences under the Act by corporate bodies. *Subsection (1)* provides that an officer of a corporate body as well as the corporate body will be guilty of an offence if the officer agreed to, or knew about, the conduct constituting the offence, or if the offence was attributable to the officer's negligence.

600. Where a body corporate is managed by its members (for example, a limited liability partnership), by virtue of *subsection (2)*, *subsection (1)* applies to a member of the body corporate as it applies to an officer of a body corporate, provided the act or default in question was connected with the member's functions of management.

601. *Subsection (3*) provides for a partner in a firm, as well as the firm, to be liable for an offence, if the offence is committed by a Scottish firm.

Section 104 : Subordinate legislation

602. This section provides for the Secretary of State or Scottish Ministers to make Orders in Council, orders or regulations under the Act by statutory instrument.

603. The statutory instrument may include incidental, supplementary and consequential provision and make transitory or transitional provision and savings.

604. These powers permit the Secretary of State to modify Acts of Parliament, or Scottish Ministers to modify Acts of the Scottish Parliament but where the Secretary of State or Scottish Ministers do so the resulting instrument is always subject to affirmative resolution procedure.

Section 105: Parliamentary control of subordinate legislation

605. This section provides for the procedures for Orders in Council, orders and regulations made under this Act.

Section 107 and Schedule 5: Minor and consequential amendments

606. This section introduces Schedule 5, which contains minor and consequential amendments, described in the Explanatory Notes under the Parts to which they pertain. It also confers on the Secretary of State powers to make any further amendments to Acts of Parliament, Acts of the Scottish Parliament or other instruments by order. These orders are subject to negative resolution procedure, unless they modify an Act or an Act of the Scottish Parliament in which case they are subject to affirmative resolution procedure (see section 106). The section also empowers Scottish Ministers to make amendments to Acts of Parliament, Acts of the Scottish Parliament or other instruments in consequence if Chapter 3 of Part 1 as that Chapter applies in relation to the territorial sea adjacent to Scotland or in relation to functions of the Scottish Minister. Instruments which amend Acts of Parliament or Acts of the Scottish Parliament are subject to approval of the Scottish Parliament.

Section 109: Transitional provision etc

607. This section gives the Secretary State or Scottish Ministers the power, by order, to make transitional or savings provisions which may appear appropriate as a consequence of the Act's passage. These may include amendments to primary legislation which, by virtue of section 94, would be subject to the affirmative resolution procedure.

608. The section also empowers Scottish Ministers to make for transitional provisions in consequence of Chapter 3 of Part 1 as that Chapter applies in relation to the territorial sea adjacent to Scotland or in relations to functions of the Scottish Ministers. This can include amendments to Acts of Parliament or Acts of the Scottish Parliament subject to approval of the Scottish Parliament.

Section 110: Commencement

609. *Subsection (1*) lists the provisions of the Act which came into force immediately the Act was passed (i.e. 26 November 2008).

610. This section provides for the Secretary of State to commence the remaining provisions of the Act by order, which by *subsection (6)* may include consequential and transitional provisions as well as making different provision for different cases.

Section 112: Extent

611. This clause sets out the extent of the various provisions of the Act.