

Concordat on the decommissioning of offshore renewable energy installations Between these Parties:

(A) The Secretary of State for:

The Department for Business, Energy and Industrial Strategy (BEIS), 3 Whitehall Place, London SW1A 2AW;

and

(B) The Scottish Ministers

Scottish Government, St. Andrews House, Regent Road, Edinburgh EH1 3DG

13 February 2017

Introduction

1. This Concordat sets out practical arrangements for the transfer of the UK Secretary of State's Energy Act 2004 functions³ ("the Energy Act functions") in relation to the decommissioning of offshore renewable energy installations to Scottish Ministers under the Scotland Act 2016⁴. This Concordat operates in accordance with the principles outlined in the Memorandum of Understanding on Intergovernmental Relations and Supplementary Agreements between the UK Government, Scottish Government, Welsh Government and the Northern Ireland Executive⁵, and is consistent with and complemented by other guidance on common working arrangements.
2. The Scotland Act 2016 ("the Scotland Act"), section 62, transfers to Scottish Ministers functions under the Energy Act 2004 ("the Act") to determine whether developers of an offshore renewable energy installation (OREI) in Scottish Waters or in a Scottish part of a Renewable Energy Zone should be required to prepare a costed decommissioning programme for submission to and approval by those Ministers. An OREI has the same meaning as given in the Act and includes offshore wind, wave and tidal energy installations, subject to certain limitations set out in the Act. The Energy Act functions constitute the regulatory functions of decommissioning offshore renewable installations as provided for in Chapter 3 of Part 2 of the Act to ensure that the relevant international obligations of a Coastal State such as the UK are delivered, including those under the UN Convention on the Law of the Sea. Such functions include: powers to require and approve decommissioning programmes; to require financial security for a programme to be put in place by a security provider; to review the programme or financial security and require appropriate action; and,

³ <http://www.legislation.gov.uk/ukpga/2004/20/contents> , amended in 2008
http://www.legislation.gov.uk/ukpga/2008/32/pdfs/ukpga_20080032_en.pdf

⁴ <http://www.legislation.gov.uk/ukpga/2016/11/contents/enacted/data.htm>

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf

should that responsible party default, to ensure that the decommissioning programme is carried out.

3. The Energy Act functions will be transferred to the Scottish Ministers in accordance with the Annex to this Concordat through commencement and transition regulations made under sections 71 and 72 of the Scotland Act 2016. Such functions re those installations in Categories 1 and 2 of the Annex will be transferred on the same date, on which the management of the Crown Estate assets in Scotland is to be transferred from The Crown Estate to a person nominated by Scottish Ministers through the coming into force of the Transfer Scheme provided for in section 36 of the Scotland Act, ("the Transfer Date"). The Transfer Date will be 1 April 2017.
4. The Memorandum of Understanding between the Department for Business, Enterprise and Regulatory Reform and the Scottish Executive on 'the decommissioning of offshore renewable energy installations and safety zones around offshore renewable energy installations' signed in 2007 will cease to apply on the commencement of section 62 of the Scotland Act.

Funder of last resort.

5. Whichever administration has responsibility for the Energy Act functions for decommissioning a particular installation will also act as 'operator / funder of last resort' for that installation. *Being the 'funder of last resort' does not automatically mean that the Secretary of State / Scottish Ministers are the first port of call should the owner be unable to decommission. A parent company, landlord or administrator (or others) may potentially be in line to decommission before the liability reverts to Government.*

Approval of decommissioning programmes leading up to the Transfer Date.

6. BEIS will continue to carry out the functions in respect of decommissioning programmes referred to in paragraph 2 up to the Transfer Date. BEIS will proceed with these processes up to the Transfer Date as they would if the functions under the Act were not being transferred, and will do so in a timely manner in line with published BEIS guidance.
7. In this period, BEIS will ensure that Scottish Ministers are consulted on proposed provisions of decommissioning programmes in Scottish waters or in a Scottish part of the Renewable Energy Zone.

Sites administered by the Scottish Government after the transfer of powers.

8. Although the international conventions governing decommissioning remain at UK level after the Transfer Date, all sites for which decommissioning responsibilities transfer to Scottish Ministers have received, or will have received, the relevant development consent and marine licence from the Scottish Ministers following a seabed lease or exclusivity agreement from the Crown Estate. For sites which transfer to Scottish Ministers, financial securities will be set/amended and collected by Scottish Ministers, and enforcement action in the event of default in securities will be for the Scottish Ministers. The

Crown Estate revenues provided by the sites will (from the date of coming into force of the Transfer Date) be paid into the Scottish Consolidated Fund. Therefore the UK Government does not intend to reimburse the Scottish Ministers if Scottish Ministers are required after the Transfer Date to organise and fund the decommissioning of sites included in the Annex below and subsequent projects (for example where an owner becomes insolvent and has provided insufficient securities).

Transfer of financial securities.

9. Any financial securities obtained and held by BEIS in respect of a specific decommissioning programme in accordance with section 110A of the Act and not yet used to fund decommissioning activities at that site will at the Transfer Date be made available to Scottish Ministers. If such securities are held in a BEIS bank account they are to be transferred to an account nominated by the Scottish Ministers. If such securities are in the form of guarantees, arrangements will be made to formally change the beneficiary from the Secretary of State to the Scottish Ministers.

Arrangements for Cross-Border Sites after the Transfer Date

10. The new section 105 (1A)(a) (1B) and (1C) of the Energy Act 2004 (inserted by section 62(9) of the Scotland Act 2016), provides for the allocation of the Energy Act functions in respect of cross-border sites.
11. A cross-border site is where the site of an OREI installation straddles, or (in respect of a proposal to extend a site) will straddle, the marine border between Scottish Waters and other internal waters of the UK or, in respect of a Renewable Energy Zone, the marine border between that part over which the Scottish Ministers have functions and the rest of the zone.
12. Subject to paragraph 13, responsibility for the decommissioning of cross-border sites will therefore be divided between the Scottish Ministers and the Secretary of State - each retaining the Energy Act functions in respect of that part of the site situated in the waters over which they have responsibility. Each will consult with the other administration on the terms of a draft decommissioning programme in respect of their part of a cross-border site. As far as is possible within the policies adopted by both administrations on the setting of financial securities, the consultation should ensure there is a coherent site-wide approach in setting financial securities.
13. The Secretary of State and the Scottish Ministers may agree, in respect of a particular site, that the Scottish Ministers take on the Energy Act functions for the whole site. In such a scenario, a separate agreement will be drawn up to set out the arrangements.
14. For the purposes of this agreement, each administration shall act as 'operator/funder of last resort' in respect of the part of the cross-border site for which they exercise the Energy Act functions. Being the 'funder of last resort' does not automatically mean that that particular administration is the first port of call should the owner be unable to pay for the costs of the decommissioning programme. A parent company, landlord or administrator (or others) may

potentially be in line to pay for those costs before the liability reverts to the relevant Minister.

15. This Concordat does not cover the arrangements for cross-border sites with Northern Ireland.

Working arrangements

16. The Scottish Government will support BEIS in efforts to enforce decommissioning programmes for Scottish projects. This may include providing regular information and feedback on the financial situation of site owners, progress updates on the status of each site, and any relevant information on the safety of each site.
17. The Scottish Government will also support BEIS' efforts to ensure that decommissioning is paid for by operators wherever possible including where an operator is in administration (or some other form of insolvency) – to help ensure compliance with the polluter pays principle, to protect the public purse.
18. BEIS will also provide regular information and feedback on progress with site owners (this will be monthly in 2017, and will continue until the point that the UK Government has completed its commitments as set out in the Annex).
19. Both administrations will continue to seek to implement a coherent UK-wide approach to decommissioning (alongside the Welsh Government and Northern Irish Executive). However, it is understood that the Act contains a wide scope for discretion and that the different administrations reserve the right to exercise this discretion in different ways where appropriate. Where either administration is considering taking a more risk-averse approach which would be likely to increase the costs of a site, they should give due weight to the potential impact on bills / investment, and any impact on existing subsidy contracts.

Disputes

20. The current 'Devolution: Memorandum of Understanding and supplementary agreements'⁶ sets out a dispute procedure which will be followed should a dispute be unresolved through normal administrative channels.

Signatures:

The duly authorised representatives of the Parties affix either their electronic signatures, or signatures in ink (only), or both below.

Signed for and on behalf of the Secretary of State for the Department of Business, Energy and Industrial Strategy.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf

Signature: 

Name: Emily Bourne

Date: 13/2/17

Position: Head of Energy Development Unit

Signed for and on behalf of the Scottish Ministers

Signature: 

Name: Chris Stark

Date: 20/2/17

Position: Director of Energy and Climate Change

Annex – Transferal dates

In this Annex, “Energy Act functions” are those set out in Chapter 3 to Part 2 of the Energy Act 2004 - i.e. powers concerned with decommissioning programmes for offshore renewable energy installations.

For each category, when the Energy Act functions pass to the Scottish Ministers re a particular site, the Scottish Ministers will also take on the role of acting as funder of last resort for that site.

The categorisation of projects below draws distinction between short term wave and tidal projects and longer term windfarms and tidal arrays. References to the end of year 2022 relate to the latest end date of existing marine licences for short-term wave and tidal devices.

In some instances (i.e. for sites in categories 3 and 4 below), a situation could occur where the UK Secretary of State is still exercising Energy Act functions in respect of the existing infrastructure of a project whilst the Scottish Ministers are already exercising Energy Act functions in relation to new infrastructure of the same project. In such cases, each administration will consult with the other to ensure there is a coherent site-wide approach in decommissioning proposals and setting financial securities.

Category 1 - “New site” - i.e. a new project or a new part of an existing OREI that–

- (a) is either constructed on or after 1 April 2017 and
- (b) for which a marine licence/consent is issued or varied on or after 1 April 2017.

→Energy Act functions will transfer to Scottish Ministers from 1 April 2017.

Category 2 - Infrastructure due to decommission on or after 1 January 2023 where infrastructure to which a consent relates has not yet been constructed as at 1 April 2017

→ passes to Scottish Ministers on 1 April 2017.

These are sites where as at 1 April 2017 no construction has started (other than initial laying of cabling) which will pass to Scottish Ministers on 1 April 2017 i.e.

- Argyll Tidal Farm
- Beatrice windfarm
- European Offshore Wind Deployment Centre
- DP Energy West Islay Tidal Energy Farm
- Inch Cape windfarm
- MacColl windfarm
- Neart Na Gaoithe windfarm
- Seagreen Alpha windfarm

- Seagreen Bravo windfarm
- Stevenson windfarm
- Telford windfarm
- HS1000 (Sound of Islay)

Category 3 - Infrastructure due to decommission on or after 1 January 2023 and partly (i.e. more than the initial laying of cabling) or fully constructed at 1 April 2017 e.g.

- Hywind
- Meygen Phase 1a
- Scotrenewables SR2000
- Shetland Tidal Array
- Sustainable Marine Energy – former Voith monopile
- Sustainable Marine Energy - PLAT-O#1 and rock anchors of PLAT-O#2

(i) → If an approved decommissioning programme and associated financial securities as required by the decommissioning programme are in place at 1 April 2017 then the Energy Act functions for that site will transfer to the Scottish Ministers on that date;

(ii) If an approved decommissioning programme and associated financial securities are not in place on 1 April 2017, then BEIS will retain the Energy Act functions until they are in place, at which point the Energy Act functions for that site will pass to the Scottish Ministers.

NB – UK Ministers do not (at 1 April 2017) operate a policy of requiring upfront securities for long-term projects i.e. windfarms with a 15-20 year subsidy period. For these projects, securities will therefore only be taken before transfer in relation to category 3 (ii) sites (if they transfer) where there is a requirement in their approved decommissioning plan for securities to have been provided before the date of transfer. By way of example:

- Where an approved decommissioning plan sets out that financial securities for a project should start to be accrued mid-way through a 15 or 20 year subsidy period, the first securities for such a project might not be due until the late 2020s. Energy Act functions for this project would therefore transfer to the Scottish Ministers once a decommissioning programme has been approved by the Secretary of State and a provisional level of financial securities and a time table for their accrual has been agreed as part of that approval- which would be well before any actual securities are provided.
- Where there is an existing project where the approved decommissioning programme required that all or part of the required securities be provided before 1 April 2017 but this has not happened, the Energy Act functions for this project will be retained by the SofS and only transfer to the Scottish Government once such financial securities have been provided.

In both the above examples, Scottish Ministers would be consulted before decommissioning programmes were approved, and would have the ability to amend the programme or level of financial securities after the transfer of Energy Act functions, subject to paragraph 19.

Category 4

Infrastructure due to decommission before 1st January 2023:

This category applies where the site contains existing infrastructure and either a consent/marine licence has been issued or there is the possibility that one will be issued for the existing infrastructure to be incorporated into a new/extended project e.g.

- Andritz Hammerfest Strom
- Nova 30 Demonstrator(single device)
- Aquamarine Oyster projects
- Atlantis AK1000
- EMEC tripod (inherited by EMEC from the former Tidal Generation Ltd / Alstom project).
- Evopod
- Open Hydro
- Seatricity
- Wello Oy

Energy Act functions re any new infrastructure not yet constructed at 1 April 2017 ("the new site") will pass to Scottish Ministers on 1 April 2017 (as per Category 2 above).

Energy Act functions re the existing infrastructure ("the old site") (excluding projects which only at this point include the initial laying of cabling) **at 1 April 2017** will stay with BEIS until decommissioning of the old site is complete, or the following conditions are both met:

- A. a decommissioning programme approved by the SofS must be in place for the old site along with associated financial securities, and;
- B. a new marine licence/consent is or has been issued for the old site to be taken forward into a new/extended project, and either
 - i. the SofS issues a notice under s108 proposing that the old site's approved decommissioning programme be modified to incorporate the new site; or
 - ii. the Scottish Ministers issue a notice under s108 proposing that the new site's approved decommissioning programme be modified to incorporate the old site.

Once a s108 notice is issued, Energy Act functions in respect of the old site will transfer to Scottish Ministers.