These notes refer to the Infrastructure Act 2015 (c.7)
which received Royal Assent on 12 February 2015

INFRASTRUCTURE ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 6 – Energy

Community electricity right

204. In January 2014, the Government published its Community Energy Strategy, which identified community shared ownership in renewable energy as a means to ensure that individuals living close to renewable energy installations are able to have a greater share in the financial benefits. A Shared Ownership Taskforce has been set up to 'facilitate a substantial increase in the shared ownership of new, commercial onshore renewables developments' such that 'by 2015 it should be the norm for communities to be offered the opportunity of some level of ownership by commercial developers'. The community electricity right is an alternative to the voluntary approach to increasing shared ownership, if this approach fails to deliver.

205. The community electricity right confers a power on the Secretary of State to make regulations giving individuals and/or community groups the right to purchase a stake in a renewable electricity generation facility in their local area (including onshore and offshore facilities). In connection with this power the Secretary of State can make regulations about the ownership of qualifying facilities, the supply of information and the enforcement regime.

206. The power allows the Secretary of State to provide for various matters in the regulations, including the kinds of facilities to which the right will apply, the members of the community who will be eligible to exercise the right to buy and the kinds of stake that may be bought through the right to buy.

Section 38: The community electricity right

207. *Subsection (1)* gives the Secretary of State a power to make regulations for a community electricity right. This gives a right to individuals resident in a community or groups connected with a community (or both) to buy a stake in a local renewable electricity generation facility that is located onshore or offshore. A renewable electricity generation facility is one which uses a renewable source of energy, being a source of energy other than fossil fuel or nuclear, but including waste of which not more than a specified proportion is waste, or is derived from, fossil fuel.

208. *Subsection (2)* gives the Secretary of State a power to make further regulations about the kinds of body which may operate a renewable electricity facility, and the ownership of facility operators, in connection with the community electricity right.

209. *Subsection (3)* gives the Secretary of State a power to make further provision about the supply of information in connection with the community electricity right regulations. The activities to which this may apply are listed in this *subsection*. Further detail is provided in Part 3 of Schedule 6.

210. *Subsection (4)* gives the Secretary of State a power to make further provision about the enforcement regime associated with the community electricity right regulations. This may include (but is not limited to) enforcement through the existing electricity licensing regime and financial penalties for non-compliance.

211. *Subsection (5)* enables the Secretary of State to modify electricity licence conditions and electricity licence exemptions in connection with the community electricity right regulations.

212. *Subsection (6)* gives effect to Schedule 6. This sets out the matters to be specified in further detail under the community electricity right regulations. The duties contained within this Schedule only come into effect when the community electricity right regulations are made.

213. *Subsection (7)* contains definitions of the terms used in sections 38, 39 and Schedule 6.

Section 39: Supplementary provision

214. *Subsection (1)* enables community electricity right regulations to confer functions in relation to the community electricity right. This can include functions of the Secretary of State and any other person apart from Scottish and Welsh Ministers.

215. *Subsection (2)* provides further detail on the functions that may be conferred. For example this may include a duty (this may be in relation to enforcing the community electricity right), a requirement to consult (this may apply to renewable electricity generators in relation to a requirement to consult with the local community on the type of stake to be offered). It may also include exercising discretion (this may include renewable electricity generators choosing the kind of stake offered to communities) and a requirement to take into account any guidance (this may include guidance produced by the Secretary of State in relation to the implementation of the community electricity right).

216. *Subsection (3)* provides that the scope of the powers within this Part of the Act is not limited to the examples provided.

217. *Subsection (4)* provides that the requirements included within Schedule 6 only come into effect when the community electricity regulations are made.

218. *Subsection (5)* provides that the commencement of the regulations (as defined in the regulations) can ensure that the regulations do not apply retroactively and would only apply to existing facilities that have not, at that date, reached a specified point of development.

219. *Subsection (6)* makes provision that the stake in the renewable electricity generating facility can be in the form of a loan or debt instrument.

220. *Subsection (7)* requires the Secretary of State to carry out a review of the provisions in connection with the community electricity right once the provisions have been in force for 5 years.

Schedule 6: Community electricity right regulations

Part 1: The Right to Buy

221. *Paragraph 1* defines 'right to buy regulations' as those regulations made under *subsection (1)* of section 38.

222. *Paragraph 2* sets out the parameters for the kinds of renewable electricity facilities that will come under the community electricity right regulations. Paragraph 2(2) provides that these regulations will not apply to any renewable electricity generation facility under 5MW of total installed capacity.

223. *Paragraph 2(3)* allows the Secretary of State to specify that the community electricity right regulations may apply to a particular type of renewable electricity facility; such facilities may be defined in terms of the renewable source of energy used, the technology used, the electricity generation capacity, and whether the facility is land-based or offshore.

224. *Paragraph 3* requires the Secretary of State to set out the criteria for identifying qualifying renewable electricity facilities under the community electricity right regulations. Paragraphs 3(2) and (3) make further provision about sites that have been expanded or where there is more than one renewable electricity facility. In relation to existing sites that have been expanded these regulations may apply to any facility where the total installed capacity of that site is expected to be 5MW or more.

225. *Paragraphs 3(4) to (6)* allow the Secretary of State to make further provision about the kinds of renewable electricity facilities that may be excluded from the community electricity right regulations; this is defined as an excepted facility. Excepted facilities may include community owned facilities, facilities where the community owns a stake, and those facilities that are not participating in statutory energy schemes (for example those not participating in the Feed-In Tariff, Contracts for Difference or Renewables Obligation schemes).

226. *Paragraph 4* defines the promoter of a qualifying facility as the person responsible for developing the qualifying facility, and makes provision to identify the promoter in cases where that person is not also the facility operator.

227. *Paragraph 5* requires the Secretary of State to make further provision in secondary legislation about the community who could exercise the right to buy. This may be in reference to the community's geographical location relative to the facility, its distance from the facility, the number of residents or any administrative boundaries.

228. *Paragraph 6* requires the Secretary of State to make further provision about which individuals and groups may exercise the right to buy. Further detail on how this may be defined in relation to individuals and groups is set out in this paragraph. *Paragraph 6(3), (4) and (7)* allow the Secretary of State to make further provision about the individuals and groups who may not exercise the right to buy. Sub-paragraphs (8) and (9) provide further provision about people who may be connected for the purpose of the regulations.

229. *Paragraph 7* makes further provision about the kinds of stake that may be offered through the community electricity right regulations. This may include shares, any other interest in a body other than a company, an equitable interest, a royalty instrument or a loan.

230. *Paragraph 8* provides that the regulations must give the designated promoter or facility operator a choice of at least two different kinds of stake that may be offered. It is then for the promoter or facility operator to make a decision on the kind(s) of stake offered to the community. The promoter or facility operator must consult (e.g. with the community) and take the results of this consultation into account before choosing the kind(s) of stake that they will offer.

231. *Paragraph 9* requires the Secretary of State to make further provision about setting the price of the stakes in a qualifying facility. It includes reference to 'a measure of fair value' when setting the price of the stake offered to communities; this means that the price of the stake should not be offered at a discounted price to the community.

232. *Paragraph 10* makes further provision about the total value of the offer to communities. *Paragraphs 10(2) and (3)* specify that the minimum size of stake that must be offered by developers is to be set in secondary legislation, but that this must not be greater than 5% of total capital costs of the development of the facility. Paragraph 10(5) allows the Secretary of State to make further provision about the calculation of the total capital costs. The minimum size of stake prescribed in secondary legislation may vary depending on the technology or size of the development up to this 5% cap. It is intended

that very large developments will not be required to offer a stake which it would be unrealistic to offer the community.

233. *Paragraph 11* makes further provision about the procedure for buying a stake, which is defined as the purchase procedure in paragraph 11(1). It establishes an initial application procedure in paragraph 11(4) where the stakes in the renewable electricity facility are offered. The offering of stakes cannot begin until after the renewable electricity generation facility has secured planning consent. The meaning of planning consent is defined further in paragraph 11(6).

234. *Paragraph 12* makes further provision for when there is either excessive or insufficient take up of the stakes offered for a renewable electricity facility. For example, paragraph 12 (2) establishes a secondary period following the application period. In this secondary period it may be possible to offer stakes to a wider community.

235. *Paragraph 13* allows further provision in regulations on the subsequent disposal of a stake after it has been bought. This may include imposing restrictions or prohibitions on the disposal of a stake on individuals or communities, with exceptions.

Part 2: Operators, Ownership & Related Matters

236. *Paragraphs 14 to 19* make further provision about operators and the ownership of renewable electricity facilities under the community electricity regulations. For example, this may include the kinds of body that may be a facility operator, the constitution of facility operators, the conduct of owners of facility operators and the treatment of revenues earned by a qualifying facility.

Part 3: Information

237. *Paragraphs 20 to 25* provide further provision about the supply of information under the community electricity regulations. This may apply to the possible buyers of stakes who would like to exercise the right to buy, prospective buyers of stakes who are entitled to exercise the right to buy, those applying to buy a stake, and the owners of stakes.

Part 4: Supplementary

238. *Paragraph 26* provides further definition of the terms used within the Schedule.

The Extractive Industries Transparency Initiative

Section 40: The Extractive Industries Transparency Initiative

239. The Act helps to maximise the transparency of data in the extractive industries by granting HMRC a function to participate in the Extractive Industries Transparency Initiative (EITI). Section 40 inserts a new section 8A in the Commissioners for Revenue and Customs Act 2005, which gives the Commissioners for Revenue and Customs the new function of participating in the EITI. *Subsection (1)* allows the Commissioners to do anything they think is necessary or expedient in connection with the EITI, in so far as it relates to taxes for which the Commissioners have collection and management responsibility. *Subsection (2)* provides a definition of the EITI.

Recovery of UK petroleum

240. On 10 June 2013 the Secretary of State of Energy and Climate Change announced a review of UK offshore oil and gas recovery and its regulation, led by Sir Ian Wood. The final report of Sir Ian's *UK Continental Shelf Maximising Recovery Review* was published on 24 February 2014.

http://www.woodreview.co.uk/documents/UKCS%20Maximising%20Recovery%20Review%20FINAL%2072pp%20locked.pdf

241. The report identified a number of key issues including the following:

- The need for operators to focus on maximising economic recovery for the UK as well as pursuing their individual commercial objectives.
- The need for a greater resourced and more proactive regulator.
- The need for significantly improved asset stewardship.
- The need for far greater constructive collaboration between operators.
- The need for better implementation of industry strategies.

242. To address these issues, Sir Ian made a number of principal recommendations, including that a maximising economic recovery of UK petroleum strategy be developed with the regulator exercising its functions with a view to maximising the economic recovery of petroleum from UK waters.

243. The Government has accepted the findings of the report and published its response on 16 July 2014

https://www.gov.uk/government/publications/government-response-to-sir-ian-woods-review-of-the-uk-continental-shelf-ukcs

Section 41: Maximising economic recovery of UK petroleum

244. Section 41 implements the first recommendation, covering maximising the economic recovery of UK offshore petroleum and the strategy. It does this by inserting a number of new sections into the Petroleum Act 1998.

245. New section 9A provides for a principal objective of maximising the economic recovery of UK offshore petroleum. The section requires the Secretary of State to produce a strategy which is the means for enabling the principal objective to be met. The strategy will set out what is meant by maximising the economic recovery of UK petroleum. This will provide the flexibility to take account of how the principle should apply in different circumstances along with the changing needs of the UK Continental Shelf.

246. New section 9B places a duty on the Secretary of State to carry out relevant functions in accordance with the strategy.

247. New section 9C places duties on licence holders, operators appointed under those licences and owners of upstream petroleum infrastructure to carry out certain identified activities in accordance with the strategy. *Subsection (4)* places a duty on a person planning and carrying out the commissioning of upstream petroleum infrastructure. This is necessary because that person may not be the owner of such infrastructure and would not fall within *subsection (3).*

248. New section 9D places a duty on the Secretary of State to lay before Parliament a report at the end of each reporting period on the extent to which relevant persons have acted in accordance with the strategy. This is the sanction for breach of the obligations in the new provision of the Petroleum Act 1998 inserted by this section.

249. New section 9F makes provision in respect of the production and revision of the strategy by the Secretary of State. In particular, the first strategy must be produced within one year of this provision coming into force. New section 9G sets out the procedure that must be followed by the Secretary of State in producing and revising the strategy.

Section 42: Levy on holders of certain energy industry licences and Schedule 7: The Licensing Levy

250. Section 42 provides the Secretary of State with a power to raise a levy from the holders of certain energy industry licences.

251. *Subsection (1)* provides for the Secretary of State to impose a levy on persons holding licences for the exploitation of petroleum, the unloading and storing of gas and the storage of carbon dioxide.

252. *Subsection (3)* provides that the amount of levy must not exceed the costs incurred by the Secretary of State in carrying out relevant functions (these are set out in *subsection (5)).* The levy cannot be used to recover costs in respect of areas in which a charge is payable under the Gas and Petroleum (Consents) Charges Regulations 2013 as those provisions stand when this provision comes into force.

253. Schedule 7 contains illustrations of the way in which the levy power can be used.

Petroleum and geothermal energy in deep-level land

254. In May 2014, the Government published a consultation on the proposal to change the process by which companies obtain underground access to petroleum and deep geothermal energy resources. Following the responses to the consultation, which closed in August 2014, the Government published its own response in September 2014 setting out the proposals to introduce a right to use deep-level land for certain purposes.

255. At present, a company drilling for petroleum or deep geothermal energy must reach agreements with landowners to obtain rights of access, even where works will only take place far below the surface. If a company cannot obtain a right of access from the landowners or, in the case of petroleum, be granted ancillary rights by the court, then the company cannot carry out works in that land. It is therefore proposed that, where a company seeks to carry out works at such depths that it would not affect a landowner's use of the land, there should be a statutory right to use the land.

256. Both the petroleum and deep geothermal industries have made voluntary commitments to notify local communities and make payments in connection with the right to use deep-level land. If the Secretary of State is not satisfied in practice with the commitments made by either of the industries, then he may introduce regulations to set up one or both of a statutory payment or notification mechanism.

Section 43: Petroleum and geothermal energy: right to use deep-level land

257. *Subsection (1)* provides for a right to use deep-level land for the purpose of exploiting petroleum or deep geothermal energy.

258. The right of use is only applicable to land that is deep-level land within a landward area (*subsection (2)*). *Subsection (3)* clarifies that deep-level land within a landward area may still be used to exploit petroleum or deep geothermal outside a landward area. It is therefore possible, for example, for a person to benefit from the right of use when drilling from a point onshore into a resource offshore, although the right will not extend to works that are not within a landward area and are not in deep-level land.

259. *Subsection (4)* defines deep-level as any land at a depth of at least 300 metres below the surface.

Section 44: Further provision about the right of use

260. Section 44 further identifies the scope of the right of use of deep-level land.

261. *Subsection (1)* lists some of the ways in which the right of use may be exercised, some of which include drilling, boring and fracturing; the installation, keeping, use and removal of infrastructure; and putting any substance into deep-level land and subsequently removing it. This allows, for example, for a company to drill and use a well in deep-level land for the purposes of exploiting petroleum or deep geothermal energy, pass substances through that well and remove any substances that are put into it.

262. *Subsection (2)* lists some of the purposes for which the right of use may be exercised, including searching for petroleum or deep geothermal energy, assessing the feasibility of exploitation, and preparing for exploitation and decommissioning.

263. *Subsection (3)* clarifies that the right of use allows land to be left in a different state than it was before.

264. *Subsection (4)* limits the effect of the right of use so that it is no different to a right granted by a person, such as a landowner, who is legally entitled to grant such a right. As a result, companies benefitting from the right must still comply with all other regimes governing petroleum and deep geothermal activities, such as the need to obtain all necessary planning permissions and environmental permits, and the need to comply with statute law relating to control of pollution.

265. *Subsection (5)* excludes a person who owns land from being liable in tort for any loss or damage that happens as a result of the exercise of the right of use of deep-level land. In accordance with Schedule 1 of the Interpretation Act 1978, "land" includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land. Provided that an owner of land would not ultimately have to bear any of the costs associated with the acts identified in the section, an owner of land may nevertheless be liable if the loss or damage is attributable to a deliberate omission on their part as owner of the land.

266. Sections 43 and 44 bind the Crown under *subsection (6)*. This means, for example, that the right of use can be exercised in relation to land that belongs to the Crown.

Section 45: Payment scheme

267. *Subsection (1)* confers a power on the Secretary of State to make regulations requiring companies to make payments in return for the right of use.

268. *Subsection (2)* sets out to whom the Secretary of State can require payments to be made, and *subsection (3)* allows the Secretary of State to specify the amount of the payments or provide a mechanism for determining the payment amounts. *Subsection (4)* states that the regulations may require energy companies to provide specific information on the right of use and payments to the Secretary of State or to any other specified person.

269. The Secretary of State must consult with appropriate persons before making any regulations under Section 45 *(subsection (5)*).

Section 46: Notice scheme

270. Section 46 confers a power on the Secretary of State to make regulations requiring energy companies to notify others of the right of use, before or after it is exercised.

271. *Subsection (2)* allows for the regulations to specify the people to whom notice should be given to require the display and publication of the notice. *Subsection (3)* provides that the regulations may make provisions on the content of the notice, including information on payment schemes available, their application and method for obtaining a payment. *Subsection (4)* provides that the regulations may specify how the notice is given which could, for example, be by display and publication at specified places or in specified publications. *Subsection (5)* specifies that the regulations may require energy companies to provide the Secretary of State or another specified person with information about the company's exercise of the right of use and notifications made by the company.

272. The Secretary of State must consult with appropriate persons before making any regulations under Section 46 *(subsection (6)*).

273. *Subsection (7)* defines "payment scheme regulations".

Section 47: Payment and notice schemes: supplementary provision

274. Section 47 provides for supplementary provisions relating to the payment and notice schemes regulations under sections 45 and 46 including, in accordance with *subsection (1)*, the imposition of financial penalties.

275. *Subsection (2)* allows for the regulations to confer a function on the Secretary of State or to any other person, apart from Welsh Ministers. *Subsection (3)* lists examples of the kinds of functions that may be imposed.

276. Some of the provisions in sections 45, 46, and 47 state that particular kinds of provisions may be made in regulations made under sections 46 and 47. *Subsection (4)* states that where this is the case, those provisions in sections 45, 46, and 47, do not limit the powers to make the necessary regulations.

277. In accordance with the principles of better regulation, *subsection (5)* requires a review of sections 45 and 46 five years after the provisions have come into force. *Subsection (6)* stipulates that the Secretary of State must repeal sections 45 and 46 and make any appropriate consequential amendments if the relevant conditions as defined by *subsection (7)* are met. *Subsection (7)* defines the relevant conditions as a delegated power not being exercised within seven years and the Secretary of State being satisfied there is no convincing case for retaining it. This ensures that the powers and related provisions will not remain on the statute book if they become unnecessary or redundant.

Section 48: Interpretation

278. Section 48 provides for the relevant definitions and interpretation of the sections about the right of use.

279. *Subsection (1)* specifies that the 300m depth limit applies from the surface, which is measured vertically above the point where works take place. Buildings, other structures, and water are not taken into account when determining the location of the surface.

Subsection (2) provides definitions of "deep geothermal energy", "deep-level land", "landward area", "relevant energy undertaking", "right of use", "specified" and "substance". For the purpose of these sections "landward area" is defined as parts of landward area in England and Wales or beneath water (other than waters adjacent to Scotland).

280. *Subsection (3)* provides that the Secretary of State may make regulations under section 4 of the Petroleum Act 1998 to amend the definition of "landward area" for the purposes of these sections.

Section 49: Advice on likely impact of onshore petroleum on the carbon budget

281. *Subsection (1)* requires the Secretary of State to seek advice from the Committee on Climate Change (CCC) from time to time on the likely impact of the combustion of, and fugitive emissions from, onshore petroleum activities and the UK's ability to (a) meet the net UK carbon target for 2050 and (b) not exceed the carbon budget.

282. *Subsection (2)* sets out that the Secretary of State must lay before Parliament (a) a copy of the CCC advice and (b) a draft of regulations or a report as specified under *subsections (3)* and *(5)* as soon as practicable after each reporting period (i.e. the period ending 1 April 2016 and each subsequent period of 5 years).

283. *Subsection (3)* allows the Secretary of State to provide for the right to use deep-level land in *section 43* to cease to have effect as specified by regulations. *Subsection (4)* clarifies that no such regulations can apply retrospectively to anything done in exercise of the right of use conferred by *section 38* before the regulations comes into force. As an alternative to *subsection (3)*, *subsection (5)* provides for the Secretary of State to submit to Parliament a report explaining why a draft of such regulations has not been laid.

Subsection (6) sets out that regulations under section 49 may also make consequential amendments or repeals of sections 43 to 48 and section 49 as appropriate.

284. *Subsection (7)* contains the definitions of "CCA 2008", "petroleum got through onshore activity, petroleum" and "reporting period".

Section 50: Onshore hydraulic fracturing: safeguards

285. *Section 50* inserts two new sections into the Petroleum Act 1998 after Clause 4. As this relates to the petroleum licensing regime, geothermal activities are excluded from this *section 50*. *Section 4A "Onshore hydraulic fracturing: safeguards"* sets out conditions for a well consent that is required by an onshore licence for England and Wales in relation to hydraulic fracturing.

286. *Subsection (1)* requires that the Secretary of State must not issue a consent to drill a well unless that well consent contains conditions (a) prohibiting associated hydraulic fracturing at a depth of less than 1000 metres and (b) requiring a hydraulic fracturing consent for associated hydraulic fracturing at a depth of 1000 metres and below. *Subsection (2)* clarifies that the licensee, or a person on behalf of the licensee, must apply for such a hydraulic fracturing consent.

287. *Subsection (3)* provides that a hydraulic fracturing consent will not be issued unless the Secretary of State is satisfied that the conditions (a) in column 1 of the table in *subsection (5)* and (b) in *subsection (6)* are met. The Secretary of State must also be satisfied that it is appropriate to issue the consent. *Subsection (4)* refers to the documents listed in the same table on which the Secretary of State may rely on to be satisfied that the conditions have been met. However, *subsection (5)* clarifies that the absence of these documents does not prevent the Secretary of State from being satisfied that the conditions have been met; provided that, in accordance with *subsection (3)*, the Secretary of State is satisfied that the conditions are indeed met he may grant a hydraulic fracturing consent.

288. The table lists eleven conditions (column 1) and corresponding documents that may be considered to be sufficient for the Secretary of State to be satisfied that the conditions have been met (column 2). The conditions relate to: the environmental impact of a development, independent well inspections, monitoring of methane in groundwater, monitoring of methane emissions, banning hydraulic fracturing within protected groundwater source areas and other protected areas, consideration of cumulative effects, regulatory approval of substances used, restoration conditions, consultation of relevant (i.e. water and sewage) undertakers, and public notification. The Secretary of State is not limited to relying on the documents listed in column 2 and may instead rely on alternative documents in determining whether the conditions have been met.

289. *Subsection (6)* sets out further conditions to the issuing of a hydraulic fracturing consent, requiring arrangements to be in place for publication of the results of methane emissions reporting and the existence of a scheme to provide financial or other benefit for the local area.

290. *Subsection (7)* allows for the hydraulic fracturing consent to be issued subject to any conditions considered appropriate by the Secretary of State, while subsection (8) clarifies that a breach of a condition is considered a breach of the well consent.

291. *Section 4B "Section 4A: supplementary provision"* contains further definitions and clarifications. "Associated hydraulic fracturing" is defined in *subsection (1)* and *subsection (2)* sets out the mechanism for determining the depth at which associated hydraulic fracturing takes place. *Subsection (3)* provides that *subsections (1)* and *(2)* apply to both section 4A and 4B.

292. *Subsection (4)* requires the Secretary of State to specify by regulations the meaning of "protected groundwater source areas" and "other protected areas". *Subsection (5)* makes these regulations subject to the affirmative resolution procedure and *subsection (6)*

stipulates that a draft of these regulations must be laid before Parliament on or before 31 July 2015. *Subsection (7)* requires the Secretary of State to consult the Environment Agency for England and the Natural Resources Body for Wales before making any regulations on the definition of "protected groundwater source areas" in England and Wales respectively.

293. *Subsection (8)* contains various definitions, including the meanings of "hydraulic fracturing consent", "onshore licence for England and Wales" and "well consent". *Subsection (9)* provides the Secretary of State with the power to amend the definition of "onshore licence for England and Wales" as appropriate under regulations made under section 4 of the Petroleum Act 1998. *Subsection (10)* allows the Secretary of State to amend column 2 of the table in 4A and make any consequential amendments to *section 4A*. In accordance with *subsection (11)* any such regulations must be subject to the affirmative procedure.

Renewable Heat Incentives

Section 51: Renewable Heat Incentives

294. *Subsections (1)-(4)* amend section 100 of the Energy Act 2008, which contains a power to make regulations establishing schemes to facilitate and encourage renewable generation of heat.

295. *Subsection (2)* inserts new *subsections* (1A) and (1B) into section 100, allowing for regulations made under the section to confer functions on any person (and for that function to be exercisable on behalf of another person). Along with the amendments made by *subsection (3)*, this means that regulations can now appoint and give functions in the regulations to any person or persons to administer the schemes, whereas previously these roles were limited to the Secretary of State or the Gas and Electricity Markets Authority ("the Authority").

296. *Subsection (3)(a) and (c)* amend *subsection (2)* of section 100 to allow for regulations to cater for the assignment of payments under schemes. *Subsection (3)(a)* amends section 100(2)(a) so that that paragraph now sets out the power to provide in regulations for an entitlement to receive payments, and not additionally an obligation to make those payments. The amendment does not change who is entitled to receive payments. This remains as the owner of a renewable heat installation; the producer of biogas or biomethane; or the producer of biofuel for the generation of heat.

297. *Subsection (3)(c)* inserts new paragraphs (ba) and (bb) into *subsection (2)* of section 100. The new (ba) specifies that regulations can make provision about the circumstances in which, and descriptions of persons to whom, the whole or a part of an entitlement to payments under the schemes may be assigned. The new (bb) replaces the wording that was in (a), and allows for the regulations to provide for payments to be made (by the Secretary of State, the Authority, any other person administering a scheme or a designated fossil fuel supplier) to persons entitled to receive payments, or to whom those entitlements have been assigned. This could allow, for example, the owner of a heat generating installation to assign his payments to a person providing finance for the installation and for payments to be made directly to that person. Paragraphs (b) and (d) of *subsection (3)* make consequential amendment because of the new defined term "RHI payment" introduced in paragraph (a).

298. *Subsection (3)(e)* substitutes paragraph (d) of section 100(2) so that regulations can authorise or require a person to provide specified information. This could be used in the context of changes to the arrangements for the administration of the scheme, such as providing for information flows between these administrators.

299. *Subsections (3)(f) to (h)* make amendments to section 100 as a consequence of the new *subsection (1A)*.

300. *Subsection (3)(i)* inserts two new paragraphs into *subsection (2)* of section 100. The new paragraph (j) means that regulations can authorise the Secretary of State to make payments to any person with respect to administration of the RHI schemes. The new paragraph (k) makes clear that the regulations can include provision about the resolution of disputes including by arbitration or appeal. This could allow for the regulations to include a right of appeal to a court or tribunal. The paragraph makes clear that an appeal or arbitration could result in an order for the payment of costs or compensation.

301. *Subsection (4)* amends *subsection (3)* of section 100 to include a definition of "other administrative function" within the new paragraph (bb).

302. *Subsection (5)* to *(8)* introduce changes to the Parliamentary control of RHI subordinate legislation contained in section 105 of the Energy Act 2008.

303. *Subsection (6)(a)* omits section 105(2)(a)(vi) and thereby removes the existing requirement that all regulations under section 100 are subject to the affirmative resolution procedure.

304. *Subsection (6)(b)* inserts a new paragraph (ab) in *subsection (2)* of section 105 setting out that renewable heat incentive regulations made under section 100 will be subject to the affirmative resolution process if they contain 'affirmative resolution provision', which is defined in the new *subsections* (3A) to (3I) in section 105 inserted by *subsection (8).*

305. The new *subsection (3A)* defines affirmative resolution provision as provision made under a power which always attracts the affirmative resolution procedure (described in new *subsection (3B)*), or which is not made under one of those powers and meets any of the conditions A to D described in new *subsections* (3C) to (3F).

306. The new *subsection (3B)* ensures that use of the following powers will always be subject to the affirmative procedure:

- Section 100(2)(c), (e), (f), (g), (h) or (k) which cover enforcement, sanctions and appeals, and levies on fossil fuel suppliers;
- Section 100(5) which allows for regulations to amend the definitions of biomass or biogas in *subsection (3)* and the list of sources of energy and technologies in *subsection (4)* of section 100; and
- Section 100(6) which allows for provision in regulations to be made, for the purposes of *subsection (2)(a)(iii)* and the definition of "fossil fuel supplier", specifying that particular activities do or do not constitute generating heat.

307. The new *subsection (3C)* contains condition A. This ensures that where provision is made under section 100(2)(bb) for RHI payments to be made by fossil fuel suppliers, the affirmative procedure is used.

308. The new *subsection (3D)* contains condition B. This ensures that the first provision in each RHI scheme which confers an administration function on someone other than the Secretary of State or the Authority will be subject to the affirmative resolution procedure.

309. The new *subsection (3E)* contains condition C, which only applies to the two RHI schemes which are in existence when the *subsection* comes into force. This ensures that the first provision in each of those RHI schemes, which is made under section 100(2)(ba) or (bb)(ii) – and which concern the assignment of the entitlement to RHI payments, and the payment of such assigned payments – will be subject to the affirmative resolution procedure.

310. The new *subsection (3F)* contains condition D, which only applies to new RHI schemes made after the *subsection* comes into force. This ensures that the first use of each of paragraphs (a) (entitlement to RHI payments), (b) (calculation of payments), (ba)

(assignment of entitlement), (bb) (requirements to pay), (d) (provision of information) or (j) (making payments to administrators) of section 100(2) in each such RHI scheme is subject to the affirmative resolution procedure.

311. The new *subsection (3G)* ensures that payment functions conferred on a fossil fuel supplier will not count as administrative functions conferred on someone other than the Secretary of State or the Authority for the purposes of condition B.

312. The new *subsection (3H)* provides that a provision made under any of the powers listed in (3A) to (3F) is still counted for the purposes of those subsections as being made under the power, even if it is also made under section 100(1), (1A) or (1B).

313. The new *subsection (3I)* defines the terms: administration function; designated fossil fuel supplier; payment function; and RHI scheme for use within new *subsections (3B) to (3H).*

314. *Subsection (9)* amends section 105 of the Utilities Act 2000. That section contains restrictions on the disclosure of information, including information gained through an RHI scheme. The new provision inserted as paragraph (aa) in *subsection (3)* of section 105 exempts from the restriction on disclosure any disclosure made for the purpose of facilitating the functions of any person under section 100 of the Energy Act 2008.

Reimbursement of persons who have met expenses of making connections

315. The Electricity Act 1989 ("the 1989 Act") provides a power in section 19 (Power to recover expenditure) for the Secretary of State to make regulations which allow for the sharing of costs among persons requiring electricity connections to a distribution network. The Secretary of State may enable or require electricity distributors to obtain so-called "second comer" payments from persons who benefit from an electricity connection paid for by a previous person (the "first comer") and for any payments received to be re-distributed to earlier contributors (such as the first comer).

316. The power in section 19(2) and (3) of the 1989 Act only applies to connections made by licensed distribution network operators. It therefore excludes independent connection providers (ICPs) which now compete with distribution network operators (DNOs) and independent distribution network operators (IDNOs) in the connections market. This can put ICPs at a disadvantage since a customer may be deterred from contracting with them to provide a connection, on the basis that they would not be able to recover a proportion of the cost from later connectees (i.e. the "second comer").

317. The provision on reimbursement of persons who have met expenses of making electrical connections in section 47 replaces the power at section 19(2) and (3) of the 1989 Act with a broader power to allow or require the recovery of second comer payments regardless of whether a DNO, IDNO or ICP made the first or second connection. It also amends the power at section 23 (Determination of disputes) of the Gas and Electricity Markets Authority ("GEMA") to determine disputes relating to connections and makes consequential amendments to sections 16 (Duty to connect on request) and 16A (Procedure for requiring a connection) of the 1989 Act.

318. The power allows the Secretary of State to provide for various matters in the regulations, which include placing a requirement on electricity distributors to seek and allocate payments from second comer. It also allows for distributors to estimate the cost of connections which they did not themselves make by reference to what it would have cost them and changes in prices since the connection was made.

Section 52: Reimbursement of persons who have met expenses of making electrical connections

319. *Subsections (1), (2) and (3)* amend section 19 of the 1989 Act by removing subsections (2) and (3) and replacing them with new Schedule 5B.

320. *Subsections (4) and (5)* make consequential amendments to sections 16 and 16A of the 1989 Act.

321. *Subsection (6)* amends section 23 of the 1989 Act by inserting a new subsection to enable GEMA to determine disputes relating to the exercise of the reimbursement powers set out in Schedule 5B. It also makes consequential amendments to the remainder of section 23.

Schedule 5B

Power to make regulations

322. *Paragraph 1* confers a power on the Secretary of State to make regulations enabling electricity distributors to exercise the reimbursement powers where conditions A to D as set out are met. Condition A is met where an electricity connection (the "first connection") is made between premises and a distribution system or between two distribution systems. Condition B is met if a payment has been made towards the cost of the first connection by the person who required the connection or caused it to be made. Conditions C and D are met where a second connection is made using electric line or plant provided for the first connection within a period prescribed in the regulations.

323. *Paragraph 1(6)* defines "first connection expenses" as those reasonably incurred by a person in providing electric line or plant to make the connection (including the capitalised value of maintaining it).

324. *Paragraph 1(7)* makes clear that it does not matter whether the first connection or second connection is made by an electricity distributor or a person of another description, thereby bringing ICPs within the scope of the power.

The reimbursement powers

325. *Paragraph 2(1)* defines the reimbursement powers as the power to require a reimbursement payment from a person who requires or otherwise causes a second connection to be made and the power to apply such a payment to reimburse anyone who was required to contribute to the cost of the first connection.

326. *Paragraph 2(2)* sets out that a reimbursement payment is a payment towards the cost of a first connection of an amount which is reasonable in all the circumstances.

Other provisions about the regulations under this Schedule

327. *Paragraph 3(1)* imposes a duty on the Secretary of State to consult GEMA before making regulations under this Schedule.

328. *Paragraph 3(2)* allows regulations requiring relevant electricity distributors to exercise a reimbursement power and thus collect and allocate reimbursement payments.

329. *Paragraph 3(3)* allows a relevant electricity distributor to estimate the cost of a first connection in situations where the electricity distributor did not make that connection. This situation arises where an ICP makes the first connection to a distribution network on behalf of its customer.

330. *Paragraph 3(4)* ensures that an ICP (or other person who has made a connection in respect of which a reimbursement payment is due) may not be required to share its cost information with a relevant electricity distributor.

331. *Paragraph 3(5)* allows a relevant electricity distributor to estimate the costs of the ICP (or other person who has made a connection in respect of which a reimbursement payment is due) by reference to its own costing methodology and changes in prices.

Interpretation

332. *Paragraph 4(1) and (2)* defines the terms "first connection", "first connection expenses", "payment in respect of first connection expenses", "reimbursement payment" and "reimbursement powers" by reference to the paragraphs of the Schedule

where they appear. It also defines "relevant electricity distributor" as the distributor who operates the distribution system into which a new connection is made.

Section 53: Consequential provision

333. Section 53 gives a power to make consequential provision in connection with any provision under Part 5 of the Act, other than section 40 (Extractive Industries Transparency Initiative).