

EXPLANATORY MEMORANDUM TO
THE NUCLEAR DECOMMISSIONING AND WASTE HANDLING (FINANCE
AND FEES) REGULATIONS 2011

2011 No. 134

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

2. Purpose of the Instrument

2.1 The purpose of this instrument is to contribute to the Funded Decommissioning Programme (FDP) regime contained in the Energy Act 2008 (“the Act”). The Act aims to facilitate new nuclear power in the UK whilst ensuring that the waste and decommissioning liabilities of operators do not fall onto the taxpayer. This is achieved by requiring companies seeking to construct nuclear power stations to submit a FDP setting out the costs of future waste and decommissioning liabilities and how such costs are to be financed. These Regulations cover a number of different areas regarding the functioning of the FDP process.

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

3.1 None.

4. Legislative Context

4.1 Chapter 1 of Part 3 of the Energy Act 2008 deals with decommissioning and clean-up of nuclear sites and the requirement for nuclear operators who apply for a nuclear site licence to submit a FDP to the Secretary of State for approval. Section 47 of the Act makes it a criminal offence to use a site by virtue of the nuclear site licence without an approved FDP in place and section 57 makes it a criminal offence for an operator or any other person with obligations under a FDP to fail to comply with such an obligation.

4.2 Section 45(7) of the Act details the matters a FDP must contain. This includes details of the steps to be taken in relation to the technical matters (matters concerned with dealing with nuclear waste during the operation of the station; decommissioning and clean up of the site; and steps in preparation for decommissioning); cost estimates for certain of those technical matters (known as “designated technical matters”) and the financing arrangements for those designated technical matters.

4.3 Section 49 of the Act sets out the procedure for modifying an approved FDP and the requirement for Secretary of State approval for any modifications. Under

section 50 of the Act the Secretary of State may make regulations disapplying the FDP modification procedure in certain circumstances.

4.4 Section 54 of the Act states that the Secretary of State may make regulations about various matters relating to the FDP including its preparation, content, implementation and modification. Section 55 provides that such regulations may make provisions enabling the Secretary of State to rely, in specified circumstances, on verification of cost estimates and financial matters by an independent third party.

4.5 This instrument makes regulations pursuant to sections 50, 54, 55 and 104 of the Act and is complemented by The Nuclear Decommissioning and Waste Handling (Designated Technical Matters) Order 2010 which specifies certain matters as designated technical matters, in addition to those provided in the Act, so that there is a clear understanding of the extent of the designated technical matters.

5. Territorial Extent and Application

5.1 These Regulations apply to England, Wales and Northern Ireland.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- **What is being done and why**

7.1 The operators of new nuclear power stations must have secure financing arrangements in place to cover their decommissioning, waste management and waste disposal liabilities. These Regulations complete the legislative framework.

7.2 Regulation 2 provides that the Secretary of State must carry out a review of these Regulations every five years. As part of this process the Secretary of State must set out the conclusions of the review in a report and such report must be laid before Parliament.

7.3 Regulation 4 requires the estimates of costs for future liabilities, to be set out in two parts in the FDP; one part showing the cost estimates for the disposal of spent fuel and intermediate level waste and the other part showing all other costs. This is so that the Secretary of State can monitor each estimate to make sure that it is prudent. Regulation 4 sets out the basis for calculating fees payable by certain persons including operators, the circumstances additional to those provided in the Act when fees will be payable and the time period within which they must be paid.

7.4 Regulation 6 provides that where a FDP or a proposal to make a modification are submitted to the Secretary of State they must be accompanied by an assessment carried out by an independent third party of the cost estimates and where relevant the financing arrangements. These assessments are required to enable the Secretary of State to monitor the prudence or not as the case may be, of the cost estimates and financing arrangements.

7.5 Regulation 7 sets out the reports which operators must provide to the Secretary of State on an annual and five yearly basis and information each must contain. The purpose of these reports is to enable monitoring of the operators waste and decommissioning liabilities and financial provision made for them. Regulation 8 allows the Secretary of State to rely on independent third party assessments of the cost estimates and financing arrangements in certain circumstances. This is to provide the Secretary of State with additional assurance in relation to the prudence of the cost estimates and the financial provision made for such costs.

7.6 Regulation 9 disapplies section 49 of the Act so that modifications which involve a change in the cost estimates of less than 5% do not need to be approved by the Secretary of State. This is to ensure that only material changes to the FDP are notified to the Secretary of State for the purposes of obtaining approval.

8. Consultation outcome

8.1 From March until June 2010 a consultation was conducted with draft regulations. The consultation was for a 12 week period and was open to members of the public, the nuclear industry, non-governmental organisations and any other organisation or body with an interest in the requirement for operators to have secure financing arrangements in place to meet the full costs of waste and decommissioning. The responses were very much supportive of the proposals. A brief analysis of the replies and the Department's policy response is set out below.

Fee charging provisions

8.2 Under the original proposals operators were required to pay a range of fees to cover the costs of the Secretary of State securing advice for the purposes of consideration of a FDP, including a basic upfront fee and supplementary fees. The supplementary fees were to be based on the cost to the Secretary of State of obtaining advice in relation to the matter being considered. The fees were, however, subject to a cap, which several respondents considered inappropriate.

8.3 Under the revised proposals, the fee charging provisions have been simplified considerably; the basic fee and the cap have been removed. The cap was removed as otherwise any costs incurred in excess of the cap would fall to the taxpayer. To counter

potential operators' concerns about incurring excessive costs, the Regulations will be explicit in that recoverable costs are only those that have been reasonably incurred.

Verification of designated technical matters

8.4 Under the original proposals, the independent verifier could make “necessary recommendations” which, in his view, “would further improve prudence”. The consultation responses from the nuclear industry were that the test for providing recommendations was inappropriate because prudence could always be improved. We have therefore changed the Regulations so that the verifier’s recommendations will be those steps that, in the verifier’s view, are needed to make the FDP prudent.

8.5 Under the original proposals the verifier was required to confirm whether the documents being assessed gave a “true and fair view” of estimated costs and the prudence of the financial provision being made. Several respondents commented on the impracticality of applying a “true and fair view” test to data that is forward looking. Following consultation, the verifier will need to assess whether the estimates of cost of the designated technical matters and any provision made for the financing of the designated technical matters are prudent.

Modifications to an approved programme

8.6 Under the original proposals the process for seeking approval of a modification was disapplied (section 49) where otherwise the operator would be in breach of any other regulatory obligation such as a condition in the nuclear site licence. This provision is not needed because compliance with section 49 will not result in the operator breaching these other regulatory obligations. Operators must comply with these obligations and if needed propose a modification to the FDP to the Secretary of State.

Information requirements

8.7 This Regulation draws together the information requirements previously set out in other parts of the Regulations, for greater clarity. It does not introduce any new provisions or materially alter the substance of the draft Regulations.

Reporting requirements

8.8 Under the original proposals the full annual report needed to be subject to independent third-party verification. Following consultation only changes to the cost estimates of the designated technical matters will need to be verified.

8.9 Under the original proposals, operators had two months to submit an annual report and three months to submit a quinquennial review (QQR). Following

consultation responses to the effect that this would be impractical operators will now have three months to submit an annual report and six months for a QQR.

9. Guidance

9.1 The Department will be issuing statutory guidance in due course to assist operators in complying with their obligations under the Act and these Regulations, including what is required for an approvable FDP. The guidance is not intended to be unduly prescriptive but instead to set out key principles which the Secretary of State will expect to see satisfied in the FDP prepared by an operator. The guidance will give information on ways in which the operator might satisfy those principles.

10. Impact

10.1 The impact on charities or voluntary bodies is likely to be none as projects will be taken forward by commercial operators. The impact on business is that all nuclear operators required to submit an FDP under the Act are affected by these Regulations.

10.2 The impact on the public sector is negligible as DECC will be the regulatory authority and will accommodate this area of work within the overall FDP approval process.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 This legislation can potentially apply to small business. However, in practice it is not likely to, as operators of nuclear sites will most likely be very large companies with the extensive resources, in terms of finances and employees; both of which are needed to operate nuclear installations.

12. Monitoring and Review

12.1 Operation of these Regulations in the context of the wider policy will be subject to ongoing internal review through the process of approving/considering operators' FDPs and related documents and may be amended accordingly.

13. Contact

13.1 Ailsha Dilmohamed at Department of Energy and Climate Change, Tel: 0300 068 5838 or email: Ailsha.Dilmohamed@decc.gsi.gov.uk can answer any queries regarding the Instrument.