

EXPLANATORY MEMORANDUM TO
THE HEALTH AND SAFETY AT WORK ETC. ACT 1974 (APPLICATION
OUTSIDE GREAT BRITAIN) (VARIATION) ORDER 2011

2011 No. 745

1. This explanatory memorandum has been prepared by the Health and Safety Executive (HSE) on behalf of the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the Instrument

2.1 Two legislative gaps will be created due to a time limiting provision inserted in the Health and Safety at Work etc. Act (Application Outside Great Britain) (Variation) Order 2009 (the 2009 Variation Order). This means the Order will cease to have effect on 6th April 2011.

2.2 This instrument replicates the 2009 Variation Order in almost identical terms and makes provision for a further two years for:

- Specified work activities involving energy structures (such as wind farms) and related structures within a Renewable Energy Zone (REZ), (an area, outside the territorial sea, which may be exploited for the production of energy from water or wind) to be covered by the Health and Safety at Work etc. Act 1974;
- Specified work activities taking place on a structure in a designated area (an area beyond the territorial sea designated by order under Section 1 (7) of the Continental Shelf Act 1964), that would have been an offshore installation but for its change of use (as it is no longer undertaking any of the activities that are within the definition of an offshore installation) to be covered by the Health and Safety at Work etc. Act 1974. An offshore installation is a structure used for: the exploration with a view to the exploitation, of mineral resources by means of a well; the storage of gas in or under the shore or bed of any water or the recovery of gas so stored; the conveyance of things by means of a pipe; or the provision of accommodation for persons.

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

3.1 The 2011 Variation Order will be laid on the 17th March 2011 and come into force on the 6th April 2011. This will breach the 21 day rule by 1 day.

Reason for breach of the 21 Day Rule

3.2. The 2009 Variation Order, which the 2011 Variation Order repeals and replaces, contains provisions that will cease to have effect on 6th April 2011. HSE was aware of this and was working on replacing the Health and Safety at Work etc. Act 1974 (Application Outside Great Britain) Order 2001 (the 2001 Order), which the 2009 Variation Order varies. In light of this work, it was not anticipated that a further Variation Order would be needed. At the point that HSE

was due to consult on the Health and Safety at Work etc. Act 1974 (Application Outside Great Britain) Order 2010 (the 2010 Order), to replace the 2001 Order, the May 2010 election resulted in a new administration and policy approach, causing HSE to cease work on the 2010 Order preferring instead to make a further Variation Order.

3.3 HSE's original timetable would have more than allowed the 21 day rule to be met. However the need to follow new procedures, including the requirement for the Reducing Policy Committee to validate the existing impact assessment and seeking clearance from the Reducing Regulation Committee has regrettably resulted in the breaching of the 21 day rule by 1 day.

Why breaching the 21 day rule is necessary

3.4 If the 2011 Order does not come into force on April 6th 2011, but the following day, the Health and Safety at Work etc. Act 1974 will not apply to wind farms that are being constructed or operated within the Renewable Energy Zone but outside the Territorial Seas for the period of one day and HSE will not have the legal power to regulate this activity.

The consequences of delaying the legislation in order to comply with the 21 day rule

3.5 If there were to be a fatality, or other serious incident, during the one day regulatory hiatus, HSE inspectors would have no powers of entry or investigation and would not be able to issue enforcement notices or prosecute for an offence.

4. Legislative Context

4.1 The Department for Energy and Climate Change (DECC) gave consent for offshore wind turbines to be constructed beyond our territorial sea in a Renewable Energy Zone and this work started in the summer of 2009.

4.2 The 2001 Order extends the prescribed provisions of the Health and Safety at Work etc. Act 1974 to specified work activities within our territorial sea (which extend to 12 miles from the UK coast) and designated areas.

4.3 Prior to 5th August 2009, the 2001 Order applied to certain activities (such as the construction, maintenance and operation) of energy structures (e.g. wind and wave farms) and other structures within our territorial sea. However, it did not extend the Health and Safety at Work etc. Act 1974 (HSWA) to activities involving energy structures and related structures beyond our territorial sea in a Renewable Energy Zone. This meant that the Health and Safety Executive did not have the jurisdiction to regulate these activities.

4.4 Prior to 5th August 2009, an offshore platform in a designated area used for a purpose other than that of an offshore installation (e.g. a helicopter base) was not covered by the 2001 Order, and so the specified provisions of the HSWA did not

extend to such activities. The Health and Safety Executive wanted to ensure that work activities on such installations, including high risk decommissioning and demolition activities were covered by the HSWA.

4.5 On the 5 August 2009, the Health and Safety Executive introduced the 2009 Variation Order which amended the 2001 Order to close these legislative gaps, and ensure that these work activities were covered by the HSWA, and that the Health and Safety Executive had legal powers to enforce the legislation. However, the 2009 Variation Order had sunset provisions which limited the time it applied until 5th April 2011, by which time the Health and Safety Executive hoped to have introduced a new Health and Safety at Work etc. Act 1974 (Application Outside Great Britain) Order with these requirements consolidated within it.

4.6 If an incident was to occur after 5th April 2011 on a wind farm or on an offshore installation being used for another purpose beyond our territorial sea, the Health and Safety Executive will not have the jurisdiction to enforce health and safety law and investigate incidents unless the 2001 Order is amended by the 2011 Variation Order

5. Territorial Extent and Application 1

5.1 This instrument applies to a renewable energy zone or a designated area beyond the territorial sea adjacent to Great Britain.

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 2011 Variation Order will amend the 2001 Order, effectively extending the provisions inserted by the 2009 Variation Order for another 2 years.

7.2 HSE has been working to update the 2001 Order. The focus of this work has been to consider how to include emerging energy technologies (e.g. offshore carbon dioxide storage), within the Order, and to consolidate the requirements of the 2009 Variation Order.

7.3 HSE hoped to introduce a new Order by April 2011, but we are still gathering information related to the processes and risks associated with these new offshore emerging energy technologies. The anticipated start dates for these work activities are also longer than initially anticipated, they are now unlikely to start offshore for another 12 - 36 months. HSE does not now anticipate introducing a new Order before April 2013.

7.4 This Instrument amends The Health and Safety at Work etc. Act 1974 (Application Outside Great Britain) Order 2001 (the 2001 Order) to ensure that

activities are covered by the HSWA until a new Health and Safety at Work etc. Act 1974 (Application Outside Great Britain) Order is introduced. The 2011 Variation Order will include sunset provisions limiting its application until April 2013.

7.5 To date there are 12 licensed operational wind farms, with 5 under construction, 7 consented projects and 5 in planning within our territorial seas. However, at least 4 are planned beyond this in a renewable energy zone. Future developments will be much larger, and are likely to be in a renewable energy zone.

7.6 The Coalition Government's energy mission is to support the transition to secure a safe, low carbon, affordable energy system in the UK. This includes a commitment to deliver an offshore electricity grid in order to support the development of a new generation of offshore wind power. This instrument will contribute to maintaining a safe working environment within the renewable energy sector, and enable those who disregard employee's health and safety to be held to account in a court of law.

7.7 Although it is unlikely that many offshore installations will change their use, incidents relating to such installations will always generate media and political interest. The Health and Safety Executive is the only regulator that has the jurisdiction to regulate health and safety associated with such work activities. If this is not maintained, workers would not be protected by the Health and Safety at Work etc. Act 1974 when they carried out these work activities.

Consolidation

7.8 The Health and Safety Executive intends to produce a new Health and Safety at Work etc. Act (Application Outside Great Britain) Order by April 2013 to consolidate the relevant legislation, to address outstanding emerging energy technology issues (e.g. related to carbon dioxide storage) and take into account several years experience of how risks in these environments are being managed.

8. Consultation outcome

8.1 As the Health and Safety Executive is only proposing to maintain the requirements in the 2001 Order that have been inserted by the existing 2009 Variation Order, consultation is not appropriate. There is no new policy decision for industry to comment on, therefore, there is no opportunity for them to influence the policy decision making process. However, HSE will write to key interested parties and tell them what they plan to do and update the relevant guidance on its website. HSE will also meet its commitment to undertake a full 12 week consultation before it finalises the proposals for a new Health and Safety at Work etc. Act (Application Outside Great Britain) Order. This will include giving

all parties and opportunity to comment on the 2011 Variation Order proposals that will be consolidated into the new Order.

9. Guidance

9.1 HSE will update its web-based guidance on the main amendments made to the Health and Safety at Work etc. Act (Application Outside Great Britain) (Variation) Order 2001.

10. Impact

10.1 There will be no new impacts on business, charities or voluntary bodies. The 2011 Variation Order will only maintain the requirements in the 2009 Variation Order. An Impact Assessment (IA) for the 2009 Variation Order estimated the costs to society to be around £275,000 over a period of 10 years (2010 until 2019). This was made up of estimated costs of £220,000 to HSE for inspection and enforcement activities and costs to wind farm businesses are estimated to be around £55,000 of this total. These costs, however, depend on the number of new structures built in future years over the appraisal period and estimates have been based on the best available evidence to HSE at this time. As this work (e.g. the high risk construction of offshore wind farms) is ongoing, industry is already complying with these requirements.

10.2 A full Impact Assessment has not been produced for this instrument.

10.3 There is no impact on the public sector.

11. Regulating small business

11.1 The legislation applies to small businesses.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach adopted is to produce guidance on this Order that is suitable for small businesses to understand. HSE will also work with large organisations to get them to inform small businesses that are part of their supply chain and sub-contracting arrangements.

11.3 The basis for the final decision on what action to take to assist small businesses is from HSE's understanding that these amendments will mainly impact on the large organisations involved in leading the work in these two specialised areas. HSE also draws on its experience of working with the limited number of businesses working in the offshore industries and its understanding of the good practice in place in terms of co-operation and the sharing of information between them.

12. Monitoring & review

12.1 The 2011 Variation Order will have sun setting provisions that will limit the time that the new provisions will apply. HSE will give interested parties a

commitment to review these provisions, and to formally consult on these changes during consultation on the new Order, before April 2013.

13. Contact

Jim Neilson at the Health and Safety Executive can answer any queries regarding the instrument. Contact details are:

Tel: 0151 951 4434

email: jim.neilson@hse.gsi.gov.uk