

EXPLANATORY MEMORANDUM TO
THE NUCLEAR DECOMMISSIONING AND WASTE HANDLING (FINANCE AND FEES) REGULATIONS 2013

2013 No. 126

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. This memorandum contains information for the Joint Committee on Statutory Instruments.

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 an FDP setting out the costs of future waste and decommissioning liabilities and how such costs are to be financed. This instrument covers a number of different areas of the FDP process and replaces the Nuclear Decommissioning and Waste Handling (Finance and Fees) Regulations 2011 (“the 2011 Regulations”).

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 Act deals with decommissioning and clean-up of nuclear sites and the requirement for nuclear operators who apply for a nuclear site licence to submit an FDP to the Secretary of State for approval. It is a criminal offence to use a site by virtue of a site licence without an approved FDP in place.

4.2 Section 45(7) of the Act sets out what an FDP must contain. This includes details of the steps to be taken in relation to the technical matters (which are 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. Section 49 of the Act sets out the procedure for modifying an approved FDP and the requirement for Secretary of State approval for any modification. Under section 50 the Secretary of State may make regulations disapplying the FDP modification procedure in certain circumstances.

4.3 This instrument 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 for 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 This instrument applies to England, Wales and Northern Ireland.

6. European Convention on Human Rights

6.1 As this 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. This instrument completes the legislative framework. Alternatives to legislation could not achieve the policy objective because operators would not be under a clear legal obligation to comply with the requirements.

7.2 Regulation 3 provides continuity for FDPs submitted under the 2011 Regulations. Where an operator has already submitted its FDP, that submission will be treated as satisfying the requirements relating to submission in this instrument.

7.3 Regulation 4 contains a number of significant new definitions which were not present in the 2011 Regulations, which are necessary to support provisions in this instrument which are either new, or different from their equivalents in the 2011 Regulations.

7.4 Regulation 5 replicates the substance of regulation 3 of the 2011 Regulations, with some small drafting changes, requiring the operator to set out its estimates of costs for future liabilities in two parts in the FDP, one part relating to disposal of spent fuel, the other relating to all other costs.

7.5 Regulation 6 provides that the Secretary of State can charge the operator for the reasonable costs of obtaining expert advice in relation to consideration of its FDP. This is to ensure that these costs do not fall on the taxpayer. This provision differs only slightly from the corresponding provision in the 2011 Regulations (regulation 4), the changes principally resulting from the introduction of the new concept of a “first criticality report”, and the introduction of wording to make clear that as well as a proposal to modify the FDP, the Secretary of State can charge for costs incurred considering information provided in support of it (regulation 6(2)(c)).

7.6 Regulation 7 replicates the effect of regulation 5(1) of the 2011 Regulations concerning information required from the operator on submission of its FDP. Regulation 5(2) of the 2011 Regulations is replaced by the more detailed information requirements in regulation 14 of this instrument.

7.7 Regulation 8 imposes a series of reporting obligations on the operator and regulation 9 sets out their required content. These reports cover both technical and financial provision for the operator’s waste and decommissioning costs. The operator is required to make a first criticality report to the Secretary of State to cover the period from the approval of its FDP

until the reactor goes critical for the first time. “First criticality” is defined as the date on which the first chain nuclear reaction in a nuclear installation on the site becomes self sustaining. The operator is then required to submit reports to the Secretary of State on an annual and five yearly basis (a “quinquennial report”). The purpose of these reports is to enable monitoring of the operator’s waste and decommissioning liabilities and the financial provision made for them. These provisions replace regulation 6 of the 2011 Regulations.

7.8 The reporting cycle in this instrument differs from that in the 2011 Regulations in two main respects. Firstly, there is no requirement to provide quinquennial reports during the construction of a nuclear installation. The first criticality report commences the cycle of five yearly reporting. Secondly, provision has been made so that the requirements for delivering annual and quinquennial reports have been better aligned with company annual reporting cycles.

7.9 All operator reports must set out the costs the operator is likely to incur in connection with the designated technical matters (defined as “DTM estimates”) and the site operator’s valuation of the assets held in any fund, plus the value of any other financial provision it is required to make in accordance with its FDP. This instrument introduces a requirement for a review of compliance with the FDP for the first criticality report and the quinquennial report stage. This contrasts with the 2011 Regulations, which stipulated the same content for both annual and quinquennial reports. This instrument also introduces the requirement that with first criticality, annual or quinquennial reports, the operator must include a statement of future payments into any fund, and details of any other future financial provision it is required to make in accordance with its FDP. The purpose of this is to provide greater financial oversight for the Secretary of State.

7.10 Regulation 10 (which replaces regulation 7 of the 2011 Regulations) provides for the verification of key reports submitted by the site operator by an independent third party (“a verifier.”) The purpose of this is to provide reassurance to the Secretary of State that the operator is complying with its obligations under the FDP. Unlike the 2011 Regulations, this instrument envisages both technical and financial verifiers, since different skill sets will be required. Paragraph 8.6 below describes the tests the verifiers will apply.

7.11 Regulation 11 sets out the modifications to which section 49 does not apply; an operator may make these modifications without Secretary of State consent. Regulations 11 and 12 replace regulation 8 of the 2011 Regulations. They seek to ensure that only material changes to the FDP are notified to the Secretary of State for the purposes of obtaining approval.

7.12 The 2011 Regulations provided exemptions from Secretary of State consent to modify only in relation to modifications to the designated technical matters and the costs that related to them up to a limit of 5%. This instrument extends the permitted range of exempt modifications, with appropriate safeguards. An operator’s modification will now be exempt if it would result only in a change in cost estimates or only to the funding of the costs likely to be incurred in connection with the designated technical matters, provided it complies with any relevant conditions in the FDP. A modification with a value greater than 5% may also be made, providing that the “required value” test in regulation 12 is met. This requires an increase in the fund or related financial provision, commensurate with the cost estimates as they would be after modification. Where an operator is making greater fund contributions or

other financial provision than the required value test necessitates, it will not need to make additional financial provision.

7.13 The second new provision allows the operator to modify without Secretary of State consent where that modification relates to a reduction in the costs estimate of 5% or more for the disposal of intermediate level waste and spent fuel. It is anticipated that the Secretary of State will enter into a contract to take title to the operator's waste for the purpose of disposal, and the operator will make provision in its costs estimates to pay a fee for this service. This provision is designed to capture the situation where the fee the Secretary of State proposes to charge has reduced because, for example, relevant technology has become more affordable.

7.14 For modifications made under regulation 11, in order to disapply the requirement for consent successfully, the operator must give the required details to the Secretary of State as set out in regulation 14 when it makes the proposal to modify.

7.15 Regulation 13 provides that, in all cases to which section 49 applies, the operator must serve notice on the Secretary of State which contains details of the proposed modification, accompanied where required by a technical report. This was not required under the 2011 Regulations, and is intended to provide the Secretary of State with the detail necessary to take the decision on whether to give consent to a modification.

- ***Consolidation***

7.16 As this instrument revokes and replaces the 2011 Regulations, no consolidation is required.

8. Consultation outcome

8.1 Since the 2011 Regulations came into force, the Government conducted a further consultation on FDP Guidance and published updated Guidance in December 2011. As a result of this work, the Government concluded that the 2011 Regulations needed to be revisited. It issued a six week consultation ("the 2012 consultation") on 27 April 2012 to seek views on whether the proposals struck the right balance between regulatory burden and protecting the taxpayer through oversight of an operator's FDP. It was felt that a shortened period would be appropriate due to the technical subject matter and the relatively small number of respondents to the previous consultation on the 2011 Regulations. The Government held two consultation events on 14 May 2012 in London. The first was a discussion on all proposed amendments, the second was focussed on verification and was attended by prospective verifiers.

8.2 Eight written consultation responses were received, which are published on the DECC website. Respondents included energy suppliers, trade associations, educational establishments and advisory organisations. Comments were generally supportive of the proposals on reporting and modification, but reflected a need for greater consideration of the verification regime.

8.3 The Government's consultation on the 2011 Regulations was entitled *The Financing of Nuclear Decommissioning and Waste Handling Regulations* and was published in March 2010. The response, *The Government response to the Consultation on the Financing of Nuclear Decommissioning and Waste Handling Regulations*, was published on 18 October

2010. The 2011 Regulations came into force in April 2011.

The reporting regime

8.4 The 2012 consultation proposed to allow the synchronisation of the FDP reports with corporate reports required under the Companies Act 2006 and to extend the reporting deadlines. Both proposals were supported by respondents. The main change post consultation is the introduction of the first criticality report. Respondents argued that producing reports in the period between the approval of their FDP and first criticality would present an unnecessary, but material, cost to their business. We consider that the first criticality report is a proportionate alternative and will provide sufficient information to the Secretary of State during this period.

The verification regime

8.5 The consultation proposed two amendments to the 2011 Regulations verification regime: (i) separate the verification report into financial and technical verification; and (ii) amend the verifier's test from assessing prudence to assessing the reasonableness of the operator's conclusion on prudence. The first proposal was welcomed but most respondents raised concerns around the tests to be applied.

8.6 The instrument clarifies the test to be applied by technical verifiers and revises the test to be applied by financial verifiers, as follows:

- (a) technical verifiers will be required to provide an assessment of whether the operator's estimate of the costs of waste and decommissioning are reasonable;
- (b) financial verifiers will be required to provide an assessment of the operator's compliance with the financial elements of the FDP and provide a valuation of the assets held in the fund and any security specified in the FDP.

The modification regime

8.7 The consultation proposed three classes of modification, in addition to those in the 2011 Regulations, that would not require Secretary of State consent:

- (a) modifications that increase estimated costs by more than the 5% materiality threshold, provided that sufficient security is available to meet the increased liabilities;
- (b) modifications that reduce estimated costs by more than the 5% materiality threshold, where the modification relates to a change in the fee for the disposal of relevant hazardous waste;
- (c) modifications to matters specified by the Secretary of State at the time of approval of the FDP as not needing consent to modify.

8.8 These proposals were generally supported by respondents. The instrument also contains provisions to clarify that the 5% threshold figure will be indexed for inflation where a price index has been specified in the FDP for the purposes of these regulations. Whilst this was always the policy intention, consultation responses suggested this was not clear. We also sought to set out more clearly the categories of modification that could be made without requiring Secretary of State consent.

9. Guidance

9.1 The Government is not intending to provide further guidance on this Statutory Instrument. The government response to the consultation has been published on the Departmental website.

10. Impact

10.1 The impact on business is set out in the accompanying Impact Assessment and shows that the amendments to the regulations provide a net benefit to business. There is no impact on charities or voluntary bodies. There is no impact on the public sector.

10.2 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 only applies to actual or prospective operators of new nuclear power stations and therefore will not have any impact on small business.

12. Monitoring & review

12.1 The regulations include a clause stating that the regulations will be reviewed in ten years' time. This is to allow an appropriate amount of time to test the regime, which will require a longer time frame than the more usual five year review cycle.

13. Contact

Richard Marriott at the Department of Energy and Climate Change Tel: 0300 068 5871 or email: richard.marriott@decc.gsi.gov.uk can answer any queries regarding the instrument.