



**REPORT ON THE HEALTH AND SAFETY AT WORK ETC.....ACT 1974
(APPLICATION OUTSIDE GREAT BRITAIN) (VARIATION) ORDER 2009**

Prepared for the British Wind Energy Association (“BWEA”)

Dated 10 August 2009



1 SCOPE

- 1.1 This is an explanatory note prepared for the British Wind Energy Association ("BWEA") giving the background to, and explaining the perceived effect of the Health and Safety at Work etc Act 1974 (Application Outside Great Britain) (Variation) Order 2009 ("Order"), on the offshore wind farm industry.
- 1.2 The Order is made under the provisions of section 84 (3) the Health and Safety at Work etc Act 1974 ("HSWA") and came into force on 05 August 2009. The Order, amends the Health and Safety at Work etc Act 1974 (Application Outside Great Britain) Order 2001 ("2001 Order") by inserting new articles 8A and 8B.

2 BACKGROUND

- 2.1 In June 2009 construction started on the first wind farm that will be partially situated in a renewable energy zone ("REZ"). The Order was produced in response to a realisation of health and safety concerns connected to risks posed to workers in relation to emerging technologies industries such as 3rd generation off- shore wind-farms. Although not part of the current amendments, a new Health & Safety at Work etc Act (Application Outside Great Britain) Order is due to be published by as early as next year. The new order will reportedly address the perceived risk of other technologies such as carbon capture and storage ("CCS") facilities and natural gas gasification.
- 2.2 The Order means that Health and Safety Executive ("HSE") can now apply sections 1 to 59 and 80 to 82 of HSWA and health and safety regulations made under HSWA¹ ("Prescribed Provisions") to certain work activities involving:
 - (a) energy structures and related structures within an REZ; and
 - (b) offshore installations², which have been subject to a change of use.
- 2.3 The reference to specific installation towers which are mentioned in article 4(2)(a) and the Schedule of the 2001 Order have been removed as these towers no longer exist.
- 2.4 The provisions inserted by the Order will require companies developing or operating energy developments in an REZ to comply with the Prescribed Provisions. Energy developments within the territorial sea³, are already subject to these requirements. The Order, however, extends these provisions to areas beyond the territorial sea including areas designated by order under Section 1(7) of the Continental Shelf Act 1964.⁴
- 2.5 Previously, there was a loophole in the legislation relating to offshore installations. These ceased to be covered by the 2001 Order where there was a change of use, bringing them outside the scope of the definition of offshore installations⁵, even though work

¹ Section 15 and Schedule 3 HSWA.

² An offshore installation is a structure used for the exploitation, or 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 for the provision of accommodation for persons.

³ The territorial sea extends 12 nautical miles measured from baselines along the UK coast

⁴ The 1958 Geneva Convention on the Continental Shelf defined this as referring to:

a) the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the sea adjacent waters admits of the exploitation of the natural resources of the said areas; and

b) to the seabed and subsoil of similar submarine areas adjacent to the coast of Ireland.

⁵ See footnote 2 above



activities might have continued to be carried out on them. The amendments mean that these installations will also be covered by HSWA.

3 DEFINITIONS IN THE ORDER EXPLAINED

WHAT IS AN REZ?

- 3.1 As previously outlined above the Prescribed Provisions apply to certain activities within an REZ. Section 84(4) of the Energy Act 2004 contains a power to designate an offshore area as an REZ⁶. An REZ is an area, which can be exploited for the production of energy from water or winds and roughly extends around Great Britain to 200 nautical miles from the baseline against which the limit of the territorial sea is measured. The term “within an REZ”, includes areas over and under that zone⁷.

WHAT ACTIVITIES ARE CAUGHT?

- 3.2 Article 8B of the Order sets out those activities within an REZ to which the Prescribed Provisions apply, which include:
- (a) the construction, reconstruction, alteration, repair, maintenance, cleaning, use, operation, demolition and dismantling of any energy structure or related structure, or any preparation for any such activity;
 - (b) the transfer of people or goods between a vessel or aircraft and an energy structure or related structure;
 - (c) the loading, unloading, refuelling or provisioning of a vessel;
 - (d) the operation of a cable for transmitting electricity from an energy structure or related structure to Great Britain;
 - (e) a diving project associated with any of the works mentioned in sub-paragraphs (a) to (d) above.

WHAT IS AN ENERGY STRUCTURE / RELATED STRUCTURE?

- 3.3 The definition of an ‘Energy Structure’ remains unchanged from the definition in the 2001 Order and relates to any fixed or floating structure other than a vessel, for producing energy from wind or water.
- 3.4 The Order inserts a new definition covering what is meant by a ‘Related structure’ with the aim of ensuring that all significant work activities related to energy structures (such as wind farms) is subject to the Prescribed Provisions. Related structure is broadly defined as:

⁶ The Renewable Energy Zone (Designation of Area) Order 2004

⁷ The Renewable Energy Zone will be co-extensive with the area within which the United Kingdom already exercises jurisdiction with respect to marine environmental matters, in accordance with Part XII of the United Nations Convention on the Law of the Sea. The co-ordinates for the Renewable Energy Zone are those set out in the Schedule to the Merchant Shipping (Prevention of Pollution) (Limits) Regulations 1996, as amended by the Merchant Shipping (Prevention of Pollution)(Limits) Regulations 1997. A map of the Renewable Energy Zone is available at www.ukho.gov.uk it can be found by searching for “Law of the Sea”, then pressing the link “UK limits” and downloading the link “UK Renewable Energy Zones”. The Map can be downloaded up to A3 size. Copies can be obtained from The Law of the Sea Division, UK Hydrographic Office, Taunton, TA1 2DN.

- (a) a structure for converting energy produced by an energy structure into a form suitable for transmission to Great Britain; and
- (b) a structure mainly for the provision of accommodation for persons carrying out work activities in relation to an energy structure or related structure.

3.5 The idea is that as 3rd generation marine offshore farms and other energy structures are constructed/decommissioned outside the territorial seas that these will be caught by health and safety legislation. So for example, accommodation for persons carrying out work activities in relation to operations and maintenance activities relating to these energy developments will now be regulated by the Prescribed Provisions.

4 GUIDANCE

- 4.1 No detailed guidance has been issued by the HSE in relation to the Order. Although on the face of it the provisions of the Order appear to be relatively straightforward, the BWEA may want to lobby the HSE on behalf of its members to clarify which health and safety regulations will in fact fall under the Prescribed Provisions.
- 4.2 The reason for this is twofold. Firstly there has been some debate in the past as to what constitutes a health and safety regulation made under section 15 of HSWA⁸ and it would be helpful to Stakeholders if these provisions were clarified by the regulator. Secondly, there is currently some debate as to whether the Order will apply the Construction (Design and Management) Regulations 2007 (“CDM”).
- 4.3 Section 15(9) of HSWA states that if an order is made that applies to, or is in relation to persons, premises or work outside Great Britain then, notwithstanding the order “health and safety regulations shall not apply to or in relation ...vessels... or ...offshore installations outside Great Britain or persons at work outside Great Britain in connection with submarine cables or submarine pipelines, *except in so far as the regulations expressly so provide.*”
- 4.4 The CDM Regulations have specific application provisions⁹ stating that they only apply outside Great Britain in so far as Article 8(1)(a) of the 2001 Order applies. Article 8(1)(a) relates to certain activities within the territorial seas and includes the construction, reconstruction, alteration, repair maintenance, cleaning, use, operation, demolition and dismantling of any building, energy structure or other structure, not being in a case a vessel or any preparation for such activity. Section 15(9) of HSWA does not make any reference to energy structures, this could be interpreted to mean that the Order will apply notwithstanding any specific provisions to the contrary in relation to energy structures and related structures, but not to other installations.
- 4.5 The HSE have taken legal advice on the point and the official view, which has yet to be confirmed to this firm by email, is that CDM will need to be amended so that the CDM Regulations can legitimately be applied to activities in an REZ, although the HSE admit that this is a grey area. In reality, it is likely that the provisions of HSWA are broad enough to encapsulate certain of the breaches under CDM and as it would be industry best practice to be CDM compliant, especially as it appears that amendments are underway to make changes to CDM to clarify this point.

⁸ See *Vibixa v Komori UK Ltd* [2006] EWCA Civ 536 –Supply of Machinery Safety Regulations 1992- held not made under s15 HSWA

⁹ Regulation 3

5 IMPACT ON THE WIND ENERGY INDUSTRY

- 5.1 The main costs as estimated by the impact assessment to a wind farm business in complying with the proposed variations brought in by the Order will be in relation to starter and recurring costs.
- 5.2 The projected impact on business and the costs of the Order will be approximately (in total) £275,000 in present value terms over a 10-year period. The cost to wind farm businesses are estimated to be around £55,000 of this total but this will depend on the number of new structures built over the coming years.
- 5.3 The main start-up costs envisaged by the impact assessment relating to the Order include:
- (a) personal protective safety equipment (mainly to ensure safety during transit, i.e. lifejackets);
 - (b) time spent by managers familiarising themselves with the requirements, organising the initial risk assessment and in review meetings before and after those assessments;
 - (c) training for engineers and technicians (again mainly relating to safe transit from the shore to the structure) and visiting the relevant structures for operational and maintenance purposes.
- 5.4 The impact assessment does not appear to take into consideration the costs of reviewing existing contractual arrangements between parties to ensure that all risks relating to those liabilities attached to the Order are provided for and dealt with appropriately now that the Prescribed Provisions apply to these activities.
- 5.5 Stakeholders may want to consider the potential implications with respect to the clarification of health and safety roles and responsibilities both during the construction, operation and maintenance of the developments and review their existing contractual relations in respect of these operations. Furthermore stakeholders should ensure that new contractual documentation currently being considered factors in these changes.

6 CIVIL AND CRIMINAL JURISDICTION (APPLICATION TO OFFSHORE RENEWABLE ENERGY INSTALLATIONS ETC.) ORDERS 2009 AND ENERGY ACT 2004

- 6.1 In order to bring future offshore renewable energy installations (“REI”) within REZs and within jurisdiction for the purpose of civil law in England, Wales and Scotland, parliament has passed the Civil Jurisdiction (Application to Offshore Renewable Energy Installations etc.) Order 2009. (“Civil Jurisdiction Order”) so that civil law applies to activities on, under or above an REI (and relation to certain electric lines) in tidal waters and parts of the sea adjacent to Great Britain up to the seaward limits of the territorial sea and waters in the REZ. The Order does not apply all civil law in force in England, Wales and Scotland and excludes certain specific enactments from the scope of the Order¹⁰.
- 6.2 Of greater interest to BWEA members will be the effect of the Criminal Jurisdiction (Application to Offshore Renewable Energy Installations etc.) Order 2009 (“Criminal

¹⁰ sections 9(1) and (2) of the Race Relations Act 1976 and provisions of the Trade Union and Labour (Consolidation) Act 1992

Jurisdiction Order”) which has been made in parallel to the Civil Jurisdiction Order¹¹. This extends criminal jurisdiction of the police in relation to all criminal offences, which might have been committed on or under or above an REI. It was already clear from the provisions of the Corporate Homicide and Corporate Manslaughter Act 2007 (“CMCHA”) that this piece of legislation would apply to any death occurring in the United Kingdom, within the seaward limits of the territorial sea adjacent to the United Kingdom, as well as deaths on UK-registered ships or British-controlled aircraft. The Criminal Jurisdiction Order, however, extends the provisions of the CMCHA to deaths that occur in an REZ. Prosecutions cannot be brought without the permission of the DPP, although the DPP’s permission is not required in relation to any offence created by HSWA.¹²

6.3 These Civil and Criminal Jurisdiction Orders were made on 08 July 2009 and laid before the UK and Scottish Parliaments on 15 July 2009. They came into force in England and Wales on 05 August 2009 and will come into force as regards Scotland on 01 November 2009.

6.4 As BWEA will be aware there are further provisions under the Energy Act 2004 (“EA”) for the Secretary of State (“SoS”) by way of notice to declare a “safety zone” in relation to waters around an REI¹³, where there is a proposal to construct, extend, operate or decommission an REI in an REZ. Such notices can contain provisions to prohibit certain activities and grant permission for vessels to enter or remain in these areas¹⁴. The offences committed¹⁵ and connected fines are listed under s.97 EA and include entering or remaining in a safety zone or breaching a condition of a permission to enter a safety zone, this can constitute a maximum 2-year imprisonment and/or unlimited fine on indictment for the ship's owner and master. There are 'reasonable enquiries' and 'reasonable steps' defences.

7 OTHER INDUSTRIES

7.1 It is clear from the definitions set out above that at present the extension of HSWA and its Prescribed Provisions relating to activities in an REZ will affect industries involved in and associated with the transmission, distribution and supply of electricity generated using water or winds. Existing industries, which already operate in these zones such as the salvage and offshore industry are covered by respective international marine legislation or by provisions of the health and safety legislation applicable to offshore installations. We were therefore unable to identify the wind power industry being treated substantially less favourably than other industries operating in these zones.

¹¹ The Energy Act (“EA”) s.85 granted the Government the power to apply criminal law to REZs.

¹² s.86(2)(a) EA.

¹³ Under the provisions of the EA (s105) a “renewable energy installation” means—

- an offshore installation used for purposes connected with the production of energy from water or winds;
- an installation in the course of construction at a place where it is to be used as an offshore installation within paragraph (a);
- an installation that has ceased to be an installation within paragraph (a) while remaining an offshore installation (whether or not at the same place);
- an installation that is being decommissioned at a place where it has been an installation within paragraph (a) or (c);
- an installation in transit to or from a place where it is to be, or has been, used for purposes that would make it, or made it, an installation within paragraph (a);
- an installation in transit to or from a place where it is to be, or was, an installation within paragraph (c).

Under the provisions of this section an “offshore installation” means an installation which is situated in waters where it permanently rests on, or is permanently attached to, the bed of the waters; and it is not connected with dry land by a permanent structure providing access at all times for all purposes.

¹⁴ Section 95/96 of the EA .The system for application for a notice under this section, and provisions relating to objections and public enquiries etc are contained in Schedule 16 to the EA.

¹⁵ S97 EA

8 FUTURE CONSULTATION

- 8.1 The HSE intend to produce a new order next year to consolidate relevant legislation and address outstanding emergency technology issues such as CCS, until then, the amendments to the 2001 Order will be applicable. There are sun-setting provisions in the Order that limit the time that this provision will apply, at present the articles are due to expire on 06 April 2011, unless revoked with effect from an earlier date by a subsequent order.

- 8.2 Stakeholders will be consulted in relation to the new order, which will include an opportunity to comment on the changes brought about by the current Order. The timetable for the consultation has yet to be set, but it is thought Stakeholders will be consulted early next year.

Hammonds LLP

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