Law Society of Scotland

Consultation Response

Offshore renewable energy - draft decommissioning guidance

March 2020

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Environmental Law, Energy Law and Marine Law Sub-committees welcome the opportunity to consider and respond to Marine Scotland's consultation: *Offshore renewable energy - draft decommissioning guidance*[1]. We have the following comments to put forward for consideration.

Consultation questions

1. This is the first version of the guidance for decommissioning offshore renewable energy installations in Scottish waters. We have, where possible, kept this in line with the UK Government's guidance. Do you agree or disagree with this approach?

Agree. Keeping the guidance in line with the UK Government guidance appears to be sensible. Substantial departures from UK Government Guidance could cause complexity for companies operating across the UK. It is important that there is clarity for businesses as to the appropriate guidance to apply.

[1] https://www.gov.scot/publications/consultation-draft-scottish-offshore-renewables-decommissioning-guidance/

2. The main proposed variation from the UK Government's approach is in relation to test centres. The BEIS guidance states that test centres remain responsible for ensuring decommissioning of tenants. The Scottish Government is proposing that plans for tenants should instead be approved by Marine Scotland. Do you agree or disagree with this approach?

We consider that the Scottish Government approach of requiring that plans for tenants should be approved by Marine Scotland makes sense, however, there are possible problems with the approach which could cause problems for test centre operators and potential tenants.

Marine Scotland will agree the plan with the tenant and will take financial security to protect taxpayers in the event that the tenant fails to decommission and this requires to be done at tax payer cost. We consider however that there is a possible problem with the arrangement. The draft guidance provides:

> *"4.8 Scottish Ministers expect that tenants within offshore renewable energy test centres in Scotland must produce their own decommissioning programmes for the approval of Scottish Ministers.*
>
> *4.9 Test centre tenants must provide Scottish Ministers with appropriate financial security to enable decommissioning of assets at the end of the operating period in line with the relevant Marine Licence. …..*
>
> *4.11 Where financial security is not sufficient or has not been put in place Scottish Ministers will expect test centre operators to step in and pay for the removal of any assets on its site at the end of the operation period."*

The result is that although the Scottish Ministers will determine the adequacy of financial security provided by tenants if the tenant fails to decommission and the security is inadequate, the financial consequences will rest with the test centre.

There is a risk that test centre operators will be cautious about accepting certain tenants unless the centre operator is provided with financial security by the tenant which will pay out if the centre operator is required to pay towards decommissioning of the tenant's infrastructure.

We would suggest that either:

- the position is dealt with in the same way as the UK Government Guidance with test centres being responsible for the decommissioning of the infrastructure of their tenants. This would allow the centre to assess the decommissioning risk and to obtain security from their tenant; or

- Marine Scotland Guidance is amended so that that Scottish Ministers will agree the plan and financial security package with tenants and will take the financial consequences if that security proves to be inadequate.

3. Do you agree or disagree with the proposed approach and timings in relation to financial securities set out in Section 9 of the draft guidance?

Agree. We note, however, that the timings for provision of security are potentially onerous as security might be required at a very early stage in the process where the technology is novel.

Paragraph 9.17 sets out the key features expected of any proposed security and these are set out in 9.17 (a) to (e). 9.17(f) is problematic as it provides that notwithstanding the features of security set out, the security must be issued by an entity acceptable to the Scottish Ministers. Given that the entity must be issued by a UK Bank or UK authorised insurer with the requisite credit rating, we wonder why the Scottish Ministers require the discretion contained in 9.17(f). The provision should perhaps be deleted so as to provide certainty to companies that securities with the stated features and by an entity with the features (including credit rating) in the guidance will be acceptable.

For the purposes of 9.34 it would be useful if the guidance could clarify what is meant when it states that "a limited proportion of the funds" may be held back pending a successful decommissioning report.

4. We are proposing to include a requirement for developers to set out inflation on their securities up to the end of the project lifetime, as set out in the draft guidance document at section 8.8-8.11. Do you have any comments on this proposal?

Agree. It appears that the reference in the question should include paragraph 8.13. Given the importance of regular reviews of the decommissioning funds (see paragraph 5.24), it may make sense to link any regular review with the way in which the Consumer Price Index has had varied the original funds. Taking an analogous approach with onshore wind, index-linking is typically only carried out on an upwards-only basis, i.e. the multiplier would never be less than 1.

5. Do you agree or disagree with the proposed timescales for review of decommissioning programmes set out in sections 5.24 – 5.29?

Do you have any further comments on these suggested review schedules?

We note that the timing requirement regarding decommissioning plans for offshore wind is more rigid than the requirement for those operating in the offshore oil and gas industry. Under the Petroleum Act 1998, the Secretary of State can give notice requiring the submission of a costed decommissioning plan for the decommissioning of offshore oil & gas installations. The Secretary of State does not as a matter of course require that these be prepared and approved prior to construction of the relevant infrastructure but rather at a later stage in asset life (usually a few years before the end of life of the asset).

To minimise the risk of Ministers and ultimately taxpayers meeting any costs for decommissioning, and to give developers clear guidance on when a review might take place, notwithstanding the ability for a review to be conducted when an unexpected event occurs, it may make sense to set a regular review point (for example, every 5 years) to make sure that a decommissioning fund remains in line with the project and taking into account inflation. If Ministers are concerned with risk for costs exposure, then it is important for Ministers to be clear on the terms they require rather than this being developer/owner led.

6. We aim to ensure that all future offshore renewable energy installations have an approved decommissioning programme in place prior to construction, as this will help to manage the risk of projects going into the water without proper plans in place for removal. How achievable is this for developers? What are the challenges for different types of project?

We agree that this is a sensible approach and would be an approach consistent with onshore wind. It is noted that there are real complexities in offshore renewable developments. It is nevertheless important to minimise risk to the taxpayer and in order to link in decommissioning programmes with environmental impact assessment, important that a decommissioning plan is in place before construction starts in the marine environment.

7. We have provided a draft template for a decommissioning programme as this was something that was highlighted as good practice from the oil and gas sector. Do you think that a template is useful?

Do you have any suggestions on how it could be improved?

We consider that a template is useful. Experience from the oil and gas industry suggests that a template can shorten the documentation by ensuring that only the most important issues are covered. This saves time and resource for those preparing and reviewing programmes.

8. It seems likely that there will be cases where part of a windfarm or array may reach the end of its lifetime earlier than others, for example where the turbines at the edge wear out more quickly than those at the centre. We would be interested to hear views on how decommissioning might work in these scenarios, for example whether non-functioning turbines could or should be left in situ until the rest of the windfarm or array can be decommissioned, and what the risks of this approach might be, or any other risks or opportunities relating to the idea of "step-down" decommissioning.

Experience from the offshore oil and gas industry has shown that, subject to safety and environmental considerations, it can be useful to defer decommissioning of infrastructure until other nearby infrastructure reaches the end of its useful life. This allows cost savings as one rather than two decommissioning campaigns are required.

9. In relation to the Partial Business and Regulatory Impact Assessment, do the proposals in this consultation have any financial, regulatory or resource implications for you and/or your business (if applicable)?

Not applicable.

10. Do you have any further comments on the draft guidance?

We note the references to the 'polluter pays' principle within the draft guidance. While recognising the desired outcomes, the guiding principles of the approach and the recognition that the 'polluter pays' principle recognising that those who create costs to the environment should pay for that, it is important to acknowledge that decommissioning may be pollution in and of itself.

In relation to paragraph 4.1, we consider that this would benefit from greater clarity around geographical scope of the scheme and how the relevant limits of the scope can be identified. We welcome the recognition of the need for collaboration in relation to cross-border sites.

In relation to timescales, we note that current requirements to apply and obtain license carries a required period of three months and final drafts of decommissioning programmes carry a proposed period of six months (paragraph 5.6). There may be merit in bringing these two periods into line, both standing at three months. This would help to simplify the arrangements and provide consistency for businesses.

For further information, please contact:
Alison McNab
Policy Team
Law Society of Scotland
DD: 0131 476 8109
AlisonMcNab@lawscot.org.uk