

**MEMORANDUM OF UNDERSTANDING BETWEEN
THE SCOTTISH MINISTERS AND
CROWN ESTATE SCOTLAND (INTERIM MANAGEMENT) WITH
RESPECT TO THE
DECOMMISSIONING OF OFFSHORE RENEWABLE ENERGY
INSTALLATIONS**

Introduction

1. The Parties to this MoU are the Scottish Ministers (“the Scottish Ministers”) and Crown Estate Scotland (Interim Management) constituted under The Crown Estate Scotland (Interim Management) Order 2017 (“Crown Estate Scotland”) (together “the Parties”).
2. The Scottish Ministers and Crown Estate Scotland have agreed to enter into a Memorandum of Understanding (“MOU”) relating to the decommissioning of offshore renewable energy installations (OREIs) in Scottish waters or in the Scottish zone of the Renewable Energy Zone. This MoU is modelled on a Memorandum of Understanding between the Department of Energy and Climate Change (now comprised in the Department for Business, Energy and Industrial Strategy and The Crown Estate Commissioners in 2007).
3. This MoU is necessary as a result of: (1) the transfer of the Crown Estate’s assets and the Commissioners’ Scottish functions in respect of the seabed out to the territorial 12 nautical mile limit and in respect of the Scottish Zone of the Renewable Energy Zone to Crown Estate Scotland, pursuant to the Crown Estate Transfer Scheme 2017 and (2) the transfer of responsibility for the regulation of decommissioning of OREIs provided for in sections 105 to 114 of the Energy Act 2004 (as amended by the Energy Act 2008 (the Energy Acts)) from the Secretary of State for Business, Energy and Industrial Strategy to the Scottish Ministers under section 62 of the Scotland Act 2016.
4. Under the United Nations Convention on the Law of the Sea 1982 (UNCLOS), abandoned or disused installations or structures are generally required to be removed, to ensure safety of navigation, taking into account generally accepted international standards. Relevant work has also been undertaken under the OSPAR Convention, which guides international cooperation on the protection of the marine environment of the North-East Atlantic. OSPAR Decision 98/3[1] also sets out binding requirements on the contracting parties for the disposal of disused offshore oil and gas installations by imposing a complete prohibition on the dumping of offshore installations under 10,000 tonnes within the maritime area covered by OSPAR. Whilst there is no equivalent Decision for offshore renewable energy installations, OSPAR has produced guidance documents on offshore wind farms, incorporating ideas on their decommissioning. The Scottish Ministers are committed to meeting these conventions, and have assumed

responsibility for the obligations imposed in the Energy Acts in respect of OREIs in Scottish waters or in a Scottish part of a REZ and those parts of a related electric line in such waters to ensure that owners of these installations are responsible for the full decommissioning at the end of their life.

5. Sections 105 to 114 of the Energy Act 2004 introduce a decommissioning scheme for OREIs. Under the terms of the Energy Acts, the Scottish Ministers may now require a person who is responsible for one of these installations to submit (and eventually carry out) a decommissioning programme for the installation.
6. The decommissioning provisions in the Energy Acts reflect the Scottish Ministers' view - taking into account Scotland's role in contributing to the UK's compliance with international obligations and its own economic and sustainable development strategy- that a person who constructs, extends, operates or uses an installation should be responsible for ensuring that the installation is decommissioned at the end of its useful life, and should be responsible for meeting the costs of decommissioning (the "polluter pays" principle).
7. By imposing a legal obligation on businesses to prepare and carry out a decommissioning programme, and providing the Scottish Ministers with powers to require financial security and to recover assets, the Scottish Ministers' view is that the decommissioning provisions in the Energy Acts reduce the risk of companies defaulting on their decommissioning liabilities. At the same time, the Scottish Ministers wish to implement the decommissioning scheme in such a way that does not hinder the development of the offshore renewable energy industry.
8. This MoU sets out how the Scottish Ministers and Crown Estate Scotland will work together to provide a streamlined and effective process to ensure the decommissioning of all OREIs covered by the statutory scheme, in accordance with the requirements of an approved decommissioning programme. The Parties' intention is to avoid duplicating decommissioning requirements for developers and to provide clarity and simplicity in the operation of the scheme. The Scottish Ministers and Crown Estate Scotland recognise the importance of close coordination between the Parties to achieve this. The Parties to this MoU will, therefore, engage in discussions at the earliest opportunity with respect to development projects, which fall within the requirements of the statutory decommissioning regime, in order to facilitate efficient and effective discharge of their respective functions in the development process.
9. References in this MoU to an OREI are to "relevant objects" as defined in section 105(10) of the Energy Act 2004, namely renewable energy installations and related electric lines and cables.

Submission and approval of decommissioning programmes

10. For installations which the Scottish Ministers determine, subject to clarification in accordance with paragraph 35 as applicable, to be an OREI which falls within the scope of the statutory scheme for which they are responsible, the Scottish Ministers will issue a notice requiring the developer to submit a decommissioning programme. This notice may be issued either once the Scottish Ministers are satisfied that the statutory consents (for the avoidance of doubt, statutory consent includes any required marine licence) required to construct an OREI are likely to be given or following the grant of such consents.

11. The developer is expected to submit a draft decommissioning programme after they are served with a notice under section 105(2) of the Energy Act by the Scottish Ministers, and in advance of commencement of the construction of the installation. The Scottish Ministers will consult with Crown Estate Scotland about the content of the draft decommissioning programme. Crown Estate Scotland will, if appropriate, endeavour to advise the Scottish Ministers of any modifications to a draft decommissioning programme it believes to be necessary within 30 working days of receipt of the draft decommissioning programme from them. The Scottish Ministers will consider the advice (if any) of Crown Estate Scotland regarding modifications which should be made to the programme. The Scottish Ministers will feedback comments taking account of the views expressed by Crown Estate Scotland - to the developer. Approval of the draft decommissioning programme by the Scottish Ministers would not normally be a pre-condition to the grant of a lease from Crown Estate Scotland.

12. Once the developer's decommissioning programme has been formally submitted (but not necessarily approved) the developer will be allowed to start construction subject to the terms of the applicable statutory consents.

13. The Scottish Ministers will decide whether to approve the developer's decommissioning programme, and whether to do so with modifications or subject to conditions. If there have been significant relevant changes from the draft decommissioning programme referred to in paragraph 11 (above) the Scottish Ministers will give Crown Estate Scotland an opportunity to comment on the final programme before taking their decision. Crown Estate Scotland shall endeavour to provide any such comments within 30 working days of its receipt of the final programme from the Scottish Ministers. In making their decision on the submitted decommissioning programme, the Scottish Ministers will consider the advice of Crown Estate Scotland.

14. The Parties envisage that the decommissioning programme will require the developer to complete the decommissioning in accordance with the approved decommissioning plan prior to expiry of a lease from Crown Estate Scotland. Crown Estate Scotland will notify the Scottish Ministers of the expiry date of the applicable lease for this purpose. The decommissioning programme will also provide for the decommissioning to be brought forward to the termination of the lease in the event of the lease being terminated (for whatever reason) prior to

its expiry date, unless another lease for the OREI has been entered into. Crown Estate Scotland will keep the Scottish Ministers informed of any steps taken to terminate a lease relating to an OREI that is subject to a decommissioning programme under the Energy Act 2004.

15. In approving the developer's decommissioning programme the Scottish Ministers will start from a general presumption in favour of the whole of disused OREIs being removed and exceptions from this general requirement will only be considered where there are very good reasons (considered within the context of applicable legislation and the consents that have been granted in respect of such OREI). Any decision to allow some or all of an OREI to remain will be based on a case by case evaluation of a range of matters including, where appropriate, potential effect on the safety of navigation and the marine environment, potential impact on other uses of the sea, costs of removal and risks of injury to personnel associated with removal.
16. Where it is proposed that an OREI should be re-used, the decommissioning programme would not normally be approved unless it sets out the decommissioning measures for when the installation or structure finally becomes disused. The Scottish Ministers would expect the approval of a decommissioning programme providing for re-use to be conditional upon the person assuming responsibility for the re-use holding a lease from Crown Estate Scotland (or equivalent assumption of legal responsibility) of the seabed on which the installation or related electric lines are situated to cover the period of re-use.
17. Where re-use would take an installation or related electric lines outside the scope of the Energy Act 2004 decommissioning scheme, the Scottish Ministers would expect approval to be subject to conditions relating to clear future undertakings and/or responsibility over ultimate decommissioning or management of the site. The responsibility for securing such undertakings would fall upon the person on whom the notice was served, subject to revision under section 108 of the Energy Act 2004.
18. Where an OREI is subject to a decommissioning programme as described in this MoU, the lease from Crown Estate Scotland will not impose on developers any obligations to decommission that OREI other than to comply with the decommissioning programme under the Energy Act 2004 (in such form as it may take from time to time). Approval of the draft decommissioning programme by the Scottish Ministers would not normally be a pre-condition to the grant of a lease from Crown Estate Scotland.
19. The Parties envisage the principles in paragraph 15 and 16 will apply where the Scottish Ministers prepare a decommissioning programme.

Provision of financial security by a developer

20. The Scottish Ministers will consider developers' proposals for the provision of financial security, and will decide what financial security is acceptable in each case. Subject to commercial confidentiality, the Scottish Ministers will consult with Crown Estate Scotland as to the proposed levels of financial security and will consider Crown Estate Scotland's views in determining what is acceptable in each case. Such views to be provided as soon as reasonably possible after the Scottish Ministers have notified Crown Estate Scotland of the proposed levels of financial security.
21. Crown Estate Scotland will not require any other financial security for decommissioning itself, for OREIs which are covered by the statutory decommissioning scheme, including any devices for which the Scottish Ministers decide that no financial security is required. Crown Estate Scotland may seek to impose additional financial requirements to cover risks in respect of residual liability issues, such as third party claims and consequential loss, but will consult with the Scottish Ministers before imposing such arrangements.

Reviews and revisions of decommissioning programmes

22. The Scottish Ministers will review decommissioning programmes, from time to time, taking account of the particular circumstances in each case.
23. In all cases, the Scottish Ministers envisage reviewing a programme prior to the actual decommissioning of the OREI, to finalise the decommissioning measures to be taken. The Scottish Ministers will consult with Crown Estate Scotland during the conduct of this review on the content of the programme (and/or on the conditions to which the programme is subject).
24. Following the review, the Scottish Ministers will decide whether or not to modify the decommissioning programme (or a condition to which the programme is subject). In making this decision, the Scottish Ministers will consider the advice of Crown Estate Scotland.
25. It is envisaged that the principles in paragraphs 22 and 23 will apply to the final review of the decommissioning programme.
26. Other reviews, during the lifetime of the OREI, are likely to be required, to ensure that financial security provisions are sufficient. The Scottish Ministers will consult with Crown Estate Scotland, during the conduct of these reviews.

Ensuring decommissioning in the event of default by a developer/owner

27. If a developer, owner or other responsible party fails to carry out the approved decommissioning programme, the Scottish Ministers will consider exercising

their discretion under section 110 of the Energy Act 2004 as to whether to compel the taking of remedial action. Where the Scottish Ministers are considering not exercising their statutory right to take remedial action, they will first consult Crown Estate Scotland on the appropriateness of such a decision. Crown Estate Scotland will, in appropriate cases, authorise and facilitate entry for the undertaking of remedial action if a lease has expired.

28. Prior to any decision being taken in accordance with paragraph 27 and/or any remedial action being taken, the Scottish Ministers will consult with Crown Estate Scotland as to the management of the OREI.
29. In cases where the developer, owner or other responsible party has defaulted on its decommissioning obligations (for example, if the notice is not complied with or in cases of insolvency), it will be for the Scottish Ministers (and not Crown Estate Scotland) to secure the decommissioning of the OREI, if necessary by calling on any financial security which the developer/owner has provided for the purpose of decommissioning. The Scottish Ministers will also seek to ensure (with Crown Estate Scotland's assistance) the OREI is safe with a view to avoiding third party claims prior to completion of decommissioning.
30. Where there is a default on the part of a developer, owner or other responsible party, it will also be for the Scottish Ministers to secure any necessary post-decommissioning monitoring, maintenance and management of the site, in accordance with the final approved decommissioning programme, where an OREI has not been removed entirely.
31. Crown Estate Scotland will assist the Scottish Ministers to secure the decommissioning of the OREI and any necessary post-decommissioning monitoring, maintenance and management of the site. This may involve (but is not necessarily limited to) assisting in selecting a contractor to undertake the work and assisting in managing and monitoring the work undertaken by the contractor. Crown Estate Scotland is not expected to incur additional expenses in providing any such assistance. Where additional expenses would be incurred these would, subject to prior agreement by the Parties, be met by the Scottish Ministers. In this context "additional expenses" would not normally cover costs associated in any liaison between Crown Estate Scotland and the Scottish Ministers nor minor administrative costs arising from such support; but would cover any substantial or external expenses incurred at the request of the Scottish Ministers in providing said assistance.
32. The Scottish Ministers will endeavour to recover from the developer, owner or other responsible party any expenditure incurred in carrying out the decommissioning (to include "additional expenses" as set out in paragraph 31 above), and any necessary post-decommissioning monitoring, maintenance and management of the site, if necessary by calling on any financial security which the developer/owner has provided for the purpose of decommissioning.

33. If it is not possible to recover from the developer/owner the full cost of the decommissioning, and any necessary post-decommissioning monitoring, maintenance and management of the site, (including from any financial security which they have provided), it will be for the Scottish Ministers to make up the shortfall. The Scottish Ministers will not cover residual liabilities, consequential loss or third party claims.
34. In relation to paragraphs 27 to 33, it should be noted that in the event of default by an owner/ developer, there may be others with interim liability (such as a parent company with a controlling interest in the company) on whom the responsibility to decommission may apply before it reverts to the Scottish Ministers. Therefore, where the owner fails in their duty to decommission it does not necessarily follow that this duty will automatically pass straight to the Scottish Ministers. However, as paragraph 29 sets out, the requirement to fund and organise decommissioning would not fall to Crown Estate Scotland.

Clarity over the applicability of the Energy Act 2004 to installations

35. If Crown Estate Scotland is unclear as to whether an installation is covered by the statutory decommissioning scheme as defined in paragraph 5, it will seek the advice of the Scottish Ministers. The Scottish Ministers will advise Crown Estate Scotland of their view in a timely manner and, if the installation is covered by the statutory scheme, the terms of this MOU will apply. Equally, Crown Estate Scotland shall, at the request of the Scottish Ministers, provide such information as is available to it in order to assist the Scottish Ministers in forming their view, providing that for the avoidance of doubt such input from Crown Estate Scotland shall not bind the Scottish Ministers nor fetter the discretion of the Scottish Ministers.

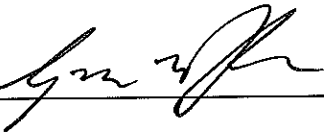
Governance

36. Crown Estate Scotland has entered into a framework document with The Scottish Ministers which describes the working relationship between Crown Estate Scotland and the Scottish Government. The Parties acknowledge the existence of the framework document and shall work to ensure that the role of Crown Estate Scotland and the assistance required of it under this MoU are compatible with the framework document's terms.
37. Nothing in this MoU shall fetter the discretion of the Scottish Ministers or Crown Estate Scotland with regard to their respective legal obligations, including those under the Energy Act 2004, the Scotland Acts 1998 and 2016, the Crown Estate Act 1961 (as modified in its application to Crown Estate Scotland) and the Crown Estate Scotland (Interim Management) Order 2017.

38. Representatives of the Scottish Ministers and Crown Estate Scotland will meet at least annually to review this MoU to ensure it continues to provide appropriate arrangements for the life cycle decommissioning of OREIs such that, in default of the OREI owner, the Scottish Ministers or another party with interim liability (excluding Crown Estate Scotland) will secure the decommissioning of the OREI.
39. The Scottish Ministers will endeavor to notify and engage with Crown Estate Scotland if and when they propose to make changes to the decommissioning process, or if the Scottish Ministers wish to alter the obligations on developers in respect of decommissioning. This MoU may be updated to reflect any changes to the policy and process as a result of any such engagement.
40. The Parties acknowledge that some of the information shared to fulfil the requirements of this MoU will include material that is commercially sensitive and both parties agree, without prejudice to their respective statutory and regulatory obligations, to treat it accordingly.

For The Scottish Ministers:

For Crown Estate Scotland
(Interim Management):

Signed : 

Signed : 

Date : 29/6/2017

Date : 29th June 2017

EXPLANATORY NOTE TO THE MOU

Crown Estate Scotland (Interim Management) and the Scottish Ministers have agreed to enter into this Memorandum of Understanding (MoU) relating to the decommissioning of Offshore Renewable Energy Installations (OREIs).

Crown Estate Scotland (Interim Management) manages that part of UK seabed adjacent to Scotland out to the 12 nautical mile territorial sea limit and holds specific rights to the exploitation of renewable energy in the Scottish Renewable Energy Zone on the UK continental shelf under the devolution settlement.

Under the United Nations Convention on the Law of the Sea 1982 (UNCLOS) and as reflected in the Acts coastal states are obliged to ensure that OREIs are decommissioned at the end of their life. This will normally presume full removal of the OREI.

To enable the Scottish Government to comply with its obligations, the Scottish Government may require an owner of an OREI to decommission in accordance with a decommissioning programme approved by the Scottish Ministers under the Acts.

The implementation and management of decommissioning programmes is intended to avoid decommissioning liabilities accruing to the Scottish Ministers and security may be taken by the Scottish Ministers from the owner of the OREI.

If the OREI owner fails to decommission in accordance with the approved decommissioning programme and in keeping with the Scottish Ministers role in assisting the UK Government's obligations under national and international law, the Scottish Ministers (or another party with interim liability, but excluding Crown Estate Scotland) is to meet the costs of decommissioning.

To enable it to grant rights, Crown Estate Scotland must be assured that it will not be liable for decommissioning costs in default of the OREI owner and is able to rely on the Scottish Ministers meeting such liabilities.