EXPLANATORY MEMORANDUM TO

THE ENERGY ACT 2013 (OFFICE FOR NUCLEAR REGULATION) (CONSEQUENTIAL AMENDMENTS, TRANSITIONAL PROVISIONS AND SAVINGS) ORDER 2014

2014 No. 469

AND

THE ENERGY ACT 2013 (IMPROVEMENT AND PROHIBITION NOTICES APPEALS) REGULATIONS 2014

2014 No. 468

1. This explanatory memorandum has been prepared by the Health and Safety Executive 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 The Energy Act 2013 (Office for Nuclear Regulation) (Consequential Amendments, Transitional Provisions and Savings) Order 2014 ("the Consequentials Order") amends various existing legislation in consequence of Part 3 of the Energy Act 2013 ("the 2013 Act") and the establishment of the Office for Nuclear Regulation ("the ONR") by that Part of the 2013 Act. It also makes transitional arrangements in connection with the changes in the regulatory regime and the transfer of functions from the Health and Safety Executive ("the HSE") and the Secretary of State to the ONR.

2.2 The Energy Act 2013 (Improvement and Prohibition Notices Appeals) Regulations 2014 ("the Appeals Regulations") set out the period within which an appeal against certain notices issued by inspectors appointed by the ONR must be made. The Regulations also set out the fees payable in connection with such appeals.

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

3.1 None.

4. Legislative Context

The Consequentials Order

4.1 The Consequentials Order is made in exercise of the powers in sections 114 and 116 of Part 3 of the Energy Act 2013 (www.legislation.gov.uk/ukpga/2013/32/part/3/enacted). The amendments made by the Order will ensure that all functions relating to the regulation of the nuclear industry in Great Britain currently resting with the HSE and the Secretary of State transfer to the ONR on 1 April 2014.

4.2 The Consequentials Order also makes necessary transitional provisions and savings to ensure continuity in the law and in the exercise of functions in consequence of the transfer of regulatory responsibility from the HSE and the Secretary of State to the ONR.

4.3 Finally, the Consequentials Order also makes necessary transitional amendments to the 2013 Act as it applies to England and Wales pending the commencement of section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (www.legislation.gov.uk/ukpga/2012/10/contents).

The Appeals Regulations

4.4 Inspectors appointed by the Office for Nuclear Regulation (ONR) under the 2013 Act will have the power to give improvement notices and prohibition notices (paragraphs 1, 3 and 5 of Schedule 8 to the 2013 Act). Any person to whom an improvement or prohibition notice is issued can appeal that notice to the employment tribunal. The Appeals Regulations prescribe, in accordance with paragraph 6 of Schedule 8 to the 2013 Act, the period within which such an appeal must be made.

4.5 The Appeals Regulations also make provision to set the issue and hearing fees payable in connection with any such appeal.

5. Territorial Extent and Application

5.1 Most of the provisions of the Consequentials Order apply to the whole of the United Kingdom. However:

- article 7 extends to England and Wales only;
- article 9 and paragraphs 3 and 8(2)(b) to (d) of Schedule 1 extend to England and Wales and Scotland only; a
- the amendments made by Schedules 2 and 3 to the Order have the same extent as the provisions they amend except:
  - paragraphs 11 to 13 of Schedule 2 and paragraph 178 of Schedule 3 extend to Scotland only;
  - paragraphs 182(2) and (4) of Schedule 3 apply to England only; and
  - paragraphs 182(3) and (5) of Schedule 3 apply to Wales only.

5.2 The Appeals Regulations apply to England, Wales and Scotland only.

6. European Convention on Human Rights

6.1 The Minister of State for Disabled People, Rt.Hon Mike Penning MP, has made the following statement regarding Human Rights:

> In my view the provisions of the Energy Act 2013 (Office for Nuclear Regulation) (Consequential Amendments, Transitional Provisions and Savings) Order 2014 are compatible with the Convention rights

6.2 As the Energy Act 2013 (Improvement and Prohibition Notices Appeals) Regulations 2014 are subject to the negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

The Consequentials Order

Creation of the Office for Nuclear Regulation

7.1 Under Part 3 of the 2013 Act, the ONR will be established as an independent statutory corporation responsible for regulating nuclear safety and security in the nuclear sector. It will also have functions in connection with nuclear safeguards and the transport by road, rail and inland waterway of radioactive materials. In addition, it is intended that ONR also be responsible for the regulation of health and safety on certain nuclear sites. In order to avoid disparity between the application of (non-nuclear specific) health and safety on ONR sites and those regulated by the Health and Safety Executive (HSE), HSE will retain policy responsibility for health and safety throughout Great Britain. This will extend to the proposal of new law and any new or updated guidance that will apply equally on sites under the remit of either regulator.

7.2 The ONR's general duties, functions and powers are set out in the provisions of Part 3 to the 2013 Act and Part 1 of the Health and Safety at Work etc. Act 1974 ("the 1974 Act"): www.legislation.gov.uk/ukpga/1974/37/contents. However, it is the intention that the ONR also be responsible for carrying out functions under other legislation which applies on nuclear sites and to persons working in the nuclear sector. This includes functions under the Nuclear Installations Act 1965 (www.legislation.gov.uk/ukpga/1965/57/contents) as well as regulations made under the 1974 Act and the Anti-terrorism, Crime and Security Act 2001 (www.legislation.gov.uk/ukpga/2001/24/contents). Where the new organisation is taking on functions in legislation previously held by others, this legislation needs to be amended to include the ONR's role. The amendments proposed to ensure the transfer of functions do not place new duties on the regulated community, nor give the ONR powers beyond those which the Health and Safety Executive and the Secretary of State have before 1 April 2014.

Consequential amendments to existing legislation

7.3 Within the Energy Act 2013, a number of amendments were made to primary legislation to assign functions to the new ONR. For example; the Nuclear Installations Act 1965 - the principal legislation by which nuclear safety is regulated - was amended to change references to HSE to ONR. There are a small number of amendments to primary legislation not covered in the 2013 Act, for instance to information sharing provisions. In addition to the information provisions set out in Schedule 9 of the 2013 Act, ONR will also need access to further information that it is currently able to obtain as a part of HSE. For this reason, a number of changes are made to primary and secondary legislation to allow for information gateways to be available to the ONR.

7.4 The Order also makes necessary amendments to secondary legislation required to ensure the ONR has all of the requisite powers, duties and functions. The majority of the amendments made by this Order relate to the ONR's health and safety role on the sites set out in paragraph 7.5 but there are also amendments relevant to ONR's security, safeguards and radioactive materials transport functions and amendments to ensure that ONR is consulted about relevant planning applications.

7.5 The extent of ONR's regulatory remit for health and safety, facilitated by the changes made by Part 3 of the Energy Act 2103 and this Order, will be to four areas:

- GB nuclear sites (within the meaning given in section 68 of the 2013 Act): those sites in Great Britain that are required to hold a nuclear site licence by virtue of the Nuclear Installations Act 1965, or one for which the period of responsibility has not ended;
- Authorised defence sites: sites in Great Britain that would be required to hold a nuclear site licence were they not operated by the Crown for the purposes of defence;
- New nuclear build sites: the wider construction site adjacent to a new licensed nuclear site under construction; and
- Nuclear warship sites: berths and anchorages which have been nominated by the Ministry of Defence as those a nuclear warship can be moored (currently only in reference to submarine berths). ONR's remit in respect of these sites will only extend to regulatory responsibilities relevant to the Ionising Radiation Regulations 1999 (www.legislation.gov.uk/uksi/1999/3232/contents/made) and the Radiation (Emergency Preparedness and Public Information) Regulations 2001 (www.legislation.gov.uk/uksi/2001/2975/contents/made).

Transitional arrangements

7.6 Legislation relevant to the ONR's purposes that falls solely within the remit of the ONR - such as the Nuclear Industries Security Regulations 2003 - will be treated by the Consequentials Order as if they were 'made' under the Energy Act, and thus be solely within the enforcement remit of the ONR. This legislation will be enforced by ONR inspectors using powers included in Schedule 8 of the Energy Act 2013.

7.7 In addition, these arrangements enable the ONR to continue to rely on some procedural legislation and fees legislation until such time as legislation is made specifically in relation to the ONR under the 2013 Act. These arrangements have been made to allow for a seamless transition from the HSE to the ONR.

7.8 Finally, actions that had been taken by the ONR as an agency of HSE will be preserved by the Order, so that licensing, exemptions, certificates and decisions made by HSE that are specific to functions ONR will be taking on will be treated as if made by the ONR and remain in force on and following 1 April 2014.

7.9 As the Consequentials Order uses the consequential, transitional and savings provisions of the Energy Act 2013, consolidation of regulations cannot be undertaken using this power. Informal consolidated text of legislation is available to the public free of charge via the National Archive website: www.legislation.gov.uk. HSE is also undertaking a number of consolidation projects for specific areas of health and safety legislation, details of which can be found at: www.hse.gov.uk.

The Appeals Regulations

7.10 Inspectors appointed by the ONR under the 2013 Act can be empowered to take a number of different actions where there has been a breach of that Act or any regulations made under it, as well as other legislation which is enforced by the ONR. Two of the actions that can be taken are the giving of improvement and/or prohibition notices.

7.11 In order to make such notices fair and transparent, there is a challenge mechanism built into paragraph 6 of Schedule 8 of the Energy Act 2013. Applicants can appeal to an employment tribunal within a period set out in regulations made by the Secretary of State. These Regulations set the appeal period. A period of 21 days was chosen, as this mirrors the current period prescribed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (www.legislation.gov.uk/uksi/2013/1237/contents/made) to appeals against notices issued under the Health and Safety at Work etc. Act 1974.

7.12 In addition, the Appeals Regulations confer the right on the tribunals system to claim a fee for any appeal made against an improvement or prohibition notice issued under part 3 of the Energy Act 2013.

7.13 The Appeals Regulations make minor amendments to tribunals legislation, and so consolidation has not been considered appropriate. Informal consolidated text of legislation is available to the public free of charge via the National Archive website: www.legislation.gov.uk.

8. Consultation outcome

8.1 The Consequentials Order and the Appeals Regulations are supplementary to the provisions in the Energy Act 2013 that create the Office for Nuclear Regulation (ONR) as a public corporation. Extensive engagement with stakeholders inside and outside of Government prior to and during passage of the 2013 Act through Parliament has taken place. Informal scrutiny of both instruments took place over six weeks, with responses requested from nuclear industry stakeholders and other Government departments. One response was received from the industry, with no amendments proposed. The Ministry of Justice and the Tribunals Service were specifically consulted on the Appeals Regulations and agreed these amendments.

9. Guidance

9.1 Whilst the Consequentials Order transfers various functions from the Health and Safety Executive (HSE) and the Secretary of State to the ONR, it does not change the duties placed on those involved in the civil nuclear sector or the transport of radioactive materials. The regulated community has been kept informed of the progress of the 2013 Act and the Order. Consequently, no specific guidance has been produced for this instrument.
Policy responsibility for the production of guidance on health and safety matters will remain with HSE, and current guidance can be found on the HSE website at: www.hse.gov.uk/guidance/index.htm. Guidance on nuclear specific matters can be found at www.hse.gov.uk/nuclear/guidance.htm.

9.2 No specific guidance has been produced on the Appeals Regulations, but there is guidance available on the process surrounding how to appeal against HSE prohibition and improvement notices, and ONR expects to follow a similar process in future: www.hse.gov.uk/enforce/enforcementguide/notices/tribunals-appeal.htm.

10. Impact

10.1 There is no impact on business or civil society, or the public sector. The Cabinet Office Secretariat has advised that the instruments should be treated as trivial or mechanical for clearance purposes, and therefore do not need Regulatory Policy Committee approval (or

collective Cabinet Committee agreement). An Impact Assessment has therefore not been prepared for these instruments.

11. Regulating small business

11.1 The Consequentials Order and Appeals Regulations capture the activities of small business, but have no effect beyond the transfer of regulatory responsibility. An Impact Assessment has not been prepared for these instruments.

12. Monitoring & review

12.1 No monitoring or review of these instruments is planned. However, under section 118 of the 2013, the Secretary of State is required to carry out a review of Part 3 of the Energy Act 2103 as soon as reasonably practicable after 31 March 2019. The changes made by these instruments will form a part of that review.

13. Contact

Chris McEwan at the Office for Nuclear Regulation - Tel: 0207 556 3523 or Email: chris.mcewan@hse.gsi.gov.uk - can answer any queries regarding the instruments.