

Energy Bill

Supplementary Delegated Powers Memorandum

Introduction

1. This Memorandum has been prepared by the Department for Business, Energy and Industrial Strategy (“the Department”) to assist with scrutiny of the Energy Bill (“the Bill”). In the case of new Part 12, relating to the Offshore Wind and Environmental Improvement Package, the memorandum has been prepared jointly with the Department for the Environment, Food and Rural Affairs.
2. This Memorandum describes powers in the Bill conferring power to make subordinate legislation and other delegated powers which were added at the Committee stage in the House of Lords (first House). This Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.
3. There are two delegated powers within the Offshore Wind Environmental Improvement Package (“OWEIP”) of measures included in this Memorandum. These are:
 - a) A power to make provision for a Marine Recovery Fund ; and
 - b) A power to make provision related to environmental assessments for offshore wind projects.
4. There are two delegated powers relating to the Nuclear Decommissioning Authority (NDA) Pension Reform. This measure is to enable the NDA group to amend their final salary pension scheme.

New Part (after Clause 224): Offshore Wind Electricity Generation

New Clause inserted after clause 224: Marine Recovery Funds

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary Procedure: Negative Resolution

Context and Purpose

5. The Government has committed to accelerating the deployment of offshore wind to address its climate change objectives and to ensure the United Kingdom has a sustainable domestic energy supply. The OWEIP is intended to enable delivery of these commitments whilst protecting the marine environment and the vital ecosystem services it provides.
6. This new clause confers a power on the Secretary of State to make provision for the establishment, operation and management of one or more Marine Recovery Funds (“MRF”), as well as provision about the application of payments held by an operator. This will support the Government’s offshore wind commitments by providing an optional framework through which developers can discharge consent conditions in relation to environmental compensation. The MRF is a fund:

- a. which will consist of amounts paid in respect of offshore wind projects; and
 - b. out of which payments may be made to deliver measures to compensate for the adverse environmental effects of one or more offshore wind projects.
7. This power will enable the Secretary of State to appoint one or more persons to carry out the functions of an MRF operator. The operator(s) of the MRF will be responsible for functions such as calculating payments required to deliver compensatory measures, collecting the payments, and undertaking or procuring the delivery of compensatory measures associated with those payments.
8. Adverse environmental effect is defined as anything which adversely affects the integrity of any site in the national site network¹ or anything that hinders the achievement of the objectives stated for a protected marine area².
9. Subsection (7) provides that the regulations may make provision to confer functions on the Secretary of State. This may include a function that involves the exercise of a discretion. It also provides that the regulations may make provision to enable the delegation of functions conferred on the Secretary of State.
10. Subsection (8) sets out the conditions for delegation to devolved public authorities.
11. Subsection (9) sets out that the regulations must provide that the delegation of a function may be cancelled by the Secretary of State. The regulations must also provide that where a function is delegated, that does not prevent the Secretary of State from carrying out that function. This will enable certain functions to be delegated to bodies within the Devolved Administrations who will deliver strategic compensation measures. In England, the Secretary of State may delegate functions to a third-party delivery body within Government or beyond.

Justification for the power

12. The Department considers that it is appropriate that these powers be delegated to the Secretary of State given the detailed technical and administrative nature of the provisions with a relatively narrow purpose. Given the expected longevity of the MRF, it is integral that the Secretary of State retains the ability to amend the detail of how the MRF works if its practical application brings to light any difficulties. These regulations underpin the effective operation of the MRF and are essential to the credibility of developers' business models in fulfilling their compensation obligations, increasing the confidence of investors and thereby further supporting Government's offshore wind ambitions.
13. To ensure that the MRF can continue to collect the monies required to enable the delivery of compensatory measures in the future, it is appropriate that the payment and delivery arrangements for the MRF are set out in regulations. This power is limited in scope and can only be exercised by making provision as set out in subsections (4), (6) and (7). A delegated power is required to allow the Secretary of State to:
 - a. Make appropriate amendments to the MRF as new compensatory measures become available.

¹ within the meaning given in the Conservation of Habitats and Species Regulations 2017.

² designated under section 116 of the Marine and Coastal Access Act 2009, section 13 of the Marine Act (Northern Ireland) 2013, or section 67(1)(a) or (b) of the Marine (Scotland) Act 2010.

- b. Determine and amend the extent to which a payment into the MRF discharges a compensation requirement.
 - c. Delegate responsibility for operating the MRF to one or more third parties, with the ability to change these parties at a subsequent date if required.
- 14. The powers in subclauses (6) and (7) are required to provide for payments out of the MRF to deliver compensatory measures. It would not be appropriate to set out the necessary level of detail regarding the payment process in primary legislation. In addition, as new technologies or monitoring costs may emerge, it may be necessary to revise the charging process. Any such changes can be more easily achieved through amending regulations. This will allow the Government to respond quickly and appropriately to support the acceleration of offshore wind deployment whilst protecting the marine environment.
- 15. The power also enables the Secretary of State to make regulations to determine the extent to which payment into the MRF discharges compensation requirements. Without these specific provisions, the Secretary of State would lack the legislative basis for linking a payment into the MRF with the discharging of compensation requirements. It would therefore be unlikely that the MRF could be successfully relied upon in the development consent process. This could make the MRF less attractive to developers, reducing the delivery of strategic compensatory measures via the MRF, and therefore limiting the Government's ability to meet its offshore wind ambitions.
- 16. An initial decision on who should serve as the MRF operator will be taken in early 2023. Prior to the appointment of the MRF operator, the Government will conduct internal assessments relating to their experience, capacity and resource to determine their suitability for this role. Setting out the fundamental components of the MRF processes in regulations, including the obligations of the MRF operator, will provide certainty to industry about the payment and delivery process and the direction of travel.
- 17. Delegating specific functions to the Devolved Administrations is appropriate because the Devolved Administrations are responsible for delivering certain measures in their waters. For example, Scottish Ministers have existing duties to agree and secure compensatory measures for certain offshore wind projects and are therefore best placed to agree suitable measures and deliver these via a MRF should they wish to. Devolved Administrations will need to operate and manage their respective MRFs in a way that is coherent and equitable for developers. This will require close collaboration with the Devolved Administrations to ensure the appropriate functions are delegated and there is a consistent approach across jurisdictions with differing consenting regimes.
- 18. The regulations must also provide that where a function is delegated, that does not prevent the Secretary of State from carrying out that function. This is needed to ensure the Department can react appropriately to a situation where a delegated function is withdrawn. It is imperative that no compensation contracts are left stranded and that at any one time there is a compensation counterparty liable for the obligations, and able to exercise the rights, under the contracts.
- 19. It is possible that additional persons to whom services may be delegated will be identified in the future. Subsequent changes to the MRF design may therefore relate to the bodies that are required to deliver measures or the MRF operator. Provision allowing the delegation of functions will enable the UK Government and public authorities in the Devolved Administrations to react to these future developments and ensure appropriate arrangements are in place.

20. The Department has published a policy statement to provide further detail on how it intends to use this power.³

Justification for the procedure

21. Regulations made under this new clause are subject to the negative procedure as they are considered uncontroversial and are limited in scope, as set out in the clause. The Department considers the scrutiny required by negative procedure is appropriate due to the largely technical information and administrative rules they will include. The negative procedure is also more appropriate because use of the MRF as a means of delivering compensatory measures is optional and payment into the MRF will not be mandated.

New Clause inserted after clause 224: Assessment of environmental effects etc.

Powers conferred on: the Secretary of State; Scottish Ministers, Welsh Ministers and the Department for Agriculture, Environment and Rural Affairs in Northern Ireland (DAERA)

Powers exercised by: Statutory Instrument by the Secretary of State; regulations made by Scottish Statutory Instrument by the Scottish Ministers; regulations made by Statutory Instrument by the Welsh Ministers; statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 by DAERA

Parliamentary Procedure: Affirmative procedure for regulations made by the Secretary of State and Scottish Ministers; draft affirmative procedure for regulations made by the Welsh Ministers and DAERA

Context and Purpose

22. The Conservation Regulations⁴ set out current requirements for the assessment of offshore wind plans and projects within European protected sites. They restrict the approval of such plans or projects unless the decision-maker is satisfied that the site is not adversely affected. Where an adverse effect cannot be avoided, the Conservation Regulations provide for circumstances in which a derogation and compensatory measures for those effects may be used. Those regulations implement Article 6 of the Habitats Directive and have been the subject of considerable case law in both the domestic and European courts. The Marine Acts⁵ set out the requirements of the assessment of applications for domestic marine protected areas.

23. In order to remove some of the bottlenecks caused by addressing the derogation requirements and in particular finding appropriate mitigation or compensatory measures, this new clause confers powers on the Secretary of State, Scottish Ministers, Welsh Ministers and DAERA to amend such requirements by making provision by regulations:

³ Available at: <https://www.gov.uk/government/publications/energy-security-bill-policy-statements-and-draft-regulations>

⁴ The Conservation of Habitats and Species Regulations 2017, the Conservation of Offshore Marine Habitats and Species Regulations 2017, the Conservation (Natural Habitats, &c.) Regulations 1994 and the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995

⁵ The Marine and Coastal Access Act 2009, the Marine (Scotland) Act 2010 and the Marine Act (Northern Ireland) 2013

- a. for and in connection with the assessment of the environmental effects of one of more offshore wind projects in the UK marine area in relation to protected sites; and
 - b. about the taking or securing of measures by a public authority in compensation for any adverse environmental effects of offshore wind projects in relation to protected sites.
24. When using the delegated power conferred in the clause, DAERA and Scottish Ministers may only make regulations which apply to offshore wind in their inshore regions (to 12 nautical miles). Welsh Ministers may only make regulations that apply to offshore wind in the Welsh inshore region, but not Nationally Significant Infrastructure Projects (NSIP). When exercising their powers, Scottish Ministers, Welsh Ministers and DAERA may not modify the functions of the Secretary of State. Otherwise, the Secretary of the State has the power to make regulations which apply to offshore wind in the UK marine area.
25. Subsection (4) sets out that the provision that may be made includes provision:
- a. specifying what should be dealt with by an assessment;
 - b. about the procedure to be followed and what needs to be considered;
 - c. specifying who should carry out an assessment; or
 - d. requiring it to be a specified person in certain circumstances;
 - e. authorising or requiring the supply of information,
 - f. requiring assistance with an assessment;
 - g. prohibiting the grant of consent if an assessment hasn't been carried out in accordance with the regulations
 - h. about when or how compensatory measures are provided and
 - i. which disapplies or modifies the assessment provisions⁶ and the compensatory measures obligations in the Conservation Regulations and Marine Acts, and any directly effective rights under Article 6 of the Habitats Directive, that apply to offshore wind developments.
26. Subsections (5) and (6) set out the legislation that the Secretary of State, Scottish Ministers, Welsh Ministers and DAERA respectively may disapply or modify under subsection (4)(i).
27. To the extent that such legislation is in primary legislation, the powers constitute a “Henry VIII power” to disapply or otherwise modify primary legislation. The legislation that could be disapplied or otherwise modified is limited to the Marine Acts and primary legislation that relates to the taking or securing of compensatory measures.
28. This power also enables the Secretary of State, Scottish Ministers, Welsh Ministers and DAERA:
- a. To direct a person to take steps or to refrain from taking steps, and to require a person to comply with such a direction;
 - b. To require the appropriate authority or a specified person to give guidance about specified matters relevant to the regulations, and to consult specified persons before giving guidance or making regulations; and
 - c. To confer functions on any person.

⁶ not including tests about alternatives to projects, public interest tests that allow projects to be authorised and related procedures)

29. Subsection (11) provides for the definition of “protected site” to be determined in accordance with the regulations made under this section. It also requires the regulations to be framed so that protected sites consist of natural habitats or habitats of species and must include certain types of marine protected areas designated under the Marine Acts.
30. The powers are designed to streamline the consenting process for offshore wind by enabling more assessment to be undertaken earlier in the consenting process and to make it quicker to identify compensatory measures by clarifying requirements for assessing impacts on protected sites.

Justification for the powers

31. These powers will support the Government’s joint commitment to accelerate offshore wind deployment whilst continuing to protect the marine environment. It will ensure that environmental protection is addressed early enough in the consenting process to inform adequate and ecologically robust mitigation and compensatory measures. By adapting the existing regimes for assessment of the environmental effects of offshore wind on protected sites, the process will be streamlined where needed while protecting the environment.
32. To date, significant delays have been experienced in the consenting process as a result of environmental assessments. The intention of these powers is to allow limited modification of environmental assessment processes for offshore wind across the UK to prevent reoccurrences of such delays.
33. The clause enables ‘the appropriate authority’ to make regulations in relation to specific offshore wind projects. This is defined to include Scottish Ministers, Welsh Ministers and DAERA in relation to relevant offshore wind projects in the Scottish, Welsh and Northern Irish inshore regions respectively. The clause requires that use of the powers is subject to consultation with the Secretary of State, arms’ length bodies, other Devolved Administrations, and such other persons as the regulation-making authority considers appropriate. The powers will only be exercised after this process of consultation.
34. It is appropriate for the relevant Devolved Administration Ministers to make regulations for their respective inshore waters. Therefore, it is preferable to introduce regulation making powers that can be used in parallel with the Devolved Administrations to make linked regulations to reduce the risk of any legislative gaps or regulatory inconsistency which could impede offshore wind development. This will help to retain a consistent approach across UK waters as far as is possible.
35. The provision specifying who should carry out an assessment allows the authority making the regulations to ensure the provision is, and remains, operable in the Devolved Administrations. The Department has not specified who the person carrying out an assessment is. This is intended to allow the provision to be enabling and remain consistent with any future regime for protected site environmental assessment.
36. The enabling power provides limited “Henry VIII powers” to disapply or modify primary legislation only where needed in the waters under each Administrations’ control. This is necessary and appropriate because the environmental impacts of offshore windfarm developments are managed under various pieces of legislation, including primary legislation passed by devolved legislatures.
37. The powers cannot be used to modify the provisions related to the public interest test in either the Conservation Regulations or the Marine Acts. These provisions allow an authority to agree to a project in the public interest, notwithstanding the risk of damage to a protected site. The Department has excluded modification of these provisions to manage the risk of the power being used to change the underlying principle of balance between environmental protection and necessary development in the planning and consenting process.

38. The Department has published a policy statement to provide further detail on how it intends to use this power.⁷

Justification for the procedure

39. It is appropriate that the regulations under this clause to develop a new or amend the existing regime relating to the assessment of the environmental impacts of offshore wind on protected sites are subject to sufficient Parliamentary scrutiny.

40. The Department has therefore concluded that it is appropriate to use the affirmative procedure for regulations made by the Secretary of State in the UK Parliament and for regulations made by Scottish Ministers in the Scottish Parliament. It is also considered appropriate that regulations are subject to the draft affirmative procedure in the Senedd and Northern Ireland Assembly to provide the legislatures with sufficient opportunity to consider and debate new regulations.

Part 12: Civil Nuclear Sector

After Clause 237 New Clause: Reform of Relevant Nuclear Pension Schemes

After Clause 237 New Clause: Application of Relevant Pensions Legislation

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary Procedure: Affirmative Resolution

Context and Purpose

41. The purpose of these powers is to enable the Nuclear Decommissioning Authority (NDA) group to amend their final salary pensions schemes. This would bring them into line with wider public sector pensions in moving from a final salary scheme to a career average scheme. This change has been subject to consultation in 2017 (with members) and 2018 (publicly) and the new scheme, which this will facilitate, was agreed with NDA unions. Public service pension reform has been subject to Parliamentary scrutiny during the passage of the Public Service Pensions Act 2013 and policy agreement for this specific reform was completed in 2018.

42. The current rules of the Nuclear Decommissioning Authority (NDA) pension schemes contain various provisions which mean the NDA do not currently do not have the power to adjust the scheme in order to bring about the agreed reform.

43. In addition, at the current time, there are two pieces of legislation that would prevent the NDA from being able to amend their schemes. Provisions within the Electricity (Protected Persons) (England and Wales) Pension Regulations 1990 and the Energy Act 2004 prevent pension schemes being amended to provide certain individuals with less favourable terms, and also prevent those persons from being transferred to pension schemes with less favourable terms.

44. A significant number of those employed by the NDA are currently covered by these protections. In order to complete the reform as intended we need to remove these protections for those currently working at the NDA. In the future if other groups of nuclear decommissioning workers with these protections, not currently employed by the NDA,

⁷ Available at: <https://www.gov.uk/government/publications/energy-security-bill-policy-statements-and-draft-regulations>

move to work with the NDA we may also need to remove these protections for those groups.

Justification for the power

45. To make this change via primary legislation only, by directly specifying that the NDA can reform their pension schemes, would mean including provisions that affect a relatively narrow group of persons. The Department believes that this is not appropriate for primary legislation.
46. The regulations themselves will also require a specified person to make changes to various aspects of the pensions in order to bring about the reform. Including those changes on the face of the Bill would require a level of technical detail, for example, setting out the level of contributions for different pension scheme members (which will vary according to which pension scheme or section of the pension scheme a member is in).
47. If this level of detail were to be included in the Bill, any future changes, for example to contribution levels, would require further primary legislation. Given the technical nature of any such changes, we consider these more appropriately dealt with in regulations. In addition, the requirement for primary legislation for such changes may also result in delay for small changes to the schemes which could impact on the effective running of them.
48. The Government only wishes for this to cover some parts of the total population of those with legislative protections working in the civil nuclear sector.
49. Therefore, it is the Department's view that the primary legislation should define a broader class, namely those working in the civil nuclear sector, with regulations following that will more precisely specify who will be affected and which legislation needs to be amended or disapplied. Initial regulations will specify those currently working at the NDA. Future regulations may cover other groups of workers coming to work at the NDA should that be necessary.
50. The Department has published a policy statement to provide further detail on how it intends to use this power.⁸

Justification for the procedure

51. Using the affirmative procedure will ensure a higher degree of scrutiny over regulations which will identify specific groups who will be subject to reform.

⁸ Available at: <https://www.gov.uk/government/publications/energy-security-bill-policy-statements-and-draft-regulations>