Energy Bill

Supplementary Delegated Powers Memorandum

Introduction

1. This Memorandum has been prepared by the Department for Energy Security and Net Zero ("the Department") to assist with scrutiny of the Energy Bill ("the Bill").
2. The section of this Memorandum relating to the amendments to "Part 3: New Technologies" has been prepared jointly with the Department for Transport.
3. This Memorandum describes powers in the Bill conferring power to make subordinate legislation and other delegated powers which were amended or added at the Report stage in the House of Lords (first House). This Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

Amendments to Part 2: Carbon Dioxide Capture, Storage etc and Hydrogen Production

New Clause inserted after clause 66: Payments to relevant market participants

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary Procedure: The first revenue support regulations making provision falling within this new clause will be subject to affirmative procedure. Any further regulations making such provisions would be subject to negative procedure.

Context and Purpose

4. This clause enables revenue support regulations to make provision requiring payments to be made to levied market participants, including where the hydrogen production counterparty receives payments from hydrogen producers under revenue support contracts. For example, when the reference price is higher than the strike price or in cases where hydrogen producers pay fees to the counterparty. This sort of provision has precedent; it is similar to section 17 of the Energy Act 2013 and section 20 of the Nuclear Energy (Financing) Act 2022.
5. This new clause also enables regulations to make provision requiring that energy consumers benefit from payments made to levied market participants from a hydrogen production counterparty and/or levy administrator. This is similar to subsection (2A) of section 17 of the Energy Act 2013, which was recently included in that Act by means of section 18(4) of the Energy Prices Act 2022.

Justification for the power

6. This clause complements the existing hydrogen levy provisions within Part 2 of the Energy Bill, which enable regulations to make provision for relevant market participants to make payments to a hydrogen levy administrator, including the calculation and determination of amounts owed, and specifying things that a hydrogen levy administrator

may or must do. This clause will be critical to helping ensure that the payment and reconciliation arrangements for the hydrogen levy are fair and efficient, including enabling regulations to allow for payments received by a hydrogen production counterparty from hydrogen producers under revenue support contracts to be passed through to levied market participants and/or energy consumers.

7. As discussed in the original Delegated Powers Memorandum, the design of the hydrogen levy may need to change over time as the hydrogen market evolves and/or to reflect changes to the wider energy market. A delegated power is therefore required for this provision, as it is not possible to determine the arrangements for payments to levied market participants and the pass-through of benefits to energy consumers that may be required in the future. In addition, the complexity and detailed nature of these arrangements are likely to be such that it would not be appropriate to include such provisions on the face of the Bill.

8. This approach aligns with the legislation for the Contracts for Difference scheme: Section 17 of the Energy Act 2013 provides a delegated power for payments to electricity suppliers and the pass-through of benefits to their customers.

Justification for the procedure

9. The Department considers that it is appropriate that the first set of regulations made using these powers should be subject to the affirmative resolution procedure. This will ensure sufficient parliamentary scrutiny of the levy design. As we expect any subsequent regulations made on the basis of this clause to be technical, it is considered proportionate that such regulations are subject to the negative resolution procedure. This aligns with the parliamentary procedure for regulations that make provisions falling within the other levy design clauses within the Bill, namely clauses 66 and 67.

New provisions inserted at the end of Clause 78: Enforcement of a hydrogen production allocation body (see clause 78(3) and (4))

Power conferred on: Secretary of State

Powers executed by: Statutory instrument

Parliamentary procedure: Affirmative procedure

Context and Purpose

10. As discussed in paragraph 189 of the Delegated Powers Memorandum published at Introduction, a decision is yet to be taken on the appropriate entity(ies) to fulfil the role of allocation body for the hydrogen production revenue support contracts. The Independent System Operator and Planner (ISOP) is being considered for the role, and the ISOP will be regulated by the Gas and Electricity Markets Authority (GEMA) through licence arrangements and statutory enforcement.

11. These new provisions inserted at the end of clause 78 enable the Secretary of State to make provision in regulations for GEMA to use its enforcement powers under the Gas Act 1986 to enforce requirements that may be imposed on the ISOP as a hydrogen production allocation body under revenue support regulations, and regulations under clause 68, in alignment with GEMA's planned regulation of the ISOP. In the event the ISOP is appointed as a hydrogen production allocation body with UK-wide functions, this

provision makes it clear that regulations may provide for the enforcement powers to apply to requirements in respect of functions of the body that relate to Northern Ireland.

Justification for the power

12. Currently the National Grid Electricity System Operator (National Grid ESO) is responsible for administering the allocation process for the Contracts for Difference (CfD) regime. This process is expected to be similar to the allocation process for hydrogen production revenue support contracts. The current CfD allocation function is expected to be transferred over with National Grid ESO into the ISOP, making it a potential candidate for the hydrogen production allocation body role.

13. The ISOP will be regulated by GEMA through licence arrangements and statutory enforcement, providing a clear and transparent operating environment well understood across the sector. These new provisions (along with the new clause inserted after clause 74 – see below) seek to enable, should a decision be made to appoint ISOP to the role of hydrogen production allocation body, that it is regulated for its hydrogen production allocation body functions by GEMA as part of its planned regulatory framework.

14. It is the intention for the hydrogen production revenue support contracts to be delivered on a UK-wide basis, supporting decarbonisation across the UK. If the ISOP is appointed to a UK-wide hydrogen production allocation body role it may be necessary for GEMA to be able to enforce its UK-wide functions.

15. As mentioned above, a decision has not yet been taken on the appropriate entity(ies) to appoint as hydrogen production allocation body and even if the ISOP were to be appointed to that role, it may not always remain in that role as per clause 68(3). The scope of its functions as hydrogen production allocation body, and the requirements imposed on it, would also be set out in regulations under clause 68, revenue support regulations and allocation frameworks, and may change over time, for example to respond to new technologies and as the hydrogen market develops.

16. The Department therefore judges that it is appropriate for the Secretary of State to be able to make this provision in regulations. This type of provision has precedent – namely, section 22 of the Energy Act 2013 and section 22 of the Nuclear Energy (Financing) Act 2022, which enable regulations to make provision for GEMA to enforce the respective supplier obligations that fund the CfD regime and nuclear revenue collection contracts.

Justification for the procedure

17. The Department considers that regulations falling within these provisions should be made according to the affirmative resolution procedure. The Department considers that it is appropriate to require additional scrutiny for regulations made under these new provisions given that the enforcement arrangements provided for by such regulations may enable GEMA to take actions that have significant implications for the ISOP.

New Clause inserted after Clause 83: Electricity system operator and gas system planner licences: modifications

Power conferred on: Secretary of State

Power exercised by: Licence / code modification document

Parliamentary Procedure: Draft Negative Resolution

Context and Purpose

18. This clause enables the Secretary of State to modify the electricity system operator and gas system planner licences expected to be held by the ISOP, as well as documents maintained in accordance with such licences (such as industry codes) or agreements that give effect to such documents. Based on the precedent set by the CfD regime, if the ISOP is appointed as hydrogen production allocation body, it may be appropriate or necessary for the Secretary of State to modify the ISOP's licences and/or related documents or agreements for the purpose of facilitating or ensuring the effective performance by the ISOP of its hydrogen production allocation body functions and the effective performance of any related functions, for example by clarifying how those functions are to interact with the ISOP's other functions or modifying any aspects of its other functions that may prevent it from carrying out its hydrogen production allocation body functions.

Justification for the power

19. In the event the ISOP is appointed as hydrogen production allocation body, it is considered crucial that Secretary of State can make changes to the ISOP's licences and/or related documents or agreements to ensure ISOP can fulfil its hydrogen production allocation body functions, therefore helping facilitate and support the implementation of the hydrogen production allocation process. Modifications under this power may only make provision in relation to times when the holder of the relevant licence is also a hydrogen production allocation body, including, consequential or transitional provision in relation to times when the holder of the relevant licence is no longer a hydrogen production allocation body.

20. A delegated power is required for this provision, as it is not possible to determine the potential licence and code modifications that may be needed pending the detailed design of the hydrogen production allocation process and the development of the ISOP's initial licence conditions, and modifications may be needed in the future as both the allocation process and the ISOP's licence conditions evolve. In addition, the complexity and technical nature of potential modifications to licences and codes are likely to be such that it would not be appropriate to include such modifications on the face of the Bill.

Justification for the procedure

21. Before making a modification, the Secretary of State must consult the holder of any licence being modified, GEMA and such other persons as the Secretary of State considers it appropriate to consult. This will help ensure that relevant bodies and GEMA are engaged on potential changes to the electricity system operator and gas system planner licences and/or related documents or agreements.

22. A new provision is inserted in clause 84 so that the procedure provided for under that clause applies to modifications made under this new clause. Clause 84 provides that the Secretary of State may only make modifications under this new clause if those modifications are first laid in draft before Parliament for a 40-day period (as defined by subsections (6) and (7)) and neither House resolves not to approve the draft during that time. The Secretary of State must publish details of any modifications made as soon as reasonably practicable after they are made. This is analogous to the draft negative resolution procedure used for statutory instruments and aligns with parliamentary procedure for the exercise of powers under section 26 of the Energy Act 2013.

New Clause inserted after Clause 74: Licence conditions regarding functions of certain allocation bodies

Power conferred on: the Gas and Electricity Markets Authority

Power exercised by: Licence / code modification document

Parliamentary Procedure: None

This is not a new delegated power – it makes provision about proposed licence modifications made under an existing power under section 23 of the Gas Act 1986

Context and Purpose

23. It is intended for the hydrogen production allocation process to be open to applications from projects across the UK. If the ISOP is appointed to the role of hydrogen production allocation body, it may be required to administer a UK-wide allocation process accepting applications from projects in Great Britain and Northern Ireland. As set out in paragraph 13 above, the ISOP will be regulated by GEMA through licence arrangements and statutory enforcement.

24. This new clause makes clear that licences under section 7AA of the Gas Act 1986 (gas system planner licences) may include conditions for or in connection with the purpose of facilitating or ensuring the effective performance by the ISOP of hydrogen production allocation body functions, whether in relation to Northern Ireland or any other part of the UK. Accordingly, it makes a related provision about proposed licence modifications under section 23 of the Gas Act 1986 where they relate to functions of a hydrogen production allocation body that are exercisable in relation to Northern Ireland.

Justification for the power

25. As explained in paragraph 13 above the ISOP will be regulated by GEMA through licence arrangements and statutory enforcement.

26. One of the ways by which GEMA regulates licensed entities is through the implementation of an incentive framework set out in licence conditions and subsidiary documents. This is considered by GEMA to be an essential regulatory tool used to ensure good performance of a regulated body such as the ISOP. This new clause seeks to make clear that certain conditions in a gas system planner licence can apply UK-wide to enable effective UK-wide regulation of the ISOP in respect of any UK-wide hydrogen production allocation body functions it might have, if considered appropriate. This new clause also provides that where GEMA proposes by a modification under section 23 of the Gas Act 1986 to add, remove or alter such certain conditions under a gas system planner licence and those conditions relate to functions of a hydrogen production

allocation body that are exercisable in relation to Northern Ireland, GEMA is to notify the Department for the Economy in Northern Ireland before making the proposed modification in accordance with section 23 of the Gas Act 1986.

Justification for the procedure

27. The existing power has no parliamentary procedure. If we were to apply a parliamentary procedure to this amendment it would be inconsistent with the procedure that will continue to apply to other licence modifications under section 23 of the Gas Act 1986.

Amendments to Clause 99: Access to infrastructure

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary Procedure: Affirmative procedure

Context and Purpose

28. These amendments to clause 99 extend the power such that it enables the existing access to infrastructure regulations (the Storage of Carbon Dioxide (Access to Infrastructure) Regulations 2011 (S.I. 2011/2305) and the Storage of Carbon Dioxide (Access to Infrastructure) Regulations (Northern Ireland) (S.R. (N.I.) 2015 No. 388)) to be amended, revoked or replaced.

29. As set out in the Delegated Powers Memorandum of 7 July 2022 accompanying the Bill's introduction (see paragraphs 231 to 235), the existing Regulations were implemented using the powers in 2(2) European Communities Act 1972. These amendments to the scope of the power at clause 99 are necessary to ensure that there are sufficient domestic powers to be able to update or make new regulations should that be appropriate in future.

Justification for the power

30. The existing Regulations were implemented using the powers in 2(2) European Communities Act 1972 and there is currently no domestic power to be able to update, replace or make new regulations. These amendments to the scope of the power at clause 99 are necessary to ensure that there are sufficient domestic powers available to the Secretary of State to ensure access arrangements remain fit for purpose, particularly in light of the new economic licensing framework for carbon dioxide transport and storage established by the Bill.

31. The amendments make clear that the Secretary of State, in making regulations pursuant to this power, may confer functions (including discretions) on any person. This would enable, for example, updated or new regulations to provide for GEMA, as the economic regulator for carbon dioxide transport and storage, to have a role in decisions relating to access to infrastructure, commensurate with the new economic regulation functions being conferred on GEMA via Part 1 of the Bill.

32. The amendments also provide for the Secretary of State to be able to provide for enforcement of obligations in respect of access to infrastructure and create new criminal offences or civil penalties. This is important to ensure that there are sufficient and

appropriate domestic powers to update or replace the enforcement provisions in the existing Regulations, to ensure they remain consistent with sanctions and penalties which apply to carbon dioxide transport and storage activities elsewhere in legislation and any future updates to judicial policy more broadly. It is made clear in the drafting of the amendments that where the power to make regulations concerns civil penalties, those regulations must also provide for a right of appeal against the imposition of the penalty.

Justification for the procedure

33. As this power may be used to amend or replace processes established in existing Regulations and noting that the original Storage of Carbon Dioxide (Access to Infrastructure) Regulations amended primary legislation and created a criminal offence, the Department considers that the affirmative procedure is appropriate to ensure appropriate scrutiny of updated or new provisions.

Amendment to Part 3: New Technology

New Clause inserted after clause 113: Treatment of recycled carbon fuel and nuclear-derived fuel as renewable transport fuel

Powers conferred on: Secretary of State for Transport

Powers exercised by: Statutory Instrument

Parliamentary Procedure: Affirmative procedure

Context and Purpose

34. This clause amends section 131 of the Energy Act 2004 to enable the Secretary of State for Transport to include recycled carbon fuels ("RCFs") and nuclear derived fuels ("NDFs") within the scope of renewable transport fuel orders, such as the Renewable Transport Fuel Obligation (RTFO 2007).

35. The RTFO was put in place to encourage the supply of renewable fuels with the aim of reducing greenhouse gas ("GHG") emissions from fuel used for transport purposes.

36. The RTFO encourages the supply of renewable transport fuels in the UK by placing an obligation on relevant fuel suppliers, which is calculated based on the amount of fossil fuel (and unsustainable renewable fuel) supplied in the UK during a calendar year. The obligation is fulfilled by redeeming Renewable Transport Fuel Certificates ("RTFCs") issued for every litre (or equivalent) of sustainable renewable fuel supplied during the calendar year, or by paying a 'buy-out' price for each litre of fuel for which an RTFC is not redeemed. A fuel supplier issued with RTFCs may also sell those certificates to other fuel suppliers to enable them to meet their obligation under the RTFO.

37. Currently, the RTFO only permits RTFCs to be issued to suppliers of renewable transport fuels, which are defined in the Energy 2004 Act (section 132), and which are sourced from wholly or partially renewable sources.

38. The government have committed to introducing a new renewable transport fuel order, the Sustainable Aviation Fuel (SAF) Mandate, from 2025. The SAF Mandate will use the same primary powers as the RTFO, therefore would also only be able to support

renewable fuels. Any further renewable transport fuel schemes would also use the powers in the Energy Act 2004.

39. Evidence shows that RCFs, which are produced from fossil-based waste and therefore not currently classified as renewable, have the potential to reduce GHG emissions relative to petrol, diesel or kerosene. Examples of RCF “feedstocks” (the raw material used to create the fuel) include the fossil fraction of municipal solid waste (MSW) (e.g. non-recyclable plastic) and industrial waste gases.

40. RCFs can deliver comparable carbon savings to renewable fuels and could be highly valuable in helping to decarbonise difficult to electrify transport modes, including road freight vehicles and aviation. As a result, we are seeking to include RCFs within the scope of the 2004 Act, so that we can amend RTF orders to enable RCFs to be rewarded under these schemes.

41. There is also evidence that NDFs, a form of low carbon power-to-liquid fuel, have the potential to reduce GHG emissions relative to petrol, diesel, or kerosene. NDFs by definition are derived from nuclear energy source. Nuclear energy is not a renewable form of energy, so like RCFs, NDFs are not currently eligible for reward under the RTFO.

42. NDFs can deliver near zero carbon fuels where they are produced using dedicated or otherwise wasted nuclear energy. These have the potential to be valuable in a similar way to RCFs in hard to electrify modes of transport. Aviation, heavy freight transport and maritime vessels are the primary candidates. As with RCFs, we are seeking to include NDFs within the scope of the 2004 Act, so RTF orders can support NDFs.

<u>Justification for the powers</u>

43. The RTFO Order 2007 is the secondary legislation made under The Energy Act 2004 (The Act) to implement the Renewable Transport Fuel Obligation. Articles 192 (3) and 124(5) of The Act confirm that the power to make an RTFO order (which is the policy intent) is subject to the affirmative resolution.

44. To introduce support for RCFs and NDFs under all RTF orders, secondary legislation will be needed to set out exactly how and which types of RCF and NDF will be rewarded and the sustainability criteria which they will be required to meet. For example, to introduce RCFs in the RTFO, an amendment will be needed to the RTFO Order 2007.

45. As the framework of the RTFO scheme sits in existing secondary legislation, it is appropriate for these changes to be contained in future amending regulations.

46. The fuel industry and associated science are developing and fast moving. To take advantage of the benefits at pace the details on how obligations are calculated, which fuel types and feedstocks are eligible for support, what level of support they should get, and the carbon and sustainability criteria which must be met are more appropriately reflected in secondary legislation. NDFs and RCFs will be treated consistently with similar feedstocks, already supported by the RTFO - renewable energy for NDFs and biofuels for RCFs.

47. As with fuels currently supported under the RTFO, some highly technical aspects, such as the details of the greenhouse gas emissions calculation methodology, are set out in subsequent guidance, where appropriate to keep pace with and benefit from scientific and technological developments.

48. Parliament will have opportunity to scrutinise the use of delegated powers under the affirmative procedure.

49. The forthcoming SAF Mandate, and any future transport fuel schemes will also use the primary powers from The Act. Amending these powers will allow RCFs and NDFs to qualify for future such renewable transport fuel orders.

Justification for the procedure

50. 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.

51. 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.