

AMENDMENT TO CLAUSES AT PART 7 AND SCHEDULE 13

LEVELLING UP AND REGENERATION BILL

**DELEGATED POWERS MEMORANDUM BY THE DEPARTMENT FOR
LEVELLING UP, HOUSING AND COMMUNITIES AND THE DEPARTMENT
FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS**

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**D. ANALYSIS OF DELEGATED POWERS CREATED BY THE LEVELLING UP
AND REGENERATION BILL**

Nutrients

Part 7

Clause 158 for the Secretary of State to make provisions for setting nutrient pollution standards

Powers conferred on: Secretary of State

Powers exercised by: designation (new sections 96C(A1), 96FA(1) and 96D(4A) WIA 1991) and regulations (new sections 96D(7A), 96FA(9) and 96LWIA 1991).

Parliamentary Procedure: Affirmative procedure (new section 96L WIA 1991); negative procedure (new section 96FA(9) WIA 1991); no procedure (new sections 96C(A1), 96FA(1), 96D(4A) and (7a) WIA)

Context and Purpose

Nutrient affected catchment area

1. Clause 158 is amended to insert new subsection (A1) into section 96C of the Water Industry Act 1991 (“WIA 1991”). This requires the Secretary of State to designate the catchment area for a habitats site wholly or partly in England as a “nutrient affected catchment” where the Secretary of State considers that a habitats site that is in an unfavourable condition by virtue of pollution from nutrients in water of any kind.

2. The purpose of this power is its interaction with the Conservation of Habitats and Species Regulations 2017 (S.I. 2017/1012) (“the Habitats Regulations”). The Bill is also amended to replace Schedule 13 with a new Schedule, paragraph 11 of which amends the Habitats Regulations to insert regulation 85A-C. The effect of a designation under 96C(A1) will be to make a ‘habitats site’ a ‘relevant site’ for the purpose of regulations 85C(1) of the Habitats Regulations. This is necessary for the conditions required for regulation 85A to be met, see subsection (1)(c). The same is true for regulation 110A of the Habitats Regulations in relation to land use plans, which is inserted by paragraph 16 of the Schedule.

Specific nutrient pollution standards

3. Clause 158 is amended to insert new subsection (4A) into section 96D of the WIA 1991. This would introduce a power for the Secretary of State to specify a particular concentration that applies to a sewage disposal works when making a designation under new section 96D, instead of applying the standard concentrations set out at clause 96F(1) and (2) respectively. New subsection (7A) of section 96D will allow the same power to be exercised in relation to plants that cease to be exempt under 96D(5).
4. Where a catchment area is designated as being nitrogen or phosphorus sensitive by the Secretary of State under subsection (1) or (2) of section 96C (depending on whether they are considered sensitive to nitrogen or phosphorus), the plant must subsequently meet the prescribed discharge limits set out at clause 96F(1) and/or (2). The objective of this exception is to provide the Secretary of State with the ability to consider the specific and technical requirements of the catchment area itself and apply a concentration that is different to the standard in the legislation.

Setting and Enforcing Nutrient Pollution Standards

5. Clause 158 is amended to insert new section 96L into the WIA 1991. This provision permits the Secretary of State to make regulations about the setting and enforcing of nutrient pollution standards. The power can be used to set and enforce alternative nutrient pollution standards that will be at least as effective as the standards applied under the provisions in section 96B to 96K, and can be used to amend, repeal or revoke those sections, together with the Environmental Damage (Prevention and Remediation) England Regulations 2015.
6. This power is a Henry VIII power since it can amend, repeal or revoke sections 96B to 96K of the WIA 1991. The purposes of such amendments is that they may be necessary to ensure consistency between this provision and pre-existing regulations governing the enforcement and implementation of environmental regulatory standards.

Catchment permitting

7. Clause 158 is amended to insert new section 96FA into the WIA 1991. Subsections (1) allows the Secretary of State to designate a ‘sensitive catchment area’ (as defined in section 96J(2) WIA 1991) as a catchment permitting area. Under subsection (3)(b) the effect of a designation is to direct the Environment Agency to assess groups of sewage disposal works and determine appropriate permit conditions in order that they can jointly achieve nutrient reduction loads that would be equivalent to those achieved if standard concentrations applied. Before exercising this power, the Secretary of State can consider advice, or guidance provided by the Environment Agency or Natural England.
8. Subsection (9) provides that the Secretary of State may specify how such determinations are to be made in regulations.

Justification for delegation

Nutrient affected catchment area

9. The Secretary of State does not have discretion on whether to designate a site under section 96C(A1). The purpose of the designation power is for the Secretary of State to act in an administrative capacity where the specified condition is met.

Specific nutrient pollution standards

10. The power is necessary to allow the Secretary of State to specify an alternative nutrient pollution standard to apply at an individual plant where it is deemed more effective to achieve reductions in nutrient pollution levels by differentiating the reduction in nutrient load across individual plants in the catchment. It is not possible to specify alternative pollution standards for individual plants on the face of the Bill due to the site-specific nature of decisions taken.

Setting and Enforcing Nutrient Pollution Standards

11. This power is intended to allow for the use of alternative nutrient reduction measures across entire catchments, and to enable water companies to fund solutions that go beyond upgrades at wastewater treatment works. This power will enable regulations to be made which will allow nutrient reduction measures which are developed in the future to be deployed in place of the fixed requirements to achieve set concentration standards at individual treatment plants.
12. This power allows for solutions with greater environmental cost-effective solutions benefits can be deployed when they become available. Regulations giving effect to such solutions may modify primary legislation. In consequence, this is a Henry VIII power.
13. This is a power that is unlikely to be exercised very often. The affirmative procedure will ensure Parliamentary approval is sought for any regulations introduced under this provision. This is appropriate given any new standards set by these regulations would have potential consequences for the environment, the water industry and the cost of water

bills. Any amendment to enforcement provisions would also potentially impact on the water industry too.

14. The Departments have included a restriction on the use of the power to where it will deliver the same or improved environmental protections. There are also restrictions on the scope of any new regulation, in that it must be relevant to the existing provisions within the current approach set out in the Bill.

Catchment permitting

15. This power to designate a sensitive catchment area is necessary to allow Ministers to direct the Environment Agency to exercise functions so as to ensure that the relevant sewerage undertaker can aim to make an equivalent reduction in nutrient pollution. The power will only be exercised in respect of catchments that identified as suitable and where sewerage undertakers can ensure that a “catchment permitting approach” would achieve the same environmental outcomes as upgrading individual wastewater treatment works to a specific standard.
16. The regulation maker power is necessary to specify the process and procedure for such designation which provides for the technical implementation of the policy.

Justification for procedures selected

Nutrient affected catchment area

17. The Secretary of State does not have discretion on whether to designate a site under section 96C(A1) and is acting in an administrative capacity therefore no procedure is necessary.

Specific nutrient pollution standards

18. It is not considered that parliamentary scrutiny is needed for the powers under subsections (4A) or (7A) of section 96D of the WIA 1991 to be exercised appropriately. The powers in 96D(4A) or 96D(7A) are technical and operational in nature and is expected to be utilised in very limited circumstances where particular circumstances require it. It is only intended to modify the application of nutrient pollution standards to certain plants, based on an understanding of the specific features, technical capacity and regulatory requirements that apply to the plant in question.

Setting and Enforcing Nutrient Pollution Standards

19. The power in new section 96L of the WIA 1991 is subject to the affirmative resolution procedure in accordance with the presumption for Henry VIII powers. This is a power that is unlikely to be exercised very often. The affirmative procedure will ensure that Parliamentary approval is sought for any regulations introduced under this provision. This is appropriate, as any new standards set by these regulations would have potential consequences for the environment, water industry and the cost of water bills. A restriction has also been included on the use of the power to require that it is only exercised where it

will deliver the same or improved environmental protections and can only be used where it is relevant to the existing provisions within the current approach set out in the Bill.

Catchment permitting

20. The powers in subsections (1) and (3)(b) of section 96FA WIA 1991 are not subject to a parliamentary procedure, as these powers involve consideration of various technical, practical and operational factors applicable to the proposed catchment area in question. The Secretary of State will, in most circumstances, obtain advice from the Environment Agency, who are the specialist regulators in this area, and as such, the exercise of this power does not require parliamentary oversight.
21. The power provided in new subsection (9) to section 96FA WIA 1991 will be subject to the negative procedure. The negative procedure will give Parliament the appropriate level of scrutiny over regulations that will be technical in nature, and will be limited to specifying the details of a framework set out in primary legislation. This procedure is considered to strike the appropriate balance in ensuring that Parliament has the opportunity to review the framework, while ensuring that the regulations as a whole are not unnecessarily delayed.

Clause 159A: power to amend enactments relating to nutrients in water which could affect linked habitats sites

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

22. Clause 159A introduces a new power to make regulations. Subsection (1) allows the Secretary of State to make provisions about the operation of any relevant enactment in connection with the effect of nutrients in water of any kind that could affect a habitats site connected to a nutrient affected catchment area.
23. A “relevant enactment” is defined in subsection (3) as meaning (a) an enactment comprised in or made under an Act of Parliament, or (b) retained direct EU legislation, so far as it relates to the environment, planning or development in England. Subsection (4) excludes this section and Part 6 of the Habitats Regulations from the definition of relevant enactments.
24. The purpose of the power at 159A(1) is to make incidental, consequential and similar provision to give effect to the policy intent behind the amendments to the Habitats Regulations. Schedule 13 textually amends the Habitats Regulations, to provide that certain authorities/bodies, when exercising duties or making decisions relevant to the regulations, must assume that nutrients in waste water from proposed developments will not adversely affect habitats sites. It is foreseen that some of these changes will be to enactments.

Justification for delegation

25. The delegated powers at clause 159A control matters of procedural detail and do not change the fundamentals of the policy which are established in primary legislation.
26. The introduction of regulation 85A, 85C and 110A of the Habitats Regulations will have the effect of preventing nutrient-related pollution from affecting the outcome of an assessment under those regulations. The policy intent is to allow development which is currently not permissible under due to nutrient pollution (without onerous mitigation being secured) to be ‘unblocked’.
27. While this legislation is targeted to address a specific issue, the interconnected nature of the related planning and environmental law requires that the government make incidental, consequential and similar provision to give effect to the policy intent.
28. The government have worked to assess the potential ambit of consequential changes that might be required to ensure that the government is able to preserve the ongoing functioning of the planning system and environmental law along with steps that may be

taken to mitigate these. However, the government was not in a position to identify all the potential ancillary amendments ahead of tabling the substantive amendment so is seeking to secure a power to guard against unintended consequences and to ensure a functioning statute book.

29. In drafting the proposed power, the government has sought to ensure that the power is limited to enactments relating to environment, planning or development in England. The government have provided an indicative list of provisions that the Secretary of State may consider appropriate to be made by regulations under this power. The power will expire (sunset) on 31 March 2030, after which the power will cease to exist. This should provide sufficient time for the departments to identify and action any necessary legislative intervention pursuant to the delivery of the stated intention of the powers.

30. It is acknowledged this is a Henry VIII provision.

Justification for procedures selected

31. The power in clause 159A(1) is subject to the affirmative resolution procedure in accordance with the presumption for Henry VIII powers. This power will be sunsetted on 31 March 2030. This date aligns with the upgrade duty at sections 96B of the WIA 1991, where the upgrading of certain treatment works must be secured by 1 April 2030. It is considered appropriate for the power to expire when these obligations come into effect, as the requisite operational and technical analysis will have been conducted to ensure that upgrades take place.

Clause 160: Amendment to Schedule 14 paragraph 2 of the Environment Act 2021, inserting New Schedule 7A to the TCPA 1990, Paragraph 10(1D)(ii) A power to specify further consenting regimes in relation to prior degradation of habitat

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and Purpose

32. This amendment inserts new sub-paragraphs 1A to 1E to paragraph 10 of Schedule 7A. This provides additional provisions as to how the value of a registered offsite biodiversity gain is to be determined, to address concerns from stakeholders. The value of all habitat and habitat enhancements under the Schedule is determined using the biodiversity metric published by the Secretary of State under paragraph 4. The new sub-paragraphs in paragraph 10, provide that the value of a biodiversity enhancement on a registered offsite biodiversity gain site is the increase in the biodiversity value after the end of the maintenance period referred to in section 100(2)(b) of the Environment Act 2021 compared to its pre-enhancement biodiversity value (sub-paragraph 1A). The pre-enhancement value is the value of the habitat on the site at the date on which the application is made to register the land subject to the habitat enhancement in the biodiversity gain site register (sub-paragraphs 1B and 1C). However where the value of the habitat has been reduced by the carrying out of any activity between 25th August 2023 and this date of registration, then the value the habitat prior to the carrying out of this activity, is to be taken to be the pre-enhancement biodiversity value. There is however an exemption to this rule, where the activity in question was carried out in accordance with either planning permission, or any other permission of a kind specified by the Secretary of State by regulations (sub-paragraph 1D).
33. New sub-paragraph 10(1D) replicates existing paragraph 6 of the Schedule, which makes similar provision in relation to how the pre-development biodiversity value of development sites is calculated.
34. This power is to enable new consenting regimes to be specified for these purposes. This may involve completely new regimes, it may also include other existing regimes if the government is satisfied they properly take account of the objective of biodiversity net gain in the granting of consents. An example of a kind of permission that might be added, is a consent to carry out an activity on a Site of Special Scientific Interest.

Justification for delegation

35. There are a variety of types of permission for land use or activity on land which may be relevant in this context, new permission/consent regimes will be added and existing ones revised or cease to exist over time. A secondary legislation power to prescribe those which are acceptable is needed to ensure that there is flexibility to keep up to date and prescribe suitable consents or remove those that are no longer suitable.

Justification for the procedure

36. This is a power that is unlikely to be exercised very often. Where it is to be used, it will be used to designate a consenting regime, most likely as a result of other legislative or non-legislative changes to that regime. Given this, the Department considers that the negative procedure provides Parliament with the appropriate level of scrutiny.