

ENVIRONMENT BILL

Supplementary Delegated Powers Memorandum from the Department for the Environment, Food and Rural Affairs

Introduction

This Memorandum has been prepared by the Department for Environment, Food and Rural Affairs (“the Department”) to assist with scrutiny of the Environment Bill (“the Bill”). This Memorandum describes provisions in the Bill conferring power to make subordinate legislation and other delegated powers which were introduced or amended in the Commons. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

New Clause - A delegated power to allow the Secretary of State to issue statutory guidance to the OEP in relation to its enforcement functions.

Power conferred on: Secretary of State

Power exercised by: Issuing statutory guidance

Parliamentary Procedure: Lay before Parliament

Context and purpose

1. This power enables the Secretary of State to issue statutory guidance to the OEP on its enforcement policy (the matters set out in clause 22(6)). The OEP will be required to have regard to this guidance in preparing its enforcement policy, and in exercising its enforcement functions.
2. The purpose of the power is to allow the Secretary of State to produce guidance on issues relating to the OEP’s enforcement functions if and when they develop. As the Minister ultimately responsible to Parliament for the OEP, it would be right for the Secretary of State to act if it became apparent that the OEP were failing to act strategically and therefore not taking sufficient action in relation to major systemic enforcement issues. If, for instance, over time the OEP were to change its approach to the determination of seriousness, adopting a policy that leads it to prioritise cases which are not serious, this power provides a mechanism for the Secretary of State to highlight this and suggest a change of approach, without giving the Secretary of State any power to direct the OEP.

Justification for taking the power

3. As set out above, the purpose of the guidance is to allow the Secretary of State to be responsive to issues that may arise in practice in relation to the OEP’s enforcement policy. These issues are not necessarily foreseeable in advance so cannot be provided for on the face of the Bill.
4. The power has been designed in a way so as to protect the OEP’s independence. Firstly, the OEP is required to ‘have regard’ to the guidance but is not bound to act in accordance with it where it has clear reasons not to do so. Secondly, the Secretary of State must exercise the power in line with their duty to have regard to the need to protect the OEP’s independence (paragraph 17 of Schedule 1). The guidance must also be laid before Parliament.

5. Ministers can also issue guidance to other independent arms' length bodies on their functions. For example, Ministers can give guidance to the Committee on Climate Change: see section 41 of the Climate Change Act 2008. Also, Ministers can give guidance to the independent regulator of higher education, the Office for Students, on the performance of its functions: see section 2(3) of the Higher Education and Research Act 2017.

Justification for taking the procedure

6. Whilst non binding guidance, including the section 41 CCA 2008 guidance to the Committee on Climate Change and the section 2(3) HERA 2017 guidance to the OfS, is often not subject to any parliamentary procedure, the Department considers that Parliament may take an interest in this guidance to the OEP. The Department's view therefore is that it is appropriate to lay this statutory guidance before Parliament and publish it, to enable both transparency and scrutiny.

New Clause on Species conservation strategies - A power for the Secretary of State to provide guidance in relation to the duties under subsection (6) of that clause

Power conferred on: Secretary of State

Power exercised by: Issuing guidance

Parliamentary Procedure: None

Context and purpose

7. Subsection (6) of the new clause places a duty on local planning authorities and any prescribed authority (see below) to cooperate with Natural England in the preparation and implementation of a species conservation strategy so far as relevant to the authority's functions.
8. Species conservation strategies will be prepared by Natural England, setting out policies in relation to the conservation of a particular species in a particular area. The intention is initially that they will be used in areas where there is an existing conflict between the conservation of the species in question and development pressure. In order to prepare the strategy, Natural England will require information about likely development areas from the local planning authority. Implementation of the strategy will also require cooperation from the local planning authority concerning development in the area that impacts upon the species (subsection (6)). The precise information authorities will need to provide to Natural England will be set out in guidance issued under subsection (7) by the Secretary of State. Such strategies have already been developed by Natural England in relation to great crested newts, and the aim is to give these strategies and any others developed in relation to other species, a statutory basis.
9. The purpose of the guidance is to provide certainty as to what is necessary from local planning authorities and other prescribed authorities to comply with the subsection (6) duty. Experience with the existing great crested newt strategies is that the information required by Natural England is relatively modest and in the possession of local planning authorities, but fundamental to the preparation of these strategies and their implementation by Natural England.

Justification for taking the powers

10. The guidance will provide reassurance that the duty under subsection (6) will not be unreasonable or onerous, and should only involve the sharing of information with Natural England that the authority already has in its possession. The precise information that is required may vary from species to species and cannot necessarily be foreseen in advance, so a degree of flexibility is required. The Department therefore does not consider it appropriate to specify this in the legislation itself.

Justification for taking the procedure

11. The Department's view is that statutory guidance containing practical and operational details for local planning and other prescribed authorities does not require parliamentary oversight.

New Clause on Species conservation strategies subsection (9) - A power for the Secretary of State to specify a public body for the purposes of this clause

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

12. As explained in relation to the guidance power (subsection (6)), this clause places a duty on local planning authorities and any prescribed authority to cooperate with Natural England in the preparation and implementation of a species conservation strategy so far as relevant to the authority's functions. In addition subsection (8) provides that a local planning authority and any prescribed authority must in the exercise of its functions have regard to a species conservation strategy so far as relevant to its functions. A prescribed authority is defined in subsection (9) of the clause as one prescribed by the Secretary of State in regulations.

13. It is expected that these strategies will initially be prepared where the conservation of a species is impacted primarily impacted by housing development, as is the case with the strategies already prepared by Natural England for the conservation of great crested newts. However strategies can be prepared for a wide variety of species. In the case of other species the information that Natural England requires to prepare the strategy may be held by other public authorities, or the strategies once prepared may be of relevance to authorities other than local planning authorities. In such case the Secretary of State will be able to prescribe those authorities.

Justification for taking the power

14. The power is required to ensure that where a public authority, other than a local planning authority, is important for the preparation and implementation of a strategy for the conservation of a particular species, the Secretary of State can prescribe it for the purpose of this clause. The authorities that may be relevant in relation to any particular species in a particular area are currently unknown. As experience is gained on the development of strategic approaches to species conservation through these strategies, the power may be used on a wider range of species than it is initially aimed at, and different authorities may be relevant to those strategies. Initially the power will be focused on local planning authorities, but the power must be capable of being used more widely in future if this is considered appropriate.

Justification for taking the procedure

15. The Department considers that the negative procedure would give Parliament the appropriate level of scrutiny, as the power is relatively limited in its scope: it will bring particular authorities into scope of the duty to cooperate with Natural England and to have regard to any strategy. This matter warrants a degree of Parliamentary oversight but does not in the Department's view, require the affirmative resolution procedure. The Department has formed this view on the basis of its experience of the non statutory great crested newt strategy.

New clause Protected site strategies subsection (8) - A power for the Secretary of State to provide guidance to public bodies, concerning how to discharge the duty in subsection (7)

Power conferred on: Secretary of State

Power exercised by: Issuing guidance

Parliamentary Procedure: None

Context and purpose

16. This new clause provides for Natural England preparing a strategy for the conservation and management of a protected site, including the management of impacts on that site from offsite sources. Protected sites can be impacted by a large number of offsite activities, including development, authorised by a variety of other authorities. All authorities taking decisions about projects capable of impacting protected sites may request advice from Natural England. In certain areas where the need to manage impacts on protected site has a significant impact on development in an area, Natural England has with the relevant authorities sought to agree strategic solutions for avoiding, mitigating and where necessary compensating for impacts on protected sites. It is considered there are wider opportunities for such strategic approaches to be taken, and giving these strategies a statutory basis will encourage such strategic solutions to be found.
17. In preparing such strategies Natural England to consult widely including with all public authorities whose functions may impact upon the site in question (subsection (5)). To prepare a strategy however Natural England is likely to need the engagement of these authorities in the preparation of the strategy. In part this will involve the authorities sharing with Natural England information in their possession about existing and potential future impacts on the site. It may however also involve engaging with both Natural England and other authorities in the area, to help find strategic solutions. This may for example include helping to develop mechanisms to enable important new development to go ahead by requiring a corresponding reduction in the existing impact from an activity which is the responsibility of another authority.
18. Therefore we have placed a duty on those public bodies consulted by Natural England, to cooperate in the preparation of the strategy (subsection (7)). What this means in practice may vary from authority to authority and between different strategies, depending on the activities currently or potentially having the greatest impact upon that site. The Secretary of State has a power (subsection (8)) to give guidance as what may be necessary to comply with this duty of cooperation in different circumstances.

Justification for taking the powers

19. The guidance will provide reassurance that the duty under subsection (7) will not be unreasonable or onerous, and should only involve the sharing of information with Natural England that the authority already has in its possession. The precise information that is required may vary between authorities and between strategies so a degree of flexibility will be required. The Department therefore does not think it appropriate to specify this in the legislation itself.

Justification for taking the procedure

20. The Department's view is that statutory guidance containing practical and operational details for particular authorities does not require parliamentary oversight.