

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

28th Report of Session 2012-13

**Rights of Passengers in Bus and Coach
Transport (Exemptions) Regulations
2013**

**Jobseeker's Allowance (Scheme for
Assisting Persons to Obtain
Employment) Regulations 2013**

Also includes Information Paragraphs on 5 Instruments

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Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)

The Committee has the following terms of reference:

- (1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—
 - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
 - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,
 with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).
- (2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
 - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
 - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
 - (c) that it may inappropriately implement European Union legislation;
 - (d) that it may imperfectly achieve its policy objectives.
- (3) The exceptions are—
 - (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
 - (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
 - (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.
- (5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

| | |
|--|------------------------------------|
| Lord Bichard | Lord Methuen |
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| Lord Hart of Chilton | |

Registered interests

Information about interests of Committee Members can be found in Appendix 4.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

Information and Contacts

If you have a query about the Committee or its work, including concerns or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email seclegscrutiny@parliament.uk.

Statutory instruments

The National Archives publishes statutory instruments on the internet at <http://www.legislation.gov.uk/>, together with a plain English explanatory memorandum.

Twenty-Eighth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

A. **Rights of Passengers in Bus and Coach Transport (Exemptions) Regulations 2013 (SI 2013/228)**

Date laid: 7 February 2013

Parliamentary Procedure: negative

The instrument applies derogations to an EU Regulation that lays out the responsibilities of industry participants, including operators and terminal owners, in the case of delays, cancellations, accidents and other issues affecting passengers on long distance coach journeys, including disabled passengers. These derogations may assist the industry but may also delay benefits for passengers. However the Committee is unable to consider properly the potential effects of these derogations because the Department for Transport failed to provide either the final Impact Assessment or the analysis of consultation when they laid the instrument. We also find the Explanatory Memorandum to be inadequate and have written to the Minister for an explanation.

These Regulations are drawn to the special attention of the House on the ground that they may inappropriately implement EU legislation.

1. This instrument has been laid by the Department for Transport (DfT) under section 2(2) of the European Communities Act 1972 with an Explanatory Memorandum(EM) and an interim Impact Assessment (IA).
2. The European Commission aims to ensure equal treatment by establishing passenger rights in all modes of transport. Similar legislation already exists for air, rail and maritime transport. Regulation 181/2011/EU of 16 February 2011 concerns the rights of passengers in bus and coach transport and comes into effect from 1 March 2013. The EU Regulation lays out the responsibilities of industry participants, including operators and terminal owners, in the case of delays, cancellations, accidents and other issues affecting passengers, including disabled passengers and passengers with reduced mobility. All provisions of the EU Regulation apply to regular domestic and international passenger services of 250km (155 miles) or longer.
3. Although the EU Regulation is directly applicable, Member States have the ability to make use of a number of time-limited exemptions, which the Government does through this instrument. These exemptions are:
 - Article 2(4) – a limited exemption for domestic regular services for four years from 1 March 2013. This exemption may be renewed once.
 - Article 2(5) – an exemption for a maximum period of four years from 1 March 2013 for particular regular services where at least one scheduled stop is operated outside of the EU. This exemption may be renewed once.
 - Article 16(2) - A Member State may for a maximum of five years from 1 March 2013 grant an exemption to drivers from the requirement for

disability awareness training for personnel of carriers and terminal managing bodies.

4. The policy approach is consistent with previous instruments covering trains, ships and planes, where the Government has decided to take full advantage of the derogations to maintain operators' market position in relation to their overseas competitors. (This Committee had particular concerns about the impact of them on rail passengers.¹) These derogations may also have an impact on passengers by delaying the benefits of the compensation scheme, but the Department for Transport states in the EM and interim Impact Assessment (IA) that most large coach operators already have similar schemes in place on a voluntary basis.
5. The Committee however has procedural concerns about this instrument because it was unable to assess the effect of the policy itself due to missing documentation which was not available when the instrument was laid on 7 February. **The Committee's guidance on this has always been explicit – all documents that are relevant to the scrutiny of an instrument should be available when the instrument is laid.**

Consultation responses

6. At paragraph 8.4 of the EM it says that the Government's formal response to the consultation will be published "shortly" on the DfT's website; that happened on 20 February, two weeks after the instrument was laid. The problem is not resolved however because the analysis of the consultation material given is largely numeric, and in the EM it only states that there were "varying levels of opposition" to the use of the derogations. In his written statement to the House on 7 February on this instrument, Earl Attlee announced that "*in response to concerns from the public about disability awareness training for bus and coach drivers, I will review the use of this exemption after one year to see whether drivers are receiving adequate training under the voluntary measure.*"² This suggests a high level of public concern. Significant opposition to a proposal is not necessarily a bar to its progress, but it does tend to attract closer scrutiny from this Committee – and that has not been possible from the material DfT has so far provided.
7. On page 10 of the interim IA it states that there could be a "*medium negative impact*" on the disabled and people with reduced mobility from applying the available exemptions, but the Department had not discussed the issue with interested parties at that stage. At paragraph 8.2 of the EM it states that the disadvantage to passengers will be mitigated by the requirements of existing domestic equality law. However all the Committee has to rely upon is the Department's unsupported assertion that that is the case.

Costs/Benefits

8. The Impact Assessment that is provided with the instrument is from the pre-consultation stage of the process and paragraph 10.3 of the EM states that the Final IA is currently with the Regulatory Policy Committee and will be published "*in due course*". **This Committee has commented before that**

¹ See 2nd, 4th and 6th reports of the Merits Committee, [session 2009-10](#)

² HL Official Report, 7 February 2013, col WS 23 (emphasis added)

Departments need to plan the implementation of their legislation appropriately so that Parliamentary scrutiny is not inhibited.

9. As well as uncertainty about the potential effects on the disabled, outlined above, the Committee does not know how accurate the financial figures given are, as estimates often need to be revised as a result of comments made during the consultation exercise.
10. The Committee noted with particular concern paragraph 10.1 of the original EM where it stated that the benefit of these derogations to employers is £8.2m, neglecting to explain that the offsetting costs of £9.3m to others would result in a net deficit of £1.1m (if the figures in the interim IA are correct). At best this is careless; at worst it might be interpreted as misrepresentation of the data to Parliament. A revised EM was laid on 25 February but this only adds that there is a “net £1.1m disbenefit” that is “almost entirely a cost to Government of appointing enforcement bodies to enforce the entire Regulation”. In the absence of a Final Impact Assessment we would have expected the Department to make rather more effort to set out clearly for the House what the costs and benefits for all affected parties are.
11. The Committee feels that the Department’s approach is unacceptable because it does not facilitate Parliamentary scrutiny. We have consequently written to the Minister to request an explanation from him directly. In the meantime we are unable to properly scrutinise the instrument and therefore must draw it to the special attention of the House on the grounds that it may inappropriately implement EU legislation.

B. Jobseeker’s Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 (SI 2013/276)

Date laid: 12 February 2013

Parliamentary Procedure: negative

Summary: These emergency Regulations were laid by the Department for Work and Pensions at 6.15pm on 12 February and came into effect at 6.45pm that day. The urgency was occasioned by the quashing of the previous regulations by the Court of Appeal in the case of Reilly and Wilson v DWP. DWP state that rapid action was necessary to clarify the position for Jobcentre staff who operate the schemes (which are listed in the EM), scheme providers and the claimants. It was also necessary to maintain the sanctions framework that underpins the conditions claimants must meet if they wish to receive Jobseeker’s Allowance. DWP are still seeking permission to appeal to the Supreme Court and are considering a range of options to ensure they do not have to repay sanctions imposed under the previous Regulations.

These Regulations are drawn to the special attention of the House on the ground of public policy interest.

12. These emergency Regulations were laid by the Department for Work and Pensions at 6.15pm on 12 February and came into effect at 6.45pm that day. The urgency was occasioned by the quashing of the previous regulations by the Court of Appeal. The instrument is accompanied by an Explanatory Memorandum.
13. These Regulations replace the Jobseeker’s Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (SI 2011/917) (‘the ESE

Regulations’), which have been quashed by the Court of Appeal in the case of *Reilly and Wilson v DWP* which considered whether the application of sanctions in relation to the Department’s employment schemes was lawful. The Court of Appeal found in favour of the Department for Work and Pensions on two grounds:

- It rejected the claimants’ argument that the ESE regulations were contrary to European Convention on Human Rights Article 4 (forced labour);
- It rejected the claimants’ argument that the ESE regulations could not be enforced in the absence of a published policy in relation to them.

However, the Court of Appeal found against DWP on two grounds:

- The ESE Regulations were quashed on the grounds that they failed to describe the schemes to which the regulations apply in sufficient detail, as required by the primary legislation;
- The Court upheld the High Court’s ruling that letters sent to claimants when they were mandated to an ESE Scheme did not comply with the regulations.

14. DWP state that the Court did not cast doubt on the intention behind any of the schemes, and noted that the use of mandation was appropriate in such schemes. Rapid action was necessary to clarify the position for Jobcentre staff who operate the schemes (which are listed in the EM), scheme providers and the claimants. DWP state it was also necessary to maintain the sanctions framework that underpins the conditions claimants must meet if they wish to receive Jobseeker’s Allowance.
15. In a Written Statement on 12 February³, the Minister said that DWP were seeking permission to appeal to the Supreme Court and would consider a range of options to ensure they do not have to repay sanctions imposed under the previous Regulations.
16. [It should be noted that these Regulations and the decision of the Court of Appeal will not affect Universal Credit claimants. The primary legislation for Universal Credit - specifically section 16 of the Welfare Reform Act 2012 - permits the Secretary of State to require certain claimants to undertake particular “work preparation” including “participating in an employment programme”. This will allow – without regulations - mandatory referral of claimants to the schemes listed.]

³ HL Official Report, 12 February 2013, col WS42

OTHER INSTRUMENTS OF INTEREST

Draft Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2013

17. This instrument amends the **Civil Legal Aid (Merits Criteria) Regulations 2013** (SI 2013/104) which were laid in draft on 29 October 2012 and which we criticised in our 14th Report⁴ because the tests in regulation 39(d) and regulation 53(b) appeared to be inconsistent. This aspect of the instrument was severely criticised in debate in the House on 3 December 2012⁵ by a number of Members and the Minister gave an undertaking to amend the wording. The new instrument fulfils that undertaking.
18. In the original version regulation 53(b) required “all alternative administrative appeals and other alternative procedures which are available to challenge the act, omission or other matter” to be exhausted before legal representation can be granted for such public law claims. Despite the Minister’s reassurances that the Director of Legal Aid Casework would need to consider whether such an alternative route was, in fact, realistically available, the House was not convinced. At the end of the debate on 3 December (col 484), Lord McNally undertook to bring forward amending regulations to introduce discretion in regulation 53(b) so that the Director of Legal Aid Casework will have the express power to grant legal aid for public law claims, even if the alternative routes have not been exhausted, if he nonetheless considers that such an appeal or procedure would not be effective in providing the remedy that the individual requires. The Ministry of Justice (MOJ) assures the Committee that in practice this will include circumstances where the alternatives might take too long. MOJ also state that the proposed wording of the amended Regulation was shared with Members who spoke in the debate and those who responded are content.

Draft Renewables Obligation (Amendment) Order 2013

19. The Department for Energy and Climate Change (DECC) has laid this draft Order, with an Explanatory Memorandum (EM) and Impact Assessment (IA).
20. In the IA, DECC states that the Renewables Obligation (RO) is currently the Government’s main financial policy mechanism for incentivising the deployment of large-scale renewable electricity generation in the UK (small-scale renewable electricity generation is incentivised through a separate Feed-in-Tariff scheme). Since the introduction of the RO, the UK’s renewable generation has more than trebled, from 1.8% in 2002 to 9.4% in 2011. As part of the Government’s Electricity Market Reform, the RO will close to new renewables stations from 1 April 2017, whilst maintaining support for existing stations in the scheme to their respective end-dates (of which the latest would be expected in 2037). Support for large-scale renewable electricity will be available from around 2014 onwards through the new Feed-in-Tariff with Contract-for-Difference scheme.

⁴ Paragraphs 42-44 [14th report](#) of Session 2012-13, HL Paper 63

⁵ HL Official Report, [3 December 2012](#), cols 464-488

21. Banding of support under the RO mechanism, allowing different technologies to receive different levels of support, was introduced in April 2009, in order to drive more rapid deployment of renewable electricity generation. As part of a review of the levels of banded support for renewable electricity generation for the period 2013-17, the Government carried out a consultation process over a twelve-week period to January 2012.⁶ This draft Order implements the outcome of the review.
22. In the EM, DECC states that new electricity generation by renewables will contribute to the UK's energy security by reducing reliance on imported energy; and also by extending the lives of some existing coal generating plants, which had been expected to close due to new climate change requirements, by providing support to enable them to convert to cleaner biomass generation. We sought further information on how the banded support provided under this Order would allow existing coal generating plants to operate for longer, and we are publishing in Appendix 1 the explanation provided by the Department.

Nuclear Decommissioning and Waste Handling (Finance and Fees) Regulations 2013 (SI 2013/126)

23. The Department for Energy and Climate Change (DECC) has laid these Regulations with an Explanatory Memorandum (EM) and Impact Assessment. In the EM, DECC states that the purpose of the Regulations is to contribute to the Funded Decommissioning Programme (“FDP”) regime contained in the Energy Act 2008 (“the 2008 Act”). DECC explains that the 2008 Act aims to facilitate new nuclear power in the UK, whilst ensuring that the waste and decommissioning liabilities of operators do not fall onto the taxpayer; and that this is to be achieved by requiring companies seeking to construct nuclear power stations to submit an FDP setting out the costs of future waste and decommissioning liabilities, and how such costs are to be financed.
24. In April 2011, the Government brought the Nuclear Decommissioning and Waste Handling (Finance and Fees) Regulations 2011 (“the 2011 Regulations”) into force, serving the same purpose. The latest instrument revokes the 2011 Regulations. In the EM, DECC states that, as a result of consultation on FDP guidance which was published in December 2011, the Government concluded that the 2011 Regulations needed to be re-considered.
25. DECC carried out a consultation process over six weeks from April to June 2012, seeking views on whether its proposals struck the right balance between imposing regulatory burdens and protecting the taxpayer. Section 7 of the EM sets out the details of the changes which the latest instrument makes to the FDP regime, as compared with the 2011 Regulations. The more significant changes relate to the cycle for operators to report to the Secretary of State, to enable monitoring of the operator's waste and decommissioning liabilities and the financial provision; independent, third-party verification of key reports submitted by the site operator by both technical and financial verifiers (rather than only a financial verifier); and classes of modifications to an FDP that would not require Secretary of State

⁶ The Government response to that consultation, published in July 2012, can be found at:

<https://www.gov.uk/government/consultations/supporting-large-scale-renewable-electricity-generation>

consent. As regards the changes to the reporting requirements, the Department states that they are intended to provide greater financial oversight for the Secretary of State.

26. We asked DECC for further information about the decision to amend the requirements so soon after the 2011 Regulations came into force, and about the intent and effect of the changes made by the latest Regulations. We publish the Department's response in Appendix 2.

Social Fund Cold Weather Payments (General) Amendment Regulations 2013 (SI 2013/248)

27. The Cold Weather Payment scheme for those of working age is to help those who are most vulnerable to cold weather (i.e. the very young and disabled people). When the average temperature is 0°C or below for 7 consecutive days in the post code where the claimant resides they receive £25 towards the additional costs of heating. These Regulations will enable Universal Credit to act as a gateway to these payments from next winter. DWP's analysis shows although the eligible population will increase overall by about 360,000 when Universal Credit is fully rolled out, the mix of recipients will differ slightly. People who previously qualified for Child Tax Credits and Housing/Council Tax Benefit on low income grounds (but not earnings) and some people on contributory benefits will become eligible, but approximately 46,000 claimants will lose entitlement due to being in employment (any earnings will disqualify the claimant unless they have a disabled child in the family).

Care Standards Act 2000 (Extension of the Application of Part 2 to Holiday Schemes for Disabled Children) (England) Regulations 2013 (SI 2013/253)

28. The Department for Education (DfE) has laid these Regulations. In the accompanying Explanatory Memorandum (EM), DfE explains that it has received strong representations in respect of the bureaucratic and financial burdens that are imposed on holiday schemes for disabled children, which are run primarily by voluntary organisations, by the regulatory framework of the Care Standards Act 2000 ("the 2000 Act") and the Children's Homes Regulations 2001 (SI 2001/3967: "the 2001 Regulations"). Currently, such schemes which provide accommodation for less than 28 days a year are required to register as children's homes; as a result, they need to meet the requirements of the 2001 Regulations and the National Minimum Standards relating to children's homes. In addition, they have to pay an annual fee for the cost of inspection and regulation.
29. In the light of these representations, and following a consultation process, the Government propose to remove holiday schemes for disabled children from the relevant definition of a children's home, and to make separate Regulations for such schemes. DfE states that the separate Regulations, while mirroring the 2001 Regulations, will include a number of modifications which will better reflect the schemes' needs.
30. SI 2013/253 prepares the ground by providing for the regulation-making powers in the 2000 Act to apply to the providers of the schemes. Once these Regulations are in force, so that the powers are applicable to the providers, DfE will lay a second set of Regulations setting out the substantive

requirements for the registration and conduct of the schemes, including enabling schemes to operate across a number of sites under one registration.

31. We asked the Department to clarify the interaction between this instrument, and the second set of Regulations still to be laid. We enclose the answer provided by DfE in Appendix 3.
32. We also sought further information about the consultation process. We asked about the Department's decision to run that process from 5 September to 5 October 2012, a period of little more than four weeks, and have received an explanation in the answer shown in the Appendix. We note that, in the EM, DfE states that its response to the consultation process will be available on its website when the second set of Regulations is made. We regard this as unsatisfactory. We have consistently advised Departments that a full analysis of the relevant consultation process should be available on the Departmental website at the time that an instrument is laid before Parliament; in this case, the analysis should have been available simultaneously with the laying of this instrument.
33. DfE has now provided the Committee with a copy of the analysis. While this is broadly consistent with the summary given in the EM, the full analysis contains a more nuanced picture. For example, in response to a consultation question about whether the proposed revisions to the Regulations would ensure sufficient safeguarding of children using the holiday schemes, 50% of respondents agreed, but 33% disagreed, and 17% were not sure.
34. We look to DfE, and to all Departments, to ensure that information presented to Parliament in support of all statutory instruments gives an accurate account of the policy background and state of stakeholders' views.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments subject to affirmative approval

Amendments to Schedule 6 of the Tribunals, Courts and Enforcement Act 2007 Order 2013

Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2013

Guardian's Allowance Up-rating Order 2013

Guardian's Allowance Up-rating (Northern Ireland) Order 2013

Local Authorities (Contracting Out of Tax Billing, Collection and Enforcement Functions) (Amendment) (Wales) Order 2013

Loss of Tax Credits Regulations 2013

Mesothelioma Lump Sum Payments (Conditions and Amounts) (Amendment) Regulations 2013

Pneumoconiosis etc. (Workers' Compensation) (Payment of Claims) (Amendment) Regulations 2013

Renewables Obligation (Amendment) Order 2013

Tax Credits Up-rating etc. Regulations 2013

Transfer of Tribunal Functions Order 2013

Instruments subject to annulment

| | |
|-------------|---|
| HC 967 | Statement of Changes in Immigration Rules |
| SI 2013/126 | Nuclear Decommissioning and Waste Handling (Finance and Fees) Regulations 2013 |
| SI 2013/176 | Misuse of Drugs (Amendment) (England, Wales and Scotland) Regulations 2013 |
| SI 2013/177 | Misuse of Drugs (Designation) (Amendment) (England, Wales and Scotland) Order 2013 |
| SI 2013/181 | Building Regulations &c. (Amendment) Regulations 2013 |
| SI 2013/190 | Nuclear Industries Security (Amendment) Regulations 2013 |
| SI 2013/207 | Olympic Lottery Distributor (Dissolution) Order 2013 |
| SI 2013/215 | Council Tax Reduction Schemes (Transitional Provision) (England) Regulations 2013 |
| SI 2013/218 | Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013 |

- SI 2013/226 Immigration (Procedure for Marriage) (Amendment) Regulations 2013
- SI 2013/227 Immigration (Procedure for Formation of Civil Partnerships) (Amendment) Regulations 2013
- SI 2013/247 Social Fund (Maternity and Funeral Expenses) Amendment Regulations 2013
- SI 2013/248 Social Fund Cold Weather Payments (General) Amendment Regulations 2013
- SI 2013/253 Care Standards Act 2000 (Extension of the Application of Part 2 to Holiday Schemes for Disabled Children) (England) Regulations 2013
- SI 2013/262 Civil Procedure (Amendment) Rules 2013
- SI 2013/263 Child Trust Funds (Amendment) Regulations 2013

APPENDIX 1: DRAFT RENEWABLES OBLIGATION (AMENDMENT) ORDER 2013

Further information from DECC

Q: How does the Renewables Obligation (Amendment) Order 2013 extend the lives of some existing coal generating plants?

A: The Government response to the consultation on proposals for the levels of banded support under the Renewables Obligation for the period 2013-17 and the Renewables Obligation Order 2012 set out a number of decisions regarding the full or partial conversion of coal-fired power stations to generate biomass renewable electricity supported by the Renewables Obligation. This included the creation of new bands (see table below) and adoption of a unit-by-unit approach for the co-firing and conversion bands.

| Band | Description | Support Level (ROC/MWh) |
|---------------------------------|--|---|
| Low-range co-firing of biomass | Less than 50% biomass co-fired in a unit | 0.5 (reduction to 0.3 in 2013/14 and 2014/15, increasing to 0.5 from 2015/16) |
| Mid-range co-firing of biomass | 50% - less than 85% biomass co-fired in a unit | 0.6 |
| High range co-firing of biomass | 85% - less than 100% biomass co-fired in a unit | 0.7 (increasing to 0.9 from 2014/15) |
| Biomass conversion | Electricity generated by a unit using 100% biomass | 1.0 |

The conversion of existing coal generating plant to biomass or higher levels of biomass co-firing is a way of keeping open some existing coal plant that would otherwise close before 2016 under environmental legislation, and therefore improve capacity margins over this decade. According to Ofgem's Electricity Capacity Assessment 2012, generating margins are expected to tighten significantly from around 15% this winter to 4% in 2016 due to the closure of old nuclear plant and coal generators affected by environmental measures. We estimate that the banding levels proposed for these technologies could enable capacity equivalent to approximately 3-4% of the capacity margin to remain in operation, which is potentially significant.

Of the current UK coal capacity, some 8 GW has "opted-out" of the Large Combustion Plant Directive (LCPD), an air quality Directive which places limits on emissions of sulphur dioxide and nitrogen oxides. This opted-out capacity is required to close by the end of 2015 at the latest, with around 5 GW expected to close by end of March 2013. The remaining capacity (~20 GW) will need to comply with the Industrial Emissions Directive (IED), which replaces the LCPD and sets more stringent emissions limits from 1 January 2016.

Similar to the LCPD, plant operators have options available to them which, if equipment is not fitted to meet the emissions standards set by the IED, essentially limit the remaining lifetime and or future operation of a plant.

The availability of support under the Renewables Obligation for coal plant to convert all or part of their combustion to biomass may therefore provide

generators an alternative means to decarbonise and to reduce emissions in order to meet the requirements of IED. This will very much depend on the type and age of the plant, and as such will be an operational decision for individual generators to make. This option is available to both opted in and opted out plant under both LCPD and IED. A plant which has opted out of LCPD can decide to refurbish and re-open as a biomass conversion, meeting the new emission requirements of IED. Such an approach would offer a more cost-effective means of supplying base load generation than new build.

Both the Committee on Climate Change's Bioenergy Review and DECC's 2012 Bioenergy Strategy concluded that both conversion and enhanced co-firing with biomass offer a quick, cost-effective way to decarbonise existing coal-fired power stations, based on current sustainability requirements.

Q: If those plants are being allowed to continue to use coal, for how long?

A: Generating stations may continue to use coal but those wishing to access the low-range, mid-range or high-range co-firing biomass bands must use biomass alongside coal at the relevant thresholds specified in the table above. Otherwise they fall back into a lower band, receiving less support, until they raise their use of biomass above the relevant threshold again. The definitions for the co-firing bands, including the relevant thresholds are set out in article 24 of the instrument, which amends Part 1 of Schedule 2 to the Renewables Obligation Order 2009.

As indicated in the Explanatory Memorandum accompanying the draft amendment Order, article 4 of the instrument removes the existing co-firing cap in order to encourage the increased use of biomass in place of fossil fuel.

Q: What controls are in place to ensure that those plants use renewable fuel from a given date?

A: Support is only available under the Renewables Obligation for electricity generated from renewable sources. Where a station generates electricity from a mixture of renewable and fossil fuel sources, such as biomass and coal, the energy content of each fuel is used to determine the proportion of the output electricity that can be treated as having been generated from renewable sources (see article 25 of the Renewables Obligation Order 2009, which is to be amended by article 7 of the instrument).

Ofgem are responsible for issuing renewables obligation certificates (ROCs), but before they do so they use their powers in article 53 of the Renewables Obligation Order 2009 (provision of information to the Authority) and article 36 of that Order (general criteria for the issue of ROCs) to obtain the information necessary to be satisfied that the station is eligible for the ROCs and has provided accurate and reliable information.

DECC

14 February 2013

APPENDIX 2: NUCLEAR DECOMMISSIONING AND WASTE HANDLING (FINANCE AND FEES) REGULATIONS 2013

Further information from DECC

Q: The Explanatory Memorandum says that “since the 2011 Regulations came into force, the Government conducted a further consultation on FDP Guidance and published updated Guidance in December 2011. As a result of this work, the Government concluded that the 2011 Regulations needed to be revisited. It issued a six week consultation (“the 2012 consultation”) on 27 April 2012...” Why did the Government carry out a consultation process only a year or so after the 2011 Regulations came into force?

A: The framework in the Energy Act 2008, which gives rise to the Regulations, is completely new and unused. The content of the 2011 Regulations was effectively developed in 2010 and a lot of development work and thinking by prospective new nuclear operators (and Government in terms of how it would operate the regime) has taken place in the 2 years since. That work highlighted a number of workability issues around reporting, verification, modification and clarity, where the burden of the 2011 Regulations could be reduced without compromising Secretary of State oversight. Hence the new Regulations.

Q: The EM sets out how the 2013 Regulations differ from the 2011 Regulations. Some changes seem quite significant: for example, at 7.9, the EM states: “The purpose of this is to provide greater financial oversight for the Secretary of State.” Is this generally the intention behind the changes made by the 2013 Regulations?

A: We have not sought greater oversight in the sense of intrusion by the Secretary of State, rather to be clearer and simpler about the financial information that an operator has to report to the Secretary of State. The point made in paragraph 7.9 of the EM relates to the greater degree of financial information required under the reporting regime, rather than across the board. The Regulations aim to assist operators by breaking down the steps required to comply, the revised reporting obligations in particular will directly reduce compliance costs. This is one of the themes that sits behind the changes in addition to addressing the workability issues mentioned above.

Q: If the purpose of the 2013 Regulations is generally to provide greater financial oversight for the Secretary of State, is it appropriate that “Regulation 3 provides continuity for FDPs submitted under the 2011 Regulations. Where an operator has already submitted its FDP, that submission will be treated as satisfying the requirements relating to submission in this instrument” (7.2 in EM)? How can the Government be certain that operators of new nuclear power stations who complied with the 2011 Regulations “have secure financing arrangements in place to cover their decommissioning, waste management and waste disposal liabilities”?

A: As set out above, the 2013 Regulations are not solely aimed at providing greater financial oversight for the Secretary of State. The transitional provision referred to at paragraph 7.2 of the EM means that an FDP already submitted under the 2011 Regulations will be treated as meeting the requirements relating to submission under the 2013 Regulations (see regulations 5, 6 and 7 of the 2013 Regulations). All the other requirements will then need to be met under the 2013 Regulations.

The requirement of an FDP to make secure financial provision is a requirement of the Act, not the Regulations. The Regulations are about reporting, the Secretary of State’s ability to recover costs, verification, modification; they are not actually

about the fundamental test that the Secretary of State must apply when approving – namely, does the FDP make prudent provision?

Q: Can you say how many FDPs have already been submitted, or are expected, under the 2011 Regulations – and, conversely, how many FDPs might be expected under the 2013 Regulations?

A: An FDP is approved under the Act irrespective of the Regulations in place (the FDP currently under consideration is likely to be approved when the 2013 Regulations have come into effect). FDPs are highly specialised and operator specific so we are not expecting them to become commoditised. There are currently three consortia/prospective operators so it is unlikely that there will be more than single figures over the next 10 years.

Q: Operators are required to submit FDPs. Are they also required to make financial provision against the risk of their own default? In other words, what happens about decommissioning costs if an operator goes out of business before those costs are incurred?

A: We have interpreted this question as relating to when liabilities are discharged rather than incurred (decommissioning is incurred on day one, waste management and disposal are incurred throughout the operating life but all liabilities are discharged at the end of life during the decommissioning phase). The FDP guidance (published December 2011) was clear that the financial provision made must be “insolvency remote”. That is, if the operator goes insolvent, an administrator cannot access the Fund for distribution to creditors. What happens to decommissioning costs if an operator goes insolvent before the liabilities are discharged depends on the extent of financial provision. The Secretary of State, in approving an FDP, needs to assess whether the financial provision is commensurate with the costs and risks faced by the taxpayer (including the likelihood and consequence of insolvency); this is essential to judging whether the FDP makes prudent provision over the full life cycle of the project.

DECC

12 February 2013

APPENDIX 3: CARE STANDARDS ACT 2000 (EXTENSION OF THE APPLICATION OF PART 2 TO HOLIDAY SCHEMES FOR DISABLED CHILDREN) (ENGLAND) REGULATIONS 2013 (SI 2013/253)

Information from Department for Education

Q: Please clarify the relationship between the SI laid on 11 February and the “second set of Regulations” mentioned in the Explanatory Memorandum.

A: Holiday schemes currently fall within the scope of the definition of a “children’s home” for the purposes of the Care Standards Act 2000 and, as such, they are “establishments” which need to comply with the Care Standards Act 2000 (“the 2000 Act”) and the Children’s Homes Regulations 2001. As “establishments” they will commit an offence under the 2000 Act if they operate without being registered by Ofsted. However the registration and regulatory framework under the 2000 Act does not allow a provider to operate multiple homes/sites under one registration. Holiday schemes are disadvantaged by this legislation as many schemes operate schemes over a number of sites.

Therefore to address concerns raised in the consultation about this issue it was agreed that this specialist group of providers should be taken out of the definition of a “children’s home” (and therefore outside the scope of the Children’s Homes Regulations 2001) and outside the definition of an “establishment” but remain within the regulatory framework of the 2000 Act by creating a new set of regulations for these schemes under powers in that Act.

To do this we need to make two statutory instruments. First, using powers under section 42 of the 2000 Act, the first SI lists the regulation-making powers contained in Part 2 of the 2000 Act and applies those regulation-making powers to holiday schemes, with modifications. This means that, once this first SI comes into force, the Secretary of State will have regulation-making powers available to make regulations relating specifically to holiday schemes. We view this first instrument as a technical SI that has the sole effect of “switching on” or applying the regulation making powers in Part 2 of the 2000 Act in respect of the schemes. It does not impose any duties on the schemes themselves and, importantly, does not yet bring those schemes out of the scope of the Children’s Homes Regulations 2001. It simply has the effect of allowing the Secretary of State to make regulations (under section 22 of the 2000 Act for instance) in respect of these schemes.

However, once the first instrument is in force, the second, substantive set of Regulations will be made and it is that second SI which, on 1 April 2013, will bring the schemes outside the scope of the Children’s Homes Regulations 2001 whilst, simultaneously, making provision for the registration and conduct requirements of the schemes.

Q: Why did the Department allow such a short period for the consultation?

A: In advance of the consultation we had worked closely with providers, of which there are only two, and met with their lawyers. They informed the development of the proposals for consultation and the consultation document itself. It was clear that providers sought the earliest resolution to effect changes to current legislation in time for this year. Therefore when considering the process for the introduction of revised regulations i.e. the preparation of an Impact Assessment, the Reducing regulations committee, (RRC) Home Affairs etc, it was the Department’s view that a shortened consultation period would be appropriate and Ministers agreed. A number of face to face meetings were held with the interested groups both during

and after the consultation. In addition a consultation event to support the process was also held to ensure all sector members were made aware of the proposed changes and stakeholders including disability groups were made aware the consultation by email when it was launched. It was therefore agreed that holding a three month consultation was not required.

Department for Education

13 February 2013

APPENDIX 4: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 26 February 2013 Members declared no interests.

Attendance:

The meeting was attended by Lord Eames, Baroness Eaton, Lord Goodlad, Baroness Hamwee, Lord Methuen, Baroness Morris of Yardley Lord Norton of Louth, Lord Plant of Highfield, and Lord Scott of Foscote.