

ENVIRONMENT BILL

Memorandum from the Department for the Environment, Food and Rural Affairs to the Delegated Powers and Regulatory Reform Committee

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1. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Environment, Food and Rural Affairs (“the Department”) to assist with its scrutiny of the Environment Bill (“the Bill”). The Bill was introduced in the House of Commons on 30 January 2020 and moved to the House of Lords on 27 May 2021. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation, including those added by amendment in the Commons. This memorandum explains in each case why the power is being sought and the nature of, and the reason for, the procedure selected.
2. The Bill contains 51 provisions (clauses and Schedules) that include delegated powers, which are set out in Annex B. The Department has considered the use of powers in the Bill as set out below and is satisfied that they are necessary and justified.
3. This memorandum refers to other powers in the Bill which do not confer powers to make delegated legislation, but which involve Parliamentary scrutiny or relate to administrative functions that may be of interest to the Committee. These are listed and summarised separately in Annex A.

2. PURPOSE AND EFFECT OF THE BILL

4. The purpose of the Bill is to protect and improve the natural environment through measures on environmental governance, including the creation of a new duty to set legally binding targets for environmental improvement and the new Office for Environmental Protection (“OEP”); improve waste management and resource efficiency; improve air quality; manage water more sustainably; and restore and enhance nature and biodiversity.
5. The Bill is structured in 8 Parts and 20 Schedules.

Summary of regulation making powers in the Bill

6. The Bill prescribes the new framework for the better improvement and protection of the environment. However, aspects of the framework will need to be determined and amended under the Bill to meet the changing environmental landscape. The provision for delegated powers, subject to appropriate scrutiny and safeguards, is proposed to enable government to react effectively to technological or environmental changes and scientific advice, and to secure further views on the design of policies through public consultation. Many environmental measures are technical in nature and these powers are integral to facilitating continuous environmental improvement.
7. The delegated powers in the Bill fall into five thematic categories. First, there are powers that are needed as a result of the UK having left the EU; second, there are provisions which modify, or are based upon, existing delegated powers; third, there are provisions which create new delegated powers to give effect to new environmental policy; fourth, there are powers for devolved administration ministers to make equivalent provision to UK Ministers, fifth, there are general provisions which are required for the Bill to have effect.
8. Provisions falling into the **first category** are intended to avoid a governance gap and to ensure the government can deliver on its environmental ambition now that the UK has left

the EU. All of the powers in Parts 1 and 2, plus six other powers fall into this category, as below:

- a. Existing environmental targets are largely derived from EU law and now that the UK has left the EU it may wish to set its own targets that differ and go beyond those of the EU that will have been retained for the time being in domestic law. Clauses 1 and 2 provide for regulations to set targets for matters relating to improving the natural environment or people's enjoyment of it, and an air quality target in respect of the pollutant fine particulate matter ("PM_{2.5}").
 - b. Environmental principles are reflected in various international instruments and are set out in the EU treaties. However, a clear articulation of these principles has never been laid out clearly at a national level. The Environment Bill will change this through requiring the publication of a statutory policy statement (clause 16) on the interpretation and proportionate application of the principles, to which Ministers will have a duty to have due regard when making policy. (This is not a delegated legislative power and it is included in Annex A. Northern Ireland has the same power in paragraph 6 of Schedule 2.)
 - c. Clause 45(5) would allow the Secretary of State to set out in secondary legislation which legislative provisions come within or outside the definition of "environmental law", if required, in order to ensure that there is clarity about the scope of that definition (which in turn will define the scope of the OEP's enforcement function). Northern Ireland would have the same power in paragraph 18(5) of Schedule 3. The aim of this power is to provide certainty to the OEP, public authorities and the public about the OEP's remit, in the unlikely case that uncertainty cannot be resolved by other means.
 - d. A number of regulation-making powers (clauses 57, 59, 83-85, 125 and Schedule 20) allow Ministers to make changes in relation to regulations made under section 2(2) European Communities Act 1972. This will, for example, ensure that the lists of priority substances for surface waters and groundwater and their environmental quality standards do not remain fixed and therefore potentially out of date or unsuitable for domestic conditions following the UK's departure from the EU. Tying the UK's standards to those set historically in the EU could increase risks to the water environment. A further example is a power that would ensure the regulation of international waste shipments can respond to the changes in the methods and practices of those engaged in illegal waste shipment activity.
9. Provisions falling into the **second category** modify, build on or clarify existing delegated powers to improve their efficacy, building on lessons learnt from consultation, stakeholder engagement and reviewing policy outcomes over time. Examples of these incremental or improving changes to existing frameworks include the following:
- a. Two clauses confer delegated powers on Ministers that relate to water and sewerage undertakers (clauses 77 and 78). The Water Act 2003 made it a statutory requirement for water undertakers to prepare, maintain and publish water resources management plans, and delegated powers of direction in relation to such plans have been in place since then (sections 37A-D of the Water Industry Act 1991). The powers in this Bill add new direction-making powers to provide for water undertakers to cooperate with each other in connection with these plans for the benefit of customers, other water users and the environment. Currently, sewerage undertakers produce drainage and wastewater management plans under a non-statutory framework. Clause 78 places these plans on a statutory footing to match the status of water resources management plans, and the

provisions and directions powers are modelled very closely on existing provision for those plans in section 37A-D of the Water Industry Act 1991.

- b. Section 77 of, and Schedule 6 to, the Climate Change Act 2008 contain a power to make provision by regulations for charging for the supply of single use carrier bags by sellers of goods. Clause 55 would amend the Climate Change Act 2008 in order to enable the Secretary of State and the Department of Agriculture, Environment and Rural Affairs to require sellers of single use carrier bags to register with an administrator and to pay a registration fee.
 - c. Clause 54 and Schedule 9 would confer power on Ministers to make regulations requiring suppliers of single use plastic items (such as plastic cutlery) to make a charge for those items. While these powers would be new, the provisions are modelled on existing powers to make regulations about carrier bag charges in section 77 of, and Schedule 6 to, the Climate Change Act 2008.
10. In the **third category** are a number of new delegated powers to give effect to new environmental policy. The powers in the Waste and Resources Part are proposed in order to encourage the more efficient use of resources from nature and minimise waste. The Nature Part contains a number of new powers to help protect land and improve biodiversity. Clause 92 and Schedule 14 would amend the Town and Country Planning Act 1990 to make it a condition for the grant of planning permission in certain cases that the development will deliver a 10% gain in biodiversity. The legislative framework sets out the core net gain framework and delegated powers are required to ensure the primary legislation remains responsive over time, and also to ensure consistency with the existing planning legislative framework. Examples of new powers include the following:
- a. Clause 50 and Schedule 5 (producer responsibility for disposal costs) confer powers on the Secretary of State and devolved authorities to make regulations requiring manufacturers and suppliers of products to pay sums of money towards the costs of disposing of those products at the end of their life.
 - b. Clause 53 and Schedule 8 confer powers to make regulations for deposit schemes, i.e. a scheme where the purchaser of an item (such as a plastic bottle) pays a deposit which is refunded if the item is returned.
 - c. A regulation making power (paragraph 2, Schedule 14) will give the Secretary of State the ability to vary the target percentage for biodiversity net gain from the default value of 10%, for example to set a lower percentage requirement for minor residential developments to reduce burdens where appropriate.
11. The **fourth category** is powers for devolved administrations. Although the environment is largely a devolved matter, the UK government has been committed to working with the devolved administrations to protect and improve the environment now that the UK has left the EU. This will help avoid gaps in environmental policy and support a consistent approach to environmental matters across the UK. The government recognises that protecting the environment, for example from pollution, is inherently an issue that cuts across boundaries and a coordinated approach is key. Many of the powers in the Bill are powers for both the UK Secretary of State and devolved administrations; some powers are for the Secretary of State but only with consent of the devolved administrations in relation to a devolved matter. Other powers are for devolved administration Ministers only (reflecting differences in legal frameworks). Five powers are for Northern Ireland alone, and are proposed at their request

(contained in clauses 58, 60, 64, 85 and Schedule 3). These powers closely mirror powers of the Secretary of State.

12. Provisions falling into the **fifth category** are powers to make consequential provision; transitional or saving provision; and to bring the Bill into force. There are three powers of this nature for the Secretary of State, which are then replicated for the devolved administrations (a further nine powers).

Henry VIII powers

13. The Bill contains 17 powers to amend primary legislation through secondary legislation. These are all subject to the affirmative procedure with two exceptions as set out below. These “Henry VIII” powers are proposed in order to ensure that legislation continues to operate effectively and the statute book is kept up to date regularly.
 - a. Clause 68 would allow the Secretary of State or Welsh Ministers (as appropriate) to amend the permitted range of fixed penalty notices (FPNs) amounts in sections 33ZA, 34ZA, 33ZB and 34ZB of the Environmental Protection Act 1990 by negative resolution statutory instrument. This is an updating power (substituting one figure for another). The Department considers the negative procedure to be appropriate given its limited scope. The approach the Department is taking is consistent with similar powers in sections 34A(10), 46B(5), 47ZB(6) and 97A(3) of the same Act.
 - b. Clause 78 would allow the Secretary of State and Welsh Ministers to make an order by statutory instrument to amend the requirement on sewerage undertakers to prepare drainage and sewerage management plans every 5 years (to specify a different time period). This is required because the plans should remain aligned with the business planning cycles of the economic regulator, Ofwat (the timings of which could change) to assist the efficient functioning of the industry. This power is subject to the negative resolution procedure. This is considered appropriate given the limited scope of the power, and the fact that it follows two similar precedents in the Water Industry Act 1991, sections 37D(4) and 39D(1) in relation to water resources management plans and drought plans.

Consultation

14. The first part of the Bill was published in part as the draft Environment (Principles and Governance) Bill on 19 December 2018. This was the subject of pre-legislative scrutiny by the Environmental Audit Committee and Environment Food and Rural Affairs Committee. Clauses 88 to 90 contain provisions about land drainage previously in the Rivers Authorities and Land Drainage Bill, which was introduced as a Private Member’s Bill on 18 March 2019 and underwent parliamentary scrutiny. Amendments to those delegated powers have been made upon their inclusion in the Bill to take account of the Delegated Powers and Regulatory Reform Committee Report dated 4 June 2019. Part 7 of the Bill makes provision for conservation covenants and is in very similar terms to the Law Commission draft Bill on conservation covenants published in June 2014, which followed a public consultation by the Law Commission.
15. Nine major consultations have been undertaken during 2018-21 to support the development of policy in the Bill. As part of those consultations, the Department proposed that a number of delegated powers should be included in the Bill. The consultations were as follows.

- a. Environmental Principles and Governance after EU (10 May – 2 August 2018) Government response published: 19 December 2018
- b. Draft Clean Air Strategy (22 May – 14 August 2018) Government response published: 14 January 2019
- c. Net Gain (2 December 2018 – 10 Feb 2019) Government response published: 23 July 2019
- d. Protecting and enhancing England’s trees and woodlands (30 December 2018 – 28 February 2019) Government response published: October 2019
- e. Conservation Covenants (22 February – 22 March 2019) Government response published: 23 July 2019
- f. Consultation on reforming the UK packaging producer responsibility system (18 February -13 May 2019) Government response published: 23 July 2019
- g. Consultation on consistency in Household and business recycling collections in England (18 February -13 May 2019) Government response published: 23 July 2019
- h. Introducing a Deposit Return Scheme (DRS) in England, Wales and Northern Ireland (18 February -13 May 2019) Government response published: 23 July 2019
- i. Due diligence on forest risk commodities (25 August – 5 October 2020) Government response published: November 2020
- j. Introducing a Deposit Return Scheme in England, Wales and Northern Ireland (24 March – 4 June 2021) Government response to be published in due course
- k. Consistency in Household and Business Recycling in England (7 May – 4 June 2021) Government response to be published in due course
- l. Extended Producer Responsibility for Packaging (24 March – 4 June 2021) Government response to be published in due course

Abbreviations

16. This Memorandum contains the following abbreviations:

“CMA”	means the Competitions and Markets Authority
“DAERA”	means the Department of Agriculture, Environment and Rural Affairs
“EPR”	means Extended Producer Responsibility
“FPN”	means Fixed Penalty Notice
“IDB”	means internal drainage board
“NRMM”	means non-road mobile machinery

“NRW”	means Natural Resources Wales
“RBD”	means River Basin District
“REACH”	means Registration, Evaluation, Authorisation and Restriction of Chemicals
“SUP”	means single-use plastic
“the 1997 Order”	means the Waste and Contaminated Land (Northern Ireland) Order 1997
“the CCA 2008”	means the Climate Change Act 2008
“the Department”	means the Department for Environment, Food and Rural Affairs
“the EA”	means the Environment Agency
“the EA 1995”	means the Environment Act 1995
“the Ecodesign Directive”	means Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009
“the ELV Regulations”	means the End of Life Vehicles (Producer Responsibility) Regulations 2005
“the Energy Labelling Regulation”	means Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017
“the Environmental Quality Standards Directive”	means Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008
“the EPA 1990”	means the Environmental Protection Act 1990
“the EU REACH Regulation”	means Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006
“the UK REACH Regulation”	means the EU REACH Regulation as it will apply in the UK after the UK leaves the EU
“the Groundwater Directive”	means Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006
“the LDA 1991”	means the Land Drainage Act 1991

“the NERC 2006”	means the Natural Environment and Rural Communities Act 2006
“the OEP”	means the Office for Environmental Protection
“the TCPA 1990”	means the Town and Country Planning Act 1990
“the TSWR 2007”	means the Transfrontier Shipment of Waste Regulations 2007
“the WBA Regulations”	means the Waste Batteries and Accumulators Regulations 2009
“the Water Framework Directive”	means Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000
“the WIA 1991”	means the Water Industry Act 1991
“SEPA”	means the Scottish Environment Protection Agency
“WCAs”	means Waste Collection Authorities
“WEEE”	means Waste electrical and electronic equipment

3. DELEGATED POWERS

17. The Bill confers delegated powers on the Secretary of State and devolved administration Ministers. The powers are required primarily to ensure that our environmental governance system and policies will continue to function in the long term, by providing some flexibility to accommodate future changes in evidence, approaches, policymaking, industries or technologies which are not necessarily predictable at this time.

Analysis of delegated powers by clause

Part 1 – Environmental Governance

Clause 1(1) and (2): Power to set environmental targets and requirement to set priority area targets

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure

Context and purpose

18. Environmental targets drive improvement to the environment. Existing targets are derived largely from EU law. Now that the UK has left the EU it will need its own mechanism to set new environmental targets.
19. Clause 1(1) of the Bill provides a power for the Secretary of State to set long term environmental targets. Clause 1(2) requires the Secretary of State to exercise that power to set at least one target in relation to four priority areas specified in the Bill: air quality, water, biodiversity, and resource efficiency and waste reduction. Under clause 3(9) the regulations setting out those priority area targets must be laid in draft by 31 October 2022.
20. All targets must specify the standard to be achieved, which must be capable of being objectively measured. A target must also specify the date by which it is to be achieved, being no less than 15 years after it is set. Finally, a target must specify a reporting date, being the date by which the Secretary of State must prepare a statement confirming whether the target has been achieved.
21. Clause 4 provides that the Secretary of State is under a duty to ensure that targets are met.

Justification for taking the power

22. The Department's view is that the amount of technical detail on targets, the standard to be achieved, and the deadline for achievement will be such that it is appropriate for it to be set out in secondary, not primary legislation. The target-setting cycle is intended to be an iterative and ongoing process, for which these measures set a framework. As such, it is envisaged that targets may be, and may need to be, amended over time in order to reflect changes in scientific knowledge and evidence. Also, targets may need to be set in new areas. It would be unduly onerous for primary legislation to be introduced every time a target needed to be amended, even slightly, or created. A Bill with appropriate scope would need to be found each time.
23. The Bill circumscribes the way in which the power can be exercised. Clause 3 of the Bill provides that the Secretary of State must seek advice from independent experts before making regulations on targets, and must be satisfied that the target, or amended target, can be met. Furthermore, clause 3 contains additional procedures which the Secretary of State must follow prior to making regulations which revoke or lower a target. The Secretary of State must be satisfied that meeting the target would (i) have no significant benefit or (ii) result in a disproportionate impact, and must publish, and lay before Parliament, a statement to that effect.

Justification for the procedure

24. The Department's view is that setting or amending targets is likely to be of particular interest to Parliament and therefore has proposed that the regulations are subject to the affirmative procedure.
25. The Department is also of the view that amending a target in a way which lowers the ambition of that target is likely to be of greater interest to Parliament. Therefore, the Bill contains a procedure to ensure that a full explanation for that such a change is published and provided to Parliament for consideration before any such amendment is made.

Clause 2 A requirement for the Secretary of State to set a target in respect of PM_{2.5}

Power conferred on: Secretary of State

Power exercised by: Laying before Parliament

Parliamentary Procedure: Affirmative Resolution Procedure

Context and purpose

26. Fine particulate matter (PM_{2.5}) is formed of tiny particles that can get into the lungs and blood that can be transported around the body, lodging in the heart, brain and other organs. It has been identified as one of the most significant pollutants in damaging public health.
27. In January 2019 the Government committed to setting a new target to reduce public exposure to PM_{2.5}.
28. Clause 2 would require the Secretary of State to set by regulations a target for PM_{2.5}, expressed as an annual average concentration in ambient air.

29. The target will be set in regulations. These will set out how the target is to be measured; define what ambient air means for the purpose of the target; and specify the date by which the target is to be achieved. The Secretary of State will also be required to seek advice from independent experts before making regulations setting a target for PM_{2.5}.

Justification for taking the power

30. The Department's view is that the details associated with the target are more appropriate for secondary legislation. Key aspects of technical detail, such as the type of equipment for measurement and the applicable methodologies to be used, should be based upon the best technical and scientific knowledge, which may change over time. For this reason it is necessary to have the flexibility to make technical changes quickly to respond to scientific developments and advice. The power is circumscribed. The PM_{2.5} air quality target cannot be revoked entirely: it can be amended only, in accordance with clause 3, which contains additional procedures that the Secretary of State must follow prior to making regulations which amend the target.

Justification for the procedure

31. The Department's view is that setting or amending an air quality target for PM_{2.5} is likely to be of particular interest to Parliament and therefore the Department has proposed that the regulations be subject to the affirmative procedure.

Clause 24 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

32. This clause, which was added by amendment at Commons Committee stage, 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.

33. 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

34. 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.
35. 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.
36. 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

37. 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.

Clause 45(5): A delegated power to allow the Secretary of State to specify legislative provisions, other than devolved legislative provisions, which fall within or outside the definition of environmental law

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure

Context and Purpose

38. There is no single definition of "the natural environment" or "environmental law". Therefore, the Bill has defined the "natural environment" in clause 41, for the specific purposes of the functioning of the OEP. Building on this definition, clause 45(1) and (3) defines "environmental law" as meaning any legislative provision (other than devolved legislative provision) to the extent that the provision is concerned mainly with one or more of the environmental protections in clause 44, and is not excluded by clause 45(1)(b) and (2).
39. The consequence of this approach is that if a legislative provision is mainly concerned with one or more environmental protections (for example, protecting the natural environment from the effects of human activity), and not concerned with an excluded matter then the legislative provision in question will fall within the definition of "environmental law" for the

purposes of the OEP. The OEP would therefore be able to investigate complaints about, and take enforcement action in relation to, that legislative provision.

40. Clause 45(2) outlines matters that are excluded from legislative provisions which may be considered “environmental law”, for example the armed forces or national security. Where a legislative provision is concerned with an excluded matter, therefore, there is no need to consider whether it addresses one or more of the matters in clause 45(1)(a), since it will not in any case be “environmental law” for the purposes of the OEP.
41. The objective of this power is to ensure that Ministers have the ability to specify legislative provisions which do or do not fall within the definition of “environmental law” in subsection (1). The power cannot be exercised in relation to devolved legislative provisions.

Justification for taking the power

42. The power would allow for the timely resolution of uncertainty as to whether a particular provision is within or outside the definition of “environmental law” for the purposes of Part 1. In most cases, it is anticipated that it will be clear through the application of these provisions whether or not a legislative provision is “environmental law”. However, there may be cases where there are questions over whether certain legislative provisions are or are not environmental law.
43. Although uncertainties might be resolved through discussion and, possibly litigation, the Department considers it desirable to provide a legislative mechanism to resolve any such uncertainties if necessary, quickly. This would be more appropriate for secondary legislation as it would be merely a clarification as to whether a specific provision was within the general definition set out in primary legislation.
44. Subsection (6) of clause 45 requires that the Secretary of State must consult the OEP and any other appropriate persons before making any regulations under this clause.

Justification for the procedure

45. The resolution of questions of whether a particular provision comes within “environmental law” for the purposes of Part 1 is likely to be a question of particular interest to Parliament, and therefore the affirmative procedure has been preferred.

PART 2 ENVIRONMENTAL GOVERNANCE: NORTHERN IRELAND

Paragraph 18(5), Schedule 3 (linked to clause 45) A power to make regulations to specify legislative provisions which fall within or outside the definition of Northern Ireland environmental law.

46. This power, conferred on DAERA, is the equivalent to the clause 45(5) power. The context, purpose, reason for taking the power and justification for the procedure is materially the same for Northern Ireland as for England and these are not repeated.

Paragraph 24, Schedule 3 A delegated power to allow DAERA to issue statutory guidance to the OEP in relation to its Northern Ireland enforcement functions

Power conferred on: DAERA

Power exercised by: Issuing statutory guidance

Parliamentary Procedure: Lay before the Northern Ireland Assembly

Context and purpose

47. This clause, which was added by amendment at Commons Report stage, enables the Department of Agriculture, Environment and Rural Affairs in Northern Ireland (DAERA) to issue statutory guidance to the OEP on its enforcement policy (the matters set out in clause 22(6)) so far as relating to the OEP's Northern Ireland enforcement functions. The OEP will be required to have regard to the DAERA guidance in preparing its Northern Ireland enforcement policy, and in exercising its Northern Ireland enforcement functions. This new clause mirrors the power for the Secretary of State to issue guidance to the OEP in England, in clause 24. The context and purpose of the Secretary of State power equally applies to the DAERA power.

Justification for taking the power

48. As for the Secretary of State's guidance power in clause 24, the purpose of this guidance power is to allow DAERA to be responsive to issues that may arise in practice in relation to the OEP's Northern Ireland enforcement policy. These issues are not necessarily foreseeable in advance so cannot be provided for on the face of the Bill. The inclusion of similar powers for the Secretary of State and DAERA will help to ensure a consistent approach to environmental governance arrangements across both jurisdictions.

49. 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, DAERA 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, as amended by paragraph 28(10) of Schedule 3). The guidance must also be laid before the Northern Ireland Assembly.

50. DAERA can also issue guidance to an existing arms-length body, the Committee on Climate Change, on its functions: see section 41 of the Climate Change Act 2008 (CCA 2008). Other Northern Ireland departments also have powers to issue guidance to arms-length bodies.

Justification for taking the procedure

51. Non-binding guidance, including the section 41 CCA 2008 guidance to the Committee on Climate Change, is often not subject to any Assembly procedure. However the Department considers that the Northern Ireland Assembly 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 the Northern Ireland Assembly and publish it, to enable both transparency and scrutiny.

PART 3 WASTE AND RESOURCE EFFICIENCY

Clause 49 and Part 1 of Schedule 4: a new UK wide power to make regulations to impose producer responsibility obligations (replacing sections 93 to 95 of the Environment Act 1995 and the Producer Responsibility Obligations (Northern Ireland) Order 1998)

Power conferred on: in relation to England, the Secretary of State; in relation to Wales, Welsh Ministers and, if Welsh Ministers consent, the Secretary of State, in relation to Scotland, Scottish Ministers and, if Scottish Ministers consent, the Secretary of State; the Department of Agriculture, Environment, and Rural Affairs in Northern Ireland (DAERA) and, if DAERA consents, the Secretary of State (together, the “relevant national authority”)

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative unless regulations are only varying targets, then Negative Resolution Procedure

Context and Purpose

52. The government has announced the aim of achieving zero avoidable waste by 2050. The UK is also committed to the UN Sustainable Development Goal 12.3, which adopted a target of halving per capita food waste at the retail and consumer level, and reducing food losses along production and supply chains by 2030. In the Resources and Waste Strategy for England (the Strategy) published in December 2018, a commitment was made to a new approach to tackle waste. The Strategy also established a set of core principles that provide a framework for reviewing existing producer responsibility systems and developing new extended producer responsibility (EPR) schemes
53. Producer responsibility obligation schemes are one of the tools by which the government will work towards its aim of achieving zero avoidable waste by 2050. Producer responsibility schemes are in place for four waste streams, putting a level of responsibility on producers for their goods at end-of-life. The purpose for which the Ministers can currently impose producer responsibility obligations cover the re-use, recovery and recycling of products but not the redistribution or the management of a surplus.
54. Clause 49 and Schedule 4 repeal producer responsibility obligation provisions in section 93 to 95 of the Environment Act 1995 (“EA 1995”), which extend to England, Scotland and Wales and the Producer Responsibility Obligations (Northern Ireland) Order 1998, which extend to Northern Ireland and replace them with revised and updated UK wide powers to impose producer responsibility obligations. These revised powers include a new purpose of the prevention of products becoming waste and the redistribution of products, as well as continuing current purposes relating to the “re-use, recovery or recycling of” products.
55. These revised powers are required in order to allow the effective reform of current producer responsibility schemes and new schemes. For example, by making provision for payment of a compliance fee as an alternative way of meeting producer responsibility obligations (see paragraph 2(3) of Schedule 4), by allowing the option of making membership of a

compliance scheme mandatory for producers (see paragraph 4(1) of Schedule 4), by the ability to appoint a different regulator to the environment agencies (compare paragraph 13(1) of Schedule 4 with definition of "appropriate agency" in section 94(6) EA 95) and by removing the requirement for obligations to be rooted in a target (compare definition of "producer responsibility obligation" in paragraph 1(3) of Schedule 4 with definition in section 93(8) EA 95).

Justification for taking the power

56. Revision of delegated powers in section 93 EA 1995 are necessary to ensure producer responsibility obligations can be imposed (including the setting of targets) for the prevention of products and materials becoming waste and for the redistribution of such products.
57. The precise subject of the power in clause 49 has not been prescribed as government needs the flexibility to state, in regulations, which producer or business to impose producer responsibility obligations on and on what products or materials and what steps are required in order to achieve those obligations. The Department's view is that it is not appropriate for such detail to be set out in primary legislation. The setting of producer responsibility obligations is intended to be an iterative and ongoing process done in consultation with industry and for which these measures set a framework. As such, it is envisaged that obligations and the scheme imposing those obligations may be, and may need to be, amended over time in order to reflect changes in circumstance or policy. Alternatively, new producer responsibility obligations may need to be set in new areas. If the producer responsibility obligations were set out in the Bill, primary legislation would need to be amended each time those obligations were amended or set.
58. However, there are limits on the purposes for which producer responsibility obligations can be imposed in regulations made under clause 49 and Schedule 4 (to prevent a product or material becoming waste, to reduce the amount of a product or material that becomes waste, to maintain, promote or secure an increase in, the re-use, redistribution, recovery or recycling of products or materials). As further safeguards, the requirement in section 93 EA 95 to consult with those whose interests are likely to be affected by the regulations is continued in paragraph 8 of Schedule 4. As is the requirement in section 93 for the relevant national authority to be satisfied of a number of factors before the power can be exercised (see now paragraph 9 of Schedule 4. These requirements are: (i) that the proposed exercise of the power is likely to achieve one or more of the purposes for which the regulations are to be made (ii) that exercising the power will produce significant environmental or economic benefits, as compared to the likely costs (iii) that the burdens imposed on businesses are the minimum necessary to secure those benefits, (iv) that consideration has been given to the fairness and efficacy of the burdens.

Justification for procedure

59. The Department's view is that imposing and amending producer responsibility obligations (and the associated scheme) warrants close parliamentary scrutiny and time for debate, and so has proposed that the regulations are subject to the affirmative procedure. However, where the amending regulations are only amending a target set in regulations, then the Department proposes that the procedure is negative. By way of example, the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 set down the yearly recycling targets producers must meet for glass plastic, aluminium, steel, paper and wood packaging materials. The targets are expressed as a percentage. Regulations

amending those percentages will be subject to negative procedure on the basis the methodology for calculating those targets will already have been set out in regulations which have been scrutinised under the affirmative procedure.

Clause 49 and Part 2 of Schedule 4 – power to make regulations about the enforcement of producer responsibility obligations

Power conferred on: in relation to England, the Secretary of State; in relation to Wales, Welsh Ministers and, if Welsh Ministers consent, the Secretary of State, in relation to Scotland, Scottish Ministers and, if Scottish Ministers consent, the Secretary of State; in relation to Northern Ireland, the Department for Agriculture, Environment and Rural Affairs and, if DAERA consents, the Secretary of State (together, the “relevant national authority”)

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative Resolution Procedure

Context and purpose

60. Clause 49 and Part 2 of Schedule 4 confer power on the relevant national authority to make regulations about the enforcement of requirements imposed by regulations (“Part 1 regulations”) imposing producer responsibility obligations. The context and purpose of this power is the same as for clause 49 above and is not repeated here.
61. The powers will enable the relevant national authority to make provision about the enforcement authority, confer functions on an enforcement authority, including monitoring compliance with requirements imposed by Part 1 regulations, requiring producers to maintain records and provide information to an enforcement authority, powers of entry, inspection, seizure and detention of property on an enforcement authority, criminal offences (for failure to comply with regulations, a civil sanction or for obstruction or a failure to assist) and civil sanctions for failure to comply with regulations.
62. The powers are designed to enable enforcement regulations to make similar provisions to those that can be made under Part 2 of Schedule 5 of the Bill (disposal costs). In most cases (but not all) those who will be required to pay sums towards disposal costs will also be subject to producer responsibility obligations.

Justification for taking the powers

63. The powers are designed to enable regulations to give enforcement authorities an effective and proportionate suite of enforcement powers including the imposition of civil sanctions for a failure to comply with requirements imposed by regulations, or for obstruction of, or a failure to assist an enforcement authority. Regulations can also create new criminal offences (punishable by a fine) but only for a failure to comply with regulations, civil sanctions or for obstruction or a failure to assist. The government considers these powers are proportionate with the enforcement powers that were conferred by section 95 EA 1995, which clause 49 repeals and replaces.
64. A power to make regulations will facilitate the making of separate provision about enforcement for each of England, Wales, Scotland and Northern Ireland. It will also provide flexibility to make different provision in relation to particular types of products, for example by specifying different bodies as enforcement authorities in different cases.

65. Appropriate safeguards are included in relation to the exercise of the powers. In relation to powers of entry, regulations may only enable an enforcement authority to enter premises by force or to enter a private dwelling without consent, or to search and seize items found on premises under the authority of a warrant. There is also a requirement on the relevant authority to consult anyone the authority considers appropriate before making provision for enforcement in regulations.

Justification for procedure

66. The Department's view is that creating new offences and making provision for civil sanctions and powers of entry warrants close Parliamentary scrutiny and time for debate, and so has proposed that the regulations are subject to the affirmative procedure.

Clause 50 and Schedule 5 - A delegated power to make provision for the payment of sums by those involved in manufacturing, processing, distributing or supplying products or materials

Power conferred on: in relation to England, the Secretary of State, in relation to Wales, Secretary of State and Welsh Ministers concurrently if Welsh Ministers consent, in relation to Scotland, Secretary of State and Scottish Ministers concurrently (if Scottish Ministers consent), in relation to Northern Ireland, Secretary of State and Department for Agriculture, Environment and Rural Affairs (DAERA) concurrently (if DAERA consents) (together, the "relevant national authority")

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure

Context and purpose

67. The context of this power is the same as for Clause 49 as set out above and is not repeated here.

68. One of the extended producer responsibility (EPR) principles established in the government's strategy to protect and improve the environment as set out in its 25 Year Plan to Improve the Environment is that producers will bear the full net cost of managing their products at end of life. Through this measure producers could be required to pay for the net costs of managing products at end of life. To date, the financial obligations placed on producers cover just the recycling/ recovery costs associated with their products, and not the full costs of managing these products at end of life. By taking on these costs, producers will have a strong incentive to consider the impacts that their products have once they have been discarded by consumers

69. The power will allow the relevant national authority to make regulations to make provision for persons specified in the regulations to pay sums to meet or contribute to the costs of disposing of specified products or materials. The power will allow the relevant national authority to make associated provision in relation to these costs including the calculation of disposal costs, calculation of the sums payable, the appointment of administrators, conferring functions on administrators, the registration of persons required to pay sums with an administrator, the payment of a registration fee, the payment of sums to the administrator, the distribution of sums paid by the administrator to those who have incurred disposal costs or to another administrator, repayment of sums or part of the sum paid to

the administrator, to the person who paid it, and the payment of charges in respect of costs incurred by an administrator in performing functions conferred on it by the regulations.

Justification for taking the power

70. Given the range of producers and products that are discarded by consumers, the government considers that setting out detailed provisions on the face of the Bill would not allow the flexibility needed to deal with likely differences in the costs of collecting, transporting, products or technical differences in sorting or treating some products, which may also affect cost. Nor would it allow for good product design or composition that reduces what is discarded or what goes to landfill to be taken into account through a variation in the amount producers have to pay. Similarly, an administrator appointed to oversee costs associated with some products may not be appropriate to other products. It would not, therefore, be appropriate to name the administrator on the face of the Bill. That said, care has been taken to ensure, the delegated power is drawn so as to give sufficient certainty as to what the regulations may be expected to contain. For example, paragraph 2 of Schedule 5 sets out what disposal costs are. This is the costs of collecting and transporting, sorting and treating products and materials

71. The legislation also limits the extent of the power. Paragraph 1 of Schedule 5 provides that regulations can only be made for the purpose of securing that those involved in manufacturing, processing, distributing or supplying products or materials contribute to the disposal costs of those products or materials.

Justification for procedure

72. Regulations will determine who pays towards disposal costs, how much should be paid and to whom. The Department's view is that this warrants close Parliamentary scrutiny and time for debate, and so has proposed that the regulations are subject to the affirmative procedure.

Clause 50 and Part 2 of Schedule 5 – power to make regulations about the enforcement of a disposal costs scheme

Power conferred on: in relation to England, the Secretary of State; in relation to Wales, Welsh Ministers and, if Welsh Ministers consent, the Secretary of State, in relation to Scotland, Scottish Ministers and, if Scottish Ministers consent, the Secretary of State; in relation to Northern Ireland, the Department for Agriculture, Environment and Rural Affairs and, if DAERA consents, the Secretary of State (together, the “relevant national authority”)

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative Resolution Procedure

Context and purpose

73. Clause 50 and Part 2 of Schedule 5 confer power on the relevant national authority to make regulations about the enforcement of requirements imposed by regulations (“Part 1 regulations”) establishing a disposal costs scheme. The context and purpose of this power is the same as for Clause 49 and is not repeated here.

74. The powers will enable the relevant national authority to make provision about the enforcement authority, requiring producers to maintain records and provide information to an enforcement authority, an administrator (where the person is not an administrator), or the relevant national authority, powers of entry, inspection, seizure and detention of property on an enforcement authority, criminal offences (but only in the limited circumstances of failure to comply with a civil sanction or for obstruction or a failure to assist) and civil sanctions for failure to comply with regulations.
75. The powers are designed to enable enforcement regulations to make similar provision to that which can be made under Part 2 of Schedule 4 to the Bill. Part 2 of Schedule 4 makes provision for the enforcement of regulations made under clause 49 and Part 1 of Schedule 4 imposing producer responsibility obligations on producers. In most cases (but not all) those who will be required to pay sums towards disposal costs will also be subject to such obligations.

Justification for taking the powers

76. The powers are designed to enable regulations to give enforcement authorities an effective and proportionate suite of enforcement powers including the imposition of civil sanctions for a failure to comply with requirements imposed by regulations, or for obstruction of, or a failure to assist an enforcement authority. Regulations can also create new criminal offences (punishable by a fine) but only for a failure to comply with civil sanctions or for obstruction or a failure to assist.
77. A power to make regulations will facilitate the making of separate provision about enforcement for each of England, Wales, Scotland and Northern Ireland. It will also provide flexibility to make different provision in relation to particular types of products, for example by specifying different bodies as enforcement authorities in different cases.
78. Appropriate safeguards are included in relation to the exercise of the powers. In relation to powers of entry, regulations may only enable an enforcement authority to enter premises by force or to enter a private dwelling without consent, or to search and seize items found on premises under the authority of a warrant. There is also a requirement on the relevant authority to consult anyone the authority considers appropriate before making provision for enforcement in regulations.

Justification for procedure

79. The Department's view is that creating new offences and making provision for civil sanctions and powers of entry warrants close Parliamentary scrutiny and time for debate, and so has proposed that the regulations are subject to the affirmative procedure.

Clause 51 and Schedule 6 – power to make regulations about the provision of resource efficiency information

Power conferred on: Secretary of State (in relation to England), Secretary of State and Welsh Ministers concurrently (in relation to Wales), Secretary of State and Scottish Ministers concurrently (in relation to Scotland), Secretary of State and Department for Agriculture, Environment and Rural Affairs concurrently (in relation to Northern Ireland) (together, the “relevant national authority”)

Power exercised by: Regulations made by Statutory Instrument

Context and purpose

80. Clause 51 and Part 1 of Schedule 6 confer power on the relevant national authority to make regulations requiring persons involved in the manufacture, import, distribution, sale or supply of a product to provide information about the resource efficiency of the product. This is information which relates to a product's production, design or other features which relate to length of product life, and certain other specified matters related to the product's impact on the natural environment, including the materials from which a product is manufactured and whether a product is recyclable.
81. The policy purpose is to provide consumers and other end-users of products with information to enable informed purchasing decisions which will help drive the market towards resource efficiency.
82. This will help to meet the government's commitment in its 25 Year Environment Plan to use resources from nature more sustainably and efficiently. That Plan sets targets to double the resource productivity of the UK economy, also contained in the government's Industrial Strategy, and to work towards zero avoidable waste by 2050.
83. In line with this, the government's Resources and Waste Strategy for England 2018 sets out a commitment to be a world leader on resource efficiency and contains a comprehensive programme of policy measures to achieve those commitments, including measures relating to providing consumers with better information about the resource efficiency of their products to encourage more sustainable purchasing decisions. As part of this, government committed to improve on the current EU ecolabelling scheme. These ambitions are shared across the Devolved Administrations, with their respective circular economy strategies also highlighting the importance of shifting the market towards more resource efficient products.
84. In addition, the purpose is to realise related benefits to our natural resources, also part of our 25 Year Environment Plan, for example in terms of greenhouse gas emissions and water availability that can be achieved through resource efficient production and design.
85. Early intended implementation measures are expected to include labelling schemes providing information as to whether packaging is recyclable or not, which the government is committed to introducing.

Justification for taking the powers

86. The government envisages that relevant national authorities will exercise these powers by developing policy proposals for, and making, separate regulations for each type of product that is regulated. This follows the approach taken under EU legislation about labelling of energy-related products (Regulation (EU) 2017/1369 of the European Parliament and of the Council setting a framework for energy labelling ("the Energy Labelling Regulation") and predecessor instruments).
87. The government considers it appropriate to take regulation-making powers for these purposes, for several reasons. Product-specific information requirements may be detailed and technical and thus more suitable for inclusion in regulations than in primary legislation. The Department envisages the types of resource efficiency requirements will differ from

product to product, making product-specific regulations more appropriate. Furthermore, a regulation-making power will enable the relevant national authorities to take decisions on an ongoing basis about whether to introduce or retain requirements for different products, taking on board market developments and the needs for such standards, and work with industry and other stakeholders to develop schemes tailored for the specific product or product group. Allowing for the possibility of industries self-regulating and avoiding the need for regulation, and providing sufficient flexibility to implement or modify such requirements at different times for different products, taking on board evolving technologies and giving industry sufficient time to adapt to changes, are additional reasons for needing the flexibility to introduce provisions by secondary legislation.

88. Taking a delegated power will also facilitate the making of separate provisions for England, Wales, Scotland and Northern Ireland, should the devolved administrations wish to exercise these powers in different ways. Importantly, taking these powers will also allow us to keep pace with developments internationally, including at the EU level or, where practicable exceed their ambitions, taking on board the decisions that are made at that level. To date the EU has signalled its intention to adopt resource efficiency labelling for energy using products and has begun researching this. France has also committed to introduce their own reparability index. At this stage, the government does not however know what these requirements will cover. These powers will give the government the flexibility to respond and ensure the Government can maintain and enhance environmental protections now that the UK has left the EU. They take on board our resource efficiency goals and the scope of existing EU ecolabel standards, albeit voluntary, which the government has committed under its Resources and Waste Strategy to improve upon.

89. Safeguards have been included in relation to the exercise of these powers. They are subject to a consultation requirement, and to a requirement for the relevant national authority to have regard to various matters before making regulations, including the extent to which the proposed regulations are likely to reduce the product's impact on the natural environment, the costs of complying with the regulations, and whether any exemptions or special provision should be made for smaller businesses. Furthermore, the powers cannot be used in relation to medicinal products, veterinary medicinal products and food.

Justification for the procedure

90. The power is subject to the affirmative procedure in all cases and, as described above, to requirements to consult and to have regard to certain matters. The Department is of the view that this is appropriate since the exercise of the power may have a significant impact on business.

Clause 51 and Schedule 6 – power to make regulations about the enforcement of resource efficiency information requirements

Power conferred on: Secretary of State (in relation to England), Secretary of State and Welsh Ministers concurrently (in relation to Wales), Secretary of State and Scottish Ministers concurrently (in relation to Scotland), Secretary of State and Department for Agriculture, Environment and Rural Affairs concurrently (in relation to Northern Ireland) (together, the “relevant national authority”)

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative Resolution Procedure

Context and purpose

91. Clause 51 and Part 2 of Schedule 6 confer power on the relevant national authority to make regulations about the enforcement of resource efficiency information requirements. The powers include:

- specifying, and conferring functions on, an enforcement authority,
- requiring persons on whom resource efficiency information requirements are imposed to maintain records and provide information to an enforcement authority,
- conferring powers of entry, inspection, examination, search and seizure on an enforcement authority,
- creating civil sanctions, of a kind for which provision may be made under Part 3 of the Regulatory Enforcement and Sanctions Act 2008, in respect of failure to comply with regulations,
- creating criminal offences punishable by a fine in respect of failing to comply with civil sanctions, or obstructing or failing to assist an enforcement authority,
- requiring, or authorising a court or tribunal to award, payment of an enforcement authority's costs of performing its functions.

92. The Department envisages that for each part of the United Kingdom a single set of enforcement regulations will be made, applying to the enforcement of all product-specific information requirements made by regulations under Part 1 of Schedule 6. They may include some differences in the provision made for enforcement in relation to different products, for example by specifying different enforcement authorities in different cases.

93. The powers are designed to enable enforcement regulations to make similar provision to that contained in Part 5 of and Schedules 2 to 4 to the Energy Information Regulations 2011 (S.I. 2011/1524), as amended with effect from the end of the transition period by S.I. 2019/539. Those Regulations make provision for the enforcement of requirements contained in delegated acts made under the Energy Labelling Regulation or its predecessor instruments.

Justification for taking the powers

94. The powers are designed to enable regulations to give enforcement authorities an effective suite of enforcement powers, based on experience of enforcing requirements under the Energy Information Regulations.

95. A power to make regulations will facilitate the making of separate provision about enforcement for each of England, Wales, Scotland and Northern Ireland. It will also provide flexibility to make different provision in relation to particular types of products, for example by specifying different bodies as enforcement authorities in different cases.

96. Appropriate safeguards are included in relation to the exercise of the powers. In relation to powers of entry etc., regulations may only enable an enforcement authority to enter

premises by force, enter a private dwelling without consent, or search and seize items found on premises, with the authority of a warrant.

97. The powers ensure that civil sanctions (e.g. monetary penalties or compliance notices) will be the primary means of enforcing breaches of resource efficiency requirements. Criminal prosecutions are only intended to be used as a last resort, and the cases in which criminal offences may be created by regulations are limited to those for which civil sanctions are considered an inadequate deterrent – non-compliance with civil sanctions, or the obstruction of or failure to assist an enforcement authority. The Energy Information Regulations 2011 are a precedent for the inclusion of criminal offences in regulations which impose product information requirements for environmental or energy efficiency purposes.

Justification for the procedure

98. The power is subject to the affirmative procedure, and there is a requirement to consult before making regulations. The Department considers this appropriate since regulations can include provision conferring powers of entry, imposing civil sanctions, and creating criminal offences.

Clause 52 and Schedule 7 – power to make regulations about resource efficiency requirements

99. *Power conferred on: Secretary of State (in relation to England), Secretary of State and Welsh Ministers concurrently (in relation to Wales), Secretary of State and Scottish Ministers concurrently (in relation to Scotland), Secretary of State and Department for Agriculture, Environment and Rural Affairs concurrently (in relation to Northern Ireland) (together, the “relevant national authority”)*

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative Resolution Procedure

Context and purpose

100. Clause 52 and Part 1 of Schedule 7 confer power on the relevant national authority to make regulations about resource efficiency requirements. These are product-related requirements to be met by persons involved in the manufacture, import distribution, sale or supply of a specified type of product, which are relevant to its impact on the natural environment. Paragraph 2(2) and 2(3) of Schedule 7 set out an exhaustive list of the matters to which such requirements may relate, with paragraph 2(2) covering matters relating to the expected life of and disposal of products, including their durability, reparability and recyclability, and paragraph 2(3) principally covering factors relating to the impact of products on the natural environment during their production and use.
101. These powers are to apply to all types of products, except for energy-related products, medicinal products, veterinary medicinal products and food. The European Commission has existing powers to set resource efficiency requirements for energy-related products in Implementing Regulations under Directive 2009/125/EC of the European Parliament and of the Council establishing a framework for the setting of eco-design requirements for energy-related products (“the Ecodesign Directive”). Those have been used, for example, to make such products more durable, repairable and recyclable and include requirements such as mandating producers to provide access to spare parts as well as repair and

maintenance information. Those powers were transferred to the Secretary of State from the end of the transition period by regulations under section 8 of the European Union (Withdrawal) Act 2018. The powers in this clause and Schedule are intended to confer similar powers on the relevant national authority to set resource efficiency requirements for other types of products.

102. The policy purpose is to help to meet the government's commitment in its 25 Year Environment Plan to use resources from nature more sustainably and efficiently. That Plan sets targets to double the resource productivity of the UK economy, also contained in our Industrial Strategy, and to work towards zero avoidable waste by 2050.

103. In line with this, the government's Resources and Waste Strategy for England 2018 sets out a commitment to be a world leader on resource efficiency and contains a comprehensive programme of policy measures to achieve those commitments, including measures relating to resource efficient product design, as well as consumer information or "ecolabelling", and addressing negative environmental impacts of resource use for example in relation to textiles.

104. The aim is to ensure products are kept in use for longer to minimise waste and reduce related environmental impacts, essentially by promoting greater product longevity as well as repair, reuse and recycling. This ambition is shared by the Devolved Administrations, In addition, the purpose is to realise related benefits to our natural resources, also part of our 25 Year Environment Plan, for example in terms of greenhouse gas emissions and water availability that can be achieved through resource efficient production and design.

105. The introduction of resource efficiency requirements is in line with the direction of travel of law internationally. France is in the process of developing and putting in place legislation relating to product design with a focus on reparability and research has been carried out by the Nordic Council of Ministers into potential eco-design requirements for textiles and furniture.

Justification for taking the powers

106. As with resource efficiency information requirements, the Department envisages that relevant national authorities will exercise these powers by developing policy proposals for, and making, separate regulations for each product group that is regulated.

107. Some examples of provision that might be made in regulations are to improve the reparability of a product through mandating that producers provide spare parts and access to repair and maintenance information to end-users and repairers; to reduce the impact of a product on the natural environment through, for example, ensuring it is made using sustainably sourced materials; and to improve the recyclability of a product through ensuring it is designed to be easily dismantled and is made from materials which can be recycled and/or from recycled materials.

108. As explained in relation to clause 51 above, the Department considers it appropriate to take regulation-making powers for these purposes, for several reasons. Product-specific requirements are expected to be detailed and technical and thus more suitable for inclusion in regulations than in primary legislation. A regulation-making power will enable the relevant national authorities to take decisions about whether to introduce or retain requirements for different products on an ongoing basis having regard to the wide range of factors identified above, and work with industry and other stakeholders to develop schemes

tailored for the specific product or product group. It will provide sufficient flexibility to implement or modify such requirements at different times for different products, and within a reasonable time-span. It will also facilitate the making of separate provisions for England, Wales, Scotland and Northern Ireland, should the devolved administrations wish to exercise these powers in different ways.

109. The Department considers that appropriate constraints are provided in relation to the exercise of these powers, by the inclusion of requirements for the relevant national authority to carry out a consultation and impact assessment before making regulations, and to be satisfied that a number of conditions have been met. The first condition is that the product has a significant impact on the natural environment at any stage of its production, use or disposal, and the second condition is that the proposed regulations would be likely to reduce that impact. Thirdly the benefit of the regulations would be significant as against the likely costs of the proposed regulations, and the last condition is that the reduction in the product's impact on natural resources could not be achieved as effectively without making the regulations. In addition, as above the powers may not be used in relation to energy-related products, medicinal products, veterinary medicinal products and food.

Justification for the procedure

110. The power is subject to the affirmative procedure and, as described above, to requirements to consult and to be satisfied of certain matters before making regulations. The Department believes this level of parliamentary involvement is appropriate since the exercise of the power may have a significant impact on business.

Clause 52 and Schedule 7 – power to make regulations about the enforcement of regulations about resource efficiency requirements

Power conferred on: Secretary of State (in relation to England), Secretary of State and Welsh Ministers concurrently (in relation to Wales), Secretary of State and Scottish Ministers concurrently (in relation to Scotland), Secretary of State and Department for Agriculture, Environment and Rural Affairs concurrently (in relation to Northern Ireland) (together, the “relevant national authority”)

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative Resolution Procedure

Context and purpose

111. Clause 52 and Part 2 of Schedule 7 confer power on the relevant national authority to make regulations about the enforcement of resource efficiency requirements. The powers correspond with those in Part 2 of Schedule 6, described above.

112. The Department envisages that for each part of the United Kingdom a single set of enforcement regulations will be made, applying to the enforcement of all product-specific requirements made by regulations under Part 1 of Schedule 7. They may include some differences in the provision made for enforcement in relation to different products, for example by specifying different enforcement authorities in different cases.

113. The powers are designed to enable enforcement regulations to make similar provision to that contained in Parts 5 and 6 of and Schedules 3 to 5 to the Ecodesign for Energy-Related Products Regulations 2010 (S.I. 2010/2617), as amended with effect from the end of the transition period by S.I. 2019/539. Those Regulations make provision for the enforcement of requirements contained in Implementing Regulations under the Ecodesign Directive.

Justification for taking the powers

114. The powers are designed to enable regulations to give enforcement authorities an effective suite of enforcement powers, based on experience of enforcing requirements under the Ecodesign Directive. The justification is the same as for clause 49 and Schedule 6 above and is not repeated in full here.

115. As with Schedule 6, civil sanctions (e.g. monetary penalties or compliance notices) will be the primary means of enforcing breaches of resource efficiency requirements. Criminal prosecutions are only intended to be used as a last resort, and the cases in which criminal offences may be created by regulations are limited to those for which civil sanctions are considered an inadequate deterrent – non-compliance with civil sanctions, or the obstruction of or failure to assist an enforcement authority. The Ecodesign for Energy-Related Products Regulations 2010 are a precedent for the inclusion of criminal offences in regulations which impose product requirements for environmental or energy efficiency purposes.

Justification for the procedure

116. The power is subject to the affirmative procedure, and there is a requirement to consult before making regulations. The Department considers this appropriate since it includes powers to confer powers of entry, to impose civil sanctions, and to create criminal offences.

Clause 53 and paragraphs 1 to 4 of Schedule 8 - A power to make regulations establishing deposit schemes.

117. *Power conferred on: in relation to England, the Secretary of State; in relation to Wales, Welsh Ministers and, if Welsh Ministers consent, the Secretary of State; in relation to Northern Ireland, the Department for Agriculture, Environment and Rural Affairs (DAERA) and, if DAERA consents, the Secretary of State (together, the “relevant national authority”).*

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative or Negative Resolution Procedure depending on factors set out in the clause

Context and purpose

118. The main purpose of this delegated power is to promote and secure an increase in recycling of materials thereby contributing to the government’s strategy to protect and improve the environment as set out in its 25 Year Plan to Improve the Environment. A deposit return scheme is a fresh intervention that will contribute to the systemic and behavioural changes needed to fulfil aspirations in the 25 Year Plan.

119. UK consumers currently use an estimated 14 billion plastic drinks bottles, 9 billion drinks cans and 5 billion glass bottles a year and, although plastic bottles are fully recyclable, recent packaging recycling rates demonstrate that there are significant improvements to be made in drinks container recycling. Moreover, drinks container litter is a serious issue which needs targeted policy action to overcome, with disposable containers, or parts of them, regularly featuring among the most commonly found items on UK beaches.
120. This delegated power will enable the relevant national authority to establish deposit return schemes for items supplied by way of sale or in connection with the supply of goods or services. Consumers will pay an up-front deposit that is included in the price of an item when they buy that item, which is then redeemed on return of that item to a collection point. The expectation is that this will increase the rate and quality of recycling and reduce littering and generate and greater domestic reprocessing capacity through providing a stable and high-quality supply of recyclable waste materials. Many other countries operate similar schemes (including Croatia, Denmark, Estonia, Finland, Germany, Iceland, Lithuania, Netherlands, Norway and Sweden). The Government has consulted on introducing a deposit return scheme for drinks containers and is minded to do so in England, Wales and Northern Ireland from 2023. The Scottish Government consulted last year and announced proposals for a deposit return scheme for Scotland in early May 2019, which will be established using delegated powers in the Climate Change (Scotland) Act 2009.

Justification for taking the powers

121. While all deposit return schemes will be established along the fundamental principle of a redeemable deposit being placed on an item, each scheme will need to be individually designed in order to achieve the desired outcomes. The Department's view is that it is not appropriate for such detail to be set out in primary legislation. While the government has consulted on a deposit scheme for drinks containers, there are other items that could be appropriate to include in such a scheme. As such, it is envisaged that new schemes will be established and schemes amended over time in order to reflect response to the scheme and changes in evidence or policy. If the schemes were set out in the Bill, primary legislation would need to be amended each time a new scheme was established or amended.
122. Whilst flexibility is sought in taking a delegated power, the legislative framework limits the extent of that power. Schedule 8 of the Bill limits the purpose for which deposit return schemes may be established to sustaining, promoting or securing an increase in the recycling or reuse of materials and/or to reduce the incidence of littering or fly-tipping. Further, a deposit scheme can only be made in relation to items that are supplied by way of sale or in connection with the supply of goods or services.

Justification for procedure

123. The Department's view is that establishing a deposit return scheme warrants close Parliamentary scrutiny and time for debate, and so has proposed that the first set of regulations made under the power are subject to the affirmative procedure. Once the first deposit return scheme has been established, the Department does not think such close scrutiny is warranted and proposes subsequent regulations are subject to the negative procedure. Whilst the flexibility of a delegated power is required because of the different items that may be covered by a deposit return scheme, there will be common aspects to all schemes (deposit in the sale price of the item, labelling the item as a deposit item,

collection points, refund of the deposit and the appointment of an administrator to oversee the running of the scheme). Making provision for the affirmative procedure for the first set of regulations ensures this framework has the appropriate level of scrutiny, The Department considers this is not necessary for subsequent schemes which follow the first set of regulations.

124. Making provision for both affirmative and negative procedure, depending on the content of the regulations, is consistent with the parliamentary procedure for other powers used to minimise waste. For example, the parliamentary procedure for regulations under the Climate Change Act 2008 to make provision for charges for single use carrier bags) is affirmative for the first set regulations made and negative thereafter. As with deposit return schemes, the power in the Climate Change Act 2008 allows different provision to be made in relation to different single use carrier bags. Provision for the affirmative procedure for the first set of regulations allows for the appropriate level of scrutiny that is not subsequently required for regulations making provision for different carrier bags but a similar framework which has already been approved.

Clause 53 and paragraph 5 of Schedule 8 - A power to make regulations for the enforcement of requirements under deposit schemes

Power conferred on: in relation to England, the Secretary of State; in relation to Wales, Welsh Ministers and, if Welsh Ministers consent, the Secretary of State; in relation to Northern Ireland, the Department for Agriculture, Environment and Rural Affairs (DAERA) and, if DAERA consents, the Secretary of State (together, the “relevant national authority”)

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative or Negative Resolution Procedure depending on factors set out in the clause

Context and purpose

125. Clause 53 and paragraph 5 of Schedule 8 confer a delegated power on the relevant national authority to make regulations to make provision about the enforcement of requirements under deposit schemes. The context and purpose of this power is the same as is set out in relation to clause 53 and paragraphs 1 to 4 of Schedule 8 (a power to make regulations establishing deposit schemes) and is not repeated here.

Justification for taking the powers

126. The power enables regulations to confer enforcement functions on persons, including on a deposit return scheme administrator. The functions are designed to equip that person with an effective and proportionate suite of enforcement powers suitable to the particular deposit return scheme. This includes provision for civil sanctions (fixed monetary penalties, discretionary requirements, stop notices and enforcement undertakings) for a failure to comply with requirements imposed under a deposit scheme or the regulations and for criminal offences (summary offence punishable with a fine) for a failure to comply with a civil sanction. The intention is to tailor the enforcement powers to each deposit return scheme established by regulations, as although there may be common provisions applicable to all schemes, what may be appropriate in relation to one scheme may not be appropriate in all cases to others. For example, it may not be appropriate to confer

enforcement functions on one scheme administrator but perfectly appropriate to do so for another. If the enforcement provisions were set out in the Bill, primary legislation would need to be amended in order to make the appropriate provision.

127. The Department also considers taking a power to make provision for enforcement in regulations is necessary as it will allow separate provision about enforcement to be made for each of England, Northern Ireland and Wales.

Justification for procedure

128. The powers allow for the creation of new criminal offences and civil sanctions. The Department's view is that this warrants close Parliamentary scrutiny and time for debate, and so has proposed that the first set of regulations or regulations that create new offences or sanctions, or increase the amount or the maximum amount of a fine or monetary penalty, or change the basis on which an amount or maximum amount of a fine or monetary penalty is to be determined, are subject to the affirmative procedure. Otherwise the Department considers such close scrutiny is not warranted and proposes that where the regulations are making different provision (such as appointing a different person to enforce the regulations, making different provision in relation to records or information or amending aspects of civil sanctions for which provision has already been made for) this should be subject to the negative procedure.

129. The Departments considers that making provision for both affirmative and negative procedure, depending on the content of the regulations, is appropriate. It is consistent with the parliamentary procedure for comparable powers aimed at minimising waste. For example, the procedure for regulations made under section 77 of, and Schedule 6 to the Climate Change Act 2008 (charges for single use carrier bags) are affirmative or negative depending on the provision in question. Section 77(4) of the Climate Change Act 2008 requires the affirmative procedure if regulations impose new civil sanctions or increase the amount of a monetary penalty. Otherwise, those regulations are subject to the negative procedure.

Clause 54 and Schedule 9 - A power conferred on the relevant national authority to make regulations about charges for single use plastic items.

Power conferred on: in relation to England, Secretary of State; in relation to Wales, Welsh Ministers; in relation to Northern Ireland, the Department of Agriculture, Environment and Rural Affairs (DAERA) (together "the relevant national authority")

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative or Negative Resolution Procedure depending on factors set out in the clause

Context and purpose

130. A "single-use item" is a manufactured item which is likely to be used only once, or used only for a short period of time, before being disposed of. There are significant and ongoing environmental issues arising from the use and inappropriate disposal of single-use plastic items. This is often due to the fact that consumers do not value them once used and then dispose of them via black-bin waste or littering. Single-use plastic items are not commonly recycled.

131. The purpose of this power is to enable the relevant national authority to impose charges on single-use plastic items to incentivise consumers to choose more sustainable alternatives. This power builds on the success of the single-use carrier bag charge, as evidenced by the reduction in the use of these items by 90% since its introduction. This demonstrates the difference even relatively small incentives can make. The Government wants to incentivise citizens not to choose single-use plastic items, and to encourage citizens to switch to reusable alternatives rather than simply using these items just once.

Justification for taking the power

132. Given the many different kinds of single-use plastic items available, the Department's view is that details as to the charge, the item and the kind of administrator required to oversee requirements relating to the charge, are not appropriate to be set out in primary legislation. If provision to impose a charge on a single-use plastic item were in the Bill, each time a charge was set on a new item, or the amount of the charge imposed changed, primary legislation would need to be amended and a legislative vehicle and Parliamentary time would need to be found.

133. However, care has been taken to ensure the clause places limits on the extent of the power. A charge can only be set in relation to plastic single-use items that are supplied in connection with goods or services. For example, a container or other packaging in which goods are placed at the point of sale and which are supplied in connection with those goods, such as a plastic take-away food container or plastic cutlery. The purpose of supplying the single-use plastic item is also limited to that of enabling the goods purchased to be taken away, used or consumed or to enable the goods to be delivered.

134. This provision is consistent with limitations on the delegated power in Schedule 6, Paragraph 2 to the Climate Change Act 2008 to charge for single-use carrier bags. Regulations made under that power are limited to requiring sellers of goods to charges for single-use carrier bags supplied where the goods are sold for the purpose of enabling the goods to be taken away, or delivered.

Justification for procedure

135. The first set of regulations made under the power is subject to the affirmative procedure. This gives Parliament the opportunity to scrutinise the first use of the power imposing a charge on a single-use plastic item. Regulations imposing a charge on a new single-use plastic item is also subject to the affirmative procedure. Otherwise, regulations are subject to the negative procedure.

136. The Department's reason for requiring the affirmative procedure in relation to new single-use plastic items is that it provides a further safeguard that is not necessary in relation to, for example, powers to establish deposit return schemes or impose charges on single-use carrier bags. This further safeguard is necessary because single-use plastic items do not need to be made wholly of plastic so there is, potentially, a larger number of single-use items in relation to which regulations could be made. The Department considers that this warrants closer Parliamentary scrutiny and time for debate, and so has proposed that regulations imposing a charge in relation to a new item (a plastic take-away container as opposed to a disposable cup made of paper but with a plastic lining) should also be subject to the affirmative procedure. This will give Parliament the opportunity to scrutinise how that power is used in relation to different items.

137. Making provision for both affirmative and negative procedure, depending on the content of the regulations, is consistent with the Parliamentary procedure for other powers aimed at minimising waste. For example, the procedure for regulations made under section 77 of, and Schedule 6 to the Climate Change Act 2008 (charges for single use carrier bags) are affirmative or negative depending on the provision in question. Provision is made for the affirmative procedure for the first set of regulations made under the Climate Change Act powers, which allows for an appropriate level of scrutiny that is not subsequently required for regulations making provision for other carrier bags.

Clause 54 and paragraphs 8 and 9 of Schedule 9 - A power conferred on the relevant national authority to enforce provisions in regulations imposing a charge for single use plastic items.

Power conferred on: in relation to England, Secretary of State; in relation to Wales, Welsh Ministers; in relation to Northern Ireland, the Department of Agriculture, Environment and Rural Affairs (DAERA) (together “the relevant national authority”)

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative or Negative Resolution Procedure depending on factors set out in the clause

Context and purpose

138. Clause 54 and paragraphs 8 and 9 of Schedule 9 confer a delegated power on the relevant national authority to enforce provisions made in regulations imposing a charge on single-use plastic items. The context and purpose of this power is the same as is set out for Clause 54 and paragraphs 1 to 7 of Schedule 9 and is not repeated here.

139. The power enables regulations to confer enforcement powers on the person appointed to administer provision made in regulations imposing the charge on single-use plastic items. Provision can be made for an administrator to require the production of documents or information and to question a seller. Regulations may also make provision for imposing civil sanctions (fixed monetary penalties, discretionary requirements, stop notices and enforcement undertakings) for breaches of the regulations and for a failure to assist an administrator.

Justification for taking the power

140. The Department considers taking a power to make provision for enforcement in regulations justified. It is intended that the provision of enforcement powers will be tailored to each set of regulations imposing a charge as what may be appropriate in relation to one item may not be appropriate in others. A power to make regulations will also facilitate the making of separate provision about enforcement for each of England, Northern Ireland and Wales.

141. Safeguards on the use of the power include provision for appeals against civil sanctions and a requirement that any power to require the production of documents or information is exercisable only where there is a reasonable belief that there has been a failure to comply with a requirement of the regulations.

Justification for procedure

142. The first regulations made under the power are subject to the affirmative procedure. The affirmative procedure also applies to regulations that impose civil sanctions, increase the amount of a monetary penalty or change the basis on which that amount is to be determined given that these matters warrant close Parliamentary scrutiny and time for debate. Otherwise, regulations are subject to the negative procedure. Provision attracting the negative procedure would include the appointment of a different person to enforce provision made by the regulations or provision for the production of documents or information.

143. The Department considers making provision for both affirmative and negative procedure, depending on the content of the regulations, is appropriate. It is consistent with the parliamentary procedure for comparable powers aimed at minimising waste. For example, the procedure for regulations made under section 77 of, and Schedule 6 to, the Climate Change Act 2008 (charges for single use carrier bags) are affirmative or negative depending on the provision in question. Section 77(4) of that Act also requires the affirmative procedure if regulations impose new civil sanctions or increase the amount or the maximum amount of a monetary penalty, or change the basis on which an amount or maximum amount of a monetary penalty is to be determined. But provision for the appointment of a different person to enforce provision made by the regulations or provision for the production of documents or information, for example, would be subject to the negative procedure. The Department considers that this strikes the appropriate balance.

Clause 55- Amendment to the Climate Change Act 2008 to confer power on the relevant national authority to require sellers to register with an administrator and to make provision about the registration process.

Power conferred on: in relation to England, Secretary of State; in relation to Northern Ireland, the Department of Agriculture, Environment and Rural Affairs (DAERA) (together "the relevant national authority")

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative or Negative Resolution Procedure depending on factors set out in the clause

Context and purpose

144. Current powers in section 77 of, and Schedule 6 to, the Climate Change Act 2008 make provision by regulations for charging for the supply of single use carrier bags by sellers of goods. This power (created by means of an amendment to the Climate Change Act 2008) enables the Secretary of State and DAERA to require sellers of single use carrier bags to register with an administrator and to pay a registration fee.

145. The purpose of registration is to enable an accurate record to be kept of those who are required to charge for single-use carrier bags. Requiring payment of a registration fee will ensure that the costs of administering (record keeping, the database system and compliance checks) a carrier bag charge are borne by sellers of single-use plastic carrier bags rather than by government. The registration fee may be set at an amount sufficient to cover the costs of the administrator in performing its functions under the regulations, which

accords with the polluter pays principle (those who produce pollution should bear the costs of managing it).

146. Some sellers may respond to the new duty to register (and pay a registration fee) by ceasing to provide single-use plastic carrier bags. Such action would be consistent with the reduction in single-use plastic bag use since regulations made under the single-use carrier bag power were introduced and which has seen some supermarket sellers removing single-use plastic bags from their stores. It would also be consistent with government policy set out in its 25 Year Plan to eliminate avoidable plastic waste.

Justification for taking the power

147. The legislative framework for charging for carrier bags is already set out in secondary legislation made under the Climate Change Act 2008. Taking a power to make regulations to make provision for the registration of sellers with the administrator therefore is consistent with the existing legislative framework. Paragraph 6 of Schedule 6 to the Climate Change Act 2008 already makes provision for the appointment of an administrator through regulations. This power will allow those regulations to also make provision for the registration of sellers with the administrator. The amount of the registration fee is limited to the amount sufficient to cover the costs of the administrator in performing its functions under the regulations,

Justification for procedure

148. Regulations made under section 77 of, and Schedule 6 to, the Climate Change Act 2008 are subject to the affirmative or negative procedure depending on the provision in question. The first regulations made under those powers are subject to the affirmative procedure as are subsequent regulations if they impose new civil sanctions, increase the monetary penalty, change the basis on which such an amount is to be determined, or modify primary legislation. Otherwise regulations under Schedule 6 of the CCA 2008 are subject to negative procedure.

149. As there are existing carrier bag charge regulations in both England and Northern Ireland which have received parliamentary approval through the affirmative resolution procedure, it is proposed that exercise of powers to require registration and set a registration fee will be subject to negative procedure. The regulations will largely make administrative provision and the amount of fees that can be set is limited by the clause to matters connected with that registration, for example, record keeping, keeping a database system and making compliance checks. The Department considers this provides the appropriate level of parliamentary scrutiny.

Clause 56- Delegated power for Secretary of State to specify in regulations what is “recyclable household waste” for the purposes of the separate collection of household waste (see new section 45A(9)(b), new section 45AZA(9)(b))

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

150. In the Government's 25 Year Environment Plan, the Government has committed to increasing the quantity and quality of what is collected for recycling. Increasing and improving the quality of recycling will help to reduce the amount of waste that goes to landfill or to incineration and will ensure that more of this is reprocessed to make new materials.
151. The Department's view is that the current legislative framework does not provide sufficient drivers to increase recycling above current levels. For example, the current UK Waste from households recycling rate is around 45% and has been at about this level for some years. The estimated recycling rate for businesses, charities and public bodies is around 35-40%. As a result, the Department's view is that the current legislation needs to be amended and strengthened for this increase in recycling levels to happen. This position was overwhelmingly supported in the recent consultation on consistency of recycling.
152. The current legislation is the Environmental Protection Act 1990 ("EPA1990"). Clause 56 amends the EPA 1990 by substituting section 45A with a new section 45A and inserting new sections 45AZA to 45AZG. New sections 45A, 45AZA and 45AZB concern the separate collection of household waste from (in the case of section 45A) households and (in the case of section 45AZA), non-domestic households. New section 45AZB concerns the separate collection of industrial and commercial waste where the waste is similar in nature and composition to household waste. New section 45AZC concerns exemptions. New section 45AZD concerns the duties of waste collectors. New section 45AZE concerns guidance. New section 45AZF concerns compliance notices and new section 45AZG concerns appeals against compliance notices.
153. New section 45A requires arrangements made under section 45(1) EPA 1990 for the collection of household waste by certain local authorities, known as waste collection authorities ("WCAs"), to meet conditions set out in subsections (3) to (8).
154. Similarly, new section 45AZA requires arrangements made for the collection of household waste from non-domestic premises to meet conditions set out in sub-sections (3) to (7).
155. The conditions in new section 45A and 45AZA concern "recyclable household waste". Household waste is recyclable household waste if (see (both in section 45A and 45AZA) sub-section (9)) it is within any of the recyclable waste streams and it is of a description specified in regulations. The recyclable waste streams are glass, metal, plastic, paper and card, food waste and garden waste for domestic premises (see section 45A (10)) and glass, metal, plastic, paper and card, and food waste for non-domestic premises (see section 45AZA (10)).
156. The purpose of the delegated power is to allow regulations to specify which materials within a recyclable waste stream are suitable for recycling. This is necessary because some materials may, on the face of it, fall within a subsection (10) waste stream, but will not, in fact, be suitable for recycling or composting. Specifying the materials that fall within each recyclable waste stream will ensure different types of recyclable waste are kept separate from other (non-recyclable) waste thereby ensuring the quality of the recycling materials collected is not adversely affected.

Justification for taking the powers

157. A delegated power is required because of the need to describe the kind of materials which make up each recyclable waste stream. This detail is better suited to secondary legislation than being set out in primary legislation because the types of materials included in each recyclable waste stream are likely to change on an ongoing basis over time as the recyclability of materials changes. By way of example, one of the recyclable waste streams is plastic (see section 45A(10)(c) and section 45AZA(10)(c)). However, not all plastics are currently suitable for recycling and so the secondary legislation may set out that plastic, does not include plastic film. Similarly, Pyrex, although it is made of glass, cannot currently be recycled with other glass. The delegated power is therefore needed to ensure that the recyclable waste streams keep pace with technological developments.

Justification for taking the procedure

158. The Department considers that the negative resolution procedure gives Parliament the appropriate level of scrutiny and is consistent with the procedure applicable to other powers defining waste in the EPA 1990. See, for example, the power in section 75(7)(d) and (8), which allows regulations to describe waste that is excluded from the definition of “commercial waste”. Also, the power is limited. It only allows for the materials falling within the recyclable waste stream to be described in secondary legislation. The recyclable waste streams themselves are set out in the primary legislation.

Clause 56- Delegated power for Secretary of State to specify in regulations the premises which are “relevant non-domestic premises” for the purposes of separate collection of recyclable household waste under section 45AZA (section 45AZA(11)(d))

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

159. The context and purpose for this power is the same as that set out for the delegated power described above (power for Secretary of State to specify in regulations what is “recyclable household waste” for the purposes of the separate collection of household waste (see new section 45A(9)(b), new section 45AZA(9)(b)).

160. Household waste is not just waste from domestic premises. Section 75(5) EPA 1990 defines “household waste” as waste from a domestic property, a caravan, a residential home, a premises forming part of a university or school or other educational establishment or a premises forming part of a hospital or nursing home. However, there is a power in section 75(8) EPA 1990, which enables the Secretary of State to provide that waste of a particular description should be treated as being household waste, industrial waste or commercial waste.

161. As explained above, clause 56(4) inserts new section 45AZA into EPA 1990. This concerns arrangements for the separate collection of household waste from ‘relevant non-domestic premises’. These are (see section 45AZA(11)) a residential home, a university,

school or other educational establishment, a hospital or a nursing home. Clause 56(4) also inserts new section 45AZA(11)(d) into EPA 1990. This power allows the Secretary of State to add to the types of premises that are “relevant non-domestic premises” for the purposes of section 45AZA.

Justification for taking the powers

162. The Department’s view is that it is necessary to take this power to ensure that, should waste that could come from a different type of premises be defined as “household waste” under the power in section 75(8) EPA 1990, the Secretary of State has the power to specify those premises as “relevant non-domestic premises” for the purposes of new section 45AZA. Without this power, those premises would not be caught by the definition of “relevant non-domestic premises” in the list set out in the primary legislation (in new section 45AZA(11)).

163. The Department’s view is that the power in new section 45AZA(11)(d) supplements the existing power in section 75(8) EPA 1990 to prescribe what is meant by household waste by ensuring the requirement for the separate collection of household waste from non-domestic premises keeps pace, and is consistent, with any changes to that meaning.

Justification for taking the procedure

164. The Department considers that the negative procedure gives Parliament the appropriate level of scrutiny. This is consistent with the procedure applicable to the power in section 75(8) EPA 1990, with which the power in new section 45AZA is designed to keep pace. As such, the Department believes it is appropriate for the new power to also be subject to negative parliamentary procedure. The Department considers the power is narrow enough (only non-domestic premises may be added to the list) but as an additional safeguard, new section 45AZA(12) prohibits the Secretary of State from specifying a domestic premises (within the meaning of section 75(5)(a) EPA 1990) as a relevant non-domestic premises.

Clause 56- Delegated power for Secretary of State to specify in regulations what is “recyclable relevant waste” for the purposes of the separate collection of commercial and industrial waste (see section 45AZB(9)(b)).

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

165. The context and purpose is the same as for the delegated power in new section 45A(9) and 45ZAZA(9) and set out in Delegated power for Secretary of State to specify in regulations what is “recyclable household waste” for the purposes of the separate collection of household waste (see new section 45A(9)(b), new section 45AZA(9)(b)).

166. Clause 56(4) inserts new section 45AZB into the EPA 1990. This new section places conditions on arrangements made for the separate collection of industrial or commercial waste from premises. More particularly, industrial or commercial waste that is similar in

nature and composition to household waste (relevant recyclable waste). “Relevant recyclable relevant waste” is waste falling within a recyclable waste stream and of a description specified in regulations made by the Secretary of State.

167. The recyclable waste streams (defined in section 45AZB(10)) are glass, metal, plastic, paper and card and food waste. The power in new section 45AZB(9) enables the Secretary of State to describe in secondary legislation what kind of material in each waste stream is “recyclable relevant waste” for the purposes of new section 45AZB. This is necessary because some materials may, on the face of it, fall within a subsection (10) waste stream, but will not, in fact, be suitable for recycling. The purpose of the power is, therefore, to ensure that recyclable waste is kept separate from non-recyclable waste thereby ensuring the quality of the recycling materials collected is not adversely affected.

Justification for taking the powers

168. A delegated power is required because of the need to describe the kind of materials which make up each recyclable waste stream. This detail is better suited to secondary legislation than being set out in primary legislation because the types of materials included in each recyclable waste stream are likely to change on an ongoing basis over time as the recyclability of materials changes. By way of example, one of the recyclable waste streams is plastic (see section 45AZB(10(c))). However, not all plastics are currently suitable for recycling and so the secondary legislation may set out that plastic does not include a plastic that is not presently recyclable. Similarly, not all glass can currently be recycled with other glass but this may change over time as technology and processes change and develop. The delegated power is therefore needed to ensure that recyclable waste streams keep pace with technological developments and that detail is appropriate for secondary legislation.

Justification for taking the procedure

169. The Department considers that the negative resolution procedure gives Parliament the appropriate level of scrutiny and is consistent with the procedure applicable to other powers defining waste in the EPA 1990. See, for example, the power in section 75(7)(d) and (8), which allows regulations to describe waste that is excluded from the definition of “commercial waste”.

170. By way of safeguard, the power is limited to setting out the detail of exactly what is meant by recyclable relevant waste (similar to setting the detail as to what is meant by household waste, commercial waste and industrial waste under section 75(8)) in respect of each of the core materials). This matter warrants a degree of parliamentary oversight but, since the implications are limited and the detail is technical, this does not, in the Department’s view, require the affirmative resolution procedure.

Clause 56- Amendments to delegated powers in the Environmental Protection Act 1990 to allow the Secretary of State to make provision for exemptions in relation to household waste and separate collection (section 45AZC(1))

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure

Context and purpose

171. The context and background is the same as that set out above regarding the power for the Secretary of State to describe in secondary legislation types of waste that are “recyclable household waste” for the purposes of section 45A(9) and section 45AZA(9) EPA 1990 (the delegated power for Secretary of State to specify in regulations what is “recyclable household waste” for the purposes of the separate collection of household waste (see new section 45A(9)(b), new section 45AZA(9)(b))).
172. The powers set out in section 45AZC(1) allow the Secretary of State to provide for exemptions from the separate collection duties set out in section 45A to section 45AZB. Under section 45AZC(1)(a) the Secretary of State may provide for exemptions from the requirements to collect the recyclable waste streams individually separated. Under section 45AZC(1)(b) the Secretary of State may provide for exemptions from the requirements in section 45AZA concerning separate collection of recyclable household waste from non-domestic premises) or section 45AZB (concerning separate collection of recyclable industrial and commercial waste, which is similar in nature and composition to household waste either entirely or in respect of a particular waste stream, for example, food waste. Section 45AZC(1)(c) enables the Secretary of State to create exemptions from section 45AZA and section 45AZB in respect of specific waste streams

Justification for taking the powers

173. The Department’s view is that, as technology develops, it will be possible to collect certain recyclable waste streams together (co-mingled) rather than separately without there being any significant impact on the quality of recycling collected. In some cases, current technology already allows (for example) plastics and metal to be collected together and then mechanically separated without any significant impact on recycling quality. In these circumstances, the Department considers the Secretary of State should be able to create exemptions by regulations from the general duty to collect the recyclable waste streams separately. This will enable the Secretary of State to respond to technological developments and reduce obligations on WCAs, where the additional obligation to collect recyclable household waste and recyclable relevant waste separately will not lead to a significant environmental benefit or significantly better recycling quality.
174. It is the Department's view that these exemptions are best dealt with in secondary legislation in order to allow for flexibility as technology develops. It is also the Department's view that exemptions are best dealt with in secondary legislation in order to allow for flexibility for certain businesses. For example, small businesses might need to be exempt for a fixed period of time to allow them a longer period to adapt to new requirements and new technologies. It may also be impractical for some businesses to separate out a specific recyclable waste stream, such as food waste. The exemptions may also need to be varied as and when technology develops and changes.
175. The Secretary of State can only set an exemption from the requirement that recyclable household waste or recyclable relevant waste must be collected separately where the Secretary of State is satisfied that by doing so it will not significantly reduce the potential for the waste to be recycled or composted. There is also an additional safeguard in that the Secretary of State must consult the Environment Agency, the English waste collection authorities, English waste disposal authorities and anyone else the Secretary of State considers appropriate before making regulations under new section 45AZC(1).

Justification for taking the procedure

176. The Department proposes that regulations made under new section 45AZC(1) should be subject to the affirmative procedure. Depending on the exemption, the regulations will have an impact on local authorities, other public bodies and industry and will set exemptions to the duties set out in primary legislation. In that context, a higher degree of parliamentary scrutiny via the affirmative procedure is, in the Department's view, appropriate.

Clause 56-A delegated power to allow the Secretary of State to amend s45A and s45AZA to add further recyclable waste streams and to make further provision about recyclable waste streams (section 45AZC(3))

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure (Henry VIII power)

Context and purpose

177. The context and purpose for this power is the same as that set out for the delegated power for Secretary of State to specify in regulations what is "recyclable household waste" for the purposes of the separate collection of household waste (see new section 45A(9)(b), new section 45AZA(9)(b)).

178. Clause 56(4) introduces new obligations on Waste Collection Authorities ("WCAs") and businesses to collect specific recyclable waste streams separately from other household waste and/or relevant waste and for those recyclable waste streams to be collected separately (so far as it is not technically or economically practicable to do so or there is no significant environmental benefit).

179. The recyclable waste streams are set out in primary legislation (see new sections 45A(10), 45AZA(10) and 45AZB(10)). Technology in the field of recycling is constantly developing and it is likely that additional recyclable waste streams will be possible in the not too distant future.

Justification for taking the powers

180. It is not possible to predict at this stage which new recyclable waste streams will become available and when. For example, it is currently possible to recycle textiles and advances in technology may make the separate collection of textiles for recycling something the Department could require in the future. It is therefore important that the Secretary of State is able to add further recyclable waste streams and make provision about the extent to which the materials can be collected with other recyclable waste streams (co-mingling). The Department, therefore, is strongly of the view that the recyclable waste streams set out in the primary legislation should not be fixed without the ability to take account of technological developments in the future.

181. The power in new section 45AZC(3) to add further recyclable waste streams is, therefore, a (Henry VIII) power to amend the primary legislation by secondary legislation.

But the Department has placed a number of safeguards and conditions upon the exercise of this power, as set out in new section 45AZC(4).

182. The conditions in section 45AZC(4) are (i) that the waste stream is suitable for recycling or composting and there is an environmental benefit from such recycling or composting (ii) there must be a market for such waste following its separate collection and (iii) all English waste collection authorities must be able to make arrangements to collect it. It is only when these three conditions are satisfied that the primary legislation can be amended (and only then by adding a specific waste stream).

183. A further safeguard is the duty in new section 45AZC(5) on the Secretary of State to consult the Environment Agency, English waste collection authorities, English waste disposal authorities and anyone else the Secretary of State considers appropriate before adding recyclable waste streams. This is to ensure that waste collection authorities (who collect household waste) and the Environment Agency (who will be the regulator for the new duties) are satisfied with what is being proposed. In particular, waste collection authorities must be consulted to ensure the condition in section 45AZC(4)(b) can be satisfied, which is that English waste collection authorities can make arrangements for collecting waste in that waste stream.

Justification for taking the procedure

184. The Department proposes that the regulations made under new section 45AZC(3) should be subject to the affirmative procedure. This will ensure Parliament has the opportunity to scrutinize any additional recyclable waste streams and consider the impact and effect this may have on WCAs and/or businesses.

Clause 56: A delegated power to allow the Secretary of State to issue statutory guidance in relation to s45A and s45AZA Environmental Protection Act 1990.

Power conferred on: Secretary of State

Power exercised by: Issuing statutory guidance

Parliamentary Procedure: No parliamentary procedure

Context and purpose

185. The context and background is similar to that which is set out above regarding Delegated power for Secretary of State to specify in regulations what is “recyclable household waste” for the purposes of the separate collection of household waste (see new section 45A(9)(b), new section 45AZA(9)(b))

186. This power, in new section 45AZE(1) enables the Secretary of State to issue statutory guidance about the duties imposed by sections 45 to 45AZD EPA 1990. The purpose of the power is to allow for guidance which will assist those subject to the new requirements set out in sections 45A to 45AZB with how to best comply with their legal obligations. Guidance will also help ensure that those subject to the new obligations understand fully what they must do to meet those obligations and comply with the law.

187. New section 45AZE(2) sets out the matters which the guidance may deal with. Guidance may make provision for the circumstances under which it may not be technically

or economically practicable, or where there is no significant environmental benefit, in collecting the recyclable waste streams separately. It may also include details regarding best practice on the frequency with which household waste other than food waste should be collected. This guidance might also set out how WCAs should complete a written assessment of why it is not technically, economically practicable, or where there is no significant environmental benefit, to collect the waste separately. Lastly, the guidance will also assist the Environment Agency when deciding on the correct circumstances to issue a compliance notice should this be necessary.

Justification for taking the powers

188. As set out above, it would not be appropriate to have the kind of detail necessary to explain the matters listed above (for example, about best practice and the optimal frequency of household waste collection) in legislation, especially given that this is an area where technology keeps developing and the detail changes over time. However, the Department considers such information helpful for persons and businesses affected by these measures and thinks it would assist policy implementation. Accordingly, the Department thinks it appropriate that this detail is included in statutory guidance.

Justification for taking the procedure

189. The Department's view is that statutory guidance containing technical, practical and operational details does not require parliamentary oversight. There are statutory requirements to consult in relation to guidance before it is issued, which will ensure that interested persons are given the chance to give their views on the proposed guidance. The consultation requirements will ensure a degree of stakeholder involvement and transparency short of parliamentary scrutiny.

Clause 57: A delegated power to make regulations for the purpose of tracking relevant waste and establishing an electronic system for that purpose.

Power conferred on: Secretary of State, Welsh Ministers and Scottish Ministers

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative for the first set of regulations made by each national authority, and for subsequent regulations which include the creation of a criminal offence, an increase to the maximum penalty for a criminal offence, the creation of a civil sanction or the amendment or revocation of primary legislation or retained direct principal EU legislation Otherwise negative procedure. Henry VIII power

Context and purpose

190. Systems for tracking controlled waste and extractive waste (from mining operations and quarries) are largely paper based. Keeping track of waste relies on "waste transfer notes", which are separate documents to record each individual waste transfer but not the overall movement of that waste. Companies are required to retain waste transfer notes for two years. For hazardous waste, a system of consignment notes is in place. These must be completed when hazardous waste is removed from any premises.

191. To replace the paper based waste transfer note system, the Serious and Organised Waste Crime Review published in 2018¹ recommended that a mandatory electronic waste tracking system should be set up, to enable the regulators to more easily track waste and detect illegal activity (such as illegal dumping and landfill tax fraud).
192. The powers in this clause allow the appropriate national authority (Secretary of State, Welsh Ministers and Scottish Ministers) to make regulations to establish and make provision for that system. In particular, the clause provides that the regulations may impose requirements on relevant waste controllers in relation to entering information onto the system. Relevant waste controllers are defined as persons who are subject to the waste duty of care for controlled waste in section 34(1) of the EPA 1990 (but are not in relation to occupiers of domestic properties and their own household waste) or are in control of waste from mines or quarries, or who export relevant waste.
193. The waste tracking regulations will be able to require information about persons in control of the waste, not just the waste itself. This will make it easier to determine who is (or was) responsible for the waste at any given time. Without this information on the system, it would be much more difficult for the regulators to determine who was responsible for any illegal activity associated for the waste (for example who was in charge of the waste when it was illegally dumped).
194. It is appropriate for regulations to be able to impose fees and charges on users of the system to pay for its establishment, operation and maintenance. This will ensure the costs of tracking relevant waste are paid by the persons who are producing that waste. A properly funded waste tracking system will allow government and regulators to keep track of waste flows and tackle waste crime.
195. The regulations may make consequential and supplementary amendments to primary legislation or retained direct EU legislation. This is necessary to ensure that waste tracking works effectively across various pieces of waste legislation, including primary legislation. Consequential amendments to primary legislation will be required, for example to aspects of the waste duty of care and associated fixed penalty notice in sections 34 and 34A of the EPA 1990, so that the primary legislation is consistent with the regulations and reflects the new electronic requirements.
196. The regulations may make provision about enforcement of waste tracking requirements, including the creation of criminal offences punishable by a fine and civil sanctions.
197. In the majority of cases, the Department believes civil sanctions (including fixed and variable monetary penalties) will be an appropriate and sufficient way to enforce waste tracking obligations. The power to create civil sanctions is also necessary as, in the majority of cases, omissions in relation to waste tracking duties are unlikely to warrant prosecution and criminal sanction. In that context, the Department considers a civil sanction regime more appropriate. Such civil sanction regime is also necessary to ensure there is enforcement and electronic waste tracking requirements are complied with.

¹ <https://www.gov.uk/government/publications/serious-and-organised-waste-crime-2018-review>

198. However, the Department does not believe it would be appropriate for more serious breaches of obligations under the regulations, for example the deliberate falsification of large amounts of records in relation to hazardous waste, to only be punished by civil sanctions rather than by way of a criminal offence (punishable by a fine). It would be up to the court to determine the appropriate fine amount in any given case where a person was found guilty of an offence made under the regulations. In those more serious cases only, it is necessary to have the threat of a criminal sanction to ensure that there is a proportionate and dissuasive deterrent in place for those most serious offences. The waste tracking system could not function properly without such enforcement mechanisms and as such the Department views these powers as appropriate and necessary.

Justification for taking the powers

199. The way in which sites manage waste is currently controlled through secondary legislation. For example, in England and Wales, this is achieved by the Environmental Permitting (England and Wales) Regulations 2016. Scotland has equivalent secondary legislation. The Department believes that it is appropriate that secondary legislation also makes provision for how waste is moved between those sites.

200. The current written waste transfer note requirements and associated consignment note requirements for hazardous waste are currently in secondary legislation (in the Waste (England and Wales) Regulations 2011, the Hazardous Waste (England and Wales) Regulations 2005, the Hazardous Waste (Wales) Regulations 2005 and (for Scotland), the Special Waste Regulations 1996). The Department believes it is appropriate that the detailed provisions for electronic waste tracking, which will replace those paper based systems, are also in secondary legislation.

201. Relevant waste controllers will already have (largely paper based) duties under current legislation. The power will allow regulations to impose similar requirements (also imposed by secondary legislation) in relation to electronic waste tracking. Technology and waste streams change over time, and it is appropriate for the details of the waste tracking system and the information entered onto that system to be in secondary legislation.

202. The Department views it as appropriate that fees for waste tracking should be set out in secondary legislation or a charging scheme prescribed by the Regulator, rather than primary legislation. As the details of waste tracking, and the electronic system established for it, will be set out in secondary legislation, it is appropriate that the fees relating to that system to also be set out in secondary legislation or a charging scheme prescribed by the regulator. Further, it is not possible to determine the exact fees and charges required in relation to waste tracking until the waste tracking system has itself been established by regulations.

Justification for taking the procedure

203. There are a number of triggers for the affirmative procedure in the enabling power. These are the first set of regulations made under these powers by each national authority, the creation of criminal offences punishable by a fine (which would not be limited in legislation, but the court would determine the appropriate fine amount in any given case), increasing the maximum penalty for a criminal offence, and amendments to or revocations of primary legislation or retained direct principal EU legislation and the creation of civil sanctions. That first set of regulations will contain the substantive requirements for waste

tracking and the electronic system that establishes it. The increased scrutiny of affirmative procedure is considered appropriate in these particular instances.

204. For minor changes to the electronic waste tracking system as it develops, for example changes to fees or to the type of information relevant waste controllers must provide, the Department believes that the negative procedure is appropriate as these incremental amendments are not considered significant enough to warrant the increased scrutiny of affirmative procedure.

205. The affirmative triggers in this clause are in line with the constraints in section 2(9) of the Pollution Prevention and Control Act 1999, under which the Environmental Permitting (England and Wales) Regulations 2016 were made. Waste tracking will work alongside the existing environmental permitting system and associated legislation.

Clause 58 – A delegated power to allow the Department of Agriculture, Environment and Rural Affairs (DAERA) to make regulations for the purpose of tracking relevant waste and establishing an electronic system for that purpose and making related provision including revoking or amending enactments and provision about enforcement, and criminal offences

Power conferred on: Department for Agriculture, Environment and Rural Affairs (DAERA)

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative for the first set of regulations, the creation of a criminal offence, increasing the maximum penalty for a criminal offence, the creation of civil sanctions or the amendment or revocation of primary legislation or retained direct principal EU legislation. Otherwise negative procedure. Henry VIII power

Context and purpose

206. The context and purpose for this power is substantially the same as the power for the appropriate national authority in Great Britain. Please see the explanation above for clause 57.

207. The waste duty of care is contained in Article 5 of the Waste and Contaminated Land (Northern Ireland) Order 1997. The detailed requirements for waste transfer notes are also contained in secondary legislation in Northern Ireland.

208. The powers in this clause allow DAERA to make regulations to establish and make provision for an electronic waste tracking system. In particular, the regulations may impose requirements on relevant waste controllers in relation to entering information onto the system. Relevant waste controllers are defined as persons who are subject to the waste duty of care for controlled waste in Article 5(1) of the 1997 Order, are in control of waste from mines or quarries, or who export relevant waste. The regulations may make provision about enforcement of waste tracking requirements, including the creation of criminal offences punishable by a fine and civil sanctions.

Justification for taking the powers

209. The justifications for taking these powers are substantially similar to those of the Great Britain clause. Current written transfer note requirements and associated consignment

note requirements for hazardous waste are currently in secondary legislation in Northern Ireland. The Department believes it is appropriate that the detailed provisions for electronic waste tracking, which will replace those paper based systems, are also in secondary legislation.

Justification for taking the procedure

210. There are a number of triggers for the affirmative procedure in the enabling power. These are the first set of regulations made under these powers, the creation of criminal offences punishable by a fine (which would not be limited in legislation, but the court would determine the appropriate fine amount in any given case), increasing the maximum penalty for a criminal offence, amendments to or revocations of primary legislation or retained direct principal EU legislation and the creation of civil sanctions.
211. The Department believes that these affirmative triggers ensure that when the regulations make more significant changes to the law, those regulations must be subject to the increased parliamentary scrutiny of the affirmative procedure. This also reflects the affirmative triggers in the Great Britain clause.
212. For minor changes to the electronic waste tracking system as it develops, for example changes to fees or to the type of information relevant waste controllers must provide, the Department believes that the negative procedure is appropriate. This is because the first set of regulations will require affirmative procedure. That first set of regulations will contain the substantive requirements for waste tracking and the electronic system that establishes it. The increased scrutiny of affirmative procedure is appropriate at that point. However, for subsequent minor amendments, negative parliamentary procedure is considered appropriate as these incremental amendments are not significant enough to warrant the increased scrutiny of affirmative procedure.

Clause 59 – power to make regulations about, or connected with, the regulation of hazardous waste.

Power conferred on: Secretary of State (in relation to England) and Welsh Ministers (in relation to Wales) (together, the “relevant national authority”)

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative with affirmative trigger(s) for the creation of a criminal offence, increasing the maximum penalty for a criminal offence or the creation of civil sanctions

Context and purpose

213. Waste can cause environmental damage and pollution, particularly waste that has hazardous properties. Hazardous waste is therefore subject to additional regulatory requirements and procedures above that of non-hazardous waste. Properties that result in waste being deemed as hazardous include explosive, oxidising, flammable, toxic, carcinogenic, corrosive and infectious (among others). It is clearly appropriate for such wastes, capable of causing significant harm to the environment and human health, to be regulated closely.

214. Much of the law on hazardous waste is derived from EU law. In particular, section 2(2) of the European Communities Act 1972 was used to make the Hazardous Waste (England and Wales) Regulations 2005 and the Hazardous Waste (Wales) Regulations 2005 (“the Hazardous Waste Regulations”). The Hazardous Waste Regulations revoked section 62 of the EPA 1990 (special provision with respect to certain dangerous or intractable waste) in England and Wales, as it was then thought to be unnecessary to retain the powers in section 62 since it was expected that any future regulation of this area would be done under section 2(2). Section 62 is still in force in Scotland.
215. This clause will insert a new section 62ZA into the EPA 1990 which is essentially a replacement section 62 for England and Wales. It will allow the relevant national authority (Secretary of State in England and Welsh Ministers in Wales) to make regulations in relation to hazardous waste. Within the confines of the 62ZA power, this will enable the relevant national authority to continue to be able to amend or replace regulations that govern how hazardous waste is managed, now that the UK has left the EU.
216. The Hazardous Waste Regulations confer various functions on both the relevant national authority and the waste regulation authority. Section 62ZA(5) contains a power to confer functions on the relevant national authority or regulator. It is important for the continuing function of those regulations now that the UK has left the EU that such functions can continue to be conferred on those bodies so that hazardous waste can be properly regulated. This power ensures that such delegations currently contained in the Hazardous Waste Regulations can be amended or added to using the new power now that the UK has left the EU. It is appropriate for the regulations to confer powers on the regulator or the relevant national authority in some circumstances (for example in relation to how hazardous waste controllers should be treated in any given case or whether particular batches of waste should be treated as hazardous or non-hazardous). This power ensures that hazardous waste can continue to be regulated by the relevant national authority and the Environment Agency or Natural Resources Wales as appropriate.
217. In particular sections 62ZA(1)(k) and (l) allow for the regulations to provide that provision can be made in relation to criminal offences and the imposition of civil sanctions respectively. This is to ensure that the current enforcement mechanisms and punishment for offences and civil sanctions as contained in the Hazardous Waste Regulations can continue to be amended as needed now that the UK has left the EU.
218. It is appropriate for particularly serious offences in relation to hazardous waste, which is capable of causing the most environmental damage and harm to human health, to carry a possible custodial sentence. It would not be appropriate in very serious cases simply to fine persons who have deliberately falsified records in relation to hazardous waste as this is potentially a very serious environmental issue. Now that the UK has left the EU, the Department would not wish to water down the enforcement mechanisms of the regulators by having lighter penalties in place for particularly serious criminal conduct in relation to hazardous waste. As such, the Department’s view is, in order to ensure environmental standards are maintained and an appropriate deterrent is in place, imprisonment must continue to be an option in the most serious criminal offences relating to hazardous waste.

Justification for taking the powers

219. Hazardous waste has been regulated by secondary legislation since the Hazardous Waste Regulations were made in 2005, and before that the government had power to regulate hazardous waste through secondary legislation under section 62 of the EPA 1990.

The Department believes it is appropriate to continue to have power to regulate this area through secondary legislation now that the UK has left the EU.

220. The Department's view is that it must be able to regulate hazardous waste to ensure that the environment and human health is not adversely affected. The regime is already set out in secondary legislation, and this power allows the relevant national authority to make appropriate amendments to those regulations to ensure that they are not frozen in time and to ensure the government can continue to regulate effectively hazardous waste now that the UK has left the EU.

221. Under this power, the fixed penalty amounts for breaches of the Hazardous Waste Regulations can be updated so that they continue to be an effective penalty and deterrent. This meets our commitment in the Resources and Waste Strategy to ensure fixed penalty notices can be varied to reflect the changing costs of waste disposal. The current maximum punishment for criminal offences will be maintained. The regulation making power will also enable the Department to meet other commitments set out in the Resources and Waste Strategy in relation to hazardous waste. These include a review of the regulations that apply to hazardous waste, looking at the technical competency requirements of those that describe waste and exploring ways to raise the management of hazardous waste up the waste hierarchy.

Justification for taking the procedure

222. The Hazardous Waste Regulations were made under the negative parliamentary procedure. However, the Department considers it is appropriate that any provision in the regulations that creates criminal offences, increases the maximum penalty for a criminal offence or creates a civil sanction are subject to the increased parliamentary scrutiny of the affirmative resolution procedure.

223. The Department believes that these affirmative triggers ensure that when the regulations make more significant changes to the law, those regulations must be subject to the increased parliamentary scrutiny of the affirmative procedure.

Clause 60- Northern Ireland: power to make regulations about, or connected with, the regulation of hazardous waste.

Power conferred on: DAERA

Power exercised by: Regulations

Parliamentary Procedure: Affirmative Resolution Procedure for the creation of a civil sanction. Otherwise Negative Resolution Procedure.

Context and purpose

224. Waste can cause environmental damage and pollution, particularly waste that has hazardous properties. Hazardous waste is therefore subject to additional regulatory requirements and procedures above that of non-hazardous waste. Properties that result in waste being deemed as hazardous include explosive, oxidising, flammable, toxic, carcinogenic, corrosive and infectious (among others). It is clearly appropriate for such wastes, capable of causing significant harm to the environment and human health, to be regulated closely.

225. Article 30 of the Waste and Contaminated Land (Northern Ireland) Order 1997 gives DAERA the power to make regulations in relation to the treatment, keeping or disposal of waste that DAERA considers is so dangerous or difficult to treat, keep or dispose of that special provision is required for dealing with it. This type of waste is known as hazardous waste. This clause adds to that existing power by allowing DAERA, by regulations, to make provision about, or connected with, the regulation of hazardous waste. Under those regulations, DAERA may also impose civil sanctions (in connection with the regulation of hazardous waste). This is to ensure that the current enforcement mechanisms and punishment for offences and civil sanctions as contained in the Hazardous Waste Regulations (Northern Ireland) 2005 can continue to be amended as needed now that the UK has left the EU.

Justification for taking the power

226. The Hazardous Waste Regulations (Northern Ireland) 2005 contains a fixed penalty notice provision in regulation 46. However, now that the UK has left the EU, DAERA will not have the power to update that fixed penalty notice provision including the fixed penalty amount. It is appropriate to amend Article 30 so that civil sanctions can be imposed (and existing civil sanctions amended) in relation to hazardous waste.

227. DAERA must be able to regulate hazardous waste to ensure that the environment and human health is not adversely affected. Under this power, provision can be made about, or connected with, the regulation of hazardous waste. This includes updating the fixed penalty amounts for breaches of the Hazardous Waste Regulations (Northern Ireland) 2005 so that this fixed penalty continues to be an effective penalty, properly reflects the costs of waste disposal and is a suitable deterrent.

Justification for taking the procedure

228. It is appropriate that regulations under Article 30 that create a civil sanction are subject to the increased parliamentary scrutiny of the affirmative resolution procedure. However, when the amount of a civil sanction or fixed penalty notice is amended (rather than a new civil sanction introduced) it is proposed that this will be subject to negative resolution procedure. The same approach towards fixed penalty notices is taken in clause 66 (which is consistent with similar powers in section 34A(10), 46B(5), 47ZB(6) and section 97A(3) EPA 1990).

Clause 61 - A power to make provision for the transfrontier shipment of waste

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative procedure where the regulations confer new powers of entry, seizure or detention, provide for new fees or charges, create criminal offences, increase the maximum penalty for criminal offences, create a civil sanction or amend primary legislation or retained direct principal EU legislation. Otherwise negative resolution procedure. Henry VIII

Context and Purpose

229. Waste has become a valuable resource and its transport across borders has increased significantly. While trading waste can have a positive impact on the economy, the uncontrolled movement of harmful waste can have disastrous consequences for human health and the environment. Illegal exports of waste can also drain the UK economy of a valuable source of raw materials.
230. International waste shipments are primarily regulated by Regulation (EC) No 1013/2006 on shipments of waste, and by the Transfrontier Shipment of Waste Regulations (2007) (“the TSWR 2007”), which were made for the purpose of implementing and enforcing the provisions of Regulation (EC) No 1013/2006. The TSWR 2007 set out offences and penalties and designate the competent authorities for enforcing Regulation (EC) No 1013/2006 in the UK.
231. Although the government already has a power to prohibit or restrict the import or export of waste under section 141 of the EPA 1990, this power requires amendment so that it can be used to make provision about, or connected with, the regulation of waste imports and exports and the transit of waste for export. This will enable government to amend existing regulations on international waste shipments such as the TSWR 2007. This clause updates the power so that it comprehensively covers issues such as transit of waste for export, civil sanctions and fee charging.
232. In particular, the updated power includes a power for the Secretary of State to make regulations about the transit of waste for export, thus ensuring that the power under section 141 is broad enough to cover the different phases of an international shipment of waste, so that the power can be used effectively. The section 141 power is widened to encompass powers corresponding to provisions already in the TSWR 2007, including powers to create civil sanctions, powers for the Secretary of State to issue general directions as to the exercise by waste regulation authorities of their functions including in connection with the regulation of the transit of waste for export, and powers to provide for the charging by waste regulation authorities of fees or charges payable by persons involved in the importation, exportation or transit of waste for export. The powers further make provision authorising the disclosure of information by Officers of Revenue and Customs to waste regulation authorities, and conferring functions relating to the seizure and detention of waste on customs officials.

Justification for taking the powers

233. The TSWR 2007 were made under section 2(2) of the European Communities Act 1972. The Department believes it is appropriate to replace this delegated power now that the UK has left the EU so that there are effective powers to amend or replace the TSWR 2007 to ensure the manner in which international waste shipments are regulated can keep pace with the methods and practices of those engaged in illegal waste shipment activity.
234. The Department is committed to fulfilling its obligations in respect to the international controls on shipments of waste. It is therefore essential that the current enforcement mechanisms and punishment for offences and civil sanctions as contained in the TSWR 2007 can be amended as needed now that the UK has left the EU. For example the level of Fixed Penalty Notices (FPNs) provided for in the TSWR 2007 of £300 cannot be amended without section 2(2) of the European Communities Act 1972, which has been repealed, given the UK’s departure from the EU. This clause will provide the Secretary of

State with delegated powers to vary the level and form of FPNs. The current maximum punishment for criminal offences will be maintained.

235. The Department's view is that it must be able to continue to regulate international waste shipments to ensure that the environment and human health is not adversely affected. Without being able to make appropriate amendments to the TSWR 2007, it is possible that the government would not be able to effectively regulate international waste shipments now that the UK has left the EU.

236. The aim of the proposed clause is to amend the existing power to prohibit or restrict the import and export of waste under section 141 of the EPA 1990 so that the provisions in the TSWR 2007 can be amended using that power. In order to achieve this, the clause provides for changes to section 141 so that it is broad enough to amend those regulations and regulate the import and export of waste and the transit of waste for export.

237. The clause also contains a Henry VIII power to make consequential, supplementary, incidental, transitional or saving provision, including provision amending, repealing or revoking primary legislation or retained direct EU legislation. This is supplementary to the main power but the power to make consequential etc. amendments is necessary to ensure consistency between pre-existing regulations like the TSWR or Regulation (EC) No 1013/2006 and any regulations made under this provision. As part of the Resources and Waste Strategy the Department has committed to a review of the regulatory framework covering waste exports to ensure that it can improve the quality of waste exports for recycling and that waste exports are recycled at sites operating to equivalent standards to those required in the UK. Additional restrictions or requirements relating to waste shipments will need to be harmonised with provisions already contained in the TSWR and any relevant retained direct EU legislation or primary legislation. Any use of the Henry VIII power will be limited to the subject matter of this clause and will be restricted to amendments which are purely consequential in nature.

Justification for taking the procedure

238. This clause amends the scope of an existing power under section 141 of the EPA 1990, which is subject to the negative resolution procedure. However, the amendment introduces a number of affirmative triggers in section 141, namely where regulations confer new powers of entry, seizure or detention, provide for new fees or charges, create criminal offences, increase the maximum penalty for criminal offences, or create a civil sanction. The affirmative procedure will also be used where regulations amend primary legislation or retained direct principal EU legislation.

239. The Department believes that these affirmative triggers will ensure that the correct parliamentary procedure is used and that there will be increased Parliamentary scrutiny where appropriate, depending on, for example, whether an offence is created or the power is being used to make minor changes to administrative procedures.

Schedule 10 (linked to clause 65): Powers of Direction in relation to Waste

Power conferred on: Secretary of State and Welsh Ministers

Power exercised by: Notice

Parliamentary Procedure: None

Context and purpose

240. The appropriate minister (Secretary of State or Welsh Ministers) already has powers of direction set out in section 57 of the EPA 1990, which include powers to direct the holder of any environmental permit authorising a waste operation to accept and keep, or accept and treat or dispose of, waste at specified places on specified terms and to direct any person who is keeping waste on any land to deliver the waste to a specified person on specified terms with a view to its being treated or disposed of by that other person.
241. There is a gap in the appropriate minister's current powers as they are unable to direct a registered waste carrier to collect and transport waste if, for example, the waste keeper is unable to transport the waste because it is not a registered waste carrier or, alternatively, in circumstances where there is no known waste keeper (for example, the waste has been abandoned or the company who was previously the waste holder has gone into liquidation). A registered waste carrier is defined as a person registered under the Control of Pollution (Amendment) Act 1989 as a carrier of controlled waste (as defined in s75(4) of the EPA 1990).
242. The purpose of these powers is to enable the appropriate minister to be able to direct a Registered Waste Carrier to collect waste and deliver it to a specified place. The intention is that the appropriate minister would only use this power in exceptional circumstances, such as where there was no other suitable alternative and where for the waste to stay on its current site would cause harm to people or the environment.
243. As with the current powers of direction, the appropriate minister will also have the power to direct the keeper of the waste to pay the waste carrier's reasonable costs. If that is not possible, the appropriate minister will also have the power to reimburse the waste carrier directly.

Justification for taking the powers

244. The current powers of direction have been used very sparingly and have not been exercised since the Foot and Mouth crisis in 2001. It is expected that instances where this new power of direction would be used would also be rare. However, the power of direction is necessary to enable the appropriate minister to act promptly where there is a potential risk to human health or the environment in order to avoid circumstances which would leave waste on a site without any means of directing an appropriate person to move it.

Justification for taking the procedure

245. The Department's view is that, in circumstances where there is an urgent situation and waste on a site might cause harm to human health and/or the environment, it is essential for the appropriate minister to have the power to issue a direction to resolve such a situation without any additional steps that would lead to unnecessary delay. As above it is envisaged that the power would only be used rarely, in exceptional circumstances (as with the Foot and Mouth crisis).
246. It would not be appropriate to have this power of direction in regulations and subject to parliamentary scrutiny via the negative or affirmative procedure. In the sorts of situation where the Department envisages using this power (for example the Foot and Mouth crisis) it would be essential that Ministers are able to act quickly to ensure that waste is transposed and treated / disposed of as appropriate. Putting these powers in regulations would mean

that Ministers would be unable to react quickly in such situations. By the time Ministers has made regulations and laid them before parliament, the situation that led to them making those regulations would have likely evolved or changed. Given current powers of direction are not subject to any parliamentary procedure, and regulations subject to parliamentary procedure would not be able to be laid quickly enough in these sorts of situations, the Department views no parliamentary procedure as appropriate for this particular power.

Clause 66 Enforcement Powers: Northern Ireland Powers of Direction in relation to Waste

Power conferred on: DAERA

Power exercised by: Notice

Parliamentary Procedure: None

Context and purpose

247. DAERA already have powers of direction set out in Article 27 of the Waste and Contaminated Land (Northern Ireland) Order 1997, which include powers to direct the holder of any environmental permit authorising a waste operation to accept and keep, or accept and treat or dispose of, waste at specified places on specified terms and to direct any person who is keeping waste on any land to deliver the waste to a specified person on specified terms with a view to its being treated or disposed of by that other person.

248. Unlike the powers of direction in s57 of the EPA 1990, Article 27 powers are routinely used by DAERA's Environment Crime Unit for remediation of sites. The existing power of direction under Article 27 is used by the Unit on average four times a month.

249. There is a gap in DAERA's current powers as they are unable to direct a registered waste carrier to collect and transport waste if, for example, the waste keeper is unable to transport the waste because it is not a registered waste carrier or, alternatively, in circumstances where there is no known waste keeper (for example, the waste has been abandoned or the company who was previously the waste holder has gone into liquidation). A registered waste carrier is defined as a person registered under Article 39 as a carrier of controlled waste.

250. The purpose of these powers is to enable the Department to be able to direct a registered waste carrier to collect waste and deliver it to a specified place. Use of this power will allow DAERA to mitigate harm to people or the environment if waste were to stay on its current site.

251. As with the current powers of direction, DAERA will also have the power to direct the keeper of the waste to pay the waste carrier's reasonable costs. If that is not possible, DAERA will also have the power to reimburse the waste carrier directly.

Justification for taking the powers

252. The power of direction is necessary to enable DAERA to act promptly where there is a potential risk to human health or the environment in order to avoid circumstances which would leave waste on a site without any means of directing an appropriate person to move it.

Justification for taking the procedure

253. DAERA's view is that, in circumstances where there is waste on a site that might cause harm to human health and/or the environment, it is essential for DAERA to have the power to issue a direction to resolve such a situation without any additional steps that would lead to unnecessary delay. Although these are used more regularly than the powers of direction set out in section 57 of the EPA 1990, when they are used, there is the same need for these to be used immediately and without needless delay.

254. It would not be appropriate to have this power of direction in regulations and subject to parliamentary scrutiny via the negative or affirmative procedure, given it is needed to fill a gap in, and be used alongside, the current powers of direction which are not subject to any parliamentary procedure.

Clause 67: New section 88(11) EPA 1990 – Power to prescribe conditions for the authorisation of authorised officers of litter authorities

Power conferred on: Secretary of State (in relation to England); Welsh Ministers (in relation to Wales)

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

255. The Secretary of State (in relation to England) and the Welsh Ministers (in relation to Wales) have an existing power under section 88(11) EPA1990 to prescribe conditions to be satisfied by a person before they may be authorised by a parish or community council to issue fixed penalty notices for littering and related offences. Clause 67 replaces and extends that existing power, enabling conditions to be prescribed which must be met by a person before they may be authorised by any litter authority (as defined in section 88(9) EPA 1990) to issue fixed penalties for these offences.

256. This power will enable the Secretary of State/Welsh Ministers to ensure that those authorised to issue these fixed penalty notices meet certain conditions relating to the skills, quality and professionalism of their activities.

Justification for taking the power

257. The Secretary of State/Welsh Ministers will need the flexibility to be able to change or update the prescribed conditions in future to reflect changing needs and developments within the sector, meaning that primary legislation would not be an appropriate vehicle for this power. This power will ensure that the skills, quality and professionalism of authorised officers of litter authorities are maintained. Before exercising the power to prescribe the conditions to be satisfied, the Secretary of State/Welsh Ministers will be required to consult those likely to be affected.

Justification for the procedure

258. It is proposed that the regulations made using this power should be subject to the negative resolution procedure. This power replaces the existing power in section 88(11)

EPA 1990, which is subject to the negative procedure. As stated above, this power is slightly broader than the existing power in the sense that regulations made under it will potentially apply to authorised officers of all litter authorities, rather than those officers authorised by parish or community councils only. This will ensure consistency in the issuing of fixed penalty notices across the whole sector.

259. However, the overarching purpose of the power remains the same: to ensure that those authorised to issue these fixed penalty notices meet suitable conditions relating to the skills, quality and professionalism of their activities. The Department therefore considers that the negative procedure continues to give Parliament the appropriate level of scrutiny for regulations which prescribe these conditions.

Clause 67: New section 88B(1) EPA 1990 – Power to issue guidance to litter authorities on the exercise of littering enforcement functions

Power conferred on: Secretary of State (in relation to England); Welsh Ministers (in relation to Wales)

Power exercised by: Issuing guidance

Parliamentary Procedure: None

Context and purpose

260. The power will allow the Secretary of State and the Welsh Ministers to issue guidance on the exercise of “littering enforcement functions”, namely the functions of:

- a. litter authorities (as defined in section 88(9) EPA 1990) and their authorised officers (defined in section 88(10) EPA 1990) conferred under section 88 EPA 1990 (fixed penalty notices for offence of leaving litter under section 87);
- b. litter authorities (as defined in section 88A(4)(a) EPA 1990) and their authorised officers (defined in section 88A(9) EPA 1990) conferred under section 88A EPA 1990 (fixed penalty notices for littering from vehicles in England);
- c. principal litter authorities (as defined in section 86 EPA 1990) and their authorised officers (defined in paragraph 8 of Schedule 3A to EPA 1990) conferred under Schedule 3A to EPA 1990 (distribution of free printed matter).

261. The guidance will cover the appropriate use of those enforcement functions, with the aim of ensuring greater consistency between the approach to enforcement undertaken by different litter authorities, to improve public understanding of enforcement activity and in doing so improve public confidence in such enforcement activity. In accordance with new section 88B(2) EPA 1990, a litter authority must have regard to any guidance issued under section 88B(1) when exercising any of its littering enforcement functions.

Justification for taking the powers

262. The power to issue statutory guidance is necessary to ensure that the various litter authorities undertake littering enforcement functions in a consistent and proportionate way. It would not be appropriate to have the kind of considerable detail necessary to achieve this aim in legislation, especially given that this is an area where best practices may develop and change over time.

Justification for taking the procedure

263. The Department's view is that the statutory guidance would contain lengthy relevant details that do not require parliamentary oversight. However, section 88B(4) requires the Secretary of State or Welsh Ministers to consult on proposed guidance (or revised guidance) before issuing it, which will enable interested authorities and persons to give their views on the proposed guidance and ensure a degree of public participation short of parliamentary approval.

Clause 68: Power to amend the permitted range of fixed penalties for waste contraventions under s33ZA, s34ZA, s33ZB and s34ZB of the Environmental Protection Act 1990

Power conferred on: Secretary of State and Welsh Ministers

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure Henry VIII

Context and purpose

264. There are currently powers to issue Fixed Penalty Notices ("FPNs") set out in s33ZA and s34ZA of the EPA 1990 in respect of England, and s33ZB and s34ZB of the EPA 1990 in respect of Wales, which were added to the EPA through secondary legislation to help tackle waste crime and help to ensure that waste is properly and lawfully disposed of. The FPNs relate to the offences of unauthorised deposit of controlled waste on land (fly-tipping) under section 33 of the EPA 1990 and for breach of the waste duty of care for occupiers of domestic properties (householders) (see section 34(2A) and (6)).

265. The level of penalties imposed by FPNs issued under these provisions may be specified by enforcement authorities within a permitted range of £150 to £400, with a default of £200 if no other amount is specified. These sums were set at the time to reflect the comparable cost of appropriate waste disposal and to act as a suitable deterrent. Enforcement authorities (the Environment Agency, Natural Resources Wales or waste collection authorities) can also set a discounted penalty for early payment of not less than £120 for payment before the end of 10 days following the date of the notice.

266. Whilst the current levels of permitted range of penalties (including the discounted penalty for early payment) for these FPNs are appropriate now, they are likely to be rendered ineffective over time by inflation, changes to waste management practices and the cost of disposal. There is no power in the EPA 1990 to allow the level of these FPNs (including the discounted penalty for early payment) to be amended without section 2(2) of the European Communities Act 1972, which has been repealed. This is in contrast to other FPNs in the EPA 1990 where, for example, the level of penalties for FPNs issued under section 47ZA for offences under section 47 can be substituted by Order under section 47ZB(5) or the penalty in section 46B(1)(b) can be substituted by Order made under section 46B(5).

Justification for taking the powers

267. Without these new powers, the permitted ranges for FPN amounts will be fixed and, over time, they will no longer be fit for purpose. There is no benefit to amending the

amounts now, in primary legislation, as they are currently set at the right amount. By taking a power to amend penalties in secondary legislation, the Department will be able to keep the penalties under review, see if they are working effectively and amend them if needed, subject to Parliamentary scrutiny.

268. The powers being sought reflect powers to amend FPNs already set out in the EPA 1990. By way of further example, section 34A(10) EPA 1990 enables the appropriate person to substitute a different amount by Order for FPNs relating to the duty of care offence of failing to comply with a requirement to make, retain and furnish documents. Section 34A(12) EPA also allows for the extent and circumstances under which a discount for early payment can be offered to be substituted by Order. Similarly, section 97A(2)(a) EPA 1990 enables the appropriate person to amend the penalty amounts in relation to the FPN for littering (as these were both created by primary legislation).

Justification for taking the procedure

269. This power is an updating power (substituting one figure for another) and as such is subject to the negative resolution procedure. Although it is a Henry VIII power to amend primary legislation, the Department considers this procedure to be proportionate as the Department does not consider the power to be sufficiently broad or controversial to warrant the use of the affirmative procedure. Instead, it is, in the Department's view, sufficient that the Secretary of State and Welsh Ministers are required to act in accordance with public law principles and, accordingly, any increase in the penalty amount will need to be reasonable and fair. The Department believes that this is consistent with similar powers in section 34A(10), 46B(5), 47ZB(6) and section 97A(3) EPA 1990, which are subject to the same procedure.

Clause 68- A power to allow enforcement authorities to set the time period in which a lesser penalty can be paid for FPNs

Power conferred on: Waste collection authorities, the Environment Agency and Natural Resources Wales

Power exercised by: Notice (time period for discounted early repayment will be specified in the Fixed Penalty Notice)

Parliamentary Procedure: None

Context and purpose

270. Along with setting out the permitted range of penalties for Fixed Penalty Notices, s33ZA, s34ZA, s33ZB and s34ZB of the EPA 1990 allows for an enforcement authority (a waste collection authority, or additionally for the household waste duty of care offence, the Environment Agency or Natural Resources Wales) to accept a lesser payment within a 10 day period. Now that s2(2) of the European Communities Act 1972 is no longer available, it will not be possible to vary the length of this 10 day period without primary legislation.

271. Clause 68 removes the explicit 10 day period from the FPNs and replaces it with a period specified by the enforcing authority. The 14 day maximum period for payment of the penalty remains in legislation.

Justification for taking the power

272. The decision as to whether or not to offer an option of lesser payment has already been delegated to the enforcing authority. The Department therefore thought it was appropriate for the enforcing authority to also decide the length of this period. The Department were concerned about this period being for a fixed length of time, which might not be appropriate in all circumstances, and there being no ability to amend the time period. If the period were shortened to the point that it was unusable, this would be no different to the enforcing authority deciding not to offer such a period, which it is already able to do.

Justification for taking the procedure

273. The Department could not foresee any circumstances in which secondary legislation amending the 10 day period would need to be subjected to parliamentary scrutiny, given the decision of whether to offer an early payment already lies with the enforcing authority. The new powers also follow the approach taken by the existing power for the enforcing authority to set the period in which a lesser amount can be paid for failure to furnish waste transfer documentation in section 34A EPA 1990.

Clause 69: A delegated power to allow the Secretary of State to make regulations, which will allow regulators to set the conditions of exemptions from prohibitions of certain activities

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

274. Section 2 of the Pollution Prevention and Control Act 1999 gives the Secretary of State power to make regulations to regulate polluting activities, which may include provision for any of the purposes in Schedule 1 to that Act.

275. The Environmental Permitting (England and Wales) Regulations 2016, made under section 2, set out which regulated facilities, such as a waste operation or a flood risk activity, require environmental permits and also specific conditions which must be met for lower risk facilities or activities to be exempt from the requirement to have an environmental permit. Such lower risk activities would include, for example, the treatment of waste wood and waste plant matter by chipping, shredding, cutting or pulverising (T6) or burning of waste as a fuel in a small appliance (U4).

276. The regulators already have the power to set the details of permit conditions for non-exempt waste activities either individually or as 'standard rules permits' where the regulator sets a framework of requirements for the appropriate operation of a waste site. The regulator can change these requirements to reflect changing conditions and appropriate practices, for example a new waste material entering the market, or changing demand for an existing material leading to stockpiling. These detailed permit conditions do not need to be set out in regulations.

277. In contrast, for the lower risk exempt activities, the conditions an operation needs to meet to be exempt currently have to be set out in regulations and this means it can be difficult to change these to ensure appropriate controls are in place as the waste market shifts. The Department wants the regulator to be able to amend these specific conditions but only with suitable safeguards in place, such as Secretary of State approval.

278. Clause 69 amends Schedule 1 to the Pollution Prevention and Control Act 1999 to create a new purpose for which the Secretary of State may make provision in regulations under section 2 of that Act, namely to prohibit an activity except where it meets conditions determined by the regulators in accordance with those regulations. Such regulations would sit alongside the existing Environmental Permitting (England and Wales) Regulations 2016 and they would allow for the detailed conditions for any exemption (from the prohibition on carrying out an activity without a permit) to be set and amended by the regulator. This power would bring the treatment of exempt activities, which by their nature are typically less significant and lower-risk activities, in line with the flexibility provided by standard rules permits.

Justification for taking the powers

279. This new purpose for which the regulation making power can be used is consistent with the purpose already granted by the Pollution Prevention and Control Act 1999 to regulate in relation to the prohibition of operating a regulated facility without a permit.

280. This power will allow the Secretary of State to set out in regulations which conditions relating to exempt activities the regulator can determine, instead of those conditions having to be set out in regulations. The Secretary of State will also be able to set out any safeguards the regulator must comply with, for example, a requirement for prior approval from an appropriate minister and a minimum period in which notice of a change must be given before the regulator is able to make a change to a particular exemption. This is to ensure that the appropriate balance is maintained between what should be determined by Secretary of State in regulations, such as what activities can be carried out under an exemption, and the details which can be set by the regulator for example, the quantity of a particular type of waste that could be stored or treated under an exemption.

281. This will allow the regulator to respond to changing market practices, conditions and materials to ensure the exemption regime proportionately and appropriately determines which activities require a permit and which do not. In the Department's view, this power to delegate to the regulator in regulations is necessary to ensure that the detailed conditions for being exempt from permitting requirements can be amended responsively to changing market conditions, or new materials or technologies, for example a new type of waste entering the market, or improvements in the understanding of the fire risk associated with different waste management practices. The current inability for the regulator to make these amendments can distort the market, serve as a barrier to the sustainable waste management as circumstances change in the short term, or allow for activities which cause environmental, economic or social harm to take advantage of the exemptions regime to avoid permitting requirements. It also presents a financial and logistical barrier to innovative low risk activities which would have a positive impact on the sustainable re-use of resources from operating, by forcing them into the permitting regime.

282. The power is limited to the Secretary of State setting out which details of exemptions (activities which can be carried out without a permit) may be determined by the regulator and any safeguards or limits they need to comply with.

283. Delegated powers in the Bill that became the Pollution Prevention and Control Act 1999 were first found inappropriate by the committee that preceded the Delegated Powers and Regulatory Reform Committee, and as such were amended by the government of the time and subsequently found appropriate. This proposed delegated power is consistent with what was previously found to be appropriate.

Justification for taking the procedure

284. The current power in section 2 of the Pollution Prevention and Control Act 1999 is subject to the negative resolution procedure. However, there are a number of affirmative triggers in section 2(9), namely the first regulations under section 2 of the Act, regulations which create an offence or increase a penalty for an existing offence or regulations which amend or repeal any provision of an Act. The Department believes that those affirmative triggers will ensure that the correct parliamentary procedure is used, depending on, for example, whether an offence is created or primary legislation is amended.

285. In the event there is no affirmative trigger, the Department considers that the negative resolution procedure is the appropriate procedure. This aligns with other powers in section 2 of the Pollution Prevention and Control Act 1999. Furthermore, any regulations made under section 2 of the Pollution Prevention and Control Act 1999 are subject to a statutory consultation requirement. This includes a requirement to consult the appropriate agency and such bodies or persons appearing to the Secretary of State to represent the interests of local government, industry, agriculture and small businesses considered appropriate and any other such bodies or persons considered to be appropriate.

286. This matter warrants a degree of parliamentary oversight but, since the implications are limited and the detail is technical, this does not, in the Department's view, require the affirmative resolution procedure except where there is a specific trigger.

PART 4 – AIR QUALITY AND ENVIRONMENTAL RECALL

Schedule 11 (Linked to clause 71): An amendment to the Environment Act 1995 inserting new section 81A(3) giving a delegated power to allow the Secretary of State to designate by statutory instrument a person as a relevant public authority for the purposes of Part IV of that Act.

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure Henry VIII

Context and purpose

287. This is a Henry VIII power. This power relates to the Local Air Quality Management Framework established under Part IV of the EA 1995. The policy objective is to ensure that where a local authority assesses that local air pollution is significantly impacted by a source of emissions that are within the control of another person exercising public functions, the delegated power will enable the Secretary of State to bring those persons within the Local Air Quality Framework as "relevant public bodies." Designation would require the relevant public body to provide reasonable assistance to the local authority and to prepare and offer measures for inclusion within the local authority's action plan, if standards and objectives

are not being achieved, or are unlikely to be achieved, and the authority has had to declare an Air Quality Management Area as a result.

288. There is precedent for the Secretary of State designating a public authority for the purposes of the Freedom of Information Act 2000 (see section 5) if it appears to the Secretary of State that it exercises functions of a public nature. That power is subject to the making of an order and having conducted prior consultation.

Justification for taking the power

289. Designation will only be possible after the Secretary of State has exercised their statutory duty to consult, including the person in question and any other persons as the Secretary of State considers appropriate (a statutory requirement). This will be in addition to the existing consultation requirements that the Secretary of State is required to meet when making regulations under this Part of the EA 1995 (see section 87(7)). Regulations made under this Part can also include such supplemental, consequential, incidental or transitional provision (including provision amending any enactment) as the Secretary of State considers appropriate. This continues to be justified should it be necessary to amend legislation concerning the intended person to be designated as a “relevant public body” to reflect its functions under the regulations and wider EA 1995 Local Air Quality Management Framework. The regulations can only be made once statutory consultation requirements have been met. The scope of the power is limited in so far as it can be exercised only in respect of bodies that exercise functions of a public nature.

Justification for the procedure

290. It is proposed that the procedure is affirmative in line with the existing powers in Part IV of the EA 1995. It is anticipated that Parliament would have a particular interest in powers used to extend the scope of the bodies subject to legal obligations under the EA 1995 Local Air Quality Management Framework made through amending primary legislation.

Schedule 11 (New section 85B EA 1995) (Linked to clause 71): An amendment inserting a new section 85B to the Environment Act 1995 giving a power for the Secretary of State to direct an air quality partner to make further proposals for measures it will take to be included in a local air quality plan

Power conferred on: Secretary of State

Power exercised by: No method prescribed by statute.

Parliamentary procedure: None

Context and purpose

291. This is a power of direction that relates to the Local Air Quality Management Framework established under Part IV of the EA 1995. The policy objective (as set out above) is to ensure that where local air pollution is significantly impacted by a source of emissions that are within the control of another person exercising public functions those persons can be brought within the Local Air Quality Framework as “air quality partners.” An air quality partner can include bodies exercising public functions where they have been designated in regulations made by the Secretary of State. Air quality partners offer measures for

inclusion within the local authority's action plan, if standards and objectives are not being achieved. This power of direction will enable the Secretary of State to require further proposals to be put forward where it is considered that proposals are insufficient.

Justification for taking the power

292. The Secretary of State already has powers of direction over local authorities acting under the Local Air Quality Management Framework. As a wider range of bodies exercising public functions can be brought within the Framework in order to improve local air quality, it is appropriate and consistent to also extend the powers of direction accordingly.

293. The power has been limited to directing an air quality partner to make further proposals by a date specified in the direction where the Secretary of State considers the proposals made by the partner are insufficient. It can require the partner to make further or supplemented proposals, but it could not be used to require the partner to take a particular action such as make a specific proposal for inclusion in the local plan.

Justification for the procedure

294. Directions would be given to specific bodies and in specific circumstances only, and in the Department's view, would largely be an administrative exercise. We expect that the direction would be issued following discussions between the Minister and the relevant bodies and local authorities. The directions will need to be published in accordance with the existing direction powers in Part IV of the EA 1995 and given to the body they are made to. There is no parliamentary procedure required for giving other directions under this Part of the EA 1995, and the Department does not consider that the nature of the direction proposed would require a departure from that position.

Schedule 11 (Linked to clause 71): Power to make regulations for the purpose of Part IV of the Environment Act 1995 covering relevant county councils, relevant public authorities or the Environment Agency

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure Henry VIII

Context and purpose

295. This is a Henry VIII power. As explained above in relation to other Schedule 11 powers, the policy objective is to ensure that there is greater cooperation within the Local Air Quality Framework so that potentially a wider range of public bodies play a role in improving local air quality. Paragraph 11 of Schedule 11 of the Bill would amend section 87 of the EA 1995 to broaden the range of bodies that regulations made under this section can apply to.

Justification for taking the power

296. The Secretary of State needs to retain flexibility to ensure that if sources of local air pollution come from public bodies or bodies exercising public functions in, or nearby, a local authority's area, and these are contributing to a failure to meet standards and objectives, that any regulations made under this section can make the necessary provision

to ensure that these wider bodies have powers in order to address them. Changes to the regulation-making power in section 87 will enable this by reflecting the amended range of authorities with responsibility for sources of air pollution in respect of the Local Air Quality Management Framework.

297. The Department may need to respond to new approaches in response to scientific advice and technological developments, or new sources of air pollution which previously had not been significant. Extending the existing regulation making power will ensure that sufficient powers can be granted to relevant public bodies, or relevant county councils where it is determined that this is necessary in order to address the local emission source they are responsible for. For instance it will ensure that these bodies can recover costs, which presently is only possible in respect of local authorities (normally district councils) should the regulations grant a power or function that necessitates such administrative cost recovery (such as for issuing permits or registration costs). As set out above, the existing regulation making power that is being amended includes consultation requirements and a power to make necessary consequential amendments to any enactment that the Secretary of State considers necessary. In the Department's view this is justified as it may be necessary to reflect the function or power granted in the regulations in other legislation that concerns the relevant public body or county council. The regulations can only be made once statutory consultation requirements have been met and for the purpose of improving air quality.

Justification for the procedure

298. It is proposed that the procedure is affirmative consistent with the existing powers in Part IV of the EA 1995. The Department considers that this is appropriate because the regulations can amend primary legislation and used to grant powers and functions to a potentially wider range of bodies subject to legal obligations under the EA 1995 Local Air Quality Management Framework.

Schedule 11: Amended power to issue statutory guidance to relevant public authorities or the Environment Agency for the purpose of Part IV of the Environment Act 1995

Power conferred on: Secretary of State

Power exercised by: Issuing statutory guidance

Parliamentary Procedure: None

Context and purpose

299. As explained above in relation to Schedule 11 the policy objective is to ensure that there is greater cooperation within the local air quality framework so that potentially a wider range of public bodies play a role in improving local air quality. Guidance will be important for describing technical matters in detail, for example, the way in which assessment of local air quality is to be undertaken (including the equipment to be used and data accuracy to be achieved). The Department considers it important that this guidance should be used consistently by all of the bodies that will potentially come under the Local Air Quality Management Framework.

Justification for taking the power

300. This power will extend the existing power to issue statutory guidance. It will enable the Secretary of State's statutory guidance to cover the wider range of bodies that could come within the Local Air Quality Management Framework. It would ensure that when public bodies are carrying out their functions under or by virtue of the Framework, they have regard to the Secretary of State's guidance. It will also be necessary to update the technical content of this guidance as evidence emerges and for this to be done quickly.

Justification for the procedure

301. The Department's view is that no parliamentary procedure is needed given the technical nature of the guidance.

Schedule 12 (new section 19A and Schedule 1A to the Clean Air Act 1993): Power to amend the maximum and minimum level of a civil penalty notice for breaches of a smoke control area order under Part III of the Clean Air Act 1993

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure Henry VIII

Context and purpose

302. This is a Henry VIII power. Paragraph 3 of the Schedule would insert a new Schedule 1A into the Clean Air Act 1993. It will provide a power for the Secretary of State to amend the maximum and minimum level of a financial civil penalty notice that can be issued by a local authority. The purpose is to support the enforcement of smoke control area orders declared under Part III of the Clean Air Act.

303. The Bill would introduce changes to Part III of the Clean Air Act 1993, which provides local authorities with a power to declare any part of their area a smoke control area, within which it is an offence to emit smoke from a chimney of a building or a chimney not attached to a building of a furnace, fixed boiler or industrial plant. The Bill would amend the Act so that emitting smoke in a smoke control area is no longer an offence but instead will be enforced by the authority issuing a civil penalty notice.

304. The key aspect of this proposal is the removal of the existing offence and statutory defences that make smoke control areas difficult to enforce. The amendments in the Bill will set out certain grounds upon which the recipient of a civil penalty notice can make representations within a specified timeframe against the issuing of a notice. If the authority disagrees with the representation made it can issue a final notice for payment (to include the amount owed, method of payment and payment deadline). The power proposed would enable the Secretary of State to amend the maximum and minimum prescribed amounts that can be included in a civil penalty notice by a local authority.

305. There is precedent for the creation of such a power. For example under the EPA 1990 the Secretary of State may by Order substitute a different amount of fixed penalty for the purpose of litter notices (section 88(7)) and the Secretary of State has the power to make regulations amending the level of penalty in respect of the littering from vehicles civil

penalty regime (section 88A(3)). These powers were introduced as a result of the Clean Neighbourhoods and EA 2005, section 19 and Anti-social Behaviour, Crime and Policing Act 2014, section 154 respectively on the basis that it would enable the penalties to remain dissuasive.

Justification for taking the power

306. This will enable the Secretary of State to ensure that the levels of any financial penalties being issued by local authorities under the civil penalty notice regime can be monitored and amended if it is deemed necessary to ensure the effectiveness of the regime. This flexibility will ensure both that increases can be made to maximum amounts to ensure that the penalties remain an adequate deterrent to smoke emissions, or to reduce the level should that be deemed necessary.

Justification for the procedure

307. It is proposed that the procedure is affirmative in line with certain existing powers in the Clean Air Act 1993. It will ensure that Parliament can scrutinise the regulations and confirm its agreement to the proposed penalty levels. The regulations will only be laid once the Department has obtained the prior consent of Her Majesty's Treasury.

Schedule 12 (new section 19A and Schedule 1A to the Clean Air Act 1993): Power to amend the grounds of objection to a civil penalty notice for breaches of a smoke control area order under Part III of the Clean Air Act 1993

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure Henry VIII

Context and purpose

308. This is a Henry VIII power. Paragraph 3 of the Schedule would insert a new schedule (Schedule 1A) into the Clean Air Act 1993. It provides a power for the Secretary of State (see paragraph 4 of Schedule 1A) to amend the grounds of objection to a financial civil penalty notice that can be issued by a local authority in order to enforce breaches of smoke control area orders declared under Part III of the Clean Air Act 1993.

309. As referred to above, the Bill will introduce changes to Part III of the Clean Air Act 1993, so that emitting smoke in a smoke control area in England will no longer be an offence but instead will be enforced by the authority issuing a civil penalty notice.

310. The amendments in the Bill will set out certain grounds upon which the recipient of a civil penalty notice can make representations against the issuing of the penalty notice within a specified timeframe. If the authority disagrees with the representation made it can issue a final notice for payment. This power will enable the Secretary of State to amend the grounds of objection if considered necessary.

311. There is precedent for such a power. For example the Secretary of State has the power to make regulations under the EPA 1990 (section 88A), and these can confer and amend

rights to make representations about penalty notices issued in respect of littering. Those regulations are subject to affirmative procedure.

Justification for taking the power

312. By taking this power the Secretary of State will be able to ensure that the grounds for objecting to a civil penalty notice remain fair and that notices remain a suitable enforcement mechanism for smoke emissions. For instance it may be necessary to amend the grounds when specific circumstances are identified that someone should be able to object to the issuing of a notice. The power is limited so it can only be used to extend or limit the range of objections that can be made to the issuing of notices.

Justification for the procedure

313. It is proposed that the procedure is affirmative in line with certain existing powers in the Clean Air Act 1993, for example, changing the relevant emission rates for furnaces in section 5. Parliament is expected to take a particular interest in the use of this power. The power can be exercised only if the Secretary of State has met the duty to carry out statutory consultation.

Schedule 12 (new section 19B – 19D to the Clean Air Act 1993): Power to make certain orders and publish information in relation to smoke control areas under Part III of the Clean Air Act 1993

Power conferred on: Secretary of State

Power exercised by: Order or publication of lists

Parliamentary Procedure: None

Context and purpose

314. The Clean Air Act 1993 provides a power for the Secretary of State to make an order that suspends or relaxes (such as because it is necessary due to an emergency) the operation of smoke control areas (section 22), and following section 15 of the Deregulation Act 2015 to publish lists in respect of authorised fuels or approved fireplaces for the purpose of smoke control area orders declared under Part III of the Clean Air Act 1993.

315. The Bill would introduce changes to Part III of the Clean Air Act 1993 so that emitting smoke in a smoke control area in England is no longer an offence but instead will be enforced by the authority issuing a civil penalty notice. The amendments made by the inclusion of new sections 19B-19D will ensure that the Secretary of State still has the delegated power to relax or suspend smoke control areas and to publish lists of “approved fireplaces” and “approved fuels” for the purposes of smoke control areas in England and the continuing offence of acquiring certain fuels for use in these areas. This will not change the way that the law applies in practice in England in respect of this offence.

Justification for taking the power

316. This amendment will not substantively change the way in which the law in relation to suspending the operations of smoke control areas or the power to publish information for the purpose of the offence associated with acquiring certain fuels operates in England. The

Department considers that it is necessary for the Secretary of State to continue to be able to suspend the operation in order to respond to emergencies or urgent situations, and continuation of the deregulated approach is necessary to ensure that the lists can be updated quickly without legislative orders having to be made.

Justification for the procedure

317. It is not proposed that these powers should be subject to any Parliamentary procedure. The deregulation of the publication of approved fireplaces and approved fuels from being required in regulations made by statutory instrument, to an administrative process (publication) was approved in section 15 of the Deregulation Act 2015.

Schedule 12 (amendments to sections 20 and 21 to the Clean Air Act 1993): Power to publish information in relation to smoke control areas in Wales under Part III of the Clean Air Act 1993

Power conferred on: Welsh Ministers

Power exercised by: Publication of lists

Parliamentary Procedure: None

Context and purpose

318. As set out above relation to Schedule 12, the Clean Air Act 1993 provides a power for the Secretary of State, and following section 15 of the Deregulation Act 2015, to publish lists in respect of authorised fuels or approved fireplaces for the purpose of smoke control area orders in England declared under Part III of the Clean Air Act.

319. The Bill will amend sections 20 and 21 of the Clean Air Act 1993, which will continue to apply to smoke control areas in Wales, to give the Welsh Ministers the power to administratively publish these lists rather than include them in orders, which is presently the case in Wales.

Justification for taking the power

320. This amendment is deregulatory in nature, it will mean that the Welsh Ministers can more flexibly update the relevant lists without having to make orders. Appliances and fuels are developed throughout the year and only being able to legally recognise these appliances and fuels once a statutory instrument has been made is unnecessarily slow as it prevents them being used in smoke control areas while the Statutory Instrument is made. This is an unnecessary restriction upon the suppliers of those goods, but allowing for an administrative update will ensure that their ability to offer such products is not delayed once it has been approved. This will reduce the delay that businesses currently face in bringing new fuels and fireplaces to the market and benefit consumers by granting more rapid access to the latest technology. It will also remove the burden on central government of having to prepare regulations and orders each time it is proposed to approve new fuels and fireplaces.

Justification for the procedure

321. These powers are proposed not to be subject to any Parliamentary procedure in accordance with the current way that the legislation operates in England following section 15 Deregulation Act 2015. That Act was intended generally to remove burdens on businesses, civil society, individuals, public sector bodies and the taxpayer. This amendment will bring the law as it applies in Wales into line with the existing law as it applies in England and Scotland, where fireplaces and fuels for the purpose of smoke control area can already be updated administratively without the need to prepare orders. Amendments to sections 20 and 21 of the 1993 Act were made for Scotland by means of the Regulatory Reform (Scotland) Act which was passed by the Scottish Parliament on 16 January 2014.

Clause 73: A power to make regulations relating to the recall of motor vehicles, etc

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

322. This clause, which was amended at Commons Committee Stage², enables the Secretary of State to make regulations relating to the recall of motor vehicles, engines for non-road mobile machinery (NRMM), and components for both, if they do not meet the environmental standards they were approved to when placed on the market. The regulations may include provision for the Secretary of State to give a compulsory recall notice to a manufacturer or distributor requiring them to organise the return of a product. The clause also allows the Secretary of State to specify a minimum percentage of relevant vehicles, engines or components which must be recalled within a specified period of time. Without the power to set a minimum percentage of vehicles, engines or components to be recalled, manufacturers would potentially be able to comply with a recall regulation by only fixing or modifying a handful of vehicles, engines or components. Setting a minimum percentage to be recalled will ensure that the environmental damage caused by the failure of a class of vehicles, engines or components can be effectively mitigated in a timely fashion.

323. In September 2015 the government became aware that Volkswagen Group had fitted software to their vehicles that distorted emissions test results for nitrogen oxides (NOx). The situation demonstrated the limits of the government's powers to compel a recall of motor vehicles or engines for NRMM for reasons of environmental non-conformity or failure. This contrasts with the government's power to compel a recall of any product

² See supplementary delegated powers memo available at:
<https://publications.parliament.uk/pa/bills/cbill/58-01/0220/supplementarydelegatedpowersmemorandum.pdf>

(including motor vehicles and engines for NRMM) on the basis that it is a “dangerous product” (or “not a safe product”) pursuant to the General Product Safety Regulations 2005 (2005/1803). Regulations made under this clause would enable the Secretary of State to compel manufacturers and distributors to make best endeavours to ensure the return of products that do not comply with environmental standards. This is considered necessary for the enforcement of environmental standards for vehicles and NRMM and thus for the improvement of air quality in the UK.

Justification for taking the power

324. The power to make such legislation is proposed for delegation in this case because the standards to which vehicles and engines for NRMM are approved are so liable to change, and the products that will be subject to regulations made under this clause are also subject to frequent change and in line with advances in technology. UK emissions standards have historically been set at EU level, prior to the UK’s departure from the UK. Furthermore, the relevant standards to which vehicles and NRMM must comply are set out in secondary legislation.
325. The power would allow the Secretary of State to make provision to reflect any future emissions standards or changes in technology which may necessitate a compulsory recall of products which are subject to these, either in line with any EU standards or under a separate domestic regime now that the UK has left the EU. Since the standards must also be specified in the regulations made under this power, the clause has been amended to include a power to make those references ambulatory. Where such ambulatory references are made, the recall powers will remain available if a relevant standard is amended in the future, irrespective of whether an EU or domestic regime applies. The power to compel the recall of vehicles where there are reasonable grounds for believing they do not meet a relevant environmental standard will be underpinned by technical evidence leading to the issue of a compulsory recall notice.
326. Delegated powers would enable the Secretary of State to consider: whether to recall vehicles in the light of the technical evidence and any information received from the manufacturer; how many vehicles, engines or components should be recalled; and whether mitigating measures taken by a manufacturer to rectify a breach of environmental standards outweigh the issue of a recall notice. Where recall powers are exercised, these may also include requirements to prohibit the supply of a vehicle subject to the recall notice, to pay compensation and to modify a vehicle so that it meets environmental standards prior to its return to the original recipient of the vehicle. In addition, powers to enable the enforcement of a recall notice include powers of entry under a warrant to obtain information and samples where there are reasonable grounds to suspect a manufacturer or distributor has failed to comply with the requirements of a recall notice. There is also an enforcement power to impose financial penalties for breach of a recall notice. The power to make regulations relating to vehicle standards is delegated to the Secretary of State (section 54 of the Road Traffic Act 1988 – albeit that current regulations were made using section 2(2) of the European Communities Act 1972), therefore it is the Department’s view that the delegation of power to make these arrangements is the most effective and efficient way of implementing an appropriate recall regime that supplements the type approval regime and given that it relates to environmental breaches of those standards.

Justification for the procedure

327. It is proposed that the regulations made using this power should be subject to the negative resolution procedure. Once the scheme has begun operating, changes may have to be made quickly in response to new environmental standards in order to ensure the effective operation of the recall regime which is based on technical evidence. In addition, the power is similar to the power to make regulations under section 54 of the Road Traffic Act 1988 which is also subject to the negative resolution procedure and enables the Secretary of State to prescribe type approval requirements. Regulations made under the power will not apply to individuals, only to manufacturers and distributors of relevant vehicles, engines or components. For these reasons, it is considered that this ensures appropriate Parliamentary scrutiny over the use of the power.

PART 5 – WATER

Clause 77(7) (New section 39E(1) and (4) WIA 1991): Power to make directions requiring two or more water undertakers to prepare and publish a joint proposal that identifies measures that may be taken jointly by the undertakers for the purpose of improving the management and development of water resources, including a power to make directions as to the form and contents of joint proposals

Power conferred on: Secretary of State and Welsh Ministers

Power exercised by: Direction

Parliamentary procedure: None

Context and purpose

328. Clause 77(7) inserts a new section 39E into the Water Industry Act 1991 (“WIA 1991”), introducing a new power that would permit the relevant Minister (Secretary of State or Welsh Ministers) to direct water undertakers to prepare a joint proposal regarding the management and development of water resources. If two or more water undertakers are directed by the Minister to prepare a joint proposal, the water undertakers must prepare and publish a joint proposal identifying measures that may be taken jointly for the purpose of improving the management and development of water resources. Under new section 39E(4) WIA 1991, directions may require joint proposals to address a number of matters, including details of the specified area which the joint proposals must cover, any specified criteria the joint proposals must consider, and any specified assumption which must be the basis of the joint proposals, for example, population forecasts, climate change projections or the planning period to which the joint proposals must relate.

329. The joint proposals will inform water undertakers’ water resources management plans and drought plans (which water undertakers must produce at least every five years). Water resources management plans are subject to public consultation and scrutiny by the Environment Agency, among others. This ability to direct undertakers to produce joint proposals is intended to help to deliver improved resilience of water resources over the long-term to assist with planning for population growth and the threat of climate change.

330. An example of when the power might be used is where water undertakers have not fully considered collaborative options and the Minister considers those undertakers are

overly reliant on water resources within their own area, which are less effective, for example, because they are not sufficiently resilient to drought or do not represent value for customers. An example of such joint measures could concern the transfer of water between the undertakers' areas or a shared water resource and associated infrastructure, such as a reservoir.

Justification for taking the power

331. Ministers need to retain flexibility to consider which undertakers should be directed to prepare joint proposals and when. The question of which undertakers are required to prepare joint proposals will be driven by environmental, water resilience or customer service considerations, which will determine which undertakers are best placed to collaborate. The management of water resources requires flexibility as it is a dynamic process; where circumstances change, change may be needed to the water resources measures required. For example, a new housing development on the border between two water undertakers' areas may create a need for collaboration between them that did not exist before, or increased frequency and severity of extreme weather events may mean drought planning needs change over time.

332. The power is also needed to prescribe a format for the joint proposals useful for stakeholders and to set out what matters the joint proposal should address, and what information should be used to inform the joint proposals. These are administrative and technical details that change over time and depend on the undertakers' circumstances.

333. These directions powers in relation to joint proposals are consistent with existing Ministerial powers to direct water undertakers in relation to water resources management plans. For example under section 37A(3)(d) of WIA 1991, Ministers may direct water undertakers to ensure their plans address additional matters not specified in primary legislation. The Water Resources Management Plan (England) Direction 2017 made under section 37A and 37B of the WIA 1991 requires water resources management plans produced by undertakers wholly or mainly in England to address leakage and domestic metering levels. Under section 37A(7) WIA 1991, Ministers can issue directions to water undertaker in order to specify the form which a water resources management plan must take and the planning period to which a water resources management plan must relate.

Justification for the procedure

334. The issuing of directions is an administrative exercise and, as is normal, the power to direct is not subject to parliamentary control. The directions have to be issued in a timely way in order to allow undertakers sufficient time to prepare joint proposals and then revised water resources management plans, which can be used to inform water undertakers' investment decisions, made every five years. Ministerial directions to water undertakers under section 37A WIA 1991 are similarly not subject to parliamentary procedure but are usually issued following discussions between the Minister and the relevant regulators.

Clause 77(7) (New section 39F WIA 1991) Power to make regulations making provision about the procedure for the preparation, revision and publication of water resources management plans, drought plans, and joint proposals.

Power conferred on: Secretary of State and Welsh Ministers

Power exercised by: Regulations made by Statutory Instrument.

Context and purpose

335. Clause 77(7) would insert a new section 39F into the WIA 1991, introducing an amended power for the relevant Minister to make regulations relating to the procedure water undertakers must follow in relation to the preparation, revision and publication of water resources management plans, drought plans and joint proposals. Regulations may make provision about the sharing of information, consultation with relevant parties, preparation and circulation of draft plans and proposals and the handling of confidential information.
336. Such provision is currently made by way of a combination of primary legislation, secondary legislation and directions, in sections 37B and 37C WIA 1991, and the regulations and directions under those sections, including the Water Resources Management Plan Regulations 2007 and the Drought Plan Regulations 2005.
337. However, the procedures prescribed by the primary legislation have proved burdensome and have become out of date, constraining the use of efficient means of communication and consultation. The policy objective of this power is to ensure administrative provisions on publication and representation for water resources management plans, drought plans and joint proposals are updated and can remain fit for purpose in the future.
338. In some areas, the new powers replace, but do not extend, existing powers to make secondary legislation. For example, the existing section 37B(5) of the WIA 1991 provides that the Secretary of State may make regulations on how representations and any comments by the water undertaker on them are to be dealt with. Under the existing section 37B(6), regulations made under subsection (5) may provide for the Secretary of State to cause an inquiry or other hearing to be held. The new powers created under the new section 39F(6) WIA 1991 are equivalent to section 37B(5) and (6), which are being repealed by clause 77(3).

Justification for taking the power

339. The Department considers that current provisions in primary legislation relating to the procedure for these plans need to be updated. For example, the existing provisions put a burdensome requirement on the Secretary of State to contact third parties about the handling of their confidential information in the undertakers' publications. It would be more practical for undertakers to seek to agree how this information is handled with the relevant third parties (with whom the undertakers will already be working) prior to the Secretary of State's involvement. The existing provisions also constrain how undertakers carry out consultation, for example stating that responses must be sent to the Secretary of State, when modern online consultation platforms can enable responses to be directed to both the undertaker and the Secretary of State at the same time. In the Department's view, the most effective way to improve the procedural requirements for water resources and other plans is to create a power to make secondary legislation. This power would extend the existing powers to make secondary legislation in relation to the procedure for water resources management plans and drought plans. It is intended that regulations made under section 39F would create a comprehensive and improved regime for the preparation and publication of these plans, which can be updated from time to time if appropriate.

Justification for the procedure

340. It is proposed that regulations under the new section 39F WIA 1991 are subject to the negative resolution procedure. This procedure will provide for transparency and parliamentary scrutiny regarding the process which water undertakers must follow, which in the Department's view is proportionate to the procedural nature of the reform. The negative resolution procedure is consistent with the existing regulation making powers in section 37B WIA 1991, which allow the Secretary of State to make provision in relation to consultations and inquiries in relation to water resources management plans.

Clause 77(7) (New section 39G WIA 1991): Power to provide that regulations made under section 39F (in relation to the procedure for the preparation, revision and publication of water resources management plans, drought plans, and joint proposals) may confer on the relevant Minister the power to make provision by directions.

Power conferred on: Secretary of State and Welsh Ministers

Power exercised by: Direction

Parliamentary procedure: None

Context and purpose

341. Clause 77 would insert a new section (section 39G) into the WIA 1991. It provides the relevant Minister (Secretary of State or Welsh Ministers) with the power to issue directions under regulations made under new section 39F WIA 1991. This power permits regulations made under new section 39F to include powers for the Minister to make directions as regards the procedure for water resources management plans, drought plans and joint proposals. The new directions power is needed as a consequence of re-enacting and remaking the regulation making power in new section 39F.

342. The policy objective of this power is to ensure that the relevant Minister has appropriate powers to deal with administrative or procedural matters arising from the preparation and publication of water resources management plans, drought plans and joint proposals. There are existing direction powers set out in primary legislation regarding the timing of the steps that must be taken by the undertakers when developing their water resources management plans and drought plans. The intention is to provide the relevant Minister with powers that are consistent with those the Minister currently has.

Justification for taking the power

343. Ministers will need to continue to update planning requirements connected with water resources management plans, drought plans and joint proposals regularly, as Ministers do currently. In relation to the timing of publications or submissions, the Minister will need the flexibility to make appropriate arrangements to ensure the plans are prepared in a timely manner. There are existing directions powers in section 37B of the WIA 1991, including the provision in 37B(11) that any steps to be taken by a water undertaker under 37B shall be completed by such time or within such period as the Secretary of State may direct, and in 37B(7) to direct that a water resources management plan must differ from the draft in a specified way. The directions power in new section 39G will allow Ministers to continue to make procedural directions under the replacement provisions. The directions power is

limited in scope as it will only be used to direct water undertakers as to procedural matters with respect to the process for the preparation, revision and publication of water resources management plans, drought plans and joint proposals.

Justification for the procedure

344. The direction making power is not subject to a parliamentary procedure. This is consistent with the current direction making powers in section 37B WIA 1991. Given this precedent and the administrative and operational nature of the directions, it is not considered necessary to provide for a Parliamentary procedure.

Clause 78 (New section 94A(3)(g) WIA 1991): Power to make directions specifying other matters which a drainage and sewerage management plan must address

Power conferred on: Secretary of State and Welsh Ministers

Power exercised by: Direction

Parliamentary procedure: None

Context and purpose

345. Clause 78 inserts a new section (section 94A) into the WIA 1991, introducing a new statutory duty on sewerage undertakers in England and Wales regarding drainage and sewerage management plans. Drainage and wastewater planning is the only key planning process without a formal statutory status in the water sector. Under this new section, sewerage undertakers will need to prepare, publish and maintain a plan for how they will manage their drainage and sewerage systems. The production of the plan will demonstrate how a sewerage undertaker will meet its duties under Part IV of the WIA 1991 including section 94, which is the duty on the sewerage undertakers to provide, improve and extend such a system of public sewers as to ensure that that area is effectually drained. A new statutory duty should help deliver more of the actions needed to address the risks that some assets may pose to the environment or customers. It should also help to deliver improved resilience of sewerage and drainage resources over the long-term to assist with planning for population and economic growth.

346. The new section 94A would set out what drainage and sewerage management plans must address (see subsections 3(a) to (f)), including the capacity of the undertaker's drainage system and sewerage system and an assessment of the current and future demands on the undertaker's sewerage system. However, there may be emerging issues or challenges that cannot be foreseen that a plan should usefully address.

Justification for taking the power

347. The direction making power is needed to ensure that, where appropriate, the relevant Minister (the Secretary of State or Welsh Ministers) can intervene to ensure drainage and sewerage management plans address emerging challenges that may arise and therefore remain efficacious. A similar power is available within the water resources management planning context (see section 37A(3) WIA 1991): the Water Resources Management Plan (England) Direction 2017 used these powers to ensure that plans addressed such matters

as greenhouse gas emissions and the carbon impacts of plans, leakage levels and domestic metering.

Justification for the procedure

348. It is proposed that the direction is not subject to a parliamentary procedure given its administrative nature. Core elements that a plan must address are contained in the Bill and are therefore subject to parliamentary approval. A parliamentary procedure for the changes proposed would make the power less agile and is likely to be disproportionate particularly in cases where the direction is being issued to one undertaker only. The approach proposed is consistent with the equivalent direction making power for water resources management plans set out in section 37A(3) WIA 1991.

Clause 78(New section 94A(6)(b) WIA 1991): Power to make directions requiring the sewerage undertaker to prepare and publish a revised plan

Power conferred on: Secretary of State and Welsh Ministers

Power exercised by: Direction

Parliamentary procedure: None

Context and purpose

349. The policy objective of this power is to ensure that, if necessary, the relevant Minister (the Secretary of State or Welsh Ministers) can direct a sewerage undertaker to update their drainage and sewerage management plan. Clause 78 would insert a new requirement (in section 94A(6) WIA 1991) that sewerage undertakers must prepare a revised plan at least every 5 years or if an annual review indicates a material change of circumstances, if directed to do so by ministers. This power is intended to be available for use if the Secretary of State or Welsh Ministers consider that there is a material change of circumstances such that an updated plan is necessary, but the next annual review (which would trigger the duty to revise the plan) is too far distant. An example of such a material change of circumstances could be a government-backed significant major development proposal (for example a 'new town') in the undertaker's area where drainage capacity could be critical to the viability of the development, and a delay until the next annual review would present unacceptable uncertainties to the viability of the proposal.

Justification for taking the power

350. The Secretary of State and Welsh Ministers may need flexibility to require a revised plan to address significant new issues that may arise in relation to an undertaker's area, but where the timing of the undertaker's next annual review would represent an unacceptable delay. Without this power, plans may become unrepresentative of the issues in an undertaker's area, and potentially lead to delays in delivery of key government commitments on housebuilding. The power of direction would provide ministers with the means to respond to such changes at speed. A similar power is already available within the water resources management planning context (see section 37A(6) WIA 1991).

Justification for the procedure

351. The power of direction is not proposed to be subject to a parliamentary procedure given its administrative nature. The directions power would only be used to respond to a material change of circumstances, to require an updated plan that is needed before the next review. The inclusion of a parliamentary process would make the power less agile and responsive to developments. The approach proposed is consistent with the section 37A(6) WIA 1991 precedent and is considered appropriate given its limited nature.

Clause 78 (New section 94A(7) WIA 1991): Power to make directions specifying the form which a drainage and sewerage management plan must take and the planning period to which a drainage and sewerage management plan must relate

Power conferred on: Secretary of State and Welsh Ministers

Power exercised by: Direction

Parliamentary procedure: None

Context and purpose

352. The policy objective of this power is to ensure that the relevant Minister (the Secretary of State or Welsh Ministers) can direct sewerage undertakers to provide drainage and sewerage management plans in such a way that the information they contain is recorded in a standardised format. The purpose of this is to aid the relevant Minister in their assessment of draft plans. Should the relevant Minister consider it necessary they can specify the planning period to which a plan must relate. The intention is that the plans will cover a long term range such as 20-30 years recognising the lifespan of drainage assets and the need for long term investment in such assets.

Justification for taking the power

353. Sewerage undertakers generally undertake long term planning in any event but in case any undertakers plan for too short a period, this direction power would enable the Secretary of State and Welsh Ministers to specify the period the plan should cover. A similar power is available within the water resources management planning context (see section 37A(7) WIA 1991): the Water Resources Management Plan (England) Direction 2017 directed companies to prepare water resources management plans for a period of at least 25 years. In addition the new power proposed would enable Ministers to stipulate for the form the plan must take, which could be used to encourage consistency across the industry and minimise the administrative burden.

Justification for the procedure

354. The direction is not subject to a parliamentary procedure in keeping with the existing powers of direction in relation to water resources management plans (see section 37A WIA 1991). The directions power will only be used, if at all, to standardise the format of plans and the planning period. These are considered to be operational and administrative details. For this reason, and in accordance with precedent, the Department does not propose to include a parliamentary process alongside this power.

Clause 78 (New section 94B(1) WIA 1991): Power to make order by statutory instrument to amend the time specified in section 94A(6)(c)

Power conferred on: Secretary of State and Welsh Ministers

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative Resolution Procedure Henry VIII

Context and purpose

355. Proposed provisions to be inserted as section 94A(6)(a) and (b) WIA 1991, by clause 78, would provide that the sewerage undertaker must prepare and publish a revised plan following conclusion of its annual review, if the review indicated a material change of circumstances, if directed to do so by the relevant Minister (Secretary of State or Welsh Ministers). Section 94A(6)(c) provides that the sewerage undertaker must prepare and publish a revised plan in any event, not later than 5 years after the plan (or the revised plan) was last published.

356. In practice, the intention is that the 5-year cycle for producing a drainage and sewerage management plans will be aligned with and inform sewerage undertakers' business plans, which are produced every 5 years as part of Ofwat's price review process (Ofwat is the economic regulator of sewerage undertakers). Ofwat could change the frequency of their price reviews, which would lead to a misalignment with the drainage and sewerage management plan planning period.

Justification for taking the power

357. The power is needed to allow the relevant Minister to change the frequency with which drainage and sewerage management plans need to be produced, from a five year period to a different period. Existing section 37D(4) of the WIA 1991 already allows the Minister to amend the five year period specified in relation to water resource management plans in section 37A(6)(c) WIA 1991.

358. There are specific circumstances in which this power is likely to be needed, for example, to ensure that plans remain effectively aligned with other processes such as the Ofwat price review into which the drainage and sewerage management plan will feed. It is intended that the information and evidence contained within the drainage and sewerage management plan will provide underpinning data for business plans and Ofwat's price review so having a power to ensure they are aligned will help ensure the optimal flow of information and ensure that the burden of providing information is minimised.

Justification for the procedure

359. The Department considers that the negative resolution procedure is appropriate notwithstanding that it is a Henry VIII power, given that the scope of the power is narrowly defined. This power follows two similar precedents in the WIA 1991, section 37D(4) and section 39D(1) in relation to water resources management plans and drought plans. The five year period specified in section 37A WIA 1991, which determines the frequency of water resources management plans, has been unchanged since 2003 and this power is similarly likely to be used infrequently. However should this power need to be used, its swift use will be necessary to reduce administrative burdens and provide certainty for sewerage

undertakers. Given the limited scope of this power it is considered that the negative resolution procedure provides an adequate level of parliamentary scrutiny.

Clause 78 (New section 94C WIA 1991): Power to make regulations about procedure in relation to drainage and sewerage management plans

Power conferred on: Secretary of State and Welsh Ministers

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative Resolution Procedure

Context and purpose

360. Clause 78 would insert a new section 94C into the WIA 1991, introducing a new power for the relevant Minister (the Secretary of State or Welsh Ministers) to make regulations relating to the procedure sewerage undertakers must follow in relation to the preparation of, consultation on, and publication of drainage and sewerage management plans. Regulations may make provision about the sharing of information, consultation of relevant parties, preparation and circulation of draft plans and proposals and the handling of confidential information. Relevant parties are likely to include the Environment Agency, Natural Resources Wales, local government (including Highways departments and planning authorities), water abstractors, water supply licensees who drain into the undertaker's sewerage system, landowners, farmers, housing developers, Internal Drainage Boards and local groups representing the interests of household customers, flood groups and wildlife groups. The regulations may make provision to help ensure that persons affected by the plan can make representations to the relevant Minister, and can make provision for inquiries or hearings for this purpose. The regulations may also make provision about the preparation and circulation of draft plans, including provision for the Minister to require changes to a draft plan.

361. The policy objective of this power is to ensure that there is a regime in secondary legislation to make provision for the procedural elements of drainage and sewerage management plans, and that the regime can remain up to date including with technological developments. The power is consistent with the power being taken in relation to water resources management plans in clause 77(7), inserting new section 39F WIA 1991, the purpose of which can be found above, and is equally relevant in the drainage and sewerage management plan context.

Justification for taking the power

362. The justification is as for clause 77(7) (inserting new section 39F WIA 1991) set out above. In the water resources management plan context, the current provision in primary legislation has not proved to be practicable. The legislation is overly burdensome and has constrained the way parties must carry out consultation so that it has not kept pace with technological developments. It is intended that regulations made under both section 39F and 94C WIA 1991 would create a more efficacious regime for the preparation and publication of these plans, which can be updated from time to time if appropriate.

Justification for the procedure

363. It is proposed that regulations under the new section 94C WIA 1991 will be subject to the negative resolution procedure. The reason for this is because the powers relate to procedural matters such as publication, consultation and information sharing. Furthermore the power is similar to the existing regulation making powers under existing section 37B WIA 1991, which is a negative resolution power, and is consistent with the new section 39F WIA 1991 power (set out in clause 77), which is also subject to the negative resolution procedure. The Department considers that this procedure will provide for adequate transparency and parliamentary scrutiny regarding the process which sewerage undertakers must follow.

Clause 78 (New section 94C(8) WIA 1991) Power to provide that regulations made under section 94C (in relation to the procedure for the preparation and publication of drainage and sewerage management plans) may confer on Ministers the power to make provision by directions.

Power conferred on: Secretary of State and Welsh Ministers

Power exercised by: Direction

Parliamentary procedure: None

Context and purpose

364. Section 94C(8) WIA 1991 proposed to be inserted by clause 78 would provide the relevant Minister (Secretary of State or Welsh Ministers) with the power to issue directions in relation to the procedure for drainage and sewerage management plans.

365. The policy objective of this power is to ensure the administrative provisions on publication and representation for drainage and sewerage management plans remain efficacious. Existing section 37B(7) WIA 1991 provides the Secretary of State with a power to direct a water undertaker that its water resources management plan must differ from the draft sent to him previously in ways specified in the direction. This new power is likely to be used to similar effect.

Justification for taking the power

366. The Minister will need to update planning requirements connected with drainage and sewerage management plans regularly, as Ministers do currently in relation to water resources management plans. In relation to the timing of publications or submissions, the Minister will need the flexibility to make appropriate arrangements to ensure the plans are prepared in a timely manner. There are existing directions powers in section 37B of the WIA 1991, including the provision in section 37B(11) that any steps to be taken by a water undertaker under section 37B shall be completed by such time or within such period as the Secretary of State may direct, and in section 37B(7) to direct that a water resources management plan must differ from the draft in a specified way. The directions power in new section 94C will allow Ministers to make similar procedural directions in relation to drainage and sewerage management plans. The directions power is limited in scope as it could only be used to direct sewerage undertakers as to procedural matters with respect to the process for the preparation, revision and publication of water resources management plans, drought plans and joint proposals.

Justification for the procedure

367. The direction making power is not proposed to be subject to a parliamentary procedure. This is consistent with the provision for existing administrative direction making powers in section 37B WIA 1991 and given the operational content of the directions, it is not considered appropriate to add a parliamentary process.

Schedule 13 (Linked to clause 80) A power for the Competition and Markets Authority Board to make rules of procedure regulating the conduct and disposal of appeals

Power conferred on: Competition and Markets Authority

Power exercised by: No statutory procedure

Parliamentary Procedure: None

Context and purpose

368. Ofwat, the economic regulator of water and sewerage undertakers, has existing powers to modify the conditions of water and sewerage undertaker appointments. Clause 80 improves that existing power of modification, and will allow Ofwat the power to modify conditions without first securing undertakers' consent or the making a reference to the Competition and Markets Authority ("CMA"). A more responsive model for water sector licence modification updated to bring it in line with other economic regulators would enable Ofwat to take better account of ongoing and future priorities leading to better outcomes for customers and the environment.
369. One of the key safeguards governing Ofwat's use of this modification power is the ability for affected undertakers, licensees and representative groups to appeal Ofwat's changes to the CMA. Clause 80 inserts new sections (12D-12I) into the WIA 1991, which set out the grounds for an appeal and the process for appeals in detail. However, the Department considers that the CMA also needs a power to set further operational rules to govern its appeals processes. The Rules will be supplementary to the provisions of primary legislation.

Justification for taking the power

370. The CMA already has published Rules in relation to appeals relating to energy licence modifications. The Rules relating to energy licence modifications restate much of the provision in the governing primary legislation (the Electricity Act 1989), but with additional detail and explanation. It would be cumbersome to provide this level of detail on the face of the WIA 1991. For example, the existing Rules provide that sensitive documents sent to the CMA or any other person should be marked to identify sensitive information; documents must be sent both in electronic form and in hard copy (and they provide the CMA email address); and details of the slip rule are set out how to deal with clerical errors in CMA orders.
371. The Department considers that the CMA must have some flexibility to adapt its Rules to manage appeals fairly, efficiently and in a cost effective way as appeal processes must take place within strict statutory time limits. The energy appeal Rules are written in a clear and user-friendly way for the benefit of the parties to the appeal, and by being non-

legislative, they can be easily updated and clarified where needed. The power is circumscribed in that the primary legislative framework (new sections 12D-12I WIA 1991) contains detailed provision for appeals and the Rules may only be made in a way that is consistent with the primary legislation.

Justification for the procedure

372. The Department considers that the CMA Rules framework must be capable of being promptly updated based on lessons learnt from experience and recent cases. The Department's view is that the CMA's power to make rules of procedure should continue as a power without any parliamentary procedure, as is the case with the CMA's other Rule making powers. The CMA before making such Rules, must consult such persons as it considers appropriate (paragraph 11(4)).

Clause 83 A power to make regulations which make changes in relation to the lists of priority substances for surface waters and groundwater and their environmental quality standards.

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and Purpose

373. Clause 83 contains a regulation-making power for the Secretary of State to make changes to the lists of priority substances for surface waters and groundwater, their environmental quality standards, and to make related provisions.

374. The Water Framework Directive is the principal EU Directive on water quality. Part of the Water Framework Directive aims to improve water quality by reducing specific "priority substances" in water, identified as such because of the significant risk they pose to water bodies. The Water Framework Directive required the European Commission to create a list of priority substances and accompanying standards for surface water and a list of polluting substances and accompanying standards for groundwater, which the Commission has done through the Environmental Quality Standards Directive and the Groundwater Directive respectively.

375. These substances and standards are used to assess whether water bodies achieve 'good chemical status' and the next review is due to begin later in 2019. This is likely to lead to changes to the lists of substances, with more substances being added and standards set for existing substances being revised in light of new scientific evidence.

376. The power would enable provision to be made adding to or removing substances from the list, and the setting or revising of the environmental quality standards for those substances. It also enables the making of connected provision, such as amending the definition of 'good chemical status' so that it includes assessment of water quality against the new substances and standards; setting a date by which good chemical status in relation to new substances or standards should be achieved; and requiring monitoring and other technical processes in relation to them

377. The power would allow the amendment or modification of the legislation which transposes the Water Framework Directive and related Directives in the UK and which incorporates into the concept of 'good chemical status' and related functions the current lists of substances and standards.

378. The power is capable of being exercised in relation to England and, as the result of agreement with the Devolved Administrations (since water quality is a devolved matter), also in relation to Wales, Northern Ireland and the parts of Scotland which are within the cross-border Solway Tweed River Basin District and Northumbria River Basin District, subject to a consent requirement.

Justification for taking the power

379. Now that the UK has left the EU, the UK authorities will continue to monitor substances of concern on our own watch list, enabling data to be gathered and decisions to be made about whether they should be included in legislation as a 'priority substance'. New scientific understanding is likely to lead to the Government wishing to update legislatively the substances and standards which are currently used to assess the chemical status of our water bodies, and drive improvements in them. New substances of potential concern are continually emerging (for example, Metaflumizone and Amoxicillin).

380. Currently there are no alternative powers to section 2(2) of the European Communities Act 1972 to make such provisions, and that Act has been repealed. The power proposed is needed to ensure that these lists and their standards do not remain fixed after the UK withdraws from the EU. The power would enable action to be taken legislatively to tackle those new priority substances most accurately representing harm to the water environment. Because a degree of flexibility is required to act on the basis of future scientific developments, it is not possible to prescribe these values now on the face of primary legislation. The department expects that the power would need to be exercised whenever significant developments in scientific knowledge about substances of concern, and standards, occur.

381. As an illustration, the next review for the Environmental Quality Standards Directive is scheduled for 2019-2020. A review of the Groundwater Directive will also take place from 2019-2020. Member States will also begin monitoring substances on a 'watch list' of new chemicals which might have an adverse impact on groundwater (e.g. pharmaceuticals and industrial chemicals). Some substances might be removed from the EU lists, based on new evidence, and the proposed power would enable similar changes to be made legislatively if appropriate to domestic conditions. This would avoid a cost to domestic businesses of having to comply with otiose regulatory burdens imposed historically at EU level.

382. The power is circumscribed: for example, it cannot be used to make wider changes to existing water quality legislation which implements the Water Framework Directive which are not connected to updating the chemical substances and their Environmental Quality Standards.

Justification for the procedure

383. The power would be exercised subject to the negative resolution procedure. There is an express consultation provision which provides a safeguard for the use of the power. The power is to make relatively narrow changes to existing transposing legislation for the purpose of updating certain water quality standards as needed domestically. Therefore,

the Department considers the negative resolution procedure affords an appropriate level of Parliamentary scrutiny.

Clauses 84 and 85 powers for the Welsh Ministers and the Northern Ireland Department to make regulations to amend legislation which transposes water quality Directives

Power conferred on: Welsh Ministers and the Northern Ireland Department

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

384. Equivalent powers to those in clause 83 for the Secretary of State are conferred on the Welsh Ministers (clause 84) and on the Northern Ireland Department (clause 85) to make changes in relation to the lists of priority substances for surface waters and groundwater and their environmental quality standards and related provision, to exercise in relation to their respective transposing legislation.

Justification for taking the power

385. The justification for taking these powers is the same as for the Secretary of State's powers in clause 83.

Justification for the procedure

386. The justification for the procedure is the same as for the Secretary of State's powers in clause 83.

Clause 86: Power to make regulations to make provision amending the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004.

Power conferred on: the Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

387. This clause confers a regulation-making power on the Secretary of State to make provision amending the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004 ("the 2004 Regulations").

388. The Solway Tweed River Basin District ("RBD") is an area which is partly in England and partly in Scotland, in which water quality is to be managed in a coordinated way. Because of the cross-border nature of the Solway Tweed RBD, when transposing the various obligations of the Water Framework Directive through the 2004 Regulations, most of the functions were conferred jointly on the Secretary of State and Scottish Ministers, or the Environment Agency ("EA") and Scottish Environment Protection Agency ("SEPA") acting jointly. This is despite water quality being a devolved matter for Scotland. For

example, the Secretary of State and the Scottish Ministers are jointly required to approve environmental objectives for the whole RBD. The EA and SEPA are required to jointly monitor all the water bodies in the RBD.

389. Given the devolved nature of water quality, and the UK's withdrawal from the EU, the Scottish Government requested that a review is undertaken of the arrangements for managing the Solway Tweed RBD to reflect that the Scottish Ministers should be able to exercise certain powers separately for the Scottish part of the RBD, and also to reduce some of the bureaucracy around the EA and SEPA joint functions.

390. The power could be used to make provision to transfer the existing functions of ministers and environmental regulators contained in those Regulations so that they are exercisable in a different way or by a different person. So functions which are currently exercisable jointly can be separated out so that, for example, the Scottish Ministers exercise them in relation to the Scottish part and the Secretary of State exercises them for the English part. It is likely that functions for any water bodies which straddle the border would continue to be joint.

Justification for taking the power

391. Changing the arrangements would require amending the 2004 Regulations which currently specify how all the functions are to be exercised. As a consequence of the repeal of the European Communities Act 1972 there are no longer suitable powers to make such amendments. A regulation-making power is required so that a review can be undertaken by the Department and the Scottish Government of the current working arrangements in the Solway Tweed. Having a regulation-making power would also allow changes to be made in stages, if that was thought appropriate.

392. A similar power exists to deal with water-related functions of the Secretary of State and the Welsh Ministers in cross-border England / Wales areas. Section 49 of the Wales Act 2017 inserted that power into section 58 of the Government of Wales Act 2006 (see subsection 2A) and has a much wider scope than the power taken in this clause as it applies to all aspects of water (not just water quality) and can be used to amend any relevant legislation.

393. The power in this clause is limited. It is focused only on amendments to one instrument, the 2004 Regulations, which themselves relate only to certain aspects of water quality. The power cannot be used to change the nature of the functions, only whether they are exercisable jointly, concurrently, or solely by either the Secretary of State or the Scottish Ministers. The power gives some flexibility as to what choice is made here, and also allows any changed functions to be subject to consultation – for example, a power which is currently joint could be amended so that in future it is exercised in Scotland by the Scottish Ministers alone, but after consultation with the Secretary of State. This is to reflect the shared nature of the cross-border RBD and that how water is dealt with on one side of the border could have an impact on the other side.

Justification for the procedure

394. The regulation-making power is subject to the negative resolution procedure. It is considered that the negative resolution procedure is appropriate because the power is narrowly drafted. The power cannot change what has to be done in the Solway Tweed

RBD, only which Minister or regulator is responsible for doing it. The power can only be used to amend the 2004 Regulations.

395. As stated above, a comparable power was taken by the Wales Act 2017 and is subject to the affirmative procedure. However, in contrast to the power in clause 84, the Wales Act 2017 power has a much wider focus on all aspects of water law including for example the water industry and flood risk management. It also has no limitation on what legislation can be amended, and can be used to amend primary legislation.

396. To reflect the devolved nature of the subject matter, and the fact that any changes made using the power will be the result of a review by both the Secretary of State and the Scottish Ministers, the Secretary of State must obtain the consent of the Scottish Ministers before making regulations using the power.

Clause 88– new sections 37(5ZA) to (5ZH) of the LDA 1991 Power to by regulations make provision for the value of other land in an English internal drainage district

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure

Context and purpose

Context and Purpose of land drainage measures (clauses 88 – 91) generally

397. Internal drainage boards (“IDBs”) are public bodies constituted under the Land Drainage Act 1991 (“LDA 1991”), which are responsible for exercising a general supervision over all matters relating to the drainage of land in internal drainage districts; areas of special drainage need, including water level management and flood risk.

398. IDBs meet their expenses by means of drainage rates and special levies. Drainage rates are raised on agricultural land and buildings (defined under the LDA 1991 as ‘chargeable property’) and special levies are raised on non-agricultural land (referred to in the LDA 1991 as ‘other land’).

399. Under section 37(1) and 37(2) LDA 1991, the proportion of an IDB’s expenses met by the drainage rate and the special levy depends upon the proportion of the total value of the land in an IDB’s district which comprises chargeable property and other land respectively. Currently, the LDA 1991 includes the detailed provisions IDBs are required to use, in order to calculate and compare the value of land comprising chargeable property and other land within each internal drainage district.

400. The classification of land into these two categories (chargeable property and other land) is specific to IDBs and there is no existing data which is readily available and immediately comparable, which IDBs can use in order to compare the value of these types of land. Instead, the land valuation calculations depend on the use of pre-existing external data, such as, non-domestic rating lists, used to assess the value of non-domestic properties as part of the overall calculation for ‘other’ (i.e. urban) land.

401. The delegated powers related to land drainage in this Bill provide for the technical implementation of the existing principles and policy which determine the apportionment of IDBs' expenses. Namely, they enable the Secretary of State to update the particular calculation by which IDBs assess the values of these different types of land.

Context and Purpose of clause 88

402. Clause 88 inserts a new subsection (5ZA) into section 37 of the LDA 1991, to provide a power for the Secretary of State to make regulations which make provision for the value of other land in an English internal drainage district. This will enable the government to include the detailed calculations for assessing the value of other land in secondary legislation. In the immediate term, this will enable the government to address the current barrier to the creation and expansion of IDBs caused by the fact that under the existing provisions in the LDA 1991, certain historic data which IDBs must currently use in order to calculate the value of other land is now missing or incomplete. The particular data which is missing or incomplete are the 1990 ratings lists which, pursuant to section 37 LDA 1991, must be used to assess the value of domestic land (as part of the overall calculation for 'other land'). Where this data is missing or incomplete, IDBs are unable to (a) calculate the value of other land in their district, and (b) therefore determine the proportion of the expenses of the IDB to be raised from the proceeds of the drainage rates and special levies (by reference to the values calculated under (a) above), preventing the expansion of existing or creation of new IDBs where there is local demand.

403. Subsections (5ZB) to (5ZF) elaborate on what the regulations under subsection (5ZA) may include. This includes provision about the methods to be applied or factors to be taken into account in determining the value of land (5ZB)(a); to make adjustments to what would otherwise be determined to be the value of land (5ZB)(f); which IDBs the regulations will apply to (5ZC); and for an IDB to elect that the regulations should apply to it (5ZD).

404. There is a Henry VIII power in subsection (5ZE)(b) and (5ZF) to make consequential, provision, which includes a power to amend primary legislation. This is considered necessary in case the application of the new calculation requires incidental or consequential provision to be made to the LDA 1991, or to repeal specific provisions of the LDA 1991 which are made redundant as a result of the regulations applying in relation to all IDBs. Additional safeguards included in relation to the exercise of this power are outlined below.

405. Clause 89 of the Bill also pertains to the valuation of other land, but applies to internal drainage districts in Wales. The clause makes a small number of minor amendments to the wording of an existing delegated power which was introduced under section 83 of the Environment (Wales) Act 2016 (but is not yet in force). The only substantive amendment to that power which is included in the Bill is the introduction of a new consultation duty in connection with the regulation making power introduced under new section 37(5Z) LDA 1991. We have not included a separate section in relation to clause 87 of the Bill as it does not introduce any new delegated powers.

Justification for taking the power

406. The powers are intended to enable the government to address any amendments needing to be made to these technical provisions in the future more readily, within secondary legislation. As such, whilst the issue of missing or incomplete data set out above has brought the problems associated with the existing valuation calculation to the fore, it

serves to illustrate the difficulties associated with these provisions, which concern the detailed and technical implementation of policy, being laid down in primary legislation. This measure seeks to address this wider issue.

407. The Department considers that setting out the valuation calculation in regulations is appropriate and proportionate, because these provisions deal with details of a subsidiary and technical matter. In reaching this conclusion, we have taken the Select Committee on the Constitution's 16th Report of Session 2017 – 19 on "The Legislative Process: The Delegation of Powers" into account, in particular paragraphs 2 and 10 of the summary of that report.³ The approach taken in the Bill will also enable further updates to the valuation calculation, when future developments (such as updated Valuation Office Agency, or other valuation data which the calculation refers to) necessitate such a change.
408. If the government were to place amended technical provisions on the face of the Bill, the same issue could arise in later years and the issue would be recurring. The Department considers that such a situation, which would require another Act of Parliament each time any updates to the calculations are needed, would be disproportionate. Therefore the Department proposes that the valuation calculation to be set out in regulations that are subject to the affirmative procedure.
409. The Department does not consider that there is any intrinsic reason why these technical provisions need to be included in primary legislation. Indeed, we note that prior to the current provisions being incorporated into the LDA 1991 (which updated the Land Drainage 1976 and consolidated provisions relating to IDBs into a single Act) the technical provisions detailing the calculation for valuation of other land and chargeable property were set out in secondary legislation (see the Internal Drainage Boards (Finance) Regulations 1990 (SI 1990/72), and Internal Drainage Board (Finance) (Amendment) Regulations (SI 1991/573)). This approach is, therefore, consistent with some established practice in this area.
410. The powers sought have been drafted as narrowly as possible, whilst ensuring that the government can achieve its aim.
411. As set out above, there is no bespoke valuation data related to the different categories of land IDBs use, to compare the value of chargeable property and other land in its district. This is because the categorisation of land into chargeable property and other land is particular to the IDB regulatory framework.
412. Instead, the valuation calculation in the LDA 1991 (and any future calculation) makes use of pre-existing data sources before adjusting these figures to ensure that they are comparable with one another. This adjustment is essential, because the economic assumptions (for example, the date of assessment for different valuation data) underpinning the data being used for different types of land may differ. The adjustments ensure that the figures which IDBs arrive at are comparable, and the apportionment calculation resulting from this comparison is fair.
413. The delegated powers have been carefully drafted, and only enable adjustments necessary to ensure the regulations can detail a cohesive set of alternative valuation calculations where any one element of the calculation needs updating.

³ <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/225.pdf>

414. By way of an example, we note that the LDA 1991 currently refers to the domestic rating lists as the data source used to value domestic non-agricultural land. However, the Valuation Office Agency now assesses the value of domestic properties and places these into council tax bands. Therefore, if the new valuation calculation is to refer to this current data source, it will need to include a calculation which first converts the council tax bands into single figures. The power under new section 37(5ZB)(b) allows for this, and other essential adjustments.

- a. In relation to the Henry VIII power under new sections 37(5ZE) and (5ZF):
- b. These powers are in accordance with the stated aim of the policy, as they would only enable amendments to primary legislation that are within the scope of section 37(5ZE)(b). This limits the extent to which any enactment could be amended, repealed or revoked by secondary legislation.
- c. At the moment, there is no need for all IDBs to use a new valuation calculation for other land. This is because the particular need to provide an alternative valuation calculation (being missing or unavailable data) does not affect all areas with IDBs. It affects, in particular, IDBs that wish to expand (where they will not still have the historic data to make use of in relation to land incorporated into the internal drainage district) or communities that wish to set up a new IDB (where, again, the historic data referred to in the existing valuation calculation in the LDA 1991 (under section 37(5)) won't have been retained).
- d. The government does not wish to require all existing IDBs (including those unaffected by missing or unavailable data) to have to devote resource and time to adopting a new calculation where the existing calculation currently suffices.
- e. Whilst the current issue affecting the valuation calculation only affects some IDBs (not all), the government is aware that owing to the technical nature of these calculations (and their reliance on changing external data), in future years, an issue with the valuation calculation in primary legislation could arise that poses problems for all IDBs. It is for this reason that new section 37(5ZC)(c) clarifies that regulations setting out an alternative valuation calculation may apply in relation to all English drainage boards.
- f. In such circumstances, the Department expects a consequential amendment to be required in relation to the existing valuation calculation currently set out under section 37(5) of the LDA 1991, namely that this would need to be repealed. This is why the power under section 37(5ZF) is included.
- g. Whilst this is a Henry VIII power, it would only be capable of being used to amend, repeal or revoke provisions in primary legislation which are related to these powers, being provisions relating to the valuation of other land. These are both matters pertaining to a narrow subject matter (see below), and matters which the Department considers would be better suited to secondary legislation in any event, owing to the fact that they provide for (i) the technical implementation of policy, and (ii) detail which is so subject to change.

415. Limitations have been placed on the power so that it can be exercised only in relation to the narrow subject matter to which the regulation making power under section 37(5ZA) pertains (owing to the constraint imposed under section 37(5ZE)).

Justification for the procedure

416. It is considered that the affirmative procedure is appropriate for regulations introduced under new section 37(5ZA). Firstly, because the new calculation, which will be set out in secondary legislation, will exist as an alternative to the current calculation which is set out in primary legislation. Secondly, because the powers enable incidental, supplementary, consequential, transitional, transitory or saving provisions to be made to the LDA 1991 under new sections 37(5ZE)(b) and 37(5ZF) such that in the future, the calculation stipulated in secondary legislation may, if necessary, replace the existing calculation provided for in the LDA 1991 in full.

417. As a safeguard on the exercise of the power, before making regulations under section 37(5ZA), the Secretary of State must consult such persons (if any) as the Secretary of State considers appropriate having regard to the extent to which the regulations are, in the view of the Secretary of State, likely to affect the valuation of other land.

Clause 90 – new section 41A – Alternative method of calculating annual value of agricultural land and buildings

Power conferred on: the Secretary of State, and Welsh Ministers

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure Henry VIII

418. In this part of the memorandum, which reviews clause 90 of the Bill, statutory references, unless otherwise specified are to provisions of the (“LDA 1991”).

Context and Purpose

419. Clause 90 inserts a new section 41A into the LDA 1991 enabling the Secretary of State in England, or the Welsh Ministers in Wales, to make provision for the annual value of each chargeable property in an internal drainage district to be determined in accordance with regulations.

420. The regulations may make provision about certain matters set out in subsections (3) and (4), including the date by which an internal drainage board (“IDB”) is to determine the annual value of each chargeable property about methods to be applied, or factors to be taken into account in determining the annual value of a chargeable property and for the annual value of a chargeable property to be determined on the basis of estimates, assumptions or averages. These powers have been drawn as narrowly as possible, whilst ensuring that they are capable of enabling a coherent and comparable valuation calculation to be provided for within the regulations.

421. Subsections (7) and (8) provide that regulations may apply in relation to IDBs specified in the regulations, IDBs of a description specified in the regulations or all IDBs. Further provision may be made for an IDB to elect to determine the annual value of chargeable property in accordance with the provisions made by the regulations and to make an election in accordance with the procedure specified in the regulations.

422. There is a Henry VIII power in section 41A(10)(b) and (11) which is considered necessary in case the application of the new calculation requires incidental or

consequential provision to be made to the LDA 1991, or to repeal specific provisions of the LDA 1991 which are made redundant as a result of the regulations applying in relation to all IDBs.

Justification for taking the power

423. The reasons for taking the power are similar to those set out for the calculation of the value of other land under clause 88. Firstly, the calculation used by IDBs to assess the value of chargeable property concerns the detailed, technical implementation of policy, which is better suited to secondary legislation. Secondly, data referred to within the calculation may change in future, requiring further updates within the provisions setting out the calculation. These updates can be more readily made if the calculation is set out in secondary legislation. Thirdly, these amendments may also give rise to the need to make specific consequential amendments to the LDA 1991.
424. In addition, the Department considers that there is no intrinsic reason why the valuation calculation needs to be included in primary legislation.
425. There is no equivalent issue of missing or incomplete data preventing IDBs from completing the valuation calculation for chargeable properties. However, and in addition to the reasons set out above, we note that any significant amendment to the valuation for other land will require adjustment to the valuation for chargeable property. This is because, if the valuation data used to calculate the value of other land were updated, without making consequential modifications to the calculation of the annual value of chargeable properties, the balance between drainage rates and special levies would be unintentionally distorted. For example, if regulations were introduced which provided a valuation calculation for other land which made use of data dating from years later than the date which the valuation calculation for chargeable property relates to, these two calculations would be based upon different economic assumptions, and this would be both inconsistent and unfair, since it would distort the figures IDBs use to determine the apportionment of their expenses.
426. As has been detailed above in relation to valuing other land, the power to amend the valuation calculation applicable to chargeable property under new section 41A(1) has been drafted with as narrow a scope as is possible.
427. The proposed power under new section 41A(1) would allow the Secretary of State, or Welsh Ministers, to provide a new valuation calculation for estimating the value of agricultural property *whether or not* there have been any changes to the calculation for assessing the value of other land.
428. The Department does not consider it necessary to make the exercise of the powers under new section 41A conditional upon exercise of the powers under new section 37(5ZA) to (5ZH), for the reasons set out below. Firstly, the immediate need for enabling powers to update the valuation calculation is due to missing and incomplete data relevant to the valuation of other land. However, updates could in future, be needed in relation to the valuation of agricultural land (i.e. chargeable properties), and as noted above, it is considered prudent and appropriate for such technical details to be placed in secondary legislation to enable these updates to be made more readily in future. Secondly, it is likely that a change to the valuation calculation for one of these categories of land will give rise to a need to make corresponding adjustments to the valuation calculation for the other. However, it is also possible that a minor amendment to one, would not *necessarily* require

changes to the other. As such, it is considered that linking these provisions in any way, would impose an unnecessary constraint upon the exercise of these powers.

429. In relation to the Henry VIII power under new section 41A(10)(b) and (11) the Department refers to the detailed reasoning provided above in relation to the equivalent powers providing for incidental, supplementary, consequential, transitional, transitory or saving provision to be made in relation to provisions in primary legislation which relate to the valuation of other land.
430. The power has been drafted so as to apply only in relation to the narrow subject matter to which the regulation making power under section 41A(1) pertains (owing to the constraint imposed under section 41A(10)(b)).

Justification for the procedure

431. The reasons for using the affirmative procedure are the same as those set out above. Firstly, the new calculation, which will be set out in secondary legislation, will exist as an alternative to the current calculation which is set out in primary legislation. Secondly, the powers enable incidental, supplementary, consequential, transitional, transitory or saving provisions to be made to the LDA 1991 under new section 41A(11), such that in the future, the alternative calculation *may*, if necessary, replace the existing calculation provided for in the LDA 1991 in full.
432. As a safeguard on the exercise of the power, before making regulations under section 41A(1), the appropriate national authority must consult such persons (if any) as the authority considers appropriate having regard to the extent to which the regulations are, in the view of the authority, likely to affect the valuation of any chargeable properties (in accordance with section 41A(12)).

Clause 91 – new section 37A LDA 1991 – A power for the Secretary of State in relation to England, or Welsh Ministers in relation to Wales to make regulations which add to the list of qualifying persons in relation to information disclosure

Power conferred on: Secretary of State, and Welsh Ministers

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure

433. In this part of the memorandum, which reviews clause 91 of the Bill, statutory references, unless otherwise specified are to provisions of the Land Drainage Act 1991 (“LDA 1991”).

Context and Purpose

434. Clause 91 inserts new sections 37A, 37B and 37C into the LDA 1991. Section 37A creates a statutory gateway for disclosure of taxation information from the Valuation Office Agency of HMRC, to a qualifying person for a qualifying purpose (which persons and purposes are set out in new section 37A(3) and (4) of the LDA 1991), providing HMRC with the statutory framework for to disclose data in certain circumstances.

435. The reason for including these provisions, is that the valuation calculations (referred to in the discussion of clauses 88 and 90 above) will require up to date information on the values of other land and chargeable properties. The intention is to use the most recent Council Tax valuation lists and non-domestic ratings lists, which are both compiled and maintained by the Valuation Office Agency, an executive agency of HMRC. The current provisions in section 37 of the LDA 1991 do not contain a statutory gateway for this information to be disclosed, and without these provisions, IDBs would only be permitted to access data made publicly available by the Valuation Office Agency.
436. Further to the statutory gateway under new section 37A, new section 37B(1)(a) enables information disclosed under section 37A to be *further disclosed* to a qualifying person for a qualifying purpose (and there are certain other circumstances under which onward disclosure is permitted, such as in pursuance of a court order). Where that onward disclosure under new section 37B(1)(a) is to: (a) an internal drainage board, (b) the Environment Agency, or (c) Natural Resources Body for Wales, no further consent is required. However, if the onward disclosure is to any of the other qualifying persons currently listed under new section 37A(3)(d)–(g), consent of the Commissioners for HMRC is required first.
437. There are two delegated powers proposed in clause 91:
438. Section 37A(3)(h) contains a power for the Secretary of State in relation to England, and Welsh Ministers in relation to Wales, to make regulations which specify a new qualifying person in addition to the existing list of qualifying persons currently included under new section 37A(3). This is not a Henry VIII power. Any new qualifying person would be specified in regulations only. Those regulations would not amend new section 37A(3).
439. Section 37B(2)(b) provides that regulations made under section 37A(3)(h) may also stipulate that section 37B(2) applies to any new qualifying person. This power enables the relevant regulations to confirm whether or not the restriction under section 37B(2) relating to onward disclosure (being the requirement for the consent of the Commissioners for HMRC) should apply to any qualifying person added to the existing list in the future (pursuant to section 37(3)(h)).

Justification for taking the power

440. The power to add to the list of qualifying persons set out under new section 37A(3)(h) is needed in order to ensure that other persons requiring access to HMRC information for a qualifying purpose, who are identified at a later date, may be added to the list in secondary legislation, in circumstances where the framework of regulatory bodies operating in this area changes.
441. The regulation making power under section 37A(3)(h) is also necessary so as to ensure that the appropriate national authority may confirm what consent provisions should be associated with onward disclosure to an as yet, unidentified qualifying person (that is, whether onward disclosure should be permissible without further consent as is the case for three particular ‘qualifying persons’ currently listed, or whether consent from the Commissioners for HMRC should be required as a condition to onward disclosure). If this delegated power were not included, then it remains unclear what conditions, if any, applied to onward disclosure to a qualifying person specified in the future.

Justification for the procedure

442. It is proposed that regulations made under this power will be subject to the affirmative resolution procedure. The regulations would extend the remit of powers to disclose information to other persons not listed in the primary legislation. It is considered that close parliamentary scrutiny is appropriate given the sensitivity of taxpayer confidentiality and the use of such data. These regulations may only be made with the consent of the Commissioners for HMRC.

PART 6 – NATURE AND BIODIVERSITY

Schedule 14 (linked to clause 92)

443. Schedule 14 (see clause 92) makes provision for biodiversity gain to be a condition of planning permission in England and inserts a new Schedule 7A into the Town and Country Planning Act 1990 (TCPA 1990).

Schedule 14 Paragraph 2, new Schedule 7A to the TCPA 1990 paragraph 2(4) the biodiversity gain objective, and the power to amend the percentage gain in biodiversity that development must achieve

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure Henry VIII power

Context and purpose

444. This is a Henry VIII power. One requirement of a biodiversity gain plan in order for it to be approved is that it meets the biodiversity gain objective. Paragraph 4 of new Schedule 7A sets out the components of this objective, including the factors to be taken into account in determining the biodiversity value of a development. Paragraph 4(3) of new Schedule 7A specifies that the biodiversity gain plan must provide for a 10% increase in the biodiversity value of the onsite habitat compared to the pre-development biodiversity value of the land. The power in paragraph 4(3) gives the Secretary of State the ability to vary the target percentage for net gain from the default value of 10%, and to set the percentage at different level. This might be used, for example, to set different percentages for different types of development which might be more or less able to achieve biodiversity net gains. Government is considering applying a percentage requirement lower than 10% for minor residential developments. Because this is a “gain” objective, the relevant percentage will need to be greater than “0”.

Justification for taking the power

445. The requirement for an increase in the overall biodiversity value of the land is at the heart of the policy and therefore it is appropriate that this key figure should be on the face of the Bill. However, this is a new measure and the Department’s view is that government may, in future or before commencement, wish to increase or decrease the percentage requirement for development as a whole (should the policy not be delivering its objectives) or for certain sectors. Such a change is currently being considered by government in relation to the percentage target for small residential developments. Detailed regulations

will need to be in place to provide the planning authorities and developers with a clear explanation of what percentage gain is expected of different types of development. A secondary legislation power to change this percentage is needed to ensure that Government has the flexibility to respond to any unforeseen impacts in a timely manner.

Justification for the procedure

446. The Department proposes that the affirmative procedure would give Parliament the right level of scrutiny. This is appropriate as the power relates to an important characteristic of the net gain requirements. The percentage gain set out in regulations needs to be set at an appropriate level in order to strike the right balance, to achieve environmental policy outcomes, whilst also not posing a risk to development rates.

Schedule 14 Paragraph 2, New Schedule 7A to the TCPA 1990, Paragraph 4(1) and (2) power to publish the metric for calculating biodiversity value of land

Power conferred on: Secretary of State

Power exercised by: Publication of a document

Parliamentary Procedure: None

Content and purpose

447. The new biodiversity gain objective is premised upon the basis that the relative biodiversity value of the habitat on any land can be calculated. Natural England has published a metric for doing this, as a tool to be used in planning decisions. This metric has been updated in the light of experience. The biodiversity metric is therefore a document describing the approach and rules for assessing the pre-development and post-development biodiversity value of the land.

448. With the introduction of the biodiversity gain objective, the Secretary of State will take over the publication of the metric from Natural England, which is now mandated as the approved method of calculating biodiversity value. This is a power for the Secretary of State to publish, update or replace the document which sets out the metric by which the biodiversity value of land is calculated. The metric will be periodically revised and republished in the light of experience. The metric sets out a methodology for calculating biodiversity value of habitat, taking account of a large number of variables. Many of these variables will require the application of expert judgment on the part of an ecologist, although a simplified version will also be available for smaller sites that will not require expert judgment to use.

Justification for taking the power

449. The format of the metric means it is unsuitable for putting in legislation. The Department recognizes the need to formalize the status of the metric but considers this is best done by publishing as a document. Prior to publication or republication the metric is to be subject to a consultation requirement, which the Department considers the best way to ensure that stakeholders have an opportunity to express a view on it. The metric is likely to be subject to incremental revision from time to time as it is used in practice and as it is refined to better take account of the different factors that contribute to the overall value of different types of habitat. Since the first publication of the metric by Natural England, the metric has been

revised to better take account of the value of linear features such as hedgerows and watercourses. Similar revisions are likely in future.

Justification for procedure

450. The Department considers that the metric itself will be highly technical and not easily subject to Parliamentary consideration. The document with the metric will have been subject to consultation. Parliament will have an opportunity to consider the transitional provisions related to the republication of the metric (as set out in relation to paragraph 13(5)).

Schedule 14 Paragraph 2, New Schedule 7A to the TCPA 1990, Paragraph 4(5)) power to make transitional provisions

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Content and purpose

451. When the metric is revised and republished it will be necessary to make transitional arrangements to provide clarity in relation to applications for planning permission that have already been made, as to whether the metric used to determine the relative biodiversity value of land in relation to those applications should be the old or the revised version of the metric. This will be particularly important in relation to phased development where gain plans may still need to be submitted and agreed many years after the original grant of planning permission.

Justification for taking the power

452. When changes in the metric are made it will be necessary to provide certainty for all stakeholders as to the version of the metric that applies at what stage of any development. A statutory instrument is necessary to provide this.

Justification for the procedure

453. The Department proposes that the negative procedure would give Parliament the appropriate level of scrutiny. The changes will be entirely technical in nature, providing how the procedures will apply in relation to the grant of different types of planning permission.

Schedule 14 paragraph 2, New Schedule 7A to the TCPA 1990, Paragraph 6(a)(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

454. Paragraphs 5-7 of Schedule 7A set out the date on which biodiversity value is calculated. Paragraph 6 provides that if, prior to applying for planning permission, habitat on land is degraded by any activity, the planning authority may treat the pre-development value of the land as the value before the activity causing degradation occurred. The intention is to avoid creating a perverse incentive to destroy high value habitat on land that could be developed. The provision will capture activities causing degradation since 30 January 2020. Where the activities causing degradation were carried out under the terms of a planning permission this provision does not apply. The power in paragraph 6(a)(ii) enables the Secretary of State to make regulations specifying other kinds of permission that can also be relied on.

455. 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 taking the Power

456. 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

457. 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.

Schedule 14 Paragraph 2, New Schedule 7A to the TCPA 1990, Paragraph 14(3) The power to specify additional content, form and procedure to be adopted in relation to the submission of a biodiversity gain plan.

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

458. Under the TCPA 1990 the Secretary of State may set the procedure and requirements of applications for planning permission (section 62 TCPA 1990). The aim of achieving a net gain in the biodiversity of land which is to be developed is to be given effect through changes to the planning process. The new provisions inserted into the TCPA 1990 require applicants to submit and have approved, a biodiversity gain plan as a condition of the grant of planning permission. The purpose of this power is to supplement the existing legislation, for example in relation to planning permission applications (made under section 59 TCPA 1990) to enable the Secretary of State to specify additional content, form and procedure, in relation to the submission of a biodiversity gain plan, consistent with existing practice.

Justification for taking the power

459. The Department's view is that detailed regulations will need to be in place to provide the planning authorities and developers with sufficient guidance on the preparation of biodiversity gain plans and to ensure consistent processes are followed across all areas of England. The completed biodiversity metric calculations will be a key component of such plans, and so it is essential for future proofing the requirement that the information to be included in the gain plan can be updated in line with metric updates and emerging good practice. The only practicable way for detailed requirements to be prescribed, while allowing them to be changed to ensure the legislation reflects the most up to date evidence and good practice, in a timely way, is secondary legislation. The intention is for these detailed regulations to form part of existing development orders made under section 59 TCPA 1990, setting out procedural aspects of the planning system.

Justification for the procedure

460. The Department considers that the negative procedure would give Parliament the appropriate level of scrutiny. The primary legislation already sets out the principal information required which ensures the core elements of the plan cannot be weakened. This is appropriate as the power relates to detailed procedural requirements relating to the process for preparing biodiversity gain plans. This matter warrants a degree of scrutiny, but not necessarily prior parliamentary debate and affirmative approval.

461. These powers are intended to be exercised jointly with existing powers, e.g. under sections 59 and 62 of the TCPA 1990, setting out procedural requirements in relation to the grant of planning permission, and which are subject to a negative resolution process.

Schedule 14 paragraph 2, new Schedule 7A to the TCPA 1990, paragraph 16 - a power for the Secretary of State to prescribe the procedure to be adopted in determining to approve a biodiversity gain plan, factors to be considered and appeals.

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

462. The preceding provisions set out the requirements for a biodiversity gain plan and the matters that must be considered by the planning authority when determining whether to approve the plan. This provision gives the Secretary of State the power to make regulations setting out in greater detail the procedures that must be followed when making this determination, and the matters which should be taken into account. It also gives a power to provide for appeals in regulations. The purpose of the measure is to provide more clarity to planning authorities when determining whether a biodiversity gain plan fulfils the requirements of the net gain condition. It will be used to set out procedure for making the determination and tests for the sufficiency of the information provided in the biodiversity gain plan. Regulations made under this paragraph may also be used to set out factors that might also be considered alongside the determination to provide greater certainty that the biodiversity gain requirement will be workable in practice.

463. The power will also cover appeals. In most case appeals will be dealt with using the usual processes applicable to all decisions under the town and country planning regime. However this power could be used, for example where additional detail is needed to clarify, to developers and decision-makers, how the appeal system will work in relation to certain types of development consent where decisions in relation to biodiversity gain are taken.

Justification for taking the power

464. This power will provide additional levers, where necessary, for smoothing implementation and supporting planning authorities in applying the net gain requirement. The intention is that the requirements in relation to the determination of biodiversity gain plans should, consistent with existing practice, form part of existing procedural regulations (made under section 59 TCPA 1990) in relation to the determination of decisions under planning regime. The powers are comparable with other powers under TCPA 1990 prescribing procedural issues and matters to be taken into account when taking decisions. There are various different routes to obtaining planning permission and taking powers to make secondary legislation enables flexibility to ensure that procedures relating to biodiversity gain plan determinations can be adjusted and adapted to fit with wider planning procedures and changes to those procedures. It is also important for the Secretary of State to be able to reflect any impact on stakeholders of the procedures (or proposed changes to procedures) and take action to adjust the regulations in a timely way.

Justification for the procedure

465. The Department considers that the negative procedure would be appropriate for this power. The powers can only be used to set out procedure for considering matters which are themselves set out in paragraph 3(2), and the Department therefore believes that there is limited scope for the fundamental purpose or considerations of the determination to be varied. The provision for the Secretary of State to make regulations relating to wider factors for consideration. This is also comparable with other similar procedural powers under the TCPA 1990 e.g. section 59(2)(b), which provides for a development order to require a local planning authority to grant planning permission in accordance with the terms of that order, and is subject to the negative procedure.

Schedule 14 Paragraph 2, New Schedule 7A to the TCPA 1990, Paragraph 17(b) Power to exempt development of a specified description

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

This paragraph will give the Secretary of State power to make regulations to exempt certain classes of planning permission from the biodiversity gain requirement introduced through these provisions. A number of types of planning permission are already exempted in the Bill. It is likely to be used to exempt developments which are considered to have a *de minimis* impact on biodiversity, including changes of use and small developments.

Justification for taking the power

A number of further exemptions are likely to be more detailed and technical. It is likely that the Secretary of State will want to exclude applications for planning permission which will be below a “*de minimis*” threshold for impact on biodiversity. Defining this *de minimis* threshold is likely to require lengthy articulation to cover a number of types of development, and the Department intends to consult on the precise articulation of these exemptions. The exemptions will be drafted to fit with other provisions of the town and country planning regime, e.g. those developments subject to permitted development rights (see the Town and Country Planning (General Permitted Development) (England) Order 2015, made under section 59 of the TCPA 1990). The power will ensure that the biodiversity net gain provisions can continue to form a coherent whole with related provisions in the planning system and can adjust to future changes in that system. Before making an order under this power the Department wants to consult stakeholders, once they have formed a view of the overall scope of the new regime set out in the Schedule, as to where such exemptions may be appropriate.

Justification for the procedure

The Department considers that the negative procedure would give Parliament the right level of scrutiny, consistent with existing delegated powers in the TCPA 1990 (e.g. section 59), with which this power may be exercised jointly. The Department recognises that the first use of this power is likely to be of widespread interest, and will need to be subject to public consultation. Subsequent exercises of the power are likely to be used simply to reflect changes in other parts of the planning regime, e.g. permitted development rights. Exemptions will be seen, as with the percentage level of biodiversity gain, as a critical characteristic of the exemption and views that exemptions should be limited in their scope were strongly expressed at consultation. This matter warrants a degree of scrutiny, but not necessarily prior parliamentary debate and affirmative approval.

Schedule 14 Paragraph 2, New Schedule 7A to the TCPA 1990, Paragraph 18, a power to define “irreplaceable habitat” and to modify or exclude application of biodiversity gain to it

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

466. This provision provides a power for the Secretary of State to make regulations which define “irreplaceable habitat” and to modify or exempt such irreplaceable onsite habitat from the biodiversity gain requirements. The context of this provision is certain habitat (referred to as “irreplaceable habitat”) which has such a high value in biodiversity terms, and its creation is so difficult, that meeting the biodiversity gain objective will be difficult. Planning policy means that such habitat should mean planning permission which could adversely impact irreplaceable habitat should only be granted in exceptional circumstances. Where it is granted, meeting the biodiversity gain condition may be prohibitively expensive or impossible due to biodiversity metric rules and may mean that even in those exceptional circumstances the land will not be capable of development. At the same time such habitat because of its high value cannot be excluded wholly from the biodiversity gain requirement. The aim will be to ensure that biodiversity gain requirements do apply to such land but that development is still possible in those exceptional circumstances where planning policy allows for this. While the biodiversity gain objective will not be capable of being fully met, there should be obligations to provide biodiversity gains to compensate for the loss of irreplaceable habitats, and this should be onerous but not so onerous as to mean necessary development cannot take place.

467. As well as defining irreplaceable habitat and modifying or excluding the application of Part 1 of Schedule 7A TCPA 1990 to that habitat, any regulations made under this power must make provision for ensuring that any development impacting on irreplaceable habitat must make arrangements for the purpose of minimising the adverse effect of that development on onsite habitat. The regulations may also (sub-paragraph 7(3)) confer powers and duties, including a power or duty to give guidance, on Natural England, the NDPB with responsibility for conserving and enhancing the natural environment.

Justification for taking the power

468. The Department’s view is that detailed regulations will need to be in place to provide the planning authorities and developers with sufficient guidance on how the biodiversity gain condition will apply to such habitat. The definitions, modifications or exemptions may also need to change over time to reflect changes in habitats, the wider environment and the planning system. Secondary legislation is necessary to ensure that the law can be responsive without undue delay, to such changes. Before making an order under this power the Department intends to consult stakeholders, once they have formed a view of the overall scope of the new regime set out in the Schedule, as to what arrangements in relation to irreplaceable habitat types may be appropriate.

Justification for the procedure

469. The Department considers that the negative procedure would give Parliament the right level of scrutiny. This is appropriate as the power relates to amending the requirements for development which affects irreplaceable habitats, a subject of stakeholder interest. The negative procedure is sufficient because in accordance with sub-paragraph 7(2) the regulations must make arrangements to minimise the adverse effect of development on the onsite habitat, which is inserted as a safeguard to ensure the power cannot be used in a manner that would undermine the overall objectives of the Schedule.

470. Again this power may need to be exercised jointly with other powers under the TCPA 1990, e.g. section 59, to ensure all the requirements for developers and planning

authorities are set out in an integrated regulations. This matter warrants a degree of scrutiny, but not necessarily prior parliamentary debate and affirmative approval.

Schedule 14 Paragraph 2, New Schedule 7A to the TCPA 1990, Paragraph 19 power to adapt application of the Part

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

471. This power is to allow the Secretary of State to adapt the procedures in Schedule 7A as they apply to developments that are intended to be carried out in phases. In the case of many large developments the development permitted under a planning permission will not be completed for many years after it is commenced. In such cases it would be preferable to enable the developer instead of submitting one biodiversity gain plan at the commencement of the development, to submit a series of such plans before commencing each phase of the development.

472. The power will enable the Secretary of State to modify the procedures set out in Schedule 7A TCPA 1990 as they apply to such phased development. In particular the aim of the regulation making power, is to be able to provide that a gain plan can be approved in different circumstances in relation to phased development, For example this might be done, where the plan includes assumptions about the post development biodiversity value of the site in relation to further phrases of development which will require further approval under conditions of the permission, where the plan to be approved is only for the purposes of commencing development on part of a site, with further approval needed for other plans in relation to later phases.

Justification for taking the power

473. The Department considers that the detail of how the biodiversity gain objective procedure is to apply to such phased development is best set out in secondary legislation. It is considered that different types of phased development may require specific alterations to how the procedure will apply to them. These requirements may need to be adapted to take account of changes to other planning procedures and it is necessary to have flexibility to ensure coherence with planning legislation in a timely manner. Before making an order under this power the Department wants to consult stakeholders, once they have formed a view of the overall scope of the new regime, as to what adaptations of the provisions in the Schedule to this class of development, may be appropriate.

Justification for the procedure

474. The Department considers that the negative procedure would give Parliament the right level of scrutiny. The changes will be entirely technical in nature, providing how the procedures will apply in relation to these two particular provisions, so as to ensure the biodiversity gain objective can still be met and will apply to only a small number of developments for which planning permission is granted using these provisions.

Schedule 14 Paragraph 2, New Schedule 7A to the TCPA 1990, Paragraph 20, power to modify or exclude application of this part of the Schedule to sections 73A and 102 of the Town and Country Planning Act 1990

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

475. This power allows the Secretary of State to make regulations to adapt, modify or exclude the provisions of Part 1 of Schedule 7A TCPA 1990 as they apply to sections 73A and 102 of the TCPA 1990. These are cases where planning permission is granted retrospectively for development that has already been carried out (section 73A) or granted under a discontinuance order (section 102). For these types of planning permission it is necessary to set out how the process works in these slightly different circumstances, e.g. where the development already exists or where permission is being granted as an alternative to a discontinued use.

476. Section 73 enables planning permission to be granted retrospectively with respect of development that has already been carried out, i.e. to legitimise development previously carried out unlawfully.

477. Section 102 enables a local planning authority, where it considers it expedient in the interests of proper planning of their area to serve a notice requiring any use of land to be discontinued, or any buildings or works. As part of the order the local planning authority may grant planning permission for alternative development on the land in question.

Justification for taking the power

478. There are likely to be additional factors and practicalities to take into account when these particular circumstances arise, for example valuing the biodiversity value of the land may require consideration of additional factors and the procedural requirements for these types of application will differ. A secondary legislation power is necessary to ensure that the necessary detail for the different cases is provided for and that there is flexibility to amend the provisions, in a timely way, to take account of changes to wider planning procedures and ensure a coherent approach. Before making an order under this power the Department intends to consult stakeholders, once they have formed a view of the overall scope of the new regime, as to what adaptations of the provisions in the Schedule to this class of planning permission, may be appropriate.

Justification for the procedure

479. The Department considers that the negative procedure would give Parliament the appropriate level of scrutiny. The changes will be entirely technical in nature, setting out how the procedures will apply in relation to these two particular provisions, so as to ensure the biodiversity gain objective can still be met and will apply to only a relatively small number of developments for which planning permission is granted using these provisions.

Schedule 14 Paragraph 2, New Schedule 7A to the TCPA 1990, Paragraph 21 power to apply this part of the Schedule to permissions granted under sections 141 and 177 of the Town and Country Planning Act 1990 with modifications or exclusions

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

480. This power allows the Secretary of State to make regulations which apply the provisions of Part 1 of Schedule 7A (TCPA 1990) with modifications or exclusions to developments for which planning permission is granted under section 141 or 177(1) of the TCPA 1990. These are cases where planning permission is granted as the result of the determination of other matters, and it may be necessary to set out how the process works in these slightly different slightly different circumstances, e.g. where the development already exists.

481. Section 141 relates to action by the Secretary of State in relation to a purchase notice. This includes a power under section 141(3) to specify that where they consider, the land subject to the notice, or any part of it, could be rendered capable of reasonably beneficial use within a reasonable time by the carrying out of any other development for which planning permission ought to be granted, then if an application for planning permission for that development is made, it must be granted.

482. Section 177 applies where the Secretary of State is determining an appeal against an enforcement notice (issued under section 172). It enables the Secretary of State in determining the appeal to grant planning permission with respect to the matters subject to the notice or discharge any condition subject to which any planning permission was granted.

Justification for taking the power

483. There are likely to be additional factors and practicalities to take into account when these particular circumstances arise, for example valuing the biodiversity value of the land may require consideration of additional factors and the procedural requirements for these types of application will differ. A secondary legislation power is necessary to ensure that the necessary detail for the different cases is provided for and that there is flexibility to amend the provisions, in a timely way, to take account of changes to wider planning procedures and ensure a coherent approach. Before making an order under this power the Department intends to consult stakeholders, once they have formed a view of the overall scope of the new regime, as to what adaptations of the provisions in the Schedule to this class of planning permission, may be appropriate.

Justification for the procedure

484. The Department considers that the negative procedure would give Parliament the right level of scrutiny. The changes will be entirely technical in nature, setting out how the procedures will apply in relation to these two particular provisions, so as to ensure the

biodiversity gain objective can still be met and will apply to only a relatively small number of developments for which planning permission is granted using these provisions

Schedule 14 Paragraph 3(11), Power to make regulations to provide for the deemed condition to apply in relation to the modification of planning permission and for modified planning permission to be subject to other conditions.

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

485. Paragraph 3(11) of the Schedule makes consequential amendments to section 97 of the TCPA 1990. It introduces a limitation on the power currently in section 97(1) for a local planning authority to modify and discharge a planning permission, where they consider it expedient. It provides that a planning authority cannot modify or discharge the deemed condition under paragraph 1 of the new Schedule 7A to the TCPA, inserted by the Bill. However it also provides that this is subject to a power for the Secretary of State to make regulations. These regulations may provide, first, for the deemed condition to apply in relation to modifications to planning permission subject to such modifications set out in the regulations. Second, the regulations may provide for a planning permission to be modified subject to an alternative condition relating to the achievement of the biodiversity gain objective (set out in paragraph 4 of Schedule 7A).

486. Because the deemed condition sets out that measures to ensure the biodiversity gain objective is met have been secured before development is started, the deemed condition may limit the modification of a planning permission with respect the timing of the development. The power is intended to enable modifications to be made to planning permissions which affect the timing of the development, and which might be made impossible unless consequential changes to the deemed condition are also possible.

Justification for taking the power

487. The power is taken to ensure that if it is subsequently found that the local planning authority is unnecessarily prevented from agreeing otherwise acceptable modifications to a planning obligation this can be addressed. The power conferred does not permit the Secretary of State to authorise the revocation of the deemed condition set out in paragraph 1 of new Schedule 7A. However it does enable the Secretary of State to enable specific modifications to the deemed condition, or alternative conditions, also delivering the biodiversity gain objective in relation to the development, to be made to planning permissions. Before making regulations under this power the Department wants to consult stakeholders, once they have formed a view of the overall scope of the new regime, as to what exceptions from the general restriction imposed under the new section 106A(6A), if any, may be appropriate.

Justification for the procedure

488. The Department considers that the negative procedure would give Parliament the appropriate level of scrutiny. This matter warrants a degree of scrutiny, but not necessarily

prior parliamentary debate and the negative resolution procedure is consistent with that applying to similar existing powers in the TCPA 1990, e.g. under section 59 TCPA 1990.

Schedule 14 Paragraph 3(14), Power to prescribe exceptions under section 106A TCPA 1990

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

489. Paragraph 3(14) of the Schedule makes consequential amendments to section 106A of the TCPA 1990. It introduces a limitation on the power currently in section 106A(6) for a local planning authority to modify and discharge a planning obligation made under section 106. It provides that except “in such cases as may be prescribed” a planning authority can not modify or discharge a planning obligation if they consider doing so will significantly increase the risk of the biodiversity gain objective (inserted into the new Schedule 7A to the TCPA1990) not being met. This creates a power for the Secretary of State to prescribe cases where this limitation will not apply.

Justification for taking the power

490. The power is taken, to ensure that, if it is subsequently found that the limitation in the new section 106(6A) unnecessarily restricts planning authorities from agreeing otherwise acceptable modifications to, or discharges of, a planning obligation, this can be addressed. Before making regulations under this power the Department wants to consult stakeholders, once they have formed a view of the overall scope of the new regime, as to what exceptions from the general restriction imposed under the new section 106A(6A), if any, may be appropriate.

Justification for the procedure

491. The Department considers that the negative procedure would give Parliament the appropriate level of scrutiny. This matter warrants a degree of scrutiny, but not necessarily prior parliamentary debate and the negative resolution is consistent with that applying to similar existing powers in the TCPA 1990, e.g. under section 59 TCPA1990.

Clause 93(1) A power for the Secretary of State to make further provision in relation to the biodiversity gain register.

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure, except where fees or penalties are set in which case Affirmative Resolution Procedure

Context and purpose

492. Clause 93(1) provides a power for the Secretary of State to make regulations which make provision for and in relation to a register of biodiversity gains sites, in particular to make provision in relation to the matters set out in paragraph 21. Regulations will set out the rules and procedures for the operation and maintenance of the new register of biodiversity gain sites. This includes setting fees in relation to applications to add land to the register, criteria for determining eligibility of land to be added to the register and rules for the allocation of land in the register to developments.

493. The new register will be the means by which the benefit of habitat enhancements on offsite land, is allocated to particular developments. Third parties will be able to apply to register land on which they have carried out habitat enhancement or have entered into an obligation to do so. The regulations will set out the criteria by which the body responsible for the register may enter it on to the register. This will include ensuring that any land entered on the register is subject to appropriate safeguards to ensure the enhancements in question are carried out and thereafter maintained. It will also set out the procedure by which allocations of those enhancements to individual developments is recorded. Allocation of enhancements is expected to be subject of payment by developers to the third parties who have registered enhancements on the register. The register will be the means that compliance with the biodiversity gain objective in relation to any individual development will be capable of being checked and monitored. The intention is that developers should be able to rely on the register as evidence of their compliance with the deemed biodiversity gain condition.

Justification for taking the power

494. The Department's view is that detailed regulations will need to be in place to provide developers, providers of offsite habitat enhancement and other stakeholders with sufficient guidance on how the biodiversity gain register will operate. In particular the criteria for adding land to the register and the rules for allocating the benefit of enhancements to developments will help to create confidence that the system is robust in ensuring the Government's biodiversity improvement objectives are met, and provide the certainty necessary for a market in biodiversity enhancements to develop. As the biodiversity gain system develops the use and nature of the register is likely to evolve and flexibility will be needed to update the requirements of the register. The only practicable way for detailed requirements to be prescribed, while allowing them to be changed in a timely manner is secondary legislation. Before making an order under this power the Department wants to consult stakeholders, once they have formed a view of the overall scope of the new regime, as to what provision in relation to the register, may be appropriate.

Justification for the procedure

495. The Department proposes that, unless fees or penalties are being set in the regulations, the negative procedure would give Parliament the appropriate level of scrutiny. This matter

warrants a degree of scrutiny, but not necessarily prior parliamentary debate and affirmative approval. Where fees or penalties are being set it is appropriate that Parliament scrutinise these and that an affirmative procedure applies. In other cases the regulations will set out the detailed rules and procedures under which the register is maintained and operated. A negative procedure is considered consistent with other comparable powers to set out procedural requirements e.g. in relation to regulations, rules and orders under the Land Registration Act 2002.

Clause 96(1) A power for the Secretary of State to provide for the designation of public authorities and make provision in relation to quantitative data in relation to biodiversity reports.

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

496. Clause 96 amends the Natural Environment and Rural Communities Act 2006, by adding a new section 40A, imposing a revised duty imposed on public authorities in relation to biodiversity, when exercising their functions. One of the weaknesses identified in relation to the provisions of section 40 was the lack of any reporting duty in relation to those authorities subject to it. However rather than impose a reporting requirement on all public authorities subject to the duty the Department considers it more appropriate to limit the reporting requirement to those authorities whose functions are likely to have the greatest impact on biodiversity, either because of the nature of those functions or because of the area of land managed by the authority.

497. New section 40A(1) imposes a reporting duty on all local authorities (other than parish councils). It also provides a power for the Secretary of State to designate other authorities as being subject to the reporting requirement. The intention is to commence the reporting requirement, in relation to local authorities, at the same time as designating additional authorities who are to be the subject to it. Before doing so the Department wants to consult further with the authorities likely to be designated.

498. New section 40A(2) requires designated public authorities to publish periodic biodiversity reports. Such reports must include a summary of the action which the authority has taken in order to comply with the section 40 duty, as well as (for planning authorities) a summary of action taken under net gain provisions. The reporting duty joins up requirements across biodiversity provisions in the Bill – in particular clause 92 (net gain) and clause 97 (local nature recovery strategies).

499. New section 40A(8)(b) provides the Secretary of State with a power to prescribe by regulations, quantitative information that biodiversity report must include. This will enable the same quantitative data requirements to be imposed on all public authorities, or all public authorities of a particular type, enabling better comparison between their respective performance in complying with the duty.

Justification for taking the power

500. The Department's view is that detailed regulations will need to be in place to provide the designated public authorities with sufficient guidance on the form of biodiversity reports, and to ensure consistent reporting across all areas of England. This is a new duty and likely to develop over time. A secondary legislation power is needed to ensure that the legislation remains responsive to these changes. The only practicable way for detailed form requirements to be prescribed, while allowing them to be changed efficiently and periodically (if needed), is secondary legislation. Before exercising the power to designate further public authorities as being subject to the duty, or setting out specific quantitative data requirements for particular classes of public authority, the Department intends to consult with the authorities affected and other stakeholders. This is more easily done once the detailed requirements of the new section 40A of the 2006 Act are finalised.

Justification for the procedure

501. The Department considers that the negative procedure would give Parliament the appropriate level of scrutiny, as the power relates to authorities subject to the duty, and to the detail of the quantitative data required from such authorities. This matter warrants a degree of Parliamentary oversight but since the implications are merely procedural, this does not in the Department's view require the affirmative resolution procedure.

Clause 98(2) A power for the Secretary of State to appoint a responsible authority for the purposes of for a local nature recovery strategy

Power conferred on: Secretary of State

Power exercised by: Appointment

Parliamentary Procedure: None

Context and purpose

502. Clause 98 places a duty on responsible authorities to prepare and publish local nature recovery strategies. These are spatial plans to direct investment for biodiversity to where it will have the most effective benefits for nature. A local nature recovery strategy must include a statement of biodiversity priorities and a local habitat map. Local authorities will be under a duty to consider local nature recovery strategies when discharging functions relating to the management of open spaces.

503. Clause 98(2) provides a power for the Secretary of State to appoint a responsible authority for areas within England. Clause 95 sets the context for this, providing there must be a local nature recovery strategies for all areas in England, but that the Secretary of State is to determine what areas within England each individual strategy covers (subject to the limitation that the area of a local authority, other than a county council, may not be split between the area of different strategies). The Secretary of State will exercise the power to determine the area of each strategy by designating the responsible authority for the strategy covering that area.

504. Under clause 98(2) the Secretary of State may choose to designate a local authority whose area is within the area of the strategy, the Mayor of London, a mayor of a combined authority, a national park authority, the Broads Authority or Natural England. The intention is that Natural England will only be appointed where no other body is prepared to be appointed. In the first instance it is intended that authorities within each area of the country should be able to agree between themselves the identity of the responsible authority and extent of the area of the strategy they are responsible for.

Justification for taking the powers

505. The power is required to ensure that there is a local nature recovery strategy in place for every part of England. It is intended to be used to endorse decisions taken at a local area by the authorities within that area. However it enables the Secretary of State to ensure that the area covered by each strategy is broadly consistent throughout England.

Justification for taking the procedure

506. The appointment is considered appropriate because it is intended to be used to appoint authorities willing to take on the role of responsible authority, and which have the support of the other authorities within the area of the strategy they are responsible for. In such circumstances it will be used only to endorse a decision taken by the authorities in that area themselves. Only where no authority within an area is willing to be responsible for the strategy will Natural England be appointed as responsible for the strategy in that area, as the option of last resort where there is no alternative.

Clause 98(4) A power to make regulations to make provision about the procedure to be followed in the preparation and publication etc. of local nature recovery strategies

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

507. Clause 98(4) provides a power for the Secretary of State to make provision about the procedure to be followed in the preparation and publication, and review and re-publication, of local nature recovery strategies by regulation. It also provides that such regulations may include provision requiring the provision of information by local authorities, for a local nature recovery plan to be agreed by all relevant local authorities, for consultation, and for the times for review and republication.

Justification for taking the power

508. The Department's view is that detailed regulations will need to be in place to provide the responsible bodies with a sufficiently clear framework on the preparation of local nature recovery strategies, and to ensure consistent processes are followed across all areas of England. These are new provisions and likely to evolve with time. A secondary legislation power is necessary to ensure there is sufficient flexibility to keep pace with developments

in a timely manner. Before designating the areas of England covered by each local nature recovery statement, and the authority responsible for preparing it, the department wants to engage with the authorities (particularly the local planning authorities for each potential area) and other stakeholders. The intention is to reach local agreement in each area as to the area covered by each recovery statement, and responsibility for preparing it. Reaching such local agreement will be easier once the nature of the provisions has been finalised.

Justification for the procedure

509. The Department considers that the negative procedure would give Parliament the appropriate level of scrutiny. The Department considers this to be appropriate as the power relates to detailed procedural requirements relating to the process for preparing, review and publishing local nature recovery strategies. This matter warrants a degree of scrutiny, but not necessarily prior parliamentary debate and affirmative approval.

Clause 99(5): A delegated power to allow the Secretary of State to issue statutory guidance in relation to contents of local nature recovery strategies.

Power conferred on: Secretary of State

Power exercised by: Issuing statutory guidance

Parliamentary Procedure: No parliamentary procedure

Context and purpose

510. Clause 99 concerns the contents of local nature recovery strategies. Subsections (1) to (3) sets out the minimum contents of the strategy. Subsection (5) provides that the Secretary of State may provide guidance as to the information that should be included pursuant to the requirements set out in the clause. It also enables the guidance to include other matters to be included in the strategy. Subsection (6) provides that the responsible authority is to have regard to this guidance when preparing the strategy.

Justification for taking the powers

511. The intention is that the guidance will be used to assist responsible authorities in setting out the minimum level of detail that would be appropriate to put into the strategy. It will also help to ensure that strategies for different areas of England are broadly consistent in content.

Justification for taking the procedure

512. The Department's view is that statutory guidance containing technical, practical and operational details does not require parliamentary oversight. The guidance is to be had regard to by responsible authorities rather than imposing legal obligations.

Clause 102 Species conservation strategies - A power for the Secretary of State to provide guidance in relation to the duties under subsection (6)

Power conferred on: Secretary of State

Power exercised by: Issuing guidance

Parliamentary Procedure: None

Context and purpose

513. Subsection (6) of the clause (which was added in by amendment at Commons Committee stage) 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.

514. 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.

515. 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

516. 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

517. 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.

Clause 102 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

518. 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.

519. 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

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

520. 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.

Clause 103 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

521. This clause, which was added by amendment at Commons Committee stage, provides for Natural England preparing a strategy for the conservation and management stage 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.

522. 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.

523. 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.

524. 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

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

**Clause 105 Habitats Regulations: power to amend general duties, subsection (1)
- A power for the Secretary of State to amend references to the requirements
of the Directives**

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure

Context and purpose

526. Regulation 9 of the Conservation of Habitats and Species Regulations 2017 (S.I. 2017/1012), sets out duties on public authorities in relation to “the requirements” of the Habitats and Wild birds Directives. Paragraph (1) of that regulation applies to the Secretary of State, Natural England and authorities exercising functions in the marine area, and requires them to exercise their functions, relevant to nature conservation, so as to secure compliance with the requirements of the Directives. In the case of other authorities, paragraph (3) of the regulation imposes a duty when exercising any of their functions to have regard to the requirements of the Directives. The purpose of this power is to enable the Secretary of State to realign these provisions to take account of the evolution of domestic biodiversity priorities after leaving the European Union, while not diminishing the overall level of environmental protection provided. The power will also enable the Secretary of State to provide greater clarity to public authorities as to the precise requirements these duties relate to, removing uncertainty that may have inhibited authorities from complying with the duties as fully as might otherwise have been the case.

Justification for taking the power

527. Part 1 of the Bill provides for a power to set long term environmental targets together with a requirement to set at least one long term target in four priority areas, including biodiversity. It also provides for the preparation of an Environmental Improvement Plan for England. Regulations made under this power to amend regulation 9 will therefore only be capable of coming into force after January 2023, following the setting of targets in priority areas under clause 1 and the first review of the Environmental Improvement Plan. The power will enable the Secretary of State to ensure “the requirements” referenced in this provision refer to our new domestic biodiversity targets and policies with respect the enhancement of biodiversity, whilst at the same time providing greater clarity as to what is expected of authorities to whom these duties apply. Before exercising this power the Secretary of State will have regard to the particular importance of furthering the conservation and enhancement of biodiversity, and may only make regulations if he is satisfied that the amendments further the conservation and enhancement of biodiversity, and, in particular, do not reduce the level of environmental protection provided by the 2017 Regulations. The provision also requires the Secretary of State, to consult such persons as the Secretary of State considers appropriate.

Justification for taking the procedure

528. The Department's view is that amending this general duty in relation to biodiversity is likely to be of particular interest to Parliament and therefore has proposed that the regulations are subject to the affirmative procedure.

Clause 106 Habitats Regulations: power to amend Part 6, subsection (1) - A power for the Secretary of State to amend the requirements for assessing the impact on protected sites of plans and projects

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure

Context and purpose

529. Part 6 of the Conservation of Habitats and Species Regulations 2017 (S.I. 2017/1012), sets out requirements for the assessment of plans and projects on European protected sites, restricts the approval of such plans or projects unless the decision-maker is satisfied that the site is not adversely affected and provides for derogations. Part 1 includes general provisions on this, and then further provisions relating to individual regimes for consenting different types of plan or project. The provisions originate in the requirements of paragraphs (3) and (4) of Article 6 of the Habitats Directive and have been the subject of considerable case law in both the domestic and European courts. The purpose of this provision is to enable the Secretary of State to make amendments to these provisions that do not reduce the level of protection provided at present. This will enable the Secretary of State to adapt the process to domestic developments and provide greater clarity as to the requirements where he considers this appropriate.

Justification for taking the power

530. Though the United Kingdom has left the European Union, the network of European sites is still important in meeting our international obligations with respect biodiversity, and in meeting our domestic biodiversity objectives. Improving the condition of protected sites is likely to be an important element in meeting any long-term target set under clause 1 of the Bill, in relation to biodiversity. Ensuring that plans and projects that could impact upon these sites are properly assessed and adverse impacts upon them avoided, will be important in meeting the Government's ambitions in relation to biodiversity. At the same time however, the Government continues to look to improve the operation of these provisions, where this is possible, e.g. adding additional clarity as to the requirements into the legislation. The Government would like to explore more strategic approaches to achieving these requirements. Such a strategic approach already underlies the proposals in clauses 102 (species conservation strategies) and 103 (protected sites strategies). The Government considers there may be further opportunities to deliver our ambitions in relation to protected sites more strategically, and that amendments to Part 6 may be necessary to do so. Further, future changes to the consenting regimes, that Part 6 applies to, may lead to opportunities to improve how Part 6 operates in relation to those regimes, in ways that go beyond what may be strictly consequential upon those changes. In order to address concerns that this power could be used in future to undermine our existing protection of biodiversity, it is provided that before making any regulations under this provision the Secretary of State will have regard to the particular importance of furthering

the conservation and enhancement of biodiversity, and may only make regulations if he is satisfied that the amendments do not reduce the level of environmental protection provided by the 2017 Regulations. The provision also requires the Secretary of State to consult such persons as the Secretary of State considers appropriate.

Justification for taking the procedure

531. The Department's view is that amending the requirements to assess the impact of plans and projects on protected sites, is likely to be of particular interest to Parliament and therefore has proposed that the regulations are subject to the affirmative procedure.

Clause 107: Power to issue guidance to local highway authorities about how to discharge the duty to consult before felling trees

Power conferred on: Secretary of State

Power exercised by: Giving Guidance

Parliamentary Procedure: None

Context and Purpose

532. The legal felling of over 5,000 fully grown ancient trees by Sheffield City Council caused a local concern and debate. A local authority does not need a license to fell a tree if it relies upon the exemption in section 9(4)(b) of the Forestry Act 1967 namely that the authority is complying with any other Act of Parliament – in this case the Highways Act 1980 which requires a local authority to maintain and repair the highway.

533. Many residents considered that the felling was unnecessary to maintain and repair (the need for repair being a matter of judgement and consideration of many factors when for example, a tree might be encroaching on a footpath or road). In Sheffield residents considered trees were felled if they presented any obstacle without consideration being given to alternative measures. Residents felt that other measures could have been taken to deal with the highway maintenance issues that the trees were allegedly causing. A report prepared by the Forestry Commission identified a number of other alternative measures that could have been taken and that guidance given to local authorities will help avoid unnecessary felling when viable alternatives are available. The purpose of any guidance will be to inform local authorities of all of the alternative measures available and how to carry out consultation prior to felling trees.

Justification for taking the power

534. The Department's view is that guidance from the Secretary of State is required in order to enable local highway authorities to comply with the duty to consult. The guidance will outline a number of legal and technical points in relation to licensed tree felling and when consultation must take place. One example would be whether and if measures other than felling a tree will satisfy the local authority's obligation to maintain a highway under section 41(1) of the Highways Act 1980 (namely to build a buffer around a large tree trunk that is growing into the road in a residential street and incorporate the tree into the traffic calming measures – rather than fell it). The statutory guidance is necessary as it will help local

highway authorities subject to the new consultation requirement to comply with their legal obligations to consult.

Justification for the procedure

535. It is proposed that the Guidance should not be subject to any parliamentary procedure. The Department's view is that any such guidance will contain technical details about tree felling that do not require parliamentary oversight.

Clause 109 and Schedule 16 Use of forest risk commodities in commercial activity

Overall Context and Purpose of the Schedule

536. This clause and Schedule was added to the Bill at Commons Committee stage. The regulatory regime set out in the Schedule is intended to help tackle deforestation by increasing the demand for sustainably sourced commodities in the UK, and contributing to increased demand globally.

537. The Schedule establishes requirements on larger businesses that use agricultural commodities associated with wide-scale deforestation, referred to as 'forest risk' commodities. Part 1 of the Schedule sets out three core requirements on regulated businesses:

a. Regulated businesses are prohibited from using forest risk commodities that were produced on land where local laws, such as those relating to land use and ownership, were not complied with.

b. Regulated businesses must establish a system of due diligence for each regulated commodity. This is defined as a procedure that identifies, assesses and mitigates the risk of illegally produced commodities entering their supply chain.

c. Regulated businesses must report on their due diligence exercise. Reports are required annually, six months after the end of the financial year.

538. The Secretary of State has powers to make regulations establishing an enforcement system, and to use an enforcement body to investigate businesses' compliance with the requirements. Fines and other civil sanctions may be issued to businesses that do not comply.

539. Finally, the Secretary of State is required to conduct a review of the law's effectiveness every two years, and to set out before Parliament any steps they intend to take to ensure that the policy is delivering as intended. This frequency of review is consistent with the reporting period under clause 20 – report on international environmental protection legislation.

Clause 109 and Schedule 16, Paragraph 1: a power to specify forest risk commodities

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure

Context and purpose

540. The three core requirements of Part 1 of the Schedule relate to use of ‘forest risk commodities’. Paragraph 1(1) defines ‘forest risk commodity’ as a commodity specified in regulations made by the Secretary of State. The commodity specified must be an agricultural commodity (i.e. a commodity produced from a plant, animal or other organism). The Secretary of State may only specify a commodity that is causing, or may cause, the conversion of forest to agricultural use. The Government will consult before exercising the power to specify a forest risk commodity. In deciding which commodities to regulate first, the Secretary of State will take into account factors including the commodity’s contribution to deforestation globally, the amount of that commodity consumed in the UK, and business’ ability to trace their supply back to the source area.

Justification for taking the powers

541. The Department’s view is that the commodities to be regulated as ‘forest risk commodities’ should be set out in secondary, not primary legislation.

542. The extent to which particular agricultural commodities, used within the UK, contribute to deforestation is dynamic: it changes across time. In addition, the judgement as to whether to bring a commodity within the scope of regulation should be based on consultation and evidence. Finally, the Government wishes to adopt a phased approach – initially specifying a small number of commodities, working closely with regulated business to refine regulatory delivery (by government) and compliance (by business) and later expanding a more mature regulatory regime to a larger number of commodities as necessary. For all these reasons, it is appropriate to specify forest risk commodities in secondary legislation, pursuant to consultation. It is the Department’s view that the power to prescribe forest risk commodities in secondary legislation will provide the flexibility necessary to respond to changing circumstances, and to ensure that UK business is regulated only to the extent necessary to achieve the policy objective underlying the requirements of Part 1 of the Schedule.

543. The power to specify forest risk commodities is limited by:

- a. paragraph 1(2) – the Secretary of State may only prescribe a commodity produced from a plant, animal or other organism;
- b. paragraph 1(3) – the Secretary of State may only prescribe a commodity if they consider that forest is being or may be converted to agricultural use for the purposes of producing the commodity; and
- c. paragraph 1(4) and (5), which describe the scope of the term ‘forest’.

544. The power is subject to a duty to consult prior to the use of the power – see paragraph 1(7).

545. Finally, the review provision at paragraph 17 requires the Secretary of State to conduct a review of the law's effectiveness every two years, and this review may include consideration of the effectiveness of regulations made using the power to specify forest risk commodities.

Justification for taking the procedure

546. The Department's view is that prescribing the commodities that will be subject to the requirements of Part 1 of the Schedule is a matter likely to be of particular interest to Parliament. Therefore the Department has proposed that the regulations be subject to the affirmative procedure.

Clause 109 and Schedule 16, Paragraph 2(4)(c): a power to add to the categories of 'relevant local law'

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure

Context and purpose

547. The requirements of Part 1 of the Schedule relate to use of 'forest risk commodities' produced from a plant, animal or other organism grown on land in a way that complies with 'relevant local law'. 'Local law' refers to the local law of the country where a commodity was produced (or more precisely, where the animal, plant or organism from which a commodity is produced, was grown). The categories of 'relevant local law' are listed at paragraph 2(4). The list is exhaustive and consists of 'local law' that relates to the ownership of land, the use of land or any other local law, relating to land and specified in regulations made by the Secretary of State (see paragraph 2(4)(c)). The Secretary of State may only specify a law that relates to the prevention of forest being converted to agricultural use.

Justification for taking the powers

548. The list of relevant local laws is designed to capture those categories of local laws, relating to land, which may have the effect of preventing the conversion of forest to agricultural use. It is the Department's view that the categories of law listed at paragraph 2(4)(a) and (b) – i.e. laws relating to ownership and use – will cover the majority of such laws. However the Department recognises the possibility there may be some laws in foreign legal systems that (arguably) do not fall squarely within the English law concepts of ownership and use: for example, some forms of native title based on custodianship. In addition, there is the possibility that novel forms of land law may arise in the future – just as native title has emerged relatively recently in some foreign legal systems. It is the Department's view that the power to make regulations adding to the scope of 'relevant local law' is necessary to address these possibilities, and for the purpose of ensuring that the definition of 'relevant local law' comprehensively covers all those local laws relating to land that have the effect of preventing the conversion of forest to agricultural use.

549. The power at paragraph 2(4)(c) is limited in two main ways:

- a. by the categories of local law identified in subparagraphs (a) and (b), with which any further prescribed category of local law should be consistent (i.e. the rule of *eiusdem generis*); and
- b. by the requirement that the prescribed category relates to land and has an effect related to preventing the conversion of forest to agricultural use.

550. Finally, the review provision at paragraph 17 requires the Secretary of State to conduct a review of the law's effectiveness every two years, and this review may include consideration of the effectiveness of regulations made using the power to specify categories of relevant local law.

Justification for taking the procedure

551. The Department's view is that regulations adding categories of law to the scope of 'relevant local law' is likely to be of particular interest to Parliament and therefore the Department has proposed that the regulations be subject to the affirmative procedure.

Clause 109 and Schedule 16, Paragraph 3: a power to make provision about due diligence systems

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

552. The core requirements of Part 1 are designed to ensure that a regulated business takes all reasonable actions to ensure that it does not use a forest risk commodity produced illegally (i.e. illegally, by reference to 'relevant local law'). A regulated business must operate in accordance with a due diligence system (see paragraph 3). In addition, an enforcement authority will not be permitted to impose a sanction on a business that has breached the prohibition on use of illegal commodities where that business has taken all reasonable steps to implement a due diligence system (see paragraph 13(2)).

553. Paragraph 3 of Part 1 requires a regulated business to establish and implement a due diligence system with respect to each commodity for which it is regulated. Paragraph 3(2) sets out the framework of that system – i.e. a system for identifying, assessing and mitigating the risk of illegally produced commodities entering the supply chain of a regulated business. Paragraph 3(3) provides the Secretary of State with power to prescribe further detail about a due diligence system.

Justification for taking the powers

554. Due diligence systems are regularly used by business to address risk. The framework of such systems is relatively settled, and so may be set out in primary legislation – as has

been done at paragraph 3(2). However the details of due diligence systems may change across time, in particular to keep pace with best practice for mitigating the risk of using illegal forest risk commodities. In addition, the extent to which government needs to prescribe the detail of due diligence systems may change across time – as the regulated community develops greater familiarity with the scheme, the need of that community for detailed prescription may reduce. For example, we may make regulations specifying the level to which risk should be reduced – possibly specifying that risk be reduced to a negligible level. There may be a need to change the level in response to technological innovation that allows risk to be reduced to a lower level.

555. The Department is of the view that the detail of the due diligence system should be responsive to best practice, and to the changing needs of the regulated community. Therefore the flexibility of secondary legislation is necessary.

556. The power at paragraph 3(3) is limited by the definition of due diligence system at paragraph 3(2), and includes examples of the kind of provision the regulations will include. Any further detail prescribed by the Secretary of State must fall within the framework outlined at paragraph 3(2), and cannot amend that framework.

557. Finally, the review provision at paragraph 17 requires the Secretary of State to conduct a review of the law's effectiveness every two years, and this review may include consideration of the effectiveness of regulations made using the power to prescribe the detail of a due diligence system.

Justification for taking the procedure

558. The Department considers that the negative procedure gives Parliament the appropriate level of scrutiny over regulations that will be technical in nature and that will be limited to specifying the details of a framework set out in primary legislation.

Clause 109 and Schedule 16, Paragraph 4: powers relating to the annual report on due diligence

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

559. Part 1 of the Schedule imposes a requirement on a regulated person to establish and implement a due diligence system. In addition there is a requirement on a regulated person to report annually to a relevant authority about the actions taken by the regulated person to establish and implement the due diligence system. Paragraph 4(3) gives the Secretary of State power to make regulations about the content and form of the report that is provided to the relevant authority, and the manner in which the report is provided. For example, it is likely that regulations will require that reports include information about the source location for all supplies of the commodity used by a regulated business.

560. Paragraph 4(4) establishes a duty on the relevant authority to publish annual reports, and gives power to the Secretary of State to make regulations specifying the manner and the extent of publication. For example, it is likely that regulations will require the published report to contain information about the volume of a particular commodity, from a particular location, used in a supply chain.

561. Annual reports are provided to a 'relevant authority'. The 'relevant authority' is defined at paragraph 4(5) as either the Secretary of State, or a person specified by the Secretary of State in regulations. At present, it is intended that the functions of the relevant authority will initially be exercised by the Secretary of State as this will allow DEFRA officials to establish reporting tools and sites for publication of reports. As the scheme matures, these functions may be passed to a separate body.

Justification for taking the powers

562. It is the Department's view that the power at paragraph 4(3) is necessary for the following reasons. The annual reports are an important means for checking compliance with Part 1 of the Schedule. It is necessary to have flexibility about the content of the report to ensure that reporting requirements can evolve, towards the objective of ensuring regulated persons are required to report no more detail than is necessary for the relevant authority to effectively check compliance. Flexibility will allow 'fine tuning' of the reporting requirement, in response to lessons learned about the most effective approach to verifying compliance. The power at paragraph 4(3) is necessary to provide the necessary regulatory responsiveness.

563. The power at paragraph 4(3) is limited by the subject matter of the annual report as described in paragraph 4(1). Under paragraph 4(1), a regulated business is required to report on the action it has taken to establish and implement a due diligence system (as described in paragraph 3(2)). The power to specify the content of a report could not be used to require content that went beyond a report on these actions.

564. It is the Department's view that the power at paragraph 4(4) is necessary for the following reasons. The annual reports are a means of informing the public about the actions taken by regulated persons to reduce their use of illegal forest risk commodities. It is necessary to have flexibility as to what information is published, in order to be responsive to the changing balance between the public interest in transparency and the interests of regulated persons in maintaining confidentiality about their operations. The power at paragraph 4(4) is necessary to provide that flexibility.

565. It is the Department's view that the power at paragraph 4(5) is necessary for the following reasons. The administration of the requirements in Part 1 of the Schedule may evolve – in the sense that functions may, across time, be distributed across different public bodies. Therefore it is necessary that the Secretary of State have the ability to specify bodies to undertake the functions of the relevant authority.

566. Finally, the review provision at paragraph 17 requires the Secretary of State to conduct a review of the law's effectiveness every two years, and this review may include consideration of the effectiveness of regulations made using the power to prescribe matters relating to the annual report.

Justification for taking the procedure

567. The Department's view is that the three powers, at paragraph 4(3), (4) and (5) warrant a degree of parliamentary oversight but involve matters of a detailed, administrative and technical nature that do not warrant parliamentary approval. As such the Department proposes that the regulations are subject to the negative resolution procedure.

Clause 109 and Schedule 16, Paragraph 5: powers relating to eligibility for the de minimis exemption

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative and Negative Resolution Procedure

Context and purpose

568. The requirements of Part 1 of the Schedule fall on a regulated person as defined in paragraph 7(1). A business will be a regulated person, with respect to a particular forest risk commodity, if its turnover exceeds a prescribed threshold. The Department proposes to regulate larger businesses, who are most able to influence commodity producers. However the Department recognises this may include some businesses with a large turnover who do not use significant amounts of a commodity. To address this problem, paragraph 5 establishes an exemption from the requirements of Part 1, with respect to a particular forest risk commodity, in the case where the amount of the commodity used by a regulated person is below a prescribed threshold – see paragraph 5(3). The Secretary of State has power to prescribe the threshold (see paragraph 5(7)). The scope of this power is outlined at paragraph 5(8), and includes power to prescribe the way in which a regulated person may determine the amount of a forest risk commodity that they use.

569. The exemption is available to a regulated person who (before a reporting period) gives the enforcement authority a notice containing prescribed information - see paragraph 5(2)(b). The Secretary of State has power to prescribe the information (see paragraph 5(7)).

570. If, in the course of a reporting period, it becomes apparent that the regulated person will exceed the prescribed threshold for the exemption, the person must lodge a second notice containing prescribed information – see paragraph 5(5). The Secretary of State has power to prescribe the information (see paragraph 5(7)).

Justification for taking the powers

571. It is the Department's view that the power to prescribe the exemption threshold for a particular commodity is necessary for the following reasons. The exemption threshold for a particular commodity cannot be set in primary legislation, if the commodities within scope are prescribed through secondary legislation. It is appropriate that the exemption threshold for a particular commodity be specified in the same manner as:

- a. a forest risk commodity is specified (see analysis of paragraph 1 powers, above); and
- b. the turnover threshold, with respect to that commodity, is prescribed (see analysis of paragraph 7 powers, below).

572. Accordingly, the powers to specify a forest risk commodity, prescribe turnover thresholds and prescribe exemption thresholds are all subject to affirmative resolution procedure, preceded by consultation.

573. Finally, the review provision at paragraph 17 requires the Secretary of State to conduct a review of the law's effectiveness every two years, and this review may include consideration of the effectiveness of regulations made using the power to prescribe the exemption threshold for a particular commodity.

574. It is the Department's view that the power to prescribe the content of the exemption notices is a detailed administrative and technical matter that is best addressed in secondary legislation. The scope of the power is circumscribed by the purpose of a notice – the Secretary of State will be limited to prescribing content that is necessary to inform the enforcement authority of matters relating to reliance on the exemption.

Justification for taking the procedure

575. The Department's view is that regulations prescribing the exemption threshold for a particular commodity is likely to be of particular interest to Parliament and therefore the Department has proposed that the regulations be subject to the affirmative procedure.

576. The Department's view is that the power to prescribe the content of the exemption notices warrants a degree of parliamentary oversight but involves a detailed administrative matter that does not warrant parliamentary approval. The Department therefore proposes that the regulations should be subject to the negative resolution procedure.

Clause 109 and Schedule 16, Paragraph 6: a power to issue statutory guidance to an enforcement authority

Power conferred on: Secretary of State

Power exercised by: Issuing statutory guidance

Parliamentary Procedure: No parliamentary procedure

Context and purpose

577. The power to make regulations relating to enforcement includes the power to confer functions on one or more enforcement authorities (see paragraphs 10 and 11, and the analysis below). The Secretary of State will have power to issue statutory guidance to an enforcement authority about the requirements of Part 1 of the Schedule. The enforcement authority must have regard to guidance when exercising its functions under Part 2 of the Schedule.

578. It is anticipated that an enforcement authority will develop public guidance, aimed at regulated business. Further, it is anticipated that the Secretary of State may wish to issue guidance, to the enforcement authority, which is relevant to the content of such public guidance. For example, it is possible that the Government will work with producer countries to recognise schemes, authorised by the government of the producer country, that certify a particular commodity has been legally produced (i.e. in accordance with 'relevant local law'). In the event that a scheme meets the requirement of the UK Government, the Government intends that regulated businesses would be entitled to rely on a certificate as

good evidence of legality. In the event that a certification scheme is recognised, the Government would use statutory guidance to inform an enforcement authority of its view that certificates may be accepted as good evidence of legality.

Justification for taking the powers

579. The Department is of the view that it is necessary that the Secretary of State have a means of informing an enforcement authority of policy initiatives relevant to compliance, and a means of influencing the authority's recognition of those initiatives.

580. The power to issue guidance is not a power to make law. An enforcement authority must apply the law set out in primary and secondary legislation, and the duty to have regard to guidance from the Secretary of State cannot override this obligation to apply the law. To put it another way, the Secretary of State's ability to influence an enforcement authority through guidance is circumscribed by the law set out in primary and secondary legislation.

581. Finally, the review provision at paragraph 17 requires the Secretary of State to conduct a review of the law's effectiveness every two years, and this review may include consideration of the effect of guidance issued by the Secretary of State to an enforcement authority.

Justification for taking the procedure

582. The Department's view is that any guidance issued by the Secretary of State to the enforcement authority will be about policy initiatives relevant to the public guidance issued by an enforcement authority. The guidance issued by the Secretary of State cannot create new law or amend existing law, and so the Department considers that parliamentary oversight is not necessary.

583.

Clause 109 and Schedule 16, Paragraph 7: powers relating to 'regulated person'

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure

Context and purpose

584. The requirements of Part 1 of the Schedule fall on a 'regulated person' as defined in paragraph 7(1). A business will be a regulated person, with respect to a particular forest risk commodity, if its turnover exceeds a threshold set in regulations made by the Secretary of State – see paragraph 7(1)(a). A subsidiary may be a regulated person if the parent entity has a turnover exceeding the prescribed threshold.

585. In addition to the power to set the turnover threshold, the Secretary of State has power to make provision about how turnover is determined – see paragraph 7(2).

586. Some businesses will not meet the turnover threshold and will not become a 'regulated person' until sometime after the Part 1 requirements come into force. The Secretary of

State will have power to make regulations specifying the way in which the Part 1 requirements will apply in such cases – see paragraph 7(3). Principally, the power will be used to ensure that newly regulated businesses do not become subject to regulation part way through a financial year. In addition the power may be used to provide transition periods, if such periods are necessary to enable newly regulated business to prepare to comply with the Part 1 requirements.

587. A group of companies may include several companies that are each, separately, a regulated person. The Secretary of State will have power to make regulations specifying the circumstances in which the separate companies, with regulated person status, can be treated as a single regulated person – see paragraph 7(4). This power may be used to allow regulated businesses within a group to operate under the same due diligence system, and to report as a group. In addition, this power may be used to overcome the problem of a regulated business avoiding regulation by arranging for subsidiaries to undertake those transactions involving the use of a forest risk commodity.

Justification for taking the powers

588. It is the Department's view that the turnover threshold for a particular forest risk commodity is best set in secondary legislation, at the same time and in the same manner that the commodity is specified using the power at paragraph 1. The Department has considered the option of setting a single turnover threshold in primary legislation, above which a business is regulated with respect to all forest risk commodities (specified under paragraph 1). However the Department is of the view that regulation can be better targeted using different thresholds for different forest risk commodities.

589. Regulations made under paragraph 7(2) are subject to a duty to consult.

590. It is the Department's view that the powers to make provision relating to new regulated persons, and to groups of companies, are necessary in order to respond where the administration of the regulatory scheme reveals the need to refine the application of the Part 1 requirements to certain categories of regulated person (i.e. new regulated persons, and groups of companies).

591. Finally, the review provision at paragraph 17 requires the Secretary of State to conduct a review of the law's effectiveness every two years, and this review may include consideration of the effectiveness of regulations made using the power to prescribe the turnover threshold for a particular commodity.

Justification for taking the procedure

592. The Department's view is that these powers are likely to be of particular interest to Parliament and therefore the Department has proposed that the regulations be subject to the affirmative procedure.

Clause 109 and Schedule 16, Part 2: powers relating to enforcement

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure

593. Context and purpose

594. Part 2 of the Schedule confers power on the Secretary of State to make regulations relating to the enforcement of requirements under Part 1 of the Schedule (see paragraph 8).

595. The regulations relating to the enforcement of requirements under Part 1 of the Schedule may:

- a. confer functions on one or more enforcement authorities (see paragraph 9);
- b. require an enforcement authority to issue guidance about the exercise of its functions, and to consult when preparing the guidance (see paragraph 9(3)).
- c. confer functions on an enforcement authority to monitor compliance with Part 1 requirements (see paragraph 10);
- d. require persons to keep records, and to provide records and other information to the enforcement authority – and require the enforcement authority to provide information to the Secretary of State (see paragraph 11);
- e. confer powers of entry, inspection, examination, search and seizure on an enforcement authority (see paragraph 12, noting the requirement that a warrant is required in the circumstances specified in paragraph 12(3));
- f. make provision for the imposition of civil sanctions, but such provision must ensure that a civil sanction is not imposed on a regulated person who failed to comply with the Part 1 prohibition on use of illegal forest risk commodities but took all reasonable steps to implement a due diligence system (see paragraph 13);
- g. make provision for criminal penalties for failure to comply with civil sanctions or obstruct/fail to assist an enforcement authority (see paragraph 13);
- h. make provision for an enforcement authority to require regulated persons to pay the costs incurred by the authority in performing its functions (see paragraph 15(a));
- i. make provision for an enforcement authority to seek recovery of costs in a matter before a court or tribunal (see paragraph 15(b)).

Justification for taking the powers

596. The Department's view is that the 'infrastructure' for enforcing compliance with the requirements of Part 1 should be established through secondary, rather than primary legislation, so that this 'infrastructure' may be responsive:

- a. in the short term, to the evidence gathered in the course of the consultation that will precede the making of regulations; and
- b. in the longer term, to the actual operation of the scheme and regulatory knowledge gained in the course of that operation.

597. Civil sanctions (e.g. monetary penalties or compliance notices) will be the primary means of enforcing breaches of the requirements of Part 1 of the Schedule. Criminal prosecutions are only intended to be used as a last resort, and the cases in which criminal offences may be created by regulations are limited to those for which civil sanctions are considered an inadequate deterrent – i.e. non-compliance with civil sanctions, or the obstruction of or failure to assist an enforcement authority.

598. Appropriate safeguards are included in relation to the exercise of the powers. In relation to powers of entry etc., regulations may only enable an enforcement authority to enter premises by force, enter a private dwelling without consent, or search and seize items found on premises, with the authority of a warrant.

599. The powers may be used to require an enforcement authority to issue guidance about the exercise of its functions, and to consult when preparing the guidance (see paragraph 9(3)). Such guidance functions as an additional protection against the arbitrary imposition of sanctions, since the enforcement authority will need to make decisions having regard to its published policy.

600. The regulation making power relating to enforcement is subject to a duty to consult (see paragraph 16). Finally, the review provision at paragraph 17 requires the Secretary of State to conduct a review of the law's effectiveness every two years, and this review may include consideration of the effectiveness of regulations made for the purpose of enforcing the requirements of Part 1 of the Schedule.

Justification for taking the procedure

601. The Department's view is that making provision for imposition of civil sanctions, criminal offences and use of investigative powers is a matter that warrants close Parliamentary scrutiny and time for debate, and so has proposed that the regulations are subject to the affirmative procedure.

602. With respect to the fact that no parliamentary procedure is required for the guidance issued by an enforcement authority (as mentioned in paragraph 9(3)), the Department notes that it is common practice to require a public body, that exercises civil sanctions power, to publish (pursuant to consultation) its policy for using those sanctions (see for example the Regulatory Enforcement and Sanctions Act 2008 section 63).

Clause 129(4) Power to specify content of annual return (responsible bodies)

Power conferred on: Secretary of State

Power exercised by: Regulations Made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure

Context and purpose

603. Conservation covenants are voluntary agreements between a landowner and a responsible body, securing conservation purposes and intended to serve the public good. Responsible bodies are charged with making important decisions as to the creation, management and enforcement of conservation covenants and are also able to take action

relating to their discharge and modification. The Secretary of State is given the power administratively to designate bodies as responsible bodies. Once designated, clause 129 requires a responsible body to make an annual return to the Secretary of State stating whether, during the period to which the annual return relates, it held obligations under conservation covenants. If so, the return must state the number of conservation covenants held and, for each conservation covenant, the area of land covered. Responsible bodies must also give such other information as may be prescribed. Clause 129(4) allows the Secretary of State to make regulations to prescribe other information to be included in an annual return, to specify the twelve month period to which an annual return relates and to specify the date by which an annual return is to be made. Under subsection (10), any other information prescribed must relate to the responsible body, its activities during the period to which the return relates, its conservation covenants, or the land covered by them. The Secretary of State will use the information from annual reports to understand the uptake of conservation covenants over time, and to help oversee the use of covenants by responsible bodies. In default of regulations specifying the date by which an annual return must be provided and the period to which it must relate, that date and that period will be such as the Secretary of State may (administratively) direct (see Annex A below).

Justification for taking the power

604. Conservation covenants are a new legal construct created by the Bill. The information which the Secretary of State needs on conservation covenants may change over time, as their use as a conservation tool is established and their link to wider government environmental policy is developed. There needs to be a flexible means of ensuring that the Secretary of State can add, amend and replace the categories of information required. The relevant provisions are likely to be too detailed to be appropriate for primary legislation.

Justification for the procedure

605. The Department considers that the power to specify the content of the annual report submitted by responsible bodies should be subject to the negative procedure to allow Parliament to scrutinise such provision. The core requirement to provide an annual return is already set out in the Bill. Any information prescribed to be provided must fall within exhaustive categories set out in the Bill. Prior parliamentary debate and approval is not considered necessary.

Clause 133 and paragraph 1 of Schedule 20 Power to amend the UK REACH Regulation

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure.

Context and Purpose

606. The use of chemicals in the EU is regulated by Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency (the “EU REACH Regulation”).

607. The EU REACH Regulation forms part of retained EU law by virtue of the European Union (Withdrawal) Act 2018. The REACH etc. (Amendment etc.) (EU Exit) Regulations 2019 (the “REACH Exit SI”) corrected deficiencies in the EU REACH Regulation so that it operates effectively in the domestic context.

608. The EU REACH Regulation, as amended by the REACH Exit SI, is referred to as the UK REACH Regulation. The regime created by the UK REACH Regulation is referred to as UK REACH. This power allows the Secretary of State to amend the UK REACH Regulation.

Justification for taking the power

609. The EU REACH Regulation draws a distinction between the Articles and Annexes of the Regulation. The Annexes can be amended by the Commission through tertiary legislation, but the Articles cannot generally be amended (there are some minor exceptions such as the requirement on compliance checks in Article 41(7)). The same distinction has been carried into the UK REACH Regulation.

610. However, this risks freezing the UK REACH Regulation in its current form. This power will allow the Secretary of State to take further steps where necessary to ensure a smooth transition to UK REACH following the UK’s exit from the EU. It will also make it possible to keep the legislation up to date and respond to emerging needs or ambitions for the effective management of chemicals.

611. In particular, the Secretary of State may want to amend the detailed operation of the regulatory processes such as evaluation, authorisation and restriction to ensure they remain efficient and effective and respond to the experience of applying them in the domestic context. The Secretary of State may also want to amend the provisions on independent scientific advice if experience shows that they need to be refined to operate more effectively (Article 77⁴).

612. Schedule 2 to the REACH Exit SI inserted Title 14A into the UK REACH Regulation. The provisions in that Title are designed to provide a smooth transition into UK REACH for existing dutyholders under the EU REACH Regulation. At the same time the policy intention is to preserve the underlying principles of the EU REACH regime, including ensuring a high level of protection of human health and the environment. Unlike other provisions in the REACH Exit SI, it was not possible to draw on the accumulated experience of operating REACH in the EU when drawing them up.

613. The importance of the chemicals sector and other sectors which depend on it (e.g. aerospace and automotive) means that it is essential that amendments can be made to the transitional provisions, if necessary, to ensure a smooth transition into UK REACH and continued effective management of chemicals for the protection of human health and the environment.

614. There are a number of aspects of the transitional provisions that the Department anticipates might need to be addressed. The Secretary of State might need to amend the requirements placed on those that are downstream users under the EU REACH Regulation

⁴ Article 77 is amended by paragraph 62 of Schedule 1 to the REACH Exit SI.

but that will be required to hold a registration under the UK REACH Regulation. A further example is the joint submission of data in relation to new and transferred registrations to reinforce the principle that animal testing should only be carried out as a last resort.

615. A number of safeguards have been included in relation to the exercise of this power. The Secretary of State must consider any amendments to be consistent with Article 1 of the UK REACH Regulation (aim and scope of the REACH Regulation). That requirement is set out in paragraph 1(2) of Schedule 20. Under paragraph 1(5), the Secretary of State must publish an explanation of why they consider that this requirement is met.
616. Under paragraphs 1(3) and 6 of Schedule 20, the power does not apply to a number of provisions of the UK REACH Regulation. This includes provisions that relate to the fundamental principles of the UK REACH Regulation and that set out the role of the devolved administrations in REACH processes. It also includes provisions that place requirements on the UK Agency (the Health and Safety Executive) to act in a transparent manner and set out how the UK Agency must work with other stakeholders.
617. The power can also not be used to amend the Annexes to the UK REACH Regulation. This is to prevent a duplication of the power in Article 131.
618. Before exercising this power, the Secretary of State will need to obtain the consent of the devolved administrations where the amendment relates to a devolved matter (paragraph 3 of Schedule 20). The Secretary of State will also have to consult the UK Agency, any person nominated by the devolved administrations and such other people as the Secretary of State considers appropriate (paragraph 5 of Schedule 20). The Secretary of State must publish the explanation referred to in paragraph 1(5) before commencing the consultation referred to in paragraph 5.

Justification for the procedure

619. It is proposed that amendments to the UK REACH Regulation should be subject to the affirmative procedure. The UK REACH Regulation is classified as “retained direct principal EU legislation” in section 7(6) of the European Union (Withdrawal) Act 2018. This means that it benefits from the highest level of protection under that Act. On that basis, the Department considers that amendments to it should be subject to a high degree of parliamentary scrutiny.

Clause 133 and paragraph 2 of Schedule 20: Power to amend the REACH Enforcement Regulations 2008

Power conferred on: Secretary of State, Scottish Ministers, Welsh Ministers, DAERA and the Department for the Economy

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution Procedure.

Context and Purpose

620. The use of chemicals in the EU is regulated by Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency (the “EU REACH Regulation”).

621. The EU REACH Regulation forms part of retained EU law by virtue of the European Union (Withdrawal) Act 2018. The REACH etc. (Amendment etc.) (EU Exit) Regulations 2019 (the “REACH Exit SI”) corrected deficiencies in the EU REACH Regulation so that it operates effectively in the domestic context. The EU REACH Regulation, as amended by the REACH Exit SI, is referred to as the UK REACH Regulation. The regime created by the UK REACH Regulation is referred to as UK REACH.

622. The REACH Enforcement Regulations 2008 were made under section 2(2) of the European Communities Act 1972. They make contravention of the listed provisions of the EU REACH Regulation a criminal offence, and set out which domestic bodies enforce those offences. After EU exit, they will also do this in respect of the UK REACH Regulation. They also form part of retained EU law by virtue of the European Union (Withdrawal) Act 2018.

623. The agreement on the withdrawal of the UK from the EU contains a protocol relating to Ireland and Northern Ireland (the Northern Ireland Protocol). Under the Northern Ireland Protocol, the EU REACH Regulation continues to apply to Northern Ireland. The UK REACH Regulation regulates the access of chemicals to the Great British Market. It provides for businesses based in Northern Ireland to be able to directly take certain steps to reduce barriers to trade between Great Britain and Northern Ireland.

624. This means that there are two versions of the REACH Enforcement Regulations 2008 in the UK. One version applies to Northern Ireland, relating to the enforcement of the EU REACH Regulation and those aspects of the UK REACH Regulation that apply to businesses based in Northern Ireland. The other relates to the enforcement of the UK REACH Regulation in Great Britain. The version that applies in Great Britain, together with those aspects of the version that applies in Northern Ireland that relate to the UK REACH Regulation, is referred to as the UK REACH Enforcement Regulations 2008.

625. This power allows the Secretary of State to amend the UK REACH Enforcement Regulations 2008. It also gives the devolved administrations concurrent powers to amend those Regulations. In Scotland the power is exercisable by Scottish Ministers, in Wales it is exercisable by Welsh Ministers, and in Northern Ireland it is exercisable by DAERA and the Department for the Economy (together referred to as the “NI Departments”). The devolved authorities able to exercise this power are collectively referred to as the “relevant devolved authorities”.

626. Welsh Ministers can only make provision that would be within the legislative competence of the National Assembly for Wales. Scottish Ministers can only make

provision that would be within the legislative competence of the Scottish Parliament. The NI Departments can only make provision that would be within the legislative competence of the Northern Ireland Assembly and would not require the Secretary of State's consent.

Justification for taking the power

627. Section 1 of the European Union (Withdrawal) Act 2018 repealed the European Communities Act 1972. This means that the only way to amend the UK REACH Enforcement Regulations 2008 is through primary legislation.

628. This power is needed to ensure that the UK REACH Enforcement Regulations 2008 can be kept up to date. For example, it may be decided that it would be more appropriate for a different body to enforce an offence because of changes of responsibility between central and local government, or to ensure there is consistency between enforcement powers and the exercise of repatriated powers following the UK's exit from the EU. The Regulations specify which bodies enforce which offences, so would need to be amended to implement such a change.

629. There are a number of safeguards in relation to the exercise of this power. The Secretary of State or relevant devolved authority must consider any amendment to be necessary or appropriate for, or in connection with, enforcement of the UK REACH Regulation (paragraph 2(2) of Schedule 20).

630. Paragraph 2(4) of Schedule 20 limits the Secretary of State's and relevant devolved authorities' powers in relation to the penalties that can be imposed in respect of criminal offences. This recreates the limits in paragraph 1(d) of Schedule 2 to the European Communities Act 1972 as it applied in the different nations of the UK.

631. The Secretary of State will need to obtain the consent of the devolved administrations before exercising the power where the amendment relates to a devolved matter (paragraph 3 of Schedule 20). The Secretary of State will also have to consult the UK Agency (the Health and Safety Executive), any person nominated by the devolved administrations and such other people as the Secretary of State considers appropriate before exercising this power (paragraph 5(1) of Schedule 20). The relevant devolved authorities will have to consult the UK Agency and such other people as they consider appropriate before exercising this power (paragraph 5(3) of Schedule 20).

632. The Secretary of State and Scottish Ministers will also have to make two statements in accordance with, respectively, paragraphs 15 and 16 of Schedule 8 to the European Union (Withdrawal) Act 2018. Those statements must be made before the regulations are laid before Parliament or the Scottish Parliament. They must set out the reasons for making the amendments and the legal background to them.

Justification for the procedure

633. It is proposed that amendments to the UK REACH Enforcement Regulations 2008 should be subject to the affirmative procedure. These Regulations are closely related to the UK REACH Regulation, which will be amended through the affirmative procedure. They also relate to criminal offences. On that basis, the Department considers that amendments to the UK REACH Enforcement Regulations 2008 should be subject to a high degree of scrutiny.

Clause 134: Consequential provision

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

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution Procedure, unless the power is exercised to modify primary legislation etc., then Affirmative Resolution Procedure Henry VIII

Context and Purpose

634. Clause 134 provides the Secretary of State, Welsh Ministers, Scottish Ministers and DAERA with a power to make consequential provision in connection with this Bill or regulations made under it. Regulations made using this power may modify primary legislation. In consequence, this is a Henry VIII power.

Justification for taking the power

635. This power may only be exercised in connection with a provision of the Bill or regulations made under it. It is not possible to establish in advance all consequential provision that may be required; a power is needed to avoid any legal uncertainty or legal lacunas after the Act comes into force.

Justification for the procedure

636. The Department considers that the affirmative resolution procedure should apply where the power is exercised to modify primary legislation, an Act of Parliament, a Measure or Act of the National Assembly for Wales, an Act of the Scottish Parliament, Northern Ireland legislation, or retained direct principal EU legislation. The Department considers that the negative resolution procedure is appropriate in all other cases.

Clause 139, subsections (3)-(5): Commencement

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

Power exercised by: Regulations or Order made by Statutory Instrument

Parliamentary Procedure: None/Affirmative

Context and purpose

637. Clause 139 contains a series of standard powers for the Secretary of State, Welsh Ministers, Scottish Ministers and DAERA to bring the Bill into force by commencement regulations or order.

Justification for taking the power

638. This power will enable the Secretary of State, Welsh Ministers, Scottish Ministers and DAERA to commence those provisions of the Bill not included in subsections (1) and (2) at an appropriate time.

Justification for procedure

639. Consistent with common practice, commencement regulations under this clause are not subject to any parliamentary procedure. Parliament will have approved the principle of the provisions in the Bill by enacting them; commencement by regulation enables the provisions to be brought into force at the appropriate time. Orders to be made by DAERA are subject to the affirmative resolution procedure in order to ensure full scrutiny of these measures by the Northern Ireland Assembly.

Clause 140: Transitional or saving provision

Power conferred on: Secretary of State, Welsh Ministers, Scottish Ministers, Department of Agriculture, Environment and Rural Affairs in Northern Ireland

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: None for Secretary of State, Welsh Ministers, Scottish Ministers and Affirmative Resolution Procedure for Department of Agriculture, Environment and Rural Affairs in Northern Ireland

Context and purpose

640. This is a standard power to make transitional or saving provision in connection with the coming into force of any provision of this Bill.

Justification for taking the power

641. The power to make transitional or saving provision is often needed when bringing legislative provisions into force, for example in transitioning between two legislative regimes.

Justification for the procedure

642. The procedure for this power is consistent with that for commencement regulations.

Annex A

The below table lists powers which are considered not to be legislative with an explanation of why this is thought to be the case.

Clause	Power
Clause 16	A power to prepare a policy statement on environmental principles
Paragraph 6, Schedule 2 (linked to clause 45)	A power to prepare a policy statement on environmental principles
Clause 56	A power that will allow the Environment Agency to create a charging scheme as a means of recovering costs which are incurred by performing functions relating to sections 45A to 45AZB of the Environmental Protection Act 1990.
Clause 57	A delegated power that will allow the Environment Agency, Natural Resources Wales or Scottish Environment Protection Agency to create a charging scheme as a means of recovering costs which are incurred by performing functions conferred under the waste tracking regulation making power
Clause 59	A delegated power to allow the Environment Agency and Natural Resources Wales to make a charging scheme to recover costs incurred in performing functions conferred under regulations made under the new section 62ZA
Clause 61	A delegated power to allow the Environment Agency, Natural Resources Wales and the Scottish Environment Protection Agency to make a charging scheme to recover costs incurred in performing functions connected with the regulation or importation or exportation of waste or the transit of waste for export
Clause 63	A delegated power to allow the Environment Agency, Natural Resources Wales and Scottish Environment Protection Agency to create charging schemes under section 41 of the EA 1995.

Clause 64	A delegated power for DAERA to create wider charging schemes under the Waste and Contaminated Land (Northern Ireland Order) 1997 and the Waste Management Licensing Regulations (Northern Ireland) 2003
Clause 80, new section 12A WIA 1991	A power for Ofwat to modify conditions of appointment of water and sewerage undertakers
Clause 112(2)	Secretary of State's power administratively to designate bodies as responsible bodies for the time being for the purposes of conservation covenants
Clause 129(6)	Secretary of State's power to direct that annual returns relating to conservation covenants must be made by responsible bodies by a particular date and must relate to a particular period

Clause 16, subsection (1): Power to prepare a policy statement on environmental principles

Power conferred on: Secretary of State

Power exercised by: Laying before Parliament

Parliamentary Procedure: The process for laying the draft and final policy statements before Parliament is set out in clause 17 of the Bill. The Secretary of State must lay the draft before Parliament and either House of Parliament may pass a resolution in respect of the draft or a committee may make a recommendation on the draft. The Secretary of State must produce a response to any resolution or recommendation made within 21 sitting days, and lay it before Parliament before laying the final statement.

Context and purpose

1. The policy objective of this power is to ensure that Ministers prepare a policy statement on environmental principles. The purpose of the statement is to provide clarification on how the environmental principles are to be interpreted and proportionately applied by Ministers in the policy-making process. Ministers are under a duty to have due regard to the policy statement on environmental principles, when dealing with policies covered by the statement (clause 18(1)). This will be a significant new legal duty to apply across government policy-making.
2. The policy statement will provide a full explanation of how the environmental principles should be proportionately applied and interpreted by Ministers in the policy-making process. This document will provide a level of detail that would be inappropriate to set out on the face of the Bill. In addition, as the policy statement relates to a new statutory duty

placed on Ministers, it is possible that the statement will need to be updated after some post-implementation experience of the duty, to fully incorporate emerging best practice or case law. In the development of the policy statement, it is proposed that Ministers will follow the procedure established in clause 17. Under this procedure, Parliament will be given 21 sitting days in order to pass a resolution in respect of the draft statement, or, within the same timeframe, a parliamentary committee of either House (or both) may make recommendations in respect of the draft statement. Should such a resolution or recommendations be made, the Secretary of State must produce a response and lay it before Parliament. The final policy statement must not be laid and published until either a response has been laid, or else until 21 sitting days have passed without such a resolution or recommendations being made. If the Secretary of State wants to amend the policy statement, any amended statement will follow the same procedure. This procedure allows for Parliamentary scrutiny of the policy statement. In addition, there will be further scrutiny as the draft statement is subject to statutory consultation requirements set out in clause 17. These procedures are considered appropriate because the policy statement will set out how the environmental principles are considered across a wide range of government policy-making, and therefore has the potential to have a significant impact.

Paragraph 6, Schedule 2 (linked to clause 47) A delegated power to prepare a policy statement on environmental principles

3. This power for Northern Ireland is materially the same as the power conferred by clause 16 and the context, purpose, and justifications are not repeated.

Clause 56: Separation of Waste Collection- A delegated power that will allow the Environment Agency to create a charging scheme as a means of recovering costs which are incurred by performing functions relating to sections 45A to 45AZB (section 41(1)(r) of the Environment Act 1995)

Power conferred on: Environment Agency

Power exercised by: Creating a charging scheme

Parliamentary Procedure: No parliamentary procedure

Context and purpose

4. Under section 41 of the Environment Act 1995 (“EA 1995”), the Environment Agency can create charging schemes in respect of a wide range of its functions. It is intended that the Environment Agency will be given new functions under new sections 45A to 45AZB of the EPA 1990 including monitoring and ensuring compliance with new separate collection obligations. Clause 54(7) amends section 41 of the EA 1995 to enable the Environment Agency to create a charging scheme in order to recover costs, which are incurred by it in performing its new functions under s45A to s45AZB, including requiring the payment of charges. The purpose of the power is to allow the EA to charge specific persons, who benefit from the EA’s functions under s45A to s45AZB or who are failing to comply with their own duties under s45A to s45AZB) as opposed to the EA being funded for their additional work through general taxation.

5. The Environment Agency already has powers in section 41 of the 1995 Act to create charging schemes in respect of a wide range of its functions. The Department, therefore, thinks this power is appropriate and consistent with the existing legislative framework. The Department considers that the Environment Agency is best placed to set up a suitable charging scheme to recover costs in relation to monitoring and ensuring compliance with new separate collection obligations as it is the body carrying out the functions. There are a number of existing safeguards in place in relation to the exercise of the section 41 power. These are that a charging scheme made under section 41 must be approved by the Secretary of State under section 42 of that Act. Prior to such approval, the Environment Agency must consult, by publishing a notice setting out their proposals and specifying the period within which representations or objections can be made. HM Treasury must also consent to the charging scheme. In deciding whether to approve a scheme, the Secretary of State is required to consider any representations made during the consultation. This power is additional to similar powers to create charging schemes in section 41 of the EA 1995. There is no parliamentary procedure for those other powers. As such, the Department that the existing safeguards are sufficient and that no parliamentary procedure for this power is appropriate

Clause 57 A power to allow the EA, NRW or SEPA to create a charging scheme in relation to functions conferred under section 34CA EPA 1990 waste tracking regulation making power (new section 41(1)(da) of the Environment Act 1995)

Power conferred on: Environment Agency, Natural Resources Wales and Scottish Environmental Protection Agency

Power exercised by: Creating a charging scheme

Parliamentary procedure: None

Context and purpose

6. The Serious and Organised Waste Crime Review recommended the introduction of mandatory electronic tracking of waste, to make it easier for the regulators to track waste and regulate it more effectively. The context is set out more fully in relation to the regulation making powers under clause 57. Clause 57 also makes amendments to section 41 of the EA 1995. This power will allow the appropriate regulator (the Scottish Environmental Protection Agency, Natural Resources Wales and the Environment Agency) to create a charging scheme for the purposes of recovering costs incurred by it in performing its functions under regulations made under the new regulation making power in section 34CA EPA 1990. It is envisaged that, where the regulator imposes charges, it will do so via a section 41 charging scheme rather than the power to impose fees and charges in section 34CA(9).
7. This power is needed to ensure that, as with other waste regulation activities such as environmental permitting, the regulator can create a charging scheme so that the cost of establishing and maintaining the electronic waste tracking system properly falls on industry and those using the system, rather than the cost being paid by general taxation. This will ensure that relevant waste controllers contribute to the costs of the regulators in relation to their waste tracking functions. With an effective charging scheme in place, the waste tracking system will be properly funded to empower the regulators to tackle waste crime.

The justification for creating a charging scheme under section 41 EA 1995 is set out above in relation to clause 56 above and clause 63 below.

Clause 59 A power to allow the EA and NRW to create a charging scheme in relation to functions conferred under regulations made under the new section 62ZA Environmental Protection Act 1990 (hazardous waste) (section 41(1)(cc) of the Environment Act 1995)

Power conferred on: Environment Agency and Natural Resources Wales

Power exercised by: Creating a charging scheme

Parliamentary Procedure: None

Context and purpose

8. The Environment Agency (EA) in England and Natural Resources Wales (NRW) in Wales regulate hazardous waste. As part of their regulatory role, they incur costs in complying with their obligations under the regulations (for example to maintain registers and process information sent by hazardous waste controllers) and also helping others to comply with their obligations under the regulations. Section 41(1)(c) of the EA 1995 gives the EA and NRW powers to create a charging scheme to recover costs incurred by it in performing its functions conferred by regulations that implemented the Waste Framework Directive, in so far as it relates to hazardous waste.
9. The Government wants the EA and NRW to continue to be able to make charging schemes in relation to such functions. However, when the UK leaves the EU and the Secretary of State or Welsh Ministers make regulations under the new section 62ZA (rather than by reference to implementing the hazardous waste elements of the waste framework directive), the section 41(1)(c) power as currently drafted will no longer allow the EA and NRW to recover costs in performing functions conferred by regulations under the power in the new section 62A.
10. In order to ensure hazardous waste can continue to be regulated effectively and the regulators are funded to regulate hazardous waste by the industry they are regulating, it is important to ensure that the regulators can continue to make a charging scheme in relation to their hazardous waste functions. This is exactly the same as it is now. But in the event that the Hazardous Waste (England and Wales) Regulations 2005 or the Hazardous Waste (Wales) Regulations 2005 are revoked, unless section 41(1) is amended to refer to this new regulation making power, the EA or NRW would not have the power to make a charging scheme in relation to these functions as they are able to now.
11. The EA and NRW can already make such charging schemes under section 41(1)(c) of the EA 1995 (and now that the UK has left the EU, under section 41(1)(ca) and (cb)). However, over time as the legislation changes, it is appropriate for there to be a standalone power to charge in relation to hazardous waste functions not expressly linked to the Waste Framework Directive (pre EU exit) or, after exit day, the Hazardous Waste Regulations. The justification for providing a power to create a charging scheme generally and the justification for no procedure is set out above in relation to clause 56 and applies equally here.

Clause 61: A power to allow the EA, NRW and SEPA to create a charging scheme in relation to functions connected with the regulation or importation or exportation of waste or the transit of waste for export (section 41(1)(d) the Environment Act 1995)

Power conferred on: Environment Agency and Natural Resources Wales, Scottish Environment Protection Agency

Power exercised by: Creation of charging scheme

Parliamentary Procedure: None

Context and purpose

12. Waste has become a valuable resource and its transport across borders has increased significantly. While trading waste can have a positive impact on the economy, the uncontrolled movement of harmful waste can have disastrous consequences for human health and the environment. Illegal exports of waste can also drain the UK economy of a valuable source of raw materials.

13. Clause 61 updates the power in section 141 of the EPA 1990 in connection with the regulation of waste imports and exports. Those regulations will confer functions on the Environment Agency, Natural Resources Wales and the Scottish Environment Protection Agency. This power allows those authorities to make a charging scheme to recover the costs incurred in performing those functions. This change essentially substitutes a reference to the functions related to implementing the EU legislation with functions relating to the import, export and transit of waste for export. This is necessary so that the power to make charging schemes in connection with the regulation of international waste shipments is not just limited to the implementation of the EU legislation but also covers any functions which arise from the exercise of powers under section 141 of the EPA 1990. The power in section 41(1)(d) of the EA 1995 allows such charges to be made now, but only in relation to functions conferred by EU Regulation 1013/2006. Now that the UK has left the EU the government will regulate the import and export of waste under UK legislation, rather than with reference to EU legislation. As such the charging power needs to be updated, but it will allow the same sorts of charging schemes to be produced by the Environment Agency, Natural Resources Wales and the Scottish Environment Protection Agency as now. The same arguments apply to this power as to clause 56 above and 63 below, in terms of the appropriateness of providing for this charging scheme, consistent with other powers to create charging schemes under section 41 of the EA 1995.

Clause 63: A delegated power to allow the EA, NRW, and SEPA to create charging schemes under section 41 of the Environment Act 1995

Power conferred on: Environment Agency and Natural Resources Wales, Scottish Environment Protection Agency

Power exercised by: Creation of charging scheme

Parliamentary Procedure: None

Context and purpose

14. Extended Producer Responsibility (EPR) is a key part of Defra's sustainable production and consumption policy; which also includes material/resource efficiency standards and consumer information measures. EPR is a powerful environmental policy approach through which a producer's responsibility for a product is extended to the post-use stage. This can incentivise producers to design their products to make it easier for them to be reused, dismantled and/or recycled at end of life.
15. Producer responsibility schemes are already in place for four waste streams, putting a level of financial responsibility on producers for their goods at end-of-life. These are: Packaging waste; End-of-life vehicles (ELV); Batteries and accumulators; Waste electrical and electronic equipment (WEEE). There are regulations already in place for these waste streams, setting out the detail of how these schemes operate.
16. In the Resources and Waste Strategy, the government established a set of core principles that will act as a framework for reviewing existing systems and developing new Extended Producer Responsibility (EPR) schemes. By the end of 2025 the Department will have reviewed and consulted on measures for five new waste streams: textiles, bulky waste (such as furniture, mattresses), certain materials in the construction and demolition sector, vehicle tyres, and fishing gear. The Department will also have reviewed all existing Producer Responsibility schemes to ensure they meet EPR principles.
17. This clause inserts new powers into section 41(1) of the EA 1995 ("Powers to make charging schemes"). These powers will allow the Environment Agency (or devolved equivalents; "the Agencies") to make a charging scheme, if they are the appointed regulator for a producer responsibility scheme made under powers in section 93 of the EA 1995. The power includes the current ELV and WEEE producer responsibility schemes. These charging schemes will bring a new degree of flexibility to how the Agencies can charge for the enforcement duties they undertake. The new powers will allow the Agencies to recover their reasonable costs of appropriate investigation, intervention and enforcement of current producer responsibility systems and, as and when they are established, new, EPR schemes.
18. In addition to this, the Independent Review into Serious and Organised Crime in the Waste Sector (November 2018) identified a need to put funding of waste crime enforcement onto a more sustainable footing, with greater flexibility and reliability. Clause 63 introduces powers for the Environment Agency to create charging schemes on a broader range of matters, within the confines of their current powers to create charging schemes in sections 41 and 42 of the EA 1995 and the requirements associated with them (for example the requirement for Secretary of State and HMT consent).
19. Currently the Environment Agency is able to charge for the operation and compliance checking of the environmental permitting regime. However, they are unable to charge for enforcement of those uncompliant with permitting requirements or operating illegally

outside of the permitting regime. The new charging power allows for the Environment Agency and Natural Resources Wales (NRW) to create charging schemes for its functions related to the illegal disposal of waste and permitted waste sites. This would allow the Environment Agency and NRW to recover its reasonable costs of appropriate investigation, intervention and enforcement of illegal waste sites from those illegal waste sites.

20. The extended power allows the EA and NRW to apply existing environmental permitting scheme charges to exempt waste operations, including registration and subsistence charges where appropriate, to fund compliance monitoring of these operations. Exemptions have an important role in allowing lower risk activities to take place when the costs of the full permitting system would be disproportionate. Charges will be targeted at specific sectors where there is an appropriate need to tackle issues of serious non-compliance and waste crime and where the charge would not be outweighed by the social, environmental or economic benefit of allowing the exempt activity to take place free of charge.
21. The extended power also allows the EA, NRW and SEPA to create a charging scheme in relation to functions conferred in relation to electronic waste tracking.
22. The Agencies can already charge producers fees for the current schemes they regulate. However, for each scheme, this happens in different ways and to different extents. These new charging powers will make charging more consistent across the current producer responsibility schemes, and new EPR schemes, where one of the Agencies is the regulator. It will do this by bringing all charging powers under section 41.
23. By way of example, fees for the enforcement of the current packaging producer responsibility scheme are set out in regulations made under section 93 of the EA 1995 that establish the scheme. This means the process of changing the fees is slow and inconsistent with other producer responsibility schemes. In allowing charges for enforcement for schemes established under section 93 to be included in a charging scheme under section 41, the Agencies will be able to be more consistent as well as more reactive to the enforcement work that needs to be done. The Agencies will have more flexibility in how the enforcement money is distributed and so will be able to more effectively target the areas of enforcement work that need the highest impact.
24. The current Waste Electrical and Electronic Equipment (WEEE) scheme uses the "environmental licence" function under powers in section 56(1) and section 41 to create charging schemes. Bringing WEEE under section 41(p) will create consistency across the producer responsibility schemes.
25. The new charging power will also allow for a more appropriate balance of regulatory activity between compliance of permitted waste sites and illegal sites operating without a permit. The permitted waste industry have raised concerns over the Environment Agency being funded to monitor their compliance but not to enforce against outright illegal activities operating without a permit, which directly undercut them and can cause greater environmental harm. The approach to the new power remains consistent with the approach to other Environment Agency charging powers set out in Section 41 of the EA 1995.

Clause 64: A delegated power for DAERA to create wider charging schemes under the Waste and Contaminated Land (Northern Ireland Order) 1997 and the Waste Management Licensing Regulations (Northern Ireland) 2003

Power conferred on: DAERA

Power exercised by: Producing scheme

Parliamentary Procedure: Laying before the Northern Ireland Assembly.

Context and purpose

26. Clause 64 amends the Waste and Contaminated Land (Northern Ireland Order) 1997 and the Waste Management Licensing Regulations (Northern Ireland) 2003 so that the charging measures set out at Clause 57, 58 and 63 are also available in Northern Ireland. This ensures that DAERA can also make provision for charging schemes for electronic waste tracking, and producer responsibility obligation schemes that effectively operate on a UK wide basis. It will allow DAERA to make provision for charging schemes for their functions relating to waste import and export and the transit of waste for export.
27. In relation to waste tracking, the amendments allow DAERA to create a charging scheme for the purposes of recovering costs incurred by it in performing its functions under the waste tracking regulations made under the new Article 5G of the Order. This power is needed to ensure that, as with other waste regulation activities such as permits and licencing, the regulator can create a charging scheme so that the cost of establishing and maintaining the electronic waste tracking system properly falls on industry and those using the system, rather than the cost being paid by general taxation. With a robust charging scheme in place, Northern Ireland will have a properly funded waste tracking system to empower the regulators to tackle waste crime.
28. In relation to international waste shipments, the amendments allow DAERA to create a charging scheme to recover its costs in performing its functions in connection with the regulation of waste imports and exports and the transit of waste for export. This power is needed to ensure that DAERA has powers to create a charging scheme in relation to those functions, as the EA, NRW and SEPA already have by virtue of section 41(1)(d) of the EA 1995. Before making a charging scheme, DAERA must consult appropriate persons and a copy of the scheme must be laid before the Northern Ireland Assembly.
29. Clause 61 makes provision for charging schemes under the EA 1995, which does not extend to Northern Ireland. This power makes the same provisions in relation to Northern Ireland and the same arguments apply. Before making a charging scheme, DAERA must consult appropriate persons and a copy of the scheme must be laid before the Northern Ireland Assembly.

Clause 80 inserting new section 12A into WIA 1991 A power for Ofwat to modify conditions of appointment of water and sewerage undertakers

Power conferred on: Ofwat

Power exercised by: No method prescribed by statute.

Parliamentary procedure: None

Context and purpose

30. The current legislative framework for the regulation of water and sewerage undertakers is well established under the WIA 1991. Under section 11 WIA 1991 the Secretary of State and the regulator, Ofwat, may attach conditions to the appointment of undertakers. Section 13(1) WIA 1991 enables Ofwat to modify the conditions of a company's appointment with the company's consent. If the company concerned does not consent to the proposed modifications, Ofwat cannot proceed to implement the modifications but can refer them to the Competition and Markets Authority (CMA), requiring the CMA to investigate and report on whether the company's appointment conditions operate or may be expected to operate against the public interest, and if so whether modifications of the appointment conditions could remedy that adverse effect (section 14 WIA 1991). If the CMA report agrees that the proposed modifications could remedy the specified public interest matters, Ofwat must consult on making these modifications (section 16 WIA 1991).
31. Ofwat's existing powers to modify conditions in WIA 1991 will be modernised by amendments made by this clause. Under the amended legislation Ofwat would have the power to modify conditions without first securing undertakers' consent or obtaining a CMA report. A more responsive model for water sector licence modification updated to bring it line with the other main economic regulators such as Ofgem will enable Ofwat to take better account of ongoing and future priorities leading to better outcomes for customers and the environment. The power is subject to a number of safeguards. Under new section 12A(3) WIA 1991, before it can make any modifications to licence conditions, Ofwat must give notice to undertakers, setting out the proposed modifications and their effect; and must give reasons for the modifications. It must then consult on the proposed modifications for at least 42 days and consider any representations made. More generally, as a public body, Ofwat will ensure it exercises its functions in a manner which complies with public law. Affected undertakers and their representative groups may appeal Ofwat's changes to the CMA. The Department's view is that the power to modify conditions, which already exists, is not a legislative power and should continue as a power without any parliamentary procedure under the WIA 1991 as amended.

Clause 80 (New section 12A(7) Water Industry Act 1991) Secretary of State's power to direct Ofwat not to make modification

Power conferred on: Secretary of State

Power exercised by: No method prescribed by statute.

Parliamentary procedure: None

Context and purpose

32. The regulation of water and sewerage undertakers is well established under the WIA 1991. Under section 11 WIA 1991 the Secretary of State and the regulator, Ofwat, may attach

conditions to the appointment of undertakers. Section 13(1) WIA 1991 enables Ofwat to modify the conditions of a company's appointment with the company's consent. Under section 13(4) WIA 1991 Ofwat shall not make any modifications which the Secretary of State has directed Ofwat not to make. Subsection (5) limits the Secretary of State's powers to make that direction, to selected circumstances, for example where the modification relates to disposal of, or of interests or rights in or over, a company's protected land that the appointment does not permit to be modified, or where a different statutory procedure should be used instead. The Secretary of State's existing power of direction under section 13 WIA 1991 is not legislative in character.

33. Ofwat's existing powers to modify conditions will be modernised by this Bill. This is explained in relation to the clause 80 power inserting new section 12A into WIA 1991. One of the safeguards upon Ofwat's new power is that the Secretary of State retains the ability, under the amended legislation, to direct Ofwat not to make a particular licence change. The Secretary of State's power to direct in relation to the new modification power is not limited in primary legislation although its exercise will be limited by standard public law considerations. It is appropriate that the Secretary of State's power to direct can be exercised in wider circumstances than currently, as a safeguard to recognise the fact that undertakers are no longer required to consent to proposed modifications. The Secretary of State could exercise this power, for example, in circumstances where they are concerned about the burden the modification would place on undertakers. The Department's view is that the power to direct Ofwat not to make a modification should continue as a power without any parliamentary procedure under the WIA 1991 as amended.

Clause 112(2) Secretary of State's power administratively to designate bodies as responsible bodies for the time being for the purposes of conservation covenants and to revoke such designation

Power conferred on: Secretary of State

Power exercisable by: No method prescribed by statute

Parliamentary procedure: None

Context and purpose

34. Conservation covenants are voluntary agreements between a landowner and a responsible body, securing conservation purposes and intended to serve the public good. Responsible bodies are charged with making informed and important decisions as to the creation, management, enforcement of conservation covenants, and is also able to take action (by agreement with the landowner or on application to the Lands Chamber of the Upper Tribunal) in relation to the discharge and modification of conservation covenants. Under clause 112 (2), the Secretary of State is given the power to designate those bodies which can act as responsible bodies. The power is only exercised on application by a body to be designated and only if the Secretary of State is satisfied that the body is eligible and suitable to be a responsible body. Subsection (5) provides that bodies (apart from local authorities) must satisfy the Secretary of State that, in the case of public bodies or charities, at least some of their main purposes or functions relate to conservation or, in any other case, at least some of its main activities relate to conservation. The Secretary of State may apply such criteria in deciding an application as he considers appropriate, and must publish (and keep up to date) those criteria and a list of bodies designated. The Secretary of State

may revoke a designation by giving notice to the responsible body concerned. That power is exercisable if the responsible body has applied for de-designation, or where the Secretary of State is satisfied that the body either is not suitable to remain as a responsible body or (where applicable) no longer meets the requirements of subsection (5).

Clause 129(6) Secretary of State's power to direct that annual returns relating to conservation covenants must be made by responsible bodies by a particular date and must relate to a particular period

Power conferred on: Secretary of State

Power exercisable by: No method prescribed by statute

Parliamentary procedure: None

Context and purpose

35. A body designated as a responsible body for the purposes of conservation covenants must make an annual return to the Secretary of State stating whether it held obligations under conservation covenants a responsible body during the period to which the return relates: clause 129(1). Regulations under subsection (4) may prescribe other information which must be provided in annual returns and may make provision as to the period to which an annual return is to relate and the date by which an annual return is to be made (this delegated power is dealt with in the main text of the Memorandum above). In default of any such provision specifying that period and that date, annual returns are to relate to such period and be provided by such date as the Secretary of State may direct: subsection (6). This is a non-legislative power. A date by which an annual return is to be provided and the period to which it must relate is closely bound up with the notion of an obligation to provide an annual return. For that reason, in the absence of regulations under subsection (4), which, as above, may make provision relating to the information to be provided in annual returns, the Department considers it appropriate that the Secretary of State may administratively make a direction as to these matters. The Secretary must, under subsection (7), take all reasonable steps to draw any direction to the attention of each responsible body affected by it.

ANNEX B - SUMMARY OF DELEGATED POWERS

Clause/Schedule	Power conferred	Parliamentary procedure
PART 1 – ENVIRONMENTAL GOVERNANCE		
Clause 1	A delegated power to allow the Secretary of State to set environmental targets by statutory instrument, and a requirement to set targets in respect of certain priority areas of the natural environment	Affirmative
Clause 2	A requirement for the Secretary of State to set a target for the reduction of PM _{2.5} (fine particulate matter, an air pollutant) in regulations	Affirmative
Clause 24	A delegated power to allow the Secretary of State to issue statutory guidance to the OEP in relation to its enforcement functions.	None
Clause 45	A delegated power to allow the Secretary of State to make regulations to specify legislative provisions which fall within or outside the definition of “environmental law”	Affirmative

PART 2 ENVIRONMENTAL GOVERNANCE: NORTHERN IRELAND		
Paragraph 18, Schedule 3 (linked to clause 46)	A power for DAERA to make regulations to specify legislative provisions which fall within or outside the definition of Northern Ireland environmental law.	Affirmative
Paragraph 24A, Schedule 3	A delegated power to allow DAERA to issue statutory guidance to the OEP in relation to its Northern Ireland enforcement functions	None
PART 3 WASTE AND RESOURCE EFFICIENCY		
Clause 49 and Schedule 4	A new UK wide power to make regulations to impose producer responsibility obligations (replacing sections 93 to 95 of the Environment Act 1995 and the Producer Responsibility Obligations (Northern Ireland) Order 1998)	Affirmative or negative depending on factors set out in the clause
Clause 49 and Schedule 4	Power for the relevant national authority to make regulations about the enforcement of producer responsibility obligations	Affirmative Resolution Procedure
Clause 50 and Schedule 5	A delegated power to make provision for the payment of sums by those involved in manufacturing, processing, distributing or supplying products or materials	Affirmative

Clause 50 and Part 2 of Schedule 5	A power conferred on the relevant national authority to make regulations about the enforcement of producer responsibility for disposal costs requirements	Affirmative
Clause 51 and Part 1 of Schedule 6	A power conferred on the relevant national authority to make regulations for mandatory provision of information about the resource efficiency of products	Affirmative
Clause 51 and Part 2 of Schedule 6	A power conferred on the relevant national authority to make regulations about the enforcement of resource efficiency information requirements	Affirmative
Clause 52 and Part 1 of Schedule 7	A power for the relevant national authority to make regulations to set resource efficiency requirements for products	Affirmative
Clause 52 and Part 2 of Schedule 7	A power for the relevant national authority to make regulations about the enforcement of resource efficiency requirements	Affirmative
Clause 53 and Schedule 8	A power conferred on the relevant national authority to make regulations to establish deposit schemes to sustain promote or secure an increase in recycling or reuse and to reduce littering or fly tipping	Affirmative or negative depending on factors set out in the clause

Clause 53 and Schedule 8	A power for the relevant national authority to make regulations about the enforcement of requirements under deposit schemes	Affirmative or negative depending on factors set out in the clause
Clause 54 and Schedule 9	A power conferred on the relevant national authority to make regulations about charges for single use plastic items	Affirmative or negative depending on factors set out in the clause
Clause 54 and Schedule 9	A power conferred on the relevant national authority to enforce provisions in regulations imposing a charge for single use plastic items	Affirmative or negative depending on factors set out in the clause
Clause 55	A power conferred on the relevant national authority to make regulations to require sellers to register with an administrator and the payment of registration fees and to make provision about the registration process by statutory instrument	Affirmative or negative depending on factors set out in the clause
Clause 56	Delegated power for Secretary of State to specify in regulations what is “recyclable household waste” for the purposes of the separate collection of household waste (see section 45A(9)(b), section 45AZA(9)(b) EPA 1990)	Negative

Clause 56	Delegated power for Secretary of State to specify in regulations which premises are “relevant non-domestic premises” for the purposes of separate collection of recyclable household waste under section 45AZA EPA 1990 (s.45AZA(11)(d))	Negative
Clause 56	Delegated power for the Secretary of State to specify in regulations what is “recyclable relevant waste” for the purposes of the separate collection of commercial and industrial waste (see section 45AZB(9)(b)) EPA 1990)	Negative
Clause 56	A delegated power to allow the Secretary of State to make exemptions from the requirements set out in section 45AZA and section 45AZB EPA 1990, relating to the separate collection of household waste	Affirmative
Clause 56 Henry VIII	A delegated power to allow the Secretary of State to amend s45A(10), s45AZA(10), s45AZB(10) EPA to add further recyclable waste streams to the EPA 1990 and make provision for its collection	Affirmative
Clause 56	A delegated power to allow the Secretary of State to issue statutory guidance in relation to s45A - s45AZB of the EPA 1990 (separate collection of household waste and commercial and industrial waste)	None
Clause 57 Henry VIII	A delegated power to allow the appropriate national authority to make regulations for the purpose of tracking relevant waste and establishing an electronic system for that purpose	Affirmative or negative depending on factors set out in the clause

Clause 58 Henry VIII	A delegated power to allow the Department of Agriculture, Environment and Rural Affairs (DAERA) to make regulations for the purpose of tracking relevant waste and establishing an electronic system for that purpose	Affirmative or negative depending on factors set out in the clause.
Clause 59	A delegated power to make provision about, or connected with, the regulation of hazardous waste	Affirmative or negative depending on factors set out in the clause
Clause 60	A delegated power to make provision about, or connected with, the regulation of hazardous waste in Northern Ireland	Affirmative or negative depending on factors set out in the clause
Clause 61 Henry VIII	A power to make provision for the transfrontier shipment of waste	Affirmative or negative depending on factors set out in the clause
Schedule 10(Linked to clause 65)	A power of direction conferred on the appropriate minister to direct a registered waste carrier to collect waste which is being kept on specified land and make associated provision	None

Clause 66	A power of direction conferred on DAERA to direct a registered waste carrier to collect waste which is being kept on specified land and make associated provision	None
Clause 67 – new section 88(11) EPA 1990	A power for the Secretary of State (in relation to England) and the Welsh Ministers (in relation to Wales) to prescribe conditions for the authorisation of authorised officers of litter authorities	Negative
Clause 67 – new section 88B(1) EPA 1990	A power for the Secretary of State (in relation to England) and the Welsh Ministers (in relation to Wales) to issue guidance to litter authorities on the exercise of littering enforcement functions	None
Clause 68 Henry VIII	A delegated power to allow the Secretary of State or Welsh Ministers (as appropriate) to amend the permitted range of fixed penalty notices (FPNs) amounts in s33ZA, s34ZA, s33ZB and s34ZB of the EPA 1990 by statutory instrument	Negative
Clause 68	A delegated power to allow enforcement authorities (waste collection authorities, the Environment Agency in England and Natural Resources Wales in Wales) to set the time period in which a lesser penalty can be paid for Fixed Penalty Notices in s33ZA, s33ZB, s34ZA and s34ZB of the EPA 1990	None
Clause 69	A delegated power to allow the Secretary of State to make regulations, which will allow regulators to set the conditions of exemptions from prohibitions of certain activities	Negative

PART 4 – AIR QUALITY AND ENVIRONMENTAL RECALL

Schedule 11 (Linked to clause 71) Henry VIII	An amendment to the EA 1995 inserting new section 81A(3) giving a delegated power to allow the Secretary of State to designate by statutory instrument a person as a relevant public authority for the purpose of Part IV of that Act.	Affirmative
Schedule 11 (New section 85B EA 1995) (Linked to clause 71)	A power for the Secretary of State to direct an air quality partner to make further proposals for measures it will take to be included in a local air quality plan	None
Schedule 11 (Linked to clause 71) Henry VIII	An amended delegated power in section 87 of the EA 1995 to allow the Secretary of State to make regulations for the purpose of Part IV of that Act	Affirmative
Schedule 11 (Linked to clause 71)	Amended power to issue statutory guidance to relevant public authorities or the Environment Agency for the purpose of Part IV of the EA 1995	None
Schedule 12 (new section 19A and Schedule 1A to the Clean Air Act 1993)	A delegated power to allow the Secretary of State to make regulations to amend the minimum or maximum amount of a civil penalty notice that may be imposed by a local authority for breaches of Smoke Control Area Orders made under Part III of the Clean Air Act 1993	Affirmative

(Linked to clause 70) Henry VIII		
Schedule 12 (new section 19A and Schedule 1A to the Clean Air Act 1993) (Linked to clause 72) Henry VIII	A delegated power to allow the Secretary of State to make regulations to amend the grounds of objection to a civil penalty notice issued for breaches of Smoke Control Area Orders under Part III of the Clean Air Act 1993	Affirmative
Schedule 12 (new section 19B- 19D to the Clean Air Act 1993) (Linked to clause 72)	An amended power to issue certain orders and publish lists of information in relation to Smoke Control Areas made under Part III of the Clean Air Act 1993	None
Schedule 12 (Linked to clause 72)	Amendment to sections 20 and 21 Clean Air Act 1993, creating powers to publish lists of approved fuels and approved fireplaces for the purpose of Smoke Control Areas in Wales	None
Clause 73	A power for the Secretary of State to make Regulations relating to the recall of motor vehicles, engines for non-road mobile machinery (NRMM), and components for both, if they do not meet the environmental standards they were approved to	Negative

PART 5 – WATER

<p>Clause 77(7) (New section 39E(1) WIA 1991)</p>	<p>Power to make directions requiring two or more water undertakers to prepare and publish a joint proposal that identifies measures that may be taken jointly by the undertakers for the purpose of improving the management and development of water resources, including a power to make directions as to the form and contents of joint proposals</p>	<p>None</p>
<p>Clause 77(7) (New section 39F WIA 1991)</p>	<p>Power to make regulations making provision about the procedure for the preparation, revision and publication of water resources management plans, drought plans, and joint proposals</p>	<p>Negative</p>
<p>Clause 77(7) (New section 39G WIA 1991)</p>	<p>Power to provide that regulations made under section 39F (in relation to the procedure for the preparation, revision and publication of water resources management plans, drought plans, and joint proposals) may confer on the relevant Minister the power to make provision by directions</p>	<p>None</p>
<p>Clause 78 (New section 94A(3)(g) WIA 1991)</p>	<p>A delegated power to allow the Secretary of State and Welsh Ministers to make directions in writing specifying other matters which a drainage and sewerage management plan must address</p>	<p>None.</p>
<p>Clause 78</p>	<p>A delegated power to allow the Secretary of State and Welsh Ministers to make directions requiring a sewerage undertaker to prepare and publish a revised plan</p>	<p>None</p>

(New section 94A(6)(b) WIA 1991)		
Clause 78 (New section 94A(7) WIA 1991)	A delegated power to allow the Secretary of State and Welsh Ministers to make directions in writing specifying the form which a drainage and sewerage management plan must take, and the planning period to which a drainage and sewerage management plan must relate	None
Clause 78 (New section 94B(1) WIA 1991) Henry VIII	A delegated power to allow the Secretary of State and Welsh Ministers to make an order by statutory instrument to amend the time specified in section 94A(6)(c)	Negative
Clause 78 (New section 94C WIA 1991)	A delegated power for Secretary of State and Welsh Ministers to make regulations about procedure for preparing and publishing a drainage and sewerage management plan	Negative
Clause 78 (New section 94C(8) WIA 1991)	A delegated power for Secretary of State and Welsh Ministers to provide that regulations made under section 39C (in relation to the procedure for the preparation and publication of drainage and sewerage management plans) may confer on Ministers the power to make provision by directions	None

Schedule 13 (Linked to clause 80)	A power for the Competition and Markets Authority Board to make rules of procedure regulating the conduct and disposal of appeals	None
Clause 83	A power for the Secretary of State to make regulations which make changes in relation to the lists of priority substances for surface waters and groundwater and their environmental quality standards and to make related provision	Negative
Clause 84	A power for the Welsh Ministers to make regulations which make changes in relation to the lists of priority substances for surface waters and groundwater and their environmental quality standards and to make related provision	Negative
Clause 85	A power for the Northern Ireland Department to make regulations which make changes in relation to the lists of priority substances for surface waters and groundwater and their environmental quality standards and to make related provision	Negative
Clause 86	A power conferred on the Secretary of State to make regulations transferring functions conferred by the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004	Negative
Clause 88 Henry VIII	A power for the Secretary of State to make regulations which make provision for the value of 'other land' in an English internal drainage district to be determined in accordance with those regulations	Affirmative

Clause 90 Henry VIII	A power for the Secretary of State in England, or the Welsh Ministers in Wales to make provision for the annual value of chargeable property in an internal drainage district to be determined in accordance with those regulations	Affirmative
Clause 91	A power for the Secretary of State in relation to England, or Welsh Ministers in relation to Wales to make regulations which add to the list of qualifying persons in relation to information disclosure	Affirmative
PART 6 – NATURE AND BIODIVERSITY		
Schedule 14 Paragraph 2 New Schedule 7A to TCPA 1990, Paragraph 2(4) (Linked to clause 92) Henry VIII	A power for the Secretary of State to amend the relevant percentage in respect of the biodiversity gain objective	Affirmative
Schedule 14 New Paragraph 4 Schedule 7A to TCPA 1990 (Linked to clause 92)	A power for the Secretary of State to publish a biodiversity metric to be used as the basis for calculating the biodiversity value of habitat on land; and, revise and republish the metric from time to time	None
Schedule 14 New Schedule 7A to TCPA	A power for the Secretary of State by regulation, to make transitional arrangements where the biodiversity metric has been revised and republished	Negative

1990 Paragraph 4(5) (Linked to clause 92)		
Schedule 14 paragraph 2, New Paragraph 6(a)(ii) Schedule 7A TCPA 1990 (Linked to clause 92)	A power to specify further consenting regimes in relation to prior degradation of habitat	Negative
Schedule 14, Paragraph 2 New Schedule 7A to TCPA 1990, Paragraph 14(3) Linked to clause 92	A power for the Secretary of State to make provision in regulations for information to be included in a biodiversity gain plan, the form of a biodiversity gain plan and the procedure to be adopted in relation to the submission of a biodiversity gain plan	Negative
Schedule 14 New Schedule 7A to TCPA 1990, Paragraph 16 (Linked to clause 9290)	A power for the Secretary of State to prescribe the procedure to be adopted in determining to approve a biodiversity gain plan, factors to be considered and appeals	Negative

<p>Schedule 14 New Schedule 7A to TCPA 1990, Paragraph 17(b)</p> <p>(Linked to clause 92)</p>	<p>Power for the Secretary of State to exempt development of a certain description from the biodiversity gain objective</p>	<p>Negative</p>
<p>Schedule 14 New Schedule 7A to TCPA 1990, Paragraph 18</p> <p>(Linked to clause 92)</p>	<p>A power for the Secretary of State to make regulations defining “irreplaceable habitat” and providing or how the biodiversity gain requirements should apply to development of sites where the onsite habitat is “irreplaceable habitat”</p>	<p>Negative</p>
<p>Schedule 14 New Schedule 7A to TCPA 1990, Paragraph 19</p> <p>(Linked to clause 92)</p>	<p>A power for the Secretary of State to provide for modifying the application of this Part of Schedule 7A TCPA 1990 to phased development</p>	<p>Negative</p>
<p>Schedule 14 New Schedule 7A to TCPA 1990, Paragraph 20</p> <p>(Linked to clause 92)</p>	<p>A power for the Secretary of State to make regulations making provision for how the biodiversity gain requirements apply in the case of development for which planning permission is granted under section 73A and 102 TCPA 1990.</p>	<p>Negative</p>

<p>Schedule 14 New Schedule 7A to TCPA 1990, Paragraph 21</p> <p>(Linked to clause 92)</p>	<p>A power for the Secretary of State to make regulations making provision for how the biodiversity gain requirements apply in the case of development for which planning permission is granted under section 141 or 177 TCPA 1990.</p>	<p>Negative</p>
<p>Schedule 14 Paragraph 3(11)</p> <p>(Linked to clause 92)</p>	<p>Power to make regulations to provide for the deemed condition to apply in relation to the modification of planning permission and for modified planning permission to be subject to other conditions</p>	<p>Negative</p>
<p>Schedule 14, Paragraph 3(14), New section 106A(6A) TCPA 1990</p> <p>(Linked to clause 92)</p>	<p>Power for the Secretary of State to prescribe cases where the new limitation on planning authorities powers to modify and discharge planning obligations, under section 106A(6) does not apply</p>	<p>Negative</p>
<p>Clause 93</p>	<p>A power for the Secretary of State to make further provision in relation to the biodiversity gain register.</p>	<p>Affirmative or negative depending on factors set out in the clause</p>

Clause 96	A power for the Secretary of State to provide for the designation of public authorities and make provision in relation to quantitative data in relation to biodiversity reports	Negative
Clause 98(2)	A power for the Secretary of State to appoint a responsible authority to prepare a local nature recovery strategy for an area of England	None
Clause 98(4)	A power to allow the Secretary of State to make provision about the procedure to be followed in the preparation and publication of local nature recovery strategies by statutory instrument	Negative
Clause 99	A power for the Secretary of State to issue guidance relating to local nature recovery strategies.	None
Clause 102(7)	A power for the Secretary of State to provide guidance in relation to the species conservation strategies duties	None
Clause 102(9)	A power for the Secretary of State to make regulations to specify a public body for the purposes of species conservation strategies	Negative

Clause 103(8)	A power for the Secretary of State to provide guidance to public bodies, concerning how to discharge the Protected site strategies duties	None
Clause 105(1)	A power for the Secretary of State to amend references to the requirements of the Directives	Affirmative
Clause 106(1)	A power for the Secretary of State to amend the requirements for assessing the impact on protected sites of plans and projects	Affirmative
Clause 107	A delegated power for the Secretary of State to issue guidance on how a local highway authority should consult members of the public before felling a tree on an urban road	None
Paragraph 1 of Schedule 16 (Linked to clause 109)	A power for the Secretary of State to make regulations to specify forest risk commodities	Affirmative
Paragraph 2(4)(c) of Schedule 16 (Linked to clause 109)	A power for the Secretary of State to make regulations to add to the categories of 'relevant local law'	Affirmative

Paragraph 3 of Schedule 16 (Linked to clause 109)	A power for the Secretary of State to make regulations to make provision about due diligence systems	Negative
Paragraph 4 of Schedule 16 (Linked to clause 109)	A power for the Secretary of State to make regulations relating to the annual report on due diligence	Negative
Paragraph 5 of Schedule 16 (Linked to clause 109)	A power for the Secretary of State to make regulations relating to eligibility for the de minimis exemption	Affirmative and Negative depending on content
Paragraph 6 of Schedule 16 (Linked to clause 109)	A power for the Secretary of State to issue statutory guidance to an enforcement authority	None
Paragraph 7 of Schedule 16 (Linked to clause 109)	A power for the Secretary of State to make regulations relating to 'regulated person'	Affirmative

Part 2 of Schedule 16 (Linked to clause 109)	A power for the Secretary of State to make regulations relating to enforcement	Affirmative
PART 7 – CONSERVATION COVENANTS		
Clause 129(4)	A delegated power to allow the Secretary of State to make regulations specifying the information that responsible bodies must provide on an annual basis	Negative
PART 8 – MISCELLANEOUS AND GENERAL PROVISIONS		
Clause 133 and paragraph 1 of Schedule 20	A power for the Secretary of State to amend the UK REACH Regulation	Affirmative.
Clause 133 and paragraph 2 of Schedule 20	A power for the Secretary of State and devolved administrations to amend the REACH Enforcement Regulations 2008	Affirmative.
Clause 134 Henry VIII	A power for the Secretary of State to make consequential provision in relation to the Bill	Negative; affirmative if regulations modify primary legislation etc.

Clause 134 Henry VIII	A power for Welsh Ministers to make consequential provision in relation to the Bill	Negative; affirmative if regulations modify primary legislation etc.
Clause 134 Henry VIII	A power for DAERA to make consequential provision in relation to the Bill	Negative; affirmative if regulations modify primary legislation etc.
Clause 134 Henry VIII	A power for Scottish Ministers to make consequential provision in relation to the Bill	Negative; affirmative if regulations modify primary legislation etc.
Clause 139	A delegated power to allow the Secretary of State to bring the Bill into force by statutory instrument	None
Clause 139	A delegated power to allow Welsh Ministers to bring the Bill into force by statutory instrument	None

Clause 139	A delegated power to allow the Department of Agriculture, Environment and Rural Affairs in Northern Ireland to bring the Bill into force by order	Affirmative
Clause 139	A delegated power to allow Scottish Ministers to bring the Bill into force by statutory instrument	None
Clause 140	A power for the Secretary of State to make transitional or saving provision in connection with the coming into force of any provision of the Bill	None
Clause 140	A power for Welsh Ministers to make transitional or saving provision in connection with the coming into force of any provision of the Bill	None
Clause 140	A power for DAERA to make transitional or saving provision in connection with the coming into force of any provision of the Bill.	Affirmative
Clause 140	A power for Scottish Ministers to make transitional or saving provision in connection with the coming into force of any provision of the Bill	None