

## ENVIRONMENT BILL

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

#### Introduction

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

#### **New Schedule 14A - New Schedule 2A Planning Act 2008, paragraph 1 - Biodiversity Gain for Nationally Significant Infrastructure Projects – a power to exclude specified development**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary Procedure: Negative Resolution Procedure*

#### Context and purpose

Sections 92 to 94 and Schedule 14 of the Bill introduce a biodiversity net gain objective with respect to development subject to requiring planning permission, by inserting section 90A and Schedule 7A into the Town and Country Planning Act 1990. The Bill is now amended to also require a biodiversity gain objective to be met in relation to development consented under the Planning Act 2008. This inserts a new Schedule 2A into the 2008 Act. Paragraph 1 sets out the development the Schedule applies to and provides for it not to apply to “excluded development” being development of a description specified by the Secretary of State in regulations.

#### Justification for taking the power

It is considered right that the Secretary of State should have a power to exclude specific types of development from the application of the Schedule. This will provide comfort to developers and Departments sponsoring NSIPs (eg the Department for Transport in respect of rail infrastructure), that where, unlikely circumstances prevent the biodiversity gain objective being met, the Secretary of State can exclude it from the requirement. This will be particularly helpful, if the requirements of the Schedule are extended to development at sea, as it will enable particularly problematic classes of marine development to be excluded. It will also enable the requirement in the Schedule to be excluded in cases of very urgent development.

#### Justification for taking the procedure

The Department considers that the negative procedure would give Parliament the right level of scrutiny, consistent with the procedure adopted in relation to the power in paragraph 17 of Schedule 7A of the Town and Country Planning Act 1990 (inserted by Schedule 14 of the Bill). The Department recognises that the first use of this power is likely to be of interest and will therefore need to be subject to public consultation. This matter warrants a degree of scrutiny, but not necessarily prior parliamentary debate and affirmative approval.

## **New Schedule 14A - New Schedule 2A Planning Act 2008, paragraph 3(3) - Biodiversity Gain for Nationally Significant Infrastructure Projects – a power to amend the relevant percentage**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary Procedure: Affirmative Resolution Procedure*

### Context and purpose

Sections 92 to 94 and Schedule 14 of the Bill introduce a biodiversity net gain objective with respect to development subject to requiring planning permission, by inserting section 90A and Schedule 7A into the Town and Country Planning Act 1990. The Bill is now amended to also require a biodiversity gain objective to be met in relation to development consented under the Planning Act 2008. This inserts a new Schedule 2A into the 2008 Act. Paragraph 3 defines the “biodiversity gain objective” as the biodiversity value attributable to development which exceeds the predevelopment biodiversity value of the onsite habitat by a percentage specified in the statement. Sub-paragraph (2) specifies that that percentage must be at least 10%. Sub-paragraph (3) enables the Secretary of State to amend the percentage specified in sub-paragraph (2).

### Justification for taking the power

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, as provided for in paragraph 2(4) of new Schedule 7A of the Town and Country Planning Act 1990 (inserted by Schedule 14 of the Bill) in future, 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. 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 taking the procedure

The Department’s view is that changes to the relevant percentage are likely to be of particular interest to Parliament. Therefore, it has proposed that the regulations are subject to the affirmative procedure, consistent with the procedure applicable to regulations made under paragraph 2(4) of new Schedule 7A of the Town and Country Planning Act 1990 (see new sub-section 333(3AA) of the 1990 Act, inserted by paragraph 15 of Schedule 14 to the Bill).

## **New Schedule 14A - New Schedule 2A Planning Act 2008, paragraph 11(4) - Biodiversity Gain for Nationally Significant Infrastructure - A power for the Secretary of State to extend the application of the Schedule to development at sea**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary Procedure: Affirmative Resolution Procedure*

### Context and purpose

Sections 92 to 94 and Schedule 14 of the Bill introduce a biodiversity net gain objective with respect to development subject to requiring planning permission, by inserting section 90A and Schedule 7A into the Town and Country Planning Act 1990. The Bill is now amended to also

require a biodiversity gain objective to be met in relation to development consented under the Planning Act 2008. This inserts a new Schedule 2A into the 2008 Act. Paragraph 3(1) defines the “biodiversity gain objective” for the purposes of the Schedule. The Schedule only applies to development in England, but not in adjacent waters. Where development occurs both on land and in the marine area, the Schedule will apply only to that part of the development taking place above low water mark. Proposals for biodiversity gain in the marine area, applicable to development authorised under the marine licensing regime in the Marine and Coastal Access Act 2009, are being developed, and it is intended these will be consulted upon. Once these proposals, which may differ significantly from the biodiversity gain requirements that apply terrestrially, have been introduced the intention is to extend the application of the Schedule, with suitable modification, to nationally significant infrastructure development in the marine area.

#### Justification for taking the power

The Government’s intention is for all nationally significant infrastructure projects to be subject to some sort of biodiversity gain requirement. Doing this requires a metric for determining the biodiversity value of existing habitat, and the relative value of any new habitat created or improved. Currently there is not an agreed metric for determining the biodiversity value of habitat in the marine area below low water mark, but this is being developed. Once a metric for marine habitat has been agreed and introduced in relation to development consented under the Marine and Coastal Access Act 2009, it is intended marine development consented under the 2008 Act should also be subject to equivalent requirements. Flexibility as to how the Schedule is to be applied to marine development is required to mirror the likely differences between how biodiversity gain is applied in relation to terrestrial and marine development that is not a nationally significant infrastructure project. Such differences may include, for example, different concepts of what is considered to add to “biodiversity value” in the marine area, and how such increased value is allocated to a development.

#### Justification for taking the procedure

The Department’s view is that the extension of the Schedule to development at sea is likely to be of particular interest to Parliament. Therefore, it has proposed that the regulations are subject to the affirmative procedure.

### **ANNEX A**

**Powers which are considered not to be legislative with an explanation of why this is thought to be the case.**

#### **New Schedule 14A - New Schedule 2A Planning Act 2008, paragraphs 9(3) and 10(2) - Biodiversity Gain for Nationally Significant Infrastructure - A power for the Secretary of State to issue separate biodiversity gain statements**

*Power conferred on: Secretary of State*

*Power exercised by: Laying before Parliament*

*Parliamentary Procedure: None*

#### **Context and purpose**

1. Sections 92 to 94 and Schedule 14 of the Bill introduce a biodiversity net gain objective with respect to development subject to requiring planning permission, by inserting section 90A and Schedule 7A into the Town and Country Planning Act 1990. The Bill is now amended to also require a biodiversity gain objective to be met in relation to development consented under the Planning Act 2008. This inserts a new Schedule 2A into the 2008 Act. Paragraph 9(2) provides that in the case of development to which an existing national policy statement (NPS), then at the next review of that NPS the biodiversity gain statement must be included in the revised

NPS. Paragraph 9(3) provides however that the Secretary of State may, prior to the next review of the NPS, issue a separate biodiversity gain statement. Sub-paragraph (7) provides that where a separate biodiversity gain statement is issued it is for the purposes of section 104(2) to (9) to be regarded as contained in the existing NPS. Paragraph 10(2) provides the Secretary of State with a similar power to issue a separate biodiversity gain statement in relation to development for which there is not an existing NPS. The amendment to section 105 of the 2008 Act (decisions in cases where no national policy statement has effect) provides the Secretary of State may not grant the application unless satisfied that the biodiversity gain objective contained in the statement is met in relation to the development to which the application relates.

2. The statement may specify how development to which it applies should meet the biodiversity gain objective. The power to issue a separate statement is aimed at allowing the introduction of biodiversity gain to nationally significant infrastructure without the need to review any existing NPS or issuing a NPS where one does not already exist. To encourage the issuing of separate statements the procedure for their issue has been kept deliberately lighter than that relating to a review of the NPS. Nevertheless, the Secretary of State will be required to consult such persons as he considers appropriate before issuing such a statement. Upon a review of a NPS, at which time the separate statement will need to be incorporated into it, however the Parliamentary requirements set out in section 9 of the 2008 Act will apply providing an opportunity for Parliament to consider the biodiversity gain requirements together with all other policy set out.