Energy Bill [HL]: Government Response
The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:
(i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
(ii) To report on documents and draft orders laid before Parliament under or by virtue of:
   (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
   (b) section 7(2) or section 19 of the Localism Act 2011, or
   (c) section 5E(2) of the Fire and Rescue Services Act 2004;
and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and
(iii) To report on documents and draft orders laid before Parliament under or by virtue of:
   (a) section 85 of the Northern Ireland Act 1998,
   (b) section 17 of the Local Government Act 1999,
   (c) section 9 of the Local Government Act 2000,
   (d) section 98 of the Local Government Act 2003, or
   (e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Drake
Baroness Fookes (Chairman)
Lord Flight
Baroness Gould of Potternewton
Lord Jones
Lord Lisvane
Countess of Mar
Lord Moynihan
Lord Thomas of Gresford
Lord Tyler

Registered Interests

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives. Interests related to this Report are in the Appendix.

Publications

The Committee’s reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/hldprrcpublications.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at http://www.parliament.uk/business/lords/.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee’s email address is hldelegatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that “in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion” (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, “be well suited to the revising function of the House”. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and other acts specified in the Committee’s terms of reference.
Seventh Report

ENERGY BILL [HL]: GOVERNMENT RESPONSE

We considered this Bill in our 6th Report (HL Paper 31). The Government have now responded by way of a letter from Lord Bourne of Aberystwyth, Parliamentary Under Secretary of State, Department of Energy & Climate Change, printed at Appendix 1.
APPENDIX 1: ENERGY BILL [HL]: GOVERNMENT RESPONSE

Introduction

1. The Government is grateful to the Committee for its report on the Energy Bill, which forms a valuable part of the scrutiny of the Bill. The Government wishes to respond to the points raised by the Committee before the Bill is considered at Committee stage, in order to inform that debate.

Responses to recommendations

2. The Committee Report makes three recommendations which relate to the following clauses and subsections (clause numbers used relate to the Bill print at the time of Introduction into the House of Lords):
   - Clause 27(8) – Disclosure of information and provision of samples.
   - Clause 40(2) – OGA guidance on determining the amount of financial penalty.
   - Clause 57(3) – Powers to charge fees.

3. For clause 27(8) the Committee considered that the power was inappropriate without the inclusion of a list of factors governing its exercise. The Committee further recommended that the power be subject to the affirmative procedure. The types of information to which the regulation will apply are diverse and the Government agrees that some of the information at issue here is potentially of high commercial value, so accept your advice in full. The Government will look at amending the Bill to provide for a list of considerations the Secretary of State must have regard to before laying the regulations. The Government also agrees that the regulations should be subject to the affirmative procedure.

4. For clause 40(2) the Committee considered that the OGA’s powers to issue guidance as to the matters to which it will have regard when determining the amount of a financial penalty were not suitable for a new institution with a nascent enforcement framework, and concluded that the guidance should be subject to Parliamentary oversight. The Committee recommended that the guidance should be laid in draft before Parliament and the affirmative procedure should apply to an Order bringing the initial or any revised guidance into force.

5. The Government accepts the recommendation that the guidance, and any revised guidance, should be laid before Parliament. The Bill does not contain any Parliamentary procedure for the guidance and, whilst the Government accepts that Parliament should have oversight over the maximum financial penalty that may be imposed – which it will do via Regulations made under the affirmative procedure – the Government considers that the guidance itself should sit wholly within the operational remit of the OGA.

6. The power in clause 40(2) is intended to provide the OGA with appropriate autonomy to set out the matters to which it will have regard in determining the amount of a financial penalty in any particular case. We believe that the OGA will be best placed to determine such matters in line with its operational framework and the requirements of the UK Continental Shelf, subject to the statutory cap on a financial penalty set out in this Bill (or changed via affirmative regulations). An approach requiring guidance of this
nature to be subject to Parliamentary procedure would be difficult to align with the OGA’s role as an independent regulator.

7. There is a precedent for this approach, particularly in cases where a regulator, not the Secretary of State directly, imposes penalties. As the Committee noted, section 55C of the Data Protection Act 1998, inserted by section 144 of the Criminal Justice and Immigration Act 2008, requires the Information Commissioner to issue guidance about the monetary penalties that the Commissioner may impose for breaches of the former Act. The guidance has to be laid before Parliament, although it is not subject to any Parliamentary procedure. By way of further precedent, section 12(1) of the Groceries Code Adjudicator Act 2013 requires the Adjudicator to publish guidance about the criteria that the Adjudicator intends to adopt in deciding the amount of any financial penalty that the Adjudicator may impose under that Act. The guidance is not subject to any Parliamentary procedure.

8. In conclusion, the Government acknowledges the Committee’s concern but hopes that these are alleviated by the commitment given to make provision for the guidance, and any revised guidance, to be laid before Parliament.

9. For clause 57(3) the Committee questioned the reason for subsection (3) in both of the new sections the function of which is to allow Regulations to confer a power on the Secretary of State to determine the levels of fees via a separate charging scheme, which is not a part of the Regulations themselves. This would allow the Secretary of State to set the level of fees, with no Parliamentary oversight.

10. The Committee advised that the government should provide further justification for this sub-delegation or else remove it from the Bill. The government considers that there are good reasons for keeping the power as it is currently drafted. It is an established practice to allow the Secretary of State to create a charging scheme, see for example regulation 8 of the Offshore Chemicals Regulations 2002 (SI 2002/1355), regulation 18 of the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (SI 2012/3038) and regulation 22 of the Offshore Combustion Installations (Pollution Prevention and Control) Regulations 2013 (SI 2013/971).

11. There are also a number of precedents for Acts in this field which specifically confer such powers, such as the powers conferred by paragraph 9 of Schedule 1 to the Pollution, Prevention and Control Act 1999, section 41 of the Environment Act 1995 and section 72 of the Energy Act 2004.

12. There are also a number of enactments where a power to charge a fee is conferred

13. The government considers that there are a number of benefits to the approach set out in the Bill:

   (a) It is more transparent than an approach where the Act confers a power to charge a fee other than by delegated powers, for example s.27(1) and s.67(5) of the Marine and Coastal Access Act 2009;

   (b) There is Parliamentary oversight, in the form of the regulations made under the power. At this stage, if Parliament objects to the setting of fees by the scheme it could pray against the regulations;

   (c) Having a separate scheme of charges which can apply to multiple regulations avoid the need to amend all those Regulations when charges are up-rated, for example, to account for inflation or other cost changes.
(d) It supports industry engagement in the setting of the charges, for example, the routine discussions with the trade association - Oil and Gas UK – and operators.

(e) It gives better certainty to the industry as it allows for prior notice. The scheme will be published on the DECC website, with clear evidence for how hourly charges are calculated and gives industry the opportunity to engage if it disagrees with the level of the fees.

14. The Government, therefore, believes that the approach taken in clause 57(3) is justified.

15. The Government will keep the Committee informed about delegated powers in the Bill, including those that arise from the amendments set out above, and any that arise from other amendments to the Bill.

Lord Bourne of Aberystwyth
Parliamentary Under Secretary of State
Department of Energy & Climate Change
26 August 2015
APPENDIX 2: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

At the meeting of the 22 July 2015 when the Committee considered the Energy Bill [HL] the following interests were declared:

Energy Bill [HL]

Lord Moynihan

Chairman, Buckthorn Partners LLP (private equity fund specialising in water; mining; oil and gas)

Attendance:

The meeting on the 22 July 2015 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Baroness Gould of Potternewton, Lord Lisvane, Countess of Mar, Lord Moynihan, Lord Jones and Lord Tyler.