

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (MEMORANDUM NO 2)

ENERGY BILL

1. This legislative consent memorandum (LCM) is laid under Standing Order (SO) 29.2. SO29 prescribes that an LCM must be laid, and a legislative consent motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the Senedd.
2. The Energy Bill (the Bill) was introduced in the UK Parliament, the House of Lords, on 6 July 2022. The passage of the Bill was stalled for a period before resuming its passage in the latter part of 2022. I laid an LCM on 29 June 2023 on the Bill as introduced, which includes a summary of the Bill.
3. This supplementary LCM (sLCM) concerns amendments to the Bill, tabled in the House of Lords on 9 January 2023 and during the House of Commons Committee Stage on 7 June 2023, known as the Offshore Wind Environmental Improvement Package clauses (“OWEIP” and “OWEIP clauses”).
4. The Bill as amended following the House of Commons Committee Stage can be found at [Energy Bill \[HL\] \(parliament.uk\)](#). The OWEIP clauses can be found at Part 13, Chapter 1, clauses 286 – 291. This new Part 13 replaces ‘Part 13 – General’ referred to in the LCM for the Energy Bill, which is now Part 15 of the latest published version.

Policy Objective

5. The UK Government’s stated policy aim of the OWEIP¹ is to accelerate delivery of offshore wind developments.
6. An offshore wind development within scope of the OWEIP clauses will require a number of permissions to proceed:
 - a. The planning of a generating station 350MW or below in the Welsh inshore region requires planning consent from the Welsh Ministers.
 - b. A generating station over 350MW requires a Development Consent Order (DCO) under the Planning Act 2008 granted by the Secretary of State (in both the Welsh inshore and Welsh offshore regions).
 - c. A generating station below 350MW requires a consent under s. 36 of the Electricity Act 1989., Consent is granted by the Welsh Ministers in both the Welsh inshore and Welsh offshore regions.

¹ [Policy Statement Offshore Wind Environmental Improvement Package Measures \(publishing.service.gov.uk\)](#)

- d. The construction and operation of a generating station and associated infrastructure in either the Welsh inshore or the Welsh offshore region will require a marine licence under the MCAA 2009 from NRW².
 - e. If the generating station is wholly in the Welsh offshore region a marine licence can be 'deemed' by the Secretary of State through the DCO process for a generating station above 350MW only.
7. The Welsh Ministers, Secretaries of State and NRW have various roles as decision makers in marine licensing and consenting in Welsh waters, and responsibilities depend on the scale and location of developments. When making decisions and before issuing any permissions, the relevant decision maker must first assess developments for their potential impacts.
8. Technical assessments are required under the Marine and Coastal Access Act (MCAA) 2009 for Marine Conservation Zones (MCZs), and the Conservation of Habitat and Species Regulations 2017 (England and Wales), and the Conservation of Offshore Habitats and Species Regulations 2017 (England and Wales) for Special Areas of Conservation (SACs) and Special Protection Areas (SPAs). MCZs, SACs and SPAs are together known as Marine Protected Areas (MPAs) and their purpose is to restore, preserve and maintain biodiversity by protecting key habitats and species.
9. Where necessary the relevant decision maker is required to undertake an appropriate assessment (Habitats Regulatory Assessment) before issuing any permission. A permission can only be granted if the project will not adversely impact an MPA.
10. Offshore wind developers are required to consider the impacts of their projects on the environment, including the MPA network, and provide robust evidence to inform decision making. Where impacts cannot be avoided, reduced or mitigated, the decision maker can consider whether the plan or project should be considered for a derogation. Under the Habitats Regulations, a derogation may be used if the decision maker is satisfied that it is necessary due to Imperative Reasons of Overriding Public Interest. A developer must demonstrate that there is no other means of proceeding that would lower the risk of achieving the conservation objectives of an MPA that is impacted, and that the public benefit outweighs the risk of environmental damage.
11. If a derogation is used, there are duties on the decision maker to ensure that the overall coherence of the MPA network is protected and that compensation has been secured. They may attach conditions to their consent referred to as 'compensatory measures' where necessary. The purpose of compensatory measures is therefore to offset unavoidable adverse environmental effects that hinder the site conservation objectives of MPAs and maintain the coherence of the MPA network.

² Welsh Ministers delegated their licensing authority function to NRW through the Marine Licensing (Delegation of Functions) (Wales) Orders of 2013 and 2017

12. The Bill provides primary powers to implement the OWEIP. The Explanatory Notes relating to the Energy Bill [HL] as brought from the House of Lords on 25th April 2023 state that ‘this package will address the impacts of offshore wind infrastructure in the marine environment and speed up the consenting process. These powers will enable improved assessment of the environmental effects of offshore wind developments’ marine infrastructure on protected sites. Where compensatory measures are required for damage to the national site network or a protected marine area, these clauses will allow compensation to be delivered by developers working together if that is more appropriate through “strategic compensation.” The powers will enable future delivery of a Marine Recovery Fund(s), which will be an optional mechanism that developers can choose to use to deliver their compensatory measures³.

13. The UKG’s aim for the OWEIP clauses within the Energy Bill is therefore to:

- enable the use of strategic compensation measures to unblock barriers to consenting for offshore wind plans or projects that will adversely affect protected European sites,
- allow the setting up of a Marine Recovery Fund or funds (“MRF”) to facilitate those measures, and
- allow amendments to the environmental assessment regime under the Habitats Regulations Assessment (“HRA”) and the marine conservation zone assessment (“MCZ”) regime relevant to the consenting and licensing of offshore wind plans and projects to facilitate those changes.

Summary of the OWEIP Clauses

14. The OWEIP clauses comprise the following:

- Clause 286 (*Meaning of “relevant offshore wind activity”*) defines the offshore wind activities that are subject to the OWEIP clauses, including (a) the planning, construction, operation or decommissioning of offshore wind electricity infrastructure, or (b) the identification of an area for activity within (a) whether or not any particular offshore wind electricity infrastructure is in contemplation. The definition is intended to capture plan-level activity and assessments as well as infrastructure, including transmission infrastructure.
- Clause 287 (*Strategic compensation for adverse environmental effects*) provides that where a public authority, including the Welsh Ministers, is under obligations concerning the provision of environmental compensation in relation to relevant offshore wind activities, the public authority may determine that measures taken or secured by the authority are to count towards discharging those obligations.
- Clause 288 (*Marine recovery fund*) provides the Secretary of State with the power, by regulation, to establish one or more MRF, out of which payments may be made towards environmental compensation measures required as a result of relevant offshore wind activities. The Secretary of State may also, by regulations, delegate functions for the operation of an MRF, including to

³ [Energy \(parliament.uk\)](https://www.parliament.uk)

Welsh public authorities in relation to Welsh waters (inshore and offshore). Such delegated functions can be cancelled by the Secretary of State and the delegation of a function does not prevent the Secretary of State from carrying out a delegated function.

- Clause 289 (*Assessment of environmental effects etc*) provides the Secretary of State, the Welsh Ministers, the Scottish Ministers and the Department of Agriculture, Environment and Rural Affairs (DAERA) in Northern Ireland with powers to make regulations concerning the assessment of environmental effects of relevant offshore wind activities and in relation to environmental compensation. For Welsh Ministers, this is restricted to the power to make regulations in relation to the Welsh inshore region (i.e. within 0-12 nautical miles (nm)) for relevant offshore wind infrastructure 350MW or below, while the Secretary of State is granted this power in relation to the Welsh offshore region (i.e. 12 - 200 nm) for all offshore wind infrastructure (i.e. above and below 350MW) and in relation to the Welsh inshore region above 350MW.
- Clause 290 (*Regulations under section 289: consultation and procedure*) provides consultation and other procedural requirements relating to the making of regulations under Clause 289 above. This includes requirements on the Secretary of State, Scottish Ministers and DAERA to consult the Welsh Ministers on the development of new regulations in certain circumstances, and a requirement on Welsh Ministers to consult with identified bodies, which includes the Secretary of State, in making regulations under Clause 289 that relate to the Welsh inshore region 350MW or below.
- Clause 291 (*Interpretation of Chapter 1*) contains further definitions and expressions which are used in the clauses listed above.

Requirement for a supplementary LCM for Chapter 1 of Part 13: Offshore Wind Electricity Generation

15. Within the Welsh inshore region (0-12nm), environmental protection, marine licensing, and planning for generating stations 350MW or below are within the Senedd's legislative competence.
16. An LCM is required for the OWEIP clauses because they make provision for a purpose within the legislative competence of the Senedd and impact upon the devolved areas of environmental protection, marine licensing, and planning for relevant offshore wind activities 350MW or below, in so far as they apply to the Welsh inshore region.

UK Government view on the need for consent

17. The UK Government's position is that the OWEIP clauses relate to the reserved matter of electricity generation, however it is also of the view that the OWEIP measures trigger the LCM process in the Senedd⁴. The UK Government agree that an LCM is required for the OWEIP clauses on the basis that they alter Welsh Ministers' executive competence or have the potential to be exercised to alter the existing executive of Welsh Ministers.

⁴ As confirmed by the letter from Lord Callanan, Minister for Business, Energy and Corporate Responsibility on the tabling of the OWEIP clauses on 9 January 2023.

Welsh Government position on the OWEIP clauses

18. Marine consenting and licensing in Welsh waters is complicated, as set out in paragraphs 6 and 7 above. The Welsh Ministers, Secretaries of State and NRW have various roles as decision makers dependant on the scale and location of developments.
19. While the Welsh Government agrees that the intention behind the OWEIP clauses is sensible, my key concern is a failure to adequately reflect the devolution settlement, in particular the role of Welsh Ministers as decision makers within areas of devolved competence.
20. The provisions where Welsh Government has specific concerns are summarised in the table below, which follows the format of the Energy Bill LCM. I have written to the Secretary of State twice regarding the changes I would like to see to the clauses. Currently these issues are unresolved.

Clauses – Brief description	Why an LCM is required	Consent not recommended and why
Part 13: OFFSHORE WIND ELECTRICITY GENERATION, OIL AND GAS		
<p>Chapter 1 – OFFSHORE WIND ELECTRICITY GENERATION</p> <p>Clause 288 (<i>marine recovery fund</i>) grants the Secretary of State power to make regulations to establish a marine recovery fund, which will apply in UK waters. There is currently no requirement on the Secretary of State to consult with the Welsh Ministers before making regulations. Regulations under this section includes the power for the Secretary of State to:</p> <ul style="list-style-type: none"> i. determine whether a payment into the marine recovery fund discharges any compensation condition on a person, i.e. if there was a condition in a marine licence for a developer to carry out certain compensation. ii. delegate management/operational 	<p>LCM required for clauses 286 - 291</p> <p>An LCM is required for these clauses because they make provision for a purpose within the legislative competence of the Senedd and impact upon the devolved areas of environmental protection, marine licensing, and planning for relevant offshore wind activities 350MW or below, in so far as they apply to the Welsh inshore region.</p>	<p>The Welsh Government recommends withholding consent for clause 288 as amendments or clarifications are recommended.</p> <p>The Welsh Government requests amendments as follows:</p> <p>Clause 288 - provide a regulation making power for the Welsh Ministers to establish and operate a Marine Recovery Fund where they are currently the appropriate authority with a duty to secure compensatory measures for protected European marine sites.</p> <p>Regulations to establish a marine recovery fund which would apply in the Welsh inshore region for activities 350MW and below should only be made with the consent of WMs.</p> <p>Clarity over how the determination of a payment into the fund discharges a compensation condition, and who</p>

<p>functions of a marine recovery fund, i.e. it would allow the Secretary of State to delegate the management / operation of a marine recovery fund to the Welsh Ministers for relevant offshore wind activities in Welsh waters where they are the appropriate authority.</p>		<p>determines this, clearly linked to the role and responsibility of WMs.</p> <p>Clarification that the operation of such a fund in Wales, and the delegation of its operation to a Welsh public authority, can only be with the consent of WMs.</p>
<p>Clause 289 (<i>assessment of environmental effects etc.</i>) grants the Welsh Ministers the power to make regulations amending the Habitats Regulations and the marine conservation zone (“MCZ”) assessment process for relevant offshore wind activities 350MW or below in the Welsh inshore region. Otherwise, the Secretary of State has this power in the Welsh offshore region for all relevant offshore wind activities (i.e. it includes 350MW or below) and relevant offshore wind activities over 350MW in the Welsh inshore region. Regulations may make</p>	<p>An LCM is required for these clauses because they make provision for a purpose within the legislative competence of the Senedd and impact upon the devolved areas of environmental protection, marine licensing, and planning for relevant offshore wind activities 350MW or below, in so far as they apply to the Welsh inshore region.</p>	<p>The Welsh Government recommends withholding consent for clause 289 as amendments or clarifications are recommended.</p> <p>The Welsh Government requests amendments as follows:</p> <p>The removal of the reference to the ‘qualifying Secretary of State functions’ in subclause 2(b).</p> <p>An amendment to respect the WMs current role in marine licensing for all developments in inshore waters, above</p>

<p>(a) provision for and in connection with the assessment of the environmental effects of relevant offshore wind activities in relation to protected sites;</p> <p>(b) provision about the taking or securing of measures by a public authority in compensation for any adverse environmental effects of relevant offshore wind activities in relation to protected sites (“compensatory measures”).</p>		<p>and below 350MW, where a licence cannot be deemed by the Secretary of State.</p>
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Financial implications

21. There may be significant costs arising from the OWEIP clauses, particularly if Welsh Ministers were delegated functions to operate an MRF without being required to consent to the delegation of functions and without control over its remit. To date, the UK Government has not provided clarity on the potential scale of these costs, as the detail of how an MRF would operate in practice is intended to be provided by regulation by the Secretary of State following entry into force of the OWEIP clauses. Were the Bill to introduce any new powers that were to be administered by Welsh Ministers, assurances would need to be sought from the UK Government of corresponding resource being made available.

Conclusion

22. In my view the OWEIP clauses currently fail to adequately reflect the devolution settlement, in particular the role of Welsh Ministers as decision makers within areas of devolved competence. Given these concerns, I recommend the Senedd withholds consent to the OWEIP clauses in the Bill at this time.

Julie James MS
Minister for Climate Change
24 July 2023