Department for Business, Energy & Industrial Strategy

The Rt Hon Anne-Marie Trevelyan MP
Minister of State for Energy, Clean Growth and Climate Change

Department for Business, Energy & Industrial Strategy
1 Victoria Street
London
SW1H 0ET

T +44 (0) 20 7215 5000
E enquiries@beis.gov.uk
W www.gov.uk

Darren Jones MP
Chair, Business, Energy and Industrial Strategy Committee
House of Commons
London
SW1A 0AA

21 July 2021

Dear Darren,

I am writing to you in response to your letter on 15 July 2021 regarding the questions about the Draft Downstream Oil Resilience Bill. To aid the committees understanding of the draft Bill, I have addressed your specific questions in Annex A.

I would like to reemphasise that our priority as a department continues to be ensuring that the United Kingdom has a secure and reliable energy supply and as we progress to a low carbon economy, our Net Zero targets will increase the pressure on the Downstream Oil sector and fuel demand generally because the demand for oil-based road transport fuel will still be over half of the current volume.

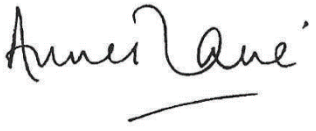
As my officials set out in the evidence hearing session on the 13 July 2021, the Bill will help us meet our policy intention to ensure that the risk of disruption is at a minimal and that economic activities are not disrupted through the loss of fuel supply. It will allow us to identify potential supply outages and respond in a timely and appropriate manner instead of relying on emergency powers under The Civil Contingencies Act 2004 and the Energy Act 1976.

I am confident that the measures set out in the Bill will help us maintain a competitive, free-market downstream oil supply sector and my officials will continue to work with the industry to ensure that we work collaboratively to ensure resilience in the sector and that these measures are used as a last resort rather than being interpreted as an unnecessary regulation of the market.

Finally, I apologise for the delay in providing you with the delegated powers memorandum to accompany the draft Bill. Following previous discussions with the Committee's staff, my officials had understood that the memorandum could be provided before the Autumn, when the Committee would be considering the wording of the Bill in more detail. Noting your comments, my officials are working to provide the memo to the Committee as soon as possible, while seeking to ensure that it provides the sort of clear and comprehensive explanation that will assist your pre-legislative scrutiny.

Thank you once again for engaging with me on the Bill. I look forward to speaking to you further about this Bill in due course.

Yours sincerely,



THE RT HON ANNE-MARIE TREVELYAN MP
Minister of State for Energy, Clean Growth and Climate Change

Response to the questions raised in the letter from BEIS select committee on 15 July 20201 regarding the Draft Downstream Oil Resilience Bill

1. *The definition of downstream oil sector activity in clause 1 requires activity to be carried on in the United Kingdom in the course of a business. A number of the draft Bill's provisions, however, operate by reference to the business owner which is defined in clause 1 in a form that is broad enough to include overseas interests. Please clarify the intended extra-territorial reach of the draft Bill in relation to foreign interests and, in particular, how effectively that reach is expected to be capable of being enforced.*

1.1. The powers of direction and regulation in clauses 3 and 8 and the information powers in clauses 9 and 12 can only be exercised in respect of a person's "*relevant assets or activities*". Relevant activities must be carried on in the United Kingdom (clauses 1(4)(a) and 1(1)(a)), and relevant assets must be associated with such activities. These powers are therefore only intended to deal with activities or assets with a clear nexus to the United Kingdom. Similarly, the restrictions on acquisitions in Part 3 of the draft Bill all require the acquisition of some rights or degree of control over a "*qualifying asset*", which must be located in the United Kingdom (clause 17(1)(a)). The financial assistance power in clause 40 can also only be exercised for the purposes of maintaining or improving downstream oil sector resilience or securing or maintain continuity of supply of crude oil-based fuel, both of which are directly linked to activities carried on in the United Kingdom (clauses 1, 2(1) and 2(2)). As such, the intention behind all of the measures set out in the draft Bill is to provide a degree of control and supervision over downstream oil assets located in and activities carried on in the United Kingdom.

1.2. The draft Bill does not distinguish between persons on the basis of their residence or nationality. It is therefore envisaged that both UK and non-UK companies carrying on downstream oil sector activities in the United Kingdom, or owning downstream oil facilities in the United Kingdom, will fall within the scope of the powers set out in the draft Bill. These powers will be enforced using the range of criminal and civil sanctions set out in the draft Bill. Given that any entity falling within the scope of the powers must necessarily have a close connection to the United Kingdom through its assets or activities, enforcement should be possible within the United Kingdom.

1.3. Activities and assets that do not have any nexus to the United Kingdom are outside the scope of the draft Bill.

2. *Clause 3(1) is drafted in broad terms. For example, the phrase: "may … direct a person… to do anything in relation to the person's relevant activities or assets". Please share your understanding of the effect of section 3 of the Human Rights Act 1998 in imposing implied parameters on clause 3(1) insofar as it does, or could, relate to expropriatory actions that would engage Article 1, Protocol 1 of the ECHR.*

2.1. The Government considers that the power in clause 3(1) of the draft Bill as drafted is compatible with Article 1, Protocol 1 of the ECHR.

2.2. Directions under clause 3 do not directly deprive persons in the downstream oil sector of property, but they do allow the Secretary of State to regulate how they use their property. Therefore, as with much regulation, the Government accepts that they are a control of use under the second paragraph of Article 1 Protocol 1 of the ECHR. As previous small-scale interruptions have shown, a breakdown in the downstream oil sector can quickly have a marked impact on both economic activities and individuals. The Government therefore considers that the securing of downstream oil sector resilience is clearly in the general interest, as set out in paragraph 2 of Article 1.

2.3. The Government also considers that these measures are proportionate and strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. There are risks within the downstream oil sector that will only grow as the market continues to fragment and change, particularly as we move towards decarbonisation. At present,

Government has no power to intervene in relation to the sector unless there is a declared national emergency. However, if assets are lost or mismanaged this may well be too late for active intervention to secure fuel supplies to the public, emergency services and military. Downstream oil is the only part of the UK energy sector that is not currently directly regulated. The Government is now seeking to implement the lighter touch measure set out in the draft Bill to support downstream oil resilience, rather than imposing a full licensing regime, which would have a much more direct impact on the use of assets.

2.4. There are also several other factors that weigh in favour of the measures being clearly proportionate.

2.4.1. First, directions under clause 3 can only be given for specific and narrowly defined purposes: to maintain or improve the resilience of the sector or to ensure continuity of supply during a disruption. There is limited evidence as to what, if any, additional costs will result from compliance with directions and that cost will only arise at the point a direction is issued. Measures to support resilience may also have the effect of reducing the risk and scale of financial impacts on downstream operators caused by any loss of resilience.

2.4.2. Second, directions can only be given to persons meeting the capacity thresholds in clause 3(6). These are intended to be set at a level that ensures only the most significant operators in the downstream oil sector are caught by the power of direction.

2.4.3. Third, before deciding whether or not to give any direction under clause 3, the Secretary of State must give the proposed recipient an opportunity to make representations about the proposed direction (see clauses 5(1) to (3)). In practice, Government will always seek a voluntary approach to maintaining fuels supply resilience whenever possible and does not expect to make frequent use of a power of direction. Even where the Secretary of State is considering giving a direction, the proposed recipient will have a role to play in the decision-making process.

2.4.4. Fourth, the Secretary of State will also have to consult with the relevant Health and Safety regulator and the relevant "competent authority" for the control of major accident hazards, as well as any other person the Secretary of State thinks appropriate (see clause 5(4)). Any decision to give a direction will therefore be made with the benefit of input from regulatory bodies with expertise in health and safety and accident control, and others.

2.4.5. Fifth, the decision-making in relation to directions is subject to additional checks and balances, in particular the right of appeal in clause 6.

2.5. Finally, Government's intention is that the directions power under clause 3 would in some cases be linked to an offer of financial support, exercising the power in clause 40, to assist the downstream oil sector undertaking comply with the direction. This would allow any adverse effect on property rights to be ameliorated. Any such spending would be subject to any relevant rules on subsidy control, competition etc.

2.6. The power of direction is therefore subject to a number of safeguards and restrictions stated on the face of the Bill, ensuring that it can only be exercised in a reasonable and proportionate manner, and in compliance with the requirements of the Human Rights Act 1998 and the ECHR.

3. Clause 7 creates an offence of failing to comply with a resilience direction. It includes a qualification so that it is committed only by failure to comply "without reasonable excuse". Please outline what range of activity you believe this qualification is, and is not, intended to cover. Please also outline whether you intend to provide great clarity on this matter on the face of the Bill in its final form.

3.1. The power of direction will be used as a backstop, and Government expects that the vast majority of issues will be addressed through a voluntary, collaborative process with industry. Government therefore considers that the chance of any criminal

sanctions being imposed, or even considered, should be very low. Taking into account the checks and balances set out in the draft Bill, any consideration of the reasonableness or otherwise of an excuse will therefore only be required in exceptional circumstances.

3.2. As with the power of direction, any offence or potential offence in respect of a direction will have to be assessed on its own merits. The circumstances that constitute a reasonable excuse are not defined or fixed and the Court or Secretary of State (as appropriate) will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis.

3.3. However, Government would expect that the relevant decision-maker will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond the addressee's control has caused the failure and the failure would not otherwise have taken place. For example, a significant and demonstrable technological failure or default by a third party (which could not reasonably have been foreseen or avoided) which prevented the addressee from meeting a deadline might, depending on the circumstances, amount to a reasonable excuse.

3.4. It is important to note that directions under clause 3 would not disapply or override any existing legal regime, unlike directions under s5 of the Offshore Safety Act 1992 (which provides a precedent of a similar direction-making power). There is also precedent for this approach in respect of offences committed "without reasonable excuse" without further clarification on the face of the legislation. See, for example, section 201(1) and paragraph 17(5) of Schedule 4 to the Enterprise Act 2002, sections 28A(2), 30(4), 33(3), 36A(7) and 38(3) of the Petroleum Act 1998, and section 38(2) of the Gas Act 1986.

3.5. The Government will produce guidance on the enforcement of offences under the draft Bill, as required by clause 38(1). That guidance will be prepared following consultation with appropriate persons, as set out in clause 38(1). If and to the extent that further clarification of what would or would not constitute a "reasonable excuse" for the purposes of clause 7 is considered necessary, that will be addressed in that guidance.

3.6. Government is therefore not currently intending to provide further clarification of this point on the face of the Bill.

4. Clause 7(2) sets out penalties for individuals failing to comply with the draft Bill's provisions, and rather than the corporations of which those individuals are a part. Please outline your assessment of how this proposed legislation would ensure DSO corporations themselves (rather than individuals) are properly accountable.

4.1. The references to "persons" in the draft Bill include a body of persons corporate or unincorporate (see Schedule 1 to the Interpretation Act 1978), so can, on their face, apply to individuals, corporate entities (e.g. limited companies) or unincorporated associations. However, the thresholds and other definitions in the draft Bill are intended to ensure that the powers are primarily directed at corporations.

4.2. Offences under clause 7 can only be committed by a person to whom a direction under clause 3 has been given (see clause 7(1)). Under clause 3(6), directions can only be given to persons either carrying on downstream oil sector activities in the course of a business which has capacity in excess of 500,000 tonnes, or a downstream facility owner if the owned facility has capacity in excess of 20,000 tonnes. These capacity thresholds should ensure that only the most significant companies in the downstream oil sector are caught by the power of direction, and the corresponding offences, and it is very unlikely that a direction could, or would, be given to an individual.

4.3. Clause 33 further provides for criminal liability of certain officers of a body corporate, being a director, manager, secretary or other similar office of the body corporate or any person purporting to act in any such capacity. In order for an officer to incur criminal liability under this clause, it must be proved that the offence committed by the body corporate was committed with the consent or connivance of that officer, or to be

attributable to neglect on their part. This offers an additional measure to ensure compliance by corporate entities, by allowing criminal sanctions to be imposed on key individuals responsible for directing the entity's actions.

4.4. The draft Bill also provides for the Secretary of State to impose civil sanctions (in the form of discretionary requirements or enforcement undertakings) as an alternative to criminal liability. The Secretary of State will consult and then publish guidance on the exercise of these functions (in accordance with clause 39), including how these will be used in respect of corporate entities.

5. Please outline in detail the intended relationship between resilience directions under clause 3 and resilience regulations under clause 8.

5.1. The primary distinction between resilience directions under clause 3 and resilience regulations under clause 8 is that the former will be made in respect in of particular, identified persons, while the latter are intended to apply to a class of persons. As above, these measures are primarily intended to catch corporate entities, rather than individuals.

5.2. Resilience directions under clause 3 are to be made by written notice and can only be made after the person subject to the direction has been given notice of the proposed direction and a period of at least 14 days to make representations to the Secretary of State (see the procedure in clause 5). Accordingly, directions under clause 3 can only be given to particular, identified persons, and must be specifically brought to their attention before being made. Directions under clause 3 could not therefore be given to a class of persons of a general description.

5.3. This new power of direction is intended to ensure that Government can require specific industry participants to take appropriate steps to ensure they have appropriate resilience measures in place. It is envisaged that directions could be given where industry participants were not implementing good practice standards in operational areas, for example in relation to site security, flood defences or contingency planning for nationally significant risks (e.g., pandemic or failure or electricity or telecommunications systems). Examples could include requiring an improvement in the maintenance of a particular asset, construction works such as digging a trench, building a wall or installing security cameras.

5.4. In contrast, regulations under clause 8 are to apply to a class of persons. As a form of delegated legislation, they can identify persons subject to the regulations by description, without every individual member of that class having to be notified or consulted in advance. The Government believes it is appropriate that a class of persons are better dealt with by way of regulations, with the corresponding parliamentary procedure, than by way of direction. The Government also believes it would not be appropriate to impose an offence, or the mode of trial and levels of sanction, by way of direction.

5.5. The general purpose for this regulation-making power is the same as that of the directions in clause 3. However, there are circumstances where actions may be required for a broader scope of operators or owners and therefore application by regulations to a class or category of persons would be more appropriate. For example, a standard of contingency planning or measures may be necessary for all "Designated Filling Stations" (DFS) (part of a priority fuel supply plan under the National Emergency Plan for Fuel). DFS are of relatively low capacity but have a critical function in response to an emergency – a direction (by way of regulations) would ensure their resilience and ability to response to or mitigate a disruption.

6. Clause 9 provides the Secretary of State with a power to require information about downstream oil activities and assets, with a qualification in subsection (2) that the information may be required only for purposes of maintaining or improving resilience. Please outline to which uses information can, and cannot, be put, once supplied for legitimate reasons as set out in subsection (2). Please also outline whether you intend to provide greater clarity on this matter on the face of the draft Bill in its final form.

6.1. Any information obtained by notice under clause 9 would primarily be used for the purposes for which it was obtained, i.e., to maintain or improve downstream oil sector resilience. In addition to the restrictions on the purposes for which information can be requested (in clause 9(2)), there are also a number of other constraints on disclosure and use of the information.

6.2. The draft Bill limits the circumstances in which the Secretary of State can disclose any information obtained to other government departments or devolved authorities. The limited circumstances in which such disclosure is permitted are set out in clause 13(2). Those circumstances are expressly limited by clause 13(3), to confirm that clause 13(2) does not authorise any disclosure that would otherwise be prohibited by data protection legislation or the Investigatory Powers Act 2016.

6.3. The Government also considers that a portion of the information obtained by notice under clause 9 is likely to be commercially sensitive and/or subject to legal obligations of confidentiality. Information subject to such constraints will be handled in an appropriate manner, and the Government will not use or disclose the information in a way that would breach any legal obligation of confidence.

6.4. Similarly, if and to the extent that the information obtained in this way contained personal data, that would be handled in accordance with all applicable data protection legislation. The clauses seek to put on a statutory footing information the Department already collects voluntarily, and the Department has embedded the applicable data protection requirements into all its current processes. In any event, given the capacity threshold and limited purposes for which information can be obtained, the Government considers that there should not be any realistic prospect of information relating to an individual (for example a sole trader) being captured.

6.5. The combined effect of the provisions of the draft Bill itself and other applicable law is therefore that information can only be disclosed in specified circumstances, and the most sensitive information, in particular confidential information and personal data, will be subject to additional protections to ensure it is used appropriately. In the circumstances, the Government does not consider that any further restrictions on use of lawfully gathered information are necessary.

7. The acquisition consent guidance statement under clause 23 is subject to affirmative resolution scrutiny under clause 24. Given the complicated and politically and commercially sensitive issues, what is the Government's assessment of the case for statements under clause 24 being subject to the super-affirmative procedure.

7.1. As noted in the Cabinet Office's Guide to Making Legislation, the Government considers that use of the super-affirmative procedure is only appropriate in exceptional cases.[1] Parliament's own guide to procedure also suggests that this procedure is usually used where a statutory instrument amends or repeals an Act of Parliament, for example a legislative reform order, localism order or public bodies order.[2]

7.2. The restriction on qualifying acquisitions has the effect of preventing a person from acquiring qualifying property, and the corresponding effect of preventing that sale or transfer of that property. Whilst the Government believes it is in the public interest for acquisitions only to proceed where there has been an assessment of the risks to financial stability of the relevant business and any adverse effect on the availability and effective deployment of the required technical resources for ensuring the sound management of that business, it acknowledges that this is interference in what would otherwise be a private transaction.

7.3. The Government does not, however, consider that the statement made under clause 23(1) is the sort of exceptional case that would require the super-affirmative procedure. Instead, the Government considers that the statement that the draft affirmative

[1] Guide to Making Legislation, July 2017: https://www.gov.uk/government/publications/guide-to-making-legislation

[2] https://guidetoprocedure.parliament.uk/collections/AAS0LGpw/super-affirmative-procedure

procedure will provide an appropriate degree of parliamentary oversight of the proposed exercise of the Secretary of State's decision-making power. The statement is not legally binding, and the draft Bill also requires the Secretary of State to carry out an appropriate consultation on the draft statement and amend it as necessary before laying it in Parliament (see clause 24(2)), ensuring that stakeholders have an opportunity to contribute to its drafting.

8. Clause 25 provides for an appeal to the First-tier Tribunal against refusal of applications for consent to acquisition. Please outline your rationale for directing these appeals to the First-tier Tribunal, rather than the High Court. Please also outline your assessment of the likelihood of such appeals inevitably progressing to the High Court in any case.

8.1. As set out in Schedule 2 to the draft Bill, appeals in relation to the proposed civil sanctions are to be made to the First-Tier Tribunal. The civil sanctions provisions of the draft Bill are modelled on those in Part 3 of the Regulatory Enforcement and Sanctions Act 2008, so this appeal route was proposed to mirror the route under that Act (see section 54).

8.2. The appeal route for other measures under the draft Bill, including under clause 25, is similarly proposed to be to the First-Tier Tribunal, so that all legal proceedings relating to downstream oil sector resilience measures are dealt with in the same forum. This should ensure consistency of approach to appeals and provide an effective and efficient route for all appeals under the draft Bill.

8.3. The Government does not consider that it is inevitable that any such appeals appeal would progress to the High Court. The route for any further appeal from a decision of the First-Tier Tribunal will depend on the circumstances of the particular case but could involve proceedings in the Upper Tribunal. In any event, the Government expects that the number of appeals in relation to the acquisition control measures is likely to be 1 case in every 10 years, or less. Accordingly, the impact on the tribunal system (and, if relevant, court system) is likely to be negligible.

9. Please outline your rationale for the £10 million maximum penalty set out in clause 34(4).

9.1. The upper limit for a variable monetary penalty in clause 34(4) was set by reference to a number of factors, including consistency with other broadly comparable energy regulation regimes, the potential economic impact of disruption to downstream oil supply, and the scale of entities operating in the sector. For example:

9.1.1. Criminal and civil penalties resulting from regulatory action by other bodies including the Health and Safety Executive, Ofwat and Ofgem can vary widely depending on the circumstances of the case, with previous examples ranging from several thousands of pounds to amounts well in excess of £10 million.

9.1.2. As set out in the Impact Assessment accompanying the draft Bill, the economic impact of a consumer disruption event could be £15m-£65m for a 3 day disruption, or £50m-£210m for a ten day disruption. Every day of disruption caused by a failure to ensure sufficient resilience in the sector could therefore have a multi-million pound impact on the economy.

9.1.3. As set out above, the measures in the draft Bill are directed at the most significant entities operating in the United Kingdom's downstream oil sector. Many of those entities are very large, multinational corporations, with global revenues measured in the billions of pounds.

9.1.4. The downstream oil sector is also not regulated in the same way as many other parts of the wider energy sector. For example, compliance with regulatory functions cannot be enforced via applicable licence provisions, or even revocation of a licence.

9.2. Taking those sort of factors into account, the Government considers that £10 million is an appropriate level for the maximum financial penalty under this draft Bill. That

amount is intended as a limit to provide some comfort to industry, while also indicating the seriousness with which Government will take any breach.

9.3. Finally, it is important to note that while this provision sets the maximum level, the actual monetary penalty will vary from case to case and will be proportionate in all the circumstances. For example, the level of any penalty may depend on factors including the nature and gravity of the offence to which it relates, as well as the financial capacity of the person subject to the penalty. The Secretary of State will publish guidance on how this function and the other civil sanctions will be exercised in due course (as required by clause 39(1)) and must have regard to that guidance in exercising those functions (see clause 39(4)).

10. Please outline your assessment of whether Parliamentary scrutiny of any financial assistance provided to the DSO under the draft Bill's provisions would be appropriate. If you do deem such scrutiny to be appropriate, please also outline how this might be incorporated on the face of the Bill in its final form.

10.1. Any financial assistance provided under the draft Bill will be funded from BEIS's existing budget, with no standing budget specifically for providing such assistance and no additional revenue raising powers taken to fund it. Any such assistance will also be subject to subsidy controls and the normal standards for Government spending will also apply as set out in Managing Public Money, including the key principles of regularity, propriety, value for money and feasibility. Any such spending will be set out in Department financial transparency data and annual accounts in the usual way, and will therefore be subject to scrutiny by Parliament, the NAO and the wider public.

10.2. The Government considers that this strikes an appropriate balance between ensuring proper use of public funds and achieving the policy aim for downstream oil sector resilience in an administratively effective and efficient manner.