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Dear Mr Mountain MSP

LEGISLATIVE CONSENT MEMORANDUM ON THE UK ENERGY BILL

I am writing in response to your letter of 22 December 2022, in respect of providing further information to assist the Committee in its scrutiny of the Legislative Consent Memorandum, in advance of the session on 24 January 2023. I have set out below the latest position on the Scottish Government's engagement with UK Government on the Energy Bill, and further information on those clauses where the Scottish Government is recommending that consent be withheld.

I wrote to the UK Government on 26 August 2022, setting out the Scottish Government's position on the Bill and areas where Scottish Government amendments to the Bill are requested. My officials continue to engage with UK Government officials on these requests, and I am expecting to receive a formal response from the UK Government by the end of January.

The Committee has requested further detail on the reasons the Scottish Government is recommending withholding consent for those areas of the Bill. I have set out this information in the attached Annex A.

The Committee also requested an update on any intention to lodge a supplementary LCM in relation to the Bill in general, and to clause 172 in particular.

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It is Scottish Government's intention to lodge a supplementary LCM, particularly as there have been additional clauses added to the Energy Bill since the original LCM was lodged. On 9 January 2023, Lord Callanan tabled Offshore Wind Environmental Improvement Package (OWEIP) – Habitats Regulations Assessment (HRA) clauses in the House of Lords. These clauses are the subject of significant and ongoing engagement with the UK Government at both Ministerial and officials levels.

The Scottish Government therefore intends to table a supplementary LCM which addresses the OWEIP – HRA clauses, the change of position on clause 172, and any further amendments required upon receipt of a response from the UK Government. I will provide a further update in terms of timescales for any supplementary legislative consent memorandum and motion as soon as practicable.

I hope the Committee finds the further information I have provided helpful, and I look forward to attending the Committee session on 24 January 2023.

Yours sincerely,

MICHAEL MATHESON MSP

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ANNEX A

Part 1 (Licensing of Carbon Dioxide Transport and Storage), Chapter 1 clauses 1-19, 26-27, 29, 31-35, Chapter 3 clause 41, Chapter 4 clause 46, Chapter 5 clause 50-52, Chapter 6 clause 53

Part 2 (Carbon Dioxide Capture, Storage Etc. and Hydrogen Production), Chapter 1 clauses 56-64, 68-81, Chapter 2 clauses 82-84, Chapter 3 clauses 88-91, Chapter 5 clauses 96-97

Scottish Government Response

Part 1 establishes a UK-wide economic regulator and licensing framework for the transport and storage of carbon dioxide. Scottish Government is recommending withholding consent to Clause 1, which establishes Ofgem as the economic regulator for CO₂ transport and storage, so that an amendment can be requested requiring Ofgem and the Secretary of State to consider Scottish statutory emissions targets in the exercise of functions related to Part 1.

Consent is also recommended to be withheld for Clause 2, which prohibits unlicensed activities (thereby setting the foundation for the licensing framework), so that an amendment can be requested requiring the Secretary of State to obtain consent from Scottish Ministers if regulations contain provision that would be within devolved competence.

The clauses in chapters 1, 2, 3 and 6 (and in chapter 3 of Part 2) describe the various functions, powers and duties of the economic regulator and features of the licensing regime, so giving consent to individual clauses within those chapters would not be meaningful as we are recommending withholding consent for clauses 1 and 2 that establish the regulator and the licensing regime.

Part 2 establishes a mechanism for providing revenue support and other financial assistance to CO₂ transport and storage companies, low carbon hydrogen producers and carbon capture entities. Part 2 also provides for the Secretary of State to establish the detailed requirements for the accrual of decommissioning funds for offshore carbon storage and to define which offshore assets are suitable for “Change of Use Relief”. As Scottish Government are recommending withholding consent for multiple Chapter 1 clauses, including Clause 57, which sets out the powers of the Secretary of State to make regulations of revenue support contracts, it would not be meaningful to grant consent to other clauses in Chapter 1 in a piecemeal way, as set out for Part 1.

Consent is recommended to be withheld for multiple Chapter 1 clauses so that amendments can be requested requiring Secretary of State to obtain consent of Scottish Ministers and to narrow the



scope of Clause 57 so that revenue support regulations may only confer on any “relevant” function or person. A similar consideration applies to Part 2 chapters 2 and 3.

Part 3 (New Technology), Chapter 1 clauses 98-107

Scottish Government Response

Part 3 establishes a mechanism to make provisions for the establishment and operation of low-carbon heat schemes, and impacts on multiple areas of devolved competence.

The Scottish Government has set out in writing to UK Government that primary powers should include provisions for Scottish Ministers to give consent to secondary regulations where devolved competence is touched upon. As such Scottish Government has requested changes are made to these clauses to reflect that:

- A requirement for Scottish Ministers to consent to any secondary regulations relating to matters within the devolved legislative competence of the Scottish Parliament.
- That the Scottish Ministers are provided powers to alter and/or revoke aspects, or proposed aspects, of the functioning of the scheme in Scotland on a case by case basis, where this is within devolved competence
- A requirement that the Secretary of State must appoint the Scottish Ministers as scheme administrators following receipt of a request from the Scottish Ministers, within the timeframe requested by the Scottish Ministers.

Part 7 (Heat Networks), Chapter 1 clause 168-169

Scottish Government Response

The Scottish Government recommends withholding consent to all of clause 168 (and schedule 15) because of an issue created by the two sub-clauses below. The fundamental issue is that clause 168 proposes that the Secretary of State merely needs to consult Scottish Ministers on these devolved matters, rather than seeking their consent:

- Sub-clause 168(7) refers to a requirement to consult Scottish Ministers before making regulations by virtue of any of Parts 3, 4, 7, 8 and 11 of Schedule 15.
- Sub-clause 168(9) specifies the consultation which is set out in 168(7).

Two amendments are being requested to sub-clause 168(7):

- Scottish Government believes that Part 6 (Enforcement of Conditions) and Part 10 (Supply to Premises) of Schedule 15 also straddle devolved areas and thus should be similarly quoted in clause 168(7).
- 168(7) is amended with regard to ‘consult’ vs ‘consent’. The phrase in 168(7) “... is to consult Scottish Ministers...” should be replaced by “...must obtain the consent of Scottish Ministers...”. The rationale is that the UK Government may be legislating in devolved areas (via Parts 3, 4, 7, 8, 11, 6 and 10 of Schedule 15) thus Scottish Ministers should be able to effectively influence such legislation as it relates to Scotland.

The Scottish Government note that 168(9) would also have to be amended as a consequence of amendments to 168(7).



Clause 169 sets out the procedure for making regulations under clause 168 i.e. whether they are to be made by negative or affirmative procedure. Affirmative procedure is required where a regulation is the first to be made under a specific power or if it amends primary legislation. As the Scottish Government is recommending withholding consent to 168, it follows that it must recommend withholding consent to 169.

However it should be noted that there is nothing in clause 169 per se which the Scottish Government objects to. The sole ground for recommending withholding consent to 169 is its linkage to 168.

Schedule 15: Part 5, paragraph 33

Scottish Government Response

Part 5 makes provisions for issuing “installation and maintenance licences”. Holders of these licences will have additional powers which will facilitate the installation and maintenance of heat network equipment in England, Wales and Northern Ireland (as per paragraph 32(1)). Paragraph 33(4) allows regulations that set out which rights an “installation and maintenance” licence can confer. Specifically, in relation to road works, paragraph 33(4) defines the meaning of “road” in Scotland.

The Scottish Government recommends withholding consent to paragraph 33 of Part 5 pending an amendment to 33(4). The amendment requested to paragraph 33(4) is to remove any reference to Scotland. If the sole purpose of installation and maintenance licences is to confer additional powers for the purposes of maintenance and installation in England, Wales and Northern Ireland only (as per para 32(1) of schedule 15 of the Bill), then there should be no need to define “road” in Scotland at all, as Scottish roads will not be affected by installation and maintenance licences (but rather, by Scottish licences under the HNSA21). Therefore, it is unclear why the meaning of “road” in Scotland is defined in paragraph 33(4).

Part 11 (Oil and gas), clauses 225-227

Scottish Government Response

Clause 225 (Arrangements for responding to marine pollution) enables the Secretary of State to make regulations requiring a person responsible for certain specified installations to have emergency plan arrangements for responding to marine oil pollution. Subsection (2) defines the installations that are within the scope of this provision, which is broad and would include but not be limited to offshore installations for production and storage of gas, offshore infrastructure such as pipelines connected to such installations, and harbours. UK Government officials have determined that the LCM process is engaged for Scotland given that in the territorial seas adjacent to Scotland, there is a mixed picture on legislative competence depending on the activity in question. Given the broad scope of clause 225, the Scottish Government is continuing to recommend that consent be withheld.

Clause 226 (Habitats: reducing effects of offshore oil or gas activities etc) concerns the protection of relevant sites, with reference to natural habitats or habitats of species. It would appear to modify and alter devolved competence and would appear to erode extant powers held by Scottish Ministers. In particular, subsection (2) is a wide provision and provides that certain activities

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specified by the Secretary of State can be prohibited from being carried out without their consent. This potentially conflicts with the Scottish Ministers' responsibilities, including in relation to carbon capture and storage and hydrogen production. For example, under the Marine (Scotland) Act 2010, Part 4, marine licences are required for specified activities (that do not engage the Schedule 5, D2 (oil and gas) reservation in the Scotland Act 1998).

Subsection (3) also includes provisions that could (subject to regulations) require Scottish Ministers to carry out a specified description of assessment before granting a specified licence. In relation to marine licensing, this could modify the Marine (Scotland) Act 2010 and alter the executive competence of Scottish Ministers under the 2009 Act. Subsection (4) is also a broad direction making power that could affect the devolved and executive devolved functions of the Scottish Ministers.

Clause 227 amends functions in Part 4 of the Petroleum Act 1998 which are exercisable by the Scottish Ministers (s30 Energy Act 2008).

Part 13 (General), clause 238

Scottish Government Response

Clause 238 provides the Secretary of State with a power to make consequential amendments arising from provisions in the Bill. This includes a power to amend, repeal or revoke Acts of the Scottish Parliament. There is no requirement for the Secretary of State to seek the consent of the Scottish Ministers or even consult where this power is used.

As the power is ancillary to the exercise of other powers in the Bill, our position is that consent should be withheld on this clause where consent is recommended to be withheld in relation to other provisions. Further consideration will be required on the clause alongside any amendments to the Bill, including the introduction of new clauses.

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