27 December 2017

The Rt Hon the Lord Trefgarne
Chairman
Secondary Legislation Scrutiny Committee
House of Lords
London SW1A 0PW

Dear Lord Trefgarne

The Environmental Permitting (England and Wales) (Amendment) Regulations 2018

PeakGen is a small, independent power producer with around 200 MW of operating plant. These are primarily diesel fuelled and generally run for less than 150 hours per year. Our newest plant uses battery technology and we have a pipeline of additional battery developments.

We understand that the Secondary Legislation Scrutiny Committee will soon be scrutinising the draft Environmental Permitting (England and Wales) (Amendment) Regulations 2018 (the Draft Regulations) which we understand have now been laid before Parliament in purported reliance on regulations 2(8) and (9)(d) of the Pollution Prevention and Control Act 1999.

We write to raise our concerns about these draft regulations and ask you to draw to the attention of the House that the proposed Statutory Instrument:

- has had inadequate consultation;
- inappropriately implements European Union Legislation; and
- is inappropriate in view of changed circumstances since the enactment of the parent Act

We have sought to encourage the Secretary of State to step back from some of the policy changes contained in the Draft Regulations and asked that he withdraw the instrument that has been laid before Parliament, in order to prevent a situation in which Parliament is asked to approve an unlawful statutory instrument. However, we have not yet received a response and, given the timescale, we feel we also need to contact you.

How this Statutory Instrument has had inadequate consultation

On 16 November 2016, Defra published a consultation seeking views on its proposals to reduce emissions from medium combustion plants and generators to improve air quality. Among other things, the proposals were intended to implement the Medium Combustion Plant Directive (2015/2193 – the MCPD).

The MCPD applies to plant of between 1 and 50 MW, with an exemption for plant operating for less than 500 hours per year averaged over five years.

Although not required by the MCPD, the consultation included proposals to regulate the emissions of plant operating for less than 500 hours per year. In doing so, they sought to distinguish between the following two categories of generators –
(a) 'Tranche A generators', defined as any generator –

(i) that comes into operation before 1 December 2016,

(ii) that is the subject of a Capacity Market Agreement for new capacity arising from the 2014 or 2015 auction (including those which have not come into operation by 1 December 2016), or

(iii) for which a Feed-in Tariff preliminary accreditation application has been received by Ofgem before 1 December 2016, and

(b) 'Tranche B generators' defined as any generator other than a Tranche A generator.

Thus, broadly, Tranche A encompassed existing generators and Tranche B encompassed new generators that had yet to come into operation at the time of the consultation.

Under the proposals set out in the consultation, Tranche B generators would be obliged to meet the requirements in relation to maximum emissions set out in the MCPD, even though the MCPD itself does not require that they do.

Under the proposals set out in the consultation, PeakGen's plants would have been classed as Tranche A generators.

The consultation ran until 7 February 2017. A summary of consultation responses, together with the governments' response was published on 11 July 2017. On 26 September 2017, Defra circulated a version of the Draft Regulations substantially similar to the one that has now been laid before Parliament.


Contrary to the proposals set out in the Consultation, under paragraph 3(3) of new Schedule 25B, a generator will cease to be a Tranche A generator if it enters into a capacity agreement – or an agreement for provision of balancing services – after 31 October 2017, and that agreement remains in force after 31 December 2018. Generators which enter into such agreements are classed as Tranche B generators for the purposes of the Permitting Regulations.

The effect of this is that such generators will need to comply with the emission restrictions in the MCPD by 1 January 2019. If they were classed as Tranche A generators, the relevant date for compliance would be 1 January 2025 or 1 January 2030, depending on their rated thermal input, annual operation hours and nitrogen oxide emission levels.

It is our view that the significant change to the proposed definition of Tranche A generators in the Consultation should have been subject to consultation.

The original policy proposals were the subject of detailed consultation. Under those proposals, there was to be no carve-out from the Tranche A category based on future take up of capacity agreements. However, those generators who – like PeakGen – will be affected by the fundamental change to this position have not been given any opportunity to provide their views.
In PeakGen’s case, the change means that, in order to maintain its plant in economic operation, it would need to make a significant capital investment in selective catalytic reduction technology six years earlier than had the definition not been changed. Further consultation would have provided an opportunity for Defra to gather evidence on the impact of the change so as to place itself in a position to assess whether it was proportionate.

**How this Statutory Instrument inappropriately implements European Union Legislation**

The effect of the Draft Regulations would be to undermine the terms on which the Department for Business, Energy and Industrial Strategy (BEIS) received state aid clearance from the European Commission with respect to the capacity market. The capacity market is intended to be technology neutral: plants are compared only on the level of their bids, not on the technology deployed.

However, the effect of the Draft Regulations is to impose new rules for bidding into that market which bite on certain methods of generation but not others. Any reform of the capacity market which impacts its technological neutrality is liable to infringe the basis on which state aid clearance has been provided.

It is surprising that Defra should be concerned with regulating competition in the capacity market as this is the responsibility of BEIS. That BEIS has not sought to do so is undoubtedly due to the fact that the mechanism set out in the Draft Regulations would conflict with the terms on which state aid clearance was granted by the European Commission in respect of the capacity market on 16 September 2014.

Defra’s proposals could be held to be discriminatory in that they treat generators in the same position differently. Any such difference in treatment must be justified under EU law. However, to the extent that the justification is to level the playing field in the capacity market, this will fall outside the purpose for which the Draft Regulations can be made under the 1999 Act.

In such circumstances, it would not be appropriate for Defra to legislate to achieve by collateral means a diminution in the technology neutrality of the capacity market in circumstances where this would give rise to a state aid infringement.

**How this Statutory Instrument is inappropriate in view of changed circumstances since the enactment of the parent Act**

Section 2 of the Pollution Prevention and Control Act 1999 (the 1999 Act) provides the Secretary of State with a power to make regulations. Two restrictions are placed on this power. First, the regulations must be of a certain type. Second, the regulations can only be made for one or more of the specified purposes.

Part 1 of Schedule 1 to the 1999 Act sets out the type of regulations that may be made. This includes regulations which establish standards, objectives or requirements in relation to emissions within the meaning of the Act, and regulations which prohibit persons from operating any installation, plant or activities of any specified description except under a permit in force

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1 Paragraph 1 of Schedule 1.
under the regulations and in compliance with its conditions\(^2\). It further includes specifying restrictions or other requirements in connection with the grant of permits\(^3\).

The purposes for which regulations may be made are set out in section 1(1). This states that the purpose of the delegated power conferred by section 2 is to –

(a) implement Council Directive 96/61/EC (the Directive) concerning integrated pollution prevention and control,

(b) regulate, otherwise than in pursuance of the Directive, activities that are capable of causing any environmental pollution, and

(c) otherwise prevent or control emissions capable of causing any such pollution.

It is clear, therefore, that regulations made under section 2 of the 1999 Act must be for the purpose of regulating, preventing or controlling environmental pollution. Other purposes are not permitted.

Levelling the playing field in the capacity (or any) market is not one of the three purposes listed. The Draft Regulations cannot therefore be used to achieve this aim.

In addition, the Draft Regulations focus only on participation in the capacity market and balancing services agreements. This means that generators can fall within the Tranche A category if they still participate in other markets or enter into other agreements after 31 October 2017. If the reduction of pollution – rather than competition in the capacity market – was really Defra's concern it could better be remedied by imposing restrictions regardless of whether or not a generator was involved in the capacity market.

For your reference, we submit here, as an attachment, our letter to Defra Minister Dr Thérèse Coffey, which was copied to her officials and set outs the background to the Statutory Instrument and our concerns in full.

PeakGen supports Defra’s efforts to control emissions. However, we are of the view that the existing controls at both EU and national level provide an adequate and proportionate means by which polluting technologies can be phased out over a reasonable timeframe as set out in the MCPD. We hope that this submission will be helpful to your Committee as you scrutinise the draft Environmental Permitting (England and Wales) (Amendment) Regulations 2018.

Yours sincerely

[Signature]

Mark Draper
Chief Executive

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\(^2\) Paragraph 4 of Schedule 1.

\(^3\) Paragraph 5 of Schedule 1.