EXPLANATORY MEMORANDUM TO

THE CONTRACTS FOR DIFFERENCE (ALLOCATION) (EXCLUDED SITES) AMENDMENT REGULATIONS 2016

2016 No. 1246

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends some of the 'non-delivery disincentive' ('NDD') provisions of the *Contracts for Difference (Allocation) Regulations 2014* (S.I. 2014/2011) ("the 2014 Regulations"). Contracts for Difference ('CFD') are allocated to generator applicants via periodic allocation rounds. This instrument broadens the range of circumstances in which a generator is barred from applying for a CFD in specified subsequent CFD allocation rounds if it has failed to enter into a CFD allocated in an earlier round, or has failed to progress a project for which a CFD was allocated in an earlier round (this bar being a 'temporary site exclusion'), unless an exemption applies. As a result of these amendments, a temporary site exclusion will apply where a project is terminated in its first 13 months (defined by reference to an ascertainable date: the 'CFD notification' date – a term explained at section 12 of the Energy Act 2013), or at a later stage for failure to meet specified delivery stages by the Milestone Delivery Date (as that term was defined in the CFD). This instrument also extends the temporary site exclusion to prohibit an application to the first allocation round commencing during the period from after the end of the 13 months post-CFD notification to a 24 month post-CFD notification 'backstop' date.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland.

4. Legislative Context

4.1 This instrument is being made in order to amend the NDD provisions of the 2014 Regulations in light of experience in the first CFD allocation round. The purpose of the NDD provisions is to deter applications to the CFD scheme in respect of projects which are unlikely to deliver, but which would otherwise keep budget for the scheme tied up. We have extended the temporary site exclusion to apply for a period of up to 24 months following the CFD notification (an ascertainable date relating to a term explained at section 12 of the Energy Act 2013) in respect of the excluded site. The exclusion has been extended in this way in view of allocation rounds being run less

frequently than originally anticipated. This instrument also broadens the range of circumstances in which the site exclusion will apply to prevent applications in respect of sites which have terminated CFDs awarded previously where the termination occurred for any reason during the 13 months after the CFD notification (unless an exemption applies).

5. Extent and Territorial Application

5.1 This instrument extends to Great Britain. The CFD scheme does not currently operate in Northern Ireland.

5.2 The territorial application of this instrument is England, Wales and Scotland.

6. European Convention on Human Rights

6.1 Greg Clark, Secretary of State at the Department for Business, Energy and Industrial Strategy, has made the following statement regarding Human Rights:

"In my view the provisions of the Contracts for Difference (Allocation) (Excluded Sites) Amendment Regulations 2016 are compatible with Convention rights."

7. Policy background

What is being done and why

7.1 The 'electricity market reform' ('EMR') programme is intended to incentivise investment in low-carbon electricity generation, while improving affordability for consumers, and maintaining energy security. These regulations are concerned with one element of this programme – 'Contracts for Difference' (CFDs).

7.2 CFDs are contracts between a low-carbon electricity generator and a Government-owned company (the CFD counterparty). Under a CFD, the CFD counterparty will pay the generator the difference between a fixed 'strike price' and a market reference price (or, if the reference price is higher than the strike price, the generator will pay the difference back to the CFD counterparty). In this way, CFDs provide long-term price stabilisation to low carbon plant.

7.3 The 2014 Regulations provide for the use of allocation rounds to identify projects suitable for CFD support. The purpose of the NDD provisions of the 2014 Regulations is to:

- ensure that an allocation process is in place which incentivises applications from projects which can be delivered under the terms of the CFD.
- encourage efficient allocation of the allocation round budget and to deter speculative applications from participating in a CFD auction.
- ensure that appropriate exemptions are in place to disapply the exclusion created by the NDD provisions in proscribed circumstances.

7.4 Following stakeholder discussion it was decided that the temporary site exclusion under the NDD – in conjunction with appropriate grounds of exemption – was a necessary and proportionate way to prevent such distortion of the CFD allocation process. The amendment of the 2014 Regulations to include the NDD provisions was welcomed by industry which was concerned that some participants may act to distort the allocation process.

7.5 However, we have reviewed the deterrent effect of the NDD in light of the first allocation round. The purpose of these amendments to the NDD provisions of the 2014 Regulations is to:

- broaden the non-delivery basis for the exclusion to include early termination (that is termination prior to 13 months post-CFD notification) of projects for reasons other than failure to meet delivery stages, as well as failure to meet delivery stages later in the life of the project;
- extend the temporary site exclusion to prohibit an application to the first allocation round commencing in the period after the end of the period of 13 months post CFD-notification to a 24 month 'backstop'. This is in response to the lower than expected frequency of allocation rounds which has reduced the disincentive effect of a 13 month exclusion;
- clarify the way in which the exclusion applies to sites which are extensions of pre-existing sites, limiting the effect of the exclusion to the extension only;
- widen the scope of one the grounds of exemption from the effect of the NDD for sites affected by sustainability changes in law, as those will be defined in the CFD contract for the second allocation round;
- make consequential alterations to the obligation on the CFD counterparty which keeps the public register of excluded sites, as well as other minor consequential amendments.

Consolidation

7.6 The Government does not intend to consolidate this instrument with existing legislation at this time.

8. Consultation outcome

8.1 The policy set out in this instrument was subject to a four week consultation: *Consultation on Changes to the Non-Delivery Disincentive for CFD Allocation,* published on 26 May 2016.[1] Details of the consultation were made available to Renewable Trade Associations to share with their members, and to those parties who had registered their interest in changes to the CFD – in particular those with an interest in participating in the next round. Given that the consultation was targeted specifically at those likely to be interested in the changes, we consider a shorter consultation was effective.

8.2 Twenty-one responses to the consultation were received. These responses were generally supportive of the proposals. Some respondents proposed minor changes to the policy that fall outside the scope of the regulations themselves. Details can be found in the *Government Response to the Consultation on Changes to the Non-Delivery Disincentive for CFD Allocation*[2] published alongside this document. A small minority of respondents suggested that the NDD be strengthened further by introducing a performance bond and Government will continue to consider this; one respondent questioned whether we should wait before amending the NDD provisions until an announcement had been made about the timing of the next CFD Allocation

[1] https://www.gov.uk/government/consultations/consultation-on-changes-to-the-non-delivery-disincentive-for-cfd-allocation

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/559106/Government_Response_-_CFD_Government_Response_to_the_Consultation_on_Changes_to_the_Non-Delivery_Disincentive_for_CFD_Allocation.pdf

Round, however since we aim for these amendments to enter force before the last occasion when an applicant to the next round could withdraw its application if it did not wish to be subject to the amended NDD mechanism, we see no merit in delaying this amendment in order to give effect to this suggestion.

9. Guidance

9.1 Guidance is provided via Gov.uk, acting as a gateway to information on CFDs, regulatory amendments and links to information provided by delivery partners. Further details are also available in the Government response to the consultation.

10. Impact

10.1 Applying for a CFD is voluntary. This instrument has an impact on businesses, charities or voluntary bodies only where they are eligible generators applying in the next CFD allocation round in respect of an eligible generating station.

10.2 The impact on the public sector is negligible. The amendment is intended to maximise the value obtained from budget made available to future allocations rounds. The CFD counterparty will be required to make a minor change to the register of excluded sites as a result of these amendments.

10.3 An Impact Assessment relating to the CFD scheme – of which the 2014 Regulations are a part – is submitted and published alongside the Explanatory Memorandum on the legislation.gov.uk website. The Impact Assessment is from 2014 and refers to Electricity Market Reform (EMR), the programme that introduced CFDs. This amendment is sufficiently minor so as not to alter the balance of costs and benefits discussed in the IA.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses, which are free to apply for a CFD if they are building an eligible generating station.

11.2 No specific action is proposed to minimise regulatory burdens on small businesses since regulation 14 of the Allocation Regulations provides that there are types of application for a CFD which are excluded from Parts 2 to 9 of those Regulations, including where the small scale Feed-in Tariff (FiT) is available for the generating station, such as onshore wind, hydro, solar PV or anaerobic digestion generation of less than or equal to 5MW. Small businesses are not likely to apply for CFDs for the type of larger scale generating station to which these regulations apply.

12. Monitoring & review

12.1 Section 5(4) of the Energy Act 2013 requires the Secretary of State to prepare and lay before Parliament a report setting out how the Secretary of State has carried out his EMR functions. The section requires the Secretary of State to report, before 31 December each year and beginning in 2014, on how he has carried out his functions in Part 2 of the Act in order to deliver EMR's objectives. The report must be laid in Parliament and be shared with the Devolved Administrations.

12.2 In addition, section 66 of the Energy Act 2013 requires the Secretary of State to report to Parliament after mid-December 2018 on a number of aspects of the operation of the EMR programme. These aspects include the extent to which the original objectives

have been met, whether these objectives are still appropriate and whether they could be delivered in a way that imposes less regulation.

13. Contact

13.1 Stephen Clark at the Department for Business, Energy and Industrial Strategy Telephone: 0300 068 6148 or email: stephen.clark@beis.gov.uk can answer any queries regarding the instrument.