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A Review of the New UK Energy Bill: Very Fancy Footwork!

*Uisdean Vass**

INTRODUCTION¹

The United Kingdom Department of Energy and Climate Change (DECC) unveiled its much-anticipated new Energy Bill, which is to become the future Energy Act 2016, to an expectant oil industry in July 2015. Published on July 10, the Bill had its second reading in the House of Lords on July 22. The Bill is presently before the House of Lords Committee. This article looks at the Bill as it existed on September 14, 2015 following the third Committee sitting. The fourth Committee sitting took place on October 14 and the Bill was submitted to Lords Report on October 19.²

Together with the highly important Sections 41 and 42 of the Infrastructure Act of 2015, the Energy Bill will, upon enactment, constitute the legislative implementation of the influential Wood Review issued in February 2014.³ The Bill has cross-party support, and, while it is

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1. References to license "model clauses" are to the latest version of model clauses, The Petroleum Licensing (Production) (Seaward Areas) Regulations 2008, 2008, S.I. 2008/225 (U.K.).

2. For legislation to be enacted in the central Westminster Parliament, a bill must either be introduced in the (unelected) House of Lords or the (popularly elected) House of Commons. As it happened, the Energy Bill was introduced in the Lords. Introduction and publication of the bill occurs at the formal First Reading. A Second Reading then occurs, in which debate is held on broad principle. Then the bill progresses into Committee stage, where interested legislators propose amendments. Next, the bill goes to a report of the full legislative chamber. The bill then passes to the other House and goes through the same process. If the bill successfully passes through both Houses then there is a conference between the Houses to finalize any discrepancies. Thus, a final agreed bill goes to Her Majesty for Royal Assent. Upon receiving Royal Assent, the bill becomes law and is published as a statute.

3. A detailed analysis of the Wood Review was provided in Bond Dickinson L.L.P.'s Summer 2014 Oil & Gas Newsletter. Uisdean Vass, *Sir Ian Wood's Review: A UKCS Game Changer?*, OIL & GAS NEWSLETTER (Bond Dickinson L.L.P., United Kingdom), July 2014, at 2, available at http://www.bonddickinson.com/sites/default/files/bon_dic_1296_oil_and_gas_-_newsletter_jun14_v7.pdf. A review of the Infrastructure Act 2015, the OGA Call to Action (February 2015), the Government Response to Call for Evidence on the Wood Review (March

not yet law, the Bill does reflect the essential thinking of the DECC and the Oil and Gas Authority (OGA).⁴

The Infrastructure Act and the Energy Bill represent a coordinated attempt to transform the face of regulatory authority in the UK offshore oil industry. Not only will the OGA become a new regulator—it will be a new *kind* of regulator. Made up of sixty-nine sections (sixty-four of which are on oil and gas), the Energy Bill deals with multiple subjects in a highly technical manner.⁵ While dense, these sections are so integral to the future of the industry that a detailed review is at least worthwhile and, in some ways, imperative.

This article summarizes the most significant provisions and raises the questions of most import to United Kingdom Continental Shelf (UKCS) oil companies.⁶ Part I necessarily begins with a detailed and foundational analysis of the relevant parts of the Infrastructure Act's crucial Section 41. Part II examines various provisions of the OGA that possess a high level of interconnection with one another and whose relationship with Section 41 of the Infrastructure Act is key. A summary of the overall view is stated in the Conclusion.

2015), the OGA Framework Document and the Budget was presented Bond Dickinson L.L.P.'s Spring 2015 Oil & Gas Newsletter. Uisdean Vass, *The UK Oil and Gas Regime – a Fast Moving Target*, OIL AND GAS NEWSLETTER (Bond Dickinson L.L.P., United Kingdom), Spring 2015, at 3, available at http://www.bond dickinson.com/sites/default/files/oilgasnewsletter-final_1.pdf.

4. See generally Energy Bill, 2015–16, H.L. Bill [62] (U.K.) [hereinafter Energy Bill].

5. *Id.*

6. Discussions of levies and renewables, covered in Energy Bill §§ 63–66, are reserved for another day. While there are only two sections in the Energy Bill relating to onshore wind projects, it is Energy Bill § 66 which closes the renewables obligations to new onshore wind projects that is driving what is a very rapid timetable for the Bill. The government is proposing to close that scheme to new entrants as of March 31, 2016; failure to obtain Royal Assent for the Bill by that time could cause substantial embarrassment to the government and would potentially undermine the purpose of the closure policy. The government has elected to use primary legislation to implement this policy to avoid the kind of legal challenges that arose when similar steps were taken in relation to large scale solar projects using secondary legislation. The downside of this approach, though, is that no-one has any certainty on what the final form under the Bill will be until the Bill is passed by Parliament. DECC cannot guarantee that the final position for onshore wind will not be worse than that under the government's proposals. As a result, commercial lending to new onshore wind projects has for all intents and purposes stopped. For this reason, DECC is very keen to achieve Royal Assent in January 2016.

I. INFRASTRUCTURE ACT 2015, SECTION 41

Section 41 of the Infrastructure Act 2015 provides the foundation upon which the Energy Bill is built.⁷ That Section amends the Petroleum Act 1998, adding new Subsections 9A–I.⁸ Section 9A(2) requires the Secretary of State⁹ to “produce one or more strategies” to achieve the “principal objective” of “maximising the economic recovery of UK petroleum” (MER).¹⁰ The “strategy” intends to serve as a variant of secondary legislation and must be laid before Parliament.¹¹ The key words “principal objective” are defined in Section 9A(1) as maximizing recovery through:

- (a) development, construction, deployment and use of equipment used in the petroleum industry (including upstream petroleum infrastructure), and
- (b) collaboration among the following persons:
 - i. holders of petroleum licences;
 - ii. operators under petroleum licences;
 - iii. owners of upstream petroleum infrastructure; [and]
 - iv. persons planning and carrying out the commissioning of upstream petroleum infrastructure.¹²

Section 9C requires the parties listed in Section 9A(1)(b), collectively known as the MER Parties, to act in accordance with the strategy.¹³ However, oil service companies are not MER Parties and are not subject to this legislation. Even so, Section 41 does not provide any sanction if the MER Parties fail to follow the strategy.¹⁴ Under Section 41, the MER Parties are not obligated to comply with “the principal objective” but only the “strategy.”¹⁵ The “strategy” is intended to have the force of secondary legislation, but it is used in both the Infrastructure Act and the Energy Bill in its basic, uncapitalized form. To clarify its intended form as that of a legal instrument, we now refer to it as the “Strategy.”

7. Infrastructure Act 2015, c.7, § 41 (U.K.).

8. *Id.*

9. All references in this article to the “Secretary of State” refer to the Secretary of State of the DECC.

10. *Id.* §§ 41(9A)(1)–(2).

11. *Id.* § 41(9G).

12. *Id.* § 41(9A).

13. *Id.* § 41(9C).

14. *See* Infrastructure Act 2015, § 41.

15. *See id.* § 41(9)(C).

The Strategy must be devised to achieve the principal objective—MER. Critically, however, neither the Infrastructure Act nor the Energy Bill *define* MER. Commencement of Strategy consultation is due this autumn, but no one presently knows what the Strategy will look like.¹⁶ At this stage, experts are concerned that, vis-à-vis individual MER Parties, MER will be an unquantifiable duty, partially or wholly unrelated to a particular MER Party's licenses or assets.¹⁷ As the Wood Review states, “. . . the key principles of MER UK . . . [would require MER Parties] . . . to act in a manner best calculated to give rise to *the recovery of the maximum amount of petroleum from UK waters as a whole, not just that recoverable under their own licences.*”¹⁸

Objectors might argue that the “Strategy” is, in fact and for practical purposes, MER, but that assertion would be false.¹⁹ As will be shown, key provisions in the Energy Bill turn on the concept of the “principal objective”²⁰ as opposed to the MER Strategy.²¹

What power, then, does Section 41 confer on the Secretary of State in devising the Strategy? Upon review, Section 41 is somewhat opaque on this issue, and Sections 9A(2) and (3) are skeletal.²² What *is* clear is that the conferred power includes the right to create entirely new legal obligations.²³

Nevertheless, the government’s approach appears to be the creation of a new regulatory structure *alongside* the existing licenses and statutes. Neither the Energy Bill nor the MER Strategy will formally amend existing licenses, contrary to the Wood Review’s recommendations.²⁴ The Energy Bill *does* heavily amend existing legislation, but mainly as a means

16. See generally Department of Energy & Climate Change, *Funding the Oil and Gas Authority: Government Response*, URN 15D/431 (2015) for further insight.

17. *Id.* at 8–9.

18. Sir Ian Wood, *UKCS Maximising Recovery Review: Final Report*, WOOD REVIEW 6 (2014) (emphasis added).

19. Some analysts believe that the Strategy will assert specific legal obligations but ultimately require MER Parties to otherwise pursue MER as a catch-all. That may be so, but at this stage in the analysis the “principal objective” is a distinct concept from the “Strategy,” so this reviewer will preserve the distinction. Logically, the “principal objective” or “MER” must be distinct from the “Strategy” to be achieved.

20. *Id.* § 41(9A)(1).

21. *Id.* § 41(9A)(2).

22. See Infrastructure Act 2015, § 41 (stating that the Secretary “must produce one or more strategies for enabling the principal objective to be met” which “may [or may not] relate to [the enumerated] matters . . . mentioned in subsections [9](1)(a) and (b).”).

23. See *id.*

24. Compare Energy Bill, 2015-16, H.L. Bill [62] (U.K.) with Wood, *supra* note 17. See also Sir Ian Wood’s Review: *A UKCS Game Changer?*, *supra* note 3 for more information.

to transfer legislative powers from DECC to the OGA. The Strategy will be key to the new regulatory structure; fully assessing the new regime is impossible without knowing what form the Strategy will take.

A last key question is whether the MER Parties will be obligated to act in accordance with the Strategy only vertically, in their relationship with the OGA, or also horizontally, in their relationships with other MER Parties, DECC, the supply chain, and outside parties.²⁵ This article posits that the new Petroleum Act Section 9C imposes on the MER Parties a duty to act in accordance with the Strategy, which is owed to *both* the OGA and all others.²⁶ If this theory is correct, the Strategy will effectively change the law of contract for MER Parties and will be directly imported into offshore licenses, joint operating agreements, offshore commercial agreements, negotiations, and re-negotiations. Under these circumstances, judges and arbitrators will have to interpret and apply the Strategy in ordinary dispute resolutions, in addition to the OGA and DECC in traditional license disputes.

Finally, the Strategy, in practice, may be difficult to define and apply as a regulatory or contractual principle because it may mean very different things for different companies. The Strategy and its application must necessarily be situational, but to what extent remains uncertain. Some licensees are new entrants with a single promote license, while others own vital infrastructure that is ripe for decommissioning. Diverse licensees may be more or less impacted by the Strategy. Some oil companies have the access to finances, people, equipment, and skills necessary to readily assume new projects, while others do not. Should their Strategy obligations vary based on corporate ability? The Energy Bill throws some interesting light on these questions, particularly in Section 14(4), discussed *infra*.

25. See Energy Bill, 2015-16, H.L. Bill [62] sched. para 2 (U.K.) (stating that the Energy Bill would amend the new Petroleum Act Subsection 9A(2) created by Section 41 of the Infrastructure Act 2015 to make the OGA responsible to produce the MER Strategy); see also *id.* sched. paras 3–7 (amending provisions to ensure the OGA is in charge of the Strategy process while preserving the Secretary of State’s final decision to lay the Strategy before Parliament).

26. See Infrastructure Act 2015, § 41(9)(C) (stating that MER Parties “must act in accordance with the current [S]trategy or [S]trategies when planning and carrying out [upstream] activities.”). The statute is silent as to whom the duty is owed except that Energy Bill makes it clear that the duty is [at least] owed to the OGA. In terms of policy, it can be argued that the Strategy would be more effective if it was owed to all persons. At this time the issue is unclear.

II. ESTABLISHMENT AND FUNCTIONING OF THE OGA

1. Energy Bill Sections 1–7

The OGA is established as an autonomous authority under the control of DECC.²⁷ The OGA will acquire both onshore and offshore responsibilities. However, the great majority of the Energy Bill provisions only apply to offshore duties. Part 2 of the Energy Bill²⁸ applies only to the offshore regulatory system, which is the Territorial Sea and Continental Shelf as opposed to the onshore system's land and Internal Sea.²⁹ The very lengthy schedule to the Energy Bill transfers numerous licensing and regulatory powers now carried out by the OGA through DECC to the new autonomous regulator. Yet, DECC will retain authority over important administrative oil and gas decision-making, including license transfers and many critical aspects of decommissioning. The Energy Bill is expected, through amendment, to bolster OGA's decommissioning powers this autumn. *Crucially*, DECC will remain the governmental party in all prior and future licenses. Licenses therefore remain a "contract" between the licensee and DECC.

The OGA must observe certain priorities in its decision-making, laid out in pertinent part in Section 4(1), as follows:

Minimising Future Public Expenditure

The need to minimise public expenditure relating to, or arising from, relevant activities.

Security of Supply

The need for the United Kingdom to have a secure supply of energy.

27. Energy Bill, 2015-16, H.L. Bill [62] cl. 1–2 (U.K.) (declaring the OGA's autonomous authority from the Crown and stating its corresponding functions); *See also id.* cl. 5–7 (discussing the DECC's powers over the OGA).

28. *Id.* cl. 12–60.

29. *See id.* cl. 12–60; *See also* cl. 2(2) (giving the Secretary of State power to transfer to OGA certain functions presently carried out by DECC), *and* cl. 2(6) (stating that these functions include DECC's authority to run the onshore licensing system).

Collaboration

The need for the OGA to work collaboratively with the government of the United Kingdom and with persons who carry on, or wish to carry on, *relevant activities*.

Innovation

The need to encourage innovation in technology and working practices in relation to relevant activities.

System of regulation

The need to maintain a stable and predictable system of regulation which encourages investment in relevant activities.³⁰

It is important to keep the five-fold priorities of Section 4(1) in mind while reviewing the more substantive provisions of the Energy Bill. Presumably, failure to adequately weigh these priorities, where relevant, could be used to ground a claim of judicial review?

2. Definitions & Non-Binding Dispute Resolution—Energy Bill Sections 12–22.

Sections 12 through 22 embody a key recommendation of the Wood Review: A qualifying dispute exists if at least *one* party to the dispute is a MER Party and the issue relates either to the fulfilment of the principal objective (as opposed to the Strategy) *or* relates to activities carried out under an offshore license *excluding* third party access (“TPA”) applications under Energy Act 2011, Section 82.³¹

The word “dispute” is not defined. It could represent a narrow concept where, for example, suit has been filed; it could alternatively contemplate broad applications whereby the parties cannot agree to vital new contractual terms relevant to MER. A qualifying dispute may be referred for OGA resolution either by a MER Party who is a party to the dispute³² *or* by the OGA of its own motion.³³

In procedural terms, the OGA is given considerable coercive power to prosecute the dispute resolution process—including the enforceable rights to seek information and control the attendance of individuals.³⁴ However, the

30. *Id.* cl. 4(1) (emphasis added).

31. *Id.* cl. 14(4). In practice very few TPA disputes have reached the stage of a Section 82 application being filed—so little is excluded.

32. *Id.* cl. 15(1).

33. *Id.* cl. 17(1).

34. Energy Bill, 2015-16, HL Bill [62] cl. 19, 20 (U.K.).

ultimate decision, called a recommendation, is not legally enforceable.³⁵ As such, Section 18(4) provides:

The OGA's recommendation must be one which it considers will enable the dispute to be resolved in a way which best contributes to the fulfillment of the *principal objective* whilst having regard to the need to achieve an economically viable position for the parties to the dispute.³⁶

In essence, the OGA must give its recommendation on any qualifying dispute on the basis of what will best contribute to “the fulfilment of the principal objective” (as opposed to the Strategy). Any such recommendation *must* result in “an economically viable position” for [both] parties to the dispute.”³⁷ Presumably, the OGA must also reach its recommendation based on the five-fold priorities of Section 4(1). Does an “economically viable position” refer to the project in question being viable in isolation or in the context of the overall corporate position of the relevant MER Party—or even of its corporate holding group? Whatever the answer, is the relevant test subjective or objective?

At this point, one can ask a broader question: Is the interpretation and application of the clearly enforceable the Strategy through sanctions³⁸ subject to a consideration of “an economically viable position” for MER Parties? A related issue discussed in Part 2.5 herein, is whether MER Parties can be forced to invest pursuant to enforcement notices.

If any MER Party failed to follow a recommendation which amounted to failing to follow the Strategy or to abide by a license term or condition, then that could result in a sanctions notice under Energy Bill Section 37. The non-binding recommendation could thus quickly become legally enforceable. This is fully consistent with the original proposition of the Wood Review: “Failure of a party to accept the non-binding opinion [recommendation], to the extent that it is inconsistent with MER UK or other licence terms, may result in appropriate sanctions being applied.”³⁹

The non-binding dispute resolution provisions are without prejudice to the normal application of formal dispute resolution mechanisms in license, JOA or other commercial contracts. There is a tension between the two dispute resolution systems, with clear scope for conflict or duplication. Why go through all this trouble for a mere non-binding recommendation?

35. *Id.* cl. 18(4).

36. *Id.* (emphasis added).

37. *Id.*

38. *See id.* cl. 41.

39. Wood, *supra* note 17, at 17.

3. Petroleum-Related Information and Samples—Sections 23–34

The Section 23 defines “petroleum-related information” as “information acquired or created by or on behalf of a [MER Party] in the course of . . . activities . . . [relating to] . . . the principal objective . . .” as opposed to the Strategy *or* in the course of carrying out license activities.⁴⁰ Documents not subject to legal privilege are excluded. This definition is thus very broad and not limited to data. On the other hand, “petroleum-related samples” are more narrowly defined as substances acquired by an offshore licensee in the course of license activities.⁴¹

These sections have a primary narrow purpose and a secondary broad purpose. The narrow purpose is to ensure proper preservation of petroleum-related information and samples by licensees if there is a “licence event” namely a transfer or relinquishment of rights under a license or an expiry or a revocation of such a license. With the possibility of a license event in mind, all licensees (called for this purpose “Responsible Persons”) must work with the OGA to agree on an “information and samples plan.”⁴² If no agreement can be reached on the plan, the OGA is empowered to impose one.⁴³ Since all licensees, operators, and non-operators must agree on a plan, potential for duplicative activity looms. MER Parties must appoint an information and samples coordinator to liaise with the OGA.

More importantly, Section 30(1) gives the OGA a very broad power to request any petroleum-related information, which may assist the OGA in carrying out a function relevant to the “principal objective” (as opposed to the Strategy).⁴⁴ The *only* ground of appeal against such an order is that the compliance deadline is unreasonable. The OGA is granted other powers to request information under the Energy Bill, but this is by far the widest. Almost anything can be relevant in some way to the “principal objective.”

While petroleum-related information obtained under Section 30 is regarded as “protected material,” it can in principle be published when DECC issues regulations allowing publication.⁴⁵ Section 31(8) gives DECC fairly broad discretion in this process, but the Secretary must consider: (a) whether the specified time for publication is reasonable given the purposes for which the information was originally acquired or created; (b) whether the given time would have the effect of discouraging other MER Parties from acquiring or creating similar information; and (c)

40. See Energy Bill, 2015-16, HL Bill [62] cl. 23 (U.K.) (emphasis added).

41. *Id.* cl. 23(b).

42. *Id.* cl. 27(2).

43. *Id.*

44. *Id.* cl. (30)(1).

45. *Id.* cl. 31(8).

benefits accruing to the petroleum industry from information being published in the suggested timeframe.⁴⁶ The Wood Review made the key recommendation that offshore data needs to be more widely and quickly available. These provisions will allow DECC/OGA to achieve that recommendation.

As is the case with the provision on non-binding dispute resolution, these provisions do not formally amend the license. Licence Model Clauses 30-33 provide that DECC, as a general rule, must not release data generated by a licensee for at least three years from the date the licensee should have supplied it, or if earlier, the date upon which the data was actually supplied.⁴⁷ Thus, one rule applies to data under the license while a second governs data under the Energy Bill, assuming DECC enacts the publication regulations.

4. The OGA and “Relevant Meetings”—Sections 35–40

A “relevant meeting” is a meeting—whether involving physical or electronic presence—between *two or more* MER Parties in order to discuss “relevant issues.”⁴⁸ A “relevant issue” is any issue “relevant to the fulfilment of the principal objective” (as opposed to the Strategy), or relating to activities carried out under an offshore license. The issue, however, may not be subject to legal privilege.⁴⁹

When a MER Party “knows or should know” that an upcoming meeting “will be or is likely to be” a *relevant* meeting, then the it is required to promptly inform the OGA of the existence of the meeting and provide details regarding the agenda and documents relevant thereto.⁵⁰ The OGA is entitled to send a non-voting participant to the meeting.

If the OGA does not send a representative to the meeting, the MER Party must timely provide OGA with a written summary of the meeting and any decisions reached.⁵¹ The idea of the OGA having the ability to attend operating committee and technical committee meetings was strongly recommended by the Wood Review. However, these provisions are burdensome and duplicative for licensees and threaten to swamp the OGA with MER Party communications.

46. Energy Bill, 2015-16, HL Bill [62] cl. 32(4) (U.K.). In balancing these factors, the Secretary must have regard to the “principal objective.” *Id.* cl. 32(5).

47. *See* Wood, *supra* note 18.

48. Energy Bill, 2015-16, H.L. Bill [62] cl. 35 (U.K.). Would a meeting between two MER Parties and a DECC representative, or a drilling company be a “relevant meeting”? We believe so . . . The key is to have more than one MER Party in the meeting discussing “relevant issues.”

49. *Id.* cl. 35(4).

50. *Id.* cl. 41.

51. *Id.* cl. 38.

5. Sanctions—Sections 41–60

Arguably, Section 41 is the most important section in the Energy Bill. Section 41 gives the OGA the power to levy a range of sanctions—enforcement notices, financial penalties, license revocation, and operator removal—on any “person” who fails to comply with a “petroleum-related requirement.” The latter term describes either the MER Party’s duty to abide by the Strategy, a term or a condition of an offshore license, or a requirement imposed by the Energy Bill which is sanctionable in itself.⁵² Section 41 gives the OGA the power to sanction a “person”—rather than only a MER Party—for failing to abide by any of these requirements. However, it is hard to see how anyone other than a MER Party could be so sanctioned.⁵³

Notice that in this case, the sanctionable failure is the failure to comply with a MER *strategy*, as opposed to “the principal objective.” Additionally, this section gives the OGA the power to sanction a licensee for failure to abide by a license term even though the OGA is not a party to the license and the licensee’s only contractual right is against DECC as a continuing state party on the license. DECC retains the right to enforce license terms. In this connection, Section 55 says that where the OGA gives a sanctions notice to a licensee, then the matter must be dealt with under Energy Bill sanctions provisions and *not* pursuant to arbitration as provided in the license. This result is a little curious because the licensee may only invoke arbitration against DECC—the license party—and not the OGA.

An enforcement notice must specify the petroleum-related requirement in question, detail the failure, and command compliance with the requirement specifying particular actions, if relevant. How would an enforcement notice actually work? Would the OGA have to go to court to get an injunction?

As it is understood, MER Parties will not be forced to invest through an enforcement notice (as potentially required by the Strategy).⁵⁴ Whatever the intentions of the OGA, nothing in the Energy Bill says that MER Parties cannot be forced to invest should such investment be required by the Strategy. In any event, the “cannot be forced to invest” idea can be confusing. On a basic level, the Strategy must require investment of some kind by MER

52. *Id.* cl. 41(3)(c).

53. Section 41 (1) of the Energy Bill allows the OGA to sanction any “person” for failure to act in accordance with the Strategy under Section 9C of the Petroleum Act 1998, for failure to comply with any term of an offshore license or for violating any sanctionable provision of the Energy Bill itself. *See also* Energy Bill Section 41(3). Only MER Parties are obligated to comply with the Strategy under the referenced Section 9C of the Petroleum Act. Offshore licensees are by definition MER Parties and the only persons who can infringe sanctionable provisions of the Energy Bill are MER Parties.

54. *See* Wood, *supra* note 18, at 2 (“The additional powers are not designed to force operators to invest . . .”).

Parties to be meaningful. The Strategy is necessarily designed to compel MER Parties to do what they would not otherwise do, and following the Strategy would usually involve some investment or spending. An enforcement notice *might* require a MER Party to commit to a project mandated by the Strategy, which requires investment. It is different to say that the OGA *can* compel the actual spending of money, or sinking of steel. It could well be that failure to comply with an enforcement notice could result in financial penalties, license revocation, or operator removal.⁵⁵ However, that simply may be the flipside of failing to follow the Strategy.

A financial penalty notice must specify the petroleum-related requirement in question, detail the failure, require compliance if the failure has not already been remedied, and demand payment to the OGA of a specific penalty. Currently, the penalty cannot amount to more than £1 million per occurrence, but the Secretary of State may by regulation raise the maximum penalty amount up to £5 million.⁵⁶ The OGA is required to issue guidance on matters it will consider when deciding the amount of a financial penalty.

The license revocation notice must specify the relevant petroleum-related requirement, give details of the failure, and issue notice of the revocation. Energy Bill Section 46 provides that a revocation notice can only be given to a licensee. However, if more than one licensee exists, the notice can be given to one or more. It is important to note that this provision gives the OGA the general power to revoke licenses as to particular licensees, whereas DECC may only do so under the license in the rather narrow circumstances described in Model Clause 42.

The OGA is not required to publish guidelines regarding the conditions under which it will consider license revocation. This omission seems odd, given that revocation is a much more serious matter than financial penalty. An operator removal notice must specify the relevant petroleum-related requirement, detail the failure, and give notice of the removal. As is the case with license revocation, the OGA is not required to publish guidelines regarding when it will consider operator removal.

55. It is worth noting that in the limited circumstances set out in Energy Act 2011, Section 84(2), DECC already has the power to compel investment in certain TPA situations.

56. *Id.* cl. 44.

The OGA may not issue a sanctions notice without first issuing a sanctions warning notice. The sanctions warning notice must specify the relevant petroleum-related requirements, state that the OGA is considering a sanction, detail the alleged failure to comply, and inform the recipient that it has a period—the representations period—to make a case to the OGA on the issues raised. The OGA must determine an appropriate representation period. The OGA then decides whether or not to issue a sanctions notice.⁵⁷

The sanctions notice is effectively a judgment from the OGA that is appealable to the Tribunal. The Tribunal that reviews these decisions is defined as a “first-tier tribunal.” Appeal of a sanctions notice must be filed within twenty-eight days of date of issuance. Appeals can be taken either on grounds that there was no failure to comply with the relevant duty *or* that, while there was a failure to comply, the sanction is unreasonable or *ultra vires*.⁵⁸

The OGA can publish details of any sanctions notice but, in this respect, cannot publish anything that, in the OGA's opinion, is “commercially sensitive,” “not in the public interest to publish,” or “otherwise not appropriate for publication.”⁵⁹

Section 56 gives the OGA important powers to require “a person” to provide information relevant to an OGA investigation as to whether that person has violated a “petroleum-related requirement” or that would otherwise assist the OGA in determining the nature and extent of any relevant sanction. The OGA has limited powers to publish this information. What showing of “investigation” does the OGA need to make to use this information-gathering power? Or to ask the question another way: what is the definition of “investigation?” The answer is not clear from Section 56.

Lastly, the OGA must draw up procedures related to “enforcement decisions,” which should not be confused with “enforcement notices.” Instead, “enforcement decisions” are decisions to issue a sanctions notice of whatever kind or “a decision as to the details of the sanction.”⁶⁰ The key element of the Section 59 procedure is that a person or persons making enforcement decisions should not be the same person who established the supporting evidence. The OGA must issue a statement of proposals on this matter.

57. Energy Bill, 2015-16, H.L. Bill [62] cl. 48 (U.K.).

58. *Id.* cl. 49–51.

59. *Id.* cl. 52(2).

60. *Id.* cl. 59(10).

CONCLUSION

Given the political climate, with a Conservative majority government with broad political support, it is a good assumption that the Energy Bill will become the Energy Act 2016 in a substantially similar form as it exists today. Along with the necessary foundation provided in new Sections 9A-C of the Petroleum Act 1998—added by virtue of Section 41 of the Infrastructure Act 2015—the new legislative provisions will transform the way the United Kingdom oil industry does business on the UKCS. The Wood Review has changed the game.

Yet absolutely key concepts such as “principal objective,” “MER” and the “Strategy” remain undefined and obscure. Industry participants await the “Strategy” in order to really grasp the impact of the legislation.

The Energy Bill creates an exceedingly powerful OGA with the authority to sanction MER Parties if they fail to follow the Strategy, violate license terms, or otherwise commit sanctionable infringements of the Energy Bill. Yet DECC's role remains considerable, in both regulatory terms, and as a government party to all licenses.

While the Strategy and the Energy Bill confer major new powers on the OGA, the government's approach has been to preserve the terms of prior licenses and the terms of prior legislation, notwithstanding the transfer of DECC functions to the OGA. Two offshore licensing regulators will thus govern activities on the UKCS.

Too much of the Energy Bill depends on the distinction between the principal objective or MER and the Strategy. The OGA must make recommendations to decide disputes under Section 19(4) based on a “principal objective” which is currently undefined and not binding on MER Parties. However, if the OGA goes on to find that failure to follow the recommendation amounts to a breach of the Strategy, this failure is sanctionable. Will MER issues under the Strategy also be subject to an “economic viability” test? How will such a test be formulated? The rationale for the “non-binding” disputes provisions has gone heretofore unexplained.

Frankly, the provisions on non-binding disputes, information, samples, and meetings make for extensive possible duplication. However, the massive sweep of the OGA's information gathering powers under Section 30 is impressive. Almost nothing important to a MER Party—except for information subject to legal privilege—can be shielded from this authority. What will be the impact on transparency?

The Energy Bill heralds the transition of the old DECC from a prescriptive/permitting authority to a directive or shepherding authority in the form of the new DECC/OGA. The key issues of MER and the

Strategy are still unresolved and must take shape as determinate, limited, and coherent concepts.

While it is evident that one new player—the OGA—will be soon be added to the UKCS game, many questions still linger unanswered. The regulatory framework feels like a very crowded dance floor, necessitating very fancy footwork in constrained places to make the new Energy Bill work.

