

Constitutional and Legislative Affairs Committee Draft Report CLA(4)-03-13 Paper 7

Title: The Natural Resources Body for Wales (Functions) Order 2012

The Natural Resources Body for Wales (Establishment) Order 2012 established a new statutory body, the Natural Resources Body for Wales and provided for its purpose, membership, procedure, financial governance and initial functions. This Order makes further provision about the Body, including provision about the modification and transfer of environmental functions to the Body.

Procedure: Enhanced Affirmative

The enhanced affirmative procedure:-

- Extends the period from the date on which a draft order was laid from 40 to 60 days
- Requires the Welsh Ministers to have regard to any representations, and resolution of the National Assembly for Wales and any recommendations of a committee charged with reporting on the draft Order made during the 60 day period
- Requires the draft Order to be re-laid before the Assembly with a statement summarising the changes, in the event that any material changes are made.

The revised draft order once laid will be subject to the normal affirmative procedure.

Technical Scrutiny

Under Standing Order 21.2 the Assembly is invited to pay special attention to the following instrument:

21.2 (i) – that there appears to be doubt as to whether it is intra vires

Preamble

The consent of the Secretary of State and Minister which is required under Section 17 of the Public Bodies Act 2011 has not yet been obtained¹.

Section 17 provides that:-

(1) The Secretary of State's consent is required for an order under section 13 or 14 which transfers a function to, or confers a function on—

- (a) the Environment Agency,*
- (b) the Forestry Commissioners, or*
- (c) any other cross-border operator.*

(2) The Secretary of State's consent is required for an order under section 13 or 14 made by virtue of section 15 which in any other way modifies the non-devolved functions of a person referred to in subsection (1).

(3) A Minister's consent is required for an order under section 13 or 14 which transfers a function to, or modifies the functions of, the Minister.

21.2 (v) That for any particular reason its form or meaning needs further explanation

Articles 5, 6 & 7

“local enactment” is not defined which could lead to uncertainty as these Articles in effect tidy up other legislation that is not specifically referred to in any of the Schedules.

Schedule 3

¹ Page 3 of the Explanatory Memorandum states that the Order will not be made without obtaining the necessary consent.

Welsh Language (Wales) Measure 2011

Paragraph 4 (2) – As the Environment Agency still exercise functions in relation to Wales it should still be subject to the Welsh Language (Wales) Measure 2011. The effect of the amendment would be to remove the EA from the requirement to comply with welsh language standards.

Schedule 4

General Drainage Charges (Relevant Quotient) Regulations 1993

Paragraph 31 (3) –The reference to the Flood and Coastal Erosion Risk Management (Levies) (England and Wales) Regulations 2011 refers to the Environment Agency (Levies) (England and Wales) Regulations 2011 which are renamed later in the Order. This is confusing to the reader who would be assisted by a suitable footnote.

21.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements

Schedule 2

Forestry Act 1967

Paragraph 42 (3) - The reference to subsection 4 (a) is incorrect and should refer to subsection (4).

Highways Act 1980

Paragraph 102 (3) – It is not clear whether the reference to “organisation” is in respect of the first or second occasion where it occurs.

Water Resources Act 1991

Paragraph 198 (2) – There is no reference to the Environment Agency in section 118(b).

Clean Air Act 1993

Paragraph 256 - The reference to ‘appropriate authority’ should refer to ‘appropriate agency’.

Schedule 3

Control of Pesticides Regulations 1986

Paragraph 20 (2)

This should refer to (if the area in which the intended aerial application is to take place in Wales).

Plant Health (Export Certification) (Forestry) (Great Britain) Order 2004

Paragraph 158 (3) (b) and (5) - the date cannot just be substituted as the 2005 Order refers to Plant Health (Forestry) Order 2005, rather than the Plant Health (Forestry) (Great Britain) Order 1993.

Welsh Language Schemes (Public Bodies) Order 1996

Paragraph 72 - Because the Environment Agency still exercise functions in relation to Wales they should still be subject to the Order. The effect of the amendment is to remove the EA from the requirement to prepare a Welsh language scheme under the Welsh Language Act 1993.

Bathing Water Regulations 2008

Paragraph 232 - Paragraph 231 changes all references to Agency without excepting regulation 2, there is no definition to omit and the definition does not then make sense.

Paragraph 233 - The reference is to 'Agency' rather than 'Environment Agency'

Infrastructure Planning (National Policy Statement Consultation) Regulations 2009

Paragraph 260 (2) (a) - the entry should refer to 'forests and woodlands' rather than 'forests or woodlands'.

Regional Flood and Coastal Committees (England and Wales) Regulations 2011

Paragraph 317 (2) - The reference to 'opening words' in this paragraph does not make sense.

Waste (England and Wales) Regulations 2011

Paragraph 325 - There is no reference to the Environment Agency or the Agency in regulation 3.

Greenhouse Gas Emissions Trading Scheme Regulations 2012

Paragraph 334 - the reference to regulation 21 is incorrect and should refer to regulation 20.

Paragraph 335 - the reference to regulation 28 is incorrect and should refer to regulation 27.

Paragraph 336 - the reference to regulation 48 (5) is incorrect and should refer to regulation 45 (5).

Paragraph 337 - the reference to regulation 87 is incorrect and should refer to regulation 86.

Paragraph 338 - the reference to regulation 89 is incorrect and should refer to regulation 87.

Paragraph 339 - the reference does not make sense.

Schedule 5

Wildlife and Countryside (Sites of Special Scientific Interest, Appeals) (Wales) Regulations 2002

Paragraph 6 - “the Countryside Council for Wales” only appears on one occasion.

Merits Scrutiny

Under Standing Order 21.3 the Assembly is invited to pay special attention to the following instrument:-

This Order is being brought forward under the powers contained in Sections 13 to 15 of the Public Bodies Act 2011.

The Legal Briefing note dated November 2012 (at Annex A) provides further background information to the Order.

The Committee has received correspondence which amongst other matters highlights issues as to whether various provisions of the Order introduced by Schedule 1 are ultra vires, because they do not meet the test under Section 16 of the Public Bodies Act 2011 in that they remove necessary protections.

The test under the Act is whether **the Welsh Ministers consider** that:

- (a) the Order does not remove any necessary protection, and
- (b) the Order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably be expected to continue to exercise.

Within the preamble to the Order, the Welsh Ministers state that they consider that the Order

does not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise

At page 11 of the Explanatory Memorandum, it states:-

In drafting this Order we have followed the general principle that we are transferring the existing functions of the three bodies in a manner which retains all existing protections and does not add any new restrictions on individual rights or freedoms.

It would be difficult for the Committee to anticipate the practical effect of particular provisions within the Order; however should the Committee wish, evidence could be taken from the Minister for Environment and Sustainable Development as to the statement made within the preamble, prior to the final Order being laid.

Legal Advisers

Constitutional and Legislative Affairs Committee

January 2013

Annex A

Paratowyd y ddogfen hon gan gyfreithwyr Cynulliad Cenedlaethol Cymru er mwyn rhoi gwybodaeth a chyngor i Aelodau'r Cynulliad a'u cynorthwywyr ynghylch materion dan ystyriaeth gan y Cynulliad a'i bwyllgorau ac nid at unrhyw ddiben arall. Gwnaed pob ymdrech i sicrhau bod y wybodaeth a'r cyngor a gynhwysir ynnddi yn gywir, ond ni dderbynnir cyfrifoldeb am unrhyw ddibyniaeth a roddir arnynt gan drydydd partion.

This document has been prepared by National Assembly for Wales lawyers in order to provide information and advice to Assembly Members and their staff in relation to matters under consideration by the Assembly and its committees and for no other purpose. Every effort has been made to ensure that the information and advice contained in it are accurate, but no responsibility is accepted for any reliance placed on them by third parties

Constitutional and Legislative Affairs Committee

The Natural Resources Body for Wales (Functions) Order 2012

Legal Briefing Note

1. Background

1.1 On 15 November 2012, the Minister for Environment and Sustainable Development, John Griffiths AM, laid a draft of *The Natural Resources Body for Wales (Functions) Order 2012*.

1.2 The Order is to be made in accordance with the powers conferred by sections 13, 14, 15 and 35 of the *Public Bodies Act 2011* ("the 2011 Act").

1.3 This is the second order concerning the Natural Resources Body for Wales ('the Body'), its having been established on 19th July 2012 by the *Natural Resources Body for Wales (Establishment) Order 2012 No 1903 (W.230)*.

1.4 The Order is subject to a form of affirmative procedure which is explained on page 2 of the Explanatory Memorandum that accompanies the draft Order. The procedure set out in Section 19 of the Public Bodies

Act 2011, requires that the Order be laid in draft for 40 days, but that within 30 days of the laying of the draft Order, the Assembly may resolve or a committee charged with reporting on the draft Order may recommend that the enhanced affirmative procedure set out in Section 19 (6) – (9) should apply.

If no such resolution is made, or if a recommendation of the committee is overruled by a resolution of the Assembly, after 40 days a motion to approve the draft Order can be made.

The enhanced affirmative procedure

- extends the period from the date on which a draft order was laid to 60 days
- requires the Welsh Ministers to have regard to any representations, and resolution of the National Assembly for Wales and any recommendations of a committee charged with reporting on the draft Order made during the 60 day period.
- requires the draft Order to be re-laid before the Assembly with a statement summarising the changes, in the event that any material changes are made.

The revised draft Order would then be subject to normal affirmative procedure.

1.5 The Committee has recommended in its report laid on 23rd November 2012, that the enhanced affirmative procedure should apply to the Order. Unless this is overruled by a resolution of the Assembly by 11th January 2013 (the latest date this could be considered in Plenary would be 9th January 2013) then the Committee has until 10th February 2013 to report on the Order

2. Requirements of The Public Bodies Act 2011

2.1 Section 13 of the Act provides the Welsh Ministers with the powers to modify or transfer functions of the Countryside Council for Wales (CCW) and the devolved functions of the Environment Agency (EA) or the Forestry Commission (FC), the functions of the Welsh Flood and Coastal Committee or any devolved Welsh environment functions of any person to:

- **Welsh Ministers**
- **To one of the existing organisations or,**
- **To a new body**

2.2 Section 16 (1) of the Act states that an Order may only be made under Section 13 for the purposes of improving the exercise of public functions having regard to efficiency, effectiveness and securing accountability to Welsh Ministers. Section 16 (2) states that an Order may only be made as long as it does not remove any necessary protection or does not impinge upon the exercising of any existing rights by individuals.

2.3 Section 17 requires the consent of the Secretary of State for an Order which transfers or confers a function on the EA, FC or other cross-border operator, or if it modifies a non-devolved function of one of the aforementioned bodies. A Minister's consent is required for an order which transfers a function to, or modifies the functions of the Minister.

2.4 Section 18 (1) of the Act states that in making an Order under Section 13, Welsh Ministers must consult any organisation or person exercising public functions to whom the proposals relate, other persons whose interests will be substantially affected by the proposals and any other person deemed appropriate.

2.5 Section 18 (2) of the Act provides that if, having carried out its consultation under Section 18 (1), the Welsh Ministers consider it appropriate to change the whole or part of the proposal, then they must carry out such further consultation with respect to the changes as seems appropriate.

2.6 Sections 21 -23 of the Public Bodies Act 2011 contain restrictions on the creation of functions, transfer and delegation of functions and the creation of criminal offences by Welsh Ministers.

2.7 The Welsh Government sets out how it has complied with each of these requirements within the Explanatory Memorandum.

2.8 It is important to note that the making of the Order is conditional upon the consent of the Secretary of State and any Minister being obtained in advance under section 17 of the Public Bodies Act 2011, and whilst the preamble to the draft Order states that the consent has been

obtained, this will need to be satisfied before Welsh Ministers can make the Order.

3. The Order

3.1 The purpose of the Order is to transfer functions to the Body from CCW, EA and FC, and to ensure that the Body's general functions are appropriate for the range of functions it will exercise.

3.2 The Order transfers all CCW functions to the Body (apart from functions which are removed to avoid duplication). It also transfers a number of wildlife licensing functions of the Welsh Ministers to the Body.

3.3 The Order transfers most FC functions in respect of Wales to the Body, including its forestry management functions. The FC's powers to make subordinate legislation in relation to Wales and its functions relating to plant health are instead transferred to the Welsh Ministers.

3.4 EA functions are generally transferred to the Body in relation to Wales (and remain exercisable by the EA in relation to England). However certain functions relating to the water resources and flood risk management are divided differently; eg. functions relating to the regulation and management of cross-border rivers for the purposes of the Water Framework Directive become jointly exercisable by the EA and the Body. In addition, the transfer does not include the Wye Navigation or a small number of functions which the EA will continue to exercise on a UK-wide basis.

3.4 The Order also makes provision to abolish the CCW and the Welsh Environment Protection Advisory Committee and Regional and Local Fisheries Advisory Committee of the EA.

3.5 The details relating to the functions of the body are contained in the Schedules to the Order.

4. Action for Committee

4.1 The Committee's Legal Advisers will prepare a draft report in accordance with Standing Order 21, together with a detailed advice, for the Committee's consideration.

**Legal Services
November 2012**