

Explanatory Memorandum to the Natural Resources Body for Wales (Establishment) Order 2012

This Explanatory Memorandum has been prepared by the Department for Environment and Sustainable Development and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Natural Resources Body for Wales (Establishment) Order 2012.

JOHN GRIFFITHS AM

MINISTER FOR ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

28 MAY 2012

1. Description

This order establishes the new single body for the management of Wales' natural resources. The new body has the working title *Natural Resources Body for Wales*, and this order establishes the body in a way that ensures that, prior to its having transferred to it the full range of appropriate functions, it will be able to undertake the preparatory work necessary to ensure the new body will be able to function fully from the first day it becomes responsible for all the environmental responsibilities that are to be transferred to it. A second order will be brought forward to transfer functions of the Forestry Commission in Wales (FCW)¹, Environment Agency – Wales (EAW)² and the Countryside Commission for Wales (CCW) to the body.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

The Order is being brought forward under powers contained in sections 13 and 15 of the Public Bodies Act 2011 (“the 2011 Act”)

The Order is subject to a form of affirmative procedure, in accordance with section 19 of the 2011 Act. In addition to the normal requirement of affirmative procedure – i.e. that the Order cannot be made unless the Assembly approves it – the 2011 Act requires that the Order be laid in draft for 40 non-recess days. Moreover, at any time within 30 days of it having been laid, the Assembly may resolve, or a Committee tasked with scrutinising the Order may recommend, that the draft Order be laid for an additional 20 non-recess days (i.e. 60 in all) before it can be made³. In that event, the Welsh Ministers will have to have regard to any representations, any resolutions of the Assembly and any recommendations of a Committee of the Assembly tasked with scrutinising the Order. If any material changes are made to the draft Order as a result, the revised draft Order would need to be re-laid before the Assembly, with a statement summarising the changes. This revised draft Order would then be subject to normal affirmative procedure in the Assembly.

Taken as a whole, this procedure is a form of ‘super-affirmative’ procedure.

The Order confers a number of functions on the Welsh Ministers, as follows.

Article 5 - power to give guidance to the Body with respect to the manner in which it should exercise its functions so as to give effect to its purpose. The Body must have regard to this guidance in exercising its functions.

¹ Technically speaking, the Forestry Commission is one body; FCW is merely an operational name for its arm in Wales. Functions transferred will be Functions of the Forestry Commission but they will, for obvious reasons, be transferred (normally) in so far as they relate to Wales.

² A similar point applies, in relation to the Environment Agency, as to the Forestry Commission – see footnote 1.

³ But the full Assembly could overrule the Committee’s recommendation and revert to the 40-day procedure for the Order.

Article 10 - implied power to request advice and assistance from the Body (to the extent, if any, that the Welsh Ministers do not already have this power under their own incidental powers contained in section 71 of the Government of Wales Act 2006)

Article 11 - power to give the Body directions as to the exercise of its functions. The Body must comply with any such directions.

Article 12 - power to give the Body grants (in addition to the Welsh Ministers' existing powers under s. 70 of the Government of Wales Act 2006)

Article 13 - power to determine the financial duties of the Body, including a power to direct the Body to pay over to the Welsh Ministers sums received by the Body, or the amount of any capital or revenue surplus that the Body may accrue

Article 14 - power to lend to the Body (in addition to the Welsh Ministers' existing powers under s. 70 of the Government of Wales Act 2006) and to consent to the Body's borrowing from another person

Article 15 - power to guarantee loans taken out by the Body (in addition to the Welsh Ministers' existing powers under s. 70 of the Government of Wales Act 2006) and power to make directions ensuring that the Welsh Ministers recover any amounts paid out by them in consequence

Schedule paragraph 2 - power to appoint the chairperson and deputy chairperson of the Body; power to appoint 5 - 11 non-executive (non-employee) members of the Body (any deputy chairperson being one of these). (References in this document to the "Board" of the Body are references to members of the Body).

Schedule paragraph 4 - power to appoint an employee of the Welsh Assembly Government as one of the non-executive members referred to above

Schedule paragraph 7 - power to remove a non-executive member (including the chairperson or deputy chairperson) from office

Schedule paragraphs 10 -12 - power to determine the level of remuneration and allowances of the chairperson, deputy chairperson and other non-executive members and to make other determinations in relation to the payment, or amounts, of pensions, gratuities and compensation to current or former members of the Body

Schedule paragraph 13 - power to appoint, or to approve the appointment of, the first chief executive; and power to approve the appointment of subsequent chief executives

Schedule paragraphs 14 and 15 - power to approve the level of remuneration and allowances of the Body's staff and to approve determinations of the Body

in relation to the amounts of pensions or gratuities to current or former members of staff of the Body

Schedule paragraph 19 - power to determine the remuneration and allowances of co-opted committee or sub-committee members

Schedule paragraphs 21 - 22 - role of considering the Body's advance Corporate Plan and receiving its Annual Report of activities; duty to lay the latter before the Assembly

Schedule paragraphs 23-24 - power to give directions as to the Body's accounts; role of receiving the annual statement of accounts; and implied power to require information relating to the Body's property or discharge or proposed discharge of its functions.

3. Legislative background

Section 13 of the Public Bodies Act 2011 enables the Welsh Ministers to make an Order to establish a new body corporate for the purposes of that section. Other provisions in section 13 enable the Welsh Ministers to transfer certain functions (including those of the Countryside Council for Wales, a Welsh Flood and Coastal Committee and the Welsh devolved functions of the Environment Agency and Forestry Commission) to a new body established under that section. The powers also enable those bodies' functions to be modified, and the modified functions to be transferred to a new body. This Order is being made to establish a new body for the purpose of having functions transferred to it under section 13.

4. Purpose & intended effect of the legislation

Purpose

This Order is intended to establish a new single body for the management of Wales' natural resources, referred to for the purposes of this legislation as the Natural Resources Body for Wales.

The overarching purpose ascribed to the new body (article 4) is to ensure that the environment and natural resources of Wales are sustainably maintained, sustainably enhanced and sustainably used. The Welsh Ministers will be able to issue guidance to the Body as to how it should exercise its functions so that it fulfils this purpose.

The purpose recognises the key role of the Body in delivering our central organising principle of sustainable development. In both its regulatory and operational functions it will need to optimise opportunities for delivering well-integrated environmental, social and economic outcomes for the people and communities in Wales.

We want the Body to have a clear role in environmental protection, but also to be tasked with encouraging sustainable and appropriate use of our

environment and natural resources for the present and future benefit of the people and economy of Wales. Through the transparent conduct of its work, the Body will promote a wider understanding of the value of our natural resources and of sustainable development...

Legal Approach

This is the first of two planned Orders to create the Body as a fully functioning entity: this Order establishes it as a legal entity, while a later Order will be laid in order to vest the body with all the functions necessary to deliver its intended remit. This first Order provides the Body with functions necessary to undertake preparatory work to ensure it will be able to carry out any functions transferred to it by that Order.

This approach to delivering the change follows a well established path for changes of this type, with the establishment of an organisation to work with the legacy bodies to plan and implement transition. Creating the “shadow” arrangement at this stage will allow ownership of the organisational design structures and systems of the new body to rest with those who will ultimately be responsible for introducing and administering them.

Functions

The functions defined in the Order are interim functions to set the direction for the new Body and to enable the preparatory work to take place for the transfer of its substantive functions in the second Order. The second Order will revoke the main initial preparatory function contained in this Order (article 6).

To this end, the Order defines the initial function of the Body as being facilitating the implementation of any proposal of the Welsh Ministers for the transfer (with or without modification) to the Body of any function of the Countryside Council for Wales; any Welsh devolved function⁴ of the Environment Agency or the Forestry Commissioners; any function of a Welsh Flood and Coastal Committee; any of their own functions relating to the environment; or any Welsh environmental function⁵ of any person.

The Order also provides for the Body to be able to undertake work that is incidental or conducive to those initial functions during the period until the Body takes up its full functions.

These provisions will enable the Body to do those things necessary to make it into a fully functioning organisation, ready to accept the transfer, in due course, of the full range of environmental powers, duties and functions.

The main provisions cover the following issues and enable the Body to:

⁴ “Welsh devolved function” and “Welsh environmental function” are terms defined in section 36 of the 2011 Act.

⁵ See previous footnote.

- Appoint and remunerate a Chair and board members (who – in so far as they are not employees - will be appointed by Ministers) and, through the Board, to appoint a Chief Executive Officer and employee members (transitional provisions will allow Welsh Ministers to make the appointment of the first CEO if this is expedient).
- Appoint staff and make decisions on terms and conditions.
- Contract the services of contractors and consultants. It will be able to occupy accommodation, use telephones, email, other ICT, etc, to communicate internally and externally, and to enter into contracts for ICT design and development, and procure other goods and services
- Enter into arrangements, and be party to agreements, receive and pay money, including: paying salaries; incurring and reimbursing travel and subsistence costs; incurring other costs e.g. maintenance, overheads, utility bills and rent for accommodation.
- Design and deliver (and agree with Welsh Government) the key governance required for running the new body, including: organisation structures, financial schemes of delegation, etc.
- Facilitate the adoption of policies, including statutory guidance to others (e.g. prosecution policy; health and safety policy; Welsh Language Scheme) that can be put into effect when the Body takes up its full functions.
- Take steps to ensure that, from the Body's first day of full operation, arrangements are in place (under powers contained in sections 26-28 of the Public Bodies Act 2011) with the Environment Agency and the Forestry Commission for the provision of certain services.

There are specific provisions relating to the establishment and general functions of the Body which, in addition to detailing its initial functions, include a general duty placed on the Body to have regard to costs and benefits in exercising powers, a requirement to provide advice and assistance to Welsh Ministers if requested and the power for Welsh Ministers to give the Body general or specific directions as to the exercise of its functions.

In addition to the broad powers and duties required to establish and run the new body (referred to above) the Order makes provision with regard to general financial duties and to borrowing powers. In this context, the Order also makes provision with regard to Welsh Ministers' ability to underwrite any borrowing undertaken by the body.

The Schedule also places duties on the Body with regard to reporting upon its functions and the keeping and publishing of accounts.

Whilst the general and financial powers and duties that are conferred upon the Body by this Order will continue to apply, partly or wholly, they will in due course be supplemented by the second Order which will also confer the full

range of functions. For example, the second Order will include powers to investigate, to prosecute, and to raise charges.

The purpose of the powers and duties included in the present Order is to enable the Body to undertake those preparatory functions necessary to ensure the new Body will be able to function fully from the first day it becomes responsible for all the environmental responsibilities that are to be transferred to it.

The Schedule to the Order sets out the status and constitution of the new body and its membership. The Body will be established as a body corporate. It will not be a Crown body, although the second Order could confer Crown status on it in relation to certain functions. It will be a Welsh Government Sponsored Body with the Chair and non-employee Members of its Board being appointed by Welsh Ministers and the appointment of the Body's chief officer being made with the approval of Welsh Ministers.

Details and conditions of tenure and remuneration are also given in the Schedule.

The appointment of the Chair and non-employee Board Members of the new body will be regulated by the Commissioner for Public Appointments.

Requirements of the Public Bodies Act 2011

Section 19 of the 2011 Act requires the Welsh Ministers to set out why they think the Order meets the requirements of section 16 of the Act. Section 16 stipulates that the Welsh Ministers may make an Order under section 13 or 14 only if they consider that the Order serves the purpose of improving the exercise of public functions having regard to:

- (a) efficiency,
- (b) effectiveness,
- (c) economy, and
- (d) securing appropriate accountability to the Welsh Ministers.

The Welsh Ministers may make an Order under either of those sections only if they 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 expect to continue to exercise.

With regard to the section 16 requirements, it should be noted that this Order is part of a package designed to improve the exercise of public functions, the need for which was clearly articulated in the business case

<http://wales.gov.uk/consultations/environmentandcountryside/eshlivingwalescons/?lang=en&status=closed>).

However, in summary, the Welsh Government is confident that the proposed establishment of the new body will achieve efficiencies and economies, and will provide the most effective means of meeting its environmental objectives. By creating a Wales only body, taking decisions for Wales in Wales, it will improve accountability to the Welsh Ministers and the National Assembly for Wales.

This Order only provides for the creation and general powers of the new body, and the Welsh Ministers do not consider that it affects any necessary protections or the exercise of rights and freedoms by any persons.

The Business Case

Together, the two Orders are intended to deliver a new body that meets the three main factors driving the proposed changes detailed in the business case:

- The need to modernise regulation and natural resource management;
- The need to focus on Wales' priorities, opportunities and challenges reflected in Welsh legislation and policy; and
- The need to ensure value for money

The Welsh Government has undertaken detailed work to evaluate a range of options, including:

- no change;
- sharing services;
- combinations of two of the existing bodies referred to above (EAW + CCW and FCW + CCW); and
- creating a new single body.

The options were assessed against Value for Money (Net Present Value) and six qualitative criteria: outcomes for the environment; outcomes for people; outcomes for business and the economy; focus on Welsh Government priorities; organisational and operational resilience; and opportunities for staff within Wales.

The business case involved a substantial evaluation, which was undertaken by staff from the existing organisations working with Welsh Government officials over a period of more than twelve months. The final report on the work was presented in the form of a strategic outline business case which was subject to an external independent review, before being presented to Ministers.

It concluded that a single body was the option most likely to deliver the best outcome on each of the six qualitative assessment criteria. It would also deliver the best net economic benefit after taking account of the cost of change and discounting for inflation (£69m over 10 years). It also concluded that the up front cost of change is affordable and that risks can be managed.

Section 5 of this Memorandum summarises the consultation process, focusing particularly on responses that have informed the preparation of this Order; wider issues of how public functions will be exercised as a result of the second Order will be covered by the explanatory document accompanying that Order.

5. Consultation

A series of consultations by the Welsh Government has led to the decision to proceed with the policy decisions underpinning this legislation.

The Welsh Government's new Natural Environment Framework (NEF) focuses on managing our environment as a whole rather than focusing on separate parts. The new approach was the subject of a public consultation (A living Wales – a new framework for our environment, our countryside and our seas) published in September 2010 (<http://wales.gov.uk/consultations/environmentandcountryside/eshlivingwalescons/?lang=en&status=closed>).

This consultation set out the Welsh Government's new approach to the way we manage our land, water and seas. It also showed how we are actively responding to the failure to meet existing biodiversity targets⁶. The document set a broad direction of travel for the Welsh Government's future work and first raised the potential for bringing together the work of existing environmental bodies in Wales.

In order to better develop their understanding of the implications of following this route, Ministers commissioned an initial review of delivery options which reported in January 2011, followed by a full business case published in November 2011 (<http://wales.gov.uk/topics/environmentcountryside/consmanagement/nef/publications/seb/businesscase/?lang>). It set out the benefits, costs and risks of creating a single body, as well as affordability and an outline plan for its establishment.

Most recently, the Welsh Government consulted on the proposed arrangements for establishing and directing a new body for the management of Wales' natural resources. The consultation ran from 9 February 2012 to 2 May 2012 i.e. for a period of twelve weeks. The consultation document was available from the Welsh Government's website (<http://wales.gov.uk/consultations/environmentandcountryside/singlebody/?lang=en&status=closed>).

⁶ The National Assembly's Sustainability Committee published the report of its inquiry into biodiversity in Wales in January 2011. The inquiry found that Wales had failed to meet both international and national targets. The targets included the binding agreement at the international Convention on Biological Diversity (CBD) in 2002 to achieve a significant reduction of the current rate of biodiversity loss at the global, regional and national level and the 2001 commitment by the EU Heads of State and Government to a target of halting the decline of biodiversity in the EU and restoring habitats and natural systems by 2010.

In particular, the consultation sought views on the following:

- The overall proposals for establishing the new body (including the business case).
- Proposals for implementing the legal changes required to establish the new body.
- Our ambitions for the new body, together with the way in which we intend to frame its overall purpose.
- Our proposed arrangements for customer and stakeholder engagement, including mechanisms for ensuring accountability and transparency in the work of the new body.
- Our proposals for the main functions and powers of the body, including consideration of some elements of Welsh Government functions and Internal Drainage Boards.
- Our proposals for the status of the body and how it will be governed, including arrangements for an executive board and wider stakeholder engagement.
- How we propose to take forward issues around cross-border governance and our proposals for the links to Welsh Government Ministers to ensure that the body will be fully accountable to Ministers.

The consultation document sought views on 12 specific questions covering the above issues.

A total of 308 consultation responses were received. There were 223 responses from organisations and 85 responses from private individuals.

The overall analysis showed that more than 60% of the 308 respondents to the consultation supported the overall proposal to manage natural resources in a more integrated way and to establish a single body by bringing together the existing functions of EAW, CCW and FCW. Approximately 10% of respondents were opposed, with the remainder not expressing any specific views on the overall proposition, or expressing views which were closely balanced.

The sectors which broadly supported the proposal to establish a single body included private individuals, environmental/ conservation bodies, local authorities and/ or their representatives, the fisheries sector, the access and recreation sector, other business and industry, other public sector bodies, academic/ research bodies and the third sector.

Just under half of the responses from the forestry sector were broadly in favour of the proposal, with the remaining responses unsupportive or neutral. Other sectors which were less supportive of the proposal were professional bodies, local partnership groups, trade unions and consultants.

The key themes emerging from the consultation were:

- Many of the respondents in support of the overall proposal cited a wide range of potential benefits in establishing a single body.

- Some respondents set out their concerns about establishing a single body. These included environmental concerns, issues around resources and transition, as well as specific issues raised by the forestry sector and industry.
- The phased approach to the creation of the body and further development of the legislation was generally supported as respondents agreed that there was a need to carry out the approach efficiently so there is no detrimental effect on existing services and to ensure business continuity.
- There were many views on the principal aim and strategic objective, with most of the respondents suggesting amendments to either the principal aim or strategic objectives or both.
- There was broad support for the approach to the delivery framework, although it was recognised that more work was needed on the actual outcomes and objectives.
- The list of functions for the new body was generally thought to be reasonable, though many detailed points were suggested.
- Many respondents agreed with the proposal to transfer marine and wildlife licensing, and tree and plant health, functions to the new body.
- The importance of the new body having a good scientific base was emphasised. There was support for the proposal for the Welsh Government to co-ordinate investment in environmental research, although many thought that the new body should have flexibility to define and implement its own research.
- In general the proposals for the status, governance and accountability of the new body were welcomed. Most respondents agreed that the body should be established as a Welsh Government Sponsored Body which is independent from government. There was widespread support for transparency and accountability across the whole range of the body's work.
- Overall the proposals for the stakeholder arrangements were welcomed. Respondents emphasised the importance of pro-active stakeholder engagement and that the success of the new body was dependent on having strong stakeholder arrangements. Many respondents highlighted that any arrangements must be developed in conjunction with stakeholders.
- In general there was support for the proposals relating to the regulatory arrangements, including clear separation of regulatory and operational work in situations where the body regulates its own activities.
- Many respondents supported the need to simplify regulatory systems, though there were concerns from some that this should not be allowed to impact on environmental protection. Transparency of decision-making and the publication of decision documents were widely supported.

Of those responses that were of particular significance to this Order, were those concerning the phased approach to the creation of the body and further development of the legislation. This was generally supported as respondents agreed that there was a need to carry out the approach efficiently so as to

avoid any detrimental effect on existing services and to ensure business continuity.

A significant majority of respondents were broadly supportive of the development of the new body, with most of the respondents suggesting amendments to either the aim or the objectives, or both. In drafting of the overarching aim included in this Order, we have taken those views fully into account, along with suggestions made by the three existing bodies and views expressed by Assembly Members in the Plenary debate on the consultation responses held on 22 May 2012.

Those consultation responses that relate more to the second Order will be summarised and addressed in the explanatory document that accompanies that Order.

6. Regulatory Impact Assessment (RIA)

No regulatory impact assessment has been prepared for this Order. This is because the purpose of this Order is solely to create a body corporate under section 13 of the Public Bodies Act 2011 to enable certain key arrangements and decisions to be made prior to the full transfer of functions to the body from the Countryside Council for Wales, Environment Agency - Wales, Forestry Commission – Wales, Welsh Government and, potentially, other bodies.

There are therefore no identifiable costs to consumers or businesses associated with the implementation of this Order. Costs and benefits for the Welsh Government and the three existing bodies are set out in the business case. This has been published and subject to consideration by the Environment and Sustainability Committee.

The wider context including the costs, benefits and risks of the overall change has been set out in the business case and the subsequent consultation.

At this point, the new body will not act in a regulatory role nor will it exercise any functions on behalf of the Welsh Government; the functions which will eventually be vested in it will continue to be exercised by the existing environmental bodies up to the full vesting date.

The Order has no impact on –

- (a) the statutory duties of the Welsh Ministers concerning equality of opportunity (section 77 of the Government of Wales Act 2006), the Welsh language (section 78) and sustainable development (section 79); or
- (b) the local government, voluntary sector and business schemes made under sections 73, 74 and 75 of the Government of Wales Act 2006 respectively.

Where the new body, whilst acting in its “shadow” role, has to formulate any policies in advance of the full vesting date (e.g. with regard to equality, Welsh language, enforcement, etc.) to enable the body to function fully upon vesting, the body will undertake any relevant consultation and/or impact assessment.

A further Order will be laid in due course to effect the transfer (and where necessary, the modification) of the full range of relevant functions. That Order will be accompanied by a further explanatory memorandum and any appropriate regulatory impact assessment.