

Jane Davidson AC/AM

Y Gweinidog dros yr Amgylchedd, Cynaliadwyedd a Thai
Minister for Environment, Sustainability and Housing



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

MB/JD/0589/09

Mick Bates AM
Chair, Sustainability Committee
Sustainability Committee
Cardiff Bay
Cardiff
CF99 1NA

15 July 2009

Dear Mick,

Draft Flood and Water Management Bill – Large Water Infrastructure Projects

Thank you for your letter of 23 June 2009 that raised two queries about the granting of permission for large scale water infrastructure projects in Wales in the light of the recent amendments to section 167 of the Water Industry Act 1991.

With regard to your query about who in future will be responsible for giving consent under section 167 of the Water Industry Act 1991 for such projects if they are proposed to be built in Wales by a water undertaker whose area is not "wholly or partly in Wales", the Welsh Assembly Government's understanding is that once the Planning Act 2008 amendments to section 167 of the Water Industry Act 1991 come into force, then there will no longer be any person capable of giving consent (or, more properly, making a 'compulsory works order') under section 167 in such instances.

Prior to the Planning Act 2008, the Welsh Ministers had the power to make a compulsory works order, under section 167 of the Water Industry Act 1991, on the application of any water undertaker for the purposes of, or in connection with, the carry out of any of its functions. The Welsh Ministers had the power to make such orders in relation to any part of Wales (though the power to make such orders in relation to matters other than the construction or enlargement of reservoirs and within the catchment areas of the rivers Dee, Wye and Severn was exercisable by the Welsh Ministers concurrently with the Secretary of State).

The effect of the amendments in the Planning Act 2008 (section 36 and Schedule 2) to section 167 of the Water Industry Act 1991, when they come into force, will be to limit the circumstances in which applications for such orders can be made. The Welsh Ministers will remain able to make such orders in relation to any part of Wales (though the power to make such orders in relation to matters other than the construction or enlargement of reservoirs and within the catchment areas of the rivers Dee, Wye and Severn will remain exercisable by the Welsh Ministers concurrently with the Secretary of State). However, an application for a compulsory works order will only be capable of being made by an undertaker whose

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area is wholly or partly in Wales, for the purposes of, or in connection with, the carrying out of its functions in relation to an area in Wales. Since application for compulsory works orders will not be capable of being brought in any other circumstances, this means that Welsh Ministers will no longer be able to make such orders:-

- On the application of undertakers whose areas are not wholly or partly in Wales, or
- On the application of undertakers whose areas are wholly or partly in Wales, but where the proposed operations are for the purposes of, or in connection with, the carrying out of their functions in relation to an area outside of Wales (such as the building of a reservoir to supply customers not in Wales).

The power to grant such orders has not been transferred elsewhere, and the intention of the Planning Act 2008 was not to alter the devolution settlement. In practice, the effect of the amendment is that the facility for undertakers that do not meet these new criteria to apply for compulsory works will be removed, ie such undertakers will no longer be able to apply to any body/person for a compulsory works order in Wales, and would therefore be unable to proceed with any such plans.

We therefore believe this unfortunate situation was brought about by error, rather than by design, in trying to deliver the UK Government's desire for applications for the construction of a dam or reservoir in England to be subject to the requirement for a "development consent" from the Infrastructure Planning Commission or the Secretary of State (as opposed to a compulsory works order under section 167 of the Water Industry Act 1991).

I am grateful to you for highlighting this error. I will write to the Secretary of State to alert him to the situation and to seek the earliest opportunity to remedy matters. It is important to note though that other legislative controls governing the impoundment of water in Wales such as licences issued by the Environment Agency under the Water Resources (Abstraction and Impounding) Regulations 2006, are not affected by these amendments.

With regard to the second part of your query why the term "wholly or partly in Wales" was used in the Planning Act 2008, while the term "wholly or mainly in Wales" is used in the Water Industry Act 1991 and now in the draft Flood and Water Management Bill, I agree that this may seem odd. There are occasions, however, when one term is more appropriate to use than the other. To explain the term "wholly or mainly in Wales" is usually used in connection with a water undertaker's area of appointment when it is practical to establish Welsh Ministers powers as they apply to the functions of a water undertakers as a whole, hence the use of this term in the Water Industry Act 1991 and the Draft Flood and Water Management Bill. It is, however, sometimes more appropriate for matters to be demarcated in another way, hence the use of this term "wholly or partly in Wales" in the Planning Act 2008 to define the electric lines and gas transporter pipe-lines for which development consent may be granted under that Act.

I agree though, that the use of the term "wholly or partly in Wales" in the Planning Act 2008 amendments to section 167 of the Water Industry Act 1991 does not appear to serve a purpose in this instance. I will also be exploring the possibility of clarifying the legislation in this area with UK Government colleagues

I hope this helps clarify matters. I am grateful to the Sustainability Committee for considering the proposals in the consultation in the Draft Flood and Water Management Bill and for investigating the existing legislation concerning the position, and for raising the inconsistencies it has discovered with me. I will stress to the Secretary of State, in the strongest terms, that it is our fundamental requirement that legislative provisions that relate, or might relate, to large water infrastructure projects must properly and accurately ensure that responsibility rests with Welsh Ministers and the National Assembly for Wales in all

instances, and that any departure from this must be remedied at the earliest opportunity. I will ensure you are kept informed of progress.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Jane Davidson', written over a circular stamp or watermark.

Jane Davidson AM

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