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Minister for Environment, Sustainability and Housing



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Eich cyf/Your ref:

Ein cyf/Our ref: JD/01530/10

Janet Ryder AM
Chair, Constitutional Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

7 July 2010

Dear 

CA454 - The Environmental Civil Sanctions (Wales) Order 2010
CA455 - The Environmental Civil Sanctions (Miscellaneous Amendments) (Wales)
Regulations 2010

Thank you for your letter of 7 July 2010 enclosing the Constitutional Affairs Committee report on the merits of these Instruments.

The report draws attention to the fact that there are a number of differences between the Order and Regulations made in England and those being implemented in Wales. I have addressed each of the points raised below:-

Regulators

In England civil sanction powers have been given to the EA and Natural England and in making the Order and Regulations in Wales we did consider giving similar powers to CCW. The Regulatory Enforcement and Sanctions (RES) Act 2008 requires the Welsh Ministers to be satisfied, before conferring power on a regulator to issue civil sanctions, that the regulator will use the power in accordance with the principles set out in the Act, i.e. that regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent and that they should be targeted only at cases in which action is needed.

There is nothing in the RES Act which sets out the manner in which the order-making authority should satisfy itself that the regulator will act in accordance with these principles. In England, Natural England were reviewed by the Better Regulation Executive (BRE) in line with the Hampton principles.

Before we can confer civil sanction powers on CCW, it is necessary for some form of assessment to be carried out of the regulatory activities, policies, procedures, governance arrangements that CCW has in place in order to meet the requirements of the RES Act.

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Countryside Council for Wales carry out a lot of their regulatory enforcement functions in conjunction with other bodies, for example the police. The level of regulatory enforcement activity is consequently relatively low. Delaying giving CCW civil sanction powers would not have a significant impact on their regulatory enforcement activities.

We have considered whether the Governance review of CCW would provide an adequate assessment to enable the Welsh Ministers to be satisfied that the requirements of the RES Act have been met. However the Governance report does not specifically discuss the organisation's regulatory activities. Moreover the report advises that attention is given to the principles of better regulation to ensure proportionality and appropriateness. It notes that as well as making CCW's regulatory functions more efficient and effective, this could improve relations with stakeholders and assist the planning function. On balance, we have concluded that the governance review alone would not be an adequate assessment of CCW's regulatory activity.

There is no reason to suppose that CCW do not or would not act in accordance with the RES principles. However, before we could confer civil sanction powers on them there needs to be some form of assessment of the regulatory activities, policies, procedures, governance arrangements that CCW has in place in order to meet the requirements of the RES Act. From the Assembly Government point of view, it is sufficient in this case to proceed with the Environment Agency alone in Wales. If CCW demonstrate RES compliance in the future, this order could be amended to bring them in.

Power of Entry

No power of entry has been provided within the Wales Order. The Environment Agency already have powers of entry, so this requirement was not needed. It was provided for in the England Order specifically for Natural England.

Maximum Variable Monetary Penalty

The England Order includes a cap of £250,000 on the amount that may be charged by a Regulator for a Variable Monetary Penalty. The Wales Order does not provide this regulatory cap. Although the Welsh Assembly Government agreed to the placing of a £250,000 cap on Variable Monetary Penalties it has not been provided for in the Wales Order because there is no enabling power in the RES Act that would allow for the imposition of a cap. Such a cap would run contrary to the wide discretion conferred under section 42 of the RES Act on the regulator to determine the amount of the penalty.

Instead, the Welsh Assembly Government has recommended to the Environment Agency, as regulator to apply the £250,000 limit for Variable Monetary Penalties and this will be included in guidance that we will be issuing, jointly with DEFRA, to the EA. The Environment Agency has been involved in the discussion for a limit to the amount of a Variable Monetary Penalty.

Publication of Enforcement Action

Article 14 of the Wales Order states that the Welsh Ministers may disapply various requirements to publish reports if they consider that publication would be inappropriate. In the England Order this power is instead given to Regulators. The draft Wales Order reflects the wording of section 65(4) of the parent Act which states; that the provision requiring publication of enforcement action does not need to apply in cases where the "relevant authority" considers that it would be inappropriate to do so. The "Relevant authority" is defined in the parent Act as meaning the Welsh Ministers.

Other Differences

There are also a number of other differences between the England and Wales Order and Regulations highlighted by the Constitutional Affairs Committee. These are minor differences and reflect legal drafting practice. Welsh Assembly Government lawyers have provided a tighter definition within the Wales Order in certain instances as opposed to the England Order. In doing so Welsh Assembly Government lawyers have remained consistent with the provisions of the Parent Act and have not gone beyond the powers the Act provides.

Yous,

A handwritten signature in black ink, appearing to be 'Jane Davidson', written over a horizontal line.

Jane Davidson AM

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