

**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 obtained<sup>1</sup>.

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**

#### **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**

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

## **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**