

Explanatory Memorandum to the Deregistration and Exchange of Common Land and Greens (Procedure) (Wales) Regulations 2012, the Commons (Deregistration and Exchange Orders) (Interim Arrangements) (Wales) Regulations 2012 and the Works on Common Land, etc (Procedure) (Wales) Regulations 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 above regulations. I am satisfied that the benefits outweigh any costs.

John Griffiths AM

Minister for Environment and Sustainable Development

7 March 2012

1. Description

The Regulations together give effect to changes introduced by the Commons Act 2006 (“the Act”) in relation to deregistration and exchange of common land in Wales and the undertaking of works on common land in Wales.

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

There are none.

3. Legislative background

The Commons Act 2006 received Royal Assent in July 2006.

- The Deregistration and Exchange of Common Land and Greens (Procedure) (Wales) Regulations 2012 will give effect to section 16 of the Act – procedure for applications to the Welsh Ministers for the deregistration or the deregistration and exchange of land registered as common land or as a town or village green. The powers to make the regulations are provided by sections 17(10), 24(1), (2) and (5) and 59(1) of the Act.
- The Works on Common Land, etc (Procedure) (Wales) Regulations 2012 (“the Works Regulations”) will give effect to section 38 of the Act – procedure for applications to the Welsh Ministers for consent to carry out restricted works on common land (as defined in section 38(2), (3) and (4) of the Act) and certain related types of applications. The powers to make the regulations are provided by sections 39(6), 40 and 59(1) of the Act.
- The Commons (Deregistration and Exchange Orders) (Interim Arrangements) (Wales) Regulations 2012, which are made under the provisions of sections 17(3), 24(1) and (2)(m) and 59(1) of the Act, will enable consents given by the Welsh Ministers under section 16 of the Act to be entered into the registers maintained pursuant to the Commons Registration Act 1965 pending the implementation of Part 1 of the Act in relation to the maintenance of registers under that Act.

4. Purpose & intended effect of the Works on Common Land, etc (Procedure) (Wales) Regulations 2012 and the Deregistration and Exchange of Common Land and Greens (Procedure) (Wales) Regulations 2012

In implementing both of the Regulations the aim is to achieve a system for consenting to works on common land and exchange of common land that safeguards the future diversity and variety of common land in Wales, clarifies procedures for those who need to apply for consent and provides a clear understanding of the enforcement procedures for unlawful works.

The Regulations protect common land and contribute to the Welsh Government's objective to care for Biodiversity by ensuring that, as a finite resource, common land is not developed unnecessarily, that access should not be prevented or impeded unnecessarily and its proper management is encouraged (Planning Policy Wales 2011 paragraph 5.2.11).

This Regulatory Impact Assessment (RIA) assesses the impact of certain measures introduced in the Act. It should be read alongside the Act and the accompanying Explanatory Notes.

Common land is valued for agriculture, recreation, nature conservation, landscape and for its historical and archaeological significance. The Welsh Government wants to ensure that the open and unenclosed nature of our common land is properly protected for current and future generations to enjoy. Some works may be appropriate if they improve the common, but we believe owners, common rights holders, and the public (who have a right of access to all common land) should have the opportunity to express their views on a proposal in all but the most minor cases.

5. Consultation

An Regulatory Impact Assessment (RIA) has been completed and the details of the consultation undertaken is included below.

PART 2 – REGULATORY IMPACT ASSESSMENT

Options

Option 1: Do Nothing

This would mean that sections 16 and 38 of the Act would not be implemented in Wales and the current consenting regimes would continue. No consultees suggested that the current system of consents should be maintained.

Option 2: Introduce new systems

The Welsh Government proposed to introduce a new 3 stage consenting regime for both the carrying out of restricted works and for deregistration and exchange of common land where the applicant:

- Fully considers the options open to them through improved guidance;
- Communicates plans to all interested parties to try to reach a local consensus and advertises the proposals locally; and
- Presents an application to Welsh Government for consent to carry out works or an exchange of land with supporting documentation e.g. maps, commons register sheet and a copy of the local advert etc.

All consultees supported the proposal to introduce a new consenting regime with general agreement with our suggestions of its features. They thought that the system allowed for the interests of stakeholders to be considered objectively and expressed a desire for guidance to bring greater clarity and detail to the process. It was emphasised that informal consultation should be encouraged from the outset of any proposals for change on a common.

Costs & benefits

Sectors and groups affected

Any changes to the legislation on protecting Wales' common land from unlawful or inappropriate development will affect many groups with an interest in the land. These include farmers, those with rights of common, private individuals, and local authorities. These groups will be required to follow new procedures which give more certainty and clarity to the protection.

Benefits

Option 1

Economic

People are familiar with the current process and advertise their proposals before making an application. After making an application, the process is managed by Welsh Government thus saving applicants the administrative time that would otherwise be involved in dealing with representations.

Environmental

Works needed to enable sustainable management of common land can only proceed with consent from the Welsh Ministers. Any person may take enforcement action for the removal of unlawful works, however the effectiveness of enforcement depends on:

- how those able to enforce prioritise against their other objectives
- uncertainty about the land to which the protection applies

Deregistrations of common land can only proceed with the issue of an Order by the Welsh Ministers ensuring that no exchange results in a less favourable overall position for the common.

Social

The public interest is protected as neither works nor deregistrations can proceed without consent. In deciding whether to give consent to works the Welsh Ministers must consider the "benefit to the neighbourhood" and the "private interests in the land". The benefit to the neighbourhood is defined as the health, comfort and convenience of the inhabitants of any

populated places where the land is situated and the enjoyment of the common as an open space. "Private interests" are defined as including the advantage of those interested in the common, i.e. landowners and those with rights of common. In deciding whether to make an order to exchange the Welsh Ministers must be satisfied that the proposed exchange would be beneficial to the owners of the respective parcels of land, and that its terms are just and reasonable. This latter consideration includes taking account of the views of the local people and the impact on the common. As much common land is in rural areas, any effects on rural communities are taken into consideration.

Option 2

Economic

The applicant will be able to tap in to clear guidance which will direct them to the best route for their application and encourage early consultation with interested parties. This should lead to fewer objections and a faster application process.

Where an application is required, people will undertake informal consultation and advertise their proposals. As with the current system, after making an application the process is managed by Welsh Government thus saving applicants the administrative time that would otherwise be involved in dealing with representations. Most applications will be decided without the need for further evidence gathering or input from the applicant.

Environmental

The new procedures should ensure it becomes much clearer when consent is necessary. Under the new regime, it will still be the case that any person may take enforcement action for the removal of unlawful works but there will be greater certainty about the land to which the protections apply, and interested individuals considering action will be equipped with clear guidance to lead them through the process.

Deregistration and exchange of common land would only proceed with the issue of an Order by the Welsh Ministers, ensuring that no exchange results in less favourable overall position for the common.

Social

The public interest is protected as most works cannot proceed without consent. The new system will achieve an appropriate level of protection for common land which recognises the value of the open and unenclosed nature of many commons. Exemptions may be appropriate for certain categories or classes of works thus making the process easier for those wishing to carry them out but these can be identified with the passage of

time. Greater enforcement could improve public access to the common for public recreation.

Costs

Option 1

Economic

There can be considerable delay in obtaining consent under the current regime. A great majority of applications are from individuals and whilst we are not able to estimate the costs to individuals there will be no diminution in costs were this option to be followed.

Environmental

With deregistrations, the criteria are not clear and do not take explicit account of the environmental impact on the common. These matters can have a detrimental effect on the environment on the common. Confusion over the current process may also lead to people deciding not to undertake projects and so the common is less well managed.

Social

People are unclear as to when consent is needed and this can lead to unlawful works appearing on common land, restricting access to the land for public recreation. With unclear criteria for deregistrations, an exchange could have a disproportionate effect on rural communities who habitually use existing common land.

Option 2

Economic

Applicants will need to be committed to the early stages of the process and to closely follow guidance to ensure they carry out good informal consultation. We are not able to estimate costs but there will be savings to applicants in having a more clearly structured process to follow and greater detailed guidance and information on how the new system operates.

Environmental

There should be no environmental costs providing guidance is followed.

Social

The position will not change in respect of identifying whether works are required but we expect a reduction in social costs when guidance on other issues is provided.

Recommendation:

Regulations will be introduced to commence the new consent procedures for works and deregistrations and exchanges of common land from 1 April 2012.

Consultation

The Welsh Government consulted Local Authorities, Welsh Local Government Association, National Park Authorities, MPs, AMs, Farming Unions, Statutory consultees, Commoners Associations, Open Spaces Society, Wildlife groups, Environmental groups amongst others who have interest or represent interests in common land between October 2007 and January 2008 on ways to enact the range of the Commons Act's provisions to deliver a system which safeguards common land in Wales yet is simple for stakeholders to comply with without placing an undue regulatory burden on them.

Under current arrangements, people wishing either to carry out works on common land or to deregister and exchange common land cannot do so unless consent is given by the Welsh Ministers. The current regime requires that applications for consent are advertised and the Welsh Ministers are required to take account of any subsequent representations.

There are often delays because of a lack of understanding on the part of applicants and those likely to be affected by the application, which can lead to protracted exchanges of correspondence as the Welsh Ministers attempt to facilitate understanding and submission of all necessary information.

The new regime, through regulations, orders and detailed guidance, encourages applicants to undertake widespread consultation with those likely to be affected and obtain their support before submitting a formal application. It is intended that by the time applications are submitted for consideration, all relevant issues (interests of common rights holders, local inhabitants and the wider public interest, including in particular nature conservation, the conservation of the landscape, and the protection of public access rights and historic features) should have been exposed and factored into the application. Through this process, it will become apparent to a prospective applicant whether the proposal is likely to succeed before it reaches the Welsh Ministers and therefore reducing costs and resources for both the Welsh Ministers and the applicant.

The new regime will also provide clearer criteria against which applications will be considered, thus facilitating greater certainty and confidence in the process by all involved.

Responses to the consultation indicated broad agreement with the Welsh Government's proposals for the new consent regime, and confirmed that it achieved the right balance between ensuring all interests were considered and the need to reach a timely decision. Respondents emphasised the need to produce clear guidance to assist applicants under the new regime.

Different approaches in England and Wales

In many respects the new regime in Wales will mirror that in England. However, a number of issues were raised where it was envisaged there may be differences between England and Wales:

Works on common land for which consent should not be required under the new regime

Section 38 of the Act sets out the circumstances in which the Welsh Ministers' consent is required to carry out works on common land in Wales. DEFRA has issued guidance on works that do not require the consent of the Secretary of State in England under section 38 of the Act.

In Welsh Government officials' experience, no matter how much it is stressed that guidance is just that, the examples provided inevitably take on a prescriptive role and no attention is paid to the particular circumstances of the works proposed. Consequently, it was considered counter-productive to provide such guidance in Wales. Respondents did provide a range of works which they considered should not require consent but it was considered that the nature of the works identified by the respondents and the need (suggested by the respondents) for those works to be the subject of more detailed guidance and conditions/limitations added weight to the argument that the question of whether works would be caught by section 38 of the Act should be considered in the light of all relevant circumstances and on the basis of fact and degree.

Works which would require consent but should be exempted from the need to apply for it

Section 43 of the Act enables the Welsh Ministers to make an Order dis-applying the requirement to obtain consent under section 38. Such an Order may be made only where the Welsh Ministers consider that the works so specified are necessary or expedient for specified purposes such as nature and archaeological conservation or the use of the land by the public.

In England, such an Order has been made. The Order exempts certain works, such as the fencing of land in connection with agri-environment schemes, from the requirement to obtain consent. The decision to exempt work from the consent requirement by including it in the Order was made on the basis of DEFRA's past experience.

There is no similar range of casework in Wales that provided evidence to support the making of such an Order. Therefore, views were sought through the consultation as to what could be included in an Order in Wales and what evidence was available to support this. Some examples were presented, but little or no explanation in support. As a result, it is proposed that no such Order be pursued in Wales, although it would be possible to reconsider at a future date should the need arise. With this in mind section 43 of the Act is being

brought into force to enable such an Order to be made if considered appropriate.

Responsibility for enforcement of control over works on common land

The Act actually provides that action against unauthorised works may be taken by any person, not only local authorities. In view of this, and the Welsh Government's belief that those who actually have rights in the land concerned should also have a responsibility for protecting it, it is not proposed to place an expectation of enforcement on any one particular person or body. There was no argument of substance against this approach.

Respondents raised the need for detailed guidance on enforcement issues and this need will be addressed by the guidance covering the following issues:

- what is involved in taking action through the courts – giving clear and specific guidance for owners, commoners, local authorities, corporate bodies and individuals;
- what actions are open to the court;
- the role of those who may take action in ensuring that common land are properly protected.

Charging for applications

The Act contains provision for the Welsh Ministers to charge a fee for applications for consent for works and for deregistration or deregistration and exchange of land. DEFRA had been able to identify the cost of considering and determining applications for exchange of common land and applications for consent to carry out works on common land based on cases they had received in the previous year. The highest estimated costs were £1,400 for an application to carry out work on common land and £4,900 for an application to exchange land.

Because of low case numbers in Wales, it was not possible to produce any meaningful figures as to the cost to the Welsh Government of dealing with each type of application. For the purposes of the consultation, assumptions were made that there was unlikely to be much variance between costs in Wales to those in England. Consultees were asked to comment on options in respect of charging based on these assumptions. Not surprisingly, there was mixed reaction about charging and, if charges were to be introduced, the level of those charges.

When considering the way forward, it was borne in mind that in the last 10 years the Welsh Ministers received 42 applications for works on common land and 11 applications for consent for deregistration. This is an average of 4 applications for works and 1 application for consent to deregister land per year. Using the costs identified by DEFRA, the annual cost to the public purse in

Wales for subsidising all those applications would be £10,500 (£1,400 x 4 = £5,600 + £4,900 = £10,500).

In view of this it was considered that there would be little benefit in recovering this level of cost. The situation will be kept under review, however, and charges imposed if necessary. With this in mind the provisions to enable a fee to be charged are being brought into effect.

The Act makes provision for the Welsh Ministers to appoint persons to determine applications for works on common land and it has been decided that the Planning Inspectorate will undertake this role in Wales unless jurisdiction over particular cases is recovered by the Welsh Ministers.

The Planning Inspectorate will carry out the procedural work as well as the decision work on applications for consent to carry out works on common land. The Inspectorate will also carry out the procedural work for applications for deregistration under section 16 of the Act, although the decision on the merits of these applications will still be taken by the Welsh Ministers as they affect people's land and ownership rights. Provision has been included within the Planning Inspectorate's budget projections to cover the costs of handling this casework without charging applicants (BEL 2250). As indicated above, the ability to carry out this work without charging applicants will be kept under review.

Competition Assessment

The Competition Assessment Filter has been applied to the proposals for the new regime for consent to works. Implementation of either option would impact upon a large number of different markets, all of which are already subject to regulatory controls that may, in themselves, inhibit competition to some extent. Applications for consents come from micro businesses through to corporate concerns, and the investment in time and resources in making an application is significantly higher for micro businesses compared with corporate concerns. However, we do not anticipate that implementation of any of the options will result in any significant further restriction in competition in any particular market.

| The competition filter test | |
|---|---------------------|
| Question | Answer yes or no |
| Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share? | No |
| Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share? | No |
| Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share? | No |
| Q4: Would the costs of the regulation affect some | No |

| The competition filter test | |
|--|---------------------|
| Question | Answer yes or no |
| firms substantially more than others? | |
| Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation? | No |
| Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet? | No |
| Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet? | No |
| Q8: Is the sector characterised by rapid technological change? | No |
| Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products? | No |

Post implementation review

After the new consent regime has been running for a period of three years stakeholders' views will be canvassed to judge the effectiveness of the new system. This will be done through a consultation exercise of all those who were consulted on the initial proposals.