

Explanatory Memorandum to the Flood and Coastal Erosion Risk Management Information Appeal Regulations 2011

This Explanatory Memorandum has been prepared by the Department for Environment, Sustainability and Housing and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Flood and Coastal Erosion Risk Management Information Appeal Regulations 2011. I am satisfied that the benefits outweigh any costs.

MINISTER FOR ENVIRONMENT, SUSTAINABILITY AND HOUSING
DATE

1. Description

These regulations provide a person with the right of appeal to the First-tier Tribunal against a penalty notice issued against them for failing to provide information in compliance with an enforcement notice from the Environment Agency or lead local flood authorities, using powers under the Flood and Water Management Act 2010 (“The Act”). The Act requires these regulations to be made.

2. Matters of special interest to the Constitutional Affairs Committee

The Committee may wish to note that the Act provides that penalty notices allow a period of at least 14 days for payment of the penalty, however the Tribunal rules which apply to these appeal provisions allow a period of up to 28 days for an appeal to be lodged. This creates an anomaly in that an Authority (either the Welsh Assembly Government, Environment Agency or a lead local flood authority) may request payment of a penalty before the period within which an appeal can be lodged has expired. We intend to address this through guidance to Authorities, stipulating that they should allow a period of 28 days for payment of a penalty, commensurate with the period for appeals.

3. Legislative background

Section 14 of the Act provides a power to the Welsh Ministers, the Environment Agency and lead local flood authorities to request a person to provide information in connection with the Minister’s, Agency’s or lead local flood authorities flood and coastal erosion risk management functions. Section 15 of the Act provides for the Minister, Agency or lead local flood authority to give an enforcement and penalty notice to any person who fails to comply with a request for information.

For the purposes of these sections, ‘a person’ is an inclusive term which means anyone and so includes reference to all organisations, authorities, businesses or individuals. If they fail to comply with the enforcement notice then the Minister, Agency or lead local flood authority may impose a penalty notice up to £1000.

Section 15 requires regulations to be made providing for a right of appeal against penalties. The regulations must confer jurisdiction on: (i) “the Minister” (the Welsh Ministers in respect of penalties issued by the Welsh Ministers, the Environment Agency in respect of a request relating to a flood or coastal erosion risk management function in relation to Wales and a local authority in Wales); (ii) a court; or (ii) a tribunal. The regulations must also make provision about procedure.

The first set of Regulations are subject to the approval of the Assembly. Any subsequent Regulations would be subject to annulment.

4. Purpose & intended effect of the legislation

The policy objective behind the relevant provisions (sections 14 and 15 of the Act) is to enable the Welsh Ministers, the Environment Agency and lead local

flood authorities to obtain the information they need to carry out their flood and coastal erosion risk management functions.

The requirements for the Welsh Ministers to develop, maintain and apply a National Strategy for flood and coastal erosion risk management in Wales and for lead local flood authorities to develop, maintain, apply and monitor local flood risk management strategies are integral to the objectives of the Act. In order to develop these strategies, the Welsh Ministers and lead local flood authorities will require information from a number of individuals and bodies, for example landowners and water companies. Previously, difficulties have been encountered in obtaining such information, even where its provision is manifestly important to the management of serious risks.

The Environment Agency will also require information to fully implement their responsibilities under the National Strategy and to undertake their enhanced oversight role in Wales, provided for within the Act. This includes monitoring implementation of the National Strategy and providing advice and assistance on its implementation by lead local flood authorities, Internal Drainage Boards and water companies.

Section 14 of the Act gives the Welsh Ministers, the Environment Agency and lead local flood authorities a specific power to request this information from any person. These powers are, however, ineffective unless sanctions are available in cases of non-compliance. Section 15, therefore, provides for non-criminal sanctions where a person does not comply with such a request for information.

The Welsh Ministers, the Environment Agency and lead local flood authorities must first serve an enforcement notice specifying the information requested. If that is not complied within a specified period, they can then issue a penalty notice for a sum not exceeding £1,000, which is recoverable as a debt payable to the Authority issuing the penalty. We will be working with the Environment Agency and local authorities to ensure that appropriate guidance is in place to ensure that penalty notices are only used in a proportionate, transparent and consistent manner.

Section 15 (8) appeals procedures

The Act requires that there be a right of appeal against such penalties. This is important to ensure both that sanctions are only applied where warranted, and that information requests are reasonable, pertinent and made within the remit of the relevant Authority. It is important in maintaining the credibility of the Act that the appeals mechanism is independent, efficient and a cost effective way of adjudicating any disputes.

The Regulations provide that the First Tier Tribunal (FTT) should handle the appeals process. The FTT comes within the ambit of the Tribunals Service, which is an executive Agency of the Ministry of Justice. The FTT is an established, independent appeals body, dealing with matters previously handled by a number of other Tribunal bodies, including the Information

Tribunal. A major ground for appeal may be commercial confidentiality and the First Tier Tribunal will be used to dealing with such matters.

The process for bringing an appeal is governed both by these regulations and by the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

These proposals are legally important as they meet the expressed requirements in the Act for an appeals mechanism to be established, and indeed are necessary to help facilitate the effective workings of the Act generally.

5. Consultation

Details of the consultation undertaken are included in the RIA below.

REGULATORY IMPACT ASSESSMENT

What is the problem under consideration

The Flood and Water Management Act 2010 (the Act) introduces new duties for the provision of information to Flood Management Authorities (the Environment Agency, Lead Local Flood Authorities and Welsh Ministers) where this is relevant to flood risk management. These are set out in Section 14 to the Act, which is supported by powers of sanction set out in Section 15.

Without a sanction the power to require information is toothless, with the risk that information required for the effective undertaking of an Authorities flood and coastal erosion risk management functions is not provided and the management of flood and coastal erosion risk is affected. In extreme cases this could result in an increased risk to life. The Act makes clear that a right of appeal should be established in respect of these penalties and Section 15 of the Act cannot, in fact be commenced without the appeals mechanism being established.

What policy options have been considered

Baseline – “do nothing” – do not implement section 15 - no sanction

The Act provides that consideration of appeals should be vested in the Minister, a court or a tribunal. The Act makes clear that a right of appeal should be established in respect of penalties. The “do-nothing” option cannot therefore be adopted.

This option would fail to address concerns raised by a large number of responders to the 2009 consultation on the Flood and Water Management Bill, relating to the duty to co-operate and sharing of information. Parties, including information requesters and providers, are keen to see guidance that specifies these terms in more detail.

The key advantage to Authorities is the provision of an incentive for information sharing which will help secure a proportion of the wider benefits of local flood risk management (total net benefit identified at Bill stage of £180m per annum). The appeals mechanisms will enable unjustified costs (including to business) to be avoided; for those lodging justified appeals the mechanism should be effectively cost neutral.

Options for an appeals system

As outlined above, we believe an appeals system is integral to the proper establishment of information requests and the main difference in approach are essentially around administrative costs to Government and the perceived independence and transparency of the process.

Option 1 – Power of appeal vested in the Welsh Ministers

This option would give the Welsh Ministers the power to consider appeals under s15(8). This would entail appellants writing to the Welsh Ministers, who would then decide whether to accept the appeal or not. In some cases officials would make recommendations to the Welsh Ministers but, in complex cases, the Welsh Ministers could appoint an independent inspector to adjudicate.

The main problem with such an approach is that it would not be an independent or transparent process. The Welsh Ministers can impose penalties and this approach would see them considering appeals against their own actions. Even where an independent inspector is appointed, this could still give rise to concerns about the role of the Welsh Ministers.

We have discounted this option because it would not be a transparent process and, whilst the costs of individual appeals would be similar to other options, the need to appear transparent may lead to a higher percentage of oral hearings than might normally be the case.

Option 2 - First Tier Tribunal Service

The First Tier Tribunal is an Executive Agency of the Ministry of Justice, and was established to take jurisdiction over a number of former appeals bodies covering a wide range of areas such as Social Security, Pensions, Local Authority administration and Information appeals. It is considered a suitable body for handling appeals as:

- i) it is an already established, independent, tribunal service which deal with a number of environmental based civil sanctions;
- ii) its work covers a number of previous tribunals such as the Information Tribunal - many of the appeals may be on the basis of commercial confidentiality and so the Tribunal service will be used to dealing with such matters;
- iii) the cost is likely to be lower than for the Planning Inspectorate or appointment of an independent assessor.

Option 3 - Planning Inspectorate

The defined remit of the Planning Inspectorate is to consider appeals based on planning matters such as Local Plans, Compulsory Purchase Orders etc. The Planning Inspectorate provides also an established, independent service, however its panel of inspectors are largely experts in planning matters and it is likely they would need to recruit and retain additional inspector resources to handle s15 appeals.

The costs for Planning Inspectorate appeals are at the very least going to be the same as the First Tier Tribunal, and possibly higher.

Costs & benefits

It is not possible to monetise the specific benefits of Section 15, but overall it seeks to provide an incentive mechanism so that the wider benefits of enhanced flood and coastal erosion risk management (including information sharing) can be achieved. The appeals mechanism provides for a level of social

justice and for the avoidance of unjustified costs on persons and businesses. An impartial and efficient appeals system also contributes to the broader aim of establishing a credible and effective Act which delivers greater information and cost sharing.

The key benefit is the provision of a sanction related to the power to require information which will help secure a proportion of the wider benefits of local flood risk management. The appeals mechanisms will enable unjustified costs (including to business) to be avoided; for those lodging justified appeals the mechanism should be effectively cost neutral.

Costs

There will be small administrative costs to Risk Management Authorities from issuing enforcement and penalty notices, and being involved in the appeals process. However, the issuance of notices will be the exception rather than the rule. The only unavoidable costs to business would be those associated with an appeal upheld by the tribunal - these are judged to be very small and the first tier tribunal may be given the power to award costs where a unreasonable information request has been made. The costs have been presented on an annual cost basis for reference only and they have not been discounted over time. There is no reason to believe that the relevant costs between the three options will change significantly over time.

Based on 48 enforcement notices and 10 appeals (details of how we arrive at this can be found below), and assuming that each notice takes three hours to prepare and issue, the admin costs across Authorities would equate to $(48+10) \times 3 = 174$ hours. Time is costed at £30 per hour including overheads. (This is based on the technical and officers rate of £12.70 per hour for 2005 in the Admin Burdens spreadsheet, inflated to August 2010 using RPI to £14.8 per hour, and grossed up for overheads by +30%. The Admin Burdens spreadsheet is based on the Admin Burdens Calculator developed by the Department for Business, Innovation and Skills and was used to provide consistency across England and Wales).

Total costs therefore equate to 174 hours @ £30 = £5,220p/a Authorities costs. Costs will largely be offset by the receipts from penalty notices. These costs are uniform across all appeals mechanisms options.

The costs associated with non-compliance of a statutory notice are largely considered avoidable if a person complies with the information requests made under Section 14 of the Act. Furthermore, Section 15 of the Act provides a period of 28 days for individuals to make representations about the information request before a penalty notice can be issued. The only unavoidable cost concerns those appeals where the tribunal upholds the appeal and requires the payment of any penalty.

It should be noted that appellants will also incur some costs in bringing an appeal, but the scale of these costs will depend on the complexity of the appeal and whether or not legal advice is required. The FTT also retains the ability to

award costs against either party. Again, their scale would depend on the complexity of the appeal.

The First tier tribunal seeks to minimise the cost dialogue between parties, for example by dealing with as many cases as possible through written submission. The costs of preparing an appeal cannot be realistically estimated as it will depend on the nature of the appeal and what type of legal representation is made. However, the tribunal will have the power to award costs where, for example, the Authority has clearly made a manifestly unreasonable request it is likely that costs would be awarded against them. As with all appeals this would be determined on a case by case basis and in line with the requirements of the First Tier Tribunal rules.

Administrative costs to Government

Information provided during the development of the Act suggests that each Risk Management Authority will make 20 information requests per year. Based on the Welsh Assembly Government, 22 local authorities and 1 Environment Agency region (Wales) areas, this equates to an estimated 480 information requests per annum.

It is difficult to estimate the percentage of information requests where the Authority would subsequently need to issue an enforcement notice – we have assumed that 10% of information requests may require such a notice. Whilst there is a process allowing the person to make representations, we have further assumed that 20% of enforcement notices will not be adhered to, thereby generating a penalty. (This is a cautious estimate given that the Environment Agency's experience of consenting and appeals processes suggests an average for appeals is around 4% - we have also assumed that all penalty notices are appealed against).

This equates to approximately 10 appeals a year based on 48 enforcement notices made (number of appeals rounded for ease of calculation).

There is no realistic way of estimating how many appeals could be dealt with in writing, or orally through a hearing or inquiry. We have used a working assumption that around 75% of appeals would be paper based with the remaining 25% requiring an oral hearing/inquiry (with the costs of these average out to include one day and longer hearings). This equates to approximately 7 paper based appeals and 3 requiring an oral hearing (number of appeals rounded for ease of calculation).

The benefits associated with the three appeals options are assumed to be identical and so, from an economic perspective, the choice of the preferred option will be based on which option has the lower administrative costs.

Option 1 – Power of appeal vested in Welsh Ministers

Costs for an inspector appointed by the Welsh Ministers on a case by case basis are likely to be similar but will include additional resource costs for the Welsh Assembly Government in managing the process for each appeal.

Assuming that an official at Management Band 1 (Salary range £34,000-£42,000) considered each paper based appeal, taking 4 hours at an hourly cost rate of £25. This would equate to £700 pa in administrative costs for paper appeal, not including any time for Ministerial consideration. For the 25% requiring an independent inspector, the costs will be at least similar to those of the Planning Inspectorate, whom the Department routinely use for other appeals processes (£3,750).

Total minimum admin costs therefore in region of £4,450.

Option 2 - First Tier Tribunal Service

The First-Tier Tribunal estimate that the administrative costs of handling an appeal are:

*Basic appeal, paper based = £50

1 day case heard by 1 legal member = £700

1 day case heard by a panel of 1 legal member and 2 lay members = £1,300

*(subject to a judge being allocated on an average of 14 paper cases to determine for their sitting fee.)

Based on 7 paper based appeals @ £50 (£350), and 3 appeals heard as a day case @ £1,000 the average of the day case costs (£2,000), this equates to annual costs of £3,350 p/a.

Option 3 - Planning Inspectorate

Estimates made by officials in respect of other appeals mechanisms in the Act provide information on the administrative costs as identified by PINS are:

Basic appeal = 0.5 days = £500

Written appeal (minor) = 1 day = £1,000

Written appeal (major) = 1.5 days = £1,500

Based on 7 paper based appeals @ £500 (£3,500) and 3 appeals heard as a day case @ £1,250 the average of the day case costs (£3,750), this equates to annual costs of £7,250 p/a.

The preferred choice for dealing with appeals is therefore the First Tier Tribunal Service. In addition to this option having the lowest administrative costs, it was also provide the necessary degree of transparency and independence to the appeals process.

RISKS

The risks from each option are considered to be largely generic to all three options.

The assumption made is that the application of sanctions will be delivered in line with Hampton principles. This, along with safeguards written into the Act that allow representations prior to a penalty being issued, will deliver a cost-effective, transparent and proportionate approach that will minimise the instances of appeal and thereby any unavoidable costs to business.

The only variation of risk, although a significant one. is where the Welsh Ministers are given powers to adjudicate on appeals. This additional risk is that the process would not be seen to be as transparent as other options i.e. an independent tribunal.

Consultation

An initial consultation on the proposals was undertaken within the public consultation on the draft Flood and Water Management Bill, which ran between April and July 2009. The draft Bill was also subjected to Parliamentary pre-legislative scrutiny and was considered by the National Assembly for Wales' Sustainability Committee and the Constitutional Affairs Committee. No specific concerns were raised in relation to the proposals.

The proposals affect England and Wales on an equal basis and in developing the Regulations we worked with the Department for Environment and Rural Affairs, conducting a number of one-to-one discussions with key stakeholders including the Environment Agency, Local Government Association (which included comments from the Welsh Local Government Association), OFWAT and the First Tier Tribunal. No significant concerns have been raised.

Competition Assessment

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 firms substantially more than others?	No
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

No detrimental effects on competition are envisaged.

Flood and coastal erosion risk management activities have historically been undertaken and funded by the public sector. The information likely to be sought is largely within the domain of the public sector, and the requesting and provision of that information will have no discernable effect on the wider market.

Costs associated with the issuing of penalties will only be incurred where a person fails to comply with a request for information, with the administrative costs borne by the public sector. For the purposes of these sections, 'a person' is an inclusive term which means anyone and so includes reference to all organisations, authorities, businesses or individuals.

Post implementation review

As part of the Environment Agency's enhanced oversight role it will report on the development of local flood risk management partnerships which will be used to measure co-operation between Authorities and individuals. We will collect data on the number and nature of appeals made to judge if the provisions are working properly.