

**MEMORANDUM FROM THE MINISTER FOR ENVIRONMENT,
SUSTAINABILITY AND HOUSING**

CONSTITUTIONAL LAW: DEVOLUTION, WALES

**The draft National Assembly for Wales (Legislative Competence)
(Environment) Order 2010**

Introduction

1. The Memorandum sets out the background to the provisions in the National Assembly for Wales (Legislative Competence) (Environment) Order 2009 which confers additional legislative competence upon the National Assembly for Wales and which has been laid in accordance with SO 22.31 and explains the scope of the power requested.
2. The constitutional context to this request is set out by the Government of Wales Act 2006 (the 2006 Act) and the UK Government's policy, contained in the White Paper "Better Governance for Wales". Section 95 of the 2006 Act empowers Her Majesty, by Order in Council, to confer competence on the National Assembly for Wales ('the National Assembly') to legislate by Assembly Measure on specified Matters. These Matters may be added to Fields within Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament, in relation to Matters, subject to the limitations provided for in Part 3 of the 2006 Act. An Order in Council under Section 95 of the 2006 Act is referred to as a Legislative Competence Order (LCO) in this memorandum.
3. The LCO confers further legislative competence on the National Assembly for Wales, in the Field of Environment (Field 6 within Schedule 5 to the 2006 Act). Attached at Annex A is a copy of Schedule 5 showing the legislative competence that the National Assembly has acquired to date.

Background

Context

4. This LCO provides the National Assembly with competence in relation to waste, pollution and nuisances. The Welsh Assembly Government's vision, as set out in the *One Wales* Programme of Government, is of a truly sustainable environment and the Welsh Assembly Government is pursuing a number of specific actions and policies in order to realise this vision. The Environment is a long-devolved policy area and was one of the Fields listed in the Government of Wales Act 1998 within which Ministerial functions were transferred from the Secretary of State for Wales to the National Assembly at its inception. In addition, further executive functions have been devolved to Welsh Ministers in

subsequent Acts of Parliament. The LCO provides legislative competence for the National Assembly in areas where executive competence is already held by Welsh Ministers. This would enable the Welsh Assembly Government to propose legislation supporting the delivery of its vision. This LCO was one of the very first Orders brought forward by the Welsh Assembly Government and is an integral part of its legislative programme.

5. The Welsh Assembly Government's overall approach to waste, pollution and local environmental quality is set out in a number of strategic policy documents. The key overarching document is the Welsh Assembly Government's Sustainable Development Scheme, which is of particular relevance to the scope of the powers in the Order. Section 79 of the 2006 Act places a duty on Welsh Ministers to prepare a scheme setting out how they propose, in the exercise of their functions, to promote sustainable development. In May 2009, the Welsh Assembly Government launched its revised Sustainable Development Scheme entitled '*One Wales: One Planet*' setting out the Welsh Assembly Government's vision of a sustainable Wales and establishing sustainable development as the central organising principle for policy development and implementation. The revised scheme sets out that in order to achieve this goal over a generation, the total resources currently used to sustain our lifestyles need to be reduced by two thirds. This includes radically reducing our use of carbon-based energy by 80-90%, resulting in a similar reduction in greenhouse gas emissions; having a radically different approach to waste management and moving towards a zero waste nation; and organising the way we live and work so we can travel less by car. This LCO provides legislative powers to the National Assembly that will enable the Welsh Assembly Government to propose legislation which will be a vital tool in helping to deliver the vision set out in the Sustainable Development Scheme.
6. The Sustainable Development Scheme sets out the Welsh Assembly Government's broad approach, across the full range of its responsibilities, toward realising the vision of a sustainable Wales. The Environment Strategy for Wales (2006) builds on the Sustainable Development Scheme's aspirations by providing more detail on the Welsh Assembly Government's long term strategy for the environment of Wales. The Environment Strategy sets the direction for the next 20 years and establishes the framework to achieve an environment which is clean, bio-diverse healthy, and valued by the people of Wales. It is supported by a series of action plans and a policy map setting out the key actions that are being taken to deliver its outcomes. There are a number of key outcomes and actions that are relevant to the scope of the LCO.
7. In relation to waste management, the Environment Strategy emphasises that achieving a more sustainable pattern of consumption and production will help reduce the impact that economic activity has on the environment. The Strategy sets out a range of outcomes which the

Welsh Assembly Government will work towards, including minimising the amount of waste generated in Wales; accepting the principle of 'reduce, reuse and recycle' across government, business, industry and home life; ensuring appropriate waste management facilities are in place to minimise landfill; and encouraging business to produce designed products that require fewer resources and ensure minimal waste.

8. The Environment Strategy also aims to minimise pollution and reduce its impact on the environment and on health. Outcomes which the Welsh Assembly Government is working towards include reducing air pollution, leading to increased life expectancy; and maintaining and enhancing the quality of groundwater, rivers, lakes and coastal waters.
9. In relation to local environmental quality, the Environment Strategy notes the Welsh Assembly Government's aim of securing places where quality of life is not negatively affected by environmental nuisances. The Assembly Government is working to minimise environmental nuisances such as litter, flytipping, graffiti, dog fouling, fly-posting, noise pollution and light pollution.
10. Supplementing the Environment Strategy's approach in relation to waste management is the Welsh Assembly Government's long term framework for waste management and resource efficiency, set out in 'Wise About Waste – The National Waste Strategy for Wales' (2002). The National Waste Strategy provides further detail on how the Welsh Assembly Government will work in partnership with others to move Wales from an over-reliance on landfill to more sustainable waste management by limiting the amount of waste produced and managing it more effectively, recycling and composting far more and finally disposing safely the waste that cannot be recycled or composted. 'Wise About Waste' was recently reviewed and a revised Waste Strategy 'Towards Zero Waste' was issued for consultation in April 2009. It sets out the long term aims for waste management and resource efficiency. By taking a 'zero waste' approach, the aim is to produce no waste in the long term (by 2050) by designing products and services that reduce or reuse waste as far as possible, and developing a local and highly skilled economy for waste management and resource efficiency.

Current Legislative Framework

11. The Welsh Assembly Government has significant executive powers and secondary legislative competence across a wide range of legislation relating to the environment. In relation to the scope of the powers within the Order, Welsh Ministers have very broad powers that have been devolved from a number of sources. The key sources of these powers are as follows:
12. The Control of Pollution Act 1974 and Control of Pollution (Amendment) Act 1989 provide powers in relation to waste carriage and disposal, water pollution, noise pollution, atmospheric pollution and public health.

13. The Food and Environmental Protection Act 1985 gives the Welsh Ministers powers to control the dumping of waste in the territorial sea adjacent to Wales.
14. The Local Government Acts of 1988 and 1999 provide further powers in relation to setting statutory recycling and composting targets.
15. The Environmental Protection Act 1990 provides Welsh Ministers with broad powers in relation to integrated pollution control and integrated air pollution control; statutory nuisances and clean air; contaminated land; waste; and litter.
16. Under the Water Industry Act and Water Resources Act 1991, the Welsh Ministers have the functions of regulating water quality and wholesomeness, and preventing and controlling water pollution, in relation to Wales.
17. The Clean Air Act 1993 confers powers on the Welsh Ministers in relation to certain types of emission into the air.
18. The Environment Act 1995 provides Welsh Ministers with powers to give directions and guidance to the Environment Agency with regard to how the Agency carries out its wide-ranging functions in Wales, which include pollution control, waste and contributing to the achievement of sustainable development.
19. The Pollution Prevention and Control Act 1999 is a key piece of legislation which provides powers for Welsh Ministers to make subordinate legislation regulating any kind of polluting activities, or to prevent or control emissions capable of causing any pollution.
20. The Anti-Social Behaviour Act 2003 provides powers relating to graffiti.
21. The Clean Neighbourhoods and Environment Act 2005 provides key executive powers in relation to local environmental quality, in relation to noise and in relation to Site Waste Management Plans.
22. Welsh Ministers also have considerable powers under Designation Orders, designating them for the purposes of implementing European law. Some of the key Designations are:
 - the European Communities (Designation) (No. 3) Order 2000 No 2812 - Designation in relation to air quality
 - the European Communities (Designation) (No. 2) Order 2003 No. 1246 – (Designation in relation to urban and industrial waste water);
 - the European Communities (Designation) (No. 4) Order 2003 No. 2901 (Designation in relation to water resources)
 - the European Communities (Designation) (No. 7) Order 2004 - Designation in relation to water quality;

- the European Communities (Designation) Order 2004 No. 706 - Designation in relation to environmental noise;
 - EC Designation Order 2005/850 (Designation for “measures relating to the prevention, reduction and elimination of pollution caused by waste and the management of packaging and packaging waste”); and
 - the European Communities (Designation) Order 2007 No. 193 (Designation in relation to land contamination);
23. The above paragraphs describe some of the key executive powers that Welsh Ministers have in relation to the environment. However, Welsh Ministers’ powers in relation to these subject areas are broad and the above list is by no means exhaustive.

Rationale

24. Many of the key actions in relation to household, commercial and industrial waste management in Wales arise from targets set in the ‘Wise about Waste’ Strategy, to be updated by the ‘Towards Zero Waste’ strategy. For example, the Welsh Assembly Government funds local authority household waste recycling via the Sustainable Waste Management Grant and the Regional Capital Access Fund. In 2009/10, the budget for this is £67m. There is also funding (£3.5m in 2009/10) allocated on a competitive basis for the provision of strategically important infrastructure. The Welsh Assembly Government also funds a number of service providers who provide a diverse range of advice and support to the general public, business, public sector and the community sector. These include agencies such as Envirowise, WRAP, Wise about Waste and Cylch.
25. In relation to pollution, the Welsh Assembly Government has been working in partnership with Defra and the Environment Agency to take forward the Environmental Permitting Programme (EPP). The EPP aims to reduce the burden of industrial regulation on both regulated businesses and the Environment Agency without reducing effective regulation of human health or the environment. With reference to environmental water quality, the Welsh Assembly Government issues detailed guidance to the Environment Agency to meet a number of European Community Directives, most notably the Water Framework Directive. The key actions to make improvements to water quality are found in the Environment Strategy for Wales, specifically that diffuse pollution (pollution from more than one source) is better understood, and action is taken to reduce and manage it. Much of the regulatory work in relation to pollution control and waste management is undertaken by the Environment Agency, to which the Welsh Assembly Government will be providing approximately £23m grant funding in 2009-10. The Welsh Assembly Government has a general power of direction over the Environment Agency in relation to Wales.
26. With regard to local environment quality, the Welsh Assembly Government issued detailed guidance in 2008 on the powers contained

in the Clean Neighbourhoods and Environment Act 2005, to help community and town councils decide whether to make use of the powers under the Act. These include powers for community and town councils to take legal action against those that litter, flypost or graffiti in their areas. The 'Tidy Towns' initiative, a *One Wales* commitment, was launched in April 2008, and is supported by an annual fund of £4 million. Funding is available to local authorities where there is evidence that they have worked with local communities, voluntary organisations and other key stakeholders to improve the quality of their local environment.

27. These activities have contributed to the Welsh Assembly Government making clear progress in relation to the overall goal of sustainable development. The latest Sustainable Development Indicators report by the Welsh Assembly Government, published in August 2008, shows clear improvements in 15 of the 39 areas measured and includes improvements in environment-related indicators such as biodiversity conservation (the status of Biodiversity Action Plan species); air quality, both urban and rural; river quality; waste (waste arising by disposal); household waste (recycled or composted); sustainable water and greenhouse gas emissions. The 'State of the Environment' bulletin, also published in 2008, summarises the latest information on the indicators that monitor progress against the Environment Strategy. The bulletin highlighted that there had been an improvement in over half of the indicators that have been defined and where information exists, including in relation to both waste management and pollution.
28. The primary purpose of the LCO is therefore to provide the National Assembly with legislative competence which reflects a number of Welsh Ministers' already devolved executive functions. This will in turn enable Welsh Ministers to propose legislation to the National Assembly, in the form of Measures. In this way, providing the National Assembly with these powers to legislate to enable a more joined up approach to policy development and improvement. As previously noted in paragraphs 11-22, Welsh Ministers already have wide-ranging executive powers in relation to waste, pollution and local environmental quality. However, these executive powers tend to be, by their very nature, piecemeal and currently the National Assembly has no power to alter the legislative framework within which Welsh Ministers operate. Legislative competence for the National Assembly will enable Welsh Ministers to adopt a more strategic approach to tackling critical challenges in relation to the environment by proposing legislation for consideration by the National Assembly. Any Measures will be subject to thorough scrutiny and approval by the National Assembly.
29. Closely linked to the need for a more holistic and coherent approach to legislation is the fact that the Welsh Assembly Government has a distinct and clearly defined policy agenda in relation to environmental policy. The Welsh Assembly Government undertakes a wide range of activities and initiatives supporting environmental improvement, and creating a sustainable environment is one of the key aims of the *One Wales*

Programme of Government. In particular, *One Wales* commits the Welsh Assembly Government to use legislation to strengthen recycling targets and to provide better and more coordinated support in relation to waste management. As noted in paragraphs 4-10, the broad policy commitments set out in *One Wales* are supported by key Assembly Government strategic documents in this policy area, namely the Sustainable Development Scheme, the Environment Strategy and the Waste Strategy.

30. Legislative competence for the National Assembly will also enable Welsh Ministers to propose legislation to address new and significant challenges in relation to the environment. A key challenge, and a headline indicator for the Welsh Assembly Government's sustainable development aspirations, is to reduce Wales' ecological footprint. The ecological footprint is an indicator of the total environmental burden that is placed on the planet and represents the area of land needed to provide the raw materials, energy and food, as well as absorb pollution and waste created – in this case by the Welsh population. Wales' ecological footprint was first calculated using 2001 data and Wales is the first country to recalculate its footprint using 2003 data. The most recent report shows that the Welsh footprint has increased at an average rate of 1.5% per year between 1990 and 2003 – a trend that is replicated elsewhere in the UK. Although the report has confirmed that Wales' ecological footprint is the lowest of the four countries of the UK, it is still at an unsustainably high level and more needs to be done.
31. Another important challenge faced by the Welsh Assembly Government, and a commitment in the *One Wales* Programme of Government, is the implementation of a citizen-centred model of improving public services, drawing on the Beecham Review of Local Service Delivery (2006). The Welsh Assembly Government has put in place a challenging programme to deliver efficient, effective, citizen centred public services. Securing improved waste management, improving local environmental quality standards and safeguarding the environment and human health from pollutants are key elements of providing better quality public services to the citizens of Wales. It is important that the National Assembly and the Welsh Assembly Government have available the appropriate policy tools, including legislation via Measures, to help address these challenges.

Scope

32. The approach taken with regard to this LCO is for legislative competence to reflect the current boundaries of what are devolved and non-devolved issues.
33. The LCO inserts four Matters into Field 6: *environment* of Schedule 5 to the 2006 Act, to enable the National Assembly to legislate on these issues by way of Assembly Measures.

Matter 6.1 – Waste

34. Matter 6.1 provides the National Assembly with legislative competence in relation to the prevention, reduction, collection, management, treatment or disposal of waste. This will enable the National Assembly to legislate on waste matters across all sectors in order to increase recycling and improve sustainable waste management in Wales. The scope of the Matter does not include the regulation of any activity in the sea (this is also dealt with in paragraph 40 below, under the heading “Fixed Exceptions”). The sea, in this context, means the area of sea adjacent to Wales, out as far as the seaward boundary of the territorial sea. (For more detail on the meaning of “Wales” and “the sea” in this context, see paragraph 73).

Matter 6.2 – Waste in the sea

35. Matter 6.2 provides competence in relation to the disposal of waste in the sea, where that waste has been collected, managed or treated on land. This will enable the National Assembly to legislate in relation to waste that has been disposed of from land into the sea. (For the meaning of “the sea”, see paragraphs 34 and 73).

Matter 6.3 – Pollution

36. Matter 6.3 provides legislative competence for the protection or improvement of the environment in relation to pollution. The LCO uses a broad definition of “pollution” modelled on that in the Pollution Prevention and Control Act 1999. This will enable the National Assembly to legislate to strengthen pollution controls.

Matter 6.4 – Nuisance

37. Matter 6.4 provides legislative competence for the protection or improvement of the environment in relation to nuisances. This will enable the National Assembly to legislate in relation to nuisances and local environmental quality. “Nuisances” are defined, for the purposes of the competence, as acts or omissions affecting any place, or states of affairs in any place, which may impair or interfere with the amenity of the environment or any legitimate use of the environment. The definition of “Nuisance” does not, however, include an act, omission or state of affairs that constitutes pollution.

Exceptions

38. As stated above, the legislative competence provided by this LCO broadly reflects current executive powers of Welsh Ministers. The LCO therefore includes a number of exceptions to the legislative competence, largely reflecting non-devolved areas of policy relevant to waste or environmental protection which are the responsibility of the UK

Government and where the Welsh Ministers do not have significant functions. Most exceptions in this LCO fall within the general areas of energy, defence, transport and marine policy, and are necessary because the Matters are so broad that the LCO could be interpreted as enabling the National Assembly to legislate for a purpose that was not meant to be included within the competence being conferred. The exceptions therefore seek to provide clarity over the extent of the competence that the National Assembly is acquiring in this LCO.

39. The LCO contains “fixed exceptions” which apply only to the individual Matters, or a number of specific Matters. The relevant fixed exceptions are described at paragraphs 40 to 63 below. There are also “floating exceptions” which apply to all Matters set out in Schedule 5 to the 2006 Act. These are listed in Part 2 of Schedule 5, as amended by the National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009. The LCO adds to that list of floating exceptions, as set out at paragraphs 64 to 66 of this Memorandum.

Fixed Exceptions

Exceptions from Matter 6.1 (Waste) alone

40. Matter 6.1 does not include the regulation of any activity in the sea. (For the meaning of the “sea” in this context, see paragraphs 34 and 73).
41. This Matter also does not include the regulation of the provision of postal services by persons licensed by the Postal Services Commission. Regulatory arrangements for postal services are set out in the Postal Services Act 2000. These arrangements have not been devolved in Wales. The effect of this exception is that a Measure provision would be outside competence, and of no effect in law, if it sought to address a waste issue by regulating the provision of postal services by a person who holds a licence from the Postal Services Commission authorising that person to convey letters from one place to another. A Measure provision under the competence provided by Matter 6.1 could however deal with unaddressed material being delivered to premises, provided that the persons delivering it are not regulated by the Postal Services Commission.

Matter 6.2 (Waste in the sea) alone

42. The regulation of certain activities in the sea adjacent to Wales is excluded from Matter 6.2. (For the meaning of the “sea” in relation to this Matter, see paragraphs 34 and 73). Regulatory arrangements in relation to the marine environment, and the conferral of additional executive powers on Welsh Ministers, are dealt with in the Marine and Coastal Access Act 2009, which proceeded in parallel with the proposed LCO. The Act provides Welsh Ministers with a range of licensing and regulatory powers in relation to the sea adjacent to Wales, including powers to prescribe further activities to be subject to regulation.

Exceptions from Matter 6.3 (Pollution) alone

43. Matter 6.3 excludes a number of topics concerned with transport fuel. The first is the regulation of the composition and content of fuel used in a means of transport, in non-road mobile machinery or in an agricultural or forestry tractor. Section 30 of the Clean Air Act 1993 allows the Secretary of State to impose requirements as to the composition and content of any fuel used in motor vehicles and this function has not been transferred to Welsh Ministers. The effect of this exception is that a Measure provision would be outside competence, and of no effect in law, if it sought – under the guise of addressing pollution - to regulate the composition and content of fuel used in a means of transport, non-road mobile machinery or an agricultural or forestry tractor.
44. Also excluded from competence are obligations upon persons who supply transport fuel at or for delivery to places in the United Kingdom to produce evidence showing the supply of renewable transport fuel. In the current renewable transport fuel obligation, this is evidence of the volume of renewable fuel supplied. Welsh Ministers do not have specific powers in relation to the renewable transport fuel obligation. The effect of this exception is that a Measure provision based on the competence afforded by Matter 6.3 could not be used to change the renewable transport fuel obligation.
45. Taking account of the fact that transport is likely to be powered not only by renewable fuel but also by renewable energy in other forms such as electricity, the Order also excludes from competence the making of provisions regarding the proportion of renewable energy consumed in transport, including the imposition of sustainability requirements in relation to renewable energy. Welsh Ministers do not have any specific powers in relation to this policy area. The practical effect of this exception is that a Measure provision relating to the competence afforded by Matter 6.3 could not lawfully impose specific proportions of renewable energy to be consumed in transport, or lay down the criteria to determine whether a form of renewable energy could be counted towards an energy obligation or target.
46. The provision of financial support in connection with the production or use of renewable energy for consumption in transport, including the imposition of sustainability requirements as a condition for financial support, is excluded. Welsh Ministers do not have any specific powers in relation to this policy area, although they have a wide power under section 60 of the 2006 Act which allows them to fund projects that promote or improve the environmental well-being of Wales. The effect of this exception is that the competence afforded by Matter 6.3 would not allow the National Assembly to legislate on the subject of the provision of financial support in connection with the production of renewable energy for consumption in transport or with the use of that energy in transport. So, for example, the National Assembly would not be able to lay down, in a Measure, sustainability criteria for receipt of such support.

47. The regulation of oil and gas exploration and exploitation is excluded from competence in relation to the outermost 9 miles of the territorial sea adjacent to Wales. The exception reflects the fact that Welsh Ministers do not currently have powers to regulate in relation to pollution from oil and gas exploration and exploitation in that part of the sea, although they do have these powers in the area extending out as far as the first 3 miles of the territorial sea adjacent to Wales, under the Pollution Prevention and Control Act 1999. The National Assembly's competence will therefore mirror the Welsh Ministers' power in this regard.

Exceptions from Matter 6.4 (Nuisance) alone

48. Competence under Matter 6.4 does not include the ability to impose criminal or civil liability for nuisances arising from electricity, gas or oil activities (as defined in the LCO) or related infrastructure where there is a statutory authority for the act, omission or state of affairs that constitutes that nuisance.
49. Likewise excluded from competence are defences or other forms of exemption from civil or criminal liability for nuisance where those defences or exemptions are created by statute and the nuisance in question relates to electricity, gas or oil activities or infrastructure.
50. Taken together, these exceptions mean that the National Assembly will not have competence to make someone liable for a nuisance arising from a defined energy activity, where, at the moment, the law protects that person.
51. Both exceptions are disapplied where the Welsh Ministers have the power to impose the relevant liability or to remove the defence in question.
52. So, for instance, the National Assembly could not legislate so as to designate as nuisances gas pipe-lines which had been authorised by the Secretary of State under statute; nor could the National Assembly impose a liability to compensate people who were affected by such a pipe-line. However, if the Welsh Ministers currently have the power to impose liability in specific circumstances, despite the existence of a statutory authorisation for the activity, the National Assembly will have the corresponding legislative competence.
53. The regulation of the emission of smoke, artificial light and noise from military establishments is excluded from Matter 6.4. Smoke, light and noise from those establishments are exempted from Welsh Ministers' regulatory powers under the Environmental Protection Act 1990 in relation to statutory nuisances. The effect of the exception is that the National Assembly could not lawfully make a Measure provision using the competence afforded by Matter 6.4 targeting smoke nuisance, light nuisance or noise nuisance caused by military premises.

54. The regulation of oil and gas activities, other than those activities carried out by an individual for their domestic purposes, is excluded from competence in relation to this particular Matter. Welsh Ministers do not currently have any specific powers to regulate nuisances caused by oil or gas supply etc. The effect of this exception is that a Measure provision under the competence afforded by Matter 6.4 could not address oil or gas activities, or related infrastructure, on the basis that they constituted nuisances. So, again, the National Assembly would not be able to legislate in a way that inhibited the laying of large-scale gas or oil pipelines on the basis that they affected amenity or legitimate uses of the environment. But a Measure could legislate in relation to nuisances caused by oil or gas activities carried out by an individual for their domestic purposes.
55. The regulation of oil and gas exploration and exploitation is excluded from Matter 6.4 in relation to the sea adjacent to Wales. Welsh Ministers do not have any powers to regulate nuisances in relation to oil and gas exploration and exploitation in the sea adjacent to Wales. (The position is different with regard to pollution, which is dealt with above.) This has therefore been excluded from the competence to be conferred on the National Assembly under Matter 6.4. The effect of this exception is that a Measure provision would be outside the competence afforded by Matter 6.4 if it sought to regulate nuisances arising from oil and gas exploration and exploitation in relation to the sea adjacent to Wales – for instance, the effect of an oil platform on visual amenity.
56. The regulation of electronic communication and networks is outside legislative competence in relation to this particular Matter. Telecommunications is a non-devolved policy area. The effect of this exception is that a Measure provision using the competence afforded by Matter 6.4 could not lawfully define aspects of electronic communications and networks as nuisances and regulate them as such.

Exceptions from all four Matters inserted by this LCO

57. Regulation concerning the control of major accident hazards involving dangerous substances is excluded from all four Matters. This exception is to be interpreted in accordance with Council Directive 96/82/EC (as amended by Directive 2003/105/EC) and it relates only to activity within the scope of that Directive. The specific power to implement the Directive has not been devolved to the Welsh Ministers. The exception means that it would be outside competence for an Assembly Measure to make provision, the purpose of which was to provide for the control of major accident hazards involving dangerous substances, rather than for a purpose within competence, such as the protection of the environment in relation to pollution.
58. The decommissioning of offshore energy installations and related infrastructure is excluded from all Matters. Offshore petroleum,

renewable energy and carbon storage installations are subject to existing decommissioning regimes established by UK legislation - the Petroleum Act 1998, the Energy Act 2004 and the Energy Act 2008. The effect of this exception is that an Assembly Measure could not make provision, under the competence conferred by any of the four Matters, the purpose of which was to regulate waste, pollution or nuisances arising from the decommissioning of offshore energy installations and related infrastructure.

Exceptions from Matters 6.1 and 6.2

59. The regulation of decommissioned explosives, in relation to military activities, is excluded from these Matters. Decommissioned explosives are excluded from the Waste Framework Directive (Directive 2006/12/EC) and the Welsh Ministers' powers in relation to waste under the Environmental Protection Act 1990 reflect this exclusion. This means that a Measure provision drawing on the competence provided by Matter 6.1 or Matter 6.2 could not lawfully be directed at regulating the treatment of decommissioned explosives resulting from military activities.
60. The regulation of radioactive material at military premises is excluded from the scope of these Matters. This exception reflects the fact that Welsh Ministers do not have powers in relation to radioactive waste at military establishments. Radioactive waste at such establishments is excluded from the provisions of the Radioactive Substances Act 1993. Similarly, the broad 'floating' exception for nuclear installations (see paragraph 66), means that radioactive waste at those premises, or higher-level radioactive waste moved from those premises, is not within competence. But radioactive waste not at military establishments or nuclear installations is within the competence afforded by Matter 6.1, and the National Assembly would be able to make Measure provisions under this competence about radioactive waste from normal household, commercial or industrial waste, as well as the disposal of very low level radioactive waste moved from nuclear licensed sites.
61. The regulation of relevant Carbon Capture and Storage (CCS) is excluded from Matters 6.1 and 6.2. "Relevant" refers to the situation where carbon dioxide, once captured, is conveyed for disposal by pipeline directly from the place of production to a place of underground disposal. This type of arrangement is likely to apply only to large-scale CCS. Under the Energy Act 2008, the disposal of CO₂ in the territorial sea adjacent to Wales requires a licence from the Secretary of State. Welsh Ministers currently have no specific powers in relation to carbon capture and storage, although they have wide powers in relation to pollution, which enable them to address greenhouse gases such as CO₂, and general licensing powers relating to deposits in the sea. Moreover, CCS is at an embryonic stage and the regulatory arrangements for the full range of CCS activities (including those involving storage under land) have yet to be defined. The practical effect of this exception would be that a Measure provision which attempted to regulate the specified

aspects of large-scale CCS (capture, conveyance or disposal) would be outside the competence conferred by the LCO. But this exception would not prevent a Measure provision from dealing with the waste aspects of CCS activities which fall outside the definition of relevant CCS, or with preventing pollution from CCS activities.

Exceptions from Matters 6.3 and 6.4

62. The regulation of the contained use of genetically modified organisms (GMOs) is excluded from both Matters. This reflects the fact that the Welsh Ministers do not have executive powers in this regard. They do have the power to regulate environmental harm from the release of GMOs under Part VI of the Environmental Protection Act 1990, but the regulation of the contained use of GMOs is led by the Health and Safety Executive, operating on a UK-wide basis under the terms of the Health and Safety at Work Act 1974. This exception relates only to the handling or use of GM organisms in research laboratories and similar contained use facilities. The effect of the exception is that the National Assembly could not seek to regulate the contained use of GMOs under the guise of addressing pollution or nuisances.
63. The licensing regime established under Part 4 of the Marine and Coastal Access Act 2009 is excluded from legislative competence afforded by Matters 6.3 and 6.4. This exception reflects the fact that regulatory arrangements in relation to the marine environment, and the conferral of additional executive powers on Welsh Ministers, are set out in the provisions of the Act. They provide Welsh Ministers with a range of licensing and regulatory powers in relation to the sea adjacent to Wales, including powers over additional topics. This exception will ensure the integrity of the arrangements agreed between the Welsh Assembly Government and the UK Government, and approved by Parliament.

Floating Exceptions

Exceptions in Paragraph A1 of Part 2 of Schedule 5 of the Government of Wales Act 2006

64. The Environment LCO adds a number of exceptions to paragraph A1 of Part 2 of Schedule 5 to the 2006 Act. Section 94 of the 2006 Act, as amended by the National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009, makes clear that a provision of an Assembly Measure is not within competence if it falls within any of the exceptions listed in that paragraph. These exceptions apply to all Matters within Schedule 5, not just to the Matters under the Environment Field. The floating exceptions contained in the Environment LCO have been included on the basis that they are directly relevant to the Matters in the LCO.
65. The LCO also amends a number of the exceptions already listed in paragraph A1 of Part 2 of Schedule 5 to the 2006 Act.

66. The exceptions to be added to Schedule 5, or amended by this Order are set out below.

Economic Development (Field 4)

- The generation of electricity from a generating station whose construction, extension or operation requires the consent of the Secretary of State or the authority of an order granting development consent under the Planning Act 2008.
- The transmission, distribution and supply of electricity
- Energy conservation, apart from the encouragement of energy efficiency otherwise than by prohibition or regulation.
- Nuclear energy and nuclear installations, including nuclear safety and liability for nuclear occurrences. This exception does not include the disposal of very low level radioactive waste from nuclear licensed sites.

Highways and Transport (Field 10)

- Road freight transport services, including goods vehicles operating licensing. This exception does not include the regulation of use of vehicles carrying animals for the purposes of protecting human, animal, fish or plant health or the environment.
- The LCO amends the exception relating to the regulation of the use of relevant vehicles on roads, the construction and use of relevant vehicles, and conditions under which relevant vehicles may be so used. The amendment excludes from the exception (i.e. preserves the National Assembly's existing competence in relation to) the regulation of the use of relevant vehicles carrying animals, where such regulation is for the purposes of protecting human, animal, fish or plant health or the environment. It also preserves the National Assembly's existing competence in relation to Matter 10.1 (which deals with road charging schemes).
- Aviation, air transport, airports and aerodromes. There are three carve-outs from this exception. Firstly, the exception does not prevent the National Assembly from legislating, where it has competence to do so, in relation to the provision of financial assistance to providers or proposed providers of air transport services or airport facilities or services. Secondly, the exception does not prevent the National Assembly from legislating, where it has competence to do so, on strategies by the Welsh Ministers or local or other public authorities about the provision of air services. Thirdly, the exception does not remove from the National Assembly's competence the ability to regulate the use of aircraft carrying animals,

where that regulation is for the purpose of protecting human, animal, fish or plant health (other than the health of persons in aircraft) or the environment.

- Shipping. There are two carve-outs from this exception. Firstly, the exception does not prevent the National Assembly from legislating, where it has competence to do so, in relation to the provision of financial assistance for shipping services to, from or within Wales. Secondly, the exception does not remove from the National Assembly's competence the ability to regulate the use of vessels for the purposes of protecting human, animal, fish or plant health (other than the health of persons on ships) or the environment.
- Harbours, docks, piers and boatslips. There are two carve-outs from this exception. Firstly, the exception does not prevent the National Assembly from legislating, where it has competence to do so, in relation to harbours, docks, piers or boatslips that are used or required wholly or mainly for the fishing industry, for recreation, or for communication between places in Wales (or for two or more of these purposes). Secondly, the exception does not remove from the National Assembly's competence the ability to legislate for the purposes of protecting human, animal, fish or plant health or the environment.
- The carriage of dangerous goods, including the transport of radioactive material,

Water and Flood Defence (Field 19)

- The appointment and regulation of any water undertaker whose area is not wholly or mainly in Wales.
- The licensing and regulation of any licensed water supplier within the meaning of the Water Industry Act 1991, apart from regulation in relation to licensed activities using the supply system of a water undertaker whose area is wholly or mainly in Wales.

Changes to the Order following pre-legislative scrutiny

67. A number of changes have now been made to the LCO as a result of pre-legislative scrutiny by the National Assembly for Wales' Legislation Committee No.4, the House of Commons Welsh Affairs Select Committee and the House of Lords Constitution Committee. The Committees published their reports on 19 June, 28 July and 16 October 2009 respectively. A number of the recommendations were concerned with making the LCO easier to understand, providing greater clarity about what is within or outside the National Assembly's competence and avoiding unnecessary duplication in the drafting of the LCO. The following changes have therefore been made in order to respond to the recommendations of these Committees:

Re-structuring of the original Matter 6.1 into two Matters where 6.2 is in relation to waste collected etc on land and disposed of in the sea

68. The proposed Environment LCO for pre-legislative scrutiny inserted a separate definition of 'Wales' for use throughout Field 6 of Schedule 5 to the 2006 Act – the Environment Field. This definition drew on the definition of 'Wales' in the Interpretation Act 1978, which equates, broadly speaking, to the landmass of Wales.
69. This contrasted with the usual interpretation of the term 'Wales' within Schedule 5 to the 2006 Act. This is the meaning set out in section 158(1) of the 2006 Act, which includes the sea adjacent to Wales as far as the outer boundary of the territorial sea, as well as the landmass of Wales.
70. The use of different definitions was a drafting device intended to reflect the agreement reached with the UK Government, in the context of the Marine and Coastal Access Act, that the competence conferred by Matter 6.1 would not extend to the sea.
71. However, during pre-legislative scrutiny, the existence of two definitions applying to different parts of the same Schedule was identified as being a potential source of confusion.
72. The LCO provides an alternative way of dealing with this issue, i.e. by having one Matter (Matter 6.1) which deals with waste on land (by specifically excluding the regulation of any activity in the sea) and a second Matter (Matter 6.2) which deals only with the disposal of waste in the sea, where that waste has been collected etc on the land.
73. The effect is that there is no need to refer to 'Wales' within either Matter and there is no need for the term 'Wales' to be specifically defined in the Order. The interpretation of 'Wales' set out in section 158(1) of the 2006 Act will continue to apply to all Fields in Schedule 5 to the Act, except where the context otherwise requires. The definition of the "sea" in the Order is one such context. That definition is: "the sea adjacent to Wales out as far as the seaward boundary of the territorial sea". In this context, "Wales" must, logically, mean "Wales" as defined in the Interpretation Act 1978, rather than the 2006 Act. The Interpretation Act definition of "Wales" comprises the landmass of Wales down to the seaward limits of local authority jurisdiction. Thus references to "the sea" mean all of the sea between those limits and the outer boundary of the territorial sea.
74. As a result of the changes there have also been some consequential amendments to the way in which the Matters and the exceptions are presented.

Exception for the generation of electricity

75. The proposed Environment LCO for pre-legislative scrutiny included a fixed exception from Matter 6.4 (which was then Matter 6.3), excepting amongst other things, “the regulation of electricity activities” from the competence to be conferred on the National Assembly by this Matter. This fixed exception was highlighted by the National Assembly’s Legislation Committee No. 4 as duplicating the floating exceptions on the generation, transmission, distribution and supply of electricity, to be inserted under the Field 4 heading as amendments to paragraph A1 of Part 2 of Schedule 5. Therefore to avoid any duplication and simplify the Order, the fixed exception under Matter 6.4 has been amended to remove the reference to the “regulation of electricity activities”.

Exception for health and safety regulation

76. The proposed LCO included an exception from all three Matters for provision made by health and safety regulation. The purpose of that exception was to exclude the control of major accident hazards from the National Assembly’s competence. These hazards are regulated for purposes relating to health and safety and the environment, and remain the responsibility of the UK Government (although the Welsh Ministers do have functions in relation to planning aspects). This has now been amended in the LCO to clarify the meaning of the exception. The result is an exception, from all four Matters, for regulation concerning the control of major accident hazards involving dangerous substances. This exception is to be interpreted in accordance with Council Directive 96/82/EC (as amended by Directive 2003/105/EC) and it relates only to activity within the scope of that Directive (see paragraph 57 above).

Definitions

77. Both the National Assembly for Wales Legislation Committee (No.4) and the Welsh Affairs Committee recommended that the LCO should contain only those definitions that were necessary to define the competence afforded by this Order. In order to provide further simplification the following definitions have therefore been removed:

- Agricultural or forestry tractor
- Non-road mobile machinery
- Renewable energy
- Transport fuel
- Vessel

Additionally, the definition of ‘offshore energy installation’ has been simplified in a minor way.

78. A number of other changes have been made to the text of the Order which were identified following pre-legislative scrutiny. These are detailed below.

- *Exception for decommissioning of offshore activities* – The proposed LCO included fixed exceptions under all three Matters. In the earlier version of the Order this was represented as being an exception under Matter 6.1 and separately as an exception under Matters 6.2 and 6.3. The LCO has now been amended to correct this presentational issue and to list these exceptions together, applying to all four Matters.
- *Carbon Capture and Storage* – There has been a small change to the wording of the exception relating to carbon capture and storage. The exception previously provided that Matter 6.1 “does not include regulation of the capture, conveyance AND disposal of carbon dioxide as part of relevant carbon capture and storage” (emphasis added). An amendment has been made to replace “and” with “or”, to read “capture, conveyance OR disposal...”. This seeks to ensure that the exception captures regulation relating only to one or two of the three components of the process, provided that those components are part of the overall process of “relevant carbon capture and storage”. Due to the changes in the way the competence over waste is now dealt with, this exception now applies to both Matter 6.1 and Matter 6.2.

Geographical limits of any Assembly Measure

79. Section 94 of the 2006 Act imposes a prohibition upon Assembly Measures having effect other than in relation to Wales. It provides that a provision of an Assembly Measure is not law in so far as it is outside the National Assembly’s legislative competence. A provision is outside competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). For these purposes, section 158 of the 2006 Act defines “Wales” as extending out to the seaward boundary of the territorial sea (12 nautical miles from the coastal baselines from which the territorial sea is measured, for domestic and international law purposes). There are limited exceptions for certain kinds of ancillary provisions, for example a provision appropriate to make the provisions of the Measure effective, or a provision enabling other provisions of the Measure to be enforced, or making consequential amendments to other legislation.
80. The limitation relating to functions other than in relation to Wales prevents the National Assembly from passing any Measure conferring on the Welsh Ministers, Welsh local authorities or any other public authority, functions which relate other than to Wales. For further discussion of the geographical scope of the competence conferred by this LCO, see paragraphs 68 to 74 above.

Minister of the Crown functions

81. By virtue of Part 2 of Schedule 5 of the 2006 Act, the National Assembly may not by Measure alter the functions of the Minister of the Crown without the consent of the Secretary of State. In relation to any future proposals that may impact on Minister of the Crown functions the appropriate UK Government Departments will be consulted and agreement sought.

Conclusion

82. For the reasons outlined above, the Welsh Assembly Government proposes that the legislative competence of the National Assembly for Wales should be extended in accordance with the LCO to which this Explanatory Memorandum relates.

Jane Davidson
Minister for Environment, Sustainability and Housing
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