

Explanatory Memorandum to the Development Procedure (Consultees) (Wales) (Miscellaneous Amendments) (Amendment) Order 2021.

This Explanatory Memorandum has been prepared by the Planning Directorate and is laid before Senedd Cymru 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 Development Procedure (Consultees) (Wales) (Miscellaneous Amendments) (Amendment) Order 2021.

Julie James MS
Minister for Climate Change

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1. Description

- 1.1 The Town and Country Planning (Development Management Procedure) (Wales) Order 2012 ('DMPWO') and the Developments of National Significance (Procedure) (Wales) Order 2016 ('DNSPWO') (referred to collectively as 'the Procedure Orders') place a statutory requirement on key bodies to be consulted at the pre-application and post-submission consultation stages of the consenting processes for planning applications and applications for Development of National Significance (DNS).
- 1.2 The Development Procedure (Consultees) (Wales) (Miscellaneous Amendments) (Amendment) Order 2021 ('the 2021 Amendment Order') amends provisions contained in the Development Procedure (Consultees) (Wales) (Miscellaneous Amendments) Order 2021 ('the 2021 Order'). The provisions relating to criteria by which the 'Natural Resources Body for Wales' (Natural Resources Wales or 'NRW') would be consulted on matters of flood risk development due to come into force on the 1 December 2021 are omitted from the Order.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

- 2.1 This 2021 Amendment Order amends provisions of the 2021 Order regarding consultation with NRW on flood risk development before they come into force on the 1 December 2021.
- 2.2 In accordance with section 11A(4) of the Statutory Instruments Act 1946, as inserted by Sch.10 para 3 of the Government of Wales Act 2006, the Llywydd has been informed that the 2021 Amendment Order will come into force less than 21 days from the date of laying.
- 2.3 It is necessary for the 2021 Amendment Order to come into force less than 21 days from the date of laying. This is in order to amend provisions of the 2021 Order referring to a policy framework (in respect of a new Technical Advice Note 15 and associated Flood Map for Planning) that will not be in effect for planning purposes at the time the legislation is due to come into force on the 1 December.

3. Legislative background

- 3.1 The powers necessary for the purpose of making the Order are contained in the Town and Country Planning Act 1990 (TCPA 1990).

- 3.2 Powers allowing the Welsh Ministers to make provision about pre-application consultation are found in section 61Z of the TCPA 1990. That provision allows them to require developers to consult specified persons before they make a planning application for certain types of development. Those types of development must be specified in a development order.
- 3.3 The Welsh Ministers are able to make provision about post-application consultation using various provisions of the TCPA 1990. Section 59(2)(b) and (3)(a) provide for the making of development orders dealing with the grant of planning permission by local authorities and the Welsh Ministers. Section 74(1)(c) provides that a development order may contain provision requiring local authorities to consult specified persons about a planning application before determining it. In respect of Wales, these powers are now vested in the Welsh Ministers. Section 62R of the TCPA 1990 allows a development order to make provision about consultation by the Welsh Ministers in relation to planning applications submitted to them.
- 3.4 Section 333(5B) of the Town and Country Planning Act 1990 provides that the procedure for a statutory instrument which contains a development order is the negative resolution procedure. Section 333(7) provides a power to vary or revoke any order by subsequent order.

Consultation under the DMPWO

- 3.5 The DMPWO requires that bodies listed in Schedule 4 to that Order be consulted by a developer prior to making a planning application (see articles 2(1), 2B and 2D) and by an LPA before it determines a planning application (see articles 14, 15 and 15ZA).
- 3.6 However, the pre-application consultation requirement only applies where an application is for development constituting “major development” which is defined in article 2 of the DMPWO as development involving one or more of the following—
- (a) the winning and working of minerals or the use of land for mineral-working deposits;
 - (b) waste development;
 - (c) the provision of dwellinghouses where—
 - (i) the number of dwellinghouses to be provided is 10 or more; or
 - (ii) the development is to be carried out on a site having an area of 0.5 hectares or more and it is not known whether the development falls within sub-paragraph (c)(i);
 - (d) the provision of a building or buildings where the floor space to be created by the development is 1,000 square metres or more; or
 - (e) development carried out on a site having an area of 1 hectare or more.
- 3.7 A body listed in Schedule 4 which is consulted at either pre-application stage or post-application stage must provide a substantive response (see articles 15A and 15B).

3.8 In addition, where a body listed in Schedule 4 is consulted by an LPA in relation to certain other types of application, it must provide a substantive response (see section 100A of the TCPA 1990 and articles 15C and 15D).

The applications in respect of which this requirement applies are:

- applications for approval of reserved matters (within the meaning of Section 92 of the TCPA 1990);
- applications for any consent, agreement or approval required by any condition or limitation subject to which planning permission has been granted; and
- applications for non-material changes to planning permission (made under Section 96A of the TCPA 1990).

3.9 Bodies listed in Schedule 4 are also required to produce annual reports for the Welsh Ministers regarding their compliance with certain of their functions in relation to consultation under the Order (see article 15F).

Consultation under the DNSPO

3.10 Similarly, the DNSPO requires that a body listed in Schedule 5 to that Order be consulted by a developer prior to making a planning application (see articles 2, 7 and 9) and by the Welsh Ministers before they determine a planning application (see article 22).

3.11 A body listed in Schedule 5 which is consulted at either pre-application stage or post-application stage must provide a substantive response (see articles 10 and 23).

3.12 Bodies listed in Schedule 5 are also required to produce annual reports for the Welsh Ministers regarding their compliance with certain of their functions in relation to consultation under the Order (see article 24).

DMPWO provisions requiring consultation with the Natural Resources Body for Wales on flood risk development

3.13 Paragraph x and paragraph n (Interpretation of Table) of Schedule 4 to the DMPWO requires consultation with the Natural Resources Body for Wales ('NRW') on proposals for certain types of development within Flood Zones C1 and C2 of the Development Advice Map ('DAM').

3.14 Provisions set out under the 2021 Order would amend those consultation requirements of the DMPWO. From the 1 December 2021, they would result in the Natural Resources Body for Wales (NRW) being consulted on development falling within floodzones of a new Flood Map for Planning, rather than the DAM.

DNSPO provisions requiring consultation with the Natural Resources Body for Wales on flood risk development

- 3.15 Paragraph u and paragraph j (Interpretation of Table) of Schedule 5 to the DNSPO requires consultation with the Natural Resources Body for Wales (NRW) on proposals for certain types of development within Flood Zones C1 and C2 of the DAM.
- 3.16 Provisions set out under the 2021 Order would amend those consultation requirements of the DNSPO. From the 1 December 2021, they would result in the Natural Resources Body for Wales (NRW) being consulted on development falling within floodzones of a new Flood Map for Planning, rather than the DAM.

4. Purpose and intended effect of the legislation

- 4.1 New flood risk national planning policy in the form of Technical Advice Note (TAN) 15: Development, Flooding and Coastal Erosion, alongside a new Flood Map for Planning, was published as a 'soft-launch' and for information purposes on the 28 September 2021. The intention was for this package of flood risk changes, including the new Flood Map for Planning, to come into force for planning purposes on the 1 December. In response, local authorities have indicated the need to be given further opportunities to provide locally specific evidence, including climate change projections, to inform the Flood Map for Planning before it can take effect for planning purposes.
- 4.2 To ensure the new Flood Map for Planning is robust and based upon the best possible evidence, it will now not come into force for planning decision making purposes on the 1 December. The current Development Advice Map ('DAM') will continue to be used for planning decision making purposes beyond the 1 December.¹
- 4.3 As a consequence, the legislative requirements of the DMPWO and DNSPO to consult the Natural Resources Body for Wales (NRW) on flood risk development must reflect the current position of consulting in accordance with the floodzones identified on the DAM for planning decision making purposes.**
- 4.4 The 2021 Amendment Order removes the provisions contained in the 2021 Order, and due to come into force on the 1 December, to consult NRW on flood risk development in accordance with the Flood Map for Planning. It ensures NRW consultation requirements for flood risk development continues to accord with the floodzones of the DAM.**

¹ As national planning policy and mapping on flood risk is a package of measures, this position will also apply to the new TAN 15 which will now not come into force for planning decision making purposes on the 1 December. The current Technical Advice Note 15: Development and Flood Risk (dated 2004) will therefore still apply on and after the 1 December 2021, with the Development Advice Map (DAM) continuing to be used alongside it as the flood map for planning purposes.

4.5 Use of the DAM will continue up to a point when the evidence provided by local authorities, including further data gathering and work on flooding assessments, has been completed to inform the Flood Map for Planning. The Welsh Government will work with local authorities and NRW to ensure this process is completed as soon as possible, including bringing forward the necessary legislative changes.

5. Consultation

5.1 Due to the need for the 2021 Amendment Order to come into force prior to 1 December (i.e. before provisions come into force that would have updated NRW consultation requirements to refer to a new Flood Map for Planning) the Welsh Government was unable to undertake a public consultation on these amending provisions.

5.2 Notwithstanding this, these amending provisions have no effect. The 2021 Amendment Order revokes amendments to the DMPWO and DNSPO (in the 2021 Order) for consulting with NRW on development in flood risk areas before they come into force. As a result, consultation with NRW on development in flood risk areas will continue to take place in accordance with the DAM.

5.3 By reverting to mapping and legislation to the default position, it will allow for further work to be undertaken on the Flood Map for Planning, and with local authorities, to ensure its robustness and that it is fit for purpose in accounting for local models of flood risk which incorporate climate change projections. It will effectively ensure any future legislative changes in respect of consulting with NRW on developments falling within the floodzones of a new flood map are underpinned by the best possible evidence.

6. Regulatory Impact Assessment

- 6.1 A separate Regulatory Impact Assessment (RIA) has not been prepared in respect of the 2021 Amendment Order as it revokes amendments to the DMPWO and DNSPO (in the 2021 Order) for consulting with NRW on development in flood risk areas before they come into force. This is considered to be a factual amendment and one that reflects the policy intent of the DAM continuing to be in use for planning decision making purposes beyond the 1 December; with NRW consultation requirements for development in flood risk areas remaining unchanged.
- 6.2 A comprehensive RIA will be undertaken as part of a future statutory instrument regarding amendments to NRW consultation requirements for development in flood risk areas. The Welsh Government is working collectively with NRW and local authorities to gather further evidence to inform these future changes before a new Flood Map for Planning can come into force for decision making purposes.