

Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 – Senedd

Meeting date:
26 March 2012

Meeting time:
14:30

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



For further information please contact:

Steve George
Committee Clerk
029 2089 8242
CLA.Committee@wales.gov.uk

Olga Lewis
Deputy Committee Clerk
029 2089 8154

Agenda

- 1. Introduction, apologies, substitutions and declarations of interest**
- 2. Instruments that raise no reporting issues under Standing Order 21.2 or 21.3**

Negative Resolution Instruments

CLA111 – The School Teachers' Qualifications (Wales) Regulations 2012
Negative Procedure. Date made 6 March 2012. Date laid 8 March 2012. Coming in to force date 1 April 2012

CLA112 – The Works on Common Land, etc. (Procedure) (Wales) Regulations 2012
Negative Procedure. Date made 7 March 2012. Date laid 8 March 2012. Coming into force date 1 April 2012

CLA113 – The Commons (Deregistration and Exchange Orders) (Interim Arrangements) (Wales) Regulations 2012
Negative Procedure. Date made 7 March 2012. Date laid 8 March 2012. Coming into force date 1 April 2012

CLA114 – The Deregistration and Exchange of Common Land and Greens (Procedure) (Wales) Regulations 2012
Negative Procedure. Date made 7 March 2012. Date laid 8 March 2012. Coming into force date 1 April 2012

CLA115 – The Partnership Council for Wales (Local Health Boards and National Health Service Trusts) Order 2012

Negative Procedure. Date made 7 March 2012. Date laid 9 March 2012. Coming into force date 3 April 2012

CLA116 – The Welsh Language Board (Transfer of Staff, Property, Rights and Liabilities) Order 2012

Negative Procedure. Date made 7 March 2012. Date laid 9 March 2012. Coming into force date 1 April 2012

CLA117 – The Welsh Language Measure (Registrable Interests) Regulations 2012

Negative Procedure. Date made 7 March 2012. Date laid 9 March 2012. Coming into force date 1 April 2012

CLA118 – The Town and Country Planning (Control of Advertisements) (Amendment) (Wales) Regulations 2012

Negative Procedure. Date made 10 March 2012. Date laid 13 March 2012. Coming into force date 30 April 2012

CLA119 – The Planning (Listed Buildings and Conservation Areas) (Wales) Regulations 2012

Negative Procedure. Date made 10 March 2012. Date laid 13 March 2012. Coming into force date 30 April 2012

CLA120 – The Town and Country Planning (Trees) (Amendment) (Wales) Regulations 2012

Negative Procedure. Date made 10 March 2012. Date laid 13 March 2012. Coming into force date 30 April 2012

CLA121 – The Town and Country Planning (Compensation) (Wales) Regulations 2012

Negative Procedure. Date made 10 March 2012. Date laid 13 March 2012. Coming into force date in accordance with regulation 1

CLA122 – The Town and Country Planning (Development Management Procedure) (Wales) Order 2012

Negative Procedure. Date made 10 March 2012. Date laid 13 March 2012. Coming into force date 30 April 2012

CLA125 – The Authorised Officers (Meat Inspection) (Revocation) (Wales) Regulations 2012

Negative Procedure. Date made 13 March 2012. Date laid 15 March 2012. Coming into force date 6 April 2012

Affirmative Resolution Instruments

None

3. Instruments that raise issues to be reported to the Assembly under Standing Order 21.2 or 21.3

Negative Resolution Instruments

None

Affirmative Resolution Instruments

None

4. Orders made under the Public Bodies Bill 2011

CLA CM2 – Consent Memorandum for The Advisory Committee on Hazardous Substances (Abolition) Order 2012 (Pages 1 – 10)

Papers:

CLA(4)-07-12(p1) – Consent Memorandum for The Advisory Committee on Hazardous Substances (Abolition) Order 2012

CLA(4)-07-12(p2) – The Advisory Committee on Hazardous Substances (Abolition) Order 2012

CLA(4)-07-12(p3) – Explanatory Document to The Advisory Committee on Hazardous Substances (Abolition) Order 2012

CLA CM3 – Consent Memorandum for The British Waterways Board (Transfer of Functions) Order 2012 (Pages 11 – 88)

Papers:

CLA(4)-07-12(p4) – Consent Memorandum for The British Waterways Board (Transfer of Functions) Order 2012

CLA(4)-07-12(p5) – The British Waterways Board (Transfer of Functions) Order 2012

CLA(4)-07-12(p6) – Explanatory Document to The British Waterways Board (Transfer of Functions) Order 2012

5. Committee Inquiries: Inquiry into the establishment of a separate Welsh jurisdiction

Devolution Studies Research Group, Bangor University Law School (Pages 89 – 100)

Papers:

CLA(4)-07-12(p1) – WJ 24 – Response from the Bangor Law School, Bangor University and an Annex to the Response

Present:

- Dr Alison Mawhinney, Lecturer in Law, Bangor Law School
- Ms Sarah Nason, Lecturer in Law, Bangor Law School
- Mr Huw Pritchard, Doctoral candidate, Bangor Law School

6. Date of the next meeting

23 April 2012

Papers to note:

CLA(4)-06-12– Report of the meeting 12 March 2012

Transcript

View the [meeting transcript](#).

7. Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

A Committee may resolve to exclude the public from a meeting or any part of a meeting where:

(vi) the Committee is deliberating on the conclusions or recommendations of a report it proposes to publish

8. Consideration of the evidence submitted to Inquiry to date

CONSENT MEMORANDUM

The Advisory Committee on Hazardous Substances (Abolition) Order 2012

Consent Motion

1. “To propose that the National Assembly for Wales agrees, in accordance with section 9(6) of the Public Bodies Act 2011, that the Secretary of State make the Advisory Committee on Hazardous Substances (Abolition) Order 2012, in accordance with the draft laid in Table Office on 28 February 2012”.

Background

2. This memorandum has been laid by John Griffiths AM, Minister for Environment and Sustainable Development, in accordance with the arrangements agreed by Business Committee on 7 February 2012.
3. The above Motion is tabled to seek the agreement of the National Assembly for Wales (the “National Assembly”), in accordance with section 9(6) of the Public Bodies Act 2011, that the Secretary of State make the Advisory Committee on Hazardous Substances (Abolition) Order 2012 (the “Order”). Section 9(6) of the Public Bodies Act 2011 requires the consent of the National Assembly for an order under sections 1 to 5 of that Act that makes provision which would be within the legislative competence of the National Assembly if it were contained in an Act of the National Assembly.
4. A copy of the Order was laid in Table Office on 28 February 2012.

Summary of the Order and its Policy Objectives

5. The Order abolishes the Advisory Committee on Hazardous Substances (the “ACHS”), established under section 140 of the Environmental Protection Act 1990, and makes repeals and revocations (including the repeal of the power to appoint that committee) associated with the abolition.
6. The ACHS was established to advise the Welsh Ministers, the Secretary of State and others in relation to the exercise of powers to make regulations under section 140 of the Environmental Protection Act 1990 (“EPA 1990”) to control the import, supply and storage of certain hazardous substances and articles. Regulations may only be made where relevant Ministers consider it is appropriate to do so for the purposes of preventing environmental

pollution or harm to human, animal or plant health. The Committee also advises the Welsh Ministers and others on the exercise of their powers to make regulations under section 142 of the EPA 1990 to obtain information about substances that have the potential to harm the environment or cause harm to human health.

7. The abolition of the ACHS as a statutory Non Departmental Public Body is an outcome of the UK Government's 2010 review of public bodies. Since the ACHS was established some twenty years ago the regulatory landscape has changed significantly and the scope for domestic legislation in the sphere of hazardous substances has diminished following the adoption of a directly applicable EU regime for regulating chemicals ("REACH"). There have also been changes to the wider landscape for Government scientific advisory committees.
8. The intention following abolition of the ACHS is to establish a non-statutory scientific committee as a successor body which will provide expert, independent and impartial advice to Ministers, including those in the devolved administrations, and others in accordance with new, more flexible terms of reference, which can more easily accommodate a changing regulatory landscape.
9. Reconstitution of the ACHS as an expert scientific committee will improve transparency and accountability, ensuring Ministers in UK Government and the devolved administrations have continued access to authoritative and cost effective advice to support Government policies.

Competence Issues

10. The Secretary of State proposes to make the Order pursuant to sections 1, 6 and 35 of the Public Bodies Act 2011.
11. The Order would abolish the ACHS and make repeals and revocations associated with the abolition.
12. The National Assembly has legislative competence in relation to "hazardous substances" (see under the "Environment" heading in Part 1 of Schedule 7 to the Government of Wales Act 2006). The National Assembly also has relevant legislative competence in relation to environmental protection (including pollution), the promotion of (human) health, the prevention of illness, animal health and welfare and plant health.
13. It is the view of the Welsh Government, therefore, that in light of the scope of the Committee's responsibilities, the abolition of the ACHS is within the legislative competence of the Assembly. For this reason, the consent of the National Assembly is sought pursuant to

section 9(6) of the Public Bodies Act 2011, in so far as the Order makes provision to abolish the ACHS in relation to Wales.

Advantages of utilising this Order

14. It is the view of the Welsh Government that this Order represents the most appropriate and proportionate legislative vehicle to implement these proposals in Wales, so that the ACHS may be abolished at the earliest opportunity. A non-statutory successor can then be established for the public benefit and in the interests of ensuring Ministers and others continue to receive expert, impartial and independent advice against a changing regulatory landscape.

Financial Implications

15. As the ACHS is funded entirely by Defra, there are no financial implications for Wales associated with this Order.

John Griffiths AM
Minister for Environment and Sustainable Development

Draft Order laid before Parliament under section 11 of the Public Bodies Act 2011, for approval by resolution of each House of Parliament after the expiry of the 40-day period referred to in section 11(4) of that Act.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2012 No. [XXXX]

ENVIRONMENTAL PROTECTION

HEALTH AND SAFETY

PUBLIC BODIES

**The Advisory Committee on Hazardous Substances (Abolition)
Order 2012**

Made - - - -

Coming into force in accordance with article 1

The Secretary of State, in exercise of the powers conferred by sections 1(1), 6(1) and (5) and 35(2) of the Public Bodies Act 2011(a) (“the Act”), makes this Order.

In accordance with section 8 of the Act, the Secretary of State considers that this Order—

- (a) serves the purpose of improving the exercise of public functions, having had regard to the factors set out in section 8(1); and
- (b) does not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

The consent of the Scottish Parliament and the consent of the National Assembly for Wales have been obtained in accordance with section 9(1) and (6) of the Act.

The Secretary of State makes this Order after consultation in accordance with section 10 of the Act.

The Secretary of State has consulted the Scottish Ministers in accordance with section 88(2) of the Scotland Act 1998(b) and the Welsh Ministers in accordance with section 63(1) of the Government of Wales Act 2006(c).

(a) 2011 c. 24.
(b) 1998 c. 46.
(c) 2006 c. 32.

A draft of this Order, and an explanatory document containing the information required in section 11(2) of the Act, have been laid before Parliament in accordance with section 11(1) of the Act after the end of the period of twelve weeks mentioned in section 11(3) of the Act. In accordance with section 11(4) of the Act, the draft of this Order has been approved by a resolution of each House of Parliament after the expiry of the 40-day period referred to in that provision.

Citation and commencement

1.—(1) This Order may be cited as the Advisory Committee on Hazardous Substances (Abolition) Order 2012.

(2) The Order comes into force on the day after the day on which it is made, except as provided by paragraph (3).

(3) In respect of the final entry (Public Bodies Act 2011) in the table of repeals in the Schedule, article 3 comes into force on the second day after the day on which the Order is made.

Abolition of the Advisory Committee on Hazardous Substances

2. The committee established under section 140(5) of the Environmental Protection Act 1990(a) is abolished.

Repeals and revocations

3. The provisions mentioned in the Schedule are repealed or revoked to the extent specified.

Name
Parliamentary Under Secretary of State
Department for Environment, Food and Rural Affairs

Date

SCHEDULE

Article 3

Repeals and revocations

Table of repeals

<i>Short title</i>	<i>Extent of repeal</i>
Environmental Protection Act 1990	Section 140(5) (power to establish committee). In section 140(6)— (a) paragraph (a) (duty to consult committee), and (b) in paragraph (b), the words “having consulted the committee,”. Section 142(3) (duty to consult committee). Schedule 12 (injurious or hazardous substances: advisory committee).
Parliamentary Commissioner Act 1967(b)	In Schedule 2 (departments etc subject to investigation), the entry relating to the Advisory Committee on Hazardous Substances.
House of Commons Disqualification Act	In Part 2 of Schedule 1 (bodies of which all

(a) 1990 c. 43. The Advisory Committee on Hazardous Substances was established by the Advisory Committee on Hazardous Substances Order 1991 (S.I. 1991/1487).

(b) 1967 c. 13. Schedule 2 was substituted by S.I. 2011/751.

<i>Short title</i>	<i>Extent of repeal</i>
1975(a)	members are disqualified), the entry relating to the Advisory Committee on Hazardous Substances.
Freedom of Information Act 2000(b)	In Part 6 of Schedule 1 (bodies that are public authorities for the purposes of the Act), the entry relating to the Advisory Committee on Hazardous Substances.
Public Bodies Act 2011	In Schedule 1 (power to abolish: bodies and offices), the entry relating to the Advisory Committee on Hazardous Substances.

Table of revocations

<i>Title</i>	<i>Extent of revocation</i>
The Advisory Committee on Hazardous Substances Order 1991(c)	The whole Order.
The Advisory Committee on Hazardous Substances (Terms of Office) Regulations 1991(d)	The whole Regulations.
The House of Commons Disqualification Order 1993(e)	In Schedule 1 (amendments of schedule 1 to the House of Commons Disqualification Act 1975), the entry relating to the Advisory Committee on Hazardous Substances.
The Scotland Act 1998 (Cross-Border Public Authorities) (Specification) Order 1999(f)	In the Schedule, the entry relating to the Advisory Committee on Hazardous Substances.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order abolishes the Advisory Committee on Hazardous Substances, established under section 140(5) of the Environmental Protection Act 1990 (c. 43), and makes repeals and revocations (including the repeal of the power to appoint a committee) associated with the abolition.

No impact assessment has been prepared in respect of this instrument as no costs to the business or voluntary sectors is foreseen.

-
- (a) 1975 c. 24. The reference to the Advisory Committee on Hazardous Substances was inserted by S.I. 1993/1572.
(b) 2000 c. 36.
(c) S.I. 1991/1487.
(d) S.I. 1991/1488.
(e) S.I. 1993/1572.
(f) S.I. 1999/1319, to which there are amendments not relevant to this Order.

**EXPLANATORY DOCUMENT TO
THE ADVISORY COMMITTEE ON HAZARDOUS SUBSTANCES (ABOLITION)
ORDER 2012**

2012 No. [XXXX]

1. This explanatory document has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Act.

2. Purpose of the instrument

The draft Order abolishes the Advisory Committee on Hazardous Substances (ACHS), established under section 140(5) of the Environmental Protection Act 1990, and makes repeals and revocations (including the repeal of the power to appoint a committee) associated with the abolition. The ACHS is one of the bodies listed in Schedule 1 to the Public Bodies Act 2011 which can be abolished by secondary legislation, using powers in that Act.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None.

4. Legislative Context

The draft Order is one of the first to make use of the power in section 1 of the Public Bodies Act 2011 to abolish a body listed in Schedule 1 to that Act. The draft Order also amends other legislation to remove references to the ACHS.

Amendments were tabled in debates in both Houses to prevent the ACHS from being listed in Schedule 1 of the Act but these were subsequently withdrawn, once the Government explained the rationale for their position and gave assurances about the successor body, in particular its independence from Ministers.

5. Territorial Extent and Application

This instrument extends to the United Kingdom.

6. European Convention on Human Rights

The Parliamentary Under-Secretary of State, Department for Environment, Food and Rural Affairs, Lord Taylor of Holbeach, has made the following statement regarding Human Rights:

In my view the provisions of the Advisory Committee on Hazardous Substances (Abolition) Order 2012 are compatible with the Convention Rights.

7. Policy background

The abolition of the ACHS as a statutory Non Departmental Public Body, and its reconstitution as an expert scientific committee, is an outcome of the Government's 2010 review of public bodies. The ACHS must be abolished before its successor is put in place. The successor body will operate within an enhanced framework for scientific bodies in Defra, and with new terms of reference which reflect changes in

the regulatory landscape for hazardous substances since the ACHS was established twenty years ago. The successor body will continue to provide expert, impartial and independent advice to Ministers and others.

Compliance with the purpose test in section 8 (1) of the Public Bodies Act 2011

The reform of the ACHS is also part of measures led by the Government Chief Scientific Adviser to increase the transparency, accountability, efficiency and effectiveness of scientific advisory bodies, for the delivery of independent and high quality scientific advice. By adhering to the Government Code of Practice for Scientific Advisory Committees, the successor body will remain independent, and where appropriate, retain the capacity to submit advice directly to Ministers.

The work of the successor body will fall under new arrangements to strengthen the science and evidence base to support policy across Defra. The new body will operate within a closer network of expert bodies overseen by Defra's Chief Scientific Adviser, supported by his Science Advisory Council. This will provide greater scrutiny and co-ordination of scientific advice in the Department.

There is now less need for advice on domestic regulations given the advent of a directly applicable EU regime for regulating chemicals since the ACHS was established. However, there remains a need for general independent advice on hazardous substances, including on the aspects of this wider regime. This reform will give the successor body new, broader and more strategic and flexible terms of reference.

Taken together these changes will improve the continued exercise of the public functions of this body.

Compliance with the conditions in section 8 (2) of the Public Bodies Act 2011

Although the draft Order does not go beyond the abolition of the ACHS – the Minister considers that these conditions are met by virtue of the fact that the Government intends to reconstitute the committee as an expert scientific committee to continue its work, after the draft Order comes into force. This will maintain the flow, openness and independence of advice on the hazards and risks of chemicals in the environment. The governance arrangements that will support the Department's new expert scientific committees will ensure that they provide advice that is clearly independent from Government.

8. Consultation outcome

8.1 Defra started a consultation on 7 July 2011 on the future of the ACHS (www.defra.gov.uk/consult/2011/07/07/achs/), and asked for views to be expressed by 14 October 2011. The primary purpose of the consultation was to invite views on - (i) the proposed abolition of the ACHS as a statutory Non Departmental Public Body, using the powers contained in the Public Bodies Bill which was before Parliament at the time, following the Government's Arms Length Body Review; and (ii) the Government's preferred option to simultaneously reconstitute this body as a new expert scientific committee.

8.2 The three options in the consultation were:

- Option A Do not abolish the ACHS as an advisory statutory NDPB
- Option B Abolish the ACHS and put nothing in its place
- Option C Abolish the ACHS and reconstitute it as an expert scientific committee

The consultation also sought views on proposed new Terms of Reference, and a name, for the successor body.

8.3 Around 120 interests were invited to comment (in addition to publicising the consultation on the Defra and ACHS websites). There was limited public interest in the consultation as only 16 responses were received. 13 of the 16 respondents gave a view on the options in the consultation, and 11 of them favoured option C, which was the Government's preferred option. One of the 11 respondents could also support option A. Of the two other respondents (out of the 13), one favoured Option B and one favoured option A, but with clearer and extended responsibilities for the committee. Three respondents did not offer a view on the options, though one of them wished scientific advice to continue to be available.

In view of the strong support expressed during this consultation for the Government's preferred option, Defra is proceeding as planned to lay a draft Order to abolish the ACHS. No further consultation is necessary.

9. Guidance

9.1 The consultation document issued on 7 July also invited views on draft terms of reference and a name for the successor body. These aspects will be finalised after further discussion, in time for the first meeting of the successor expert scientific committee.

10. Impact

10.1 This Order has no impact on business, charities or voluntary bodies. It does not impose any new costs, administrative burdens or information obligations.

10.2 The impact on the public sector is neutral as a successor body will be established with the same level of Secretariat support from Defra.

10.3 An Impact Assessment has not been prepared for this instrument for the reasons mentioned above (and was not required for the consultation).

11. Regulating small business

The legislation does not apply to small business.

12. Monitoring & review

The body which replaces the ACHS will continue to work openly, and papers for meetings will continue to be available, and members of the public and specialist chemical press and other stakeholders will be able to attend meetings. The terms of reference for the new committee will be kept under review, in line with Cabinet Office guidelines for such bodies. The oversight of the successor committee by the Defra Chief Scientific Adviser, supported by the Defra Science Advisory Council, will provide an additional level of peer review and scrutiny.

13. Contact

Patrice Mongelard at the Department for Environment, Food and Rural Affairs – Tel 0207 238 5719 or email patrice.mongelard@defra.gsi.gov.uk

CONSENT MEMORANDUM

The British Waterways Board (Transfer of Functions) Order 2012

Consent Motion

1. “To propose that the National Assembly for Wales agrees, in accordance with section 9(6) of the Public Bodies Act 2011, that the Secretary of State make The British Waterways Board (Transfer of Functions) Order 2012 in accordance with the draft laid in Table Office on 1 March 2012”

Background

2. This memorandum has been laid by John Griffiths AM, Minister for Environment and Sustainable Development, in accordance with the arrangements agreed by Business Committee on 7th February.
3. The above Motion is tabled to seek the agreement of the National Assembly, in accordance with section 9(6) of the Public Bodies Act 2011, that the Secretary of State make the British Waterways Board (Transfer of Functions) Order 2012. Section 9(6) of the Public Bodies Act 2011 requires the consent of the National Assembly for an order under sections 1 to 5 of that Act that makes provision which would be within the legislative competence of the National Assembly if it were contained in an Act of the National Assembly.
4. A copy of The British Waterways Board (Transfer of Functions) Order 2012 was laid in Table Office on 1 March.

Summary of the Order and its Policy Objectives

5. The Order transfers the functions of British Waterways to the Canal & Rivers Trust (CRT) or Glandwr Cymru in Wales.
6. British Waterways is a public corporation with a statutory responsibility for operating and maintaining the waterways for which they are the navigation authority.
7. In October 2010 the Government announced that British Waterways will move from a Public Corporation and that the assets and statutory functions of British Waterways in England and Wales should be transferred to CRT.
8. The intention of moving functions and assets of British Waterways in England and Wales to civil society through the creation of a new

national charity for the waterways is to liberate their potential to provide benefits to the public as well as offering waterways users the opportunity to play a role in their governance. It will enable local communities to have a greater say in how their local canal or river is run.

9. The waterways will be placed on a more financially sustainable basis as the charity will be able to access new commercial and private income streams. There will be greater opportunity to recruit volunteers to support heritage, environmental and amenity waterways assets while reducing the long term public funding.

Competence Issues

10. The British Waterways Board was specified as a public body for the purposes of Part 2 of the Welsh Language Act 1993 by article 2 of, and the Schedule to, the Welsh Language Schemes (Public bodies) Order 1996 (S.I. 1996/1898). As a public body under the Welsh Language Act 1993, the British Waterways Board adopted a Welsh Language Scheme.
11. Article 2 of the order has the effect of transferring the British Waterways Board's functions under the Welsh Language Act 1993 to the Canal & Rivers Trust. Article 2 also has the effect of requiring references in subordinate legislation made under, or by virtue of, the Welsh Language Act 1993 to the British Waterways Board to be read in relation to England and Wales as references to the Canal & Rivers Trust.
12. In the view of the Welsh Government, article 2 includes provision about the Welsh language. Because the National Assembly for Wales has legislative competence in relation to the Welsh language, it is the view of the Welsh Government that article 2, as it relates to the Welsh Language Act 1993, makes provision which would be within the legislative competence of the Assembly if it were contained in an Act of the Assembly.
13. Article 3 of the order has the effect of transferring a number of functions from the British Waterways Board, to the Canal & River Trust. The transferred functions do not include the functions of a statutory undertaker under Part 10 of the Local Government, Planning and Land Act 1980. As the law currently stands, the British Waterways Board is a statutory undertaker for these purposes. So, the controls over land held by it, which are set out in Part 10 apply. When the Order comes into force, the effect of the provision is that those controls will not apply to land that will be held by the CRT.
14. In the view of the Welsh Government this particular provision is about the regulation of land held by a public body. Because the

National Assembly for Wales Assembly has competence in relation countryside and open spaces including the designation and regulation of national parks and areas of outstanding national beauty, (field 7 of Schedule 7 to the Government of Wales Act 2006), urban development (field 18), and competence in relation to the reclamation of derelict land and improvement of the environment (field 4), it is the view of the Welsh Government that this particular provision relates to the Assembly's competence in a number of areas.

Advantages of utilising this Order

15. It is the view of the Welsh Government that this Order represents the most appropriate and proportionate legislative vehicle to implement these proposals in Wales, so the functions of British Waterways are transferred to the Canal & Rivers Trust at the earliest opportunity.

Financial Implications

16. There are no financial implications for Wales associated with this Order.

John Griffiths AM
Minister for Environment and Sustainable Development

Draft Order laid before Parliament under section 11 of the Public Bodies Act 2011, for approval by resolution of each House of Parliament after the expiry of the 40-day period referred to in section 11(4) of that Act.

DRAFT STATUTORY INSTRUMENTS

2012 No.

CANALS AND INLAND WATERWAYS

PUBLIC BODIES

TRANSPORT

**The British Waterways Board (Transfer of Functions) Order
2012**

Made - - - -

Coming into force in accordance with article 1

CONTENTS

1.	Citation, commencement, extent and interpretation	2
2.	Transfer of statutory functions	3
3.	Transfer of functions of harbour authority, navigation authority and statutory undertaker	3
4.	Supplementary provision	4
5.	Transitional provisions	4
6.	Savings	4
7.	Revocation	4

SCHEDULE 1	— Enactments conferring functions transferred by article 2	5
SCHEDULE 2	— Amendments to Transport Act 1962 and Transport Act 1968	6
SCHEDULE 3	— Amendments	20
PART 1	— Public general Acts	20
PART 2	— Acts of the Scottish Parliament	25
PART 3	— Subordinate legislation	26
SCHEDULE 4	— Transitional provisions	27

The Secretary of State, in exercise of the powers conferred by sections 5(1), 6(1) to (3) and 35(2) of the Public Bodies Act 2011(a) (“the Act”), makes the following Order.

In accordance with section 8 of the Act, the Secretary of State considers that this Order—

- (a) serves the purpose of improving the exercise of public functions, having had regard to the factors set out in section 8(1) of the Act;
- (b) does not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

The Treasury have consented to the making of this Order in so far as their consent is required by section 6(4) of the Act.

The Scottish Parliament has consented to the making of this Order in so far as its consent is required by section 9(1) of the Act.

The National Assembly for Wales has consented to the making of this Order in so far as its consent is required by section 9(6) of the Act.

Canal & River Trust has consented to the transfer of functions made by this Order in so far as its consent is required by section 21(1) of the Act.

The Secretary of State has carried out consultation in accordance with section 10 of the Act.

The Secretary of State has consulted the Scottish Ministers in accordance with section 88(2) of the Scotland Act 1998(b) and the Welsh Ministers in accordance with section 63(1) of the Government of Wales Act 2006(c).

A draft of this Order and an explanatory document containing the information required in section 11(2) of the Act have been laid before Parliament in accordance with section 11(1) after the end of the period of twelve weeks mentioned in section 11(3).

In accordance with section 11(4) of the Act, the draft of this Order has been approved by resolution of each House of Parliament after the expiry of the 40-day period referred to in that provision.

Citation, commencement, extent and interpretation

1.—(1) This Order may be cited as the British Waterways Board (Transfer of Functions) Order 2012.

(2) This Order comes into force on the day after the day on which it is made.

(3) The amendments, repeals and revocations made by article 7 and Schedules 2 and 3 have the same extent as the provisions to which they relate.

(4) In this Order—

- (a) “the 1962 Act” means the Transport Act 1962(d);

(a) 2011 c. 24.

(b) 1998 c. 46.

(c) 2006 c. 32.

(d) 1962 c. 46.

- (b) “the 1968 Act” means the Transport Act 1968(a);
- (c) “the transfer date” means the day this Order comes into force.

Transfer of statutory functions

2.—(1) On the transfer date, the functions exercisable by the British Waterways Board—

- (a) under or by virtue of the enactments listed in Schedule 1 (enactments conferring functions transferred by article 2), and
- (b) under or by virtue of any local Act(b),

are transferred, so far as exercisable in relation to England and Wales, to Canal & River Trust(c).

(2) Schedule 2 (which makes consequential provision to the 1962 Act and the 1968 Act) has effect.

(3) Schedule 3 (which makes consequential provision to public general Acts, Acts of the Scottish Parliament and subordinate legislation) has effect.

(4) Paragraphs (5) and (6) apply so far as is necessary for the purposes of, or in consequence of, paragraph (1).

(5) Any reference in an enactment which, by virtue of section 32 of, or Schedule 2 or 6 to, the 1962 Act(d), is to be read as a reference to the British Waterways Board is to be read in relation to England and Wales as a reference to Canal & River Trust.

(6) Subject to paragraph (5), any reference to (and any reference which is to be read as a reference to) the British Waterways Board—

- (a) in any subordinate legislation made under or by virtue of any Act listed in Schedule 1 (other than subordinate legislation made under or by virtue of any section of the 1962 Act or the 1968 Act listed as an exception in that Schedule), or
- (b) in any local Act or any subordinate legislation made under or by virtue of any such Act,

is to be read in relation to England and Wales as a reference to Canal & River Trust.

Transfer of functions of harbour authority, navigation authority and statutory undertaker

3.—(1) Where immediately before the transfer date—

- (a) the functions of the British Waterways Board include, by virtue of any enactment, any functions of a harbour authority, navigation authority or statutory undertaker, and
- (b) those functions are not otherwise transferred by this Order,

those functions become functions of Canal & River Trust in relation to England and Wales on that date.

(2) But paragraph (1) does not apply in relation to functions of a statutory undertaker under Part 10 of the Local Government, Planning and Land Act 1980(e).

(a) 1968 c. 73.

(b) Local Acts with particular relevance to the British Waterways Board include the British Waterways Acts 1963 to 1995 (1963 c. xii, 1965 c. xxiii, 1966 c. xiii, 1971 c. xviii, 1974 c. xxiii, 1975 c. xxiii, 1983 c. ii, 1987 c. xxviii, 1988 c. xxv and 1995 c. i). A number of local Acts contain provision for the protection of the British Waterways Board.

(c) Canal & River Trust is a company limited by guarantee formed and registered under the Companies Act 2006 (c. 46), company number 07807276.

(d) References to the British Transport Commission in certain enactments specified in Part 1 and 3 of Schedule 2 to the Transport Act 1962 were substituted by references to the British Waterways Board. Those substituted references include references to any wholly-owned subsidiary of that Board by virtue of paragraph 7(1) of Schedule 16 to the Transport Act 1968. Paragraph 2 of Schedule 6 of the Transport Act 1962 makes additional provision for statutory provisions referring to the British Transport Commission to be read as references to the Board.

(e) 1980 c. 65. Paragraph 18 of Schedule 16 was amended by the Gas Act 1986 (c. 44), section 67(4) and Schedule 9, Part 1, the Electricity Act 1989 (c. 29), section 112(4) and Schedule 18, and the Water Act 1989 (c. 15), section 190 and Schedule 25, paragraph 61.

(3) In this article, “harbour authority”, “navigation authority” and “statutory undertaker” have, in relation to any function of the British Waterways Board exercisable by virtue of an enactment, the same meaning as in that enactment.

Supplementary provision

4.—(1) Nothing in this Order affects the validity of anything done (or having effect as if done) by or in relation to the British Waterways Board before the transfer date; and anything (including legal proceedings) which on that date is in the process of being done by or in relation to the British Waterways Board, so far as it relates to any of the transferred functions, may be continued by or in relation to Canal & River Trust.

(2) Anything done (or having effect as if done) by or in relation to the British Waterways Board, so far as it relates to any of the transferred functions, has effect, so far as is necessary for continuing its effect after the transfer date, as if done by or in relation to Canal & River Trust.

(3) In this article, “transferred functions” means the functions transferred by virtue of articles 2 and 3.

Transitional provisions

5.—(1) Schedule 4 (transitional provisions) has effect.

(2) Nothing in article 2 affects the application of section 44(a) of the 1968 Act (account by Minister of receipt and disposal of certain sums) so far as relating to—

- (a) the period commencing on 1st April 2011 and ending on 31st March 2012, and
- (b) the period commencing on 1st April 2012 and ending on the day before the transfer date.

Savings

6.—(1) Nothing in this Order affects the validity of the appointment of any person to the British Waterways Board made by the Scottish Ministers under section 1(2A)(b) of the 1962 Act as it had effect immediately before the transfer date.

(2) Nothing in this Order affects any order made under section 74 of, or Part 4 of Schedule 7 to, the 1962 Act and in force immediately before the transfer date.

Revocation

7. The Regulatory Reform (British Waterways Board) Order 2003(b) is revoked.

Date *Name*
Parliamentary Under Secretary of State
Department for Environment, Food and Rural Affairs

We consent

Name
Name
Two of the Lords Commissioners of Her Majesty’s Treasury
Date

(a) Section 44 was amended by S.I. 1973/338, the Transport Act 1980 (c. 34), S.I. 1991/510 and S.S.I. 2002/263.
(b) S.I. 2003/1545.

Enactments conferring functions transferred by article 2

Public general Acts

Transport Act 1962(a), except sections 1, 10 to 14, 16 to 21A, 24, 25, 27(1) to (5) and (7) to (8C), 36, 73 to 75, 81, 89 (except so far as it relates to section 27(6)), Schedule 1 and Part 4 of Schedule 7.

Harbours Act 1964(b).

Transport Act 1968(c), except sections 41, 46, 48 to 52, 107, 109, 134, 135 and 137.

Salmon and Freshwater Fisheries Act 1975(d).

Ancient Monuments and Archaeological Areas Act 1979(e).

Highways Act 1980(f).

Transport Act 1981(g).

Agricultural Holdings Act 1986(h).

Pilotage Act 1987(i).

Town and Country Planning Act 1990(j).

Water Resources Act 1991(k).

-
- (a) 1962 c. 46. Relevant amendments were made by the Harbours Act 1964; the Transport Act 1968 (c. 73); the Statute Law (Repeals) Act 1974 (c. 22); the Acquisition of Land Act 1981 (c. 67); the Transport Act 2000 (c. 38); the Railways Act 2005 (c. 14); S.I. 2000/3251 and 2003/1545. Section 72 ceased to have effect in relation to the British Waterways Board by virtue of section 137(8) of the Transport Act 1968. The Transport Act 1962 provided for the distribution of the functions and property of the British Transport Commission (the BTC) amongst four boards. Under section 31, the British Waterways Board (the Board) became the successor to the property, rights and liabilities comprised in the part of the BTC's undertaking constituted by their inland waterways (with an exception) and certain harbours. Functions of the BTC under a number of public and local Acts (including under the Coast Protection Act 1949 (c. 74) and several British Transport Commission Acts) were transferred to the Board under section 32(1) and Schedule 2. Functions of the BTC under statutory provisions so far as relating to an undertaking, or part of an undertaking, or property transferred to the Board by Part 2 of the Transport Act 1962 were transferred to the Board by section 32(3). Functions of the BTC under statutory provisions authorising the carrying out of works designed to be used in connection with an undertaking or part of an undertaking transferred to the Board, or the acquisition of land for the purpose of carrying out such works, were transferred to the Board by section 32(4). The functions transferred included functions of the BTC under or by virtue of the Transport Act 1947 (c. 49), S.R. & O 1947/2797, various British Transport Commission Acts and other legislation. Functions under certain statutory provisions authorising the BTC to appoint, nominate, or concur in or approve the appointment or nomination of, a member of certain bodies were transferred from the BTC to the Board by virtue of the British Transport Commission (Transfer of Functions) (Appointments and Nominations) Order 1963 (S.I. 1963/2023) (made under section 32(5)).
- (b) 1964 c. 40. Relevant amendments were made to sections 30 and 36 by the Transport Act 1968, Schedule 16. Section 42 was substituted by the Transport Act 1981 (c. 56), Schedule 6, paragraph 10 (and there are other amendments to that section that are not relevant to this Order). There are amendments to the definition of "the Boards" in section 57(1) that are not relevant to this Order.
- (c) 1968 c. 73.
- (d) 1975 c. 51.
- (e) 1979 c. 46.
- (f) 1980 c. 66.
- (g) 1981 c. 56.
- (h) 1986 c. 5.
- (i) 1987 c. 21.
- (j) 1990 c. 8.
- (k) 1991 c. 57.

Transport and Works Act 1992(a).

Welsh Language Act 1993(b).

Channel Tunnel Rail Link Act 1996(c).

Licensing Act 2003(d).

Planning and Compulsory Purchase Act 2004(e).

Gambling Act 2005(f).

Natural Environment and Rural Communities Act 2006(g).

Crossrail Act 2008(h).

Planning Act 2008(i).

Flood and Water Management Act 2010(j).

Subordinate legislation

The Utilities Contracts Regulations 2006(k).

The Community Drivers' Hours and Recording Equipment Regulations 2007(l).

SCHEDULE 2

Article 2(2)

Amendments to Transport Act 1962 and Transport Act 1968

Transport Act 1962

1. The Transport Act 1962(m) is amended as follows.
- 2.—(1) Section 1(n) (the four Boards) is amended as follows.
 - (2) In subsection (2)—
 - (a) for “each Board”, where first occurring, substitute “the Docks Board”;
 - (b) omit “of each Board”, where second occurring.
 - (3) For subsection (2A) substitute—

(a) 1992 c. 42.

(b) 1993 c. 38. Part 2 of that Act is repealed, as from a date to be appointed, by the Welsh Language (Wales) Measure 2011 (nawm 1), section 145(2)(a).

(c) 1996 c. 61.

(d) 2003 c. 17.

(e) 2004 c. 5.

(f) 2005 c. 19.

(g) 2006 c. 16.

(h) 2008 c. 18.

(i) 2008 c. 29.

(j) 2010 c. 29.

(k) S.I. 2006/6.

(l) S.I. 2007/1819.

(m) 1962 c. 46.

(n) Section 1 was amended by the Transport (London) Act 1969 (c. 35), Schedules 6 and 12; the Transport Act 1981 (c. 56), Schedule 12, Part 1; the Transport Act 2000 (c. 38), Schedule 31, Part 4, and S.I. 2000/3251.

“(2A) The chairman of the British Waterways Board shall be appointed by the Scottish Ministers and the other members (including any vice chairman) shall be appointed by the Scottish Ministers after consultation with the chairman.”.

(4) In subsection (6)—

- (a) for “not more than nine nor less than four” substitute “between one and four”;
- (b) omit “the Minister or, as the case may be,”;
- (c) omit “him or”.

(5) Omit subsection (6A).

(6) Until the coming into force of the repeal (by the Transport Act 2000^(a)) of the words “the British Railways Board (in this Act referred to as the “Railways Board”)” in subsection (1) of section 1 of the Transport Act 1962 the amendment of subsection (2) of that section made by subparagraph (2)(a) is to have effect as if the reference to “the Docks Board” were a reference to “the Railways Board and of the Docks Board”.

3. In section 10(3)(b) (duty and powers of the British Waterways Board)—

- (a) omit paragraph (dd);
- (b) in paragraph (g)(i), for “Great Britain” substitute “Scotland”.

4. In section 11(c) (development of land), for subsection (5) substitute—

“(5) In the application of this section to the British Waterways Board —

- (a) the references to the Minister are to be read as references to the Scottish Ministers;
- (b) the power in subsection (4) is limited to the acquisition of adjoining land in Scotland.”.

5. For section 12(3A)(d) (pipe-lines), substitute—

“(3A) In the application of this section to the British Waterways Board—

- (a) references to Great Britain are to be read as references to Scotland,
- (b) references to the Minister are to be read as references to the Scottish Ministers, and
- (c) the power in subsection (2) is limited to the acquisition of land in Scotland.”.

6.—(1) Section 14(e) (supplemental provision relating to the Boards’ powers) is amended as follows.

(2) After subsection (1), insert—

“(1A) In the application of this section to the British Waterways Board, the power in subsection (1)(c) is limited to land in Scotland.”.

(3) In subsection (4B)—

- (a) after “shall have the power” insert “with the consent of the Scottish Ministers, and for the purposes of the Board’s business,”;
- (b) omit paragraphs (a) and (b).

(4) In subsection (4C)—

- (a) after “shall have the power” insert “with the consent of the Scottish Ministers, and for the purposes of the Board’s business,”;
- (b) omit paragraphs (a) and (b).

(5) Omit subsection (4D).

(a) 2000 c. 38.

(b) Section 10 was amended by the Transport Act 1968, Schedule 18, Part 1 and S.I. 2003/1545.

(c) Section 11 was amended by the Transport Act 1968, Schedule 18, Part 1 and S.I. 2000/3251.

(d) Subsection (3A) was inserted by S.I. 2000/3251. There are other amendments to section 12 that are not relevant to this Order.

(e) Relevant amendments to section 14 were made by S.I. 2000/3251.

7. After subsection (2) of section 15(a) (compulsory purchase of land), insert—
- “(2A) The Minister may authorise Canal & River Trust to purchase compulsorily any land in England or Wales which it requires for the purposes of any of its functions under an enactment and the Acquisition of Land Act 1981(b) shall apply as if Canal & River Trust were a local authority within the meaning of that Act.”.
- 8.—(1) Section 15A(c) (compulsory purchase of land: British Waterways Board in Scotland) is amended as follows.
- (2) In the heading, omit “in Scotland”.
- (3) In subsection (1), omit “in Scotland”.
- (4) In subsection (4), for “section 12(3A)(b)” substitute “section 12(3)”.
9. After subsection (1) of section 17(d) (power to promote and oppose Bills), insert—
- “(1ZA) In the application of subsection (1) to the British Waterways Board, the reference to the Minister is to be read as a reference to the Scottish Ministers.”.
10. After subsection (5) of section 18(e) (financial duty of Boards), insert—
- “(5A) In the application of subsections (4) and (5) to the British Waterways Board—
- (a) references to the Minister are to be read as references to the Scottish Ministers, and
- (b) references to the approval of the Treasury are omitted.”.
- 11.—(1) Section 19(f) (borrowing powers of Boards) is amended as follows.
- (2) For subsection (3), substitute—
- “(3) In any financial year the net amount of sums borrowed by the British Waterways Board under this section for discharging their functions under this Act or for meeting their obligations in connection with the discharge of their functions shall not exceed the amount specified for that year for the purposes of this subsection in a Budget Act.”.
- (3) For subsection (3A), substitute—
- “(3A) In subsection (3)—
- (a) “net amount” means the amount of sums borrowed in the financial year less any repayments made during that year (otherwise than by way of interest) in respect of sums borrowed in that year or any other year, and
- (b) “Budget Act” has the same meaning as in the Public Finance and Accountability (Scotland) Act 2000(g).”.
- (4) In subsection (7)—
- (a) omit “in connection with the exercise of their functions in Scotland”;
- (b) in paragraph (b) after “the Minister” insert “and the Secretary of State”;
- (c) omit paragraph (c).
12. In section 20(7)(h) (Exchequer loans), omit “in connection with the exercise of their functions in Scotland”.

(a) Section 15 was amended by the Acquisition of Land Act 1981 (c. 67), Schedules 4 and 6.

(b) 1981 c. 67.

(c) Section 15A was inserted by S.I. 2000/3251.

(d) Section 17 was amended by S.I. 2000/3251.

(e) Section 18 was amended by the Transport Act 1968, Schedule 18, Part 1. There is a further amendment not relevant to this Order.

(f) Subsection (7) was inserted by S.I. 2000/3251. Section 19 was also amended by the Transport Act 1968, Schedule 18, Part 1; the Transport (London) Act 1969, Schedule 6; the Statutory Corporations (Financial Provisions) Act 1974 (c. 8), section 4 and Schedule 2; the Transport (Financial Provisions) Act 1977 (c. 20), section 3(2)(a); the Transport Act 1981, Schedule 12, Part 1; the Water Act 1981 (c. 12), section 1(1) and (2); the Transport Act 2000, Schedule 31, Part 4, and S.I. 2011/1043, article 4(1).

(g) 2000 asp 1.

(h) Subsection (7) was inserted by S.I. 2000/3251.

13. In section 21(1)(a) (Treasury guarantees), after “a Board” insert “other than the British Waterways Board”.

14. In section 21A(1)(b) (British Waterways Board: guarantees by the Scottish Ministers), omit “, in connection with the exercise of their functions in Scotland,”.

15.—(1) Section 24(c) (accounts) is amended as follows.

(2) In subsection (1)—

- (a) after “Each Board” insert “, other than the British Waterways Board,”,
- (b) omit the words from “and, in the case of” to the end.

(3) In subsection (2)—

- (a) after “each Board”, insert “, other than the British Waterways Board,”,
- (b) omit the words “after, in the case of the British Waterways Board, consultation with the Scottish Ministers”.

(4) In subsection (3), omit “and, in the case of the British Waterways Board, to the Scottish Ministers” and “and in the report which is, under this Act, to be laid by the Scottish Ministers annually before the Scottish Parliament”.

(5) After subsection (3), insert—

“(3A) The British Waterways Board—

- (a) must cause proper accounts and other records in relation to those accounts to be kept, and
- (b) must prepare an annual statement of accounts in such form and containing such particulars, compiled in such manner, as the Scottish Ministers may from time to time direct.

(3B) The British Waterways Board must send the statement of accounts to the Auditor General for Scotland for auditing.

(3C) As soon as the accounts have been audited under subsection (3B), the British Waterways Board must send to the Scottish Ministers a copy of the statement of accounts together with a copy of the report made by the Auditor General for Scotland on that statement.

(3D) A copy of the statement of accounts and the report referred to in subsection (3C) must be included in the report which is under this Act to be laid by the Scottish Ministers annually before the Scottish Parliament.”.

16. For section 25(2A)(d) (the Board’s subsidiaries), substitute—

“(2A) In the application of this section to the British Waterways Board, references to the Minister are to be read as references to the Scottish Ministers.”

17.—(1) Section 27(e) (power of Ministers in relation to Boards) is amended as follows.

(2) After subsection (5), insert—

“(5A) In the application of subsections (1) to (5) to the British Waterways Board, references to the Minister are to be read as references to the Scottish Ministers.”.

(3) In subsection (6), after “Board”, in each place occurring, insert “or Canal & River Trust”.

-
- (a) Section 21 was amended by the Statutory Corporations (Financial Provisions) Act 1974, section 4 and Schedule 2 and the Miscellaneous Financial Provisions Act 1983 (c. 29), section 4 and Schedule 2.
 - (b) Section 21A was inserted by S.I. 2000/3251. Another section 21A (grants to the Railways Board) was inserted by the Railways Act 1993 (c. 43), section 109 and repealed, as from a date yet to be appointed, by the Transport Act 2000, Schedule 31, Part 4.
 - (c) Section 24 was amended by S.I. 1991/1997, 2000/3251 and 2008/948.
 - (d) Subsection (2A) was inserted by S.I. 2000/3251. Section 25 was also amended by the Transport Act 1968, Schedule 18, Part 1.
 - (e) Section 27 was amended by the Transport Act 1968, sections 46(5) and 51(3), the Railways Act 1974 (c. 48), section 4(6); the Transport Act 2000, Schedule 31, Part 4 and S.I. 2000/3251. There are further amendments not relevant to this Order.

(4) In subsection (7), for the words from “Each Board” to “shall” substitute “The Docks Board shall”.

(5) In subsection (8), for the words from “each Board” to “shall” substitute “the Docks Board shall”.

(6) Omit subsection (8A).

(7) In subsection (8B), omit “in or as regards Scotland” in both places occurring.

(8) In subsection (8C), omit “in Scotland”.

18. In section 28(2), (3) and (4)(a) (powers exercisable subject to Minister’s consent), after “Board”, in each place occurring, insert “or Canal & River Trust”.

19.—(1) Section 43(b) (charges and facilities: general provisions) is amended as follows.

(2) In subsections (1) and (2), after “British Waterways Board”, in each place occurring, insert “or Canal & River Trust”.

(3) In subsection (3)—

(a) after “British Waterways Board”, insert “and Canal & River Trust”,

(b) after “shall”, insert “each”.

(4) In subsection (4), after “British Waterways Board”, insert “and Canal & River Trust”.

(5) In subsection (5), after “the Boards”, insert “or Canal & River Trust”.

(6) In subsections (6) and (8), after “British Waterways Board”, in each place occurring, insert “and Canal & River Trust”.

20.—(1) Section 50(c) (port charges and conditions at harbours) is amended as follows.

(2) In subsection (1), after “the Boards” insert “and Canal & River Trust”.

(3) In subsection (2), after “the Boards”, in each place occurring, insert “or Canal & River Trust”.

21. In section 52(4)(d) (independent railway companies and inland waterway undertakings), in the definition of “independent inland waterway undertaking”, after “of the Boards”, insert “or Canal & River Trust”.

22.—(1) Section 62 (local enactments relating to the supply of water for canals) is amended as follows.

(2) In subsection (1)—

(a) after “the British Waterways Board”, where first occurring, insert “or Canal & River Trust”;

(b) after “the British Waterways Board”, in each other place occurring, insert “or, as the case may be, Canal & River Trust”.

(3) In subsection (2)—

(a) after “the British Waterways Board”, insert “or, as the case may be, Canal & River Trust”;

(b) after “the Board’s obligations”, insert “or, as the case may be, Canal & River Trust’s obligations”.

(a) Section 28 was amended by S.I. 2000/3251.

(b) Section 43 was amended by the Transport Act 2000, Schedule 27; the Railways Act 2005 (c. 14), Schedule 12. There are further amendments not relevant to this Order.

(c) Section 50 was amended by the Harbours Act 1964 (c. 40), Schedule 6.

(d) There are amendments and modifications to section 52 that are not relevant to this Order.

23. Section 63(a) (abstraction of water by British Waterways Board), to the extent that it continues in force, is repealed.

24. In section 73 (the powers of the Boards and the Holding Company as regards pensions and pension schemes), after subsection (2) insert—

“(3) In the application of this section to the British Waterways Board, the reference to the Minister is to be read as a reference to the Scottish Ministers.”.

25. In section 74(b) (Minister’s power to make orders about pensions), before subsection (1) insert—

“(A1) In this section, references to the Boards do not include the British Waterways Board.”.

26. In section 86(4) and (5)(c) (application of Town and Country Planning Acts), omit “in respect of any development in Scotland” in each place occurring.

27.—(1) Schedule 1(d) (the Boards and the holding company) is amended as follows.

(2) In paragraph 6—

(a) in sub-paragraph (2), for “Any member appointed by the Minister” substitute “A member of any Board other than the British Waterways Board”;

(b) for sub-paragraph (3) substitute—

“(3) Any member of the British Waterways Board may at any time by notice in writing to the Scottish Ministers resign that member’s office.”.

(3) In paragraph 7(1A), omit “made by the Scottish Ministers”.

(4) In paragraph 8(1A), omit “appointed by the Scottish Ministers”.

28.—(1) Schedule 6 (distribution of Commission’s undertaking) is amended as follows.

(2) In paragraph 1(1)—

(a) after “duty of the Boards”, insert “and Canal & River Trust”;

(b) in paragraph (a) after “the other Boards”, insert “or, as the case may be, Canal & River Trust”;

(c) after paragraph (a), insert—

“(aa) afford to Canal & River Trust as against the Boards such rights and safeguards as they may require for the proper discharge of their functions, and”;

(d) in paragraph (b) after “functions of the Boards”, insert “or, as the case may be, Canal & River Trust”.

(3) In paragraph 4(1)—

(a) in paragraph (b) after “the Boards’ functions”, insert “or Canal & River Trust’s functions”;

(b) after “Board or Boards”, insert “or, as the case may be, Canal & River Trust”.

(4) In paragraph 4(2), after “between the Boards”, insert “, or between a Board and Canal & River Trust,”.

(a) Section 63 was repealed, in relation to England and Wales, by the Water Resources Act 1963 (c. 38), Schedule 14, Part 2. Modifications extending to Scotland were made by the Water Industry (Scotland) Act 2002 (Consequential Modifications) Order 2004 (S.I. 2004/1822).

(b) There are amendments to section 74 that are not relevant to this Order.

(c) Relevant amendments to section 86 were made by S.I. 1970/1681 and 2000/3251.

(d) Relevant amendments to Schedule 1 were made by the Transport Act 1968, section 52(4); the Transport Act 2000, Schedule 31, Part 4 and S.I. 2000/3251.

29. In Schedule 9(a) (port charges), in paragraph 5(1), after “the Boards”, insert “or Canal & River Trust”.

Transport Act 1968

30. The Transport Act 1968(b) is amended as follows.

31.—(1) Section 43(c) (additional financial provisions as to Waterways Board) is amended as follows.

(2) Omit subsections (2) and (5).

(3) In subsection (6), for “Where an excess under subsection (5) of this section arises in relation to the activities of the Board in Scotland,” substitute “If in any accounting year of the Board there is an excess of the revenue of the Board over the total sums properly chargeable by them to revenue.”.

32. After section 43, insert—

“Grants to Canal & River Trust

43A. The Minister or any other Minister of the Crown may, with the approval of the Treasury, from time to time make grants to Canal & River Trust.”.

33. In section 44(1)(b)(d) (account by Minister of receipt and disposal of certain sums), omit “or the Waterways Board” and “or 43(5)”.

34. In section 46(2)(a)(e) (duty of Boards and new authorities to promote research and development), omit “in respect of their functions in Scotland,”.

35. In section 48(1A)(f) (manufacture, repair and supply)—

(a) omit “in connection with any activity in Scotland”;

(b) after “in subsection (6)”, insert “the reference to section 27(8) shall be construed as a reference to section 27(8C) and”.

36. In section 49(g) (powers with respect to land), for subsection (4A) substitute—

“(4A) In the application of this section to the Waterways Board —

(a) the references to the Minister are to be read as references to the Scottish Ministers;

(b) the powers in subsections (3) and (4) are limited to the acquisition of adjoining land in Scotland.”.

37.—(1) Section 50(h) (miscellaneous provisions as to powers) is amended as follows.

(2) In subsection (1)—

(a) omit “the Minister or, in the case of the Waterways Board, in connection with the exercise of their functions in Scotland,”;

(b) after “other premises” insert “in Scotland”.

(a) Schedule 9 was amended by the Harbours Act 1964, sections 28 and 39(3) and Schedule 6, and the Transport Act 1981, Schedule 12, Part 1.

(b) 1968 c. 73.

(c) Section 43 was amended by S.I. 2000/3251. There are other amendments not relevant to this Order.

(d) Relevant amendments to section 44 were made by the Transport Act 1980 (c. 34), Schedule 9; S.I. 1973/338 and 1991/510 and S.S.I. 2002/263. Section 44(1) was also amended, as from a date to be appointed, by the Transport Act 2000, Schedule 31, Part 4.

(e) Section 46 was amended by S.I. 2000/3251.

(f) Relevant amendments to section 48 were made by S.I. 2000/3251 and S.S.I. 2002/263.

(g) Subsection (4A) was inserted by S.I. 2000/3251. Other relevant amendments to section 49 were made by the British Waterways Act 1995 (c. i), section 23.

(h) Section 50 was amended by the Transport Act 2000, Schedule 31, Part 4, and S.I. 2000/3251. Other amendments were made that are not relevant to this Order.

(3) In subsection (5), omit “the Minister or, in the case of the Waterways Board, in connection with the exercise of their functions in Scotland,”.

(4) Omit subsection (8A).

(5) In subsection (9), omit “in connection with the exercise of their functions in Scotland,”.

(6) Until the coming into force of the repeals of words in section 50(1) of the Transport Act 1968 made by the Transport Act 2000—

(a) sub-paragraph (2)(a) is to have effect as if it omitted “in connection with the exercise of their functions in Scotland,”;

(b) sub-paragraph (2)(b) is to have effect as if it inserted “(in the case of the Waterways Board, in Scotland)”.

38.—(1) Section 104(a) (classification of the Board’s waterways) is amended as follows.

(2) In the heading, omit “the Board’s”.

(3) In subsection (1)—

(a) for “undertaking” substitute “undertakings”,

(b) after “Board” insert “and Canal & River Trust”.

(4) In subsection (3), after “Board” insert “or Canal & River Trust”.

(5) After subsection (3) insert—

“(3A) Canal & River Trust may apply to the Minister for the making of an order under subsection (3).

(3B) In deciding whether to make an order under subsection (3), the Minister must have regard to the financial position of Canal & River Trust.”.

39.—(1) Section 105(b) (maintenance of the Board’s waterways) is amended as follows.

(2) In the heading, omit “the Board’s”.

(3) In subsection (1), after “Board” insert “and of Canal & River Trust, in relation to the waterways comprised in their respective undertakings”.

(4) In subsection (2), after “the Board” insert “or Canal & River Trust”.

(5) In subsection (3)—

(a) after “or any part thereof,”, insert “or to any other reason the Minister considers relevant to the duty under subsection (1),”;

(b) for “the Board”, in each place occurring, substitute “Canal & River Trust”.

(6) After subsection (3) insert—

“(3ZA) Canal & River Trust may apply to the Minister for the making of an order under subsection (3).

(3ZB) In deciding whether to make any order under subsection (3), the Minister must have regard to the financial position of Canal & River Trust.”.

(7) For subsection (3A), substitute—

“(3A) If it appears to the Scottish Ministers that, having regard to any change in the size, design or type of vessel customarily using any commercial waterway or cruising waterway, or any part of such waterway, it is desirable to exercise their powers under this subsection, they may (after consultation with the Board) by order substitute for the duty imposed on the Board by subsection (1) in respect of that waterway (or part) such duty in respect of the maintenance of such waterway (or part) as they consider appropriate having regard to that change, and may by that order make such incidental or transitional provision as they think necessary or expedient in connection therewith.”.

(a) Section 104 was amended by S.I. 2000/3251.

(b) Section 105 was amended by S.I. 2000/3251 and modified by S.I. 1993/119.

- (8) In subsection (4)—
- (a) after “(3)” insert “or (3A)”;
 - (b) after “such order” insert “made by the Minister under subsection (3)”;
 - (c) after “Parliament” insert “, and an order made by the Scottish Ministers under subsection (3A) is subject to the negative procedure”.
- (9) In subsection (6), after “the Board” insert “or Canal & River Trust”.
- (10) In subsections (7) and (8), after “Board”, in each place occurring, insert “or, as the case may be, Canal & River Trust”.

40. For section 106(a) (enforcement of maintenance duty), substitute—

“Enforcement of maintenance duty – the Waterways Board

106.—(1) If, on an application by any person under this section to the Court of Session, the court determines that there has been, in respect of any waterway, a serious and persistent failure by the Waterways Board to discharge the duty imposed on them by—

- (a) section 105(1), or
- (b) an order made under section 105(3A),

the court may, subject to the provisions of this section, require the Board to remedy that failure; but, save as aforesaid, neither subsection (1) of section 105 nor any order under subsection (3A) of that section shall be construed as imposing any duty or liability enforceable by proceedings before any court to which the Board would not otherwise be subject.

(2) The fact that proceedings on an application under subsection (1) (referred to in this section as “enforcement proceedings”) are in progress in respect of any waterway or any part of a waterway, or that the court has in any such proceedings imposed any requirement on the Board, shall not prevent the Scottish Ministers from making an order in respect of that waterway or part under section 104(3) or 105(3A); but—

- (a) except as provided in subsection (3) of this section, where such an order is made while enforcement proceedings are in progress, the court shall nevertheless determine those proceedings on the basis of the duty of the Board as it stood when the proceedings were instituted; and
- (b) the making of such an order shall in no case absolve the Board from complying with any requirement which is imposed by the court in any enforcement proceedings.

(3) If a relevant order is pending at the time when enforcement proceedings are instituted, or if, at any time after enforcement proceedings have been instituted and before the court has imposed any requirement on the Board in the proceedings, the Scottish Ministers notify the Board that they are considering the making of a relevant order and give the court such a certificate as is mentioned in subsection (4)—

- (a) the court shall not, so long as the order is pending, impose any requirement on the Board in those proceedings; and
- (b) if the order is made, the court shall, in determining in those proceedings whether there has been a failure by the Board to discharge their duty, have regard only to the duty (if any) to which the Board are subject in consequence of the making of the order.

(4) The certificate referred to in subsection (3) is a certificate in writing to the effect that it appears to the Scottish Ministers that the imposition of any requirement on the Board on the basis of their existing duty would result in their incurring substantial expense and that, having regard to their financial position and their duty under section 18 of the Act of 1962

(a) Section 106 was amended by S.I. 2000/3251.

and section 41 of this Act, it would be unreasonable for them to bear that expense without a grant or further grant under section 43 of this Act.

(5) In subsection (3) “relevant order” means, in relation to any enforcement proceedings, an order under section 104(3) or 105(3A) of this Act in relation to the waterway or part of a waterway which is the subject of the proceedings; and for the purposes of that subsection an order is pending during the period of three months beginning with the day on which the Scottish Ministers notify the Board that they are considering the making of the order and, if before the expiration of that period notice of the proposed order is published under Schedule 13 to this Act, during any further period until the order is made or the Scottish Ministers notify the Board that it will not be made.

(6) As soon as may be after giving the Board any such notification as is mentioned in subsection (5), the Scottish Ministers shall give notice of that notification in the Edinburgh Gazette.

(7) For the purposes of this section enforcement proceedings shall be treated as instituted at the time when the summons beginning the proceedings is served on the Board.

Enforcement of maintenance duty – Canal & River Trust

106A.—(1) If, on an application by any person under this section to the High Court, the court determines that there has been, in respect of any waterway, a serious and persistent failure by Canal & River Trust to discharge the duty imposed on it by—

- (a) section 105(1), or
- (b) an order made under section 105(3),

the court may, subject to the provisions of this section, require Canal & River Trust to remedy that failure; but, save as aforesaid, neither subsection (1) of section 105 nor any order under subsection (3) of that section shall be construed as imposing any duty or liability enforceable by proceedings before any court to which Canal & River Trust would not otherwise be subject.

(2) The fact that proceedings on an application under subsection (1) (referred to in this section as “enforcement proceedings”) are in progress in respect of any waterway or any part of a waterway, or that the court has in any such proceedings imposed any requirement on Canal & River Trust, shall not prevent the Minister from making an order in respect of that waterway or part under section 104(3) or 105(3); but—

- (a) except as provided in subsection (3) of this section, where such an order is made while enforcement proceedings are in progress, the court shall nevertheless determine those proceedings on the basis of the duty of Canal & River Trust as it stood when the proceedings were instituted; and
- (b) the making of such an order shall in no case absolve Canal & River Trust from complying with any requirement which is imposed by the court in any enforcement proceedings.

(3) If a relevant order is pending at the time when enforcement proceedings are instituted, or if, at any time after enforcement proceedings have been instituted and before the court has imposed any requirement on Canal & River Trust in the proceedings, the Minister notifies Canal & River Trust that the Minister is considering the making of a relevant order and gives the court such a certificate as is mentioned in subsection (4)—

- (a) the court shall not, so long as the order is pending, impose any requirement on Canal & River Trust in those proceedings; and
- (b) if the order is made, the court shall, in determining in those proceedings whether there has been a failure by Canal & River Trust to discharge its duty, have regard only to the duty (if any) to which Canal & River Trust is subject in consequence of the making of the order.

(4) The certificate referred to in subsection (3) is a certificate in writing to the effect that it appears to the Minister that the imposition of any requirement on Canal & River Trust on

the basis of its existing duty would result in its incurring substantial expense and that, having regard to its financial position, it would be unreasonable for it to bear that expense without a grant or further grant under section 43A of this Act.

(5) In subsection (3) “relevant order” means, in relation to any enforcement proceedings, an order under section 104(3) or 105(3) of this Act in relation to the waterway or part of a waterway which is the subject of the proceedings; and for the purposes of that subsection an order is pending during the period of three months beginning with the day on which the Minister notifies Canal & River Trust that the Minister is considering the making of the order and, if before the expiration of that period notice of the proposed order is published under Schedule 13 to this Act, during any further period until the order is made or the Minister notifies Canal & River Trust that it will not be made.

(6) As soon as may be after giving Canal & River Trust any such notification as is mentioned in subsection (5), the Minister shall give notice of the notification in the London Gazette.

(7) For the purposes of this section enforcement proceedings shall be treated as instituted at the time when the claim form beginning the proceedings is served on Canal & River Trust.”.

41. In section 108(1)(a) (prevention of nuisance as respects certain waterways), for “the Waterways Board” substitute “Canal & River Trust”.

42.—(1) Section 109(b) (power of certain bodies to maintain or take over waterways and connected works) is amended as follows.

(2) In the heading, after “connected works” insert “in Scotland”.

(3) In subsection (2)—

- (a) omit paragraph (b) so far as having effect in relation to England and Wales;
- (b) omit paragraphs (c) and (h);
- (c) omit paragraph (j) so far as having effect in relation to England and Wales;
- (d) omit paragraph (k);
- (e) for the words from “the Minister” to “as the case may be,” substitute “the Scottish Ministers as a body appearing to”.

(4) In subsection (3)—

- (a) for the words from paragraph (b) to the end of the subsection substitute—

“(b) Scottish Water unless the Scottish Ministers have consented to the agreement or transfer;

and the powers under this section of Scottish Water shall be exercisable only for the purposes of their water undertaking and with the consent of the Scottish Ministers.”.

(5) For subsection (5) substitute—

“(5) The Board may make an agreement for maintenance or transfer under this section with two or more bodies jointly on such terms as to the sharing of expenses between those bodies and otherwise as those bodies may agree; and, notwithstanding subsection (3)(a)(i) of this section (but without prejudice to subsection (3)(a)(ii) of this section), a local authority may be a party to such an agreement if part of what is to be maintained or transferred is situated in their area and the remainder in the area or areas of one or more other authorities (whether or not local authorities) who are also parties to the agreement.”.

(a) Section 108 was amended by the Planning (Consequential Provisions) Act 1990 (c. 11), Schedule 2, paragraph 22(2); the Environmental Protection Act 1990, Schedule 15, paragraph 10(3); the Planning (Consequential Provisions) (Scotland) Act 1997 (c. 11), Schedule 2, paragraph 17(1), and the Public Health etc (Scotland) Act 2008 (asp 5), schedule 3, Part 1.

(b) Section 109 was amended by the Gas Act 1986, Schedule 7, paragraph 9; the Electricity Act 1989 (c. 29), Schedule 16, paragraph 14; the Water Act 1989, Schedules 25 and 27; the Water Consolidation (Consequential Provisions) Act 1991 (c. 60), Schedule 1, and S.I. 1996/593, 2000/3251 and 2004/1822. It was modified by the Gas Act 1995, Schedule 4, paragraph 2(2)(d) and the Utilities Act 2000 (c. 27), sections 31(1) and 76(7).

43. In section 111 (access agreements and orders as respects canals other than commercial waterways and cruising waterways), for “the Waterways Board” substitute “Canal & River Trust”.

44.—(1) Section 112(a) (power to extinguish statutory rights and obligations in respect of canals not comprised in undertaking of Board) is amended as follows.

(2) In the heading, after “Board” insert “or Canal & River Trust”.

(3) In subsection (1)—

- (a) after “Waterways Board” insert “or Canal & River Trust”;
- (b) after “the Minister” insert “, or, in the case of a canal in Scotland, the Scottish Ministers,”.

(4) In subsection (3)—

- (a) in paragraph (a), for “the Minister” substitute “the authority making the order”;
- (b) in paragraph (d), for “the Minister” substitute “the authority making the order”.

(5) In subsection (5)—

- (a) after “order shall” insert “, in the case of an order made by the Minister,”;
- (b) after “Parliament” insert “, and in the case of an order made by the Scottish Ministers, is subject to the negative procedure”.

(6) Omit subsection (6A).

45. In subsection (5) of section 113(b) (byelaws in respect of waterways owned or managed by certain bodies), in the definition of “qualified body” omit the words “(except paragraph (c) thereof)”.

46.—(1) Section 116(c) (transfer of responsibility for maintenance etc) is amended as follows.

(2) In the heading, for “Boards” substitute “certain”.

(3) After subsection (11), insert—

“(12) Subsection (13) applies if Canal & River Trust is, or but for this section would be, responsible for maintaining—

- (a) a highway carried by a new bridge over an inland waterway comprised in its undertaking or over any other installation or land used by Canal & River Trust in connection with such an inland waterway, or
- (b) that highway together with an access highway.

(13) Where—

- (a) the highway at each end of the bridge; or
- (b) if Canal & River Trust is also responsible for maintaining any access highway, the highway at each end of the bridge and any access highway,

is a highway maintainable at the public expense, the highway carried by the bridge, together with any access highway, shall be a highway maintainable at the public expense.

(14) In this section—

- (a) “access highway”, in relation to a bridge, means a highway giving access to the bridge; and
- (b) “new bridge” means a bridge constructed after the coming into force of the British Waterways Board (Transfer of Functions) Order 2012.

(a) Section 112 was amended by the Water Act 1989, Schedule 25, paragraph 38; the Planning (Consequential Provisions) Act 1990, Schedule 2; the Planning (Consequential Provisions) (Scotland) Act 1997, Schedule 2, paragraph 17(2); the Public Health etc (Scotland) Act 2008 (asp 5), schedule 3, Part 1, and S.I. 1996/593, 2000/3251 and 2004/1822.

(b) Section 113 was amended by the Criminal Justice Act 1982 (c. 48), sections 37, 38 and 46; the Water Act 1989, Schedule 25, paragraph 38, and S.I. 2004/1822.

(c) Section 116 was amended by the Local Government Act 1972 (c. 70), Schedule 30 and S.I. 1996/420 and 2003/1615.

(15) Subsections (6) and (7) of this section shall have effect in relation to Canal & River Trust and any such bridge of Canal & River Trust as is mentioned in subsection (12) above as they have effect in relation to a Board.”.

47.—(1) Section 117(a) (duty of Boards as respect bridges carrying highways) is amended as follows.

(2) In the heading, omit “of Boards”.

(3) After subsection (1B) insert—

“(1C) This section also applies to a bridge (whenever constructed) which —

(a) carries a highway over an inland waterway of Canal & River Trust or any other installation or land used by Canal & River Trust in connection with an inland waterway, and

(b) belongs to Canal & River Trust,

and in relation to any such bridge references in this section to each of the Boards or a Board are, subject to subsection (1D), to be read as references to Canal & River Trust.

(1D) Subsection (7) applies in relation to a bridge constructed by or belonging to—

(a) Canal & River Trust and one or more of the Boards mentioned in subsection (1) of this section;

(b) Canal & River Trust and a network owner; or

(c) Canal & River Trust, one or more of the Boards mentioned in subsection (1) of this section and a network owner,

as it applies in relation to a bridge constructed by or belonging to any two or more Boards.”.

48.—(1) Section 118(b) (duty of highway authorities, etc, as respects bridges over Boards’ railways or inland waterways) is amended as follows.

(2) In the heading, for “Boards” substitute “certain”.

(3) After subsection (1A) insert—

“(1B) This section also applies to any bridge (whenever constructed) which —

(a) carries a highway over an inland waterway of Canal & River Trust, but

(b) does not belong to Canal & River Trust,

and in relation to any such bridge references in this section to any of the said Boards or a Board are to be read as references to Canal & River Trust.”.

49.—(1) Section 119(c) (ending of liability of Boards to make payments on being relieved of responsibility for bridges carrying trunk or special roads) is amended as follows.

(2) In the heading, omit “of Boards”.

(3) In subsection (1)—

(a) for “or the Waterways Board” substitute “, the Waterways Board or Canal & River Trust”;

(b) after “the Board”, in each place occurring, insert “or, as the case may be, Canal & River Trust”.

(4) In subsection (2), after “of this section” insert “or Canal & River Trust”.

(a) Section 117 was amended by S.I. 1996/420 and 2000/3251. There are other amendments and modifications that are not relevant to this Order.

(b) Section 118 was amended by S.I. 1996/420 and 2003/1615.

(c) Section 119 was amended by the Highways Act 1980, Schedule 24, paragraph 18 and S.I. 1996/420 and 2003/1615.

50.—(1) Section 121(a) (application of foregoing sections to undertakers other than Railways Board, London Board and Waterways Board) is amended as follows.

(2) In the heading, for the words from “undertakers” to the end substitute “other undertakers”.

(3) In subsection (1)—

(a) after “any reference to” insert “Canal & River Trust,”;

(b) for “that Board” substitute “that body”.

(4) In subsection (2), for “Boards”, in each place occurring, substitute “bodies”.

51.—(1) Section 137(b) (machinery for negotiation and consultation with staff) is amended as follows.

(2) In subsection (3)—

(a) in paragraph (a), after “in the case of” insert “the Waterways Board or”;

(b) after paragraph (a), insert—

“(aa) in the case of the Waterways Board, to the Scottish Ministers,”.

(3) In subsection (4)—

(a) in paragraph (a), after “in the case of” insert “the Waterways Board or”, and omit the “or” at the end of that paragraph;

(b) after paragraph (a), insert—

“(aa) in the case of the Waterways Board, the Scottish Ministers, or”;

(c) after “as the case may be, to” insert “the Scottish Ministers or”.

(4) In subsection (7), omit “the British Waterways Board or”.

52. In section 144(3)(c) (transfer and disposal of historical records and relics), after “other than the Railways Board,” insert “Canal & River Trust,”.

53.—(1) Schedule 13(d) (orders relating to inland waterways) is amended as follows.

(2) In paragraph 1, for sub-paragraph (2) substitute—

“(2) Before making an order under section 104(3), 105(3A) or 112 the Scottish Ministers shall comply with the requirements of this Schedule applicable to that order and may then make the order as originally proposed or with such modifications as they think fit and in the case of such an order any reference in this Schedule (however expressed) to the Minister is to be construed as a reference to the Scottish Ministers.”.

(3) In paragraph 2—

(a) in sub-paragraph (1) after “shall consult” insert “with Canal & River Trust, where the waterway in respect of which the order is to be made is in England or Wales, and”;

(b) for sub-paragraph (2) substitute—

“(2) In the case of a proposed order under section 104(3) adding to or reducing the waterways in England or Wales in Part 2 of that Schedule, the Minister shall consult with Canal & River Trust.”.

(4) After paragraph 3 insert—

(a) Section 121 was amended by the Highways Act 1980, Schedule 24, paragraph 18; the Transport Act 1980, Schedule 9, Part 3 and the Transport and Works Act 1992, Schedule 4, Part 1. There are further amendments and modifications that are not relevant to this Order.

(b) Section 137 was amended by S.I. 1997/2971 and 2002/2626. There are other amendments not relevant to this Order.

(c) Section 144 was amended by S.I. 1994/2032 and 1997/1744. There are other amendments not relevant to this Order.

(d) Schedule 13 was amended by the Water Act 1989, Schedule 25, paragraph 38; the Natural Environment and Rural Communities Act 2006, Schedule 11, Part 2 and S.I. 1996/593, 2000/3251, 2004/1822 and 2012/[0000]. It was modified by S.I. 1993/1119.

“**3A.** In the case of a proposed order under section 105(3A) in respect of a commercial waterway or any part of such a waterway the Scottish Ministers shall consult with any organisation appearing to them to represent persons operating commercial freight-carrying vessels on that waterway or part.”.

(5) In paragraph 5—

- (a) in sub-paragraph (1), after “105(3)” insert “or (3A)”;
- (b) in sub-paragraph (2)(a)—
 - (i) after “105(3)” insert “or (3A)”,
 - (ii) after “(and is not withdrawn) by” insert “Canal & River Trust, where the waterway in respect of which the order is to be made is in England or Wales,”;
- (c) in sub-paragraph (3), after “105(3)” insert “or (3A)”.

SCHEDULE 3

Article 2(3)

Amendments

PART 1

Public general Acts

Public Health Acts Amendment Act 1907

1. In section 94(8) of the Public Health Acts Amendment Act 1907(**a**) (power to license pleasure boats), for “the British Waterways Board” substitute “Canal & River Trust”.

Harbours Act 1964

2.—(1) The Harbours Act 1964(**b**) is amended as follows.

(2) In section 26(5)(a) (repeal of provisions limiting discretion of certain harbour authorities as to ships, passenger and goods dues charged by them), after “the Boards” insert “or Canal & River Trust”.

(3) In section 30(**c**) (duty of harbour and local lighthouse authorities to make available for inspection, and to keep for sale, copies of lists of certain charges)—

- (a) in subsection (1)—
 - (i) omit the “or” at the end of paragraph (a);
 - (ii) after paragraph (b) insert an “or” and then—

“(c) by virtue of section 43 of the Transport Act 1962 by Canal & River Trust at a harbour specified in Schedule 9 to that Act;”.
- (b) in subsection (3)—
 - (i) for “(a) or (b)”, substitute “(a), (b) or (c)”;
 - (ii) after “concerned”, insert “or by Canal & River Trust”;
 - (iii) after “Board”, in the second place it occurs, insert “or Canal & River Trust”;
- (c) in subsection (6), after “Board”, insert “or by Canal & River Trust”.

(a) 1907 c. 53. Section 94(8) was substituted by S.I. 1997/1187, article 2.

(b) 1964 c. 40.

(c) Section 30 was amended by virtue of the Decimal Currency Act 1969 (c. 19) and by the Transport Act 1968, Schedules 16 and 18; the Transport Act 1981 (c. 56), Schedules 5, 6 and 12; the Merchant Shipping Act 1995 (c. 21), Schedule 12; the Transport Act 2000 (c. 38), Schedule 31, Part 4, and S.I. 1978/272, Schedule 5.

(4) In section 36(a)(a) (sections 31 and 32 not to apply to charges at certain harbours), after “the British Waterways Board”, insert “or Canal & River Trust”.

(5) In section 42(11)(a)(b) (accounts and reports relating to harbour activities and associated activities), after “the Boards”, insert “or Canal & River Trust”.

(6) In section 57 (interpretation), after subsection (5) insert—

“(6) Any reference in this Act to Canal & River Trust shall be construed as including a reference to any company that is a subsidiary (within the meaning of the Companies Act 2006) of Canal & River Trust.”.

Countryside Act 1968

3. In section 16(6)(c) of the Countryside Act 1968(c) (access to open country: canals and woodlands), for “the British Waterways Board” substitute “Canal & River Trust”.

Salmon and Freshwater Fisheries Act 1975

4.—(1) The Salmon and Freshwater Fisheries Act 1975(d) is amended as follows.

(2) In section 40 (River Severn)—

(a) for “the British Waterways Board” substitute “Canal & River Trust”;

(b) for “the Board’s” substitute “Canal & River Trust’s”.

Local Government, Planning and Land Act 1980

5.—(1) The Local Government, Planning and Land Act 1980(e) is amended as follows.

(2) In section 185(2)(a)(f) (restriction on power of certain authorities to make pleasure boat byelaws), for “the British Waterways Board” substitute “Canal & River Trust”.

(3) In Schedule 16(g) (bodies to whom Part 10 applies), in paragraph 18, after “Statutory undertakers” insert “other than Canal & River Trust”.

Highways Act 1980

6.—(1) The Highways Act 1980(h) is amended as follows.

(2) In section 111(1) (interpretation of Part 6), for “the British Waterways Board” substitute “Canal & River Trust”.

(3) In section 169(6) (controls on scaffolding in section 169 not to apply to certain structures), for “the British Waterways Board” substitute “Canal & River Trust”.

(4) In section 219(4)(i)(i) (provisions relating to payment for street works not to apply in certain cases), for “the British Waterways Board” substitute “Canal & River Trust”.

(5) In section 329(4) (interpretation), for “the British Waterways Board” substitute “Canal & River Trust”.

(6) In Schedule 11 (provisions as to orders under section 93), in paragraph 4(c)—

(a) Section 36 was amended by the Transport Act 1968, Schedule 16; the Transport Act 1981, Schedule 12, Parts 1 and 2; the Transport Act 2000, Schedule 31, Part 4, and S.I. 1999/1820, Schedule 2, Part 1, paragraph 34.

(b) Section 42 was substituted by the Transport Act 1981, Schedule 6, paragraph 10. There are other amendments not relevant to this Order.

(c) 1968 c. 41. Section 16(6)(c) was amended by the Transport Act 1968, section 111.

(d) 1975 c. 51. Section 40 was amended by the Environment Act 1995 (c. 25), Schedule 15, paragraph 2.

(e) 1980 c. 65.

(f) There are amendments to section 185 that are not relevant to this Order.

(g) See article 3(2) of this Order. Paragraph 18 of Schedule 16 was amended by the Gas Act 1986 (c. 44), section 67(4) and Schedule 9, Part 1, the Electricity Act 1989 (c. 29), section 112(4) and Schedule 18, and the Water Act 1989 (c. 15), section 190 and Schedule 25, paragraph 61.

(h) 1980 c. 66. There are amendments to the listed provisions that are not relevant to this Order.

- (a) for “the British Waterways Board” in the first place it occurs substitute “Canal & River Trust”;
- (b) for “that Board” substitute “Canal & River Trust”;
- (c) omit “(the predecessors of the British Waterways Board)”.

Transport Act 1981

7. In Schedule 3 to the Transport Act 1981(a) (powers of Associated British Ports), in paragraph 31(4), after “the British Waterways Board” insert “, Canal & River Trust”.

Agricultural Holdings Act 1986

8. In Schedule 12 to the Agricultural Holdings Act 1986(b) (modifications applicable to old tenancies and other similar cases), after paragraph 4(5) insert—

“(5A) Where by a scheme under section 24 of the Public Bodies Act 2011 relevant land has been transferred by the British Waterways Board to Canal & River Trust or any subsidiary of Canal & River Trust, sub-paragraph (2) shall (so far as relates to relevant land so transferred) have effect in relation to Canal & River Trust or, as the case may be, that subsidiary as it had effect in relation to the British Waterways Board immediately before that land was transferred under that scheme.

(5B) In sub-paragraph (5A)—

- (a) “relevant land” means land falling within paragraph (a) or (b) of sub-paragraph (2) and transferred to the British Waterways Board as there mentioned;
- (b) “subsidiary” means a company which is a subsidiary within the meaning of the Companies Act 2006.”.

Town and Country Planning Act 1990

9. In section 264(4)(a) (operational land) of the Town and Country Planning Act 1990(c), after “the Water Industry Act 1991”(d), insert “or, in the case of land held by Canal & River Trust, the Public Bodies Act 2011”.

Ports Act 1991

10. In section 1(4) of the Ports Act 1991(e) (meaning of relevant port authority), after paragraph (c), insert—

“(ca) Canal & River Trust;”.

Water Resources Act 1991

11.—(1) The Water Resources Act 1991(f) is amended as follows.

(2) In the heading to section 66 (inland waterways owned or managed by British Waterways Board), for “British Waterways Board” substitute “Canal & River Trust”.

(3) In section 66(g)—

(a) 1981 c. 56. There are amendments to paragraph 31 of Schedule 3 that are not relevant to this Order.
 (b) 1986 c. 5. There are amendments to paragraph 4 of Schedule 12 that are not relevant to this Order.
 (c) 1990 c. 8. Relevant amendments to section 264 were made by the Water Consolidation (Consequential Provisions) Act 1991 (c. 60), section 2, Schedule 1, paragraph 54; the Planning and Compulsory Purchase Act 2004, section 40(2)(k).
 (d) 1991 c. 56.
 (e) 1991 c. 52. There is an amendment to section 1 that is not relevant to this Order.
 (f) 1991 c. 57.
 (g) Section 66 was amended by the Water Act 2003 (c. 37), sections 14(3)(d) and 101; Schedule 7, Part 1, paragraphs 1 and 7, and Schedule 9, Part 3, and by the Environment Act 1995, Schedule 22, paragraph 128.

- (a) in subsection (1), for “the British Waterways Board (“the Board”)”, substitute “Canal & River Trust”;
- (b) in subsections (2)(b) and (c) and (3), for “the Board” in each place occurring, substitute “Canal & River Trust”.

(4) In the heading to section 130 (charges in respect of abstraction from waters of British Waterways Board), for “British Waterways Board” substitute “Canal & River Trust”.

(5) In section 130(a), in subsections (1) and (2), for “the British Waterways Board” and “the Board” in each place occurring, substitute “Canal & River Trust”.

Transport and Works Act 1992

12.—(1) The Transport and Works Act 1992(b) is amended as follows.

(2) In section 5(7) (subject matter of orders under sections 1 and 3), for “the British Waterways Board’s” substitute “Canal & River Trust’s”.

(3) In section 20 (power to apply for, or object to, orders), omit subsection (3).

Environment Act 1995

13. In section 41(8) (power to make schemes imposing charges) of the Environment Act 1995(c), for “the British Waterways Board” substitute “Canal & River Trust”.

Channel Tunnel Rail Link Act 1996

14.—(1) Schedule 15 (protective provisions) to the Channel Tunnel Rail Link Act 1996(d) is amended as follows.

(2) In the heading to Part 6 (protection of British Waterways Board), for “British Waterways Board”, substitute “Canal & River Trust”.

(3) In Part 6(e)—

- (a) in paragraph 1(2), omit the definition of “the Board”;
- (b) for “the Board”, in each place occurring, substitute “Canal & River Trust”.

Freedom of Information Act 2000

15.—(1) The Freedom of Information Act 2000(f) is amended as follows.

(2) In Part 6 of Schedule 1 (other public bodies and offices: general)—

- (a) omit the entry relating to the British Waterways Board;
- (b) at the appropriate place insert—

“Canal & River Trust, in respect of information held by it relating to functions exercisable by it by virtue of the British Waterways Board (Transfer of Functions) Order 2012.”.

Licensing Act 2003

16.—(1) The Licensing Act 2003(g) is amended as follows.

(2) In section 13(4)(a) (vessels: responsible authorities), in paragraph (h)(iii), for “the British Waterways Board” substitute “Canal & River Trust”.

(a) Section 130 was amended by the Environment Act 1995, Schedule 22, paragraph 128.
(b) 1992 c. 42.
(c) 1995 c. 25. There are amendments to section 48 that are not relevant to this Order.
(d) 1996 c. 61.
(e) Paragraph 11 of Part 6 was amended by S.I. 1997/2971, Schedule, paragraph 37.
(f) 2000 c. 36.
(g) 2003 c. 17.

(3) In section 69(4)(b) (vessels: responsible authorities), in paragraph (h)(iii), for “the British Waterways Board” substitute “Canal & River Trust”.

Gambling Act 2005

17.—(1) The Gambling Act 2005(c) is amended as follows.

(2) In section 211(4) (vehicles and vessels: premises licences), for paragraph (c) substitute—

“(c) the British Waterways Board, if the place where the vessel is or is likely to be while activities are carried on in the vessel in reliance on a premises licence is in Scotland,

(ca) Canal & River Trust, if the place where the vessel is or is likely to be while activities are carried on in the vessel in reliance on a premises licence is in England or Wales, and”.

(3) In section 231(3) (vehicles and vessels: temporary use of premises), for paragraph (c) substitute—

“(c) the British Waterways Board, if the place where the vessel is moored or is likely to be moored, or the place in the United Kingdom nearest to the place at which the vessel is or is likely to be, while activities are carried on in the vessel in reliance on a temporary use notice is in Scotland,

(ca) Canal & River Trust, if the place where the vessel is moored or is likely to be moored, or the place in the United Kingdom nearest to the place at which the vessel is or is likely to be, while activities are carried on in the vessel in reliance on a temporary use notice is in England or Wales, and”.

Natural Environment and Rural Communities Act 2006

18. In Schedule 7 to the Natural Environment and Rural Communities Act 2006(d) (designated bodies), in paragraph 7, for “The British Waterways Board” substitute “Canal & River Trust”.

Crossrail Act 2008

19.—(1) Schedule 17 to the Crossrail Act 2008(e) (protective provisions) is amended as follows.

(2) In the heading to Part 5 (protection of British Waterways Board), for “British Waterways Board”, substitute “Canal & River Trust”.

(3) In Part 5—

(a) in paragraph 1(2), omit the definition of “the Board”,

(b) for “the Board”, in each place occurring, substitute “Canal & River Trust”.

Flood and Water Management Act 2010

20. In Schedule 3 to the Flood and Water Management Act 2010(f) (sustainable drainage), in paragraph 11(3)(d), for “British Waterways” substitute “Canal & River Trust”.

(a) There are amendments to section 13 that are not relevant to this Order.
(b) There are amendments to section 69 that are not relevant to this Order.
(c) 2005 c. 19.
(d) 2006 c. 16.
(e) 2008 c. 18.
(f) 2010 c. 29.

Crime and Security Act 2010

21. In section 55(2)(a) (power to restrict sale and supply of alcohol) of the Crime and Security Act 2010(b), in the inserted section 172B(5)(i)(iii) of the Licensing Act 2003 (vessel: responsible authorities), for “the British Waterways Board” substitute “Canal & River Trust”.

Police Reform and Social Responsibility Act 2011

22. In section 119(3)(c) (early morning alcohol restriction orders) of the Police Reform and Social Responsibility Act 2011(d), in the substituted section 172B(4)(j)(iii) of the Licensing Act 2003 (vessel: responsible authorities), for “the British Waterways Board” substitute “Canal & River Trust”.

PART 2

Acts of the Scottish Parliament

Ethical Standards in Public Life etc. (Scotland) Act 2000

23. In schedule 3 to the Ethical Standards in Public Life etc. (Scotland) Act 2000(e) (devolved public bodies), at the appropriate place insert “The British Waterways Board.”.

Scottish Public Services Ombudsman Act 2002

24. In schedule 2 to the Scottish Public Services Ombudsman Act 2002(f) (listed authorities), in Part 2 (entries amendable by Order in Council) before paragraph 21 insert the following—

“**20B** The British Waterways Board.”.

Freedom of Information (Scotland) Act 2002

25. In schedule 1 to the Freedom of Information (Scotland) Act 2002(g) (Scottish public authorities), in Part 7 (others) before paragraph 62 insert the following—

“**61B** The British Waterways Board.”.

Public Services Reform (Scotland) Act 2010

26.—(1) The Public Services Reform (Scotland) Act 2010(h) is amended as follows.

(2) In schedule 5 (improvement of public functions: listed bodies), in the list headed “Scottish public authorities with mixed functions or no reserved functions”, at the appropriate place insert “British Waterways Board”.

(3) In schedule 8 (information on exercise of public functions: listed public bodies), at the appropriate place insert “British Waterways Board”.

(a) Section 55 comes into force on a date to be appointed, but has been prospectively repealed by section 119(4) of the Police Reform and Social Responsibility Act 2011 (c. 13), which comes into force on a date to be appointed.

(b) 2010 c. 17.

(c) Section 119 comes into force on a date to be appointed. When in force, section 119(4) will repeal section 55 of the Crime and Security Act 2010.

(d) 2011 c. 13.

(e) 2000 asp 7.

(f) 2002 asp 11. Paragraph 20A (Bòrd na Gàidhlig) was inserted by the Gaelic Language (Scotland) Act 2005 (asp 7), schedule 2, paragraph 2. There are other amendments that are not relevant to this Order.

(g) 2002 asp 13. Paragraph 61A (Bòrd na Gàidhlig) was inserted by the Gaelic Language (Scotland) Act 2005 (asp 7), schedule 2, paragraph 3. There are other amendments that are not relevant to this Order.

(h) 2010 asp 8.

(4) The amendment made by sub-paragraph (3) does not require the British Waterways Board to publish any information under section 31(1) or (3) or 32(1) of the Public Services Reform (Scotland) Act 2010 in respect of expenditure incurred, payments made or steps taken prior to the transfer date.

Public Records (Scotland) Act 2011

27. In the schedule to the Public Records (Scotland) Act 2011(a) (authorities to which Part 1 applies), in the list headed “Others”, at the appropriate place insert “British Waterways Board.”.

PART 3

Subordinate legislation

The Drainage Rates (Appeals) Regulations 1970

28. In regulation 5(2)(c) (hereditaments occupied for purposes of extensive undertakings) of the Drainage Rates (Appeals) Regulations 1970(b), for “and the British Waterways Board” substitute “, or Canal & River Trust”.

The Secretary of State for Transport (Harbour Authorities) Charging Scheme 1982

29. In the Schedule (contributing authorities) to the Secretary of State for Transport (Harbour Authorities) Charging Scheme 1982(c), at the appropriate place insert “Canal & River Trust”.

The Local Government Reorganisation (Preservation of Right to Buy) Order 1986

30. In Schedule 1 (modifications as applied to preserved right to buy) to the Local Government Reorganisation (Preservation of Right to Buy) Order 1986(d), in sub-paragraph (4) of paragraph 7 of Schedule 4 to the Housing Act 1985(e) inserted by paragraph 42(a) of Part 1, at the appropriate place insert “Canal & River Trust”.

The Housing (Right to Buy) (Prescribed Persons) Order 1992

31. In the Schedule (prescribed persons) to the Housing (Right to Buy) (Prescribed Persons) Order 1992(f), at the appropriate place insert “Canal & River Trust”.

The Transport and Works Applications (Inland Waterways Procedure) Regulations 1993

32.—(1) The Transport and Works Applications (Inland Waterways Procedure) Regulations 1993(g) are amended as follows.

(2) In regulation 3(1) (application of regulations), for “the British Waterways Board’s” substitute “Canal & River Trust’s”.

(3) In Schedule 1 (modifications of the Transport Act 1968)—

- (a) omit paragraph 1;
- (b) in paragraph 3(3)—

(a) 2011 asp 12.

(b) S.I. 1970/1152, to which there are amendments not relevant to this Order.

(c) S.I. 1982/9.

(d) S.I. 1986/2092.

(e) 1985 c. 68.

(f) S.I. 1992/1703.

(g) S.I. 1993/1119 as amended by the Inland Waterways Advisory Council (Abolition) Order 2012 (S.I. 2012/[0000]).

- (i) after “shall consult”, insert “with Canal & River Trust, where the waterway in respect of which the order is to be made is in England or Wales, and”;
- (ii) after “of this Schedule,”, insert “to Canal & River Trust and”;
- (c) in paragraph 3(4), after “of this Schedule, to”, insert “Canal & River Trust”;
- (d) in paragraph 3(5), in the text of the modified paragraph 3—
 - (i) in sub-paragraph (a), before paragraph (i), insert—
 - “(ai) to Canal & River Trust”;
 - (ii) in sub-paragraph (b), after “copy thereof to”, insert “Canal & River Trust”.

(4) In paragraph 2(2) of Schedule 2 (modifications of the Transport and Works Act 1992) in the text of the modified section 11(4)(c)—

- (a) for “the British Waterways Board’s” substitute “Canal & River Trust’s”;
- (b) after “with that paragraph” insert “, Canal & River Trust”.

The Scotland Act 1998 (Cross-Border Public Authorities) (Specification) Order 1999

33. In the Schedule to the Scotland Act 1998 (Cross-Border Public Authorities) (Specification) Order 1999(a), omit the entry relating to the British Waterways Board.

The Utilities Contracts Regulations 2006

34. In Schedule 1 (utilities) to the Utilities Contracts Regulations 2006, in Part P, for “British Waterways Board” substitute “Canal & River Trust”.

The Merchant Shipping (Inland Waterways and Limited Coastal Operations) (Boatmasters’ Qualifications and Hours of Work) Regulations 2006

35. In Part 1 of Schedule 2 to the Merchant Shipping (Inland Waterways and Limited Coastal Operations) (Boatmasters’ Qualifications and Hours of Work) Regulations 2006(b), after “British Waterways Boatmanship Licence” add “or equivalent licence issued by Canal & River Trust”.

The Community Drivers’ Hours and Recording Equipment Regulations 2007

36. In Part 1 of the Schedule (exempted vehicles) to the Community Drivers’ Hours and Recording Equipment Regulations 2007(c), in paragraph 1(2)(f), after “the British Waterways Board” insert “or Canal & River Trust”.

SCHEDULE 4

Article 5(1)

Transitional provisions

Interpretation

1. In this Schedule, “the relevant period” means the period commencing on 1st April 2011 and ending on 31st March 2012.

(a) S.I. 1999/1319. There are amendments to the Schedule that are not relevant to this Order.
 (b) S.I. 2006/3223.
 (c) S.I. 2007/1819.

Accounts and report for the period 1st April 2011 to 31st March 2012

2.—(1) Subsections (1)(b) to (4) of section 24 of the 1962 Act shall continue in force as they had effect immediately before the transfer date in relation to the accounts of the British Waterways Board for the relevant period.

(2) Subsections (8) and (8C) of section 27 of the 1962 Act shall continue in force as they had effect immediately before the transfer date in so far as they relate to the making of reports by the British Waterways Board on the exercise or performance of their functions, and on their policy and programme, in the relevant period.

Transitional arrangements for the period 1st April 2012-31st March 2013

3.—(1) Before making any direction under section 24(3A) of the 1962 Act(a) relating to the preparation of the annual statement of accounts for the period ending on 31st March 2013, the Scottish Ministers must consult the Secretary of State.

(2) The British Waterways Board must, at or around the same time as they send the relevant statement and report to the Scottish Ministers under section 24(3C) of the 1962 Act, send a copy of the relevant statement and report to the Secretary of State.

(3) The Secretary of State must lay before Parliament a copy of the relevant statement and report sent to the Secretary of State under sub-paragraph (2).

(4) In this paragraph, “the relevant statement and report” means the statement of accounts prepared by the British Waterways Board under section 24(3A) of the 1962 Act for the period ending on 31st March 2013 and the report made by the Auditor General for Scotland on that statement.

Obligations on Canal & River Trust

4.—(1) Canal & River Trust must provide the Secretary of State with such returns, accounts and other information with respect to the property and activities of the British Waterways Board during the relevant period and for the period commencing on 1st April 2012 and ending on the day before the transfer date, and the property and activities of any company which was the subsidiary of the Board during any such period, as the Secretary of State may from time to time require.

(2) Canal & River Trust must provide such assistance as the British Waterways Board may reasonably require for the purpose of enabling the Board to comply with the requirements of paragraph 2 or 3 or of section 24(3A) of the 1962 Act.

EXPLANATORY NOTE

(This note is not part of the Order)

This instrument transfers statutory functions, so far as exercisable in relation to England and Wales, from the British Waterways Board (the Board) to Canal & River Trust. It also makes consequential amendments to provide for the Board to continue to exist as a statutory corporation exercising statutory functions in relation to Scotland.

Article 2(1) and Schedule 1 provide for the transfer of certain statutory functions exercisable by the Board in relation to England and Wales to Canal & River Trust. The statutory functions are those exercisable by the Board under or by virtue of the enactments listed in Schedule 1 (and so include functions in subordinate legislation made under those enactments), and functions under or by virtue of any local Act. The statutory functions include functions which were transferred to the Board from the British Transport Commission under the Transport Act 1962 (c. 46). A number of functions under that Act and the Transport Act 1968 are not transferred.

Article 2(2) and Schedule 2 makes amendments to the Transport Act 1962 and the Transport Act 1968. The amendments made by Schedule 2 include amendments to the Transport Act 1968 to

(a) Subsections (3A)-(3D) are inserted by paragraph 15(5) of Schedule 2 to this Order.

give Canal & River Trust a right to apply to the minister for the making of an Order under section 104(3) of that Act (for the reclassification of inland waterways), and to require the Minister to have regard to the financial position of Canal & River Trust in deciding whether to make any such Order. There are further related amendments to sections 105 and 106 and to Schedule 13. Article 2(3) and Schedule 3 make amendments to primary and secondary legislation (and Acts of the Scottish Parliament). The amendments made by Schedule 3 include an amendment to the Local Government and Planning Act 1980 (c. 65) to provide that Canal & River Trust is not a statutory undertaker for the purposes of Part 10 of that Act.

Article 2(5) and (6) provide for certain statutory references to the Board to be changed to references to Canal & River Trust, in relation to England and Wales.

Article 3 provides for the transfer of functions exercisable by the Board as a harbour authority, navigation authority or statutory undertaker in relation to England and Wales to Canal & River Trust.

Article 4 contains provision for the continued validity or effect of things done by or in relation to the Board following the transfer of functions.

Article 5 and Schedule 4 contain transitional provisions relating to reporting and accounting obligations in relation to the Board with respect both to the last financial year for which the Board operated as a statutory corporation in Great Britain and for the period between the end of that year and the coming into force of this instrument.

Article 6 contains savings in relation to the continued validity of appointments to the Board made by Scottish Ministers before the coming into force of this instrument and in relation to orders made under section 74 of the Transport Act 1962 (which deals with matters concerning pensions).

Article 7 contains a revocation.

A full impact assessment of the effect that this instrument will have on the costs of business, the voluntary sector and the public sector is available on the Defra website at www.defra.gov.uk, and is published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.

EXPLANATORY DOCUMENT TO
THE BRITISH WATERWAYS BOARD (TRANSFER OF FUNCTIONS) ORDER

2012 No. [XXXX]¹

1. This explanatory document has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 This instrument transfers functions exercisable by the British Waterways Board under certain enactments to Canal & River Trust (a company limited by guarantee), in relation to England and Wales. The British Waterways Board will continue to operate in Scotland, and this instrument additionally makes consequential changes to the constitution and functions of that Board in Scotland.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The British Waterways Board was established by section 1 of the Transport Act 1962, and became the statutory successor to certain functions and property of the British Transport Commission. By virtue of the Transport Act 1962 and a number of other public and local enactments, the British Waterways Board exercises a range of functions. The Board operates as a navigation authority, a statutory undertaker and a harbour authority under a wide range of enactments.

4.2 The Public Bodies Act 2011 confers powers on Ministers in relation to certain public bodies and offices. Section 5 to that Act enables Ministers by order to modify the functions of a body specified in Schedule 5, or transfer a function of such a person to an eligible person. The British Waterways Board is listed in Schedule 5.

4.3 This instrument is being made to transfer statutory functions exercisable by the British Waterways Board in England and Wales to Canal & River Trust. Canal & River Trust is a company limited by guarantee (and an eligible person within the meaning of section 1(3) of the Public Bodies Act 2011), and is in the process of

¹ For reasons of length, some Annexes are not attached to all versions of this Explanatory Document, as follows:

- Annexes A-C are attached to all versions.
- Annex D is a stand alone document sent to the House of Commons EFRA Select Committee, the House of Lords Merits Committee, the Joint Committee on Statutory Instruments (JCSI), the Vote Office and the Printed Paper Office.
- Annexes E-H are stand alone documents sent to the House of Commons EFRA Select Committee and the House of Lords Merits Committee only.
- Annexes I-K are stand alone documents to follow to the House of Commons EFRA Select Committee and the House of Lords Merits Committee only.

seeking charitable status. The British Waterways Board will continue to exist and carry out functions in relation to Scotland.

4.4 As required by section 9(1) and (6) of the Public Bodies Act 2011, the UK Government is seeking the consent of the Scottish Parliament and the National Assembly for Wales. The UK Government is also seeking the consent of Canal & River Trust to the transfer of functions, as required by section 21(1) of that Act. The consent of the Treasury is also required under section 6(4) of that Act. The Scottish Ministers and the Welsh Ministers have been consulted on the proposal in accordance with section 88(2) of the Scotland Act 1998 and section 63(1) of the Government of Wales Act 2006 respectively. The order will not be made without obtaining the necessary consents. As required under section 6(2) of the Public Bodies Act HM Treasury consent has been already been obtained for the modified funding arrangements which will apply to CRT.

4.5 The order makes consequential amendments, including provision to enable the British Waterways Board to continue to operate as a body in relation to Scotland. The order also contains an amendment to Schedule 5 to the Public Bodies Act 2011.

4.6 A transfer scheme will be made by the Minister using the powers under section 23

(1)(a) of the Public Bodies Act 2011 at the same time as the order is made. This will transfer certain property, rights and liabilities of the British Waterways Board. The Transfer of Undertakings (Protection of Employment) Regulations 2006 will apply to this transfer. The transfer scheme will be laid in Parliament once the order has been made.

5. Territorial Extent and Application

5.1 This instrument extends to the United Kingdom.

6. European Convention on Human Rights

Richard Benyon, Parliamentary Under Secretary of State for the Department for Environment, Food and Rural Affairs, has made the following statement regarding Human Rights:

“In my view the provisions of the British Waterways Board (Transfer of Functions) Order 2012 are compatible with the Convention rights.”

7. Policy background

- What is being done and why

7.1 The British Waterways Board (‘British Waterways’) is a public corporation with a statutory responsibility for operating and maintaining those waterways, docks and harbours in Great Britain that were transferred to it in 1963 as one of the successors to the British Transport Commission under the Transport Act 1962 together with waterways and docks acquired or restored since then. British

Waterways is required by statute to maintain the majority of the waterways in a suitable condition for the craft which use them. British Waterways' 2,200-mile network of historic canals, rivers and docks is visited by 13 million people a year and delivers an annual £500m in benefits to the nation, from amenity, flood relief and employment to green infrastructure, neighbourhood renewal and wildlife corridors.

7.2 The Government has policy responsibility for inland waterways in England and in Wales. Responsibility for inland waterways in Scotland is devolved to Scottish Ministers. British Waterways operates across Great Britain and was specified as a cross-border public authority for the purposes of the Scotland Act 1998. As a result of the Scotland Act 1998 (Cross-Border Public Authorities) (Adaption of Functions etc) (No. 2) Order 2000, Scottish Ministers hold largely the same functions with regard to British Waterways in Scotland as those held by the Government for British Waterways in England and Wales.

7.3 The Government's policy intention is that the Canal & River Trust (CRT) should replace British Waterways in England and Wales, and that the assets and statutory functions of British Waterways in England and Wales should be transferred to CRT. CRT is currently applying for charitable status. The Scottish Government has decided to retain the Scottish waterways in the public sector. Statutory functions of British Waterways will be transferred in England and Wales to CRT by means of this instrument; assets and liabilities of British Waterways will be transferred to CRT by a separate transfer scheme made under the Public Bodies Act.

7.4 This instrument which is being laid before Parliament is made using powers in the Public Bodies Act 2011, and transfers certain functions exercisable by British Waterways in relation to England and Wales to CRT. Certain functions required by British Waterways to operate as a statutory corporation are not needed for a company with its own powers to operate, and so such functions have not been transferred by this order. The order also contains consequential provision, including the amendment of other legislation. A detailed summary of the provisions of the instrument is included as Annex A to this document. Because British Waterways will continue to operate in Scotland, this instrument additionally makes consequential changes to the constitution and functions of British Waterways in Scotland, which have been developed in conjunction with the Scottish Government. As this order makes provision which would be within the legislative competence of the Scottish Parliament and the National Assembly for Wales, the consent of that Parliament and that Assembly is being sought.

7.5 BW staff in England and Wales will transfer into the Canal & River Trust under TUPE arrangements with no direct loss of jobs. It will be for the charity to decide after that whether further changes including efficiencies are needed.

Accompanying documents submitted with the Transfer Order, and their purpose

7.6 In order to enact this policy, several different documents have had to be drawn up alongside this instrument which is being laid before Parliament. **The following paragraphs detail what these additional documents are, the respective roles that they play in the setting up of CRT, and how they relate to one another.**

7.7 **The Transfer Scheme** is made under section 23 of the Public Bodies Act 2011. It transfers the property, assets rights and liabilities of British Waterways in England and Wales to CRT (as distinct from the Transfer Order which transfers the statutory functions). We will let the Committees have a draft at the earliest possible moment. The property and assets being transferred to CRT include not just the infrastructure of the waterways, but also a substantial portfolio of investment property which originated from the development of surplus operational land but which has been substantially grown by British Waterways by the re-investment of capital development returns over recent decades. This commercial property portfolio, worth around £460m and used by British Waterways to fund repair, maintenance and operation of the network infrastructure, will be transferred to CRT for the same purposes, along with the rest of the network.

7.8 Defra and CRT have agreed on a series of measures to shape the management of this property endowment. Working with CRT, the Government will define a clear memorandum of its purposes in transferring the investment property to CRT. CRT and Defra will jointly appoint a ‘protector’ to help the CRT develop a statement of investment principles that will seek to interpret and apply the Government’s memorandum of purposes. The ‘protector’ will monitor and report to CRT and Defra on the implementation of the statement of investment principles, noting any significant deviations from the agreed principles. These measures will guide the CRT in its investment behaviour and offer continued assurance to Government that the CRT is abiding by the purposes for which the commercial property is being transferred. The Trust Settlement (see below) and entrenched provisions in the CRT’s articles of association will make provision to transfer the commercial endowment in the unlikely eventuality that the CRT were to be removed as trustee of the waterways infrastructure.

7.9 A very important role of CRT will be to safeguard the infrastructure of the waterways in perpetuity for the nation. We want the canals, towpaths, locks and other parts of the waterways to be looked after for the benefit of future generations. The document which will ensure this is the **Trust Settlement**. A draft of this document is at Annex I. The Trust Settlement places the waterways infrastructure in a Trust (called the ‘Waterways Infrastructure Trust’), which the Secretary of State will settle on CRT as first trustee. The Trust Settlement ensures that all of the waterways infrastructure (as defined in the Trust) is held as permanent functional endowment. This means that the CRT will not be able to sell any part of the waterways infrastructure without gaining the Secretary of State’s and in some cases the Charity Commission’s prior consent. Before granting such consent, the Secretary of State will hold a public consultation; for land held in Wales, the Secretary of State will also consult the Welsh Ministers before reaching a decision. The Trust Settlement also requires the CRT to grant free pedestrian access to the towpath (except in certain very tightly defined circumstances and again with the prior consent of the Secretary of State, following public consultation and, in the case of towpath in Wales, after consulting the Welsh Ministers).

7.10 CRT is a new charitable company which has been set up especially for the purpose of receiving the undertaking of British Waterways in England & Wales. Substantial discussions are taking place with the Charity Commission in connection with CRT’s proposed registration as a charity. Those discussions include

consideration of the proposed Charitable Objects of CRT. These **Charitable Objects** (essentially its purposes, which are subject to the approval of the Charity Commission), are set out in Annex J. Briefly, these objects are: to hold in trust or own, and to manage, inland navigations for the public benefit together with associated charitable objects to protect and enhance the environmental, heritage and landscape value of waterway corridors. CRT will have power to extend its activities beyond former state owned waterways. Indeed it is planned that the waterways and museums of The Waterways Trust in England and Wales will transfer to it when that organisation merges with CRT later in the year.

7.11 An **Impact Assessment** has been undertaken (attached at Annex D), which sets out the anticipated costs and benefits of the creation of CRT. The Government believes that moving the functions and assets of British Waterways in England and Wales to civil society through the creation of CRT will further liberate the potential of the waterways to provide benefits for the public. It should also offer waterways users the opportunity to play a role in their governance and bring their passion and expertise to the waterways. It will enable local communities to have a greater say in how their local canal or river is run. It will enable the waterways to be placed on a more financially sustainable long term footing through CRT being able to access new commercial and private income streams (including legacies, donations, borrowing and other fund-raising activities), as well as providing greater opportunity to recruit volunteers to support heritage, environmental and amenity waterways assets. There will also be some savings from efficiencies and other benefits flowing from charitable status, as identified in the Impact Assessment. Overall there will be a reducing of the long-term Exchequer commitment.

7.12 Under a **funding agreement (Heads of Terms)** between the Government and CRT, attached at Annex K, CRT will receive grant funding of around £800m over the 15 year term of the funding agreement until 2026/27. This represents good value for the taxpayer when compared with levels of public funding for the waterways in previous spending review periods. A summary of all the aspects of the funding agreement can be found at Annex B. A Grant Agreement is being prepared which will set out the terms of the funding agreement in more detail.

7.13 In addition, a **Memorandum of Understanding (MoU)** is being drawn up to set out how the relationship between Defra and CRT will work. It will include matters concerning finances and risk, in order to safeguard public monies and satisfy Defra's legitimate interest in CRT. It will also deal with certain issues related to the governance and monitoring of expenditure of grant funding not considered appropriate for the legally binding funding agreement. It is being drawn up by Defra and CRT, and does not convey any legal powers or responsibilities.

Section 8 of Public Bodies Act

Section 8(1)

7.14 Section 8(1) of the Public Bodies Act 2011 provides that a Minister can make an order under section 5 only if the Minister considers that the order serves the purpose of improving the exercise of public functions, having regard to efficiency, effectiveness, economy and securing appropriate accountability to Ministers.

7.15 The Minister considers that the transfer of the functions of British Waterways in England and Wales will lead to greater efficiency, effectiveness and economy, and that accountability will be maintained.

7.16 Exercise of public functions will improve because waterways' users and the communities which live alongside waterways will have greater involvement in how the waterways are managed. The transfer of functions and property of British Waterways in England and Wales to civil society will achieve this by giving key stakeholders a role in the governance of the waterways and allowing them to bring their expertise and passion to the organisation.

7.17 Greater local community engagement is particularly important as this will help communities recognise what the waterways have to offer in achieving their objectives such as public health, well being and 'green travel' to work, as well as opening up opportunities for regeneration in both inner city and rural areas. It will enable the waterways in England and Wales to be placed on a more financially sustainable long term footing through CRT being able to access new commercial and private income streams (including legacies, donations, borrowing and other fundraising activities), as well as providing greater opportunity to recruit volunteers to support heritage, environmental and amenity waterways assets. Full detail is set out in the Impact Assessment which accompanies this instrument.

7.18 As set out in paragraph 7.11 savings in the public funding of the waterways in England and Wales will result from the long term funding agreement between Government and CRT.

7.19 Further savings are expected as CRT develops new income sources. Potential sources of new revenue include fundraising activities, donations, charitable grants and legacies, an ability to borrow against the body's property assets and facilitation of wider commercial opportunities. Charitable status would also facilitate a step change in volunteering, enhanced local partnership working and a range of cost efficiencies. This will reduce the need for Government support over time. There should be some savings from efficiencies and other benefits flowing from charitable status. Savings have been identified in the Impact Assessment which accompanies this Order.

7.20 Accountability is maintained in a number of areas. CRT's new governance structures are specifically designed to ensure accountability to the wide community of interested parties, not just waterways users but also to environmental and heritage groups local communities etc. The charity will also be accountable to Defra, through its funding agreement, for the Government's long-term funding of the waterways. It will also be accountable under the terms of a Trust Settlement under which the waterways transferred to it will be held in trust in perpetuity on behalf of the nation. It will also be accountable through the 'protector' arrangements to be put in place for the commercial property portfolio under which the stewardship of that portfolio will be monitored by an investment professional reporting to Defra.

7.21 It is quite common for private companies who own specific infrastructure to have statutory powers conferred upon them. For example, the utility companies such as energy, water, rail companies all have special statutory powers which they need in order to run such an operation. A significant number of the powers which British

Waterways currently exercise can be traced back to private Acts of Parliament which conferred authority on the private companies who originally built the canals. So many of the powers were originally conferred on private companies in the first place, long before the canals were nationalised in the 1940s. Perhaps because of that, they tend to contain safeguards. For example, in many cases there are rights of compensation and appeal.

7.22 British Waterway's powers to make byelaws are transferred to the CRT by virtue of this order. These powers to make byelaws will remain subject to confirmation by Ministers. So no byelaw could come into force without the agreement of a Minister who is accountable to Parliament. The CRT would not be the only non public sector body to have power to make byelaws. For example water companies can make byelaws, and indeed within the charitable field, the National Trust has the power to make byelaws.

Section 8(2)

7.23 Section 8(2) of the Public Bodies Act 2011 provides that a Minister may make an order under sections 1 to 5 only if the Minister considers that the order does not remove any necessary protection, and does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

7.24 The Minister considers that conditions in section 8(2) are met. The transfer of British Waterways' functions to the CRT will not remove any necessary protection nor prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. The powers currently exercised by British Waterways in England and Wales which transfer to the CRT will not change and have limitations and safeguards relevant to them. These include notice requirements; rights of appeal to special bodies or the courts; and requirements for ministerial approval.

For example:

- the power to enter land (under the British Waterways Act 1995) requires prior notice which can be challenged in the magistrates court and any entry is subject to payment of compensation; the order will transfer powers of entry to CRT, which they will need for operational purposes, but with existing safeguards;
- under the British Transport Commission Act 1954, section 16, byelaws have to be publicised in draft and are subject to ministerial scrutiny and confirmation before they can come into force; the order will transfer to CRT the power to make byelaws, and that Ministerial confirmation role will remain;
- under the Transport Act 1962, section 15, British Waterways has a power to compulsorily purchase land. This power will be transferred to the CRT and the Minister will retain the current duty to give consent first. Under the British Waterways Act 1983, section 10, the Minister may make orders to transfer new navigations to the Board. The Government intends to allow CRT to be the recipient of new navigations, but it will still be the Minister who makes the orders.

- under the British Waterways Act 1995 the making of Boat Safety Standards is subject to prior public consultation and scrutiny by user panels and their application can be appealed to a statutory standards appeal panel;
- removal of unsafe, unlicensed or abandoned vessels by British Waterways is subject to prior notice and rights of return (on payment of the removal costs).

7.25 The Public Bodies Act allows for transferred functions to be modified. Hence, if it were decided that the powers require additional safeguards, the Order could be used to add those safeguards on transfer. The Government has actively scrutinised all powers that are to be transferred to check whether additional safeguards ought to be added but has decided this is not necessary.

7.26 At present British Waterways is subject to a broad range of legal duties set out in a large body of legislation, much of it quite historic. These include legal obligations to maintain the waterways in their care; to manage navigation on those waterways; and general commitments to deliver wider environmental objectives in line with, for example, EU legislation. It also has a range of legal powers needed for the proper running of the waterways. These are extremely wide-ranging in nature and include powers such as those to remove vessels that are not lawfully present on the waterways. Other powers include:

- power to make byelaws (subject to the approval of Ministers) for regulating use of inland navigations or for control of shipping in harbours and docks;
- a statutory power enabling entry onto land for the purpose of carrying out works to inland waterways for repair, maintenance, alteration, renewal or protection;
- powers to charge for the licensing or registration of vessels;
- powers to require standards for the construction and equipment of vessels; and
- powers to require insurance of vessels in respect of third party liabilities.

7.27 One of the main purposes of the draft Transfer Order is to provide for the transfer to CRT of those statutory powers and duties that are now held by BW in England and Wales and are necessary for the CRT to be an effective manager and guardian of the waterways being transferred to it. This includes some consequential modification of existing statute law.

7.28 Statute law concerning the waterways falls into two broad categories:

- legislation relating to specific waterways passed before their nationalisation in 1948; and
- legislation following nationalisation and relating to waterways generally.

The improvement of rivers to enable navigation and the construction of canals were originally authorised by a large number of Acts of Parliament (well over 300 in the case of British Waterways). Most were passed in the late 18th and early 19th centuries, and nearly all are to some extent still relevant today. For example, it is these Acts that continue to authorise the taking of water and in many respects regulate the relationship between the waterway and its neighbours.

7.29 Parliament passed these Acts waterway by waterway, and most waterways have several such Acts relevant to them. On nationalisation, British Waterways (and its predecessor, the British Transport Commission) were made successor to the original canal proprietors' powers and duties under these enabling Acts. In a similar manner, with responsibility in England and Wales passing from British Waterways to the CRT, the draft Transfer Order will make the CRT a successor to the powers and duties provided by these enabling Acts. (Like British Waterways, the CRT will exercise these powers and duties as a 'statutory undertaker'.) The powers and duties will pass 'as they are now'; there will be no enhancement of them – the CRT will be in the same position as British Waterways currently is with regard to the enabling Acts.

7.30 After nationalisation in 1948, most of the waterway-related laws enacted by Parliament were of general effect (although some exceptions dealt with specific waterways). These laws divide into two broad categories: those concerning the management of waterways, and those concerning the governance of British Waterways itself and its status as a public authority.

7.31 The general scheme of the draft order is to provide for the transfer to the CRT of the waterway management duties and powers for England and Wales provided for by these statutes, but not to apply those provisions relating to the governance of British Waterways in England and Wales and its status as a public authority. Full provision for the governance of CRT will be made through its company constitution and status as a registered charity in England and Wales.

7.32 The key post-nationalisation statutes containing important waterway management powers and duties are the Transport Acts 1962 and 1968 and the British Waterways Acts 1971, 1983 and 1995. Some minor provisions are contained in other Acts. The draft Transfer Order makes provision for these waterway-management powers and duties to pass to the CRT, while the provisions concerning the governance of British Waterways in England and Wales and the powers needed for a statutory corporation to operate will not be transferred in relation to England and Wales, as the CRT, being a charitable company rather than a creature of statute, will have its own powers in this respect. These provisions, adapted as necessary, will continue to apply to British Waterways as regards its continuing operations in Scotland.

7.33 Mostly the CRT will succeed to these duties and powers on exactly the same basis as British Waterways in England and Wales now holds them. In some respects adaptation is necessary to take account of the different status of the CRT as a charity outside the public sector, but the net effect is intended to be the same. In particular it should be noted that there will be no enhancement of, or addition to, the existing enforcement powers of British Waterways in England and Wales when those powers pass to the CRT. Existing safeguards for the use of those powers will also remain.

7.34 In addition to waterway specific statutes there is a body of legislation that affects British Waterways by reason of its general status as a navigation authority, harbour authority and statutory undertaker in the same way as other such bodies are so affected. Such statutes will continue to apply to CRT in the same way as they do to British Waterways now.

7.35 British Waterways is currently subject to a range of statutory environmental duties under both domestic legislation (such as section 22 of the British Waterways Act 1995) and legislation originating from the EU such as the Habitats Directive and Water Framework Directive. CRT will succeed to the environmental statutory duties currently applicable to British Waterways in England and Wales and there will be no derogation from those statutory standards in the way CRT will have to operate.

Parliamentary activity during the passage of the Public Bodies Bill

7.36 An amendment to remove British Waterways from Schedule 5 was tabled during the passage of the Act in the House of Lords. Concerns were raised about apparent comparisons with the National Trust, noting the financial difficulties that the National Trust was experiencing. Concerns were raised in particular because BW carried out a range of important public functions, including freight transport. Information was requested about the relationship between the new charity and the Welsh Government and the Scottish Government and whether any practical issues been identified. The need for a consultation was queried given the Government had made a decision to create a new charity. Suggestions were made that the Government should provide some sort of guarantee that the body be protected from financial failure. A question was also raised as to whether the proposed arrangements were consistent with charity law legal requirements. In response the Government confirmed that the charity would be set up only in England and Wales. The Government said that there were a number of issues addressed in the consultation and that it included questions on governance. The Government also confirmed that there would be a further consultation on the provisions of the Order. It also confirmed that the proposal were consistent with charity law but the Minister offered to write in further detail if that was not sufficient assurance. The amendment was withdrawn.

7.37 The Government tabled an amendment to clause 21 of the Bill. This was because Clause 21 provided that certain functions (essentially those of a regulatory enforcement nature) could not transfer to a body which did not otherwise already exercise public functions (defined as functions conferred by statute or Royal Charter). The new charity would not otherwise have public functions at the time at which transfer occurred, and so will not be able to be the recipient of any of the functions in clause 21. The amendment was accepted which ensures that the limited regulatory enforcement and other powers currently held by British Waterways can be transferred to the charity, so that the effective and safe operation of the transferred waterways can continue.

- Consolidation

7.38 Not applicable.

8. Consultation outcome

8.1 The Government has carried out consultation in accordance with section 10 of the Public Bodies Act. The requirement of section 11(3) of the Act has also been met.

8.2 In March 2011, Defra launched a consultation on the UK Government's proposals to place those waterways in England and Wales which are owned by the state in trust for the nation through the establishment of a civil society organisation, a new waterways charity. It stated the Government's proposal for those waterways

owned and/or managed by British Waterways to be transferred to the new charity in April 2012, with the Environment Agency navigations being subsequently transferred in 2015/16, subject to affordability at that time and the agreement of the charity's Trustees. The consultation closed on 30 June. A copy is at Annex E and is also available at <http://www.defra.gov.uk/consult/files/A-New-Era-for-the-Waterways-FINAL.pdf>

8.2 The consultation document made clear that the Scottish Government had decided that its canals, including British Waterways in Scotland, would remain in the public sector. It explained that the decision to establish the charity and to transfer into it British Waterways' waterways in England and Wales would require consequential changes to the legislation affecting British Waterways' operations in Scotland.

8.3 The consultation invited views from 99 organisations on the new charity's objectives and purpose, governance model and operation and how we can best secure the financial sustainability of the waterways. A list of consultees is at Annex C. There were 350 responses. The majority of respondents were supportive of the move to charitable status.

8.4 On governance, the consultation sought views on proposals to create Local Waterways Partnerships and membership of the charity's proposed council. In response to the comments received the Government agreed with the CRT trustees that because of the large size of the areas covered by the Local Partnerships they should be re-named Waterways Partnerships. It was also agreed that in order to recognise the specific identity of waterways in Wales there should be an All-Wales Waterways partnership in addition to the Waterways Partnership based on the management unit which includes Wales. In response to comments on the need to encourage localism the Government and CRT trustees agreed that each Waterways Partnership should draw up a localism strategy. In response to comments on the council the Government and CRT trustees agreed to increase the number of council members directly elected and to move to 50% of members being directly elected over time. The CRT trustees decided not to have a membership for fundraising purposes. They decided it was better to seek voluntary giving through a variety of channels but a formal membership will not be one of them. This would not preclude growth of the supporters' constituency to provide for more elected seats on the Council and the CRT trustees decided that this was an issue which can be reviewed when all the Council's constituencies are reviewed in three years time.

8.5 The consultation sought views on the proposed approach for Trust Obligations under which the Government would control in perpetuity the uses to which the operational infrastructure can be put after transfer. A very wide range of suggestions for improvement were made, many of which included questions from respondents seeking assurance that certain obligations would be picked up elsewhere if not through the Trust Obligations. The most common suggestions for improvement were: include the obligation to maintain the canals for navigation; explain 'free access to the towpaths'; commit to the charity cooperating with other, local interest groups and communities; and looking ahead to the inclusion of the Environment Agency navigations, how related obligations could be captured here. Following the consultation the Government and CRT trustees confirmed the overall approach, explaining what obligations were considered appropriate for Trust Obligation. In

addition the Government and CRT trustees decided to protect free pedestrian access by means of an explicit safeguard in the Trust Obligations. This protects the status quo, i.e. the right of free pedestrian access on existing towpaths, subject to certain pragmatic qualifications (i.e. for operational/maintenance purposes and control of access at some tourist sites). As the majority of towpaths are not currently public rights of way and access is permitted at British Waterways' discretion, this is a significant new protection. It was agreed that CRT would publish policies on free access for pedestrians and cyclists.

8.6 The consultation document suggested a list of areas which Government felt should be included in the Charitable Purposes which will define and control the activities that the charity can carry out. The majority of respondents were positive about these suggestions, with many offering suggestions about additional areas to be covered. The most popular areas to include reference to, in addition to those suggested in the consultation document, were: commercial freight, residential boaters, and rural regeneration (as much as urban). The most common suggestions for improvement were either to emphasise social purpose/engagement, navigation, partnership working or the importance of maintaining the network as a whole. In the light of comments received the Government and CRT trustees amended the charity's proposed Charitable Purposes to make some specific changes for example to make explicit reference to navigation and use of vessels (including legitimate residential use), and freight was addressed by a reference to commerce and industry.

8.7 The consultation sought views on the need for the charity to have a mission statement and beliefs. Many respondents questioned the need for a mission statement, belief and vision, asking if one statement would suffice. Most interest was centred around the mission statement. The most common suggestions for improvement were to reference navigation, local communities living on and around the waterways, or current users and uses of the waterways to make it more 'alive' and relevant. A range of suggestions were made in order to improve the 'belief' statement, the most popular being a greater emphasis on: the 'national', not just the 'local'; people and communities; and navigation. There was more general support for the 'vision' statement, but again most common suggestions for improvement were more reference to/emphasis on navigation and local communities. In summary, for each of these statements, navigation and communities/people emerged as the two key areas where respondents felt there should be greater emphasis. Other suggestions for all of the above included greater emphasis on: natural environment, access, freight, transport, and to reflect the charitable purposes. The Government agreed that it would be for the CRT trustees to work further on these statements.

8.8 The consultation sought views on what activities should be undertaken by the charity's proposed Community Interest Company. Many respondents felt that the Government's proposals were sensible for the CIC. However, the most popular suggestions for further activities to be included were: freight, utilities, property, the development of hydro-electric power schemes and merchandising. Some respondents queried why a CIC was needed, and suggested that alternative trading routes should be considered. Others said the charity should be careful not to become too focussed on its commercial profit. Several commented that remunerated positions should be kept to a minimum. In response the Government said that this was a matter for the Trustees to decide upon. The Trustees agreed that the charity must not be dominated

by its commercial dealings but at the same time were conscious that the majority of its income will come from these activities and should therefore be closely overseen by the Trustees.

8.9 In the context of creating a sustainable future for the waterways the consultation sought views on proposals for management of commercial waterways, the Government funding agreement with the charity and developing income and efficiencies. On commercial freight the Government proposed options to change the way commercial freight waterways were managed in order to reduce the financial burden on CRT. The majority of respondents agreed that the current position was not tenable, and that change was needed. The most popular option favoured was the Government's preferred option whereby there would be no changes to current classification or BW's maintenance duties for commercial waterways, but that an amendment would be made to the Transport Act 1968 in relation to the Secretary of State's power of determination, to include additional obligations on the Secretary of State to take into account the charity's representations on affordability. In the light of the consultation responses the Government decided to proceed with its preferred option. The Government said that it would expect that any application for a change would be supported by a comprehensive cost benefit analysis from the charity. Linked to this change the Government decided that it would consult further on a proposal to amend sections 104 and 105 of the Transport Act 1968 to give CRT an enhanced 'statutory proposer' role in relation to ministerial orders on classification and maintenance of its waterways. This issue was covered in the supplementary consultation exercise (see paragraph 8.16 below).

8.10 On the proposed funding agreement the consultation sought views on the monitoring of the charity's performance. Most suggestions for measuring the charity's use of public funds revolved around measuring progress against the charity's core activities and a majority of these suggested performance indicators included in the existing BW Stewardship Score. A number of respondents explicitly supported the use of the Stewardship Score; several stating that it would be useful to have some continuity with the way in which BW's performance was measured. The most commonly suggested indicators were: asset condition, customer satisfaction and enjoyment, navigation, access and the environment. On the environment, many respondents suggested that specific indicators on, for example, litter or water quality should be included as well as SSSI condition. A few suggestions were made as alternatives to, or running in parallel with, the Stewardship score indicators. These included: an independent audit; membership numbers and/or volunteer numbers; the charity's success in raising additional funds; comparing the charity's performance with other charities using a standard performance mechanism where one existed. Many made the general point that there should be clear and transparent scrutiny of the use of public funds by Government. In response Government confirmed its commitment to ensure that the new charity was accountable for the range of public benefits it delivered with public funds. This would be addressed in the funding agreement and the Government undertook that clear methods of measuring public benefits delivered – such as the Stewardship Score – would form a part of the planned negotiations.

8.11 On income and efficiencies a wide range of suggestions were made about how the new charity could increase its income. In terms of commercial income, the most

popular suggestions were through membership schemes, and more effective development/use of tourist opportunities: including heritage properties, retail and catering, holiday accommodation and leasing pleasure boat sites. The development of renewable energy schemes was another common suggestion, primarily hydro-electric generation.

8.12 Many respondents suggested that more non-paying users of the waterways could be encouraged to donate time and money through effective publicity and information campaigns. Another suggestion was to encourage corporate sponsorship of stretches of canal. Also, several respondents felt that Local Authorities could contribute more to the waterways, for example the maintenance of footpaths. Several respondents felt that the prediction of charitable income overall was too optimistic; others requested that safeguards be put in place to ensure any rises in license fees were not excessive. On efficiencies, the most common suggestions were to review remuneration of senior staff, make more effective use of volunteers, prioritise preventative maintenance, and minimise re-branding costs. In response Government considers that it will be for the Trustees to work with the executive of the charity to grow its income from all available sources and to make efficiencies in line with the normal business practices already pursued by British Waterways. However, one of the benefits of moving out of the public sector will be that it should enable and encourage more innovation and diversity in the way the new charity grows its income.

8.13 The Government sought views on a name for the new charity. The most popular name of those suggested in the consultation document was 'National Waterways Trust', with the support of a third of respondents. The next two most popular from the suggested list were 'Waterways Trust' and 'Waterways Trust for England and Wales'. In response the Government and Trustees recognise that the name of the charity must accurately represent its scope. Furthermore, in addition to the word 'waterways' (well understood by enthusiasts), consideration also needs to be given to words more familiar to the wider public (including 'canal' and 'river') if the name is to have the widest possible appeal. It was recognised that the Welsh name for the charity needed to be one that resonates in that language and is not necessarily a straightforward translation of the English name. The Trustees subsequently named the charity Canal & River Trust - Glandwr Cymru in Wales.

8.14 Finally, the consultation specifically asked whether or not the new charity should enjoy the same powers and be subject to similar duties to maintain the waterways as British Waterways. Most respondents agreed that the new charity should have the same powers and similar legal duties to maintain the waterways as British Waterways. Some respondents asked for further detail about the duties concerned.

8.15 The Government published its response to the consultation on setting up the new charity on 12 September 2011. This set out the key areas where representations had been received and the Government's proposed way forward in the light of those representations. The response is attached at Annex F. It is also available at <http://www.defra.gov.uk/consult/files/110912-waterways-summary-responses.pdf>

8.16 Because some respondents had asked for further detail about the duties being transferred the Government decided there should be further consultation on these

issues. On 12 September a further six week supplementary consultation was issued to 99 organisations setting out in more details proposals to transfer British Waterways' functions in England and Wales to CRT and consequential changes for Scotland. The Government decided that a limited consultation period was appropriate because (a) a full, twelve-week consultation had already taken place on the principles of the transfer; (b) the scope of the consultation was limited; and (c) the timetable for preparing the necessary Transfer Order was tight. The list of consultees was the same as the list for the previous consultation (Annex C). There were 61 responses.

8.17 The supplementary consultation sought views on proposed changes to the functions of British Waterways being transferred to CRT. A copy is at Annex G and is also available at <http://www.defra.gov.uk/consult/files/110912-waterways-condoc.pdf>

Removal of the Ministerial power to direct disposal of property under the Local Government, Planning and Land Act 1980

8.18 The Government proposed that the power for the Secretary of State and the Welsh Ministers to give directions on the sale of land assets would no longer be needed when the assets of British Waterways transfer to the CRT. Of those who responded, nearly two thirds agreed with the Government's proposal to remove the power for the Secretary of State and the Welsh Ministers to give directions on the sale of land assets. Those who disagreed with the proposal expressed concerns that removing the accountability to Parliament could result in CRT selling off valuable national assets and that additional safeguards were needed. Some respondents raised more general concerns while not addressing the question, such as the Government should have a role in checking over any proposals to sell land of historic interest or that any income derived from land sales should be invested back into the property portfolio. In response the Government confirmed it would amend the definition of 'statutory undertaker' in Schedule 16 to the Local Government, Planning and Land Act 1980 to provide that it does not cover the CRT within its terms.

Provisions in the Transport Acts 1962 and 1968 on Employment

8.19 The Government proposed not to extend certain provisions to CRT on the basis that they have largely been replaced by more recent employment legislation. A majority of respondents agreed that the provisions specified would not be needed by the Canal & River Trust. In response to this question several respondents expressed a view that the pension liabilities should not be transferred to the CRT but should be retained by Government. Some others thought the pension liabilities should only be transferred to the CRT if sufficient Government funding was provided to account for this liability. In response the Government said it would proceed as proposed. In addition the Trustees stated that the maintenance of good employee relations was very important to the success of CRT. Good, regular communication and liaison at all levels contribute to that and the Trustees committed to continuation of the existing Representation and Procedure Agreement with the unions on the same terms as BW. They confirmed that in accordance with employment law all employees of BW in England and Wales will transfer to CRT on the same terms and conditions they currently have.

Classification and maintenance of waterways – Sections 104 and 105 of the Transport Act 1968

8.20 Government proposed that the CRT should have an enhanced statutory proposer role in relation to ministerial orders on classification and maintenance of its waterways to give it an explicit power to seek adjustment of its statutory duties in the interests of financial sustainability. That required amendment of sections 104 and 105 of the Transport Act 1968. There was an even split between those supporting and those opposing the proposal for the charity to have an enhanced statutory proposer power. Concerns were raised, primarily from a small number of live-aboard boaters that there should be no changes on re-classification which might lead to a down-grading of waterways or restrictions on particular users and which in particular could impact to the detriment of certain live-aboard boaters. A number of respondents raised concerns about the need to ensure commercial freight operations continue. Concerns were also raised that there should be no change which would impact on the duty of the charity Trustees to get the best possible value from the funds at their disposal. Any additional burdens on the charity would need to be matched by additional Government grant. One respondent was concerned that the proposal might impact on reclassification of cruiseway waterways, which appeared contrary to the position set out in the first consultation and would be robustly opposed. In response the Government confirmed its intention for the charity to have an enhanced statutory proposer power. In doing so the Government noted that a significant number of the responses opposing the proposal were not focused on the proposal itself. Nearly half of respondents objecting to the proposal had raised concerns about how reclassification and maintenance changes might impact on some live-aboard boaters. These points were ones which stakeholders had already raised in comments on the previous consultation on the creation of the charity and did not specifically address the question posed in the supplementary consultation. Comments were also made that the charity should look at a range of efficiency measures before looking to re-classify waterways, again points which were more relevant to, and were raised in response to, the previous consultation. The Government decided that providing the charity with an enhanced statutory proposer role would not have any impact on decisions on re-classification or maintenance as applications would still be subject to a cost benefit analysis, consultation and determination by Ministers. That would ensure a transparent process.

Ministers' Powers of Direction under the Transport Act 1962

8.21 The Government proposed that the power of Ministers to direct the CRT under the Transport Act 1962 should be restricted to circumstances in the interests of national defence (under section 27(6) of the Act) since they are not in general appropriate for Ministers to hold in relation to the business and other related activities of an independent charity. The majority of respondents agreed with the proposal. Nearly all of the responses opposing the proposal were from live-aboard boaters who wanted powers of direction to remain to provide accountability and to provide constraints on the charity's actions towards live-aboard boaters such as evictions. In response the Government decided to proceed with amending section 27 of the Transport Act 1962 to retain, as against the CRT, only the power of direction in relation to national defence in section 27(6). In doing so, the Government noted the concerns of some live-aboard boaters but that there were a number of legal mechanisms already in place to provide protections for users of the waterways where enforcement action had been taken. The Government decided that there was no reason for the concerns of some live-aboard boaters to be specifically addressed by a continuing general power of direction.

Freedom of Information and the Environmental Information Regulations

8.22 The Government sought views on application of the Freedom of Information Act (FOIA) and Environmental Information Regulations (EIRs) to the CRT.

The Government offered three options in the consultation:

- Option 1 – do not apply FOIA or EIRs to CRT (noting that the Courts might still decide that the EIRs did apply to CRT);
- Option 2 – apply FOIA to CRT only in respect of information relating to its exercise of public functions; the Courts would ultimately decide if the EIRs applied; and
- Option 3 – List CRT as a public authority in schedule 1 of the FOIA; this would have the immediate effect of applying the EIRs to CRT.

8.23 Respondents had mixed views. Roughly one-third of individuals and one-third of organisations that responded to the consultation chose not to answer this question at all. Of those who did, those wanting FOIA and the EIRs to apply wholly to the CRT formed the biggest grouping (roughly one-third of all those organisations who responded to the consultation and two-fifths of individual respondents to the consultation). Typical reasons given included the public functions to be carried out by the CRT and the CRT's public funding; the importance of accountability and transparency. A smaller group of organisations (roughly one-fifth of all such respondents to the survey) and individuals (roughly one-eighth of all such respondents to the survey) said that the FOIA should not apply to the CRT. Typical arguments included the need for the CRT to be treated like other charities, and to avoid imposing administrative burdens on the new charity. The small group of organisations and individuals who supported partial application of the FOIA to the CRT tended to argue in favour of a balance between the CRT's charitable activities and those where it was performing a public function. The majority of those who answered this question thus wanted the FOIA and EIRs to apply to the charity at least in part.

8.24 In response the Government decided that the FOIA should apply to the CRT proportionately, recognising the need both to treat the CRT as something different from BW, and to establish a level playing-field with other navigation authorities in the voluntary and private sectors. The Government therefore decided, subject to parliamentary approval, to apply the FOIA to the CRT, in respect of all those statutory functions that CRT will inherit from BW through the draft Transfer Order. This limited application of the FOIA will have the effect of excluding from the provisions of the Act those broader charitable functions carried out by CRT. It will also exclude bodies that merge with CRT, unless the FOIA already applies or is made to apply to them at the point of merger. The Environmental Information Regulations (EIRs) may be considered to apply to CRT to the extent that CRT is carrying out 'functions of public administration'. The Government noted that ultimately, this will be a question for the courts to decide. In addition the Government undertook to consult, under s.5 of the FOIA, with the other navigation authorities on the application of the Act to their statutory functions and duties, within the next two years. If the Government subsequently decided not to apply FOIA to navigation authorities, it undertook to review the continued listing of CRT under schedule 1 of the FOIA.

House of Commons Disqualification Act 1975; Scottish Parliament (Disqualification) Order 2010; National Assembly for Wales (Disqualification) Order 2010

8.25 The Government proposed that the disqualifications applying to members of the BW Board through this legislation should not apply to the Trustees of the CRT because this would not be appropriate for Trustees of a charitable body. The majority of respondents were in favour of not imposing the same disqualifications on the CRT Trustees as applies to members of the BW Board. In response the Government confirmed it did not intend for these disqualifications (nor the Northern Ireland Assembly Disqualification Act 1975, to which the same principles apply) to be applied to the CRT Trustees. This approach was agreed with the Scottish Government, the Welsh Government and the Northern Ireland Executive.

Consequential provision for Scotland

8.26 The consultation also sought views on behalf of the Scottish Government on consequential provisions for Scotland. The decision to establish the Canal & River Trust and to transfer BW waterways in England and Wales into it require consequential changes to legislation to allow the BW Board to operate effectively in Scotland in future without involvement from UK Government Ministers. Only 13 responses were received to the Scottish component of the consultation which the Scottish Government took to mean there was general contentment with the proposals.

8.27 The consultation sought views on the Scottish Government's proposal that the British Waterways Board, operational solely in Scotland, should consist of a chair, a vice chair, and between one and four other members. A majority of respondents either agreed with the proposals or did not comment. In response the Scottish Government confirmed its intention for the British Waterways Board, operational solely in Scotland, to consist of a chair, vice chair and between one and four other members, and that it would not revise the existing quorum of three. Scottish Ministers believe that a large Board would represent poor value to the Scottish purse, and would be excessive for the size of organisation.

8.28 The consultation sought views on the Scottish Government's proposal that the British Waterways Board operating solely in Scotland should, in future, come within the scope of The Freedom of Information (Scotland) Act 2002, The Environmental Information (Scotland) Regulations 2004, the Scottish Public Services Ombudsman Act 2002 and the Ethical Standards in Public Life etc. (Scotland) Act 2000. Respondents were supportive of the proposals. In response the Scottish Government confirmed its intention that the British Waterways Board operating solely in Scotland should come under the scope of relevant Scottish legislation. In addition to the ones listed the consultation it was confirmed that it would also include the Public Services Reform (Act) 2010 and the Public Records (Scotland) Act 2011.

8.29 Finally, the consultation sought views on whether the water abstraction legislation now in place in Scotland were sufficient such that the requirement for Ministerial consent in the Transport Act 1962 could be repealed. There was no opposition to this proposal and the Scottish Government confirmed its intention to repeal the requirement for Ministerial consent.

8.30 The Government published its response to the supplementary consultation on 20 December 2011. This set out in detail the areas where representations had been

made and the Government's proposed way forward in the light of those representations. The response is attached at Annex H. A copy is also available at <http://www.defra.gov.uk/consult/files/201212-waterways-summary-responses.pdf>

8.31 In addition to formal written consultations the Government has engaged frequently with stakeholders via meetings, workshops and focus groups which have targeted regular users of the waterways, as well as those who do not currently visit the waterways, to help prepare for charitable status. British Waterways have been engaged in on-going consultation on proposals for taking its waterways out of the public sector since May 2009 when they published '2020 – A vision for the future of our canals and rivers'. They have continued to discuss the proposed changes with users, staff and their trades unions.

8.32 As mentioned in paragraph 4.4 the Scottish Government and Welsh Government have been consulted.

8.33 As required under Section 6(2) of the Public Bodies Act HM Treasury has been consulted and consent has been obtained for the modified funding arrangements which will apply to CRT.

9. Guidance

9.1 This instrument transfers most of British Waterways' statutory functions and makes amendments to enable CRT to succeed to those powers and duties. Guidance for stakeholders or enforcement agencies is therefore not required.

10. Impact

10.1 The impact on business is minimal as the creation of CRT is not expected to impose or reduce costs on business in any material way. Creating the new charity is not expected to have any material impacts on competition. Apart from the planned merger of the Waterways Trust in England and Wales with CRT (which is not part of this order) there is no financial or other impact on charities or voluntary bodies. Creation of the charity is not expected to re-direct resources or donations from other charities, although there is a risk that it might do so. Equally, CRT may become an exemplar and so encourage wider voluntary and charitable activity. This issues can be considered in the planned review.

10.2 There is no impact on the public sector apart from the abolition of the Inland Waterways Advisory Council (IWAC) as a consequence of creating CRT. Details of the abolition of IWAC are set out in the Explanatory Document which accompanies the order to abolish IWAC.

10.3 An Impact Assessment is attached to this Explanatory Document and will be published alongside the Explanatory Document on www.legislation.gov.uk. This takes account of comments received following public consultation and reflects the outcome of negotiations between the Government and the CRT on the agreed level of long-term funding under the Grant Agreement which was announced on 31 January 2012.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 Government expects policies to be evaluated after implementation because such evaluation can yield invaluable insights, in terms of what works, what could be improved, and how others can learn from the approaches used. The Grant Agreement recognises the importance of realising benefits by making a portion of grant funding conditional on the satisfactory completion of performance standards.

2021 Review

12.2 The Grant Agreement recognises that the charity's challenge is a long-term one and that it will take time to develop new sources of income and finance. As part of the Grant Agreement, a review will take place in 2021/22 examining the case for Government funding beyond 2026/2027. This will involve an evidence-based assessment of the extent to which Defra's investment objectives have been realised.

12.3 Key evaluation questions (as set out by the Government's Magenta Book) that are particularly relevant are:

- To what extent have the success criteria been met?
- To what extent have there been unintended consequences?
- What are the costs and benefits, in hindsight and going forward?
- Is government intervention still required? Or has the market changed as a result of the policy?

Specifically, the review would include:

- evaluate the success of CRT in generating additional income,
- delivery of civil society benefits , including increased community engagement and volunteer support
- assessment and interpretation of key performance data and trends.

Local case studies of increased engagement would also be valuable, as would further research on valuing the benefits of waterways, for instance through a new primary valuation study of the nature and magnitude of the benefits of the waterways.

In assessing various trends and indicators, it is important to note that the baseline is not static, which is a major reason for the policy itself. It will be difficult to attribute changes in visitor numbers or asset condition solely to the change in status, given the significance of a declining baseline trend in grant income, and other extraneous variables affecting the charity's income (such as the property market) and visitor numbers.

Review of options for moving the EA navigations to CRT

12.4 In line with its commitment to move the EA navigations into CRT following the next spending review – subject to affordability and the consent of CRT Trustees at that time, the Government will review the options for this transfer.

13. Contact

John Kittmer at the Department for Environment, Food and Rural Affairs Tel: 020 7238 5320 or email: john.kittmer@defra.gsi.gov.uk can answer any queries regarding the instrument.

Summary of the British Waterways Board (Transfer of Functions) Order 2012

Article 1 – Citation, commencement, extent and interpretation

1. This article provides for the order to come into force on the day after that on which it is signed (on the day on which it comes into force, the transfer of functions occurs).
2. Amendments to the various pieces of legislation described have the same extent as the provision amended. This is because some of the legislation only extends to England and Wales, some only to Scotland and others to GB or UK. Subject to this the order extends to the whole of the UK. Certain functions of the British Waterways Board transferred away in relation to England and Wales form part of Scottish law as well as English law.

Article 2 - Transfer of statutory functions

3. Paragraph (1) provides for the transfer of functions exercisable by the British Waterways Board under or by virtue of the enactments listed in Schedule 1 so far as exercisable in relation to England and Wales to the CRT. The reference to ‘under or by virtue of’ includes functions exercisable by virtue of secondary legislation made under the primary legislation listed. It also covers functions exercisable by British Waterways as a result of succession under the Transport Act 1962 from the British Transport Commission exercised (who in turn had succeeded to those functions from someone else in some cases).
4. Unlike the approach taken by the Transport Act 1962 which dealt with the transfer of property, asset and liabilities from the British Transport Commission to the British Waterways Board on the face of the Act, and transferred some functions on the basis of the link to the property transferred, this order does not provide for the transfer of property, assets or liabilities. This will be done under a separate transfer scheme made under section 23 of the Public Bodies Act 2011. The order transfers any function (subject to exceptions) exercisable by the British Waterways Board in England and Wales under or by virtue of the 1962 Act (amongst others), so functions exercisable in relation to property in England and Wales are transferred by virtue of this.
5. Paragraph (1) also provides for the generic transfer of functions under or by virtue of any local Act. These include the British Waterways Acts 1963-1995.

Article 3 - Transfer of functions of harbour authority, navigation authority and statutory undertaker

6. The British Waterways Board falls within various statutory definitions of statutory undertaker, harbour authority or navigation authority, and as such exercises functions placed on these bodies in a wide range of legislation. This article transfers those functions, so far as exercisable in relation to England and Wales, to CRT (with one exception in the case of statutory undertakers under the Local Government, Planning and Land Act 1980, which is addressed later in this annex). None of these powers and duties involves the British Waterways Board being named – it exercises the functions because it fits the statutory definition (usually through carrying on a canal undertaking). CRT will continue to fit those same definitions when it succeeds to property transferring from the British Waterways Board.

Article 4 – Supplementary provision

7. Generally, transfer of function orders contain provisions transferring not only functions but property, assets and liabilities. As commented on above the order does not address the transfer of property, assets or liabilities. The article includes two provisions relating to continuity.
8. Paragraph (1) allows CRT to carry on doing things that were being done by the British Waterways Board in England and Wales at the time of the transfer, so far as relating to transferred functions. Paragraph (2) provides that anything done by the British Waterways Board in England and Wales, so far as it relates to any of the transferred functions, has effect as if made or done by CRT (so far as is necessary).

Article 5 - Transitional provisions

9. Article 5 gives effect to detailed transitional provisions in Schedule 4 relating to the Transport Act 1962. In addition it provides for the continuation of obligations of the Minister, under section 44 of the Transport Act 1968 to account for the receipt and disposal of any sums issued to the Minister by HM Treasury out of the National Loans Fund so far as it relates to the British Waterways Board for the financial year 2011-12 and for the period from April 2011 to the transfer date. The Minister and the Secretary of State then have to send the accounts to the Comptroller and Auditor-General not later than the end of November following the year to which the account relates; and the Comptroller and Auditor-General then has to examine and lay the report before Parliament. Article 5 therefore provides for the fact that that the necessary report to HM Treasury may not have been made under section 44 of the Transport Act 1968 before the transfer date.
10. Outstanding NLF loans to the British Waterways Board will be repaid before the end of the financial year 2011/12 to HM Treasury as part of the funding agreement with CRT.

Article 6 – Savings

11. This article contains two savings provisions. The first preserves the validity of appointments made under the Transport Act 1962 by the Scottish Ministers to the British Waterways Board before the order comes into force (the order effects a number of constitutional changes to the British Waterways Board). The second saving provision relates to orders made under section 74 of, and Part 4 of Schedule 7 to, the Transport Act 1962. Whilst these provisions and order making powers should not apply to CRT there is a need to ensure no change to the effect of these provisions in relation to any employee of CRT with respect to past service accrued whilst serving with the British Waterways Board. Section 74 and Part 4 of Schedule 7 are excluded from the transfer, and section 74 is effectively repealed in relation to the British Waterways Board (in Scotland as well as in England and Wales). The saving provides that nothing in the order affects any order made and in force at the time of the transfer date.

Article 7 – Revocation

12. This is the only legislation revoked or repealed in its entirety and therefore it has been given its own provision.

Schedule 1

13. Schedule 1 contains a list of legislation under or by virtue of which the British Waterways Board exercise functions in England and Wales. Key Acts are the Transport Act 1962 and the Transport Act 1968 (see below in relation to amendments made under Schedule 2), relating to the operation and maintenance of inland waterways. Examples of other functions in public Acts are set out below. Specific amendments to these Acts are set out in Schedule 3.

Transport Act 1962

Many of the British Waterways Board's powers and duties exist under or by virtue of this Act. Certain functions relating to the power of the Board to operate as a statutory corporation are excepted from the transfer, as are some functions relating to employment matters (which are covered by more modern employment legislation).

Harbours Act 1964

A number of the provisions of this Act apply to the British Waterways Board, or provide an exemption for the Board or in relation to certain harbours of the Board (see, e.g. sections 28, 30(1)(b), 36 and 42(11)).

Transport Act 1968

This Act provides a number of the British Waterways Board's functions, including financial provisions. Part 7 of this Act provides important powers and duties relating to the maintenance and classification of the waterways, which are being transferred to CRT (but with the modifications specified in Schedule 2 to this Order, including the requirement for the Minister to have regard to the financial position of CRT when considering making an order re-classifying a waterway – this is explained further below). A number of functions under this Act are not being transferred to CRT, where they are considered to be no longer necessary for a company with its own powers to operate or no longer or inappropriate to impose on an independent charitable company (such as the duty under section 46 to promote research).

Salmon and Freshwater Fisheries Act 1975

Section 40 applies to the dams constructed by the Severn Commissioners under the Severn Navigation Act 1842 and the Severn Navigation Act 1853 and vested in the British Waterways Board, and to all fish passes in those dams. It imposes a duty on the British Waterways Board to maintain those passes in an efficient state.

Highways Act 1980

Provisions on such matters as control of scaffolding on highways (section 169), payments to be made by owners of new buildings in respect of street works (section 219(4)(i)) (disapplying the section to buildings to be erected on land belonging to or in the possession of named bodies); Schedule 11 (provisions as to orders under section 93 - power to make orders as to reconstruction, improvement, etc. of privately maintainable bridges).

Transport Act 1981

Schedule 3 deals with powers of the Associated British Ports (ABP). Paragraph 31 allows ABP to enter into agreements with a 'public transport authorities' (or subsidiaries) – including the British Waterways Board - for the management, working and use by one party of works, land or other property belonging to the other party, and

with respect to the rendering of services and pooling of receipts or expenses. The order transfers the functions of the British Waterways Board to CRT in this respect.

Agricultural Holdings Act 1986

Schedule 12 contains modifications relating to old tenancies and similar cases. Paragraph 4(2) contains provision relating to the application of section 25 of the 1986 Act (which deals with length of notices to quit) to pre-March 1947 agreements, including in relation to notices given by the British Waterways Board in respect of land acquired them for the purposes of their undertaking.

Pilotage Act 1987

This Act contains the enabling legislation for the Yorkshire Ouse (Pilotage) Powers Order.

Town and Country Planning Act 1990

Some subordinate legislation made under this Act contains provisions relevant to the British Waterways Board, some of a protective nature e.g. Schedule 13 to the Docklands Light Railway (Capacity Enhancement and 2012 Games Preparation) Order 2007 (S.I. 2007/2297).

Water Resources Act 1991

Section 66 provides that only the British Waterways Board may apply for an abstraction licence in respect of an abstraction from inland waters that it owns or manages (unless they are specified in an order). Section 130 provides that where section 66 applies then licence charges should be reduced to the extent agreed between the British Waterways Board and the Environment Agency or if not agreed to the extent determined by the Secretary of State.

Transport and Works Act 1992

A number of pieces of secondary legislation made under this Act contain protective provisions for the benefit of the British Waterways Board or give the Board functions.

Welsh Language Act 1993

Requirements for public bodies providing services in Wales to prepare a scheme setting out how they will provide those services in Welsh.

Channel Tunnel Rail Link Act 1996

There are protective provisions for the British Waterways Board in Schedule 15 part 6 relating to matter such as the purchase of land, consultation with the British Waterways Board, provision of protective works.

Licensing Act 2003

Provisions regarding licensing of premises. In sections 13 and 69, “responsible authorities” are defined as including, in relation to vessels, the British Waterways Board and navigation authorities.

Planning and Compulsory Purchase Act 2004

Section 54(4) imposes a duty on prescribed consultees to give a substantive response in relation to certain consultation. The British Waterways Board is a prescribed consultee for these purposes in relation to certain proposed development: see S.I. 2010/2184.

Gambling Act 2005

Provisions regarding licensing of premises. In sections 211 and 231, “responsible authorities” are defined as including, in relation to vessels, the British Waterways Board and navigation authorities.

Natural Environment and Rural Communities Act 2006

The British Waterways Board is a ‘designated body’ in Schedule 7 to that Act, for the purposes of allowing the Secretary of State to enter into agreements in relation to the performance of functions.

Crossrail Act 2008

Protective provisions for the British Waterways Board in Schedule 17 part 5 relating to matter such as the purchase of land, consultation with the British Waterways Board, provision of protective works.

Planning Act 2008

The British Waterways Board is an interested party for the purposes of Chapter 4 of that Act (and so has functions) by virtue of section 102(1)(b) and (3) of that Act and S.I. 2010/102. There are other subordinate instruments made under that Act that are relevant to the Board.

Flood and Water Management Act 2010

The British Waterways is a statutory consultee in relation to certain applications for construction work which has drainage implications.

14. Schedule 1 also lists two pieces of subordinate legislation made under the European Communities Act 1972 – the Utilities Contracts Regulations 2006 and the Community Hours Driving Hours and Equipment Regulations 2007. These Regulations contain functions exercisable by the British Waterways Board.

Schedule 2

15. Schedule 2 contains specific amendments to the Transport Act 1962 and the Transport Acts 1968. Most of the British Waterways Board’s powers and duties exist under or by virtue of these Acts. For example, the 1962 Act contains the duty of the British Waterways Board to provide, to such extent as it considers “expedient”, services and facilities on the commercial and cruising waterways (and harbours) owned or managed by it having “due regard to efficiency, economy and safety of operation’. The 1968 Act contains duties on the British Waterways Board to maintain its waterways to defined maintenance standards in accordance with a classification system.
16. The changes are effective in England in Wales and in Scotland where relevant. Some amendments include a qualification (e.g. ‘in Scotland’), particularly where the powers of Scottish Ministers are concerned. In other cases there is already in implicit inbuilt

territorial limitation based on references to the ‘undertaking’ of the British Waterways Board.

17. Key amendments to the Transport Acts include:

Provisions on employment

Both Transport Acts contain certain provisions regarding the employment of staff by the British Waterways Board and their pensions (sections 73 to 75 of the 1962 Act and section 137 of the 1968 Act). The provisions on pensions are essentially spent as they were intended to enable the consolidation of the many pre-nationalisation pension schemes. That process was completed by the British Waterways Board many years ago. There are also generic powers for the Minister to make orders reorganising or restructuring pension schemes of the nationalised transport bodies. These powers will not be extended to the CRT. The powers in the 1962 and 1968 Acts pre-date modern pensions legislation and are now largely redundant or inappropriate in the light of that more modern legislation. The transfer process (separate from this Order) will provide for CRT to take over from the British Waterways Board the role of principal employer under the existing British Waterways Board pension schemes and employee pension rights will not be affected on account of the transfer.

The other employment provision that it is not proposed to apply to CRT is section 137 of the Transport Act 1968. This relates to machinery for consultation etc with employees and again has largely been rendered redundant by modern employment law. The Trustees have committed to continuation of the existing Representation and Procedure Agreement with Unite and Unison on the same terms. In accordance with employment law all employees of the British Waterways Board in England and Wales will transfer to CRT on the same terms and conditions they currently have.

Ministers’ Powers of Direction under the Transport Act 1962, section 27

Section 27 of the Act provides for Ministers to give directions to the British Waterways Board in certain circumstances. The effect of this Order is that the power of Ministers to direct the CRT under the Transport Act 1962 is restricted to taking action in the interests of national defence (section 27(6)). This is because wider powers of direction are not in general appropriate for Ministers to hold in relation to the conduct of business and other related activities of an independent charity. While charity law requires charities to be independent from Government the Government has decided that there should continue to be a power to direct in relation to national defence to enable it to effectively deal with exceptional security circumstances. The power of Direction will also be retained for the British Waterways Board in Scotland in relation to national defence as that is a reserved matter.

Classification and maintenance of waterways, sections 104 and 105 of the Transport Act 1968

Section 104 of the Transport Act 1968 divides the British Waterways Board’s undertaking into ‘commercial waterways’, ‘cruising waterways’ and the ‘remainder’ (the first two classifications being specified in Schedule 12). Subsection (3) enables a Minister by order to re-classify waterways. Section 105(3) enables a Minister by order to change the duties on the British Waterways Board under that section to maintain waterways having regard to the size, design or type of vessel customarily using any commercial or cruising waterway.

Sections 104 and 105 are amended to introduce a new obligation for the Secretary of State to take into account the financial circumstances of the new charity when considering an application for any proposed changes to the classification or maintenance of its waterways. These sections are also amended to introduce an enhanced statutory proposer power for the CRT. The need for the financial position of the CRT to be taken into account and the enhanced statutory proposer power is a consequence of the fact that the overall risks and liabilities for the network will be transferring to the new charity and the new Trustees will be responsible for ensuring its financial sustainability. In the event that the CRT seeks to reclassify a waterway, any application for an order under the Act would be subject to a full cost benefit analysis and wide consultation with those likely to be affected as required by the Transport Act. It will remain obligatory for the Secretary of State to hold a public enquiry in certain circumstances, including if an objection is made and not withdrawn by an organisation representing a substantial number of persons using the waterway in question. In addition, there would likely be consultation by the CRT Trustees with the charity's Council and the relevant local Waterways Partnership before embarking on such a significant course of action which would impact on a large number of its users. These mechanisms will help ensure a robust and transparent process on a re-classification of any of the charity's waterways.

Enforcement of maintenance duties – Section 106 of the Transport Act 1968

The Act is amended so that there are two new sections (106 and 106A) containing the provisions relevant to the Waterways Board in Scotland and the CRT in England and Wales respectively.

Schedule 3

18. Schedule 3 deals with bespoke changes to other legislation listed in Schedule 1. Some changes relate simply to consequential changes of name; others are material. Significant material adaptations of existing statute law are:

Local Government, Planning and Land Act 1980

Under this Act, the Secretary of State and, in relation to Wales, the Welsh Ministers have certain powers of direction as against statutory undertakers (and others). By virtue of Part 10 and Schedule 16 of the Act, this power is operable against the British Waterways Board and, unless changed, would cover the CRT. Under sections 95, 97 and 98 of the Act, the Secretary of State may require the British Waterways Board to provide specific information about land owned by the British Waterways Board if the Secretary of State thinks that that land is not being sufficiently used for the purposes of the British Waterways Board's functions or undertaking; the Secretary of State may give a direction requiring the British Waterways Board to dispose of its interest in that land, subject to certain conditions and requirements. The Government does not consider that it would be appropriate for the Secretary of State to exercise the powers under Part 10 of the Act in relation to the CRT. The Act is therefore amended to remove the power for the Secretary of State and the Welsh Ministers to give directions on the sale of land assets when the assets of the British Waterways Board in England and Wales transfer to the CRT. The operational heritage infrastructure will be preserved in a trust in perpetuity, for the benefit of the nation. The Trust Settlement will detail which land will be functional permanent endowment.

Freedom of Information Act 2000

The British Waterways Board is listed under Schedule 1 to the Freedom of Information Act 2000 as a public authority for the purposes of that Act: this also extends to the British Waterways Board in Scotland. This means that the British Waterways Board is subject to the provisions of the FOIA in the same way as are, e.g., Government departments. The British Waterways Board is thus obliged both to operate an approved publication scheme (a means of providing access to information which an authority proactively publishes or intends to publish) and to respond to individual information requests made under the Act. By virtue of its inclusion in Schedule 1 to the FOIA, BWB is also a public authority for the purposes of the Environmental Information Regulations 2004. These Regulations give the public access rights to environmental information held by a public authority in response to requests, and require public authorities to disseminate information by electronic means and to organise information relevant to its functions. It is possible to charge for making environmental information available in many cases, provided that the charge is reasonable.

There needs to be a balanced approach such that the FOIA applies to the CRT proportionately, recognising the need both to treat the CRT as something different from BW, and to establish a level playing-field with other navigation authorities in the voluntary and private sectors.

Therefore under the Order, the CRT will have a partial listing in schedule 1 of the FOIA: the listing explicitly includes information relating to all those functions that the CRT will inherit from BW through the Transfer Order; it implicitly excludes all other functions, such as the activities of bodies merging with the CRT, charitable fund-raising etc. This is a simple and straightforward provision that will give stakeholders confidence that they will have access to the same sorts of information as they have now.

The Government will consult, under s.5 of the FOIA, with the other navigation authorities on the application of the Act to their statutory functions and duties, within the next two years. If the Government subsequently decides not to apply FOIA to navigation authorities, it will review the continued listing of CRT under schedule 1 of the FOIA.

In law, the application of the EIRs to the CRT will be a question for the courts ultimately to decide. It is possible that a court may decide that the EIRs apply to the CRT to the extent that it is carrying out the 'functions of public administration'. In the meantime, the CRT Trustees have made a public commitment to adopt a transparency policy that mirrors the provisions of the EIRs. This will be covered in the memorandum of Understanding between Defra and CRT.

19. Schedule 3 also contains specific amendments to Acts of the Scottish Parliament, as well as changes to secondary legislation. The changes to secondary legislation are mainly consequential changes or additions of name or result from other changes made by this Order.

Schedule 4

20. The Schedule sets out transitional arrangements to deal with the drawing up and laying in the respective Parliaments of British Waterways' final Annual Report and Accounts for the period 2011/12 (when it was a GB-wide body), after the CRT has been set up in England and Wales. It provides for the continuation of accounting and reporting obligations under sections 24 and 27 of the Transport Act 1962 in relation to that financial year. It also sets out the arrangements for 2012/13, given that British Waterways will continue to be a GB-wide body for the period from 1 April 2012 until the transfer date.

The intention is to ensure that the principle of direct accountability of the public corporation to Parliament is maintained in relation to the final period of its operation as a GB-wide organisation.

Accounts/final Annual Report for the year 1 April 2011-31 March 2012

The obligations in section 24 Transport Act 1962 (as un-amended by the Transfer Order) will continue to apply in relation to the 2011-12 financial year. These are:

- (a) British Waterways prepare a statement of accounts
- (b) those accounts are to be audited
- (c) British Waterways send the statement of accounts and the required report by external accountants' report to the Secretary of State and Scottish Ministers
- (d) the Secretary of State and Scottish Ministers include that statement in the Annual Report laid before the UK Parliament and the Scottish Parliament.

Although, following the transfer date, the British Waterways Board will be re-constituted and will operate as a Scotland-only body, it will legally remain the same entity as that created under section 1 of the 1962 Act. Some of the obligations on the Board under section 24 with respect to the 2011-12 financial year may have been completed at the time of the transfer date, but to the extent that they have not, the continuation in force of relevant provisions of sections 24 and 27 of the 1962 Act will mean that the re-constituted Scottish Board will carry out those obligations in relation to the 2011-12 financial year.

Accounts for the period 1 April 2012 to transfer date

Prior to the transfer date, the British Waterways Board (in its GB-wide form) and CRT will work together to produce completion accounts (which cover the transfer of assets from the GB Board to CRT) for this period. The completion accounts will then be included as a Note to the Accounts of the Scottish Board's annual statement at the end of the 2012/13 year. The accounts will then laid before the UK Parliament as well as the Scottish Parliament. Accounts of the BWB from 2013/14 onwards will concern Scottish operations only and will not be laid before the UK Parliament.

Paragraph 3 places the necessary obligations on the Board (which at this stage will be in its Scottish form) to enable the accounts for 2012/13 to include the completion accounts of the Board in its GB-wide form for the period from 1 April 2012 to the transfer date This will be achieved under GAAP and standard accounting rules. The Auditor General for Scotland will audit and sign off the accounts of the Board for 2012/13 and will take account of information provided by auditors of the Board in its GB-wide form who will audit the completion accounts. This paragraph includes a

requirement for laying that year's accounts before the UK Parliament as well as the Scottish Parliament.

Paragraph 3(1) provides for Scottish Ministers to consult the Secretary of State on any accounts direction made under s 24 of the Transport Act 1962 (as amended by this Transfer Order going forward from the transfer date), but only for the period ending 31 March 2013 which will be the last year in which the Board would function on a GB-wide basis as a cross border body.

Paragraph 4 sets out obligations on CRT, in particular to reasonably assist the Board (in effect in its Scottish form) given they will hold the necessary information relating to the Board on a GB-wide basis which will need to be included in the 2012/13 annual report and accounts.

SUMMARY OF FUNDING AGREEMENT

The grant element of the agreement on funding is made up of two elements, **Core Grant** and **Conditional Grant** which is tied to required standards. The other key element of the agreement relates to dealing with CRT pension liabilities inherited from British Waterways.

In summary the funding agreement comprises:

Core Grant

Core grant of **£39m p.a.**

- Payable to CRT in quarterly instalments for **15 years** from 2012/13.
- **Index linked to the GDP deflator** from 2015/16 onwards based upon the last GDP forecast in 2014/15 and set for three years. To be refreshed at the end of each three-year period.
- A review will take place in 2021/22 examining the public benefit case for Government funding beyond 2026/27.
- For years 2013/14 and 2014/15 £3m of the core annual funding will be treated as a conditional grant, subject to the conditions explained below.

Conditional grant – including performance measures

A Conditional grant of **£10m p.a.**, tied to the three required standards

- From 2015/16 to 2021/22, **not index linked**.
- The overall value of funding paid by Defra for the final 5 years of the contract will be capped at the level of the 2021/22 payment (core + conditional). As the core grant continues to be inflated in each of the last five years, the conditional grant will be reduced by the same amount in each year, such that the total amount of funding (core + conditional) is always the same as the 2021/22 payment (as inflated according the formula set out above).
- In the event that inflation causes the core grant to be increased to a level at which the conditional grant would be lower than £4m (based upon the method of calculation above), an element of core grant will be treated as conditional grant, such that the amount of money subject to the performance measures is never less than £4m.
- A review will take place in 2021/22 examining the case for Government funding beyond 2026/2027.

In the event that the conditional grant reaches zero,² the core grant will cease to be inflated, such that the total amount of funding is never greater than the amount paid in 2021/22.

- The Conditional grant is dependent upon the satisfactory completion of the following standards (based on previous year’s performance):

Standards	Applicable Measurement	Warning Threshold	Breach Threshold
(i) Safe Waterways:	Asset management to be in accordance with PAS-55. Percentage of assets in Class D and Class E shall not rise to or above the relevant thresholds.	23% in Classes D & E	25% in Classes D & E
(ii) Towpath condition:	Percentage of towpath at condition A, B or C shall not fall to or below the relevant thresholds.	60% in condition A-C	50% in condition A-C
(iii) Flood management:	Percentage of principal culverts and embankments in class D and E, breach of which would cause more than £2m in damages, shall not rise to or above the relevant thresholds.	4% in Classes D & E	7% in Classes D & E

- In relation to (i), (ii) and (iii) above, there will be two different performance levels indicated in the Grant Agreement, one which acts as an “amber light” indicator (“**Warning Threshold**”), and one which indicates a clear breach (“**Breach Threshold**”).

If the warning threshold is triggered, CRT will have to provide an action plan to remedy the problems and agree it with Defra. If CRT fails to provide a plan in a form that Defra can agree, and if it fails to implement the plan within the required timescale, Defra will be able to withhold some or all of the conditional grant.

- If the breach threshold is triggered, Defra will be able to withhold some or all of the conditional grant.

National Loan Fund repayment

² Calculations show that the level of inflation projected by the GDP deflator required for this to occur is 4% for each of the last five years.

DEFRA will make a one-off payment on or before the end of the 2011/12 financial year to the British Waterways Board, to enable it to repay its National Loan Fund debts to HM Treasury, of around **£6.2m**, including penalties for early repayment. NLF loans cannot be held by bodies outside the public sector.

Pensions

At the date of the March 2010 actuarial valuation of the British Waterways Pension Fund (BWPF), the pension deficit was £65.6m. No formal valuation has been prepared since March 2010, although estimated updates have been prepared by the Scheme Actuary for the pension fund Trustees.

Defra and CRT have agreed a deal on the pension's deficit which will enable CRT to meet their business plan and protect historic public sector pensions.

One-off payment

A one off grant payment of **£25m** spread across 2011/12 and the early months of 2012/13.

Due to the manner in which the pension's deficit is calculated, current low gilt yields will increase the rate of deficit repayment required by the pension's trustees. The one-off payment will help CRT manage the ensuing cash-flow challenges.

Pension guarantee

A 'last resort' wrap around guarantee

- This is capped at **£125m** for a **19 year** period at the end of which CRT plan to have repaid the pensions deficit in its entirety.
- This covers the historic public sector pension liabilities within the pension scheme.
- This would only pay out once all of CRTs assets had been exhausted (i.e. the charity has become insolvent).

Public Reporting Requirements

Under the funding agreement CRT is required to publish information on its activities to ensure public and stakeholder accountability. This includes:

- the Network Stewardship Score
- Data on SSSIs based on published EN data, the percentage area of SSSIs under CRT management in good or recovering condition.
- Data on heritage showing the percentage of heritage assets assessed on completion of work as good or adequate, with double weighting given to good assessments;
- Data on housing forecast figures.
- Data on volunteer participation as the number of volunteer days contributed to CRT.
- Data relating to safety as follows:

- the number of reported incidents involving customers relating to infrastructure failure;
 - the number of reported incidents involving employees related to infrastructure failure; and
 - the data underpinning the standards identified above;
- Data relating to towpaths as follows:
 - the number of towpath visitors (based on annual survey data);
 - the number and duration of unplanned closures; and
 - the data underpinning the standards identified above

Public Access to Information

CRT will maintain an information regime that mirrors the Environmental Information Regulations. Subject to Parliamentary consent CRT will be subject to legal obligations under the Freedom of Information Act relating to its statutory functions.

Other performance requirements

Under the terms of a Memorandum of Understanding CRT will have obligations to draw up certain policies.

Localism Strategies

CRT will ensure that its Waterways Partnerships put in place localism strategies which will commit the Partnerships to facilitating local engagement, working with a range of locally based partners throughout the area covered by the Partnership.

Free Public Access

The right to free access to towpaths for pedestrians will be enshrined in the Trust Settlement. In addition, CRT will publish a policy on access and leisure on the waterways and their towpaths. The policy will in particular set out how CRT will as a general rule ensure pedestrian access free of charge and the extent of necessary qualifications from the general rule for operational/maintenance purposes and control of access at some tourist sites. It will also deal with the promotion of cycling and partnerships to improve the cycling environment.

Performance monitoring

A Memorandum of Understanding will set out the relationship between Defra and CRT. This will be similar in some respects to the Framework Agreement which currently applies to British Waterways but takes full account of the fact that CRT is a charity independent of Government.

List of Consultees

Angling Trust
Ashby Canal Project
Associated British Ports
Association of Inland Navigation Authorities
Association of National Park Authorities
Association of Pleasure Craft Operators
Association of Waterway Cruising Clubs
Barge Association
Basingstoke Canal Authority
Boat Museum Society
Boating Association
Bristol Harbour Authority
British Canoe Union
British Marine Federation
British Ports Association
British Rowing
British Waterways
British Waterways Advisory Forum
Broads Authority
Business Link
Campaign to Protect Rural England
Canal Boat Builders' Association
Canoe England
Cardiff Harbour Authority
Central Council of Physical Recreation
Chesterfield Canal Partnership
Commercial Boat Operators Association
Conservators of the River Cam
Country Land and Business Association
Countryside Council for Wales
Cyclists Touring Clubs
Driffield Navigation Ltd
Droitwich Canals Trust Ltd
Electric Boat Association
English Heritage
Environment Agency
Environment Trust for Richmond-upon-Thames
Essex Waterways Ltd
Fieldfare Trust
FTA Freight by Water
Forestry Commission
Grand Western Canal Country Park

Great Ouse Boating Association
Hereford and Gloucestershire Canal Trust
Heritage Alliance
Heritage Lottery Fund
Historic Narrow Boat Owners' Club
Homes and Communities Agency
Horse Boating Society
Hutchison Ports
Inland Waterways Association
Inland Waterways Advisory Council
International Mountain Bike Association
Local Access Forums
Local authorities in England and Wales
Local Government Association
Manchester Ship Canal Company
Medway Ports
Mersey Partnership
Middle Level Commissioners
National Association of Boat Owners
National Community Boats Association
National Farmers Union
National Offender Management Service
National Trust
National Trust Wales
Natural England
Norfolk and Suffolk Boating Association
Northern Canals Association
Peel Ports (Liverpool Port and Medway Port)
Port of London Authority
Ramblers Association
Residential Boat Owners Association
River Thames Society
Royal Society for the Protection of Birds
Royal Yachting Association
Save Our Waterways
Sleaford Navigation Trust
Southern Canals Association
Sport England
Steam Boat Association of Great Britain
Stroudwater Navigation
Sustrans
Thames User Group
Town and Country Planning Association
Towpath Action Group
United Kingdom Major Ports Group
Upper Avon Navigation Trust

Waterways Trust
Welsh Local Government Association
Wey and Arun Canal Trust
Wey Navigations
Wildlife Trusts
Wildfowl and Wetlands Trust
Wiltshire and Berkshire Canal Trust
Yacht Harbour Association

Impact Assessment

[This is attached as a separate document]

Consultation document – A New Era for the Waterways

[This is attached as a separate document]

Summary of responses to the consultation A New Era for the Waterways

[This is attached as a separate document]

Consultation document - A New Era for the Waterways supplementary consultation

[This is attached as a separate document]

Summary of responses to the supplementary consultation

[This is attached as a separate document]

Trust Settlement

[This document to follow]

Charitable Objects

[This document to follow]

Funding Agreement (Heads of Terms)

[This document to follow]

Inquiry into the establishment of a separate Welsh jurisdiction
Response from the Bangor Law School, Bangor University and an Annex to the Response

INQUIRY INTO THE ESTABLISHMENT OF A SEPARATE WELSH JURISDICTION

Submission to the Constitutional and Legal Affairs Committee of the National Assembly for Wales

**Bangor Law School
Bangor University**

Introduction

1. This submission takes the view that a separate Welsh legal jurisdiction already exists. Wales is a defined territory¹ with a body of law that is growing increasingly apart from that pertaining to England and Wales or to England alone.² A distinct body of law applying to a defined territory implies the existence of a separate jurisdiction.

The submission therefore takes a different interpretation of the meaning of the word “jurisdiction” to that proposed by the Committee in its scoping paper. The Committee defines jurisdiction as “the territory or sphere of activity over which the legal authority of a court or other institution extends”. Therefore it relies significantly on the view that “jurisdiction” is largely related to the question of which court an action should be commenced in.

2. The Committee’s definition may confuse the concept of “jurisdiction”, which can be taken to refer to the presence of a distinct body of law applying to a defined territory, with that of “competence”, which refers to the authority of particular courts or other institutions to interpret and apply that law. At present there is a separate Welsh jurisdiction, however there are no courts or other legal institutions with exclusive competence over laws that apply only to Wales and over laws that apply both to England and Wales in respect of cases that relate predominantly to Wales.³ The lack of such competency does not deny the existence of a

¹ Wales is a statutorily defined territory and such has also been strengthened in practice by the establishment of the Welsh Circuit. Local Government Act 1972 (Part 2 and Schedule 4) as amended by the Local Government (Wales) Act 1994 and confirmed by the Interpretation Act 1978 (Schedule 1). Government of Wales Act 2006 (section 158) as amended by section 43 of the Marine and Coastal Access Act 2009.

² See for example, O. Rees, “Devolution and the development of family law in Wales” [2008] *Child and Family Law Quarterly* 45. In the field of health and social care there are substantive differences between provisions on either side of Offa’s Dyke. For instance, in England there is no statutorily defined procedure for assessing charges for domestic social care whereas in Wales there is. The differences that exist come about either by the use of separate and distinct legal processes such as the requisite Measure, or by minute differences found in separate and differing Directions from the Department of Health on the one hand and Welsh Government on the other. See L. Clements and P. Thompson, *Community Care and the Law*, (LAG, 2011) 12-13.

³ Courts in either England or Wales have authority to administer Welsh law even if it applies to Wales alone. The “apply and extend” principle means that legislation applying to Wales alone has an effect which extends over England and Wales which allows English courts to hear cases related exclusively or predominantly to Wales. Regarding Acts of the Assembly this is defined by section 108 of the Government of Wales Act 2006.

separate Welsh jurisdiction. However, its absence will increasingly hinder the efficient, effective and fair administration of justice in Wales.⁴

3. This submission argues that what needs to be “introduced” is not a separate Welsh jurisdiction, for such already exists. We focus instead on the potential benefits, barriers, costs and practical implications for the legal profession and the public of “introducing” separate courts and other legal institutions with exclusive competence to administer Welsh law and claims under the law of England and Wales that pertain primarily to Wales. In particular, we draw upon research examining the early impacts of establishing a new legal institution in Cardiff, namely the Administrative Court in order to put forward evidence-based recommendations with respect to the development and support of such bodies.⁵
4. The submission also considers the need for other institutions (such as legal training providers and professional organisations), which although they do not administer the law, will be necessary to ensure full training and support to those that do. In doing so we refer comparatively to Northern Ireland, highlighting some of the considerations to be taken into account when establishing and maintaining appropriate legal institutions in small legal jurisdictions.

The Administrative Court in Wales

5. The Administrative Court acts as a constitutional court adjudicating upon the powers of public bodies, establishing standards of legal propriety, applying public law principles consistently and equally, and acting as guardian of our fundamental rights. A Judicial Working Group recommended that an Administrative Court should be established in Cardiff both to improve access to justice and for constitutional reasons.⁶
6. At present the “competence” of the Cardiff Administrative Court (by which we mean the reach of its authority both in terms of the subject matter and territorial origin of claims that can be issued in that Court) is governed by Civil Procedure Rules, Practice Direction 54 Administrative Court (Venue). The Practice Direction does not state that claims wholly or mainly pertaining to Wales must be issued in Cardiff and heard in Wales. There is, however, a general presumption that where claims are issued in Cardiff they will be heard in Wales.

⁴ In this paper, we do not make out the case for a formal legal definition of the competency of the courts in Wales. The arguments in favour of this development have been persuasively articulated elsewhere and, in our view, make such a development an incontestable requirement, see T. G. Watkin, Law Society Wales Annual Lecture, National Eisteddfod 2011.

⁵ This research was funded by the Nuffield Foundation and British Academy and supported by the Administrative Court. For further information see, S. Nason, ‘Regionalisation of the administrative court and the tribunalisation of judicial review’ [2009] Public Law 440 and S. Nason and M. Sunkin ‘The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Legal Services in Public Law’ *forthcoming* Public Law.

⁶ First, that the Welsh Assembly Government derives its powers from a variety of sources. Second, that public law pertaining to Wales already differs from that pertaining to England and Wales, and to England alone and that such divergences will continue to increase. Third, that judicial review and other public law claims examining decisions made in Wales by Welsh public bodies ought obviously to be issued and heard in Wales, this third point should be seen particularly in the context of bilingual court proceedings. Prior to the opening of an Administrative Court in April 2009, some public law claims could be issued in Cardiff, but this facility came to be known as little more than a “post box” and many claims issued in Cardiff continued to be heard in London.

Nevertheless, in all cases (whether proceedings are initially issued in Cardiff or one of the English courts) a number of factors will be taken into account in determining the final location of administration and hearing.⁷ The upshot is that claims under Welsh law and claims under the law of England and Wales either wholly or mainly pertaining to Wales can still be issued and heard in England.

Impacts of the Cardiff Administrative Court (given its current competence)⁸

Benefits

7. The case for maintaining a centralised system of public decision-making, including systems for accessing the courts has now been outweighed by the benefits of devolution (in Wales) and localism (in the English regions). A specific claim is that local courts ought to better understand local issues and may serve as a symbol of community, justice and equality within the territory.⁹ Comparative research examining the legitimacy of national high courts, for instance, has concluded that with increased awareness comes increased confidence, "...to know something about courts is to be favourably oriented toward them".¹⁰
8. The current research noted a "cluster" effect in which specialist legal service providers will "cluster" around courts with the relevant "competence" to determine particular claims. This can lead to greater awareness and increased use of the courts among the local population.
9. Prior to the opening of the Administrative Court in Cardiff, Wales generated an estimated 2% of all judicial review¹¹ claims issued across the Administrative Court as a whole, despite being home to 5.6% of the population of England and Wales.¹² There is early evidence that the number of judicial review applications pertaining to Wales has increased following the opening of the Cardiff Court, to an estimated 2.5%-3% of all Administrative Court claims. The number of claims issued against Welsh public bodies (as opposed to those bodies with responsibility for both England and Wales) has increased (by at least 30%).¹³ Increased litigation is not prima facie a "benefit", however given that the number of claims per head of population is so small across Wales compared to the English regions questions must be asked,

⁷ There is a "general expectation...that proceedings will be administered and determined in the region with which the claimant has the closest connection". However, other factors are taken into account such as the location of the claimant's legal representatives, the location of the defendant and their legal representatives, media interest, urgency, the backlog of cases in any of the four regional Administrative Court Centres or in London and so on.

⁸ Further data is available at Annex A.

⁹ M. Elliott and S. Bailey, "Taking Local Government Seriously: Democracy, Autonomy and the Constitution" (2009) Cambridge Law Journal 436.

¹⁰ J.Gibson, G.Caldeira and V.Baird, "On the legitimacy of national high courts" (1998) 92(2) *American Political Science Review* 343, 344-345.

¹¹ The most prominent species of public law claim constituting approximately 80% of the Administrative Court's overall caseload.

¹² Office for National Statistics data.

¹³ This bucks a trend in the English regions where the number of claims against local authorities is reducing.

and any assumption that this is because public services are better administered in Wales should be treated with caution.

Barriers, costs and practical implications for the legal profession and the public

10. Critics were concerned that Wales would not generate enough cases to justify the resources needed to maintain its own Court. It was suggested that communications technology, i.e. video-links would be sufficient to enable claimants and advisers located in Wales to participate in proceedings administered and determined in London. With respect this proposal would fail to achieve most of the “benefits” noted above and it was duly dismissed.
11. Another barrier that remains is the limited specialist public law legal service provision in Wales. There is still an evident lack of experienced practitioners in this field, and the activities of those lawyers with specialist expertise have been hindered by the past London-centricity of public law litigation. General public awareness of judicial review and other public law claims is also extremely limited.
12. There is evidence that the presence of an Administrative Court in Cardiff has improved professional and public awareness of public law redress. In ordinary civil judicial review (i.e. all claims except asylum and immigration) the number of claims per 1,000 residents in Wales has increased from 0.021 to 0.028 between the first and second years of operation of the Cardiff Court. In London and the South of England the number of claims per 1,000 residents has stayed static but is much higher at 0.057 claims per 1,000 residents.
13. A key practical concern is that almost 50% of judicial review claims issued in Cardiff do not pertain either wholly or substantially to Wales. At least 42% of such claims relate to the South West of England, with a smaller proportion concerning the Midlands. Occasionally Welsh solicitors are instructed to represent claimants and defendants from the South West of England (which is of economic benefit to the Welsh legal services industry), but generally speaking public law legal services in Wales are under-developed and those services which exist are under-utilised as a consequence of historic London-centricity. .
14. A high proportion of Welsh claimants and solicitors choose to issue their claims in London.¹⁴ There may be a number of reasons for this, i.e. the gravitas attached to litigating at the Royal Courts of Justice in London and concern for the quality and consistency of justice dispensed by judges outside London. Lack of awareness may be another factor. Approximately half of all claims involving a Welsh public authority or the Welsh Assembly Government are issued in London and the factor seemingly most influential in the choice of issue location is the instruction by Welsh defendants of London-based specialist barristers.
15. Even some unrepresented Welsh claimants, litigants in person, are choosing to issue in London (approximately 40%). However, overall there has been an increase in the number of claims issued by unrepresented Welsh claimants. This phenomenon has been experienced in

¹⁴ Approximately 40 per cent in the first year post the Cardiff Court’s opening, down to 34 per cent in the second year.

the English regions gaining new Administrative Court Centres,¹⁵ but not in London and the South of England. The growth in Welsh and regional litigants in person may raise particular concerns about the availability of legal aid funding. Regionalisation of the Administrative Court was meant to broaden access to public law redress in part by encouraging regional solicitors to specialise in this area, whereas reforms of public funding have worked to reduce the numbers of solicitors able to undertake publicly funded cases.¹⁶

An Administrative Court with exclusive competence over Welsh public law and cases under the public law of England and Wales pertaining primarily to Wales

Benefits

16. At present the Cardiff Court does not have exclusive competence over claims under Welsh law or over claims under English and Welsh law wholly or substantially pertaining to Wales. Such claims are regularly issued and heard in London where there is no protected right to use the Welsh language in court proceedings.¹⁷ Giving the Cardiff Administrative Court exclusive competence would better protect this right. It would also ensure that cases are listed before appropriately experienced judges with the capacity to extend equal weight to both the English and Welsh versions of legislative texts. Giving the Cardiff Court exclusive competence might also lead to an increase in the number of claims issued and heard in Cardiff. This would be beneficial in terms of justifying court and judicial resources. It might also catalyse more widespread and better quality public law legal service provision in Wales.

Barriers, costs and practical implications for the legal profession and the public

17. Approximately half the Cardiff Court's current caseload stems from outside Wales. To an extent this work, originating in England, is subsidising access to justice in Wales by ensuring a large enough caseload for the Cardiff Court to remain a going concern. If the Cardiff were to lose its competence with respect to cases under the law of England or the law of England and Wales pertaining mainly to England, Cardiff would lose this work. Similarly public law practitioners in Wales would be less inclined to advise English clients losing out on business.
18. At present approximately five claims per-annum originate in North Wales and most of these are issued in Manchester due to geographical convenience, though hearings take place in North Wales. Were Cardiff to have exclusive competence over Welsh claims this might reduce access to justice for claimants and legal advisers based in North Wales.

¹⁵ North East, North West and Midlands.

¹⁶ The implication is that specialist firms of advice providers dealing with a higher volume of cases will be able to attract public funding for judicial review claims, whereas the vast majority of solicitors who issue only a small number of claims per-annum will not.

¹⁷ Under section 22 of the Welsh Language Act 1993, there is a right to use the Welsh language in any court proceedings in Wales, but this does not extend to cases heard in England.

Northern Ireland: the experience of a small jurisdiction

19. A study of the experience of Northern Ireland is instructive in understanding the legal and practical issues involved in successfully operating a small jurisdiction within the UK.

To this end, Bangor Law School, in partnership with the School of Law at Queen's University Belfast, is currently working on a research project entitled '*Small legal jurisdictions in the UK: the legal and practical considerations*'.

The aim of this project is three-fold:

(i) *To consider the legal issues that may arise for small jurisdictions in the UK*

Including cross-jurisdictional issues, binding/persuasive effect of judgements from outside the jurisdiction.

(ii) *To examine the institutional framework required to support such jurisdictions*

Including the role of highly specialised courts that are of fundamental importance to the Welsh public and private spheres (such as the Administrative Court and Mercantile Court), but which generate small caseloads making the effective allocation of resources a challenging consideration. Other concerns are appropriate levels of public funding for institutions and for the cases they administer, and raising awareness of new institutions to ensure access to justice.

(iii) *To identify the implications for the legal profession*

Including the teaching of law at third level; availability of learning materials; professional training issues (including the mutual recognition of qualifying law degrees within the UK); professional qualification and regulation issues (including the mutual recognition of professional qualifications within the UK); continued professional development for legal practitioners; access to statutes and case law; and judicial structures, including training and appointments.

20. As noted, the research project aims to provide a detailed understanding of the institutional framework required to support a separate jurisdiction. This demands consideration not only of courts and tribunals but also the requirement for other institutions (such as legal training providers and professional organisations), which although they do not administer the law, will be necessary to ensure full training and support to those that do. Preliminary research in Northern Ireland suggests that, at a minimum, organisations with the following functions should be established.

(i) A body to ensure that professional training bodies are informed of the evolving needs of the Welsh legal professions.

- (ii) A body to support a general understanding of the law and legal system throughout Wales (through the publication of Welsh law bulletins, the publication of books on various aspects of Welsh law; the organisation of conferences and courses for legal practitioners, civil servants and other interested parties).

Summary and recommendations

21. If existing courts or new institutions are given exclusive competence over Welsh legal matters, measures must be taken to promote practitioner and general public awareness in order to ensure access to justice and caseloads sufficient to justify the allocation of resources to these institutions and the to the particular fields of law involved.
22. The Administrative Court research concluded that market forces and the availability of public funding have substantial effects on access to justice and these should be taken into consideration when introducing any new institutions or altering the competence of existing institutions.
23. The opportunity to alter the competence of existing institutions and to create new institutions to service the separate Welsh jurisdiction provides an opportunity to create new structures and competencies that both increase efficiency and improve access to justice.¹⁸
24. Northern Ireland provides an appropriate point of reference in understanding the substance and process required in supporting a successful small jurisdiction. A detailed examination of the Northern Ireland experience would be highly beneficial in contributing to the continued evolution of a separate Welsh jurisdiction.

Ms Sarah Nason, Lecturer in Administrative Law

Dr Alison Mawhinney, Lecturer in Public Law and Human Rights Law (formerly Lecturer in Law, Queen's University Belfast)

Mr Huw Pritchard, Doctoral candidate, Bangor Law School

Dr Osian Rees, Lecturer in Family Law and Land Law

February 2012

¹⁸ In public law, for example, it is questionable whether the majority of public law claims (particularly those concerning human rights) must necessarily be issued at High Court level. It can be argued that such claims ought to be capable of issue at any civil court in Wales. Wales does not need to maintain the High Court-centricity of the current arrangements.

ANNEX A

1. *The General Administrative Court caseload*

Figure 1: Location of issue – Civil judicial review claims

Administrative Court Centre	1 May 2009 to 30 April 2010		1 May 2010 to 30 April 2011	
	No	%	No	%
Birmingham	137	6.5	178	8
Cardiff	61	3	80	4
Leeds	221	10.5	238	11
Manchester	215	10	212	10
Sub-total outside London	634	30	708	33

Figure 1 shows that 4% of all civil judicial review claims are now issued in Cardiff, however it should be noted that approximately half of these claims originate from outside Wales, with 42% pertaining to the South West of England. On the other hand approximately 35% of claims originating in Wales were listed outside Cardiff in the second year post regionalisation (1 May 2010 to 30 April 2011), most of these claims were issued in London with 3-5 North Wales claims issued in Manchester.

Figure 2: Civil judicial review claims per 1000 residents

Region	Claims per 1000 residents - 1 May 2009 to 30 April 2010	Claims per 1000 residents – 1 May 2010 to 30 April 2011
Midlands (Birmingham claims)	0.015	0.019
Wales (Cardiff claims)	0.021	0.028
North East (Leeds claims)	0.029	0.032
North West (Manchester claims)	0.032	0.031
London and South of England (London claims)	0.058	0.056

Figure 2 shows that whilst claim rate per 1000 residents in Wales is half the claim rate in London and the South of England, claim rates in Wales have increased more than in any other region in the second year after the new Administrative Court Centres were opened. The figure for Wales is similar to the North East and North West, with the Midlands having the lowest rate of claim per 1000 residents.

Figure 3: The main subject areas of judicial review claims by Centre 1 May 2009 to 30 April 2011 (excluding asylum and immigration)

Subject	Location of issue											
	B'ham		Cardiff		Leeds		Manchester		London		Total	
	No	%	No	%	No	%	No	%	No	%	No	%
Community care	51	16	3	2	15	3	12	3	104	4	182	4

Homelessness	18	6	15	11	7	1.5	36	8	89	3	165	4
Housing	13	4	2	1	6	1	10	2	236	8	267	6
Prisons	47	15	7	5	262	57	192	45	489	17	997	24
Town and country planning	25	8	28	20	17	4	22	5	235	8	327	8

Figure 3 shows the main topics of civil judicial review (excluding asylum and immigration). What this shows is that the most prominent public law claims issued in Cardiff relate to homelessness and town and country planning. However, these figures must be treated with caution as they also include cases stemming from the South West of England that have been issued in Cardiff. On further analysis it appears, however, that homeless in particular, but also town and country planning do have a higher incidence among claims specifically relating to Wales when compared to London and some other English regions.

Figure 4: Asylum and immigration judicial review claims

Administrative Court Centre	1 May 2009 to 30 April 2010		1 May 2010 to 30 April 2011	
	No	%	No	%
Birmingham	334	4	517	6
Cardiff	59	0.8	69	0.9
Leeds	154	2	244	3
Manchester	186	2	284	3.5
Sub-total outside London	733	8.8	1114	13.4
London	6,894	91.2	6,983	86.6

Figure 4 refers specifically to the location of issue of asylum and immigration claims and the proportion issued in Cardiff is clearly very small. In part this is due to the low proportion of foreign born residents living in Wales, nevertheless rates of claim are still lower than is to be expected given immigrant and asylum seeker populations. Unlike with ordinary civil judicial review the vast majority of these claims do originate in Wales, not in the South West of England.

Figure 5: Asylum and immigration claims per 1000 residents

Region	Claims per 1000 residents - 1 May 2009 to 30 April 2010	Claims per 1000 residents – 1 May 2010 to 30 April 2011
Midlands (Birmingham claims)	0.035	0.055
Wales (Cardiff claims)	0.020	0.024
North East (Leeds claims)	0.020	0.032
North West (Manchester claims)	0.027	0.042
London and South of England (London claims)	0.268	0.272

Figure 5 shows that Wales has the lowest rates of claim per 1000 residents with respect to asylum and immigration judicial review, this is partly a function of the small asylum seeker and immigrant population, however, the current research also found a lack of specialist legal service

providers in this field. 95% of asylum and immigration claims issued in Cardiff involved just one firm of solicitors.

2. *Ordinary civil judicial review claims, location and type of claimant*

The remainder of this Annex focuses on ordinary civil judicial review claims which make up the main caseload in Wales, further data with regard to asylum and immigration claims is available if required.

Figure 6: Ordinary civil judicial review claims by claimant location where claimant address available¹

Claimant location	1 May 2007 – 30 April 2008		1 May 2008 – 30 April 2009		1 May 2009 – 30 April 2010		1 May 2010 – 30 April 2011	
	No.	%	No.	%	No.	%	No.	%
North West	35	6	70	8	65	9	69	8
North East	48	8	62	7	100	14	83	10
Midlands	51	8	82	10	123	17	124	14
Wales	25	4	28	3	31	4	42	5
Sub Total Four locations with new Admin Court Centres	26%		28%		44%		37%	
South West	55	8	82	10	62	8	67	8
South East	112	18	167	20	117	15	137	15
London	296	48	361	42	244	33	351	40

Figure 6 clearly shows that in cases where the claimant’s address is available (which constitute 36% of all ordinary civil judicial review claims over the period of research) the number and proportion of claims issued by litigants outside London and the South of England has increased substantially in the two years after the new Administrative Court Centres were opened.

Figure 7: Litigants in person ordinary civil judicial review applications

Location	1 May 2007 – 30 April 2008	1 May 2008 – 30 April 2009	1 May 2009 – 30 April 2010	1 May 2010 – 30 April 2011
North West	20	24	37	31
North East	28	28	47	52
Midlands	30	30	47	49

¹ The claimant’s address is generally only recorded where the claimant personally issues the application, claimant’s address was available in 36% of cases during the period of this research, in 58% of cases the claimant remained as an unrepresented litigant, in 42% of claims they went on to instruct legal advisers.

Wales	19	14	18	23
South East	67	64	68	91
South West	39	39	36	47
London	197	199	160	181
Total	400	398	413	474

Figure 7 looks specifically at those claimants who remain unrepresented throughout the progression of their claims. There has been a notable rise in the number of litigants in person from every location except London. This may be a reflection of the availability of legal aid funding outside the Greater London area. It may also be a sign of increased awareness among potential claimants.

3. *Legal advisers*

Figure 8: Ordinary civil judicial review claims by solicitor's location

Location	1 May 2007 – 30 April 2008		1 May 2008 – 30 April 2009		1 May 2009 – 30 April 2010		1 May 2010 – 30 April 2011	
	No.	%	No.	%	No.	%	No.	%
North West	208	14	149	11	167	11	128	9
North East	166	11	182	13	208	14	192	14
Midlands	198	14	132	9	189	13	152	11
Wales	30	2	28	2	37	2	31	2
Sub Total Four new regional Admin Court Centres	41%		35%		40%		36%	
South West	137	9	104	7	87	6	78	5
South East	122	9	118	9	127	9	106	8
London	601	41	696	49	678	45	717	51

Figure 8 examines the origin of claims by considering solicitor's addresses. What we find is that the number and proportion of claims involving solicitors based outside London and the South of England has either stayed the same, decreased or certainly has not increased as dramatically as claims from unrepresented litigants outside London and the South of England. Essentially it appears that whilst judicial review claims from outside London and the South of England are increasing, most of the increase is made up of litigants in person and not represented claimants. Even among represented claimants, a considerable number are still choosing to instruct solicitors from outside their own region, for example approximately 30% of Welsh claimants instruct solicitors based outside of Wales (predominantly solicitors based in London).

This Annex does not discuss the position of barristers in detail though further statistics are available if required. Essentially the research found that barristers outside London are taking on an increasing proportion of Administrative Court work. However, it still appears that London-based barristers are instructed to act for claimants in 40% of judicial review claims originating in Wales and London-based barristers are instructed to act for public body defendants in 50% of claims originating in Wales.

Cynulliad
Cenedlaethol
Cymru
National
Assembly for
Wales



Constitutional and Legislative Affairs Committee

Report: CLA(4)-06-12 : 12 March 2012

The Committee reports to the Assembly as follows:

Instruments that raise no reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

CLA101 – The Local Authorities (Alteration of Requisite Calculations) (Wales) Regulations 2012

Procedure: Negative.

Date made: 22 February 2012.

Date laid: 27 February 2012.

Coming in to force date: 28 February 2012

CLA103 – The Residential Property Tribunal Procedures and Fees (Wales) Regulations 2012

Procedure: Negative.

Date made: 23 February 2012.

Date laid: 28 February 2012.

Coming in to force date: 21 March 2012

CLA104 – The Coleg Menai Further Education Corporation (Dissolution) Order 2012

Procedure: Negative.

Date made: 29 February 2012.

Date laid: 2 March 2012.

Coming in to force date: 1 April 2012

CLA107 – The National Health Service (Optical Charges and Payments) (Amendment)(Wales) Regulations 2012

Procedure: Negative.

Date made: 4 March 2012.

Date laid: 6 March 2012.

Coming in to force date: 1 April 2012

Affirmative Resolution Instruments

CLA103 – The Mobile Homes Act 1983 (Jurisdiction of Residential Property Tribunals) (Wales) Order 2012

Procedure: Affirmative.
Date made: not stated.
Date laid: not stated.
Coming into force date: 21 March 2012

CLA108 – The Welsh Language (Wales) Measure 2011 (Transfer of functions, Transitional and Consequential Provisions) Order 2012
Procedure: Affirmative.
Date made: not stated.
Date laid: not stated.
Coming into force date: 1 April 2012

Instruments that raise reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

CLA105 – The Abergavenny Improvement Act 1854 (Repeal) Order 2012
Procedure: Negative.
Date made: 28 February 2012.
Date laid: 2 March 2012.
Coming in to force date: 26 March 2012

CLA106 – The Environmental Permitting (England and Wales) (Amendment) Regulations 2012
Procedure: Negative.
Date made: 28 February 2012.
Date laid before Parliament: 5 March 2012
Date laid before the National Assembly: 5 March 2012.
Coming into force date: 6 April 2012

CLA109 – The Local Election Survey (Wales) Regulations 2012
Procedure: Negative.
Date made: 4 March 2012.
Date laid: 6 March 2012.
Coming in to force date: 31 March 2012

CLA110 – The Isle of Anglesey Local Authorities (Change to the Years of Ordinary Elections) Order 2012
Procedure: Negative.
Date made: 6 March 2012.
Date laid: 6 March 2012.
Coming in to force date: 27 March 2012

Affirmative Resolution Instruments

None

The Committee agreed the Reports under S.O.21.2 and S.O.21.3 on these statutory instruments, which are attached as Annexes 1 – 4.

Other Business

Committee Correspondence

Proposal for a Directive of the European Parliament and of the Council on Public Procurement

The Committee noted the response of the Chairman of the House of Commons European Scrutiny Committee (Mr William Cash MP) dated 29 February 2012 to the Chair's letter dated 23 February 2012 expressing the Committee's concerns regarding the subsidiarity aspect of the proposed 'national oversight body' (Article 84.1 of the draft Directive). The Committee also noted that on 29 February 2012 that Committee discussed the EU Public Procurement directives and subsidiarity concerns, including the letter submitted by the National Assembly for Wales and agreed a draft reasoned opinion which quotes directly from that submission and also attaches it in full as an annex. It was also reported that the reasoned opinion had subsequently been approved by the House of Commons following a debate on the 6th March, and submitted to the European Commission.

Committee Inquiries: Inquiry into the establishment of a separate Welsh jurisdiction

The Committee took oral evidence from the Law Society, which was represented by Kay Powell, Solicitor and Policy Adviser to the Society; Michael Imperato of NewLaw Solicitors and Richard Owen, Deputy Head of the School of Law, Accounting and Finance, University of Glamorgan, both members of the Wales Committee of the Society. The Law Society agreed to provide additional statistics of transfers between jurisdictions under The Qualified Lawyers Transfer Scheme.

Resolution to Meet in Private

In accordance with Standing Order 17.42(vi) the Committee resolved to exclude the public from the remainder of the meeting to discuss the evidence submitted thus far on the Inquiry into the establishment of a separate Welsh jurisdiction.

David Melding AM

Chair, Constitutional and Legislative Affairs Committee

12 March 2012

Annex 1

Constitutional and Legislative Affairs Committee

(CLA(4)-06-12)

CLA105

Constitutional and Legislative Affairs Committee Report

Title: The Abergavenny Improvement Act 1854 (Repeal) Order 2012

Procedure: Negative

This Order, made under section 58 of the Local Government (Wales) Act 1994, repeals section 28 (including to the extent that section 26 of that Act has effect in relation to section 28) of the Abergavenny Improvement Act 1954 on the grounds that the section has become obsolete and unnecessary and has been substantially superseded by the Food Act 1984.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument/draft instrument

Merits Scrutiny

Under Standing Order 21.3(ii) (political or legal importance or giving rise to issues of public policy likely to be of interest to the Assembly) the Assembly is invited to pay special attention to the following instrument.

Section 58 of the Local Government (Wales) Act 1994 conferred powers on the Secretary of State to repeal local Acts (or specified provisions thereof) where they appeared to be “spent, obsolete or unnecessary or ...have been substantially superseded [by other legislation dealing with the same subject-matter]”.

The power was transferred to the National Assembly by virtue of the National Assembly for Wales (Transfer of Functions) order 1999 and is now vested in the Welsh Ministers.

In so far as can be ascertained, this is the first occasion since the transfer of the power in 1999 and its subsequent vesting in the Welsh Ministers that the power has been exercised. In these circumstances the Assembly is invited to special attention to this Order under Standing Order 21(3)(ii)

David Melding AM

Chair, Constitutional and Legislative Affairs Committee

12 March 2012

Annex 2

Constitutional and Legislative Affairs Committee

(CLA(4)-06-12)

CLA106

Constitutional and Legislative Affairs Committee Report

Title: The Environmental Permitting (England and Wales) (Amendment) Regulations 2012

The instrument amends the Environmental Permitting (England and Wales) Regulations 2010 (“the 2010 Regulations”). The amendments do the following:

- reduce regulatory requirements for those who operate certain anaerobic digestion installations or mobile plant and for those who burn waste-derived fuel that has ceased to be waste;
- make it easier to transfer permits in certain situations;
- provide for the vesting of an environmental permit in the personal representative of a deceased operator;
- make relatively minor changes to certain exempt waste operations;
- make minor amendments relating to radioactive substances activities;
- make minor amendments to the Environmental Damage (Prevention and Remediation) Regulations 2009 and the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 to clarify the enforcement position of the Environment Agency; and
- make consequential amendments to the 2010 Regulations and to other legislation.

Procedure: Negative

Technical Scrutiny

Under Standing Order 21.2 the Assembly is invited to pay special attention to the following instrument:-

1. These Regulations have not been made bilingually save for Regulation 19, which makes minor amendments in both languages to Wales only Regulations.

[21.2(ix) - that it is not made or to be made in both English and Welsh].

Merits Scrutiny

No points are identified for reporting under Standing Order 21.3 in respect of this instrument at this stage.

David Melding AM

Chair, Constitutional and Legislative Affairs Committee

12 March 2012

The Government has responded as follows:

The Environmental Permitting (England and Wales) (Amendment) Regulations 2012

"These composite Regulations amend some of the provisions in the Environmental Permitting (England and Wales) Regulations 2010 S.I. 2010.675 to:

- reduce regulatory requirements for those who operate certain anaerobic digestion installations or mobile plant and for those who burn waste-derived fuel that has ceased to be waste;
- make it easier to transfer permits in certain situations;
- provide for the vesting of an environmental permit in the personal representative of a deceased operator;
- make relatively minor changes to certain exempt waste operations;
- make minor amendments relating to radioactive substances activities;
- make minor amendments to the Environmental Damage (Prevention and Remediation) Regulations 2009 and the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 to clarify the enforcement position of the Environment Agency; and
- make consequential amendments to the 2010 Regulations and to other legislation
-

The Environmental Permitting regime streamlines the procedural parts of a raft of highly technical and complex legislation. It has enabled the simplification of the operation of the permitting system that industry and regulators work with without in any way compromising

environmental or human health standards. This has brought much needed simplification to the complexity that industry and regulators in England and Wales previously faced.

Securing these changes via composite instruments made with the Secretary of State is consistent with the aim of simplification referred to above. The composite instrument also minimises the inconvenience and potential confusion for those affected by the Regulations, especially as the Environment Agency (a regulator) is a cross border body.

These composite Regulations apply to England and Wales and are subject to approval by the National Assembly for Wales and by Parliament. Accordingly, it is not considered reasonably practicable for this Instrument to be laid in draft, or made, bilingually."

Annex 3

Constitutional and Legislative Affairs Committee

(CLA(4)-06-12)

CLA109

Constitutional and Legislative Affairs Committee Report

Title: The Local Election Survey (Wales) Regulations 2012

Procedure: Affirmative

Section 1 of the Local Government (Wales) Measure 2011 (the Measure) imposes a duty on a local authority (a county council or a county borough council), in accordance with regulations, to conduct a survey after each ordinary election to the council of the county or county borough and to each community council (normally held concurrently every four years) in the local authority's area.

A local authority must conduct the survey by asking prescribed questions of councillors and unsuccessful candidates who have stood for election as councillors in the local authority's area.

These Regulations prescribe the questions that a local authority must ask when conducting a local election survey. The prescribed questions and the form in which they may be asked are set out in the Schedule to the Regulations.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument

Merits Scrutiny

The following point is identified for reporting under Standing Order 21.3 in respect of this instrument –

Much of the information to be gathered by this survey is sensitive personal data within the meaning given to that term by section 2 of the Data Protection Act 1998. Although the Measure provides for anonymity, the small number of candidates for some authorities may make it relatively easy to recognise those with a particular combination of characteristics (age, gender, religion etc.). The form of questionnaire therefore includes a footnote that draws attention to the provision in section 1 of the Measure that there is no duty to complete the survey.

[S.O.21.3(ii) that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly]

David Melding AM

Chair, Constitutional and Legislative Affairs Committee

12 March 2012

Annex 4

Constitutional and Legislative Affairs Committee

(CLA(4)-06-12)

CLA110

Constitutional and Legislative Affairs Committee Report

Title: The Isle of Anglesey Local Authorities (Change to the Years of Ordinary Elections) Order 2012

Procedure: Negative

This Order provides that the ordinary elections of councillors to the Isle of Anglesey County Council will take place in 2013 instead of 2012. It also provides that the ordinary elections of councillors to the community councils in the Isle of Anglesey county will take place in 2013 instead of 2012.

The current term of office of existing councillors elected to the Isle of Anglesey County Council is accordingly extended by one year. The current term of office of existing community councillors elected to community councils in the Isle of Anglesey county is also accordingly extended by one year.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument –

1. This Order has the effect of postponing elections in Anglesey by one year. Nevertheless, the enabling legislation provides that the negative procedure applies to this Order.
2. The Order also has the effect of putting Anglesey on a different electoral cycle from the other Welsh counties. Attention is therefore drawn in particular to the final paragraph of part 4 of the Explanatory Memorandum.

[S.O.21.3(ii) that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly]

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

12 March 2012