

Explanatory Memorandum to The Sustainable Drainage (Approval and Adoption) (Wales) (Amendment) Order 2020

This Explanatory Memorandum has been prepared by the Department for Economy, Skills and Natural Resources and is laid before the Senedd in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Sustainable Drainage (Approval and Adoption) (Wales) (Amendment) Order 2020.

Lesley Griffiths

Minister for Environment, Energy and Rural Affairs

19 May 2020

1. Description

1.1 Schedule 3 of the Flood and Water Management Act 2010 (the 2010 Act) sets out provisions concerning sustainable drainage (SuDS). These include the establishment of a SuDS Approving Body (SAB) to be set up within the local authority alongside their lead local flood authority (LLFA) duty. SAB approval will be required before construction of drainage systems can commence on new and redeveloped sites.

1.2 The Sustainable Drainage (Approval and Adoption) (Wales) Order 2018 ("the 2018 Order") makes provision in relation to the requirement for approval of, and requests for adoption of, sustainable drainage systems under Schedule 3 to the 2010 Act.

1.3 The Sustainable Drainage (Approval and Adoption) (Wales) (Amendment) Order 2020 ("the 2020 Order") amends Article 2 of the 2018 Order to add a definition of 'planning permission' into that Article, which applies throughout the 2018 Order. The amendment states that "planning permission" means planning permission on application and excludes general permitted development rights or permissions granted in accordance with development orders or local development orders.

1.4 References to “planning permission” are contained in articles 4, 5 and 6 of the 2018 Order. The 2020 Order makes amendments to Article 4 of the 2018 Order by substituting it with the same provisions, whilst removing the footnote in Art.4(1) which has a definition of planning permission for the purpose of that Article.

1.5 The 2020 Order also inserts a new subsection (3) in article 4 of the 2018 Order which provides that emergency permitted developments under Part 3A, Part 12A and Part 37 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995, do not require approval under paragraph 7(1) of Schedule 3 to the 2010 Act. The new subsection exempts emergency permitted developments by NHS bodies, local authorities and the Crown from the need to obtain SAB approval.

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

2.1 None.

3. Legislative background

3.1 This Order is made exercising the powers conferred by sections 32 and 48(2) of, and paragraph 7(4)(c) of Schedule 3 to, the Flood and Water Management Act 2010.

3.2 In accordance with the powers listed in paragraph 3.1 above this instrument follows the Senedd’s negative procedure.

4. Purpose and intended effect of the legislation

4.1 Articles 4, 5 and 6 of the 2018 Order refer to exceptions to the requirement for approval where planning permission is required and also to exceptions where planning permission is not required.

4.2 In summary, the policy aim behind the 2018 Order was that after 7 January 2019 all developments with a construction area of 100 square metres or more (including permitted developments) would need to be approved under the sustainable drainage legislation.

4.3 However, permitted developments, which are granted planning permission by virtue of development orders or local development orders are regarded as having obtained that planning permission when such orders were made. An example would be permitted developments under the Town and Country Planning (General Permitted Development) Order 1995 (“GPDO”).

4.4 Article 5 to the 2018 Order provides an exception to the requirement for approval where planning permission was granted or deemed to be granted before 7 January 2019. As a result, it could be interpreted that Article 5 has the effect of exempting permitted developments, such as those under the GPDO, with a construction area of 100 square metres or more from the requirement to obtain approval. This is not the intended effect of the legislation and it does not accord with the policy intention of the SuDS legislation.

4.5 To clarify the position and intended effect of the 2018 Order, the Sustainable Drainage (Approval and Adoption) (Wales) (Amendment) Order 2020 amends Article 2 of the 2018 Order to add a definition of “planning permission” which applies throughout the 2018 Order. The amendment states that “planning permission” means planning permission on application and excludes general permitted development rights or permissions granted in accordance with development orders or local development orders.

4.6 In response to the Covid 19 pandemic, the 2020 Order also inserts a new subsection (3) in article 4 of the 2018 Order which provides that emergency permitted developments by NHS bodies, local authorities and the Crown do not require SAB approval under paragraph 7(1) of Schedule 3 to the 2010 Act.

5. Consultation

5.1 The Order provides a technical amendment to correct an unintended omission in the 2018 Order and does not reflect a change in the Welsh Government’s original policy. While a formal public consultation has not taken place, the Welsh Government wrote to stakeholders on 14 January 2020 to inform them of the intention to make the amendment by way of an Order.

5.2 Subsequently, in response to the Covid 19 pandemic, Orders have been made under the Planning system to give permitted development status to emergency developments by local authorities and the NHS. (Emergency developments by the Crown were already regarded as permitted developments). The 2020 Order treats such developments in a similar way by exempting them from the requirement to obtain SAB approval. In view of the need for an urgent response to the pandemic, no consultation has been undertaken on this matter.

6. Regulatory Impact Assessment (RIA)

6.1 A regulatory impact assessment has not been undertaken as the Amendment Order does not reflect a change in the Welsh Government’s original policy since the original Order was made in 2018. A regulatory impact assessment was undertaken for 2018 Order.

7. Competition Assessment

7.1 Not applicable

8. Post implementation review

8.1 Not applicable