

Constitutional and Legislative Affairs Committee Report

CLA(4)-20-12

CLA179

Radioactive Contaminated Land Statutory Guidance

1. “The Guidance is intended to explain how local authorities should implement the radioactive contaminated land regime, including how they should go about deciding whether land is “contaminated land” in the legal sense of the term”
2. On 24th September 2012, the Statutory Guidance was laid before the National Assembly together with a brief Explanatory Memorandum. Statutory guidance may (or may not) constitute subordinate legislation. The usual test is whether or not the guidance is legislative in character. The persons (including public bodies) to whom the guidance is directed are required to have regard to such guidance. In practice this means that they must have a very good reason for not following that guidance. The reason must be capable of justifying the course of action adopted in any judicial review procedure.
3. The procedure applicable to the guidance is legislative in character, and therefore it has been agreed that the Committee will consider the guidance.

Enabling Power

4. The Welsh Ministers have various powers to issue guidance under Part IIA of the Environmental Protection Act 1990. The Explanatory Memorandum states that the guidance is legally binding on local authorities and the Environment Agency.

Procedure

5. The procedure for approval is set out in Section 78YA as follows:–
Section 78YA
 - (1) *Any power of the Minister for the Environment and Sustainable Development to issue guidance under this Part shall only be exercisable after consultation with the appropriate Agency and such other bodies or persons as he may consider it appropriate to consult in relation to the guidance in question.*
 - (2) *A draft of any guidance proposed to be issued under section 78A(2) or (5), 78B(2) or 78F(6) or (7) above shall be laid before the National Assembly for Wales and the guidance shall not be issued until after the period of 40 days beginning with the day on which the draft was so laid or, if the draft is laid on different days, the later of the two days.*

- (3) *If, within the period mentioned in subsection (2) above, the National Assembly for Wales resolves that the guidance, the draft of which was laid before it, should not be issued, the Minister for the Environment and Sustainable Development shall not issue that guidance.*
 - (4) *In reckoning any period of 40 days for the purposes of subsection (2) or (3) above, no account shall be taken of any time during which the National Assembly for Wales is dissolved or prorogued or during which the National Assembly for Wales is adjourned for more than four days.*
 - (5) *The Minister for the Environment and Sustainable Development shall arrange for any guidance issued by him under this Part to be published in such a manner as he considers appropriate.*
6. The guidance is subject to a variation on the negative procedure. As in negative procedure cases, the guidance can be made and come into force unless the Assembly resolves to the contrary within a specified period. However, in the case of statutory instruments made under a negative procedure, the instruments are normally made before they are laid. In this case, the guidance is laid in draft, and may not be made until the end of a specified period. The procedure therefore provides a greater measure of scrutiny than a standard negative procedure.

Scrutiny

7. The Committee has agreed to scrutinise guidance which is subject to an Assembly procedure. If the guidance is regarded as subordinate legislation not made by statutory instrument, the Constitutional and Legislative Affairs Committee may report on it under Standing Order 21.7 (i). Even if it is not so regarded, the Committee may still report on it as being a legislative matter of a general nature under Standing Order 21.7 (v).

Technical Scrutiny

8. If this had been a statutory instrument, the matter would have been drawn to the attention of the Assembly under Standing Order 21.2 (ix) – *that it is not made or to be made in Welsh*
9. The Minister for the Environment and Sustainable Development has discretion to publish the guidance in such a manner he considers appropriate. (Section 78YA (5)).
10. There appears to be a typographical error in paragraph 3 of the Explanatory Memorandum which states that *“This Statutory Guidance has been scored in accordance with the Welsh Government’s Welsh*

*Language Scheme and **does** require translation due to the length, the technical nature and limited target audience of the document."*

Merits Scrutiny

11. No merits points are identified that would have been reported under Standing Order 21.3 if this had been a statutory instrument.
12. This matter is drawn to the attention of the Assembly under Standing Orders 21.7 because it raises legislative and procedural issues likely to be of interest to the Assembly.

Legal Advisers

Constitutional and Legislative Affairs Committee

October 2012

The Government has responded as follows:

Draft Radioactive Contaminated Land Statutory Guidance 2012

The draft Guidance was scored against the criteria to be applied under the Welsh Government's Welsh Language Scheme and did not require translation due to the length, technical nature, and limited target audience of the document. I am grateful to the Committee for pointing out the typographical error in the Explanatory Memorandum and will ensure that it is corrected in any copies that are produced for further distribution.