



House of Commons  
Regulatory Reform Committee

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**Proposal for the  
Regulatory Reform  
(Joint Nature  
Conservation  
Committee) Order 2005**

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First Report of Session 2004–05





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*Report, together with formal minutes and  
written evidence*

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## The Regulatory Reform Committee

The Regulatory Reform Committee is appointed to consider and report to the House of Commons on proposals for regulatory reform orders under the Regulatory Reform Act 2001 and, subsequently, any ensuing draft regulatory reform order. It will also consider any "subordinate provisions order" made under the same Act.

### Current membership

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### Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 141, available on the Internet via [www.parliament.uk](http://www.parliament.uk).

### Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at [www.parliament.uk/regrefcom](http://www.parliament.uk/regrefcom)

A list of Reports of the Committee in the present Session of Parliament is at the back of this volume.

### Committee staff

The current staff of the Committee are Mick Hillyard (Clerk), Stuart Deacon (Committee Specialist), Brian Dye (Committee Assistant) and Liz Booth (Secretary).

### Contacts

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## Summary

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The Proposal for the draft Regulatory Reform (Joint Nature Conservation Committee) Order 2005 was laid before the House by the Department for the Environment, Food and Rural Affairs (Defra) on 12 October 2004.

The Joint Nature Conservation Committee [JNCC] was created by the Environmental Protection Act 1990 and is the UK Government's wildlife adviser, undertaking national and international conservation work on behalf of the three country nature conservation agencies: English Nature, Scottish Natural Heritage and the Countryside Council for Wales.

According to the Government, the draft Order would free JNCC of various constraints presently upon it and enable it to operate more effectively. This will include providing the ability to employ its own staff, remunerate its Chairman and independent members and receive certain monies direct from Government.

The draft Order would make amendments to section 129(1) of and Schedule 7 to the Environmental Protection Act 1990. It would remove the requirement imposed by section 129(1) of the 1990 Act for the Secretary of State to make all payments for the work of JNCC through the country bodies, rather than making direct payments to JNCC for work undertaken directly for the Government.

The draft Order would amend Schedule 7 to the 1990 Act to remove the current requirement on English Nature, Scottish Natural Heritage and the Countryside Council for Wales to provide JNCC with staff, accommodation and other facilities, and to enable it employ its own staff and to give it responsibility for paying remuneration, allowances, pension and, where necessary, compensation to its chairman, to the three JNCC members appointed by the Secretary of State and to the non-voting members.

Finally, the draft Order would afford the option of setting up a Company Limited by Guarantee as a corporate vehicle for the employment of staff and to provide other administrative and corporate support services for the purposes of the functions discharged through JNCC.

This Report describes the effect of the Proposal and assesses it against the statutory and Standing Order tests. The Committee recommends some minor drafting changes (paragraph 47) before the draft Order is laid before the House.



# 1 Background to the Proposal

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1. The Joint Nature Conservation Committee [JNCC] was created by the Environmental Protection Act 1990 [the 1990 Act] and is the forum through which the three country conservation agencies - the “country bodies”, i.e. the Countryside Council for Wales [CCW], English Nature [EN] and Scottish Natural Heritage [SNH] - fulfil their statutory responsibilities for Great Britain as a whole, and internationally. These responsibilities, known as special functions, contribute to sustaining and enriching biological diversity, enhancing geological features and sustaining natural systems. The special functions are principally:

- a) to advise ministers on the development of policies for, or affecting, nature conservation in Great Britain and internationally;
- b) to provide advice and knowledge to anyone on nature conservation issues affecting Great Britain and internationally;
- c) to establish common standards throughout Great Britain for the monitoring of nature conservation and for research into nature conservation and the analysis of the results; and
- d) to commission or support research which the Committee deems relevant to the special functions.

2. JNCC comprises thirteen members: a Chairman and three independent members, the Chairmen and one other member from each of the three country agencies, the Chairman of the Countryside Agency, and two (non-voting) members appointed by the Department of Environment (Northern Ireland). Its headquarters are in Peterborough. JNCC has an annual budget of around £ 6.6 million, of which about half is spent on staff costs. As at 11 November 2004 there were 111 staff assigned to the JNCC from the three country bodies (60 from EN, 35 from SNH and 16 from CCW).<sup>1</sup>

3. The Proposal is part of a wider package of measures aimed to improve the efficiency, effectiveness and service delivery of JNCC as set out in the Government Response to the Financial, Management and Policy Review of JNCC.<sup>2</sup> Some improvements have already been made through administrative change; others await primary legislation. The former includes the agreement of a new statement of strategic direction and a revised corporate planning framework while the latter includes extending some of JNCC’s functions to Northern Ireland and reviewing its constitution to give the two Northern Ireland observers voting rights and increasing the number of independent members.

4. The Proposal for the draft Regulatory Reform (Joint Nature Conservation Committee) Order 2005 was laid before the House by the Department for the Environment, Food and

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1 Appendix, A6

2 The Finance, Management and Policy Review (also known as the Quinquennial Review) of the Joint Nature Conservation Committee. The Stage 1 Report (March 2001), the Stage 2 Report (January 2002) and the Government Response (November 2002) are available on the [www.jncc.gov.uk](http://www.jncc.gov.uk) website.

Rural Affairs (Defra) on 12 October 2004.<sup>3</sup> Following an informal presentation by Defra officials to the Committee on 2 November 2004, Defra responded to a number of questions in writing.<sup>4</sup>

## 2 Extent of the Proposal's application

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5. The Proposal primarily concerns the country bodies for England, Scotland and Wales and their staff working at the JNCC.<sup>5</sup> JNCC is a specified Cross-Border Public Authority under section 88(5) of the Scotland Act 1998, which ensures that the UK Government and Scottish Ministers receive advice reflecting input from all three country bodies on matters of GB-wide, European or international importance.<sup>6</sup>

6. Defra's Statement<sup>7</sup> says that the devolved administrations, including Northern Ireland, were party to the Government's response to the Financial, Management and Policy Review of JNCC<sup>8</sup> and were consulted on the Proposal for the draft Order. Defra also recorded that the Scottish Executive and the Welsh Assembly Executive were content with the provisions of the draft Order.

7. Defra stated that the draft Order would be subject to separate approval by the Welsh Assembly,<sup>9</sup> though Defra had been informed in late October that the Welsh Assembly Government considered the draft Order did not need to be submitted for approval by the National Assembly for Wales under its Standing Order 24 provisions since, while the Order would extend to Wales, it did not seek to remove or amend any of the Assembly's functions. The preamble to the draft Order accordingly omits any mention of approval by the National Assembly for Wales. Defra apologised for not amending the Statement to take account of this revised advice prior to submission to this Committee.<sup>10</sup>

## 3 Assessment of the Proposal against the Standing Order No. 141(6) criteria

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### Use of delegated legislation

8. The Proposal for a Regulatory Reform Order, though self-contained, is made against the background of possible primary legislation, possibly to create an autonomous statutory

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3 The Proposal for a draft Regulatory Reform (Joint Nature Conservation Committee) Order 2005 together with a Statement by the Department for the Environment, Food and Rural Affairs are included among the papers formally laid upon the Table of the House on 12 October 2004. This Statement is frequently referred to in the footnotes below.

4 See Appendix

5 Statement para 2

6 Statement para 3

7 Statement para 4

8 Annex C to the Statement

9 Statement para 9

10 Appendix, A7

UK-wide non-departmental public body<sup>11</sup> but almost certainly to include extending some of JNCC's functions to Northern Ireland, reviewing its constitution to give the two Northern Ireland observers voting rights and increasing the number of independent members.<sup>12</sup> The Committee has noted before that it would “reserve judgment” on the principle of splitting legislative proposals into bills and regulatory reform orders.<sup>13</sup> **We consider that this Proposal appears to be appropriate for delegated legislation.**

## Removal and reduction of burdens

9. Defra identifies four burdens under the existing legislation:

- (i) inability to employ staff, etc.
- (ii) limit on power to delegate
- (iii) inability to seek direct funding
- (iv) inability to conclude work on remuneration of members and chairman, etc.

### *Inability to employ staff, etc.*

10. Defra says that the requirement in paragraph 7 (1) of Schedule 7 to the 1990 Act that the country bodies provide JNCC with staff, accommodation and other facilities imposes a burden on JNCC and that this is an impediment to JNCC carrying out its statutory functions.<sup>14</sup> According to Defra, many of the administrative procedures are unduly complex and JNCC is unable to make decisions on some fairly routine issues without involving the country bodies. In particular, the requirement arising from paragraph 7(1) of Schedule 7 to the 1990 Act that staff working at JNCC must be employed by one of the country bodies (English Nature, Scottish Natural Heritage or the Countryside Council for Wales) increases the complexity of and adds to the costs of human resources (personnel) services to both the country bodies and JNCC. At present, JNCC has staff working side by side, doing similar work, engaged on different terms and conditions. Removing the requirement under the 1990 Act for the country bodies to provide staff, and enabling JNCC to do so itself, either directly, or through a company limited by guarantee, would allow all staff working at JNCC to be employed on a consistent set of terms and conditions.

11. Article 4 of the draft Order allows for the setting up of a company limited by guarantee to facilitate the employment of staff (JNCC being an unincorporated public body) and the

11 Consultation paper para 5.13 and Statement para 8. The Government announced on 23 November 2004 that it intends to publish a draft Modernising Rural Delivery Bill for pre-legislative scrutiny. The draft Bill is expected to establish a new Integrated Agency to integrate and build on the work done by English Nature, the Countryside Agency and the Rural Development Service, to remove organisational barriers and to streamline administration and legislation.

12 Statement para 39

13 See para 230 of the Eleventh Report from the Regulatory Reform Committee of Session 2003-04, *Proposal for the Regulatory Reform (Fire Safety) Order 2004*, HC 684. The Proposal for the Regulatory Reform (Fire Safety) Order was introduced while the Fire and Rescue Services Bill was completing its passage through Parliament, and elements of the proposal originally consulted upon were enacted by means of that Bill rather than by means of the proposed Regulatory Reform Order. Two other instances referred to by the Committee were the proposals for the Regulatory Reform (Patents) Order 2004 and the Regulatory Reform (National Health Service Charitable Trust Accounts and Audit) Order 2004, which had links to the Patents Bill [*Lords*] and the Public Audit (Wales) Bill [*Lords*] respectively.

14 Statement para 10

provision of other corporate services and is a part of the means by which this burden would be addressed. The burden of having to rely upon the provision of staff on secondment would be removed, and such a company could be used to ease the fulfilment of some of its administrative and corporate support needs by providing a contracting body.

**12. We agree that the requirement on the country bodies to provide staff, accommodation and facilities to JNCC imposes a burden which affects JNCC and would be removed by the Proposal.**

### ***Limit on power to delegate***

13. Defra identifies a restriction of the power to delegate in paragraph 9(1) of Schedule 7 to the 1990 Act, which allows JNCC to delegate functions to employees of the three country bodies.<sup>15</sup> Under the Proposal, the scope for delegation would be extended to include employees of JNCC, or of a company limited by guarantee formed by it, and such a company itself.

14. Defra describes this restriction as a further burden, incidental to the burden of JNCC's inability to employ its own staff described above. **In our view, the provision in Article 4(4) of the proposed draft Order may be better regarded as using the power in section 1(6)(c) of the Regulatory Reform Act to make incidental or supplemental provision to the Proposal.**

### ***Inability to seek direct funding***

15. Defra says that the current requirement arising from section 129 of the 1990 Act that all funding must be made via the country bodies places a burden on JNCC in that it cannot seek direct funding for work it undertakes on UK-wide matters where there is no specific individual or collective responsibility.<sup>16</sup> At present the only way that core funding can be supplemented by Government is by making payments via the country bodies adding administrative complexity by 'double handling'.

**16. We agree that the requirement to fund Government activities carried out by JNCC via the country bodies amounts to a burden on central government which affects JNCC in the carrying on of its activities and adds complexity to the administrative arrangements of the country bodies and would be removed by the Proposal.**

### ***Inability to conclude work on remuneration of members and chairman, etc.***

17. The Proposal would allow JNCC to deal directly with the pay, pensions and related issues of those members of JNCC who are appointed as 'independents' by the Secretary of State without (as is necessary at present) having to do so via the country bodies. Defra says that this would remove an unnecessary layer of administrative complexity which is an impediment to JNCC carrying out its statutory functions efficiently.<sup>17</sup> **In our view this part**

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15 Statement para 12

16 Statement para 13

17 Statement para 14

of the Proposal would remove burdens from the country bodies and impose them on JNCC.

### New burdens and proportionality between burdens and benefits

18. It is up to the Government to justify any new burdens proposed and to satisfy the Committee that a Proposal satisfies the condition of proportionality between burdens and benefits set out in section 1 of the Act and the fair balance and desirability tests set out in section 3. Defra argues that its Proposal does not create any new burdens, but would re-allocate to JNCC a series of functions or obligations, such as employing staff and providing remuneration, which currently fall on the country bodies collectively.<sup>18</sup> Defra listed these obligations —

- the employment of staff working at JNCC;
- payment of remuneration and other allowances to those staff;
- payment of pensions for those staff and former employees ;
- the maintenance of pension schemes;
- the provision of accommodation and other facilities for JNCC;
- payment of remuneration, pensions, allowances and gratuities to JNCC’s Chairman, three independent members, all appointed by the Secretary of State, and two non-voting members.

19. Defra added that if the option of setting up a company limited by guarantee were to be used, JNCC would also be obliged to take responsibility for the company’s governance and ensuring it met the requirements of the Companies Acts.<sup>19</sup>

20. The Committee asked Defra what consideration it had given to whether the imposition of these obligations satisfied the conditions of proportionality between burdens and benefits set out in section 1 of the Regulatory Reform Act 2001 and the fair balance and desirability tests set out in section 3 of the Act.

21. Defra argued that the central object of the proposed reform was to remove the burden JNCC faced in not being able to employ its own staff, or to do a number of ancillary things for itself. The burdens to be removed were the limitations on JNCC’s powers preventing it from being able to do these things. Giving the responsibility to JNCC would be lifting a burden (in the sense of section 2(1)(b) of the Regulatory Reform Act), rather than imposing one. In Defra’s view, being responsible for such matters as paying the employees and maintaining a pension scheme for their benefit was clearly consequentially related to being able to employ them.<sup>20</sup>

22. Where obligations were to be “transferred” to JNCC, the safeguarding roles of the Secretary of State and Treasury would in each case be preserved. These safeguards were

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18 Statement paras 19 and 33

19 Appendix, A1

20 Appendix, A2

seen by Defra as a limitation on the powers conferred, and thus burdens, either new or re-enacted, in terms of the Regulatory Reform Act.

23. Defra was satisfied that, as well as offering necessary protection, these limitations were proportionate as they reflected the 1990 arrangements, JNCC was content to be subject to them, the benefits they would provide by way of safeguards were desirable, and it would be inappropriate for JNCC not to be subject to similar safeguards in respect of staff numbers and payments as the country bodies would continue to be in respect of their own employees under Schedule 6 to the 1990 Act, or under Schedule 1 to the Natural Heritage (Scotland) Act 1991 in respect of Scottish Natural Heritage. Defra was satisfied that for the same reasons their inclusion would maintain a fair balance between the public interest and the interests of JNCC, which would be subject to the new or re-enacted burdens. Defra also considered that, having regard to the benefits arising from the removal of the central burden on JNCC, it was desirable that the Order should be made as in the Proposal.<sup>21</sup>

24. In the light of Defra's responses to the Committee's questions, **we agree that the Proposal satisfies the conditions of proportionality between burdens and benefits set out in section 1 of the Regulatory Reform Act 2001 and the fair balance and desirability tests set out in section 3 of the Act.**

### **Maintenance of necessary protection**

25. The draft Order mirrors the existing provisions of the Environmental Protection Act 1990 which provide for safeguards in the form of approval by the Secretary of State and the Treasury in respect of the powers to employ and pay staff and to remunerate the Chairman and members of JNCC. Direct grants made by the Secretary of State to JNCC would be subject to the same Treasury approval as required by section 129(1) of the 1990 Act. **We agree that any necessary protection would be maintained.**

### ***Enabling the setting up of a company limited by guarantee***

26. Defra argues that necessary protection will be provided by the proposed subparagraphs of paragraph 7 of Schedule 7 to the 1990 Act, inserted by Article 4(3)(c) of the draft Order, making the setting up of a company limited by guarantee subject to the approval of the Secretary of State and Treasury and stipulating that members of the company limited by guarantee must be members of JNCC and that directors must either be members of JNCC or staff employed either directly by JNCC or on its behalf by the company limited by guarantee.<sup>22</sup>

27. According to Defra, these requirements will ensure that the company operates within the framework provided for by the 1990 Act and that control is vested in JNCC, with due regard for the make-up of interests represented on JNCC itself. The approval regime could, for example, be used to ensure any company limited by guarantee is constituted in such a way as to prevent it being wound up without the prior approval of the Secretary of State.

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21 Appendix, A2

22 Statement para 29

28. Defra has been in discussion with the Treasury to clarify how suitable indemnities could be given to JNCC members who participate in any company limited by guarantee against any liabilities, provided they have acted honestly and in good faith.<sup>23</sup> Defra expected that it would lay a Minute before the House stating that the Government would indemnify JNCC Committee members against liabilities incurred where they acted honestly and in good faith both as Committee members and through any role in a Company Limited by Guarantee. These indemnities would be analogous to those provided for other non-departmental public body members and in line with paragraph 8.3.18 of *Government Accounting*.<sup>24</sup> **We agree that any necessary protection would be maintained.**

### Expectation as to the exercise of rights and freedoms

29. The draft Order includes a safeguard in Article 5 for the continuity of employment for employees who transfer to employment by JNCC or by a company limited by guarantee formed by it. This is a statutory provision giving staff continuity of employment. The Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) provisions would not apply to staff who transfer. Without the safeguard in Article 5, staff would be treated as having resigned from (or been dismissed by) their present employer and as having started afresh with the new employer. The new employer could agree to give them benefits equivalent to those they currently enjoy but could not treat the employment as though it had started from the day they joined their present employer. For example, staff would lose protection, for the first 12 months, against unfair dismissal.

30. The provision would not prevent staff from remaining in the employment of their current employers by transferring into suitable jobs available within the country bodies. Where staff transfer to JNCC from one of the country bodies after the coming into force of the Order and subsequently elect to return to their former employer, the latter transfer would not be covered by the provision in Article 5 and would break the continuity of employment. According to Defra —

“The Government understands that the country bodies and JNCC have publicly committed themselves to following the Government guidance on applying the principles of TUPE to public sector transfers. This will protect staff transferring to JNCC from suffering any detriment in their terms and conditions overall.”<sup>25</sup>

31. In order to get this “understanding” on the record, the Committee requested a copy of the current Government guidance on applying the principles of TUPE to public sector transfers.<sup>26</sup> The Committee also asked for an authoritative statement committing the Government and JNCC to following the Government guidance on applying the principles of TUPE to public sector transfers, in respect of staff transferring to JNCC. In its reply, Defra stated—

“The country bodies and JNCC are committed to applying the Government guidance on applying the principles of TUPE in respect of staff transferring to the

23 Statement Annex C and Appendix, A3

24 Available on the Internet at <http://www.government-accounting.gov.uk>

25 Statement para 31

26 Cabinet Office, *Staff Transfers in the Public Sector — Statement of Practice*, January 2000

JNCC. Government fully endorses and strongly supports that commitment. The only public statement made to date is that within the Explanatory Memorandum which is, of course, a public document. The JNCC offer of employment to staff currently working at JNCC (see also the answer [A6] below) will reflect the principles of TUPE. We and JNCC are happy to be guided by the Committee on this matter if it is felt that some additional form of statement would be helpful.<sup>27</sup>

**32. We are satisfied that the Government has now fully endorsed and strongly supported the commitment of the country bodies and JNCC to applying the Government guidance on applying the principles of TUPE in respect of staff transferring to JNCC.**

33. Defra does not consider that any of the proposals prevent any person from continuing to exercise any right or freedom that they might reasonably expect to enjoy. **We agree that the Proposal would not prevent any person from continuing to exercise any reasonable right or freedom.**

### Estimates of costs, savings and other benefits

34. Defra concludes that overall, the additional costs associated with implementing the Proposal are modest, and are proportionate to the size and structure of the organisation.<sup>28</sup> The costs, for JNCC, of putting these new arrangements in place are estimated to be in the order of £225,000 in total for the period 2003/04 to 2004/05, assuming an implementation date of April 2005. From 2005/06 to 2007/08 the costs are estimated to be £780,000 in total mainly comprising increased salary costs following pay harmonisation, and the cost of corporate systems and tasks necessary to support JNCC's human resources and finance functions and to meet good corporate governance practice. These are expected to settle after 2008/09 to £220,000 per annum.<sup>29</sup>

35. Set against these costs, there would according to Defra be savings of approximately £46,000 per annum, primarily in staff time, for the country bodies from 2005 onwards as some of the services that they currently provide for JNCC were transferred to JNCC's support unit.<sup>30</sup> Defra expects that there would be longer term efficiency savings in staff time for JNCC arising from the reduced complexity and streamlined accountability arrangements, once the new administrative arrangements had bedded in.

36. Defra reports dissatisfaction among current JNCC staff who find themselves working side by side, doing similar work, but being paid on differing terms and conditions.<sup>31</sup> Defra argues that changes proposed in the draft Order would help JNCC to avert the risk of a

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27 Appendix, A5

28 Statement para 38

29 Defra points out that these estimated costs of implementation are slightly but not significantly higher than those given in Defra's December 2003 consultation paper, having been revised in the light of better information. Statement para 35 and Regulatory Impact Assessment, Statement Annex E section 5

30 Statement para 36

31 Statement para 41

successful (and therefore costly) challenge in an industrial tribunal to the existing staff arrangements.<sup>32</sup>

37. In terms of other benefits, Defra places the Proposal in the context of a wider package of measures aimed to improve the efficiency, effectiveness and service delivery of JNCC as set out in the Government Response to the Financial, Management and Policy Review of JNCC.<sup>33</sup> Some improvements have already been made through administrative change; others await primary legislation. Defra expects that the benefits from JNCC employing its own staff will be —

- removal of substantial pay anomaly
- improvement in staff satisfaction
- improved retention of existing expertise
- reduction of staff turnover
- support for the efficient delivery of JNCC's business
- increased staff productivity
- lower risk of equal treatment claims.<sup>34</sup>

38. In response to a question from the Committee on the effect of the draft Order on secondments, Defra replied that JNCC's 111 staff were assigned indefinitely to JNCC from the three country bodies, rather than seconded for a fixed period.<sup>35</sup> As JNCC would be party to the Common Trawling Agreement, the amount of exchange between JNCC and the country bodies was not expected to fall and indeed Defra considered that it could rise if there were an improvement in morale as a result of the proposed changes.<sup>36</sup> Staff would be invited to opt to 'transfer' to JNCC or 'remain' with their employing body, subject to the Order being made, in November and December 2004. Defra told us that JNCC was, however, confident that the overwhelming majority of staff currently assigned to JNCC would opt to 'transfer' to JNCC.<sup>37</sup>

39. Defra says that enabling the Government to pay directly for the relatively small amount of work which JNCC undertakes on UK-wide matters would avoid the present unnecessary 'double handling'.<sup>38</sup> Defra argues that the RRO change is needed to allow a direct funding stream to be created for the relatively small proportion of JNCC's overall workload comprising services to the UK Government beyond the country bodies' specific individual or collective responsibilities: for example, advice on licences under the Convention on International Trade in Endangered Species (CITES).

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32 Statement para 36

33 Statement para 39

34 Statement paras 41 to 44

35 Appendix, A6

36 Appendix, A6

37 Appendix, A6

38 Statement paras 45 and 46

40. Defra supplied a full Regulatory Impact Assessment.<sup>39</sup> **We consider that the Proposal has been the subject of, and takes appropriate account of, estimates of increases or reductions in costs or other benefits which may result from its implementation.**

## Consultation

41. The consultation document was published on 11 December 2003 on the Defra and Cabinet Office websites and sent directly to the persons and organisations either known or thought likely to have an interest in the proposals. The closing date for the consultation was 4 March 2004 (a period of 12 weeks) but account was taken of all 20 representations received, including one received after the closing date.

42. Most of the respondents were in agreement with the purpose and form of the Proposal and considered it could appropriately be given legislative effect by means of a Regulatory Reform Order. Annex C to Defra's Statement briefly records the Department's reasoned response to suggestions for changes to the Proposal; no changes were made in the light of the consultation.<sup>40</sup>

43. The eight proposals listed in the consultation document<sup>41</sup> are presented as ten items in Defra's Statement.<sup>42</sup> The seventh proposal in the consultation document is split into the seventh and eighth item in the Statement, with a tenth item added specifically to refer to the option of setting up a company limited by guarantee as a corporate vehicle for the employment of staff and to provide other administrative and corporate support services for the purposes of the functions discharged through JNCC. The option of setting up a company limited by guarantee was, however, mentioned in the consultation document.<sup>43</sup>

## *Company limited by guarantee*

44. In its response to the representations received as a result of the consultation,<sup>44</sup> Defra recognises that it would be important to establish the correct relationship between JNCC and the company limited by guarantee.<sup>45</sup> Defra recognised the concerns raised in representations received as a result of the consultation about the effect on staff in the event of the company limited by guarantee winding up.<sup>46</sup> In response to a question from the Committee, Defra stated<sup>47</sup> that it had held preliminary discussions with the devolved administrations about the conditions which the Secretary of State might wish to impose when considering an application to set up a company limited by guarantee. Defra told us that, without prejudice to any application which might be received once the Order was in force, it would expect to impose a condition which would require the Secretary of State's

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39 Statement Annex E

40 Statement para 51

41 Consultation document paras 4.1 to 4.8

42 Statement para 1

43 Consultation document para 5.13

44 Statement Annex C

45 See paragraphs 26 to 28 above

46 Statement Annex C

47 Appendix, A8

prior approval before any such company was wound up. The purpose of such a condition would be to provide additional assurances for staff who might be employed by JNCC through a company limited by guarantee. Defra also expected to impose conditions which would require further approval for setting up any subsidiary to the company limited by guarantee and for changes to its objectives and purpose as set out in its Memorandum and Articles of Association. Defra was also looking at conditions which would specify minimum numbers of members and directors for the company limited by guarantee in order to ensure the members and directors were broadly representative of JNCC. Defra hoped that all JNCC members would wish to become members of the company limited by guarantee and Defra would encourage them to do so.<sup>48</sup>

### **Common Trawling Agreement**

45. In its response to the representations received as a result of the consultation, Defra recognised the concerns raised about the operation of provisions for continuity of employment when transferring between the country agencies in the Common Trawling Agreement.<sup>49</sup> The Committee asked Defra what assurance it could give about the operation of the Common Trawling Agreement once the Order came into force. Defra replied that the proposed Common Trawling Agreement<sup>50</sup> was a concordat which the three country bodies and JNCC had negotiated which would give employees of any of those four agencies common access to vacancies arising in the other three. Defra told us that both it and the devolved administrations fully supported this initiative and that they had asked that the Agreement should be finalised before the Order comes into force. The Agreement would help JNCC and the country bodies to retain valuable expertise and to offer staff better career development opportunities.<sup>51</sup>

46. In the light of Defra's responses above on the Company Limited by Guarantee and the Common Trawling Agreement, **we consider that the Proposal has been the subject of, and taken appropriate account of, adequate consultation.**

### **Drafting**

47. The draft Order is written in reasonably plain English and Defra has helpfully supplied a document showing how the relevant parts of the 1990 Act would appear after the Order was made. Defra undertook to rectify a minor slip in paragraph (d) of the preamble, which refers to the "Deregulation and Regulatory Reform Committee." In relation to Article 5 of the draft Order, Defra explained that the phrase "an employee of one of the Councils for the purposes of section 128(4) of the 1990 Act" included employees of Scottish Natural Heritage as well as the Countryside Council for Wales and English Nature and that footnote (a) in the draft Order was intended to make this clear.<sup>52</sup> **We invite Defra to consider whether a re-drafting of Article 5 (1) of the draft Order might possibly make**

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48 Appendix, A8

49 Statement Annex C

50 A copy of the draft Common Trawling Agreement, as agreed by the JNCC, SNH and CCW Trade Union Sides, was supplied to the Committee.

51 Appendix, A9

52 Appendix, A13

**the point clearer.** Defra agreed to make two other drafting changes arising out of points raised by the Committee:

- Defra agreed to include the words “(within the meaning of section 133 of this Act)” in the proposed new paragraph 7(5)(a) of Schedule 7 of the 1990 Act to make clear that the “special functions” to be carried out by JNCC as referred to in that paragraph were to be the same as the special functions set out in section 133 of the 1990 Act (see paragraph 1 of this Report);<sup>53</sup>
- Defra agreed to amend the draft Order to include a definition of “the 1990 Act”, i.e. the Environmental Protection Act 1990.<sup>54</sup>

### Compatibility with obligations arising from membership of the European Union

48. Defra told us that the Government did not consider that there were obligations arising from membership of the European Union that are relevant to this Proposal.<sup>55</sup>

49. The Government considers that the provisions of the draft Order are compatible with the European Convention on Human Rights.<sup>56</sup>

### Other criteria - charge on the public revenues, retrospective effect and subordinate provisions

50. The Proposal for the draft Order does not include any provision for a charge on the public revenues. It does not purport to have retrospective effect and nor does it designate any provisions as subordinate provisions.

## 4 Conclusion: vires and desirability

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51. **We conclude that the Proposal for the Regulatory Reform Order (Joint Nature Conservation Committee) Order 2005 is within the vires of the Regulatory Reform Act 2001 and that Defra has made a convincing case for the desirability of making the Order.**

52. **We consider that a draft Order amended as described at paragraph 47 should be laid before the House.**

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53 Appendix, A12

54 Appendix, A14

55 Appendix, A10

56 Statement para 52

# Formal minutes

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**Tuesday 7 December 2004**

Members present:

Mr Peter Pike, in the Chair

Mr Russell Brown

Dr Doug Naysmith

Mr Mark Lazarowicz

Brian White

Mr Denis Murphy

The Committee deliberated.

Draft Report [Proposal for the Regulatory Reform (Joint Nature Conservation Committee) Order 2005], proposed by the Chairman, brought up and read.

*Ordered*, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 52 read and agreed to.

*Resolved*, That the Report be the First Report of the Committee to the House.

*Ordered*, That the Chairman do make the Report to the House.

Several papers were ordered to be appended to the Report.

*Ordered*, That the Appendices to the Report be reported to the House.

[Adjourned till Tuesday 14 December at 9.30 am.]

# Appendix

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## Letter from the Department for Environment, Food and Rural Affairs to the Clerk of the Committee

### Proposal for the Regulatory Reform (Joint Nature Conservation Committee) Order 2005: response to request for information

Thank you for your letter of 3 November. Defra's responses to the points raised and your specific questions are set out below.

#### *New burdens and proportionality between burdens and benefits*

##### **Q 1 Please describe each of the series of obligations allocated to JNCC under the Proposal.**

A1 - The proposal would transfer a number of functions or obligations from the 3 country bodies (English Nature, the Countryside Council for Wales, and Scottish Natural Heritage) to the Joint Nature Conservation Committee. These are:-

- the employment of staff working at the JNCC;
- payment of remuneration and other allowances to those staff;
- payment of pensions for those staff and former employees;
- the maintenance of pension schemes
- the provision of accommodation and other facilities for the JNCC;
- payment of remuneration, pensions, allowances and gratuities to the JNCC Chairman, 3 independent members, all appointed by the Secretary of State, and 2 non- voting members.

If the option of setting up a Company Limited by Guarantee under were to be used, the JNCC would also be obliged to take responsibility for the company's governance and ensuring it met the requirements of the Companies Acts.

##### **Q 2 What consideration has Defra given to whether the imposition of these obligations satisfies the conditions of proportionality between burdens and benefits set out in section 1 of the Regulatory Reform Act 2001 and the fair balance and desirability tests set out in section 3?**

A2 - Although the draft order re-allocates obligations from the country bodies to the JNCC, this does not mean, in the Department's view, that it creates new burdens on the JNCC in the meaning of the Regulatory Reform Act. Our understanding of the Act is that it provides powers to remove, reduce, re-enact or create burdens, but not, directly at least, to remove, reduce etc. *functions*, of which obligations or duties are a category.

The central object of the proposed reform is to remove the burden the JNCC faces in not being able to employ its own staff, or to do a number of ancillary things for itself. The burdens being removed are the limitations on the JNCC's powers preventing it from being able to do these things. Giving the responsibility to the JNCC would be lifting a burden (in the sense of section 2(1)(b) of the Regulatory Reform Act), rather than imposing one.

Being responsible for such matters as paying the employees and maintaining a pension scheme for their benefit is clearly consequentially related to being able to employ them.

Where obligations are "transferred" to the JNCC, the safeguarding roles of the Secretary of State and Treasury have in each case been preserved. These safeguards are a limitation on the powers conferred, and are thus burdens, either new or re-enacted, in RRA terms.

The Department is satisfied that, as well as offering necessary protection, these limitations are proportionate as they reflect the 1990 arrangements, the JNCC are content to be subject to them, the benefits they provide by way of safeguards are desirable, and it would be inappropriate for the JNCC not to be subject to similar safeguards in respect of staff numbers and payments etc. as the country bodies continue to be in respect of their own employees etc. under Schedule 6 to the Act, or under Schedule 1 to the Natural Heritage (Scotland) Act 1991 in respect of Scottish Natural Heritage. The Department is satisfied that for the same reasons their inclusion maintains a fair balance between the public interest and the interests of the JNCC, which will be subject to the new or re-enacted burdens. It also considers that, having regard to the benefits arising from the removal of the central burden on the JNCC, it is desirable that the order be made.

### ***Maintenance of necessary protection***

#### **Q 3 What progress has Defra made on providing indemnities to JNCC members who participate in any company limited by guarantee?**

A3 - Defra has been in discussion with the Treasury to clarify how suitable indemnities can be given. We anticipate that the Department will lay a minute before the House stating that Government will indemnify JNCC Committee Members liabilities incurred where they act honestly and in good faith both as Committee Members and through any role in a Company Limited by Guarantee. These indemnities will be analogous to those provided for other NDPB members and in line with paragraph 8.3.18 of Government Accounting.

### ***Expectation as to the exercise of rights and freedoms***

#### **Q 4 Please supply a copy of the current Government guidance on applying the principles of TUPE to public sector transfers.**

A4 - A copy of the Cabinet Office publication 'Staff Transfers in the Public Sector – Statement of Practice' is attached.

#### **Q 5 Please supply the Committee with an authoritative statement committing the Government and JNCC to following the Government guidance on applying the principles of TUPE to public sector transfers, in respect of staff transferring to JNCC.**

A5 – The country bodies and JNCC are committed to applying the Government guidance on applying the principles of TUPE in respect of staff transferring to the JNCC. Government fully endorses and strongly supports that commitment. The only public statement made to date is that within the Explanatory Memorandum which is, of course, a public document. The JNCC offer of employment to staff currently working at JNCC (see also the answer to question 6 below) will reflect the principles of TUPE. We and JNCC are happy to be guided by the Committee on this matter if it is felt that some additional form of statement would be helpful.

### ***Estimates of costs, savings and other benefits***

#### **Q 6 What assessment has Defra made of the effect of the Order on the number of secondments from the country bodies to JNCC, after JNCC begins to employ its own staff, and how any reduction in secondments might affect JNCC's interaction with the country bodies?**

A6 – As of 11<sup>th</sup> November, 2004 there were 111 staff assigned to the JNCC from the 3 country bodies (60 from English Nature, 35 from SNH and 16 from CCW). These staff are assigned indefinitely to the JNCC rather than seconded for a fixed period.

Exchange between the JNCC and country agencies is encouraged by allowing access to each others vacancies and offering continuity of employment to successful applicants. (See Q&A 9 on the Common Trawling Agreement). However in practice this tends to generate a relatively low level of applications for JNCC posts from country agency employees and, accordingly, the vast majority of vacancies are filled by external recruits who have not previously held posts within the country agencies. Similarly, only a small proportion of staff

leaving the JNCC do so to take up country agency posts. As JNCC will be party to the Common Trawling Agreement the amount of exchange is not expected to fall, indeed, an increase in morale as a result of the changes could increase the exchange.

Whilst the exchange of staff between the bodies is fairly limited as described there is extensive interaction between staff assigned to the JNCC and staff employed within the country bodies. Liaison takes place between individual staff members at all levels and through a wide variety of inter-agency working and governance groups. The changes will not affect these arrangements.

It is too early to be able to make a full assessment of the implications of the proposal in respect of numbers of staff who will opt to transfer to JNCC or return to their employing country body. Staff will be invited to opt to 'transfer' to the JNCC or 'remain' with their employing agency, subject to the Order being made, in November and December, 2004. JNCC is, however, confident that the overwhelming majority of staff currently assigned to JNCC will opt to 'transfer' to the JNCC.

### **Consultation**

#### **Q 7 Please explain why Welsh Assembly approval would be required and why the preamble to the draft Order does not reflect that.**

A7 – The reference in the question is to paragraph 4 of the Department's Explanatory Statement states that the draft Order will be subject to separate approval by the Welsh Assembly. This statement is no longer relevant. Defra was informed in late October that by the Welsh Assembly Government considered the draft Order did not need to be submitted for approval by the Assembly under its Standing Order 24 provisions since, whilst the Order would extend to Wales, it does not seek to remove or amend any of the Assembly's functions. We apologise for not ensuring that the Explanatory Memorandum was amended to take account of this revised advice prior to submission.

#### **Q 8 What conclusions has Defra reached on the exercise of the provision in the draft Order for the Secretary of State to impose conditions on the JNCC in the setting up of a company limited by guarantee, in particular in connection with the winding up of such a company?**

A8 - Defra has, to date, had preliminary discussions with the Devolved Assemblies about the conditions which the Secretary of State might wish to impose when considering an application to set up a Company Limited by Guarantee. Without prejudice to any application which might be received once the Order is in force, Defra would anticipate imposing a condition which would require the Secretary of State's prior approval before any such Company was wound up. The purpose of such a condition would be to provide additional assurances for staff who might be employed by JNCC through a Company Limited by Guarantee (CLG).

Defra also anticipates imposing conditions which would require further approval for setting up any subsidiary to the Company Limited by Guarantee and for changes to the CLG's objectives and purpose as set out in the Memorandum and Articles of Association. We are also looking at conditions which would specify minimum numbers of members and directors for the CLG in order to ensure the members and directors are broadly representative of the JNCC but we hope that all JNCC members will wish to become members of the CLG and will encourage them to do so.

#### **Q 9 What assurance can Defra give about the operation of the Common Trawling Agreement once the Order came into force?**

A9 - The proposed Common Trawling Agreement is a concordat which the 3 country bodies and JNCC have negotiated which will give employees of any of the 4 agencies common access to vacancies arising in the other three. Defra and the Devolved Administrations fully support this initiative and have asked that the Agreement be finalised before the Order comes into force. The agreement will help JNCC and the country bodies retain valuable expertise and offer staff better career development opportunities. A copy of the draft Agreement, which has now been agreed by the JNCC, SNH and CCW Trade Union Sides, is enclosed.

### **Compatibility with obligations arising from membership of the European Union**

**Q 10 What account was taken in drawing up the draft Order of any relevant obligations resulting from membership of the European Union?**

A10 – The Government does not consider there are obligations arising from membership of the European Union that are relevant to this proposal.

### **Drafting**

We note the error in the drafting of paragraph (d) of the preamble (which refers to the Deregulation and Regulatory Reform Committee) and are grateful to you for drawing this error to our attention, and will amend the draft accordingly.

**Q 11 New sub-paragraph (5)(a) of paragraph 7 of Schedule 7 to the Environmental Protection Act 1990 (introduced by article 4(3)(c) of the draft Order) refers to the provision of administrative and corporate support services to the JNCC “for the purposes of the special functions”. Section 133(1) of the Act defines “special functions” for the purposes of that section, but the term does not appear to be defined for the purposes of Schedule 7. Does the department agree that, if the term is used in the amendments to Schedule 7, a definition should be added?**

A11 – The Department does agree with the Committee’s observation, and are grateful for it. We will provide certainty by including “(within the meaning of section 133 of this Act)” in the proposed new paragraph 7(5)(a) of Schedule 7.

**Q 12 Alternatively, given that the “special functions” are functions of the Councils rather than of the JNCC, might it be preferable for new paragraph 7(5)(a) to refer to the functions of the committee under section 133(3)?**

A12 - Although the special functions are required to be discharged through the JNCC, they are still functions of the Councils, rather than of the Joint Committee. Thus the Department does not think the alternative proposed here would be technically correct, and would prefer the solution agreed to in the above response to Q11.

**Q 13 Article 5 of the draft Order states that it applies to a person who is an employee of one of the Councils for the purposes of section 128(4) of the 1990 Act. Explain the meaning of the underlined words. Is it intended to refer to employees who are provided to the JNCC under paragraph 7 of Schedule 7?**

A13 – The wording in question arises out of the re-organisation effected by the Scottish Natural Heritage Act 1991. As originally enacted, “the Councils” in section 128(1) of the Environmental Protection Act referred to the three country bodies as then established. As a result of amendments in the 1991 Act, “the Councils” in s.128(1) now refers only to the English and Welsh bodies. However, savings are made by the 1991 Act so that the new Scottish body, Scottish Natural Heritage, is included in “the Councils” in respect of those provisions concerning the JNCC (please see the relevant footnote in the draft Order). Thus the phrase “one of the Councils for the purposes of section 128(4) of the 1990 Act” has the effect of making it clear that we are here talking about [employees of] the Countryside Council for Wales, English Nature or Scottish Natural Heritage (rather than just of the first two).

Yes, it is concerned with employees who are provided to the JNCC by the country bodies under paragraph 7 of Schedule 7.

**Q 14 Does the Department agree that, in view of the references in article 5 of the draft Order to “the 1990 Act”, that expression should be defined?**

A14 - Yes, indeed. We are grateful for this observation, and will amend the draft accordingly, to include a definition of “the 1990 Act”.

I trust the above answers all the Committees concerns but if additional information is required, please let me know and we will endeavour to provide further clarification speedily.

*18 November 2004*

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