



House of Commons
Regulatory Reform Committee

**Proposal for the
Regulatory Reform
(Forestry) Order 2006**

First Report of Session 2005–06



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*Report, together with formal minutes and
written evidence*

*Ordered by The House of Commons
to be printed 29th November 2005*

HC 729

Published on 5th December 2005
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

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.

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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.

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

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Contents

Report	<i>Page</i>
Summary	3
1 Report under Standing Order No 141	5
2 Introduction	5
3 Extent of the proposal's application	6
4 Requirements of the Regulatory Reform Act	6
5 Assessment of the proposal against the Standing Order No. 141(6) criteria	7
Inappropriate use of delegated legislation	7
Removal or reduction of burdens	7
Power to participate in companies or trusts	8
Power to exploit intellectual property	8
Power to delegate charging	9
Power to enforce restocking requirements	10
Proportionality	11
Fair balance and desirability	12
Removal of inconsistencies and anomalies	13
The continued exercise of reasonable rights and freedoms	13
Rights of access to forest land	13
Restocking	14
The maintenance of necessary protection	15
Protection of the public purse	15
Levels of charging and possible effects on ability to access facilities	15
Exploitation of intellectual property	17
Enforcement of restocking after the unlawful felling of trees	17
Provision for the consideration of appeals against restocking and enforcement notices	19
Estimates of costs and benefits	21
Adequate consultation	22
6 Conclusion	24
Formal minutes	25
List of written evidence	26

Reports from the Regulatory Reform Committee in the previous Session

inside back cover

Summary

The purpose of the proposed Order is to enhance the powers of the Forestry Commissioners to enable them better to carry out their existing functions.

The proposed Order would give the Forestry Commissioners new powers in three main areas. First, to enter joint ventures with others, in order to provide recreational facilities within publicly owned forests. The Commissioners would be empowered to invest in and make loans to companies for these purposes, and to delegate to other persons the power to make charges in connection with recreational facilities provided on the public forest estate.

Second, the proposed Order would give the Commissioners the power to exploit their research commercially. The Commissioners already have specific powers to undertake research work in connection with forests, whether alone or in partnership with others.

Third, the proposal would also give the Commissioners new power to require restocking of felled trees without the person responsible for felling them first having been convicted of unlawful felling and to allow the Commissioners to enforce restocking requirements against persons other than freeholders.

The Committee considers that the proposal meet the tests laid down in the Regulatory Reform Act and would be beneficial and recommends that a draft Order in the same form as the proposal should be laid before the House.

1 Report under Standing Order No 141

1. The Regulatory Reform Committee has examined the proposal for the Regulatory Reform (Forestry) Order 2006 in accordance with Standing Order No. 141. We recommend unanimously that a draft Order in the form of the proposal should be laid before the House.

2 Introduction

2. The proposal for the draft Regulatory Reform (Forestry Order) 2006 was laid before the House by the Secretary of State for Environment, Food and Rural Affairs on 19 July 2005.

3. The Government wish to enable the Forestry Commissioners (“the Commissioners”) to make use of private funding in furtherance of their work. The proposed Order would give the Commissioners a new power to form or to participate in forming companies or charitable trusts. This would make it possible for the Commissioners to enter into joint ventures with commercial partners to provide improved recreational, sporting and tourist facilities for the public within the state-owned forest estates which they manage. It is proposed to give the Commissioners new power to delegate their existing power to levy charges under the Countryside Act 1968 (“the 1968 Act”) for the use of tourist facilities in these publicly-owned forests to other persons. The ability to take part in joint ventures would also be enhanced by a proposed new power for the Commissioners to exploit commercially intellectual property rights which arise as a result of their research activities.

4. The second main aspect of the proposed Order is to enhance the Forestry Commissioners’ powers to require remedial action following the unlawful felling of trees. It is proposed to repeal the existing requirement of the Forestry Act 1967 (“the 1967 Act”) that a person may only be served with a notice requiring them to restock felled trees where that person has first been convicted of unlawful felling of those trees under that Act and replace it with a power to require restocking without the requirement of prior conviction. The Commissioners would also be empowered to take enforcement action for breach of requirements imposed by felling licences against the original applicant for the licence rather than, as now, only against the freeholder of the land on which felled trees had been growing.

5. The House has instructed us to examine the proposal against the criteria specified in Standing Order No. 141(6) and then, in the light of that examination, to report whether the Government should proceed, whether amendments should be made, or whether the Order should not be made.

6. Our discussion of matters arising from our examination is set out below. Where a criterion specified in Standing Order No. 141 (6) is not discussed in the report, this indicates that we have had no concerns to raise about that criterion. In the course of our examination, we requested further information from the Forestry Commissioners about a number of issues relating to the proposal and the text of our questions to the Commissioners is reproduced in Appendix A to this report. The Commissioners’ response is reproduced as Appendix B.

3 Extent of the proposal's application

7. Forestry is a devolved responsibility of the Scottish Parliament and Executive. The proposed Order applies to England and Wales only, with the exception of one element which applies also to Scotland. This exception is the proposed amendment by Article 3 of the Order to Section 8 of the 1967 Act to give the Forestry Commissioners power to exploit any intellectual property they own. It would not be possible to exercise a power to exploit intellectual property separately in relation to Scotland and to England and Wales; hence Article 3 of the proposed Order is not restricted in its geographical application, but would amend section 8 the 1967 Act as it applies throughout Great Britain. Intellectual property law, unlike laws relating to forestry, is a matter reserved to the UK Parliament under the Scotland Act 1998. All other amendments which would be made by the proposed Order to the 1967 and 1968 Acts would apply only to the law as it has effect in England and Wales.

8. The making of an Order in the same form as the proposal would, in the absence of separate and parallel legislation by the Scottish Parliament, introduce an element of asymmetry as between England and Wales, and Scotland in the law as it relates to the powers of the Forestry Commission. Whether the powers of the Forestry Commissioners in Scotland should be identical with their powers in England and Wales is entirely a matter for the Scottish Parliament to consider.

4 Requirements of the Regulatory Reform Act

9. We noted that the proposal for an Order was laid before the House with an explanatory memorandum by the Forestry Commissioners stating that they acted on behalf of the Secretary of State for Environment, Food and Rural Affairs. Similarly, we noted that the consultation document on the proposal, which was published on 14 February 2005, describes itself as being published “by the Forestry Commission on behalf of the Secretary of State for Environment, Food and Rural Affairs and in accordance with the Regulatory Reform Act 2001”. Section 5 of that Act requires that, before any Minister makes an Order under the Act, “he shall consult such organisations as appear to him to be representative of interests affected by his proposals”. The Minister is further required to carry out additional consultations where he regards it as appropriate to vary the proposal as a result of the views expressed by the initial consultees, and a statutory discretion is established at this point in the Order-making process which only the Minister making the Order is empowered to exercise. It was therefore unclear to us how the Commissioners could apparently consider they had a power under the Regulatory Reform Act to act on behalf of the Secretary of State in relation to carrying our preliminary consultation and, if they had done so, forming the

views required to be taken before a proposal for an Order could be laid before the House.¹ We asked the Commissioners to explain.²

10. In their response, the Commissioners indicated that the Minister with responsibility for forestry matters had at each stage personally approved the actions of the Commissioners in preparing for the laying of the proposal for an Order, including the issuing of the consultation documents and the decision that the proposal should proceed unchanged in the light of views expressed by the consultees.³ It was their view (and presumably that of the Minister) that, in this context, "As long as the Minister exercises any discretion associated with [the various] statutory functions, he may require any other person to implement his decisions on his behalf". **We accept the validity of this approach.**

11. In light of the requirements of the Regulatory Reform Act that Ministers must themselves perform various specified actions before they make any Regulatory Reform Order, we recommend that where an agent other than Ministerial civil servants gives effect to the relevant Ministerial decisions, that the explanatory statement should explicitly confirm that the Minister has performed those actions required of him before presenting his proposals to Parliament.⁴

5 Assessment of the proposal against the Standing Order No. 141(6) criteria

Inappropriate use of delegated legislation

12. **The proposal appears to be appropriate for delegated legislation.**

Removal or reduction of burdens

13. **The general purpose of the proposed Order is to supply the Forestry Commissioners with additional new powers. In their statement, the Forestry Commissioners have**

1 The duty of the Commissioners to act in accordance with directions under section 1(4) to (6) of the Forestry Act 1967 were not immediately reconcilable with their statement. They are not part of the Department for Environment, Food and Rural Affairs, and furthermore in presenting this proposal to Parliament they were not clearly acting under that 1967 Act.

2 See Annex A, Question 1. The Carltona Doctrine is the principle of administrative law which establishes that departmental civil servants are the effective alter ego of their Minister when carrying duties which legislation imposes on that Minister. Mr Justice Sedley (*Administrative Law and Government Action*, Oxford University Press, 1994) described the doctrine thus: "...Ministers have historically relied on their Civil Servants to do most of their work and much of their thinking for them. By the 1940s this was well established, but no statute or doctrine of common law had ever sanctioned it, and executive and prerogative powers were always (as they still are) vested by law in Ministers alone. Intra-departmental delegation, theoretically underpinned by Ministerial responsibility, was an accepted convention, but when in 1943 its lawfulness was challenged (*Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560) the Court of Appeal found itself compelled to elevate departmental practice into a doctrine of law. Since the whole immunity of the state from tort actions rested on the theory that Civil Servants were the servants not of their Ministers but of the Crown, so that the Minister was legally no more than first among equals, an entirely heterodox concept of the civil servant as the Minister's *alter ego* was enunciated. It violated all the common law rules against unauthorised delegation, but it perfectly adequately described what went on and could not be stopped, and it has done service ever since as a principle of constitutional law."

3 Appendix B, Answer 1, paragraph iii.

4 In their response the Commissioners did not actually confirm that the Minister had formally decided that the proposed Order would not remove any necessary protection or prevent the exercise of any right or freedom a person might reasonably expect to continue to exercise (as required by section 3(1) of the Regulatory Reform Act). However, the general nature of the response to our question and the fact that the Order may only be made where the Minister is of this opinion leads us to conclude that this confirmation has been omitted merely by oversight.

described how they believe the proposed Order would remove burdens in the existing legislation at paragraphs 29- 45. Our comments on their reasoning and our own analysis of the way in which the proposed Order falls within the *vires* of the Regulatory Reform Act is given below.

Power to participate in companies or trusts

14. The Commissioners have argued that because the 1967 and 1968 Acts do not expressly give them a power to form or participate in corporate bodies or charitable trusts these Acts impose to a restriction on their powers (in that it prevents them from participating in joint ventures with private and public sector partners in furtherance of their statutory duties and strategic objectives). It could be argued that the 1967 and 1968 Acts amount to “legislation which has the effect of imposing burdens”⁵ insofar as these powers, which might reasonably be considered to be incidental to the duties and functions of the Commissioners as established by these Acts, have not been established through making explicit provision for them within the Acts. The Commissioners consider that the lack of a power to participate in companies or trusts also affects persons who might otherwise participate with the Commissioners in such corporations, and it therefore amounts to a restriction on the powers of such persons, and hence this burden has a necessary negative impact on persons other than the Government.

15. Articles 2 and 6(3) of the proposed Order remove these burdens in the form of the proposed creation of new incidental powers for the purpose of exercising functions conferred on the Commissioners by the 1967 and 1968 Acts. By implication, granting these additional powers to the Commissioners removes the parallel and related burden on any person who would otherwise participate in a company or trust in association with them.⁶ **We therefore consider that the effect of Articles 2 and 6(3) of the proposed Order would remove burdens as described.**

Power to exploit intellectual property

16. Section 8 of the 1967 Act makes provision for the ‘miscellaneous’ powers of the Forestry Commissioners. These powers relate mainly to the collection and dissemination by the Commissioners of statistics and other forms of information relating to forestry. Although section 8 gives the Commissioners powers to conduct research or to aid others in the conduct of research, it does not provide them with any power to exploit commercially the research they undertake. This lack of power to exploit research is identified by the Commissioners as one that adversely affects their potential partners in joint research ventures as well as themselves.

17. Article 3 of the proposed Order would remove the burden by inserting a new provision in section 8 of the 1967 Act to give the Commissioners power to exploit intellectual property or other intangible assets.⁷ The granting of such power to the Commissioners

5 Regulatory Reform Act 2001, S.I (1)

6 Technically, the creation of the Commissioners’ proposed power to ‘form’ a company does not involve the removal of a burden from any other person but we regard this element of the proposal as incidental to the fuller purpose of permitting the participation of the Commissioners in companies in which they are not the only member.

7 Article 3(3) states that intellectual property is to include “any patent, trademark, copyright, design right, registered design or plant breeder’s right”.

seems necessarily to benefit any person who might wish to acquire licences to use, or take assignments of, those intellectual property rights. **We consider that the Commissioners have correctly identified a burden and the effect of Article 3 would be to remove that burden.**

Power to delegate charging

18. Section 23 of the 1968 Act gives the Commissioners power to provide tourist, recreational or sporting facilities on land placed at their disposal by Ministers and to make such charges as they think fit in connection with those facilities. In their explanatory statement and in correspondence with us, the Commissioners have advanced the view that this provision imposes a burden on themselves in that it fails to establish any power for them to delegate the power to charge in connection with these facilities to another person and that the burden also adversely affects those persons who operate the relevant facilities in association with them.

19. The amendment proposed in article 6 of the Order would insert new wording into section 23(2) of the 1968 Act to give the Commissioners power to allow another person to make such charges as that other person thinks fit. The Commissioners regard this as remedying an existing implicit restriction in the 1968 Act and thereby removing a burden from them.

20. It is our view that section 23 of the 1968 Act is a provision which authorises the imposition of a burden. Section 23 gives the Commissioners power to make charges in connection with facilities they provide in publicly owned forests. The making of a charge is a burden on those required to pay it, but section 23 does not itself impose a charge; it merely gives the Commissioners a power to make charges if they so wish. The charge is to be paid by persons making use of the facilities and its burdensome effect is therefore solely on those persons and has no adverse effect on the Commissioners as a government department.

21. In addition to arguing that it removes an implicit burden from themselves, the proposed amendment in article 6 of the Order is viewed by the Commissioners as imposing a new burden on persons paying charges to use the relevant facilities in that those charges could be levied both by the Commissioners, as now, and also for the first time by those others to whom they might give the power to charge. We do not recognise this as amounting to a new burden, on the basis that the form of the burden is simply that users of the facilities may be charged; the fact that the power to levy charges might be exercisable at the discretion of the Commissioners by two persons (themselves or another appointed by them) rather than the Commissioners alone does not materially alter or increase the burden itself. However, it grants a new power to create the burden in question, and references in the Regulatory Reform Act to imposing a burden cover authorising burden creation as well as direct burden creation (section (2)(a)). **In this sense, section 23 of the 1968 Act would be capable of reform under section 1(1)(c) of the Regulatory Reform Act, as the making of a new provision having the effect of imposing a burden. We consider this is a more plausible and realistic account of the regulatory effect of the existing legislation and of the way in which the proposal would amend it than that supplied by the Commissioners.**

Power to enforce restocking requirements

22. Section 17A(1) of the 1967 Act provides that the Commissioners may serve a notice on a person who has been convicted under that Act of the offence of unlawfully felling trees requiring him to restock the land or other land with trees and to maintain those trees for a period not exceeding ten years. The Commissioners argue that the need to secure conviction in order to enforce restocking imposes a burden on themselves and on persons who, although they may have committed the offence, are prosecuted simply in order to allow the imposition of a duty to restock upon them. Article 4 of the proposed Order would amend section 17A to permit notices to be served on anyone who appeared to the Commissioners to have committed the necessary offence, and the Commissioners consider this would remove a burdensome restriction on themselves.

23. Similarly, existing section 24 of the 1967 Act provides that a duty to restock trees imposed by a felling licence⁸ can only be enforced on the freeholder of the land on which trees are felled. The Commissioners regard this as a burden on themselves and on the freeholders of land who may be subject to enforcement action in situations where they may have had no responsibility for the unlawful felling of trees on that land. Article 5 would amend section 24 to provide the Commissioners with a new power to serve an enforcement notice on any applicant for a felling licence, provided at the time of service of the notice he retains sufficient interest in the land to enable him to comply with it. They consider this removes a burden from themselves, in the form of removing an implicit restriction on their powers.

24. We have doubts about the Commissioners' interpretation of the effect of these existing provisions and of the way the corresponding elements of the proposal which address the policy difficulties identified fall within the *vires* of the Regulatory Reform Act. We consider that sections 17A and 24 of the 1967 Act are more realistically seen as provisions which authorise the imposition of burdens, in these cases on those persons who are the subjects of restocking and enforcement notices. Article 4 of the proposed Order would insert new provision into section 17A of the 1967 Act permitting the service of restocking notices on persons who, in the opinion of the Commissioners, appear to have committed the relevant offence. Insofar as it creates a new category of persons who are potentially subject to enforcement action and thus adversely affected by the revised section 17A, a new burden is created. Application of section 1(1) of the Regulatory Reform Act does not depend on identifying an existing burden on the Commissioners and on those who, although indeed guilty of an offence, are prosecuted *merely* to secure restocking in order to justify this element of the proposal. Similarly, article 5 inserts new provision into section 24 of the 1967 Act subjecting, where appropriate, persons other than freeholder applicants for felling licences to potential enforcement action under the Act for the first time. This is also a new burden on the non-freeholders. In contrast, while it is recognised that the incidence of prosecution or enforcement action on some groups may be reduced, the scope for such action will remain identical if the proposed Order is made, so it is hard to reconcile this element of the proposal with burden removal or reduction.

8 Section 24 applies (a) to all works required to be carried out in accordance with conditions of a felling licence (but not carried out), and (b) to all directions given by the Forestry Commissioners but not complied with. The restocking notice comes within the scope of (b).

25. Although we are not persuaded by the arguments of the Commissioners that these provisions are removing burdens, as provided for under section 1(1)(a) of the Act, we do nevertheless conclude that both articles 4 and 5 of the proposed Order satisfy the *vires* of the Regulatory Reform Act by coming within the scope of section 1(1)(c) of the Act as the making of new provisions having the effect of imposing burdens.

Proportionality

26. The Commissioners describe the new and re-enacted burdens which they consider the proposed Order would impose at paragraphs 71–79 of the explanatory statement, together with their analysis of these burdens in relation to the test of proportionality under the Regulatory Reform Act. They consider that Articles 2, 6(1) and 6(2) of the proposed Order would have the effect of imposing new burdens on themselves in that these provisions would make the ability of the Commissioners to exercise their proposed new powers to invest in a body corporate, make loans, or make arrangements with any other person to share profits arising from the delegation to that person of their power to charge in relation to facilities on the public forestry estate conditional on the approval of the Treasury. The power of the Treasury is seen as a safeguard preventing injudicious uses of public funds. **We agree with the Commissioners’ reasoning in respect of the proportionality of these burdens.**

27. The Commissioners also consider that the use of the proposed new power to delegate the ability to charge which would be created by Article 6 of the Order would amount to a new burden for the reason that “A third party, providing facilities on Commission land, and making charges for the use of them will be making an impact on the public wanting to use that land and facilities”. We have already rejected this line of argument (see paragraphs 18 to 21 above).

28. Article 4 of the proposed Order would remove the existing requirement for a conviction under that Act for the unlawful felling of trees before the Commissioners may exercise their power to serve re-stocking notices. They would instead be empowered to serve a restocking notice on any person in England and Wales who appeared to them to have committed an offence under section 17 of the 1967 Act.⁹ Article 5 of the proposed Order would amend section 24 of the 1967 Act to allow the Commissioners to enforce compliance with the terms of felling licences on persons other than the freeholder of the land on which trees have been felled. Given that these provisions would have the effect of permitting action against persons who would not presently be liable to such action, or on terms other than those which the present law permits, we consider that the proposal would create new burdens which the Commissioners failed to recognise as such.

29. We asked the Commissioners to indicate whether they agree that articles 4 and 5 of the proposed Order would impose new burdens as described at paragraph 24 above. In their

⁹ See paragraph 78 of the explanatory statement. The Commissioners have also argued that Article 4 of the Order would have the effect of re-enacting the existing section 17A(1) of the 1967 Act on the basis that it would continue to limit the power to enforce restocking to those persons who have sufficient interest in the land in question to comply with it (defined at section 10(1) of the 1967 Act (see Annex B, question 2 & 3, paragraph vi). Although we agree that the limitation to persons with the necessary interest remains unaffected, we do not accept it can be correct to say that the existing provision is re-enacted - the very point of the proposal in relation to this provision has been to change it to allow the service of re-stocking notices on persons other than persons convicted of an offence under this section of the 1967 Act.

response, the Commissioners stated that they “can understand why the Committee has identified a way in which articles 4 and 5 can also be seen as having the effect of imposing burdens in the way the Committee describe”. At our request, the Commissioners also considered the proportionality of the new burdens which are created by articles 4 and 5. In relation to article 4, the Commissioners consider that this burden is proportionate to the benefit which will arise from their ability to achieve “more effective and better targeted restocking following unlawful felling”. In this context, we also note that the continuation of the appeals procedure under section 17B of the 1967 Act would provide a means where any person who might be unfairly served with a restocking notice could seek an appropriate remedy. **In these circumstances, we agree that the new burden created by this article is proportionate.**

30. In relation to article 5, the Commissioners have argued that the new burden on such persons would be proportionate to the benefit of their being able actually to target enforcement action on the person responsible for the breach of the conditions in the felling licence and to the benefit arising to freeholders who would not thereby need to be prosecuted in order to secure the necessary restocking of trees. **We agree that the burden imposed on the public by article 5 of the proposed order is proportionate.**

Fair balance and desirability

31. The Commissioners consider that the proposed Order would benefit the public interest in allowing the Commissioners increased access to private sector resources in the furtherance of their statutory duties and by allowing them to secure re-stocking of forests following felling in a way which is “more effective”. This presumably means that the Commissioners believe the proposed changes to sections 17A and 24 of the 1967 Act would make it feasible and justifiable first to use their power to serve re-stocking notices on responsible persons in circumstances where they would be reluctant to pursue the conviction that would be necessary under the present law, and to address remedial notices to those in a position to comply directly, rather than freeholders in every case. Paragraph 80 of the explanatory statement appears to suggest that this ‘increased effectiveness’ self-evidently meets the requirements of the fair balance test.

32. In paragraph 81 of the explanatory statement, the Commissioners state their view that the Order would remove existing limits on their powers and allow them as a result to “take advantage of opportunities to perform their functions in particular ways”. The Commissioners then claim that any new burdens on members of the public which would arise through the proposal would be outweighed by these public benefits.

33. As discussed at paragraphs 22-25, the Commissioners do not recognise that articles 4 and 5 of the proposed Order would impose new burdens on the public and, as described above, they have a different understanding of the effect of the proposal in creating new burdens on themselves and others. As a result of these differences in interpretation, they apply the tests of fair balance and desirability in a different way from that which we would expect.

34. In response to a question from us, they asserted that, should these articles impose new burdens on the public in the ways we argued, the tests of fair balance and desirability would be continue to be satisfied as they describe in relation to their own analysis at paragraphs

80-81 of the explanatory statement.¹⁰ Paragraph 80 of the explanatory statement, which addresses the question of fair balance, states that the benefits of the proposal are the extent to which it will permit the application of greater resources to the provision of facilities for the public and for the undertaking of forest-related research, will permit more effective restocking after felling and will create greater opportunities to create and manage forests with public sector partners. These benefits to the public interest must be weighed with the interests of those affected by the creation of new burdens.

35. We consider that the Order as whole strikes a fair balance between the benefits to the public interest identified by the Commissioners, the interests of the Commissioners (who would be subject to appropriate new limitations on their proposed powers to invest in corporate bodies, make loans to them or to share profits arising from the provision of facilities in forests), and the interests of the public (who could be subject to enforcement action by the Commissioners under the 1967 Act in wider circumstances than the existing law presently permits).

36. The Commissioners state that the effect of the Order is to remove restrictions on their powers to enable them advantageously to pursue their objectives in new ways and on this basis it satisfies the test of desirability. **We agree.**

Removal of inconsistencies and anomalies

37. The Commissioners have stated in the explanatory statement that they consider the proposed article 5 will amount to the removal of an anomaly in the existing law. We would agree that the targeting of the present enforcement power in section 24 of the Act on freeholders alone, even when they might not have been the applicant for the licence whose terms have not been complied with, is ill-targeted. **However, as discussed in paragraph 24 above, we consider that this element of the proposal is better treated as the imposition of a new burden under section 1(1)(c) of the Regulatory Reform Act.**

The continued exercise of reasonable rights and freedoms

Rights of access to forest land

38. Paragraph 66 of the explanatory statement suggests that no person would be deprived of access to facilities provided on the Commissioners estates by virtue of their proposed power to delegate the power to set and take charges for those facilities on the basis that the existing facilities provided by the Commissioners are already subject to charges. However, elsewhere they acknowledge that this element of the proposal does change the basis on which charges are made as they would make it possible for charges to be set by some person other than the Commissioners.¹¹ It is stated that “This will not in any way affect the Commissioners policy of allowing the public general access to these forests”.¹²

10 Appendix b, Answers 2 &3, paragraph xvii.

11 Explanatory statement, paragraph 53

12 Explanatory statement, paragraph 66

39. On a straightforward reading this appears to amount to a guarantee that the Commissioners will ensure that no person to whom power to charge might be delegated would be permitted to levy fees simply for access to forests. Annex C to the explanatory statement states “The Forestry Commission is committed to free access to the forests for walkers, cyclists and others using the forest for informal recreation. Indeed, we intend to dedicate all our freehold land under section 16 of the Countryside and Rights of Way Act to preserve this right of access in perpetuity”. We therefore asked the Commissioners to specify the timetable for this process of dedication.

40. The Commissioners informed us that the process of dedication will be completed in England by May 2006. All freehold land in Wales for which the Commissioners have responsibility has already been dedicated.

41. We consider that the proposal would not remove any public rights of access to forest land.

Restocking

42. The Commissioners consider that the no reasonable right or freedom would be lost as a result of the proposed power for them to impose re-stocking requirements. They also believe that, by permitting that a person can be required to restock felled trees without the existing condition of his first having been convicted of the relevant offence being satisfied, that person’s freedom would actually thereby be enhanced, as he would not necessarily be prosecuted in circumstances where he might currently be.¹³ This reasoning seems questionable; but in these circumstances the relevant consideration under the Standing Order and statutory test is that no person should be compelled to carry out restocking unless that person has indeed committed the offence of unlawfully felling trees under the 1967 Act (or he has to carry out the remedial work as the freeholder of the land, in a situation where the person responsible for felling the trees no longer retains such an interest in the land as would enable him to comply with a remedial notice). However, **we consider that no reasonable right or freedom would be lost, given the proposal maintains a right of appeal against a restocking notice where the service of that notice or its terms might be in some way unfair.**

43. The Commissioners also note that the proposal would permit them for the first time to enforce remedial requirements against lessees or licensees who had breached the requirements of a felling licence – such persons would therefore lose their current immunity from enforcement action under the 1967 Act. The Commissioners reason that it would be unreasonable for lessees and licensees who have breached the requirements of the law in felling trees to expect to continue to enjoy this immunity. **We agree.**

13 Explanatory statement, paragraph 68

The maintenance of necessary protection

Protection of the public purse

44. Article 2 of the proposed Order would give the Commissioners an incidental power in England and Wales to form and participate in companies or other corporate bodies, invest in them and to make loans. The power to invest in bodies corporate and to make loans would be exercisable only with the approval of the Treasury. Article 6 would amend the 1968 Act to provide parallel incidental powers in connection with the intended new power to delegate the Commissioners' power to make charges. Paragraph 48 of the explanatory statement notes that the proposed new power to give grants and loans is parallel with the Commissioners' existing power in the Forestry Act 1979 to "make grants and loans to owners and lessees of land for and in connection with the use and management of the land for forestry purposes".¹⁴ As with this provision of the Forestry Act 1979, it is proposed that the powers to invest, to provide loans and to make arrangements with another person for the sharing of profits arising from the delegation of the power to charge for the use of facilities should be exercisable only with the approval of the Treasury. The Commissioners consider that making the exercise of these proposed new powers conditional on the approval of the Treasury will "ensure that the basis of such investment and the terms under which such arrangements are entered into are an acceptable use of taxpayers' money".¹⁵

45. The explanatory statement also recognises that the proposed new power to undertake commercial activities through companies formed in association with others would have the effect of putting receipts accruing to those companies from activities on the public forest estate outside the scope of section 41(8) of the 1967 Act, which gives the Minister power to direct that receipts of the Commissioners themselves may be paid into the Consolidated Fund instead of being retained by them. Commercial activities undertaken through the medium of jointly owned companies would not therefore *necessarily* give rise to any receipts which could be claimed by the public purse, although the Commissioners could, in agreement with their commercial partners, make a division of those receipts which would provide funds which could be used by the joint company for purposes which benefit the public interest (in addition to the presumed public benefit in the operation of a company which existed to provide facilities on the public forest estate, or otherwise to develop that estate). Arrangements for the sharing of receipts would therefore be a matter of commercial discussion between the Commissioners and their possible future partners and the Treasury would be able to prevent any investment by the Commissioners in a joint company, or profit sharing through the medium of a joint company, through the proposed 'veto' powers which would be created by Articles 2 and 6 of the Order. The government is therefore of the view that the proposal does not give rise to unacceptable risks in the use of public funds. **We agree.**

Levels of charging and possible effects on ability to access facilities

46. The Commissioners note that the existing section 41(8) of the 1967 Act protects against the possibility of the Commissioners taking 'excessive' receipts by means of the Minister's

¹⁴ Forestry Act 1979, s. 1

¹⁵ Explanatory statement, paragraph 51.

power to direct that receipts of the Commissioners (or any part of them) be paid into the Consolidated Fund.¹⁶ While this protection is not affected by the proposal, at the same time no parallel provision is created in respect of receipts accruing to possible joint ventures (which, as the explanatory statement notes, would as receipts of a separate corporate body be for that corporation to deal with). Under the proposal, the Minister could not influence the level of receipts which the Commissioners might take in association with their commercial partners, other than through the Treasury's capacity to disallow investment by the Commissioners in any planned joint venture company.

47. The Commissioners consider that the operation of the market would prevent any person who has had delegated to them the Commissioners' power to make charges from making unreasonable charges. It is their current policy to charge what "the market will bear" in connection with facilities they provide.¹⁷ They further note that facilities on their land are already in some cases provided by other persons acting on their behalf and, where this occurs, those other persons already do in practice determine the level of charge made for the use of those facilities. The implication is therefore that they do not expect this element of the proposal to result in any change in practice on the level of charges levied on the public.

48. While we could accept that market forces would in future determine pricing levels for the use of the relevant facilities, as they do now, it was not clear to us that this amounted to any kind of guarantee that prices might not rise as a consequence of the intended further development of facilities. It appeared to us that that the establishment of new joint ventures on a fully commercial basis and the delegation to those partnerships of the Commissioners' power to charge might have a more marked effect on charges for facilities in locations where there is little competition from other providers of such facilities to keep prices down. Our concern was that there may be some areas in England and Wales in which the Commissioners currently provide the relevant facilities on a basis of an effective local monopoly and that increases in access costs in such locations might price out those on the lowest incomes. We therefore asked the Commissioners to explain how they intended to ensure affordable access for all members of the community in areas where the possible future joint venture developers were not required to keep prices down through pressure of local competition.

49. In their response, the Commissioners stated that they were "keen to ensure there would be affordable access to facilities for all members of the public" and they felt that their existing pricing policies reflected that intention.¹⁸ With respect to the future effects of market pressures, they took the view that the market for the relevant facilities in forests is "open and competitive and rarely operates with little or no competition" (although elsewhere in their correspondence with us it is acknowledged that "the Forest Holidays product occupies a niche with few direct competitors").¹⁹ Although the Commissioners claim to believe that market forces will keep prices at a reasonable level they also additionally suggest that they themselves could act to influence the pricing policies of

16 Explanatory statement, paragraph 49

17 Explanatory statement, paragraph 52

18 Appendix B, Answer 5 paragraph i

19 Appendix B, Answer 12 paragraph i

future joint venture companies or that prices could actively be controlled through provisions made in the legal arrangements underlying specific development projects.

50. We consider that the Commissioners should have regard to the affordability of future facilities developed on the public forest estate and we welcome their suggestion that they actively pursue a policy of affordable pricing through discussion with commercial partners and, where appropriate, through specific legal provision in development contracts. **We request that they formally adopt a policy of affordable pricing for facilities which they or their partners develop and maintain on the land they manage and that future partnership arrangements should specifically reflect that commitment to the provision of affordable products and services in the public interest.**

Exploitation of intellectual property

51. The Commissioners have addressed the issue of the maintenance of protection in connection with the proposed power for them to exploit forestry research at paragraphs 55 – 58 of the explanatory statement. They have argued firstly that permitting them to play a part in the market for research of this kind will allow them to undertake this activity in association with commercial partners, rather than in competition with them. We accept that, given the nature of the market for these forms of intellectual property, that exploitation of the kind the proposed Order would make possible would in practice take place in partnership with other public and commercial organisations and would not be likely to result in unfair competition. Secondly, it is argued that, insofar as the applications of research by the Commissioners would be exploited in conditions of a free market, any prices charged for products developed as a result would, by definition, be at a level which is “reasonable”. **We are content that no necessary protection would be lost.**

Enforcement of restocking after the unlawful felling of trees

52. It is proposed that a person could have a legal duty to carry out remedial works imposed on them as a result of a decision of the Forestry Commissioners, in circumstances where at present that person could be required to perform those works only after being found guilty of the necessary offence in the courts. The Commissioners have stated that there is no intention that the standard of proof required before a re-stocking notice is issued will in practice be lessened, so as to make it possible for re-stocking to be required in cases where a conviction would presently be unlikely or impossible. They further argued that the process of determining whether a re-stocking notice should be served on someone is concerned with questions of fact, and that this is a judgement “which the Commissioners would be qualified to make”.²⁰ Essentially, they seem to consider that the existing requirement to obtain a prosecution is without a practical justification or beneficial purpose, given their belief that they will always be in a position to reach a justified conclusion on whether a person has committed the relevant offence. The relevant question therefore appeared to us to amount to whether there is any necessary protection for the public in the need for the Commissioners to obtain a conviction before they may require restocking works to be carried out. If there are no questions of fact which the

20 Explanatory statement, paragraph 60

Commissioners could not determine as readily, effectively and impartially as a court, there would not be any necessary protection in the current requirement to secure prosecution.

53. The Commissioners also drew attention in their statement to section 17B of the 1967 Act, which already provides that any person on whom a restocking notice is served who objects to that notice or to any condition contained therein may request the relevant Minister to refer the notice to an appeals committee constituted under that Act which will then consider the issue and report to him. Having considered that report the Minister may, if he considers it appropriate, direct the Commissioners to withdraw the notice or to notify the objector that the notice shall have effect subject to such modification as the Minister directs. The continuation of this right of appeal is seen by the Commissioners as maintaining necessary protection should the requirement for preliminary conviction be dispensed with, that protection presumably being against the possibility of a restocking notice being served in circumstances which did not justify it, or making requirements in respect of re-stocking which are unreasonable.

54. The Commissioners argued in support of their proposal that the current need to obtain a conviction as pre-condition for requiring re-stocking has given rise to a situation in which the “existing provisions have not been effective”.²¹ This view is derived from their argument that there are many cases where the relevant offence has certainly been committed but no prosecution is ever attempted as it would not in their view be in the public interest to do so (and thus enable the service of a restocking notice) for reasons such as the offence having been committed in ignorance.²² On this basis, the Commissioners believe the existing enforcement machinery gives rise to active problems, in addition to their view that there is no practical benefit in requiring prosecutions as pre-condition for enforcement when they believe that they are already in a position to establish for themselves whether the relevant act has in fact been committed.

55. While we take no issue with the view that whether a person has committed an offence is a question of fact, we also note that the proposal takes the form of exchanging a finding by a court for a decision of the Commissioners that *it appears* that person has done something, as a basis on which to carry out enforcement action. The explanatory statement refers to there being a new procedure whereby the Commissioners would form their view as to whether the relevant offence had been committed, and it is stated that this procedure would be “more appropriate” than the current mechanisms for the purpose of securing restocking.²³ No details of the methods by which the Commissioners might establish whether a person should be served with a re-stocking notice were given in the statement.

56. We therefore asked the Commissioners to explain how they proposed in practice to determine whether a person had committed the relevant offence under the 1967 Act.²⁴ In their response, the Commissioners said that it was intended that appropriately qualified members of their staff should visit the site of any alleged unlawful felling to investigate the allegation, and that they would both examine evidence on site and interview any witnesses

21 Explanatory statement, paragraph 62

22 Explanatory statement, paragraph 62

23 Explanatory statement, paragraph 59

24 Appendix A, Question 9

or other people present who might be in a position to offer relevant information. Following such a visit, a report and recommendations would be prepared which would ultimately pass to the Director of Forestry for either England or Wales (as appropriate) to consider. In each case, the Director would decide whether i) no action should be taken; ii) a restocking notice should be issued and/or; iii) the person responsible for the felling should be prosecuted. We consider this process should be adequately robust to arrive at an informed decision, provided the investigations in individual cases are carried out with sufficient care; we also consider it is appropriate that the decision about whether to issue the notice should be taken at this senior level.

57. Various statistics relating to the operation of the current enforcement mechanisms are given in the Regulatory Impact Assessment at pages 50 and 51 of the explanatory statement. These indicate that, in England and Wales in 2003/4, 215 cases of alleged illegal felling were reported and 76 were fully investigated, of which 15 finally went to court. 14 of these 15 court actions resulted in a successful prosecution. It is noted on page 51 of the explanatory statement that “The [Forestry Commissioners] would have liked to pursue a larger proportion of those investigated...but did not on the advice of Defra Legal”. This appeared to us to indicate that there are more instances of alleged illegal felling in which the Commissioners would like to enforce re-stocking than cases in which the Commissioners believe a successful prosecution could be achieved. The implication seemed to be that, should the Commissioners be given the powers which they propose, they would use that power to enforce restocking in instances where at present the need to prove the relevant offence in court or demonstrate a public interest in prosecuting would make this impossible. It is not clear to what extent any increase in the use of the power could arise from a lower standard of proof or simply a lower cost of taking action under the administrative procedure compared with that currently through the courts.

58. To establish the extent to which the Commissioners envisage using the proposed power to take action against persons against whom the standard of proof or need for public interest would make it hard to prosecute under the existing law, we asked the Commissioners to indicate what estimate they had made of the effect of the proposal on the number of restocking notices likely to be served annually in England and Wales. They expected that an additional 20 notices might be served each year, mainly replacing the issuing of the informal “warning letters” which they presently send where they believe unlawful felling to have taken place but, for whatever reason, choose not attempt to prosecute the individual concerned.

59. We have considered this issue very carefully. **We take the view that the method of determination which the Commissioners propose is sufficiently thorough to protect against the use of the proposed administrative power in relation to frivolous or unsubstantiated allegations of unlawful felling.**

Provision for the consideration of appeals against restocking and enforcement notices

60. Section 17B of the 1967 Act makes provision for an appeals procedure against the service of restocking notices or against any condition contained within a restocking notice. In relation to England and Wales, the Secretary of State may refer any appeal to a Committee constituted to advise him under section 27 of the Act. No Forestry

Commissioner or person employed by the Commissioners may serve on that Committee. Any person concerned with a case considered by the Committee has a right to appear before the Committee and the Committee may decide or be required by the appellant to inspect the trees or the land to which the appeal relates before deciding on their recommendations to the Minister. After considering the Committee's report, the Minister may, where he believes it justified, direct the Commissioners to withdraw their notice or notify the objector that it shall effect with such modification as the Minister directs.

61. As we noted at paragraph 59 above, this procedure appears to us to be sufficient to continue necessary protection against the service of restocking notices on occasions or making conditions where they were not justified. Despite this, we remained concerned about the effect of the proposal, in particular the ability it would create to compel restocking measures without any reference to the courts, which we felt could give rise to concerns about the use of a quasi-judicial power to require burdensome action of individuals merely where it *appears* to the Forestry Commissioners they have committed an offence. We therefore asked the Commissioners whether they believed there might be any merit in providing that appeals against restocking notices might in future be heard not by the Ministers but by the magistrates court.²⁵

62. In their response, the Commissioners set out a careful argument why they believe an amendment to the law in that way would not be beneficial in terms of public expense or any other benefit. In their view, there is no reason to think the current system is in any way unfair or fails provide a sufficiently informed forum in which the reasonableness of any notice served can be thoroughly examined and tested. In particular, they note that the persons who are required to consider the matter raised by any appeal – the Minister and the Committee appointed to consider and report to him – are fully separate from the Commissioners and able to come to their own independent judgement. The fact that the same body of persons consider all the appeals means that they develop valuable experience in the narrow technical grounds on which the very small number of appeals which are made typically turn and the Commissioners believe that this should not be lost, as it would be if the appeals process was transferred to the magistrates' courts. Finally, the Commissioners point out that any legal error alleged against the Minister or the advisory committee in dealing with an appeal against a stocking notice could give cause for judicial review proceedings.

63. We do not doubt the integrity of the appeals procedure, and it does not appear to us that the proposal would expose members of the public to a real risk of being required to undertake remedial works where they in fact had no responsibility for the unlawful felling of trees.²⁶

64. However, we remain concerned about the need to demonstrate the appeals processes' independence of government in a situation where it would be the Commissioners' opinion that a person has committed an offence, rather than a conviction by a court, which formed the basis for the use of statutory enforcement powers. If, as we expect, the Commissioners

25 Appendix A, Question 13

26 Or, as the case may be, is as freeholder of necessity the only person of whom remedial action can be required in default of the availability of another person who felled trees unlawfully but who no longer has such interest as would enable them to perform restocking work.

do make a more frequent use of the enforcement power once they are no longer required to persuade a court that a given person is guilty of an offence, it may be that appeals against restocking notices will occur more often in future than they do now (and they might involve contesting whether unlawful felling had been carried out by a person at all in a way which the need to secure conviction prior to service of the notice at present makes very unlikely). Without any involvement by the courts, a situation would exist in which various agencies of the Crown, albeit not the same persons, would be empowered to decide that there was evidence to conclude an offence had been committed, on that basis serve a notice compelling remedial action and then judge whether any appeal against that notice should be upheld. Although all those involved in the appeals process may be well-qualified to perform their role and carry out their duties with full propriety, an entirely non-judicial process as proposed could give rise to perceptions of inequity. It seems to us that the public might be reassured to know that there was a route for future appeals against restocking notices served under administrative action and without any prior conviction to be considered by the courts, other than by a judicial review of Ministerial actions.

65. We consider that the existing procedure for considering appeals against restocking notices continues necessary protection. However, we nonetheless request that the Secretary of State consider whether provision should be made for appeals against restocking notices to be heard in the magistrates courts.

Estimates of costs and benefits

66. The Regulatory Impact Assessment (“the RIA”) is very clear that “The rationale for the changes proposed is the Government’s policy of securing maximum benefit from forestry” and the proposals should be viewed in that context. The Government takes the view that, in the broadest terms, “if the proposed changes are not accepted and implemented, the Forestry Commission will not be able to take full advantage of business opportunities and therefore be unable to maximise the development of the public forest estate”. Regarding the proposed widening of the Commissioners power to serve re-stocking notices under the 1967 Act, the RIA states “The changes to the felling regulations will increase the efficiency and effectiveness of ensuring that illegal felling does not lead to loss of woodland area”.²⁷

67. The RIA analyses the risks, benefits and other consequences of the respective policy options which would be given legislative effect in the proposed RRO and the likely methods of implementation which would be used to deliver the policy objectives once the RRO was in place.

68. The RIA gives particular information in relation to the proposed future development of Forest Holidays as a joint venture with a private sector partner. It is argued that the development of facilities managed under this name which presently generates an operating surplus of £1 million p.a., is hampered by lack of investment capital. It is thought that there may be difficulties in trying to sell Forest Holidays as a going concern as result of some historic rights and the possible adverse effects of subsequent development in the surrounding forests. The best solution would be a) to ensure that the correct partner is chosen and b) the form of the agreement with them adequately protects the public interest

²⁷ Quotations in the paragraph are drawn from page 40 of the explanatory statement.

whilst not hampering commercial operations. Headline economic forecasts of the costs and benefits are given on page 57 of the explanatory statement, with brief indications of social benefits and environmental impacts.

69. The economic costs of existing enforcement work under the 1967 Act in relation to the unlawful felling of trees are summarised in pages 63 - 65 of the explanatory statement. The current annual costs of enforcement action on the Commissioners and DEFRA are estimated at £300,000. These costs are characterised as excessive as the result of enforcement provisions which are unduly burdensome. The Commissioners consider that many of the current prosecutions would not need to be brought were enforcement action possible without prior conviction, and, although it is acknowledged that meaningful prediction is impossible, a rough saving of £87,000 might be possible without prosecutions which the Commissioners think would be unnecessary if the proposed RRO was in force. The Commissioners consider that their projected savings in administrative and legal costs would also enable them to serve a greater number of restocking notices than at present. Where prosecution was no longer necessary in order to serve a restocking notice the Commissioners anticipate that landowners might be more likely to co-operate with investigations into unlawful tree felling than they sometimes are at present, though this argument seems unduly optimistic to us.

70. The possible impact of the proposal on competition are discussed in pages 66-69 of the explanatory statement. It is the view of the Commissioners that their proposal “will not give rise to any significant restriction in competition in any particular market”.

71. We consider that the Commissioners have made reasonable efforts to foresee the costs, savings and other benefits which could arise from the proposal.

Adequate consultation

72. A consultation document on the proposal was published on 14 February 2005 by the Forestry Commissioners. The consultation period ran until 11 May 2005 (although the Commissioners indicate that some representations were received up to 18 May, and that all representations were taken into account, notwithstanding any late delivery). The document was sent to a range of bodies which represent the interests of those with responsibility for the care and maintenance of forests, industries connected with forestry and bodies representing various sports and activities undertaken by members of the public in a forest setting. 125 bodies were sent the document and 26 responses were received. The consultation document was also made available on three central government websites.²⁸

73. The Commissioners also referred the consultation document to the National Assembly for Wales (as required by section 5(1) of the Regulatory Reform Act) and the Scottish Executive. Neither wished to make any comment on the proposal.

74. Most of the respondents to the consultation were in agreement with the broad purpose and form of the proposed Order. Annex C to the explanatory statement briefly records key

points made by respondents and gives the Forestry Commission's responses to these points. No changes were made to the proposals in the light of the consultation process.

75. It is clear that a number of respondents took the view that the Forestry Commission as presently constituted was in an undesirably influential position, being simultaneously the chief adviser to governments in Westminster, Edinburgh and Cardiff on forestry matters, the national regulator for the forestry industries and a major participant in the market for timber and other forest related products. Respondents who took this view suggested that it was undesirable to legislate to increase the Forestry Commission's powers to compete in the market, before undertaking a fundamental review of the functions of the Commissioners and the future of forestry policy in Great Britain. Some of these respondents also referred to the divergence which the proposed RRO would create between the law in England and Wales and the law in Scotland, and argued this illustrated the undesirability of legislating in a piecemeal fashion.

76. There were also specific concerns about the proposed enhanced powers of the Commissioners to operate on a fully commercial basis. Respondents indicated that they would be concerned if the proposal were to introduce a more market-oriented Forestry Commission in which less account would be taken of the need to protect the environment and biodiversity, or where the ability to raise revenue might take precedence over the provision of free and unhindered access to forest sites by members of the public. Other concerns were raised about the effect of the proposed powers to exploit forest research commercially might have on future research priorities and whether increased scope for undertaking research in association with commercial organisation or which might have income generating applications might diminish the likelihood of the Commissioners' undertaking more 'pure' research, or inhibit the free exchange of the findings of research. It was suggested that the Commissioners research priorities might be protected if suitable representatives were appointed to a commercialisation committee.

77. The Council for National Parks ("the CNP") drew specific attention to the objectives which Ministers have set for the Commissioners in England, Scotland and Wales respectively. In the view of the CNP, these objectives require of the Commissioners a greater degree of care for the protection of the environment in England than Scottish and Welsh Ministers have required of the Commissioners in their respective jurisdictions. The CNP believed that it would assist the Commissioners, and ensure that unhelpful conflicts between the various objectives of the Commissioners did not arise, if there were stringent guidelines for the Commissioners future commercial activities in association with partner organisations.

78. The Wales Tourist Board considered that the proposals would probably lead to an increased cost to the public making use of forestry facilities, although it considered that this would be reasonable if the increased revenues were used in order to provide timely and beneficial investment to improve the forest estate and if they allowed the development of facilities that attract visitors and support local economies. The Board took the view that many of those who currently make use of forests and facilities provided within them would be willing to pay a higher charge which would fund improvements, provided the level of the charge was reasonable, although it would be important to ensure that charges were not increased to a level where those who currently enjoy using facilities at no or low cost were inhibited from continuing to make use of them. The Board hoped that Commissioners

and their future partners would aim to levy charges on a cost recovery basis wherever possible and that their facilities would be operated with the intention of developing new markets, rather than displacing trade from existing businesses. This concern was widely shared amongst respondents, given their belief in the already powerful market position of the Commissioners.

79. In their responses to consultation recorded in Annex B to the explanatory statement, the Commissioners have stated that the strategic objectives laid on them by Ministers, together with existing statutory obligations will ensure that they will continue to undertake their work with full regard to all economic, environmental and social benefits.

80. We consider that the proposal has been the subject of, and taken appropriate account of, adequate consultation.

6 Conclusion

81. We conclude that a draft Order in the same form as the proposal should be laid before the House.

Formal minutes

Tuesday 29 November 2005

Members present:

Andrew Miller, in the Chair

Mrs Sharon Hodgson
Dr Doug Naysmith

Ms Angela C Smith

The Committee deliberated.

Draft Report [Proposal for the Regulatory Reform (Forestry) Order 2006], 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 81 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 a day and time to be fixed by the Chairman.]

List of written evidence

A Letter from the Committee Specialist to the Forestry Commission	27
B Letter from the Forestry Commission to the Committee Specialist	30

Appendix A

Letter from the Committee Specialist to the Forestry Commission

Proposal for the Regulatory Reform (Forestry) Order 2006: request for information

Thank you for the helpful presentation made by officials from the Forestry Commissioners yesterday on the subject of this RRO proposal.

The Committee considered the proposal and decided to seek your further comments on a number of points. The issues which concern the Committee are set out below, under the relevant categories for consideration in the Regulatory Reform Act and the Committee's Standing Order (references to the Standing Order are printed below in italics).

Whether the proposals give rise to doubts whether they are intra vires (S.O.141(6)(g))

1. The Committee notes that the proposed Order has been laid before the House with a statement by the Forestry Commissioners which says that they are acting on behalf of the Secretary of State for Environment, Food and Rural Affairs. This statement indicates that, among other steps taken in preparation of the proposal, the Forestry Commissioners carried out the consultations on the proposal required under section 5 of the Regulatory Reform Act. This section of the Regulatory Reform Act specifies that a Minister who makes an Order under the Act must conduct consultations with, amongst others, organisations which appear to him to be representative of interests which are substantially affected by his proposals and must reach conclusions on the consultations.

2. It is not clear how the Forestry Commissioners have been empowered to carry out undertakings which the Regulatory Reform Act specifically requires of the Minister who proposes to make the Order, given that the Commissioners –

a) have no express power to act under the Regulatory Reform Act; and

b) are not officials of the relevant minister, and are unable to pray in aid the Carltona doctrine.

Q 1 Please explain how each of the steps preparatory to the making of the Order have been or will be carried out by the Secretary of State.

3. The Commissioners have indicated that they consider that provisions establishing power to impose charges in connection with forestry facilities in section 23(2) of the Countryside Act 1968 and to serve restocking notices under sections 17 and 24 of the Forestry Act 1967 place burdens –

a) on the Commissioners (in their capacity as a government department) and also on other persons, in that those persons are unable to take part in the setting of charges for facilities in which they have an interest;

b) on the Commissioners and on other persons, in that those other persons must first be prosecuted before they can legally be compelled under the legislation to carry out remedial action in relation to felled trees

c) on other persons where they are the subject of enforcement action because they own the freehold of the land on which trees have unlawfully been felled and no capacity exists to require restocking of any person other than the freeholder, notwithstanding the fact that the freeholder has not felled the trees.

4. The Committee considers that it is possible to regard section 23(2) of the Countryside Act 1968 and sections 17A and 24 of the Forestry Act 1967 as provisions which authorise the imposition of burdens (in these cases, the power to make charges in connection with the use of forestry facilities and to require remedial

action subsequent to the unlawful felling of trees). These are burdens which do not apply to any Government department.

5. The Committee notes that the Commissioners' view that the use of the proposed new power to delegate the ability to charge which would be created by Article 6 of the Order would amount to a new burden for the reason that "A third party, providing facilities on Commission land, and making charges for the use of them will be making an impact on the public wanting to use that land and facilities". It is not clear how the proposed new provision in Article 6 creates a new burden, as it does not establish any new requirements on members of the public, but merely permits the Commissioners to delegate their power to levy charges to another person.

6. The Commissioners state that the proposed Order would re-enact section 17A of the Forestry Act 1967. This is not correct – Article 4 and 5 would amend that Act to permit the service of re-stocking notices on persons in circumstances outside those which the law presently allows or on persons who are not liable to such enforcement action under the present law. Insofar as Articles 4 and 5 of the proposed Order would so amend the existing law, the new provisions would have the effect of authorising the imposition of new burdens affecting those persons who would thereby become subject to enforcement action for the first time.

7. On this basis, it is not clear the Commissioners are correct to consider that the effect of Article 4 would be to create a new burden affecting themselves.

8. Similarly, it is not clear that the Commissioners are correct to regard the proposed provision in Article 5 of the Order as effecting the removal of an anomaly.

9. On the basis of the foregoing commentary:

Q 2 Please indicate whether the Commissioners agree that, as the proposed new power to delegate the setting of charges in Article 6 of the Order imposes no new requirement on the public, no new burden is created by it and if not, why not.

Q 3 Please indicate whether the Commissioners agree that Articles 4 and 5 of the proposed Order would create new burdens as described above and if not, why not. If the Commissioners do agree, please indicate how those burdens satisfy the test of proportionality in sections 1 and 3 of the Regulatory Reform Act.

Whether the proposal appears to be incompatible with any obligation resulting from membership of the European Union (S.O. No 141 (6)(i))

10. The Committee notes that the Government considers that the provisions of the draft Order are compatible with the European Convention on Human Rights. The Committee is, however, required to consider in each case whether a proposal for an RRO appears to be incompatible with any obligation resulting from membership of the European Union.

Q 4 What account has been taken of the United Kingdom's obligations arising from membership of the European Union in drawing up the proposed RRO?

Whether the proposal has the effect of continuing any necessary protection as required in Section 3(1)(a) of the Regulatory Reform Act 2001 (S.O. No 141(6)(c))

11. Article 6 of the proposed Order would amend the Countryside Act 1968 to provide the Commissioners with a new power to delegate to another person their own power to make charges in connection with the provision by them (and with others) of facilities on the public forest estate. In that context, the Committee notes that the Commissioners consider that the operation of market forces would prevent any person who has delegated to them the Commissioners' power to make charges for the relevant facilities from making charges at an unreasonable level and that they anticipate that future joint ventures will make such charges 'as the market will bear', as the Commissioners presently do in respect of facilities which they directly administer.

12. It is not clear whether the establishment of new joint ventures to develop and run the relevant facilities on a fully commercial basis and the delegation to them of the Commissioners' power to charge might not have more marked effects on charges for facilities in locations where there is little competition from other providers of such facilities to keep charges to the public down.

Q 5 Please explain how, given the Commissioners intended policy of setting charges in accordance with market conditions, the Commissioners intend to ensure affordable access to facilities for all members of the public, especially in areas where future joint ventures face little or no competition?

13. Article 4 of the proposed Order will, by means of the amendments it would make to the Forestry Act 1967, give the Commissioners' new power to require restocking of trees after unauthorised felling without the person concerned first having been convicted of unlawful felling of trees under that Act. Article 5 would amend the Forestry Act 1967 to permit the Forestry Commissioners to enforce restocking of felled trees by persons other than the freeholder of the land in which the felled trees grew, where that other person continues to have sufficient interest in the land to enable them to comply with the restocking requirement.

14. The effect of these proposed amendments would be to make it possible, were the Commissioners to make use of their new power, to exchange a determination by the courts that an offence has been committed for an executive decision of the Forestry Commissioners that it appears that that offence has been committed as a basis on which to issue enforcement notices. The Commissioners have asserted in their explanatory statement that whether an offence has been committed is a matter of fact which they would be in a position to determine.

15. The Committee notes that the existing procedure for appeals against notices requiring restocking of felled trees under section 17B of the Forestry Acts will continue to be applicable under the proposed administrative procedure for issuing notices.

Q 6 Please indicate in how many cases restocking currently takes place on a voluntary basis, without the service of an enforceable remedial notice.

Q 7 Please indicate how many appeals are made at present against restocking notices.

Q 8 Please indicate what projections, if any, the Forestry Commissioners have made of the effect of the proposed amendments on the number of restocking notices likely to be served annually in England and Wales.

Q 9 Please provide a detailed explanation of the procedure which the Forestry Commissioners would follow for determining as a matter of executive decision that the relevant offence had been committed under the Forestry Act 1967 and indicate who within the Commissioners would take a decision that a restocking notice should be served.

Whether the proposals prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise (S.O. No. 141(6)(j))

16. The Committee notes that it is the intention of the Commissioners to designate all land for which they have management responsibility under section 16 of the Countryside and Rights of Way Act 2000. This would presumably establish that no existing public right of way could be hindered or made the subject of a charge.

Q 10 Please indicate the Commissioners' intended timetable for dedicating all of the land for which they have responsibility under section 16 of the Countryside and Rights of Way Act 2000.

Other matters arising from the Committee's consideration of the proposal (S.O. 141(5))

The Committee notes that the proposed Order will apply within England and Wales, except for Article 3, which would amend section 8 of the Forestry Act 1967 as that applies throughout Great Britain.

Q 11 Please indicate whether it is the intention of the Scottish Executive to legislate to introduce reforms to the Commissioners' powers in Scotland of a similar kind to those which be effected by Articles 1, 2 and 4 – 6 to the law in England and Wales, and if so, what is the expected timetable for the introduction of legislation in the Scottish Parliament.

17. The Committee understands that the present inability of the Forestry Commissioners to form or participate in forming a body corporate has prevented them from taking a full part in a number of commercial projects with public and private sector partners. It is the Commissioners' intention to make use of their proposed new powers in the Order, as a Government department, to enter into joint ventures for the purpose of further developing existing income-generating recreational facilities on the public forest estate.

Q 12 Please indicate whether the Commissioners consider the increased or enhanced provision of recreational facilities by a government department acting in partnership with other bodies will adversely affect the revenues of competing private businesses, and if not, why not.

18. The Committee notes that section 17B of the Forestry Act 1967 makes provision for an appeals process against the service of restocking notices and that this appeal process would continue to be available to persons on whom notices were served under the enhanced enforcement powers given to the Commissioners by Articles 4 and 5 of the Order. Appeals under this existing process are made to the relevant Minister.

Q 13 Please indicate whether the Commissioners consider there might be any saving of public expense or other benefit arising from simplifying the existing appeals process in the 1967 Act to provide that appeals against remedial notices might be heard by Magistrates' Courts.

I would be grateful to receive your response to these questions, together with any additional information which the Commissioners believe would be helpful to the Committee not later than **Wednesday, 26 October**.

12 October 2005

Appendix B

Letter from the Forestry Commission to the Committee Specialist

Proposal for the Regulatory Reform (Forestry) Order 2006: response to request for information

We are grateful to the Committee for taking so much time to hear our presentation on 11th October and for the very full consideration they gave us, reflected in your letter of 12th October. The Commissioners answers to the Committee's questions are set out below.

Q 1 Please explain how each of the steps preparatory to the making of the Order have been or will be carried out by the Secretary of State.

A1

i) The Minister of the Crown who is given power (by section 1(1) of the Regulatory Reform Act) to make an order under the Act, is required to undertake certain duties preparatory to the making of the order. These statutory duties must be undertaken by the Minister or by a member of his or her Department in accordance with the Carltona doctrine.

ii) The proposed order will be made by the Secretary of State for Environment, Food and Rural Affairs. In accordance with public law principles, any decisions associated with the carrying out of ministerial functions under the Act must be taken by her or by a suitably senior representative of her Department. In practice, such decisions have been and will be taken by the Minister with responsibility for forestry. As long as the Minister exercises any discretion associated with these statutory functions, he may require any other person to implement his decisions on his behalf.

iii) With regard to the duties imposed on the Minister in relation to consultation by section 5 of the Act, the Minister (at that time, Ben Bradshaw) considered and approved all of the consultation documents and in particular considered who should be consulted in accordance with section 5(1). The Secretary of State wrote to Cabinet colleagues on 12th January seeking policy clearance to publish the Consultation Document. The Consultation Document made it clear that the consultation was being conducted by the Forestry Commission on behalf of the Secretary of State for Environment, Food and Rural Affairs. The new Minister, Jim Knight, considered, in the light of the results of the consultation, that the proposals should proceed unchanged, thereby exercising his discretion under section 5(3) and 6(1). Accordingly, the Commissioners laid before Parliament the documents required by section 6(1) on his behalf (including the Regulatory Impact Assessment, duly signed by the Minister).

iv) The Minister will personally have regard to any representations made during the period for Parliamentary consideration, including any resolution or report of, or of any committee of, either House of Parliament, as required by section 8(4) and will take the decision whether, and, if so, how such representations should be reflected by changes to the proposals.

v) Finally, the Minister will be responsible for satisfying himself as to the matters in section 1(1) before he makes the order.

Q 2 Please indicate whether the Commissioners agree that, as the proposed new power to delegate the setting of charges in Article 6 of the Order imposes no new requirement on the public, no new burden is created by it and if not, why not.

&

Q 3 Please indicate whether the Commissioners agree that Articles 4 and 5 of the proposed Order would create new burdens as described above and if not, why not. If the Commissioners do agree, please indicate how those burdens satisfy the test of proportionality in sections 1 and 3 of the Regulatory Reform Act.

A2 & A3

i) These questions appear to the Commissioners to go to the issue of the way that the proposals in articles 4, 5 and 6 have been analysed in terms of Section 1(1) of the Regulatory Reform Act (“the Act”).

ii) It is considered that the primary analysis of these proposals is that they remove burdens on the Commissioners by removing restrictions on their current powers. It is clear from section 2(1) of the Act that a ‘burden’ can be a restriction or a limit on the statutory powers of any person.

iii) The main purpose of the proposal contained in article 6 is therefore to remove the burden on the Commissioners by virtue of the restriction on their current power to charge in relation to facilities provided under section 23(2) of the Countryside Act 1968. This restriction is their inability to delegate that power to a third party.

iv) Whilst the principal object of the article 6 proposal is to remove a burden to which the Commissioners are currently subject, in a ‘technical’ sense, the proposal also has the effect of imposing a new burden on the public. This is because the proposal would authorise a person other than the Commissioners themselves to impose charges: in that sense it goes beyond the existing burden. However, it is agreed that, in practice, the proposal is unlikely to have an impact on the public using facilities in connection with which the Commissioners can, and do, already impose a charge.

v) The purpose of the proposal contained in article 4 is also to remove a burden on the Commissioners which consists of a limitation on their powers. This limitation is the inability to require restocking without first securing a conviction for unlawful felling. It was considered, however, on a strict interpretation of the Act, that an additional effect of the proposal was to re-enact a provision imposing a burden on the Commissioners, as explained below.

vi) Under section 17A(1), the Commissioners' power to serve a restocking notice is currently limited to service on those who not only have been convicted of an offence under section 17 but who also have 'such estate or interest as is mentioned in section 10(1)'. As this latter provision in section 17A(1) of the Forestry Act is also a limit on the Commissioners' statutory powers it is technically a 'burden' within the meaning of section 2(1) of the Regulatory Reform Act. Article 4 of the Order re-enacts this requirement that a person must have an estate or interest in the land as is mentioned in section 10(1). It is therefore considered that to this extent Article 4 re-enacts a provision which has the effect of imposing a burden on the Commissioners.

vii) The proposal in article 5 will remove the burden on the Commissioners represented by the restriction on their power to serve a notice to enforce restocking requirements (which notice is served under section 24 of the Forestry Act 1967 as applied to restocking notices by section 17C of that Act) on any person other than a freeholder. However, in addition to the principal purpose of this provision, it may also be seen as removing an anomaly in the current law.

viii) This is because it might reasonably be expected that any person who is entitled to apply for or, in the case of a breach of condition of a licence, has actually been granted, a felling licence should be capable of being made responsible for the consequences of his either felling without a licence or of failing to comply with the conditions imposed on a licence to fell trees.

ix) Whilst, for the reasons explained above, it is considered that the proposals contained in articles 4, 5 and 6 have been properly analysed in terms of the Act, the Commissioners can understand why the Committee has identified a way in which articles 4 and 5 can also be seen as having the effect of imposing burdens in the way the Committee describe.

x) The issues relating to the effects that the proposals would have on those who would become subject to enforcement action to which they had not previously been subject were explored in depth in the consultation document, in the context of the analysis of whether the proposals to remove burdens on the Commissioners would remove any necessary protection or prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise. It is considered that the imposition of the burdens identified by the Committee meets the tests of proportionality in section 1 and of fair balance and desirability in section 3 of the Act. The reasons for this conclusion, and the analysis leading to it, are the same in essence as those for concluding that the safeguards referred to above were satisfied.

xi) The burden that has been identified as being imposed by article 4 is on persons who, although they have felled trees unlawfully, have not been convicted of that offence. The difference is therefore that the Commissioners (or the Minister on appeal), need to be satisfied that the offence has been committed as opposed to the person being convicted of the offence by a Magistrates' Court. This issue has been addressed in the consultation document (at paragraph 5.30 on page 21) and explanatory statement in terms of the maintenance of a necessary protection.

xii) The benefit that will result from this proposal is that the Commissioners will be able to achieve more efficient and better targeted restocking following unlawful felling. A person who would otherwise be prosecuted purely for the purpose of securing restocking will also benefit from the change. (As explained in the explanatory statement and in the consultation document (at paragraph 3.41 on page 14), there are cases in which it would not otherwise be in the public interest to prosecute.)

xiii) It is therefore considered that the burden imposed by the provision contained in article 4 is proportionate to the benefit which is expected to result from it.

xiv) The burden that has been identified as being imposed by article 5 is in allowing the Commissioners to take enforcement action against a person who has breached a restocking notice or the conditions of a felling licence, even though that person may not own the freehold in the land subject to the notice or licence. The current position is considered to be anomalous for the reasons discussed above.

xv) The benefit that will result from this proposal is that the Commissioners will be able to target enforcement action against the person who is actually responsible for the breach (provided that person still has sufficient interest in the land). A freeholder who would otherwise be subject to enforcement action will also benefit from this change. (Action is currently taken against freeholders who are not responsible for breaching a restocking notice or the conditions of a felling licence where this is the only option available to secure restocking.)

xvi) It is therefore considered that the burden imposed by the provision contained in article 5 is proportionate to the benefit that is expected to result from it.

xvii) Having regard to the above reasoning, if the proposals are considered as imposing new burdens, it is also considered that the tests of 'fair balance' and 'desirability' required by section 3(2) of the Act (as applied in paragraphs 80 and 81 of the Explanatory Statement) are fulfilled in relation to the proposed order.

Q 4 What account has been taken of the United Kingdom's obligations arising from membership of the European Union in drawing up the proposed RRO?

A4

i) The proposed RRO has been considered in the light of the UK's obligations arising from membership of the European Union and it has been concluded that the proposals have no implications with regard to these obligations.

Q 5 Please explain how, given the Commissioners intended policy of setting charges in accordance with market conditions, the Commissioners intend to ensure affordable access to facilities for all members of the public, especially in areas where future joint ventures face little or no competition?

A5

i) There is no intention of charging for traditional free/open access to FC land, as the Commission's commitment to dedication demonstrates. The Commission is very keen to ensure that there is affordable access to facilities for all members of the public and this is reflected in our current policies. The Commission's policy of setting charges on the public estate is to set charges in accordance with the market where significant additional facilities are provided. Where facilities are run by a Joint Venture or third party the Commission could seek to influence the charging levels by ensuring that reasonable levels were set either through Board discussion or by specific restrictions contained within the project's legal documentation as well.

ii) The market for leisure facilities is open and competitive and rarely operates with little or no competition. If the price of Forestry Commission facilities is too high, customers will select the next best alternative, which could be a different type of facility or another location. The issue of competition is also dealt with in answer to Question 12.

Q 6 Please indicate in how many cases restocking currently takes place on a voluntary basis, without the service of an enforceable remedial notice.

A6

i) Where woodland is felled without a licence, where one would have been required under the Act, the Commission can only secure replanting by issuing a Restocking Notice following a successful prosecution for illegal felling. Where the replanting conditions of the Restocking Notice are not met, then once again, the Commission can secure replanting through the issue of an Enforcement Notice (under Section 24 of the Forestry Act). We assume the Committee is referring to the Restocking Notice.

ii) Sometimes, a warning letter from the Forestry Commissioners is sufficient to persuade people to replant rather than pursuing a prosecution through the courts in order to secure a Restocking Notice. In

2003/04 in England and Wales, we issued 23 warning or advisory letters in cases where we did not pursue a prosecution. We have no information on whether replanting has been successfully carried out in these cases as it can take some years for a woodland to re-establish.

iii) In the same period we issued 14 restocking notices following successful prosecution. Seven of these cases of unlawful felling were not through malicious intent and we only prosecuted so that we could secure restocking.

iv) Where a felling licence is obtained, the normal conditions imposed on the licence are sufficient in the vast majority of cases to secure restocking. Enforcement notices are a necessary safeguard in the small number of cases in which conditions are not complied with. They also ensure that as well as replanting the felled trees, subsequent maintenance is carried out to prevent losses.

Q 7 Please indicate how many appeals are made at present against restocking notices.

A7

i) Over the past three years in England and Wales, there has been one appeal against a restocking notice.

Q 8 Please indicate what projections, if any, the Forestry Commissioners have made of the effect of the proposed amendments on the number of restocking notices likely to be served annually in England and Wales.

A8

i) The proposed legislative change will result in an increase in the number of Restocking Notices issued, mainly in place of “warning letters”. From past experience, we might expect this to be an additional 20 each year.

Q 9 Please provide a detailed explanation of the procedure which the Forestry Commissioners would follow for determining as a matter of executive decision that the relevant offence had been committed under the Forestry Act 1967 and indicate who within the Commissioners would take a decision that a restocking notice should be served.

A9

i) Following a report being received about an alleged illegal felling (usually from a member of the public), the Forestry Commission Woodland Officer and another member of staff (for corroboration purposes) will investigate and gather evidence at the site of the alleged illegal felling. They will survey the site to ascertain the extent of the felling and measure any felled timber that may still be on the site or estimate the volume using accepted procedures. They will also carry out basic interviews with any people present on the site (or associated with the felling) and may also seek information from witnesses. The purpose of the interviews is to find out the timespan over which the felling took place, whether a felling licence had been issued, the owner of the property and those involved with the felling. This will ascertain whether the felling is exempt from control due to the size of trees, their location and the timescale over which felling has occurred.

ii) Details of the case would be reported to the Conservator, i.e. the Forestry Commission’s regional manager, and then to the Country Director for England or Wales as appropriate with detailed recommendations on actions including whether a Restocking Notice should be issued.

iii) The Country Director, who is also a Forestry Commissioner, will decide whether the circumstances of an offence and the evidence in the case warrant that:

- a. no further action be taken; or
- b. a restocking notice be issued and/or
- c. an offender be prosecuted.

Q 10 Please indicate the Commissioners’ intended timetable for dedicating all of the land for which they have responsibility under section 16 of the Countryside and Rights of Way Act 2000.

A10

i) Jim Knight, Parliamentary Under-Secretary (Commons), Defra launched the dedication of the Forestry Commission's public forest estate in England for public open access on 16th August 2005. The majority of the Commission's Freehold Estate in England (180,000 ha) will be dedicated by the end of November, with all the dedications 'live' by May 2006. In Wales all Freehold dedications are complete and live.

Q 11 Please indicate whether it is the intention of the Scottish Executive to legislate to introduce reforms to the Commissioners' powers in Scotland of a similar kind to those which be effected by Articles 1, 2 and 4 – 6 to the law in England and Wales, and if so, what is the expected timetable for the introduction of legislation in the Scottish Parliament.

A11

i) The Forestry Commission cannot prejudge the intentions of the Scottish Executive. However, we are currently involved in talks with them to facilitate identical changes in Scotland during the next Parliament. This will require primary legislation and we have been advised that the earliest we could expect Parliamentary time is in 2007.

Q 12 Please indicate whether the Commissioners consider the increased or enhanced provision of recreational facilities by a government department acting in partnership with other bodies will adversely affect the revenues of competing private businesses, and if not, why not.

A12

i) The development of new facilities will open up opportunities for the private sector to develop commercial activities using the 'green' infrastructure provided by the Forestry Commission estate. Such facilities are often under-provided at present. In many rural areas, there is a need to stimulate economic activity and encourage innovative use of the natural resources with which they are endowed. The aim, therefore, is to release opportunities rather than crowd out existing activities and provide quality facilities that enhance processes of rural development. Our market research has shown that the overall market for this type of break is growing and that the Forest Holidays product occupies a niche with few direct competitors. However, in any market there is competition and there could be an impact on some other business at the margin.

Q 13 Please indicate whether the Commissioners consider there might be any saving of public expense or other benefit arising from simplifying the existing appeals process in the 1967 Act to provide that appeals against remedial notices might be heard by Magistrates' Courts.

A13

i) The Commissioners do not consider that changing the 1967 Act procedure so as to provide for an appeal to be made to the Magistrates' Court rather than the Minister would result in saving of public expense or other benefit sufficient to warrant such a change.

ii) If a person on whom a restocking notice has been served objects to it in whole or part, he may request the Minister to refer the matter to a committee (consisting of three people), which the Minister is required to do unless she considers the matter to be frivolous. The committee must give the person concerned an opportunity of appearing before it and of making representations, and, if it thinks fit or is required to do so by the person concerned, will inspect the trees or land in question. It must also take into consideration any information furnished by the Commissioners as to the performance within the relevant area of their duty of promoting the establishment and maintenance of adequate reserves of growing trees. After considering the report that the committee is required to make, the Minister may direct the Commissioners to withdraw the notice or may notify the objector that it shall have effect unchanged or subject to modifications.

iii) Over the past three years, there has only been one such appeal in England and Wales (and two in Scotland).

iv) This procedure will incur costs in relation to the involvement of the Minister, the committee (including any remuneration payable to them in accordance with section 27(4)), and the Commissioners (such as where they supply information to the committee on the performance matters noted above).²⁹ The Commissioners consider that an appeal to the Magistrates' Court would involve the making of representations (probably by lawyers), possible site visits, and the calling of relevant evidence by both the appellant and the Commissioners. On this basis, they consider it unlikely that a Magistrates' Court appellate system would be significantly faster or, indeed, simpler to operate than the current procedure. Whilst the Commissioners are not in a position to assess the full costs involved in a Magistrates' Court hearing (which should take into account not only the parties' costs but also those for accommodation, administration and staffing associated with a court hearing), they do not consider it likely that such a court hearing would result in any savings of public costs when compared with the current system.

v) Nor do the Commissioners consider there to be any other benefits in moving to a system of appeals to the Magistrates' Court sufficient to warrant such a change. Consideration has been given to whether the involvement of the Courts in this process could be considered a 'benefit'. However, the Commissioners consider that the current procedure provides a sufficiently informed and objective element, such that involvement of the courts at this stage is unnecessary. Those currently involved in the appeal process – the Minister and the committee – are separate from the Commissioners (indeed it is expressly provided in section 27(1) that no Commissioner or person employed by the Commissioners shall be a member of the committee). Two members of the committee are selected from a panel appointed following consultation with the regional advisory committee for the area concerned,³⁰ as well as with organisations appearing to the Minister to represent the interests of woodland owners and timber merchants, and with organisations concerned with the study and promotion of forestry. Thus the Minister has the benefit of the advice of those closely involved in forestry matters, but independent of the Commissioners, when considering the matter. This brings both objectivity and expertise to the decision-making process, which Commissioners consider to be a significant benefit.

vi) Under the current system, appeals to the Minister can relate to either the content of the restocking notice or its legal validity.³¹ Currently, as a conviction under section 17 is required before a notice can be served, appeals are unlikely to involve claims that the person nonetheless did not commit the offence. However, under the changes proposed to section 17A, a conviction would no longer be required. It is therefore possible that under such a system an appellant might claim that the Commissioners' decision that the offence had been committed was flawed.

vii) As the offence of unlawful felling is a strict liability offence, an appeal on this basis is perhaps most likely to involve a claim that one of the exceptions to the requirement for a felling licence (in section 9) applies. The vast majority of these exceptions relate to the size of trees or the area of timber felled or are otherwise of a factual nature. The exception in section 9(4)(a) (felling which is for the prevention of danger or the prevention or abatement of a nuisance) requires an element of judgement but it is a test that persons professionally involved in forestry have experience of applying. In these cases, the current appeal procedures are considered no less appropriate than an appeal to the Magistrates' Court.

viii) The Commissioners acknowledge the possibility that a question of law might arise, for example, in relation to the precise meaning of the exception for felling in a 'public open space'. However, as noted above, appeals on legal points are already raised and dealt with under the current system. The Commissioners do not consider any advantage there might be in having what they think would probably be a small minority of appeals on legal points of any complexity being heard by the Magistrates to be sufficient justification for

29 These costs have not been quantified for this response.

30 The Commissioners maintain a regional advisory committee for each conservancy in Great Britain, for the purpose of advising them as to the performance of their functions under section 1(3) and Part II of the 1967 Act. The members (between seven and twelve people) are appointed by the Commissioners, and at least four members are appointed only after consultation with organisations appearing to the Commissioners to represent the interests of owners of woodlands and timber merchants respectively and organisations concerned with the study and promotion of forestry.

31 For the two Scottish appeals mentioned above, one appeal concerned the extent of the tree planting and the types of trees that had been specified in the notice, and the other concerned whether the applicant had the sufficient interest in the land that was required by Section 17A in order for the restocking notice to be properly issued.

transferring the appellate process to the Magistrates' Court. Any advantage would be offset by a loss of the valuable experience that the committee currently bring to the proceedings. Moreover, judicial review proceedings would be available as a safeguard against any error of law alleged against the Minister or the committee in dealing with such a point.

I hope these answers address the Committee's questions. However, if you need any further information or clarification, please let me know.

27 October 2005

Reports from the Regulatory Reform Committee in the last Session of Parliament

Session 2004-05

First	Proposal for the Regulatory Reform (Joint Nature Conservation Committee) Order 2005	117
Second	Proposal for the Regulatory Reform (Registration of Births and Deaths) (England and Wales) Order 2004	118
Third	Proposal for the Regulatory Reform (Prison Officers) (Industrial Action) Order 2004	148
Fourth	Draft Regulatory Reform (Joint Nature Conservation Committee) Order 2005	270
Fifth	Draft Regulatory Reform (Prison Officers) (Industrial Action) Order 2005	271
Sixth	Draft Regulatory Reform (Trading Stamps) Order 2005	272
First Special	Operation of the Regulatory Reform Act 2001	273
Seventh	Draft Regulatory Reform (Execution of Deeds and Documents) Order 2005	429
Eighth	Draft Regulatory Reform (National Health Service Charitable and Non-Charitable Trust Accounts and Audit) Order 2005	430
Ninth	Draft Regulatory Reform (Fire Safety) Order 2005	495
Second Special	Government Response to the Committee's First Special Report of Session 2004-05: Operation of the Regulatory Reform Act 2001	431

All reports are available from The Stationery Office.