**Carl Sargeant AC / AM**
**Y Gweinidog Cyfoeth Naturiol**
**Minister for Natural Resources**

Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref LF CS 0561 15

David Melding AM
Chair of the Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
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June 2015

Dear David,

I am writing following my appearance before the Constitutional and Legislative Affairs Committee on 1 June to provide evidence on the Environment (Wales) Bill. I committed to supply further information to help explain the provisions of the Bill and how I am intending them to work in practice.

Section 22 – power to suspend statutory requirements for experimental schemes

Where it is likely to contribute to the sustainable management of natural resources, section 22 gives the Welsh Ministers power, in specific circumstances, to suspend a provision or provisions in legislation. This will enable Natural Resources Wales ('NRW'), where necessary, to undertake an experimental scheme (as provided for in section 23 of the Bill).

The suspension means, in effect, that a person is exempted from a statutory requirement, or that the requirement is relaxed as it applies to a person.

The Bill provides a number of checks and balances for the appropriate application of this power.

- The power may only be exercised by the Welsh Ministers following a detailed application by NRW.
- The suspension must relate to a specific scheme and therefore to the application of a provision in relation to the party or parties involved in the scheme. It is not by any means a 'blanket' suspension.
- A suspension may not be provided for unless it is necessary to facilitate the scheme. The scheme itself must be relevant to the exercise of NRW's statutory functions.
- A three-year time limitation applies, as does an obligation to consult and the the Affirmative resolution procedure.

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Furthermore, the power relates only to legislation in which NRW is responsible for the application of a statutory provision, or the statutory provision applies to NRW and the way in which, or the purposes for which, natural resources are managed or used. The power is therefore limited to legislation relating to the specific functions of NRW.

My department will be working closely with NRW to ensure it has the necessary clarity on the process for making an application to the Welsh Ministers. I would expect that any application by NRW would include the following:.

- Details on what the proposed experimental scheme would entail, its objective and expected duration;
- Why, or in what way, the provision(s) they have identified provides a legal barrier to the scheme it intends to undertake;
- Information on the parties involved in the scheme, including how they are to be involved;
- An assessment of how the suspension of the provision(s) will assist in the sustainable management of natural resources; and
- Information on how the scheme will be monitored.

The Welsh Ministers would then consider the application. As noted, Welsh Ministers would need to be fully satisfied that the suspension is necessary to enable an experimental scheme to be carried out, and that that scheme is likely to contribute to the sustainable management of natural resources. As part of that consideration, the Welsh Ministers must consult with the persons who would be affected by the provision and also the persons affected by the experimental scheme.

If the Welsh Ministers are satisfied that it will, in fact, contribute to the sustainable management of natural resources, the use of the power would then be subject to the agreement of the Assembly via the Affirmative procedure.

The suspension is temporary: limited to three years with the potential to extend, on no more than one occasion, for a further period of no more than three years. In this case the suspension would be in place for a maximum of six years.

For more information on what kind of circumstances under which NRW may wish to make such an application, I refer you to the Explanatory Memorandum, and the Statement of Policy Intent and the examples provided in its Annex.

<u>The policy intent relating to climate change and carbon units, and further information on carbon trading</u>

As I mentioned in Committee on 1 June, our understanding of climate change and the mechanisms to address it are constantly evolving, and it is vital that we are able to respond to these developments quickly. The provisions in the Bill have been drafted in a way that allows us to do this.

Sections 33 and 34 of the Bill outline how we will calculate 'Welsh emissions', which is achieved by the establishment of a 'net Welsh emissions account'.

The 'net Welsh emissions account' is calculated in part by the addition and subtraction of carbon units.

Section 36 enables 'carbon units' to be defined in regulations but this power is limited to three kinds of carbon unit. It includes an amount of greenhouse gas emissions already regulated within an emissions trading scheme to be defined as a carbon unit for the purposes of the 'net Welsh Emissions account'.

At the time of writing, it is intended, that the definition will be units of carbon that can be traded, for example, as in the EU Emission Trading Scheme (EU ETS). The EU ETS works on the 'cap and trade' principle. A 'cap', or limit, is set on the total amount of certain greenhouse gases that can be emitted by the factories, power plants and other installations in the system. The cap is reduced over time so that total emissions fall.

The EU ETS operates in phases, and is subject to regular review by the European Commission. Changes introduced by the Commission could necessitate changes to carbon accounting under the Bill, which is one of the examples that these sections can provide for.

In drafting the relevant provisions of the Bill, we were mindful that any regulatory mechanisms to tackle climate change need to be adaptable to account for new scientific and technological discoveries come to light and new agreements are made at the international and sub-national level. One example will be the 2015 United Nations Framework Convention on Climate Change ('UNFCCC') Conference in Paris in December this year (known as 'COP21'). The UN's forward work programme on Reducing Emissions from Deforestation and forest Degradation ('REDD') may also lead to new binding international agreements. Domestically, the UK Woodland Carbon Code and the pilot UK Peatland Code are good examples of areas where there may be future developments on which we may need to consider how this impacts on the net Welsh emissions account.

These are just a few examples, and with the certainty that there will be more examples looking ahead, it did not seem appropriate to fix a definition on the face of the Bill. Doing so would mean that we would be able to modify the definition to take account of changes at the international, European or domestic level.

As noted in the Statement of Policy Intent, I would wish to make these regulations as soon as is practicable. This work would be necessarily technically complex, and warrants needs careful consideration and analysis. My department would, however, be undertaking this work alongside that in relation to the setting of setting of the five-year carbon budgets.

<u>Current operation of Welsh law in relation to charges to carrier bags as applicable to sellers in England and the Memorandum of Understanding with the UK Government</u>

The carrier bag charge will continue to apply to sellers in England in the same way it applies now. The only difference in the proposed legislation is that the term "seller" will now be defined on the face of the Bill rather than in the regulations. Section 55 of the Bill applies in relation to Wales and, therefore, falls within section 108(4)(b) of the Government of Wales Act 2006.

Sellers, in so far as they operate in Wales, must comply with Welsh law. Supermarkets in England or, for that matter, any businesses elsewhere in the world who deliver goods to households in Wales, will continue to be required to charge for any new carrier bags they supply.

At the Committee session on 1 June, reference was made to the 2013 Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee. The principle of good communication between administrations is a

specific commitment in that Memorandum, particularly where one administration's work may have some impact on the responsibilities of another administration.

While this is an agreement in place between Governments, and not specifically with Local Authorities, the Welsh Government has worked closely with the Local Government Association ('LGA') in England as well as with UK Government departments to ensure that any sellers operating in Wales comply with Welsh law. This has included writing to the LGA to clarify the role of home and primary authorities in England when advising large retailers and to raise awareness of the Welsh Government's enforcement guidance.

I would also like to take this opportunity to confirm my position on section 57 in regards to legislative competence. To be clear, I am satisfied that this provision is appropriate for giving effect to the carrier bag charging regime and therefore falls within section 108(5)(a) of the Government of Wales Act 2006. This being the case there is no requirement to demonstrate that charitable purposes must relate to one or more subjects in Schedule 7 to that Act.

The appeal process in section 74 of the Bill (power to serve notices for protection of European marine sites) and its relationship with the European Convention of Human Rights

Section 5 of the Sea Fisheries (Shellfish) Act 1967 currently allows the Welsh Ministers to determine a Several or Regulated shellfishery if certain matters are occurring, such as if the fishery is not being properly cultivated.

The Welsh Ministers are under obligations (arising pursuant to the Habitats Directive) to protect European Marine Sites ('EMSs') in Wales. There is a concern at present that the powers in section 5 of the 1967 Act may not always be sufficient to ensure that the Welsh Ministers can comply with their European obligations in this regard.

The amendments to the 1967 Act made by sections 74 and 75 of the Bill will allow the Welsh Ministers to take the action necessary to protect EMSs, if shellfisheries created after the coming into force of the Bill are causing harm to such a site, or are threatening to do so. This will ensure that the Welsh Ministers can comply with their Habitats Directive obligations.

The new powers will enable the Welsh Ministers to serve a Site Protection Notice on the grantee of the fishery in question requiring that it is operated (or not operated) in a particular way. The Welsh Ministers can, subsequently, adjust or revoke the Several or Regulating Order in order to reflect the terms of the Site Protection Notice. These new powers will only apply to Several or Regulating Shellfish Orders made after the Bill provisions have come into force. The new provisions will not, consequently, affect any property rights in shellfisheries that currently exist. Any property rights which are created by such Orders after the coming into force of the Bill will have been created subject to the new powers to adjust or interrupt the same.

Whilst the new powers will enable the Welsh Ministers to adjust or revoke a Several or Regulating Shellfishery Order where that is in the public interest (i.e. in order to protect the marine environment where necessary to comply with the Welsh Ministers obligations under the Habitats Directive), the Welsh Ministers are, of course, under a duty to comply with the European Convention on Human Rights and with that in mind, the new section 5C of the 1967 Act (inserted by section 74 of the Bill) provides an appropriate appeal mechanism which will help ensure that any interference with the property rights is proportionate, and thus providing sufficient protection of property rights.

An appeal may be brought, in relation to a Site Protection Notice, before the First-tier Tribunal which has the power to confirm, vary or cancel the Site Protection Notice, and

order the Welsh Minister to pay compensation if appropriate. The First-tier Tribunal also has the power to suspend or vary a Site Protection Notice until the appeal is concluded.

The Welsh Ministers power to amend or revoke a Several or Regulating Order is undertaken by way of Statutory Instrument which will also be subject to Assembly scrutiny under the Negative procedure. That instrument can only reflect the terms of the Site Protection Notice and can only be made after any period within which an Appeal in relation to the same has expired or the appeal has been determined. The Appeals mechanism set out in section 74 is also, therefore, effective in providing sufficient protection for any property rights affected by the making of an amending or revoking Order under section 75 of the Bill.

I believe that sections 74 and 75 of the Bill will enable the Welsh Ministers to adjust or revoke a Several or Regulating Shellfishery Order where that is in the public interest – i.e. in order to comply with Habitats Directive obligations – and that the new appeals mechanism will help to ensure that any interference with property rights that results from those new powers will be proportionate. I am satisfied that these provisions provide sufficient protection of property rights.

I hope that these explanations are helpful. If you would like any further information on the Bill and how I see it functioning, please contact me. I am copying this letter to the Chair of the Environment and Sustainability Committee.

Yours sincerely

**Carl Sargeant AC / AM**
Y Gweinidog Cyfoeth Naturiol
Minister for Natural Resources

CC: Alun Ffred Jones AM, Chair of the Environment and Sustainability Committee