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Annwyl Simon

THE 2015-16 ACCOUNTS OF NATURAL RESOURCES WALES

Thank you for your letter of 16 December 2016.

As we discussed over the phone, it is correct to say that there is no discretionary power to delay the laying of the certified statement of accounts of NRW and report thereon (as required under paragraph 23(5)(c) of the Natural Resources for Wales (Establishment) Order 2012). The situation with NRW's accounts is, however, not a matter of exercising a discretionary power. Instead, it is a situation where there are several legal obligations, and it is not possible in the present circumstances to meet them all.

As well as the obligation to lay the certified statement of accounts together with my report by 23 December 2016, I am also under a statutory duty to comply with the Code of Audit Practice pursuant to section 10 of the Public Audit (Wales) Act 2013. The Code includes several requirements, reflecting the need to undertake audit functions properly. Among other things, the Code requires that after conducting fieldwork the auditor must draw evidence-based conclusions and offer audited bodies and relevant third parties the opportunity to comment on the factual accuracy of the findings. As well as being a requirement of the Code, the opportunity to comment is important to provide natural justice.

It is perhaps worth noting that case law (*R v Secretary of State for the Home Department Ex p Doody [1994] 1 A.C. 531*) has confirmed the established common law requirement that administrative functions conferred by statute must be "exercised in a manner which is fair in all the circumstances". In particular, *Doody* sets out that fairness very often requires that a "person who may be adversely affected by [a] decision will have an opportunity to make representations." The matters arising from NRW accounts relate to certain contracts. It is not possible to report in

relation to those matters without breaching natural justice unless I give the contracting parties the opportunity to make representations.

For context, I should also explain that the full nature of our findings only became apparent following our receipt of finalised external legal advice on 28 November 2016. As I mentioned in my letter to the Chair of PAC of 14 December, it has been necessary for NRW to gather a significant quantity of documentation, which took nearly two months, and in addition it has been necessary for WAO staff to review that documentation and obtain external legal advice. It has not been possible, and it is not possible, to provide the contracting parties with the opportunity to make representations by 23 December (the deadline set by the Establishment Order).

The legal advice I have received is that the appropriate approach to resolving a conflict of duties (including potential breach of statutory duty) is to analyse the effect of a breach of duty. This is to be done in terms of the importance of each provision and the relation of the provisions to the general objective to be secured. In assessing the importance of a provision, particular regard should be given to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected and the importance of the procedural requirement in the overall administrative scheme established by statute.

Clearly the duty to offer affected parties the opportunity to comment on findings engages individual rights, whereas it is not apparent that the statutory time limit engages such rights. Although there is a public interest in swift administration, including audit functions and the provision of a report on accounts to enable public scrutiny, it is not apparent that any substantial prejudice would be suffered as a consequence of not meeting the statutory time limit. This is particularly the case as it is my firm intention, as I emphasised during our telephone conversation, to lay the certified accounts and report as soon as possible in the New Year. That is in contrast to the potential substantial detriment to NRW and a contractor, if I were to lay the certified accounts and my report before giving the affected parties the opportunity to comment.

I should perhaps also explain that when the impossibility of laying by 23 December 2016 became apparent, I considered the possibility of obtaining an extension to the deadline. However the Establishment Order itself does not contain such a facility. In other circumstances, it might be possible for the Welsh Ministers to make an order under section 13 of the Public Bodies Act 2011 containing provision (by virtue of section 15 of the 2011 Act) to modify the laying deadline. It is, however, apparent from sections 18 and 19 of the 2011 Act that the Welsh Ministers must consult for at least 12 weeks before laying a draft order and that the draft order must be laid a minimum of 40 days before coming into force. These requirements make the extension of the deadline through such procedure impractical.

We also discussed during our telephone call the possibility of addressing the present conflict of requirements of the Establishment Order and the Public Audit (Wales) Act 2013 through further legislation. I would suggest that if the opportunity arises, consideration be given to amending the

Establishment Order and other relevant audit provisions so that the statutory time limit does not apply in a way that conflicts with the requirements of the 2013 Act. One means of achieving this would be to provide that the four month time limit does not apply in circumstances where its application would be prejudicial to compliance with the Code of Audit Practice issued under the 2013 Act. Such amending legislation could form part of wider reform to make audit provisions clearer and more consistent across different public bodies, as, I understand, was originally envisaged with the draft Public Audit (Wales) Bill. I should be happy to discuss options to address this issue further.

To conclude I would repeat that it is my firm intention to lay the certified accounts and report as soon as possible, once I have given adequate opportunity for the relevant parties to comment on my findings.

Yn gywir



HUW VAUGHAN THOMAS
AUDITOR GENERAL FOR WALES