

# HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

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1st Report of Session 2012-13

## **Public Bodies Orders:**

**Draft British Waterways Board (Transfer of Functions) Order 2012**

**Draft Inland Waterways Advisory Council (Abolition) Order 2012**

**Draft Public Bodies (Child Maintenance and Enforcement Commission: Abolition and Transfer of Functions) Order 2012**

## **Correspondence:**

**Statement of Changes in Immigration Rules (Cm 8337)**

Includes 1 Information Paragraph

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*Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)*

The Committee has the following terms of reference:

- (1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—
  - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
  - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,
 with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).
- (2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
  - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
  - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
  - (c) that it may inappropriately implement European Union legislation;
  - (d) that it may imperfectly achieve its policy objectives.
- (3) The exceptions are—
  - (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
  - (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
  - (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.
- (5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

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*Registered interests*

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*Publications*

The Committee's Reports are published on the internet at [www.parliament.uk/seclegpublications](http://www.parliament.uk/seclegpublications)

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If you have a query about the Committee or its work, including concerns or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email [seclegscrutiny@parliament.uk](mailto:seclegscrutiny@parliament.uk).

*Statutory instruments*

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# First Report

## PUBLIC BODIES ORDERS

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### A. Draft British Waterways Board (Transfer of Functions) Order 2012

#### *Introduction*

1. The Draft British Waterways Board (Transfer of Functions) Order 2012 (“the draft Order”) has been laid under section 5(1) of the Public Bodies Act 2011 (“the 2011 Act”). The draft Order has been laid by the Department for Environment, Food and Rural Affairs (“Defra”) with an Explanatory Document (“ED”) and an Impact Assessment (“IA”).
2. The purpose of the draft Order is to transfer statutory functions, so far as exercisable in relation to England and Wales, from the British Waterways Board (“BW”) to the Canal and River Trust (“CRT”), a company limited by guarantee. BW will continue to operate in Scotland, and the draft Order makes consequential changes to the constitution and functions of BW in Scotland.
3. Defra have also provided the Committee with copies of a number of supporting documents, including: a funding agreement relating to a proposed grant agreement between Defra and CRT (“the funding agreement”); the Trust Settlement under which the waterways transferred to CRT will be held in trust in perpetuity on behalf of the nation (“the Trust Settlement”); the draft Transfer Scheme; and the Charitable Objects for CRT. In order to carry out our scrutiny we sought further information on: the risks around the changes; the transfer of enforcement powers; the charitable status of CRT; and the issues around freight activity (see Appendix 1).
4. An amendment was moved by Lord Bradshaw in the House at Committee Stage on the Bill to leave BW out of Schedule 5 to the 2011 Act. In the debate, a number of issues were raised about the proposals, including around the maintenance of the waterways, the transfer of the public duties that BW currently undertakes, and around freight.<sup>1</sup>

#### *Overview of the proposal*

5. BW is a public corporation with a statutory responsibility for operating and maintaining those waterways, docks and harbours in Great Britain that were transferred to it in 1963 (as one of the successors to the British Transport Commission under the Transport Act 1962) together with waterways and docks acquired or restored since then. BW is required by statute to maintain the majority of the waterways in a suitable condition for the craft which use them. BW’s 2,200 mile network of historic canals, rivers and docks is visited by 13 million people a year. Defra say it delivers an annual £500 million in benefits to the nation, from amenity, flood relief and employment to green infrastructure, neighbourhood renewal and wildlife corridors (ED paragraph 7.1).

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<sup>1</sup> HL Deb 9 March 2011 Cols 1660-66

6. The Government have policy responsibility for inland waterways in England and Wales. Responsibility for inland waterways in Scotland is devolved to Scottish Ministers. BW operates across Great Britain and was specified as a cross-border public authority for the purposes of the Scotland Act 1998. As a result of a 2000 Order<sup>2</sup>, Scottish Ministers hold largely the same functions with regard to BW in Scotland as those held by the Government for BW in England and Wales (ED paragraph 7.2).
7. The Government's policy intention is that CRT should replace BW in England and Wales, and that the assets and statutory functions of BW in England and Wales should be transferred to CRT. CRT has been registered<sup>3</sup> as a charity by the Charity Commission under registration number 1146792. The Scottish Government have decided to retain the Scottish waterways in the public sector. Statutory functions of BW will be transferred in England and Wales to CRT by means of this instrument (ED paragraph 7.3).
8. A transfer scheme will be made by the Minister using the powers under section 23(1) (a) of the 2011 Act at the same time as the order is made. This will transfer certain property, rights and liabilities of BW. The Transfer of Undertakings (Protection of Employment) Regulations 2006 will apply to this transfer. The transfer scheme will be laid in Parliament once the order has been made (ED paragraph 4.6). **It would be helpful for the House if the Minister could lay a draft of the transfer scheme in the Library of the House in advance of the debate on this draft order.**

#### *Role of the Committee*

9. The Committee's role as set out in its Terms of Reference is to "report on draft orders and documents laid before Parliament under section 11(1) of the 2011 Act in accordance with the procedures set out in sections 11(5) and (6)". A key aspect of this role is the Committee's power to trigger the enhanced affirmative procedure which would require the Government to have regard to any recommendations made by the Committee during a 60-day period from the date of laying. The Committee may also consider taking oral or written evidence in order to aid its consideration of the orders. On 27 March the Committee triggered the 60-day enhanced affirmative procedure for the draft Order and the linked Draft Inland Waterways Advisory Council (Abolition) Order 2012. The Committee then took oral evidence on the draft Order from Richard Benyon MP (Parliamentary Under-Secretary for Natural Environment and Fisheries), as well as Robin Evans (Chief Executive of BW and Chief Executive designate of CRT) and Nigel Johnson (Legal Director and Corporate Services Director of BW and Company Secretary to CRT), and John Kittmer, Deputy Director of Inland Waterways at Defra on 24 April. A transcript of the evidence session is available on the Committee's website.<sup>4</sup>

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<sup>2</sup> Scotland Act 1998 (Cross-Border Public Authorities)(Adaptation of Functions etc)(No.2) Order 2000

<sup>3</sup><http://www.charity-commission.gov.uk/Showcharity/RegisterOfCharities/CharityFramework.aspx?RegisteredCharityNumber=1146792&SubsidiaryNumber=0>

<sup>4</sup> [http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/Correct-Transcript-of-Merits-Committee-\(British-Waterways-Board\)-24-April-2012.pdf](http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/Correct-Transcript-of-Merits-Committee-(British-Waterways-Board)-24-April-2012.pdf)

*Consultation*

10. In March 2011 Defra launched a consultation on the Government's proposals to place those waterways in England and Wales which are owned by the state in trust for the nation through the establishment of a civil society organisation, a new waterways charity. The consultation invited views from 99 organisations on the new charity's objectives and purpose, governance model and operation and how best to secure the financial stability of the waterways. Defra received 350 responses, the majority of which were supportive of the move to charitable status (ED paragraph 8.2 and 8.3). The ED provides a response to various issues raised in the consultation (ED paragraph 8.4 to 8.14). The Government have also published a response to the consultation<sup>5</sup>. Because some respondents had asked for further detail about the duties being transferred the Government decided that there should be further consultation on these issues (ED paragraph 8.16). Defra therefore ran a further supplementary consultation receiving 61 responses. The ED includes a response to the issues raised in this supplementary consultation (ED paragraph 8.18 to 8.29) and Defra have published the Government's formal response.<sup>6</sup>
11. In addition to the formal written consultations, the ED says that the Government have engaged frequently with stakeholders via meetings, workshops and focus groups which have targeted regular users of the waterways, as well as those who do not currently visit the waterways, to help prepare for charitable status (ED paragraph 8.31). **The Committee considers that Defra have done a solid job of engaging with stakeholders in the development of this policy.**

*Tests in the Public Bodies Act 2011: assessment of the proposals*

12. Section 8(1) of the 2011 Act requires that a Minister may only make an order under sections 1 to 5 of the Act if the Minister considers that the order serves the purpose of improving the exercise of public functions, having regard to – (a) efficiency, (b) effectiveness, (c) economy, and (d) securing appropriate accountability to Ministers. The Minister considers that the transfer of the functions of BW in England and Wales will lead to greater efficiency, effectiveness and economy, and that accountability will be maintained (ED paragraph 7.15).

*Efficiency and effectiveness*

13. The ED argues that the exercise of public functions will improve because waterways users and communities that live alongside waterways will have greater involvement in how the waterways are managed. The transfer of functions and property of BW in England and Wales to "civil society" will achieve this by giving key stakeholders a role in the governance of the waterways and allowing them to bring their expertise and passion to the organisation. Greater local community engagement is particularly important as this will help communities recognise what the waterways have to offer in achieving their objectives such as public health, well being and "green travel" to work, as well as opening up opportunities for regeneration in both inner city and rural areas (ED paragraph 7.16 and 7.17). The ED says that CRT's

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<sup>5</sup> <http://www.defra.gov.uk/consult/files/110912-waterways-summary-responses.pdf>

<sup>6</sup> <http://www.defra.gov.uk/consult/files/201212-waterways-summary-responses.pdf>

new governance structures are specifically designed to ensure accountability to the wide community of interested parties, not just waterways users, including environmental and heritage groups, local communities etc. (ED paragraph 7.20). 11 Waterways Partnerships and an All Wales Waterway Partnership will encourage participation at a more local level. Each of the Waterways Partnerships will draw up a localism strategy, to foster participation and volunteering at a local level (see Appendix 1). A good case was made in oral evidence that CRT will be able to mobilise public support in a way that BW cannot. Robin Evans told us that “there is a completely different feel to an organisation that runs a national heritage treasure as a charitable trust as opposed to a public department ... People would not give us money if we were a public department”; and that “Since we announced that we were becoming a trust, the number of volunteer days has increased to 39,000 this year and we will end up with 100,000 or more volunteer days” (QQ38 and 39).

### *Economy*

14. The Government have agreed a long-term funding agreement with CRT until 2026/27 which means that CRT will receive over £800 million over the 15-year term of the agreement. The property and assets being transferred to CRT include not just the infrastructure of the waterways, but also a substantial portfolio of investment property which originated from the development of surplus operational land but which has been substantially grown by BW by the re-investment of capital development returns over recent decades. This commercial property portfolio, worth around £460 million and used by BW to fund repair, maintenance and operation of the network infrastructure, will be transferred to CRT for the same purposes, along with the rest of the network (ED paragraph 7.7)
15. In the evidence session the Minister said that the 15-year funding agreement would allow them to take a long-term view, putting repairs and maintenance on a strategic level (Q20). Nigel Johnson explained how the funding agreements would “go beyond simply proper spending; they seek to achieve certain outcomes”. He gave the specific example of towpaths: at the moment there is no public right of access to all towpaths, but it will be an obligation under the trust settlement and funding agreement that such access be maintained to certain standards (Q14).
16. The ED says that the change will enable waterways in England and Wales to be placed on a more financially sustainable long-term footing through CRT being able to access new commercial and private income streams (including legacies, donations, borrowing and other fund-raising activities), as well as providing greater opportunity to recruit volunteers to support heritage, environmental and amenity waterway assets (ED paragraph 7.17). And further savings are expected as CRT develops new income sources, with potential sources of new revenue including: fundraising activities; donations; charitable grants and legacies; an ability to borrow against the body’s property assets and facilitation of wider commercial activities (ED paragraph 7.19). The IA estimates<sup>7</sup> that CRT might achieve net additional resources of around £12 million per annum by 2026, although significant increases are not expected in the early years of the charity. In evidence to the Committee,

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<sup>7</sup> Impact Assessment pages 5 and 6

Robin Evans acknowledged that “in the early years, we will probably spend more money than we receive” (Q32).

17. The IA estimates the total costs of the change as being £243 million – a significant sum. This figure includes: transition costs; costs of fundraising and recruitment; and a transition cost of one-off payments related to pension deficit and loan repayment (IA page 2). The IA estimates the benefits as being £764 million, the majority of which are real welfare benefits which are not financially realisable benefits (IA page 2).
18. Defra have identified as one of the key risks that CRT does not generate sufficient income to support the waterways into the long term. However, they say that their projections of charitable income are based on market research, expert judgement and benchmarking, and have been prudently adjusted; and the CRT Trustees are confident that the charity is viable (see Appendix 1).
19. The statutory obligation to facilitate freight traffic on the designated commercial waterways will transfer to CRT. Whilst there is a limited amount of freight carried on the BW waterways in England and Wales, this generates an income of around £500,000 per year. However, Defra say that the principal issue is the costly requirement to maintain navigable dimensions on the commercial waterways well in excess of that needed for leisure traffic, but which is required by only a very small amount of freight traffic. And these cost pressures are significantly greater than the income generated from freight traffic (see Appendix 1).
20. Financial sustainability will clearly be central to the success of the proposals. In evidence the Minister and John Kittmer provided the Committee with a clear view of the Government’s aspirations for the financial future of the new organisation, and set out the provisions that have been set up in case the charity were to fail (Q40). John Kittmer also spoke of an “intermediate situation” between the charity being the success that they want and being a failure. In such a situation, where the charity did not get the income it hoped and might not be able to meet its liabilities, they would expect the charity “to cut its cloth accordingly and to realise efficiencies” (Q40). Given the amount of public money in the funding arrangement, Parliament has a legitimate interest in the financial wellbeing of the new organisation. **In order to allow for scrutiny of the financial development of the new organisation, the Committee recommends that Defra provides Parliament with a Written Statement setting out the financial position of CRT two years after the draft Order is made.**

#### *Accountability*

21. The Government argue that accountability is maintained in a number of areas. CRT’s new governance structures are designed to ensure accountability to the wide community of interested parties, the charity will also be accountable to Defra through its funding agreement, and CRT will also be accountable under the terms of the Trust Settlement. Crucially the Minister told us that “the new body will be much more accountable to those who use the waterways, who currently have to rely on the good offices of seeking to bend the ears of British Waterways, and occasionally of Ministers” (Q5). CRT will also be accountable through the “protector” arrangements to be put in place for the commercial property portfolio under which the stewardship of that portfolio will be monitored by an investment professional reporting to Defra (ED paragraph 7.20). The Minister and Robin Evans set

out the governance arrangements in detail in the evidence session (QQ20-23).

22. The Committee sought further information from Defra on the proposed charitable status of the new organisation (see Appendix 1). An interesting feature of the transfer is that some powers of compulsory purchase will pass to CRT. When asked about this in the evidence session, John Kittmer said “there are already a number of canals that are held by charities or private companies. The National Trust and the Inland Waterways Association run canals, which also have, reflecting their history, the same plethora of statutory powers and back-up” (Q 19). There are also a number of statutory undertakers, including private and not-for-profit companies (such as Network Rail and Water and other utility companies), which have compulsory purchase powers. The Transport Act 1962 (as amended) will provide that the Acquisition of Land Act 1981 will apply to CRT as if it were a local authority (in common with other statutory undertakers, public or non-public). Any compulsory acquisition will require ministerial authorisation and can be challenged by members of the public, in accordance with the statutory code under the Acquisition of Land Act. The power is available for operational reasons only and the CRT will have to act in accordance with its Charitable Objects in exercising functions such as compulsory purchase (see Appendix 1).
23. CRT will also receive BW’s existing power to make subordinate legislation under the British Transport Commission Act 1954 (as amended) to regulate canal use and conduct on the canal. These byelaws have to be published in draft and are subject to ministerial scrutiny and confirmation before they can come into force. Defra intend to transfer to the new charity the power to make byelaws, and the Ministerial confirmation role will continue. Defra say that CRT would not be the only non public sector body to have a power to make byelaws e.g. water companies can make byelaws, and within the charitable field, the National Trust has the power to make byelaws (see Appendix 1).

#### *Safeguards*

24. Section 8(2) of the 2011 Act requires that a Minister may make an order only if the Minister considers that (a) the order does not remove any necessary protection, and (b) the order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.
25. The Minister considers that the conditions in section 8(2) are met as the powers currently exercised by BW in England and Wales which transfer to the CRT will not change and have limitations and safeguards relevant to them. These include: notice requirements; rights of appeal to special bodies or the courts; and requirements for ministerial approval (ED paragraph 7.24). In addition, the 2011 Act allows for transferred functions to be modified, hence if it were decided that the powers require additional safeguards, the order could be used to add those safeguards on transfer (ED paragraph 7.25).
26. The draft Order will transfer enforcement powers currently exercisable by BW to CRT. These powers fall broadly into three categories: (i) powers of entry to land to gain access to waterway infrastructure to undertake inspection and or repairs, (ii) powers to inspect vessels for safety compliance

purposes (particularly with regard to fire and explosion risks), and (iii) powers to move vessels elsewhere on a waterway (when obstructing other vessels or for the purpose of works) or to remove vessels from the waterway that are not lawfully present on the waterway.

27. The Committee has received a submission from the National Barge Travellers Association (“NBTA”), a volunteer organisation which campaigns and provides advice for itinerant boat dwellers on Britain’s inland and coastal waterways. The NBTA are concerned about the transfer of the BW’s statutory enforcement powers to a charity. They say that this will reduce the already minimal rights and avenues for redress available to boat dwellers and will put thousands of people at increased risk of homelessness. NBTA believe that the draft Order should be abandoned unless and until specific measures are put in place protecting boat dwellers from harassment, unlawful eviction and homelessness. The full submission and a number of linked submissions from individual boat dwellers are available on the Committee website<sup>8</sup>.
28. Defra say that the enforcement powers will continue to be subject to existing safeguards, such as requirements to give notice, rights of appeal, rights to compensation etc depending on the nature and severity of the power. In addition to the statutory safeguards and access to redress, BW currently funds, and CRT will also fund, an independent Waterways Ombudsman to adjudicate complaints of maladministration at no cost to the complainant. The Ombudsman has and will continue to have power to award financial compensation to successful complainants (see Appendix 1). In the evidence session, Robin Evans said that the governance of the new organisation will involve 150 people up and down the country, locally and nationally, and that “it will be a much more engaged organisation that will reflect the will of the people” (Q 20). On the basis that all existing safeguards and processes will continue in place, the draft order would seem to meet the statutory tests. **However, the Committee recommends that CRT demonstrates that it has taken into consideration the specific needs of all stakeholders, including itinerant boat dwellers, in the development of all future byelaws.**

#### *Title of the order*

29. Defra have now laid three public bodies orders under the 2011 Act in close succession, none of which include the words, “Public Bodies” in the title. The Committee raised this issue with the Minister in the oral evidence session as it will be easier for the House to follow this type of legislation through Parliament if the titles for all future orders include these words (Q46). **The Committee notes the commitment given by Defra that the titles for all future orders will include the words “Public Bodies ... Order” as set out in Cabinet Office guidance<sup>9</sup>.**

#### *Conclusions*

30. The changes proposed by the draft Order are possibly the most significant of any in this type of order considered by the Committee so far. There seems to

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<sup>8</sup>Available at <http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/public-bodies-orders/public-bodies-orders-considered/>

<sup>9</sup> Available on Cabinet Office website on: <http://www.cabinetoffice.gov.uk/resource-library>

be a good level of support for the changes and Defra appears to have stayed close to the stakeholder base in the development of the policy. Indeed, the Government's view that the mobilisation of stakeholders' enthusiasm for waterways will enable the CRT to act more effectively than BW in the exercise of the relevant public functions stands out as the key piece of positive evidence in relation to the tests in the 2011 Act (see paragraph 13 above) and it is this that tips the balance in terms of the Government's ability to demonstrate that the statutory tests have been met. The Committee considers that other evidence designed to show that the Order meets these statutory tests is at best equivocal. The Committee triggered the 60 day enhanced affirmative procedure for this instrument and makes two recommendations in this report to which the Minister must now have regard.

## **B. Draft Inland Waterways Advisory Council (Abolition) Order 2012**

### *Introduction*

31. The draft Inland Waterways Advisory Council (Abolition) Order 2012 ("the draft Order") was laid on 29 February 2012 under section 1 of the Public Bodies Act 2011 ("the 2011 Act"). The draft Order was laid by the Department for Environment, Food and Rural Affairs ("Defra") with an Explanatory Document ("ED"). The draft Order is linked to the Draft British Waterways Board (Transfer of Functions) Order 2012.
32. The purpose of the draft Order is to abolish the Inland Waterways Advisory Council ("IWAC") in England, Wales and Scotland, established by sections 110 to 110C of the Transport Act 1968 (inserted by sections 74 to 77 of the Natural Environment and Rural Communities Act 2006).
33. An amendment to remove IWAC from Schedule 1 (power to abolish bodies and offices) was tabled by Lord Faulkner of Worcester and Lord Berkeley at Committee stage on the Bill in the House of Lords. Some concerns were raised about the timing of its abolition in relation to the creation of the new waterways charity in England and Wales. And the Government said that timing of IWAC's abolition would be considered following consultation on British Waterways ("BW") and creation of the new charity. After debate, the amendment was withdrawn (HL Deb 11 January 2011 cols 1349-54).<sup>10</sup>

### *Overview of the proposal*

34. IWAC is an independent, advisory non-departmental public body ("NDPB") which provides advice to Government and other interested persons on matters considered appropriate and relevant to Britain's inland waterways. IWAC's remit covers all of the inland waterways in England and Wales. In Scotland its remit covers those inland waterways that are owned or managed by, or which receive technical advice or assistance from, British Waterways (ED paragraph 7.1 and 7.2).
35. The ED says that following public consultation, the Government have decided that IWAC should be abolished because it is no longer needed to help develop policy for the inland waterways as this is a role for Government Departments and Ministers (ED paragraph 7.4). The ED also says that the

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<sup>10</sup> <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110111-0002.htm>, see also ED paragraph 7.16

proposal to move BW into civil society in 2012 outside Government control and management and to set up the new waterways charity, the Canal and River Trust (“CRT”) means that there will no longer be a need for a statutory body to provide advice for policy development (ED paragraph 7.4).

#### *Role of the Committee*

36. The Committee’s role as set out in its Terms of Reference is to “report on draft orders and documents laid before Parliament under section 11(1) of the 2011 Act in accordance with the procedures set out in sections 11(5) and (6)”. A key aspect of this role is the Committee’s power to trigger the enhanced affirmative procedure which would require the Government to have regard to any recommendations made by the Committee during a 60 day period from the date of laying. The Committee may also consider taking oral or written evidence in order to aid its consideration of the orders. The Committee triggered the 60 day enhanced affirmative procedure for the two linked draft orders. On 24 April the Committee took evidence on the two linked draft orders from Richard Benyon MP (Parliamentary Under-Secretary for Natural Environment and Fisheries), as well as Robin Evans (Chief Executive of BW and Chief Executive designate of CRT) and Nigel Johnson (Legal Director and Corporate Services Director of BW and Company Secretary to CRT). A transcript of the evidence session is available on the Committee’s website.<sup>11</sup>

#### *Consultation*

37. The Government ran a 12-week consultation from 22 August to 14 November 2011 and invited views from 95 organisations (ED paragraph 8.3). The Government received 35 responses. The majority of responses for England and Wales did not support the proposal to abolish IWAC and argued that it should be retained in its current role (ED paragraph 8.4). The ED gives the reasons given as including:
- The knowledge, expertise and experience of the members of IWAC and their quality advice;
  - The importance of independent and objective advice to Government, the continued need for advice during the transition period until CRT is fully established; and
  - That IWAC should be retained until the Environment Agency’s navigations are transferred to CRT in 2015/16 subject to affordability and the agreement of the CRT Trustees which the Government have already announced (ED paragraph 8.4).
38. The ED says that the majority of responses for Scotland agreed that there was no need for IWAC to continue and that it should be abolished (ED paragraph 8.5).
39. The Government have published a response to the consultation<sup>12</sup> and Defra provided the Committee with copies of the consultation responses.

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<sup>11</sup>[http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/Correct-Transcript-of-Merits-Committee-\(British-Waterways-Board\)-24-April-2012.pdf](http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/Correct-Transcript-of-Merits-Committee-(British-Waterways-Board)-24-April-2012.pdf)

<sup>12</sup> <http://www.defra.gov.uk/consult/files/120201-iwac-consult-sum.pdf>

40. The Government have decided that, notwithstanding the responses in relation to IWAC's functions in England and Wales, IWAC should be abolished as a Great Britain body. The ED says that the Government have decided that the creation of the CRT, subject to Parliamentary consent, means that a statutory body is no longer required to provide advice on inland waterways policy (ED paragraph 8.7). Defra say that in reaching its decision to abolish IWAC, the Government took into account the very low number of responses to the consultation in proportion to the number of responses (over 350) to the consultation on creating the new waterways charity (ED paragraph 8.8). **The Committee notes the broader policy context in which the abolition of IWAC is being made, but would expect the Minister to provide a full response in the debate to the key concerns raised in the consultation.**

*Tests in the Public Bodies Act 2011: assessment of the proposals*

41. Section 8(1) of the 2011 Act requires that a Minister may only make an order under sections 1 to 5 of the Act if the Minister considers that the order serves the purpose of improving the exercise of public functions, having regard to – (a) efficiency, (b) effectiveness, (c) economy, and (d) securing appropriate accountability to Ministers. The ED says that the Minister considers that abolition of IWAC will lead to greater efficiency, effectiveness and economy (ED paragraph 7.10).

*Efficiency and effectiveness*

42. The ED says that abolishing IWAC will not only avoid possible duplication of roles but also deliver efficiencies (ED paragraph 7.11). Guidance and advice can be provided by the Association of Inland Navigation Authorities (“AINA”) which covers the interests of the navigation authorities. AINA is also able to provide advice to Government on a range of matters relating to inland waterways policy (ED paragraph 7.10). But in addition, the Government have decided it is more efficient and effective to create ad hoc specialist advisory bodies to deal with specific issues (ED paragraph 7.10).
43. IWAC has a statutory role in relation to appeals on boat construction and equipment standards under the British Waterways Act 1995, although this function has only been exercised once and an appeals panel convened once only (ED paragraph 7.11). The ED says that the creation of the new charity in England and Wales will enable its stakeholders and boating experts to influence changes to boat safety requirements before they are made, removing the need for a statutory body.

*Economy*

44. The ED says that the abolition of IWAC will yield savings of around £200,000 per year to Government in respect of the costs of research projects, the Chairman's fees and Council members' expenses, and the cost of the small secretariat which supports the Council. The Scottish Government contribution to IWAC was £33,000 annually (ED paragraph 7.7).

*Safeguards*

45. Section 8(2) of the 2011 Act requires that a Minister may make an order only if the Minister considers that (a) the order does not remove any

necessary protection, and (b) the order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. The ED says that the Minister considers that the conditions are met – IWAC’s statutory functions as an advisory body have no impact on personal protections, rights or freedoms, and it follows that abolition of IWAC’s functions will not remove any necessary protection nor prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise (ED paragraph 7.14).

46. IWAC has a statutory role in relation to appeals on boat construction and equipment standards under the British Waterways Act 1995. The ED says that should IWAC be abolished, the appeals panel in England and Wales would continue with five members, with two appointed by the Board of CRT; in Scotland, the appeals panel will comprise one person appointed by BW Board and two other persons. The ED says that this approach maintains the principle that that BW/CRT should not outnumber other members, that there should be an odd number of members to prevent hung decisions, and in Scotland takes account of the smaller size of the BW Board in future (ED paragraph 7.15).

*Title of the order*

47. Defra have now laid three public bodies orders under the 2011 Act in close succession, none of which include the words, “Public Bodies” in the title. The Committee raised this issue with the Minister in the oral evidence session as it will be easier for the House to follow this type of legislation through Parliament if the titles for all future orders include these words (Q46). **The Committee notes the commitment given by Defra that the titles for all future orders will include the words “Public Bodies ... Order” as set out in Cabinet Office guidance<sup>13</sup>.**

*Conclusions*

48. There is significant opposition to the purpose of this draft Order. Whilst the Government can point to some savings as a result of the change, the consultation highlighted some significant issues which the Government may wish to address. However, the Committee accepts that in many respects the proposal is consequential to the more significant policy development in the Draft British Waterways Board (Transfer of Functions) Order 2012.

**C. Draft Public Bodies (Child Maintenance and Enforcement Commission: Abolition and Transfer of Functions) Order 2012**

49. The Order was laid before Parliament by the Department for Work and Pensions (DWP) on 23 April along with an Explanatory Document. It seeks to abolish the Child Maintenance and Enforcement Commission (CMEC) as a separate entity and transfer its key functions to the Secretary of State for Work and Pensions. It will operate in future as a separate business unit within DWP with the primary function of facilitating the payment of child maintenance for children who live apart from one or both of their parents.

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<sup>13</sup> Available on Cabinet Office website at: <http://www.cabinetoffice.gov.uk/resource-library>

*Overview of the Proposal*

50. There is no intention to change the services currently delivered by CMEC when its functions are transferred. The promotion of child maintenance, the provision of information and guidance and the delivery of the statutory service will all continue. However this Order represents one small element in a wider reform of the way the service will run that will take several years to deliver. Other elements include the provision of a new computer system from October 2012 and, under the Welfare Reform Act 2012, the charging of fees from 2014. In combination these changes are expected to provide 25% savings, that is £147 million from the current annual budget of £572 million, within this current spending review period.
51. During the passage of the 2011 Act through the House, Lord Freud, the Minister for Welfare Reform made it clear that the key gain expected from this Order would be greater accountability to the Minister.<sup>14</sup>

*Role of the Committee*

52. The House of Commons Work and Pensions Committee has already held an evidence session with the Minister on the Order and this report makes some use of additional material provided in that session.<sup>15</sup>

*Consultation*

53. DWP ran a consultation exercise from 10 October 2011 to 3 January 2012. There were 11 responses of which 5 were broadly supportive, three disagreed and the remainder were neutral. The chief concern raised by respondents was the rigour with which CMECs current objectives will be pursued, how its activities will be reported on following its change of status, and whether the change could be justified on the grounds of improving value for money.

*Tests in the Public Bodies Act 2011: Assessment of the Proposals*

54. A Minister may only make an order under sections 1 to 5 of the 2011 Act if the Minister considers that the order serves the purpose of improving the exercise of public functions, having regard to (a) efficiency, (b) effectiveness, (c) economy, and (d) securing appropriate accountability to Ministers (section 8 of the 2011 Act).

*Efficiency and effectiveness*

55. In paragraph 7.16 of the Explanatory Document DWP states that efficiencies will be realised from the removal of the duplication of Human Resources and finance functions and there will be economies of scale from bringing these and various other functions within the Department. Effectiveness will be improved by Ministers having closer control over service delivery.

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<sup>14</sup> HL Deb 21 Dec 2010 : Col 1059

<sup>15</sup> Uncorrected transcript of the evidence taken on 25 April can be seen on the Work and Pensions Committee website at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmworpen/uc1948/uc194801.htm>

*Economy*

56. The Explanatory Document states that small economies, around £0.5 million per annum, can be attributed directly to this Order as there will no longer be a need for separate annual accounts or remuneration for Board members.
57. Some offsetting transitional costs are mentioned at paragraph 10.2, such as IT changes, but it is difficult to discern what proportion of this would be solely attributable to the effects of this Order and what part to other congruent changes. DWP confirm that there are no staff redundancy costs directly attributable to this Order as staff will transfer from CMEC to DWP as a machinery of government change on equivalent terms. However over time other elements of the reform of the system will see various common functions being merged and the 8,000 staff reduced. Similarly a programme is already in place to reduce the number of premises in the CMEC estate.

*Accountability to Ministers*

58. The key reason for proposing this Order in DWP's view is to remove the interim layer of external management between the Minister and the delivery of the service. This will make the service more directly accountable both to Parliament and the electorate.

*Safeguards*

59. Section 8(2) of the 2011 Act requires that a Minister may make an order only if the Minister considers that (a) the order does not remove any necessary protection, and (b) the order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. One issue which was raised in both consultation responses and the Commons evidence session was whether the accounts of the merged CMEC would remain separately identifiable and transparent to the public. In response to questions from the Commons Work and Pensions Committee the Minister and the Chief Executive of CMEC both said they believed that the transparency and information will be improved as a result of the change. Mr Shanahan said that the quarterly updates that he produces will continue with even more information on arrears, successes etc. (Commons evidence session QQ14-16) There is nothing in the ED or responses to the consultation to suggest the draft Order does not meet the tests.

*Conclusion*

60. This instrument reverses the provisions of the Child Maintenance and Other Payments Act 2008 and returns the CMEC back into the Department for Work and Pensions, thereby increasing direct Ministerial accountability. This is part of a much wider initiative to revise the system and there is some difficulty isolating the effects of this small part of the overall jigsaw. The Explanatory Document makes a fair attempt at explaining the policy intention and how the tests have been met. While the actual value for money improvements delivered solely by the Order are marginal, if seen as a catalytic part of the larger initiative it has the potential to deliver significant improvements to economy, efficiency and efficacy in the longer term.

61. The Committee has found no reason to dispute the effect of the proposed Order and is content to clear the Order within the 40 day affirmative procedure.

## INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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**No new instruments are drawn to the special attention of the House in this report.**

## CORRESPONDENCE

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### **Statement of Changes in Immigration Rules (Cm 8337)**

In our 58th Report of the 2010-12 session<sup>16</sup>, we drew this Statement to the special attention of the House. In addition we wrote to the Home Office Minister seeking assurance that the 21 day convention on statutory instruments is not breached in future. We have since received a response from the Minister and have responded to the Minister's letter, and this correspondence is published in Appendix 2.

## OTHER INSTRUMENT OF INTEREST

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### ***Draft Nationality, Immigration and Asylum Act 2002 (Authority to Carry) Regulations 2012***

62. In response to the attempted terrorist attack over Detroit in December 2009 work has been undertaken to consider the effectiveness of aviation and border security with a view to prevent those who pose a threat from travelling to the UK. This included a review of the UK's counter-terrorism watchlisting arrangements. The proposed scheme will require designated flights or airlines to get clearance before allowing known "undesirables" passage to the UK. For designated flights, airline carriers will need to provide passport information to the "e-borders" division of UKBA no less than 30 minutes before departure. Those on terrorism watchlists may be refused permission to fly, as may those in the process of deportation and others regarded as a threat to national security or subject to a UN travel ban. It should be noted that the measure cannot prevent UK citizens from entering the UK. This instrument also creates a civil penalty regime authorising the Secretary of State to fine the carrier up to £10,000 where the check is not made or the person of interest is carried anyway. More detailed guidance has been published that sets out the full details of the scheme.<sup>17</sup>

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<sup>16</sup> Session 2010-12, HL Paper 285

<sup>17</sup>See the Home Office website "Security and Travel Bans Authority to Carry Scheme 2012" <http://www.homeoffice.gov.uk/publications/about-us/consultations/authority-to-carry/scheme-document?view=Binary>

## **INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE**

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The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

### **Draft Instruments subject to affirmative approval**

Community Right to Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012

Nationality, Immigration and Asylum Act 2002 (Authority to Carry) Regulations 2012

### **Draft Instruments subject to annulment**

Amended Guidance Issued under Section 182 of the Licensing Act 2003

### **Instruments subject to annulment**

- SI 2012/947 Quality Standards for Green Bananas (England and Wales) Regulations 2012
- SI 2012/991 Road Transport (Working Time) (Amendment) Regulations 2012
- SI 2012/1034 School Governance (Constitution) (England) Regulations 2012
- SI 2012/1035 School Governance (Federations) (England) Regulations 2012
- SI 2012/1046 Education (Penalty Notices) (England) (Amendment) Regulations 2012
- SI 2012/1074 Child Benefit and Guardian's Allowance (Administration) (Amendment) Regulations 2012
- SI 2012/1108 Health Research Authority (Amendment) Regulations 2012
- SI 2012/1109 Health Research Authority (Establishment and Constitution) Amendment Order 2012
- SI 2012/1115 Education (Induction Arrangements for School Teachers) (England) Regulations 2012
- SI 2012/1118 Mental Health (Hospital, Guardianship and Treatment) (England) (Amendment) Regulations 2012
- SI 2012/1124 School Information (England) (Amendment) Regulations 2012
- SI 2012/1133 Safety of Sports Grounds (Designation) Order 2012
- SI 2012/1134 Civil Aviation (Air Travel Organisers' Licensing) (Amendment) Regulations 2012

- SI 2012/1135 Jobseeker's Allowance (Amendment) Regulations 2012
- SI 2012/1139 Batteries and Accumulators (Placing on the Market) (Amendment) Regulations 2012
- SI 2012/1154 Milford Haven Port Authority (Constitution) Harbour Revision Order 2012
- SI 2012/1155 Food Additives (England) (Amendment) and the Extraction Solvents in Food (Amendment) (England) Regulations 2012
- SI 2012/1157 Further Education Corporations (Publication of Proposals) (England) Regulations 2012
- SI 2012/1158 Sixth Form College Corporations (Publication of Proposals) (England) Regulations 2012
- SI 2012/1167 Dissolution of Further Education Corporations and Sixth Form College Corporations (Prescribed Bodies) Regulations 2012

## APPENDIX 1: DRAFT BRITISH WATERWAYS BOARD (TRANSFER OF FUNCTIONS) ORDER 2012 AND DRAFT INLAND WATERWAYS ADVISORY COUNCIL (ABOLITION) ORDER 2012

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### Further Information from DEFRA

DEFRA officials have provided the following responses to the questions put by the Committee:

#### *Risks*

*Q1. The Committee would be grateful if you could provide a note setting out the key risks around the changes, and the action to be taken to mitigate those risks*

A. The New Waterways Charity Project is one of the Major Projects Authority's top 200 projects, and is subject to MPA reporting requirements. BW/CRT and Defra have worked collaboratively and constructively to assess the risks and to devise proportionate mitigation. We have in place a robust framework to identify and manage risks – as bearing both on timely delivery of the project and on the subsequent viability of the charity. Within our risk framework, the Project Team manages a risk register and an issues log, while the Project Board provides challenge and oversight. Risks can be escalated within Defra from the Board to the Management Committee. An MPA Gateway Review in November 2011 gave assurance on the approach we have adopted. Many risks have been effectively eliminated as we have taken the work forward; this paper deals with key remaining risks.

I. The **key risks for delivery of the project by July 2012**, together with the mitigating action we are taking, are:

**a) The Charity Commission refuses the registration of CRT**

CRT has been in consultation with the Charity Commission on registration for a number of months. Defra and CRT are confident that CRT's application for registration will be successful. A registration date is expected before the end of April 2012.

**b) Congestion in the Parliamentary timetable delays the signing of the Transfer Order**

Delay to the making of the Transfer Order may result in lost fundraising opportunities. The project timetable has accounted for the possibility that the parliamentary committees trigger the 60-day parliamentary consideration. The lengthier process will put pressure on the timetable. Discussions will take place with the business managers to try to secure timely debates once the committee processes are complete.

II. The **key risks for the viability of the charity after vesting**, together with the mitigating action we are taking, are:

**a) CRT does not generate sufficient income to support the waterways into the long term**

The Government have agreed a long-term funding agreement with CRT until 2026/27 which means that CRT will receive over £800m over the 15 year term of the agreement. The Government is also transferring BW's £460m commercial portfolio to the charity.

The assumptions which have been built into CRT's business model are prudent and build on the experience of BW in managing its commercial operations successfully for many years. The projections of charitable income are based on market research, expert judgement and benchmarking, and have been prudently adjusted. Fund-raising teams are being recruited. The CRT Trustees are confident that the charity is viable.

**(b) CRT does not generate sufficient public engagement**

The Governance structures of the CRT have been designed to maximise public engagement. The Council draws on a very wide range of groups who derive benefit from the waterways. Eleven Waterways Partnerships and an All Wales Waterway Partnership will encourage participation at a more local level. Each of the Waterways Partnerships will draw up a localism strategy, to foster participation and volunteering at local level.

**(c) CRT inappropriately sells the permanent waterways infrastructure or manages its commercial portfolio inappropriately**

We are placing the permanent waterways infrastructure in trust for the benefit of the nation in perpetuity. CRT will become the first and sole trustee of the 'Waterways Infrastructure Trust'. The Trust Settlement will not allow the CRT to sell the permanent infrastructure without the prior consent of the Secretary of State and the Charity Commission.

The Commercial Property Portfolio is intended to be used to generate revenue for the sustainable management of the waterways in the long term. To guard against inappropriate use of the capital, we have agreed a 'protection' arrangement, which will be set out in an annex to the Grant Agreement. Under this, a Statement of Agreed Purposes, agreed between Defra and CRT, will set out the broad uses to which the commercial assets are to be used. CRT, in liaison with a 'Protector', appointed jointly by CRT and Defra, will draw up a medium-term investment strategy, in line with the Statement of Agreed Purposes. The protector will report to Defra from time to time on the compatibility of the strategy with the statement, and on performance. The Secretary of State will have a range of remedies available in the event that the protector issues a 'red warning' about CRT performance.

*Charity status/relationship with Government*

*Q2. The CRT will be a charitable company limited by guarantee. Who will be the guarantors?*

A. Under company law the guarantors will be the members of the company which in the case of CRT will be its Council. The guarantee is limited to £10 per individual, if called upon.

*Q3. Has the CRT been granted charitable status yet? If not, when do you envisage that this will happen?*

A. As a 'shell' company with charitable objects CRT is, in fact, already a charity. Formally, registration is not required until it has an annual income of £5,000 or more. CRT is in a pre-registration dialogue with the Charity Commission with a view to achieving registration in April 2012, in advance of the transfer of functions.

*Q4. The statutory power of compulsory purchase will be transferred to CRT. What will be the process for CRT operating this statutory power of purchase?*

A. The Transport Act 1962 (as amended) will provide that the Acquisition of Land Act 1981 will apply to CRT as if it were a local authority (in common with other statutory undertakers, public or non-public). Any compulsory acquisition will require ministerial authorisation and can be challenged by members of the public, in accordance with the statutory code under the Acquisition of Land Act. The power is available for operational reasons only.

It is also worth noting the following points:

- The Compulsory Purchase power is very rarely (if ever) used but its existence is important as it brings parties to the negotiating table;
- The power is only available for operational reasons/needs;
- The Transport Act 1962 defines ‘land’ as including ‘any interest in land and any right over land’;
- The power is primarily needed to acquire permanent rights of access for inspection purposes;
- Aging infrastructure and modern safety expectations require more frequent asset inspection and some inspection (e.g. the toe of embankments) can only be effectively done from adjoining land;
- Inspections are necessary to comply with statutory duties and are therefore not ‘optional’;
- The British Waterways Act 1995 contains provisions for compulsory temporary access to inspect and to do works, but notice must be served on each occasion;
- Frequent inspection requires a permanent right of access over land. The existence of the power to compulsorily acquire that right invariably enables it in practice to be acquired by private treaty.

*Q5. Are you aware of any other charities with compulsory purchase powers? If so, what is the process by which they are operated?*

A. No, we are not aware of any other charities with compulsory purchase powers. There are, however, a number of statutory undertakers, including private and not-for-profit companies (such as Network Rail and Water and other utility companies), which have compulsory purchase powers.

*Q6. Ministers will retain the current duty to give consent to any compulsory purchase. Does the Government consider that this is compatible with the CRT’s status as a charity?*

A. The Government does consider it compatible with CRT’s role as a statutory undertaker and notes that other not-for-profit statutory undertakers have such powers. The power is available for operational reasons only. CRT will have to act in accordance with its Charitable Objects in exercising functions such as compulsory purchase.

*Q7. Ministers will retain the power to give directions under the Transport Act 1962 in relation to national defence. How will this work in practice? Does the Government consider that this is compatible with the CRT’s status as a charity?*

A. BW does now, and CRT will in future, liaise with the security authorities in relation to threats from terrorism. It is in this field above all that CRT imagines that this provision will be relevant. There may, for example, be reason for a power of direction to be used against the entry of vessels into

London docklands, or the waterways in the vicinity of the London Olympic Games this summer. As above, the Government considers this compatible with CRT's role as a statutory undertaker, notwithstanding its status as a charity.

*Q8 . Will the CRT receive BW's existing powers to make subordinate legislation? If so, what is the scope of the powers? And, do you envisage any risks around transferring these powers to a charity?*

A. CRT will receive BW's existing power to make subordinate legislation. This power is given under section 16 British Transport Commission Act 1954 (as amended), which exists to regulate canal use and conduct on the canal. It is important to note, however that the power currently exercised by British Waterways is subject to relevant limitations and safeguards. These include notice requirements; rights of appeal to special bodies or the courts; and requirements for ministerial approval. Under section 16, byelaws have to be publicised in draft and are subject to ministerial scrutiny and confirmation before they can come into force; we intend to transfer to the new charity the power to make byelaws, and the Ministerial confirmation role will continue. So no law could come into force without the agreement of a Minister who is accountable to Parliament. CRT would not be the only non public sector body to have a power to make byelaws. For example, water companies can make byelaws, and indeed within the charitable field, the National Trust has the power to make byelaws.

We do not envisage any particular additional risks around transferring these powers to a charity. It is quite common for private companies who own specific infrastructure to have statutory powers conferred upon them. For example the utility companies such as energy, water, rail companies all have special statutory powers which they need in order to run such an operation.

### *Freight*

*Q9. What is the current level of freight activity on the waterways?*

A. There is a limited amount of freight carried on the waterways of BW in England & Wales. Traffic is concentrated in the North East area on the Aire & Calder Navigation, the Yorkshire River Ouse, the River Trent, and the Sheffield and South Yorkshire Navigation. There is some traffic on a short stretch of the River Severn in Worcestershire. The largest concentration of tonnage is handled at Sharpness Dock on the Severn Estuary. The total tonnage of freight carried on these waterways or handled at Sharpness is between 1m and 1.5m tonnes each year. This generates an income of around £500,000 per year.

*Q10. What particular challenges will freight activity pose for the CRT?*

A. Freight will pose no greater challenges for CRT than those currently faced by British Waterways. The statutory obligation to facilitate freight traffic on the designated commercial waterways will transfer to CRT. The principal issue is the costly requirement to maintain navigable dimensions on the commercial waterways well in excess of that needed for leisure traffic, but which is required by only a very small amount of freight traffic. These cost pressures are significantly greater than the income generated from freight traffic.

This is not to say that CRT is against commercial operations, or against dredging for them, but rather that deep dredging on some (though not all) the navigations is disproportionate to their use. With this in mind, the Transport Act 1968 will, subject to parliamentary approval of the draft Transfer Order, be amended to give CRT a statutory proposer role, so that it will have an explicit power to seek the reclassification of a waterway in the interests of financial sustainability. It will also be amended so that the Secretary of State has to take into account the financial circumstances of the charity when dealing with applications to reclassify a waterway.

*Q11: Will any enforcement powers transfer from BW to the CRT e.g. powers of entry, powers of search and seizure?*

A: Yes, enforcement powers currently exercisable by BW are being transferred to CRT, subject to Parliamentary approval. These powers fall broadly into three categories: (1) powers of entry to land to gain access to waterway infrastructure to undertake inspection and or repairs; (2) powers to inspect vessels for safety compliance purposes (particularly with regard to fire and explosion risks); and (3) powers to move vessels elsewhere on a waterway (when obstructing other vessels or for the purpose of works) or to remove vessels from the waterway that are not lawfully present on the waterway.

Such powers will continue to be subject to existing safeguards, such as requirements to give notice, rights of appeal, rights to compensation etc depending on the nature and severity of the power. In addition to the statutory safeguards and access to redress, BW currently funds, and CRT will also fund, an independent Waterways Ombudsman to adjudicate complaints of maladministration at no cost to the complainant. The Ombudsman has and will continue to have power to award financial compensation to successful complainants.

Almost all other statutory undertakers (whether public, private or not-for-profit) who operate public use infrastructure have statutory powers of enforcement that are necessary to effectively operate, manage and maintain that infrastructure. The Powers to be inherited by CRT from BW are of a similar nature to the powers conferred on such other statutory undertakers. These long-held powers operate in the interests of the waterways and their users. The draft Transfer Order does not amend or expand them as it transfers them to CRT.

Certain 'live-aboard' boaters who use a vessel as their home have expressed concern about the risk of their boats being removed from the waterways as a result of enforcement action by BW (and in the future by CRT) with the consequential loss of a home. All existing safeguards and processes will continue in place.

Under section 8 of the British Waterways Act 1983, sunk, stranded or abandoned vessels or vessels moored without lawful authority on the waterways may only be removed by BW (and in the future CRT) after due process, including giving any required notice and periods of grace. Wherever a vessel is identified as being someone's home, British Waterways does not exercise its powers under section 8 without having taken the matter to the County Court and obtained a declaration from the Court that the removal is lawful. It is intended that, subject to parliamentary approval of the draft Transfer Order, CRT will follow the same procedures. These procedures have been considered by the courts on a number of occasions and have not

been found to be incompatible with the requirements of the Human Rights Act 1998.

*Q12. Will the CRT receive BW's existing powers to make subordinate legislation? If so, what is the scope of the powers? And, do you envisage any risks around transferring these powers to a charity?*

A. CRT will receive BW's existing power to make subordinate legislation. This power is given under section 16 British Transport Commission Act 1954 (as amended), which exists to regulate canal use and conduct on the canal. It is important to note, however that the power currently exercised by British Waterways is subject to relevant limitations and safeguards. These include notice requirements; rights of appeal to special bodies or the courts; and requirements for ministerial approval. Under section 16, byelaws have to be publicised in draft and are subject to ministerial scrutiny and confirmation before they can come into force; we intend to transfer to the new charity the power to make byelaws, and the Ministerial confirmation role will continue. So no law could come into force without the agreement of a Minister who is accountable to Parliament. CRT would not be the only non public sector body to have a power to make byelaws. For example, water companies can make byelaws, and indeed within the charitable field, the National Trust has the power to make byelaws.

We do not envisage any particular additional risks around transferring these powers to a charity. It is quite common for private companies who own specific infrastructure to have statutory powers conferred upon them. For example the utility companies such as energy, water, rail companies all have special statutory powers which they need in order to run such an operation.

#### *Miscellaneous*

*Q13. Is it correct that the CRT will not take on responsibility for the waterways museums? If so, what is the rationale for this?*

A. The Waterways Museums are owned and managed by the Waterways Trust (an independent charity), rather than by British Waterways. The Trustees of the Waterways Trust and the Trustees of CRT have agreed that the Waterways Trust will merge with CRT after the latter is vested as a charity. That merger will be by private treaty. So although the Waterways Museums will not become part of CRT under the legislation before the House (since they are not currently owned by British Waterways), the intention is that they do become part of CRT under a separate process shortly afterwards.

*Q14. What will be the arrangement for a waterway which runs across the border between England and Scotland?*

A. There are no cross-border artificial waterways between England and Scotland and none (artificial or natural) under the management of British Waterways. For this reason no explicit arrangement has been made for such a waterway. Should there be plans for such a waterway in the future, it would be for CRT and British Waterways' successor in Scotland to agree how best to manage the construction and management.

*Q15. There is a requirement for towpaths to ensure free pedestrian access. Does the requirement apply to horses also? If not, why not?*

A. We recognise that the use by horses of the towpaths was an integral part of the history of the waterways, and that the canals could not have operated without them. At that time, however, there were no public pedestrian access rights to the towpaths. Nowadays, by contrast, CRT has to provide for potentially competing uses of the towpath, and to ensure the proper safety of all users, such as cyclists, anglers and joggers. This means that absolute rights can be granted to pedestrians only, but this does not imply that no access rights can be given to horses (or to cyclists, for that matter). It does, however, mean that their rights are more local and limited. CRT has committed itself to publishing an early policy statement about access to the towpath and the waterways.

**DEFRA**

**March 2012**

## APPENDIX 2: STATEMENT OF CHANGES IN IMMIGRATION RULES (CM 8337): CORRESPONDENCE

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### **Letter from Lord Goodlad, Chair of the Merits Committee to Damian Green MP, Minister for Immigration**

This Statement makes significant changes to the Immigration Rules as they relate to skilled migrants. It was considered by the Committee earlier this week and we agreed that I should write to you about the timing of the Statement.

You will be aware that the Committee has raised concerns about a number of recent Statements, particularly around the explanation of the various policy changes provided to Parliament. It is therefore disappointing that this Statement was laid during recess and fails to comply with the convention that changes should be laid before Parliament no less than 21 days before they will come into force. The Committee does not accept that delays by the Migration Advisory Committee or by the Home Office are an acceptable reason for Parliament being deprived of the scrutiny time it is entitled to expect.

As in this case, the policy changes given effect by these Statements often have a broad impact and significant costs. I would therefore be grateful if you could reassure the Committee that there will be no further breaches of the 21 day convention.

**25 April 2012**

### **Letter from Damian Green MP to Lord Goodlad**

Thank you for your letter of 25 April, about the above Statement of Changes. You are concerned that the changes were laid less than 21 days before coming into force.

Cm 8837 was laid on 4 April. The provisions relating to the renewal of the limit on the numbers of migrants who can come to the UK annually through Tier 2 of the Points Based System took effect from 6 April. This was to provide continuity in the operation of the limit, given that the limit for 2011/12 expired on 5 April. Had we applied the 21 day convention, there would have been a period of suspension of the limit which would have been disruptive for employers. I did consider introducing an interim measure but, given that there are no changes to the level of the substantive limit or to its operation, I did not consider it necessary to have a stopgap as no new costs or requirements are being imposed on users of the system for which they need a period of adjustment, or which Parliament needs time to consider. I have not had any complaints from users of the Tier 2 system about the roll-over of the limit on 6 April.

Of course I would nonetheless have preferred to have been in a position to have complied with the 21 day convention. Last year we committed to a review of the Tier 2 limit carried out by the independent Migration Advisory Committee (MAC) and ultimately we were not in a position to act on their advice earlier than we did. However, it is partly to avoid a recurrence that we have now announced that the current limit will stay in place until April 2014, giving more time to complete and act on the review process than is possible within an annual cycle.

I do want to comply with the 21 day convention wherever possible. You will have noted that the other changes introduced in Cm 8337 will only take effect from 14 June, thus allowing Parliament and employers due time to consider. You will also

have noted that the large package of immigration changes, which were introduced separately by HC 1888 but which also came into force on 6 April, were laid so as to comply with the 21 day convention.

I always endeavour to respect that convention and to provide Parliament with adequate notice and explanation of changes.

**9 May 2012**

**Further letter from Lord Goodlad to Damian Green MP**

Thank you for your letter of 9 May in response to mine of 25 April. The Secondary Legislation Scrutiny Committee considered it at yesterday's meeting.

We welcome the fact that employers and users of the Tier 2 system have not been inconvenienced by the short time allowed between the laying of the instrument and its coming into effect, but the Committee has asked me to reiterate that legislation should not be made to meet operational needs at the expense of allowing sufficient time for Parliamentary scrutiny.

In the last session over a quarter of the instruments the Merits Committee (now the Secondary Legislation Scrutiny Committee) drew to the special attention of the House were from the Home Office: more than from any other Department. Of those Home Office instruments reported, half (7) were Statements of Immigration Rules and our reports document a series of complaints including inadequate information being provided, impact assessments not being produced and inaccurate analyses of consultation exercises. The Committee hope that you will help to ensure that future Statements are properly planned so that when laid before Parliament they are complete, accompanied by all the necessary explanatory material and allow this Committee and the House sufficient time to carry out effective scrutiny.

**16 May 2012**

### APPENDIX 3: INTERESTS AND ATTENDANCE

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 15 May 2012 Members declared the following interests:

***Draft Inland Waterways Advisory Council (Abolition) Order 2012***

***Draft British Waterways Board (Transfer of Functions) Order 2012***

Baroness Butler-Sloss and Lord Scott of Foscote as recreational users of towpaths

Lord Eames as a Member of the Royal Yachting Association

Baroness Eaton as a taker of barge holidays

Lord Methuen as a sometime owner of a narrowboat and taker of barge holidays

***School Governance (Constitution) (England) Regulations 2012 (SI 2012/1034)***

***School Governance (Federations) (England) Regulations 2012 (SI 2012/1035)***

Lord Norton of Louth, as Governor, King Edward VI Grammar School, Louth.

Lord Plant of Highfield, as Governor, Pilgrims' School, Winchester.

***Attendance:***

The meeting was attended by Lord Eames, Lord Goodlad, Lord Hart of Chilton, Lord Methuen, Baroness Morris of Yardley, Lord Norton of Louth, Lord Plant of Highfield and Lord Scott of Foscote.