

Consultation Response Form

The Use of Planning Conditions for Development Management

We want your views on our proposals for amendments to some non-domestic permitted development rights in Wales. Your views on the draft text for the subsequent Amendment Order and draft Technical Guidance document are also sought.

Please submit your comments by: 25/04/2014

If you have any queries on this consultation, please email: planconsultations-b@wales.gsi.gov.uk or telephone Owain Williams on 029 2082 1715.

Data Protection

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

The Use of Planning Conditions for Development Management		
Date of consultation period: 29/01/2014 – 25/04/2014		
Name	Rhian Jardine	
Organisation	Natural Resources Wales	
Address	Glan Teifi Barley Mow Lampeter Ceredigion SA48 7BY	
E-mail address	rhian.jardine@cyfoethnaturiolcymru.gov.uk	
Type <i>(please select one from the following)</i>	Businesses/Planning Consultants	<input type="checkbox"/>
	Local Planning Authority	<input type="checkbox"/>
	Government Agency/Other Public Sector	<input checked="" type="checkbox"/>
	Professional Bodies/Interest Groups	<input type="checkbox"/>
	Voluntary sector (community groups, volunteers, self help groups, co-operatives, social enterprises, religious, and not for profit organisations)	<input type="checkbox"/>
	Other (other groups not listed above) or individual	<input type="checkbox"/>

Q1	Do you think an updated circular on conditions is required?	Yes	Yes (subject to further comment)	No
		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comments: Yes, we welcome the proposal to update the Circular to reflect; legislative changes introduced since the publication of Circular 35/95, and recognised best practice.				

Q2	Do you agree that the information retained from Circular 35/95 should be carried forward into the new circular?	Yes	Yes (subject to further comment)	No
		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comments: Yes. The retained information remains relevant and should be carried forward				

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into the new Circular.

Q3	Do you consider: (i) that all six tests are still relevant today and should be retained?	Yes	Yes (subject to further comment)	No
	(ii) that there are additional tests that could be used (demonstrate with case law if possible)?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comments:
We consider that the six tests can help improve the quality of development, whilst ensuring that conditions attached to a planning permission are reasonable and practicable. We therefore consider that the tests remain relevant and should be retained in the Circular.

Q4	Do you consider that any significant pieces of recent case law have been overlooked, which would provide better examples than those used, to support the text?	Yes	Yes (subject to further comment)	No
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comments:
No comment.

Q5	Are there any topic areas in Chapter 5.0 which should be expanded on, or, are there any new topic areas you consider should be included?	Yes	Yes (subject to further comment)	No
		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comments:
Nature Conservation
We welcome the inclusion of a section on nature conservation in Section 5 of the Draft Circular. However, as currently drafted the guidance relates only to wildlife habitats and 'special' sites. No definition is provided of 'special' sites and we assume they refer to designated sites. So that the Circular is consistent with Planning Policy Wales (PPW) and Technical Advice Note 5 (TAN5): Nature Conservation and Planning, we recommend that the word 'special' is replaced with 'designated and notified'.

Further, this section should be expanded to also make reference to protected

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species, and species of principal importance for biodiversity in Wales.

Additionally, there seems to be a typographical error at the end of paragraph 5.80. The reference to "paragraph 4.29" should be deleted.

Renewable Energy
For improved clarity as to which renewable energy schemes the model conditions are likely to be applied to, paragraph 5.106 should provide a definition of a 'larger renewable energy scheme'. For example, it may be useful to clarify how the definition used here relates to that used in the 'Positive Planning' consultation document.

Other
It may be useful for the Circular to include guidance on the types of conditions that will be pertinent to hybrid applications for planning permission, for example, applications that seek full permission on schemes such as the restoration of a waste site, and outline permission for the principle of residential or mixed use development following the site's restoration. The Circular should set out that the conditions for the outline part of the site should be clearly separate from other parts of the decision notice.

Q6	Do you agree that decision notices should be structured in the manner proposed? If you do not, please suggest an alternative.	Yes	Yes (subject to further comment)	No
		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comments: NRW welcomes the intention to structure conditions as suggested in the consultation document. This should improve clarity on the timeline for discharging conditions.				

Q7	Do you agree that the approved plans and drawings relevant to a decision should be identified in a condition?	Yes	Yes (subject to further comment)	No
		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comments: NRW welcomes the proposal that approved plans and drawings relevant to a decision should be clearly identified in a condition. This approach will provide greater clarity and certainty on the approved works to be undertaken in accordance with a planning permission.				

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Q8	Do you agree with the approach taken towards the term 'unless otherwise agreed by the Local Planning Authority' discussed in paragraph 3.36 of the draft circular? If not, please suggest your preferred approach.	Yes	Yes (subject to further comment)	No
		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Comments:

NRW agrees that conditions should avoid ambiguity. However, there are instances where it may be appropriate to include the term 'unless otherwise agreed by the local planning authority' to ensure there is flexibility in the condition to reflect changing circumstances identified through monitoring regimes, without the applicant having to formally apply to vary the condition under Section 73 of the 1990 Act.

For example, where habitat management plans (HMP) are secured through a planning condition, there is generally a requirement to monitor the effectiveness of agreed measures that have been identified to avoid or mitigate potential harm to acknowledged interests. The measures required to secure the agreed objectives of a HMP can change over time based on the evidence obtained in the monitoring process, and there will often be instances where it will be appropriate to amend the initially agreed measures. Such amendments will require the agreement of the local planning authority. Flexibility is therefore required in such conditions to allow for the necessary amendments to be made to the initially agreed management and monitoring regime, without the applicant having to apply to vary the condition.

In such instances, we therefore consider that there is benefit to the continued use of the term 'unless otherwise agreed by the local planning authority'.

We note the concern regarding the lawfulness and uncertainty that may stem from the use of such tailpiece phrases in poorly drafted conditions. However, the case in R(Midcounties Co-Operative Ltd)v Wyre Forest District Council & Tesco Stores Ltd and Others (2010) referred to retail floorspace, where we accept that the amount of floorspace agreed should be clear to all and not something that should normally be something to be determined at the discretion of the LPA. That case, and the certainty required regarding floorspace however, is very different to amending management regimes following an assessment of monitoring results. The purpose of monitoring is to ensure that the measures being implemented are producing the results predicted. Where the monitoring results demonstrate that is not the case, different measures are sometimes required, and these will be required to be agreed with the LPA.

We consider that further guidance is required to ensure that conditions, where appropriate, reflect the potential for changing circumstances. Further guidance on this matter should be provided in the new Circular.

Additionally, should the Planning Advisory and Improvement Service (PAIS) as proposed in the Positive Planning consultation document be implemented, that

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body could offer training and best practice guidance on how to draft planning conditions to address such matters.

Q9	Do you agree that Local Planning Authorities should provide applicants with advance notice of conditions before an application is due to be determined?	Yes	Yes (subject to further comment)	No
		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<p>Comments:</p> <p>We generally agree with the guidance set out in paragraph 4.3 of the Draft Circular which encourages local planning authorities to discuss potential conditions with applicants. As highlighted in our response to Question 15, early discussions on potential conditions should also involve relevant statutory consultees to ensure that conditions meet the tests of the Circular, and satisfactorily address the identified potential harm, or provide appropriate mitigation. Where statutory consultees recommend a condition, a draft of the condition/s should be discussed with the relevant statutory consultee prior to it being attached to a grant of planning permission to ensure it achieves the measures intended.</p> <p>Any timescale set out in the Draft Circular for when potential conditions should be provided to applicants or statutory consultees should be appropriate to ensure draft conditions can be amended in time for the release of reports/ papers to planning committees.</p>				

Q10	Should guidance be provided in the circular with regards to any other conditions related matter?	Yes	Yes (subject to further comment)	No
		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<p>Comments:</p> <p>Paragraph 4.27: Conditions that Should not be Imposed</p> <p>We welcome the recognition that surveys should be undertaken to inform a decision and should not generally form a condition attached to a planning permission.</p> <p>However, where a planning permission is not implemented for a number of years it may sometimes be necessary to update surveys in advance of the works being implemented. For example, pre-commencement surveys will often be necessary on larger schemes where surveys have been undertaken to inform an EIA prepared in support of an application for planning permission. Given that a number of years may have elapsed from when the original surveys were undertaken to when the planning permission is granted, to when development is</p>				

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implemented, the protected species interest at a site may have changed considerably. To ensure there is no breach of European legislation, no likely detriment to the favourable conservation status of European Protected Species, and that developers are not required to implement mitigation measures when a species is no longer present at the site, it will often be prudent to require pre-commencement surveys as a condition on planning permissions for EIA schemes that are likely to take a number of years to come to fruition. We therefore recommend that paragraph 4.27 is amended to clarify the exceptional circumstances when surveys may be required through a condition to a planning permission.

Paragraph 5.54: Contaminated Land
 We have concerns in relation to the guidance provided in this paragraph. Where there is a suspicion that the site might be contaminated, we would expect that a Preliminary Risk Assessment is undertaken and provided in support of an application for planning permission.

Only, where the proposed site is located within an area of low sensitivity would we consider it appropriate to allow a planning permission to be granted prior to a site investigation/ assessment being undertaken. Further, such a permission should be subject to conditions which require:

- the investigation/ assessment to be undertaken prior to the commencement of works; and
- the development to incorporate any remedial measures shown to be necessary.

Paragraph 5.59 to 5.62: Drainage
 Subject to the timescale for the publication of the new Circular, the Circular should also include a reference to the proposed SuDS approval body, and its potential role in the planning process.

Other
 It may be useful to include a model condition on the notification of commencement of development. For example: "The developer shall give the local planning authority [x] days advance notice of the commencement of development".

Q11	Does Appendix A of the draft circular contain sufficient examples of model conditions?	Yes	Yes (subject to further comment)	No
		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comments: For operational reasons, and as many wind farm developments are sited in environmentally sensitive areas, there is usually a need to microsite turbines at the construction stage of development. To ensure micro-siting does not damage				

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recognised interests of acknowledged importance, there is generally a requirement for a micro-siting condition. We therefore suggest that the Circular includes a model condition on micrositing, and suggest the following text as an example:

'No development shall commence until a micro-siting protocol has been submitted to and approved by the local planning authority. It shall set out a methodology for a detailed peat depth assessment and a protocol for deciding on micro-siting of all development to minimise the developments impact on, but not limited to, peat, curlew, black grouse, protected species, watercourses, and any other identified environmental constraints.'

Similarly because of the open, upland areas where windfarm developments are generally located, there will often be a number of public rights of way (PROWs) crossing the site, or it will comprise areas of open access land. To ensure there is limited disruption to users of PROWs and Access Land, a Rights of Way Management Plan is often required. We suggest that a model condition on PROW management plans are included in the Circular, and suggest the following text as an example:

'No development shall commence until a Rights of Way Management Plan (RWMP) has been submitted to and approved by the local planning authority. The RWMP shall be implemented as approved and shall include:

- a) details of the temporary re-routing of public rights of way during construction of the authorised development;**
- b) details of the provision of signage and other information alerting the public to construction works;**
- c) details of any fencing or barriers to be provided during the construction period;**
- d) details as to how public rights of way, paths and roads will be inspected prior to and monitored during the construction period;**
- e) details of alternative routes for any public rights of way that need to be diverted; details of permissive routes to be provided within the site.'**

In addition to examples of model conditions, it may also be useful for the Appendix to include the reason in support of each model condition.

Natural Resources Wales is currently reviewing the advice we give to local planning authorities when responding to planning application consultations. This includes a review of the 'standard conditions' that NRW has inherited from one of its legacy bodies. We would welcome the opportunity to share the results of this review with the Welsh Government, and local planning authorities in due course.

Q12	Do you consider that any of the conditions used should be reworded? If so, which conditions and why? Please suggest alternatives if you are able.	Yes	Yes (subject to further comment)	No
		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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Comments:

Model Condition 27, Criterion (iii):

Clarification is required on the definition of 'ecological systems'. It is not clear whether it is intended to include reference to protected species. If it does not include protected species, specific reference is required to them in the condition.

Contaminated Land (Investigation)

The reference to BS10175 should be amended to refer to the 2011 version.

Further, the reference to the WLGA/ WAG/ EA guidance: 'Land Contamination: A Guide for Developers (July 2006)', should be replaced with the a reference to the guidance document: 'Development of Land Affected by Contamination: A Guide for Developers' (WLGA/ Environment Agency Wales, 2012).

Model Condition 28: Contaminated Land (Investigation)

Certain forms of remediation may be appropriately undertaken alongside development. For example, a part of the site may be developed whilst remediation measures are undertaken at another part of the site. We therefore recommend that Condition 28 should be amended by replacing the sentence: "The site shall be remediated in accordance with the approved measures before development begins" with "The site shall be remediated in accordance with the approved measures before occupation".

Further, for improved clarity we recommend that the penultimate and final sentence of Condition 28 should be removed, and included in the Circular as a separate model condition.

Model Condition 35: The suggested model condition for a construction method statement (CMS) in the Draft Circular, provides a suitable example for development in urban areas. However in rural areas and sensitive natural environments where development is proposed to take place, there will generally be a requirement for more details to be included in a CMS. We therefore suggest that an additional model condition is included for CMS in the Circular to demonstrate the variation of requirements that may be required depending on the scheme and its location. We have included the following as an example:

No development or site clearance shall commence until a Construction Method Statement (CMS) has been submitted to, and approved in writing by, the local planning authority. The CMS shall be implemented as approved. The CMS shall include (for example):

- (a) detailed contractor arrangements, monitoring and contingency proposals, including a pollution prevention plan, and the identification of an ecological clerk of works;
- (b) management arrangements setting out how the developer, contractors and regulators will work together to ensure that the provisions of the CMS are carried out;
- (c) a site construction environmental management plan (CEMP), based on up to date ecological and hydrological surveys, that provides for the use of best practice working methods, and for a monitoring scheme to ensure that construction works avoid damage to the environment and that any necessary licences have been obtained;

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- (d) a scheme for the protection of watercourses, drainage systems, wetlands and the water environment from impact from the Development including:**
 - 1. measures to prevent pollution and methods for the containment of spillages, and**
 - 2. detailed measures for stream crossings to allow surface water flows to pass beneath or through tracks, and to prevent any polluting discharge from haul roads from entering the water environment;**
- (e) measures to be taken to protect the rights, interests and safety of users of public rights of way crossing the Site, and open access land within the Site during the construction of the Development;**
- (f) Measures for the demarcation and protection of Sites of Special Scientific Interest, Biodiversity Action Plan and Local Biodiversity Action Plan habitats and Scheduled Ancient Monuments within or adjoining the Site;**
- (g) measures for the management and disposal of contaminated soils;**
- (h) measures for the storage of all fuels, oils, cement, concrete and chemicals on impervious bases away from watercourses or water features;**
- (i) details, including the volume and source, of any material to be imported to site for backfilling trenches, or constructing access tracks;**
- (j) measures for the management of foul water, including concrete wash-out;**
- (k) details of track design and construction, including the excavation and make up of internal access roads and hard standings, including measures to address silt laden run off from any working, temporary and permanent access roads, soil storage and other engineering operations;**
- (l) detailed measures to minimise disturbance to and the impacts on breeding birds;**
- (m) details of all handling, storage and re-use on site of soil and peat, including details of receptor areas and methods of translocation where it is proposed to translocate peat from the site;**

Model condition 40:

Criterion (ii) needs to be amended to clarify what should be included.

Criterion (iii): The word 'of ' needs to be deleted from the first line of the criterion.

Model Condition 110: As drafted the condition includes no reference to the requirement to implement the mitigation measures in the report. There is also ambiguity between the terms 'survey' and 'report'.

To provide greater precision in the Model Condition, we recommend that the third sentence of the condition should be amended to include the word 'survey' before 'report', Further, we suggest that the following sentence should be added to the end of the condition:

'The survey report shall be implemented as agreed.'

Model condition 114: To provide a more rounded example of what is likely to be required in decommissioning a windfarm, we recommend that a further criterion is added to the model condition as follows:

(iii) A habitat restoration and management plan.

Model Condition 120: To avoid a site being cleared and then the remainder of the permission not able to be implemented as a pre-commencement 'interim

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certificate' is not able to be achieved, we recommend that the condition should be amended to read: 'Prior to the commencement of development and site clearance an 'interim certificate' shall be submitted to the LPA etc...'

Model Condition 123: See comments for Model Condition 120 above.

Model Condition 133: Although we welcome the inclusion of this condition in the Draft Circular, as currently drafted it appears to refer only to species. To ensure that habitats are also afforded the necessary protection, we advise that the heading is amended to Wildlife and Habitat Protection, and that all references to wildlife protection plans and zones in the model condition are amended to read Wildlife and Habitat protection plans/zones.

Q13	Do you believe any of the conditions fail any of the six tests identified in the circular?	Yes	Yes (subject to further comment)	No
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comments: No comment.				

Q14	Should any conditions be totally removed from Appendix A of the draft circular?	Yes	Yes (subject to further comment)	No
		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Comments: Model Conditions 33 and 34 We are unclear on the need to include Model Conditions 33 and 34 in the Circular given that the requirement to undertake an assesment of risk to groundwaters and surface waters prior to the commencement of development is already addressed in Model Condition 27.				

General

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Q15

We have asked a number of specific questions throughout this consultation. If you have any related queries or comments which we have not specifically addressed, please use this space to report them:

We welcome and support the promotion of pre-application discussions in Section 4 of the Draft Circular. Natural Resources Wales would welcome the opportunity to participate, where appropriate, at this stage in the planning process so that environmental opportunities and constraints can be identified and addressed at the earliest opportunity to inform the location, layout and design of a development proposal. This approach should ensure that costly delays in later stages of the planning process are avoided.

We therefore consider that the Circular should recommend that applicants and local planning authorities should consult statutory consultees, where appropriate, as part of pre-application discussions.

We also welcome the statement that local planning authority officers should discuss potential conditions with statutory consultees. It is important that local planning authorities secure the necessary measures to minimise potential adverse environmental impacts. We welcome the guidance that local planning authorities should discuss potential conditions with relevant statutory consultees before attaching them to a planning permission. This should ensure that conditions attached to a planning permission address the particular harm it is intended to avoid or mitigate.

Please see also our response to Question 9 above.

I do not want my name/or address published with my response (please tick)

How to Respond

Please submit your comments in any of the following ways:

Email
Please complete the consultation form and send it to : planconsultations-b@wales.gsi.gov.uk [Please include 'Conditions Consultation – WG-19178' in the subject line]
Post
Please complete the consultation form and send it to: Conditions Consultation Development Management Branch Planning Division Welsh Assembly Government Cathays Park Cardiff CF10 3 NQ
Additional information
If you have any queries on this consultation, please Email: planconsultations-b@wales.gsi.gov.uk Telephone: Owain Williams on 029 2082 1715