

EXPLANATORY MEMORANDUM TO
THE BRENDON COMMONS COUNCIL ESTABLISHMENT ORDER

2013 No. 2959

1. This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 To establish the Brendon commons council under section 26(1) of the Commons Act 2006 (the Act)¹.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 The Brendon Commons Council Establishment Order is the first exercise of the powers of the Secretary of State to establish commons councils by order under section 26(1) of the Act.

4. **Legislative Context**

4.1 The Act received Royal Assent on 19 July 2006, and Part 2 (comprising sections 26 – 37) provides for the establishment of statutory commons councils. The Secretary of State can establish commons councils by order under section 26(1). Commons councils are democratic structures through which the various interests (e.g. commoners, landowners) on a common can manage and protect the common. Part 2 of the Act was commenced in England on 20 January 2010 by the Commons Act 2006 (Commencement No. 5) (England) Order 2010².

4.2 Section 31 of the Act prescribes the functions capable of being conferred on commons councils, covering the management of (a) agricultural activities, (b) vegetation and (c) rights of common, on the land for which the council is established, which may include, in each case, the function of making rules. According to section 34 of the Act where any rule specifies that its contravention constitutes a criminal offence, and such rule is made with the consent of the Secretary of State, then breach of that rule is an offence.

4.3 The Secretary of State is required by section 29(1) of the Act to prescribe in regulations standard terms regarding the constitution and administration of all commons

¹ The Commons Act 2006: www.legislation.gov.uk/ukpga/2006/26/pdfs/ukpga_20060026_en.pdf.

² 2010 No. 61: www.legislation.gov.uk/uksi/2010/61/pdfs/uksi_20100061_en.pdf.

councils. This was done in the Commons Councils (Standard Constitution) (England) Regulations 2010³, which came into force in April 2010 and provide the terms by which commons councils generally must abide. The standard constitution (found in the Schedule to S.I. 2010/204) contains terms governing a commons council's membership and proceedings, procedures as to the payment of fees, their use of income and property, and the requirement to keep accounts and the manner of executing documents. Section 29(4) of the Act gives the Secretary of State with the power to supplement, disapply or replace any terms of the standard constitution when making an establishment order. Other elements can be specified in the establishment order of a commons council and pages 21 and 22 of the Technical Guidance on setting up a commons council⁴ lists such likely elements.

4.4 The Secretary of State must, under section 27 of the Act, consult on a draft order (which would establish a commons council) and can only make the order if, having regard to responses received and, if applicable, the result of a local inquiry, substantial support is shown for the making of the order. The Secretary of State must pay particular regard to responses from persons with rights other than rights of common in relation to the land (e.g. tenants, the landowner), person with rights of common over the land, and persons with a legal power or duty to maintain or manage the land (e.g. a National Park Authority).

4.5 Two model draft establishment orders were published in 2010 to illustrate to candidates how such an order would be likely to be drafted: the West Bassetshire Commons Council Establishment Order and the Basset National Park Commons Council Establishment Order. The former illustrates the content of an order for a smaller commons council, whereas the latter illustrates the content of one for a larger commons council, known as an 'umbrella council', and covering, in this example, all commons in the "Basset National Park".

4.6 A commons council is established with effect from the appointed day specified in its establishment order. In the case of the Brendon Commons Council Establishment Order 2013 (the Order), this will be 1 April 2014, which is three months after the Order itself comes into force on 1 January 2014. Three months are provided in order to give the returning officer, who is appointed by the Secretary of State, sufficient time to prepare lists of persons eligible to vote in the first elections, organise the meeting at which the elections and appointments will take place, which includes giving adequate notice, and announcing the results of the elections. Schedule 1 to the Order makes provision for the first election and appointment of the Council's members.

4.7 The Order makes provision for the membership of the Council, which is restricted to between five and seven members. Three are to be elected by the active graziers to represent their interests, one is to be elected by the other commoners who are not active

³ S.I. 2010/204: www.legislation.gov.uk/ukSI/2010/204/made.

⁴ The Technical Guidance on setting up a commons council can be found at the following web address: www.gov.uk/government/uploads/system/uploads/attachment_data/file/218757/cc-techguide.pdf.

graziers, and one is to be appointed by the landowner to represent its interests. Up to two additional, non-voting, members may be co-opted to the Council.

4.8 Article 5 of the Order prescribes the functions of the Council. These are the management on the Common of the agricultural activities, vegetation and rights of common; the ability to make rules; the preparation and maintenance of a register of the grazing animals on the common; the establishment and maintenance of boundaries on the common; removing unlawful boundaries, other encroachments and animals unlawfully permitted to graze the common. Article 6 specifies further detail for rules relating to the keeping of animals on the Common. Article 7 provides the procedure for making, amending or revoking rules.

4.9 Article 8 of the Order provides for the register to be maintained by the Council, which is to be prepared within one month of 1 April 2014. The register must record the name and address of each person (whether a commoner or not) who has grazed animals on the common during 2013, as well as any other commoner who applies to be included in the register; a description of their right of common (or other right); the number, types and breeds of animals they currently have grazing the common; the period during which the grazing takes place; the details related to the identification of the ownership of the animals; and any other information the Council thinks fit.

4.10 Article 9 concerns the decisions of the Council, the details for which are provided by Schedule 2 to the Order.

5. Territorial Extent and Application

5.1 This instrument applies to England.

5.2 The order will apply to Brendon Common, North Devon. The boundary of the common is recorded as register units CL168 and CL175 in the register of common land held by Devon County Council. There are two separate entry numbers for the common, but it is a single contiguous common.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 Defra published on 8 September 2008 a public consultation on the terms of the standard constitution, the model establishment orders and the Impact Assessment. There were 49 responses, including 17 from commoners' groups or associations, 8 from landowners or landowning interests, and 14 from local or National Park authorities. No

major changes to policy proposals were carried out following consultation. A consultation summary⁵ was published in February 2010.

7.2 In August 2010, Natural England commissioned work on proposals for commons councils for three Commoners' associations which had shown a strong interest and volunteered. Two of those emanated from the earlier case study project (Brendon and Cumbria), and the other came forward later (Bodmin). The proposals were submitted to Defra in April 2011 and were assessed by Defra officials. The Bodmin and Cumbria proposals were sent back for further work (the Cumbria proposal was submitted as a draft). The Brendon proposal was judged as strong and, following discussions with the Secretary of the Brendon Commoners Association and the submission of further evidence of the vote for whether they should seek to become a commons council, the proposal was accepted and work commenced on drafting the establishment order. The proposal contained information relating to the content the Brendon Commoners Association sought for its establishment order.

7.3 A meeting to discuss the proposed Brendon commons council took place in November 2011 and was attended by members of the Brendon Commoners Association, which is comprised of the commoners and the landowner, and officials from Defra and Natural England. The Association's Secretary acted as a conduit for discussions relating to the drafting of the establishment order.

7.4 A consultation on the draft Brendon Commons Council Establishment Order was published⁶ on 4 October and ran until 3 November 2013.

8. Consultation outcome

8.1 The consultation received 53 responses and 47 (89%) responded in favour of the Order and 6 (11%) were against it.

8.2 Regarding persons with a legal interest in the land, responses were received from the commoners, the landowner (The Badgworthy Land Co) and the Exmoor National Park Authority. There were 46 responses, 40 (87%) were in favour and 6 were (13%) against. Four non-grazier commoners did not respond.

9. Guidance

9.1 The technical guidance on setting up a commons council was published in February 2010 and provides advice to candidates on the legal framework, the role and functions of a commons council, how to set up a commons council and how it operates. A web link to the guidance can be found at footnote 3.

⁵ A copy of the consultation summary can be found here:

<http://archive.defra.gov.uk/rural/documents/protected/common-land/cc-consultsummary.pdf>.

⁶ A copy of the consultation can be found here: <https://consult.defra.gov.uk/landscape-outdoor-recreation-and-forestry/brendon-commons-council>.

10. Impact

10.1 The impact on business, charities or voluntary bodies is neutral, except in relation to the farming businesses (the commoners) and the landowning charity related to Brendon Common – see 11 below.

10.2 The impact on the public sector is neutral.

10.3 An Impact Assessment has not been prepared for this instrument, but one was prepared for the Standard Constitution⁷ which provides figures on the estimated costs of establishing small and umbrella commons councils and running costs.

11. Regulating small business

11.1 The Order applies to small farm businesses (the commoners) which have a legal interest in Brendon Common.

11.2 The Brendon Commoners Association currently incurs running costs for the purposes of its agri-environment agreement with Natural England. The new costs imposed by the Order relate to taking out notices in at least one local newspaper to give notice of (a) the first elections, which is a one-off cost, and (b) when applying to the Secretary of State for confirmation of rules, which will seldom be done. Where the gross annual income of the Brendon Commons Council exceeds £10,000 then the accounts must be audited by an independent examiner, and this may lead to further minimal costs.

11.3 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to keep to a minimum the amount of regulation which would result in the Brendon Commons Council incurring costs.

12. Monitoring & review

12.1 Defra officials will remain in contact with the Brendon Commons Council.

13. Contact

Grant McPhee at the Department for Environment, Food and Rural Affairs, Tel: 020 7238 6326 or email: grant.mcphee@defra.gsi.gov.uk, can answer any queries regarding the instrument.

⁷ A copy of the Impact Assessment can be found here:
<http://archive.defra.gov.uk/rural/documents/protected/common-land/cc-iasummary.pdf>.