EXPLANATORY MEMORANDUM TO

THE DARTMOOR COMMONS (AUTHORISED SEVERANCE) ORDER 2008

2008 No. 1962

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.

2. Description

2.1 The Order enables the Dartmoor Commoners' Council, in relation to the Dartmoor commons, to acquire rights of common by severance from the land to which they are currently attached; and to veto any such acquisition of rights by Natural England.

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

3.1 None.

4. Legislative Background

4.1 Section 9 of the Commons Act 2006 ('the 2006 Act') prohibits severance of rights of common, whether the severance is temporary (*e.g.* where the rights are licensed by the commoner to a third party) or permanent (*e.g.* where the rights are sold to one person, and the land to which the rights are attached is sold to another). The section applies only to rights of common which are (i) attached to land, and (ii) which were capable of being severed under the law as it stood (*i.e.* following the judgment of the House of Lords in *Bettison and another v. Langton and others*[1], in its application to quantified grazing rights) before section 9 came into force.

4.2 Paragraph 1 of Schedule 1 to the 2006 Act enables limited, permanent exceptions to the prohibition on the severance of rights of common. In particular, rights of common may be acquired (by severance) by a commons council established for the common under Part 2 of the 2006 Act, or by Natural England with the consent of any such commons council. Where there is no commons council, but a statutory management body has been established for a common under other legislation, an order may be made under paragraph 1(5) of Schedule 1 providing that that body is to be regarded as a commons council for the purposes of exercising the same powers.

4.3 The Dartmoor Commons Act 1985 ('the 1985 Act') established "the Dartmoor Commoners' Council for the maintenance of and the promotion of proper standards of livestock husbandry on the commons in and about Dartmoor National Park"[2] ('the Dartmoor commons'). The Council has powers under section 4(2) of the 1985 Act to acquire and dispose of property and rights of common, and has requested that it be appointed for the purposes of paragraph 1 of Schedule 1 to the 2006 Act.

[1] [2001] 1 AC 27.
[2] Preamble to the 1985 Act.

5. Extent

5.1 This instrument applies in England.

6. European Convention on Human Rights

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

7. Policy background

7.1 A right of common is a right, which one or more persons may have, to take or use some portion of that which another man's soil naturally produces (such as rights of grazing or to collect firewood). Most rights of common are attached to the land farmed or held by the commoner. The rights may be exercised over the common, (which will be owned by someone other than the commoner). Traditionally, rights of grazing were quantified by reference to the capacity of the commoner's own land to support his livestock over the winter, so that a similar number might be turned out onto the common during the summer. The courts adopted a rule that any purported severance of unquantified rights from the land to which they were attached would extinguish the rights.

7.2 In 2001, the House of Lords (in *Bettison*) determined that a consequence of the quantification of grazing rights on registration under the Commons Registration Act 1965 was to enable a commoner to dispose of rights of common independently from the land to which they were traditionally attached (or, alternatively, to sell the land and retain the rights). This is known as 'severance'.

7.3 The Commons Act 2006 received Royal Assent on 19 July 2006 and section 9 prohibits (with effect from 28 June 2005 — see section 9(7)) further severance of rights of common. The prohibition on severance is subject to exceptions described in Schedule 1, including, in paragraph 1, provision for the permanent severance of rights by transfer to public bodies in a limited class of cases.

7.4 The Order enables the severance of rights of common to which section 9 applies (*i.e.* registered, quantified, appurtenant rights to graze animals). The Order therefore does not permit the severance of other rights of common (such as a right to gather firewood or to cut peat), nor does it apply to appendant rights (which the courts have held not to be severable, regardless of whether the right is quantified).

7.5 Severance was the subject of much debate in both Houses during the Parliamentary stages of the Commons Bill. During Third Reading in the House of Lords, the then Minister for Sustainable Farming and Food, Lord Bach, said that he would look into the possibility of the appointment of the Dartmoor Commoners' Council under paragraph 1 of Schedule 1[3].

7.6 Defra consulted on detailed proposals for the implementation of Part 1 of the 2006 Act in July 2007[4], including proposals for the exercise of the powers of appointment in

[3] *Lords Hansard*, 18 Jan 2006, cols. 679–683.
[4] *Consultation on updating the commons registers: Implementation of part 1 of the Commons Act 2006.*

paragraph 1 of Schedule 1. Defra published a summary of responses in January 2008[5], including a statement of its policy conclusions following the consultation. A total of 38 responses were received, including 14 from local authorities and 10 from commons bodies. The proposal to appoint the Dartmoor Commoners' Council was supported by respondents; some respondents suggested the appointment of other similar commons management bodies, but no application has been received from any such body for that purpose. Accordingly, only the Dartmoor Commoners' Council is appointed by this Order.

8. Impact

8.1 A Regulatory Impact Assessment (RIA) was prepared for the Commons Bill. Copies of the RIA were deposited in the House libraries and are available on the Defra website[6].

8.2 No separate RIA has been prepared for the order itself as it has no impact on the costs of business.

8.3 The impact on the public sector is negligible.

9. Contact

9.1 Hugh Craddock at the Department for Environment, Food and Rural Affairs, Tel: 020 7238 5663 or e-mail: commons.villagegreens@defra.gsi.gov.uk can answer any queries regarding the instrument. Further information about the Commons Act 2006 generally, is also available on the Defra website, at: www.defra.gov.uk/wildlife-countryside/issues/common/index.htm .

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[5] *Summary of responses to the consultation on updating the commons registers*: both the summary and the consultation paper are available on the Defra website, at: www.defra.gov.uk/wildlife-countryside/issues/common/registration/index.htm.

[6] www.defra.gov.uk/wildlife-countryside/issues/common/commonbill/index.htm.