

Conservation Covenants

Response to Defra consultation by Wildlife and Countryside Link
March 2019

Wildlife and Countryside Link (Link) is the largest environment and wildlife coalition in England, bringing together 50 organisations to use their strong joint voice for the protection of nature. Our members campaign to conserve, enhance and access our landscapes, animals, plants, habitats, rivers and seas. Together we have the support of over eight million people in the UK and directly protect over 750,000 hectares of land and 800 miles of coastline.

This response is supported by the following Link members:

- *Bat Conservation Trust*
- *Butterfly Conservation*
- *Campaign for National Parks*
- *ClientEarth*
- *WWF-UK*
- *Institute of Fisheries Management*
- *Marine Conservation Society*
- *Plantlife*
- *RSPB*

EXECUTIVE SUMMARY

We welcome the Government's proposals for a national system of conservation covenants, which could play an important role in delivering new policies like biodiversity net gain, the Nature Recovery Network and the new Environmental Land Management System.

Conservation covenants could provide an invaluable tool for achieving the goals of restoring and preserving the natural and historic environments.

To be effective, conservation covenants need to last in perpetuity as a default. They must also have the flexibility to respond to changes such as climate change.

The legal framework in which covenants operate will need to be clear and effective, and funding mechanisms must be sufficient to ensure their success.

Clear information about and reporting on covenants will be important to ensure they are fit for purpose and receive public support, and there should be adequate regulation and policing of conservation covenants by an over-seeing public body.

DETAILED RESPONSE

Introduction

We welcome the Government's proposals for a national system of conservation covenants. We believe that covenants can play a crucial role in the Government's environmental ambitions. If the Government is to achieve its aim to leave the environment in a better state than it inherited it, then it will need a range of tools. Covenants can play an important role in delivering new policies like biodiversity net gain, the Nature Recovery Network and the new Environmental Land Management

System. They also have the potential to engage landowning individuals in meeting national conservation objectives, while retaining land ownership, in a way that has not been possible to date.

Question 1. Should conservation covenants be introduced into the law of England?

Yes. Conservation covenants could provide an invaluable tool for achieving the goals of restoring and preserving the natural and historic environments.

Question 2. What demand do you foresee for conservation covenants? What is the basis for your view?

Conservation covenants could be central to the delivery of biodiversity net gain, as mooted in the recent Defra consultation on the matter. In particular, they could help ensure a site is protected in perpetuity and they would be the basis of a legal mechanism that ensures commitments made to deliver biodiversity net gain are implemented.

Question 3. What potential do you foresee for conservation covenants to deliver lasting conservation outcomes? What is the basis for your view?

There is significant potential for conservation covenants to deliver important outcomes for the environment.

However, there are some criteria that would need to be met to ensure that conservation covenants deliver for nature.

Lasting:

Covenants should be long-lasting; as a default they should be in place in perpetuity.

The existence of appropriate funding mechanisms must be ensured by statute and form a key part of each covenant. These must guarantee a funding stream for the management of the site, adequate to fulfil the requirements of the covenant.

Unilateral discharge must be normally impermissible. There should be clear criteria for when a covenant can be modified or discharged, including the involvement of an appropriate court or tribunal.

Conservation:

There must be clear restrictions on what covenants can be used for. Statute must provide these limitations.

The various conditions of the covenant must be specified at the right scale. Some essential components of all covenants must be stipulated in statute (e.g. default restrictions). Core obligations (both positive and negative) should be in the covenant itself, and there should be a legislative requirement to create and adhere to a management plan containing the details (the plan itself would not necessarily be binding on future landowners).

Covenants must contain the right degree of flexibility, in particular to respond to changes over time (both on the site itself, to the surrounding area, and as a result of ecological shifts such as climate change).

In terms of ecological join-up, coherence with a Nature Recovery Network is key. This may require joint/co-ordinated management plans. We note that, by contrast, the Law Commission, holds the view that "no management powers should be provided for in the statute". [6.24]

There need to be clear methods for reviewing management plans.

Outcomes:

Outcomes must be additional - i.e. the covenants system cannot be a replacement for proper establishment and management of existing protected areas.

Care is needed to avoid 'double-counting', an incoherently networked set of sites and/or a weakening of statutory obligations on government with regards biodiversity conservation and enhancement.

Access to information and enforcement is crucial to delivering outcomes. The public should have access to the land and to information about it, as if it were publically held information.

Enforcement may not be straightforward. There needs to be a fast and inexpensive mechanism to resolve cases where the covenant has not been implemented. In certain circumstances, third party enforcement should be possible.

A system of conservation covenants that had the same provisions around non- neighbouring land, and that also allowed positive (as well as restrictive) obligations would be powerful. This could help to deliver the environmental ambition contained in the Government's 25 Year Environment Plan, particularly biodiversity net gain, the Nature Recovery Network, and the new Environmental Land Management System. In fact, delivering these policies will be hard to achieve at scale and in perpetuity without a system of covenants.

Question 4. What use would you make of conservation covenants?

Question 5. What, if any, unintended consequences might there be? What is the basis for your view?

Below we set out several possible such consequences:

- Double counting. It will be important to ensure conservation covenants work with new Environmental Land Management schemes among others, to avoid double counting
- The privatisation and closure of natural spaces
- A danger of over-reliance on the third sector to deliver conservation improvements
- Biodiversity net gain. The proposed mechanism for biodiversity net gain does not, as yet, deliver key principles of a successful policy. See the Link response to the recent net gain consultation proposals. It is important to ensure that securing a conservation covenant for compensatory habitat as part of biodiversity net gain does not override good planning and to ensure that development occurs in the most sustainable locations. The covenant will not necessarily make it any more likely that the proposed compensatory habitat will deliver the promised habitat creation or enhancement so should not override full ecological consideration of planning proposals
- Planning permission. In addition, if a development proposal has been approved on the condition that a covenant is secured before a landowner has agreed to the covenant, there

could be delays in the development going ahead. The terms of a conservation covenant tied to any planning condition must be made clear before a development is given permission and not fixed 'after the event' (and therefore risk being inadequate to meet the compensation required for the development for which the planning permission is being granted). There would need to be a clear resolution process, including the ability to revoke planning permission where agreement is not reached. Therefore, any legal mechanism for conservation covenants must align closely with that of net gain, and the planning system

- Conservation covenants must not be used as an excuse to cut other funding streams to the environment

Question 6. What changes, if any, to the Law Commission proposals do you consider necessary to make conservation covenants more effective tools?

There are several key changes that we believe need to be made to the Law Commission's proposals.

It will be important to balance the importance of securing habitats in perpetuity against the need to respond to external changes, such as the climate change, that will mean that conservation needs and management plans will need to change over time. In these instances, there needs to be clear criteria for when it is possible to modify a covenant, and how it should be done. This will need to include who should be consulted before a decision is made.

We believe the following are all important elements for conservation covenants:

- Covenants lasting in perpetuity
- Not possible to unilaterally discharge a covenant
- Clear criteria for when it is possible to modify or discharge a covenant
- Full role for the public in monitoring and enforcing covenants. This requires access to land, to information, and to justice
- There needs to be a fast and inexpensive mechanism to resolve cases where the covenant has not been implemented. The current legal process, relying on the Upper Tribunal and the courts, lends itself to delays and protracted disputes
- We think that a clearer definition is needed of 'public good', otherwise there is considerable scope for a landowner to dispute their obligations under a covenant. It should be made clear in the context of conservation covenants that the goods in question are "environmental" in nature. It may make sense for the definition to be harmonised with other definitions, such as that of public goods in the agriculture bill

We are concerned that there is a lack of clarity over securing mechanisms that fund the initial and ongoing conservation activity under a covenant. While there are several possible sources for this, covenants must identify and ensure responsibility for the long-term provision of adequate funding, with the default being responsibility on the landowner. Options include: for the landowner to create a secure and sufficient funding source; for the funding to come from the responsible body, which could fundraise against these costs; for the net gain tariff to provide some of the funds; for a market in payments for ecosystem services to provide an income from the covenanted land; or for Government to introduce grants or tax incentives for landowners who own covenanted land that offsets both any loss of land value and the cost of management through an up-front rebate. Reliance on unsecure income streams should be backed up to ensure the conservation objectives of a covenant can be achieved. However, it is important to emphasise that covenants are not a no-cost

option. Government also needs to budget for and ensure that the success of any conservation covenant system is incorporated into its annual environmental monitoring and indicators as part of the 25 Year Environment Plan and future Environmental Improvement Plans.

Question 7a. Should tenants be able to enter into conservation covenants?

Yes.

Question 7b. If so, do you agree that the qualifying threshold for the remaining length of a lease should be set at a minimum of 15 years?

Question 7c. If not, what level would you set it at and why?

Question 8a. Should tenants be required to secure the agreement of the freeholder before entering into a covenant?

Yes.

Question 8b. If not, what is the basis for your view?

Question 8c. Should freeholders be required to secure the consent of a tenant before entering into a covenant when the land affected is leased?

Yes.

Question 9a. Should public oversight provisions require responsible bodies to provide details of the location and headline conservation objectives of conservation covenants held by them?

Yes. We also believe that responsible bodies should provide information on the covenants they hold and on the implementation (by landowners) of the conditions of the covenant. We also think government should back or fund overall monitoring of conservation covenants to be able to have some sense of the success of the system, and report this through the 25 Year Environment Plan reporting process.

In order for the system to avoid falling into disrepute, particularly if its use is predominantly in relation to biodiversity or environmental net gain, there must be transparency both in terms of the conservation covenant itself, its objectives and terms, and/or post-covenant monitoring of the land concerned.

The existing duty, proactively to publish environmental information, pursuant to the Environmental Information Regulations 2004, will impact on any public authority involved in conservation covenants, therefore, in any event, we would expect any new system involving conservation covenants and public authorities to provide the fullest information online concerning each and every covenant entered into or examined by any public authority.

Question 9b. If not, what would you propose and what is the basis of your proposed alternative?

Question 10a. Should for-profit bodies be able to hold conservation covenants?

This is an important consideration which we feel needs further work. The need to ensure covenants are permanent and secure is of primary importance, and the rules governing, amending or extinguishing an agreement will be crucial, whatever the nature of the bodies involved.

Question 10b. Should there be additional mechanisms introduced for for-profit bodies which provide assurances that the covenants they hold are delivering conservation outcomes for the public good? If so, what mechanisms would you suggest?

As we stated in 10, we feel this question needs further work. In the event that for-profit organisations were allowed to hold covenants, there would be a need for additional safeguards and perhaps additional mechanisms such as a multi-party provision. For instance, that a third party (possibly a public official or an eNGO) holds a 'green share' in the agreement and no amendments can be made without their agreement. This type of arrangement is the most common in Australia.

Question 11a. Do you consider the Law Commission proposals, with the proposed amendments set out above, as containing sufficient safeguards to ensure they are not abused?

We believe that these safeguards are necessary but not sufficient.

Question 11b. If not, what changes would you make?

In addition, there should be:

- Clear criteria for what qualifies as a conservation covenant
- A clear definition of 'public goods'
- Clear criteria for when a covenant can be modified or discharged
- A fast, inexpensive and robust process for enforcement and modification that is a deterrent from neglecting or undermining the covenant. For example, the right to apply to the Lands Chamber in relation to any conservation covenant should be open to the wider public and there should be as low a costs barrier as possible for anyone seeking to bring a matter to the Lands Chamber, to deal with potential or actual abuse of conservation covenants
- Government should spell out any role for the Office for Environmental Protection in enforcing covenants. For example, the public may wish to lodge complaints with the OEP where they believe a covenant may have been breached

Question 12a. Do you consider the Law Commission proposals, with the proposed amendments set out above, as simple, practical and capable of delivering lasting conservation outcomes?

No.

Question 12b. If not, what changes would you make to them?

As stated above, we believe there needs to be greater clarity about the connection between conservation covenants and Government's other cornerstone environmental policies. There also needs to be more information on how the up-front and ongoing costs of conservation management will be funded. A clear strategy and funding proposals will provide the operating environment for covenants to have a significant impact.

For example, we think that Natural England should convene stakeholders within each of its Focus Areas to design and deliver the Nature Recovery Network. This should include targeting areas where greatest public or environmental benefit can be delivered. Government needs to spell out how conservation covenants fit into these strategic aims.

Question 13a. Do you consider the Law Commission proposals, with the proposed amendments set out above, contain sufficient safeguards to ensure they are not used to block development, or otherwise abused?

Yes.

It is also important to ensure that they are not used to enable inappropriate development in inappropriate locations.

Question 13b. If not, would you support additional safeguards? Please give details.

Question 14. What alternative or supplementary processes might be used to seek remedies against breaches of conservation covenants? If so, what do you see as their advantages and drawbacks?

It is vital to the effective running of conservation covenants and to securing public confidence in their use that there be an effective deterrent to any abuses of the system.

Pursuing enforcement action through the courts for breaches can indeed be costly, as the consultation indicates.

There may be a role for a public body within the Defra group of public authorities to have a role in issuing appropriate warning letters when conservation covenants appear to be subject to abuse.

The setting up of the Office for Environmental Protection pursuant to the Environment Bill if enacted would provide one place for where such an overarching scrutiny function could lie.

There may be a role here for civil penalties (enforcement undertakings and the like) to be applied to the regulation and policing of conservation covenants by an over-seeing public body. That would enable low cost resolution of disputes rather than immediately going to costly and time consuming legal proceedings.

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<https://www.wcl.org.uk/docs/WCL%20response%20FINAL%20Feb%2008%20with%20sign%20ons%20for%20submission.pdf>