

Wildlife and Countryside Link's response to the Law Commission consultation on conservation covenants

June 2013

Wildlife and Countryside Link (Link) brings together 41 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Our members practise and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together our members have the support of over 8 million people in the UK and manage over 750,000 hectares of land.

This response is supported by the following 6 members of Link:

- Buglife – The Invertebrate Conservation Trust
- Plantlife
- Royal Society for the Protection of Birds
- Salmon & Trout Association
- Wildfowl & Wetlands Trust
- The Wildlife Trusts

Summary

Link welcomes this consultation document and believes it has the potential to play an important role in positively affecting change in the conservation sector. We believe this is a very constructive piece of work and, if enacted, could achieve progressive conservation outcomes.

We do not envisage that in current circumstances conservation covenants are going to be quickly applied to a great many areas of land. However we do consider them to be a potentially very valuable tool, particularly when land owners are considering the legacy that they leave to future generations. In the long-term a significant area of land may accrue under conservation covenants. Securing the benefits of their work and investment would create a better, richer countryside for people and would contribute to halting the long term loss of wildlife habitats and declines in species.

While under current circumstances conservation covenants may be a medium to long term prospect, in terms of take-up, Link believes that they may well be extremely successful in addressing the lack of protection given to the vast majority of the English and Welsh countryside that does not enjoy statutory nature conservation designation. In support of statutory mechanisms and initiatives, conservation covenants could provide value for money and greater permanence over existing mechanisms. Conservation covenants could play an important role in securing greater landscape scale conservation efforts that are critical to address the pressures on wildlife. Conservation covenants may well find a more near future role in securing the public benefit created by publically or developer funded habitat creation schemes.

We believe that conservation covenants as a concept will work best for the environment and the public if there are elements of consultation, transparency and third party appeal incorporated. These features would help to ensure that the initial

benefit of the covenant is maximised; that benefit arising from the investment of public funds is maintained; and that it is possible for certain bodies to represent the public environmental benefit and ensure that it is delivered.

The mechanism of conservation covenants must be additional to statutory nature conservation mechanisms, for example Sites of Special Scientific Interest (SSSIs). Conservation covenants are not an alternative to establishing a robust SSSI series that represents biodiversity interest, and cannot alone create an ecologically coherent network of sites. While they may contribute to these objectives, it is imperative that nature conservation is enhanced by this option and that statutory measures are not undermined or given a lower priority.

Below we respond to specific questions in the consultation document.

We invite views from consultees on ways in which they could use conservation covenants to conserve land for environment or heritage purposes.

Consultation Paper, Chapter 2, paragraph 2.30

Conservation covenants could be used to help secure land for the benefit of wildlife and people without having to purchase land. Some landowners are keen for their land to be maintained for wildlife but at the same time for it to remain within their family into the future, rather than selling or gifting it to a conservation organisation.

There is also clearly scope for covenants to be useful beyond philanthropic landowners. Conservation bodies and statutory undertakers would find the tool useful, particularly in cases of relatively simple land management obligations. There will be costs involved in managing and auditing covenant delivery. Existing funding mechanisms, e.g. Lottery funding, may be able to adapt to include conservation covenanting in their programmes. New funding streams that lend themselves well to a covenant system could be developed.

Conservation covenanting introduces the option for conservation organisations of purchasing land, transforming the land into wildlife rich habitat and then selling the land with a conservation covenant, thereby achieving a sustainable conservation outcome and recouping some of the initial outlay.

As our countryside is under increasing pressure from habitat loss and fragmentation, landscape scale conservation is critical. Covenants could play a critical role in delivering this. However, it should be noted that covenants should work alongside existing mechanisms, such as agri-environment schemes, and would not replace the need for designation.

We would be interested to hear from consultees about legal mechanisms they have used to secure conservation covenants. We invite consultees to tell us:

- (1) whether they have used any of the “workarounds” we describe, and the benefits and disadvantages of those approaches; and
- (2) whether there are other ways in which they have attempted to create binding obligations in respect of land for a conservation purpose (and how successful those measures have been).

Consultation Paper, Chapter 2, paragraph 2.47

No comment.

We invite views from consultees on:

- (1) how long-term biodiversity offsetting activity can currently be secured on an offset site;
- (2) whether existing methods for securing biodiversity offsetting activity are satisfactory;
- (3) whether conservation covenants would be a useful addition to the methods available to deliver biodiversity offsetting activity; and
- (4) what advantages conservation covenants might offer relative to existing methods.

Consultation Paper, Chapter 2, paragraph 2.54

The concept of off-setting elements of the habitat loss and damage associated with development is currently at an experimental stage. Until the results of current pilots are known and the details of any system are proposed it is not possible for Link to indicate whether offsetting could be a viable approach that would result in the improvement in the statuses of species and habitats.

If a viable approach is put forward then conservation covenants could be part of such a scheme. At present there is no clear legal mechanism available for securing offsets. While the planning obligations under s106 of the Town and Country Planning Act 1990 provide some opportunities for offsets, this is constrained by requirements in the Community Infrastructure Levy ("CIL") Regulations 2010 (regulation 122). By contrast conservation covenants offer a positive mechanism by which to secure certain key aspects required for implementation of a biodiversity offset system that will succeed in securing no net loss of biodiversity in perpetuity. They would allow for cheaper biodiversity offset options as they would not require the organisation offering the offset to buy the land.

The mechanism clarifies the enforcement and non-compliance measures safeguarding the conservation benefits should a covenant not be complied with. It would be improbable for conservation covenants associated with offsetting to be entered into without there being substantial funding packages to cover long term management costs. Clearly the feasibility of this remains untested, but see our answer to para 7.63, as a reasonable security of permanence is required for conservation covenants to be a reliable mechanism to underpin offsetting.

Link believes that, if conservation covenants can ensure a site is protected in perpetuity, then it would be a useful addition to the methods available to deliver biodiversity offsetting. It would provide a legal mechanism that ensures a developer has to provide, and maintain, an agreed level of commitment. Offsetting must be managed long term to enable the new habitats to develop to a satisfactory level.

The existing planning hierarchy of avoid, mitigate and compensate should not be compromised and we do not believe that conservation covenants require or justify

any change to this principle. We believe that the governance of an offsetting scheme must allow for losses to be permanently offset with monitoring arrangements put in place to ensure that new sites are provided in perpetuity.

There is already a compensation system built into the Habitats Directive – and section 106 agreements – both managed through the Land Use Planning System that have been widely used in the UK to achieve the same ends. One of the main weakness in the section 106 agreement process (apart from the lack of monitoring) is the difficulty in pooling compensation from multiple developments to achieve a landscape-scale win. This could be achieved through the use of conservation covenants.

- (1) Land acquisition or s106 agreements.
- (2) Limited by funds available for land acquisition and there is an absence of adequate long-term monitoring and enforcement measures associated with s106 agreements.
- (3) Potentially yes, although funding of monitoring by a competent body may be an outstanding issue.
- (4) Simpler than current work arounds, do not require land purchase; law is clear, non-compliance is clear; requirement for non-compliance to pay all costs to re-establish covenant allows for security in the conservation gain. It is possible that a publicly available register of covenants may attract more public interest and scrutiny, meaning that breaches are more readily brought to light. This is particularly true for public access, the denial of which is much more easily identified in the breach than is (for example) the use of a pesticide which has been prohibited under the covenant.

We provisionally propose the introduction of conservation covenants into the law of England and Wales. This scheme of conservation covenants should include:

- (1) no requirement for there to be benefited land;
- (2) the ability to impose positive as well as negative obligations; and
- (3) provision for those obligations to bind successors in title.

Do consultees agree?

Consultation Paper, Chapter 2, paragraph 2.72

Yes.

We invite feedback from consultees who have used the Scottish system, on:

- (1) the types of land protected by conservation burdens;
- (2) the number of new conservation burdens created; and
- (3) their experience of the Scottish system of conservation burdens generally.

Consultation Paper, Chapter 3, paragraph 3.17

No comment.

We provisionally propose that the holder of a freehold estate in land, or of a

leasehold term with at least seven years left to run, should be able to create a conservation covenant that would bind their successors in title and those with interests derived from their own. Do consultees agree?

Consultation Paper, Chapter 4, paragraph 4.7

We agree that the freehold owner of land should be able to create a conservation covenant over it, subject to protection for others who have an interest in that land. We note that no mention is made in the Consultation Paper about common land, the vast majority of which is of high amenity value (as well as of high natural and cultural heritage interest). It seems to us that the owner of common land should only be able to enter into a covenant with the agreement of all registered rights holders.

With respect to leaseholders, we agree that holders of a lease with a long time still left to run should be able to enter a covenant. However, we believe that seven years is far too short a time frame and landowners are more likely to agree to a covenant that will last for at least 15 years. We contrast this with the ability of a leaseholder to dedicate land for public access under CROW s16(1)(a) provided that the lease has at least 90 years left to run.

We provisionally propose that conservation covenants should be capable of being held by any Secretary of State (for England) or the Welsh Ministers (in Wales). We further propose that in England, a single Secretary of State should have the power to nominate or exclude responsible bodies. The Welsh Ministers should have the same power in Wales. Responsible bodies should be:

- (1) a public body whose objects include some or all of the purposes set out at paragraph 4.40;
- (2) a registered charity whose objects include some or all of the purposes set out at paragraph 4.40; or
- (3) a local authority.

Do consultees agree?

Consultation Paper, Chapter 4, paragraph 4.22

Yes. Link believes that the structure and governance arrangements of charities mean that such bodies have clear objectives, and are responsible and accountable for adhering to these objectives to the Board of Trustees and the Charity Commission.

As such the operation of conservation covenants by charities would be objective led, transparent and regulated with no additional burdens on the state. In determining the lists of charity responsible bodies the Secretary of State and Welsh Ministers should ascertain that:-

- 1) The objectives of the charity are largely or very significantly concerning nature conservation.
- 2) The charity is sufficiently large to submit audited accounts.

We also believe that listed responsible bodies should be able to nominate other charities with similar objectives to set up and manage conservation covenants under the responsible bodies' supervision (see below).

We are however concerned about the position of local authorities or Ministers/ Secretaries of State as responsible bodies as they will be subject to other duties or economic imperatives that may conflict with conservation, particularly given the suggestion in paragraph 7.10 that a responsible body would be able to discharge unilaterally the obligations in the conservation covenant (but see our response to para 7.10). Therefore we suggest that it would not be acceptable for Local Authorities to be responsible bodies in this context – only bodies that are governed primarily by clear, conservation objectives should be able to hold conservation covenants.

We note that any future imposition of a duty to promote economic growth on all government bodies would result in there being no public bodies with a primary duty to conserve wildlife.

Finally, we would point out that provision for public participation must be made to ensure the system is fully accountable and stakeholder engagement is encouraged.

We invite views from consultees on whether there is a case for giving the Secretary of State and the Welsh Ministers the power to include for-profit companies whose objects include some or all of the purposes set out at paragraph 4.40 as responsible bodies.

Consultation Paper, Chapter 4, paragraph 4.24

No. Charity Commission provisions and Memorandum and Articles of Associations are a more robust back up. While some commercial enterprises may be involved with negotiating between land holders, developers and conservation bodies to achieve conservation benefits (for instance in any future offsetting schemes) the arbiter of conservation benefit and holder of the conservation covenant should be the charitable or public body that has clear conservation objectives.

We provisionally propose that a conservation covenant should be capable of being transferred from one responsible body to another. Do consultees agree?

Consultation Paper, Chapter 4, paragraph 4.26

Yes, but the circumstances under which this may happen and the responsible body(ies) to which the transferal may take place may be limited or specified by the covenant. Public participation is also needed.

We invite consultees' views on what should happen to a conservation covenant where the responsible body which holds it ceases to exist, or ceases to be a responsible body. In particular:

- (1) should there be a holder of last resort?
- (2) if so, who should take on this responsibility?

Consultation Paper, Chapter 4, paragraph 4.29

Yes. A Statutory Nature Conservation Organisation (i.e. a body with a clear commitment to conserving wildlife) should be nominated in the legislation as the holder of last resort for conservation.

The legislation should also provide for the provision of a holder of first resort to whom the conservation covenant would revert in the first place should the responsible body cease to exist. This arrangement would support standard practice in winding charities up; assets should be passed on to another charity that has closely aligned charitable objectives. The measure would enable clarity and security for the landholder when entering the covenant and would reduce the burden on government. The holder of first resort must be a responsible body and must be a formal party to the conservation covenant.

Should the bodies of first or last resort or their successors no longer exist then the covenant should pass to the relevant Secretary of State or Welsh Minister who should identify and appoint a replacement responsible body at the first opportunity. The replacement responsible body having objectives as similar to those of the original body as is possible.

A responsible body should also be able to nominate another organisation fitting the broad criteria – e.g. charity with primary conservation aims - to draw up, hold and manage a conservation covenant with the responsible body being the holder of first resort. Where the responsible body is not the primary holder of the conservation covenant it would be able to transfer this duty to itself or another similar qualifying body.

We provisionally propose that the purposes for which a conservation covenant may be created are an obligation to do or not do something on land for the public benefit, to preserve, protect, restore or enhance in relation to that land:

- (1) its natural environment, including its flora and fauna;
- (2) its natural resources; or
- (3) any cultural, historic or built heritage features of that land.

Do consultees agree?

Consultation Paper, Chapter 4, paragraph 4.40

Yes. We believe that the second purpose should be expanded to say “its natural resources and/or ecosystem services”.

Provision should also be made in the guidance to address any potential conflict between wildlife (natural environment) and cultural, historic or built heritage legislation.

We invite views from consultees as to whether a scheme of conservation covenants for England and Wales should include any form of public oversight for the creation of new conservation covenants.

Consultation Paper, Chapter 4, paragraph 4.49

Link would suggest that if the subject matter of a conservation covenant, as discussed in the previous question, is challenged, then the usual jurisdiction of the Lands Chamber should be apply. We would not want to see a system of 'pre-oversight' of the detailed objectives and terms of conservation covenants. Or any heavy handed statutory body led approval process.

This may well cause a dampening of interest or enthusiasm in landowners offering to enter into such covenants.

While we accept that there is the public interest at the heart of conservation covenants, the covenants will remain essentially private agreements. We would suggest that conservation covenants are assumed to be made lawfully, with sufficient public interest, and where there are grounds for concern, they should be subject to challenge in the Lands Chamber by the persons aggrieved.

However, we would support public engagement through a participation process so that there is greater public ownership of the objectives and a chance to raise issues of public concern. Where public funds are used to establish a conservation covenant a greater level of public scrutiny may be beneficial.

We provisionally propose that conservation covenants shall be statutory burdens on land, rather than proprietary interests or contractual agreements. Do consultees agree?

Consultation Paper, Chapter 5, paragraph 5.8

Yes.

We provisionally propose that a conservation covenant must be created in writing and signed by the parties. Do consultees agree?

Consultation Paper, Chapter 5, paragraph 5.10

Yes.

We provisionally propose that a conservation covenant should bind land in perpetuity, unless a shorter period is expressed in the conservation covenant. Do consultees agree?

Consultation Paper, Chapter 5, paragraph 5.14

Yes, providing that in establishing the conservation covenant any pre-determined consultation process was properly followed.

We provisionally propose that, subject to two exceptions, a statutory scheme for conservation covenants should not limit the obligations which parties may include in a conservation covenant, provided they do not go beyond the purposes for which such a covenant can be created. Do consultees agree?

Consultation Paper, Chapter 5, paragraph 5.16

Yes, but we would expect that the format for many conservation covenants (those obliging parties to complex arrangements, such as a provision of safe and free public access) would take the form of a commitment to a specific objective, linked to measures set out in a management plan. This plan could then be modified in the light of experience, new technology, better understanding of management, without having to modify the covenant. It is essential that the holder of the covenant has right of access to the land for compliance and auditing.

We provisionally propose that any provisions of a conservation covenant made by a leaseholder which conflict with the provisions of his or her lease should be void. Do consultees agree?

Consultation Paper, Chapter 5, paragraph 5.18

Yes, but this should only apply to pre-existing leases, it must be made clear that subsequent leases cannot disturb the conservation covenant. We believe that there is still a risk of contention as many existing leases will not mention conservation covenants specifically but may contain wording that could be interpreted as including conservation covenants. We also believe that 7 years is too short a lease period (see question para 4.7).

We provisionally propose that if land which is the subject of a conservation covenant is subdivided, the owners of the subdivided land should be jointly and severally liable for the conservation covenant obligations, unless the conservation covenant has provided otherwise (or it is modified or discharged). Do consultees agree?

Consultation Paper, Chapter 5, paragraph 5.20

Yes.

We provisionally propose that a statutory scheme for conservation covenants should be accompanied by non-statutory guidance for those who create and hold conservation covenants. This guidance should include model terms. Do consultees agree?

Consultation Paper, Chapter 5, paragraph 5.22

Yes.

We invite consultees' views on who should formulate non-statutory guidance (for example, Government departments, advisory bodies, or conservation organisations).

Consultatio Paper, Chapter 5, paragraph 5.23

The relevant Secretary of State/ Welsh Minister should authorise guidance prepared by the relevant nature conservation advisory body/organisation. The legislation should require the guidance to be consulted upon widely before being adopted. It could be the holder of last resort (a Government agency with a clear conservation objective and preferably involved in conservation land management).

We provisionally propose that a conservation covenant should be registrable as a local land charge, and that from the date when a conservation covenant is so registered it will be enforceable against successors in title to the original covenantor. Do consultees agree?

Consultation Paper, Chapter 5, paragraph 5.31

Yes.

We provisionally propose that there should not be a statutory requirement for central recording of conservation covenants; but that responsible bodies should be encouraged to publish this information voluntarily, with the agreement of the relevant landowner. Do consultees agree?

Consultation Paper, Chapter 5, paragraph 5.32

Lists of conservation covenants and the locations to which they apply must be easily accessible to the non-professional public and bodies representing public environmental interests. In addition, to ensure notification to other holders of interest in the land (including environmental bodies) there has to be some publicly available reference to the aim of the covenant. As such, we wonder whether the Local Land Charges system proposed would be sufficiently transparent.

Where public funds are used to establish the covenant, or it was created as part of a statutory scheme, such as a statutory offsetting regime, then there is an even greater need for public scrutiny. The objectives of the conservation covenant and the location to which it relates should in those cases be in the public domain, unless its disclosure would be exempted under Part 3(12) of the Environmental Information Regulations 2004, and to the extent allowed by 3(13) of those regulations. This may sit outside the regulation of conservation covenants, i.e. with subsequent scheme/s, but consideration should also be given to how the public would be notified of subsequent changes to the covenant.

Consideration should be given to establishing a fuller register of conservation covenants, or even a repository.

Do consultees foresee difficulties with the interaction of statutory designations for conservation purposes and conservation covenants?

Consultation Paper, Chapter 5, paragraph 5.34

No. Statutory designations are identified using clear sets of criteria and in current

circumstances it is likely that much covenanted land would not, in a matter of decades, achieve the criteria for designation. Where this does happen then it is likely that the conditions of the covenant would have contributed to this outcome and would therefore be synergistic with continued designation requirements. A more complex situation may arise if a conservation covenant is placed on an existing designation where the conservation objectives of the two do not coincide – this would need to be strongly discouraged in the guidance. Link would be concerned if conservation covenants became seen as a replacement for statutory nature conservation and would resist such a change. The guidance should further clarify the relationship between statutory designations and conservation covenants.

We invite consultees' views on how obligations under a conservation covenant should be managed, and in particular:

- (1) what sort of management action is likely to be needed; and
- (2) whether in some cases it would be useful for a management agreement to be used in addition to a conservation covenant.

Consultation Paper, Chapter 6, paragraph 6.10

We can envisage a wide range of potential actions covering aspects such as land use, vegetation management measures, water level management, agricultural practices, access arrangements, soil conservation and monitoring. These will be determined by, and dependent upon, the habitat, its current condition and the aims and objectives for the land of both the landowner and the responsible body.

We think that in most cases where specified habitat or species conservation outcomes are required, these outcomes and the pursuant measures would be best placed in a management agreement that is underpinned by the conservation covenants. A management agreement can also be a useful source of information about when certain management actions are required and/or inappropriate.

We provisionally propose that the parties should be free to agree management actions as part of a conservation covenant, but that no management powers should be provided for in the statute. Do consultees agree?

Consultation Paper, Chapter 6, paragraph 6.15

We agree with the proposal, and believe specific management powers should be avoided in statute, except, all conservation covenants should contain a reasonable right of access to inspect for the responsible body. There is no easily envisioned circumstance where the responsible body would not on occasion need to check that the conservation covenant is functioning. It is possible to imagine cases where the person to be bound by the agreement may negotiate to for the responsible body not to have access, the officer agrees, but subsequent post holders are left to rue the decision.

We provisionally propose that, under the terms of a conservation covenant, a person who is bound by a restrictive obligation breaches it by doing something which it prohibits, or by permitting or suffering someone else to do so; and a person who is bound by a positive obligation breaches it if the obligation is not performed. Do consultees agree?
Consultation Paper, Chapter 6, paragraph 6.20

Yes, whether by self, servant or agent including personal responsibility for director or officer of company if neglect or connivance contributes to failure.

We provisionally propose that, on proof of a breach of a conservation covenant, the court should have the power to issue a final injunction. Do consultees agree?
Consultation Paper, Chapter 6, paragraph 6.40

Yes.

We provisionally propose that the court should have the power to issue an interim injunction in respect of a breach of a conservation covenant. In determining whether an interim injunction should be issued, the court should be required to consider the public interest. Do consultees agree?
Consultation Paper, Chapter 6, paragraph 6.41

Yes.

We provisionally propose that, on proof of a breach of a conservation covenant by a landowner, the court should have the power to order:
(1) the payment of compensatory damages to the responsible body; and
(2) the payment of exemplary damages to the responsible body. We invite consultees' views on the way this remedy should be framed in a statutory scheme, and the circumstances in which such an award should be made. Do consultees agree?
Consultation Paper, Chapter 6, paragraph 6.51

Yes. In determining compensatory damages the court should consider the legal costs and losses of the responsible body. In the first place reinstatement and remediation action on the covenanted land should be considered. Only if this is not feasible should full compensation be awarded to the responsible body. Full compensation should be calculated as the cost of recreating the same habitat, or mix of habitats, of the same hectarage, supporting the same features identified in the conservation covenant or associated Management Agreement and being in the vicinity of the existing conservation covenant. In considering exemplary damages the court should consider the benefits accrued to the landowner by breaching the covenant and should award damages greater than the benefits accrued.

While compensatory damages should be awarded to the responsible body, we recommend that an independent trust fund be established to receive the exemplary

damages from all such court orders. The trust fund should have the objective of dispersing the funds upon application to responsible bodies to support the restoration and creation of new wildlife habitats on covenanted land.

We provisionally propose that a statutory scheme for conservation covenants should not include an ability for the court to award damages in substitution for an injunction. Do consultees agree?
Consultation Paper, Chapter 6, paragraph 6.55

Yes.

We invite consultees' views on whether Government or a statutory conservation body should have the power to enforce conservation covenants where a holder has failed or is unable to do so.
Consultation Paper, Chapter 6, paragraph 6.59

Neither – unless the responsible body cedes the covenant to the Government or a statutory conservation body in their role as holder of last or first resort. For the Government to have a general power to step in would undermine the basis of conservation covenants as an independent agreement between two parties who are responsible for its enforcement. If Government had the power to usurp the responsible body then there would have to be statutory notification, arbitration and appeal processes for the responsible body.

However, where public funds are used to establish the conservation covenant, we would expect a suitable government body or agency to be the responsible body, or where this was not appropriate to have a role as holder of last or first resort and to write into the covenant clear criteria relating to what happens should the responsible body fail to enforce the covenant.

The Lands Chamber, as the overarching body to address enforcement and disputes, could, in response to an application by the landowner or a third party meeting criteria set out in Article 2 (5) of the Aarhus convention, may decide to instruct a statutory conservation body to enforce a covenant.

We provisionally propose that, on proof of the breach of a responsible body's obligations under a conservation covenant, the court should have the power to order remedies in accordance with general principles of contract law. Do consultees agree?
Consultation Paper, Chapter 6, paragraph 6.61

Yes.

We provisionally propose that unless a conservation covenant expressly provides otherwise, its responsible body may unilaterally discharge the obligations contained in it. Do consultees agree?
Consultation Paper, Chapter 7, paragraph 7.10

Only in certain circumstances.

Where the conservation covenant was established or has been maintained for a significant period by public funds then it is not appropriate to allow the responsible body to unilaterally decide to cease/abandon the covenant without a transparent process and a system of checks and balances. This would be particularly true if Local Authorities or government bodies other than those with clear and contradictory conservation objectives were to be included in the list of responsible bodies (we say they should not be included).

Should a responsible body wish to discharge, or substantively amend, a conservation covenant that was established or maintained for a significant period by public funds then there should firstly be a six month public consultation, then an application should be made to the Lands Chamber of the Upper Tribunal, finally there should be a clear right of third party appeal, whereby a body meeting the criteria set out in Article 2 (5) of the Aarhus convention could challenge the decision of the Lands Chamber on the basis of public and environmental benefit.

Note also our response to para 4.24.

We invite consultees' views on whether the responsible body's ability to discharge should be limited to certain circumstances, and, if so, what circumstances would be appropriate.

Consultation Paper, Chapter 7, paragraph 7.11

No, except where the responsible body has authorised a conservation covenant in the role of holder of first resort, as we suggest in para 4.24, in such a case it should not be able to discharge obligations without the consent of the nominated a holder of the conservation covenant.

We provisionally propose that the parties to a conservation covenant for the time being may agree to modify it. Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.16

Yes, as long as lease/land holders and responsible bodies are in agreement and subject to the guidance framework. Link also believes as for discharge of obligations, modification must meet a public interest test, to avoid modifications being agreed merely for mutual expediency.

We provisionally propose that where a responsible body in respect of a conservation covenant acquires land which is subject to that covenant, the conservation covenant should cease. Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.20

Yes, unless the legislation allows the appointment of responsible bodies that do not have a clear primary conservation purpose. Should organisations with mixed

objectives be allowed to be responsible bodies then it would be more appropriate for the covenant to pass to the relevant Secretary of State or Welsh Minister who should identify and appoint a replacement responsible body at the first opportunity. The replacement responsible body having objectives as similar to those of the original body as is possible.

We provisionally propose that the Lands Chamber of the Upper Tribunal should have the power to determine applications for the modification and discharge of statutory conservation covenants. Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.48

Yes.

We provisionally propose that on the application of a landowner, the Lands Chamber of the Upper Tribunal may modify or discharge a conservation covenant where it is reasonable to do so, having regard to all of the circumstances and in particular the following matters (where relevant):

- (1) any change in circumstances since the conservation covenant was created (including changes in the character of the property or the neighbourhood);
- (2) the extent to which the conservation covenant confers a benefit on the public;
- (3) the extent to which the purposes for which the conservation covenant was created, or any other purposes for which a conservation covenant may be created, are served by the conservation covenant;
- (4) the extent to which the conservation covenant prevents the landowner's enjoyment of the land;
- (5) the extent to which it is practicable or affordable for both the landowner and future landowners to comply with the conservation covenant; and
- (6) whether the purposes for which the covenant was created could be achieved to an equivalent extent and within the same period of time by an alternative scheme on a different site which the landowner owns, and it is possible to create a new conservation covenant on that site in substitution for the covenant to be discharged. Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.63

No. We believe that the breadth of these provisions to modify or discharge the conservation covenants reduces the certainty and value of the conservation covenants to the responsible body to the extent that it undermines the value of the mechanism. Of these matters (2), (3) and (6) are for the responsible body to determine, having the necessary objectives and expertise, and take appropriate action.

Should an issue arise under matters (2), (3) or (6) the Lands Chamber should not be involved unless, the conservation covenant was established or maintained using public funds. In this case the responsible body should consult with the public, apply to the Lands Chamber for a discharge and this should be open to appeal by an

environmental body (see answer to para 7.10 for more detail on this proposed process). In any case, the wording of (6) is too loose, the phrase “within the same period of time” is not clear and does not guard against a significant time delay between the discharge of the original covenant and the establishment of habitat of equivalent value under a new covenant. For true achievement of “no net loss”, it would be expected that in most cases the discharge of the original covenant would need to be delayed until such time as the new covenanted land had reached the same value.

Matters (1) and (4) appear to be matters of degrees about which it would be difficult for a tribunal to set consistent thresholds and in any case were matters for the original landowner to consider in establishing the conservation covenant.

Only matter (5) clearly benefits from an independent adjudication process on the application of the landowner.

Do consultees envisage any situations in which compensation should be payable to a responsible body for modification or discharge of a conservation covenant by the Lands Chamber of the Upper Tribunal?

Consultation Paper, Chapter 7, paragraph 7.68

Yes, but note response to para 7.63 if this system works well and the range of grounds for requests from the landowner/lease holder for discharge are strictly limited as we suggest then the number of cases where compensation would be required as a result of a modification or discharge would be vanishingly small. [Note: some have assumed that this question related to the Lands Chamber compensating the responsible body, we have assumed that in all cases the landowner or leaseholder would be responsible for providing compensation.

We provisionally propose that it should not be possible for a responsible body to apply to the Lands Chamber of the Upper Tribunal for modification or discharge of a conservation covenant. Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.71

No. This should be necessary prior to discharge of conservation covenants established and maintained using public funds. See responses to para 7.10 and para 7.63. In addition while we recommend that access rights for the responsible body to monitor compliance should be a statutory requirement and not an optional clause in the conservation covenants, if this were not the case then the responsible body would need to have some recourse to address this omission should circumstances require it.

We provisionally propose that the existing jurisdiction of the court under section 84(2) of the Law of Property Act 1925, and the proposed jurisdiction of the Lands Chamber of the Upper Tribunal, should be extended to include conservation covenants. Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.74

Yes.

We provisionally propose that section 237 of the Town and Country Planning Act 1990 should enable the overriding of conservation covenants. Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.80

There should be a clear presumption that a conservation covenant is in perpetuity and is not easily revoked.

Link is also concerned that if conservation covenants are used for offsets, which should be in perpetuity, but then these offsets could be modified for future development. The overall result would be increasing development but no increase in the amount of offset or conservation covenant created.

We suggest that there may be exceptional circumstances of overriding public or economic interest where it would be reasonable to revoke the covenant. However there should be an appropriate system of checks and balances.

We propose that the planning authority would have to apply to Lands Chamber of the Upper Tribunal for the revocation of the conservation covenant. Before agreeing to the revocation the Chamber should be satisfied that:-

1. There is an overriding public or economic interest;
2. Alternative solutions have been considered;
3. A comparable replacement area of land has been identified in the vicinity, and replacement habitats will be created and conservation covenanted before the revocation of the original conservation covenant; wherever possible the responsible body would be the same body as the existing body relevant to the current covenant.
4. The responsible body (as well as the land owner) is suitably compensated by the Local Authority, and that compensation covers current value to the responsible body and past investment in the land and, additionally, where appropriate in relation to 3, sufficient funds to establish the replacement conservation covenant in the vicinity.
5. There will be no net damage to biodiversity.

In addition:

Link has concerns about this proposal and what happen in the following cases;

- (a) A landholder who no longer wants to abide by the conservation covenant could approach the council to buy the land.
- (b) Councils could see this as an easy way to provision land.
- (c) As Local authorities are proposed themselves to be responsible bodies (but note our views on this above) we have some concerns that this would equate to a conflict of interest.

Therefore we propose that if government bodies or agencies with mixed objectives

are allowed to be responsible bodies then caveats are put in place to ensure the above points cannot be conflicted.

We invite consultees to tell us whether covenants made under section 8 of the National Trust Act 1937 present any advantages for the National Trust or for the public that are not replicated in our provisional proposals for a statutory conservation covenants scheme.

Consultation Paper, Chapter 8, paragraph 8.16

No comment.

We provisionally propose that section 5 of the Forestry Act 1967 should be replaced by a statutory conservation covenants scheme. Do consultees agree?

Consultation Paper, Chapter 8, paragraph 8.25

There would seem to be a case for repealing this legislation, but we do not think that conservation covenants as proposed are a suitable replacement.

We also concerned that, firstly the dedication of an area of land to forestry may be contrary to the nature conservation interest of that land, and secondly that in England at least the objectives of the Forestry Commission are primarily to afforest and not to conserve wildlife.

The 1967 Forestry Act states that “The Commissioners shall be charged with the general duty of promoting the interests of forestry, the development of afforestation and the production and supply of timber and other forest products” and only goes on to say that “The Commissioners’ general duty includes that of promoting the establishment and maintenance of adequate reserves of growing trees. In discharging their functions under the Forestry Acts 1967 to 1979 the Commissioners shall, so far as may be consistent with the proper discharge of those functions, endeavour to achieve a reasonable balance between;

- (a) the development of afforestation, the management of forests and the production and supply of timber, and
- (b) the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest.”

The conflict between these objectives remains evident in current Forestry Commission activities and we do not think they meet the ‘primary conservation objectives’ test for being a responsible body.

Do consultees agree that the statutory covenants set out in Appendix A should not be replaced by a statutory scheme for conservation covenants?

Consultation Paper, Chapter 8, paragraph 8.28

Yes. The proposed covenants need to be 'new' and 'additional'. If all the current covenants were to be revisited, the administrative burden would be immense and the risk would be a lessening of the effectiveness of the covenants.

Do consultees agree that conservation covenants will be more widely used in rural areas than on urban land?

Consultation Paper, Chapter 9, paragraph 9.3

Yes, but the covenants should be available and consistently applied to both rural and urban land.

We invite consultees to indicate how widely used conservation covenants would be in England and Wales, or how frequently they might use covenants in the course of their work.

Consultation Paper, Chapter 9, paragraph 9.7

Link members already work with many leaseholders we can see the benefit of making these agreements into conservation covenants. For example, using conservation covenants would be a way for organisations such as the Wildfowl & Wetlands Trust (WWT) to work with landowners to benefit wetlands and wildlife without having to purchase land.

Do consultees agree that conservation covenants will lead to an increase in the opportunities for development and resource management, whether through encouraging the release of land or facilitating development via biodiversity offsetting? What would the financial benefit of such an increase be (for example to developers or those working in the biodiversity sector)?

Consultation Paper, Chapter 9, paragraph 9.11

Link believes that this is a potential outcome.

There are a range of additional concerns that would arise if conservation covenants were used as part of a mechanism to permit development. We believe biodiversity offsetting should only be used as a last resort and should not be used to weaken the tests set out in the National Planning Policy Framework including demonstrating that it was not possible to avoid or, only failing that, mitigate predicted impacts arising from the development, that the damage to biodiversity outweighed the need to conserve that biodiversity and therefore compensation (including offsetting) is required as a last resort.

Conservation covenants could certainly increase the options for resource management and habitat creation, but facilitating development will depend more on the details of any proposed offsetting scheme and the long term effect on the behaviour of developers of having to properly compensate for damage caused to biodiversity.

Do consultees agree that the introduction of conservation covenants will have a positive impact on conservation, leading to benefits such as the protection of natural capital, and enhancement of a green economy and better availability of recreational activity for the public? We would welcome information consultees are able to provide on monetisation of these benefits.

Consultation Paper, Chapter 9, paragraph 9.15

Yes.

Do consultees agree that removing the need for a conservation organisation to purchase land, and for landowners to sell land, will reduce the costs involved in protecting it? We invite consultees to provide us with details of specific costs they have incurred in using this workaround.

Consultation Paper, Chapter 9, paragraph 9.18

Yes.

Do consultees agree that removing the need for lease-back arrangements will reduce the costs involved in protecting land? We invite consultees to provide us with details of specific costs they have incurred in using this workaround.

Consultation Paper, Chapter 9, paragraph 9.20

Yes.

We invite consultees to provide details of how a conservation covenant could affect the value of land (whether the site itself, or neighbouring properties).

Consultation Paper, Chapter 9, paragraph 9.23

No comment.

We invite consultees to provide details of the likely costs of managing a conservation covenant, particularly where this can be drawn from existing management actions that they undertake or are aware of.

Consultation Paper, Chapter 9, paragraph 9.25

As per the answer for Para 6.10, the type of management action and level of intervention that will be required will be determined by and dependent upon the habitat, its current condition and the aims and objectives for the land or both the landowner and the responsible body. This will also obviously determine the cost of managing a conservation covenant.

HLS options provide payment rates for different maintenance/creation/restoration actions, which gives some indication of how much these activities cost. For example:

- Management of hedgerows of very high environmental value (both sides) £54/100m.

- Management of hedgerows of very high environmental value (one side) £27/100m.

On top of these, extra payments for capital works e.g. laying, coppicing, planting up gaps, establishing new hedgerow trees can be funded by a Capital Works Plan. For example:

- Maintenance/restoration of woodland £100/ha.

We invite views from consultees as to the likelihood of enforcement action being needed for conservation covenants in England and Wales.

Consultation Paper, Chapter 9, paragraph 9.27

We believe that the likelihood of enforcement action will be rare, as in most cases it will be difficult to prove that breaches have occurred and responsible bodies will be reluctant to take action for fear of failure, costs and loss of goodwill. It is our experience that covenants are also about educating the landowner and their legal responsibility to abide by these will, in most cases, be sufficient.

Link would hope that enforcement action against the landowners with which covenants are first agreed would be unlikely. As long as future purchasers of the land are sufficiently on notice of and understand before purchase what the covenant entails then future enforcement action should be minimal.

We invite consultees to provide details of the likely costs of enforcement action such as seeking damages or an injunction.

Consultation Paper, Chapter 9, paragraph 9.28

No comment.

Do consultees agree that the cost of training for legal professionals and them judiciary will be absorbed by existing training and professional development?

Consultation Paper, Chapter 9, paragraph 9.30

Yes.

Do consultees agree that the transitional impact on local authorities of registering new conservation covenants would be minimal and in any event absorbed by the fee payable?

Consultation Paper, Chapter 9, paragraph 9.32

Yes.

Do consultees agree that the transitional impact on responsible bodies would be minimal?

Consultation Paper, Chapter 9, paragraph 9.34

Yes. Unless a new scheme is introduced that relies on the conservation covenant

mechanism.

Do consultees agree that the transitional impact on the Lands Chamber of the Upper Tribunal would be in the region of £7,500?
 Consultation Paper, Chapter 9, paragraph 9.36

No comment.

We invite views from consultees as to the range of likely costs of an application to modify or discharge a conservation covenant.
 Consultation Paper, Chapter 9, paragraph 9.40

No comment.

We invite views from consultees as to the likely increase in applications to the Lands Chamber of the Upper Tribunal following the introduction of a statutory scheme for conservation covenants.
 Consultation Paper, Chapter 9, paragraph 9.43

We agree with the analysis presented – *there is likely to be a considerable increase in casework.*

Do consultees agree that conservation covenants provide benefits in terms of opportunities for increased engagement on the part of individuals and communities?
 Consultation Paper, Chapter 9, paragraph 9.45

Yes, particularly if local communities are involved in formulating the terms of the covenant, are consulted and aware of the covenant and especially if the covenant includes the provision of additional access (physical and/or intellectual) to the affected site.

We invite consultees to advise us of areas which constitute likely costs or benefits of a statutory scheme for conservation covenants.
 Consultation Paper, Chapter 9, paragraph 9.47

Costs: The landowner and future landowner is likely to incur costs, not only one-off/set-up costs (e.g. legal fees) but also on-going costs of different management practices (which may result in less income or incur costs).

Benefits: If the introduction of conservation covenants result in more land being managed in a fully sustainable way, there should be environmental benefits over and above the ‘without covenants’ future. Increased opportunities for recreation have

enormous potential to deliver not only rural economic growth but a range of benefits, including improvements to public health, well-being and an increase in public understanding of and support for the environment. Whilst these benefits are difficult to monetise, they are nonetheless real.

Link believes that, measured in the widest possible terms, for example including the value of ecosystem services that would be protected, the potential benefits of conservation covenants are highly likely to outweigh the costs by many orders of magnitude.

**Wildlife and Countryside Link
June 2013**



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