MISCELLANEOUS CIRCULARS AND GUIDANCE FROM DEFRA AND OTHER DEPARTMENTS

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1. INTRODUCTION

1.1 This code of practice gives guidance to water undertakers, sewerage undertakers and the Environment Agency ('the relevant bodies') on matters which they should consider when carrying out their duties in respect of conservation, access and recreation in relation to the functions described under paragraph 1.6 below.

1.2 The duties of water and sewerage undertakers are in sections 3 to 5 of the Water Industry Act 1991, and those of the Environment Agency ('the Agency') in sections 7 to 9 of the Environment Act 1995. The guidance also relates to the Agency's duties specifically with respect to water under section 6(1) of the 1995 Act.

1.3 These duties involve:

* the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest

* the protection and conservation of buildings, sites and objects of archaeological, architectural, engineering (in the case of the Agency) or historic interest

* the effect of any proposals on the beauty or amenity of any rural or urban area or on any flora, fauna, features, buildings, sites or objects

* in the case of the Agency, the effect which any proposals would have on the economic and social well-being of local communities in rural areas

* the maintenance of public freedom of access to places of natural beauty and to buildings, sites or objects of archaeological, architectural or historic interest

* the availability of water and associated land to which the relevant bodies have rights for recreational purposes, taking into account the needs of disabled people

* additional environmental duties with respect to sites of special interest.

1.4 The Agency also has a more general duty to promote the conservation and recreational use of inland and coastal waters, and associated land.

1.5 The relevant bodies must discharge their duties in respect of conservation, access and recreation so far as may be consistent with their statutory functions. The duties apply wherever the relevant bodies are formulating or considering proposals relating to their functions - other than the recreational duties of the undertakers and the Agency under section 3(5) of the Water
Industry Act 1991 and section 7(4) of the Environment Act 1995 respectively. Those recreational duties apply where the relevant bodies have rights to the use of water or associated land.

1.6 The guidance in the Code applies to the water and sewerage undertakers in respect of all their functions. It also applies to management by undertakers of their protected land. It applies to the Agency as regards its functions in respect of water resources management; control of pollution of water resources; flood defence; land and works powers; fisheries; and its functions as a navigation, harbour and conservancy authority (and local legislation relating to those functions).

1.7 The Code applies to water undertakers and sewerage undertakers whose area of appointment is not wholly or mainly in Wales. It applies to the Agency in so far as its functions are carried out in England.

1.8 The Code is complemented by the Code of Practice on Environmental Procedures for Flood Defence Operating Authorities published by the Ministry of Agriculture Fisheries and Food and the Welsh Office in December 1996.


1.10 The Environment Agency must have regard to the Code in carrying out its duties under sections 6(1), 7 and 8 of the Environment Act 1995. For the water and sewerage undertakers, failure to comply with any provision of the Code will not of itself constitute a breach of the duties imposed on them by sections 3 and 4 of the Water Industry Act 1991. However, the Secretary of State for the Environment, Transport and the Regions and the Minister of Agriculture, Fisheries and Food must take into account whether there has been or is likely to be any contravention of the Code in determining how they should exercise their powers in relation to the undertakers.

1.11 The Code is monitored by the Government's Standing Committee on Conservation, Access and Recreation.

1.12 Section 2 of the Code covers general steps to be taken by the relevant bodies. It is followed by sections on Conservation, Access and Recreation and the further environmental duties with regard to Sites of Special Scientific Interest, National Parks and the Broads. Section 7 sets out other legislation and guidance which the relevant bodies will need to take into account.
2. GENERAL MATTERS

2.1 In carrying out their duties in respect of conservation, access and recreation, the relevant bodies should seek to contribute to the over-arching objective of achieving sustainable development. This concerns ensuring a better quality of life for everyone, now and for generations to come. It involves taking a long-term view, and an integrated approach, to the way we work through considering the social, environmental and economic impacts of our actions. (See also paragraphs 7.2 to 7.6)

2.2 The extent to which biodiversity is becoming integrated into policies and programmes is a key test of sustainable development. The relevant bodies should take account of biodiversity when devising or revising their environmental management systems (EMS), as well as seeking to foster biodiversity in the other ways described in this Code. They should consider reporting on their actions to conserve and enhance biodiversity, particularly national and local biodiversity targets, as part of their EMS reporting. (See also paragraph 7.15 to 7.16.)

Integrated approach

2.3 The relevant bodies should carry out their conservation, access and recreation duties within the framework of an integrated approach to management of the environment. Conflicting demands may arise between these duties and operational considerations. There may also be differing objectives both between and within the fields of conservation, access and recreation. The relevant bodies should seek to reconcile these considerations through the preparation of land use and management plans.

2.4 The relevant bodies should make assessments of the environmental value of their sites and the suitability of land for different uses in respect of conservation, access and recreation. Land use and management plans should be drawn up following consultation with relevant interests. Relevant bodies should also have detailed plans for individual sites, especially where they are subject to pressures from competing uses. Implementation of all plans should be monitored closely and they should be regularly reviewed. The relevant bodies may wish to consider the use of a database of their sites.

2.5 For the Agency, an integrated approach to management is achieved by Local Environment Agency Plans (LEAPs), which cover all aspects of the Agency’s functions including water abstraction and discharge needs, conservation, access and recreation. Since a LEAP is drawn up following consultation with interested bodies and the public, the other relevant bodies will also have been involved. The Agency should therefore work with them from the outset in formulating conservation, access and recreation policies. LEAPs should present relevant issues, address conflicts between uses and identify action needed by the Agency and others to ensure that environmental objectives are met.

Consultation

2.6 The relevant bodies should consult fully, at an early stage, where proposals raise conservation, access or recreation issues. This will enable any necessary measures to be incorporated in as simple and cost-effective manner as possible.

2.7 Consultation should be at a level (national, regional or local) which is most likely to elicit an
informed response. The relevant bodies should in particular be aware of the following government departments and agencies and non-governmental organisations:

**Government Departments, Agencies/NDPBs:**

- British Waterways
- CADW: Welsh Historic Monuments Countryside Agency
- Countryside Council for Wales
- English Heritage
- English Nature
- English Sports Council (Sport England)
- Farming and Rural Conservation Agency
- Forestry Commission
- National Forest Company
- National Tourist Boards
- Sports Council for Wales

**Non-governmental organisations:**

- Association of Drainage Authorities
- Campaign for the Protection of Rural Wales
- Central Council of Physical Recreation and relevant member organisations
- Council for British Archaeology
- Council for the Protection of Rural England
- Country Landowners Association
- Fieldfare Trust
- National Farmers Union
- Farmers Union of Wales
- National Trust
- Ramblers' Association
* Regional Archaeological Trusts in Wales
* Royal Society for the Protection for Birds
* The Wildlife Trusts
* Welsh Sports Association

Others:
* local authorities (including local authority archaeologists)
* National Park Authorities and the Broads Authority
* Community Forest teams

It may also be appropriate to consult local user groups, including those representing disabled users, landowners and bodies representing industry.

2.8 The relevant bodies should establish mechanisms to ensure regular contact with conservation, recreation and sports organisations, which will facilitate discussions on particular proposals as they arise. The relevant bodies should also, where appropriate, consult with each other on proposals relating to conservation, access and recreation.

Public information

2.9 Relevant bodies should make available public information on the exercise of their conservation, access and recreation duties. They should at least once a year publish a report on their activities in these areas, either as a separate report or by including the relevant information in a distinct section of their wider environmental report. Reports should be prepared in accordance with the Guidance Notes for the Preparation of Annual Conservation, Access and Recreation Reports, issued by DETR and the Welsh Office.

2.10 They should also make available to the public, if requested, land use and management plans and any policy statements, for example on the carrying out of works, which may be relevant to the performance of their environmental and recreational duties. If plans are withheld because of sensitive conservation issues, an explanation should be given. In making information available, consideration should be given to those members of the public who are disabled. The duties placed on providers of goods, services and facilities under the Disability Discrimination Act 1995 will apply (see paragraphs 7.55 to 7.57).

Training and data collection

2.11 The relevant bodies should ensure that all their staff understand and demonstrate commitment to the body's responsibilities with regard to conservation, access and recreation, and training should be provided for staff who are directly involved in these areas. They should also ensure that any agents, contractors or consultants understand these responsibilities. To allow them to discharge their duties properly, the relevant bodies should make suitable arrangements for monitoring, research and the collection and maintenance of survey data and where appropriate take into account data provided or collected by other bodies.
3. CONSERVATION

GENERAL

3.1 Many of the regular operations of the relevant bodies, including construction of new schemes, maintenance works and management of water resources, can have significant environmental effects. They may result in direct visual and physical effects on the landscape, natural habitats, historic buildings and archaeological remains. The conservation duties apply both to land which the relevant bodies own and to areas in which they exercise functions.

3.2 The relevant bodies should have special regard to the requirements of statutory protection afforded to some areas, and to some species and their habitats, which carry landscape or conservation designations (see also chapter 6 and paragraphs 7.8 to 7.13).

Conservation of natural beauty

3.3 The relevant bodies should avoid damage arising from any works and land use changes which could have an adverse effect on the character of the landscape. Projects should be designed to:

* conserve and enhance the landscape character of an area
* use local materials and building styles wherever possible
* if possible plant native species which are appropriate to the site and of local provenance and which contribute to the achievement of national or local biodiversity targets.

Conservation of flora, fauna and geological or physiographical features

3.4 The relevant bodies should assess the potential impact of any proposals on biodiversity and, where practicable, make available information on species and habitats from surveys and monitoring to local biological record centres, local biodiversity action plans and the National Biodiversity Network. The relevant bodies should avoid damage to flora, fauna and geological or physiographical features. While different functions will give rise to different requirements in respect of nature conservation, some general practices are likely to be relevant to all aspects of management and use of the water environment and associated habitats. These are to:

* carry out surveys and consultations to identify sensitive and valuable habitats, plants and animals that could be affected
* conserve and where practicable enhance biodiversity having regard to national or local targets
* minimise clearance of natural vegetation; prune or reduce mature trees, where appropriate for the tree and site, as an alternative to felling; replace trees with species suitable to the site
* identify trees worthy of protection, for example those of biodiversity value, install appropriate fencing and undertake remedial work. More generally, to protect tree roots from compaction or severance and branches from fire or breakage by excavators or high-sided vehicles
* retain overhanging trees and fallen trees adjacent to rivers or canals, where they are not
causing obstruction or adversely affecting the aquatic ecology or likely to enter the river and cause a flood hazard

* maintain hedgerows (see also paragraph 7.21)
* retain and protect existing ground cover plants, where practicable, during construction works
* retain trees at intervals where general scrub clearance is necessary
* retain river flows and water tables at levels sufficient to protect associated habitats
* avoid the canalisation of channels; design asymmetric channels; reprofiling, where needed, should be carried out in short sections over several years
* retain flood plains and allow them to function naturally where this does not conflict with the need to protect life or valuable natural or man-made assets. Discourage inappropriate development in such areas
* retain where practicable natural river features such as pools, riffles, sand bars, shingle banks, cliffs, meanders and braided channels
* retain landscape features and habitats, for example ponds, brackish lagoons, marsh, fen, water meadows, bog, scrub and marginal trees
* use natural materials from sustainable sources, local if possible
* retain where practicable natural features such as cliffs, shingle beaches, dunes and salt marsh
* avoid excessive organic pollution, nutrient enrichment and siltation of streams, lakes and other water bodies
* retain natural fish populations and avoid overstocking of ponds and lakes.

Archaeological, historical and architectural features

3.5 Archaeological remains and historic buildings, and the historic environment more generally, may be subject to differing pressures. Where proposed works would result in lower water levels, there may be a threat of drying out and decay of water logged materials such as timber. Buildings, monuments and other historic features are also vulnerable to damage caused by misuse or neglect.

3.6 The relevant bodies should have special regard to the requirements of statutory protection, and to areas identified for their heritage or landscape importance (see also paragraphs 7.40, 7.41 and 7.49 to 7.50).

3.7 The relevant bodies should:
* carry out surveys of archaeological, historical and architectural features
* avoid disturbance of archaeological or historic features, and works damaging to the historic
environment generally, and where disturbance is unavoidable, details of such features should be recorded

* protect buildings, monuments and other historic features from damage caused by misuse or neglect

* maintain features whether or not in current use

* conserve and/or record details of, for example, machinery, equipment, documents

* consult local authority archaeologists in England, or the relevant regional Archaeological Trust in Wales, and conservation officers where historic or archaeological features are affected

* circulate lists of surplus movable features to potential new keepers such as industrial archaeology or history societies, county archivists, civic trusts, and the English and Welsh Royal Commissioners on Ancient and Historical Monuments

* in respect of plant or machinery, consult the Science Museum or the Council for British Archaeology.

**SPECIFIC**

3.8 In addition to the need for consultation and the general advice above, some specific considerations below apply to particular functions.

**Water resources management**

3.9 This may involve new schemes or major modification to existing schemes for river regulation, inter-river water transfer, conjunctive use, groundwater abstraction, groundwater recharge, abstraction from water courses into reservoirs, the alteration of water levels in reservoirs and lakes and the alteration of flow in rivers, canals or estuaries.

3.10 In drawing up proposals for new surface water abstraction schemes (which may involve the construction of new pumped storage reservoirs and/or water channels) or for new impounding reservoirs, the relevant bodies should carry out an appropriate environmental assessment. In particular, the requirements of the Environmental Impact Assessment Directive must be met (see paragraph 7.7). They should make provision wherever practicable for the retention of the existing flora, fauna and physiographical features likely to be affected by the scheme. They should also make suitable provision for the preservation or, failing that, detailed documentation of any features of archaeological, architectural or historic interest which would be destroyed or inundated. The relevant bodies should also consider creating or enhancing features such as islands, marshy areas and woodlands and, in consultation with wildlife conservation bodies, seek to conserve and enhance flora and fauna, particularly where this would be of value to biodiversity.

3.11 Existing reservoirs and artificial water transfer channels should be operated with due regard to the conservation of the flora, fauna and physiographical features which have come to be associated with that infrastructure. The Environment Agency should always take account of conservation issues in the drawing up or revision of water resources management arrangements with water undertakers under the provisions of section 20 of the Water Resources Act 1991. If a reservoir is to be placed permanently out of use in either a drawn down or filled state, the
relevant body should consider how flora, fauna and physiographical features may best be enhanced as a result.

3.12 Where the Agency is considering an application for authorisation of an abstraction or impoundment which might affect a Site of Special Scientific Interest (SSSI), a scheduled ancient monument or a site of other conservation importance, it must (under section 34 of the Water Resources Act 1991) consult English Nature, the Countryside Council for Wales, English Heritage or Cadw as appropriate, as well as other local conservation bodies and local authorities. (See also paragraph 7.10 for proposals affecting Special Areas of Conservation (SACs) and Special Protection Areas (SPAs). The effects on nature conservation and the man-made heritage will be significant factors in the Agency's determination of the application. The Agency will also consider the effects on fish populations and migration.

3.13 In determining the conditions which should apply to a new or renewed abstraction or impounding authorisation, the Agency should take into account the need to safeguard the conservation interests which have come to its attention. For example, the licence could require the water undertaker to monitor the effects of the abstraction or impoundment and to adjust the operation, if effects harmful to the conservation interests are shown.

3.14 If an existing authorised abstraction is shown to be significantly damaging a conservation interest, the water undertaker concerned should take account of the views of the Agency and the other relevant conservation bodies and agree modifications to the abstraction. If, exceptionally, no agreement can be reached, the Agency should use its powers to vary or revoke the authorisation, with particular urgency where SACs, SPAs and SSSIs are concerned.

**Sewerage, sewage disposal and pollution control**

3.15 The Agency plans improvements in effluent quality, particularly to avoid adverse impacts on SSSIs or other sites of importance, which can be achieved through the exercise of its functions, notably through the review of discharge consent conditions. For the water and sewerage industry these improvements will reflect the priorities set by the Government in the context of the Periodic Review of price limits.

3.16 In the case of SACs or SPAs, the Agency must assess the implications for the site of a proposed discharge and existing discharges (see paragraph 7.10). In determining the specific conditions to be attached to a consent, the Agency will act in accordance with its environmental and recreational duties under sections 7 and 8 of the Environment Act 1995, which include consultation with the relevant conservation agency, and the practical guidance given in this Code of Practice. Similarly, in considering how to meet the requirements of a consent, or in planning new or varied discharges, the sewerage undertakers should comply with their duties under sections 3 and 4 of the Water Industry Act 1991 and the practical guidance in this Code.

3.17 When considering whether its further duty under section 101A of the Water Industry Act 1991 to provide sewers applies, a sewerage undertaker must have regard, inter alia, to the nature and extent of any adverse effects on the environment as a result of the premises not being connected to a public sewer (see paragraph 7.59). These factors must also be taken into account by the Agency in determination of any dispute between a sewerage undertaker and an owner or occupier of premises seeking connection to a public sewer.

**Pipe laying**

3.18 When laying new trunk sewers and trunk mains or replacing existing pipelines, the
undertakers should seek to adjust routes to minimise damage to the landscape and important habitats, to by-pass sites of importance for conservation and to avoid damage to features of archaeological or historic interest. Consideration should be given to the use of a trenchless method which can minimise environmental damage, after taking into account pre-construction borehole surveys and site investigations to identify risk to features of archaeological or historic interest. Working widths of pipeline construction should be minimised and specifications could require the erection of, for example, barriers or fences to contain the disturbed areas.

3.19 Each undertaker should follow the good practice set out in its Code of Practice for Pipelaying, prepared under section 182 of the Water Industry Act 1991 and approved by the Secretaries of State, when laying or carrying out work on pipes in private land, or doing work to prevent contamination of the water in their waterworks.

3.20 Guidelines for the planning, installation and maintenance of utility services in proximity to trees (National Joint Utilities Group, publication No.10) provides advice on how to avoid damaging trees when digging trenches and causing instability through severance of roots and compaction of the ground by excavation equipment.

3.21 Construction programmes should be designed to avoid damage to natural systems. Where necessary there should be specific assessments of the existence, character and extent of features which may be affected. Where damage to features of archaeological interest is unavoidable, the undertakers should arrange for investigation by an archaeological body and publish the results in advance of the works being implemented. If possible, work should be scheduled with regard to the likely impact on the environment, for example avoiding winter working in locations where summer working would cause significantly less disturbance. The timing of works should, for example, avoid the disturbance of nesting birds and wintering wildfowl.

3.22 Reinstatement should be carried out as soon as possible, in co-operation with the landowners and occupiers, with planting and reseeding and in accordance with the provisions of each undertaker's Code of Practice for Pipelaying. Restoration should reinstate, as far as practicable, the disturbed area to its original condition.

Fisheries, bankside activities and navigation

3.23 The Environment Agency has a statutory duty to maintain, improve and develop salmon, trout, freshwater and eel fisheries in England and Wales. The relevant bodies should promote and pursue activities which contribute to sustainable fisheries management, in accordance with good practice.

3.24 For example, techniques such as mechanical weed cutting, the use of herbicides, the substances employed for fisheries management, and the use of anti-fouling paint should be carefully evaluated for environmental impact. Guidance on the use of herbicides to control weeds in or near waters is provided in the MAFF booklet Guidelines for the use of herbicides on weeds in or near watercourses and lakes.

3.25 The relevant bodies should take steps to protect wildlife and landscape from any harmful effects of bankside activities or of navigation. For example, the speed and level of boat activity may need to be controlled in order to minimise disturbance to wildlife, bank erosion and increase in turbidity, which may reduce plant growth and diversity and adversely affect the landscape.
4. ACCESS

4.1 The relevant bodies have a statutory duty, in formulating or considering any proposals relating to their functions, to have regard to the desirability of preserving public access to places of natural beauty - including areas of woodland, mountains, moor, heath, down, cliff or foreshore - and to buildings, sites and objects of archaeological, architectural or historic interest and to take into account the effect which the proposals would have on public access. These duties apply to their own land and to areas in which they exercise their functions.

4.2 Land and water owned or controlled by the relevant bodies offers a unique resource for a wide range of recreation activities. The relevant bodies should normally allow freedom of access to all land and water of natural beauty, amenity or recreational value. Access should be considered for the widest possible range of activities. The relevant bodies should be aware of the Government's intention to legislate during 2000 to give people a statutory right of access over open countryside and to improve the network of public rights of way, especially for equestrians and cyclists. Wherever possible they should provide access by means of marked paths for walkers and, where appropriate, for other users, including equestrians and cyclists. The relevant bodies should also consider the formal dedication of permitted paths.

4.3 Access to land and water should be allowed provided that there is no significant danger to public health and safety, risk of pollution or damage, or harmful impact on wildlife. If access is not possible, public notices should normally be displayed explaining why.

4.4 Access should similarly be granted to archaeological monuments and buildings of historic and architectural interest and could be facilitated by:

* signposting of sites in areas with public access or close to rights of way
* creation of heritage trails, if appropriate in conjunction with wildlife interests
* creation of formal displays or museums or holding open days
* provision of facilities for specialists to study objects, machinery or documents either directly or through loans to libraries or museums.

4.5 Monitoring the impact of visitors and recreational uses can give an indication of what a site can support without long term damage. The relevant bodies should consider ways in which sustainable access can be promoted.

4.6 Access should normally only be withdrawn for operational, health and safety or conservation reasons. Closure should usually be for a limited period and kept under review. The relevant bodies should display public notices to this effect. Where there are proposals that would restrict or remove existing access, the relevant bodies should consult interested parties at an early stage. Where termination of access is unavoidable, alternative provision should be made unless evidence is provided that there is no need for such provision. The relevant bodies should be aware that they can divert or extinguish statutory rights of way only by using their powers under Schedule 11 of the Water Industry Act 1991 or Schedule 19 of the Water Resources Act 1991. Local authorities have powers to do so under the Highways Act 1980 or the Town and Country Planning Act 1990 (see also paragraph 7.35).

4.7 Care should be taken in using herbicides on land or for aquatic plant control. Notices should
be displayed to warn the public where such spraying has taken place. The Health and Safety Commission has published an *Approved Code of Practice on the Safe Use of Pesticides for Non-Agricultural Purposes*.

4.8 In determining any type of public access, the relevant bodies must bear in mind the needs of disabled people and, in particular, the legal obligations on service providers specified in the Disability Discrimination Act 1995 (see paragraphs 7.55 to 7.57). They should seek to facilitate access for disabled people and to avoid creating obstacles to access.
5. RECREATION

GENERAL

5.1 The relevant bodies are required to take such steps as are reasonably practicable and consistent with other enactments relating to their functions, to secure that any rights which they have to the use of water and associated land are exercised so as to ensure that the water or land is made available, in the best manner, for recreational purposes. Opportunities are particularly likely to arise in respect of:

* inland reservoirs, flooded gravel pits and coastal waters, which may be an important resource for water sports, such as sailing, windsurfing and canoeing, and for angling, walking and birdwatching

* upland water gathering grounds, where there should be provision for informal recreation such as walking, mountaineering and enjoyment of the countryside. Wherever practicable, access on roads and tracks should be extended to equestrians and cyclists for informal recreation. Access for organised activities such as orienteering, climbing, paragliding and caving should be granted unless there are clear reasons why it should be refused.

5.2 The Agency also has a general duty to promote the use of inland and coastal waters and associated land for recreational purposes.

5.3 The relevant bodies should establish mechanisms for consulting regularly with local and national user groups, the English Sports Council (Sport England) or Sports Council for Wales, regional sports fora and, where appropriate, with governing bodies of specific sports.

5.4 The relevant bodies should seek to ensure that access is provided to as wide a range of facilities as possible and to as wide a range of people as possible. Promoting access for all should help to improve health and reduce social exclusion.

The main considerations should be to:

* increase enjoyment and success in outdoor sport and recreation

* promote access for everyone, particularly beside, to and on water, while encouraging safe and responsible behaviour among those taking part

* use sporting and recreational activities as a way of increasing awareness of, and appreciation for, the environment and to increase support for its protection

* provide, design and manage facilities and activities which follow the principles of sustainable development

* consider the possibility of locating facilities close to population centres from which demand is likely to originate.

5.5 How the relevant bodies put their water and land to use for sport and recreation in the best manner will depend on particular circumstances, but two considerations which will generally be relevant are:
* the need to provide for as broad a range of activities and interest groups as practicable while seeking to reconcile potential conflict

* the need to take account of the recreational needs of local people and wider communities and to ensure by good planning and management that opportunities are provided for popular as well as more specialised demands.

5.6 Considerations which should be taken into account in establishing and operating specific sites are that:

* subject to suitable terms and conditions, public use of sporting and recreational facilities should be maintained and new demands met by the grant or renewal of leases or licences

* facilities provided for formal or organised recreational pursuits may be offered on terms which take account of the capital costs of provision and maintenance

* existing users of sporting and recreational facilities on the relevant bodies' land or water - and in the surrounding area - and conservation bodies should be consulted before the introduction of any new activity and judgements should be made on the basis of the principles in paragraph 5.5

* provision should be made, where possible, for the needs of disabled people (see paragraphs 7.55-7.57)

* journeys to the facility by non-motorised or public transport should be encouraged, for example, by liaising with local authorities and public transport providers and opportunities should, where possible, be provided close to where people live

* reasonable account should be taken of the need for public car parks, toilets and picnic sites, and facilities for the study of nature, geology or archaeology.

5.7 Details of concessionary recreational and access arrangements should be notified to the Ordnance Survey.

5.8 The sustainable development of tourism can bring economic, social and environmental benefits at both local and national levels. In providing information on opportunities for recreation, recreational facilities, and means of heightening appreciation for the countryside and encouraging responsible behaviour, relevant bodies will wish to bear in mind the needs of visitors to the area and may wish to consult the appropriate regional tourist board.

**SPECIFIC**

**Water resources management**

5.9 Varying water levels, which may result from new or modified reservoir schemes or ground water abstractions, could affect boating or angling and also birds or other wildlife. Fisheries, and so angling, could also be affected by inter-river transfers or conjunctive use schemes.

5.10 In the design, construction and management of capital water resources schemes, such as water storage schemes and river or estuarine barrages, the relevant bodies should consider the effect upon, and opportunities for, recreation and the possible inclusion of recreational facilities.
Partnerships between interested bodies should be developed to maximise the potential of schemes for recreation.

5.11 Recreational bodies with an interest should be kept informed of the expected fluctuation of reservoir levels, which will be largely seasonal in character. They should be given as much notice as possible of exceptional draw-downs, whether for maintenance or other operational reasons. Owners of impounding reservoirs should also inform recreational bodies - including fishing, boating or canoeing clubs - of the expected pattern of compensation water discharges and, as far as possible, spillway flows to downstream water courses and the consequent effects on river flows and levels. Water drawdown release programmes should be prepared in consultation with fishery managers, recreational user groups and the Agency.

5.12 If an undertaker proposes to retain a reservoir which is surplus to operational requirements, it should consider whether there is potential for recreational use.

5.13 Where major pipelines are constructed, the relevant bodies should consider whether any land retained alongside for access and maintenance, could be used as a footpath, cycle track or bridleway.

Sewerage, sewage disposal and pollution control

5.14 When laying new trunk sewers, undertakers should assess any opportunities for the creation of footpaths, cycle tracks or bridleways, taking full account of the interests and views of neighbouring landowners and occupiers. There may also be opportunities along the existing network of trunk sewer lines.

Fisheries

5.15 The Agency has a statutory duty to maintain, improve and develop salmon, trout, freshwater and eel fisheries. The relevant bodies should seek to maintain a balance between angling clubs and day ticket anglers, either by requiring clubs to whom they lease fishing rights to issue day tickets or by managing some fisheries themselves.

5.16 For popular venues the relevant bodies should consider the provision of formal angling positions, in particular some for disabled persons, and launching facilities for boat fishing.

Navigation

5.17 The Agency is the navigation authority for a number of rivers and also has certain harbour and pilotage duties. Its duty where it is the navigation authority is to maintain and improve navigation on waters and their facilities for use by the public. However, there may be conflicts between possible activities, such as canoeing, rowing, sailing, motor cruising, water skiing and power boating, and between those activities and conservation needs, other recreational activities, such as angling or birdwatching, and commercial interests, such as boatyards and marinas. The Agency should therefore consider, in consultation with users and conservation interests, and the regional fora for sport and recreation (where they exist), the need for strategic planning.

Flood and coastal defence

5.18 Flood defence projects, whether new schemes or improvement works, may have potential for recreational activities. Where possible, consideration of such activities should be incorporated into scheme designs. For example:
* sailing may be made possible by preserving adequate channel depths and providing launching sites

* the construction or repair of land drainage channels or weirs may provide an opportunity to create canoe slaloms or allow rafting activities

* when repairing or improving river banks, improved facilities should be considered for moorings or boat access, angling or other recreational activities

* walking, angling, horse riding and cycling could be encouraged by providing access to flood banks.

In considering such possibilities, it will be necessary to take account of factors such as disturbance to wildlife and public safety. It is also necessary to take account of the MAFF *Code of Practice on Environmental Procedures for Flood Defence Operating Authorities* (see paragraph 7.42).

5.19 When carrying out sea defence work close to the holiday season, attempts should be made to minimise the effects upon visitors of sand and shingle replenishment work. When constructing or repairing sea defences, access should be considered for boats used for recreation.
6. SITES OF SPECIAL SCIENTIFIC INTEREST (SSSIs), NATIONAL PARKS AND THE BROADS

6.1 In addition to their general duties in respect of conservation, access and recreation, which apply wherever the relevant bodies are formulating or considering proposals, there are particular statutory duties - under section 4 of the Water Industry Act 1991 and section 8 of the Environment Act 1995 - in respect of SSSIs, National Parks and the Broads.

Sites of Special Scientific Interest

6.2 The Nature Conservancy Council for England (English Nature) and the Countryside Council for Wales have a duty to notify the relevant bodies of any areas of land which are of special interest by reason of their flora, fauna or geological or physiographical features - Sites of Special Scientific Interest (SSSIs) - and which may be affected by activities of the relevant bodies or authorisations given by them.

6.3 Where the relevant bodies have been notified that any land is an SSSI, they must consult English Nature (EN) or the Countryside Council for Wales (CCW) before carrying out or authorising any works, operations or activities which appear likely to damage the SSSI.

6.4 Where the relevant bodies own or lease land within an SSSI, EN or CCW will also notify them formally under the Wildlife and Countryside Act 1981, specifying the operations which they consider to be harmful to the conservation interest. All owners and occupiers, including the relevant bodies are required to notify English Nature or Countryside Council for Wales of potentially damaging operations and may not undertake them for four months, or longer by agreement, unless they are in accordance with the terms of a management agreement or have the consent of EN/CCW.

6.5 In addition to their statutory duties, it is advisable for relevant bodies to consult EN or CCW in respect of any works or operations within or outside an SSSI which are likely to affect it.

6.6 The relevant bodies are expected to take appropriate action to secure the protection of the special interests for which SSSIs have been notified and where they are owners and occupiers of such sites, to ensure that they are managed positively, in the conservation interest.

6.7 Some SSSIs may also be Special Areas of Conservation under the Habitats Directive, Special Protection Areas under the Birds Directive and/or Ramsar Sites (see paragraphs 7.8 to 7.12).

National Parks and the Broads

6.8 The undertakers are major landowners within the National Parks. Many of the considerations applying to National Parks also apply to the Norfolk and Suffolk Broads.

6.9 Relevant bodies should maintain close links with National Park Authorities and the Broads Authority, take account of their plans and policies and consult them on all relevant matters. They must take account of National Park purposes when coming to decisions or carrying out their activities relating to or affecting land within the Parks (see paragraph 7.37). National Park Authorities and the Broads Authority must notify the relevant bodies of any areas of land which are particularly important with regard to their environmental and recreational duties and may be affected by their activities and give reasons why they are important. Where it has received such a
notification, a relevant body must consult the notifying body before carrying out any works, operations or activities which appear likely to prejudice anything which has been identified as being of particular importance. Consultation may also be necessary on matters which have not been notified.

6.10 In addition to their statutory duties, it is advisable for relevant bodies to consult the National Park Authority or the Broads Authority before undertaking or authorising any works affecting a National Park or the Broads.
7. OTHER LEGISLATION, GUIDANCE AND VOLUNTARY SCHEMES

7.1 The relevant bodies should take account of any of the following which are relevant to the performance of their duties in respect of conservation, access and recreation.

**Sustainable development**

7.2 The Strategy for Sustainable Development in the UK: *a better quality of life* (Cm 4345) published in May 1999 sets out the Government's interpretation of sustainable development. The strategy provides a framework for Government policy on sustainable development, but is also intended to stimulate action by others - in business, local government, the voluntary sector, and as individuals.

7.3 Sustainable development involves taking an integrated approach to the way we work through considering the social, environmental and economic impacts of our actions. Sustainable development means meeting four objectives at the same time: social progress which recognises the needs of everyone; effective protection of the environment; prudent use of natural resources and the maintenance of high and stable levels of economic growth and employment.

7.4 The Sustainable Development Strategy sets out ten principles and approaches which policies should take account of:

* putting people at the centre
* taking a longer term perspective
* taking account of costs and benefits
* creating an open and supportive economic system
* combating poverty and social exclusion
* respecting environmental limits
* the precautionary principle
* using scientific knowledge
* transparency, information, participation and access to justice
* making the polluter pay.

In carrying out their duties relevant bodies should seek to contribute to sustainable development with policies, programmes and projects being developed to include sustainable development considerations.

7.5 At a local level, many communities have developed Local Agenda 21 (LA21) strategies on sustainable development in their areas. All local communities are committed to have strategies in place by 2000. These LA21 Strategies should be used to inform relevant bodies' plans, policies or programmes where relevant. At a regional level in England, sustainable development will have a place in all strategic documents produced by public bodies.
7.6 The Environment Agency has as its principal aim the objective of achieving sustainable development and should act in accordance with statutory guidance issued by Ministers under section 4 of the Environment Act 1995.

7.7 The *Environmental Impact Assessment Directive (85/337/EEC as amended by 97/11/EC)* sets out a procedure which must be followed for certain types of project where they are likely to have a significant effect on the environment. Projects covered include long-distance water mains, flood and coastal defence schemes, some fisheries, land drainage schemes, waste water treatment plants and the transfer of water between river basins, ground water abstraction and recharge schemes. The EIA procedure is a useful tool in helping to achieve sustainable development and the relevant bodies should undertake any necessary Environmental Impact Assessments in accordance with best practice. Early consultation with the relevant consenting body is strongly encouraged.

**Conservation**

7.8 The *Habitats Directive (92/43/EEC)* aims to contribute to ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora. The Directive lists habitats and species of European importance and makes provision for designating Special Areas of Conservation (SACs) within which they are represented. The measures set out in the Directive are designed to maintain at, or restore to, a 'favourable conservation status' the listed species and habitats. It also states that land-use planning and development policies should encourage the development of features of the landscape which are of major importance for wild fauna and flora, such as rivers and ponds. Details of SACs and the habitats and species they support are available from English Nature (EN) and the Countryside Council for Wales (CCW).

7.9 The *Birds Directive (79/409/EEC)* requires that special measures be taken to conserve the habitats of listed species in order to ensure their survival and reproduction in their area of distribution. The most suitable areas for these species are classified as Special Protection Areas (SPAs). Similar measures are to be taken in respect of regularly occurring migratory species not listed in the Directive. Details of designated sites are available from EN/CCW.

7.10 The *Conservation (Natural Habitats, &c.) Regulations 1994* implement the Habitats Directive. They also apply to sites classified as SPAs under the Birds Directive. The Regulations require the relevant bodies to have regard to the requirements of the Habitats Directive in the exercise of their functions. Regulations 48 and 49 require the effect on a European site (SAC or SPA) to be assessed before granting any consent or authorisation. Where a plan or project will have an adverse effect on the integrity of a site, it can only proceed, in the absence of alternatives, in the overriding public interest in which case compensatory measures must be provided. Regulations 50 and 51 require the review of consents or authorisations granted before the date on which a site becomes a European site. Regulation 85 makes equivalent provision for consideration of the effect on a European site and for review in respect of discharge consents under Chapter II of Part III of the Water Resources Act 1991.

7.11 The *Ramsar Convention on Wetlands of International Importance* requires the protection of wetlands that are of international importance, especially as wildfowl habitats. Ramsar sites are listed by the Government, who are required to promote the conservation of wetlands included in the list and the wise use of wetlands in the exercise of their functions. The majority of Ramsar sites will also be proposed or classified SPAs and/or candidate SACs, and all are SSSIs. The
Convention has agreed guidelines on implementing the 'Wise-Use' concept which consider appropriate action at the local as well as the national level.

7.12 The wise use of wetlands is their sustainable use for the benefit of human kind in a way compatible with the natural properties of the ecosystem. The concept of wise use seeks both the formulation and implementation of general wetland policies, so as to promote the conservation of wetlands included in the Ramsar List, and as far as possible, the wise use of wetlands. Wherever planning is initiated for projects which might affect important wetlands, the following action should be taken in order to promote wise use of the wetland: integration of environmental considerations in planning of projects which might affect wetlands; continuing education during their execution; and full implementation of necessary environmental measures. Wise use initiatives should also be complemented by efforts to build awareness of the importance of nature conservation.

7.13 The natural heritage goes beyond sites which are notified as SSSI under the Wildlife and Countryside Act 1981 or designated under international treaties or European legislation. There will be sites identified because of their particular local importance. Often termed Sites of Importance for Nature Conservation (SINC) they are usually defined in local plans, identifying sites of local nature conservation or geological significance and of particular importance to local people. Some may also be managed as local nature reserves.

7.14 The Memoranda of Understanding between the Environment Agency and English Nature and the Countryside Council for Wales on River SSSIs provide guidance on the protection and management of rivers notified as SSSIs. They will also apply to SACs and it is intended to provide a model applicable to other designated sites such as wetlands, lakes and estuarine/coastal habitats notified as SSSIs, SPAs and Ramsar sites.

7.15 Government policy on biodiversity is set out in the UK Biodiversity Action Plan, published in 1994, supplemented by the UK Biodiversity Steering Group report and the volumes of national species and habitat action plans subsequently published by the UK Biodiversity Group, which oversees biodiversity work in the United Kingdom. The relevant bodies have been active in various aspects of the UK biodiversity process. The action plans for priority species and habitats contain specific, costed targets. They also identify actions necessary to achieve these targets and those lead agencies or departments responsible for implementing them. The national plans have been followed up by a number of regional and local biodiversity action plans, which translate national targets and objectives into local ones and highlight species and habitats of local significance for biodiversity.

7.16 A number of the relevant bodies have produced their own Biodiversity Action Plans. These identify actions to be taken for the conservation and enhancement of biodiversity, particularly the national and local biodiversity targets. Advice on the preparation of local biodiversity action plans is given in Guidance for Local Biodiversity Action Plans - Guidance Notes 1-5, available from the Biodiversity Secretariat, Department of the Environment, Transport and the Regions. Further guidance on how relevant bodies can help achieve the Biodiversity Action Plan targets is given in Meeting the biodiversity challenge - the RSPB good practice guide for the UK water industry, available from the RSPB. Advice on integrating biodiversity into environmental management systems is given in the guide Business and Biodiversity prepared by the UK Round Table on Sustainable Development and published by Earthwatch.

to the owners and occupiers, planning authorities, the Secretaries of State for England and Wales and the relevant bodies. When notified of the SSSI designation on their land, owners and occupiers receive a letter detailing their obligations; a description of the special interest; a map of the whole site; and a list of operations likely to damage the special interest. The legal obligations require owners and occupiers to consult the agency before undertaking any of the listed operations. It is a criminal offence to undertake a damaging operation without consultation, or within four months unless the agency gives its consent.

7.18 The Act also provides legal protection for birds, and some animals and plants. It prohibits certain methods of killing or taking wild animals; and it restricts the introduction into Great Britain of certain animals and species.

7.19 Local planning authorities (LPAs) in England and Wales have powers under the *Town and Country Planning Act 1990* to make **Tree Preservation Orders** (TPOs). TPOs are used to protect trees and woodlands which make a significant impact on the amenity of local areas. The effect of a TPO is generally to prohibit the cutting down or topping or lopping of trees without the LPA's consent.

7.20 Water and sewerage undertakers have powers to carry out work on protected trees on their operational land without the LPA's consent if necessary: in the interests of safety; or while inspecting, renewing or repairing any mains, pipes or other apparatus; or to enable them to carry out their permitted development rights under the *Town and Country Planning (General Permitted Development) Order 1995*. The Environment Agency may also carry out work on protected trees without the LPA's consent to enable it to carry out its permitted development rights.


7.22 MAFF administers the **Environmentally Sensitive Areas** (ESA) scheme in England. In Wales ESAs are administered by the Agriculture Department of the National Assembly for Wales. The objective of the scheme is to protect and enhance the environment by encouraging environmentally beneficial agricultural practices in areas of the countryside where the landscape, wildlife or historic interest is of national importance. Under the scheme, farmers may enter into voluntary 10-year management agreements to maintain and enhance the environmental features of their land. Such agreements require them to follow a range of management practices that will be beneficial to the environment and for which they receive an annual payment. The specified practices vary according to the environmental and agricultural objectives of each ESA, but all ESAs include a basic management requirement which usually places a restriction on certain cultivation techniques, animal stocking rates, the use of fertilisers, fungicides and insecticides, and drainage improvements. The ESA scheme also offers options for more demanding management regimes, for which a higher level of payment is available, to encourage management practices with a higher conservation return (eg the management of water levels, greater restrictions on grazing and fertiliser use). In addition, grants are available to ESA agreement holders carrying out capital works to improve the landscape, wildlife and historic interest of the area, or to facilitate public access.

7.23 MAFF also runs the **Countryside Stewardship** (CS) scheme which is the main agri-environment scheme outside ESAs. It aims to sustain landscape beauty and diversity, to protect
wildlife habitats, to conserve archaeological sites and historic features, restore neglected land or features, create new habitats and landscapes and improve opportunities for people to enjoy the countryside. Farmers and land managers apply to enter ten year agreements under which they are required to follow environmentally beneficial management practices in return for annual payments. Grants are also available for capital works such as hedge coppicing, repairing stone walls etc. Provision of new access is a feature of some agreements under the scheme.

7.24 ESA and CS Agreements, up to and including those offered in 1999, require farmers to abide by the MAFF Codes of Good Agricultural Practice for the Protection of Soil, Water and Air and, where applicable, the Code of Practice for the Safe Use of Pesticides on Farms and Holdings. Post 1999, all new agri-environment agreements offered under the Rural Development Regulation will include a requirement to comply with standards of good farming practice. All farmers joining agri-environment schemes will also be given copies of these four Codes of Practice and encouraged to comply with their recommendations.

7.25 Launched as a ten year initiative in April 1999, Tir Gofal is a scheme to encourage farmers throughout Wales to maintain and enhance the agricultural landscape and its wildlife. It brings together a number of other schemes such as ESAs, Tir Cymen and Moorland and Countryside Access Schemes, and takes forward experiences gained from those schemes. Tir Gofal is a whole farm scheme, available throughout Wales to farmers or others who have responsibility for, and control over, farmed land. It comprises of four elements including land management, the creation of new permissive access, capital works and training for farmers. Entrants are selected on the basis of achieving the best environmental value for money.

7.26 Changes to water levels and water courses could significantly affect achievement of the conservation objectives of agri-environment schemes. Where any changes are envisaged, owners or occupiers should if possible be asked whether their land is subject to an agreement. If so, the Farming and Rural Conservation Agency project officer for the scheme should be consulted.

7.27 The Government's Forestry Strategy for England, A New Focus for England's Woodlands, was published in December 1998. The Strategy sets out the Government's priorities for forestry for the next 5 to 10 years and is based on four programmes with associated actions for implementing the strategic priorities.

7.28 The UK Forestry Standard was published by the Forestry Commission in 1997. It describes the policy, legislative and regulatory frameworks for sustainable forestry in the UK. The Standard also summarises best practice, drawn from a series of Guidelines published by the Forestry Commission. These include the Forests and Water Guidelines.

7.29 Woodland planting and management should be consistent with the practices set out in the UK Forestry Standard and supporting Guidelines. The Forestry Commission should be consulted over the need for a felling licence where tree felling is not directly related to statutory functions (for example felling in water catchments owned by water companies).

7.30 Under the Woodland Grant Scheme water undertakers are eligible to apply to the Forestry Commission for grant aid to plant and manage woodlands and there are financial incentives for woodland owners to provide controlled public access on foot in new woodlands.
Access

7.31 The main powers which may be used to give people access to the countryside in England and Wales are included in:

* the National Park and Access to the Countryside Act 1949, which gives local planning authorities power to provide public access to open country for open air recreation. Access may be made by agreement with Landowners or by order confirmed by Ministers

* the Wildlife and Countryside Act 1981, which gives local planning authorities the power to enter into management agreements with landowners. Management agreements can include access provisions

* EC Council Regulation 2078/92 (the Agri-Environment Regulation) covers agri-environment agreements offered from 1992 to 1999. Agreements offered from 1 January 2000 will be covered by the Rural Development Regulation 1257/1999 implemented by Commission Regulation 1750/1999. Public access provisions are included in the Regulations

* in addition to the network of public rights of way, local authorities may create footpaths and bridleways by agreement with landowners, or by order under the Highways Act 1980.

7.32 In England there are about 169,000 kilometres of public rights of way - minor public highways which exist for the benefit of the community at large, in much the same way as the public road network does. It is a basic principle of highway law that a right of way, once established, cannot be removed unless statutorily extinguished by order.

7.33 The categories of public right of way are:

* Footpaths (132,000 km) over which the right of way is on foot only;

* Bridleways (29,000 km) for pedestrians, horse riders and bicyclists (who must give way to people on foot or on horseback); and

* Byways open to all traffic (BOATs) (3,000 km) carriageways over which the right of way is on foot, on horseback and for vehicular traffic, but which are used mainly for the purposes for which footpaths and bridleways are used (ie. by walkers and horse riders).

7.34 In addition there are 5,000 km of Roads Used as Public Paths (RUPPs). Under section 54 of the Wildlife and Countryside Act 1981, surveying authorities must review all RUPPs which appear on definitive maps and reclassify them according to the rights which are found to exist.

7.35 The three main Acts that deal with public rights of way are the Highways Act 1980, Wildlife and Countryside Act 1981, and the Town and Country Planning Act 1990. The 1980 Act places a duty on local authorities to assert and protect the public's use and enjoyment of public rights of way. It contains various powers to assist local authorities to carry out and enforce this duty (such as ensuring landowners do not block or stop up paths). The 1981 Act requires surveying authorities (normally county councils or unitary authorities) to prepare and keep up-to-date a definitive map and statement for their area - this is the legal record of public rights of way. Anyone may apply to their surveying authority to have the map altered to show a way that was previously not recorded, recorded incorrectly or added to the map in error.
Recreation

7.36 The Memorandum of Understanding between the Countryside Commission, English Sports Council and the Environment Agency sets out joint objectives for the development and promotion of sport and recreation, following the principles of sustainable development and equal opportunities, and how they can be achieved.

National Parks, the Broads, the New Forest and AONBs

7.37 National Parks are designated by the Countryside Agency under the National Parks and Access to the Countryside Act 1949 and confirmed by the Secretary of State for the Environment Transport and the Regions. The purposes of National Parks, under section 61 of the Environment Act 1995, are to conserve and enhance the natural beauty, wildlife and cultural heritage of the National Parks: and to promote opportunities for the understanding and enjoyment of the special qualities of the Parks by the public. Section 62 of the 1995 Act places a general duty on all relevant authorities, which include the National Park Authorities, statutory undertakers and other public bodies, to have regard to National Park purposes. DOE Circular 12/96, Environment Act 1995, Part III - National Parks contains advice on the implementation of Part III as it relates to National Parks.

7.38 The Broads Authority, under the Norfolk and Suffolk Broads Act 1998, has similar responsibilities to National Park Authorities. It also protects the interests of navigation. National Park planning principles also apply in the New Forest Heritage Area by virtue of a Government Announcement in 1994 (see also paragraph 7.46).

7.39 Areas of Outstanding Natural Beauty (AONBs) are designated by the Countryside Agency under the National Parks and Access to the Countryside Act 1949 for the conservation of the natural beauty of the landscape. They are confirmed by the Secretary of State for the Environment and the Regions. There is no distinction in landscape quality between National Parks and AONBs, but recreation is not a purpose of designation of AONBs. Special planning considerations apply in AONBs (see paragraph 7.47)

Historic buildings

7.40 Detailed advice on the application of legislation affecting historic buildings and conservation areas is contained in PPG15 on Planning and the Historic Environment for England, and in Welsh Office Circular 61/96 Planning and the Historic Environment : Historic Buildings and Conservation Areas for Wales. Further advice is contained in the joint DCMS and DETR Circular 1/97 + 14/97. The compilation of statutory lists of buildings of special architectural or historic interest is a matter for the Secretary of State for Culture, Media and Sport, who receives advice from English Heritage. In Wales, it is the responsibility of the National Assembly for Wales with advice from Cadw. Copies of the list for each area are held by local planning authorities who are responsible in the first instance for determining applications for consent to carry out works to listed buildings. Consent is required for any works of demolition, alteration or extension which would affect the character of the building.

Ancient monuments

7.41 Structures or sites of archaeological interest may be scheduled as ancient monuments under the Ancient Monuments and Archaeological Areas Act 1979. Either the Department for Culture, Media and Sport (Buildings, Monuments and Sites Division) or English Heritage or Cadw should be consulted if there is any doubt about the status of a particular site. PPG16 on Archaeology
and Planning for England, and Welsh Office Circular 60/96 Planning and the Historic Environment : Archaeology for Wales summarise the legislation and its procedures. The consent of the Secretary of State is required for any work to a scheduled site which would have the effect of demolishing, damaging, removing, repairing, altering, adding to, flooding or covering it. Precise details of any proposed work must be submitted with applications for consent, and it is desirable to discuss any works well in advance with English Heritage or Cadw to reduce delay in processing the application. They will also provide informal advice on any problems arising from management of scheduled sites. Unscheduled ancient monuments may also be of great importance, as explained in PPG16, and works affecting them should be discussed at the earliest possible stage with the relevant local authority archaeologist in England or the relevant regional Archaeological Trust in Wales.

Flood and coastal defence

7.42 MAFF and the Welsh Office have produced a Code of Practice on Environmental Procedures for Flood Defence Operating Authorities (MAFF and Welsh Office, 1996). The Code is a practical guide to help the Environment Agency, Internal Drainage Boards and local authorities follow good environmental practice when carrying out flood and coastal defence works. It seeks to embody the best practices already adopted by some bodies in carrying out their responsibilities in these areas. That Code should be used in conjunction with the Code of Practice on Conservation, Access and Recreation.

7.43 MAFF has also devised the Water Level Management Plan initiative (Water Level Management Plans - a procedural guide for operating authorities (MAFF, Welsh Office, Association of Drainage Authorities, English Nature, National Rivers Authority, 1994)). Operating authorities are encouraged to produce water level management plans, as a means by which the water level requirements for a range of activities in a particular area, including agriculture, flood defence and conservation, can be balanced and integrated. Priority has been given to producing plans for Natura 2000 sites and all SSSIs where the management of water levels is necessary to retain site integrity.

7.44 As a consequence of the Government Response to the 1998 Agriculture Select Committee report on Flood and Coastal Defence, operating authorities are committed to targets for the completion and implementation of these plans. To help achieve these targets, MAFF, in November 1999, issued additional guidance notes to operating authorities on the preparation of Water Level Management Plans (WLMPs). The purpose of the guidance notes is to clarify existing policy on preparing WLMPs and to assist operating authorities in completing plans.

Planning

7.45 Planning Policy Guidance (PPG) notes and Planning Guidance (Wales) Planning Policy (PG(W)PP) and Technical Advice Notes (Wales) (TAN(W)) set out the Government's policies on different aspects of planning.

7.46 PPG2 on Green Belts contains information on the recreational use of land within Green Belts in England.

7.47 PPG7 on the Countryside - Environmental Quality and Economic and Social Development contains advice on land use planning in rural areas, including guidance on special considerations in the National Parks, the Broads, the New Forest and AONBs. In Wales, only Annexes B-F and Appendix of PPG7 apply. The generality of PPG7 has been superseded by PG(W)PP.
7.48 PPG9 on Nature Conservation, and PG(W)PP and Technical Advice Note 5 Nature Conservation and Planning, give guidance on how the Government's policies for the conservation of our natural heritage are to be reflected in land use planning. They embody the Government's commitment to safeguarding our natural heritage under domestic and international law.

7.49 PPG15 on Planning and the Historic Environment contains advice on the application of legislation affecting historic buildings and conservation areas, and on World Heritage Sites, historic parks and gardens, historic battlefields and the wider landscape.

7.50 PPG16 on Archaeology and Planning sets out Government policy on archaeological remains on land, and the importance of archaeological interests being taken into account at an early stage of the planning process, with a presumption in favour of the preservation in situ of nationally important remains. Welsh Office Circulars 60/96 Planning and the Historic Environment: Archaeology and 61/96 Planning and the Historic Environment: Historic Buildings and Conservation Areas and PG(W)PP give guidance on how Government policy for the conservation of archaeological remains and historic buildings is to be reflected in the planning process.

7.51 PPG17 and TAN(W)16 on Sport and Recreation describe the role of the planning system in assessing opportunities and needs for sport and recreation provision and safeguarding open space with recreational value.

7.52 PPG20 and TAN(W)14 on Coastal Planning cover planning policy for coastal areas and give guidance on policies for developments that require a coastal location.

7.53 PPG21 and TAN(W)13 on Tourism outline the environmental impact of tourism and contains advice on dealing with the needs of tourism.

7.54 PPG23 on Planning and Pollution Control and PG(W)PP give guidance on the relevance of pollution controls to the exercise of planning functions and the relationship between local authorities' planning responsibilities and the separate statutory responsibilities exercised by local authorities and other pollution control bodies.

Disability

7.55 Part III of the Disability Discrimination Act 1995 places specific duties on those providing goods, facilities and services not to discriminate against disabled people. There are duties: not to refuse service; not to provide a worse standard of service; and not to offer service on worse terms. Since October 1999, service providers have been required to take reasonable steps to:

* change practices, policies or procedures which make it impossible or unreasonably difficult for disabled people to use a service;

* provide auxiliary aids or services which would make it easier for, or enable, disabled people to use a service; and

* overcome physical features which make it impossible or unreasonably difficult for disabled people to use a service, by providing the service by a reasonable alternative method.

7.57 From 2004, service providers must take reasonable steps to remove, alter, or provide reasonable means of avoiding physical features that make it impossible or unreasonably difficult for disabled people to use a service.

**Land disposals**

7.58 Under section 156 of the Water Industry Act 1991, where water and sewerage undertakers wish to dispose of land no longer required for the purposes of their undertaking, they must satisfy the requirements of general authorisations issued by the Secretaries of State or seek their specific consent. Where the land in question is in a National Park, the Broads, or an Area of Outstanding Natural Beauty or Site of Special Scientific Interest, undertakers must first consult in England the Countryside Agency (in the case of a SSSI, English Nature must also be consulted) or in Wales the Countryside Council for Wales (CCW). The general authorisation enables the Countryside Agency or the CCW to require agreements or covenants to be entered into before disposal.

**Other**


7.60 BS 5837: Trees in relation to construction (1991) contains advice on construction work close to trees and recommendations for action prior to and during operations.
COUNTRYSIDE AND RIGHTS OF WAY ACT 2000

Introduction

1. The Countryside and Rights of Way Act received Royal Assent on 30 November 2000. Some of its provisions (those specified in section 103(1)) came into force on that day while certain others will automatically come into force on 30 January 2001 (those set out in section 103(2)). Section 103(3) of the Act provides a power for the Secretary of State to commence, as respects England, the other provisions in the Act. An order has been made\(^1\) bringing into force several other provisions on either 30 January or 1 April 2001. This circular provides guidance to local authorities on these sets of provisions, and also gives brief details of other provisions in the Act which will affect local authorities on which more detailed guidance will be issued in due course.

2. Copies of the Act and the accompanying Explanatory Notes may be obtained from The Stationery Office or accessed at their web site.\(^2\)

Part I: Access to the countryside

3. Part I introduces a new right of access for open-air recreation to mountain, moor, heath, down (collectively described as open country) and registered common land. There will be restrictions on the new right, including restrictions on dogs and provisions for landowners to exclude or restrict access for any reason for up to 28 days a year without seeking permission. There is also provision for further restrictions on access for reasons of land management, conservation, fire prevention and to avoid danger to the public. The Act also includes a power to extend the right to coastal land by order, and enables landowners voluntarily to dedicate irrevocably any land to public access.

4. The Act provides for certain functions in respect of access land to be exercised by ‘access authorities’, i.e. National Park Authorities for their areas and local highway authorities elsewhere. These functions include powers to make byelaws (section 17),

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\(*1*\) The Countryside and Rights of Way Act 2000 (Commencement No.1) Order 2001 (S.I. 2001/114 (C.4)

appoint wardens (section 18) and to erect and maintain notices indicating boundaries etc (section 19). Access authorities will have the power under section 35 of the Act to negotiate agreements to provide means of access and to undertake the necessary works themselves if agreement cannot be reached.

5. District councils which are not access authorities also have powers to appoint wardens under section 18.

6. The right of access will be brought into effect in relation to any land by a commencement order and may be commenced at different times in different areas. It is intended that such commencement orders will not be made until all necessary regulations have been made and other preparatory work has been completed. The Department has a Public Service Agreement to implement the right of access by 2005. However, the Act enables access to land over 600 metres and registered common land (which can already be identified from existing maps) to be introduced earlier, ahead of the Countryside Agency publishing statutory maps of open country and registered common land. The Secretary of State will look to commons registration authorities to assist the Countryside Agency in fulfilling its statutory mapping duties by providing the Agency with data from the common land registers and commenting on maps of common land produced by the Agency.

7. Although most of the provisions mentioned in paragraph 4 (except the power to appoint wardens) come into force on 30 January, local authorities are advised that they need to take no action under them at this stage. This is because the powers can only be exercised in relation to land which is access land for the purposes of section 1(1) of the Act. Whilst some land will qualify as access land from 30 January (land over 600 metres and registered common land), most land will not qualify as access land until it has been shown on conclusive maps issued by the Countryside Agency. The Secretary of State does not consider it will be necessary for access authorities to use the powers available to them in Part I until the right of access to access land is commenced by Ministerial Order, or in anticipation of the right being commenced. We shall issue further guidance to access authorities before any such commencement Order is made.

8. The function of determining applications for restrictions and exclusions of access falls to the ‘relevant authorities’, i.e. National Park Authorities as regards their areas and the Countryside Agency elsewhere. Where land which is dedicated to access under section 16 is woodland, the Forestry Commission is the relevant authority.

Part II: Rights of way and common land

9. The provisions contained in Part II of the Act change the law on rights of way in a number of respects and will affect local authorities’ functions in relation to rights of way. Most of these provisions, for example the requirement in sections 60-61 to prepare rights of way improvement plans (see also paragraph 16 below), will be brought into force when the necessary regulations have been made and further guidance issued.

10. Guidance is given in paragraphs 11 to 45 below on those provisions in Part II which come into force on 30 January 2001 under section 103(2) of the Act, or which will be commenced by order on 30 January or 1 April 2001. Authorities should continue
to refer to Department of the Environment Circular 2/93 for matters not affected by
the provisions which come into force on these dates.

Restricted byways

11. The Act creates a new category of highway – restricted byways – carrying a public
right of way on foot, on horseback or leading a horse, and for vehicles other than
mechanically propelled vehicles. On commencement of sections 47 and 48 of the
Act, highways which are shown in definitive maps as roads used as public paths
(RUPPs) will instead be treated as being shown as restricted byways and will have
restricted byway rights created over them. Supplementary provisions are contained
in sections 49 to 51. All of these provisions are to be brought into force by
commencement orders at a later date.

12. However, section 52 of the Act, which enables the Secretary of State to amend by
regulations existing legislation in relation to restricted byways, takes effect
automatically on 30 January. This will enable the Department to scrutinise the large
body of legislation relating to highways and determine which provisions should or
should not apply to restricted byways or how they should be modified.

13. The Act requires that regulations made by the Secretary of State under section 52 be
approved by both Houses of Parliament. In addition, the Secretary of State is
required to consult the National Assembly for Wales before making provision which
affects Wales and to obtain the Assembly’s consent before expressly amending or
revoking secondary legislation which the Assembly has made. The Assembly is also
entitled to submit proposals to the Secretary of State on how his regulation making
power might be exercised.

14. The Assembly itself has the power to make regulations under section 52 amending
certain classes of legislation relating to Wales. These are: any local or private Act
passed before or in the same session as the 2000 Act and relating only to Wales; and
any secondary legislation made before enactment of the 2000 Act which the
Assembly has the power to amend or revoke as respects Wales.

15. When section 47 of the Act is brought into force, section 54 of the Wildlife and
Countryside Act 1981 will cease to have effect and so surveying authorities will no
longer be under the duty in that section to reclassify RUPPs. Until then, however,
the duty under section 54 continues to apply and authorities should continue to
review their RUPPs and make reclassification orders. Any such orders, or
applications for orders modifying the status of a RUPP, which are made before
section 47 of the 2000 Act is brought into force are to be processed to a final
determination. Section 48(9) of the Act requires that provision is made for this in
the relevant commencement orders to be made under section 103(3).

Public path creation orders for purposes of Part I of the Act

16. Section 58 of the Act enables the Countryside Agency to apply to the Secretary of
State (or the Countryside Council for Wales to apply to the National Assembly for
Wales) to make a public path creation order. This is to facilitate access to land to
which the public are to be given access under Part I of the Act. For example, there
may be no practicable means for the public to gain access to some areas of access land
(sometimes described as “inaccessible islands”). Before making such an application,
the countryside bodies are required to have regard to any rights of way improvement plan prepared under section 60 of the Act by the local highway authority for the area.

17. If requested by the Countryside Agency to use his reserve powers to make a public path creation order, the Secretary of State would not be obliged to do so but would consider carefully whether the circumstances warranted his taking action. Before making an order, the Secretary of State would be required by section 26 of the Highways Act 1980 to consult with local authorities in whose area the new path would be situated. Generally, it will be for local authorities, where necessary, to provide new means for the public to reach access land, either by negotiating permissive access with landowners or by using their existing powers under the Highways Act 1980 to create rights of way by agreement or by order.

**Effect of Part I of the Act on powers to stop up or divert highways**

18. Section 59 relates to powers, whether or not by order, to stop up or divert highways. It prevents an authority, when exercising such powers from regarding the existence of the new right of access to open countryside under Part I of the Act as, for example, reducing the need for the highway, the need for an alternative highway or the need to reserve a public right of way. In addition, when deciding whether to stop up or divert a highway, it may be necessary for an authority to consider the extent (if any) to which that highway is likely to be used apart from the exercise of the power. The section requires, when assessing that use in relation to a highway situated on or in the vicinity of access land, that particular regard be had to when the right of access would not be exercisable.

19. The purpose of section 59 is to prevent the new right of access from being used to support a case for stopping up or diverting highways, except, for example, where a diversion may be required to help people reach access land.

**Wilful obstruction of a highway**

20. Section 64 of the Act inserts a new section 137ZA into the Highways Act 1980. The new section empowers a magistrates’ court, when convicting a person under section 137 of that Act of wilfully obstructing a highway, to order that person to remove the obstruction. Under new section 137ZA(3), failure to comply with an order, without reasonable excuse, is an offence punishable by a fine not exceeding level 5 on the standard scale (currently £5000). Further fines, not exceeding 1/20th of level 5, may be imposed for each day the offence continues after conviction under section 137ZA.

21. A person who has been ordered to remove an obstruction may not be prosecuted again under section 137 of the Highways Act 1980 in respect of that obstruction during the period set by the court under section 137ZA for removing it. Neither may they be similarly prosecuted during any period set under section 311(1) of the Highways Act 1980 for complying with directions of the court.

22. Highway authorities have powers at common law to remove unlawful obstructions in certain circumstances. Where authorities choose to exercise these powers after a person has been convicted under new section 137ZA(3), then subsection (4) in conjunction with section 305 of the Highways Act 1980 allows authorities to recover their costs through the magistrates’ court.
Vegetation overhanging bridleways

23. Section 154 of the Highways Act 1980 enables highway authorities and certain local authorities to require owners and occupiers of land whose trees, shrubs or hedges overhang highways to the extent of endangering or obstructing the passage of vehicles or pedestrians, to cut the vegetation back. Section 65 of the 2000 Act extends section 154 to apply to vegetation which endangers or obstructs the passage of horse-riders. Authorities will, therefore, be able to require that vegetation overhanging bridleways or carriageways is cut back to a height which is suitable for horse-riders.

Traffic regulation orders for purposes of conserving natural beauty

24. Local traffic authorities have powers under the Road Traffic Regulation Act 1984 to make traffic regulation orders to prohibit, restrict or regulate traffic using particular highways. The Secretary of State has similar powers as respects trunk roads. Circular 2/93 sets out one of the purposes for which traffic regulation orders may be made.

25. Section 22 of the 1984 Act enables authorities to make traffic regulation orders in respect of the use of roads in certain areas for the purpose of conserving or enhancing the natural beauty of the area, or of affording better opportunities for the public to enjoy the amenities of the area. In England and Wales the areas concerned include:

- National Parks
- Areas of outstanding natural beauty
- Country parks
- Areas where the Countryside Agency or the Countryside Council for Wales are undertaking experimental projects
- Nature reserves
- National Trails
- Land belonging to, and held inalienably by, the National Trust.

26. Section 66 of the 2000 Act extends section 22 to include Sites of Special Scientific Interest and removes the restriction in that section which prevented orders being made in relation to Greater London.

27. The section also inserts a new section 22A into the 1984 Act. The new section enables traffic authorities to make orders to control vehicular traffic on unclassified roads and byways in areas not covered by section 22 of that Act for the purposes of conserving or enhancing the natural beauty of the area.

28. A definition in sections 22 and 22A makes it clear that conserving the natural beauty of an area is to be construed as including the conservation of flora, fauna, geological and physiographical features of the area.

29. The Secretary of State will consider whether further advice on the making of traffic regulation orders is necessary when other provisions in Part II of the Act are brought into force.
Unauthorised Driving of Mechanically Propelled Vehicles elsewhere than on Roads

30. Schedule 7 to the 2000 Act makes a number of changes to the prohibition of driving motor vehicles elsewhere than on roads contained in section 34 of the Road Traffic Act 1988. The Schedule substitutes a new section 34. It also inserts a new section 34A into the 1988 Act. The latter provision is to be brought into force at a date still to be determined. In part, these provisions address issues brought to attention by various cases in recent years.

31. Section 34 currently relates to the driving of a “motor vehicle”, a term which is defined in section 185(1) of the 1988 Act. The Act extends the offence to cover mechanically propelled vehicles which may not fall within the current offence because they are not intended or adapted for use on roads – i.e. they do not fall within the definition of “motor vehicle”. Schedule 7 makes similar amendments to section 21 of the 1988 Act which relates to the offence of driving or parking “motor vehicles” on cycle tracks.

32. The new offences under section 34 and section 21 do not apply to certain classes of vehicles such as invalid carriages, mechanically propelled vehicles controlled by pedestrians used for cutting grass and electrically assisted pedal cycles.

33. As before, the new section 34(1)(b) prohibits driving on footpaths and bridleways. However, the offence is also extended to the new category of highway, restricted byways.

34. The recording of a way in a definitive map as a footpath or bridleway (or, when the relevant provisions are in force, a restricted byway) does not mean that higher rights do not exist over the way in question. In other words, it does not mean that there are no public rights of way to drive mechanically propelled vehicles over the way. However, section 34(2), which is a new provision, specifies that for the purposes of the offence where a way is shown in a definitive map as a footpath, bridleway, or restricted byway, it is to be presumed to be a way of the kind shown unless the contrary is proved. It is, accordingly, presumed to carry only those public rights of way which a footpath, bridleway or restricted byway carry. Therefore, once the prosecution have proved that a highway is shown in a definitive map as a footpath, bridleway or restricted byway, the burden of proof would be on the defence to prove on the balance of probabilities that there are full public vehicular rights of way.

35. Section 34(2) will be subject to the new section 34A of the 1988 Act when that latter provision is brought into force. However, until then the presumption under section 34 (2) applies without being subject to section 34A.

36. Section 34A provides for the presumption in section 34(2) to be rebuttable only in those circumstances which are expressly set out in it or in regulations made under it. This means that, except where those circumstances apply or the defences in section 34 are made out, the offence under section 34(1)(b) is committed where the way being driven on is shown in a definitive map as a footpath, bridleway or restricted byway. This is irrespective of whether there are public rights of way to drive mechanically propelled vehicles.
Vehicular access over common land

37. Section 68 deals with problems relating to vehicular access across common, and other, land over which it is an offence to drive. Despite the fact that many property owners, or their predecessors, have been using a vehicular access to their property across such land unhindered for many years, they have recently found that they have not acquired a legal right to do so. This is because a prescriptive right through long use cannot be acquired where the activity being undertaken is a criminal offence. To compound the problem, such property owners are sometimes faced with having to pay a substantial sum of money to acquire a legal right of vehicular access, without which the property would probably be unsaleable.

38. This section provides that where a person has used a vehicular access to property across land over which it is an offence to drive, regulations can be made to provide for the creation of a statutory easement, providing certain qualifying criteria are met. Although section 68 itself will be brought into effect by commencement order, the statutory easement scheme will only come into effect when the regulations provided for in section 68 (2) are agreed by Parliament. These regulations will specify such matters as the criteria to be met in order to apply for an easement, the method of applying, the methodology for calculating the price to be paid by the property owner to the owner of the land over which the access is sought, the conditions to which the easement will be subject; dispute resolution procedures and how the easement will be recorded by the Land Registry.

39. This section will have particular relevance to local authorities that own land over which it is an offence to drive. However, where such an authority wish to grant an easement for less than the price due in accordance with the provisions to be set out in the regulations, it will still be open to them to consider whether, in accordance with the provisions of section 123 or 127 of the Local Government Act 1972, they wish to seek the Secretary of State’s consent for such a disposal at less than the best consideration reasonably obtainable. Specific consent would only be required if the undervalue exceeded that permitted by paragraph 6 of the Local Government Act 1972 General Disposal Consents 1998.

Provisions in Part II to be brought into force by commencement order.

40. The Secretary of State has made an order under section 103(3) of the Act to bring certain other provisions in Part II into force.

Section 70

41. Section 70 (2) and (4) will come into force on 1 April 2001.

42. Section 70(2) amends section 134 of the Highways Act 1980. Section 134 confers a right to plough or otherwise disturb the surface of a footpath or bridleway which crosses agricultural land, but subject to a duty to make good the surface of the highway and to mark out its width. Failure to comply with that duty is an offence under subsection (4). Currently, subsection (5) restricts who may bring proceedings for that offence to highway authorities and certain councils. Section 70 removes that restriction by causing subsection (5) to be repealed. This means that any person will be able to prosecute the offence under section 134(4) of the 1980 Act but under the
terms of the commencement order, only in respect of offences committed on or after 1 April 2001.

43. Section 70(4) amends section 21(2)(b) of the Road Traffic Act 1988. The amendment provides highway authorities with a defence against prosecution for driving or parking mechanically propelled vehicles on cycle tracks when this is done to prevent or remove obstructions or in the prevention or abatement of any other interferences with the highway. The amendment arises out of a judgement by the House of Lords (Goodes v East Sussex County Council [2000] 3 All ER 603) which would appear to mean that the current provisions in section 300 of the 1980 Act and section 21(2)(b) of the 1988 Act do not cover the removal of obstructions or the abatement of nuisances. This is because a narrow interpretation was given to the meaning of “maintenance” that appears to exclude the removal of obstructions and the such like.

44. Subsection (3) of section 70 amends section 300 of the Highways Act 1980 and similarly provides highway authorities with immunity from prosecution for driving mechanically propelled vehicles on footpaths and bridleways. However, the operation of the amended section 300 depends upon amendments being made to secondary legislation and section 70(3) will be brought into force at a later date when those amendments have been made.

Section 72 and Schedule 16

45. Section 72 provides a number of definitions for the Interpretation of Part II. Section 72 and the repeal in Schedule 16 to the Act relating to section 22 of the Road Traffic Regulation Act 1984 are brought into force on 30 January 2001.

Part III: Nature conservation and wildlife protection

46. Part III of the Act amends the law relating to nature conservation and the protection of wildlife, and includes provision on the conservation of biodiversity and the protection of sites of special scientific interest. The following paragraphs summarize the key implications for local authorities.

Biodiversity

47. Section 74 of the Act places new duties on Government Ministers and Departments in respect of the conservation of biodiversity. Local authorities are not covered by these duties. However, the Secretary of State may include local authorities in exercising his duty to promote the taking of steps by others to further the conservation of the habitat types and species of principal importance for biodiversity. In practice the Government expects the lists of habitat types and species of principal importance to be consistent with those that are already the subject of action plans under the UK Biodiversity Action Plan.

48. Local authorities’ responsibilities for preparing their own Local Biodiversity Action Plans do not rely on the provisions of this Act; these plans are amongst the elements local authorities should build upon when preparing the overarching community
strategy required by section 4 of the Local Government Act 2000\(^3\). Local wildlife sites will be important components within Local BAPs.

**Sites of Special Scientific Interest**

49. Schedule 9 substitutes significant new provisions regarding the notification, protection and management of Sites of Special Interest (SSSIs), in place of section 28 of the Wildlife and Countryside Act 1981: existing notifications made to local authorities under that section remain valid, but the very few remaining notifications under section 23 of the National Parks and Access to the Countryside Act 1949 cease to have effect. English Nature will write to individual authorities about these sites. DETR will also issue further advice, including a revised Code of Guidance containing recommendations, advice and information for the guidance of those exercising responsibilities under the new section 28, but the effect of the new provisions is briefly described below.

50. The revisions to section 28 enable English Nature to refuse consent for operations listed on the site notification as likely to damage the special interest. (Previously, the ability to refuse consent had effect for only a limited period.) They also include powers for English Nature to vary the notification, in relation either to the details of the notification, or the area of land covered; and to remove the notification from land which is no longer of special interest. They must notify the local planning authority of any such changes.

51. English Nature also have new duties, to advertise notifications in local newspapers and to include in the notification, a statement of views about the management of the land; and new powers, to formulate management schemes for conserving the special features on an SSSI, and to serve management notices requiring owners and occupiers to carry out work in accordance with a management scheme. There are rights of appeal to the Secretary of State against refusal of consent and against management notices. Appeal Regulations, together with an accompanying Circular describing the new arrangements more fully, will be issued shortly.

52. A fine of up to £20,000 in the Magistrates’ Court (or an unlimited fine, on conviction on indictment) may be imposed, where an owner or occupier carries out potentially damaging works without notifying English Nature or, having notified, without receiving consent. In addition, any person who intentionally or recklessly damages or destroys an SSSI, or intentionally or recklessly disturbs any of the fauna for which the site is notified, may incur a similar penalty: and the Courts may require the restoration of the site to its former condition. English Nature may also make byelaws for the protection of an SSSI. As a consequence of these additional measures, the power of the Secretary of State to make nature conservation orders under section 29 of the 1981 Act has been repealed. Existing orders cease to have effect, and new operations must be the subject of an application for consent.

**Duties on public bodies in relation to SSSIs**

53. New section 28G, inserted in the 1981 Act, imposes an important new duty on public bodies, exercising statutory functions which may affect SSSIs, to take reasonable steps, consistent with the proper exercise of these functions, to further

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\(^3\) Preparing Community Strategies: Government guidance to local authorities DETR December 2000.
the conservation and enhancement of the features for which the site is of special interest. Public bodies specifically include local authorities and the duty applies wherever they are exercising their functions. Ministers expect public bodies to apply strict tests when carrying out functions within or affecting SSSIs, to ensure that they minimise adverse effects: and to adopt the highest standards of management in relation to SSSIs which they own.

54. Where a public body, having had regard to this duty, nevertheless proposes carrying out operations likely to damage the special features on an SSSI, new section 28H requires that it must notify English Nature. This applies whether or not the operation is taking place on land included in an SSSI. English Nature must give notice within 28 days indicating whether or not they assent to the operation. If they do not assent, but the public body decides it must proceed with the works, it must give English Nature not less than 28 days notice of its decision to proceed, and explain how it has taken account of any of their advice. In addition, in carrying out the works it shall give rise to as little damage to the SSSI as is reasonably practicable, and if damage does occur, shall restore the site to its former condition, again in so far as is reasonably practicable. It is an offence, liable to a penalty on summary conviction of a fine of up to £20,000, or on conviction on indictment an unlimited fine, if a public body fails to comply with the requirements of section 28H.

55. An authority (including a planning authority) which has power to grant permission for other parties to carry out proposed operations, or change the way that land, or buildings on it, are used, must consult English Nature where such operations are likely to damage an SSSI. This applies whether or not the operation etc would actually take place on the SSSI. It must then wait for 28 days before deciding whether to issue its consent, unless English Nature have notified it earlier that it need not wait, and must take account of their views, including views on attaching conditions. If the public body decides that it will issue a permission against their advice it must notify English Nature, and then allow a further period of 21 days before the operation may commence. Once issued, a planning permission granted on an application under Part III of the Town and Country Planning Act 1990 constitutes a 'reasonable excuse' for the purpose of new section 28P(4) should damage occur to the SSSI during the legitimate exercise of that permission.

56. Where an owner or occupier wishes to exercise permitted development rights on an SSSI, and the works involved are listed on the SSSI notification as operations likely to damage the special interest, then he or she must apply to English Nature for consent under section 28 in the usual way. If English Nature refuse consent for such works it will not be possible to exercise the permitted development rights. In such cases, or where English Nature attach conditions to a consent the applicant may appeal to the Secretary of State. Alternatively, the owner or occupier may apply to the local planning authority for planning permission under Part III of the Town and Country Planning Act 1990. Such applications will be considered by local planning authorities in the normal way; likewise, the normal arrangements would apply to any appeal against a local planning authority’s refusal of an application for planning permission, or against conditions attached to an approval.

57. The Government will be consulting in the near future on a revised draft Planning Policy Guidance Note 9 on nature conservation and biodiversity, taking account of the new Act.
**Ramsar sites**

58. Section 77 of the Act requires the Secretary of State to notify English Nature when he has designated, under the Ramsar Convention, a wetland for inclusion in the list of wetlands of international importance. English Nature must then notify the local planning authority as well as owners and occupiers of the land, and other relevant bodies.

59. In England, this provision has been supplemented by policy guidance on the protection and management of English Ramsar sites, issued in November 2000, giving them a level of protection equivalent to that currently afforded to European sites (as defined in the Conservation (Natural Habitats &c) Regulations 1994). This gives guidance to local planning authorities and other public bodies on issues which should be taken into account in making decisions on development proposals likely to impact on sites which are listed as wetlands of international importance and the exercise of their duties under new section 28G. If, unusually, consent is given to development on or affecting such sites, lost wetlands interests will have to be replaced, by restoring and recreating habitats. The Government also expects that developers will have normally to bear the cost of these compensatory packages, under the polluter pays principle.

**Limestone Pavement Orders**

60. County or unitary planning authorities continue to have powers under section 34 of the 1981 Act to make limestone pavement orders prohibiting the removal or disturbance of limestone on land covered by the order. Under section 78 of the Act the penalty for an offence under such an order has been increased to £20,000, in line with the penalty for damaging SSSIs and emphasising the importance which the Secretary of State attaches to this nationally-important habitat.

**Wildlife Enforcement**

61. Part III also contains measures to strengthen the enforcement of the provisions in the Wildlife and Countryside Act 1981 relating to the protection of certain wildlife species. Section 25 of the 1981 Act already requires local authorities to bring Part I of that Act to the attention of the public, and empowers them to institute proceedings for offences committed in their area.

62. Schedule 12 of the Act makes certain offences ‘arrestable’ – this will bring with it stronger search and seizure powers for the police; it creates new reckless disturbance offences; it gives increased powers to the police and DETR wildlife inspectors – they will have the power to enter premises to check species sales controls and can require tissue samples to be taken from wildlife species for DNA analysis; and it enables Courts to impose heavier fines and prison sentences for virtually all offences under Part I of the Wildlife and Countryside Act 1981.

**Part IV: Areas of outstanding natural beauty**

63. Part IV of the Act introduces provisions to enable the better management and protection of Areas of Outstanding Natural Beauty (AONBs). It requires the preparation and publication of a management plan for every AONB. It places a duty on ‘relevant authorities’ when exercising or performing any function in relation
to, or so as to affect, land in an AONB, to have regard to the purpose of conserving and enhancing the natural beauty of the AONB. It provides for the creation of conservation boards for individual AONBs by means of an establishment order made by the Secretary of State. It also consolidates the AONB provisions previously contained in the National Parks and Access to the Countryside Act 1949.

64. The new duties imposed by Part IV include the requirement for local authorities at county and district levels (including unitary authorities), having land in an AONB, to participate in the preparation and publication of a management plan for the AONB. A management plan must be in place for each AONB by 31 March 2004. Under the commencement order referred to in paragraph 1 above, from 1 April 2001, all local authorities will also be under the duty imposed by section 85 (see paragraph 69 below) to have regard to the purpose of conserving and enhancing the natural beauty of an AONB, when exercising any function in relation to land in that AONB.

AONB Management Plans

65. Section 89 of the Act requires a management plan to be prepared and published for each AONB. The responsibility for doing so rests with the local authorities (counties, districts or unitaries) having land within the AONB, except in cases where an AONB conservation board comes into existence (see paragraphs 70-75). Local authorities within an AONB will therefore need to establish a mechanism for joint working in preparing, publishing and reviewing these plans. Non-statutory management plans already exist for many AONBs and there is already experience of joint working mechanisms among the local authorities.

66. The Government intends the introduction of a statutorily required AONB management plan to raise the profile of AONB management issues and to demonstrate the commitment of local authorities and other stakeholders to the management of the AONB. The Countryside Agency expects to issue detailed guidance on the preparation and content of management plans during 2001; the guidance is being produced in close co-operation with the Association of AONBs and will draw on experience in the National Parks, which already have a statutory duty to produce management plans. Local authorities preparing AONB management plans will be aware of the need for consistency with the content of other plans they are required to produce, including Community Strategies under the Local Government Act 2000.

67. Management plans must be prepared and published by the responsible local authorities within three years of the commencement of the relevant section on 1 April 2001. An existing non-statutory plan which has been prepared by a local authority or joint committee may be reviewed and adopted as the AONB management plan. Once a plan has been published, it must be reviewed at intervals not exceeding five years. The Government is providing increased funding to the Countryside Agency from 2001/02 to enable the Agency to offer an agreed level of support for the carrying out of core functions in each AONB in England, including the production of management plans. The increased support available from the Agency will be significantly in excess of the estimated cost to local authorities of producing management plans. As well as core funding, the Agency will also make grants available for appropriate projects within AONBs consistent with the management plan.
68. AONB management plans will not form part of the statutory development plan system. But an AONB management plan may be adopted by a local authority as Supplementary Planning Guidance if the requirements set out in Planning Policy Guidance Note 12, paragraphs 3.15 – 3.18 (as to content, consultation and adoption) are fulfilled. Those elements in an AONB management plan which relate to the development and use of land, and supplement and support the policies set out in the development plan, may be material considerations to be taken into account in determining a planning application.

**Duty on Public Bodies**

69. Section 85 of the Act places a duty on any relevant authority, in exercising or performing any function in relation to, or so as to affect, land in an AONB, to have regard to the purpose of conserving and enhancing the natural beauty of the AONB. ‘Relevant authority’ is defined as any Minister of the Crown, any public body, any statutory undertaker or any person holding public office. ‘Public body’ includes any local authority. This section is modelled on the similar duty towards National Park purposes which was introduced by section 62(1) of the Environment Act 1995. The requirement to have regard to conserving and enhancing natural beauty will not override particular considerations which have to be taken into account by relevant authorities in carrying out any function, but is intended to ensure that the purpose for which AONBs have been designated is recognised as an essential consideration in reaching decisions or undertaking activities impacting upon an AONB.

**AONB Conservation Boards**

70. Section 86 of the Act enables the Secretary of State to establish conservation boards for individual AONBs by means of establishment orders. Conservation boards are expected to be most suitable for some of the larger AONBs which cross a number of local authority boundaries, where unified management of the AONB would bring benefits. The Government has no target to create a particular number of conservation boards and expects the first moves towards a board to be instigated from within the AONB. The core funding formula which the Countryside Agency is developing with the Association of AONBs is intended to be applicable regardless of the management model adopted in a particular AONB.

71. The Countryside Agency will be able to provide assistance to any local authorities contemplating the establishment of an AONB conservation board. The Secretary of State must consult the Countryside Agency and any affected local authorities before proceeding with an establishment order, and must be satisfied that a majority of the local authorities consent. Establishment orders will be subject to the affirmative resolution procedure in Parliament.

72. In exercising its functions a conservation board will be required to have regard to two principal purposes, i.e. (a) to conserve and enhance the natural beauty of the AONB, and (b) to increase public understanding and enjoyment of the special qualities of the AONB. If there is conflict between the two purposes, then greater weight is to be attached to (a) (under the same ‘Sandford’ principle as operates in the National Parks). In having regard to its two purposes a conservation board will also have to seek to foster the economic and social well-being of local communities within the AONB, but without incurring significant expenditure in doing so. Boards
will be expected to co-operate with other organisations (such as local authorities and Regional Development Agencies) to fulfil this requirement, which is based on the similar provision applying to National Park Authorities. In both National Parks and AONBs the intention is that the body set up to manage the designated area recognises the importance of the social and economic well-being of the local communities, while focusing its own spending on the specific purposes for which it has been established.

73. Conservation boards, where established, will take over responsibility for the AONB management plan from the local authorities. Their further specific functions will be laid down in their individual establishment orders, following consultation with the local authorities as to what is required in a particular AONB. Section 86(3) provides that specified powers may be transferred from local authorities to the conservation board by the establishment order or, where appropriate, may be shared between the two. But the transfer or sharing of the principal development plan and development control functions contained in the Town and Country Planning Act 1990 is specifically excluded by the legislation.

74. Schedule 13 to the Act provides for local authorities with land in the AONB to appoint at least 40% of the members of the conservation board, and for parishes to appoint at least a further 20%. The remaining members (a maximum of 40%) will be appointed by the Secretary of State to reflect a variety of interests such as conservation, land management and recreational use of the AONB.

75. Conservation boards will be eligible to receive grants which may come either direct from the Secretary of State or via the Countryside Agency. The local authorities which have co-operated in the establishment of the conservation board will also be expected to provide continued funding, particularly in respect of local authority functions transferred to or shared with the conservation board. Boards will not have levying powers. The establishment of a conservation board is likely to help in negotiating effectively for supporting funds from elsewhere, eg from the European Union, the lottery funds or corporate sponsorship.

**Part V: Miscellaneous and supplementary**

**Local access forums.**

76. Section 94 places a duty on highway authorities and national park authorities to establish local access forums to advise on the improvement of public access for open-air recreation and the enjoyment of the area. Relevant decision-making authorities will have to have regard to forums’ views in reaching decisions, for example in relation to draft maps, the imposition of byelaws, and proposals for long term closures of access land (under Part I), as well as on wider access issues contained in new rights of way improvement plans (under Part II). The duty will not arise until regulations are made setting out the constitution and functions of the forums. The regulations are expected to be issued later this year and will be subject to public consultation. The regulations must provide that membership of forums will include users of rights of way and the new right of access, landowners and occupiers, together with any other interests especially relevant to the area. The duty does not apply to London boroughs, but any such council will have the power to set up a forum if it wishes to do so. The Secretary of State may exclude the duty in
respects of any other local authority – for example, if there is little or no access land and an insignificant network of recreational rights of way in the area.

Management agreements.

77. Section 39 of the Wildlife and Countryside Act 1981 enables local authorities to enter into management agreements with the owner of land in the countryside for its conservation (and for other related purposes). Section 96 of the 2000 Act amends section 39 in order that the Countryside Agency, the Countryside Council for Wales, and conservation boards in areas of outstanding natural beauty, may also enter into such agreements, and to enable agreements to be made in respect of any land, whether or not it is in the countryside. These amendments will allow these bodies, for example, to make agreements with the owner of land both for its dedication to access, and the long term conservation of access (by ensuring that dedicated land cannot become excepted land for the purposes of Schedule 1).

Norfolk and Suffolk Broads

78. Section 97 of the Act places a duty on any relevant authority, in exercising or performing any functions in relation to land in the Norfolk and Suffolk Broads, to have regard to the purposes for which the Broads have been designated (conserving and enhancing natural beauty, promoting public enjoyment and protecting the interests of navigation). This brings the treatment of the Broads into line with that for National Parks and AONBs (see paragraph 69).

Town and Village Greens

79. Section 98 of the Act revises and clarifies the third limb of the definition of town and village greens contained in section 22 (1) of the Commons Registration Act 1965.

80. Under the first part of the revised definition the land will be regarded as village green provided that it is land on which for not less than 20 years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right. The implications of this are that the commons registration authority will need to be satisfied only that a significant number of local inhabitants have used the land in a qualifying manner. Use by people not from the locality will therefore be irrelevant. Furthermore, use of the words “... any locality, or neighbourhood within a locality...” is intended to clarify that a locality does not necessarily equate to an administrative area, e.g. an entire parish, but rather to a suitable area which the land in question might reasonably be expected to serve as a green.

81. The second part of the revised definition provides that the local inhabitants must either continue to use the land in a qualifying manner or must have ceased to use the land within any period prescribed in regulations. These regulations may also require that specific procedures relating to the process of applying to register land as a green are followed.

82. The revised definitions contained in this section come into effect on 30 January 2001. The Government is still considering what provisions should be contained in subsequent regulations.
Isles of Scilly

83. The commencement order referred to in paragraph 1 above brings into force certain parts of section 100 of the Act which deals with the application of various provisions to the Isles of Scilly. Section 100 prevents Part I and sections 58 to 61 and 71 from applying to the Isles of Scilly except by order made by the Secretary of State after consultation with the Council of the Isles. Section 100 also amends the Highways Act 1980 to make similar provision in respect of certain provisions in Schedule 6 that will be inserted into the 1980 Act and in respect of the power for highway authorities to recover the costs of removing certain obstructions which is described in paragraph 22 above. Finally, section 100 empowers the Secretary of State, after consultation with the Council of the Isles, to make an order modifying the application of Part IV of the Act to the Isles of Scilly.

84. Section 100, with the exception of subsections (3) and (5)(a) will be brought into force on 30 January 2001. Subsection (3), which relates to Part IV of the Act, will be brought into force on 1 April 2001. Subsection (5)(a) will be brought into force when the new provisions in the Highways Act 1980 to which it relates are also brought into force.

C L L BRAUN
Assistant Secretary

The Chief Executive:
   County Councils in England
   District Councils in England
   Unitary Authorities in England
   London Borough Councils
   Council of the Isles of Scilly

The Town Clerk, City of London
The National Park Officer, National Park Authorities in England
The Chief Executive, The Broads Authority
Head of Paid Services, Greater London Authority
Consultation paper on proposed amendments to legislation when 'Roads Used as Public Paths' are reclassified as restricted byways
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Section 1: Overview

Introduction
1.1 Sections 47 - 51 of Countryside and Rights of Way Act 2000 ('the 2000 Act') introduce a new class of right of way called 'restricted byway'. Restricted byways will replace ways shown on local authorities’ definitive maps as Roads Used as Public Paths (RUPPs). Restricted byways will carry a right of way on foot; a right of way on horseback or leading a horse; and a right of way for vehicles other than mechanically propelled vehicles. Restricted byway means a highway over which the public have restricted byway rights, with or without a right to drive animals of any description along the highway, but no other rights of way. Reclassification from RUPP to restricted byway does not extinguish any private rights or higher vehicular rights that may exist but have not been recorded on the definitive map.

1.2 Section 52 of the 2000 Act provides for regulations to be made to amend relevant provisions in legislation relating to highways or highways of a particular description so that they apply, with or without modification, or do not apply, to restricted byways. Amendments can also be made to provisions relating to things done on or in connection with highways and in relation to provisions for the creation, stopping up or diversion of highways or highways of a particular description. The approach to this task is the subject of this consultation paper which extends to England and Wales.

Background
1.3 The rights attached to RUPPs were defined in 1949 when local authorities were first required to record rights of way on definitive maps and statements. Section 27(6) of the National Parks and Access to the Countryside Act 1949 ('the 1949 Act') provided that a RUPP is ‘a highway other than a public path, used by the public mainly for the purposes for which footpath or bridleways are so used’.

1.4 It is not clear from the 1949 Act whether RUPPs were subject to vehicular rights. The Countryside Act 1968 sought to resolve this uncertainty by placing a duty on local authorities to reclassify each of their RUPPs either as a footpath, bridleway or Byway Open to All Traffic (BOAT) in accordance with the criteria set out in the Act, which included consideration of the current use and state of repair of each RUPP. This attempt at clarity did not enable authorities to resolve the status of their RUPPs. In an attempt to make the position clearer, section 54 of the Wildlife and Countryside Act 1981 ('the 1981 Act') removes any consideration of physical characteristics of the RUPP and introduced the requirement for authorities to review and reclassify each of their RUPPs either as BOAT, bridleway or footpath only according to the rights which could be proved to exist. The 1981 Act provides a legal presumption that RUPPs carry at least bridleway rights unless the contrary is shown. In addition, section 66(1) provides a statutory definition of a BOAT1.

1.5 Many local authorities have not completed the task of reclassifying their RUPPs. An evaluation of the process of recording public rights of way in England – a report for the County Surveyors’ Society Countryside Working Group (May 1999)

---
1 A byway open to all traffic means a highway over which the public have a right of way for vehicular traffic and all other kinds of traffic, but which is used by the public mainly for the purposes for which footpaths and bridleways are so used.
found that 4,166 RUPPs had been reclassified in accordance with section 54 of the 1981 Act, with 3,305 still to be reviewed. Recognising that the uncertainty over what rights exist on these RUPPs detracted from the public’s enjoyment of them, the Government introduced the new category of way – restricted byway – in the 2000 Act.

**A new category of right of way: restricted byway**

1.6 The purpose of the new category, ‘restricted byway’, is two fold:

(i) to give certainty to walkers, horse riders, cyclists and horse drawn and other non-mechanically propelled vehicle drivers by giving them express statutory rights to use restricted byways; and

(ii) to enable authorities to concentrate on other important rights of way functions by relieving them of the duty to review the status of each RUPP individually.

The 2000 Act approach builds on the presumption in the 1981 Act that RUPPs carry at least bridleway rights. It will not be possible to make a definitive map modification order to downgrade a restricted byway to a footpath or bridleway even if it could be shown that only footpath or bridleway rights existed prior to reclassification.

1.7 On the other hand, restricted byway rights are without prejudice to other rights that may exist, for example for motor vehicles. So it will be possible to modify the definitive map to record a higher right than restricted byway rights where the higher right is proved to exist. Anyone with evidence that a restricted byway carries vehicular rights will be able to apply to the local authority for a definitive map modification order to reclassify a restricted byway as a BOAT.

1.8 Every restricted byway will be maintained at public expense. Any private liability, for example of the landowner, to maintain a RUPP will be extinguished.

**Formulating regulations under section 52**

1.9 Legislation is peppered with references to bridleways, footpaths, BOATS, and similar terms relating to rights of way. Parliament accepted that this legislation should be looked at in detail after the Act was in place to ensure that it operated effectively in relation to restricted byways. Parliament also agreed that changes to be introduced as a matter of policy should be considered and implemented by way of secondary legislation. Section 52 provides for this.

1.10 Regulations made under section 52 are subject to affirmative resolution in both Houses of Parliament. This means there will be full opportunity for scrutiny and debate on the content of the regulations. The Secretary of State is also required to lay before Parliament a document giving details of consultations with the National Assembly (‘the Assembly’).

1.11 The purpose of this consultation paper is to invite comments on proposals for:

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2 Section 54(3)(b) of the Wildlife and Countryside Act 1981.
3 Section 52(8) of the 2000 Act.
(i) changes to legislation that we propose to make as a matter of policy; and 
(ii) changes to legislation which we intend to make to ensure consistency with other categories of rights of way.

Some legislation will apply to restricted byways without any need for amendment. We have, for completeness, included a table of the principal legislation which will automatically apply to restricted byways.

**Geographic extent of legislation**

1.12 Almost all of the legislation applies to both England and Wales. The Secretary of State is required to consult (and where she proposes to amend subordinate legislation made by the Assembly, gain the express consent of) the National Assembly for Wales before making provisions having effect in Wales\(^4\). In addition the Assembly may submit proposals to the Secretary of State\(^5\), and may also make its own provision in relation to Wales\(^6\), but none is proposed in this consultation paper.

**Transitional arrangements**

1.13 We are aware that there is some confusion concerning what will happen to orders made under section 53 or 54 of the 1981 Act which relate to a way shown on a definitive map as a RUPP (or any applications for orders modifying the status of a RUPP) which are not confirmed (or otherwise) before section 47 is brought into force.

1.14 The 2000 Act requires that any orders made under section 53 or 54 of the 1981 Act which relate to a way shown on a definitive map as a RUPP (or any applications for orders modifying the status of a RUPP) which are made before section 47 is brought into force are to be processed to a final determination. Any RUPP which is the subject of an outstanding application or undetermined order after commencement of section 47 will carry restricted byway rights. When the order is determined, it will take effect\(^7\).

**Methodology for identifying amendments needed to legislation**


1.16 We identified different categories of amendment, and many examples where no amendment is needed. Figure 1 overleaf illustrates these different categories and the sections dealing with each category in this consultation paper.

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\(^4\) Section 52(3) of the 2000 Act. 
\(^5\) Section 52(4) of the 2000 Act. 
\(^6\) Section 52(6) of the 2000 Act. The National Assembly can amend local and private acts passed during or before 2000 that relate only to Wales and amend any secondary legislation that the Assembly currently has the power to amend or revoke. 
\(^7\) Section 48(9), (10) and (11) of the 2000 Act.
Provisions in legislation, categories of amendments

Figure 1

Section 2
Provisions that we propose to change to encompass restricted byways

Section 3
Provisions that apply to or encompass restricted byways as they stand
Annex 1, Table 3

Section 4
Other matters needing clarification

Identifying relevant provisions in legislation

Provisions that should encompass restricted byways as a matter of policy
Annex 1, Table 1

Provisions that should apply to restricted byways to ensure consistency with other categories of rights of way
Annex 1, Table 2
Section 2: Provisions that we propose to apply to restricted byways

Approach

2.1 Legislation can be applied to ‘restricted byways’ or to ‘ways shown in the definitive map and statement as restricted byways’ 8. Restricted byways will carry a right of way on foot; a right of way on horseback or leading a horse; and a right of way for vehicles other than mechanically propelled vehicles. Legislation applied to ‘restricted byways’ applies to these rights and not to any higher rights which might exist but have not been reflected in a definitive map modification order. Legislation applied to ‘ways shown in a definitive map and statement as restricted byways’ applies to the restricted byway rights and to any higher rights which might exist. In most cases, legislation will be amended to apply to restricted byway rights and not to any higher rights.

2.2 We have identified:

(i) Changes we propose to make to legislation as a matter of policy - we consider desirable (but not necessary) to integrate restricted byways more fully into the rights of way network (Annex 1, Table 1); and

(ii) Changes we intend to make to legislation to ensure consistency with other categories of rights of way - we consider these necessary for restricted byways to operate sensibly within the framework of existing legislation (Annex 1, Table 2).

2.3 The amendments proposed in Table 1 are not necessary in order for restricted byways to operate within the current legislative framework but we consider them to be desirable as a matter of policy. In making our assessment, we have had regard to various considerations, including:

- On commencement of sections 47 and 48, each RUPP will become a restricted byway, but the definitive map and statement could be modified to record a BOAT if vehicular rights are proved.

- The introduction of restricted byways increases provision for non-motorised users of rights of way. Section 48 distinguishes between non-mechanically propelled vehicles, such as horse drawn vehicles, and mechanically propelled vehicles.

- Under section 54 of the 1981 Act, RUPPs are presumed to carry at least bridleway rights. We believe that the addition of statutory rights for horse drawn vehicles will usually have minimal effects on the land and the owner or occupier of land crossed by a restricted byway.

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8 Section 52(1)(a) of the 2000 Act.
Policy amendments
2.4 The principal policy amendments are outlined below. (A full list is in Annex 1, Table 1).

Creating restricted byways
2.5 Ministers indicated during the passage of the 2000 Act through Parliament that they were sympathetic to giving local authorities the power to create restricted byways either by agreement or compulsorily. The consultation paper, Improving Rights of Way: Draft Guidance to Local Highway Authorities on the Preparation of Rights of Way Improvement Plans, invited views on whether local authorities should be given such powers. The majority of respondents agreed that it would be desirable for authorities to be able to make orders creating restricted byways.

We intend to amend sections 25-28 of the Highways Act 1980 to give local authorities the power to create restricted byways, both by agreement and compulsorily, and allow provision for compensation where appropriate. National Park authorities and district councils will also be able to create restricted byways.

Stopping up and diverting restricted byways
2.6 Local authorities have powers under section 118 of the 1980 Act to stop up footpaths and bridleways which are not needed for public use. They have powers under section 119 of the 1980 Act to divert footpaths and bridleways where they are satisfied that this is in the interests of the owner, lessee or occupier of the land crossed by the path, or in the interests of the public. Under sections 118A and 119A of the 1980 Act they can stop up or divert footpaths and bridleways in the interests of public safety where they cross railways or tramways. Defra and the Welsh Assembly Government advice that local authorities should use these powers rather than section 116 will also apply to restricted byways.

Proposal 1: Local authorities’ public path extinguishment and diversion powers under sections 118, 118A, 119 and 119A of the Highways Act 1980 should be extended to restricted byways. (National Park authorities and district councils would also be able to extinguish and divert restricted byways.)

(No amendment is needed to sections 118B or 119B (which allow the stopping up or diversion of rights of way for crime prevention and school security) or 119D of the 1980 Act (SSSI diversion orders) because they already encompass restricted byways).

2.7 As with footpaths and bridleways, compensation should be available for loss caused by the stopping up or diversion of restricted byways. Section 121(2) of the 1980 Act, which applies the public path creation compensation provisions in section 28 to public path orders, will apply to restricted byways by virtue of our proposed amendments to sections 118, 118A, 119 and 119A.

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10 Wales does not have any district councils: all local authorities in Wales are unitary.
11 Paragraph 35, Circular 2/93 (Department of Environment) and Circular 5/93 (Welsh Office).
2.8 Local authorities can charge applicants for orders under sections 118, 118A, 119 and 119A of the 1980 Act\(^\text{12}\). The ability to charge is based on the premise that an applicant is seeking to alter a public right for private gain. If the section 118, 118A, 119 and 119A powers are extended to restricted byways, the power to charge applicants for orders made under them would be similarly extended.

2.9 The 2000 Act inserts sections 118ZA and 119ZA into the 1980 Act, which introduce a right for land managers of land used for agriculture, forestry or the breeding or keeping of horses to apply for public path (i.e. footpath and bridleway) extinguishment and diversion orders.

We do not propose at this stage to extend sections 118ZA and 119ZA of the Highways Act 1980 to restricted byways. Dealing with applications for orders relating to footpaths and bridleways will be a substantial new administrative task for local authorities. We consider it appropriate to first allow a reasonable period to assess how this process operates in practice before considering any extension to restricted byways.

**Temporary diversions**

2.10 Where an occupier of agricultural land wishes to carry out an excavation or engineering operation which is reasonably necessary for the purposes of agriculture, he may apply to the highway authority to make an order for the temporary diversion of a footpath or bridleway under section 135 of the 1980 Act. If reasonably necessary to permit the works, the diversion can be for up to 3 months. The authority may impose conditions to ensure the protection of users and for making good the surface of the path or way before the expiration of the authorisation period.

2.11 The 2000 Act inserts sections 135A and 135B into the 1980 Act. Section 135A enables the occupier of any land to temporarily divert a footpath or bridleway which passes over land where works are likely to cause danger to the users of the way. The period of the diversion is limited to no more than 14 days in any one calendar year. Section 135B requires the person effecting the diversion to make good any damage to the footpath or bridleway caused by the works. Sections 135A and 135B have not yet been implemented so we have no experience of how successful they will be in practice. In particular, the expertise of land managers to make good damage to ways affected by temporary works will be an important element of their operation.

Proposal 2: Highway authorities should have the power to make temporary diversion orders on restricted byways under section 135 of the Highways Act 1980. While we recognise the desirability among land managers for maximum flexibility in their land management options, we do not propose at this stage to extend sections 135A and 135B to restricted byways. We consider it appropriate to first allow a reasonable period to assess how these powers, and the extension of section 135 to restricted byways, work in practice before considering an extension to restricted byways.

Maintenance
2.12 Every way which becomes a restricted byway will be maintained publicly by virtue of section 49(1) of the 2000 Act. Section 42 of the 1980 Act enables district councils to undertake the maintenance of certain highways, including footpaths and bridleways\(^\text{13}\). Section 43 enables parish councils (in England) and community councils (in Wales) to undertake the maintenance of footpaths and bridleways. Extending these powers to restricted byways could require expertise above that required for maintaining footpaths and bridleways.

We invite views on whether the powers enabling district, parish and community councils to maintain footpaths and bridleways should be extended to restricted byways, in order to provide flexibility in the administration of maintenance responsibility.

Waymarking
2.13 The waymarking signs for footpaths, bridleways and byways are set out in the Traffic Signs Regulations and General Directions 2002\(^\text{14}\). Yellow arrows generally identify footpaths, blue arrows bridleways and red arrows byways (there is some discretion as to the background colour of the sign). We propose to distinguish between the colour of waymarks for BOATs and restricted byways. Figures 2, 3 and 4 below illustrate some options for a waymark to denote restricted byways.

We invite views and suggestions on the most appropriate waymark for restricted byways.

Planning
2.14 Section 257 of the Town and Country Planning Act 1990 allows local planning authorities to stop up or divert a footpath or bridleway to enable development, for which planning permission has been granted, to take place. The Secretary of State (or, in Wales the Assembly) has similar power under section 247 in respect of any highway.

2.15 Section 258 further enables local authorities to make an order for the extinguishment of a footpath and bridleway over land held for planning purposes (there is no provision for diversion). ‘Planning purposes’ in this context broadly

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\(^{13}\) Wales does not have any district councils: all local authorities in Wales are unitary.

\(^{14}\) SI 2002/3113 Schedule 7 Part VII, diagram 2610.2. Diagrams 2610 and 2610.1 already provide for signposting indicating direction to or along a restricted byway.
means land acquired by the local planning authority for development or improvement or which is required for a purpose in the interests of the proper planning of the area. The Secretary of State in England, and the Assembly in Wales have a similar power under section 251 in relation to all rights of way.

**Proposal 3:** We intend to amend sections 257 and 258 of the Town and Country Planning Act 1990 to extend local planning authorities’ powers to make stopping up and diversion orders to restricted byways.

### Harbours and ports

2.16 Under sections 14 and 16 of the Harbours Act 1964, the Secretary of State (or, in Wales, the Assembly) can make harbour revision and empowerment orders for the purpose of construction, improvement or efficient management of a harbour. These orders are made on application from harbour authorities, intending undertakers and others with an interest. The orders can make provision for the extinguishment or diversion of a footpath or bridleway for the purposes of the works set out in the order, and for ancillary works.

2.17 An application for an order relating to a footpath or bridleway has to be accompanied by a map at 1/2500 scale showing the right of way affected and any proposed alternative route. Notice of the application must be served on every local authority for the area in which the footpath or bridleway is situated and a copy of the notice must be posted at each end of way which would be affected by the order. Prior to making the order, the Secretary of State (or, in Wales, the Assembly) must be satisfied, in the case of an extinguishment, that an alternative route has been or will be provided or that an alternative way is not required and, in the case of a diversion, that the new path will not be less convenient to the public in consequence of the diversion.

**Proposal 4:** The special procedures that apply to footpaths and bridleways affected by harbour revision and empowerment orders should be extended to restricted byways.

### Water

2.18 Under section 168 of the Water Resources Act 1991 and section 167 of the Water Industry Act 1991 the Secretary of State (or, in Wales, the Assembly and, in some circumstances, the Secretary of State) can make compulsory works orders to facilitate works by the Environment Agency and water undertakers to carry out engineering or building operations or to discharge water into any inland waters or underground.

2.19 Where the Agency or an undertaker makes an application to the Secretary of State for an order that would include an authorisation to stop up or divert a footpath or bridleway, additional procedures apply. These include requirements for notice to be given both of the draft order and the made order to prescribed bodies, and the posting of notice of the draft order on the footpath or bridleway.
Proposal 5: The additional requirements for footpaths and bridleways affected by compulsory works orders should be extended to restricted byways.

Defence

2.20 Section 16 of the Defence Act 1842 gives the Secretary of State (for Defence) the power to stop up and divert footpaths and bridleways. Section 17 requires an alternative path or road to be provided where a footpath or bridle road is stopped up.

Proposal 6: Sections 16 and 17 of the Defence Act 1842 should be extended to restricted byways.

Section 3: Provisions that will automatically apply to or encompass restricted byways

3.1 We consider that any legislative provision which refers to a 'highway' or 'highways' in general (i.e. not to a highway of a particular description) will automatically encompass restricted byways. This is because a restricted byway is a category of highway. This principle similarly applies to other general terms – right of way, carriageway, road, and street.

3.2 Table 3 (Annex 1) lists the principal provisions which will apply to restricted byways. We do not propose to disapply any of these provisions.

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15 Section 48(4) of the 2000 Act. A restricted byway is a highway for the purposes of Part II. It is also a highway for the purposes of the 1981 Act through amendments to sections 53(3)(a)(iii), 56, and 66 of the 1981 Act made by Schedule 5 to the 2000 Act.

16 Section 48(4) of the 2000 Act provides that 'restricted byway rights' means a right of way for certain categories of user.

17 We consider the term restricted byway falls within the definition of carriageway in section 329(1) of the Highways Act 1980 by virtue of the reference there to ‘vehicle’.

18 Road is defined in the Road Traffic Regulation Act 1984 as “any length of highway or of any other road to which the public has access, and includes bridges over which a road passes”.

19 Street is defined in the New Roads and Street Works Act 1991 as’ .... any highway, road, ....'.
Section 4: Other matters

Magistrates’ court procedure – retaining footpath and bridleway rights

4.1 Section 116 of the 1980 Act allows the magistrates’ court to stop up or divert a highway applies to restricted byways. Section 116(4) of the 1980 Act allows for footpath or bridleway rights to be retained when higher rights are stopped up. Paragraph 15 of Schedule 5 to the 2000 Act amended section 116(4) so that restricted byway rights may also be retained.

Barriers and fences on rights of way

4.2 Section 66(3) of the 1980 Act enables highway authorities to provide and maintain barriers, rails and fences in footpaths to safeguard the public. The 2000 Act amends this section to allow provision for posts and extends it to apply to bridleways that are maintainable at public expense. We have received representations from local highway authorities suggesting that section 66(3) should be extended to restricted byways. However, this is unnecessary, since section 66(2), which applies similar provisions to those in section 66(3) to a ‘carriageway’, will automatically encompass restricted byways. Local highway authorities should recognise that any barriers erected must not hinder legitimate users of restricted byways, such as those driving horse drawn carriages.

Definitive maps

4.3 Regulations made under the Wildlife and Countryside Act 1981 prescribe the notation to be used for rights of way on the definitive map. RUPPs are shown either by a broken green line or by a broken line and arrowheads as illustrated below in figure 5.

`v___v___v___v___v`

4.4 We consider that all ways shown on definitive maps by these notations will be reclassified as restricted byways. This includes ways which may be referred to by a term other than “RUPP” (CRF or CRB\(^\text{20}\) for example).

Since restricted byways will replace RUPPs on the definitive map, we see no reason to change these notations other than to clarify that they will instead denote a restricted byway.

\(^{20}\) CRF and CRB were used to denote a Carriage Road used mainly as a Footpath and a Carriage Road used mainly as a Bridleway. These terms have no legal recognition.
Annex 1

Table 1: Changes we propose to make to legislation in respect of restricted byways as a matter of policy

Primary legislation

<table>
<thead>
<tr>
<th>Act</th>
<th>Section or Schedule</th>
<th>Description</th>
<th>Effect of amendment is to</th>
</tr>
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<tbody>
<tr>
<td>Highways Act 1980</td>
<td>S 25</td>
<td>Creation of footpath or bridleway by agreement</td>
<td>Extend provisions to restricted byways</td>
</tr>
<tr>
<td>Highways Act 1980</td>
<td>S 26</td>
<td>Compulsory powers for creation of footpaths and bridleways</td>
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<td>Highways Act 1980</td>
<td>S 27</td>
<td>Making up of new footpaths and bridleways</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 28</td>
<td>Compensation for loss caused by public path creation orders</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 42</td>
<td>Power of district councils to maintain certain highways</td>
<td>Give district councils power to maintain restricted byways</td>
</tr>
<tr>
<td>Highways Act 1980</td>
<td>S 43</td>
<td>Power of parish and community councils to maintain footpaths and bridleways</td>
<td>Give parish councils power to maintain restricted byways</td>
</tr>
<tr>
<td>Highways Act 1980</td>
<td>S 118</td>
<td>Stopping up of footpaths and bridleways</td>
<td>Extend provisions to restricted byways</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 118A</td>
<td>Stopping up of footpaths and bridleways crossing railways</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 119</td>
<td>Diversion of footpaths and bridleways</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 119A</td>
<td>Diversion of footpaths and bridleways crossing railways</td>
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<td>Highways Act 1980</td>
<td>S 135</td>
<td>Authorisation of other works disturbing footpath or bridleway</td>
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<td>Highways Act 1980</td>
<td>S 275</td>
<td>Contributions by councils and local planning authorities towards expenses</td>
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<td>Highways Act 1980</td>
<td>S 293</td>
<td>Powers of entry for purposes connected with certain orders relating to footpaths and bridleways</td>
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<td>S 329</td>
<td>Further provision as to interpretation</td>
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<td>Highways Act 1980</td>
<td>Sch 6</td>
<td>Procedure for making and confirming certain orders relating to footpaths and bridleways</td>
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<tr>
<td>Town and Country Planning Act 1990</td>
<td>S 257</td>
<td>Footpaths and bridleways affected by development: orders by other authorities</td>
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<tr>
<td>Town and Country Planning Act 1990</td>
<td>S 258</td>
<td>Extinguishment of public rights of way over land held for planning purposes</td>
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<tr>
<td>Town and Country Planning Act 1990</td>
<td>S 260</td>
<td>Telecommunication apparatus: orders by or on application of other authorities</td>
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<tr>
<td>Town and Country Planning Act 1990</td>
<td>S 336</td>
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<td>Town and Country Planning Act 1990</td>
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<tr>
<td>Water Industry Act 1991</td>
<td>Sch 11</td>
<td>Orders conferring compulsory works powers</td>
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<td>Water Resources Act 1991</td>
<td>Sch 19</td>
<td>Orders conferring compulsory works powers</td>
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<tr>
<td>Act</td>
<td>Section or Schedule</td>
<td>Description</td>
<td>Effect of amendment is to</td>
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<tr>
<td>Environment Act 1995</td>
<td>Sch 9</td>
<td>Miscellaneous powers of National Park Authorities (NPA) (creating, diverting,</td>
<td>Give National Park authorities the power to create etc</td>
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<td></td>
<td></td>
<td>stopping up and widening of public paths)</td>
<td>restricted byways</td>
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<tr>
<td>Local Government Act 1972</td>
<td>S 187</td>
<td>Local highway authorities and maintenance powers of district councils</td>
<td>Extend provisions to restricted byways</td>
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<tr>
<td>Harbours Act 1964</td>
<td>S 14</td>
<td>Minister’s powers, on application of harbour authorities, or others, to make</td>
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<tr>
<td></td>
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<td>orders (to extinguish or divert footpaths and bridleways)</td>
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<tr>
<td>Harbours Act 1964</td>
<td>S 16</td>
<td>Minister’s powers, on application of intending undertakers, or others, to make</td>
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<td></td>
<td></td>
<td>orders (to extinguish or divert footpaths and bridleways)</td>
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<tr>
<td>Harbours Act 1964</td>
<td>S 17</td>
<td>Procedure for making harbour revision and empowerment orders, and</td>
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<td></td>
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<td>substitution thereof, (to extinguish or divert footpaths and bridleways)</td>
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<tr>
<td>Harbours Act 1964</td>
<td>Sch 2</td>
<td>Object for whose achievement harbour revision orders may be made</td>
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<tr>
<td>Defence Act 1842</td>
<td>S 16</td>
<td>Principal officers power to stop up or divert footpaths and bridleways</td>
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<tr>
<td>Defence Act 1842</td>
<td>S 17</td>
<td>When footpaths, etc., are stopped up, other paths to be provided in lieu thereof</td>
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</tbody>
</table>

**Secondary legislation**

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<thead>
<tr>
<th>UK Statutory Instrument</th>
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<td>1993/9 Rail Crossing Extinguishment and Diversion Orders Regulations 1993</td>
<td>Highways Act 1980 ss 28(2), 118, 118A(6) and (7), 119, 119A(9) and (10), and 120(3A); Sch 6 paras 1(1) and (3), 3 and 4</td>
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<tr>
<td>1993/10 Town and Country Planning (Public Path Orders) Regulations 1993</td>
<td>Town and Country Planning Act 1990 ss 259(4) and 333(1); Sch 14 para 1 and 6</td>
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<tr>
<td>1993/11 Public Path Orders Regulations 1993</td>
<td>Highways Act 1980 ss 26, 28(2), 118 and 119; Sch 6 paras 1, 3 and 4; Acquisition of Land Act 1981 s.32</td>
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<tr>
<td>1993/407 Local Authorities (Recovery of Costs For Public Path Orders) Regulations 1993</td>
<td>Local Government and Housing Act 1989 s 150 and 152(5)</td>
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<tr>
<td>1999/221 Water (Compulsory Works Powers) (Notice) Regulations 1999</td>
<td>Water Industry Act 1991 s 213(2)(Z); Sch 11 para 1(3)(g) ; Water Resources Act 1991 s 219(2)(e); Sch 19 para 1(3)(f)</td>
</tr>
<tr>
<td>2002/3113 Traffic Signs Regulations and General Directions 2002</td>
<td>Road Traffic Regulation Act 1984 s 64; Road Traffic Act 1988 s 36(5)</td>
</tr>
</tbody>
</table>
Table 2: Changes we intend to make to legislation to ensure consistency between restricted byways and other categories of rights of way

**Primary legislation**

<table>
<thead>
<tr>
<th>Act</th>
<th>Section or Schedule</th>
<th>Description</th>
<th>Purpose of amendment is to:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wildlife and Countryside Act 1981</td>
<td>S 59</td>
<td>Prohibition on keeping bulls on land crossed by public right of way</td>
<td>Apply provision to <strong>restricted byways</strong></td>
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<tr>
<td>Wildlife and Countryside Act 1981</td>
<td>S 62</td>
<td>Appointment of wardens for public rights of way</td>
<td>Enable local authorities to appoint wardens for <strong>restricted byways</strong></td>
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<tr>
<td>Countryside Act 1968</td>
<td>S 27</td>
<td>Signposting of footpaths and bridleways, including BOATs</td>
<td>Enable local authorities to erect signposts on <strong>restricted byways</strong></td>
</tr>
<tr>
<td>Highways Act 1980</td>
<td>S 47</td>
<td>Power of magistrates’ court to declare unnecessary highway to be not maintainable at public expense</td>
<td>Prevent local authorities from applying to magistrates to declare <strong>restricted byways</strong> not maintainable at public expense</td>
</tr>
<tr>
<td>Highways Act 1980</td>
<td>S 300</td>
<td>Right of local authorities to use vehicles and appliances on footways and bridleways</td>
<td>Enable mechanically propelled vehicles or appliances to be used to clean, maintain or improve <strong>restricted byways</strong></td>
</tr>
<tr>
<td>Road Traffic Act 1988</td>
<td>S 24</td>
<td>Restriction of carriage of persons on bicycles</td>
<td>Clarify that <strong>restricted byway</strong> is included in definition of road</td>
</tr>
<tr>
<td>Road Traffic Act 1988</td>
<td>S 33</td>
<td>Control of use of footpaths and bridleways for motor vehicle trials</td>
<td>Clarify that local authority authorisation is needed for motor vehicle trials on <strong>restricted byways</strong></td>
</tr>
<tr>
<td>Road Traffic Offenders Act 1988</td>
<td>Sch 1</td>
<td>Offences to which ss 1, 6, 11 and 12(1) apply</td>
<td>Ensure that <strong>restricted byway</strong> is incorporated in definitions</td>
</tr>
<tr>
<td>Road Traffic Regulation Act 1984</td>
<td>S 15</td>
<td>Duration of [temporary prohibition] orders and notices under s 14</td>
<td>Restrict duration of order to 6 months (as for other rights of way)</td>
</tr>
<tr>
<td>Road Traffic Regulation Act 1984</td>
<td>S 58</td>
<td>Consents for purposes of s 57(1). Parish or community council will not have power to provide parking space in a road which is not a highway, or in a public path except with the consent of the owner or occupier of the land over which the road or path runs</td>
<td>Clarify that consent of the owner and the occupier of the land over which the <strong>restricted byway</strong> runs should be sought by the parish or community council</td>
</tr>
<tr>
<td>Road Traffic Regulation Act 1984</td>
<td>S 60</td>
<td>Supplementary provisions relating to ss 57-59</td>
<td></td>
</tr>
<tr>
<td>Road Traffic Regulation Act 1984</td>
<td>S 127</td>
<td>Footpaths, bridleways and byways open to all traffic</td>
<td>Add <strong>restricted byway</strong> to scope</td>
</tr>
<tr>
<td>Chronically Sick and Disabled Persons Act 1970</td>
<td>S 20</td>
<td>Use of invalid carriages on highways</td>
<td>Ensure that invalid carriages can be taken on to <strong>restricted byways</strong></td>
</tr>
</tbody>
</table>
### Secondary legislation

<table>
<thead>
<tr>
<th>Statutory Instrument</th>
<th>Regulations made under:</th>
<th>Purpose of amendment is to:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950/1066 National Parks and Access to the Countryside Regulations 1950</td>
<td>Sch 2 Forms of notices</td>
<td>Change RUPP to restricted byway</td>
</tr>
<tr>
<td>1969/414 Motor Vehicle (Competitions and Trials) Regulations 1969</td>
<td>Sch 2 Particulars to be given in the application for authorisation</td>
<td>Extend to restricted byway</td>
</tr>
<tr>
<td>1987/2004 Local Authorities (Publicity Account) (Exemption) Order 1987</td>
<td>Schedule of exemptions from the separate account of expenditure on publicity required under s 5(1) Local Government Act 1986</td>
<td>Extend exemption to restricted byways</td>
</tr>
<tr>
<td>1992/1215 Road Traffic (Temporary Restrictions) Procedure Regulations 1992</td>
<td>2 General interpretation 4 Footpaths, bridleways, cycle tracks and byways open to all traffic 11 Footpaths, bridleways, cycle tracks and byways open to all traffic</td>
<td>Extend to restricted byway</td>
</tr>
<tr>
<td>1993/12 Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993</td>
<td>Sch1 Notation to be used on definitive maps Sch 3 Sch 5 Form of notice of modification order Sch 7 Form of application for modification order Sch 8 Form of notice of application for modification order</td>
<td>Clarify notation and otherwise incorporate restricted byway</td>
</tr>
<tr>
<td>1997/1160 Hedgerows Regulations 1997</td>
<td>Sch 1 Additional criteria for determining “important” hedgerows Part II criteria</td>
<td>Change RUPP to restricted byway</td>
</tr>
<tr>
<td>2000/2190 Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2000</td>
<td>4 Interpretation and notices 10 documents accompanying applications Sch 3 forms of notice form 4 Sch 5 Those to be served with a copy of application and documents</td>
<td>Change RUPP to restricted byway and otherwise incorporate restricted byway</td>
</tr>
<tr>
<td>2000/2853 Local Authorities (Functions and Responsibilities) (England) Regulations 2000</td>
<td>Sch 1 Functions not to be the responsibility of an authority’s executive</td>
<td>Incorporate restricted byway</td>
</tr>
</tbody>
</table>
### Table 3: Principal legislation that will without amendment apply to or encompass restricted byways

#### Primary legislation

<table>
<thead>
<tr>
<th>Act</th>
<th>Section or Schedule</th>
<th>Description</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wildlife and Countryside Act 1981</td>
<td>S 53</td>
<td>Duty to keep definitive map and statement under continuous review</td>
<td>Restricted byway inserted by the Countryside and Rights of Way Act 2000 (CROW Act)</td>
</tr>
<tr>
<td>Wildlife and Countryside Act 1981</td>
<td>S 56</td>
<td>Effect of definitive map and statement</td>
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<tr>
<td>Wildlife and Countryside Act 1981</td>
<td>S 66</td>
<td>Interpretation of Part III</td>
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<tr>
<td>Countryside Act 1968</td>
<td>S 41</td>
<td>Power to make byelaws</td>
<td></td>
</tr>
<tr>
<td>Act</td>
<td>Section</td>
<td>Description</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 119E</td>
<td>Provisions supplementary to s 119D</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 120</td>
<td>Exercise of powers of making public path extinguishment and diversion orders</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 121</td>
<td>Supplementary powers as to public path extinguishment and diversion orders</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 121C</td>
<td>Cases where council may decline to determine applications</td>
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<td></td>
<td></td>
<td>Encompasses restricted byway where application made by school proprietor under ss 118C and 119C</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 121D</td>
<td>Right of appeal to Secretary of State in respect of applications for orders</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 121E</td>
<td>Determination of appeals</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 122</td>
<td>Power to make temporary diversion</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 130A</td>
<td>Notices to enforce duty regarding public paths</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 130B</td>
<td>Orders following notice under s 130A</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 131</td>
<td>Penalty for damaging highway etc.</td>
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<tr>
<td>Highways Act 1980</td>
<td>S 131A</td>
<td>Disturbance of surface of certain highways</td>
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<td>Highways Act 1980</td>
<td>S 136</td>
<td>Damage to highway consequent on exclusion of sun and wind</td>
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<td>Highways Act 1980</td>
<td>S 137</td>
<td>Penalty for wilful obstruction</td>
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<td>Highways Act 1980</td>
<td>S 137A</td>
<td>Interference by crops</td>
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<td>Highways Act 1980</td>
<td>S 137ZA</td>
<td>Power to order offender to remove obstruction</td>
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<td>Highways Act 1980</td>
<td>S 138</td>
<td>Penalty for erecting building etc</td>
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<td>Highways Act 1980</td>
<td>S 141</td>
<td>Restriction on planting of trees etc. in or near made-up carriageway</td>
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<td>Highways Act 1980</td>
<td>S 145</td>
<td>Powers as to gates across highways</td>
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<td>Highways Act 1980</td>
<td>S 148</td>
<td>Penalty for depositing things or pitching booths etc. on highway</td>
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<td>Highways Act 1980</td>
<td>S 161</td>
<td>Penalties for causing certain kinds of danger or annoyance all highways</td>
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<td>Highways Act 1980</td>
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<td>Danger or annoyance caused by fires lit otherwise than on highways</td>
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<td>Highways Act 1980</td>
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<td>Control of scaffolding on highways</td>
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<td>Highways Act 1980</td>
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<td>Duty to have regard to needs of disabled and blind in executing works, etc.</td>
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<td>Telecommunications’ rights</td>
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<td>Highways Act 1980</td>
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<td>Further powers of highway authorities and councils re minimum widths</td>
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<td>Road Traffic Regulation Act 1984</td>
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<td>Road Traffic Regulation Act 1984</td>
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<td>What a traffic regulation order may provide for vehicular traffic</td>
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<td>Road Traffic Regulation Act 1984</td>
<td>S 3</td>
<td>Restrictions on traffic regulation orders</td>
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<td>Provisions supplementary to ss 2 and 4</td>
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<td><strong>Road Traffic Regulation Act 1984</strong></td>
<td>S 5</td>
<td>Contravention of order under s 6</td>
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<td><strong>Road Traffic Regulation Act 1984</strong></td>
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<td>Orders similar to traffic regulation orders, Greater London</td>
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<td><strong>Road Traffic Act 1988</strong></td>
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<td><strong>Road Traffic Act 1988</strong></td>
<td>S 13</td>
<td>Regulation of motoring events on public ways</td>
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<td><strong>Road Traffic Act 1988</strong></td>
<td>S 22A</td>
<td>Causing danger to road-users</td>
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<td><strong>Road Traffic Act 1988</strong></td>
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<td>Control of dogs on roads</td>
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<td><strong>Road Traffic Act 1988</strong></td>
<td>S 28</td>
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<td><strong>Road Traffic Act 1988</strong></td>
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<td>S 30</td>
<td>Cycling when under influence of drink or drugs on road or other public place</td>
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<tr>
<td><strong>Road Traffic Act 1988</strong></td>
<td>S 31</td>
<td>Regulation of cycle racing on public ways</td>
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<td><strong>Road Traffic Act 1988</strong></td>
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<td><strong>Road Traffic Act 1988</strong></td>
<td>S 34</td>
<td>Prohibition of driving mechanically propelled vehicles elsewhere than on roads</td>
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<td><strong>Road Traffic Act 1988</strong></td>
<td>S 34A</td>
<td>Exceptions to presumption in s 34(2)</td>
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<tr>
<td><strong>Road Traffic Act 1988</strong></td>
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<tr>
<td><strong>Road Traffic Offenders Act 1988</strong></td>
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<td><strong>Town and Country Planning Act 1990</strong></td>
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<td><strong>Town and Country Planning Act 1990</strong></td>
<td>S 248</td>
<td>Highways crossing or entering route of proposed new highway, etc</td>
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<td><strong>Town and Country Planning Act 1980</strong></td>
<td>S 249</td>
<td>Order extinguishing right to use vehicles on highway</td>
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<td><strong>Town and Country Planning Act 1990</strong></td>
<td>S 250</td>
<td>Compensation for orders under s 249</td>
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<td><strong>Town and Country Planning Act 1990</strong></td>
<td>S 251</td>
<td>Extinguishment of public rights of way over land held for planning purposes</td>
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<td><strong>Town and Country Planning Act 1990</strong></td>
<td>S 252</td>
<td>Procedure for making of orders</td>
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<td><strong>Town and Country Planning Act 1990</strong></td>
<td>S 253</td>
<td>Procedure in anticipation of planning permission</td>
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<td><strong>Town and Country Planning Act 1990</strong></td>
<td>S 254</td>
<td>Compulsory acquisition of land in connection with highways</td>
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<tr>
<td><strong>Town and Country Planning Act 1990</strong></td>
<td>S 261</td>
<td>Temporary stopping up of highways for mineral workings</td>
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<td><strong>Horses (Protective Headgear for Young Riders) Act 1990</strong></td>
<td>S 3</td>
<td>Interpretation</td>
<td></td>
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<tr>
<td><strong>Criminal Justice and Public Order Act 1994</strong></td>
<td>S 61</td>
<td>Power to remove trespassers on land</td>
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</tbody>
</table>

Amended by the CROW Act to include restricted byways

Young riders will have to wear protective headgear on restricted byways
<table>
<thead>
<tr>
<th>Statutory Instrument</th>
<th>Regulations made under:</th>
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<tr>
<td>1993/12 Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993</td>
<td>Wildlife and Countryside Act 1981 s 57(1) and (2); Sch 14 paras 1, 2, 5; Sch 15 paras 3, 11, 13</td>
</tr>
<tr>
<td>1995/419 Town and Country Planning (General Development Procedure) Order 1995</td>
<td>Town and Country Planning Act 1990 ss 59, 61(1), 65, 69, 71, 73(3), 74, 77(4), 78, 79(4), 188, 193, 196(4), and 333(7); Sch 1 paragraphs 5, 6, 7(6), and 8(6)</td>
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<tr>
<td>2002/523 Local Government (Best Value) Performance Indicators and Performance Standards Order 2002</td>
<td>Local Government Act 1999 ss 4(1) and (2) and 28(1)(b)</td>
</tr>
<tr>
<td>2002/757 Local Government (Best Value Performance Indicators) (Wales) Order 2002</td>
<td>Local Government Act 1999 ss 4(1)(a) and (2) and 29(1)</td>
</tr>
<tr>
<td>2002/3113 Traffic Signs Regulations and General Directions 2002</td>
<td>Road Traffic Regulation Act 1984 s 64; Road Traffic Act 1988 s 36(5)</td>
</tr>
</tbody>
</table>
Section 52

Restricted byways: power to amend existing legislation

(1) The Secretary of State may by regulations -
   (a) provide for any relevant provision which relates -
       (i) to highways or highways of a particular description,
       (ii) to things done on or in connection with highways or highways of a particular description, or
       (iii) to the creation, stopping up or diversion of highways or highways of a particular description, not to apply, or to apply with or without modification, in relation to restricted byways or to ways shown in a definitive map and statement as restricted byways, and
   (b) make in any relevant provision such amendments, repeals or revocations as appear to him appropriate in consequence of the coming into force of sections 47 to 50 or provision made by virtue of paragraph (a) or subsection (6)(a).

(2) In this section -
   -"relevant provision" means a provision contained -
     (a) in an Act passed before or in the same Session as this Act, or
     (b) in any subordinate legislation made before the passing of this Act; "relevant Welsh provision" means a provision contained -
     (a) in a local or private Act passed before or in the same Session as this Act and relating only to areas in Wales, or
     (b) in any subordinate legislation which was made before the passing of this Act and which the National Assembly for Wales has power to amend or revoke as respects Wales.

(3) In exercising the power to make regulations under subsection (1), the Secretary of State -
   (a) may not make provision which has effect in relation to Wales unless he has consulted the National Assembly for Wales, and
   (b) may not without the consent of the National Assembly for Wales make any provision which (otherwise than merely by virtue of the amendment or repeal of a provision contained in an Act) amends or revokes subordinate legislation made by the Assembly.

(4) The National Assembly for Wales may submit to the Secretary of State proposals for the exercise by the Secretary of State of the power conferred by subsection (1).

(5) The powers conferred by subsection (1) may be exercised in relation to a relevant provision even though the provision is amended or inserted by this Act.

(6) As respects Wales, the National Assembly for Wales may by regulations -
   (a) provide for any relevant Welsh provision which relates -
       (i) to highways or highways of a particular description,
       (ii) to things done on or in connection with highways or highways of a particular description, or
       (iii) to the creation, stopping up or diversion of highways or highways of a particular description, not to apply, or to apply with or without modification, in relation to restricted byways or to ways shown in a definitive map and statement as restricted byways, and
(b) make in any relevant Welsh provision such amendments, repeals or revocations as appear to the Assembly appropriate in consequence of the coming into force of sections 47 to 50 or provision made by virtue of subsection (1)(a) or paragraph (a).

(7) Regulations under this section shall be made by statutory instrument, but no such regulations shall be made by the Secretary of State unless a draft of the instrument containing them has been laid before, and approved by a resolution of, each House of Parliament.

(8) Where the Secretary of State lays before Parliament the draft of an instrument containing regulations under subsection (1) in respect of which consultation with the National Assembly for Wales is required by subsection (3)(a), he shall also lay before each House of Parliament a document giving details of the consultation and setting out any representations received from the Assembly.
Annex 3: Summary of main proposals and areas on which we are inviting views

Views, comments and suggestions are invite on the issues detailed below and any other aspect of the regulations to be made under section 52 of the Countryside and Rights of Way Act 2000. It would be helpful if responses could highlight the issue being addressed by the relevant paragraph or proposal number.

### Stopping up and diversion

**Proposal 1:** Local authorities’ public path extinguishment and diversion powers under sections 118, 118A, 119 and 119A of the Highways Act 1980 should be extended to restricted byways. *(National Park authorities and district councils would also be able to extinguish and divert restricted byways.)* [para 2.6]

We do not propose at this stage to extend sections 118ZA and 119ZA of the Highways Act 1980 to restricted byways. Dealing with applications for orders relating to footpaths and bridleways will be a substantial new administrative task for local authorities. We consider it appropriate to first allow a reasonable period to assess how this process operates in practice before considering any extension to restricted byways. [para 2.9]

### Temporary diversions

**Proposal 2:** Highway authorities should have the power to make temporary diversion orders on restricted byways under section 135 of the Highways Act 1980.

While we recognise the desirability among land managers for maximum flexibility in their land management options, we do not propose at this stage to extend sections 135A and 135B to restricted byways. We consider it appropriate to first allow a reasonable period to assess how these powers, and the extension of section 135 to restricted byways, work in practice before considering an extension to restricted byways. [para 2.11]

### Maintenance

We invite views on whether the powers enabling district, parish and community councils to maintain footpaths and bridleways should be extended to restricted byways, in order to provide flexibility in the administration of maintenance responsibility. [para 2.12]

### Waymarking

We invite views and suggestions on the most appropriate waymark for restricted byways. [para 2.13]
### Planning

**Proposal 3:** We intend to amend section 257 and 258 of the Town and Country Planning Act 1990 to extend local planning authorities’ powers to make stopping up and diversion orders to restricted byways. [para 2.15]

### Harbours and ports

**Proposal 4:** The special procedures that apply to footpaths and bridleways affected by harbour revision and empowerment orders should be extended to restricted byways. [Paras 2.16 and 2.17]

### Water

**Proposal 5:** The additional requirements for footpaths and bridleways affected by compulsory works orders should be extended to restricted byways. [Para 2.18 and 2.19]

### Defence

**Proposal 6:** Sections 16 and 17 of the Defence Act 1842 should be extended to restricted byway. [Para 2.20]
Annex 4: Handling the consultation

1. Responses
Please send your response, by 18 December 2003 to:

Lee Armitage
Countryside (Recreation and Landscape) Division 5
Department for Environment, Food and Rural Affairs
Zone 1/01
2 The Square
Temple Quay
BRISTOL
BS1 6EB

If you wish to fax your response, please fax it to:
Fax: 0117 372 8587

If you are responding by e-mail, please send your response to:
rights.ofway@defra.gsi.gov.uk

Please send your response using only one of these options.

If you are responding as a representative organisation, please include in your response a summary of the people and organisations which you represent.

2. Copies of responses
Copies of responses will, following the close of the consultation, be deposited in Defra’s library and the library of the National Assembly for Wales, where anyone may inspect them. You should say at the beginning of your response if you do not want your letter to be available in this way. All responses will be included in any statistical or other summary of the results.

If you submit comments in response to this consultation exercise, we may keep your name and address on a list that will be used for future consultation exercises on related issues.

3. Enquiries
Enquiries about the contents of this consultation paper should be made to:

Lee Armitage
Countryside Division 5
Department for Environment, Food and Rural Affairs
Zone 1/01
2 The Square
Temple Quay
BRISTOL
BS1 6EB
Tel: 0117 372 8957
Fax: 0117 372 8587
E-mail: lee.armitage@defra.gsi.gov.uk
4. Further copies of this consultation paper
Requests for further copies of this document should be made, quoting reference PB8666 to:

DEFRA Publications
Admail 6000
LONDON
SW1A 2XX

Tel: 0845 9556000
Fax: 020 8957 5012
E-mail: defra@iforcegroup.com

The document is available in both English and Welsh language versions.

Please direct any requests for the document in another format, for example one suitable for people with visual disabilities (large print, Braille, tape etc), to the contact at 3 above.

The consultation paper is also available on the Defra’s internet site, at:
http://www.defra.gov.uk/wildlife-countryside/cl/index.htm, and via
http://www.ukonline.gov.uk.

We are sending copies of the consultation paper to the main national organisations in England and Wales listed in Annex 5 (and those that responded to the Government’s consultation paper on improving rights of way). If you think any other organisation should see the consultation paper, please let us know.

5. Complaints or comments about this consultation paper
The consultation document has been drafted in accordance with the Cabinet Office’s code of practice on national public consultations. The code aims to increase the involvement of people and groups in public consultations, minimising the burden it imposes on them, and giving them a proper time — a standard minimum period of twelve weeks — to respond. The code may be viewed on the Cabinet Office’s web site at: http://www.cabinet-office.gov.uk/servicefirst/index/consultation.htm

If you have any comments or complaints about this consultation process, other than comments on the consultation document itself, you may wish to take these up with Defra’s consultation co-ordinator. He can be contacted as follows:

Lewis Baker
Service Standards Unit
Department for Environment, Food and Rural Affairs
Room 547
Nobel House
LONDON
SW1P 3HX
Tel: 020 7238 5789
Fax: 020 7238 5376
E-mail: lewis.baker@defra.gsi.gov.uk
## Annex 5: List of Consultees

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Cyngor Sir Ynys Mon
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Disabled Drivers Association
Disabled Off-Road Access
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Duke of Edinburgh's Award
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English Heritage
English Historic Towns Forum
English Nature
English Partnerships
English Sports Council
English Tourist Board
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Environment Council
Environment Trust
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Environmental Services Association
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Face – UK
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Farmers and Rural Conservation Agency
Farmers and Wildlife Advisory Group
FAVASA
Federation of Rural Community Councils
Federation of Small Businesses
Fieldfare Trust
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Forest Enterprise
Forestry Commission
Forestry Contracting Association Ltd
Forestry Industry Committee of Great Britain
Forestry Society
Forum of People with Disabilities
Forum for Private Business
Association
FPD Savills
Friends of the Earth
Friends of the Lake District
Friends of the Ridgeway
Friends, Families and Travellers
Gala Research
Game Conservancy Trust
Garden History Society
Geological Society
Geologists Association
Greater London Action on Disability (GLAD)
Green Base Exchange
Green Lane Association
Green Lanes Bridleways Group
Green Lanes Environmental Action Movement
Greenpeace
Guide Association
Health and Safety Executive
Highways Agency
Historic Buildings and Monuments
Commission for England
Historic Houses Association
Horticultural Trades Association
House Builders Federation
IFA Association
IMPROVEMENT AND DEVELOPMENT AGENCY
Incorporated Society of Valuers & Auctioneers
Industrial Water Society
Inland Waterways Association
Inner London Magistrates’ Court Service
Inst. Of Environmental Management and Assessment
Institute of Chartered Foresters
Institute of Directors
Institute of Economic Affairs
Institute of Highways and Transportation
Institute of Leisure and Amenity Management
Institute of Public Rights of Way Officers
Institution of Civil Engineers
Institution of Environmental Sciences
Institution of Water and Environmental Management
International Wildlife Coalition
ISFTPOWP
Joint Airports Committee of Local Authorities
Joint Committee of National Amenity Societies
Joint Committee on Mobility for Disabled People
Joint Committee on Mobility for Disabled People
Joint Committee on Mobility for Disabled People
Joint Nature Conservation Committee
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Justices’ Clerks Society
Land Access and Recreation Association
Land is Ours
Land Owners Group
Landscape Institute
Law Commission
Law Society
League of Venturers
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Transport and General Workers Union
Tree Council
TUA (BBT)
Twentieth Century Society
UK 200 Group
UK Environmental Law Association
UK Major Posts
UK Petroleum Industry Association
UKAEA
Unison
United Kingdom Sports Council
Vauxhall Off-Road Club
Victorian Society
Wales Association of Community and Town Councils
Wales Council for the Blind
Wales Council for the Deaf
Wales Council for Voluntary Action

Wales Social Partners Unit
Wales Tourist Board
Wales Wildlife and Countryside Link
Wales Women’s National Coalition
Walking and Cycling for Health
Water Companies Association
Wildfowl & Wetlands Trust
Wildlife and Countryside Link
Wildlife Trusts
Wildlife Trusts Wales
Woodland Trust/Coed Cadw
World Wide Fund for Nature
Young People’s Trust for the Environment & Nature Conservation
Youth Hostels Association (England and Wales)

Individuals and regional organisations are not listed.
INTRODUCTORY

1. Section 2 of the Clean Neighbourhoods and Environment Act 2005 introduces a new power that allows councils to make, vary or revoke gating orders in respect of highways within their area. This is achieved by inserting new sections 129A to 129G in the Highways Act 1980 which will enable councils to restrict public access to any public highway by gating it (at certain times of the day if applicable), **without removing its underlying highway status**. Local authorities will be able to make “gating” orders on grounds of anti-social behaviour as well as crime.

2. Powers to close alleyways were first introduced by the Countryside and Rights of Way Act 2000 (CROW Act 2000); this enables alleyways, which are also rights of way, to be closed and gated for crime prevention reasons. But they do not enable alleyways to be gated expressly to prevent anti-social behaviour and they exclude many alleyways that are public highways but not recorded as rights of way. Also, under these provisions the removal of rights of passage is irrevocable.

3. The Clean Neighbourhoods and Environment Act 2005 provisions enable a council to gate a highway in a similar manner to the CROW Act 2000 power but it:
   a) doesn’t first require the highway to be designated by the Secretary of State,
   b) enables gating to take place if highway suffers from crime and/or anti-social behaviour,
   c) enables the council to continue with a gating order, even if objections are made (if it is considered in the best interests of the local community to do so).

4. The power to make a gating order will be commenced on 1 April 2006.

5. **This guidance is not statutory, but we recommend that local authorities read the guidance and use it where practicable as it will help avoid some operational difficulties. It has been written with the help of practitioners by the Home Office, the Department for Transport and the Department for Environment, Food and Rural affairs.**
CONDITIONS FOR MAKING A GATING ORDER

General principles:

6. In general, rights of way do not cause or facilitate crime. The provisions in the Clean Neighbourhoods and Environment Act are framed in a way that limits their use to alleyways where it can be shown that persistent crime and anti-social behaviour is expressly facilitated by the use of certain rights of way.

7. The Government considers that these powers will be particularly important in enabling the closure of those back (or side) alleys where they are demonstrably the source of crime in built up areas, particularly housing estates. The rationale behind the formulation of these powers was to assist in strictly urban areas and, in practice, if a footpath is the only means of access to the rear of a terrace of properties, it may well be easier to demonstrate whether the way itself is facilitating persistent crime, than in an open rural setting, where there might be a number of means of access to premises.

8. This provision is intended to be used as a deterrent for temporary closures while the crime or ASB is persistent. Following the reduction of the crime or the ASB, the highway restrictions can be varied or revoked.

9. If the intention is permanently gate the highway (i.e. removing the highway status), the provisions introduced by the Countryside and Rights of Way Act 2000 (CROW Act) should be used. However, given the longer timescales under the CROW Act, and that the condition of the highway may warrant quick action, you can use the Clean Neighbourhoods and Environment Act 2005 provisions to gate the highway while seeking a CROW Act order to revoke the highway status.

10. Section 129A of the Highways Act 1980 sets out these general principles, asserting that a council must be satisfied, before making an order, that the area surrounding the relevant highway suffers from crime or anti-social behaviour and would act as a useful crime/anti-social behaviour reduction measure.

11. Local authorities should also be satisfied that residents and members of the public who use the relevant highway would not be inappropriately inconvenienced by its gating, and should be satisfied that alternative access routes exist. However this should not restrict the gating of highways that are in such a dangerous condition, that gating it is in the best interest of all concerned.

12. The health implications of the order should also be considered as gating orders could potentially encourage the use of cars if the alternatives are too long or lack pedestrianised sections. This should be balanced against the health impacts facing pedestrians from the ongoing crime or ASB in the alleyway. In these situations a Health Impact Assessment could be
carried out if there is any doubt over the availability of alternate routes and/or the proposed times the gates will be closed.

**Issues of Mobility:**

13. Special consideration should be given to the impact a potential order might have on disabled users of the highway to ensure that alternative routes are free from obstructions and are suitably paved. During the installation of the gates consideration should be given to the height of the locks and the ease at which they can be opened and closed.

**Consideration of other tools to tackle crime and ASB:**

14. Gating orders are not the only solution to tackling crime and anti-social behaviour on certain thoroughfares. Before proposing an order, local authorities should give consideration as to whether there are alternative interventions that may be more appropriate (and cost effective) for tackling the specific problems they are facing without having to gate the highway. Nevertheless, gating orders should not be seen as a last resort.

**PUBLICITY**

15. Gating orders can have implications for various groups of people, such as walkers who may oppose the termination of certain rights of way. For this reason, it is essential that gating orders are satisfactorily publicised before they are made. Local authorities must publicise a notice to this effect in a local paper and on their website. In order to save costs, this notice does not need to be excessively large and does not need to include a lot of information. The legislation states that the notice should include the highway affected and the general effect of the order. However, in practice this information will be included in the proposed order itself, so the notice only needs to:

- include a draft of the proposed order;
- identify alternative routes that members of the public may take; and
- invite representations (in writing) as to whether or not an order should be made, within a period of notice that is at least 28 days.

16. A similar notice, including all the information stated above, should also be placed on or adjacent to the relevant highway at both ends, in order that people who want to use the highway can see that it is to be gated. These need to be visible enough to draw their attention, and make it clear what the implications of the order will be. The regulations do not specify a minimum time period that these notices should be up before the gating order comes into force. This is because local circumstances may make this difficult to achieve. However, wherever possible, these notices should be assembled to coincide with the notices published on the website and local paper, i.e. for a minimum of 28 days before the gating order is made. It is the responsibility of the council to ensure that notices are maintained in a condition that ensures they remain visible and legible.
17. It is not only necessary to make this notice available to the general public. Certain groups which may be directly affected should be specifically informed of the planned order through receipt of a copy of the order. These include:

- all occupiers of premises adjacent to or adjoining the relevant highway;
- any authority through which the gated highway will run including:
  - Any other council, including parish and town councils;
  - Police authorities (informing the chief of police);
  - fire authorities;
  - NHS Trusts;
- any Local Access Forum through whose area the relevant highway passes
- other public bodies and companies that do maintain or provide services on or around the locality in which the relevant highway will is situated including:
  - statutory undertakers;
  - gas or electricity services providers;
  - water services providers;
  - communications providers;
- anyone who requests a copy of the notice; and
- anyone who has asked to be notified of any proposed gating orders.

18. The council should also inform anyone they reasonably consider might have an interest in the proposed order. This could include a wide range of groups, and it is the responsibility of the applying council to decide who this might include. However, it is recommended that councils also notify a variety of groups that are likely to take an interest in the gating of a highway. The Department of the Environment Circular 2/1993 sets out organisations who should be contacted under other rights of way legislation and you may wish to consult this.

The majority of highways will be urban alleyways that suffer from ASB and crime, however rural highways can suffer from ASB and crime too. Therefore, it is important to ensure that any group who has a particular interest in the highway on which the order will be made is given an opportunity to comment. For example these may be the appropriate National Park, the Chiltern Society and the Peak and Northern Footpaths Society. In the majority of these cases you should be seeking to engage with these organisations early in the process in order to effectively consider all interventions to tackle the ASB and crime.

19. It is important that people who use these relevant highways understand why a gating order has been proposed. Therefore, it is recommended that Local Authorities provide a justification and evidence for the order before it is made. Ideally, this evidence and justification should appear on the notice in the newspaper, with details of where members of the public can find more information if necessary.
REPRESENTATIONS FROM INTERESTED PARTIES

20. Before a gating order can be made it is essential that local authorities consider all representations as to whether or not an order should be made. If there is considerable objection to the order, it is necessary to be absolutely sure that there are sufficient grounds for the order to be made. Particular attention should be given to Section 129A of the Highways Act 1980, balancing crime and anti-social behaviour concerns against the impact it will have on users of the highway and local residents. Section 129D of the Highways Act 1980 allows individuals to challenge an order in the High Court if the conditions for making it have not been complied with. To ensure full impartiality, you may want to consider the use of an external evaluation, for example a Health Impact Assessment.

21. A full justification, with evidence should be something that local authorities have on file to provide to anyone who objects to this order, or who requests an explanation for the proposed order. Your responses to those who object should be comprehensive, and specifically address their concerns. It is in the interests of all parties to conclude this process promptly and without unnecessary delay. Ideally, consideration should be concluded 28 days (or less) after the final date in which written representations can be made.

PUBLIC ENQUIRIES

22. While it is important to consider all representations, certain authorities’ representations as to whether a gating order should be made will bear more significance. Consequently, an objection from these bodies will automatically cause a public inquiry to be held, if the relevant highway passes through their area. These authorities include:

- the chief officer of a police force;
- a fire and rescue authority;
- any council (including parish councils); and
- an NHS trust, NHS foundation trust or NHS primary care trust.

23. Objections from these authorities should be made in writing, giving reasons for their actions, within the prescribed period of notice (which is not less than 28 days).

24. If objections are received from other individuals, the council can still conduct a public inquiry where it is appropriate to do so.

25. A gating order should not be made until this public inquiry has been concluded and a decision has been made. Consequently, before proposing a gating order, it is highly recommended that you work in partnership with these authorities to ensure that the general consensus is positive. By taking these initial steps, it should be possible to make progress without the need for a potentially costly public inquiry. If objections are still received in writing, the council can avoid an inquiry if they make the requisite changes to the proposal. Public enquires should
only be instigated as a last resort, when fundamental differences exist between authorities that discussion and negotiation have failed to alleviate.

26. If a public inquiry is inevitable, then the council must adequately advertise this fact. This may include the display of notices in roads or delivering letters to local premises. However, local authorities must publish a notice in a local newspaper (at least once) and write to those who have already made representations as to the making of the order. Again, this notice does not have to be excessively large, but it should include:

- The title and draft of the proposed order (including its general effect);
- the name of the council;
- the identity of the relevant highway, with enough detail, either by description or specification, so that people understand which highway is being referred to;
- A statement referring to the initial notice advertising the order, notifying people that a public inquiry is to be held;
- the date, time and place of the inquiry and the name of the inspector;
- information as to where further information can be found on the proposals for the relevant gating order. Opening and closing times of these premises should be included; and
- the address to which any representations for consideration by the inspector should be sent.

**Appointing an Inspector:**

27. It is the responsibility of the council to appoint an individual to conduct the inquiry. The council should ensure that this inspector is suitably qualified and fully impartial. Impartiality is essential because the applying authority must be able to defend their actions in court if the situation arises where the order is legally challenged. Any evidence of the authority compromising the independence of the inquiry would invalidate the order’s existence. In order to ensure that independence is preserved, it is recommended that the council appoint someone from the Planning Inspectorate.

28. The procedure of the public inquiry is determined by the inspector, but should allow any person to make representations or appear at the inquiry if they wish. The inspector may refuse to listen to any representations if he feels they are irrelevant. After the inquiry has been concluded to his satisfaction, the inspector will then be in a position to make a decision, and all relevant agencies should comply fully with the verdict.

**FORM AND CONTENT OF A GATING ORDER**

29. In reality, gating orders are quite simple straightforward documents. Firstly, the order must include a statement asserting that the council have met the
conditions set out in Section 129A(3) of the Highways Act, 1980. In effect, this means that you must state that the council is satisfied that anti-social behaviour and/or crime exists in the area around the gating order, that the existence of such behaviour is exacerbated by the highway and that a gating order would be beneficial for tackling crime and anti-social behaviour in the area. You will not need to include large amounts of detail and so this initial statement should be kept fairly brief.

30. In addition to the initial statement, the order should include:
- the dates and times that the public right of way will be restricted;
- The location where the gating order will be situated;
- details of any persons who are excluded from this restriction; and
- the name and contact details of the person who is responsible for maintaining any gate authorised by the order.

31. There is no statutory model, upon which gating orders should be based.

REGISTER OF GATING ORDERS

32. After an order has been made, it is necessary that they continue to be exhibited in a manner that will draw people’s attention to them. Prior to the making of the order a copy of the gating order should have been in place at each end of the highway for at least 28 days, inviting representations as to whether or not the order should be made. This should now be replaced by a copy of the gating order alone, in such a manner that it is still visible to members of the public. Therefore, it is recommended that this notice is again placed in a prominent position at each end of the highway. This notice should be in place for as long as the order is in force and the public’s right to use the highway is suspended, and it is the council’s responsibility to ensure that it remains visible and legible.

33. A copy of the order should also be placed in a prominent position in the council for at least 12 months from the date the order is made, and should also be published on the council’s website as well.

34. A register of all orders and all proposed making, varying and revocation of orders should be kept and maintained by each council. This must be open between 9am and 5pm each day for inspection by members of the general public and councils must supply any copies of these documents to anyone who requests them and pays a reasonable charge, (decided by the council).

PROVISION OF KEYS AND MAPS

35. A number of individuals and groups will have legitimate purpose or business to pass through gates. These can include, but is not limited to, property owners and occupants, statutory undertakers, such as telecommunication companies and utility companies, the emergency services and of course council officers on business.
36. Therefore, early in the process of developing these gating orders, councils should undertake an assessment of the likely number of individuals needing keys to enter the particular highway subject to the gating order.

37. It is important that maps are updated quickly, and it is important that they are issued to the relevant groups who will need them. In particular it is very important that the emergency services have access to accurate maps. Failure to provide up to date information on the limited passage of gated highways may impact on the speed at which emergency services can provide their service.

VARYING, REVOKING AND REVIEWING A GATING ORDER

38. Once a gating order is in place, it is possible for the council who originally applied for the order to vary or revoke the order. However, any variation will need to comply with the key principles of reducing crime and anti-social behaviour while not excessively inconveniencing users of the gated highway. Consequently, to revoke or vary an order, it is necessary to follow the same procedure required for making the initial order, i.e. advertising the order in a paper, notifying relevant agencies and individuals, considering representations, and prompting a public inquiry when certain bodies object. In order to follow this correctly, the requirements set out in this guidance should be followed.

39. There is no maximum limit to how long a highway can be gated. However, it is recommended that councils review each of their orders on an annual basis. This review should evaluate whether the gating order is acting as a useful crime or anti-social behaviour reduction measure. It should also assess the impact it is having on the community and discussions should be held with local residents to gauge whether the limited access is causing excessive inconvenience.

VERSION

40. This guidance is version 1 and was published on 24 March 2006.

41. It is important that this guidance remains up to date and relevant. To help us ensure this, if you have any comments on the content or suggestions for improvements please email them to together@homeoffice.gsi.gov.uk using the subject line “Alleygating guidance”.

www.together.gov.uk
ActionLine 07870 220 2000

Home Office
From the Minister for Biodiversity, Landscape and Rural Affairs
Barry Gardiner MP

Thank you for your letter of 20 June to David Miliband enclosing two from your constituent, Mr John Riddall, Countryside Secretary of The Ramblers’ Association, Spring View, Town End, Bradwell, Hope Valley about the Clean Neighbourhoods and Environment Act and the Natural Environment and Rural Communities Act.

Mr Riddall’s letter of 28 May asks about the Clean Neighbourhoods and Environment Act. The Statutory Instrument is number 2005 No. 3439 (C. 144), and copies of the Act can be downloaded from the Defra website at: http://www.defra.gov.uk/environment/localenv/legislation/cnea/index.htm or ordered from the Office of Public Sector Information website at http://www.opsi.gov.uk/

Mr Riddall’s letter of 2 June asks about section 68 of the Natural Environment and Rural Communities Act 2006. The Department’s view is that a pedal cycle is a non-mechanically propelled vehicle and that a qualifying period of use by pedal cycle may give rise to a public right of way for vehicles. Up until the commencement of the Natural Environment and Rural Communities Act and the restricted byway provisions in the Countryside and Rights of Way Act 2000, the only rights of way that pedal cycle use could have given rise to would have been a byway open to all traffic.

However, the overall aim of Part 6 of the Natural Environment and Rural Communities Act is to curtail claims for public rights of way for mechanically propelled vehicles, i.e. byways open to all traffic, where those claims derive from historic use and dedication for use by non-mechanically propelled vehicles. This triggered concern from cycling interests that pedal cycles might be regarded as mechanically propelled vehicles and that therefore their...
use would not be capable of giving rise to restricted byways. To address these concerns, we included provision in the Natural Environment and Rural Communities Act to ensure that this would not be the case.

Consequently, what section 68 of the Natural Environment and Rural Communities Act does is to ensure that use of a way by a non-mechanically propelled vehicle (such as a pedal cycle) is capable, in appropriate circumstances, of giving rise to a public right of way for non-mechanically propelled vehicle, i.e. a restricted byway. There is no intention, nor provision, to create a right of way solely for pedal cycles.

With Kind Regards

Barry

Barry Gardiner MP
Thank you for your letter of 1 August enclosing a further one from your constituent Mr J G Riddall, Countryside Secretary of the Ramblers’ Association, about section 68 of the Natural Environment and Rural Communities Act 2006.

Mr Riddall is concerned to find out the meaning behind the words ‘in appropriate circumstances’ in my previous letter to you on this subject, in the context of pedal cycle use possibly giving rise to a restricted byway. It is worth noting that it is Defra’s view that, prior to the Natural Environment and Rural Communities Act, use of a way by pedal cycle could have given rise to a byway open to all traffic, which is a public right of way with rights for mechanically propelled vehicles. One of the aims behind section 66 of the Natural Environment and Rural Communities Act is to ensure that use of a way by non-mechanically propelled vehicles, in particular pedal cycles, cannot give rise to a byway open to all traffic, but could instead only give rise to a restricted byway, which has rights for non-mechanically propelled vehicles.

During the passage of the Natural Environment and Rural Communities Bill, there was considerable pressure from cycling interests to provide that a restricted byway arises automatically after a qualifying period of use by pedal cycle. This we resisted, for the kinds of reasons that Mr Riddall sets out in his letter, and we were careful to ensure that the Bill did not provide such an automatic link.

The main criteria for use giving rise to a right of way, as set in section 31 of the Highways Act 1980, are that the way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years (with common law applications, the period may in
certain circumstances be shorter). If these are satisfied, the way is to be deemed to have been dedicated as a right of way unless there is sufficient evidence that there was no intention during that period to dedicate it. There is one important proviso to this, and that is that where the way is of such a character that use of it by the public could not give rise at common law to any presumption of dedication.

From the case law it appears that there is good authority to show that a claim that a footpath has become a restricted byway on the basis of its use by bicycles may fail by virtue of the law of public nuisance. I am aware that Mr Riddall is a co-author of "Rights of Way, A guide to law and practice" and so will be interested in the relevant case law.

This issue was dealt with in the case of Hereford and Worcester CC v Pick (1996) 71 P & CR 231, page 239. The judge in that case said: "I am equally satisfied that riding a bicycle or motorcycle on the footpath at this particular place would be dangerous for pedestrians. That being so, it would constitute a nuisance and no rights could be acquired as a result of such conduct."

The court in the Pick case referred to the 1904 case of Sheringham UDC v Holsey as authority for that proposition. The case concerned a public footpath that had for many years been used by fishermen to drive their carts. Joyce J rejected the submission that such use had given rise to the presumed dedication of a carriageway at common law. "It is said that a right to use the lane for wheeled traffic has been acquired by a user. Upon the evidence I do not see any way to hold that there has been any such user as to convert the footway into a public highway for all purposes. The user for wheeled traffic was in its inception and has all along been a public nuisance, and no length of time can legalise it."

Lord Scott, in the judgement in the House of Lords in Bakewell Management Ltd. v Brandwood and others (2004) 2 All ER 305, referred to Pick's case and said: "I agree with Stuart-Smith LJ's remarks about nuisance. It would not, in my opinion, have been open to the land owner to have dedicated the footpath as a public vehicular highway if use by vehicles would have constituted a public nuisance to pedestrians using the footpath."

It is our belief that, whether or not, the use of a footpath by bicycles amounts to a public nuisance, is a question of fact to be resolved having regard to the circumstances of each case. However, such use by itself is unlikely to provide a proper basis for a finding that a public nuisance has arisen. There must be some particular fact, or circumstance, which provides the foundation for such a finding. In both Pick and Holsley's cases, referred to above, the Court was concerned by the physical limitations of the footpath in question, and the fact that danger to pedestrians would arise from vehicular use.

We can see no reason why an Inspector should not adopt a similar approach when determining a claim under the Wildlife and Countryside Act 1981, if he is satisfied on the evidence that pedestrians have or would be endangered, or obstructed, by bicycles or other vehicles, using the footpath in question, by virtue of the physical limitations of the footpath itself. The Inspector may also consider that even though the footpath may be
capable of accommodating pedal cycles as well as pedestrians without conflict, if there is evidence that pedestrians have already been obstructed or endangered by the presence of cyclists, we believe that the Inspector is entitled to reject the claim for a restricted byway on that basis.

In addition, the Inspector may find that even though use by bicycles has not given rise to public nuisance, use of it by other classes of vehicles may be likely to do so. In common law, the correct analysis would be that the character of the footpath was such as to negate the inference of dedication as a restricted byway, that being an improper inference in the circumstances notwithstanding the actual use of the footpath by cyclists. Under section 31 of the Highways Act 1980, the analysis would be that the footpath was a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication as a restricted byway because its use for passage by vehicles could give rise a public nuisance.

It seems to us that footpaths such as the one that Mr Riddall mentions in his letter, would be very unlikely to be upgraded to the status of restricted byway for the reasons set out above. It will, of course, depend upon the particular facts of any given case, but with an application in relation to such a path, we think it likely, that an Inspector would be given evidence of actual nuisance to pedestrians by pedal cycles and conclude that the way was of such a character that use of it by the public could not give rise to any presumption of dedication as a restricted byway. In our view, whether or not there were styles, or gates, along the route would also be material to any Inspector's consideration.

I trust this is helpful,

Yours,

Barry Gardiner MP
The List of Streets and unrecorded rights of way

The Countryside & Rights of Way Act 2000, sections 53 to 56 2026 (cut-off date for extinguishment of unrecorded rights of way) and the Highways Act 1980, section 36(6) (the ‘list of streets’)

In the Countryside and Rights of Way Act 2000 the Government fulfilled its commitment in Chapter 11 of the 2000 Rural White Paper, which announced that Government would: “set a deadline of 25 years for registering forgotten historic footpaths and bridleways on the local definitive maps of the rights of way network”. Section 53 of the Countryside and Rights of Way Act provides that on 1st January 2026 all historic rights of way that have not been recorded on the definitive map and statement will be extinguished.

It has been brought to our attention that some local authorities believe that there is no need to record a public right of way on the definitive map and statement where that right of way is also shown on the list required to be kept under section 36(6) of the Highways Act 1980, the so-called ‘list of streets’.

However, the list of streets is a local highway authority’s record of all highways that are maintainable at public expense; it is not a record of what legal rights exist over that highway. And there is no exemption, under sections 53 or 54 of the Countryside and Rights of Way Act 2000, from the extinguishment of unrecorded rights over a way on the basis that it is shown on the list of streets.

Consequently, any route that on 1 January 2026 is shown on the list of streets but not on the definitive map will have any unrecorded rights extinguished, subject to the terms of the Countryside & Rights of Way Act 2000.
Local authorities are therefore urged to ensure that any unrecorded footpath, bridleway and restricted byway rights are recorded on the definitive map and statement by the cut-off date of 2026, regardless of whether they are also shown on the list required to be kept under section 36(6) of the Highways Act 1980, the ‘list of streets’.

Yours faithfully

Dave Waterman
Head of Rights of Way Branch
Making stiles and gates easier for those with mobility problems

Section 69 of the Countryside and Rights of Way Act 2000 amends section 147 of the Highways Act 1980, and introduces a new section 147ZA, to provide that stock-proof furniture (principally stiles and gates) across public footpaths and bridleways will be better suited to the needs of people with mobility problems.

There are also powers for the Secretary of State to issue statutory guidance to local authorities on using the powers under these sections. Because there is already ample relevant guidance and many authorities already consider the needs of those with mobility problems, Defra sees no need to introduce statutory guidance at present, but may do so in the future if the need arises.

The Government wants to make it easier for people with mobility problems to have access to the countryside by encouraging measures to improve the accessibility of public rights of way and authorities are urged to make maximum use of these new powers and the relevant guidance. Set out below is an explanation of the new powers, some advice on their use and links to other relevant guidance.

The new powers: sections 147 and 147ZA of the Highways Act 1980

Existing section 147 enables a landowner of occupier to apply to their local authority for authorisation for the erection of gate, stile etc. across a footpath or bridleway. Authorities may attach conditions to the authorisation to ensure that the public is able to use the right of way without undue inconvenience. The amendment to section 147 requires authorities to have regard, when considering an authorisation, to the needs of people with mobility problems.

New section 147ZA enables authorities to enter into agreements with landowners, lessees or occupiers for existing structures such as stiles and gates across footpaths and bridleways to be replaced with structures that are safer or easier for people with mobility problems to use. Such agreements will have the effect of replacing the owner’s or occupier’s previous right to erect and maintain the structure concerned, and may in particular contain conditions that are binding on any succeeding owner lessee or occupier.

The powers in sections 147 and 147ZA can be exercised by “competent authorities”, which include, in England, non-metropolitan district councils exercising maintenance powers under sections 42 and 50 of the Highways Act 1980. The powers may also be exercised by national park authorities and by non-metropolitan district councils acting as the agent of the highway authority.

Guidance on the needs of people with mobility problems
For a summary of existing guidance click here.

The Secretary of State has already given guidance to authorities on the needs of people with mobility problems in connection with rights of way improvement plans (ROWIPs). Authorities are reminded of that advice, and of British Standard 5709:2006: in addition the Secretary of State wishes to draw authorities’ attention to two recent publications.

- By all reasonable means: inclusive access to the outdoors for disabled people (Countryside Agency, 2005, CA 215).

These two publications, together with the improvement plan guidance and the British Standard, should provide authorities with enough information on how to assess the needs of people with mobility problems, and to determine which routes should have priority for improved access for such people. They also make it clear that tackling physical barriers on rights of way is only a part of providing better access to the countryside for people with disabilities or mobility problems, and that consideration needs also to be given to such things as publicity, parking and other relevant facilities. Many authorities have already, in the course of their work on rights of way improvement plans undertaken consultation on the needs of people with disabilities and mobility problems and developed proposals for improved access to the countryside.

**Advice on using sections 147 and 147ZA**

Both sections 147 and 147ZA contain powers to impose conditions on the design and maintenance of structures. Authorities are advised that these powers can be used to require, for example, that a structure complies with BS 5709.

Authorities should keep records of authorisations under section 147 and agreements under section 147ZA and are encouraged to keep details of authorisations available for public inspection with the definitive map and statement. Section 53(4) makes it clear that a definitive map modification order may add details of limitations or conditions affecting the right of way to the statement.

Before they authorise a barrier under section 147, authorities should be satisfied that the barrier being authorised is the least restrictive barrier to users of the right of way that is consistent with the need to contain or exclude animals.

On agreements under section 147ZA authorities are advised to note the following.
• It provides a power only to enter into an agreement, and authorities may not enter into an agreement except with the consent of every owner, lessee or occupier of the land on which the relevant structure is situated who is not a party to the agreement. There are powers, similar to those in section 147, to impose conditions, including conditions for future maintenance. The agreement will have the effects described in section 147ZA only if any conditions are complied with.

• Where the authority is the owner of the land on which the structure is situated it cannot enter into an agreement with itself, but it is able to give consent as owner to an agreement entered into with a lessee or occupier.

• The power to enter into an agreement is limited to structures which are “relevant structures”. These are structures which are lawful limitations on the exercise of the right of way, and it is for authorities to satisfy themselves that a structure the subject of a proposed agreement is a “relevant structure”. Any structure across a footpath or bridleway which is not a “relevant structure” should be dealt with by the authority under sections 130 and 143 of the Highways Act as an obstruction: in some circumstances authorisation by the authority of a replacement structure under section 147 may provide a solution.

• An agreement can cover more than one structure.

• Authorities should ensure that the replacement structure is the least restrictive barrier to users of the right of way that is consistent with any need to contain or exclude animals. Authorities should note that the power to enter into agreements does not extend to removal of structures without replacement: there has to be a replacement structure of some description.

• The power to enter into agreements envisages that works will follow, so the power cannot be used to enter into agreements to give retrospective effect to a physical change that has already been made.
Defra response - Sections 67(3)(a) and 67(6) of NERC

03/04/2007

To all local highway authorities in England.

Sections 67(3)(a) and 67(6) of the Natural Environment and Rural Communities Act 2006 - compliance of definitive map modification order applications with schedule 14, paragraph 1(b) of the Wildlife & Countryside Act 1981

1. We have been asked by several authorities for urgent advice on what constitutes an application that is compliant with schedule 14, paragraph 1(b) of the Wildlife & Countryside Act 1981, with regard to sections 67(3)(a) and 67(6) of the Natural Environment and Rural Communities Act 2006. These requests were made in light of an opinion commissioned from George Laurence and Ross Crail by the Green Lanes Protection Group.

2. We have therefore decided to write to all local highway authorities in England with advice on this matter. This advice will be reflected in the Defra online guidance on Part 6 of the Natural Environment and Rural Communities Act 2006 when the next version is published. Defra's advice is as follows.

3. The intention behind the provisions in section 67(3) of the NERC Act was to deal equitably with long outstanding BOAT claims, where they had been properly prepared and made in good faith.

4. The issue under scrutiny here is whether, in those cases where an applicant has supplied a list or summary analysis of the documentary evidence supporting an application under section 53(5) of the Wildlife & Countryside Act 1981, this is sufficient to constitute an application that is compliant with schedule 14, paragraph 1 (and in particular sub-paragraph (b)) and therefore satisfies the requirements of sections 67(3)(a) and 67(6) of the Natural Environment and Rural Communities Act 2006 (that an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act).

5. Schedule 14 paragraph (1)(b) of the 1981 Act requires that: "An application shall...be accompanied by...copies of any documentary evidence...which the appellant wishes to adduce in support of the application." (our emphasis)
6. In our view, the use of the words: "any" and "wishes" allows for an element of discretion in the provision of copies of the documentary evidence. In this way the legislation provides for the applicant to adduce evidence sufficient to support the application.

7. For example, in many cases, the applicant will have an agreement with the surveying authority as to what evidence shall be provided with the application. In one particular case at issue here, the surveying authority did not want the applicant to provide copies of the documentary evidence because the surveying authority already had custody of the originals. Why, in such a case, would an applicant wish to adduce copies of the documentary evidence in support of the application?

8. Furthermore, the evidence provided under schedule 14, paragraph 1(b) is "in support of the application", not in support of the Order and therefore we believe that the function of the application is to make a credible case that a public right of way exists to the surveying authority. Once this is done, it triggers the surveying authority's duty, under paragraph 3(1) of Schedule 14 and section 53(2) of the Wildlife & Countryside Act 1981, to investigate matters stated in the application and ensure that the way is correctly recorded, i.e. with the appropriate status, on the definitive map and statement.

9. Moreover, as Counsel's opinion points out (at the end of paragraph 16): "a court or other tribunal would be slow to infer against an applicant who had provided inadequate or irrelevant material, that he was acting in bad faith (e.g. by putting in an application before having done any research into the history of the claimed route) or otherwise than in a genuine attempt to comply with paragraph 1 of Schedule 14; but would do so in an appropriate case.". Paragraph 17 of the Opinion goes on to say: "The legislative intention underlying paragraph 1 of Schedule 14 is that the applicant should have prepared his case to the best of his ability before making his application, and not the other way round.". It seems to us that what the applicant has done in the example quoted in paragraph 7 above is to act in good faith by having conducted research into the history of the claimed route and supplied the surveying authority with a list of all the evidence, which the surveying authority already holds.

10. For the reasons set out above, we do not share the view that "unless and until the applicant has provided the surveying authority with an itemised list of documents and a set of copies of the listed documents, he cannot...be regarded as having complied with the statute" or that ""any documentary evidence" must in the context of paragraph 1 be read as equivalent to "all documentary evidence". We believe that where an application under section 53(5) of the Wildlife & Countryside Act 1981 is
accompanied by a list or summary analysis of documentary evidence sufficient to make a credible case for an Order under section 53(2) of the '81 Act, then this constitutes an application that is compliant with schedule 14, paragraph 1, and hence with sections 67(3)(a) and (6) of the NERC Act.

Yours faithfully

Dave Waterman
Head of Rights of Way Policy and Legislation
Annie J Owen
Rights of Way Section Manager
The Planning Inspectorate
Room 4/04, Kite Wing
Temple Quay House
2 The Square, Temple Quay
Bristol, BS1 6PN.

Date: 8th October 2007

Dear Annie,

We have reviewed and revised our interpretation of the exception in s.67(3)(a) of the NERC Act 2006.

In November 2006, Defra’s published advice on the exception in s.67(3)(a) was questioned by one of the rights of way Inspectors. This advice, as set out in version 4 of Defra’s online guidance on Part 6 of the NERC Act, is that the exception in s.67(3)(a) is engaged only where a DMMO application for a BOAT was made before the relevant date and was still outstanding (i.e. not decided) at commencement (of ss.67-71 of the NERC Act). This is consistent with the policy intention behind this part of the Act. Paragraphs 33-41 and flowchart 3 in Defra’s guidance refer.

It was put to Defra that the wording of s.67(3)(a) refers simply to applications made before the relevant date and the exception is not therefore confined to applications that were outstanding but is engaged in all cases where an application for a BOAT had been made before the relevant date, regardless of whether the application had been decided before commencement. At that time Defra agreed that the wording of s.67(3)(a) leads to that interpretation and undertook to revise its online guidance.

However, following a challenge to this view from an objector in a current case, where the interpretation of s.67(3)(a) is a key issue, Defra agreed to review its interpretation of s.67(3)(a). Having done so, Defra has concluded that its original advice, as contained in version 4 of its online guidance was correct and that the exception in s.67(3)(a) is engaged only where a DMMO application for a BOAT was made before the relevant date and was still outstanding (i.e. not decided) at commencement. The reasons for this are as follows.

We believe that a literal interpretation of paragraph (a) would be to take it out of context. The purpose behind section 67 is to extinguish certain existing
unrecorded public rights of way, but to preserve certain others in limited circumstances and for limited reasons. Paragraph (4) sets out the two relevant dates by which applications made under section 53(5) must have been lodged in order for any rights over a particular way to be preserved by the legislation. It is therefore implicit that paragraph (a) only applies to applications which were outstanding at the relevant date.

This is borne out in the explanatory notes to the statute (paragraph 183) which deals with subsection (3) of section 67. These say: "These exceptions relate to cases where an application to record a public right of way for mechanically propelled vehicles has already been lodged. Under paragraph (a), all applications made under Part 3 of the 1981 Act to record rights for mechanically propelled vehicles which were lodged before the relevant date will be preserved and dealt with under the old law".

It would be clearly against the purpose behind the legislation and contrary to statements made by Government Ministers during the passage of the NERC Bill if, in cases where an application for a BOAT was determined before the relevant date and it has been found against there being a BOAT, those cases were now be re-opened so as to allow for a second determination of the question.

Yours sincerely

Dave Waterman
Rights of Way Policy & Legislation
To: rights of way stakeholders

16 March 2008

Dear Stakeholder

You should have heard by now that Natural England has reported to the Minister for Marine, Landscape & Rural Affairs, Jonathan Shaw, on the outcome of its review of the Discovering Lost Ways project.

The Minister has agreed the recommendations put to him by Natural England, and Natural England are contacting stakeholders to explain what this means in practice. My purpose in writing to you is to confirm that the Minister has agreed that implementation of sections 53 to 56 of the Countryside and Rights of Way Act 2000 (which would extinguish any historic rights of way not shown on the definitive map and statement by 2026 and are not yet in force) will not be pursued, at least until the stakeholder group proposed by Natural England has reported to Defra on its conclusions.
To all local authorities

4th December 2008

Dear colleague

This letter concerns surveying authorities, who have the power to make combined orders under the Public Rights of Way (combined orders) (England) regulations 2008: SI 2008/442

The current Regulations

Many of you will be aware by now, that there has been some controversy over the prescribed form of combined orders, as set out in the current combined order regulations, SI 2008/442. The concern is that the form of order provided for in these regulations, does not enable the way in which the definitive map and statement are to be modified to be set out in the combined order, as it would be in a definitive map modification order or legal event modification order under SI 1993/12. Moreover, contrary to the advice that we mistakenly issued in July this year, the regulations do not enable surveying authorities to modify the form of any combined order they make so as to include this.

Nevertheless, any combined order made under SI 2008/442 will still enable a surveying authority to modify the map and statement, at the time of consolidation of the definitive map and statement, in line with the changes effected by the combined order. Moreover, from a legal standpoint, the current regulations fulfill their function adequately (in terms of permitting combined orders to be made) and Defra is firmly of the view that orders made on this basis are perfectly sound as long as the form of order is adhered to, either strictly or “substantially to the like effect”, in other words, they have not been modified to set out the way in which the definitive map and statement are to be modified.

Amending regulations

We have been consulting practitioners in surveying authorities about whether there is a need to amend SI 2008/442. They tell us that the regulations would be greatly improved by the addition of provision, in the form of order, for setting out the way in which the definitive map and statement is to be modified.
and so we have decided that we will amend the regulations accordingly. However, such regulations will not come into effect before the next common commencement date, which will be the beginning of April 2009.

**In the interim**

Until the new regulations come into effect, there are two options open to surveying authorities. They can make combined orders under SI 2008/442, which will be legally sound, provided they have not been modified to set out the way in which the definitive map and statement are to be modified. Alternatively, they can continue to make separate orders, as they did before the combined orders regulations came into effect.

**Objections to combined orders already made**

We are aware that a number of combined orders have been the subject of objections from the Byways and Bridleways Trust. We understand that some of these are objections to the form of the legal event modification order element of the order. Although the legislation governing definitive map modification orders and public path orders (and analogous orders) provides for these orders to be objected to and, if opposed, submitted to the Secretary of State, the legislation does not provide for orders made under s.52 in consequence of events in s.53(3)(a) of the Wildlife and Countryside Act 1981 (commonly referred to as legal event modification orders) to be objected to in this way.

There is therefore no legal basis for an objection to the legal event modification order element of a combined order. The legislation provides only (in s.53A(7)) that the order may be challenged in the usual way, though the Courts, on the grounds that it is not within the powers of this Part of the Act (Part III of the Wildlife and Countryside Act 1981), or that the requirements of this Part of the Act or of the regulations had not been complied with. Any objection to the legal event modification order element of a combined order has no basis in law and the Secretary of State has no jurisdiction in relation to orders objected to in this way.

Consequently, we will be returning any combined orders to surveying authorities, where the sole ground of objection is to the legal event modification element of the order. Where such a combined order conforms to the form of order set out in SI 2008/442, surveying authorities may simply confirm the order as unopposed. Where such a combined order has been modified to set out the way in which the definitive map and statement are to be modified, as indicated in the advice that we mistakenly issued in July, then surveying authorities have two options. One is to remake the order from scratch, adhering to the form of order prescribed in SI 2008/442. The other is to detach the legal event modification element of the order, leaving only the public path (or analogous) order element of the combined order, which may then be confirmed, enabling a separate legal event modification order to be made, as was the practice before the introduction of combined orders;
sections 53A, subsections (3) and (4), enable a surveying authority to do this without having to repeat any of the statutory procedures already undertaken.

**Guidance**

We will be revising the combined orders guidance and publishing this revised version once the amending regulations are made. In the meantime if you require clarification of anything in this letter, or require further guidance on combined orders for any reason please email the following address: recreation.access@defra.gsi.gov.uk

Yours sincerely

[Signature]

DAVE WATERMAN
Recreation & Access Policy