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NATURE CONSERVATION AND HABITAT
PROTECTION - SITES OF SPECIAL
SCIENTIFIC INTEREST (SSSI)

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SUMMARY RECOMMENDATIONS IN RESPONSE TO THE GOVERNMENT'S DISCUSSION DOCUMENT

For reasons that are set out in this report, we recommend that:

- (i) There should be full transparency in the operation of the conservancy agencies and the scientific basis for their decisions should be fully transparent.
- (ii) There should be a formal process of independent scientific review of SSSI notification, denotification and positive management requirements. This review should be available to landowners, occupiers and individuals and groups with sufficient standing. It should only be available on sites which the conservancy agencies have considered and whose status has been determined. The terms of reference for the independent scientific review should be purely scientific and should not include economic or other considerations. The conservancy agencies should not be expected to defend their decisions but should supply the information used to reach their decision and the reasons for the decision. Those seeking independent scientific review may supply expert scientific information for consideration. The decision and basis for the decision of the scientific review should be made publicly available.
- (iii) English Nature and the Countryside Council for Wales should be given the powers to denotify SSSIs exceptionally and in clearly defined circumstances.
- (iv) There should be a proactive response to SSSI protection from local impacts such as fertilizer use etc., through the development of good practice circulars etc.
- (v) SSSIs should be open to regular monitoring and that the conservancy agencies or their nominees should have rights of access to SSSIs in order to carry out such monitoring. This monitoring should include consideration of local environmental impacts and not only those of a regional or global nature.
- (vi) Lists of potentially damaging operations and the positive monitoring agreements should be open to periodic review.
- (vii) The conservancy agencies should have powers for refusal of consent for damaging operations on all SSSIs without the need for a ministerial order.
- (viii) The conservancy agencies should have powers to require positive management by specified operations where attempts to reach agreement on this issue have failed.
- (ix) A system of arbitration should not be used in dispute resolution but an appropriate independent appeal system should be established in its place. This could involve a scientific review where appropriate and use of the planning appeals structure, involving a hearing or inquiry before a planning inspector.

INTRODUCTION

1. In the UK the protection of habitat has played a pivotal role in nature conservation and has centered on the designation of two types of sites, nature reserves and sites of special scientific interest (SSSIs)¹. Habitat protection is part of wildlife and countryside conservation which is a significant and essential component in the Government's strategy for sustainable development in the UK as outlined in *This Common Inheritance*². Sustainable development is one of the objectives of the Environment Agency established under the Environment Act 1995³. It is also a key element in the Brundtland report⁴. One means of achieving sustainable development outlined in the Brundtland report is the need to merge environment and economics in decision-making processes. This has implications for habitat protection and planning regimes.

2. The current system for maintaining and enhancing SSSIs relies largely on the voluntary co-operation and goodwill of owners and occupiers. This is seen as preferable to coercive legislation. The outcome, however, is a relatively weak legislative regime in the Wildlife and Countryside Act 1981(as amended) afforded to SSSIs. The national wildlife agencies are in a poor negotiating position. The legislation ultimately will not prevent a person who stands to gain financially by destroying or damaging a SSSI, from so doing. The weaknesses in the existing system require attention. Proposals for reform are outlined in this paper. The focus in the paper is how to strengthen existing legislation to make the law more transparent and effective.

3. At the outset it is important to establish the value of SSSIs. They are considered to substantially contribute⁵ to the UK fulfillment of international and EU obligations in the areas of habitat and biodiversity conservation. There are two key EU Directives which require UK compliance, these are the EC Habitats Directive⁶ and the EC Birds Directive⁷. It must be questionable how far current UK legislation adequately implements the Habitats Directive 92/43/EEC in particular. The UK is signatory to a number of international agreements which are of relevance in considering SSSIs. Two key conventions for habitat conservation are the Convention of Wetlands of International Importance Especially as Waterfowl Habitat (1971), known as the Ramsar Convention, and the Convention on Biological Diversity (ratified by the UK in 1994). SSSIs are used to underpin sites designated under the European Directives e.g. Natura 2000 sites, or under the Ramsar Convention. They also serve as a mechanism in the maintenance of

¹ Created under the National Parks and Access to the Countryside Act 1949. Legal powers with regard to SSSIs have been substantially changed since this Act in the Wildlife and Countryside Act 1981.

² Cm. 1200 (1990)

³ See s.4 of the Environment Act 1995.

⁴ A definition of sustainable development is provided in: '*Our Common Future*' and also the World Commission on Environment and Development (the Brundtland Report), 1987. Policy objectives to achieve sustainable development are also outlined in this report. These include conserving and enhancing the resource base, and merging environment and economics in decision-making processes.

⁵ see '*Site of Special Scientific Interest: Better protection and management*' Department of Environment, Transport and the Regions (1998).

⁶ Council directive on the conservation of natural habitats and of wild fauna and flora (92/43/EEC, OJ L206, 22.7.92. p.7)

⁷ Council directive on the conservation of wild birds (79/409/EEC, OJ L103, 25.4.79, p.1)

biodiversity since this is only really possible through the protection of the natural habitat. The Convention on Biological Diversity adopts a proactive attitude to conservation underlining the significant role of maintaining biological diversity through sustainable use, while still accepting the importance of protecting special sites and species⁸. Since the UK is a signatory to this Convention it is in this context that any review of the protection of designated habitats must be considered. Land-use planning and agricultural practices are important components in habitat and SSSI protection. The government recognises the importance of 'good conservation practice in the wider countryside'⁹ and the significance for this in terms of SSSI protection should not be underestimated. For example the use of pesticides and fertilizers may have major effects on natural habitats, and applications should follow appropriate codes of practice.

4. English Nature and the Countryside Council for Wales notify and monitor SSSIs. These agencies may restrict the activities of landowners in relation to SSSIs potentially with the payment of compensation for loss of earnings. Recently, however, the relationship between landowners and the agencies has been changing with the development of positive management agreements. Under these agreements the landowner undertakes operations which are appropriate to maintain the SSSI in a favourable conservation status. Since the majority of UK natural habitats exist because of past management practices and human intervention, appropriate management regimes are essential to maintaining and enhancing SSSIs. Even given the development of such agreements large numbers of SSSIs have been lost through neglect or third party damage¹⁰.

5. The government has recently produced a discussion document (*Sites of Special Scientific Interest: Better protection and management*)¹¹ to encourage discussion of techniques to improve the protection of SSSIs, still relying heavily on the policy of close participation and co-operation with landowners. The Royal Commission on Environmental Pollution (1998) has recognised that standards may be applied to conservation and habitat protection and considers that 'such environmental standards should be based on sound science'¹². In light of these documents it is timely to consider reforms to SSSI protection. In this report we consider the Government's most important recommendations on SSSI protection and we also provide our own proposals for reform.

⁸ See Warren, L.M. (1996) "Law and Policy for Marine Protected Areas" in C.P. Rodgers editor, *Nature Conservation and Countryside Law* pp 65-88.

⁹ See *Sites of Special Scientific Interest: Better protection and management* Department of Environment, Transport and the Regions (1998).

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² See Royal Commission on Environmental Pollution (1998) 21st Report "Setting Environmental Standards". Cm 4053. Para 2.65, p. 27.

TRANSPARENCY IN NOTIFICATION AND DENOTIFICATION OF SITES

6. The Government in the discussion document (Proposal 5)¹³ is concerned with the need for English Nature and the Countryside Council for Wales 'to devise procedures for securing the widest possible support for their decisions'. In order to achieve the greatest public confidence in the protection of SSSIs and decision making by the agencies, it is essential that there should be full transparency in decisions relating to SSSIs. It is important that there should be public confidence in the decision of an agency to notify or indeed not to notify a site. Transparency in decision making will tend to encourage such confidence and foster public support for English Nature and the Countryside Council for Wales. This objective is supported by the Nolan (now Neill) Committee on Standards in Public Life¹⁴ which has recommended greater transparency in decision making within the planning process. We support this approach. We recommend that, for reasons of transparency, notification of SSSIs should include the scientific basis for notification whenever possible, provided that the reason for protection is not endangered by this e.g. in the case of the presence of an endangered species which may be at risk from collectors.

7. Our views on greater transparency are also supported by proposal 3 of the Government's Discussion paper, which considers implementation strategies. Proposal 3¹⁵ includes an invitation to English Nature and the Countryside Council for Wales to review mechanisms publicising SSSIs. Such publicity should apply to decision-making mechanisms and procedures as well as to individual sites to ensure full transparency in the operation of the agencies. Publicity is one of the key components of transparency and steps taken to ensure more public information are essential. In consideration of the significance of local nature conservation sites it is recognised that local people or conservation groups may wish to bring such features to the attention of the conservation agency. It is the agency that will carry out an assessment to determine whether such sites meet the national standard for notification as an SSSI¹⁶. This underlines the importance of transparency in decision making with regard not only to the basis for notification, but a decision not to notify.

8. We recommend that there should be a formal process of scientific review of SSSI notification (Paragraph B:11)¹⁷. This should extend beyond a simple peer review of the processes for notification i.e. the management process, to a review that includes an element of independent analysis. The basis for SSSI notification is essentially scientific and data on individual sites may be interpreted differently within the scientific community. It is highly desirable to have the ability to assess the decision to notify or not

¹³ *Op. cit.* DETR

¹⁴ see the Third Report of the Committee on Standards in Public Life 'Standards of Conduct in Local Government' (July 1997) Cm 3702-1.

¹⁵ *Op. cit.* DETR

¹⁶ *Ibid.* Paragraph B:19

¹⁷ *Ibid.* D

to notify on the basis of scientific criteria by independent scientific assessors. As noted in the discussion document a formal process of scientific review has been in place for Scotland since 1992. That such a process of scientific review has only been rarely used in Scotland does not negate the value of such a process. Rather it suggests that a scientific review process such as the one envisaged, would not be prohibitively expensive to introduce in England and Wales. The peer review of the process for notification is, of course, an essential component in ensuring appropriate operational and management processes in notification. This will also strengthen the economy, efficiency and effectiveness of the agencies.

9. We recommend that the formal process of scientific review should be available when a group or individual holding sufficient standing i.e. an owner/occupier, local conservation groups or local authority, request it. The scientific review should only be available for sites that the conservancy agencies have previously considered and made a decision to notify or not to notify. The request for review must be in purely scientific terms as to the conservation value of a site and should not include consideration of economic or other factors. As far as possible policy matters should be separated from objective scientific criteria on the merits of the case. Such scientific review should be available both for objectors to a site receiving SSSI status and to proposers of a site denied SSSI status. The conservancy agency should not be required to defend any decision previously made on the site, but should provide the scientific information that formed the basis for the decision. The party requesting the review may supply their own expert scientific information if desired. The scientific information provided by the conservancy agency and other parties should be reviewed by an expert scientific review panel. The decision of the scientific review panel should be published, open to public consultation, and available for any subsequent appeal by a landowner or occupier (see below).

10. The advantage of scientific review rests in providing a clear route for independent and impartial review of the scientific basis for site notification. The scientific review should be clearly reasoned and supported by the relevant evidence used in the assessment. This will increase the public perception of fairness in decision making. It will also give greater openness in decision making where there is a dispute about site status. The result should give greater confidence in the procedures and decisions of the conservancy agencies.

11. We also recommend that English Nature and the Countryside Council for Wales should be given powers to denotify SSSIs. This power may be used only exceptionally and in clearly defined circumstances (Paragraph B:12)¹⁸. There are circumstances when regrettably damage or neglect to SSSIs is such that habitat restoration is not possible. Habitat restoration involves the return of the land to the ecosystem prior to damage or disturbance¹⁹, which is clearly an essential prerequisite in the case of SSSIs. Depending on the extent and nature of the damage this, in practical terms, may not be an achievable goal. In reality we have only a limited ability to measure and define the structure and

¹⁸ *Ibid.* DETR

¹⁹ Beauchamp, G.S. (1993) 'Establishing new landscapes. Reclamation options.' In T.Cairney (ed.), *Contaminated land. Problems and Solutions*. Blackie Academic and Professional, London. pp. 191-210.

functioning of even well known ecosystems, knowledge essential to achieve total restoration. It is doubtful that substantially damaged SSSIs could be returned to their original state removing the scientific basis for notification of the habitat. Providing English Nature and the Countryside Council for Wales with the ability to denotify a site is recognition of this fact.

12. Denotification of a site is likely to be a controversial decision. Public consultation is essential to ensure effective decision making. It is recommended that there should be full transparency in the decision making process. In addition denotification should be defined narrowly to rest on purely scientific grounds. The scientific justification for the decision that habitat restoration is not a practical possibility and that habitat damage is such that the site no longer complies with the reasons for notification should, in common with the decision to notify a site, be open to debate within the scientific community. It is essential that a broad range of scientific advice is taken on denotification. We recommended that the formal process of scientific review of SSSI notification (at present in Scotland only) should be extended to include scientific review of denotification. This will encourage public support for denotification and add to public confidence in the impartial and objective nature of the decision. The basis for requesting scientific review should be the same as for notification of a site, and should be limited to parties with sufficient standing (see paragraphs 8 to 10 for a full explanation of the conditions and terms for scientific review).

13. It is important in the context of denotification that all appropriate actions have been taken to avoid a site becoming damaged or neglected to such an extent that denotification is necessary. In paragraph B:12 it is suggested that denotification may arise as the result of a road scheme or other development. In this context it is essential to ensure that there should be a balance between the economic, social and environmental considerations in planning decisions. There should be sufficient weight given to the integrity of SSSIs during the planning process to ensure conservation of biodiversity and natural resources both for national and international sites and the maintenance of the UK International and EU obligations. Amendments to planning policy guidance as suggested in paragraph C:9²⁰ are to be recommended in the terms suggested i.e. 'a strong presumption against any development proposal'. In the case where a road, or similar, scheme has been given planning permission we recommend that there should still be the opportunity to request a scientific review of any denotification decision made by the conservancy agencies after completion of the scheme.

A TIERED SYSTEM OF SSSIs

14. While it is accepted that SSSIs should include both sites of international importance e.g. Ramsar sites or "Natura 2000", and sites of national conservation importance, in principle there should be no difference in the protection extended to these sites. However, account needs to be taken of the legal effects of the different designations. It is preferable

²⁰ *Op. cit.* DETR

that a tiered system does not result in lower priority being given to SSSIs which are not International or EU sites, though in practice this may be unavoidable.

PROTECTION OF SSSIs FROM DAMAGE; AND THE NEED FOR MONITORING

15. SSSIs can be damaged by a variety of activities. These may have an impact either directly on the site of the SSSI, or on the surrounding land, or through regional (e.g. acid rain), and global (e.g. global warming), effects. The susceptibility of habitats to damage and the vulnerability of individual species, and therefore site biodiversity, to environmental stress is often difficult to assess and varies with habitat and organism²¹.

16. The concept of lists of potentially damaging operations (Proposal 15)²², linked to positive management agreements, clearly are an important component in the protection of individual SSSIs. However, site damage may result from activities outside the SSSI. For example, the use of pesticides and fertilizers on surrounding agricultural land²³; and water abstraction in the surrounding area which can influence habitats especially aquatic and wetland habitats; discharge of liquid waste to aquatic systems etc. We recommend that any effective system for the protection of SSSIs should take cognisance of such impacts. Although Agenda 2000 CAP reform may ultimately contribute to SSSI protection (Proposal 16) it is inappropriate to rely solely on this. We recommend that a proactive response should be adopted through the development of agricultural good practice circulars etc. as recognised in Paragraph D:8²⁴. The application of good agricultural practice is one of the key factors in habitat and species protection.

17. The Agencies or their nominees need to monitor SSSIs' on a regular basis. This is essential to establishing the condition of an SSSI and any damage or harmful impact on the SSSI. It is accepted that such monitoring is resource intensive but it is an essential component in any system of habitat protection and preservation. Monitoring may permit the identification of a stress that was unforeseen in the development of the list of potentially damaging operations and positive management agreements, or which originates off-site. We recommend that SSSIs should be open to regular monitoring and that agencies or their nominees should have rights of access to SSSIs in order to carry out such monitoring. Proposal 20²⁵ is for legislation 'to enable the agencies to enter land in order to establish whether there are features justifying notification of the land as an SSSI; to confirm the terms of an agreement are being complied with; to assess the condition of an SSSI; and to establish whether an offence is being committed on a designated site.' We recommend that the assessment of the condition of an SSSI should include access for

²¹ see McEldowney, J. and McEldowney, S (1996) *Environment and the Law*, Longman, Essex p. 4-7 for a summary discussion of ecosystem 'harm'. For greater detail see Freedman, B. (1995) *Environmental Ecology. The Impact of Pollution and Other Stresses on Ecosystem Structure and Function*, 2nd edn. Academic Press, San Diego.

²² *Ibid.* DETR

²³ see McEldowney, J. and McEldowney, S (1996) *Environment and the Law*, Longman, Essex. p. 127-138 for a summary of mechanisms and effects.

²⁴ *Ibid.* DETR

²⁵ *Op.cit.* DETR

regular site monitoring perhaps annually or on whatever periodic basis is appropriate to the nature of the site. The importance of such monitoring is accepted in Section E (Paragraph E:1) in terms of 'monitoring whether conservation action is successful in conserving the interest'. In order to achieve this there must be appropriate rights of access. In addition monitoring should go beyond establishing the effectiveness of conservation practice to ensure that any off-site impacts are established and monitored. It may be possible to involve appropriate local interest groups to participate in this monitoring under strictly defined conditions whenever appropriate. This would have the advantage of raising local awareness and participation in maintenance of the sites and thereby local support for the activities of English Nature and the Countryside Commission for Wales.

18. We also recommend that lists of potential damaging operations and any positive management agreements should be open to periodic review and modification. Given the scientific uncertainty in establishing in advance all activities and impacts that might have a deleterious impact on a site the ability to review and modify existing agreements is essential. Regular monitoring of a site may permit the early discovery of any unforeseen impacts on the SSSI and allow appropriate remedial action or changes to agreements with the landowner to moderate any such impacts.

19. The identification of 'impacts of wider processes such as acid or nitrogen deposition, climate change etc.' (Paragraph E:1)²⁶ are of considerable interest and will require the opportunity for regular monitoring of a site. However, these are regional or global impacts which are essentially beyond local control. In general modifications to management practices are unlikely to protect the SSSI from such impacts. In terms of protection and preservation of a site it would be more appropriate to monitor more local impacts such as pesticide and fertilizer use; local emissions to the atmosphere or aquatic systems; or the effects of any local disposal of solid waste. We recommend that such potential impacts should be identified and whenever possible monitored.

20. Planning Policy Guidance (paras. 30 and 31) allows for the definition of consultation areas around SSSIs, which will involve the conservation agencies being consulted on planning applications within the area that may affect the SSSI. It may be possible to build on this procedure and extend it to other activities within the area local to an SSSI likely to offer a risk of 'harm' to the site. The nature conservation authority could identify such the activities and risks and embed them in their monitoring programme and require consultation about the operation e.g. water abstraction, changes in effluent discharge consents.

CONSERVATION AND POSITIVE MANAGEMENT

21. We would support securing protection and positive management so far as possible by the voluntary approach. In our view, however, strong reserve powers are needed and are justified for the relatively small minority of cases where cooperation is not forthcoming. We would, therefore, support the proposals (24 and 27) allowing for the refusal of

²⁶ *Ibid.*

consent for damaging operations: in our view this should apply to all SSSIs, with no ministerial order being needed. Secondly, in our view powers are needed (again they are likely to be used only in a very few cases) to require positive management by specified operations, where attempts to reach agreement on this issue have failed. The Agency might be required to demonstrate to the Secretary of State (a) that the proposed actions were necessary and reasonable in the circumstances; and (b) that reasonable attempts had been made to agree a positive management scheme.

APPEALS AND ARBITRATION

22. It is recognised in paragraph D:20²⁷ that the proposed changes to SSSI protection would result in increased limitations on the landowners ability to manage his land as he wants. The increased protection for SSSIs, however, raises the possibility of the need for an appeal system. It is noted (paragraph D:21) that owner occupiers already have the right to make representations to English Nature and the Countryside Council for Wales prior to the confirmation of site notification. Arbitration can be used for resolution of disputes over such factors as the financial provisions included in an offer of management agreement (paragraph D:22). The use of arbitration in dispute resolution may be problematic, as indicated, because of the confrontational nature of the process and potentially large costs to both parties in the dispute. Alternative forums of dispute resolution should therefore be considered where possible.

23. We recommend that a system of arbitration should not be used in dispute resolution and that an appropriate appeals system should be established in its place. Proposal 31²⁸ suggests that 'the Council of English Nature or the Countryside Council for Wales should be required in the first instance to consider and resolve disputes about the management of SSSIs ...'. It is accepted that disputes, in the first instance, should be addressed by the Councils of the conservation agencies. Many disputes will undoubtedly be resolved at this stage. It is, however, important that the public and landowners have confidence in any appeal system and that it is viewed as independent and impartial. As a consequence there should be the opportunity to pursue an appeal beyond the Councils of the conservation agencies. The scientific review recommended above (see paragraph 8 to 10), for the notification and denotification of SSSIs is one alternative forum for dispute resolution. This should act as an appeal forum for challenges made on the scientific basis for notification and denotification of sites. We recommend that this scientific review should include the ability to consider the scientific basis for positive management requirements as part of positive management agreements prior to any powers being invoked by agencies enforcing such agreements (see paragraph 21 above). As indicated above, rights of requesting a scientific review should be limited to a landowner, occupier and groups or individuals demonstrating sufficient standing on recognised criteria. This review, however, is limited to purely scientific terms of reference and does not include economic or other factors that are more properly dealt with through another forum. Independent scientific review should also be available for refusal of permission for potentially damaging operations.

²⁷ *Op. cit.* DETR

²⁸ *Ibid.*

24. SSSI denotification as a result of damage incurred through a planning decision, which has properly been reviewed through planning procedures and environmental and other concerns balanced appropriately (see paragraph 13), should not be open to appeal. It should be possible to request a scientific review of denotification in these cases, however (see paragraph 13).

25. We recommend that an independent appeal system in addition to the scientific review (above) should be developed with regard to economic and scientific factors for SSSI notification, denotification, positive management agreements, refusal of permissions and enforcement actions by the agencies. This appeal system should be restricted, possibly to landowners and occupiers only. The inclusion of scientific issues is intended to allow a wide consideration of the scientific and policy implications raised on appeal. This is in conformity with the Human Rights Act 1998. A number of possible appellate bodies have been suggested (paragraph D:24) including the Appointed Person Procedure (MAFF) or a specially established body perhaps set-up through the Joint Nature Conservation Committee consisting of individual experts. The Appointed Person Procedure might appear inappropriate if the landowner or occupier is not conversant with this system. The setting up of a special body through the Joint Nature Conservation Committee may be restrictively expensive.

26. In our view, an alternative procedure may be to follow the planning appeals structure as used in section 78 of the Town and Country Planning Act 1990. This has the advantage of harmonising the protection of SSSIs within the general planning system. This gives added protection in the way SSSIs are commonly regarded. Furthermore, it provides a form of standard setting that may apply universally throughout the country. It is difficult to estimate how many appeals there might be. *Expertise* in hearing appeals might come from an inspector in the case of the need for a planning inquiry. *Scientific expertise* may be supplied entirely or in part through the independent scientific review panel (as presently constituted in Scotland, see above). Findings of the scientific review could be made available to any planning inquiry. The details of any appeal structure would require new legislation.

