



The Common Act Part 2 Consultation

A response by the English National Park Authorities Association

November 2008

SUMMARY

1. Respondent details

1.1 The English National Park Authorities Association (ENPAA) exists to provide a collective voice for the nine English National Park Authorities. It is governed by the Chairs of the nine Authorities. Our response represents the collective view of officers who are working within the policies established by the National Park Authorities (NPAs). Individual National Park Authorities may submit separate comments, which will draw on the specific issues for their particular area.

1.2 National Park Authorities (NPAs) have environmental, recreational, social and economic purposes and duties, but would probably be best described for the purposes of this consultation as a “local authority”.

2. General comments

2.1 Our detailed response to the consultation is based on a number of key principles:

- The uplands contain a high percentage of common land, particularly within National Parks.
- The management of the commons is an essential element in ensuring that these areas, often perceived by the public as a wild and natural landscape, retain their unique visual, archaeological and nature conservation value.
- Extensive farming as practiced on the commons is also a crucial part of the cultural heritage of the uplands.
- That extensive farming systems practised on the commons is also responsible for the ‘ecosystem services’ or ‘public benefits’ delivered that Defra has identified as being so crucial for the health of the nation.

2.2 This consultation draws heavily on the experience gained on Dartmoor as an example of good practice, where a Commoners Council has existed since 1985.

3. Summary of comments

3.1 ENPAA broadly supports the aims of the proposals to make management of commons more practical, sustainable, and effective, and welcomes the opportunity to comment. ENPAA believes that the active management of commons, through mixed grazing regimes, is essential to maintain the very landscapes that gained these areas National Park status.

3.2 There are though some concerns about some of the details. These are summarised as follows:-

Complexity of setting up a council

3.3 Quote from one consultee “If it becomes over complicated it becomes a burden - and we have enough of these”.

3.4 It is important that the process of setting up a council does not become too complicated, too expensive or too arduous a task to adopt. Guidelines should be flexible, transparent, and based on principles rather than prescription.

3.5 For those looking for a means to access the benefits of an agri-environment scheme a simpler solution may be to follow the example of many commons that have entered into ESA. Commoners entering land into ESA agreements have drawn up legal agreements that cover the agreement area (which could be more than one common). These ‘internal’ agreements between commoners provide legal back up should any one commoner renege on the agreement. This system has the flexibility to add ‘new’ commoners to the agreement, so avoiding discrimination of all commoners not presently actively putting stock out, which the present proposals seems to do. These agreements have a cost in drawing them up, as this involves the legal profession preparing such documents. The cost could be prohibitive to smaller councils. Payments should be available to all councils that seek to emulate this high standard by themselves entering into formal legal agreements. The grant aid for this should be 100% (up to a maximum set limit).

Make up of a Council

3.6 It is important that the elected members of a council include non-active graziers as well as active. Some present ESA agreements include the co-operation of non-active graziers. If the new councils were to exclude non-graziers in future agreements this would disenfranchise the present participating non-graziers, and limit the range of interested parties represented on the Council. A conscious action to limit representation would in our view be unfortunate. Weighting could be greater towards active graziers, to ensure that the ability to actively manage the commons is not compromised. This should, however, be read alongside, our comments under Transparency and Openness.

3.7 It is clear that the idea of an ‘umbrella’ council would not suit all national parks. The flexibility to have either a statutory umbrella council, or statutory local commoners association should be maintained.

Landowners' Rights

3.8 The rights of the owner are equal to the rights of commoners. In fact commons rights do not stretch to a right to manage the land (common rights are merely rights to graze the vegetation and minor rights such as Estovers). The right to manage the land lies with the owner, which is why the owner's consent is required in all agri -environment scheme agreements that cover the commons. This consultation does not recognize this, in as much as the voting rights do not give sufficient weighting to give the owner an influencing voice on the Council. What owner would consent to the formation of the council, if by doing so the owner loses any power to influence decisions made?

Protecting the Public's Interest

3.9 Although commons councils are not set up to manage the wider public interest, there is acknowledgement in the Act that they must have due regard for those interests. This fact should be re-iterated and spelt out in any guidance for commons councils. Serious consideration needs to be considered to retaining a power of intervention to deal with any instances where a commons council is clearly operating against the wider public interest/national policy.

Transparency and openness

3.10 To be effective the commons councils need to be seen to be open and transparent in all they do. Experience tells us that having closed meetings and carrying out decisions and proceedings without full explanation has led in the past to suspicion and suggestions that councils may be acting in the interests of just a small cartel.

3.11 There is also the possibility that a small cartel of active graziers could monopolise a council. The weighting of votes should be such that no one section represented can dominate the others. For this reason, it is important that the Chair and other committee posts have a maximum term of office.

Rights of Common under 1965 Act being compromised?

3.12 Rights of Common under the 1965 Act allow individuals use of common land without further permissions of other individuals. Under the proposals set out in this consultation, it appears that these rights of common may be compromised. At present commons councils can limit those who are allowed to graze the common. Over zealous councils could 'cut out' those graziers that are not actively using the commons at present. The viability of farming may dictate, at some future date, that some rights need to be reactivated. Under the proposed system there is no means of doing this, if the ruling members of a commons council chose to block the reuse of 'non-active' rights. Some sort of flexibility needs to be brought into the system so that new commoners can be brought into an agreement.

Varying an establishment order

3.13 Rather than refer all variances back to the Secretary of State, we would suggest, in order to simplify the system that any changes are advertised as suggested, but only called in by the Secretary of State if the public make their objections publicly known.

4. Detailed comments

Question 1

The functions provided by the legislation, in our view, are unlikely to allow for the (more) effective management of active or under-grazed commons for the following reasons:-

- **The right to use the surplus of the land**
This is probably only of use if the landowner is dormant. Surplus grazing is a landowners' right and is a potential source of income for the landowner. Landowners are most unlikely therefore to consent to limitations on the use of any surplus grazing to a commons council.
- **Establishing and maintaining boundaries**
Are the boundaries that the commons council would have jurisdiction over, within the common or on the edge? If the boundaries are on the perimeter of land with common land status, then responsibility (normally) lies with the adjacent landowner - the commons council could have no power other than persuasion over private land off the commons.
- **Acquisition or disposal of land.**
The council cannot dispose or sell land that it does not own. This right can only have relevance where they own the land.
- **Right to regulate grazing numbers**
The 1965 Commons Registration Act accepted rights of common as registered. Does the proposal that councils could limit or impose conditions on the exercise of rights of common over the land, seek to compromise these rights? This would in our view be unfortunate, and could lead to a cartel blocking someone using their rights and instead leasing rights to someone who has no rights on the common. This scenario could not be described as a sustainable practice.
- **Leasing and license of common rights**
Again, as above, the rights to surplus grazing lie with the landowner not the commoners. Licensing or leasing could only happen to existing active rights that someone has offered up to the council as 'not required'.
- **Problems arising from overgrazing**
A definition of the word 'overgrazing' needs to be defined. The definition of overgrazing to a farmer might well be completely different from that of an ecologist. A nationally recognised definition, such as Natural England's present methodology, should be used. Setting up a second system to assess grazing pressures on the commons would be a waste of resources and effort. There should be local flexibility and assessments should be based on the sward height rather than the number of LUs per ha.

There is a suggestion that if a person whose consent is required cannot be identified, a council may serve notice by posing notice on the land. In our view this is unlikely to have the desired effect, and advertising through local/regional press would be a better option. There should also be a simple statement that all commons should be managed in accordance with the Code of Good Practice for Commons.

Question 2

Para 2.3 sets out some examples of types of rules that commons councils might wish to introduce. We would question whether some of these suggestions, intentionally compromise other legislation:

For example:

- **Limiting the landowner's surplus grazing.** This can only be achieved through agreement, and therefore by definition cannot be a rule;
- **Placing a limitation on the exercise of rights of common.** (see Question 1 above)
- **Fix a period when stock may go out** – the right to put stock out in the 1965 Act is not time or seasonally limited.

The sort of rules that would help a commons council manage the vegetation, agriculture, and exercise of common rights is well illustrated through the *Dartmoor Commons Act* which sets out the rights and responsibilities of a Dartmoor Commoners Council, and its associated Regulations. These are available at:

<http://www.dartmoorcommonerscouncil.org.uk/regulations.htm>

Question 3

In our view this is not necessary, i.e. commons councils should not be given the power to exercise their functions differently in relation to different commons or areas.

The powers should remain the same for all commons, the relevance of those powers to each common will dictate whether they need to be imposed (i.e. maximum stock rates – If stocking rates were to be imposed - the need for restricted numbers would remain on all commons, but those in agri-environment schemes will have those restrictions as part of their Natural England agreement).

Question 4

No. The problems of undergrazing are generally not caused through a lack of people with stock, but because the cost of putting stock out is no longer a viable option for many upland farmers. In extreme cases, however, the acquisition of rights by the council might be helpful. It is very doubtful that Natural England or any other authority would want to invest in the responsibility of owning and looking after its own stock, when stock management is not their own expertise. This would only ever be as a matter of last resort.

Question 5 – Managing the landowners' surplus

In our view this power is not likely to be very useful. This can be achieved without guidance or legislation through delegated authority of the landowner.

Guidance that commoners' rights should be considered first would be appropriate, if the landowner does not take his rights up. Existing rightholders should be considered before outside people who would otherwise have no right to put stock out on the common.

More importantly though, a definition of 'surplus' grazing needs to be included in any guidance notes that are produced (see comments under response to Question 1 above).

Question 6

There needs to be complete transparency and consistency as to how payments are divided up, based perhaps on a publicised formula, which could be determined at a local level.

On Dartmoor all commoners enter into a legal agreement amongst themselves, to protect everyone against any commoner defaulting on the agreement. We would welcome national guidance illustrating this as an example of good practice. There is obviously a cost to drawing up a legal agreement, and solicitors' costs are not cheap. Some form of support for these costs should be available at 100% funding, up to a set maximum.

Question 7

One problem on Dartmoor is that commoners are required to pay a levy to the Dartmoor Commoners Council based on the number of stock that they put out. Many pay for more stock than they actually do put out, to give them flexibility (this problem is duplicated under ESA where the number of stock put out is not necessarily the number paid for). This leads to the fact that it is still impossible to ascertain precisely how many stock are out on the moor, when trying to compile statistics on grazing levels. Therefore the number of stock that is recorded needs to be the actual stock out, not the number someone has paid to put out.

Question 8

Other function or activities that councils might wish to undertake should also include:-

- Promotion of proper standards of livestock husbandry.
- Responsibly to ensure commons are neither under or overgrazed and even exclusion of stock if necessary.
- Enforcement of proper commons entitlement
- Power to turn down requests for commercial events being held on the commons, if it is likely to be damaging, or contrary to the aims of the Council, Statutory Regulations, ES prescriptions etc.

Question 9 - Other areas considered for guidance

- Dogs under control.
- Byelaws relating to behaviour of public where there is a public right of access.

Question 10

Advantages of small common:

- easier to get decisions reached
- more likely to have a hands –on approach
- easier to apportion agri-environment monies

Disadvantages:

- no willing volunteers to stand for elections
- only looking after vested interests
- too much responsibility for a small group to regularly keep on top of those duties

Question 11 - Potential issues or conflicts that might arise between commons councils and existing management structures

The manorial courts on Dartmoor are based on the commoners putting forward issues to the Lord of the Manor (Land owner), with implicit understanding that the landowner has the final say. By contrast commons councils would have the landowner as an equal member of the council (a single voice amongst the other majority), a rather different status to that which landowners enjoy through manorial courts. This could lead to some reluctance from landowners to accept a new system in which they would 'lose' power.

Question 12 – Proposed Regulations – are they appropriate as Standard Terms?

Yes. In more detail, clause 20 should include non graziers, and clause 24 – remuneration should be at published, prescribed and agreed rates only.

Question 13

The proportion of representation (expressed on a percentage basis) of all legal interests should be set out in the Standard Constitution, not the establishment orders.

A grazing register must be a requirement not an option. If it remains an option this would lead to 'poor housekeeping'.

Question 14

No comment.

Question 15

The minimum should include evidence that consensus has been sort from the outset. It will be important to avoid a group of people running away with an idea and then having an open meeting where the subject matter appears more of a fait accompli.

Question 16 - Planning Inspectorate to carry out Public Enquires

We would have no objection to this proposal.

Questions 17 – 19

We feel that process is too complicated.

Questions 20 - 21

No comment.

Question 22 - Active Grazier definition

The number of animals can't be included in any definition as otherwise this would excluded all small graziers; and they have an equal right to large graziers.

Question 23 - Representation

Active graziers should not have greater weighting over those rights holders that are inactive other than on issues on grazing management. All views are equally valid and it is important that active graziers are not able to dominate all decisions made through such a representation system.

Any system of weighting, needs careful consideration otherwise this could be used unscrupulously to gain voting control of the council.

Question 24

We do not agree with this proposal.

Question 25

Yes, agree.

Question 26

No comment.

Question 27

Yes, we would agree.

Question 28

We agree that subscription or contribution or changes to existing rates should only be taken at a general meeting of the council.

Question 29

Yes we would agree that a higher threshold should be required in relation to the three decisions outlined in the consultation paper.

Question 30

No. This could lead to a perception that the council is not working in a transparent way.

Questions 31 and 32

Some flexibility is needed (see our comment in the summary above).

Question 33

No comment.

Question 34

See our comments in the summary above.

Question 35

No comment.

Question 36

Grant aid should be available to help with the cost of setting up legal agreements linked to ES schemes.

Question 37

There is a view that some of these costs look rather high, but if they are taken from real situations this may well be the reality.

We would broadly agree with the assessment made in Annex E of the consultation paper.

English National Park Authorities Association (ENPAA)

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