Open Spaces Society response to *Financial Assistance Statutory Instrument*

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Introduction

0.1 This is the response of the Open Spaces Society to the consultation by Defra on the *Financial Assistance Statutory Instrument*.

0.2 Where we do not specifically address a question, we have no comment on it.

0.3 In responding to this consultation, we have been unable to address questions arising from cross compliance. At present, under the CAP schemes, agreement-holders must deliver cross compliance (including compliance with existing agricultural and environmental statutory and regulatory requirements). Defra has not disclosed to what extent, if any, a regime similar to cross compliance will be imposed on agreement-holders under ELMs. If requirements similar to cross compliance are imposed on agreement-holders (for example, if breaches of existing agricultural and environmental statutory and regulatory requirements may bring about sanctions connected with the agreement), then the arrangements in this consultation for enforcement and monitoring will be inadequate, because they do not describe an integrated regime for enforcement and monitoring both of agreement delivery and 'cross compliance', and we have not been invited to comment on how such a regime might function.

1 Do you want your responses to be confidential? If yes, please give your reason

1.1 No — this response may be published in full if desired.

2 What is your name?

2.1 Open Spaces Society.

3 What is your email address?

3.1 hugh@oss.org.uk

4 Where are you located?

4.1 Our office is located in southeast England, but we are a charity which works in England and Wales at national and, through its network of local correspondents, local, level.

5 Who are you?

5.1 The Open Spaces Society was founded in 1865 and is Britain's oldest national conservation body. It campaigns to protect common land, village greens, open spaces and public paths, and people's rights to enjoy them.

5.2 In responding to this consultation, we have a particular interest in promoting public access to the countryside through England's network of public rights of way and public rights of access, and in providing for the better management of common land to reflect the many public goods which it sustains.

6 Q.1: Background

6.1 Yes. But the consultation paper overlooks the role of MAGIC (magic.defra.gov.uk), a geographical information system, in providing information about grants. At present, where grants are given under agri-environment or forestry schemes, the extent of land under grant support is identified on MAGIC, together with outline scheme details and the grant recipient.

6.2 This medium is essential to enabling people to understand how grant support contributes to the enhancement of the natural environment. It should be retained and enhanced.

7 Q.2–Q.6: Publication of beneficiary data

7.1 The details of grants given should enable in all cases (with rare exceptions: for example, a grant for infrastructure to facilitate nesting raptors) the identification of the land and grant recipient to which the grant relates. The present abbreviation of information — by redacting the full address of the recipient — is both pointless and contrary to the public interest. It is pointless, because it is usually possible to identify the recipient from the details disclosed — for example, by further internet search, or by using MAGIC. And it is contrary to the public interest, because there is little value to knowing the approximate distribution of grants, without knowing what land benefits from the grant, in what way, and who is responsible for delivering the benefits.

7.2 The public is entitled to know how their taxes are being used to enhance the natural environment. They should also be able to support the Government in ensuring compliance with grant schemes. If members of the public identify breaches of grant schemes, they should be able to report them for further action. They have no incentive to do this if they do not know whether specific areas of land are subject to grant agreements, still less the requirements of the agreement.

7.3 Thus we submit that disclosure should include the requirements of each grant agreement, subject to rare exceptions referred to above.

7.4 As explained in section 6 above, such disclosure should include the provision of as much information as practicable on the MAGIC portal, or any evolution of it.

8 Q.7–Q.10: When will we publish?

8.1 A delay of up to one year is a long period of time during which the public will have no knowledge of land becoming subject to a grant agreement. We wish to see a more frequent cycle of updating of website databases — say every three months.

9 Q.11–Q.12: How long should we retain beneficiary data on the publicly available Defra database?

9.1 We agree that details of grant agreements should be withdrawn from disclosure after a reasonable period of time. However, this period should reflect the benefits of the agreement. For example, if grant support has been given for capital works which are intended to endure beyond the term of the agreement (such as new parking places for public use in visiting the countryside), then the requirements of the agreement should continue to be available for as long as the works are intended to endure. If necessary, the details disclosed might be modified so as to require disclosure of information only of continuing relevance.

10 Q.13–Q.15: *De Minimis*

10.1 We consider that all agreements should nevertheless be disclosed because, by definition, they give rise to public benefits. As such, their existence and contents should be made available for public inspection.

11 Q.16–Q.17: Background

11.1 An approach founded in risk-based targeting is acceptable only if, first, there is capacity to target sufficient agreement-holders to represent a credible risk of inspection, and secondly, if the sanctions for wilful non-compliance with the terms of an agreement are sufficient to act as a deterrent (taken with the risk of inspection).

11.2 We entirely support the practice of advising rather than penalising agreement-holders provided that breaches of agreements are attributable to genuine misunderstanding or mistake. But where breaches are attributable to intentional neglect, they should be sanctioned accordingly — for example, by penalty deductions (section see 15 below); in appropriate cases, by termination of the scheme and possible recovery of payments already made; and in exceptional cases, prosecution for fraud.

11.3 A monitoring and enforcement regime which relies primarily on a corrective steer whatever the breach does not promote respect among agreement-holders for compliance

with the requirements of the agreement. Put shortly, why should an agreement-holder deliver the requirements of an agreement if the worst that can happen is an unlikely compliance visit, and in that event, a reminder to do better in future? There must be a downside to deliberate non-compliance.

12 Q.18: Information and monitoring

12.1 It is not clear what is meant in this section. It is stated that checks will be carried out, *inter alia* at payment stage (presumably at least annually) to ensure 'the agreement terms and conditions are or continue to be met'. But it is also stated that site visits will be targeted and risk based. How can there be assurance that agreement terms are met without site visits?

13 Q.19–Q.20: Inspections and Powers of Entry

13.1 We do not agree with proposals on routine inspections (site visits) (Q.19). At least some visits, particularly those which are targeted because of compliance concerns, should be unannounced. Some outputs of an agreement will be capable of being delivered at short notice (and certainly where a visit is deferred by request), and it is absurd that the agreement-holder should always be given time to secure the outputs required by the agreement during that delay, where the delivery of those outputs is already overdue.

13.2 The consultation states (Q.20) that, 'where there is suspicion of a breach…we propose to have the power to carry out these inspections, where necessary, without notice'. But this will apply only where there is 'suspicion of a breach'. If all routine inspections are subject to notice, Defra will not be able to detect breaches where the agreement-holder has had time to rectify the breach before the inspection. Such rectification may be perfectly proper where it is a matter of temporary oversight — but it is quite contrary to the public interest to forgo the opportunity to catch out more serious breaches by giving the agreement-holder time to put right what was seriously wrong (for example, to halt pollution of a watercourse or cease animal welfare abuse). The only reason for 'suspicion of a breach' may arise from an unannounced inspection.

14 Q.21–Q.22: Breaches

14.1 Again, we are sceptical that it is suggested that: 'where appropriate, we would endeavour to provide the agreement-holder with an opportunity to rectify a breach before any further action is taken'. What is 'appropriate' to such cases?

14.2 We reiterate — if the usual sanction for a breach is an opportunity to put things right, there is a likelihood that a significant proportion of agreement-holders will see no reason to comply with costly elements of an agreement unless they are required to do so following an inspection. Moreover, if the likelihood of an inspection is sufficiently low (for example, if most

agreement-holders are not the subject of an inspection during the term of an agreement), there will be no assurance that the public are receiving the benefits for which they have paid.

14.3 That said, we accept that the regime should be more tolerant during the pilot implementation, provided that the level of inspection, advice and support is commensurately high to identify and address breaches.

15 Q.25–Q27: Sanctions

15.1 Unfortunately, the consultation is lacking in detail about the key elements of the regime. It is easy, and stating the obvious, to suggest that minor breaches should be capable of rectification, and that 'cases of serious or repeated breaches' should attract sanctions including withholding of payments or recovery of payments already made. But the consultation does not explain what principles will be applied to distinguish one class from the other, and thus it is pointless to comment on the approach which it is intended to apply.

15.2 It is proposed that there should be no additional administrative penalties for breaches of agreements. However, consider for example an agreement in its first year. An inspection is made towards the end of the first year, and the agreement-holder is found to be in serious default of delivery. No grant payments have yet been disbursed, so there is nothing to recover. The withholding of payments (or termination of the agreement) is very likely if the agreement-holder does not take immediate action to comply with the agreement, but this is no real sanction on an agreement-holder who has done little to deliver the agreement. The evidence for fraud is slight, and the likelihood of prosecution zero. In these circumstances, only the possibility of additional administrative penalties, which impose an actual cost on the agreement-holder, are likely to deter the non-compliance.

15.3 Consider alternatively an agreement in its fifth year. An inspection is made and there is evidence of substantial non-compliance throughout the term of the agreement to date. Four years of grant payments have been disbursed. Again, the evidence for fraud is slight, and the likelihood of prosecution zero. In these circumstances, it seems that the worst the agreement-holder faces is the return of payments already made, but where the agreement-holder has incurred few expenses.

15.4 In both these examples, the agreement-holder, if detected and enforced against as seriously non-compliant, will be little or no worse off following the application of sanctions than if the agreement had not been entered into. That is hardly a deterrent, particularly where the agreement-holder has incurred few costs. But, as we have discussed, the risk of inspection is so low that detection is itself unlikely.

15.5 It is not a promising basis on which to deter serious abuse by a minority if the risk of detection is slight, and the worst penalties for non-compliance are no more than the deprivation of monies paid which were not deserved in the first place.

16 Q.28–Q.31: Appeals

16.1 We consider that the appeals process should be administratively modest and efficient. Appeals should, where appropriate, be determined by independent persons advised by a legally-qualified clerk. By 'independent', we do not mean peer farmers and land managers (and indeed persons who may also be agreement-holders), but persons who are independent of the agricultural and land management sector. There is no reason why Ministers should be involved in determining appeals: there is no wider precedent for Ministerial engagement in individual personal cases other than in the existing CAP appeals process. We note, for example, that Ministers have not 'called in' a determination for personal decision on a public path order or an application made under Part 1 of the Commons Act 2006 in the last fifteen years, yet decisions on such matters are made weekly in the name of the Secretary of State. Conversely, Ministers personally make decisions on agricultural appeals sometimes involving trivial amounts. There is no logical explanation for this disparity in Ministers' personal attention to casework, and we suggest that it should cease, so that Ministers instead confer the function of determining appeals on the decision of an independent but properly advised persons — much as they do at present in relation to other casework.

Hugh Craddock for
Open Spaces Society
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