

PROPOSED SOUTH DOWNS NATIONAL PARK

RE-OPENED INQUIRY

CLOSING SUBMISSIONS ON BEHALF OF WEST SUSSEX COUNTY COUNCIL

INTRODUCTION

1. These submissions address all of the topics considered at the re-opened inquiry. Topics 1, 2 and 6 are most conveniently covered together, for much of the evidence submitted and heard at the reconvened inquiry is relevant to the effect of NERC and of the Meyrick decision and to the principle of excluding the western Weald from any SDNP. Topic 3 can be dealt with discretely as it relates to more specific boundary-setting considerations, on the assumption that the western Weald has been omitted. Topics 4 and 5 are considered briefly at the end.
2. Much of the evidence before this session of the inquiry has been provided by those who call for the Inspector to resile from his clear conclusions as to why the western Weald should not form part of a SDNP. That evidence has been characterised by misconceived attempts to use changes in the law to justify changes in judgment, or to attack judgments which the Inspector was entitled to reach. It is predicated on an unspoken and unjustified criticism that the Inspector did not properly consider the merits of including the western Weald and should therefore admit as much to the Secretary of State. However, none of the new evidence submitted by any party alters what was there to be seen on the ground when the Inspector wrote his report, and nothing has changed on the ground since then.

The evidence does not materially add to the information that was before the inquiry at the previous session and taken into account by the Inspector. It fails to recognise how a SDNP including the Weald would weaken the important distinction between National Parks and AONBs. We explain why below, under topics 1, 2 and 6 in particular.

TOPICS 1, 2 AND 6

Natural beauty

Characteristic natural beauty

3. NE and others argue that a requirement for “characteristic natural beauty” was not part of the “natural beauty” test in s. 5(2)(a) before NERC; and that any view to that effect has been overtaken by NERC.¹

Effect of NERC

4. It is wholly wrong to argue that the New Forest decision, which endorsed the need to look for characteristic natural beauty, has been “overtaken by the changes introduced by the NERC Act”,² and that it should not even be “influential”.³ Here NE is wrongly trying to use NERC to airbrush history and resolve a fundamental problem with its case.
5. Any sensible reading of NERC reveals that the legislation cannot possibly have had any effect on a conclusion that “characteristic natural beauty” was required for land to be designated as a National Park.
6. NERC now requires wildlife and cultural heritage to be taken into account when assessing whether land meets the natural beauty criterion.⁴ The legislation also provides that if land is used for agriculture or woodlands, or as a park, or is otherwise partly the

¹ See the NE submissions on Topics 1 and 2, pp. 4-11, para.s 12-36.

² Para. 32.

³ NE Closing submissions para. 103.

⁴ S. 59(1).

product of human intervention, this does not prevent it from being treated as being an area of natural beauty.⁵ It does not provide an exhaustive definition of what ‘natural beauty’ means.

7. None of the changes can be read so as to displace any requirement that the land exhibits “characteristic natural beauty”. Even if land were brought into a proposed National Park taking account of its wildlife or cultural heritage, or where it had to a degree been influenced by man, those considerations would not speak at all to any test of whether the land possessed “characteristic natural beauty” across its extensive tract.
8. Put another way, the task of looking for a “distinctive, coherent identity” for a National Park would not disappear simply because land was included based, in part, on a judgment of its wildlife and heritage value and notwithstanding that it had been affected by human activity.
9. In so far as NE might suggest that the explicit inclusion of that test in the Scottish legislation supports the view that it was excluded from the legislation applicable south of the border, this simply does not follow. It can equally be said that the Scottish legislation, which requires National Parks to have a “distinctive character and coherent identity,”⁶ makes explicit what is implicit in the legislation applicable to this case.
10. NE also relies upon the absence of any reference to “characteristic natural beauty” in the debates on the NERC Bill to mean that the government was seeking to continue previous policies which did not require it. The simple answer is that if the debates demonstrate an intention to return the criteria to where the *government* thought they were before Meyrick,⁷ that would involve “returning” to an approach to National Park designation which the *government* endorsed following the New Forest decision and which clearly required that land within the boundary exhibits a characteristic natural beauty.

⁵ S. 99.

⁶ See 1330/0/8 p. 5 para. 14 and p. 10 para. 28.

⁷ See Hansard 27 February 2006 column 85; 20 March 2006, column 53.

11. NE and others are therefore driven to claiming that the Assessor and Inspector were wrong to rely on the Dartmoor and New Forest decisions when finding that land in any SDNP should share characteristic natural beauty.⁸ This argument is nearly as surprising as the first in that it completely ignores the unqualified support from the Secretary of State for the approach taken by the Inspectors in those cases. NE have clearly failed to learn the lessons from those cases, particularly the New Forest decision. The Inspector and Secretary of State may not be bound in law by that decision,⁹ but both will be aware of the need for consistency in decision-making, particularly bearing in mind the relative infrequency with which decisions are taken on National Park designation and the short period of time between that decision and this one.

12. The Assessor to the New Forest inquiry identified the approach taken from Dower (who identified “characteristic landscape beauty” as a defining element of National Parks) and from the Dartmoor Inspector (who accepted the view expressed by the Countryside Commission that the critical test for boundary-making was whether the landscape was of both Dartmoor character and national quality).¹⁰ The Inspector agreed with this approach¹¹ and so did the Secretary of State.¹²

13. Following the New Forest decision which, contrary to the NE submissions,¹³ excluded the Avon Valley from the National Park on grounds which related to the absence of “characteristic natural beauty”,¹⁴ NE was not heard to complain about the approach, still less seen to challenge the exclusion on those grounds. It beggars belief that in their closing submissions they now say that “even NE recognised the doubts about its natural

⁸ NE submissions on topics 1 and 2 pp. 10-11 para.s 30-6.

⁹ See the NE closing submissions para. 103.

¹⁰ See the Assessor’s report Annex A pp. 49-50 para.s 6.17 and 6.19 and pp. 52-3 para. 6.27; see too WSCC and CDC Closing submissions on the Downs area para.s 28-34.

¹¹ Closing submissions on the Downs area para. 31.

¹² Closing submissions on the Downs area para. 26.

¹³ NE closing submissions para. 105.

¹⁴ See Assessor’s report Annex A p. 53 para. 6.29; WSCC and CDC Closing submissions on the Downs para. 30. and see CD 204 Appendix 1 paragraph 3.15 and 5.321 quoted at 1881/2698/1/10, 2.3.2 and 2.4.2

beauty at the time”¹⁵ when they were promoting that land as part of the National Park and made a designation order to that effect. And they ask the Inspector to rely on their judgments. Further, it can hardly say credibly to the Secretary of State now that an unlawful decision was taken, whatever internal discussions took place behind closed doors that were not considered worthy of any airing in public.¹⁶ As is evident from the Inspector’s report in this case, the approach of the Secretary of State was clear and unambiguous and nothing since then can be taken to alter it (including NERC, for the reasons given above). At the last session of the inquiry, the Agency tried to wave away the New Forest decision on the basis that it simply turned on its own facts, however that argument was rejected by the Inspector and it should similarly be rejected now. As the Inspector has already concluded, that decision set out principles of approach which ought to be applied to National Park designation generally. After their closing submissions on Topic 6 NE have submitted a so-called “Factual Paper” on the New Forest. We respond to that paper by way of the attached WSCC rebuttal and ask the Inspector to read those two documents together.

14. In that New Forest decision the Secretary of State clearly endorsed the Countryside Agency and now English Nature policy set out on the 16th March 2000¹⁷. That policy may be summarised in this way. National Parks are likely to be derived from AONBs and the distinguishing features would be that a National Park should have “qualities” (i.e. qualities of the landscape) which provided a markedly superior recreational experience and be an area where a sense of relative wildness would be an important factor. The Secretary of State clearly did not however endorse or adopt the CA approach to defining boundaries for National Parks set out in (old) CD83 and in particular did not endorse criterion 2 b which allowed for the inclusion of differing landscape character. In endorsing the Assessor’s approach and the Inspector’s reasoning in the New Forest which included areas of New Forest character but excluded downland and river valley which did not share that character, the Secretary of State directly rejected criterion 2 b in the CA/NE

¹⁵ Para. 105.

¹⁶ Farmer XX.

¹⁷ CD46.

approach. That criterion was not based on the original Hobhouse criteria as NE submits in its closing submissions¹⁸ and indeed the CA expressly identified it as a “new” criterion¹⁹ NERC certainly does not enshrine that approach or that criterion within it as now suggested for the first time by NE in their closing submissions.²⁰

15. The contention that the Dartmoor decision was intended to apply only to “boundary-making” seeks to introduce a distinction without a difference between that case and those that have followed it. Even if that decision concerned a variation order, and not a designation order, it would be absurd for a different approach to be taken depending on the type of order under consideration, when the issue is simply whether the land in question meets the statutory criteria. If it is decided that a core area of an extensive tract is worthy of National Park status, then the question is whether a boundary which includes other land allows the Park to possess a characteristic natural beauty and distinctive identity of its own. That principle lies at the heart of the approach taken in the Dartmoor and New Forest decisions and the Inspector here was right to follow it.

16. NE then argues that requiring characteristic natural beauty “subverts the intention of the legislation” by materially departing from the plain language of the phrase “natural beauty” in s. 5(2)(a) of the 1949 Act.²¹

17. Of course it is unlawful to apply tests that are materially different from those contained in statute. However that does not obviate or remove the need first to understand what “the intentions of the legislation” are and to interpret what the words in any statutory test actually mean.

18. The task of defining what “natural beauty” means was not one that the 1949 Act, or NERC, sought to carry out exhaustively. It is entirely proper therefore to consider what approach to the criterion fits with the intention behind the legislation.

¹⁸ Para. 9.

¹⁹ CD44 CA Board 13/07/00 Annex 2 italic note to criterion 2b.

²⁰ Para. 14.

²¹ NE submissions on topics 1 and 2, pp. 9-10 para.s 26-8.

19. We say that the legislation cannot have intended to produce anything other than a National Park which had an individual and coherent identity and was therefore recognisable as such. The legislation implies that it is the natural beauty of an “extensive tract,” conceived as a distinct whole, which makes it desirable to designate, in order that the National Park purpose of conserving and enhancing the natural beauty of that “area,” conceived as a distinct whole, can be fulfilled. This is clearly what Dower envisaged and it is what the Secretary of State has regarded as the right approach.
20. The Assessor and the Inspector were therefore entitled to adopt the same approach to the natural beauty criterion as the Secretary of State had adopted on these two previous occasions that land was designated as a National Park. Reading their conclusions as a whole, it is clear that they did not depend upon the inclusion of the word “character” in s. 5(2)(b) of the 1949 Act. Nor is there any indication that there was any confusion with Scottish National Parks legislation which requires a “distinctive character and coherent identity”.²² It is unfair to suggest as much when it is evident that the competing arguments on this issue were properly analysed and that the Assessor and Inspector were evidently applying the legislation applicable in England and Wales.²³ Their approach stems from a proper reading of what the legislation is trying to create.
21. In their own guidance on landscape assessment the Countryside Commission, the Agency now NE have consistently seen factors akin to “characteristic natural beauty” as important criteria in evaluating landscapes for designation. The Countryside Commission’s 1993 Landscape Assessment Guidance refers to a designated area having a “sense of place – it should have a distinctive and common character, including topographic and visual unity and a clear sense of place”. The Interim Landscape Character Assessment Guidance issued jointly by the Countryside Agency and Scottish Natural Heritage in 1999 similarly identified as a criterion for designation “landscape quality – the extent to which the character of an area is expressed, in terms of presence of

²² See 1330/0/8 p. 5 para. 14 and p. 10 para. 28.

²³ See Part 2 pp. 25-8 para.s 2.26-2.35; Annex A, pp. 49-53 para.s 6.17-6.32.

key characteristics...”. The final guidance issued by these bodies in 2002 sets out criteria which can be used “either individually or in combination” to define nationally important areas. They included “representativeness- whether the landscape has a particular character and/or contains features and elements felt by stakeholders to be worth representing”.²⁴

22. The Agency’s board paper of February 2000 also contains a checklist for use when applying the statutory criteria, which included “Natural beauty – quality of landscape, brought about through: distinctiveness and local character” [emphasis added].

23. However desperately NE tries to distance itself from these words,²⁵ on any sensible reading they indicate that a consistency of character is regarded as important to the designation process. They underline the proper approach to looking for characteristic natural beauty, as set out in the New Forest decision, which had similar guidance before it.

Conclusions on characteristic natural beauty

24. It is hardly surprising therefore that the Inspector concluded that the weight of analysis suggested it was appropriate to look for characteristic natural beauty. The Secretary of State had endorsed that approach and the Agency had identified it as a criterion for inclusion in its own landscape assessment guidance. It has never suggested that a consideration of the natural beauty criterion which applied that guidance would be defective in law.

25. The approach that Natural England are now commending is inconsistent with the intent of the legislation, inconsistent with their own guidance and inconsistent with the clear approach adopted by the Secretary of State before NERC. The later enactment of NERC

²⁴ See Assessor’s report Annex A pp. 31-34 para.s 4.9, 4.14 and 4.17.

²⁵ See closing submissions para.s 98-101.

cannot, on any reasonable analysis, have any legal effect on the proper application of the natural beauty criterion in terms of characteristic natural beauty.

26. Those arguing against the Inspector's recommendations ultimately tell him now to disregard the clear findings of the Secretary of State on two previous occasions, on the basis that they are not binding on him. But how can they realistically expect this, when the Secretary of State has endorsed the very approach that the Inspector adopted, in the most recent decision on National Park designation in this country? If consistency of decision-making is to mean anything, it seems absurd to suggest that characteristic natural beauty is somehow deleted from the decision-making that must on any view inform this case.

Unifying links

27. At the last session of the inquiry, the Council's approach to characteristic natural beauty was set against the Agency's reliance upon unifying links to justify the inclusion of the western Weald. Since then the concept of unifying links now seems to have been consigned, as quietly as possible, to the NE dustbin.

28. In their legal submissions on topics 1 and 2 NE now claims that the importance of unifying links only arose as a result of the debate on characteristic natural beauty and that the presence or absence of unifying links does not affect the decision as to whether land meets the statutory criterion.²⁶

29. However contrast this with the evidence of the Agency in March 2002 before the last session of the inquiry: "*a key aspect of the application of the criteria for designation is that there will be 'unifying factors' between the landscape character areas to be brought into the National Park*".²⁷

²⁶ P. 12 para.s 37-41.

²⁷ CD49 para. 3.2.

30. Position Paper 2, prepared in July 2003, again before the inquiry began, said this:

43. In the South Downs, the Countryside Agency agreed at the Area of Search stage of the boundary setting process that the overall character of the South Downs is more than just the chalk landscapes, although the chalk downs are generally considered to be the “essence” of the South Downs. All of the non-chalk landscape character areas included in the area of search have unifying factors to the “core” area of the chalk downs, which include geological, historical, land-use, cultural and visual links. The inclusion of a non-chalk landscape character area is dependent on not only the statutory criteria, but also that it has demonstrable unifying links with the chalk downs. Where there are visual links to the chalk downs an area may ‘borrow character’ from the chalk. The extent to which ‘borrowed character’ is influential in decision making is dependant often on proximity of the area to the chalk downs. If a landscape character area has weak unifying links with the chalk escarpment for example then it has by definition weak associations with the South Downs. Such an area may have attractive, or even outstanding, natural beauty and may also offer opportunities for open air recreation; but it would not merit inclusion within a South Downs National Park boundary because it is not unified with the core ‘essence’ of the South Downs landscape type [emphasis added]

31. It now appears to have struck NE that even if it were right to reject any requirement of characteristic natural beauty, its own approach to designation created a rod for its own back by introducing another test which required that the non-Downs landscapes are nonetheless linked in a unifying way with the core chalk landscapes.

32. This causes it to argue that at the last session of the inquiry it only ever regarded the presence of unifying links as a “relevant consideration” and that now the presence or absence of such links “will not affect the decision as to whether land meets the statutory criteria for designation”. This is clearly not what its own evidence said at the time.

33. The Council has always been critical of both the concept of unifying links and the absence of any evidence which justified the inclusion of land in the SDNP on the basis of that concept. NE now appears to be arguing that the concept is immaterial and we have no reason to disagree that it should be discarded. In yet another example of a complete change of case by NE it now says in its closing submissions that “NE agrees that the presence or absence of unifying links between areas of land should not affect the decision as to whether those areas meet the statutory definition for National Park land.”²⁸ They were telling the Inspector at the last session of the inquiry that inclusion of the Weald was “dependent” on the unifying links with the Downs being established. The inconsistency is breathtaking.

Relative wildness

34. NE contends that in seeking openness, relative wildness, remoteness and an ability to get away from it all in the proposed SDNP, the Inspector applied the statutory criteria “in a way which materially alters their requirements” and introduced a test which “has no basis in law”.²⁹ It also argues that aspects of this approach fail to accord with government or NE policy.³⁰

35. We deal with this argument later primarily by reference to the recreation criterion, but explain here its conjunction with the natural beauty criterion. It is to be recognised at the outset that this issue is entirely freestanding of the debate on characteristic natural beauty. Further, even if these hallmark qualities were not considered relevant to the application of the natural beauty criterion, for reasons that we explain later the absence of these qualities from the western Weald would be sufficient to justify its exclusion under the recreation criterion alone.

²⁸ NE Closing submissions para 110.

²⁹ See 1330/0/8 p. 13 para. 44; see generally pp. 4-9 para.s 14, 16, 17, 20-3, pp. 13-15 para.s 42-51.

³⁰ See NE Closing submissions para.s 3-11, 36, 67-76.

36. NE's fundamental point is that in law the natural beauty test for National Park designation is the same as that for AONB designation, and that neither test imports a requirement for any particular *type* of natural beauty.³¹
37. However this ignores the relationship between the two criteria for National Park designation and seeks to apply them without reference to each other. We say that this is inconsistent with the scheme of the legislation and with the concession that NE itself makes about the approach to the criteria for designation. We deal with each point in turn.
38. True it is that both a National Park³² and an AONB³³ must have natural beauty (although an AONB's natural beauty must be outstanding). However a National Park (and not an AONB) must also afford opportunities for open-air recreation, having regard to matters including the "character" (and "special qualities") of the extensive tract.³⁴ The character of the tract must do something to produce the recreational experience of a National Park that sets it apart from other countryside, including AONBs. If, as we explain below, that means looking for relative wildness, remoteness, openness and a sense of getting away from it all, this must in turn affect the way that the natural beauty criterion for National Park designation is approached, in contradistinction to the different search for outstanding natural beauty when designating an AONB. Looking for those characteristics under the recreation criterion inevitably produces a search for a particular form of natural beauty. It does not matter that the legislation does not say so expressly. This is an exercise in applying only a partial statutory definition of the term 'natural beauty' in a manner that is consistent with the broad intention of Parliament to maintain the distinction between National Parks and AONBs.
39. NE concede that there is at the very least a "strong relationship"³⁵ between the recreation and natural beauty criteria, in that recreational experiences of National Park quality are

³¹ See NE Closing submissions para.s 61-6.

³² 1949 Act, s. 5(2)(a).

³³ Countryside and Rights of Way Act 2000, s. 82.

³⁴ 1949 Act, s. 5(2)(b) and 5(2A)(b).

³⁵ Farmer xx.

derived from the character and quality of the donor landscape.³⁶ That concession reveals the error in NE's argument. Once this relationship between the two is accepted, it is difficult to avoid the conclusion that the type of natural beauty sought in National Park designation must be influenced by the type or character of land which can afford the necessary recreational experience.

40. It therefore becomes clear that the legislation does not anticipate that *any* form of natural beauty would satisfy the natural beauty criterion. If, as all parties accept, the two criteria are closely related, then the hallmark characteristics of the extensive tract which provide the opportunities for recreation (and which we address below) are also critical to the satisfaction of the natural beauty criterion.

41. This has been confirmed by NE's latest approach to reviewing areas proposed for the extension of the Yorkshire Dales and Lake District National Parks.³⁷ The evaluation framework for the review refers to the natural beauty criterion as including "relative wildness" and within it a sense of "remoteness", "openness or exposure" and "the passing of time or return to nature", along with a "relative lack of human influence." Tranquillity is another factor, defined as "evidence of apparent openness and perceived naturalness in the landscape".³⁸ The framework for evaluating the recreation criterion then refers to "good access to areas that pass the tests for natural beauty" and "opportunities to enjoy tranquillity and relative wildness."³⁹ The connection between the two criteria is clear.

42. These documents came after the Meyrick litigation and after NERC and NE does not suggest that they are not setting out a valid approach because of that litigation and legislation. The approach advanced in those documents is effectively the same as that used by the Assessor and by the Inspector here in the South Downs and the Weald and which we say is the right approach. These documents also give the lie to the suggestions

³⁶ See too new CD 36 para. 4.3.7.

³⁷ New CD34.

³⁸ Table 2.

³⁹ Ibid.

in the NE closing submissions⁴⁰ that Ms Hankinson is adopting an out of date approach inconsistent with the legislation. Her approach is the approach in these documents being used now by NE in seeking to designate new areas of national Park in the North-West.

43. It is all the more strange then for NE in its closing submissions to suggest that the characteristics which the Assessor, the Inspector and Mrs Hankinson see as important to identifying land as worthy of National Park designation – and which are listed in paragraph 65 of its closing submissions – are not important factors when these very characteristics are included almost word for word by NE itself in its “Tests for natural Beauty” and “Evaluation of opportunities for open air recreation” being used now in evaluating land for National Park extensions in the North-West of England.⁴¹ Without these being characteristics of National Parks then there really is no difference between National Parks and AONBs. That cannot be right. The Government recognises the distinction. Lord Bach in the debates on NERC clearly distinguished between the way the natural beauty criterion had been applied in designating National Parks and AONBs.⁴² Their landscape qualities may be “equivalent” as Nick Raynsford MP said in June 2000⁴³ in that they are of equal value but that does not mean they are of the same type.

44. We return later, when considering the recreation criterion, to why the Inspector was right to look for the hallmark National Park qualities in the Weald and why he was right not to find them.

Wildlife and cultural heritage

45. It is acknowledged that NERC now supersedes the Council’s position at the last session of the inquiry in that wildlife and cultural heritage are to be taken into account when applying the natural beauty criterion.

⁴⁰ Para.s 35 -37.

⁴¹ See new CD37 para.s 3.5.8 – 3.5.14 and new CD34 Table 2.

⁴² See 1007/2/3 para. 2.4.23.

⁴³ NE Closing Submissions para 50

46. This does not change the Council’s case at all. Ms Hankinson argued that cultural heritage should not be brought into account but, contrary to the NE submissions,⁴⁴ in her evidence she did assess it for the purposes of applying the Agency’s guidance⁴⁵. She explained this in her evidence on topics 1 and 2 and that assessment rightly made no difference to her view that the requisite characteristic natural beauty was nonetheless absent outside the Downs landscapes, where the hallmark qualities of National Parks were not evident. It is incorrect therefore for NE to have suggested⁴⁶ that her conclusions should be disregarded.
47. More importantly, wildlife and cultural heritage were clearly taken into account by the Inspector.⁴⁷ Evidence on the cultural links between the Downs and the Weald, including the settlement of Petersfield, was clearly considered, but not regarded as persuasive.⁴⁸ Information on the locations of historic parks and gardens and sites of wildlife importance was before the last session of the inquiry and no-one has suggested that this was not taken into account.⁴⁹ All this evidence was presented in similar forms in both sessions of the inquiry.
48. None of the other evidence justifies a change in approach to the western Weald. The historic landscape assessment provided by Hampshire County Council reveals the “time depth” of the landscape and the degree to which it remains in good condition. However, the same time depth would appear on an analysis of any part of the country and the intact nature of the western Weald is in fact a feature of the Weald more generally, beyond any suggested boundary of the proposed SDNP. In fact if historic landscape assessment were regarded as an important factor, it would count against the designation of the Downs landscapes, as the Hampshire maps indicate.
49. Evidence of the farmstead resource in the excluded part of the Weald applies just as much to the rest of the Weald outside the proposed SDNP and offers no assistance to the

⁴⁴ NE Closing submissions para. 53.

⁴⁵ See 1007/2/3 2.5.3.

⁴⁶ Submissions on topics 1 and 2.

⁴⁷ IR Part 1 para. 3.30; see AR para. 6.55.

⁴⁸ IR Part 2 para. 2.50.

⁴⁹ See the plans at old CD36 and old CD49; see too Moira Hankinson in principle evidence plan HDA 5.

Inspector in deciding what land should be included within the boundary of any SDNP. The HCC evidence demonstrated that the “historic farmstead resource” was strongest in the High Weald AONB and weakest in the New Forest and the South Downs⁵⁰ and that the least historic landscapes were those of the Downs⁵¹. There is clearly minimal correlation between the cultural heritage resource and natural beauty leading to National Park designation.

50. The same could be said of the archaeology and geology of the Weald, both of which are described as rare or valuable by Hampshire. In fact, the archaeological resource of the Weald will be replicated in many instances in lowland England. As the Council explained at the last session of the inquiry, the geological feature of the greensand is repeated outside the proposed Downs and does not of itself assist in determining a boundary for any SDNP. This was accepted by the Inspector and there is no reason to change that view now.

51. Similarly, the biodiversity interest in the western Weald continues beyond the proposed SDNP and if there were to be a correlation between nature conservation interest and satisfaction of the natural beauty criterion, anywhere with a collection of SSSIs or an area with a suite of designations (such as Chichester Harbour) would qualify. This cannot be what is meant by taking wildlife factors into account when applying the natural beauty criterion.

52. Hampshire seeks to sidestep some of these points by arguing that the continuation outside the proposed SDNP of wildlife and cultural heritage features of the western Weald is irrelevant: as long as the land within the designated area meets the test that is the end of the matter. But if the task of the inquiry is to define land that justifies National Park status in a way that allows it to be meaningfully distinguished from land outside the boundary, how can any feature of the western Weald that also appears further afield be a reliable trigger for conferring that status?

⁵⁰ 1969/2/10 p.44.

⁵¹ 1969/2/10 p.41.

53. However in reality it is unnecessary to answer that question, for considerations of wildlife and heritage should not on any analysis affect the decision on whether to include the western Weald in any SDNP. If, as we say, the Inspector was entitled to attach particular weight in his judgment to the absence of sufficient relative wildness or sense of getting away from it all in the Weald, none of the evidence on the cultural or wildlife heritage of the Weald could alter that view. The Inspector did not recommend the exclusion of the Weald on the grounds that it possesses insufficient wildlife or cultural heritage. His conclusions were based on different considerations that remain undisturbed by the wildlife and cultural interest of the western Weald.
54. Thus if the Inspector remains of the view that the western Weald should but does not possess relative wildness and an ability to get away from it all, and so fails the recreation criterion, no amount of evidence relating to wildlife and cultural heritage under the natural beauty criterion will assist. Both criteria have to be met to justify designation. Similarly, if the Inspector considers that the approach we commend to the recreation criterion then inevitably affects the type of natural beauty that is to be found in a National Park, the western Weald would fail on that count too irrespective of the wildlife and cultural heritage value of that area. Hampshire eventually appeared to accept as much. For the reasons set out in these submissions, the Inspector ought to follow this approach. The evidence at this session of the inquiry on the wildlife and cultural heritage of the western Weald should not therefore alter the previous findings of the Inspector.

Conclusions on natural beauty

55. The approach of NE and others to the natural beauty criterion fails to acknowledge the findings of the Secretary of State in the New Forest on the need for characteristic natural beauty. It fails to understand the need for a particular type of natural beauty in National Parks when the relationship between the two statutory criteria is properly examined. It was rightly rejected by the Inspector.

Recreation

Relative wildness and an ability to get away from it all

56. There is no basis for NE's assertion that seeking openness, wildness, remoteness and an ability to get away from it all introduces a test which has no basis in law or policy.⁵² Similarly it is wrong to argue that, even if there were such a requirement, NERC removed it. We say so for the following reasons. Again it is instructive to distinguish between the pre-NERC and post-NERC positions.

Pre-NERC

57. First, the NE case is fundamentally inconsistent with its own policy (which NE has never suggested to be inconsistent with the statutory criteria), the guidance issued by the Secretary of State (which it has never suggested to be unlawful) and its own evidence to this inquiry.

58. Following correspondence with Michael Meacher, the Agency's policy on including land in a National Park was introduced and stated, before NERC, that "whilst the countryside need not be rugged and open, a sense of relative wildness would be important".⁵³ However before NERC the government's Circular 12/96 advised that when identifying the special qualities of National Parks "*particular emphasis should be placed on identifying those qualities associated with their wide open spaces, and the wildness and tranquility which are to be found within them*".⁵⁴ NE conveniently sidesteps the clear evidence that this guidance was relied upon by the Agency in considering whether land met the recreation criterion.⁵⁵ It is right that this advice is addressed to national park authorities and deals primarily with management but clearly the advice is predicated on National Parks containing wildness and tranquility and that those qualities are particularly emphasized. It would be strange then if a National Park or a significant area of it did not sufficiently contain those qualities – as the Inspector here found was the case

⁵² See now in particular NE Closing submissions para.s 3-11, 62, 67-81.

⁵³ Assessor's report Annex A p. 13 para. 2.7.

⁵⁴ Assessor's report Annex A p. 7 para.s 1.19-20.

⁵⁵ Position Paper 1; old CD 69.

with the Weald.⁵⁶ Despite the government being aware that NE was reviewing its policy, it has not chosen to change the advice in the Circular and it is right to apply it. It must be treated as extant policy until we are told otherwise.

59. NE says that these qualities are just factors to be taken into account and are not pre-requisites to designation. However if relative wildness is “important” and openness and tranquillity are to be given “particular emphasis” (as NE and others have accepted in evidence),⁵⁷ it is difficult to see how a relative absence of these qualities can nonetheless allow for an extensive tract to become a National Park, even applying the NE policy.

60. Secondly, as we mention above, NE ignore both the intention behind the legislation, in particular the need to differentiate between National Parks and AONBs, and the close link between the statutory criteria.

61. The recreational opportunities afforded by National Parks are intended to distinguish the Parks from other countryside, including AONBs. Those opportunities will emerge from the “character” of the extensive tract.⁵⁸ If the recreational opportunities in the Parks are to be different from those of other countryside, including AONBs, the “character” of the extensive tract that offers those opportunities must be distinguished from that of other countryside, including AONBs.

62. The distinguishing characteristics have clearly been the presence in National Parks of “relatively wild country,” as Dower first put it,⁵⁹ or as the Edwards report found “an element of wildness and a perception of remoteness,”⁶⁰ a “sense of wildness” and “opportunities to get away from it all” in scenery with “striking quality and remoteness”.⁶¹ These commonly understood features found their way first into Circular 12/96 and even the policy of the Agency, which NE continues to support (*NE Closing*

⁵⁶ IR Part 2 paragraphs 2.39-40.

⁵⁷ Farmer and Carman xx.

⁵⁸ 1949 Act, s. 5(2)(b).

⁵⁹ See the Assessor’s report Annex A p. 3 para.s 1.2-3.

⁶⁰ Assessor’s report Annex A p. 10 para. 1.31.

⁶¹ Assessor’s report Annex A p. 6 para. 1.15.

1330/0/29 at para 11) , which binds no-one, still regards relative wildness as important. The Agency Board paper of 1999 recognised that the distinguishing feature of the Parks had always been the ability to take long walks in wild scenery with a sense of true remoteness. It accepted that the enjoyment of long walks in other countryside can still be great, but that these opportunities are readily available in AONBs.⁶²

63. It is right of course that these are not statements of the courts; nor do they appear explicitly in the wording of the legislation any more than the words “relative wildness” do. However the legislation must be interpreted and applied consistently with the intentions of Parliament. These statements acknowledge that for the recreation criterion to be meaningfully applied in a way which expresses the intended legislative distinction between National Parks and other countryside including AONBs, the nature of the recreational experience in the Parks must be different.

64. The need for a comparative approach is obvious. NE state that the test of recreational quality is not comparative, but in the next breath accept that the test is to be carried out “by reference” to the countryside of England.⁶³ Even the rather obvious policy stipulation of NE that there be a “markedly superior recreational experience” acknowledges the comparative approach that is required. The difference between National Parks and AONBs is best and lawfully expressed by ensuring that the Parks exhibit the very characteristics that have been their hallmarks, because they indicate how National Parks can offer more than one might reasonably expect from recreational visits to tracts of other countryside including AONBs.

65. The validity of the approach which looks for the hallmark qualities is underlined by the evidence before the Inspector on the availability of access to rights of way and open access land. These forms of access exist in plentiful supply across the country, including AONBs and the land beyond the proposed SDNP boundary. Relying simply on the ability to so access land which is simply described as naturally beautiful land or of high

⁶² Assessor’s report Annex A p. 48 para. 6.12.

⁶³ NE Closing submissions para. 118.

landscape quality does nothing to assist in maintaining the distinction between AONBs and National Parks. On that approach every AONB would meet the recreation criterion. Rather than looking at statistical measures relating to access, the important task is to identify land which has a character from which emerge recreational experiences that can be distinguished from those capable of being found in AONBs. As Hampshire acknowledges, the “critical” task is to examine whether the hallmark National Park qualities are present. That is exactly what the Inspector sought to do and he was right to do so.

66. NE is right – if inelegant - to say in their closing submissions that “the assessment is experiential not merely quantitative...it is the quality of the experience that counts.”⁶⁴ That is what Mrs Hankinson was getting at in oral evidence when she said that the density of the footpath network was not the critical consideration – as was obvious to everyone who heard the evidence and despite NE’s attempts to misrepresent what she was saying in their closing submissions.⁶⁵ NE tries to water down its own policy that a sense of relative wildness would be important in designation by saying that it need only be a sense and not an actuality⁶⁶ and it provides no attempt to identify how or why the quality of the experience in a National Park ought to be distinguished from that offered by an AONB.

67. But of course it is the experience of relative wildness that is important as the Inspector rightly concluded in his report where he recommended the exclusion of the Weald. He rightly found that a “key characteristic of National Parks is their ability to provide opportunities for quiet outdoor recreation in an extensive tract of land having a sense of relative wildness”. He found that the core chalk hills have that ability and he and the assessor agreed that the Weald does not come close to matching that ability to get away from it all⁶⁷. NE in its closing submissions appears to accept that that was the right

⁶⁴ NE Closing submissions para. 117.

⁶⁵ At para. 120.

⁶⁶ NE Closing submissions at para. 70.

⁶⁷ IR Part 2 para. 2.39.

question the Inspector was asking himself. It says “the markedly superior recreational experience comes from being able to get deep into the countryside and close to nature, to experience the landscape and its cultural heritage and wildlife, and to get away from it all.”⁶⁸

68. The Assessor and Inspector looked for that experience by going out and becoming familiar with the areas under consideration and found that ability to get away from it all in the Downs but the Weald did not come close to matching that experience. NE seems to accept that the Inspector’s approach to this fundamental question was right. The Downs have not changed; the Weald has not changed. The experiences they offer have not changed. The Inspector should come to the same answer.

69. We should perhaps make clear that the Council have not rejected the Assessor’s “position” in his report as NE claim in its closing submissions.⁶⁹ Our differences with him relate only to judgments as to the quality of particular areas of the Weald. His approach was correct but in any event it is clear from a proper reading of the Inspector’s Report, as he well knows of course, that he came to independent judgments on the key issues notably the sense of relative wildness and the ability to get away from it all. Even NE accept in their closing submissions⁷⁰ that the Inspector “rightly decided that there was a need to look afresh at how National Parks had previously been designated “in the light of 21st Century needs and demands and pressures of modern day living”. They acknowledge that he “was also right to say that a ‘departure from the perceived ‘wild, rugged and remote characteristics’ of National Parks historically designated would be appropriate and that there was nothing in the legislation that rules out a National Park containing gentler landscapes and that ‘new National Parks are likely to be less wild, rugged, remote and tranquil than their predecessors’. With all this in mind the Inspector went on to apply the important consideration of the sense of relative wildness and the ability to get away from it all and recommended that the Weald should not be included. It

⁶⁸ NE Closing submissions para 127.

⁶⁹ Para. 24.

⁷⁰ Para. 77

is because these considerations are now important that the New Forest was properly designated in Southern England and the South Downs can properly be designated by exhibiting these characteristics – contrary to the strange suggestion in the NE closing submissions that if these are important matters then there can be no new National Parks in southern England⁷¹.

Post-NERC

70. Contrary to NE’s claim, sometimes asserted but not always in their closing submissions, this approach remains true following NERC.

71. NE suggests that s. 99 somehow qualifies or undermines the search for relative wildness, and “the ability to get away from it all”.⁷² However this argument is unsustainable when seen in its proper context.

72. The explicit recognition that land used for agriculture or woodlands or used as a park or otherwise influenced by humans may be included in a National Park does not in any way preclude a requirement that the same land offer a sense of relative wildness or a sense of “getting away from it all”. If it did then much of the land within the existing National Parks, which are agreed to possess these qualities, would never have been designated as such. As the government stated during the Parliamentary debates on the NERC Bill, the intention of the legislation was to “*continue that tradition*” of National Park designation⁷³ which recognized that “*all National Parks in Britain are influenced by man*”⁷⁴ but where designation still took place on the basis of “*the striking quality and remoteness of much of their scenery...and the opportunities it offers for suitable forms of recreation*”.⁷⁵

73. Further, if the influence of man did undermine the extent to which a new National Park could be expected to possess the more traditional hallmark qualities, the Secretary of

⁷¹ Para. 68.

⁷² See NE Closing submissions para.s 78-81.

⁷³ See Hansard 27 February 2006 column 85; see too 20 March 2006 columns 51-3 and 56.

⁷⁴ Hansard 27 February 2006 column 84.

⁷⁵ Hansard 20 March 2006 column 51.

State could not have published Circular 12/96, and there has never been any suggestion that Circular 12/96 is now unlawful after NERC. The Circular states that:

*The National Parks are areas of exceptional natural beauty. They contain important wildlife species and habitats, many of which have been designated as being of national and international interest. But the Parks are also living and working landscapes and over the centuries their natural beauty has been moulded by the influence of human activity...*⁷⁶

74. This did not prevent the Secretary of State from then advising, as we have mentioned, that particular emphasis should be placed on the qualities associated with “their wide open spaces and the wildness and tranquillity” within them.⁷⁷

75. Further, there is no suggestion that the “sense of relative wildness” regarded as important by the Agency when preparing its policy has in any way been overtaken by NERC.

76. The NE submissions on topics 1 and 2 rely on the Meyrick decision to support the proposition that NERC has “relegated to history” any requirement that a National Park exhibits openness, remoteness, relative wildness and a sense of getting away from it all. The decision also shows, it says, that the plain words of s. 5 “must be applied as they stand and without more”.⁷⁸

77. It is clear from the judgment that the Court in no way attempts to provide a “definitive statement”⁷⁹ of how the statutory criteria ought to be interpreted. The structure of the main judgment makes clear that the court set itself the task of considering (i) whether the Inspector’s approach to the recreation criterion in the New Forest was correct, particularly based on the extent of access to the land in question; and (ii) whether the new s. 5(2A)(b) of the 1949 Act, as inserted by NERC, would have made any difference to the result.

78. Beyond that it was expressly stated that:

⁷⁶ See Assessor’s report Annex A p. 7 para. 1.19.

⁷⁷ Annex A p. 7 para. 1.20.

⁷⁸ 1330/0/8 p. 2 para. 4.

⁷⁹ Ibid.

*“It would not serve any useful purpose to extend this judgment by addressing the question whether the judge was entitled to hold that the challenge was entitled to succeed in relation to the natural beauty criterion in section 5(2)(a). On any future consideration of the question whether the Designation Order should be varied, the Secretary of State will be required to take into account the area’s wildlife and cultural heritage – section 5(2A)(a) of the 1949 Act – and will have regard to section 99 of the 2006 Act”.*⁸⁰

79. Whilst there is a suggestion that the specific land in question in that case may meet that criterion following NERC,⁸¹ the Court explicitly declined to offer any definitive statement on the statutory interpretation of either of the designation criteria and did not want to “prejudge any issues that might arise in that context”.⁸² There is nothing there to suggest any detailed explanation of how either the recreation or the natural beauty criterion ought to be applied following NERC.

80. Further, there is no indication in the judgments that the Court was addressed on the need for land to exhibit the hallmark qualities considered in the round (including openness, remoteness and the ability to get away from it all) or on the applicability of those qualities primarily to an assessment of the *recreation criterion*, which is then linked to the natural beauty criterion in the way we have submitted above.

81. Therefore neither NERC nor Meyrick can be relied upon by NE to undermine the approach of the Assessor and the Inspector. Their analysis shows a keen appreciation that any proposed SDNP would be bound to include land that has been the subject of human influence⁸³ and NERC was not required to confirm that. Their conclusion that the qualities of openness, remoteness, relative wildness and a sense of “getting away from it all” are necessary, even if land has been influenced by man, simply acknowledges the reality of the existing National Parks, the findings of previous National Park reviews including the Edwards Report, extant government guidance in Circular 12/96 and current NE policy.

⁸⁰ New CD20 para. 58.

⁸¹ Ibid, referring to para. 26 of the Secretary of State’s skeleton argument as set out at para. 48 of the NE submissions.

⁸² Ibid.

⁸³ IR Part 1 paragraphs 3.30 and 3.38.

82. Even the latest approach of NE to considering a draft boundary for an extended Lake District National Park maintains the search for the hallmark qualities regarded as important by the Inspector and this follows NERC. A report to NE, which NE appears to have endorsed, talks of a “link between opportunities for recreation and the special qualities of the Park...The link has been made explicit in section 5(2A)(b) introduced into the 1949 Act by the NERC Act. Accordingly, there is a focus on quiet outdoor countryside recreation, associated with wide open spaces, wildness and tranquillity to be found within the Parks”.⁸⁴ Another recent report into potential designations in the north west of England advises that “*a judgment has to be made as to whether the recreational experience...is not only of high quality, but is also the type expected from a National Park*”⁸⁵ [emphasis added]. We agree. None of this suggests that NERC has fundamentally changed the proper approach to applying the recreation criterion.

83. However, even if NE are right in saying that “hallmark qualities” are simply relevant factors to be taken into account in an overall assessment of landscape quality, as opposed to a legal requirement, it would be wrong to argue that the Assessor and Inspector were not entitled (or the Secretary of State would not be entitled) to attach significant weight to the absence of those qualities in the proposed SDNP. NE may disagree. However the final decision rests elsewhere, despite their repeated reluctance both at the original and resumed inquiry to accept that, and there would be no grounds for challenging any decision which chose to attach greater weight to these qualities than others and, as a matter of judgment, found them to be absent from the western Weald.

New evidence

84. Hampshire in particular introduced new evidence which, it says, demonstrates how the western Weald meets the recreation criterion. However there is no reason for this evidence to have any effect on the Inspector’s judgment.⁸⁶

⁸⁴ New CD37 para. 3.5.11.

⁸⁵ New CD36, para. 4.3.7.

⁸⁶ Cf NE Closing submissions para.s 82-92.

85. The evidence was based in part on the ability to access the land on rights of way or on open access land but, as we have explained, this is insufficient in itself to show that the land offers recreational experiences of National Park quality. Hampshire rightly accepts as much.⁸⁷ A network of small fields with many footpaths crossing them may be a feature of an AONB, but does not make for recreation of a National Park standard.
86. Evidence on the extent of rights of way and open access land in the proposed SDNP was in any event before the Inspector at the last session of the inquiry.⁸⁸ The new material does not significantly change the picture, in that there remains a broad correlation between the accessibility of land within the Downs and in the western Weald. Whilst the Hampshire evidence shows an additional area of open access on MOD land at Longmoor, that can hardly be considered of the same quality as the other land already considered by the Inspector in 2003. Access is either on footpath or across an area normally reserved for military exercises.
87. The evidence on tranquility mapping may now be more sophisticated, but Hampshire rely on it to make a point that would have been apparent to the Inspector when taking account of both the older maps and other evidence arguing that the Weald was tranquil.⁸⁹ The maps, new and old, suggest that there are areas of tranquillity within the Weald, but these are more fragmented than such areas within the Downs. Further, the limitations of placing excessive reliance on these maps is illustrated by the higher level of tranquillity shown in the Weald to the north east, which no-one is suggesting as worthy of National Park designation.
88. The evidence on the extent of semi-natural habitat in the proposed SDNP demonstrates why it should not be regarded as the litmus test for land of National Park quality. Large parts of that habitat in the Weald comprises woodland which is not significantly greater in extent within that area than the wooded cover in West Sussex considered as a whole.⁹⁰ This does not help in justifying the inclusion of the Weald within any SDNP boundary. Further, the Downs possess lower levels of such habitat than the Weald given the

⁸⁷ Carman xx.

⁸⁸ See the plans in old CD36; old CD49; Moira Hankinson in principle evidence plan HDA8.

⁸⁹ See old CD123 and old CD 49.

⁹⁰ See Moira Hankinson in principle evidence para. 3.8.7 and Appendix O.

removal of hedgerows that occurred there in the last century but this did not influence the Inspector's recommendation that the Downs be confirmed as a National Park. And as Hampshire accept in any event, the mere factual record of semi-natural habitats in the Weald can only be part of a much broader consideration of relative wildness.

89. Although Hampshire and NE urge the Inspector to attach great weight to the emergence of the Landscape Character Assessment for the South Downs,⁹¹ it is important to place this document and its contents in their proper context.

90. It is a report written by another firm of landscape consultants who express the view that parts of the Weald are relatively wild and tranquil. However in December 2005 they were reaching judgments on the same Weald that the Inspector had examined on the ground for himself, before making his own judgments and completing his report in March 2006. The Weald has not changed since then.

91. The report was written to inform the South Downs Joint Committee's Management Plan for an area including both the South Downs and the Weald. It was not written to justify designating land as a National Park. A similar document was prepared as a Strategy for the New Forest in advance of the New Forest decision and it covered an area more extensive than that later confirmed as a National Park by the Secretary of State. There is no reason why it should be accorded any particular significance in this case.

92. It is also important not to read too much into some of the references in the report to relative wildness and tranquillity. Parts of the report mention these qualities not as prevalent characteristics but simply as sensitive features to be protected, without commenting on the extent those features are present in the landscape. Nothing in the report can be taken to characterise the western Weald as part of an extensive tract of land which consistently exhibits the hallmark National Park qualities.

93. Further, it must be remembered that the Inspector and Assessor had before them in evidence at the original sessions of the inquiry judgments as to the openness, relative

⁹¹ New CD14.

wildness and tranquility of the Weald or parts of it.⁹² They were free then and are free now to accept or reject those judgments as their own judgments, experiences and visits determine.

94. There is no basis for including the Weald, as Hampshire suggest, to alleviate visitor pressure in the Downs. This is not part of the recreation criterion and, even if it were considered, the approach has already been rejected by the Inspector.⁹³ If anything concerns about visitor pressure in the Downs suggest that it would be wrong to designate that land as a National Park and thereby to encourage open-air recreation there.

95. Ultimately the evidence produced by Hampshire in particular did not suggest any different approach to that taken by the Inspector in his report.⁹⁴ It amounted to more detailed evidence which did not alter the substance of points that the Inspector considered before reaching his own judgments and writing his report. The further expression of contrary views does not amount to a reason for the Inspector's judgments to change.

96. NE also attempted to show that the western Weald exhibited these characteristics but, as Ms Hankinson explained in evidence, Ms Farmer's assessment⁹⁵ of the excluded land refers in several places to the tests of relative wildness and tranquility being only "partly met".⁹⁶ This hardly comes across as a ringing endorsement of the case for including land beyond the Downs in any SDNP. Indeed all her references to areas "partly" or "slightly" or even "mainly" meeting the important consideration of relative wildness undermine any case that these areas should be designated as National Park. It is important to note too that she did not carry out a new assessment of the land between the chalk scarp and the Rother Valley.

⁹² See for example "The East Hampshire Landscape" CD 60 p.25, "The Landscape Assessment Of West Sussex CD 113 p.56, "A Landscape Assessment of the Sussex Downs AONB" CD 182 p.48 re the scarp footslopes, p.52 re the Sandy Arable farmland, p.60 re the North Wooded Ridges and p. 65 re the Low Weald, "The Landscape of the Sussex Downs AONB" CD 59 p.38 re the heathland mosaic, p.40 re the North Wooded Ridges, p.42-43 re the Low Weald, "The East Hampshire AONB Integrated Management Guidelines CD 183 p.109 and p.113 and "The Hampshire Landscape – A Strategy for the Future" CD 87 p.28.

⁹³ IR Part 2 para. 2.62.

⁹⁴ See IR Part 2 para.s 2.20 and 2.39; Carman xx.

⁹⁵ See Annex 5 to evidence on topics 3 and 6.

⁹⁶ See eg pp. 3,4,5,9 12,13,14,16,17.

97. NE cannot claim that the evidence of the Council has changed the way in which the Weald should be viewed.⁹⁷ The Council has never disputed the landscape quality of the Weald, but, as it has repeatedly argued, that of itself does not justify designation. Any work that has been done over the last few years has had no effect on the absence of the hallmark National Park qualities in the western Weald.

98. The Assessor recommended the exclusion of the areas of the Weald proposed for designation for the following reasons:

- a. there is a lack of special qualities;⁹⁸
- b. they are the same as the Weald beyond the areas proposed for designation;⁹⁹
- c. populated character;¹⁰⁰
- d. the kind of recreational experience;¹⁰¹
- e. the lack of a consensus as to a special place;¹⁰²
- f. the lack of unifying factors;¹⁰³
- g. the lack of openness, relative wildness and the ability to get away from it all;¹⁰⁴
- h. the lack of coherent character.¹⁰⁵

99. The Inspector recommended the exclusion of the areas of the Weald for these reasons:

- a. the lack of tranquillity, openness, sense of relative wildness and remoteness and the effect on the recreational experience;¹⁰⁶
- b. it is more settled, intimate and enclosed;¹⁰⁷
- c. the A3 corridor and the Rother Valley fail to satisfy the natural beauty criterion and the recreational criterion;¹⁰⁸

⁹⁷ See the NE Closing submissions para. 17.

⁹⁸ Annex A para. 6.96.

⁹⁹ Para.s 6.97-98.

¹⁰⁰ Para. 6.98.

¹⁰¹ Para. 6.10.

¹⁰² Para.s 6.127-129, 7.19.

¹⁰³ Para.s 6.151, 7.21.

¹⁰⁴ Para.s 6.163, 6.190, 7.23.

¹⁰⁵ Para.s 7.16-18.

¹⁰⁶ IR Part 2 para.s 2.20, 2.39-40, 2.59, 2.62, 2.71.

¹⁰⁷ Para. 2.20.

- d. the areas do not have the distinctive and characteristic natural beauty
- e. the lack of a long standing consensus in relation to these areas;
- f. the lack of unifying links.¹⁰⁹

100. These judgments are as valid now as they were then and stand.

Potential opportunities

101. The Council agrees with the summary of the law on the recreation criterion and the effect of NERC as set out in paragraphs 54-7 of the NE submissions. This supersedes the position taken by the Councils at the last session of the inquiry which, as it turned out, received some support in Meyrick.

102. However it is important to recognise that the explicit requirement now to “take into account the extent to which it is possible to promote opportunities for the understanding and enjoyment of [the Park’s] special qualities”¹¹⁰ merely echoes the approach adopted by the Assessor and the Inspector in any event.¹¹¹

103. The Council takes the view that there is no substantive difference between considering on the one hand the “potential opportunities” referred to by the Assessor and considering on the other “the extent to which it is possible to promote opportunities” as required now by NERC. Indeed if NE claims that this aspect of NERC is neutral to the case presented at the last part of the inquiry, as it does,¹¹² it is difficult to see how it can now argue that NERC has introduced a “*major new factor to be taken into account*”.¹¹³

104. In any event, the test is likely to be whether the future potential for recreation is speculative or unrealistic and this is clearly the approach taken by the Assessor and the

¹⁰⁸ Para. 2.24.

¹⁰⁹ Para.s 2.53, 2.62.

¹¹⁰ NERC S. 59(1) inserting new s. 5(2A)(b) into the 1949 Act.

¹¹¹ See Assessor’s report Annex A p. 94 para.s 6.206 and 6.208 and p. 95 para. 6.210. See too the Inspector’s report at Part 1 p. 50 para. 3.53.

¹¹² 1330/0/8 p. 25 para. 91.

¹¹³ P. 17 para. 59.

Inspector in this case. On this basis, there is no reason for this aspect of NERC to alter the conclusions in their reports. NE refers in particular to the possible future access on MoD land at Longmoor and Woolmer Forest.¹¹⁴ However there is no real evidence to suggest that the potential for greater levels of access on that site is anything but speculative at this stage.

105. Whatever the interpretation of this aspect of NERC, it does not affect the overarching requirement for the extensive tract to meet the recreation criterion by possessing relative wildness and a sense of getting away from it all (or the requirement for characteristic natural beauty). Taking into account “potential opportunities” would not alter the conclusion that the non-Downs landscapes simply do not exhibit those characteristics.

Conclusions on recreation criterion

106. The western Weald in particular is beautiful, worthy of AONB status, but has a less distinctive character, which continues across the whole Weald; it has less dramatic topography, with smaller-scale, more enclosed landscapes and few icons; there are settlements, roads, a higher population density and a sense of being in an established, comfortable, quintessentially English landscape of farms and villages, with paths through beautiful countryside. These features of the land, which are clear on the ground, do not amount to a character from which recreational experiences of National Park quality can emerge.

107. The need for relative wildness, tranquillity and a sense of getting away from it all should properly be given significant weight to preserve the legislative distinction between designating National Parks and AONBs. This was the clear approach taken by the Inspector who after careful consideration and extensive site visits, rightly found that these features were not sufficiently present in the western Weald to justify its inclusion in any SDNP. However persistently those in favour of including the western Weald have

¹¹⁴ NE Closing submissions para. 131.

bombarded the Inspector with further evidence, the Weald that informed his judgments in 2003 remains the same and there is no reason why the Inspector ought to change his mind.

Settlements

108.NE rely on a submission accepted by the Court of Appeal in Meyrick to argue that designation can “wash over” a “large tract of land”, which was a different approach from that taken by the Assessor and Inspector.¹¹⁵ Again this reads too much into the Meyrick decision.

109.In Meyrick it was accepted¹¹⁶ that a “designation can ‘wash over’ a large tract even though there is no public access to parts of the tract”. This did not mean that “large tracts” could themselves not meet the statutory criteria, but that parts of the “large tract” forming the National Park could be washed over. The size of those parts would, as Meyrick suggests, be “very much a matter of judgment for the Inspector on the ground”.¹¹⁷

110.The Inspector applied a similar approach to settlements, by essentially considering their size and whether they fell within a broader sweep of land that met the statutory criteria.¹¹⁸ These were essentially matters of judgment as anticipated by Meyrick and that case cannot be taken to mean that significant parts of the Weald comprised in settlements should now be included. There is no reason for the Inspector’s treatment of settlements to change.

Especially desirable

¹¹⁵ Legal submissions on topics 1 and 2, para. 68.

¹¹⁶ See para.s 83-4 of CD9 and para. 20 of CD20, where the Court of Appeal reported the finding at first instance without comment.

¹¹⁷ CD9 para. 84.

¹¹⁸ Part 2 p. 39 para. 3.2.

111. As we have already said, the Council has watched with interest how NE appears again to be altering the case advanced at the previous inquiry sessions. The Inspector's report records the submissions of the Council on the Agency's case at those sessions:

*At the inquiry, the Agency claimed that if the natural beauty and recreational opportunity criteria are met, the only reason for not confirming the designation order would be if it was not deemed "especially desirable" to conserve the natural beauty of the area and/or promote opportunities for the understanding and enjoyment of its special qualities. This interpretation is an unnecessary constraint on the matters to be considered in deciding whether it is "especially desirable" to designate a National Park in the South Downs. Indeed it is different from the Agency's own policy which invites a comparison between what an NPA can achieve in terms of management and planning and what other bodies might achieve.*¹¹⁹

112. The Inspector later noted this inconsistency in the way NE had presented its case on this aspect of the legislation and proceeded with the comparative exercise.¹²⁰

113. A further inconsistency can now be noted. NE now submits that:

*[N]atural beauty and recreation are not the only or even the main operative elements of the statutory definition of National Park land. The key requirement of the statutory definition is whether it appears to NE that it is especially desirable that "the necessary measures be taken". Natural beauty and recreation are secondary to the subsequent "especially desirable" judgment. The ultimate question is whether it is especially desirable to designate the land as a National Park;*¹²¹

*"Wider policy issues" [such as sustainable development] were at the forefront of the satisfaction of the statutory provision in s. 5(2) as going to the heart of whether it was especially desirable to designate the SDNP;*¹²²

[T]he necessary question of whether it was desirable to designate the non-chalk landscapes in order to achieve the National Park purposes of conserving and enhancing

¹¹⁹ Part 1 p. 11 para. 1.8.

¹²⁰ Part 1 pp. 51-2 para.s 3.58-61.

¹²¹ 1330/0/8 p. 21 para. 77.

¹²² Pp. 22-3 para. 82.

*their natural beauty, wildlife and cultural heritage, and promoting the understanding and enjoyment of the special qualities of the area, was not asked or answered;*¹²³

*The result is that the meaning and effect of the “especially desirable element of s. 5(2) has been overlooked, and that the prominence of natural beauty and recreational opportunities has been artificially elevated.*¹²⁴

114. NE seem now to be departing from the submissions made at the end of the “in principle” session, which essentially argued that the “especially desirable” test added nothing to the natural beauty and recreation criteria set out in s. 5(2). It seems that this is another aspect of the NE case which can, as it has put it, be “relegated to history”. The wavering in approach hardly does much credit to any of the propositions advanced by the Countryside Agency or latterly by NE. This cannot be glibly dismissed by saying that “we are where we are”. But in any event there are other fundamental difficulties with the new approach.

115. It is completely unsustainable to suggest that those criteria are “secondary” or “not even the main operative elements” in defining National Park land. The statute requires that it be especially desirable to designate for the joint purposes of “(a) *conserving and enhancing the natural beauty, wildlife and cultural heritage of the area...and (b) of promoting opportunities for the understanding and enjoyment of the special qualities of the area*”, “by reason of” the satisfaction of the natural beauty and recreation criteria. If those criteria are not satisfied, that is the end of the matter and the failure of land to meet the criteria cannot be cured by a claim to some other reason why it is “especially desirable” to designate.

116. It is therefore misleading to downgrade the importance of the criteria in the way NE now suggest. Whilst it must be especially desirable to designate for the joint purposes set out above, the special qualities that the purposes refer to must arise from meeting the natural beauty and recreation criteria in the first place.

¹²³ P. 23 para. 83.

¹²⁴ P. 23 para. 84.

117. It follows that there was no “important omission” by the Inspector in failing to consider whether it was desirable to designate the non-Downs landscapes in order to achieve the National Park purposes, because the natural beauty and special qualities that the statutory purposes refer to were not established at the outset.

118. Even if the arguments advanced to support the inclusion of the Weald under the “especially desirable” test are taken into account, they do not amount to anything which should alter the Inspector’s conclusion. The Council’s position is set out fully in its written response to NE’s Position Paper 6, however the main points are as follows:

- a. the management of the western Weald is already being carried out successfully by the South Downs Joint Committee, local authorities and other agencies working together; this is not disputed by NE and there is no need for another layer of bureaucracy;
- b. including the western Weald within a SDNP would require the encouragement of open-air recreation, which would risk undermining the character of the Weald that the existing bodies have been striving to protect;
- c. land management in the western Weald should be focused on practical measures that deliver real benefits on the ground, without being distracted by spending time and resources on dealing with the large numbers of planning applications that are made within that area;
- d. the planning policy protection for National Parks and AONBs under PPS7 is identical and there is no reason why the inclusion of the western Weald within any SDNP would provide a greater degree of control over development in the area;
- e. whilst National Parks generally receive higher levels of funding than AONBs, this simply reflects the wider range of functions that National Park Authorities have to discharge (including development control) and it does not follow that higher total funding achieves improved services in specific areas such as land management;
- f. however the level of funding to both National Parks and AONBs is ultimately a matter for the discretion of central government and there is no reason why the western Weald should inevitably become the poorer cousin of the National Park;

- g. the funding that has previously been available for the management of the AONB has been sufficient to allow the specific requirements of the Weald to be successfully addressed.

119. Ultimately, the NE case is based upon the supposition that an AONB unit would do less well given its different focus and funding. However it would be up to the individual AONB management units how they operated and it is a sweeping generalisation to assume that an AONB body would not be able to perform its duties as well as an National Park Authority. There is no evidence to suggest that National Park management is more likely to bring about integrated management of the land within the planning system because of an Authority's plan making function. The South Downs Joint Committee successfully performs its land management functions and is consulted upon planning applications within an AONB, which must be determined against planning policy which provides similar protection to that for land within National Parks. It does not follow that a National Park would be any more or less efficient in stopping or tempering inappropriate development than local planning authorities in AONBs.

120. For these reasons there are no grounds to include the western Weald in any SDNP on an application of the "especially desirable" test.

Conclusions on topics 1, 2 and 6

121. We set out our conclusions on these topics as part of our overall conclusions at the end of these submissions.

TOPIC 3

122. This topic merits separate consideration because, as Defra's guidance notes on making submissions to this inquiry session confirm, the starting point is an assumption that the Inspector was entitled to recommend the exclusion of the western Weald from any SDNP.

123. Unfortunately the hubris of NE has left it unwilling to accept even the possibility that this might be the case and stubbornly reluctant to draw a new boundary for sections E-H as the Secretary of State asked. Its evidence on this topic has been characterised by a complete failure to engage with that request, even on the understanding that doing so would be without prejudice to its wider case on the inclusion of the western Weald.

124. It is also clear that in carrying out its half-hearted attempt to draw a revised boundary line, NE did not try to understand the task it had been set. The Secretary of State asked for the Inspector's indicative line to be used as a basis for a proposed definitive line, but asked that NE's formal, detailed proposal for the boundary should come forward "in the light of the Inspector's reasoning and findings in his report".¹²⁵ On any sensible interpretation this required a full reading of the report, not just references to the recommendation which just summarises the Inspector's earlier analysis and oversimplifies the boundary-setting exercise that NE actually carried out. Ms Hankinson's methodology, in contrast, drew the main findings from the report, as Defra had anticipated, and made a far more meaningful attempt to apply the Inspector's findings.¹²⁶

125. For NE to describe her evidence in its closing submissions as a "rag bag" of principles¹²⁷ is a gratuitous, unfounded and inaccurate insult not only to Ms Hankinson (although that would be nothing new) but also to the Inspector whose reasoning she carefully and fully took into account. That is the same approach that the Secretary of State took at the New Forest. She had not found the same "difficulties" as NE supposedly claim in understanding the Defra instructions and the Assessor and Inspector's recommendations in applying best current practice to drawing a boundary for the SDNP.

¹²⁵ New CD31.

¹²⁶ This is confirmed by the additional material in Moira Hankinson's supplementary and rebuttal evidence on topic 6.

¹²⁷ Para.13.

126. The Council put forward that one boundary line.¹²⁸ In Ms Hankinson's Topic 6 evidence she showed on plan the indicative line for the Hampshire area which has been in the public domain for some 4 years since her original Downs only evidence. She also made it clear that it is not intended to be a definitive recommended boundary for Hampshire but was included to inform the Inspector as to a likely area to be included within his SDNP in order to be able to compare designations and open access land within this area with those in the surrounding ordinary countryside and AONBs.

127. If the proper approach was not clear to NE, or it had some difficulty in understanding the task it had been set, it should have asked for further guidance from the Inspector, publicly if necessary? It was inappropriate to wait until after the boundary had been drawn to have it confirmed by the Inspector that the indicative line was not to be used as a detailed OS-based boundary?

128. NE's failings should not be allowed to somehow bring the western Weald back into consideration for inclusion in any SDNP, simply on the basis that the statutory body asked by the Secretary of State to define a boundary has been unwilling or unable properly to do so.

129. The result is that the Council is the only main party at the inquiry that is willing to stand by a detailed boundary line. Its proposed boundary covers the West Sussex part of sections E to H and there is no reason for it to go further, although a potential line in Hampshire based upon the area of scrutiny advanced at the last session of the inquiry has also been identified.

130. The reasoning behind that proposed boundary is explained fully in the Council's topic 3 evidence and we do not repeat that detail here. It is primarily a matter for judgment on the ground. It represents a robust and consistent line that would allow those visiting the area to appreciate clearly when they were entering a National Park. If the methodology used to reach that line is accepted, as we say it should be, no one seriously disputes the boundary

¹²⁸ Cf NE closing submissions at para. 170: MH's boundary supersedes the draft line submitted at consultation stage.

that results. The Inspector recommended that non-chalk landscapes should only be included where there is “a strong visual link or other association with the core chalk Downs”.¹²⁹

131. Ms Hankinson took this fully into account including only those areas where “the visual links form a dominant characteristic of the land”¹³⁰ and which are close to the escarpment core of the National Park¹³¹. In so doing the boundary often extended beyond the chalk to include some of the Greensand footslopes dominated by the escarpment. The land always of course had to meet the statutory criteria. The intemperate criticisms of Ms Hankinson’s work on drawing a boundary in NE’s closing submissions¹³² are yet again impolite but perhaps more importantly yet again wrong.

132. We deal finally with the issue of consultation. NE have argued that if the Council’s proposed boundary is accepted, further consultation would have to be carried out given the size of the area that would be excluded from the original designation.

133. The Council is wholly unpersuaded that this is correct. The statutory procedure provides for NE to designate land as a National Park and for objections to be heard to both the principle and the boundary of the designation. Those objections routinely advance an alternative boundary. They may, as in this case and at the New Forest inquiry, suggest that a large area of land be excluded. Other objectors have an opportunity to comment on the alternative boundaries proposed by others if they so wish. The Inspector makes recommendations based on the evidence and the Secretary of State makes a decision. This is what happened in the New Forest decision and no-one suggested, not even NE, that any further consultation was required before the final decision was made, simply because the Avon Valley represented a significant exclusion when compared with the Agency’s designation.

¹²⁹ IR Part 2 para. 2.71.

¹³⁰ IR Annex A 6.149.

¹³¹ IR Part 2 para.s 2.51, 2.52, 2.71, 6.9.

¹³² Para.s 173-180.

134. In this case, the Council proposed an area of scrutiny at the last session of the inquiry, to which others had the opportunity to respond. At the time no-one suggested that if a detailed boundary had been drawn, further consultation would have to take place. The detailed boundary now proposed under topic 3 has in fact drawn rebuttal evidence from other participants at the inquiry and has been available for anyone interested in the future of the South Downs to comment upon.

135. None of this is unfair and the only legitimate expectation on the part of the public is that the statutory procedures be followed, as they have been in this case.

136. The NE position appears to equate the decision of the Secretary of State to consult upon NE's alternative boundary line, with a need to have a further consultation in the event that a different one is adopted. However the latest round of consultation was prompted by the conclusion of the Inspector that he was simply unable to recommend a detailed boundary for sections E-H and required further evidence to do so. That does not apply now, where the Inspector has heard evidence relating to a detailed alternative boundary on which he and the Secretary State can take a view in the normal way. That requires no further consultation.

137. In any event, if the Secretary of State decided that further consultation were appropriate, so be it. If more time is required to define the right boundary for any SDNP, more time should be taken. As we have said, that approach (with any consequent delay) is preferable to the risk of deciding to include the western Weald simply because NE has not bothered to define a defensible line suggesting how it could be excluded.

TOPIC 4

138. The Council has no submissions to make on this topic.

TOPIC 5

139. The Council's position is clearly set out in its evidence on this topic. In short, it accepts that the landscape quality of all parts of the existing AONB continue to merit that designation, notwithstanding that the wider National Park qualities discussed extensively at the inquiry are absent.

140. The important issue is how to ensure the continued protection of the AONB land in the event that the western Weald is excluded from any SDNP. Here the Council finds itself in rare agreement with NE. An acceptable course would be to vary the AONB revocation orders so as to revoke the original AONB Orders in part, in relation to any land that is confirmed as a National Park. The confirmation of the varied revocation orders would then occur simultaneously with any confirmation of a modified National Park designation order. Of course, any proposal that would leave the western Weald unprotected, would be wholly unacceptable.

CONCLUSIONS

141. As we said in opening, no-one could have predicted that nearly 5 years after the opening of the inquiry, the future of the South Downs would be unresolved. However it is important not to let the mere passage of time create the impression that much has changed since the autumn of 2003.

142. The implications of NERC and Meyrick for the conclusions reached by the Inspector are neutral. Neither alters the importance of characteristic natural beauty and the presence of a sense of relative wildness and a sense of "getting away from it all" in a National Park distinguished properly from an AONB. Neither alters the fundamental approach and judgments that the Inspector reached after the last session of the inquiry.

143. Similarly, there is nothing in the new evidence introduced at this session of the inquiry that should affect those judgments. That evidence was essentially before the Inspector 5 years ago; it referred to the same Wealden landscape that the Inspector saw and

considered for himself. That landscape has not changed since 2003 and there is no reason for the Inspector's recommendations to change either. We ask him to hold his ground and to reject the criticisms of him that are made or implied by much of the evidence before him. He was right to recommend the exclusion of the western Weald before and he would be right to do so again.

RHODRI PRICE LEWIS QC

SCOTT LYNESS

Landmark Chambers

180 Fleet Street

London

EC4A 2HG

6th June 2008