

South Downs National Park Inquiry

Submissions by West Sussex County Council

on

TOPIC 1 : NERC Act

and

TOPIC 2: Meyrick Judgements

INTRODUCTION

1. These representations consider whether the legislative changes brought about by NERC and the judgments in Meyrick Estate Management Ltd v. SSEFRA,¹ should affect the (a) case advanced by the Council at the Inquiry and (b) the conclusions reached by the Inspector in his report.
2. At previous sessions of the Inquiry, the Council argued that a South Downs National Park (“SDNP”) should not be created at all and alternatively, if there were to be a SDNP, that it should focus on the chalk downlands. The Inspector’s recommendations rejected the first proposition but accepted the second.
3. For the reasons set out below the Council does not consider that NERC or Meyrick alters its evidence on either proposition, and it maintains its formal position. However, it accepts that there is nothing in NERC or Meyrick of themselves which would require the Inspector to reach a different conclusion, as a matter of judgment, on the “in principle” case advanced by the Council. Similarly, neither NERC nor Meyrick ought to affect the Inspector’s recommendations on the exclusion of the non-chalk landscapes from any SDNP.
4. Representations and evidence submitted by Natural England and others use Topics 1 and 2 to challenge the Inspector’s conclusions on grounds that go beyond an assessment of the effect of NERC and Meyrick, in particular the approach to “characteristic” natural beauty. However for completeness these submissions end by responding to that material, even if it does not appear to fall under Topics 1 and 2.
5. Further evidence has also been produced, in particular by Hampshire County Council, which argues for the inclusion within any South Downs National Park (“SDNP”) of land recommended for exclusion by the Inspector’s recommendations. Material which is presented ostensibly under Topics 1 and 2, rather seeks more to re-open debate on issues

¹ [2007] EWCA Civ 53.

considered at previous Inquiry sessions. The Council will respond separately to this evidence as soon as possible.

TOPIC 1

Any implications for the South Downs National Park (Designation) Order 2002 (as varied by the South Downs National Park Designation (Variation) Order 2004) arising directly as a result of the legislative changes at sections 59 and 99 of the Natural Environment and Rural Communities Act 2006 (“NERC”)

The legislative changes

Designation

6. Prior to the changes, National Parks were designated pursuant to s. 5(2) of the National Parks and Access to the Countryside Act 1949 (“the 1949 Act”), as:

those extensive tracts of country in England as to which it appears to the Agency that by reason of

(a) their natural beauty and

(b) the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population,

it is especially desirable that the necessary measures be taken...

7. The effects of NERC on the designation of National Parks were summarised by the Court of Appeal in Meyrick² as follows. First, when considering whether it is especially desirable to designate a tract of land by reason of its “natural beauty”, account must be taken of its wildlife and cultural heritage (s. 59(1) of NERC, inserting a new s. 5(2A)(a) into the 1949 Act). Land is not prevented from being of natural beauty by the fact that it

² [2007] EWCA Civ 53 per Chadwick LJ at para. 27.

is used for agriculture or woodlands, or as a park, or that its physiographical features are partly the product of human intervention in the landscape (s. 99 of NERC).³

8. Secondly, when considering whether designation is especially desirable by reason of the opportunities afforded for open-air recreation, it is necessary to take into account the extent to which “it is possible to promote” opportunities for the understanding and enjoyment of its special qualities by the public (s. 59(1) of NERC, inserting a new s. 5(2A)(b) into the 1949 Act).
9. The NERC provisions referred to above apply to the current designation process (see s. 59(2) and s. 99).

Management

10. NERC also alters the law on the composition of National Park Authorities.
11. At the time of the Inquiry Schedule 7 to the Environment Act 1995 (“the 1995 Act”) set out the basic arrangements. The total number of seats on an authority was not prescribed.⁴ However the division of seats was prescribed by a formula.⁵ This broadly resulted in local authorities having 50% (plus 1) of the seats, parish council representatives having 25% (less 1) and other appointees of the Secretary of State (“national members”) having the rest.⁶
12. S. 61(1) of NERC amends Schedule 7 to remove the formula, leaving the shares of membership across the categories of local authority, parish council and national members to be determined by statutory instrument. There remains no prescribed limit in primary legislation on the number of members in a national park authority.⁷

³ See Meyrick CA ref.

⁴ This task was carried out by a statutory instrument which addressed each National Park separately: see National Park Authorities (England) Order 1996 (SI 1996/1243).

⁵ Sch. 7 para.s 1(4)-(6).

⁶ See the Inspector’s report Part 2 Annex C para. 1.9.

⁷ National Park Authorities (England) Order 2006 (SI 2006/3165). The order also reduced the membership of English National Park Authorities to 22, with the exception of the authority for the Peak District, which has 30.

Judicial interpretation of the legislative changes

13. In the Meyrick decision (addressed later in more detail), the Court of Appeal considered whether the land in that case would meet the recreational criterion following NERC.

14. It suggested that “vague aspirations” for public access, which it had not regarded as “opportunities” for open air recreation under s. 5(2)(b), could not be regarded either as “possibilities to promote opportunities” under the new s. 5(2A)(b). There was no certainty that the new recreation criterion could be satisfied because of the lack of public access to the land:

In that context the question, as it seems to me, would be whether the Inspector had explained how it is possible to promote opportunities for the understanding and enjoyment of the area’s special qualities by the public in the absence of public access⁸

15. This clearly indicates that when applying the new legislation:

- a. vague or unrealistic aspirations should not be sufficient to create “opportunities” for open-air recreation under s. 5(2) or “possibilities to promote opportunities” for the understanding and enjoyment of an area purposes of s. 5(2A)(b); and
- b. in the absence of public access to land it is at least questionable whether the recreational criterion, even as now drafted, can be achieved.

16. The court did not seek to interpret the new provisions relating to natural beauty.

The effect of the changes on the Councils’ evidence

17. Attached at Appendix 1 is a written statement from Moira Hankinson, who gave evidence for the Council at the previous inquiry sessions on the application of the statutory criteria. Her conclusions were based on the need to identify an extensive tract with characteristic natural beauty and a sense of openness, wildness, remoteness: an ability to “get away from it all”. In her view, NERC does not alter this approach or reduce the weight to be

⁸ Para. 57.

attached to these factors and her conclusions remain unaltered, for the reasons she explains.

The effect of the changes on the Inspector's conclusions

Natural beauty: taking into account wildlife and cultural heritage

18. The Inspector has already taken into account cultural heritage when assessing whether an area possessed natural beauty. In his report, he concludes that “cultural heritage also has a relevance”, which could not be “disregarded when virtually all of the landscapes of lowland Britain have been altered by man to a greater or lesser degree”.⁹
19. This is apparent in his conclusions which support the inclusion of the chalk hills in any South Downs National Park. That area is regarded as a landscape which has a distinct and coherent character of its own “as a consequence of a wide range of factors including geology, ecology, landform, land-use, settlement pattern and cultural history”.¹⁰
20. Further, the Inspector took into account claimed “unifying” historical/cultural links between the chalk hills and adjoining countryside.¹¹
21. The potential for settlements to contain “a wealth of important historic buildings and other cultural assets” was also taken into account.¹²
22. Similarly, the Inspector took into account wildlife where relevant by acknowledging in particular that the non-chalk landscapes contained “land that is internationally recognised for its ecological value”.¹³
23. Therefore, the newly explicit legislative requirement to take cultural heritage and wildlife considerations into account when assessing natural beauty should make no difference to the Inspector's conclusions.

⁹ Part 1 para. 3.30.

¹⁰ Part 2 para. 2.28.

¹¹ Part 2 para. 2.50.

¹² See Part 2 para. 3.3.

¹³ Part 2 para. 2.23.

24. In any event those conclusions depended in large part on the need for National Park land to possess the qualities of relative wildness and remoteness within an area of clear identity and coherent character, in order to satisfy the natural beauty criterion.¹⁴ Those findings applied notwithstanding that cultural heritage and wildlife were, or ought to be, taken into account.
25. Similarly there is no reason for his conclusions on the claimed “unifying links” to alter as a result of these legislative changes. The merits of those links were rejected on the basis that they were evident across the country and did not create any specific link between the chalk hills and the surrounding tract of land within the proposed National Park boundary. There is no reason for the legislative changes to alter that conclusion.
26. There is nothing to suggest that the Inspector’s conclusions on the approach to including settlements in the PSDNP should change either. The main determinant, he considered, was whether a settlement lies within a sweep of countryside that clearly meets the designation criteria, taking account of the influence of the settlement on the land in question, including the effect of adverse or intrusive built development. This approach ought not to alter even if settlements were regarded as exhibiting features of cultural heritage value.¹⁵
27. When considering more detailed boundary issues relating to Arundel, the Inspector accepted that it was an important historic settlement¹⁶ but concluded that its exclusion was justified since it was not surrounded by high quality landscapes. There is no reason to for that finding to alter as a result of any requirement to consider cultural heritage following NERC.

¹⁴ Part 2 para.s 2.20, 2.30 and 2.35.

¹⁵ As per Part 2 para. 3.3.

¹⁶ Part 2 para. 7.849.

Natural beauty: land in agriculture, woodland, parkland, partially product of human intervention

28. The same position holds true in respect of the legislative provision which does not prevent land being considered of natural beauty if it is in agriculture, woodland, parkland or its flora, fauna or physiographical features are partially the product of human intervention in the landscape. This ought not to change the Inspector's conclusions on the natural beauty criterion, for the following reasons.
29. First, the Inspector did not adopt an approach which excluded such land from consideration as naturally beautiful for the purposes of National Park designation. He recognized that "virtually all of the lowland landscapes of Britain have been altered by man to a greater or lesser degree"¹⁷ and that much of the proposed SDNP was farmland, with sizeable areas being managed for commercial forestry purposes.¹⁸ This did not preclude that land from potential consideration for national park designation and as such was consistent with the legislation.
30. Secondly, the Inspector acted in accordance with the newly drafted legislation by subjecting all of the proposed national park land, including any which might fall within the scope of s. 99, to scrutiny under the wider natural beauty criterion in s. 5(2) of the 1949 Act.
31. S. 99 does not seek to provide a definition of natural beauty, let alone an exhaustive one, and does not mean that the land referred to in s. 99 should automatically be regarded as being naturally beautiful for the purposes of the legislation. The law still requires natural beauty to be considered in the round. The Inspector adopted that approach, again consistent with the legislation.
32. Thirdly, when considering the natural beauty criterion in the round, the Inspector was satisfied that land within the proposed SDNP, including the majority of the Weald,

¹⁷ Part 1 para. 3.30.

¹⁸ Part 1 para. 3.38.

possessed natural beauty given its status as AONB.¹⁹ The ability to regard the non-chalk landscapes as naturally beautiful by virtue of s. 99 would not have changed this view.

33. Fourthly, the Inspector was then, however, entitled to go on and consider whether land was naturally beautiful so as to warrant designation as a National Park. Considering for potential inclusion land which fell within the scope of s. 99 did not, and should not, then preclude a finding that, as a matter of degree, the land should exhibit relative wildness in the sense anticipated by the Countryside Agency's policy or, in the Inspector's view, the sense of wildness, remoteness, openness and tranquility anticipated by previous reviews of the approach to national park designation.²⁰ As Lord Bach identified in the House of Lords, "no landscape in the United Kingdom has escaped human influence"²¹ and this has not prevented these considerations from being applied to land including the existing National Parks.
34. This is confirmed by the absence of any suggestion that the legislative changes have altered that policy, or the guidance in Circular 12/96 that national parks exhibit wildness,²² or the guidance on landscape character assessment which requires consideration of wildness.²³ Further, when the legislative changes were passing through Parliament, the government stressed that the changes were not intended to alter the approach that had been previously taken to designation.²⁴
35. Therefore the Inspector's approach to natural beauty, based in part on those documents, should not be regarded as qualified by the legislative change.
36. This is confirmed by the common recognition that the natural beauty and recreation criteria are inextricably linked. The ability to get away from it all in landscape that is open, remote and wild is an important aspect of the recreation criterion which allows National Parks to be distinguished from that AONBs. This approach is unchanged by

¹⁹ Part 2 para. 2.23.

²⁰ Part 1 para. 3.40; Part 2 para.s 2.19-2.20.

²¹ Hansard 20 March 2006, column 53.

²² Assessor's report para. 1.20, Annex A.

²³ Assessor's report para. 4.4, Annex A.

²⁴ Hansard House of Lords 27 February 2007 Column 85.

NERC and it makes sense for any application of the natural beauty criterion to be consistent with it.

37. Fourthly, and in any event, the Inspector's conclusions on natural beauty were also based on the need also to identify an extensive tract with a clear identity and coherent character or, put another way, *characteristic natural beauty*.²⁵ This finding remains undisturbed by the legislative changes in s. 99 (or those in s. 5(2A) for that matter).
38. Thus even if land within the scope of s. 99 in the non-chalk landscapes were included for potential consideration as national park land, it still does not exhibit the "core landscape characteristics"²⁶ that are required to meet the wider natural beauty criterion. This reason for excluding the non-chalk landscape cannot be influenced by s. 99 which (along with s. 59(1) is silent on the issue of characteristic natural beauty. This issue is addressed further at the end of these submissions.
39. Fifthly, when considering more specific boundary issues at Arundel, the Inspector found that the land south of the A27 was less intact than the Agency claimed due, primarily, to the loss of some field boundaries; that the distinctive enclosure of the wide valley floor by downland hillsides was absent; that the land was fragmented by traffic on the busy A27, built development close to Arundel Railway Station and by the town of Arundel itself. These matters, which raised doubts concerning satisfaction of natural beauty criterion,²⁷ would be unaffected by the legislative changes in s. 99 (or for that matter the new s. 5(2A)).

Open air recreation: possibility of promoting opportunities

40. The legislative change which requires consideration of the extent to which "it is possible to promote" opportunities for the understanding and enjoyment of its special qualities by the public ought to have no effect on the Inspector's conclusions.

²⁵ See Part 2 para.s 2.29-35.

²⁶ Part 1 para. 2.31.

²⁷ Part 2 para. 7.845.

41. First, the Inspector took into account the potential for land to offer opportunities for open air recreation, in a manner which is sufficient to encompass s. 5(2A)(b). He took s. 5(2)(b) to “embrace the possibility that land may be enhanced in some way (for example by improving public access or restoring damaged countryside) and as a consequence could provide an improved recreational experience”. Accordingly, it was “reasonable to take the potential to provide enhanced recreational opportunities into account so long as the necessary actions or works of enhancement are realistic and achievable”.²⁸ This approach is consistent with the changes brought about by s. 5(2A)(b), and the interpretation of that provision suggested by the Court of Appeal decision in Meyrick.
42. Secondly, and in any event, the main basis for the Inspector’s conclusions on the recreational opportunities criterion remains unaffected by the change.
43. The Inspector considered that a key characteristic of national parks is their ability to provide opportunities for quiet outdoor recreational experiences in an extensive tract of land having a sense of relative wildness and remoteness, with an ability to “get away from it all”.²⁹
44. Therefore, despite considering the potential opportunities for recreation and enjoyment of the National Park, the Inspector concluded that neither the Weald nor the coastal lowlands “come close” to matching the ability of the chalk hills to achieve those qualities.³⁰
45. Similarly, when reaching conclusions on boundary considerations, he concluded that there had been a lack of stringency in applying the recreational opportunities test, which was reflected in fact that an extensive tract of land that offers no public access and therefore no opportunities to “get away from it all” (land south of Arundel) was deemed to meet the criterion.³¹ Again, there is no reason for the legislative changes to warrant any interference with this judgment.

²⁸ Part 1 para. 3.53. See too Part 2 para. 2.38.

²⁹ Part 2 para. 2.39.

³⁰ Ibid; see too para. 2.40.

³¹ Part 2 para. 6.4. See too para. 7.846 Part 2 (land south of the AONB up to and including the Variation Order land): “south of the A27 the very extensive valley floor landscape is devoid of any public rights of way”.

46. Further, the Inspector noted that land outside the chalk hills contained only one of the honeypot sites identified in the Agency's assessment. He also noted that the former Countryside Commission found that west Weald was "not at all open and offers few recreational opportunities which would demand National Park management".³² These findings are also unaffected by the legislative change.
47. For all these reasons the legislative changes brought about by NERC should not of themselves cause any alteration to the Inspector's conclusions on the application of the natural beauty or recreation criteria, with particular reference to the non-chalk landscapes.

Management

48. The legislative changes do not directly affect the Inspector's recommendation that the chalk only National Park should have 34 members.³³ However it must have been his understanding, given the legislation in force at the time, that local authority membership would stand at 18.
49. The NERC provisions, which simply require local authority and parish membership to outnumber national membership, create the potential for this local authority membership to change.
50. The County Council considers that a total of 34 members (18 of whom are local authority members) is the minimum acceptable and that the NERC provisions should not be used to reduce the local authority membership below that which must have been anticipated by the Inspector.

³² Part 2 para. 2.41.

³³ Part 2, Annex C, para. 1.17.

TOPIC 2

Any implications for the South Downs National Park (Designation) Order 2002 (as varied by the South Downs National Park Designation (Variation) Order 2004) arising directly as a result of the Meyrick High Court and Court of Appeal judgments.

51. The Meyrick judgments were essentially reached following a consideration of the law as it stood before NERC and as such their significance has been reduced.

52. In the Meyrick decision in the High Court,³⁴ Sullivan J held, in summary, that (a) the expanded treatment of natural beauty in s. 114(2), which sets out the purposes of national park designation, should not be applied when determining whether land met the natural beauty criterion under s. 5(2);³⁵ (b) the wildlife and cultural heritage of an area were not relevant considerations when deciding whether an area should be designated as a national park;³⁶ (c) the approach of asking whether an area had “potential opportunities” for open air recreation unlawfully diluted the proper test of whether there were such “opportunities”;³⁷ and (d) the Inspector (whose recommendation were accepted by the SS) had failed to explain on the available evidence why any such “opportunities” arose, absent any track record of public access over the land or any prospect it being achieved.³⁸ The designation order was quashed in so far as it related to the claimant’s land.

53. Grounds (a)-(c) of Sullivan J’s decision were later superseded by the provisions of NERC which have already been addressed above.

54. The Court of Appeal³⁹ upheld the decision so to quash the designation order, but only expressly considered and endorsed Sullivan J’s finding (d) that on the detail of the evidence before the SS, the recreation criterion (as drafted before NERC) was not satisfied.⁴⁰ As mentioned above, in doing so the Court indicated that the “vague aspirations” of public access which had been wrongly relied upon by the SS as

³⁴ [2005] EWHC 2618 (Admin).

³⁵ Para.s 44-9.

³⁶ Para. 50.

³⁷ Para.s 72-4.

³⁸ Para. 82.

³⁹ [2007] EWCA Civ 53.

⁴⁰ Para. 55.

“opportunities” would not necessarily be sufficient to meet the recreational criterion newly defined by NERC to include “the extent to which it is possible to promote opportunities”. This suggested approach to the new legislation is consistent with the approach already taken by the Inspector in this case, as explained above.

55. Further, the decision to quash the designation order was based on the finding that on the evidence the land in question could not be regarded as meeting the recreation criterion. The court then declined to consider whether the land met the natural beauty criterion. It is clear from this that land, including that near the boundary, must fully meet both criteria. Any suggestion that land does not have to meet the criteria to the same extent⁴¹ should not be regarded as valid. Whilst this has implications for the approach advocated by the Countryside Agency, as it was, at the inquiry, this does not appear however to have fundamental implications for the main conclusions reached by the Inspector.
56. One aspect of Sullivan J’s conclusions which was not addressed by NERC (or queried by the Court of Appeal) was his acceptance it was not necessary for there to be rights of access over every part of a qualifying tract of land: a designation could wash over a large tract even if there was no public access to parts of it.
57. There is nothing to suggest that this approach would result in any difference to the conclusions reached by the Inspector in this case. Ultimately, as Sullivan J accepted, the question of whether the degree of public access justifies land being included in a proposed national park is a question of judgment for the relevant Inspector who, in this case, has taken public access into account and reached his own views.
58. For all these reasons it is submitted that neither NERC nor Meyrick ought of themselves to cause the Inspector to alter his conclusions or his recommendations.

⁴¹ See Moira Hankinson evidence 1881/2698/1/1 section 8.8.

OTHER POINTS RAISED IN EVIDENCE ON TOPICS 1 AND 2

59. As mentioned above, parties including Natural England⁴² have used their responses on Topics 1 and 2 to argue against the findings of the Inspector, with particular reference to their reliance on the concept of characteristic natural beauty in rejecting the inclusion of the non-chalk landscapes within any proposed SDNP. The Council does not consider their arguments to have merit, for the following reasons.
60. First, it is to be recognised that reliance on the need for characteristic natural beauty was only one of the reasons for the exclusion of the non-chalk landscapes. The absence of National Park qualities were also relied upon in the Inspector's conclusions and this approach remains sound as explained above.
61. Secondly, the approach discloses no error of law, as Natural England claim.⁴³ It is clear that natural beauty is not exhaustively defined in the Act and the mere absence of the word "characteristic" from the statutory wording (or its appearance in the recreation criterion) does not invalidate the interpretation relied upon by the Inspector.
62. As the evidence and submissions of the Council have already explained, that interpretation is wholly justified having regard to the approach taken in previous designations, most recently that of the New Forest National Park.
63. In previous designations, the principle of looking for characteristic natural beauty has been firmly established. Whilst the Dartmoor decision related to variations to the boundary of that National Park, there is no proper distinction to be drawn between that exercise and the assessment of whether land should fall within a newly designated National Park. There is no reason to suppose that the Inspector in that case thought a different test should be applied to land being considered as part of a boundary review as opposed to a newly proposed designation and it would not make sense for varying approaches to be followed.

⁴² See too the evidence submitted by the South Downs Campaign.

⁴³ See evidence of Val Kirby paragraphs 23-48; Natural England Position Paper 5 para.s 40-53.

64. Clearly this is what the Inspector to the New Forest National Park inquiry considered, because he was rightly content to apply the principle of characteristic natural beauty to the designation of a new National Park.
65. This forces Natural England to argue that he was wrong.⁴⁴ However this conveniently ignores how the Secretary of State accepted the conclusions of the Inspector and in no way questioned the approach to requiring characteristic natural beauty in that case, argued for by the Council and accepted by the Inspector here. That must carry far greater weight than the position adopted by Natural England.
66. If the position of the Secretary of State had changed since that decision, NERC was the place to confirm as much, but there is nothing in the legislation to suggest that the Secretary of State was turning away from the approach accepted in the New Forest decision. Rather, the intention behind NERC was apparently to ensure that National Park designation returned to its traditional approach and there has never been any suggestion that the New Forest decision was somehow to be airbrushed from that history.
67. For these reasons, the approach of the Inspector was correct in law.
68. Thirdly, Natural England may then argue that this approach was not the same as their designation policy,⁴⁵ however as it has already recognised the Inspector is not bound by that policy and there is no reason why repetition of it at this stage of the inquiry should change the approach taken by the Inspector.
69. For these reasons, the Council does not consider there to be any reason for the Inspector to alter his approach to seeking characteristic natural beauty when assessing whether land ought to be included in the proposed SDNP.

⁴⁴ Evidence of Val Kirby para. 32.

⁴⁵ Evidence of Val Kirby para.s 41-48; see too Position Paper 5 para.s 47-53.