

South Downs National Park Public Inquiry
(Re-opened)

Implications
of
NERC Act 2006 and
Meyrick judgments
for
South Downs National Park

Proof of Evidence

by



Campaign to Protect
Rural England



SOUTH DOWNS CAMPAIGN

Working for the best possible National Park

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1 Introduction

- 1.1 The South Downs Campaign (“SDC”) submits the following proof of evidence on the implications of the Natural Environment and Rural Communities Act 2006 (the “NERC Act”) and the Meyrick Judgments for the proposed South Downs National Park (“PSDNP”). This covers both the implications for the South Downs National Park (Designation) Order 2002 (as varied by the South Downs National Park (Variation) Order 2004) (the “Designation Order”) and the Inspector’s provisional conclusions and recommendations following the first part of this Inquiry.
- 1.2 The SDC is a network of organisations working for the best possible South Downs National Park, representing over 125 National, regional and local groups and organisations¹. This particular proof of evidence has been produced in partnership with a number of organisations, in particular with the Campaign to Protect Rural England (CPRE).

2 Biography of Principal Witness

- 2.1 Christopher Napier spent 14 years as an officer in the Royal Navy, mainly in submarines. He then qualified as a Solicitor and became a partner of the international law firm of Clifford Chance, where he specialised in commercial litigation and environmental law. He retired from Clifford Chance some seven years ago, and now practises from home as a mediator of civil and commercial disputes.
- 2.2 He is Vice Chairman of the Campaign to Protect Rural England (CPRE), Chairman of CPRE Hampshire, and a member of CPRE South East. He is a past Chairman of CPRE East Hampshire & Havant District Group. He is a Board member of Radian Group, a housing association of about 15,000 homes, of which one subsidiary is Drum Housing Association based in Petersfield. He is Chairman of the South Downs Advisory Forum and a member of the South Downs Joint Committee; and also President of the Petersfield Society.

¹ SDC Updated Biography – Inquiry Document No: #1147/0/1

3 Implications of NERC Act

3.1 Background to and Interpretation of the NERC Act

- 3.1.1 The evidence of the SDC given to the earlier stage of this Inquiry was based on the legislative framework for the designation of National Parks as set out in the National Parks and Access to the Countryside Act of 1949 as it then stood and as amended by the Environment Protection Act 1990 and by section 61(1) of the Environment Act 1995 (“The 1949 Act”). This evidence not only took into account a legal interpretation of the 1949 Act but also had regard to the practice of National Park designations. In this respect, the SDC did not differ from the approach of the then Countryside Agency in its understanding of the designation criteria.
- 3.1.2 The Countryside Agency is now part of Natural England, and hereafter the expression “Natural England” is used to refer both to the current body and to the Countryside Agency.
- 3.1.3 The 1949 Act has now been amended by the NERC Act 2006. The recently amended 1949 Act applies to all future designations as well as any currently under consideration. Accordingly, it now applies to the designation of the PSDNP.
- 3.1.4 The NERC Act amendments were designed to overturn the potential impact of statements made in the High Court in the Meyrick case on the process of designating National Parks, and to restore the “status quo” whilst giving greater clarity to the legislation. When Lord Bach was moving the amendments in the House of Lords he stressed this point as follows: “...I shall talk about our Amendment No. 131, which will clarify the interpretation of the criteria in Section 5 of the National Parks and Access to the Countryside Act 1949 for a National Park, and return its interpretation to how I argue it was generally understood prior to the Meyrick judgment in the challenge to the New Forest National Park designation confirmation order. As I have argued, the former understanding can be traced back over the past 56 years...”²
- 3.1.5 The Minister at the time, Jim Knight MP, in the subsequent Commons debate made similar statements: “These Lords amendments are intended to clarify the interpretation of the statutory criteria for the designation of national parks... ...in line with how they have been generally understood and applied for the past 56 years. ...The amendments return the situation to one in which we have what were generally understood, prior to the judgment, to be the relevant criteria, but with greater clarity.”³
- 3.1.6 The SDC, having reviewed carefully the recently amended 1949 Act, and taken legal advice on certain aspects, considers it reinforces the way the criteria for designation were applied by Natural England in its work leading up to the Designation Order. The SDC therefore considers that the boundary laid out in the Designation Order is in all respects consistent with the 1949 Act as amended by the NERC Act, and that the Order should now be supported in full by this re-opened Inquiry.

² Column 52, Hansard, 20 March 2006 (Lords debate) – CD #21

³ Column 951, Hansard, 29 March 2006 (Commons debate) – CD #23.

- 3.1.7 The Inspector's Report dated 31 March 2006 (CD #3) on the previous stage of this Inquiry was dated just 24 hours after Royal Assent was given to the NERC Act, and in these circumstances it must have been difficult to allow for a full review of the implications for the Designation Order and Inspector's provisional findings. The Secretary of State has accepted this in directing that the implications of the NERC Act amendments should be an area of examination in the re-opened Inquiry.
- 3.1.8 The outcome is that there are clear differences between the designation criteria set out in the 1949 Act as amended by the NERC Act and the interpretation of the designation criteria which underlies parts of CD #3. Some of these differences are quite fundamental to the provisional recommendations made in this report, and now need review at the re-opened Inquiry to bring them into line with the amended designation criteria. These are discussed below.

3.2 Single or Core Characteristic

- 3.2.1 One of these fundamental differences relates to the provisional recommendation that confirmation of the Designation Order should be confined to land showing a single or core characteristic. This is crucial as it has led to the provisional recommendation to exclude the Western Weald from the National Park, essentially on the basis that it is of a different characteristic to the chalk hills (which is not disputed).
- 3.2.2 In this regard, the SDC is concerned and surprised that a phrase from its Closing Statement (CD 262) was taken out of context and used in the Landscape Assessor's Report⁴ as though to support the concept of a National Park being of a single or core landscape type. It is clear that if the phrase is put into its context, it is referring to the whole of the PSDNP, including the Western Weald, and not just the 'core chalk'.
- 3.2.3 In formulating this provisional recommendation, substantial reliance was placed on Inspectors' Reports in relation to a boundary review in the Dartmoor National Park and the designation of the New Forest National Park. It was the latter report that argued that a single or core characteristic was the appropriate starting point for designating a new National Park. This has then influenced thinking on the PSDNP.
- 3.2.4 However, the SDC argues that this is based on a number of false premises. The Dartmoor Inquiry was not an inquiry into designating a new National Park but into amending or reviewing existing National Park boundaries, something that is quite different. It was also held in the context of the Sandford Review, which made a recommendation on altering the boundaries of the existing national parks⁵, and the Government policy, current at the time, which stated "*The Secretaries of State agree with the [Sandford] Committee in not favouring radical alterations to National Park boundaries (22.2)...*"⁶
- 3.2.5 It is within this framework that the Dartmoor boundaries were thus constrained to be amended only within areas of 'Dartmoor' character and not that a new National Park should be necessarily restricted in such a way. Unfortunately, this does not appear to

⁴ Paragraph 6.25, page 52, Annex A, Inspector's Report, Volume 1 – CD #3

⁵ Paragraph 22.2, The Sandford Report, 1974 – CD 86

⁶ Paragraph 13, Circular 4/76 – Report of the National Parks Policies Review Committee – CD #22

have been understood at the New Forest Inquiry and no evidence appears to have been examined at that Inquiry on the character of the existing National Parks in England and Wales.

- 3.2.6 Coming up to date, Parliament had full knowledge of the New Forest Inspector's Report in considering the amendments to be made to the 1949 Act but chose not to take the opportunity given to it to enshrine into legislation a principle that in designating National Parks the area covered should be confined to a single or core characteristic. The amended 1949 Act continues to refer only to "natural beauty" in the first limb of the designation criteria. Natural beauty may be displayed by a number of different characters within one National Park.
- 3.2.7 Indeed, as the SDC demonstrated in CD 217, many English National Parks including a number of the best-known and most visited National Parks, such as the Lake District and Peak District, are not based on a single or core characteristic. Moreover, the SDC notes that the Landscape Assessor, in reaching his conclusions, omitted to make any mention of the Welsh National Parks. These were designated under the same legislation as the English National Parks and by the same body, the National Parks Commission (England and Wales) and all contain a number of different landscape character types.
- 3.2.8 For the Government to ask Parliament to introduce such a principle into the National Park designation process would clearly have been in conflict with the 1949 Act and previous practice, and so would have gone much further than restore the "status quo", as intended. Also, consideration of variations to designation orders for current National Parks containing more than a single or core characteristic would have become fraught with difficulty.
- 3.2.9 The result is that reliance on any precedent that new National Parks should consist of a single or core characteristic that may have been thought to be established by either the Dartmoor or New Forest Inquiry Reports must now be re-assessed against the statutory criteria as set out in the amended 1949 Act. The necessary conclusion from such re-assessment is that any such precedent, if indeed it existed, has been rejected by Parliament through the NERC Act amendments to the 1949 Act; and the amended 1949 Act, by its continued reference only to "natural beauty", makes it clear that a single or core characteristic is not a legitimate consideration in designating a new National Park in England or Wales. The SDC notes that this is in contrast to the position in Scotland where, under the National Parks (Scotland) Act 2000, section 2(2), there is specific reference to 'distinctive character and coherent identity'.
- 3.2.10 Accordingly, the provisional recommendation that the Western Weald should be excluded from the PSDNP on the basis that it is of a different character to the chalk hills must now be removed; and reconsideration must be given in the re-opened Inquiry to the full area contained by the Designation Order, which SDC contends was properly based on the designation criteria for National Parks as now reinforced by the NERC Act amendments to the 1949 Act.

3.3 Relative Wildness

- 3.3.1 CD #3 (Part 2 Report) notes in paragraph 2.19 that a sense of relative wildness is not expressly part of the statutory criteria. It suggests, however, in paragraph 2.20, that issues such as tranquillity, openness, a sense of wildness and remoteness are ‘hallmark qualities’ necessary to satisfy the statutory criteria.
- 3.3.2 Such an interpretation of the statutory criteria could be considered to be in line with the High Court judgement on the Meyrick case, which placed considerable reliance on the concept of relative wildness, and was available at the time that the Inspector was writing his report.
- 3.3.3 However, section 99 of NERC Act has amended the 1949 Act so that it now states that the fact that an area consists or includes “*land used for agriculture or woodlands, or land used as a park, or whose features are partly the product of human intervention in the landscape, does not prevent it from being treated as being an area of natural beauty*” - including for the purpose of National Park designation. Moreover, in proposing the amendment to Parliament Lord Bach made clear that such areas are contained within existing National Parks⁷. Clearly, the clarification contained in this provision has significant implications for CD #3, most notably those provisional recommendations and conclusions related to the exclusion of the Western Weald.

3.4 Wildlife and Cultural Heritage

- 3.4.1 In the work underlying the Designation Order, Natural England took account of the area’s wildlife and cultural heritage. However, in the Landscape Assessor’s Annex B Report, little or no mention was made of the wildlife and cultural heritage of the areas in question. Given that his report was used to formulate the provisional recommendations in CD #3 it is unlikely that these matters were taken into account to the same extent as did Natural England, notably in relation to the recommendation to exclude the Western Weald. This is another of the fundamental differences referred to above.
- 3.4.2 The 1949 Act as amended by the NERC Act makes it absolutely clear that the area’s wildlife and cultural heritage are matters of which Natural England may take account in designating National Parks. The extent to which it can do so must be a matter for its discretion.
- 3.4.3 So, the SDC contends that an implication of the amendments to the 1949 Act is that it is inappropriate to give less weight to the area’s wildlife and cultural heritage than Natural England has done in formulating the Designation Order.
- 3.4.4 Accordingly, reconsideration needs to be given in the re-opened Inquiry to the extent to which Natural England took account of the area’s wildlife and cultural heritage in formulating the Designation Order, and this (along with any new evidence) needs to be reflected in the recommendations to be made to the Secretary of State as a result of the re-opened Inquiry.

⁷ Column 50, Hansard, 20 March 2006 (Lords debate, Columns 50 – 67) – CD #21

3.5 Opportunities for Open Air Recreation

- 3.5.1 Finally, at the time CD #3 was written the legal position with regard to opportunities for quiet recreation was in doubt because of the judgment of the High Court in the Meyrick case. The 1949 Act as amended by the NERC Act has fully clarified the legal position in providing that Natural England may take into account the extent to which it is possible to promote opportunities for the understanding and enjoyment of an area's special qualities by the public. This also has implications for the provisional recommendations in relation to the Western Weald.

3.6 NERC Act Conclusions

- 3.6.1 In conclusion, the SDC maintains that the amendments made by the NERC Act to the 1949 Act have implications for the designation of the South Downs National Park which are fundamental to the provisional recommendations (CD #3) on single or core characteristic, relative wildness, wildlife and cultural heritage, and opportunities for recreation. The SDC will be bringing forward further evidence on these issues later in the inquiry.

4 Implications of Meyrick Judgments

4.1 Relevance of Meyrick Judgments

- 4.1.1 The SDC considers that the result of the Meyrick Judgements and the NERC Act amendments is to reinforce the way in which the criteria for designation were applied by Natural England in determining the designated boundary for the PSDNP. Therefore, as regards the Designation Order there are now no outstanding issues arising out of the Meyrick Judgments.
- 4.1.2 However, one of the points made by Judge Sullivan and reinforced by the Appeal Court is very relevant to this re-opened Inquiry. This was the criticism of the New Forest National Park Inspector that in reaching his conclusions regarding the Hinton Estate the Inspector was judged not to have “clearly explained” why the area met the designation criteria⁸.
- 4.1.3 It is this failure to “clearly explain” the reasoning, for example in the Landscape Assessor’s Report (Annex B, CD #3), or of certain provisional recommendations, particularly on proposed new boundaries contained in CD #3, such as around Ditchling or Lewes, that is impacted upon by these findings. The SDC will be bringing further detailed evidence on these points at other times in the inquiry.

4.2 Meyrick Conclusions

- 4.2.1 While the Meyrick Judgement no longer has an impact on the National Park designation criteria and definition of natural beauty, the need to “clearly explain” the reasoning behind any recommendations in the Inspector’s report remains an outstanding issue. Given the absence of any “clear explanation” on a number of provisional recommendations in CD #3, often associated with advice from the Landscape Assessor, there is a need for further examination of the facts. The SDC firmly believes that unless these issues can be fully addressed at the re-opened Inquiry, the Secretary of State will not be in a position to come to a sound and informed decision and could find any such decision challenged in the Courts.

⁸ Paragraph 74, Meyrick Judgment (High Court) – CD #9
Paragraphs 21, 44 and 47, Meyrick Judgment (Court of Appeal) – CD #20