

To: Defra

Date: 22 March 2019

Ref: Conservation Covenants

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Conservation Covenants Consultation – NFU Response

The National Farmers' Union (NFU) represents 55,000 members in England and Wales, involved in 46,000 farming businesses. In addition, we have 55,000 countryside members with an interest in farming and the countryside.

Summary

Defra has [consulted](#) on the creation of conservation covenants as a legal tool to secure long term environmental outcomes. The Law Commission originally examined conservation covenants in 2013 and 2014.

The NFU provided a comprehensive response to the Law Commission's original consultation in 2013. The Defra consultation builds on the Law Commission's original findings and many of our original reservations concerning the introduction of conservation covenants remain. We attach a copy of our response to the Law Commission.

To appeal to farmers, the NFU believes that conservation covenants must be sufficiently flexible in terms of the freedom to negotiate the specifics of the covenant and the length of the term. Furthermore, long term flexibility will be vital to allow for variations or modifications of the obligations, for example to accommodate changes in circumstances or wider policy priorities, and the ability to meet desired outcomes.

If introduced, conservation covenants must deliver a fair financial payment for the services provided, which need to reflect and fairly reward farmers for the full costs of delivery as well as future losses. It must also be transparent from the outset how delivering a conservation covenant relates to existing or future environmental land management schemes.

NFU Response

The Defra consultation sets out a number of questions. Each of these are addressed below:

Question 1: Should conservation covenants be introduced into the law of England?

As an organisation, the NFU does not support the introduction of conservation covenants in the form proposed by the Law Commission or Defra in its current consultation. The introduction of conservation covenants is promoted within the current consultation as an effective delivery tool for environmental outcomes, for example to deliver proposals concerning net gain and to ensure long term sustainability of conservation features on land. In our view the restrictive nature of the proposed covenants would render their use unappealing to most farmers for the reasons set out in this response. The freedom to negotiate and secure more flexible, short to medium term options would in our view, create greater options to achieve environmental goals. In turn it would allow farmers and landowners the necessary long term flexibility to address changes in farming practices, cropping, diversification and ultimately succession.

The consultation paper outlines a number of 'scenarios' at page 5; we would submit that the suggested use of conservation covenants as a solution for these scenarios is too simplistic. Whilst securing the preservation of conservation improvements to a historic house might be entirely feasible through the mechanism of conservation covenants, the creation and maintenance of habitat in perpetuity is an aspiration with extremely complex goals. The achievability or success of maintaining those outcomes will be influenced by many external factors, for example climate change.

Our view in terms of the general concept of conservation covenants is that they should be as flexible as possible as to the circumstances and needs of the landholder. We have great reservations about the length of time to which these covenants could bind land. Therefore, adequate safeguards need to be in place to allow for a number of future scenarios that include modification or changes in priority or purpose of the land, to ensure protection for our members. These covenants should not restrict, but should allow, future development. The consultation paper promotes the use of conservation covenants as providing a mechanism to allow development rather than stifle it; however we assume that this presumption is purely for the benefit of large scale housing development, rather than farmers who may themselves wish to develop land in the future. Therefore, any introduction of conservation covenants should explicitly allow farmers the flexibility for future land development.

Question 2: What demand do you foresee for conservation covenants? What is the basis for your view?

Farmers are subject to considerable regulation, much of which relates to environmental matters. This is likely to be a factor when farmers are considering whether or not to enter into additional obligations through private conservation covenant arrangements.

We believe that a default position of conservation covenants existing in perpetuity, and therefore binding successors in title, will be viewed as highly restrictive to farmers and therefore this may deter them from entering into such arrangements. Not only could conservation covenants create difficulties in terms of the adaptation of farming practices, business flexibility and succession planning, but they could also create a significant block to future development on land.

Presently, farmers wishing to undertake measures that would be beneficial for the environment have a number of vehicles they can use to achieve those aims. The majority of farmers claim payments under the Basic Payment Scheme and are bound by cross compliance requirements under that scheme, many of which deal with the management of the land. Farmers can also take part in voluntary activities like Championing the Farmed Environment; they can enter into contracts with third parties under which they agree to undertake measures for consideration and they can voluntarily enter into agri-environment schemes, which are designed to encourage farmers to protect and enhance the environment on their farmland by paying them for the provision of environmental services. Given these options, conservation covenants are unlikely to be seen as an attractive option without a framework that allows for flexibility.

Question 3: What potential do you foresee for conservation covenants to deliver lasting conservation outcomes? What is the basis for your view?

The proposals put forward as part of this consultation to allow conservation covenants to vary in length, rather than be required in perpetuity, could open up opportunities for the use of conservation covenants by farmers to a certain degree. However, farmers considering conservation covenants will have many questions that are not answered within the consultation. Land managers will need the ability to modify or vary the agreed outcomes and will need to have a full understanding of the obligations contained within the covenant and how these are managed, to ensure that they are able to make an informed decision and continue to meet the obligations. Equally, the payments for delivery and maintenance need to match the length of the commitment, taking into account the risk of permanent habitat creation.

We also foresee added administrative complexity given that conservation covenants are likely to be registered as local land charges. The process for the removal and / or modification of local land charges is not straightforward and this would present an additional barrier to flexibility.

Question 4: What use would you make of conservation covenants?

The NFU as an organisation would not make use of conservation covenants. We are unsure about the extent to which conservation covenants might be taken up by our membership. If farmers can enter into a conservation covenant and continue farming productively at the same time (similar to agri-environment agreements) this would be likely to be more attractive than a strict covenant which permanently takes land out of production, potentially for generations to come. It is likely that it would vary as between circumstances as to whether farmers would be interested in entering into a conservation covenant – it would depend on their interests and particular business circumstances.

Question 5: What, if any, unintended consequences might there be? What is the basis for your view?

We have concerns that the introduction of conservation covenants could add to the complex legal landscape that already exists alongside current European and domestic land designations, and therefore may deter farmers as a result. In addition, we have concerns regarding the issue of potential double-funding and how payments under a conservation covenant might impact (potentially negatively) on claims under schemes designated under the Common Agricultural Policy or future schemes in place post-Brexit. We would not want to see farmers penalised under cross compliance or agri-environment schemes, for entering into a conservation covenant.

In terms of agricultural land, long term obligations or restrictions on land use are often viewed as severely limiting in terms of future farming methods and practices on the land in question. The existence of a conservation covenant is also likely to have an impact on future farm diversification considerations, as well as planning and development on the property. Any positive obligations within a conservation covenant might become severely onerous in the future; habitats change over time and climate change could well have a progressive natural impact on the land in question.

Question 6: What changes, if any, to the Law Commission proposals do you consider necessary to make conservation covenants more effective tools?

As outlined above, the NFU believes that conservation covenants should offer sufficient flexibility in terms of the freedom to negotiate the terms of the covenant, the length of the term and also long term flexibility to vary or modify the obligations to allow for changes in circumstances and the ability to achieve the desired outcomes.

The NFU has concerns about the potential for the voluntary transfer of the benefit of the covenant from one responsible body to another, with notice given to the landowner, as proposed by the Law Commission. The NFU would accept that conservation covenants could be transferred between public bodies in the event of a constitutional change to those bodies and their powers. However, we would strongly resist the ability for conservation covenants to be transferred from public bodies to private bodies, or between private bodies.

We have further concerns about the proposal that, when a conservation covenant is transferred, it will not be enforceable by the transferee unless the change has been notified to the local land charges office. This would render the agreement extremely unbalanced, with all of the obligation resting on the landholder. It also raises questions about who would be responsible for any payments due to the landholder.

It would be more effective if, in the event of a transfer between responsible bodies taking place, a trigger existed to enable the landowner to discharge the covenant, in a similar way to a break clause in a lease. A fresh conservation covenant could then be entered into, if the landholder agrees, with the new responsible body.

Question 7a: Should tenants be able to enter into conservation covenants?

Around 30% of agricultural land in England and Wales is let on an agricultural tenancy. In the event that conservation covenants are introduced, the NFU has reservations regarding the extension of the right to enter into these covenants to tenants. We are concerned that in the context of agricultural tenancies, should tenants have the ability to enter into such covenants then this could have a negative impact on land values and could potentially have considerable adverse impacts on the landlord/future tenant's use of the land.

In the context of agricultural tenancies, Farm Business Tenancies (FBTs), which have existed since 1995, would not generally provide the tenant with the power within the lease to enter into such obligations, without the prior agreement of the landlord. Tenant farmers who have the benefit of an Agricultural Holdings Act (AHA) tenancy might have a greater degree of autonomy in this context given that these tenancies are three generation tenancies, where the original lease was granted before 12th July 1984.

Question 7b: If so, do you agree that the qualifying threshold for the remaining length of a lease should be set at a minimum of 15 years? Question 7c: If not, what level would you set it at and why?

We would suggest that in the context of agricultural tenancies, if tenants were to be provided with the ability to enter into conservation covenants, then this should be limited to AHA tenancies and subject to the landlord's proper written consent.

Tenancies granted before 12th July 1984 under the Agricultural Holdings Act 1986 (the 1986 Act) contain succession rights on the death or retirement of a tenant, subject to certain tests being met. There are two potential successions available. This type of tenancy may initially have been created for a fixed period but due to restrictions in how a landlord could gain possession, would then have defaulted to an annual periodic tenancy. Other tenancies under the 1986 Act may intentionally or unintentionally have started on an annual periodic basis. Whichever way in which the tenancy was created, succession rights apply, meaning that a successor can apply to take over the tenancy in the event of death or retirement of the existing tenant. The successor will essentially continue the tenancy (albeit a new tenancy is created) on an annual periodic basis until he or she either dies or retires, surrenders the tenancy or the landlord is able to satisfy the narrow grounds on which to serve notice to quit.

There are a good number of AHA tenancies still in operation on an annual periodic basis but with a high degree of security of tenure with a number of indefinite years yet to run. Because of the security of tenure and succession elements, the years left on a tenancy could well be expected to exceed 15 years. Some of these tenancies may not even have had a first succession. Clarity is therefore needed as to whether a tenant whose tenancy is indefinite (through succession or otherwise) but likely to exceed 15 years would meet the qualifying threshold.

The CAAV Land Occupation Survey 2017 showed that the average length of a FBT let with land, buildings and a house was 9.29 years. FBT lettings without a house were around about 5 years on average. This obviously falls very short of the proposed 15-year threshold.

It is unlikely that the majority of FBTs would be able to enter into a conservation covenant on the basis that they are too short term. Clarification would be required on whether an AHA tenancy with an undefined but possibly long period left to run, would be able to enter into a covenant.

Question 8a: Should tenants be required to secure the agreement of the freeholder before entering into a covenant? Question 8b: If not, what is the basis for your view?

We would agree that the proper agreement of the freeholder should be sought and set out in writing. A covenant might permanently remove agricultural land from production, and the continuing restrictions/obligations may be considered to be overly burdensome for the landlord and successive tenants. In addition, given that conservation covenants are proposed to be long term and/or binding upon successors in title, we are concerned that the covenant would result in an inability for the successive tenant/ landlord to adapt to changing farming practices. If a freeholder has secured borrowing over the land there may be implications from the lender if a conservation covenant is entered into with or without the landlord's consent.

When tenants under the 1986 Act are served notice to quit under one of the narrow statutory grounds, or where a FBT under the Agricultural Tenancies Act 1995 comes to an end, the tenant is usually entitled to statutory compensation. Clarification is required as to whether any benefit derived by a landlord from having a conservation covenant on the land would result in statutory compensation for the tenant on determination of the lease, provided the tenant had sought their landlord's consent.

Most tenancy agreements contain clauses obliging a tenant to farm within the definitions of good estate management and good husbandry, as set out in the Agriculture Act 1947. It is likely that some activities undertaken by a tenant for a conservation covenant could result in a breach of these definitions, and therefore a breach of the tenancy. This could result in a notice to quit. On this basis, a tenant would need to have the landlord's permission to perform what is required by the conservation covenant, to avoid losing the tenancy.

Question 8c: Should freeholders be required to secure the consent of a tenant before entering into a covenant when the land affected is leased?

In every lease there is an implied covenant by the landlord for quiet enjoyment. This gives the tenant the right to be in possession of the land without suffering any physical interference or disturbance from the landlord. It is likely therefore that a landlord will be required to secure the consent of a tenant if he is not to be in breach of such a covenant.

In any event consent should be sought from the tenant as it may interfere with a tenant's business model or plans. It may also interfere with any borrowing the tenant may have taken on the land for investment.

In addition, we would not wish to see landlords attempting to impose certain burdensome practices or new environmental agendas on existing tenants over and above obligations contained within agreed tenancy terms.

Question 9a: Should public oversight provisions require responsible bodies to provide details of the location and headline conservation objectives of conservation covenants held by them? Question 9b: If not, what would you propose and what is the basis of your proposed alternative?

The NFU does not see any merit in including public oversight in any scheme of conservation covenants. Whilst the wider theoretical perspective in creating such covenants is the 'public benefit', the covenants are private legal agreements between the responsible body and the landholder.

Flexibility as to the terms of the covenant should be maintained and the terms of the covenant should not in our view be influenced by public opinion. The terms of the covenant will be circumstance and site specific.

There should, however, be oversight from an independent professional adviser to the landowner. It should be a requirement that all landowners entering into conservation covenants are advised on the implications of this by an independent solicitor. This is a particular concern where the conservation covenant will exist for a long period of time, or even in perpetuity, and therefore bind successors in title. No conservation covenant should be valid without it being accompanied by a certificate from an independent solicitor to the effect that the landowner had been independently advised of the implications of entering into that covenant.

We would also expect some form of independent oversight where the 'responsible body' is a charity or for-profit company, to provide a check and balance on the agreement.

Question 10a: Should for-profit bodies be able to hold conservation covenants?

The NFU has serious concerns about for-profit companies being given the power to enter into conservation covenants with private landowners. Private limited companies are easily created, with broad company objects within constitutions. Our concerns include those relating to the on-going monitoring and management of the land, and the approach of private for-profit organisations to take enforcement action against landholders. We agree that, at the very least, statutory criteria should be developed which should be met in order for for-profit companies to apply to the Secretary of State to be deemed a responsible body. We also agree that stakeholders should be consulted on the criteria itself.

Question 10b: Should there be additional mechanisms introduced for for-profit bodies which provide assurances that the covenants they hold are delivering conservation outcomes for the public good? If so, what mechanisms would you suggest?

Yes, we would expect to see additional mechanisms for for-profit bodies as well as additional safeguards in place, for the reasons set out above. These safeguards should not only ensure the conservation outcomes but also that the agreement is fair and balanced, to protect the landholder.

The NFU also has reservations about charities being responsible bodies. Our principle concerns are with successors, in terms of what would happen when the charity ceases to exist, and with objectivity and impartiality. Charitable objects are inherently broad and might not identify the true nature of the charity's activities. We therefore believe that if charities are permitted to be responsible bodies, they too should have additional requirements imposed, to provide safeguards and checks and balances to reassure landowners. Such requirements would need further consultation.

Question 11a: Do you consider the Law Commission proposals, with the proposed amendments set out above, as containing sufficient safeguards to ensure they are not abused? Question 11b: If not, what changes would you make?

In relation to development, for delivery or other public benefit priorities or for compulsory purchase, it is clear that there will be an ability to override a conservation covenant. The abilities to override that have been suggested however do not appear to include genuine plans of the landowner to redevelop their land. In this regard, it is crucial that farms retain as much flexibility as possible for development as this may be required to comply with future regulation and changes in farming practices.

Question 12a: Do you consider the Law Commission proposals, with the proposed amendments set out above, as simple, practical and capable of delivering lasting conservation outcomes?

Question 12b: If not, what changes would you make to them?

Achieving environmental outcomes as set out in a conservation covenant could be very difficult, depending on the outcome. The scenarios for the potential use of conservation covenants outlined in the consultation recognise the importance of land management for achieving the outcomes. Each scenario mentions words like 'appropriate' or 'proper' land management, through to 'securing permanent land management obligations'. The consultation is silent about when the management requirements are defined, how they are measured and monitored or what happens in the circumstances of force majeure. For the landholder these contract issues are where the costs of delivering the covenant are determined, so are fundamental to the delivery of the covenant.

Equally, the landholder needs protection from changing views on appropriate management or wider policy priorities. In a period of 20 years the view of what constitutes good habitat management could change, leading to the landholder inadvertently being deemed in breach of his covenant. Equally there could be new national requirements introduced during the life of the covenant that the landholder needs to respond to that could be at odds to the covenant. It would be unreasonable for the landholder to be in breach in that situation.

The elements that need to be addressed that will make delivery of environmental outcomes a market opportunity for landholders are:

- It must deliver a fair financial payment for the services provided. Financial payments offered also need to reflect and fairly reward farmers for the full costs of delivery as well as future losses. For example, a permanent land use change from arable production to wet grassland could be completed through a 10 year agreement. It would require payments for all capital works together with annual management costs and recognition of the permanent land use change.
- Farmers could be willing to participate provided it is voluntary, the obligations set out are achievable and flexible enough to respond to the challenges thrown up by the natural environment and recognise and respond to the needs of the farming business, such as future modification, but also termination. To achieve this there needs to be a fair and balanced agreement, with clear on-going management until determination of the covenant.
- The terms of the covenant need to be clear in terms of how success is measured and, where there are potential failures, how these will be addressed.
- It must be clear who carries out the monitoring and what redress exists should delivery not achieve the desired outcomes.
- Farmers often face significant challenges as a result of extreme weather conditions or other natural occurrences, which may impact on environmental actions. For example, where tree planting efforts have failed due to drought. The arrangement therefore needs to be flexible enough to address such issues in a fair way.
- In addition to the environmental outcomes, farmers should be able to gain reward for a range of benefits delivered such as carbon sequestration from the same area of land, even if the funding comes from different sources. It must be transparent from the outset how delivering a conservation covenant relates to existing or future environmental land management schemes, including the current Common Agricultural Policy delivery through the Basic Payment Scheme.
- In addition there is a need to develop knowledge on how to best manage biodiversity to achieve the intended environmental outcome. This needs to be available to in a user friendly format to enable effective delivery. In the contract it needs to be clear who is responsible for providing the most appropriate advice for successful delivery.
- There needs to be security for the landholder, to ensure that they know who the responsible body is for the entire length of the covenant. The arrangements need to cover all eventualities including the responsible body ceasing to exist. In these circumstances the provider must be able to terminate the agreement.

Question 13a: Do you consider the Law Commission proposals, with the proposed amendments set out above, contain sufficient safeguards to ensure they are not used to block development, or otherwise abused? Question 13b: If not, would you support additional safeguards? Please give details.

As set out above, the NFU has concerns that the proposed safeguards that have been suggested to avoid conservation covenants being used as a tool to block development do not appear to include genuine plans of the landowner to redevelop their land. It is vital that farms also retain as much flexibility as possible for development.

Question 14: What alternative or supplementary processes might be used to seek remedies against breaches of conservation covenants? If so, what do you see as their advantages and drawbacks?

Greater clarity is required on dispute resolution between the responsible body and the landholder. For example, we can see the potential for disputes to arise over the assessment of habitats and appropriate management to achieve the agreed outcomes. This is particularly pertinent in the event of an agreement that exists in perpetuity, when a variety of issues could arise that might lead to a dispute between the parties.

There is a clear need for appropriate dispute resolution options to address this and we would want to see more clarity on how such situations will be resolved. For example, could the wider draft Environment (Principles and Governance) Bill address this by proposing a solution, such as an independent body that would have the necessary experience and resources to oversee an appropriate method of dispute resolution. The costs of any such method of dispute resolution would need to be proportionate.