

Department for Environment, Food and Rural Affairs

Conservation covenants consultation

Background to CIWEM

CIWEM is the leading independent Chartered professional body for water and environmental professionals, promoting excellence within the sector. The Institution provides independent commentary on a wide range of issues related to water and environmental management, environmental resilience and sustainable development.

CIWEM welcomes the opportunity to respond to DEFRA on its consultation on conservation covenants. This response has been compiled with the assistance of members from our Natural Capital Specialist Panel.

Response to consultation questions

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

Yes. Conservation covenants, that work as a means of agreement between a variety of parties, should be introduced to remedy a gap in English law. The introduction of conservation covenants will be essential in delivering positive conservation actions over the long term.

Currently long term management is secured through sale and lease back or granting a long term lease. Whilst some landowners are happy to use these methods, they do not suit all landowners. Sale and leaseback is often unattractive as many landowners are motivated by retention of their land. Long leases can create tax liabilities through generating a chargeable gain under Capital Gains Tax and excluding availability of Business Property Relief from Inheritance Tax.

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

Following Treasury's announcement to introduce mandatory biodiversity net gain for development, there will be a demand for conservation covenants to allow the required gains, underpinned by scientific evidence, to be delivered on third party land.

Conservation covenants could also be used as a tool for delivering privately funded Payments for Ecosystem Services (PES) schemes that benefit individuals or companies.

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

If the model of conservation covenants introduced is simple and can be used by many parties, it will overcome an existing barrier to securing positive long-term wide-spread conservation activity.

In order to deliver lasting change it is important that long terms can be facilitated. During these terms the availability of new scientific evidence and changes in relationships and circumstances will make it necessary for parties to be able to renegotiate elements of the agreement and, failing that, to be able to access effective dispute resolution mechanisms.

We are aware that in some cases extended periods of conservation management will create new land uses that are difficult to reverse and so may endure even after the formal agreement has ended.

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

Conservation covenants should be used for: providing biodiversity units for net gain, securing management solely for public good through entering agreements with Wildlife Trusts and other public bodies, and securing management for environmental improvements which benefit private businesses as well as the wider public, for example cleaner water.

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

There is potential to tie people into management actions that are later found to be ineffective or counter productive to the aims of the agreement. Including provision to review the agreement to take account of new scientific evidence will overcome the potential for ineffective agreements being funded without delivering.

If introduced, conservation covenants should be a welcome addition to the existing options for securing land management rather than a replacement. Having a variety of options available will allow agreements to be tailored to meet landowners' requirements and reflect their motivations. Member feedback noted that some landowners may be cautious of entering into agreements with 'responsible bodies' whose agenda may be seen as hostile to their interests.

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

It is important that conservation covenants can be set up by a range of parties and not just 'responsible bodies'. This will ensure delivery is not unnecessarily restricted allowing greater environmental benefit to be secured.

Having said that, 'responsible bodies' may be able to play an important role in securing and ensuring delivery of biodiversity net gain projects to meet developer obligations.

We consider that conservation covenants should be available to use for setting up privately funded agreements that are primarily for private benefit.

If there are any strong risks associated with allowing all willing and able parties to enter into commercial agreements, an approach which operates smoothly in other contexts, these should be clearly expressed and safeguards to prevent system abuse should be developed.

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

Tenants should be able to enter into conservation covenants extending beyond their term providing they have gained consent of the appropriate landowner who is happy to take on the agreement after the termination of the tenancy. The appropriate owner will have a right to occupation that exceeds the term of the proposed covenant and adequate management rights. This may not be the tenant's immediate landlord in cases where the property has been sublet. It may also not be the freehold owner where a long lease is in place.

If the tenant is looking to enter into an agreement within the term of their tenancy a conservation covenant may not be the best tool as their strength is in binding successors in title which would not be necessary, instead a contractual management agreement would (alongside appropriate landowner permission) likely suffice.

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?

We do not think that it is necessary to set a minimum remaining lease term as the tenant should be able to agree a covenant extending beyond their term providing they have the permission of the appropriate landowner who will then take on the remaining commitment once the tenant's lease has expired.

However conservation covenants agreed should be long term to prevent bringing the regime into disrepute. A minimum 15 year term for conservation covenants may be appropriate.

As an example, if a tenant has eight years of their tenancy remaining and both the tenant and landlord would like to enter into a 15 year conservation covenant, with the tenant performing management for the first eight years and the landlord for the remaining seven years, this should be possible.

Question 7c: If not, what level would you set it at and why?

If the landlord must agree to take on the management obligations at the end of the tenant's lease, the length of the remaining lease should not impact on the agreement's performance and is therefore not relevant. A landlord should be able to reasonably refuse permission where the proposal would materially change the use of the land or would extend beyond the tenants remaining term.

Where the remaining lease is short it would be more appropriate to negotiate an agreement with the landlord who should then seek permission from the tenant if it requires a change in management of land the tenant has the right to use.

Question 8a: Should tenants be required to secure the agreement of the freeholder before entering into a covenant?

Tenants should be required to secure the agreement of the person or body holding the appropriate long term right to the land. This is necessary for several reasons:

- the management term may extend beyond the tenant's occupation
- there may be clauses allowing early termination of the tenancy
- the agreement will also bind the landlord in the cases that management reverts to them (during or after the initial lease term), and
- the management practices required may materially change the use of the land which the tenant will need permission for and the potential for a compensation claim will also need to be discussed and an agreed approach recorded.

Question 8b: If not, what is the basis for your view?

N/A

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

Yes. Where the land affected is leased it will impact on the tenants use of that land and therefore their business so their permission should be sought. It may be appropriate to renegotiate the lease, either in terms of area included or rental payment. This may only be possible by agreement if variation rights were not initially reserved either in the agreement or by the governing legislation.

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?

We understand that the intention behind collecting this data would be to assess agreements' contribution towards meeting the 25 Year Environment Plan goals. Monitoring of goals is important, however it would not be appropriate to require information on agreements that are created mainly for the benefit of a private company or individual as this information could be commercially sensitive. Voluntary reporting could be encouraged.

A benefit of requiring headline information from conservation covenants could be realised by allowing this information to be used for third party enforcement, where the agreement is being used to fulfil a legal obligation.

Question 9b: If not, what would you propose and what is the basis of your proposed alternative?

N/A

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

Yes, it is important that the use of conservation covenants is not restricted beyond willing and able parties if we are to see them provide the most benefit to the environment.

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?

Whilst conservation covenants should play an important role in providing public goods, we see no reason to prevent their use for delivering goods for private bodies or individuals where this is privately funded. Simple and accessible conservation covenants will fill a gap in English law, under which we currently only have restrictive covenants for the benefit of neighbouring land.

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?

Whilst restricting the parties that can enter into conservation covenants potentially reduces the likelihood that the mechanism is abused, it will reduce overall levels of delivery limiting the value of the mechanism.

The best way to ensure the mechanism is not abused is to have a route of recourse for disagreements. We therefore agree that the Lands Chamber should be able to consider the delivery of the agreement and any changes to deliverability, and be able to alter the agreement.

Where parties to the agreement are satisfied with delivery and the agreement is for private benefit, a third party should not be able to bring enforcement or review actions on the parties.

Question 11b: If not, what changes would you make?

It may be appropriate for third parties to be able to enforce delivery where an agreement for public benefit was created to fulfil a legal obligation.

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?

We agree that conservation covenants:

- should allow agreement of positive and negative obligations
- should bind successors in title, and
- should not require there to be neighbouring benefitted land.

We disagree that conservation covenants should be used solely for delivering public benefit and that agreements should only be created by 'responsible bodies'.

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

We believe that conservation covenants will provide more benefit if they can be made between all willing and able parties, including 'responsible bodies', for the benefit of private interests as well as the public.

For example, it should be possible for a water company to use a conservation covenant to secure long term management that limits diffuse pollution. Whilst this would mainly benefit the water company in avoided costs of water treatment it would also provide public benefit through improving the quality of water entering watercourses and would reduce impacts on aquatic organisms. In doing so the covenant would contribute to the 25 Year Environment Plan goals of clean and plentiful water and thriving plants and wildlife.

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?

As the consultation paper notes, it is already possible for development to be blocked using restrictive covenants, but this does not appear to be an issue in practice. We have no reason to think that conservation covenants will be used to block development.

Question 13b: If not, would you support additional safeguards? Please give details.

N/A

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?

This question would be best answered by legal professionals, as such we refrain from suggesting any alternatives.