

<b>Title:</b> Conservation Covenants Bill 2014 <b>IA No:</b> LAWCOM0034 <b>Lead department or agency:</b> Law Commission  <b>Other departments or agencies:</b> Department for Environment, Food and Rural Affairs	<b>Impact Assessment (IA)</b>		
	<b>Date:</b> 24 June 2014		
	<b>Stage:</b> Final		
	<b>Source of intervention:</b> Domestic		
	<b>Type of measure:</b> Primary legislation		
<b>Contact for enquiries:</b> Matthew Jolley 020 3334 3371			
<b>Summary: Intervention and Options</b>			<b>RPC Opinion:</b> Not Applicable

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as Two-Out?
£ 163.99 m	£m	£m	No   N/A

**What is the problem under consideration? Why is government intervention necessary?**

Landowners can play an important role in conservation efforts by agreeing voluntarily to take on legal obligations relating to how they use land. Under the current law it is difficult to ensure that these undertakings will remain once the land is sold, and thus realise longer-term environmental and historic conservation. As a result conservation opportunities are missed and lost, or fail to achieve long-term sustained outcomes. To avoid this, complex legal workarounds are used; however, these have high associated costs. The Bill would remove the difficulties created by the law by introducing conservation covenants - a simple alternative which has been successfully applied around the world. Government intervention is necessary; only primary legislation can introduce conservation covenants.

**What are the policy objectives and the intended effects?**

The Policy objectives are:

- (1) to create a versatile, low cost legal tool (a conservation covenant) which is capable of: (a) unlocking currently missed conservation opportunities, (b) facilitating better ways of delivering existing conservation initiatives, and (c) providing assurance of long-term conservation benefits;
- (2) to create a simple, certain and cost effective framework for conservation covenants; and
- (3) to ensure that any decision taken about modification or discharge of a conservation covenant balances flexible land use against the conservation and enhancement of the historic and natural environment.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

Option 0: Do nothing (base case)  
Option 1: Introduce conservation covenants  
In general terms, this option (which was strongly supported during the Law Commission consultation) includes introducing a statutory scheme to allow for the effective creation, management, enforcement, modification and discharge of conservation covenants, on a voluntary basis. This is the preferred option. The scheme has been designed to be led by landowners and the conservation sector - it is therefore low on regulation, allowing the scheme to be cost effective. Ultimately, the scheme provides an appropriate means by which to realise missed conservation opportunities and to drive down, if not eliminate, the use of workarounds in this context.

<b>Will the policy be reviewed?</b> It will not be reviewed. <b>If applicable, set review date:</b> Month/Year						
Does implementation go beyond minimum EU requirements?				Yes / No / N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		<b>Micro</b> Yes/No	<b>&lt; 20</b> Yes/No	<b>Small</b> Yes/No	<b>Medium</b> Yes/No	<b>Large</b> Yes/No
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)				<b>Traded:</b>		<b>Non-traded:</b>

**I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.**

Signed by the responsible SELECT SIGNATORY: \_\_\_\_\_ Date: \_\_\_\_\_

# Summary: Analysis & Evidence

# Policy Option 1

## Description:

### Introduce conservation covenants

Price Base Year 2014	PV Base Year 2014	Time Period Years 60	Net Benefit (Present Value (PV)) (£m)		
			Low: £14.91	High: £312.55	Best Estimate: £163.99

COSTS (£m)	Total (Constant Price)	Transition Years	Average (excl. Transition)	Annual (Constant Price)	Total (Present Value)	Cost
Low	negligible	1	£0.04*			<b>£3.97</b>
High	negligible		£0.14*			<b>£11.99</b>
Best Estimate	negligible		£0.08*			<b>£7.67</b>

#### Description and scale of key monetised costs by 'main affected groups'

Transitional costs: negligible

The key ongoing costs that arise from the realisation of missed conservation opportunities and the otherwise reduction or elimination of the use of workarounds are: annual transactional cost of creating conservation covenants £74,547 – best estimate – responsible body; annual monitoring cost of conservation sites £1050, which does not include costs for Theme 2 because the unit value is unavailable – best estimate; annual enforcement costs by the responsible body against the landowner commence from year 26 – £112,300 best estimate; annual enforcement costs arising from action taken by the landowner against the responsible body commence from year 26 – £534,600, best estimate. There will be costs to the court system arising from appeals against Land Chamber decisions but these are expected to be negligible. \*excludes enforcement costs that commence in year 26.

#### Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	Total (Constant Price)	Transition Years	Average (excl. Transition)	Annual (Constant Price)	Total (Present Value)	Benefit
Low	Optional	0	£0.74			<b>£18.88</b>
High	Optional		£12.79			<b>£324.54</b>
Best Estimate	0		£6.76			<b>£171.66</b>

#### Description and scale of key monetised benefits by 'main affected groups'

No transitional benefits identified.

The best estimates of the key monetised benefits that arise from the realisation of missed conservation opportunities and the otherwise reduction or elimination of the use of workarounds are: unblocked land now available for developments: £5.41 million per year by developers; savings from the avoidance of costly workarounds - £1.35 million per year by landowners and conservation sector; savings from avoidance of sale and lease back arrangements: £5,623 per year by landowners and conservation sector.

#### Other key non-monetised benefits by 'main affected groups'

The key non-monetised benefits that arise from increased conservation through the realisation of missed conservation opportunities are: retention and protection of habitats and their associated species and biodiversity; health and wellbeing that results from enjoying and exploring nature; a source of natural capital and environmental service – regulation of climate and water quality; increased recreational and sport opportunities; increased connectivity of conservation; possible employment opportunities resulting from national and local tourism and from increased recreational opportunities.

#### Key assumptions/sensitivities/risks

Discount rate (%) 3.5%

Assumptions: 1. The context in which a conservation covenant can be used is split into two categories – Theme 1 refers to the less complex and more frequently occurring and Theme 2 refers to the more complex and less frequently occurring; 2. Additional staffing requirements of the scheme by responsible bodies can be accommodated within existing staffing remits.

### BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

# Evidence Base (for summary sheets)

## Context

This impact assessment accompanies the Law Commission's ("Commission") Final Report and draft Bill on conservation covenants.<sup>1</sup> The conservation covenants project formed part of the Commission's Eleventh Programme of Law Reform. The sponsoring Department for the project was the Department for Environment, Food and Rural Affairs ("Defra").

The project had its origins in the Commission's wider work on easements, covenants and profits à prendre,<sup>2</sup> during which it was suggested that the Commission investigate the possibility of introducing conservation covenants in England and Wales.

## Terminology

There are a number of technical terms which have a specific meaning in relation to the conservation covenants scheme:

- **Responsible bodies** are eligible to "hold" a conservation covenant - that is, to oversee the performance of the covenant. The Secretaries of State and Welsh Ministers will automatically become responsible bodies. Local authorities, public bodies and registered and exempt charities may apply to become a responsible body by being listed as such by the Secretary of State or Welsh Ministers.
- **Landowner** means an owner of a freehold or leasehold estate (of more than seven years).
- The **holder of last resort** is a Secretary of State (in England) and the Welsh Ministers (in Wales). The holder will automatically become the responsible body for a conservation covenant in a limited number of defined circumstances.
- **Conservation purpose:** a conservation covenant may be created to conserve (and also to protect, to restore and to enhance) (1) the natural environment of the land or natural resource of the land; (2) land that is a place of archaeological, architectural, artistic, cultural or historic interest; or the setting of land in relation to (1) or (2).
- **Public good** a conservation covenant must benefit the public, and not just a private individual.

## Introduction

Green spaces and unique habitats, remarkable buildings, and historic places are valuable to us. They give us a sense of identity and community, they help us to be healthier, they broaden understanding of our social and cultural heritage, they provide opportunities for recreation and relaxation, and they contribute to our economy.

The conservation of our environmental and heritage assets remains a serious challenge. In spite of the publicly-funded measures which exist, there is a demand for more to be done that is above and beyond anything that the public sector can do. The role that landowners, communities and the voluntary sector play in attempting to meet that demand cannot be overlooked.

In recent years there has been an appreciation – both in this and other countries – of the contribution that the conservation sector can make to a nation's conservation efforts through agreements with landowners. As a result many countries, including Australia, New Zealand, the USA and Scotland, have given legal recognition to voluntary conservation agreements in the form of conservation covenants. In these countries, conservation covenants have been used to drive and deliver a bottom-up approach to conservation; they operate in a different space from that of the publicly-led measures by providing a voluntary means to determine the use of land for conservation purposes.

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<sup>1</sup> Conservation Covenants (2014) Law Com 439 (referred to hereafter as the "Report"). The Consultation Paper was published in March 2013: see Conservation Covenants: a Consultation Paper (2013) Law Com Consultation Paper No 211 (referred to hereafter as the "Consultation Paper").

<sup>2</sup> Marking Land Work: Easement, Covenants and Profits à Prendre (2011) Law Com 375. Referred to hereafter as the "Easement Report".

### *Box 1: What is a conservation covenant?*

The form of a conservation covenant varies across jurisdictions. The core elements are:

- It is a voluntary, private agreement made between a landowner and an eligible holder.
- Its purpose should be for conservation (for example, the protection of a special environmental or historic feature).
- It binds future owners of the land.
- The obligations set out in the agreement include doing or not doing something on land.

There are a significant number of potential uses for conservation covenants, namely:

- as an alternative to acquisition of land by public or voluntary sector bodies;
- as a safeguard where the voluntary sector or public bodies dispose of land;
- as a guarantee for individuals who sell or bequeath their land;
- as an alternative way for individuals to donate to a conservation cause;
- to facilitate payment to a landowner for conservation action;
- to secure a biodiversity compensation measure under the planning system; and
- as a way of supporting “land designations”, through creating connectivity of conservation or networks of biodiversity.<sup>3</sup>

The law of England and Wales does not currently permit landowners or the conservation sector to create voluntary agreements with the legal effects described above. A major opportunity is, therefore, missed: the utilisation of the role of the private conservation-minded landowner in the protection, conservation and enhancement of our natural and historic assets. This results in lost conservation opportunities.

This project has therefore investigated whether conservation covenants should be introduced in England and Wales, and the Commission has concluded that they should.

## Problem under consideration

### **The limitations of the current law**

It is very difficult for landowners to agree conservation obligations that will bind future owners of the land. There are several ways of attempting to do so, but all of them suffer from serious drawbacks:

- A **freehold covenant** can be agreed over the land, but there are shortcomings. First, landowners cannot impose positive obligations (for example, an obligation to restore and maintain a historic stone bridge) in a way which ensures that they run with the land. Only a restrictive covenant (for example, not to knock down the historic stone bridge) will bind the land. Second, even a restrictive covenant cannot bind the land unless there is neighbouring land which benefits from it. These shortcomings are a particular problem in a conservation context: positive action is often required and conservation work usually benefits society generally, rather than particular individuals who own neighbouring land.

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<sup>3</sup> This is not an exhaustive list; new uses will arise as different environmental and conservation challenges and priorities occur. More information on the potential uses for conservation covenants can be found in the Consultation Paper, Chapter 4 and the Report, Chapter 2. For more information on the connectivity of conservation see: Department for Environment, Food and Rural Affairs, *Making Space for Nature: A review of England's Wildlife Sites and Ecological Network* (September 2010), Chapter 5 and B Lausche and others, *The Legal Aspects of Connectivity Conservation: A Concept Paper* (2013).

- The Commission has, in another Report, recommended that freehold covenants should be replaced by land obligations.<sup>4</sup> **Land obligations** would permit the parties to enter into binding positive obligations - thus removing one of the limitations described above. However, the second shortcoming of requiring neighbouring land would remain on the implementation of the Commission's recommendations. It was not an option to make a general or specific exception to this recommendation.
- **Statutory powers** exist that allow certain organisations to make covenants with landowners without to the need to benefit other land.<sup>5</sup> One example of this is section 8 of the National Trust Act 1937, which allows the Trust to agree (on a mutually voluntary basis) restrictive obligations which are consistent with its general purposes. Whilst these existing statutory powers have been widely used, they are limited: generally they can only impose restrictive obligations. The powers have also been introduced on an ad hoc basis; covenants made under these statutes can only be held and enforced by a very limited number of bodies.
- **Planning conditions** and **section 106 planning obligations** can be used to require either positive or restrictive action for the purpose of conservation; these also have the potential to bind successive owners of the land.<sup>6</sup> An emerging use for planning obligations is in relation to biodiversity compensation under the planning system, including the practice of biodiversity offsetting. However, consultees to the Commission's consultation reported that they do not have confidence in the use of planning obligations in this context.<sup>7</sup> The use of planning obligations is also limited in this context by the fact that the obligations can only be enforced by the relevant local planning authority and apply only within a limited geographical area. This hampers efforts by those seeking to mitigate or compensate the impacts associated with their developments. In addition, only a local authority can enter into and enforce a planning obligation. Planning conditions are an imperfect tool: they can only be used in a planning context, can only endure for as long as the planning permission lasts and can only be imposed if they meet strict criteria.<sup>8</sup>

## The consequence of the current law

A major consequence of the current law is missed conservation opportunities. Efforts to expand voluntary conservation efforts by private landowners and the conservation sector are, therefore, being hampered. The limitations in current legal mechanisms may also be inhibiting wider conservation aims; for example, the ability of developers to fully mitigate or compensate the impact associated with developments. They could also be hampering innovation in the context of payment for ecosystem services.

Some landowners and conservation organisations are unwilling to accept the limitations of the current law and have started to develop unwieldy "workarounds" to realise conservation objectives, namely chains of covenants, sale and lease back arrangements, rentcharges and long term leases.<sup>9</sup> None of these are entirely satisfactory. They are complex, uncertain and expensive; often they require an over-investment on the part of both the landowner (parting with their freehold ownership) and conservation organisations (using resources to purchase land as a means of protecting it). This is economically inefficient.

The lack of conservation covenants also means that in some contexts planning obligations and conditions are being relied upon to deliver conservation objectives that are deemed necessary to mitigate development impact. This is not always suitable and in such instances development opportunities may be missed.

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<sup>4</sup> See the Easement Report.

<sup>5</sup> See the Consultation Paper, Chapter 8 and Appendix A for specific information on these statutory covenants.

<sup>6</sup> Planning conditions will bind the successive owner to the extent that he or she seeks to rely on that grant of planning permission and section 106 obligations bind those deriving title from the original person who entered into the obligation.

<sup>7</sup> The Report, Chapter 2.

<sup>8</sup> Namely, that the planning condition is necessary to make the development acceptable in planning terms; that the condition is directly related to the development; and that the condition is fairly and reasonably related in scale and kind to the development.

<sup>9</sup> For further information on the workarounds currently used see: the Consultation Paper, Chapter 2.

The Bill aims to remove the current difficulties by recommending the introduction of conservation covenants. As a versatile, bespoke legal tool, conservation covenants would provide landowners and the conservation sector with an effective, voluntary means of realising missed conservation opportunities, without resorting to inappropriate workarounds or the planning system.

## Rationale for intervention

The Government may consider intervening if there are strong enough failures in the way the market operates, or because there are gaps in existing interventions, which prevents the market from reaching effective outcomes. The above discussion demonstrates that such failings are at work. The current legal framework does not contain an appropriate tool to facilitate private conservation efforts, which in turn has resulted in private actors using workarounds and, consequently, an expected lower level of conservation effort overall than is economically optimal. The effect is an inefficient compromise that prevents optimal outcomes, or in some cases an outcome at all.

The failings in the market are frustrating the efforts of private individuals and communities when they seek to conserve, protect, restore or enhance our historical and environmental assets. This has the impact of preventing and/or hampering the realisation of personal and national conservation objectives.<sup>10</sup> In turn the environmental and economy-wide benefits that flow from private conservation efforts are lost.

The existing law is unable to develop in a manner that will address these failings. Statutory reform is therefore needed in the form of conservation covenants.

## Policy objectives

- To create a versatile legal tool (a conservation covenant) which is capable of: (a) unlocking currently missed conservation opportunities by overcoming the legal difficulties faced when creating binding obligations; (b) facilitating better ways to deliver existing conservation objectives; and (c) providing assurance of long-term conservation benefits.
- To create a simple, certain, and cost effective framework for conservation covenants; and
- To ensure that any decisions taken about the modification or discharge of conservation covenants balance flexible land use against the conservation of land as an environmental, and/or historical asset.

In essence the objective is to create a versatile tool which will better facilitate private conservation efforts. This new tool would sit within a legal framework which is flexible, cost effective and low on regulation. Consequently, a grass-roots approach will be encouraged, with central and local Government playing a limited role. The scheme and approach was widely supported by the Commission's consultees.

## Policy options

### Description of option 0: do nothing

Under this option the legal landscape would remain unchanged; conservation covenants and the accompanying framework would not be introduced. The key features of and problems with the current law, which give rise to the issues identified earlier, are summarised below.

*Table 1: Current law*

Current law	Key features and associated problems
Positive freehold covenants cannot run with land	It is currently impossible for a landowner to impose

<sup>10</sup> Conservation covenants have the potential to be used to meet a variety of governmental/national environmental policy objectives. For instance, the tool could be used to halt the decline in biodiversity and realise no net loss; to create connectivity of conservation sites or "green corridors"; or drive the delivery of payment for ecosystem services, which can aid the realisation of a number of policy objectives in the water-services and flood defence context.

	positive obligations in a way which ensures that the obligation is enforceable against future owners of the land. This is a particular problem in a conservation context where positive action is often required.
Restrictive freehold covenants cannot take effect unless they benefit neighbouring land	It is possible for a landowner to agree lasting restrictive obligations that will withstand the transfer of land. However, the obligation must benefit neighbouring land. So a conservation body that does not own the neighbouring land cannot enter into such a covenant.
Continued use of workarounds	As a result, practitioners, landowners and conservation bodies have taken to developing and using workarounds, which are far from satisfactory.
Continued reliance on planning obligations	As a result, local authorities and developers are faced with little choice but to use planning obligations to deliver conservation objectives, in particular to deliver compensation for biodiversity loss under the planning system.

## Description of option 1: introduce conservation covenants

Under this option conservation covenant would be introduced along with a framework to sustain the use of the covenants in England and Wales. The reform does not build on existing law; it creates a new tool to fill a gap in the law. The key elements of the scheme (which were widely supported during the Commission's consultation) are noted below.<sup>11</sup>

### *Box 2: Alternative policy that was considered*

When formulating this option, it was considered whether the framework facilitating conservation covenants should take a more regulatory approach; that it to say that the framework would include regulation and oversight by central Government. This was never a viable option or alternative. From a policy perspective, it would have taken the scheme away from its voluntary and private nature; and it would have led to the costs of the scheme being significantly higher.

## The legal tool

- A conservation covenant is a voluntary agreement between a landowner and a responsible body.
- These agreements can contain obligations to do or not do something on land for a specific conservation purpose,<sup>12</sup> which achieves a public good.
- These obligations can be enforced against future owners of the land, provided that the covenant is registered.
- The covenants can take effect without the responsible body having to own neighbouring land.
- A conservation covenant can last for ever. It can also exist for a fixed period of time in order to achieve a particular goal.
- To be valid, a conservation covenant has to be in writing and signed by the parties; this is a minimal level of formality designed to keep costs low.

<sup>11</sup> For a detailed explanation on the conservation covenants scheme please refer to the Report.

<sup>12</sup> The purposes for which a conservation covenant can be created are broad; this permits the tool to be used in a number of different contexts, to achieve a variety of conservation goals. See the Report, Chapter 3.

## The framework

- The statute will make provision for the creation, registration, transfer, enforcement, modification or discharge of a conservation covenant.
- The statutory framework has been designed to reflect the private, voluntary nature of conservation covenants. It is low on regulation and oversight – trusting the responsible bodies to make informed decisions about creating, managing and discharging conservation covenants. The role of the responsible bodies is therefore paramount.
- It is flexible: the parties are free to modify or discharge a covenant voluntarily. Elements have also been included to ensure that balanced decisions are taken as to the use of land. The Lands Chamber of the Upper Tribunal (“Lands Chamber”) will have the power to modify or discharge a conservation covenant on certain grounds, which have been designed to balance private and public uses of land.<sup>13</sup> Furthermore, conservation covenants (like any other private right) are subject to the compulsory purchase regime and can be overridden by section 237 of the Town and Country Planning Act 1990 (and analogous powers) when a public interest demands.
- The framework is designed to promote long lasting conservation; covenants can exist in perpetuity, be transferred between responsible bodies and, in certain circumstances, the holder of last resort can step in to ensure the continuation of the covenants.
- There is one element that sits outside the statute: non-statutory guidance. The guidance will provide information as to how the statutory scheme will operate, including template conservation covenants, the steps for registering a covenant and some principles of good practice (for example encouraging the publication of information about existing conservation covenants). Its purpose is to bring consistency to the new scheme.

## Key stakeholders

- The landowner: from the philanthropic property owner to developers.
- Individuals, groups or companies that are willing to pay for conservation action.
- The conservation sector: registered and exempt charities, for example the National Trust and the Woodland Trust.
- Public bodies, such as Natural England, English Heritage and Natural Resources Wales.
- National and local Government.
- The legal community: property and environmental law practitioners, HMCTS and the judiciary.

## Scale and Scope

### Scope of conservation covenants

There are no data available on the number of conservation opportunities being lost or the frequency at which workarounds are used. However, discussions with consultees during the course of the Commission’s project indicate that a wide range of opportunities are being missed and that the use of workarounds is significant. The problem is best highlighted by considering examples which provide a way to examine the impact of the lack of conservation covenants.

#### *Example One: Fulfilling philanthropic objectives*

A landowner has inherited an extensive family estate. Much of the land is forested and used by the public for hiking. The landowner intends to sell the estate but she wants to ensure that the forest is maintained and members of the public continue to have access.



The issue is how to ensure that the forest is protected and that the public are permitted access after the land has left the ownership of the original owner (such situations also occur when a landowner wishes to ensure that a particular feature of the land is protected when the land passes to his or her heirs upon death). In some circumstances the landowner may simply decide not to sell the property. This prevents the flexible use of the land in question and, ultimately, when the land does change hands the conservation asset could be lost.

In some cases the landowner might be more persistent in pursuing the original objective. There are a number of options that could be considered, for example:

- the landowner could bequeath the land to a conservation organisation on his or her death;
- the landowner could sell the land to a conservation organisation; or
- the landowner could enter into a sale and lease back arrangement with a conservation organisation.

The above options will permit the landowner to preserve the forest, but none of the methods are satisfactory. The first option places the landowner in a dilemma between leaving the freehold to his or her heirs or to a conservation organisation; ultimately the family could be deprived of the land.

The second option can often be an “over-investment”; if ownership is thought of as a “bundle of rights” in land, then it is generally more efficient to transfer to the conservation organisation only those rights that it actually needs for its purposes.<sup>14</sup> Figures provided by the Woodland Trust show that conservation organisations also face significant associated costs in these circumstances. The acquisition of a site of 50 hectares or less costs approximately £2,000 in staffing and between £2,000 and £2,500 in legal fees by the time the site’s title is registered. Legal fees can escalate if the site is burdened by complex rights or the title is unregistered. In such cases it may be necessary to pay up to £20,000 in legal fees for the acquisition of a single site.

The third option, which would also deprive the owner’s heir of the land, is used currently by the Woodland Trust, via the Conservation Land Trust, as a means of protecting woodland that it does not wish to take into its ownership. To date the Trust holds 20 leases under the scheme which was created 10 years ago; on average each lease covers an area of 10 hectares.<sup>15</sup> Such agreements can be cumbersome and expensive. Woodland Trust guidance sets out the costs of entering into a lease back agreement.<sup>16</sup>

If the landowner was permitted to create conservation covenants, he or she could negotiate a sale subject to controls on the type of development that can take place, which would be monitored by a conservation organisation; although the need to monitor such sites should be low whilst the land remains in the ownership of the agreeing party.<sup>17</sup> Similarly, the landowner could still bequeath the land to his or her heirs, but subject to a conservation covenant held by a third party conservation organisation. For the organisation in question, this arrangement may also be more attractive than taking on the costs and responsibilities associated with freehold ownership. By using the conservation covenants scheme a conservation objective is met, and the need to use workarounds is extinguished.

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14 I Hodge, R Castle and J Dwyer, *Covenants as a Conservation Mechanism* (Department of Land Economy, University of Cambridge, Land Economy Monograph 26, 1993) p 9.

15 Information provided by Woodland Trust officials.

16 The costs would involve a basic fee of either £1,500 or £2,500 with a further reviewable £100 per annum as ground rent. The landowner must also reimburse the Trust’s legal costs. In addition we assume a landowner would need to seek independent legal advice. We estimate that between one and six hours of legal advice would be required.

17 This is based on the fact that the original owner will have agreed to the creation of the covenant and is therefore highly likely to comply with it.

A number of benefits could then result from this situation. First, the expenses associated with creating a workaround are avoided (although the costs of creating the covenant must be taken in to account). In addition, the provision of public access to the forest would allow for recreational and sport activities to take place that could provide benefits in terms of physical and mental health.<sup>18</sup> For example, work of the Spatial Planning and Health Group indicates that if every household in the UK had good access to green spaces, this would save an estimated £2.1 billion in health care costs.<sup>19</sup> Similarly, Natural England's *Walking for Health Scheme* is estimated to bring £81 million of savings to the NHS.<sup>20</sup>

*Example Two: Aiding the protection of land belonging to the voluntary sector or public bodies upon sale*

A heritage group has invested funds in buying and restoring a Georgian house. The organisation wishes to sell the land but ensure that the work it has undertaken, and the heritage value of the property, is preserved.

Situations occur in which a public or voluntary sector organisation owns land with conservation value but wishes to sell it to a private purchaser. Such transactions help organisations to achieve conservation aims whilst providing a source of funding for future conservation work.

The difficulty in this example is in finding a way to ensure that the purchaser and future owners maintain the conservation work already undertaken. In some circumstances the heritage group might simply feel unable to sell the house because the current law does not allow it to ensure that provisions will be in place to sufficiently protect it. Three consequences then follow: the heritage group is unable to raise funds from the sale of the property; the group's ability to invest in other conservation projects is limited; and the group would have to continue spending its funds on the house.

Alternatively, the heritage group might attempt to use a workaround. One such practice has been to grant long leases or to create positive covenants supported by chains of indemnity covenants.<sup>21</sup> English Heritage has confirmed that it has considered using chains of covenants when selling its historic properties.

Evidence we have collected suggests that because of the complex nature of chains of covenants, large amounts of legal advice and administrative work are required.<sup>22</sup> This view is supported by English Heritage, who noted that such workarounds "place additional requirements on sale that can delay the transaction". English Heritage has also noted that chains of covenants can be an ever-increasing administrative burden.

Conservation covenants would provide a simpler and more effective means of achieving the goals of the heritage group in the above example. The imposition of a conservation covenant as part of the sale would secure the commitment of future landowners, and preserve the conservation value of the site, thus protecting the investment of any public or charitable funds. In permitting the use of a conservation covenant in this instance a conservation opportunity would not be missed and the need to use a workaround would be eliminated.

*Example Three: Supporting payment for ecosystem services*

A landowner's decision to remove an area of woodland upstream of a river which passes near to homes has contributed to localised flooding. After negotiations, the landowner agrees to adopt different land management practices, restoring and maintaining the woodland in return for a yearly payment.

18 Royal Society for the Protection of Birds, *Naturally at your service: why it pays to invest in nature* (28 September 2009) available at <http://www.rspb.org.uk/ourwork/library/reports.aspx?page=6>.

19 Spatial Planning and Health Group, *Steps to Healthy Planning: Proposals for Action* (June 2011) and Natural England, *An Estimate of the Economic Health Value and Cost effectiveness of the Expanded way to Health Initiative* (2009).

20 Natural England, *An Estimate of the Economic Health Value and Cost effectiveness of the Expanded way to Health Initiative* (2009).

21 For more information on chains of covenants see the Consultation Paper, para 2.40 to 2.44.

22 Impact Assessment of the Law of Property Bill 2011 (2011) Law Commission Impact Assessment No LAWCOM0008, para 121.

This situation is a form of payment for ecosystem services (“PES”). The difficulty in this example is finding a means of ensuring that the obligations are fulfilled in return for the yearly payment. This is less problematic when the land is in the hands of the original landowner; a personal contract should suffice. The challenge is how to ensure that future owners comply with the obligation; uncertainty about the ability to achieve this could result in the funding body pulling out of the negotiations with the landowner. A conservation opportunity is therefore lost, as is a natural flood defence.

Another option would be to use a workaround. Currently, PES schemes are commonly delivered in England and Wales through personal covenants. According to Defra’s Best Practice Guide a PES arrangement could require a farmer to place a deed of covenant on his or her property for 10 to 25 years in return for conditional grants of £5,000.<sup>23</sup> Whilst the method of using personal covenants in the context of PES works currently, conservation covenants may provide a stronger form of long-term protection.

One example of this in practice is a scheme investigating whether better land management can enhance flood protection for Pickering, North Yorkshire. This scheme aims to protect Pickering from 1 in 25 year flooding events through a mixture of land management measures and woodland creation.<sup>24</sup> The initiative was undertaken because Pickering has been flooded four times in recent years with the last flood causing damage to homes and businesses valued at about £7m.<sup>25</sup>

Another direct and indirect benefit that can follow from a PES scheme is increased water quality. This naturally benefits wildlife, but is also advantageous to water companies and consumers. In the USA, the New York City Department for Environmental Protection funds a scheme that maintains and protects the Cateskill and Delaware water catchments by reducing water pollution. This provides high quality drinking water to nine million water consumers (almost 50% of the state’s population).<sup>26</sup> It was estimated that to re-create this benefit through a water treatment plan would have cost US\$8 to 10 billion.<sup>27</sup> United Utilities undertakes similar programmes in relation to water catchments in Lancashire and the Peak District.<sup>28</sup>

Non-monetised benefits were also realised under the above examples. Such benefits include: enhanced habitats and wildlife; realisation of sustainable land use; and the provision of new recreational and access opportunities which benefit health and wellbeing.<sup>29</sup>

Conservation covenants may therefore provide a more secure way to achieve, and secure in the long term, a beneficiary’s payment to a landowner for the provision of ecosystem services. The potential for expanding the use of PES in England and Wales is considerable and conservation covenants represent a relatively low cost and light touch tool which could be used to deliver PES, avoiding costly workarounds.

#### *Example Four: Facilitating compensation for biodiversity loss in the planning context*

A local planning authority receives a planning application for an affordable housing development. The proposed development site is a wild flower meadow. Following the mitigation hierarchy if the development were to go ahead, part of the meadow would be completely destroyed. In this instance the planning authority is willing to grant planning permission, provided the net damage caused to the meadow after mitigation is adequately compensated.

The hypothetical example given above involves two elements: a means of requiring a developer to compensate or contribute to a compensation scheme and a way of securing permanent obligations in relation to that compensation. Conservation covenants relate to the latter issue.

23 Department for Environment and Rural Affairs, *Payments for Ecosystem Services: A Best Practice Guide* (2013) p 65.

24 Department for Environment and Rural Affairs, *Payments for Ecosystem Services: A Best Practice Guide* (2013) p 32.

25 Department for Environment and Rural Affairs, *Payments for Ecosystem Services: A Best Practice Guide* (2013) p 32 and 66.

26 Department for Environment and Rural Affairs, *Payments for Ecosystem Services: A Best Practice Guide* (2013) p 34.

27 Compared to the US\$1.5 billion that it costs to administer the scheme. Department for Environment and Rural Affairs, *Payments for Ecosystem Services: A Best Practice Guide* (2013) p 34

28 Department for Environment and Rural Affairs, *Payments for Ecosystem Services: A Best Practice Guide* (2013), Case Study Appendix.

29 For specific examples see: Department for Environment and Rural Affairs, *Payments for Ecosystem Services: A Best Practice Guide* (2013), Case Study Appendix.

In the above example, the developer would need to avoid, mitigate or compensate any damage that the development would cause to the meadow. In this instance the developer is left with no choice but to compensate. As such, the local planning authority might rely on using a section 106 planning obligation to ensure that the developer compensates for the damage caused. The compensation could take the form of creating or contributing to another site compensating for, or offsetting, biodiversity loss. However, when granting planning permission on that basis, the authority would want to ensure that the other site is properly protected and managed; it could realise this via a planning obligation, but there are limitations to this approach.

As a consequence, developments can become blocked. In this example, the developer would be unable to deliver the affordable housing development; this could then have a profound impact on the economy.

A conservation covenant on the other hand could be used to secure the permanence of the compensation site, whether it is owned by the developer, by the local authority itself, or (more likely in the future) by a third party. The developer's offer to compensate for the biodiversity loss (whether by creating the compensation site itself or by contributing to a scheme being operated by the local authority (or a third party) will be made more effective where the future of the site is secured by a conservation covenant made between the site owner and the body with responsibility for enforcing the covenant. The local planning authority could thus take the conservation covenant into account when determining the application for planning permission. This could, in turn, unblock a much needed development project.

Conservation covenants therefore have a natural application as a vehicle for securing compensation sites in the planning context. Should conservation covenants be used in this way then there is the potential benefit that the full impact of development projects can be compensated for by measures that are tailored to secure long-term ecological objectives. An added benefit is that development that would have otherwise been refused could be approved.

## Scale of conservation covenant

The conservation covenants scheme will be new to England and Wales. The scale and impact of the proposed scheme will depend greatly on the level of uptake. This in turn will depend on a number of factors, including the purpose and context in which conservation covenants will be used. With this in mind we can only make estimates as to the potential scale of the conservation covenants scheme.

One indicator as to the frequency at which conservation covenants might be created is the overseas picture. The number of conservation covenants in existence in Scotland, the USA and New Zealand is noted in Table 2.

*Table 2: The use of conservation covenants in other jurisdictions*

Jurisdiction	Number of covenants in existence (approx)	Area of land covered (approx) (in acres)
Scotland <sup>30</sup>	581	Unknown
The USA <sup>31</sup>	95,448	18,072,520
New Zealand <sup>32</sup>	3,700	617,000

<sup>30</sup> These figures were obtained during the consultation process. 310 are held by Historic Scotland. We have also been informed by the Registers of Scotland that a total of 263 conservation burdens have been registered by the Scottish Ministers or conservation bodies, and further 8 were registered on the nomination of Scottish Ministers or a conservation body.

<sup>31</sup> Figures obtain from National Conservation Easement Database, <http://nced.conservationregistre.org/report/easements> and <http://nced.conservationregistre.org/>. The figures are based on the data that the NCED has been able to obtain thus far; it actually estimates that there 40 million acres covered by conservation easements in the USA.

<sup>32</sup> The area of land covered by covenants in New Zealand is split between two forms of conservation covenants. The proportions are: 247,000 Queen Elizabeth the second National Trust covenants and 370,000 Nga Whenua Rahui covenants. Figures sourced from: Queen Elizabeth the Second National Trust, Annual Report 2012 (2012) p 10 to 11 and A-GE Ausseil, JR Dymond, and ES Weeks, "Provision of Natural Habitat for Biodiversity: Quantifying Recent Trends in New Zealand" in O Grillo (ed), Biodiversity Loss in a Changing Planet (2011) p 215, at <http://www.intechopen.com/books/biodiversity-loss-in-achanging-planet>.

The overseas picture can only inform our judgment; we cannot make direct comparisons. Some of these jurisdictions provide financial incentives for landowners to enter into conservation covenants and the statutory regimes for conservation vary between countries. Of the figures presented in Table 2, the best comparison would be with Scotland, which allowed for the creation of new conservation burdens under the Title Conditions (Scotland) Act 2003. However, here the complete picture is difficult to gain as there are no accurate figures on how many conservation covenants exist in Scotland.

Another indicator is the evidence of consultees to the Commission's consultation. Some made a tentative prediction as to the number of covenants that might be created. The Woodland Trust thought it would enter into between 10 and 50 covenants per annum. Similarly, South West Water suggested a figure of between five and 10 per annum. Natural England indicated that several hundred could be created each year in relation to its species licensing activities. Others simply noted that conservation covenants have the scope to be extremely popular and used on a frequent basis. Some consultees suggested that the initial uptake would be limited, but would increase over time. This is because new legal tools are usually treated with caution at first.

A proportion of consultees thought it was too early to attempt to predict the number of covenants that might be created in England and Wales. They thought that the frequency of creation would depend on a number of factors, including:

- How expensive and labour-intensive a conservation covenant would be to create, manage and enforce.
- Whether there are direct financial incentives for entering into a conservation covenant (we assume for the purpose of this impact assessment that there would not be any such incentives).
- General trends in uptake of mechanisms such as PES and biodiversity offsets in England and Wales.

Some of these factors can be controlled and calculated; for example it is possible to assess the likely costs of creating a conservation covenant, which we do below.<sup>33</sup> The majority of these factors, however, are subject to external forces beyond the control of the conservation covenants scheme.

Based on the above factors we would expect that a responsible body will, on average, enter into between 5 and 50 covenants a year. We have therefore taken a best estimate of 25 covenants per year. We make the assumption that initial creation will be towards the lower end of our estimated range; as momentum builds, creation is likely to increase towards our best estimate and it is then likely to even-out. This is an extremely conservative estimate. The number of covenants could reach or exceed our top estimate; this would be more likely if conservation covenants became widely used to facilitate a growing market of offsetting and PES.

The overall number of covenants created each year will be driven by the number of potential responsible bodies that the Secretary of State and Welsh Ministers list. It is not possible for us to state how many responsible bodies will exist in England and Wales; this is a matter for the Secretary of State and Welsh Ministers to decide and will be driven by the level of interest in the scheme. As an indicator, there are 58 bodies capable of holding conservation covenants in Scotland.<sup>34</sup> It should, however, be noted that Scotland is a smaller jurisdiction than England and Wales.

## Costs and Benefits

This impact assessment identifies both monetised and non-monetised impacts of intervention, with the aim of understanding the overall impact on society and the wider environment. The costs and benefits of each option are measured against the "do nothing" option. Impact assessments place a strong emphasis on valuing the additional costs and benefits in monetary terms (including estimating the value of non-market goods and services). However there are important aspects that cannot sensibly be monetised such as environmental impacts on health and well-being.

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<sup>33</sup> Pages 17 and 18 below.

<sup>34</sup> See the Title of Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003/453 (Scottish SI), as amended.

The impact assessment process requires that we make an assessment of the quantifiable costs and benefits even when there is insufficient material on which to base those calculations. Where possible we have spoken to practitioners to inform our view of the likely issues to be affected by the change in the law and have used this as the basis for our calculations. Where it has not been possible to obtain a rough indication of numbers in this way we have had to make a realistic estimate. In such cases we have taken a conservative approach.

As a result of the uncertainty around the frequency of creation we focus on the four examples above when assessing the costs and benefits of the scheme. Below are our conservative estimates on which we would like to build this scenario based assessment. The assessment must, however, be viewed for what it is – a conservative, scenario-driven assessment of the likely costs and benefits that result from introducing the proposed reform.

*Table 3: Estimate of additional conservation opportunities*

	Number of additional conservation opportunities that will arise per year
Example 1 and Example 2 (combined)	15 additional opportunities per year
Example 3	5 additional opportunities per year
Example 4	1 additional opportunity per year

The NPV is calculated over a 60 year period with the current year 2014 being year 0. We have decided to assess impact over a 60 year period for two main reasons. First, it will take time for the scheme to develop and for confidence in and participation in the scheme to grow. Secondly, certain costs and benefits associated with conservation covenants may take generations to be felt; this is partly because land tends to change hands on a generational basis (every 25 years) and because it takes time for conservation objectives to be realised.

We have used a discount rate of 3.5% for the first 30 years and 3% for the next 30 years, in accordance with accepted Government practice. The price base year is 2014 with any exception to this being clearly indicated.

## Option 0 – Do Nothing

Given that option 0 is the “do-nothing” option the additional costs and benefits of option 0 are, by definition, zero. However, below we set out the baseline position on costs and benefits against which option 1 “to introduce conservation covenants” is then compared.

### Costs

We have explained the problems with the existing law in some detail above.<sup>35</sup> There are two major costs that result from the existing law, namely:

- that conservation opportunities are missed; and
- that landowners and the conservation sector must use expensive and inefficient workarounds.

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<sup>35</sup> Pages 4 to 6 above.

## **Missed conservation opportunities**

The costs flowing from missed conservation opportunities are likely to be very substantial. Many benefits flow from the conservation of the natural and historic environment; some can be monetised (for example the contribution that the historic environment tourism sector brings to the UK economy or the saving that PES schemes can bring in the context of water regulation), others are more difficult to express in monetary terms (such as the impacts on our health and wellbeing). If conservation opportunities are missed these benefits will also be missed.

## **Costs associated with the use of workarounds**

Elsewhere in this paper,<sup>36</sup> these costs have been expressed in terms of the transactional cost of creating a workaround via imperfect and inefficient alternatives to conservation covenants. There are, however, additional non-monetised costs, for example the complexity and uncertainty associated with the use of workarounds.

As stated above, the current law has the effect of placing obstacles in the way of individuals' efforts to undertake private, voluntary conservation activities on land. These artificial limitations impede efforts to expand conservation measures by private landowners and the conservation sector and may also be undermining private philanthropic intentions towards conservation.

## **Benefits**

Doing nothing would avoid the costs of law reform.

## **Option 1 – introduction of conservation covenants as a legal tool in England & Wales**

When setting out the scope of the proposed scheme we noted that there are no central records of the number of conservation opportunities being lost because of the absence of conservation covenants; nor is there a figure that can be placed on the number of workarounds being used in an attempt to realise a conservation objective. Rather, in order to illustrate the problem which the proposed scheme is designed to address, we undertook a scenario-based approach. These examples were:

1. fulfilling philanthropic objectives;
2. aiding the protection of land belonging to the voluntary sector or public bodies upon sale;
3. supporting payment for ecosystem services; and
4. facilitating compensation for biodiversity loss in the planning context.

We estimate that the costs and benefits areas associated with the first two examples will be broadly similar to one another, as they are thematically similar. Likewise, we consider that the costs and benefits areas associated with the third and fourth examples will be broadly similar, again because of their thematic similarities. The examples will therefore be gathered under the following two headings for the purpose of assessing costs and benefits:

- Theme 1: Costs and benefits associated with fulfilling philanthropic objectives and aiding the protection of land belonging to the voluntary sector or public bodies upon sale; and
- Theme 2: Costs and benefits associated with supporting payment for ecosystem services and facilitating compensation for biodiversity loss in the planning context.

The proposed scheme will be of immediate benefit in situations under the first theme. However, the utility of the proposed scheme in respect of the second theme may depend upon Government policy or the provision of other incentives.

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<sup>36</sup> Pages 8 to 12 above.

# Costs

Our focus has been on the voluntary and private nature of conservation covenants. We have made the decision to ensure that the system is low in regulation and that the costs placed on the parties involved in the scheme (responsible bodies and landowners) and Government (both central and local) are minimal. However, the introduction of a new scheme and the conservation of our natural and historic environment do not come without some associated costs – these are inevitable, but are outweighed by the benefits that follow.

## Transitional costs

The transitional costs identified are the same for Theme 1 and 2. These costs represent the costs that are associated with introducing the conservation covenants scheme.

## Drafting non-statutory guidance

The cost of drafting the non-statutory guidance will be absorbed into the normal implementation costs, which we do not monetise. However, the non-statutory guidance which accompanies the legislation will be key in reducing costs. If non-statutory guidance is clear and comprehensive then this should help to limit ambiguity and confusion, which in turn reduces the risk of disputes occurring.

## Training

In terms of the legal profession and judiciary, we would not expect any additional training costs. The Judicial College have indicated that in this instance primary responsibility for updating on the new law will rest with individual judges. Similarly, the cost of training legal professionals (barristers and solicitors) would be absorbed through continued professional development requirements.

Responsible bodies may also want to provide training to their own staff on conservation covenants. This is an optional cost, but if training is sought it could be achieved with minimal expenditure. We would expect that any costs could be absorbed into existing training budgets.

## Advertising the new scheme

It is possible that Defra and the responsible bodies will want to advertise the new scheme. One simple way of doing that would be to create an additional page on their respective websites. This cost will be minimal and optional. On that basis it is considered it would be absorbed into routine casework and IT budgets.

## Making provision for conservation covenants to be registered as a local land charge

Representatives from local authorities have stated that the cost of preparing the local land charge registers for the registration of conservation covenants would be minimal. This is based on the following assumptions:

1. That conservation covenants would be registered under an existing part of the registers, namely Part 4 of the Local Land Charges Register (which relates to miscellaneous charges).
2. That comprehensive guidance is created informing the parties about how to apply for registration, that is, the steps that must be followed and a standard form that must be submitted to Local Land Charge offices.

The costs that local authorities are likely to face will be in relation to the training of local land charge offices so that they are familiar with conservation covenants as a new local land charge. Discussions with Land Data indicate that this could be achieved by way of a briefing note. The costs would be minimal.<sup>37</sup>

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<sup>37</sup> Although it is intended that Land Registry should take over the registration of local land charges: Infrastructure Bill 2014, cl 23 to 35 and Sch 4. Also Land Registry, *Consultation Paper: Land Registry, Wider Powers and Local Land Charges* (January 2014), Ch 8.



## Ongoing costs

### The cost associated with realising missed conservation opportunities

#### Transactional costs of creating a conservation covenant

The cost of creating a conservation covenant will vary, with the complexity of the circumstances and obligations. The likely areas of expenditure are legal fees (in terms of legal advice and the drafting of the conservation covenant), administration fees (on the part of the responsible body) and registration fees. We would anticipate there to be a difference in costing between Themes 1 and 2. Theme 2 is likely to cost more because the agreements are likely to be more complex. We set out our estimates as to costs in Tables 4 and 5.

It will be for the parties to decide who pays these costs. It will be for the relevant party to make a decision whether the benefits of creating a conservation covenant outweigh the costs; there is nothing within the system that will force the parties to enter into the transaction.

Table 4: Annual transactional cost under Theme 1

	Low estimate	Best estimate	High estimate
A. Hours of legal service required	5	7	10
B. Solicitor cost per hour <sup>38</sup>	£272	£272	£272
C. Total legal costs [A x B]	£1,360	£1,904	£2,720
D. Responsible body staffing hours	3	10	25
E. Admin cost per hour <sup>39</sup>	£14	£14	£14
F. Responsible body admin costs [D x E]	£42	£140	£350
G. Cost of registration <sup>40</sup>	£54	£67	£80
H. Cost per covenant: [C+F+G]	£1,456	£2,111	£3,150
I. Total cost based on 15 conservation opportunities per year	£21,840	£31,665	£47,250

#### Assumptions:

1. Responsible bodies will only create and undertake covenants that it can adequately manage.
2. Legal service provides advice for both parties and drafting.
3. Full employer marginal cost includes a 30% uplift in gross salary for non-wage labour cost such as national insurance and pensions; solicitor gross hourly rate of £209, equivalent to about £272.
4. The hours stated are informed estimates based on anecdotal evidence.

38 Average is based on figure shown in the "Solicitor's Guideline Hourly Rates 2010" available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/guideline-hourly-rates-2010-v2.pdf>.

39 See Median Admin Salary (national government) in Annual Survey of Hours and Earnings, ONS, 2013, Table 14.6A.

40 Figure provided during the course of the Law Commission's consultation by the Royal Borough of Kingston upon Thames.

5. Total cost is based on a conservative assumption of an annual average of 15 additional covenants created by all responsible bodies during the 60 year period. We recognise that there may be initial increased demand that subsequently plateaus at a higher rate than is currently the case, but also recognise that the converse could also hold. Given this uncertainty we have opted for a steady rate of increase that captures both possibilities.

*Table 5: Annual transactional costs under Theme 2*

	Low estimate	Best estimate	High estimate
A. Hours of legal service required	10	25	50
B. Solicitor cost per hour <sup>41</sup>	£272	£272	£272
C. Total legal costs [A x B]	£2,720	£6,800	£13,600
D. Responsible body staffing hours	10	20	30
E. Admin cost per hour <sup>42</sup>	£14	£14	£14
F. Responsible body admin cost [D x E]	£140	£280	£420
G. Cost of registration <sup>43</sup>	£54	£67	£80
H. Cost per covenant: [C+F+G]	£2,914	£7,147	£14,100
I. Total cost of 6 conservation opportunities: [H x 6]	£17,484	£42,882	£84,600

Assumptions:

The same assumptions as 1, 2, 3 and 4 above.

5. Total cost based on conservative assumption of an annual average of 6 additional covenants created by all responsible bodies during the 60 year period. We recognise that there may be initial increased demand that subsequently plateaus at a higher rate than is currently anticipated, but also recognise that the converse could also be true. Given this uncertainty we have opted for a steady rate of increase that captures both possibilities.

**Annual transactional costs (Theme 1 plus Theme 2): £74,547 [best estimate]**

**Present value over 60 years (Theme 1 plus Theme 2): £1.89 million [best estimate]**

### **The costs associated with alternative land use**

There are costs that result from deciding to use land for conservation. For instance, there is the lost opportunity of what the land could have otherwise been used for. The essential point here is that the creation of a conservation covenant is voluntary; the landowner will only enter into it if they decide that the potential benefits of such an agreement exceed the potential costs. A further point of consideration is that the draft Bill aims to ensure that balanced decisions are made between competing desires on how to use the land in the future and what is in the public interest. It does this in the following ways:

<sup>41</sup> Average is based on figure shown in the "Solicitor's Guideline Hourly Rates 2010" available at

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/guideline-hourly-rates-2010-v2.pdf>.

<sup>42</sup> See Median Admin Salary (national government) in Annual Survey of Hours and Earnings, ONS, 2013, Table 14.6A.

<sup>43</sup> Figure provided during the course of the Law Commission's consultation by the Royal Borough of Kingston upon Thames.

- The Lands Chamber has the ability to modify or discharge a conservation covenant.
- Certain statutory powers (for example, section 237 of the Town and Country Planning Act 1990), that provide for private rights to be overridden or extinguished, will apply in the context of conservation covenants. Similarly the compulsory purchase regime also applies to conservation covenants in the same manner as it does other private rights.
- In the planning context, the link between conservation covenants and the effective safeguarding of the biodiversity compensation measures could provide local planning authorities with the confidence to approve planning applications on land elsewhere that they would have otherwise refused.
- The conservation purpose of the covenant must relate to the land in question; this will prevent land that is of no conservation merit being subjected to a covenant to secure a wider, unrelated objective.

It is also worth noting that it is already possible for landowners to prohibit certain types of land use by imposing restrictive freehold covenants or using workarounds. In addition, conservation-minded landowners would in any case have been less willing to sell land for alternative use; to that extent the land was already less likely to be sold for alternative use.

There will also be costs associated with creating, restoring, maintaining, monitoring and managing the covenanted site. These costs will depend heavily upon the nature of the obligation and the type of conservation being undertaken. We do, however, attempt to present an idea of the potential costs in relation to Themes 1 and 2 below.

We envisage that costs in respect of covenants falling into Themes 1 and 2 will differ - covenants falling into the latter may cost more to fulfil, monitor and manage. There are two main reasons for this:

1. Biodiversity compensation or offsetting measures and PES schemes are more likely to require the positive creation or restoration of a habitat or ecosystem, which can be costly.
2. It will be necessary to put in place a detailed monitoring and management programme to ensure that the land bound by the conservation covenant is delivering the desired outcomes.

It is assumed that the costs associated with Theme 1 will increase slightly over time as proximity to the original agreement holder diminishes. This may also be the case in respect of conservation covenants under Theme 2, but we would expect costs to be more consistent in relation to Theme 2 over the given period.

**Costs associated with alternative land use under Theme 1**

Under Theme 1 the focus will be on the restoration, maintenance, monitoring and management of existing environmental or historic assets on the land.

In terms of the restoration and maintenance costs of an environmental asset, the Higher Level Stewardship Scheme provides a useful guideline. The scheme provides different payment rates for the maintenance and restoration of different habitats. The guideline payment for the maintenance/restoration of woodland is £100 per hectare.

The restoration and maintenance of a historic asset will be entirely context-driven, and it is difficult to provide any meaningful estimate.

We also anticipate that responsible bodies will want to monitor sites under Theme 1. Our estimates as to the associated costs are noted below.

*Table 6: Annual monitoring cost under Theme 1*

	Low estimate	Best estimate	High estimate
A. Average number of hours spent monitoring each covenant	1	5	20
B. Admin cost per hour <sup>44</sup>	£14	£14	£14

<sup>44</sup> See Median Admin Salary (national government) in Annual Survey of Hours and Earnings, ONS, 2013, Table 14.6A.

C. Cost per conservation opportunity [A x B]	£14	£70	£280
D. Total cost of 15 conservation opportunities per year [C x15]	£210	£1,050	£4,200

Assumption:

1. Full employer marginal cost includes a 30% uplift in gross salary (Median admin salary £10.74) equivalent to about £14.
2. The hours stated are informed estimates based on anecdotal evidence.
3. It is assumed that a responsible body will have the expertise and resources to monitor the conservation covenants it creates without resorting to external consultants.
4. It is assumed that a responsible body will make use of volunteers.
5. Total cost is based on the conservative assumption of an annual average of 15 additional covenants created by all responsible bodies during the 60 year period.

**Annual monitoring costs: £1,050 [best estimate]**

**Present value over 60 years: £9,338 [best estimate]**

## Costs associated with alternative land use under Theme 2

ICF GHK, a leading consulting service to Government, has produced figures as to the likely cost, per hectare, of restoring or creating a habitat for the purpose of biodiversity offsetting. The cost per hectare, which includes administration, management, transaction and monitoring costs,<sup>45</sup> is represented in the table below. The figures are based on 100-year management agreements.<sup>46</sup>

*Table 7: Cost per hectare of restoring or creating a habitat<sup>47</sup>*

	Restoration PV unit costs per hectare	Creation costs PV unit cost per Hectare
Upland habitats	£2,151	£7,382
Lowland heathland	£8,530	£11,791
Lowland grassland	£10,168	£11,293
Woodland	£7,776	£7,436
Wetlands	£9,435	£11,072

<sup>45</sup> Administrative, management, transaction and monitoring costs for implementing the offset requirement are assumed to add 30% to the total cost, while the central regulatory costs for an offset scheme are assumed to add 10% to the total cost. These additional costs are added to the unit costs of restoration and creation to provide total costs under the management agreement option and are described in greater detail below. See GHK, *Costing potential actions to offset the impact of development on biodiversity* (March 2011), p 22 available at <http://archive.defra.gov.uk/environment/biodiversity/offsetting/documents/110714offsetting-technical-costing-potential.pdf>.

<sup>46</sup> The ongoing annual costs have been discounted using a discount rate of 3.5% to provide present value (PV) estimates over a period of 100 years, since the offsets are assumed to be preserved in perpetuity and the annual PV costs are negligible after 100 years. The model assumes capital costs per hectare are paid initially, followed by 10 years of annual restoration or creation costs (as appropriate), followed by a further 90 years of annual management costs. All costs are in real terms, with no adjustment for inflation, and the same unit costs are used for each year of the model up to 2030. See GHK, *Costing potential actions to offset the impact of development on biodiversity* (March 2011), p 22 available at <http://archive.defra.gov.uk/environment/biodiversity/offsetting/documents/110714offsetting-technical-costing-potential.pdf>.

<sup>47</sup> GHK, *Costing potential actions to offset the impact of development on biodiversity* (March 2011), p 22 available at <http://archive.defra.gov.uk/environment/biodiversity/offsetting/documents/110714offsetting-technical-costing-potential.pdf>.

Coastal	£4,509	£48,758
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The figures show that the costs are estimated to range from around £2,000 to £49,000 per hectare, for different habitats.

PES schemes are likely to have similar associated costs. For instance, South West Water is spending £10 million pounds over the next 5 years to realise its “Upstream Thinking” project;<sup>48</sup> the aim of the project is to reduce treatment costs and manage water flow during droughts and floods. Such projects can also result in increases to consumer prices; although the costs to the consumer resulting from the “Upstream Thinking” project are reported to be minimal.<sup>49</sup>

There are also, of course, the costs of paying the landowner to undertake the ecosystem service; the payment will be driven by circumstances and it is therefore difficult to give any particular estimates. However, as an indicator, the Pickering PES scheme (explored above<sup>50</sup>) paid landowners in the form of grants, capital investment, compensation and in-kind support.<sup>51</sup> Farmers participating with the “Upstream Thinking” project were paid a £5,000 grant to fulfil the conditions in a 10 to 25 year agreement.<sup>52</sup>

Based on these figures we would expect the management of a 10 hectare offset or PES site to cost between £20,000 and £490,000 over a hundred year period. If this is multiplied by the additional conservation opportunities in our scenario (6), the total cost is £120,000 to £2.94 million. We do not have annual costs and so are unable to derive the present value over 60 years.

### Enforcement costs

We take the view that enforcement costs (legal fees, admin fees and court fees) will be similar under Themes 1 and 2. The costs may however differ depending on whether it is the responsible body or the landowner that is seeking to enforce obligations under the covenant.

#### *Enforcement by the responsible body against the landowner*

Table 8 below sets out our estimate of the potential costs. There are, however, a number of things to note in relation to this.

1. The overseas examples suggest that compliance with conservation covenants is very high and that enforcement action is rarely needed.<sup>53</sup>
2. Enforcement is likely to become more of an issue some years in the future; this assumption is also supported by the overseas picture.<sup>54</sup>
3. It is very unlikely that responsible bodies will rely in the first instance on legal enforcement because of the inherent risks associated with enforcement and the negative impact this would have on the relationship between the parties. Instead responsible bodies would seek alternative ways to encourage compliance, for example, through its monitoring activities.
4. Costs will vary depending on the nature of the dispute.
5. Some of the cost will be recoverable against the other party if the responsible body is successful in its action.

48 Department for Environment, Food and Rural Affairs, *Developing the potential for Payments for Ecosystem Services: an Action Plan* (May 2013), p 19.

49 The cost to the customer appear to be modest, totalling £0.60/year/household during PR09 and an estimated £2.00/year/household for PR14: Department for Environment, Food and Rural Affairs, *Developing the potential for Payments for Ecosystem Services: an Action Plan* (May 2013), p 19.

50 Pages 10 – 11 above.

51 Department for Environment, Food and Rural Affairs, *Payments for Ecosystem Services: A Best Practice Guide* (May 2014), Annex – Case Studies, Flowing the Flow at Pickering.

52 Department for Environment, Food and Rural Affairs, *Payments for Ecosystem Services: A Best Practice Guide* (May 2014), Annex – Case Studies, Upstream Thinking.

53 A USA-wide survey of 7,400 easements in 1999 found that breaches had occurred in 498 cases (less than 7%). Of these only 115 were major breaches, and the vast majority of these were resolved without litigation (E Byers and K Marchetti Ponte, *The Conservation Easement Handbook* (2nd ed 2005) p 158). In New Zealand, the Queen Elizabeth the Second National Trust found a 95.1% adherence rate among the 1,723 conservation covenants monitored in 2011 to 2012 (Queen Elizabeth the Second National Trust, *Annual Report 2012* (2012) p 11).

54 A report conducted by the Land Trust Alliance in the USA suggests that the probability of breach increases when land changes hands. E Byers and K Marchetti Ponte, *The Conservation Easement Handbook* (2nd ed 2005) p 158.

Table 8: Annual enforcement costs under Themes 1 and 2 commencing in year 26 onwards

	Low estimate	Best estimate	High estimate
A. Per hour admin cost <sup>55</sup>	£14	£14	£14
B. Hours worked	25	50	75
C. Total admin cost [A x B]	£350	£700	£1,050
D. Per hour solicitor cost <sup>56</sup>	£272	£272	£272
E. Chargeable hours	30	40	50
F. Total solicitors' fees [(D x E) x 2]	£16,320	£21,760	£27,200
G. Cost per enforcement action [C+F]	£16,670	£22,460	£28,250
H. Annual cost:			
Theme 1 [G x 3]	£50,010	£67,380	£84,750
Theme 2 [G x 2]	£33,340	£44,920	£56,500

Assumptions:

1. The hours stated are informed estimates based on anecdotal evidence.
2. Enforcement proceedings do not commence until a generation has elapsed, one generation is equivalent to 25 years.
3. Under Theme 1 there will be 3 enforcement proceedings brought each year from year 26.
4. Under Theme 2 there will be 2 enforcement proceedings brought each year from year 26.

**Annual enforcement costs by the responsible body [Theme 1 plus Theme 2] from year 26: £112,300 [best estimate]**

**Present value over 60 years [Theme 1 plus Theme 2]: £1.0 million [best estimate]**

It is not possible to give a meaningful estimate of court fees because the fees will depend on the nature of the claim (damages, injunctive relief or specific performance).

Turning to the impact that this will have on the court system, the numbers indicated above are such a small proportion of the overall cases before the courts that the impact will be minimal.

*Enforcement by the landowner against the responsible body*

A conservation covenant can also contain obligations on the part of the responsible body. It is therefore also possible, although less likely, that a landowner would need to take enforcement action against a responsible body. This need to take enforcement action is likely to be minimal.<sup>57</sup> On this basis we do not intend to monetise the cost. However, in such instances the cost of enforcement is likely to be much less than that described above. This is because the cases are likely to be more straightforward.<sup>58</sup>

<sup>55</sup> See Median Admin Salary (national government) in Annual Survey of Hours and Earnings, ONS, 2013, Table 14.6A

<sup>56</sup> Average is based on "Solicitor's Guideline Hourly Rates 2010" available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/guideline-hourly-rates-2010-v2.pdf>.

<sup>57</sup> This is based on the responsible body concept operating as described in Chapter 3 of the Report.

<sup>58</sup> This is based on the assumption that responsible body obligations are likely to be simpler; as a result it will be easier to prove breach.

Turning to the impact that this will have on the wider court system, the numbers indicated above would constitute such a small proportion of the total number of cases before the courts that the impact will be minimal.

### Modification and discharge

The conservation covenants scheme will also allow for parties to agree a modification or discharge or, failing that, either party can apply to the Lands Chamber for the conservation covenant to be modified or discharged. The Lands Chamber will also determine whether the agreement in question is, in fact, a conservation covenant.

Legal costs would be incurred by both responsible bodies and landowners for applications of this nature to the Lands Chamber. The costs of submitting an application to the Lands Chamber are set out in Table 9 below.

*Table 9: Lands Chamber fees*

Process	Free
Lodging an application	£800
Preliminary hearing (if one is necessary to determine whether or not an objector is entitled to object)	£500
Interlocutory hearing	£100
Final hearing	£1,000
Engrossing a final order (only payable where proceedings do not proceed to a final hearing)	£450

The fees payable to the Lands Chamber if an application proceeds to a final hearing are therefore between £1,250 and £2,400.<sup>59</sup> This figure does not include other associated costs, such as legal fees. In the impact assessment that accompanied the Commission's draft Law of Property Bill 2011 it was noted that to proceed to a final hearing would cost between £30,000 and £100,000.<sup>60</sup> Our best estimate was an average at the mid-point of the two; £65,000.<sup>61</sup> We would anticipate similar costs under the conservation covenants scheme.

The overall impact on the Lands Chamber's resources will depend on the number of conservation covenants that are created and the proportion of those covenants that are then modified or discharged. The number of applications would be low at the start of the scheme, but may increase over time as the land changes hands and events occur that drive the need or desire to modify or discharge a covenant. The proportion of applications relating to conservation covenants will form only a small proportion of the Lands Chamber's overall work. Taking our working example as a guideline we would estimate the following:

*Table 10: Annual cost of applications for modification/discharge commencing year 26 onwards*

	Low estimate	Best estimate*	High estimate
A. Fee per application	£1,250	£1,825	£2,400
B. Legal fee per application	£30,000	£65,000	£100,000
C. Cost per application [A + B]	£31,250	£66,825	£102,400

<sup>59</sup> The lower figure of £1,250 is based upon proceeding which involves an application fee (£800) and engrossed order without final hearing (£450). The higher figure of £2,400 is based upon proceedings which involve an application fee (£800), a preliminary hearing (£500), one interlocutory application (£100) and a final hearing (£1,000).

<sup>60</sup> Impact Assessment of the Law of Property Bill 2011 (2011) Law Commission Impact Assessment No LAWCOM0008, para 61.

<sup>61</sup> Impact Assessment of the Law of Property Bill 2011 (2011) Law Commission Impact Assessment No LAWCOM0008, para 61.

D. Annual cost of applications:			
Theme 1 [C x 5]	£156,250	£334,125	£512,000
Theme 2 [C x 3]	£93,750	£200,475	£307,200

\* mid-point

Assumptions:

1. Under Theme 1 there would be 5 applications for modification or discharge a year from year 26.
2. Under Theme 2 there would be 3 applications for modification or discharge a year from year 26.

Decisions of the Lands Chamber can be appealed. However, we would expect the number of appeals to be minimal, and on that basis we do not monetise this impact.

**Annual enforcement costs by the landowner [Theme 1 plus Theme 2] from year 26 onwards: £534,600 [best estimate]**

**Present value over 60 years [Theme 1 plus Theme 2]: £4.75 million [best estimate]**

### Cost to Government – local and central

#### *Local Government – local land charge offices*

This will largely consist of processing applications to register conservation covenants as local land charges as well as maintaining the register and responding to search requests. Any additional cost should be minimal and can be recovered via the fees charged to register a conservation covenant.

Local authorities may incur a liability for failing to register a conservation covenant or disclose its existence when responding to a search request. In these circumstances individuals are able to claim compensation for a provable loss they have suffered as a result of the error.<sup>62</sup> This cost has the potential to be substantial. This potential risk could be managed if a receipt requirement is built into the registration scheme that requires applicants to ensure that the local land charges office has registered the covenant.

#### *Central Government*

There will be costs associated with the general administration of the scheme, for example the administration of the list of responsible bodies. It is anticipated that these costs will be absorbed into existing workloads.

The role of the Secretary of State and Welsh Ministers as holders of last resort has the potential to create cost. We have mitigated this risk by providing that the holder of last resort only becomes liable under the covenant if it accepts that responsibility.

### Summary of costs

The table below sets out a summary of the key costs.

*Table 11: Summary of the key costs*

	Low estimate	Best estimate	High estimate
<b>Costs</b>			
<i>Transitional</i>	Negligible	Negligible	Negligible
<i>On-going:</i>			
Transactional costs:			
Theme 1	£ 21,840	£ 31,665	£ 47,250
Theme 2	£ 17,484	£ 42,882	£ 84,600
Costs associated with			

<sup>62</sup> Local Land Charges Act, s 10.



alternative land use:			
A. Monitoring costs:			
Theme 1	£ 210	£ 1,050	£ 4,200
Theme 2	N/A	N/A	N/A
B. Enforcement costs*:			
<i>By the responsible body</i>			
Theme 1	£50,010	£ 67,380	£ 84,750
Theme 2	£33,340	£ 44,920	£ 56,500
C. Modification/Discharge			
<i>By either party*:</i>			
Theme 1	£156,250	£ 334,125	£512,000
Theme 2	£ 93,750	£ 200,475	£307,200

\* Annually from year 26 onwards; N/A = unit costs unavailable

## Benefits

### Transitional benefits

No transitional benefits have been identified.

### Ongoing benefits

There are two main benefits that flow from the proposed reform: namely, that missed conservation opportunities are realised and the need to use workarounds to create private conservation obligations in relation to land is reduced, if not eliminated. There are a number of monetised and non-monetised benefits that result from the two main benefits. These are explored below.

The analysis focuses on non-monetised benefits. This is partly due to the fact that the benefits that are being explored are traditionally difficult to value as a monetary unit, but it is also because (as noted above) with the introduction of a new scheme there comes uncertainty as to scale and scope.

## Missed conservation opportunities will be realised

If conservation covenants are introduced the conservation opportunities that are currently missed could be realised. There are a number of monetised and non-monetised benefits that then follow from that. These are difficult to express because they will depend on the context in which the covenant is used and the number of covenants that are created, although there are some benefits that will be common to all contexts.

This section, therefore, proceeds by evaluating the benefits that result from a conservation opportunity happening that might not otherwise have happened under the base case. The opportunities that we will assess the benefits against are the same as those discussed above,<sup>63</sup> now expressed in terms of Themes 1 and 2. We go forward by referring to our conservative estimate noted above,<sup>64</sup> that is 15 additional opportunities arising each year under Theme 1 and 6 additional opportunities arising each year under Theme 2, with a break down of 1 additional compensation or offsetting measure in the planning context and 5 additional PES schemes being realised each year.

### Realised conservation opportunities under Theme 1

#### *Benefits that result from a woodland being protected and public access being granted*

The benefits that may result from protecting an area of woodland in perpetuity and providing public access to that woodland are expressed in Box 3 below. These benefits are not monetised.

<sup>63</sup> Page 14.

<sup>64</sup> As above.

*Box 3: the benefits associated with retention of woodland and public access provision*

- The retention and protection of a habitat and associated species and biodiversity.
- Increased connectivity of conservation.
- A source of natural capital and environmental services – regulation of climate and water.
- Landscape amenity and cultural heritage.
- The health and wellbeing benefits that result from enjoying and exploring the natural environment.
- Recreational and sports opportunities.
- Increased engagement with and attachment to the environment.
- Educational opportunities.
- Benefits for and resulting from national and local tourism.
- Possible employment opportunities.
- Increase in land's market value.

*Benefits that result from a historic house being maintained and public access being granted*

The benefits that may result from maintaining a historic house and providing public access to that house are listed in Box 4 below. These benefits are not monetised.

*Box 4: benefits associated with the maintenance of a historic house and public access provision*

- Landscape amenity and cultural heritage.
- Educational opportunities.
- Increased engagement with and attachment to the historic environment.
- The health and wellbeing benefits that result from enjoying and exploring the historic environment.
- Recreational opportunities.
- Benefits for and resulting from national and local tourism.
- Possible employment opportunities.

## **Realised conservation opportunities under Theme 2**

*Benefits that results from facilitating biodiversity compensation in the planning context*

There are two major benefits that result in these circumstances. The first is that a development that might otherwise have been blocked is permitted to go ahead in the light of the compensation site being secured via a conservation covenant. The other is that biodiversity is created and then protected on the compensation site. Together these help to realise sustainable and flexible land use.

*Development is permitted to go ahead*

The existence or proposed creation of a compensation site that is protected by a conservation covenant may enable a planning authority to approve a planning permission that it would otherwise have refused. It should be noted that our calculations in respect of this benefit are conservative, and are informed by data that relates to a *voluntary* scheme of biodiversity offsetting.

The main monetised benefit that results from the existence of a conservation covenanted compensation site or an agreement to create a covenanted site is that it could unblock developments, thus permitting a build that would otherwise have stalled to go ahead.

Table 12: Monetised benefit of unblocked developments

	Low estimate	Best estimate	High estimate
A. Number of additional developments	0	1	2
B. Average number of dwellings per development	46	46	46
C. Total number of dwellings	0	46	92
D. Total value of developments [C x £235k]	£0	£10.81 million	£21.62 million
E. Land purchase price = 50% of development value [D x 0.5]	£0	£5.41 million	£10.81 million
E. Total benefit [D – E] per annum	£0	£ 5.41 million	£10.81 million

Assumptions:

1. The assumptions reflect those made in “Biodiversity Offsetting Impact Assessment”.<sup>65</sup>
  - a. Unblocked developments = 5 average-sized major housing developments =0.5% of rejected major housing development applications.
  - b. Each development averages 46 dwellings.
  - c. The average house price is £235,000.
  - d. Land purchase price is 50 percent of development value.

**Annual savings: £5.41 million [best estimate]**

**Present value over 60 years: £137.28 million [best estimate]**

*The biodiversity compensation site is created and effectively protected*

There are a number of benefits that may result from a biodiversity compensation site being created and then effectively protected, potentially in perpetuity. These are expressed in Box 5 below. These are non-monetised benefits and must, of course, be balanced against the loss of the original conservation site.

**Box 5: benefits resulting from the effective protection of a compensation site**

- The creation and the protection of a habitat and any associated species and biodiversity, which realise no net loss.
- Increased connectivity of conservation.
- A source of natural capital and environmental services – regulation of climate and water.
- Landscape amenity.
- The health and wellbeing benefits that result from enjoying and exploring the natural environment.
- Educational opportunities.
- Possible employment opportunities.

<sup>65</sup> See Department for Environment, Food and Rural Affairs, *Biodiversity Offsetting Impact Assessment* (2013) DEFRA1126.

### *Benefits that result from a PES scheme going ahead*

The benefits resulting from the realisation of a PES scheme can be split into two broad categories. These are the benefits that flow from the service provided by the scheme, for example, improved water quality or prevention of flooding; and the benefits that follow from the improved ecosystem, for example, the improvement and protection of biodiversity. Together these will help to realise sustainable and flexible land use.

- **Benefits associated with the service provided by the scheme**

There are substantial monetised benefits that can result from the service that is provided under a PES scheme. These benefits/savings will be heavily driven by the circumstance and nature of the PES. On that basis we do not propose to make a detailed assessment of the monetised benefits that result from an opportunity being realised in this context. Instead we will focus on one specific example.

As noted above,<sup>66</sup> a PES scheme has been put in place in Pickering, North Yorkshire with the aim of preventing a 1 in 25 year flooding event. If the PES scheme is successful it could bring savings of £7 million to local homes and businesses. If five similar PES schemes were set up, they could bring savings of around £35 million. We do not have annual costs or benefits figures; we are therefore unable to derive the present value over 60 years.

- **Benefits associated with a improved ecosystem**

The presence of a PES scheme will also improve and protect the ecosystem that is being used to provide a service. This may have a number of substantial benefits, which are not monetised for the purpose of this impact assessment. These benefits are expressed in Box 6 below.

*Box 6: benefits associated with an improved ecosystem*

- The enhancement and the protection of a habitat and any associated species and biodiversity.
- Natural capital and environmental service – regulation of climate and water quality.
- Landscape amenity.
- The health and wellbeing benefits that result from enjoying and exploring the natural environment.
- Educational opportunities.
- Benefits for and resulting from national and local tourism.
- Possible employment opportunities.

## The use of workarounds will be reduced or eliminated

The introduction of conservation covenants will reduce, if not eliminate, the need to use workarounds in this context.<sup>67</sup> There are two particular benefits that result from that. The first is that there will be a reduction in transactional costs, as it will cost the parties less to enter into a conservation covenant than a workaround. The other is that uncertainty in the law is reduced because there is a simple and effective tool to facilitate private conservation agreements relating to the land.

### **Reducing the transactional costs of existing legal agreements**

Whether a conservation covenant is created in respect of Theme 1 or 2 the transaction should be cheaper. This saving is realised when a conservation covenant is used instead of a workaround in relation to a conservation opportunity.

#### *Theme 1 situations*

Currently, landowner, voluntary sector organisations and public bodies use a number of expensive workarounds to realise objectives that a conservation covenant could achieve. We have explored this in some detail above.

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<sup>66</sup> Pages 11 and 12 above.

<sup>67</sup> For information on the workarounds currently used see page 5, and pages 8 to 12 above.

Conservation covenants will be a cheaper way of realising conservation goals than existing workarounds. In particular, conservation bodies and public bodies will no longer have to purchase land in order to protect it or undertake conservation activities in relation to it. This brings savings.

In addition, if voluntary sector organisations or public bodies were able create conservation covenants they could release land which they hold by negotiating a sale subject to a conservation covenant. This would be a way of realising the capital (in the form of the value of land) that could then be re-invested into other projects.

Table 13 and 14 below set out the costs associated with two particular workarounds (outright acquisition of a site and a sale and lease back). These costs are compared against the costs associated with creating a conservation covenant to present the savings that can be made from introducing conservation covenants.

*Table 13: Annual savings from avoidance of costly workarounds – purchasing a site*

	Low estimate	Best estimate*	High estimate
A. Purchase price based on 10 hectare site at £14,445 per hectare <sup>68</sup>	£144,450	£144,450	£144,450
B. Admin/Legal fees per unit cost of non-complex cases	£4,000	£4,250	£4,500
C. Number of non-complex cases	5	8	11
D. Legal fees per unit cost of complex cases	£10,000	£15,000	£20,000
E. Number of complex cases	0	1	2
F. Land acquisition savings (a) Non complex (AxC) + (BxC)	£742,250	£1,189,600	£1,638,450
(b) Complex (AxE)+(ExD)	0	£159,450	£328,900
G. Total land acquisition savings (F(a) + F(b))	£742,250	£1,349,050	£1,967,350

\* mid-point between low and high estimate

#### Assumptions:

1. The acquisition of a site of 50 hectares or less costs approximately £2,000 in staffing and between £2,000 and £2,500 in legal fees [best estimate £2,250] by the time that the site's title is registered.  
That is, £4,250 per unit cost [best estimate].
2. Complex cases arise when legal fees of land acquisitions escalate if the site is burdened by complex rights or the title is unregistered. In such cases it may be necessary to pay up to £20,000 in legal fees for the acquisition of a single site [best estimate £15,000].
3. Complex rights in land acquisitions occur infrequently [best estimate 1 case per year].

<sup>68</sup> £14,445 is the average price per hectare of rural land in England and Wales. GHK, *Costing potential actions to offset the impact of development on biodiversity* (March 2011), p 23 available at <http://archive.defra.gov.uk/environment/biodiversity/offsetting/documents/110714offsetting-technical-costing-potential.pdf>

**Annual savings: £1,349,050 [best estimate]**

**Present value over 60 years: £34.23 million [best estimate]**

*Table 14: Annual savings from the avoidance of costly workarounds – sale and lease back*

	Low estimate	Best estimate	High estimate
A. Number of sale/lease cases	1	2	3
B. Basic fee per case: £1,500 or £2,500	£1,500 x 1 = £1,500	£1,500 x 1 and £2,500 x 1 = £4,000	£2,500 x 3 = £7,500
C. Landowner cost of legal advice @ £272 per hour	£272 x 1 =£272	£272 x 3 x 2 = £1,632	£272 x 6 x 3 = £4,896
D. Sale/lease savings (A + B + C)	£1,772	£5,632	£12,396

Assumptions:

1. The Woodland Trust currently charges a basic fee of either £1,500 or £2,500 for each case. A low estimate takes the lowest fee, the best estimate uses both instances and the high estimate applies the highest fee to all three cases.
2. Hours allocated for landowners' legal advice ranges from a low estimate of 1 hour to 6 hours, high estimate, and 3 hours best estimate.
3. Savings exclude the legal and administrative costs faced by the Trust.

**Annual savings: £5,632 [best estimate]**

**Present value over 60 years: £142,914 [best estimate]**

### *Theme 2 situations*

The introduction of conservation covenants may also reduce the transactional and administrative costs of existing legal agreements in respect of Theme 2 situations. For example, a number of workarounds are used to realise PES and to deliver biodiversity compensation measures within the planning context.

In addition, in a planning context a conservation covenant is likely to be transitionally cheaper to use than a section 106 planning obligation, although we cannot monetise this.

### **Reducing uncertainty in the law**

We anticipate that our recommendation will result in a non-monetised benefit of increased certainty and clarity in the law. This will benefit landowners, the conservation sector, legal practitioners and the courts. Advice should be easier and quicker to prepare and its content easier to understand.

### **Summary of benefits**

The table below sets out a summary of the key benefits.

*Table 15: Summary of annual key benefits*

	Low estimate	Best estimate	High estimate
<b>Benefits</b>			
<i>Transitional</i>	None	None	None

<i>On-going:</i> Unblocked developments: Avoidance of costly workarounds:	£ 0	£5.41 million	£10.81 million
Purchasing a site	£742,250	£1,349,050	£1,967,350
Sale/lease back	£ 1,772	£ 5,632	£ 12,396

## Summary – Option 1

This impact assessment has sought to identify some of the key costs and benefits that may be associated with our proposed scheme. Based on the figures presented we summarise the low/best/high estimate position as follows in Table 16 which sets out the net present value of option 1 over the 60 year period.

Table 16: Net Present value of Option 1 over 60 years (in £million)

	Low estimate	Best estimate	High estimate
Transitional costs	0	0	0
On-going costs* (Annual)	£0.04	£0.08	£ 0.14
<i>Present value costs</i>	£3.97	£7.67	£11.99
Transitional benefits	0	0	0
On-going benefits (Annual)	£0.74	£6.76	£12.79
<i>Present value benefits</i>	£18.88	£171.66	£324.54
<b>Net present value</b>	<b>£14.91</b>	<b>£163.99</b>	<b>£312.55</b>

\*excludes costs accruing in year 26 onwards; all figures are rounded which may introduce a small discrepancy relative to summary page figures.

## Risks, Assumptions and Sensitivities

### Assumptions

All the assumptions that underpin specific cost/benefit estimates are indicated alongside the relevant discussion. However there are broader assumptions that inform our approach to the impact assessment and these are as follows:

1. Conservation covenants fall within two categories: Theme 1 – less complex and more common; and Theme 2 – more complex and less frequent. Theme 1 generates an additional 15 opportunities per year and Theme 2 generates an additional 6 opportunities per year.
2. Additional staffing requirements can be accommodated within the existing structure.

### Risks

1. Underestimation of the number of additional opportunities likely to be created.
2. Underestimation of the resource impact placed on responsible bodies and related organisations.

### Sensitivities

1. All cost/benefit estimates that rely on a range have been indicated throughout the impact assessment.

## **Specific Impact Tests**

An impact assessment must consider the specific impacts of policy options upon various groups within society. These specific tests are carried out below and refer to the implementation of Option 1.

### **Statutory equality duty**

We do not think that the proposed reform will have an adverse equality impact on any social groups as defined by their race, religion or belief, sexual orientation, gender, age or disability.

### **Competition**

We do not anticipate that there will be any particular effect, whether positive or negative on competition.

### **Small business**

We do not anticipate that there will be any particular effect, whether positive or negative, on small business.

### **Environmental impact and wider environmental issues**

The impact of the proposed reform on the environment is considered throughout this impact assessment.

### **Health and well-being**

The health and well-being benefits that are associated with the conservation of our environmental and historic environment are well understood. We have noted throughout this impact assessment the impact that the proposed reform might have in this area. Conservation covenants, as a means of protecting the nation's environment and historic assets and providing public access to them so that they can be enjoyed, will clearly have a positive effect on health and well-being.

### **Human rights**

The provision being introduced is voluntary and enabling. We do not anticipate that there will be any particular effect, whether positive or negative, on human rights.

### **Justice system**

We have considered the impact that the proposed reform could have on the justice system (in terms of the legal profession, the judiciary and HMCTS) throughout this impact assessment.

### **Rural proofing**

Conservation covenanted sites are likely to be found in both urban and rural areas. Consultation responses indicated that it will be very difficult to assess whether the scheme will have a greater impact on rural areas over that of urban areas. However, on balance it was thought that more rural than urban land would be subject to conservation covenants. This conclusion is based on anecdotal evidence only.

Based on the potential uses for conservation covenants, and the views of consultees, we consider that the following types of site are most likely to be subject to a covenant:

- Land which is privately owned and is not protected under law for environmental or historical purposes, either at a regional level (for example land protected as a Local Nature Reserve) or at a national level (for example a National Nature Reserve or Site of Special Scientific Interest).
- Marginal or brownfield sites which are in public and private use, but not managed for a particular purpose. For example, this land might be used as part of a PES or a biodiversity compensation measure in the context of planning.
- Agricultural grade land which is utilised either as part of a PES or under a biodiversity compensation measure in the context of planning.
- Historic properties which require long-term management through various positive and restrictive obligations.



## **Sustainable development**

The impact on sustainable development and land use is considered throughout this impact assessment. Conservation covenants, if used in connection with biodiversity compensation measures, have a clear part to play in realising sustainable development in England.