

IMPORTANT BRIEFING

Extracts relation to Common land and particular lowland heath

from **NE227** [*HLS handbook third edition October 2011*] and **NE316** [*HLS common land and shared grazing supplement to environmental stewardship October 2011*] which may be of interest to those involved with the management of lowland heath commons through HLS especially those designated SSSI and where the public have rights to 'air and exercise' general recreation

Comments by Bob Milton

NE227

Options for lowland heathland

Formed and maintained by traditional agricultural practices, lowland heathlands are ancient semi-natural landscapes on nutrient-poor acidic, sandy and peaty soils, typically below 250 m in altitude. **They are often found on common land with a tradition of public access.** The vegetation of lowland heathland is a mixture of dwarf shrubs (particularly heathers and gorses), providing a refuge for rare species such as the marsh gentian, Dartford warbler and sand lizard.

In the past, heathlands were managed by burning, grazing and/or cutting[see [HO1 below](#)]. Many heathlands have been lost or become fragmented due to ploughing, development or forestry planting. Those that remain are often neglected, dominated by scrub and bracken or have returned to woodland.

Management of lowland heathland under these options will protect and enhance the valuable plant communities and associated wildlife, the vegetation mosaics characteristic of lowland landscapes and protect archaeological features.

Soil type, management history and location in relation to existing heathland sites will be significant factors in determining the suitability of a site for restoration or heathland creation. You will need to submit evidence of current soil analysis with your application when applying for the restoration or creation options (results that are up to 3 years old are acceptable). Heathlands vary in character and complexity and therefore an implementation plan may be required. Areas of fen or bog within heathland should be managed under these lowland heathland options.

A range of capital items, including fencing, bunds, sluices and ditch restoration, can be funded by a Capital Works Plan.

HO1 Maintenance of lowland heathland £200 per ha

This option is used to maintain the valuable plant communities and associated wildlife of lowland heathland by appropriate, active management.

Management will require you to:

burn, or cut and remove, small patches of heathland each year to sustain a varied and balanced age range and structure of dwarf shrubs;

maintain fire breaks; **and**

graze to control scrub, grasses, bracken and tree cover.

No supplementary feeding is allowed. **[Note: RJM There is no alternative to grazing for lowland heath but it does not require extensive grazing. The alternative of a combination including exempt grazing (s38 Commons Act 2006) is not excluded and would be the least restrictive option where there are existing public recreation and access rights]**

HR8 Supplement for group applications £10 per ha

This supplement contributes towards the costs of facilitating linked agreements, which together manage a target feature. It is particularly targeted at common land and areas of shared grazing that have two or more active graziers. It may also be applied to applications for agreements covering

areas under more than one ownership, which are to be managed for resource protection, inter-tidal habitat management and/or wetland management.

Appendix 3

Glossary and list of abbreviations

Common land

Land owned by one or more persons over which one or more other persons are entitled to exercise rights of common such as grazing animals.

Note:-

No reference to

1. **No guidance on what to do about existing Public Access rights**
2. Scraping or removal of scrapings or other s38 Consent requirements for fencing or works
3. Gating under s147 HA for conservation grazing over public rights of way
4. The inability to grant permissive access to the public at large where to carry out that access would be a criminal offence ie permissive cycle routes on S193 common land and s34 Road Traffic Act 1988.

NE316

Common land and shared grazing supplement

Please read this supplement together with the ELS and HLS handbooks as appropriate (the ELS handbook also provides information about Uplands ELS). **Where there is any inconsistency between this supplement and the handbooks, you should follow the guidance in this supplement.** Also, **where we say in this supplement that you must do something, it will be a condition (along with the requirements in the ELS or HLS handbook) of your ES agreement**

If your application is made by the landowner who owns the whole common and has sole use of the land, the common can be entered as the landowner's holding or be attached to the landowner's holding as part of a normal application and this supplementary guidance does not apply, and you do not need to complete a supplementary application form.

If your application is made by the landowner who does not have sole use of the land this supplementary guidance will apply. You will need to complete a Common land and shared grazing supplementary application form (NE–CLA4), set up a commoners' association **and produce an internal agreement**. You do not need to establish a commoners' association, if there are only two parties (landowners or commoners) benefiting or contributing to the delivery of the agreement (e.g. where commoners are not exercising their grazing rights but are involved with land management operations such as scrub control) see Q1.

In all cases where there are three or more parties benefiting from or contributing to the delivery of the agreement a commons association or **stewardship group will need to be established.**

It is also incorrect to refer only to common land as per the supplement ie A 'common' and 'common land' mean any land included on the statutory registers of common land held by commons registration authorities under the Commons Registration Act 1965 or the Commons Act 2006 (or commons specifically exempted from registration under these Acts). Common land may not have been registered as a result of incorrect government advice and guidance or due to incorrect entry in the Registers. These are dealt with by Part 1 of the Commons Act 2006 and by the House of lords in the case of Hampshire CC v Millburn 1998 in respect to non registration of manorial waste. Some commons were excluded from registration in 1965 and the Registers have not been up dated.

Making an application

In addition to the requirements outlined in the ES handbooks, to make an application in respect of common land or shared grazing **you must complete each of the seven steps set out below:**

Step1

If not in existence already, and if required, set up a commoners' or graziers' association to represent all of those who will be actively managing the common or shared grazing for the purposes of delivering your ES agreement [Q1 – Q3].

Step5

Negotiate an internal agreement between all those who wish or should participate in an ES agreement, i.e. those who actively manage the common or shared grazing and who will contribute to the management required under the ES agreement [Q30 – Q40].

Points to note from Q&A

Consult the landowner and other people who may have a legal or an active interest in managing the vegetation on the common or shared grazing, e.g. the owner of the shooting rights. The association should effectively represent all those who have a legal and active interest in the management of the land. Whilst some landowners may not wish to be involved, they can be represented by their agents or their tenants who are permitted to graze or utilise rights (e.g. shooting game) [Note RJM ie those with beneficial interests]

Hold a general meeting inviting the landowners and all the commoners or graziers with rights to graze the common or shared grazing. The general meeting could also serve to brief the graziers and people who are entitled to exercise rights of common of a possible application for an ES agreement. The invitation could be extended to individuals and organisations who have an interest in the land, for example Natural England if the land or part of it is an SSSI, or members of the community. There are obviously practical considerations where there are several right holders — see point 11 under Annex A.

if you do not know at this stage all those who will benefit from or contribute to the proposed ES agreement, you may supply this information at a later stage but you must do this before you apply for an ELS or Uplands ELS agreement or, for an HLS agreement, **before an offer of an agreement is made** (see Q42).

You should not proceed with an application until you have the agreement of the active commoners or graziers and the owner (through the commoners' or graziers' association if one exists). The commoners or graziers will need to be able to agree on how to enter the common or shared grazing into an ES agreement. You should also resolve any boundary issues with neighbouring commons and farms

Q30 Do we need an internal agreement?

Yes, if there is more than one party benefiting from or contributing to the delivery of the agreement – see notes under Introduction. An internal agreement is a commitment signed by all the parties to an application specifying the obligations placed on each person and the payments they may expect to receive. You must have an internal agreement for all ES agreements if the delivery of your ES agreement will require input from more than one individual. The internal agreement is intended to ensure that everyone who is involved in the ES agreement has a clear view of their responsibilities and minimises areas for disagreement. We advise you to employ an experienced adviser to undertake this work. See Annex C – guidance on drafting an internal agreement.

An internal agreement must be signed by all key parties before the application is made for ELS or Uplands ELS. For HLS agreements, you must finalise an internal agreement before accepting the offer of an agreement.

You must have an internal agreement as a condition of your ES agreement, but you do not need to send the internal agreement with your application for ES. An internal agreement must show how the ES agreement will work on the ground both in terms of management and payments. Natural England or the RPA may ask to see your internal agreement at any time.

The internal agreement should, if possible, include all those who are in the position to influence the level of grazing and the management of the vegetation and features required by your ES agreement (the delivery of an ES agreement requires effective collaboration between all those who have an active interest in the management of the land). An internal agreement cannot in itself prevent those who are not participating in the ES agreement from exercising their legal rights of common or grazing. The commoners' or graziers' association should therefore assess the risk of the objectives

and requirements of an ES agreement being jeopardised by anyone not party to the internal agreement and provide for this in the internal agreement (see Q40). It is expected that all those contributing to an ES application are members of the commoners' or graziers' association, but not all members of the association need be party to the ES agreement.

The internal agreement is intended to ensure that everyone who is participating in an ES agreement has a clear understanding of their roles and responsibilities. It should set out the ground rules and requirements of the ES agreement

Q37 Should the internal agreement include the landowner?

A The landowner, because of the landowner's own grazing rights or other land management responsibilities, should normally be party to the internal agreement. Co-operation will be needed from a landowner whose responsibilities extend to the protection of environmental features (such as archaeological remains, woodland and wetland), land drainage and management of scrub and heather, which you may wish to manage under an ES agreement. The active involvement of landowners and shooting interests is likely to result in more effective ES agreements and are essential for HLS. **[Note RJM Where the management of the land is vested in a local authority as with a Scheme for the Regulation and Management under the Commons Act 1899 the landowners responsibility would rest with the Scheme manager. Those with hunting or shooting rights should also be consulted as they with the commoners rights are a beneficial interest in the land outside of that vested in the Scheme Manager. The HLS scheme monies can be paid to or made with a contractual licensee but that does not mitigate the landowners statutory duty under the habitat Directive or replace the dominant tenement of the reason for which the land is held which in the case of a CA1899 Scheme or commons acquired under the Open Spaces Act 1906 and the Public Health Act 1845 is public recreation.**

Q38 Should the internal agreement include inactive commoners or graziers?

A The decision to include inactive commoners or graziers will depend on the judgement of the commoners' or graziers' association (see Q35). Those who have an active interest in the management of the land could include some non-graziers as well as graziers, particularly if they are involved in the delivery of the ES agreement, for example in carrying out scrub control and providing extra shepherding. The internal agreement may include those who have previously agreed to remove livestock from the common so that others can have a viable ES agreement that limits the level of stocking.

Q39 Do those included in the internal agreement need to be notified to the RPA?

A **You must ensure that all those who benefit from or contribute to the delivery of the agreement (including non-active commoners or graziers) are included in the RPA customer registration for the common.** You must do this either at the time you obtain an SBI for the common (see Q8) or at a later stage by using a CReg10 form to amend the Customer Register. For ELS and Uplands ELS, this means before you make an application; for HLS, this means before an offer of an agreement is made (see Q42).

Q44

Unless you are the landowner with sole use of the land – see the *Introduction* – you will need to include with your application a Common land and shared grazing supplementary application form (NE-CLA4), which will be sent to you with your application pack, or which you can download from the Natural England website at:

<http://www.naturalengland.org.uk/ourwork/farming/funding/es/forms/default.aspx>.

You must be able to declare on the supplementary form that:

n The landowner of the common or shared grazing consents to the ES agreement. No separate consent is needed if the person signing the supplementary form is the owner.

n For ELS and Uplands ELS, the RPA customer registration (SBI) for the common or shared grazing includes the names of all people who will benefit from or contribute to the delivery of the ELS or Uplands ELS agreement (see Q8 and Q42).

n **for HLS, the RPA customer registration (SBI) for the common or shared grazing includes the names of all people who will benefit from or contribute to the delivery of the agreement before Natural England can offer an agreement** (see Q8 and Q42).

For HLS, once the outcome of the FEP has been agreed and the application passes the eligibility requirements, Natural England will offer you an agreement. You can then decide whether to accept

and proceed with the agreement. [Note: RJM It is important to remember that at no point does NE or the RPA remove the landowner's or grazier's liability under the Animals Act 1971 where grazing is being introduced on land whose primary and dominant tenement is public recreation for any accident which may occur. See HSE ais17ew for guidance on public access and grazing.]

Annex A: Points to consider before making an application

1. Commoners, graziers and the landowner should form a working group to consider and discuss proposals more widely before thinking of making an application (see item 10).
2. They must be subject to a separate and binding commoners' association or group internal agreement.
3. The landowner must be involved (at least to consent to an application). The responsibility for management of some commons is vested in the local authority under a scheme of regulation made under the Commons Act 1899, including in some cases where the common has no known owner: in such cases, the local authority will be required to consent to the application. Where the landowner cannot be identified or contacted, an explanation to Natural England will be required to progress an application (see Q45). The contribution of the landowner will depend on the landowner's active interest in the land and what is required under the ES agreement.
4. **The agreement should involve all the active graziers but non-graziers should also be considered, especially those who have the capacity to exercise their grazing rights (i.e. they have land available alongside or near the common and have the necessary skills to husband grazing livestock on the common).** They may wish to exercise their grazing rights during the course of the agreement. Bear in mind that some non-graziers could lease their grazing rights. However the scope to do so would be dependent on whether the rights could be leased to farmers not involved in the agreement and who have the capacity to exercise those rights. Rights of common attached to land cannot be leased for more than two years (although the lease can be renewed at the end of each term): an RPA inspector may ask to see evidence of any lease.
5. A wide consultation is required for applications to enter common land into ES. The working group must contact all the landowners and practising commoners. Also, they must go to all reasonable lengths to contact any other right holders and anyone else or any organisation that has a legal interest in the management of the land. Other organisations and members of the local community could also be considered where they have a concern in the management of the land, for example those who are interested in archaeological features or particular species of wildlife. Invitations by letter could be complemented by placing notices in local newspapers and at access points to the common.
6. All those who are actively involved in the management of the land through grazing or other means should then be interviewed, either individually or collectively to obtain their views (possibly by the appointed agent). If possible, those who express a wish not to participate in the ES agreement or have a grievance should also be contacted. It may be possible to address their concerns and make them a party to the proposed application or, alternatively, since they can legally exercise their rights on the common, it may be necessary to negotiate ways that both parties can fulfil their aims without prejudicing the other. Their existing grazing practices and proposals for changes should be considered in case they could jeopardise the objectives and requirements of the agreement (particularly in the case of HLS agreements where there is a stocking limit). Try to reach an understanding, and review the situation on a regular basis, for example annually. **Any agreement on the way forward should be written into the internal agreement or formally recorded in order to address any disputes that occur at a later date.**
7. **Applicants should be advised that internal agreements must be drawn up as a deed to stand up to legal challenge and to limit the liability of the individuals involved.** Whilst land agents and environmental and agricultural consultants can assist in drafting a deed, they should be aware that no one, except qualified lawyers, can be paid for drafting a legally binding document.
8. Any grazier not covered by the agreement will need to be covered by consent, and anyone carrying out activities on an SSSI without consent may be acting in breach of the legislation.

Note: Re Statutory Duty

There seems to have been some slight changes since the 2008 handbook with regard to the ability of Government in its widest sense to access HLS for statutory duty. The words have changed but the sentiment is still there but in a way that perhaps is no longer as clearly set out.

From the 2008 handbook

1.2.8 What if the land I farm is owned by the Crown, a local authority or another Exchequer funded body?

Land owned and managed by Government Departments, Executive Agencies and Non-Departmental Public Bodies cannot be entered into HLS.

Other public bodies, including local authorities, National Park Authorities and Public Corporations, are eligible for HLS provided the work is not already required as part of their conservation responsibilities.

If you are an agricultural/farm business tenant of a public body, with security of tenure for the length of the agreement, you will be eligible for HLS **provided the application does not include any environmental management which is a condition of your tenancy, or is already required as part of the conservation responsibilities of your landlord.** It is your responsibility to ensure there is no overlap between your obligations as a tenant and any HLS management requirements. Ask your RDS adviser if you are uncertain.

There's now a new version, **Feb 2010**, which doesn't contain that text. It now says:

1.2.1 Who can join the scheme?

HLS is open to all farmers and land managers who are one of the following:

- freehold owners
- tenants
- contractual licensees
- common land rights holders.

You must have management control of the land for the term of your agreement (normally 10 years). If you are not certain you have management control for the term of your agreement, you must make a countersigned application with a person who undertakes to carry on your agreement if your management control of the land ceases. Further guidance on countersigned applications is provided at Section 1.2.2 of the ELS or OELS handbook.

So what happened to the proviso that you must not be carrying out environmental management which is already required as part of the conservation responsibilities of the landlord ie landowner statutory duty

These extracts are not a complete copy of the Natural England's Stewardship and Commons supplement and are not aimed at giving legal advice but reproduced, without prejudice, as a ready guide to those specifically involved with the management of public access commons, manorial waste and other public open space especially those which are SSSI's. All the extracts above come from the publications except for the Notes which are personal observations and opinions.