

Defra response - Sections 67(3)(a) and 67(6) of NERC

03/04/2007

To all local highway authorities in England.

Sections 67(3)(a) and 67(6) of the Natural Environment and Rural Communities Act 2006 - compliance of definitive map modification order applications with schedule 14, paragraph 1(b) of the Wildlife & Countryside Act 1981

1. We have been asked by several authorities for urgent advice on what constitutes an application that is compliant with schedule 14, paragraph 1(b) of the Wildlife & Countryside Act 1981, with regard to sections 67(3)(a) and 67(6) of the Natural Environment and Rural Communities Act 2006. These requests were made in light of an opinion commissioned from George Laurence and Ross Crail by the Green Lanes Protection Group.
2. We have therefore decided to write to all local highway authorities in England with advice on this matter. This advice will be reflected in the Defra online guidance on Part 6 of the Natural Environment and Rural Communities Act 2006 when the next version is published. Defra's advice is as follows.
3. The intention behind the provisions in section 67(3) of the NERC Act was to deal equitably with long outstanding BOAT claims, where they had been properly prepared and made in good faith.
4. The issue under scrutiny here is whether, in those cases where an applicant has supplied a list or summary analysis of the documentary evidence supporting an application under section 53(5) of the Wildlife & Countryside Act 1981, this is sufficient to constitute an application that is compliant with schedule 14, paragraph 1 (and in particular sub-paragraph (b)) and therefore satisfies the requirements of sections 67(3)(a) and 67(6) of the Natural Environment and Rural Communities Act 2006 (that an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act).
5. Schedule 14 paragraph (1)(b) of the 1981 Act requires that: "An application shall...be accompanied by...copies of any documentary evidence...which the appellant wishes to adduce in support of the application." (our emphasis)

6. In our view, the use of the words: "any" and "wishes" allows for an element of discretion in the provision of copies of the documentary evidence. In this way the legislation provides for the applicant to adduce evidence sufficient to support the application.

7. For, example, in many cases, the applicant will have an agreement with the surveying authority as to what evidence shall be provided with the application. In one particular case at issue here, the surveying authority did not want the applicant to provide copies of the documentary evidence because the surveying authority already had custody of the originals. Why, in such a case, would an applicant wish to adduce copies of the documentary evidence in support of the application?

8. Furthermore, the evidence provided under schedule 14, paragraph 1(b) is "in support of the application", not in support of the Order and therefore we believe that the function of the application is to make a credible case that a public right of way exists to the surveying authority. Once this is done, it triggers the surveying authority's duty, under paragraph 3(1) of Schedule 14 and section 53(2) of the Wildlife & Countryside Act 1981, to investigate matters stated in the application and ensure that the way is correctly recorded, i.e. with the appropriate status, on the definitive map and statement.

9. Moreover, as Counsel's opinion points out (at the end of paragraph 16): "a court or other tribunal would be slow to infer against an applicant who had provided inadequate or irrelevant material, that he was acting in bad faith (e.g. by putting in an application before having done any research into the history of the claimed route) or otherwise than in a genuine attempt to comply with paragraph 1 of Schedule 14; but would do so in an appropriate case.". Paragraph 17 of the Opinion goes on to say: "The legislative intention underlying paragraph 1 of Schedule 14 is that the applicant should have prepared his case to the best of his ability before making his application, and not the other way round.". It seems to us that what the applicant has done in the example quoted in paragraph 7 above is to act in good faith by having conducted research into the history of the claimed route and supplied the surveying authority with a list of all the evidence, which the surveying authority already holds.

10. For the reasons set out above, we do not share the view that "unless and until the applicant has provided the surveying authority with an itemised list of documents and a set of copies of the listed documents, he cannot...be regarded as having complied with the statute" or that ""any documentary evidence" must in the context of paragraph 1 be read as equivalent to "all documentary evidence". We believe that where an application under section 53(5) of the Wildlife & Countryside Act 1981 is

accompanied by a list or summary analysis of documentary evidence sufficient to make a credible case for an Order under section 53(2) of the '81 Act, then this constitutes an application that is compliant with schedule 14, paragraph 1, and hence with sections 67(3)(a) and (6) of the NERC Act.

Yours faithfully

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