

**Non-statutory advice on new provisions
relating to diversions of rights of way for the
protection of sites of special scientific interest
(SSSIs)**

**To accompany SI 1494/2007 – The Highways (SSSI Diversion
Orders) (England) Regulations 2007**



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This document is available on the Defra website at
<http://www.defra.gov.uk/wildlife-countryside/issues/public/sssi-tempdiv.htm>

Published by the Department for Environment, Food and Rural Affairs

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1. Introduction

1.1 This provides non-statutory guidance on the new provisions relating to Sites of Special Scientific Interest (SSSI) diversion orders in England. (The National Assembly for Wales is responsible for implementing these provisions in Wales.) It is primarily aimed at Natural England and local highway authorities, but may be of interest to landowners, rights of way users and others.

2. Background

2.1. In England, SSSIs are notified by Natural England under section 28 of the *Wildlife and Countryside Act 1981*, when in its opinion an area of land “is of special interest by reason of any of its flora, fauna, or geological or physiographical features”.

2.2 SSSIs are nationally important and conserve and protect the best of our wildlife, geological and physiographical heritage for the benefit of present and future generations. They are a key component of the Government’s overall nature conservation strategy, set out in *Working with the Grain of Nature: A biodiversity strategy for England*. There is a Government commitment to ensuring 95% of the SSSI area is in favourable or recovering condition by 2010.

2.3 The *Countryside and Rights Of Way Act 2000* (“the CROW Act”) significantly amended section 28 of the *Wildlife and Countryside Act 1981* and introduced improved powers to protect and conserve SSSIs. It gave enhanced powers to Natural England to enable the positive management of SSSIs and restrict damaging activities on SSSIs; introduced new penalties for deliberate damage to SSSIs; and imposed duties on public bodies in respect of SSSIs.

2.4 In line with these changes, during the passage of the *CROW Act* it was decided that there should also be a power to divert rights of way where the public use of the highway is causing, or continued public use is likely to cause, significant damage to the special interest features of SSSIs.

2.5 Natural England has undertaken to consult widely and work with stakeholders to consider the use of appropriate management measures and/or traffic regulation orders before considering making an application for an SSSI diversion order. This approach will ensure that the use of these powers is as a last resort and that the impact and restriction on users of rights of way is minimal. There may nevertheless be circumstances in which an SSSI diversion order may prove to be the most appropriate means of protecting the special interest features of sites and these powers should be used in these cases..

2.6 These powers will ensure that the United Kingdom can meet its international obligations under the *European Habitats and Wild Birds*

Directives and the Ramsar Convention, as all terrestrial European and Ramsar sites are also SSSIs.

3. Overview of the legislation

3.1 These new provisions are contained in Schedule 6 to the *CROW Act*. They were commenced on 21 May 2007¹ and insert new sections 119D and 119E into the *Highways Act 1980*. They enable the diversion of relevant highways for the protection of the special interest features of SSSIs following an application from Natural England.

3.2 The legislation enables the Secretary of State to prescribe in regulations procedural matters to provide clarity on the operation of these two provisions. Regulations were made on 21 May 2007 and come into force on 1 July 2007². See section 16 below to find out how to obtain copies of the relevant legislation.

3.3 The highway must be in, form part of, or be adjacent to or contiguous with an SSSI³ and be:

- A footpath, bridleway or restricted byway;
- A highway which is shown in a definitive map and statement as a footpath, a bridleway or a restricted byway but over which the public have a right of way for vehicular and all other kinds of traffic, or
- Any highway which is shown in the definitive map and statement as a byway open to all traffic⁴.

But does not include any highway that is a trunk road or special road.

The grounds for making an order are that:

- public use of the highway is causing, or that continued use of the highway is likely to cause, significant damage to the flora, fauna, or geological or physiographical features by reason of which the SSSI is of special interest, and
- that it is expedient that the line of the highway, or part of that line should be diverted (whether on to land of the same or another owner, lessee or occupier) for the purpose of preventing such damage⁵.

3.4 Applications from Natural England must be in the prescribed form, and at least 14 days before making an application it must notify any owner, lessee or

¹ The Countryside and Rights of Way Act 2000 (Commencement No.12) Order 2007 – SI 1493(C.61)/2007

² The Highways (SSSI Diversion Orders) (England) Regulations 2007 – SI 1494/2007

³ s119D(1) Highways Act 1980

⁴ s119D(2) Highways Act 1980

⁵ s119D(1) Highways Act 1980

occupier of land over which the proposed order would create or extinguish a public right of way of its intention to do so.

3.5 The form of the notification of intent, the application and various other procedural matters are set out in regulations referred to in paragraph 3.2 above. The form of the notification and application are reproduced at Annexes B and D respectively.

3.6 Once an application is made the local highway authority should consider whether it meets the various tests set out in the legislation and decide whether to make an order. These are set out in section 12 below. If the authority decides to make an order it must publicise it and allow a minimum of 28 days for objections to be made. If no objections are received, or received but then withdrawn, the local highway authority may proceed to confirm the order. No changes can be made on the ground until an order has been confirmed.

3.7 If objections are received, but not withdrawn, the local highway authority must decide whether or not to submit the order to the Secretary of State for confirmation. Where the authority have neither confirmed the order (unopposed) nor submitted it to the Secretary of State for confirmation within six months of receiving the application, the Secretary of State may exercise his power to make an order without consulting the authority⁶. The flowcharts at Annexes E and F summarise the procedure for SSSI diversion orders.

3.8 These procedures are much the same as those for public path and rail crossing diversion orders. Further details of these are set out in *DOE Circular 2/1993* and the Countryside Agency (predecessors to Natural England) publication *A guide to definitive maps and changes to public rights of way*. (Details of where to get these publications can be found in section 16 below.)

3.9 Before making or confirming an SSSI diversion order, the local highway authority or the Secretary of State is required to consider the effect which the diversion would have on public enjoyment of the highway as a whole, and whether the damage to the special interest features of the SSSI could be prevented by the making of a traffic regulation order ("TRO") and, if it could, whether making a TRO would cause less inconvenience to the public than diverting the highway.

3.10 A right of way created by an SSSI diversion order may be either unconditional or subject to such limitations or conditions as may be specified in the order⁷, even if no such limitations or conditions applied to the existing right of way. For example if the new path or way is to pass over a stile or through a gate, the landowner's right to erect that stile or gate is a limitation on the public's right and should be recorded in the Order. It will be particularly important for any limitations on restricted byways to be included in any diversion order as the local authority's power to authorise erection of stiles

⁶ s120(3D) Highways Act 1980

⁷ s 119D(7) Highways Act 1980

etc. for the management of livestock under section 147 of the Highways Act 1980 does not extend to this type of way. Any new or different limitations included in the Order should be added to the authority's Public Rights of Way Definitive Map and Statement.

3.11 Before determining to make an SSSI diversion order, the council may require Natural England to enter into an agreement with them to defray, or make a contribution towards, any compensation which may become payable, and any expenses incurred by the council in bringing the new site of the highway into a fit condition for use⁸.

4. The scope of SSSI diversion orders

4.1 The grounds for making an order are that the public use of the highway is causing, or that continued use of the highway is likely to cause, significant damage to the flora, fauna, or geological or physiographical features by reason of which the SSSI is of special interest.

4.2 Where an SSSI is notified for fauna interest features (such as birds) significant damage should be interpreted to include significant disturbance caused or likely to be caused by users.

4.3. It may also be appropriate to consider the use of these powers where significant damage is being caused away from the highway itself, but where it can be shown that the damage is being caused by people gaining access by means of the highway in question, but then venturing away from it. In other words, there would need to be a clear connection between the use of the right of way and the damage. However in these circumstances there may also be alternative relevant legislation and powers that could be applied to address concerns and protect the site. For instance, section 28P(6A) of the *Wildlife and Countryside Act 1981* (as amended) makes it an offence for any person who without reasonable excuse intentionally or recklessly destroys or damages the special interest of an SSSI, or disturbs any of the faunal interest features. Additionally, a person who strays from the path or way may be committing trespass.

5. Requirement to consider the use of Traffic Regulation Orders

5.1 Before using the SSSI diversion provisions in sections 119D and 119E of the *Highways Act 1980* (as inserted by the *CROW Act*) a local highway authority must consider whether it would be able to prevent the damage being caused by the public use of the highway by making a traffic regulation order, and if so, whether the making of the TRO would cause less inconvenience to the public than that which would be caused by the diversion of the highway.

⁸ s119D(8) Highways Act 1980

5.2 TROs can be used to permanently restrict access to all users or users of a certain users and type or class. They can also be made so as to apply only at certain times, often referred to as seasonal TROs. A seasonal TRO could, for example, be used to temporarily close a route to prevent bird disturbance during the breeding season. Experimental TROs can also be made to see if the desired impact can be achieved before a more permanent one is put in place. A TRO can often be less inconvenient to the public than a diversion which prevents all users from accessing a particularly attractive route or area on a permanent basis.

5.3 Natural England has also undertaken to consider, in consultation with the local highway authority, whether the use of a TRO or other appropriate management measures might be appropriate before making an application for an SSSI diversion order. Details of these considerations should be included in their application. This will assist the local highway authority in deciding how to proceed.

6. Damage caused by vehicular traffic

6.1 Traffic Regulation Orders may be particularly helpful in cases where mechanically propelled vehicles (MPVs) are causing damage in sensitive areas. As mentioned above, TROs can be used (where appropriate) to prohibit access to specific types of user e.g. MPVs which would leave the route open to other users such as walkers, equestrians and cyclists.

6.2 Byways open to all traffic (BOATs), which carry a right of way for vehicular traffic but are used mainly for the purposes for which footpaths and bridleways are used, i.e. by walkers and horseriders, come within the scope of SSSI diversions. It should be noted though that since there is no power to create BOATs, the alternative highway created in these circumstances will simply be a way over which the public have a right of way for vehicular and all other kinds of traffic [e.g. an all purpose highway].

6.3 Guidance for local highway authorities on the management and maintenance of byways which carry motor vehicles is contained in the Defra publication *Making the Best of Byways* issued in December 2005. This includes information about the use of TROs.

6.4 Advice on tackling illegal vehicular use is contained in the Defra Publication *Regulating the use of motor vehicles on public rights of way and off-road* also published in December 2005. This includes advice on dealing with damage to nature conservation interests. Copies of both documents can be downloaded from <http://www.defra.gov.uk/wildlife-countryside/cl/mpv/index.htm>

6.5 Following commencement of sections 66-71 of the *Natural Environment and Rural Communities Act* on 2 May 2006, there is a presumption that any unrecorded public rights of way for motor vehicles over ways shown on the

definitive map and statement as footpaths, bridleways or restricted byways will have been statutorily extinguished.

7. Identifying an alternative route

7.1 It is Natural England's responsibility to identify the proposed new route and, wherever possible, to negotiate agreement with relevant landowners. (Natural England must include details of any written consents, refusals, or consents yet to be obtained in their application to the local highway authority (see section 10 below)).

7.2 Local highway authority staff should be consulted over the selection of the route and will be able to offer advice on suitability. There will be others who will have an interest in the selection of the route (see section 8 below).

7.3 The diversion must not alter the point of termination of the path or way if that point is not on a highway (e.g. it ends at the sea shore or at a viewing point). If it is on a highway, it cannot do so otherwise than to another point on the same highway, or on a highway connected with it.⁹

7.4 Natural England should avoid proposing diversions on to tarmac roads wherever possible. Where this is proposed, the safety of users of the right of way should be a consideration.

7.5 Although the features of the new path do not need to be identical to the existing one it must be capable of being made fit for purpose, and the choice should seek to minimise any adverse effect on the public enjoyment of the right of way as a whole, on the land the new section of highway will cross, and on other land served by the rights of way network. Issues like length, width, gradient, accessibility (e.g. stiles, gates, steps and other features which may limit access for those with mobility problems or prams) land-use, safety of users, landscape and views may be relevant considerations in this respect.

7.6 Determination of width will be influenced by factors such as physical boundaries, the type of user, ground conditions and what is reasonable.

7.7 Failure to reach agreement with landowners on an alternative route does not prevent Natural England from making an application for an SSSI diversion order. Nor does it prevent the local highway authority from making an SSSI diversion order providing that it is satisfied that it would be expedient having regard to those matters set out in the legislation. But it is likely to prolong the process as the landowner may object to the order being confirmed (see the flowchart at Annex F). It is therefore preferable if Natural England is able to reach agreement at an early stage with relevant landowners. Agreement does not prevent the landowner from making a claim for compensation (see section 14 below).

⁹ Highways Act 1980 section 119D(5) as inserted by the CROW Act 2000

8. Who should be consulted and when?

8.1 The early consultation of a wide range of people will enable any potential difficulties to be explored and other options considered. Whilst the legislation enables the Secretary of State to prescribe additional bodies and persons who should receive the formal notice of intention to apply, this power has not been exercised because Natural England has undertaken to consult widely during and before the preparation of their application for an SSSI diversion order.

8.2 Natural England must, however, consult any owner, lessee or occupier of land over which the proposed order would create or extinguish a public right of way. Defra recommends that Natural England also consult relevant organisations and individuals from the following:

- Representative bodies where appropriate e.g. the NFU or CLA ;
- Local highway authorities, parish and district councils.
- Local Access Forums;
- National Park Authorities, AONB Boards and Partnerships;
- Wildlife and conservation bodies
- British Waterways Board
- Environment Agency
- Local Government Association
- Statutory undertakers who have apparatus which goes under or over land which the proposed order would create or extinguish a public right of way.
- Rights of Way User Groups
- Local residents
- Organisations or individuals who use the land but do not own it for example to access their business or property, to shoot, fish and canoe.
- Ministry of Defence

This list is not meant to be exhaustive and is in no particular order. Local circumstances may also influence who it is appropriate to consult. The important thing is that Natural England give some thought to those organisations and individuals who might have an interest. It may wish to contact the rights of way section at the local highway authority which may be able to suggest potential consultees and provide contact details.

9. Notification of intention to make an application.

9.1 The form which Natural England should use to notify their intention to apply for an SSSI diversion order is at Annex B.

9.2 Natural England may know who the owners, lessees and occupiers of the land on either side of any path or way to be extinguished or created are. If

not, this information may be available from the local highway authority¹⁰ or the Land Registry. Where Natural England cannot find out the name or address of any owner, lessee or occupier it may apply to the local highway authority for exemption from the requirement to serve a personal notice, and for consent instead to address it to the owner, lessee or occupier of the land (as described in the notice) and affixing it to a conspicuous object on the land. Consent should not normally be withheld if Natural England can show that it has made every reasonable effort to identify the owner, lessee and occupier.¹¹

9.3 The local highway authority should be able to supply details of path names or numbers.

9.4 Natural England should send a copy of the notification to any persons or individuals who might have an interest in their application for an SSSI diversion order. Having consulted widely during earlier stages in the process it will know which persons and individuals have an interest.

9.5 Defra recommend that Natural England send the *Note for Information* included at Annex C along with the notification and a copy of the flowchart at Annex E. This sets out the next steps in the process and incorporates information about compensation and opportunities for formal representations at the later stage in the order making process.

9.6 If Natural England decide not to proceed with an application after a notification has it should write to all the persons who received the notification to tell them. If Natural England receives comments from any person(s) after an application has been made it should explain that the matter is now in the hands of the local highway authority, and that if they wish to make any comments these should be directed to that authority instead of Natural England.

10. Application for an SSSI diversion order

10.1 Natural England will need to demonstrate the need for the order and applications must be made on the appropriate form as prescribed in the regulations¹² and reproduced at Annex D. Applications which are not in the appropriate form, or which fail to supply the required information, cannot be accepted as validly made. Local highway authorities should indicate on receipt of an application whether they consider it to be valid. Work will probably need to start on gathering together the information which is required in the application before the notification is issued.

¹⁰ Rights of way officers at the local highway authority will often know who the landowner is. A further source of information once the Register of Notifications under the [Highways Act?] 1980 s31(6) comes into force in 2007 will be authorities' records of any declarations made by landowners about public rights of way over their land. These registers will be available electronically on local authority websites.

¹¹ Section 322 Highways Act 1980 sets out general requirements for the serving of notices

¹² SI 1494/2007 The Highways (SSSI Diversion Orders) (England) Regulations 2007

10.2 As well as identifying the names and addresses of relevant owners, lessees and occupiers (as in the notification) Natural England must state whether it has the written consent of every person having an interest in the land over which a path or way is to be extinguished or created. Written consents must be attached to the application and details given of any consents refused or yet to be obtained.

10.3 The application must also include an assessment of the effects of public use of the right of way. This assessment should:

- clearly identify and assess the effects of any existing significant damage to the flora, fauna or geological or physiographical features, by reason of which the SSSI is of special interest, which has been caused by the public use of the highway;
- clearly identify and assess the effects of any significant damage that continued public use of the highway is likely to cause to the flora, fauna or geological or physiographical features, by reason of which the SSSI is of special interest;
- specify what consideration has been given to alternative options available and to any steps that have been taken to prevent or ameliorate the damage being or likely to be caused by the public use of the highway.

10.4 The assessment can be annexed to the application, and any supporting evidence in the form of expert witness statements or reports should be enclosed with it.

10.5 The names of public utility undertakers in the area must be included, but Natural England should by this stage know who they are, having consulted them at an earlier stage.

10.6 A copy of the notification must be enclosed with the application.

10.7 Natural England should also consider submitting any information it may have available which it considers will assist the local highway authority in deciding whether the application meets all the conditions set out in the legislation (see Section 12 below).

10.8 Although Natural England is not obliged to provide this information it will help the local highway authority and should help to speed up the order making process.

11. Where to send applications

11.1 Once completed the application for a diversion will need to be sent to the relevant highway authority (ies). In the case of a diversion which crosses

land within a National Park this will be the relevant National Park Authority¹³. If a diversion crosses land covered by the *Norfolk and Suffolk Broads Act 1988* the highway authority will be the Broads Authority¹⁴.

11.2 It should also be noted that any function of a local highway authority may be exercised, by agreement, on its behalf by a non-unitary district council, although such an agreement does not relieve the highway authority of its duties. Natural England should therefore check whether any agreements exist and where the application should be sent to.

12. Consideration of SSSI diversion orders by local highway authorities

12.1 Local highway authorities must be satisfied that the key tests in the legislation have been met before making an order¹⁵. The local highway will also need to consider:

- whether it would be able to prevent the damage being caused by the public use of the highway by making a traffic regulation order, and
- if so, whether the making of a traffic regulation order would cause less inconvenience to the public than that which would be caused by the diversion of the highway.¹⁶
- whether the right of way created by an SSSI diversion order should be unconditional or (whether or not the right of way extinguished by the order was subject to limitations or conditions of any description) subject to such limitations or conditions¹⁷ e.g. a gate on the new route. See section 3.10 above.

12.2 Before confirming an unopposed order an authority must also consider whether it is expedient having regard to the effect which -

- the impact the proposed diversion would have on public enjoyment of the right of way as a whole¹⁸ e.g. is the new route shorter, is it easier, does it offer pleasant surroundings, does it expose any category of user to increased hazard;
- the impact the coming into operation of the order would have as respects other land served by the existing public right of way¹⁹; and

¹³ Environment Act 1995, Schedule 9, paragraph 11

¹⁴ Norfolk and Suffolk Broads Act 1988, Schedule 3, paragraph 47

¹⁵ s119D(9) Highways Act 1980 [different font]

¹⁶ Section 119E(3) Highways Act 1980

¹⁷ Section 119D (7) Highways Act 1980

¹⁸ Section 119D(9)(a) Highways Act 1980

¹⁹ Section 119D(9)(b) Highways Act 1980

- the effect that any new public right of way created by the order would have as respects the land over which the right is created and any land held with it.²⁰

12.3 Since these orders are intended to protect SSSIs, it is essential that local highway authorities deal with all such applications promptly. All of these sites are considered to be of national importance and some (over 75% by area) are also recognised as being of international importance. The Government is committed to ensuring that 95% of SSSIs are in favourable or recovering condition by 2010.

12.4 When considering an application for an SSSI diversion order authorities should have in mind their statutory duty as ‘section 28G authorities’²¹, under the *Wildlife and Countryside Act 1981* (as amended), to take reasonable steps, consistent with the proper exercise of their functions, to further the conservation and enhancement of the special interest features of SSSIs. When considering the above matters, and in addition to their statutory duty as ‘section 28G’ authorities, the following provisions may also be relevant:

- i. Section 22(1)(a) of the *Road Traffic Regulation Act 1984* (as amended by the *CROW Act*) enables an authority to make a Traffic Regulation Order to prohibit or enhance restrict vehicular traffic on certain roads to conserve the natural beauty of an SSSI, including conserving its flora, fauna and geological and physiographical features.
- ii. Section 40 of the *Natural Environment and Rural Communities (NERC) Act 2006* requires every public authority to have regard to the purpose of conserving biodiversity, which includes restoring or enhancing habitats.

13. Recovery of costs of SSSI diversion orders

13.1 Local authorities **cannot** recover the costs of making SSSI diversion orders from Natural England under the Local Authorities (Recovery of Costs for Public Path Orders) Regulations (SI 1993/407).²² These orders are deemed to be in the wider public interest and not solely for the benefit of Natural England. Local authorities have already been funded for the administrative costs of making SSSI diversion orders, and for other new duties imposed by the *CROW Act*, through the local government settlement.

13.2 As with public path and rail crossing orders, objections to SSSI diversion orders, and their determination by the Secretary of State, fall within the public domain and, as such, are considered outside the applicant’s control. It is

²⁰ Section 119D(9)(c) Highways Act 1980

²¹ These bodies are defined in section 28G(3) of the *Wildlife and Countryside Act*, as amended, as including any Government Department, local authority, statutory undertaker, or any other public body.

²² As amended by the Local Authorities (Charging for Overseas Assistance and Public Path Order) Regulations 1996

considered unreasonable to expect the applicant, in this case Natural England, to bear the extra expense incurred by the local authority in pursuing opposed orders through to confirmation; although the authority will, nevertheless, wish to ensure that Natural England is afforded every opportunity to participate in any public inquiry.

14. Compensation

14.1 There is provision in the *Highways Act 1980* for compensation to be paid to anyone whose property interests can be shown to have been adversely affected by the coming into operation of any public path order. The local highway authorities may require Natural England to enter into an agreement with them to defray, or make a contribution towards, any compensation which may become payable, and to pay or contribute towards any expenses incurred by the authority in bringing the new site of the highway into a fit condition for use.

15. Power of the Secretary of State to make Orders

15.1 As mentioned above, where the local highway authority have neither confirmed the order nor submitted it to the Secretary of State for confirmation within six months of receiving the application, the Secretary of State may exercise his power to make an order without consulting the authority, although he will only normally intervene in response to a written request from Natural England. It will, of course, be up to Natural England to judge when it would be appropriate to ask the Secretary of State to use this power. It should not, however, be regarded by local highway authorities as an alternative to the exercise by them of their order making powers under sections 119D and E of the *Highways Act 1980*.

16. Further reading

Acts, regulations and circulars

These can be obtained in printed form online via the TSO Online Bookshop (www.tso.co.uk/bookshop/bookstore.asp) by email: customer.services@tso.co.uk, by post to:

TSO, PO Box 29, Norwich NR3 1GN or via the telephone order line 0870 600 5522 or fax order line 0870 600 5533

Some of the publications are also freely available on the internet as shown. In all cases what you purchase or download is the Act, Regulation or Circular as first published, not as subsequently amended.

Acts

Countryside and Rights of Way Act 2000

<http://www.opsi.gov.uk/acts/acts2000/20000037.htm>

Regulations

The Countryside and Rights of Way Act 2000 (Commencement no.12) Order 2007 – SI 1493(C.61)/2007

The Highways (SSSI Diversion Orders)(England) Regulations 2007

http://www.opsi.gov.uk/legislation/about_legislation.htm

Circulars

Department of the Environment Circular 2/93: Public rights of way.

This a comprehensive circular giving guidance to local authorities on a wide range of matters relating to public rights of way, including definitive maps and changes to public rights of way and the related orders.

Other publications

- *Making the Best of Byways* (issued by Defra in December 2005).

An updated version of the guidance originally published in 1998, this guide aims to provide practical advice, mainly to local highway authorities, on managing byways open to all traffic and other unsurfaced vehicular routes and including examples of best practice and technical advice on surfacing.

- *Regulating the use of motor vehicles on public rights of way and off-road* (Issued by Defra in December 2005)

A guide setting out the range of existing powers available to the police and local authorities and encouraging a better understanding and use of these powers including the use of traffic regulation orders - published by Defra in December 2005

Both documents are available online at:

<http://www.defra.gov.uk/wildlife-countryside/cl/mpv/index.htm>

- *A guide to definitive maps and changes to public rights of way* (published by the Countryside Agency in May 2003)

A useful starting point to understand how public path order procedures work, which includes other recommended sources of information and reading.

http://www.countryside.gov.uk/Publications/articles/Publication_tcm2-4326.asp

- *Sites of Special Scientific Interest: Encouraging Positive Partnerships- A Code of Guidance (published in May 2003)*

Provides information and advice on sections 28-31 of the *Wildlife and Countryside Act 1981*, the legislation regarding the notification, protection and conservation of SSSIs in England. Note it does not reflect the recent minor changes made to section 28 through the *Natural Environment and Rural Communities Act 2006*.

<http://defra/wildlife-countryside/ewd/ewd08.htm>

17. Useful Contacts

Department for the Environment, Food and Rural Affairs

Rights of Way Branch (SLR5)

Zone 1/01, Temple Quay House, 2 The Square, Temple Quay, Bristol BS1 6EB

Tel: 0117 372 6274

www.defra.gov.uk/wildlife-countryside/index.htm

Annex A - sections 119D and 119E of the Highways Act 1980

Diversion of certain highways for protection of sites of special scientific interest

119D. - (1) Subsection (3) below applies where, on an application made in accordance with this section by the appropriate conservation body, it appears to a council, as respects any relevant highway for which they are the highway authority and which is in, forms part of, or is adjacent to or contiguous with, a site of special scientific interest-

(a) that public use of the highway is causing, or that continued public use of the highway is likely to cause, significant damage to the flora, fauna or geological or physiographical features by reason of which the site of special scientific interest is of special interest, and

(b) that it is expedient that the line of the highway, or part of that line should be diverted (whether on to land of the same or another owner, lessee or occupier) for the purpose of preventing such damage.

(2) In subsection (1) "relevant highway" means-

(a) a footpath, bridleway or restricted byway,

(b) a highway which is shown in a definitive map and statement as a footpath, a bridleway or a restricted byway but over which the public have a right of way for vehicular and all other kinds of traffic, or

(c) any highway which is shown in a definitive map and statement as a byway open to all traffic,

but does not include any highway that is a trunk road or special road.

(3) Where this subsection applies, the council may, by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order,-

(a) create, as from such date as may be specified in the order, any such-

(i) new footpath, bridleway or restricted byway, or

(ii) in a case falling within subsection (2)(b) or (c) above, new highway over which the public have a right of way for vehicular and all other kinds of traffic,

as appears to the council requisite for effecting the diversion, and

(b) extinguish, as from such date as may be specified in the order or determined in accordance with the provisions of subsection (6) below, the public right of way over so much of the way as appears to the council to be requisite

for the purpose mentioned in subsection (1)(b) above.

(4) An order under this section is referred to in this Act as an "SSSI diversion order".

(5) An SSSI diversion order shall not alter a point of termination of the highway-

(a) if that point is not on a highway, or

(b) (where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it.

(6) Where it appears to the council that work requires to be done to bring the new site of the highway into a fit condition for use by the public, the council shall-

(a) specify a date under subsection (3)(a) above, and

(b) provide that so much of the order as extinguishes (in accordance with subsection (3)(b) above) a public right of way is not to come into force until the local highway authority for the new highway certify that the work has been carried out.

(7) A right of way created by an SSSI diversion order may be either unconditional or (whether or not the right of way extinguished by the order was subject to limitations or conditions of any description) subject to such limitations or conditions as may be specified in the order.

(8) Before determining to make an SSSI diversion order, the council may require the appropriate conservation body to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards,-

(a) any compensation which may become payable under section 28 above as applied by section 121(2) below,

(b) to the extent that the council are the highway authority for the highway, any expenses which they may incur in bringing the new site of the highway into fit condition for use for the public, or

(c) to the extent that the council are not the highway authority, any expenses which may become recoverable from them by the highway authority under the provisions of section 27(2) above as applied by section 119E(6) below.

(9) The Secretary of State shall not confirm an SSSI diversion order, and a council shall not confirm such an order as an unopposed order, unless he, or as the case may be, they are satisfied that the conditions in subsection (1)(a) and (b) are

satisfied, and that it is expedient to confirm the order having regard to the effect which-

- (a) the diversion would have on public enjoyment of the right of way as a whole;
- (b) the coming into operation of the order would have as respects other land served by the existing public right of way; and
- (c) any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it,

so, however, that for the purposes of paragraphs (b) and (c) above the Secretary of State or, as the case may be, the council shall take into account the provisions as to compensation referred to in subsection (8)(a) above.

(10) Schedule 6 to this Act has effect as to the making, confirmation, validity and date of operation of SSSI diversion orders.

(11) This section has effect subject to section 119E below.

(12) In this section-

"the appropriate conservation body" means-

- (a) as respects England, English Nature [*now Natural England*], and
- (b) as respects Wales, the Countryside Council for Wales;

"site of special scientific interest" has the same meaning as in the Wildlife and Countryside Act 1981.

Provisions supplementary to section 119D. 119E. - (1) An application under section 119D above shall be in such form as may be prescribed and shall be accompanied by-

- (a) a map, on such scale as may be prescribed,-
 - (i) showing the existing site of so much of the line of the highway as would be diverted if the order were made and the new site to which it would be diverted,
 - (ii) indicating whether a new right of way would be created by the order over the whole of the new site or whether some of it is already comprised in a highway, and
 - (iii) where some part of the new site is already so comprised, defining that part,
- (b) by an assessment in the prescribed form of the effects

of public use of the right of way on the site of special scientific interest, and

(c) by such other information as may be prescribed.

(2) At least fourteen days before making an application under section 119D above, the appropriate conservation body shall give a notice in the prescribed form of their intention to do so-

(a) to any owner, lessee or occupier of land over which the proposed order would create or extinguish a public right of way;

(b) to such other persons as may be prescribed; and

(c) in the case of English Nature, to the Countryside Agency.

(3) A council, in determining whether it is expedient to make or confirm an SSSI diversion order, and the Secretary of State, in determining whether to confirm such an order, shall, in particular, have regard to the following questions-

(a) whether the council would be able to prevent damage of the kind referred to in section 119D(1) above by making a traffic regulation order, and

(b) if so, whether the making of a traffic regulation order would cause less inconvenience to the public than that which would be caused by the diversion of the highway.

(4) The Secretary of State, in determining whether it is expedient to make an SSSI diversion order under section 120(3) below in a case where by virtue of section 22(4) of the Road Traffic Regulation Act 1984 he has power to make a traffic regulation order shall, in particular, have regard to the following questions-

(a) whether he would be able to prevent damage of the kind referred to in section 119D(1) above by making a traffic regulation order, and

(b) if so, whether the making of a traffic regulation order would cause less inconvenience to the public than that which would be caused by the diversion of the highway.

(5) An SSSI diversion order shall be in such form as may be prescribed and shall contain a map, on such scale as may be prescribed,-

(a) showing the existing site of so much of the line of the highway as is to be diverted by the order and the new site to which it is to be diverted,

(b) indicating whether a new right of way is created by the order over the whole of the new site or whether some part of it is already comprised in a highway, and

(c) where some part of the new site is already so comprised, defining that part.

(6) Section 27 above (making up of new footpaths and bridleways) applies to a highway created by an SSSI diversion order with the substitution-

(a) for references to a footpath or bridleway of references to a footpath, a bridleway, a restricted byway or a highway over which the public have a right of way for vehicular and all other kinds of traffic,

(b) for references to a public path creation order, of references to an SSSI diversion order, and

(c) for references to section 26(2) above, of references to section 120(3) below.

(7) Neither section 27 nor section 36 above is to be regarded as obliging a highway authority to provide on any highway created by an SSSI diversion order a metalled carriage-way.

(8) In this section-

"the appropriate conservation body" has the same meaning as in section 119D above;

"prescribed" means prescribed by regulations made by the Secretary of State;

"site of special scientific interest" has the same meaning as in the Wildlife and Countryside Act 1981;

"traffic regulation order" means an order under section 1 or 6 of the Road Traffic Regulation Act 1984."

Annex B – Notification of intent

SCHEDULE 1 Regulation 3

HIGHWAYS ACT 1980, SECTION 119E

NOTICE OF INTENTION TO MAKE AN APPLICATION
REQUESTING A LOCAL HIGHWAY AUTHORITY TO MAKE AN
SSSI DIVERSION ORDER TO DIVERT CERTAIN HIGHWAYS FOR
THE PROTECTION OF A SITE OF SPECIAL SCIENTIFIC
INTEREST

Name(s) and address(es) of notifiable bodies *[insert details – note 2]*

.....
.....
.....

Notice is hereby given of our intention to make an application to.....
[name and address of the local highway authority or authorities in whose area(s) the right of way is located]

requesting that the highway described below is diverted for the protection of a site of special scientific interest on the grounds that:

[public use of the highway is causing] or [continued public use of the highway is likely to cause/ delete as appropriate] significant damage to the flora, fauna, or geological or physiographical features by reason of which the site of special scientific interest is of special interest; and

it is expedient that the line of the highway, or part of that line, should be diverted for the purpose of preventing such damage.

Name and location of SSSI: *[insert details]*

1. PUBLIC RIGHT OF WAY TO BE EXTINGUISHED

(a) Name(s) and number(s) of highway(s) to be extinguished (including type of highway, grid references and parish or district in which it is located).

(b) Length in metres of path or way to be extinguished.

2. NEW PATHS OR WAYS TO BE CREATED

(a) Type of highway to be created: *[enter type]*

(b) Description: width, length, terminal points (indicating any section which runs over existing paths or ways), including grid references and parish or district in which it is located:
.....
.....
.....

Signed:

Name in capitals:

On behalf of Natural England

Address:

Telephone Number:

Email address:

Position held:

Date:

Note: once an application is made, the local highway authority will consider whether to make an order to divert the highway. If it decides to proceed you will have an opportunity to view the application and to comment to the local highway authority on the proposals before any diversion takes effect.

Notes

1. This form is to be completed by Natural England to serve notice on the persons or bodies to be notified of their intention to apply for an SSSI diversion order (section 119E(2) of the Highways Act 1980).

2. Natural England must serve notice on any owner, lessee or occupier of land over which the proposed order would create or extinguish a public right of way, and on such other persons as may be prescribed.

Annex C

PUBLIC RIGHTS OF WAY - SSSI DIVERSION ORDERS

Additional information for owners, lessees and occupiers of land to accompany a notice from Natural England stating that it intends to apply for a diversion of a public right of way to protect the special interest features of an area of Special Scientific Interest (SSSI).

What happens next?

This notice must have been sent to you at least 14 days before Natural England make an application to the relevant local highway authority. Once an application is made the authority will consider whether it meets the various tests set out in the legislation and decide whether to **make** an order. This is the initial stage and not the end of the process. No changes can be made on the ground until the process is complete and the order has been **confirmed**, before which, views will be sought. The attached flowchart sets out the various stages in this process. Where the authority have neither confirmed the order (unopposed) nor submitted it to the Secretary of State for confirmation within six months of receiving the application, the Secretary of State may exercise his power to make an order without consulting the authority.

Can I object?

Yes. The right to object comes when the order is made and advertised by the relevant local highway authority. If the authority decides to make an order to divert the public right of way it must publicise it and allow at least 28 days for any objections to be made. The notice, order and plan must be sent to the owners, occupiers and lessees of any land affected by the order. So you will be notified if the authority decides to make an order to divert the highway. The notice will tell you where to send any comments.

Can I obtain a copy of Natural England's application to the local authority?

The notice of making an order from the relevant local authority will explain where you can view and obtain copies of documents relating to the order, including the application from Natural England. Local authorities may make a charge for photocopying.

Will I be compensated?

Under section 28 of the *Highways Act 1980*, as applied by section 121(2) of that Act, compensation for depreciation of the value of an interest in land or for disturbance in the enjoyment of land arising in consequence of the coming into force of the Order is payable. You will be given details by the relevant

local authority of how and when to make a claim when you are notified that an order has been confirmed.

How can I find out more about this process?

The Department for Environment, Food and Rural Affairs (Defra) has issued guidance on the operation of these provisions. A copy of this guidance is available online at <http://defraweb/wildlife-countryside/issues/public/sssi-tempdiv.htm> Alternatively you can call the rights of way section at your local highway authority.

Annex D - Application for an SSSI diversion order

SCHEDULE 2 Regulation 4

HIGHWAYS ACT 1980, SECTION 119E

**APPLICATION REQUESTING A LOCAL HIGHWAY AUTHORITY
TO MAKE AN SSSI DIVERSION ORDER TO DIVERT CERTAIN
HIGHWAYS FOR THE PROTECTION OF A SITE OF SPECIAL
SCIENTIFIC INTEREST**

FOR AUTHORITY USE ONLY
File ref:
Date acknowledged:

Name and address of local highway authority: *[insert details]*

An application is made to divert the highway *[note 2]* described below on the grounds that:

[public use of the highway is causing] or [continued public use of the highway is likely to cause][delete as appropriate] significant damage to the flora, fauna, or geological or physiographical features by reason of which the site is of special interest; and

it is expedient that the line of the highway, or part of that line, should be diverted for the purpose of preventing such damage.

Name and location of SSSI: *[insert details]*

1. PUBLIC RIGHT OF WAY TO BE EXTINGUISHED

(a) Name(s) and number(s) of highway(s) to be extinguished (including type of highway, grid references and parish or district in which located):

.....
.....

(b) Length in metres of path or way to be extinguished:

(c) Description of length of path or way to be extinguished by reference to terminal points shown on the map supplied and attached by the applicant which is on a scale of not less than 1:2500 or, if no such map is available, on the largest scale readily available [note 3]:
.....
.....

(d) The name(s) and address(es) of the owners, lessees and occupiers of the land over which the proposed order would extinguish a public right of way:.....
.....
.....
.....

(e) Have you obtained the written consent of every person having an interest in the land over which path or way to be extinguished passes, in so far as any consent is needed?

YES	NO	NOT NEEDED
-----	----	------------

If YES, enclose copies of all written consents.

If NO, enclose copies of all written consents that you now possess, and give particulars of those where consent has been refused or has yet to be obtained.

(f) Is the path or way that is to be extinguished subject to any limitation or conditions (e.g. is there a traffic regulation order in place?).

YES	NO
-----	----

If YES, please give details.

2. NEW PATHS OR WAYS TO BE CREATED

(a) Type of highway to be created: [enter type].....

(b) Description: width, length, and by reference to terminal points (indicating also any section which runs over existing paths or ways) shown on the accompanying map [note 3], including grid references and parish or district in which it is located:

.....
.....

(c) The name(s) and address(es) of the owners, lessees and occupiers of the land over which the new path(s) or way(s) would pass:

.....
.....
.....

(d) Have you obtained the written consent of every interested person to this land being dedicated for this purpose, in so far as consent is needed, that is to say, every person having an interest in the land over which the path or way to be created passes?

YES	NO	NOT NEEDED
-----	----	------------

If YES, enclose copies of all the written consents.

If NO, enclose copies of all written consents that you now possess, and give particulars of where consent has been refused or has yet to be obtained.

(e) Will the new path or way connect with a trunk road?

YES	NO
-----	----

If YES, give details.

3. ASSESSMENT OF THE EFFECTS OF PUBLIC USE OF THE RIGHT OF WAY ON THE SPECIAL FEATURES OF THE SSSI *[note 4]*

(a) A summary of the reasons for seeking the proposed SSSI diversion order:

.....
.....

Answer the following in detail, using separate sheets as necessary –

(b) Clearly identify and assess the effects of any significant damage to the flora, fauna or geological or physiographical features by reason of which the SSSI is of special interest, which has been caused by the public use of the highway.

.....
.....
.....

(c) Clearly identify and assess the effects of any significant damage that continued public use of the highway is likely to cause to the flora, fauna or geological or physiographical features by reason of which the SSSI is of special interest.

.....
.....
.....

(d) Specify what consideration has been given to alternative options available and to any steps that have been taken to prevent or ameliorate the damage being, or likely to be, caused by the public use of the highway.

.....
.....
.....

4. NAMES AND ADDRESSES OF PUBLIC UTILITY UNDERTAKERS IN AREA (whether or not their apparatus is likely to be affected)

(a) Public gas supplier:

(b) Public electricity supplier:

(c) Water undertaker:

(d) Sewage undertaker (if different):

(e) Public telecommunications operator:

(f) Others (please specify):

5. OTHER INFORMATION

The application must be accompanied by a copy of the notice of the intention to make this application.

Give any other information you consider relevant.

DECLARATION

I/We

(a) understand that no authority for the extinguishment, obstruction or creation of any path or way in this request is conferred unless and until an SSSI diversion order has been confirmed and the relevant provisions have come into force;

(b) request that an SSSI diversion order is made and confirmed relating to the path or way described above; and

(c) declare that to the best of my/our knowledge and belief, the factual information in this form is true and accurate.

Signed:

Name in capitals:

On behalf of Natural England

Address:

Telephone number:

Email address:

Position held:

Date

Note: the council will need all relevant information to enable them to proceed.

Notes

1. *This form is to be completed by Natural England when requesting a local highway authority to make an SSSI diversion order to divert certain highways for the protection of a site of special scientific interest under section 119E of the Highways Act 1980.*

2. *The highway must be in, form a part of, or be adjacent to or contiguous with, a site of special scientific interest, and must be a “relevant highway”, defined in section 119D(2) as follows—*

(a) a footpath, bridleway or restricted byway;

(b) a highway which is shown in a definitive map and statement as a footpath, a bridleway or a restricted byway but over which the public have a right of way for vehicular and all other kinds of traffic, or

(c) any highway which is shown in a definitive map and statement as a byway open to all traffic,

but does not include any highway that is a trunk road or special road.

3. *The application must be accompanied by a map (section 119E(1)(a)) on a scale not less than 1:2500, or, if no such map is available, on the largest scale available).The map must—*

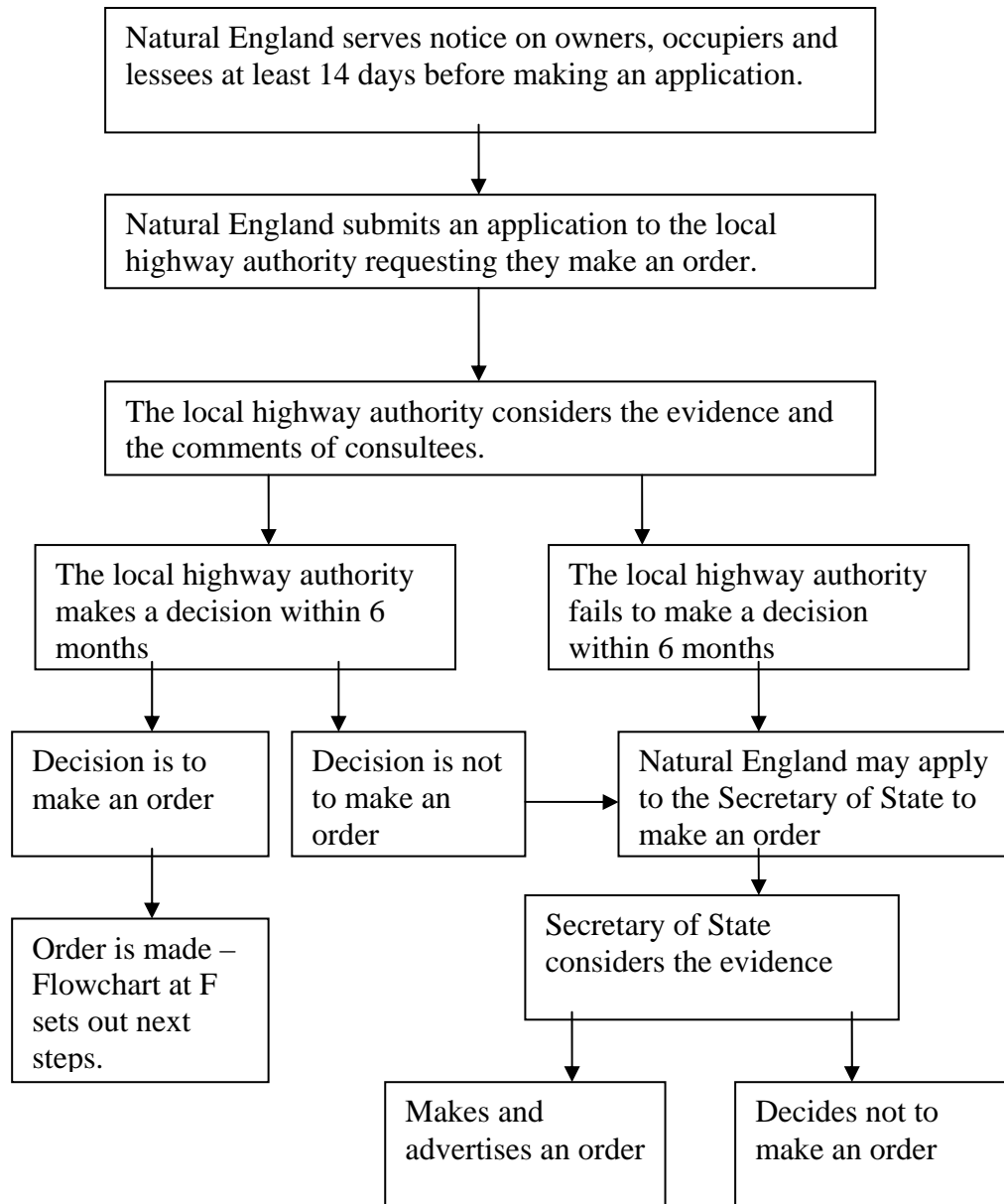
(a) show the existing site of so much of the line of the highway as would be diverted if the order were made and the new site to which it would be diverted;

(b) indicate whether a new right of way would be created by the order over the whole of the new site or whether some of it is already comprised in a highway; and

(c) where some part of the new way is already so comprised, define that part.

4. *The application must be accompanied by an assessment of the effects of public use of the right of way on the site of special scientific interest (section 119E(1)(b)).*

Annex E – Flowchart: Applications for SSSI diversion orders



Annex F – Flowchart: Procedure for SSSI diversion orders

