

**THE SOCIAL AND POLITICAL  
DETERMINANTS IN THE FORMATION  
AND IMPLEMENTATION OF HABITAT  
CONSERVATION POLICY: THE WILDLIFE  
AND COUNTRYSIDE ACT 1981**

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**THE SOCIAL AND POLITICAL DETERMINANTS IN THE FORMATION  
AND IMPLEMENTATION OF HABITAT CONSERVATION POLICY:  
THE WILDLIFE AND COUNTRYSIDE ACT 1981 - SUMMARY**

**KATHRYN VICTORIA LAST**

The aim of the thesis is to ascertain the determinants involved in the introduction of the 'voluntary system' for the protection of habitats in the Wildlife & Countryside Act 1981 in order to explain its existence and form and also its effectiveness.

The identification of the determinants involves consideration of a number of hypotheses. A positive proof shows why the voluntary approach was chosen. A negative proof shows why the alternatives of using criminal sanctions or planning control were not chosen. Hypothesis 1 is that the system adopted for species protection had proved inefficacious and thus criminal sanctions were regarded as inappropriate for protecting habitats. This hypothesis is disproved. Hypothesis 2 is that the purpose of the legislation was a determinant. The thesis will show that there is no positive proof of this hypothesis although there is the possibility of a negative proof. Hypothesis 3 is that pressure group activity in the pre-parliamentary stages of its enactment was a determinant. This shows a possible positive proof. Hypothesis 4 is that the influence of pressure groups and Parliament was a determinant during the parliamentary stages of its enactment.

This hypothesis is disproved. Hypothesis 5 is that Thatcherite policy was a determinant. This shows a negative proof. Hypothesis 6 is that trends in governmental implementation mechanisms were a determinant in the adoption of the voluntary approach. This shows both positive and negative proofs.

The determinants in the formation of the system are then reconsidered in the context of the impact of the system. The purpose of the system is then reconsidered to evaluate the efficacy of the system. This evaluation indicates the predicted defects of the system that have materialised. The results are then considered in relation to the implementation of the Habitats Directive. Criteria for reform of the system are then proposed.

## LIST OF ABBREVIATIONS

ADAS	Agricultural Development and Advisory Service
AHDS	Agriculture & Horticulture Development Scheme
AIS	Agriculture Improvement Scheme
BES	British Ecological Society
BTO	British Trust for Ornithology
CAP	Common Agricultural Policy
CC	Countryside Commission
CCW	Countryside Council for Wales
CLA	Country Landowners Association
CNP	Council for National Parks
CPRE	Council for the Protection of Rural England
DC	District Council
DOE	Department of the Environment
EN	English Nature
EPA	Environmental Protection Act 1990
ESA	Environmentally Sensitive Area
FA	Forestry Authority
F&CGS	Farm & Conservation Grant Scheme
FDGS	Farm Diversification Grant Scheme
FHDS	Farm & Horticulture Development Scheme
FOE	Friends of the Earth
FWAG	Farming And Wildlife Advisory Group

FWPS	Farm Woodland Premium Scheme
GDO	General Development Order
JNCC	Joint Nature Conservation Committee
LPA	Local Planning Authority
LLCA	Local Land Charges Act
LNR	Local Nature Reserve
MAFF	Ministry of Agriculture Fisheries & Food
MNR	Marine Nature Reserve
NC	Term used to refer to NCC, SNH & CCW
NCC	Nature Conservancy Council
NCO	Nature Conservation Order
NFU	National Farmers Union
NNR	National Nature Reserve
NPACA	National Parks & Access to the Countryside Act 1949
NRA	National Rivers Authority
NRIC	Nature Reserves Investigation Committee
NSA	Nitrate Sensitive Area
NT	National Trust
PDO	Potentially Damaging Operation
PPG	Planning Policy Guidance
RSNC	Royal Society for Nature Conservation
RSPB	Royal Society for the Protection of Birds
RSPCA	Royal Society for the Prevention of Cruelty to Animals
SAC	Special Area of Conservation

SCI	Site of Community Importance
SOS	Secretary of state
SPNR	Society for the Promotion of Nature Reserves
SPA	Special Protection Area
SSSI	Site of Special Scientific Interest
TCPA	Town & Country Planning Act
TGO	Timber Growers Organisation
WACA	Wildlife & Countryside Act 1981
WACAA	Wildlife & Countryside (Amendment) Act 1985
WACSONA	Wildlife & Countryside Service of Notices Act 1985
WES	Wildlife Enhancement Scheme

# CHAPTER 1

## INTRODUCTION

### 1) RESEARCH OBJECTIVES

The thesis will provide an explanation for why the so-called 'voluntary system' was introduced for the protection of habitats and how it is working. This voluntary system has been the subject of much criticism, both during and since its enactment in the Wildlife And Countryside Act 1981 (WACA). The research question is why, in the face of heavy opposition and obvious deficiencies, the government introduced this system. The answer to this is not purely of academic interest, although the WACA is 15 years old, because the government has continued to utilise the voluntary approach in the implementation of the EC Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora 92/43/EEC, hereafter referred to as the Habitats Directive.

The aim of the thesis is to ascertain the determinants involved in the introduction of the voluntary system in order to explain its existence, form and effectiveness. It might seem that an appreciation of the effectiveness of the system should be the most important element of such a study; indeed the majority of writing on the subject has concentrated on this aspect. However, such an assessment is methodologically flawed without an understanding of the origin of that system. As McManus (1978:185) points out, "To take legislation as a starting point, as the object of our research, and to remove it from the context within which it was the

chosen vehicle for the implementation of policy, may ignore factors crucial to the assessment of its impact". This has also been recognised by Renner (1949:54), who commented that "we can only develop a complete theory of the law if we supplement positive legal analysis by an investigation of the two adjoining provinces, the origin and the social functions of the law". An understanding of the origin of the legislation and its intended purpose provide a benchmark by which to evaluate the system and formulate criteria for its reform. The thesis will therefore propose reforms that take account of the determinants in the operation of the system and the purpose of the protection.

A number of writers (Adams,1984, Lowe et al,1986, Rowell,1992) have conducted evaluations of the voluntary system and proposed reforms. These are the source of much of the criticism discussed in chapters 2 and 9. However, these evaluations have been carried out without reference to the purpose of the legislation or the determinants of its introduction and operation. This thesis will show that an understanding of this purpose and these determinants is fundamental to an understanding of the operation of the system. Possible determinants in the introduction of the system have been discussed in the literature. The predominant proposals have been that it is a product of Thatcherite policy or of the corporatist relationship between the National Farmers Union (NFU) and the state. However, this thesis will show that there is no theoretical justification for the argument that Thatcherism is a determinant. It will also show that concentration on the NFU's corporate status is too simplistic an approach. According to Allen (1964:433), "the elements which contribute to the framing of much modern legislation are numerous and diverse". It will be argued that a number of determinants have

interacted to bring about the adoption of the voluntary system. There are also a number of proposals for reform of the system, but as these are often based on methodologically unsound evaluations, they have proved unrealistic when considered in the light of a comprehensive evaluation of the system

## **2) TERMINOLOGY**

Until 1991 responsibility for nature conservation in Great Britain rested with the Nature Conservancy Council (NCC)<sup>1</sup>. This was established under the Nature Conservancy Council Act 1973. The NCC advised the Government on all aspects of nature conservation. They promoted conservation directly and through the provision of advice and information on nature conservation.

The Environmental Protection Act (EPA) 1990, section 128, established three separate national bodies to take over the responsibilities of the NCC. These were the Nature Conservancy Council for England known as English Nature (EN), the Nature Conservancy Council for Scotland and the Countryside Council for Wales (CCW). In Wales the functions of the Countryside Commission (CC) have been combined with the NCC. In Scotland the Natural Heritage (Scotland) Act 1991 merged the Nature Conservancy Council for Scotland with the Countryside Commission for Scotland to form Scottish Natural Heritage (SNH). A Joint Nature Conservation Committee (JNCC) was established under section 128(4),

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<sup>1</sup> For a discussion of the history of the NCC see Blackmore (1974).

EPA 1990. It is funded by the three country agencies and is responsible for undertaking special functions on behalf of the three Councils<sup>2</sup>.

Because of the nature of the study, it concerns events both before and after the changes to the NCC. To avoid having to use all of these names and to provide consistency, throughout the thesis reference will be made to the Nature Conservancy (NC) rather than NCC, EN, SNH or CCW except where they are specifically referred to in quotation.

### **3) RESEARCH AREA**

The voluntary system for the protection of habitats<sup>3</sup> is based on the designation of areas as a Site of Special Scientific Interest (SSSI). There are many other types of designation aimed at nature conservation which are discussed in chapter 2. However, as they are all based on the SSSI designation this thesis will concentrate on this particular area as it is the foundation for protection.

Designation as an SSSI of itself provides little protection. It is merely a procedure for initiating negotiations with the landowner so that a management agreement can be concluded. Brotherton (1989) refers to this as a system of enforced delay. Management agreements provide for the payment of compensation to landowners

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<sup>2</sup> For a full description of their constitution and responsibilities see Ball (1991).

<sup>3</sup> A detailed explanation of this system is given in chapter 2. The explanation is of the English system of protection. The system in Scotland is essentially the same.

who abstain from damaging activities on a site. It is known as the voluntary system because there is no compulsion upon landowners to enter into these agreements and, if they decline to do so, after a short delay they are free to damage the site, unless a Nature Conservation Order (NCO) is made. The NCO is effectively just a SSSI with a longer negotiating period and is not available for all sites. The protection of habitats is, therefore, purely dependent upon the voluntary co-operation of landowners<sup>4</sup>. This voluntary system shows a different approach to the system of protection for species, which involves the imposition of criminal sanctions for actions such as injuring or killing certain species.

#### **4) THEORETICAL CONTEXT**

The thesis presupposes a conceptual framework based on the classification of government policy implementation mechanisms as four generic types. This is necessary because, when ascertaining the determinants in the introduction of the provisions for the protection of habitats in the WACA, it is important to remember that such legislation is the result of a process of which it is in no sense an inevitable or the only potential result. The government has a wide range of tools from which to choose. As Daintith (1989:193) points out, "the imposition of legal controls is only one of several ways in which the government tries to secure compliance with its policies".

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<sup>4</sup> Although Brotherton (1989) argues that it is not strictly a voluntary approach, the term is in common usage and as will be seen in chapter 9 any controls that exist which may indicate a non-voluntary system are rarely, if ever, used.

This wide range of tools makes the understanding of the determinants of the adoption of a voluntary system fundamental to an evaluation of its efficacy and thus its appropriateness. This is because, according to Hood (1983:132), "most of the time, in seeing a choice of instruments by government as inept or inspired, we judge case by case, *ex post*, on the basis of common sense ... but there is no elaborate science in this ... context is everything".

Therefore, in evaluating the impact of the system it is first necessary to understand the reasons for its implementation. To do this we must first understand what alternatives were available to government to implement its policies. These policy implementation mechanisms are what government can do about problems once it knows about them. These can take a number of forms and there are four basic resources available to government that can be used alone or in combination<sup>5</sup>.

*AUTHORITY* - This involves the possession of power (legal or official). Government can demand, forbid, guarantee or adjudicate. It is the traditional defining property of government and "gives the government the ability to determine in a legal or official sense, using tokens of official authority as the coin, and subject to a limit of legal standing" (Hood 1983:6). This strategy requires people to adopt new behaviour under threat of penalties (Balch,1980).

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<sup>5</sup> These tools are not unique to government: "government's attempts to make an impact on the world outside do not, much of the time, differ from those of other organisations in terms of basic tools of the trade" (Hood 1983:121).

*TREASURE* - This involves the possession of money or goods with the capacity for free exchange. It is sometimes referred to as cheque book government or incentives (Balch,1980).

*NODALITY* - This "denotes the property of being in the middle of an information or social network" (Hood,1983:4) for example as a figurehead or, in an informal sense, building up a store of information not available to others. The resultant capability is the traffic in information founded on figureheadness or having the whole picture. According to Balch (1980) this is a strategy used when people wish to adopt the new behaviour.

*ORGANISATION* - This is based on the possession of a stock of people, land, buildings, materials and equipment, somehow arranged. It provides the government with the ability to act directly using its own forces and affect the physical environment. This is sometimes referred to as facilitation (Balch,1980)

The habitat protection system in the WACA involves a mixture of these approaches. The management agreement is an example of the use of treasure. The reciprocal notification<sup>6</sup> requirement is an example of authority. The code of conduct in section 33 represents the use of nodality. Examples of the use of organisation include the ability of the NC to conclude management agreements and to undertake restoration of damaged sites<sup>7</sup>.

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<sup>6</sup> The requirement that an owner or occupier notifies the NC before carrying out a prescribed operation. A failure to notify is an offence under Section 28(5).

<sup>7</sup> This is only available for sites subject to a section 29 NCO.

Such a mixture is not unusual. The tools are generic types, having a long ancestry and innovation is through the use of different mixtures applied in different situations and new contexts. "Government in practice always involves some mixture of the whole gamut of tools...there may be single tool agencies, but there is no such thing as single tool government" (Hood 1983:154). On the basis of this classification of policy implementation mechanisms, a number of alternatives were available to the government to protect habitats. An infinite number of combinations is possible. However, the most important choice relates to the dominant tool.

According to Ball (1990:74) "site protection may broadly be furthered by four legal devices - legal restrictions, backed up by criminal sanctions; purchase and management of the site; voluntary protection by the occupier, usually compensated or encouraged by other incentives; and taking the interest of the site into account in public decisions". These proposed methods relate respectively to the use of authority, organisation and treasure. The final method is indirect and the closest category is nodality. However, it doesn't strictly relate to one of these tools as they do not focus solely on legal methods.

Of the four types of tool, nodality is generally the least often used in a formal manner. Protection of habitats based on the use of nodality would involve information and education on means of protection. This is available through the Farming and Wildlife Advisory Group (FWAG) and the code of conduct produced under section 33 of the WACA. It has never been proposed as an exclusive

measure for the protection of sites although the NCC has proposed its use for the wider countryside (NCC,1989:8)<sup>8</sup>.

Control based primarily upon the use of organisation would involve something like the purchase and management of all sites by the NC. This takes place to a limited degree but it is currently restricted to National Nature Reserves. The resource implications of such an approach are obvious<sup>9</sup>.

The system introduced in the WACA is based primarily on the use of treasure. This involves positive grants for conservation work and compensation under management agreements for not undertaking certain operations. This encompasses the options available when using treasure.

The use of authority to protect habitats is the most often cited alternative to the approach chosen. It represents the traditional approach of the legislature to policy problems. This could take two possible forms. The first is an approach based on the use of criminal sanctions such as that adopted for species protection and Tree Preservation Orders. The second approach is the use of regulatory mechanisms under the land use planning system such as those adopted for the protection of listed buildings. Both possibilities were often cited in parliamentary debates on the WACA.

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<sup>8</sup> It was also viewed by the Victorian preservationists as the only long term method of protection. For more details see Chapter 4.

<sup>9</sup> In fact the NC has been put under pressure "to sell off as many owned NNRs as possible, in accordance with government dogma on privatisation" (Ratcliffe,1989:15).

## 5) METHODOLOGY

A consideration of why the voluntary system was introduced involves the identification of the determinants of the decision to adopt the voluntary approach. According to Rose (1982:22), "a law normally reflects specific circumstances of a given time and place. The remedies it proposes will have some generality, but the diagnosis of the problem, and the prescription for resolving it, are rooted in a particular conjunction of political and social circumstances". The methodological approach adopted to identify these circumstances, and thus the determinants, does not involve the presumption of a 'correct' hypothesis of what these determinants are. The study involves a systematic consideration of a number of hypotheses to ascertain which of these are likely to have been of influence.

Each hypothesis will be tested to ascertain whether it was a determinant in the introduction of the voluntary approach. This testing takes a number of forms. Firstly it will be considered whether the hypothesis can be proved theoretically. If so, it will be considered whether this is proved in practice. This is achieved by considering the historical events, interviews with members of the conservation bodies and pressure groups, and reading the archives of pressure groups and Hansard reports.

There are both positive and negative proofs involved in this hypothesis testing. The most important, the positive one, is why the voluntary approach was chosen. The negative to this is why the often proposed alternative of using authority was

not chosen. This might seem tautologous. However, as will be seen, some hypotheses display only one proof and not both.

*HYPOTHESIS 1* - Hypothesis 1 arises because of the disparity between the approach adopted under the habitat protection system and that under the species protection system. The hypothesis is that the system adopted for species protection had proved inefficacious and was thus regarded as inappropriate for protecting habitats. If this hypothesis is answered affirmatively, only a negative proof<sup>10</sup> is made. If it is answered negatively, neither the positive nor the negative proofs are made.

*HYPOTHESIS 2* - This hypothesis is that the purpose of the legislation, the function that it was intended to perform, determined the choice of approach. If this is affirmed, the positive proof and negative proofs will be made. This may seem to be an obvious determinant. However, this thesis will prove that this is one of the least plausible hypotheses and thus there is no positive proof. A comparison will be made with the purposes of the species protection system to ascertain whether the hypothesis provides a negative proof.

*HYPOTHESIS 3* - This hypothesis concerns the assertion made by writers such as Cox & Lowe (1986a) and Grant (1983) that the corporate status<sup>11</sup> of the NFU was a determinant in the choice of the voluntary approach. However, rather than

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<sup>10</sup> As it relates to criminal sanctions.

<sup>11</sup> This term is explained in chapter 5.

restricting the hypothesis purely to the influence of the NFU, hypothesis 3 is that pressure groups were a determinant in the choice of the voluntary approach in the pre-parliamentary stages of the enactment of the WACA. This hypothesis is capable of both positive and negative proofs.

*HYPOTHESIS 4* - This hypothesis is that the influence of pressure groups and Parliament was a determinant during the parliamentary stages of the enactment of the WACA. It is capable of both positive and negative proofs.

*HYPOTHESIS 5* - This is a hypothesis put forward by writers such as Blowers (1987) and Lowe & Flynn (1989), that Thatcherite policy was a determinant. It is capable of both positive and negative proofs.

*HYPOTHESIS 6* - This hypothesis is that trends in governmental implementation mechanisms that can be associated with constitutional change were a determinant in the adoption of the voluntary approach. This is capable of both positive and negative proofs.

The list is obviously not exhaustive. Some possible determinants will not be considered, for example, cultural expectations, media coverage and the role of property. These may have been influential, but this influence will have been far too indistinct to attribute a specific role to it in the design of the system.

Once the determinants of the legislation have been identified, it is then possible to evaluate the efficacy of the system. Thus, the purpose of the system<sup>12</sup> will be considered in order to evaluate the efficacy of the system. This evaluation will indicate whether the defects predicted in the system have materialised. The determinants in the formation of the system then have to be reconsidered to ascertain how they may have influenced the efficacy of the system in fulfilling its purpose. This will identify the source of any deficiencies in the system. Statistics on loss and damage to sites provided by the conservation bodies have been used to indicate impact and these have been supplemented by official reports and interviews.

The importance of these results will then be considered in relation to the recent implementation of the Habitats Directive. On the basis of this and a conception of how the system is working and what has affected this, it is possible to propose criteria for reform of the system so that the factors exerting a negative influence on the efficacy of the system can be circumvented or their influence diminished.

## **6) STRUCTURE**

Chapter 2 explains the system of habitat protection and describes the defects that were predicted during the passage of the Act and immediately after, both in parliamentary debates and by external commentators.

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<sup>12</sup> Which was identified earlier to assess whether it was a determinant of the voluntary approach.

Chapter 3 tests hypothesis 1. It explains the species protection system and examines the efficacy of the system to ascertain whether this was a determinant in the choice of the voluntary system to protect habitats.

Chapter 4 tests hypothesis 2. It considers the purpose of the species protection system and the purpose of the habitat protection system and compares them to see if this is likely to have influenced the introduction of the voluntary system. The identification of the purpose of the habitat protection system has a dual function. As well as being a possible determinant in the choice of implementation instrument, it provides criteria by which to evaluate the efficacy of the system as considered in chapter 9.

Chapter 5 tests hypothesis 3. It considers the nature of pressure group influence utilising theories of corporatist and pluralist styles of interest group intermediation. It details the activities of the groups in the pre-parliamentary stages of the enactment of the WACA and evaluates their influence.

Chapter 6 tests hypothesis 4. It considers the influence of Parliament and pressure groups in the parliamentary stages of the enactment of the WACA. This considers the proposed amendments to the Act that were successful and identifies who was supporting or opposing them and thus who had influence.

Chapter 7 tests hypothesis 5. It considers the proposed influence of Thatcherite ideology in the introduction of the voluntary system.

Chapter 8 tests hypothesis 6. It considers the trends in governmental policy implementation mechanisms and equates this to both the species protection and habitat protection measures that have been enacted since the late nineteenth century. It then considers why these trends have developed by reference to constitutional changes during the same period. The chapter then offers some conclusions as to the determinants of the introduction of the voluntary system.

Chapter 9 details the legislative changes to the voluntary system since its introduction. It then evaluates the impact of the system. The determinants in the introduction of the system are then reconsidered in the context of their possible influence on the operation of the system.

Chapter 10 evaluates the efficacy of the system with reference to the purposes for which it was first introduced. It then reconsiders this question in the context of its use in the implementation of the Habitats Directive and considers whether the system is suitable for habitat protection.

Chapter 11 makes proposals for reform based on the determinants of the operation of the system.

## **CHAPTER 2**

### **THE HABITAT PROTECTION SYSTEM: AN EXPLANATION & THE PREDICTED DEFECTS IN ITS OPERATION**

#### **1) THE HABITAT PROTECTION SYSTEM**

The statutory method of protecting habitats relies on the designation of areas. There are a number of different types of designation but the one that has assumed central importance is the Site of Special Scientific Interest (SSSI)<sup>1</sup>. This provides the foundation of legal protection. This is because "the 1981 Act is based on a philosophy of voluntariness, with consultation, negotiation and the management agreement, rather than compulsory powers, being the favoured mechanisms for dealing with disputes. The SSSIs are the crucial test of that philosophy" (Ball,1985:767).

The SSSI designation was introduced in section 23 of the National Parks and Access to the Countryside Act 1949 (NPACA). Under the NPACA, designation as an SSSI only afforded protection to a site through the land use planning system. If the NC considered an area to be "of special interest by reason of its flora, fauna, or geological or physiographical features" the NC was under a duty to notify that fact to the local planning authority (LPA) in whose area the land was situated. The purpose of this notification was to enable the LPA to take account of the

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<sup>1</sup> As of April 1994 there were 6057 SSSIs in Great Britain.

special interest of the site when deciding planning applications regarding that site<sup>2</sup>. Additional protection was provided in section 15 of the Countryside Act 1968. This gave the NC the power to enter management agreements with owners or occupiers of such land. These were to enable the management of the land in the interests of nature conservation. However, before 1981, the only real protection for SSSIs was through planning control.

Section 15 NPACA provided for the establishment of nature reserves. These are defined as areas managed "for the study of, and research into, matters relating to the fauna and flora of Great Britain and the physical conditions in which they live, and for the study of geological and physiographical features of special interest in the area" or for "preserving flora, fauna or geological or physiographical features of special interest in the area". The protection of these areas can be achieved in a number of ways. The most certain method of protection is for the NC either to buy<sup>3</sup> or lease the land. They will then have control over the area and can manage it accordingly. The other mode of control is through a nature reserve agreement between the NC and the owners and occupiers of the land under section 16 of the NPACA.

Section 20 of the NPACA empowers the NC to make bylaws for the protection of nature reserves. These may include restrictions on: entry into or movement within the reserve of persons, vehicles, boats and animals; taking, killing or interfering

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<sup>2</sup> Under Town & Country Planning Act 1947 at the time of the enactment of the WACA.

<sup>3</sup> This can be through an agreement with the landowner or the compulsory purchase of the area.

with animals, plants or the soil; the shooting of birds in areas surrounding the reserve; dropping litter and lighting fires. These bylaws may not restrict public rights of way, and if the site is subject to a nature reserve agreement, the land will remain in its original ownership and the owners' rights will not be affected by these bylaws. Protection as a nature reserve was limited to a small number of sites<sup>4</sup> so SSSI designation provided the protection for the majority of sites.

In the WACA, a remodelled form of the SSSI was introduced. This SSSI system is based on the premise that the use of authority should be a last resort. The philosophy of voluntariness, using the tool of treasure, is thus the predominant characteristic of the controls. This is indicated by the use of management agreements as the basis of protection for sites<sup>5</sup>. Management agreements provide for the payment of compensation to a landowner who abstains from damaging activities on the site.

There are supplemental provisions of a mandatory nature. These provide for enforced delay in the performance of an operation that may damage the site. This allows for the NC to negotiate a management agreement with the owner or occupier. Consequently, the legal requirements of the provisions focus on the duty to notify the NC of proposals to carry out activities on the site. The NC can then identify threats to sites and initiate the process of negotiation of a

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<sup>4</sup> In 1981 171 nature reserves existed in Great Britain.

<sup>5</sup> The same protection that was provided by agreements under Section 15 of the Countryside Act 1968.

management agreement. The use of authority, in the form of criminal sanctions, plays a very minor role in the scheme. It is used to ensure notification to the NC of the landowner's intention to carry out a prescribed activity on the site.

The following description is of the SSSI system as enacted in the WACA 1981. Amendments have been made since its enactment and are discussed later in the thesis<sup>6</sup>. However, it is the format of the enactment in 1981 that we are concerned with because the aim of the thesis is to discover why the system was introduced in that particular form. Therefore, judicial decisions on the Act and amendments will not be discussed here. Once the system has been described, the criticisms made at the time of the enactment will be discussed. This discussion will indicate why the choice of this particular approach to habitat protection was so controversial.

#### **1)a) Sites Of Special Scientific Interest**

SSSIs were intended to comprise a representative sample of British habitats to make up a national network of sites<sup>7</sup>. This was regarded in the report of the Wild Life Conservation Special Committee (1947:48), hereafter referred to as the Huxley Report, as the minimum necessary to maintain biodiversity. The basis for designation is scientific<sup>8</sup>. Most sites are selected for their biological interest but there are also geological sites. The selection of sites is performed by the NC. The

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<sup>6</sup> See chapter 9.

<sup>7</sup> See NCC (1984b) Nature Conservation In Great Britain.

<sup>8</sup> Although the Huxley Report also considered amenity interests to be of great importance when such sites were first proposed.

only criterion given by the Act, in section 28(1), is that the area is "of special interest by reason of any of its flora, fauna, or geological or physiographical features". It has remained for the NC to decide the conceptual framework and criteria for the determination of special interest. According to the guidelines on selection of biological SSSIs, "in deciding what is special, we [the NCC] seek to identify the most important areas for the range of habitats and diversity of wildlife occurring naturally in Britain" (NCC,1989).

If a site fulfils the criterion of special interest, the NC are under a duty to designate that site<sup>9</sup>. The effect of this is to make any challenge against the designation of a site extremely difficult. The NC sets the criteria and then applies them. The application of principles of judicial review is therefore limited by the subjective nature of the designation.

When the criterion of special interest is satisfied, section 28(1) requires the NC to notify that fact to the Secretary of State, the local planning authority and every owner or occupier of the land<sup>10</sup>. Under the code of guidance<sup>11</sup>, paragraph 6, the NC will also notify public utilities, statutory undertakers, the Forestry Commission, MAFF and other relevant bodies. All sites notified to the LPA under the NPACA 1949 have to be renotified in this manner. Section 28(2)

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<sup>9</sup> The effect of this duty has been considered recently in *R v Nature Conservancy Council, ex parte London Brick Property Limited* [1995] ELM 95, although this concerned Section 28 as amended by the Wildlife and Countryside (Amendment) Act (WACAA) 1985.

<sup>10</sup> Hereafter referred to as the landowner.

<sup>11</sup> Established under section 33, WACA 1981.

required<sup>12</sup> the NC to give three months' notice to a landowner before this notification. This period is for the resolution of objections to the proposed designation. The notification to landowners will specify the reasons for the special interest of the area and any operations that appear to the NC to be likely to damage that interest. These are commonly known as potentially damaging operations (PDOs), although this phrase has no statutory basis.

Section 28(5) provides that these PDOs cannot be undertaken unless certain conditions are met. Written notice of the landowner's intention to carry out a PDO must be given to the NC. This is often referred to as reciprocal notification. The operation can then be performed if one of three conditions is satisfied: if a three<sup>13</sup> month period has elapsed; if the NC has consented to the performance of the operation; if it is carried out in accordance with a management agreement. The three month moratorium is designed to allow time for the negotiation of a management agreement.

The NC has the power to enter management agreements with landowners under section 15 of the Countryside Act 1968. A management agreement is a contract between the NC and the landowner to manage that land in the interests of nature conservation. Management agreements are generally restrictive in nature, providing for the landowner not to do certain things. However, they can be used

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<sup>12</sup> This is one of the provisions which has been subsequently amended. The three month period of notice has now been removed because it provided an opportunity for landowners to destroy the special interest of the site before any restrictions on activities were imposed.

<sup>13</sup> This was raised to four months in the WACAA 1985.

to provide for positive actions to manage for the purposes of nature conservation. The landowner receives compensation from the NC for the loss of profits arising as a result of the abstention from carrying out the PDO. The amounts of compensation payable are laid down in the financial guidelines produced by the Ministers<sup>14</sup> under section 50 WACA. These guidelines were published on 2/2/1983 in the Department of the Environment (DOE) Circular 4/83<sup>15</sup>. They are based on the principle of compensation for profits forgone which includes such things as loss of agricultural grants or lost revenues had the land been converted to more profitable use<sup>16</sup>.

If a management agreement is not entered, at the end of the three month moratorium the landowner is free to go ahead with the operation without penalty<sup>17</sup>. However, if the operation is carried out before the end of the moratorium period or if no notice of the proposal to carry out the PDO has been given to the NC, an offence is committed. Section 28(7) provides for a maximum fine of £500<sup>18</sup> for such an offence. An exception to the offence is provided in

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<sup>14</sup> The Secretary of State and Minister of Agriculture Fisheries and Food. Although the Bill was promoted by the Department of Environment (DOE) it is interesting to note that the Ministry of Agriculture Fisheries and Food (MAFF) is solely responsible for setting the guidelines for compensation payments by virtue of Section 52(1). However, they are actually published by the DOE.

<sup>15</sup> The guidelines are discussed in detail in section 1e of this chapter.

<sup>16</sup> As such they are generous to landowners; a grant for the work may not have been made in reality but this is of no relevance in determining the amount of compensation.

<sup>17</sup> However, if it is an operation requiring planning permission this must also be obtained.

<sup>18</sup> This was converted to the standard scale level 4 by Section 46 of the Criminal Justice Act 1982. Level 4 was increased to £1000 by the Criminal Penalties (Increase) Order 1984 SI 1984/447 art 2(4) Sch 4, and then to £2,500 by the Criminal Justice Act 1991.

section 28(7) when there is 'reasonable excuse'. This is defined in section 28(8). No offence is committed if it was an emergency operation or if the operation was authorised by planning permission. The offences under section 28 can only be committed by a landowner, as defined above.

Section 33 provides for the Minister to prepare a code of guidance in respect of SSSIs<sup>19</sup>. This was published in 1982, explaining how the SSSI system was to work but added little of legal substance.

### **1)b) Nature Conservation Orders**

Under section 29, if the Secretary of State for the Environment, in consultation with the NC, considers it expedient, he may make a Nature Conservation Order (NCO). This Order may be applied to a SSSI in two circumstances. The first is for the purpose of securing the survival of any kind of plant or animal, or for compliance with an international obligation<sup>20</sup>. Secondly, for the purpose of conserving flora, fauna, or geological or physiographical features. The sites must be of special interest and, for those falling under the second category, must be of national importance.

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<sup>19</sup> At one stage during the enactment of the WACA this was intended as the only protection for SSSIs. See Chapter 6 for details.

<sup>20</sup> For example, the Directive on the Conservation of Wild Birds 79/409/EEC (known as the Birds Directive), the Convention on the conservation of European Wildlife and Natural Habitats 1979 (known as the Bern Convention), the Convention on the Conservation of Migratory Species of Wild Animals 1979 (known as the Bonn Convention), The Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971 (known as the Ramsar Convention).

Schedule 11 lays down the procedure for the application of NCOs. A NCO comes into effect immediately it is made<sup>21</sup>. Under Schedule 11 paragraph 1(2) the order ceases to have effect nine months after it is made unless the Secretary of State has given notice under paragraph 6 that he does not propose to amend or revoke it or he has amended or revoked it. When the order is made it must be notified to every owner or occupier and the LPA, and it must be publicised generally in a local paper. Paragraph 2(1)(c) gives a period of 28 days for objections or representations to be made. Paragraph 4 provides that if any objection to the order is not withdrawn, the Secretary of State shall hold a local inquiry or appoint an inspector. The Secretary of State may then confirm, amend or revoke the order.

The controls on activities provided in section 29 are essentially the same as those in section 28. The restrictions on carrying out PDOs are extended in section 29(3) to cover all persons and not just landowners. In addition, the three month negotiation period can be extended to twelve months. This can be done if the NC offer a management agreement or offer to purchase the interest of the person who notified them of their intent to carry out a PDO. If a management agreement is rejected by the landowner before the expiration of twelve months, the period is three months from the rejection<sup>22</sup>. At the end of the twelve month period, the operation can go ahead without penalty. As with SSSIs, the purpose of the

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<sup>21</sup> Unlike the three month interim period originally enacted for SSSIs.

<sup>22</sup> The same period applies if the NC withdraw their offer to enter a management agreement.

moratorium is to facilitate the formation of a management agreement or the conclusion of terms for purchase of the site.

Compensation is payable under section 30(2) for any reduction in the value of an agricultural holding due to the imposition of a NCO. In addition, where the extended negotiation period has come into operation, section 30(3) provides for compensation for expenditure incurred which has been rendered abortive by reason of the extension or any loss directly attributable to the extension<sup>23</sup>. This is purely compensation for losses during the twelve month moratorium, and is separate from compensation payable under a management agreement.

As with SSSIs, if the PDO is carried out before the end of the period or if no notice was given to the NC of the landowner's intention to perform it, an offence is committed. Under section 51 the NC is authorised to enter land to see if an offence has been committed. These powers are not available for SSSIs, although the power in section 51 extends to where it is necessary to ascertain whether a section 29 Order should be made. For committing an offence under section 29(8), the offender is liable to a fine not exceeding the statutory maximum<sup>24</sup> on summary conviction and to an unlimited fine for conviction on indictment. Because protection has been extended to cover such actions by all persons, the offence is not limited merely to landowners.

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<sup>23</sup> This does not include any reduction in the value of the interest in land.

<sup>24</sup> This was £1000 and since the Criminal Justice Act 1991 is £5,000.

If an offence has been committed, the court has the power under section 31 to make an order for restoration of the site. This requires the offender to carry out specified works within a specified period to restore the land to its former condition. If they fail to do so, section 31(5) provides for a fine of £1000<sup>25</sup> and £100 a day for a continuing offence. There is also provision in section 31(6) for the NC to perform the restoration. Any expenses involved in this can then be recovered from the landowner.

NCOs therefore rely on the SSSI system as a first defence. For sites that fulfil the criteria in section 29(1) & (2) NCOs provide extra controls when SSSI designation has been unsuccessful in securing the protection of the site<sup>26</sup>. If the NCO also fails, the only recourse is compulsory purchase of the site under section 17 of the NPACA 1949. Once this has been achieved, the site can be managed by the NC as a National Nature Reserve (NNR).

### **1)c) National Nature Reserves**

Nature reserves were first provided for in the NPACA 1949. The substantive legislation has largely remained in place since then, but section 35 of the WACA 1981 has provided for the designation of National Nature Reserves (NNRs). Designation of an area as an NNR is performed by the NC declaring it as one.

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<sup>25</sup> This was converted to the standard scale level 5 by Section 46 of the Criminal Justice Act 1982. Level 4 was increased to £2000 by the Criminal Penalties (Increase) Order 1984 SI 1984/447 art 2(4) Sch 4, and then to £5000 by the Criminal Justice Act 1991.

<sup>26</sup> In the year 1993-1994 there were 23 such sites in Great Britain. A total of 41 Orders have been made since 1981 (Withrington & Jones, 1992).

NNRs are nature reserves that are of national importance and are either held by the NC, being managed as a nature reserve under an agreement<sup>27</sup>, or are held by an approved body and being managed as a nature reserve. This third category allows for sites owned by bodies such as the Royal Society for the Protection of Birds (RSPB) to be declared NNRs<sup>28</sup>. This also allows the NC to save its money for the purchase of sites at risk.

Ownership by the NC of a NNR represents the highest level of protection available to a site (Adams,1984a). Although NNRs are arguably simply a different method of protection, rather than a higher one, the power of land ownership<sup>29</sup> in practice gives much stronger protection<sup>30</sup>. The NC will manage the site for the purposes of nature conservation and they can impose bylaws to limit damage by third parties. NNRs are also designated as SSSIs. NNRs do not necessarily represent the top of a hierarchy of sites. Declaration as a NNR tends to be opportunistic in nature. It depends mainly on the resources of the NC and occurs when sites happen to become available or are under threat<sup>31</sup>.

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<sup>27</sup> If the NC are unable to come to an agreement with the owner, or if an unremedied breach of agreement occurs, then the NC have powers to seek a compulsory purchase order under Section 18 of the NPACA 1949. Such an order will require the approval of the Secretary of State.

<sup>28</sup> This category accounts for 10 out of 150 NNRs in England.

<sup>29</sup> If the NC own or lease the site.

<sup>30</sup> Although the majority of NNRs are held under Nature Reserve Agreements (Adams,1984a) so the protection afforded is diminished.

<sup>31</sup> Although the NC does have a list of proposed nature reserves: Ratcliffe (1977).

## 1)d) Duties Of Agriculture Ministers & Water Authorities

Section 32 of the WACA delineates the duties of agriculture Ministers regarding SSSIs. When considering applications for farm capital grants<sup>32</sup> in areas designated as SSSIs or where a NCO has been imposed, the Minister must have regard to furthering the conservation of the special interest of the site. However, this only applies so far as it is consistent with the purposes of the farm capital grants scheme. If the NC object to the making of the grant on conservation grounds and the grant is refused for that reason, section 32(2) provides that the NC must offer a management agreement to the landowner within three months.

Section 48 provides a similar duty with respect to water authorities<sup>33</sup>. They must exercise their functions so as to further conservation generally. With respect to SSSIs, section 48(3) provides that before carrying out any operations appearing to them to be likely to damage the site, the water authorities must consult with the NC<sup>34</sup>. However, this excludes emergency operations.

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<sup>32</sup> Under Section 29 of the Agriculture Act 1970.

<sup>33</sup> This was superseded by the Water Act 1989, Water Resources Act 1991 and the Environment Act 1995. Details of these changes are given in Chapter 9.

<sup>34</sup> It was just such a consultation that was absent in *Southern Water Authority v NCC* [1992] 3 All ER 481 which is discussed in detail in Chapter 9.

## 1)e) The Financial Guidelines

The financial guidelines were published in DOE circular 4/83 on 2 February 1983<sup>35</sup>. The guidelines only concerned themselves with compensation for restrictions. Payment for positive actions was to be left to the individual parties to negotiate. The guidelines provide for a choice of either a lump sum payment or annual payments that are index linked<sup>36</sup>. The lump sum payment should be equal to the difference between the restricted and unrestricted value of the landowner's interest<sup>37</sup>. Annual payments should reflect net profits forgone because of the agreement. This calculation assumes that farm capital grant would have been payable. In addition, the guidelines provide for the NC to pay the costs of professional advisors used by the landowner in connection with the agreement. In addition to the statutory compensation under section 30(3) for areas subject to a NCO, the guidelines provide for the NC to pay for any expenditure reasonably incurred in the twelve months prior to the date of the notification that was rendered abortive by the agreement, or any loss or damage directly attributable to the agreement.

The landowner has the right to dispute the offer within one month and determination of the payment offered is then referred to arbitration. If the making

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<sup>35</sup> As they are not in the form of a statutory instrument they are not subject to any direct parliamentary control.

<sup>36</sup> Special indices are provided for this purpose which reflect annual changes in farm productivity and profitability.

<sup>37</sup> This is calculated having regard to the rules for assessment in respect of the compulsory acquisition of an interest in land as set out in Section 5 of the Land Compensation Act 1961.

of the offer was mandatory<sup>38</sup>, and the amounts payable determined by the arbitrator exceed those determined by the NC, the NC must amend its offer accordingly. However, if the offer was non-mandatory, the NC may choose either to amend the offer or to withdraw that offer<sup>39</sup>.

Under section 32 of the WACA, the obligation on the NC to provide a management agreement in respect of a refusal of farm capital grant consequential upon their objections<sup>40</sup> was limited in its application. It did not extend to a number of grant schemes such as those for forestry operations and those under the Agriculture and Horticulture Development Scheme. However, in the guidelines, the NC agreed to treat forestry applications in SSSIs the same as agricultural ones and voluntarily apply the obligation under section 32, even though they were under no statutory duty to do so.

To cope with the problems where land is let<sup>41</sup>, the guidelines proposed a complementary agreement with the landlord in which the landlord undertook not to serve a notice to remedy contrary to the intentions of the management agreement. In addition, where the landlord intends to take the land in hand at the termination of the tenancy he should give the NC six months' notice of his wish to

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<sup>38</sup> Because the NC were obliged to offer a management agreement due to a successful objection to a farm capital grant application.

<sup>39</sup> No mention is made in the guidelines of what should happen if the arbitrator determines amounts lower than those already being offered by the NC.

<sup>40</sup> Discussed in previous section.

<sup>41</sup> Where there is a possibility of a tenant being in breach of his tenancy agreement by entering a management agreement. For a detailed discussion of the problems involved see Cardwell (1996).

terminate the agreement. Then a management agreement would be offered on similar terms to those enjoyed by the previous occupier.

### **1)f) The Land Use Planning System**

The provisions in the WACA overlap with those of the land use planning system. Most important is the exception to offences under Sections 28 and 29 where the activity has been granted planning permission. A planning permission can, therefore, represent a threat to the protection that might otherwise be available for a site under the WACA 1981. Planning permission is required for operations and material changes of use that fall within the definition of development<sup>42</sup>.

Where planning permission has been applied for on a site designated as an SSSI, the LPA is required to consult with the NC before making a decision<sup>43</sup>. The NC are then allowed 14 days to make their reply. This was supplemented by the Department of the Environment (DOE) circular 108/77 on Nature Conservation and Planning, which urged the LPA to allow more than the minimum of 14 days and encouraged consultation to facilitate the framing of suitable conditions to the planning permission<sup>44</sup>. It also encouraged consultation over developments in the vicinity of an SSSI.

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<sup>42</sup> Currently in the Town and Country Planning Act (TCPA) 1990 Section 55.

<sup>43</sup> This requirement is currently contained in the Town and Country Planning (General Development Procedure) Order 1995, article 10(u).

<sup>44</sup> This is now contained in DoE Planning Policy Guidance Nature Conservation (PPG 9).

## **1)g) Capital Taxation**

Conditional exemption from Inheritance Tax is available on land of outstanding scientific interest under sections 30 - 35, Inheritance Tax Act 1984. Land within a NNR or SSSI can be expected to qualify for this. To obtain the exemption, the landowner is required to undertake to maintain the scientific interest of the land, to preserve its character and to provide reasonable public access to it (where appropriate). Where a management agreement is already in existence and conditional exemption is granted from Inheritance Tax, any compensatory payments due to the landowner under the management agreement cease and any part of a lump sum previously made would be reclaimed. If land is of outstanding scientific interest, relief from Capital Gains Tax is available under section 258, Taxation of Chargeable Gains Act 1992, if the land is sold to certain bodies listed in Schedule 3 to the Inheritance Tax Act 1984. The NC is one such body. The effect is that 10% of the notional tax is given back to the vendor as an inducement to sell to one of the named bodies.

## **2) CRITICISMS OF THE HABITAT PROVISIONS IN THE WACA**

The system of habitat protection described above has been heavily criticised. The WACA was extremely controversial both during its passage<sup>45</sup> and after its enactment. It involved 2,300 tabled amendments and eleven months of debates before its final enactment on 30th October 1981. The choice of the voluntary

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<sup>45</sup> The passage of the bill through Parliament is detailed in Chapter 6.

principle was attacked by the conservation lobby throughout the Parliamentary stages of the enactment of the WACA. The provisions of the Bill were also attacked by members of the farming community, but this was more on the detail of drafting than the use of a voluntary system.

Before considering the criticisms two points must be made. Firstly, the provisions have been amended since their initial enactment so that a number of the defects have now been remedied<sup>46</sup>. Secondly, the provisions changed dramatically throughout the Parliamentary stages of the enactment<sup>47</sup>. The original intention of the government was to protect only a limited number of sites through what became NCOs under section 29. The SSSI provisions in section 28, the restoration of sites under section 31, the duties of agriculture Ministers and the duties of water authorities were all introduced during the Parliamentary stages<sup>48</sup>. Those introduced at later stages of the Parliamentary process were obviously subject to less criticism in debates. Also, much of the criticism directed at the voluntary approach was linked to the various proposals to protect SSSIs at the particular stage that had been reached. The progression was from no additional protection<sup>49</sup> for most SSSIs, to protection through a voluntary code, to protection through notification. Most of these were referred to under the heading of the

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<sup>46</sup> See Section 1 of Chapter 9.

<sup>47</sup> For a detailed discussion see Chapter 6. Also see Appendix 1 Table 1 for an overview of the changes made.

<sup>48</sup> See Appendix 1 Table 1 for details of when each was introduced.

<sup>49</sup> Other than that already existing under the NPACA 1949 which was protection through town planning only.

voluntary approach. However, in the following discussion, the criticisms cited are related to the final versions of the provisions when possible<sup>50</sup>.

Another point to note is the types of defect that were identified at the time of the enactment. These tended to be the political/policy defects<sup>51</sup>. Because there was little legal debate on the Act, the defects identified were not the lawyers defects<sup>52</sup> that have subsequently been identified. One possible reason for this is that the voluntary conservation groups involved in lobbying on the Bill did not have lawyers working for them then and so these issues were not raised.

Many of the criticisms correlate with different perceptions of the purpose of the controls<sup>53</sup>. For example the criticism that the voluntary system is in conflict with the land use planning system is based on the view that the system should seek to control all activities on a site. Many of the 'conservationist lobby' thought that the legislation should aim to do more than the government intended it to do. This is clearly represented in the comment of Lord Chelwood: "It does not really seem to measure up fully to the clear needs of the moment or to all of our hopes" (Hansard:HL415,16-12-1980,1028). These differing perceptions of what the Act

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<sup>50</sup> Some criticisms, although made of earlier versions of the provisions, were not specific to those versions. This is particularly true of the structural defects.

<sup>51</sup> Classified below as structural or design defects.

<sup>52</sup> Classified below as drafting defects.

<sup>53</sup> The purpose of the controls is identified in chapter 4. This different perception of the purpose of the controls is also reflected in subsequent evaluations of the system. If an evaluation is undertaken with the premise that the provisions do not fit the purpose then they will necessarily be judged inefficacious. Although a different purpose might be desirable, an evaluation must be on the basis of the actual purpose of the controls.

should do for habitat protection are evident throughout the debates on the Act. According to Mr Hastings MP, "The Bill's whole approach to the countryside is misconceived" (Hansard:HC3,27-4-1981,547). Mr Bennet MP considered it to be "a sad and anaemic Bill, and a tragic missed opportunity ... yet another example of the Government's ability to compromise all virtue away. It is about as useful in dealing with the problems of the countryside and of wildlife as sitting in an oak wood on a stormy autumn day and trying to catch all the falling leaves" (Hansard:HC3,27-4-1981,591). According to Lord Melchett, "The Bill simply does not begin to meet the needs which it should be meeting" (Hansard:HL415,16-12-1980,994). As these quotations indicate, the Act was considered to be lacking in several respects; it was referred to by Viscount Ridley as "a toothless bulldog"<sup>54</sup> (Hansard:HL417,13-2-1981,446). Baroness David believed that "the provisions in this Bill for the preservation of conditions essential to even a modicum of wildlife are inadequate ... the Bill is no more than window dressing" (Hansard HL 415,16-12-1980,1081). However, underlying all the criticisms are a number of recurring themes, resource problems, the 'maverick' landowner and the conflict with agricultural policy.

The criticisms made of the system have been divided into structural, design and drafting criticisms. Structural criticisms relate to the framework within which the system operates and tend to be rather general in nature. Many of these problems would be present when using any of the possible implementation mechanisms and

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<sup>54</sup> A sentiment echoed in the decision in *Southern Water Authority v NCC* [1992] 3 All ER 481 where Lord Mustill referred to the provisions as "toothless".

are not necessarily specific to the voluntary approach. They often represent the fundamental problems that face conservation. Drafting and design criticisms tend to be more specific. Design criticisms are those that relate to the type of implementation mechanism and the approach adopted. Drafting criticisms, the lawyers defects, concern the wording of provisions and do not relate to the type of implementation mechanism. They are things not really thought about at the time and are easily solved without changing the nature of the system. However, the distinction between the three is blurred and there is obviously some overlap. The drafting and design criticisms are relatively easy to solve, requiring the introduction of amendments to the legislation<sup>55</sup> or new legislation. However, structural problems are much more difficult to solve<sup>56</sup>.

At this point the thesis will not consider all the criticisms that have been made of the system. In addition to the distinction between structural, design and drafting criticisms, a distinction can also be drawn between those problems seen at the time of the enactment of the WACA, those spotted soon after and those realised in the application of the law. The focus in this chapter will be on those criticisms made when the provisions were enacted in 1981 and before its amendment in 1985. This will indicate the problems and disadvantages of the system that arise due to the choice of instrument and its enactment in that particular form. This shows why the choice of the voluntary system was so controversial at the time of

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<sup>55</sup> In fact a number of them have been subsequently solved in the WACAA 1985.

<sup>56</sup> These tend to be the defects that are most often cited and were the most contentious in the Parliamentary debates.

its enactment. This relates to the research question posed in Chapter 1: why in the face of heavy opposition and obvious deficiencies did the Government introduce this system? The determinants of the choice of approach therefore become highly relevant when attempting to justify its adoption. This discussion of the criticisms will also provide the basis for an evaluation of the Act later in the thesis<sup>57</sup>. It will enable an assessment of whether the Act is more or less efficacious than was expected and whether perceived problems have come to fruition.

## **2)a) Structural Criticisms**

### **2)a)i) Insufficient Resources**

Resources are of fundamental importance for habitat protection because finances form the backbone to the voluntary approach. Without money to pay compensation for management agreements there is no protection. As Rose and Secret (1982:preamble) point out, "the letter of the Act depends not on the spirit of goodwill but on hard cash". Lack of resources was therefore one of the most often cited criticisms of the system. According to Lord Gibson "cash is at the bottom of our problems" (Hansard HL 415,16-12-1980,1009).

This is one of the structural defects that is of greater importance with the adoption of the voluntary approach. The reliance on management agreements has a high visible cost, that of compensation payments. Other mechanisms such as using

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<sup>57</sup> In Chapter 10.

criminal sanctions, have high non-visible costs such as administrative costs, for example enforcement costs. However, in addition to the cost of compensation under management agreements administrative costs are also high for the voluntary system. The system is therefore expensive.

There are three elements to this criticism of insufficient resources: (1) lack of money to enter management agreements, (2) lack of money to use stronger powers such as NCOs and compulsory purchase and (3) lack of administrative resources.

#### **2)a)i)1) Lack of Money to Enter Management Agreements**

For any SSSI that the NC wishes to save from damaging agricultural or forestry operations it is obliged to come up with money for compensation to conclude a management agreement. If this money is not available then the site may be lost. Commentators were concerned that compensation payments would be so high that the NC would be able to afford to pay compensation on only a limited number of sites<sup>58</sup>. This is compounded by the additional cost of negotiating these agreements. According to Lord Gibson<sup>59</sup>, "in our experience, management schemes take a great deal of time and trouble to draw up and management time to monitor" (Hansard:HL415,16-12-1980,1010).

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<sup>58</sup> In addition, according to Ball (1985:775), the cost of the system is higher than expected by the government because "occupiers have been encouraged to seek compensation for what may previously have happened voluntarily". Adams (1984a:276) also notes that "farmers previously happy to conclude agreements at a nominal figure are now unwilling to do so".

<sup>59</sup> Chairman of the National Trust.

The generous nature of compensation payments<sup>60</sup> was seen as an incentive to the uncooperative landowner to enter an agreement and protect that site. However, they were also seen as a risk to other vulnerable sites because the limited finances of the NC would mean that only a few sites could benefit from the agreements and thus be protected. According to Viscount Thurso, "the money will not be there, either with management agreements or with compulsory purchase, to meet all of these obligations" (Hansard:HL418,12-3-1981,413). The financial guidelines were also criticised by the RSPB for prolonging discussion needlessly (RSPB,1984:13).

## 2)a)i)2) Lack of Money to use Powers

The lack of resources could also influence the NC's ability to impose NCOs or compulsorily acquire sites. NCOs, like SSSIs, are only a delaying tactic, merely allowing a longer negotiation period than with SSSIs. The requirement in section 30 to pay compensation<sup>61</sup> may inhibit the imposition of a section 29 Order. The imposition of a NCO also shows a willingness to act to save the site and, failing a management agreement, the NC will have to purchase the site to protect it. Thus the expense involved in compulsory purchase *may also inhibit the imposition of* an NCO.

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<sup>60</sup> This is because of the principle enshrined in the financial guidelines that landowners should be compensated for any net loss of income, including potential use. The guidelines are not legally binding on the NC in all circumstances (only where a PDO is notified to them or a farm capital grant has been refused as a result of their objection) but in practice the guidelines are applied in all circumstances.

<sup>61</sup> This does not protect the site; a management agreement or compulsory purchase, both involving more expenditure, are necessary for this.

This influence has become apparent with the announcement during the debates on the Bill that only some 40 sites should be subject to the section 29 protection (Hansard:HL415,16-12-1980,1092, Earl of Avon)<sup>62</sup>. This limitation on the role of NCOs was criticised by Lord Buxton of Alsa as "a crude attempt, albeit well-meaning, to solve financial stringency, the knock-on effect of which may be catastrophic in the long run" (Hansard:HL415,16-12-1980,1059).

### 2)a)i3) Lack of Administrative Resources

The lack of financial and administrative resources on the part of the NC was one of the most damning criticisms of the Act. Lord Gibson noted that "management of the countryside, where we need to achieve the required balance of interests, cannot be achieved without whatever agencies are set up being properly funded" (Hansard:HL415,16-12-1980,1010). As Lord Chelwood<sup>63</sup> pointed out, however, such funding had not been adequately provided for the NC: "we suffer in that council from a very serious lack of resources which greatly inhibits our carrying out our statutory duties" (Hansard:HL415,16-12-1980,1028). Such a lack of resources obviously limits the activities of the NC and their ability to protect sites within the framework of the voluntary system. Lord Chelwood's prophecy of "a continued erosion of critically important habitats for wildlife" was based on his

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<sup>62</sup> By 1994 there were only 25 sites subject to a NCO.

<sup>63</sup> A member of the NC and an ex-president of the RSPB.

observation that "the government's excellent intentions have not been matched with the minimum necessary resources" (Hansard:HL415,16-12-1980,1032).

These much needed resources were not perceived as being adequately dealt with, although they were recognised as being very necessary. According to Lord Gibson "policies of balanced management are expensive and the Bill does not provide greater resources to back ... management agreements" (Hansard:HL415,16-12-1980,1009). This point was also stressed by Lord Winstanley who noted that, "we shall not achieve everything that is necessary unless we are prepared to pay the price. I believe that there is a price, and I am not entirely sure that it is adequately provided for in the Bill" (Hansard:HL415,16-12-1980,1052). The scale of the problem was great because of the requirement of renotification of sites notified under the NPACA 1949<sup>64</sup>.

## 2)a)ii) Conflict With Other Systems

A particular problem is the conflict with the land use planning system. If planning permission has been granted for an activity the landowner is exempted from offences under section 28(8). The landowner can therefore apply for planning permission to carry out an operation without notifying the NC of their intention. The NC will only be informed of the threat by the LPA and will have only 14 days to take action. The moratorium period is bypassed and the lack of notification by the landowner will not constitute an offence. Thus the additional protection

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<sup>64</sup> See Adams (1986) for a discussion of this problem.

afforded to SSSIs under the WACA is effectively removed, putting them in an equivalent position to SSSIs under the NPACA 1949.

This exception also results in the avoidance of the controls under the WACA for existing permissions for mineral and peat extraction within SSSIs. These are in sites which tend not to have been identified as of importance when the permission was originally granted. Revocation of the planning permission would entail a liability to pay compensation, any management agreement would mean having to pay compensation for lost profits, and any attempt to purchase the site would generally involve payment of the market price.

In addition to planning permission trumping SSSI designation, there is also the problem of private Acts<sup>65</sup> taking priority.

#### 2)a)iii) Conflict With Agricultural Policy

Agriculture and conservation were seen as conflicting land uses in the debates on the Act. According to Ball (1985:767), "there is a conflict between modern agriculture and conservation with SSSIs on the battleground". The conflict has been attributed to the failure to integrate agricultural policies and conservation objectives. It was recognised that an integration of rural policy was necessary. According to Lord Sandford there was a "need to take a more integrated approach to rural matters" (Hansard:HL415,16-12-1980,1039). This was also recognised by

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<sup>65</sup> Such as the Cardiff Bay Barrage Act 1993.

Lord Beaumont of Whitley: "We do need to reconcile the interests of agriculture and the environment. It is a very great shame when dealing with this Bill that we cannot at the same time cope with the revision of our agricultural policy in order to reassure and reward the farmers. It is an even greater shame that countryside matters are split between MAFF and the Department of the Environment. It is a great pity that we do not have, as so many European countries have, a department of rural affairs" (Hansard:HL415,16-12-1980,1008). This division between departments is of great importance; as Mr Thomas MP pointed out, "there is a lack of co-ordination between the Ministry of Agriculture, Fisheries and Food, the Scottish Office agricultural division and the Welsh Office agricultural division, and the environmental policies of those Departments and the Department of the Environment. There is no coherent countryside policy" (Hansard:HC3, 27-4-1981,576).

The result of such separation is an inevitable conflict of policy. According to Tam Dalyell MP, "The left hand of the Government, in the shape of the narrow Ministry of Agriculture, Fisheries and Food's responsibility, does not co-ordinate with what the right hand of the Government, in the shape of environmental responsibility, is doing or would like to do" (Hansard:HC3,27-4-1981,596). The result of this non-integration of policy is the imposition of economic pressures on farmers which conflict with conservation (Harvey,1982). Stephen Hastings MP noted that "economic pressures - not least the CAP and the demands of European agriculture - often force a farmer to plough and drain where many of us would wish him to leave the land alone" (Hansard:HC3,27-4-1981,546). This was also recognised by Mr Bennett MP who commented that "One of the major problems ..

is that we still have vast amounts of money available to the farming community that can be used to destroy the countryside rather than conserve it. It is sad that from the Common Market and its agricultural fund there are large amounts of money available to create butter mountains and wine lakes but very little money to conserve our own mountains, lakes and countryside generally" (Hansard:HC9,30-7-1981,1318).

These economic pressures are best illustrated by the farm capital grants scheme under the Agriculture Act 1970. The policy of this scheme<sup>66</sup> is to raise the productivity of middle range farms. Grants were available for a number of activities including drainage, land clearance, reclamation, lying of permanent pasture and the filling of ditches and ponds. If any of these activities were to be carried out on an SSSI they would represent a threat to the scientific interest of that site. "The grants of more than £500m given to farmers each year actually promote the destruction of wildlife" (The Times,6-1-81). Without the provision of these grants the project may not be an economically viable proposition. In the assessment of grants it is merely technical viability that is relevant, no assessment is made of the value of the project<sup>67</sup>.

This is a prime example of the conflict between agricultural and conservation policies. This leads to the anomalous situation described by Earl Peel: "How can

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<sup>66</sup> This was in the Agriculture and Horticulture Development Scheme between 1980 and 1985, the Agriculture Improvement Scheme between 1985 and 1988, and is now more conservation oriented in the Farm and Conservation Grant Scheme running since 1989. Details of these schemes are given in Chapter 9.

<sup>67</sup> They are also awarded irrespective of the wealth of the farmer who is applying for them.

it be right for one department of state - to wit, the Ministry of Agriculture, Fisheries and Food - to encourage farmers by means of powerful incentives, capital grants, to reclaim and develop for minor agricultural gains vital areas of moorland within a national park whose principal feature is moorland, while in contrast and, indeed, in contradiction by compensatory grants another department of state - to wit, the Department of the Environment - is trying to dissuade farmers from proceeding to reclaim, to plough or otherwise to develop, but with no power to prevent them" (Hansard:HL415,16-12-1980,1025). According to Lord Buxton of Alsa, the influence of this grant aid was pervasive. "Nobody except a lunatic would derive satisfaction from destroying a man-made treasure, say, a Rembrandt; but, either because of the indifference to the interest of future generations or because of the lure of grant aid, agricultural human beings, I am sorry to say, are wiping natural Rembrandts from the face of the earth ... The Government remain, through grant aid, the chief instigators and supporters of habitat destruction" (Hansard:HL415,16-12-1980,1058). The essential problem was that farmers are as bound by economic reality as anybody else. In economic terms, conservation was not viable in the face of capital grants. Farmers seldom act independently of governmental agricultural policy because of economic conditions. Therefore a voluntary system is unlikely to be effective when a farmer is not really free to cooperate because of economic considerations.

If the farmer starts an operation that is a PDO before making a grant application and fails to notify the NC he will commit an offence under section 28(8). However, though it may jeopardise his chances of a grant, it will not ensure non-approval. When one considers that in 1981 the maximum fine under section 28

was £500 and the total spent on capital grants schemes was £100.4 million (National Audit Office,1989:21), there seems to be no effective deterrent to farmers for undertaking work on an SSSI for which a grant will be applied for.

Under section 32(1) of the WACA 1981 if the application for a grant concerns a site designated as an SSSI, the appropriate agriculture minister is under a duty to make his decision on a grant so as to further the conservation of the special interest of the site. However, this is subject to the important qualification of "so far as may be consistent with the purposes of the scheme". The scheme is production oriented so conservation is unlikely to be consistent with its purposes.. The Agricultural Development and Advisory Service (ADAS) will consult with the NC who will inform them if the proposal will affect the scientific interest of the site. If so, ADAS will attempt to reconcile the two sides. There are two possibilities, modification of the application or the offer of a management agreement by the NC. If no arrangement can be reached the NC can formally object to the award of a grant and the Minister will take this into account when making his decision.

A refusal of grant by the Minister on conservation grounds results in a duty being imposed on the NC to offer a management agreement compensating the farmer for the loss of grant and lost profits<sup>68</sup>. The imposition of this duty effectively restrains the NC's power of objection to a grant since it will thereby be subjected

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<sup>68</sup> As long as the farmer used the reciprocal notification procedure.

to an open-ended duty to pay compensation that it may not be able to afford<sup>69</sup>. Even the refusal of a grant will not necessarily save a site. The farmer is not obliged to accept an agreement or the compensation. He can go ahead with the work without the grant if he so desires. The only recourse for the NC is to compulsorily purchase the site.

Even if the farmer does not apply for a grant and merely notifies the NC of intention to carry out a proscribed operation its availability is assumed under the financial guidelines and any compensation under a management agreement would include this amount. This has obvious implications for resources.

## **2)b) Design Criticisms**

Design defects are those that relate to the choice of implementation mechanism, the voluntary approach. The focus of these criticisms was therefore the fear of the SSSI system being wilfully undermined by maverick farmers who would not co-operate. These mavericks were seen as the primary threat to effective protection for habitats. Management agreements, the foundation upon which the whole voluntary system is based, have been heavily criticised. "Any voluntary agreement has a crucial limitation - it is a technique for producing compromise and can rarely succeed where there is a serious conflict of interest, since it does

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<sup>69</sup> This is particularly so since the levels of compensation payable have been inflated by agricultural policy. According to Ball (1985:776), "agricultural support of all types inflates the incomes of farmers and the value of agricultural land, and in paying compensation the NCC is effectively paying sums for which the Ministry of Agriculture should be responsible".

not tackle the underlying reasons for the conflict"(Ball,1985:775)<sup>70</sup>. There were two criticisms made of management agreements, (1) that they are voluntary and landowners do not have to enter into them, and (2) that even if the landowner does enter an agreement they are ultimately unenforceable.

### 2)b)i) Management Agreements Rely On Voluntary Co-operation

The use of the voluntary philosophy with the reliance on management agreements does not provide for the maverick landowner. Management agreements can only be entered into with co-operative landowners. No one can force a landowner to enter into an agreement with the NC. As Lord Winstanley pointed out, "they depend for their effectiveness entirely on the goodwill of individual farmers. Those who are not sympathetic to conservation will not enter into an agreement" (Hansard:HL417,13-2-1981,435). These mavericks were a real cause for concern: "most people behave in a sensible and civilised way. The problem is persuading the remainder to conform. That is the major weakness of the voluntary approach. The good landowner would be perfectly happy to conform to the voluntary code, but it would not catch the rogue or the agricultural vandal" (Hansard:HC8,13-7-1981,911,Andrew Bennett MP). This becomes a particular problem with sites in multiple occupation where all have to agree<sup>71</sup>.

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<sup>70</sup> The underlying reasons for the conflict can of course be seen in relation to the lack of cohesion with policies on agriculture which is discussed above.

<sup>71</sup> Problems may also arise with new owners when the agreements may have to be re-negotiated, due to the difficulty of enforcing management agreements against successors in title. The problem of enforcing management agreements against successors in title is discussed in chapter 10 rather than here because it has not been identified before.

The benefits of the system were recognised but so were its limitations. As Lord Underhill commented, "of course compromise is desirable. Of course management agreements are desirable. But ... will it be sufficient to leave this matter entirely to a voluntary system? What will be the situation if agreement is not reached?" (Hansard:HL415,16-12-1980,1046). The basis of these criticisms was that a voluntary system<sup>72</sup> had not worked so far. "This is the system that operates at the moment. The Nature Conservancy Council and nobody else has any legal powers to stop this rate of change. Compromise, agreement, getting on with landowners and not upsetting anybody is the order of the day at the moment. It is under that system that we have lost sites of special scientific interest, at the rate last year of 10 per cent"<sup>73</sup> (Hansard:HL417,12-2-1981,291, Lord Melchett).

## **2)b)ii) Management Agreements Are Unenforceable**

The second criticism of management agreements was their unenforceability. A management agreement is a contract between the landowner and the NC. If the landowner was to breach the agreement, damages are payable. However, it would be almost impossible to quantify the loss as it would be to the national heritage. The plaintiff claiming damages would be the NC, as they are the other party to the

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<sup>72</sup> That provided by the NPACA 1949. This was a different type of voluntary system but although additional protection has been afforded to SSSIs by the WACA it too is voluntary and dependent upon co-operation.

<sup>73</sup> Reference here was to the system proposed before Section 28 was introduced. Although the protection afforded to 'ordinary' SSSIs was changed, it is still ultimately voluntary and the only real protection is through co-operation.

contract, and it is doubtful if they would be able to claim for a loss that is not personal.

Other possible remedies for breach would be specific performance and injunction. Specific performance, however, would only be of use for sites that are not yet damaged and the need for constant supervision by the courts could make it unworkable. Injunction is a possibility but by the time the NC know of the breach it may be too late to save the site. If the breach is serious the NC may treat the contract as repudiated, however, this will not ensure the long term protection of the site.

#### **2)b)iii) Compensation Levels Under the Financial Guidelines**

The amounts of compensation are provided for by the Financial Guidelines laid down under section 50 of the WACA<sup>74</sup>. These provide the formulation for the calculation of compensation and enshrine the principle that the landowner should be fully compensated for any net loss of income, including the potential use value<sup>75</sup>. Paragraph 23 requires the assumption that any available agricultural grants would have been paid and thus such amounts are included in the calculation of the compensation. As Adams points out, the Financial Guidelines "demand the estimation of future agricultural yields, for which there is nationally no adequate

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<sup>74</sup> Discussed earlier at section 1e.

<sup>75</sup> These principles are based on the sums paid for agreements on Exmoor in the 1970s which were intended to be a special case: the Porchester Report (1977).

source of data, they assume that farmers would receive a grant without demanding an appraisal of whether in fact it would have been paid, and they make no allowance for risk in land development" (Adams,1984a:276).

Compensation is paid in two situations, as part of a management agreement, and under section 30, which allows for payment if an owner/occupier loses income as a result of a section 29 order. In addition, under section 32(2)(b) owner/occupiers are automatically entitled to a management agreement when an application for MAFF grant aid is denied on conservation grounds and this will entail the payment of compensation. This provision was highly controversial, since it "establishes an extraordinary precedent; it enshrines in law the right of an owner or occupier to receive tax-payer's funds, either in the form of MAFF grants or compensation payments from the NCC, merely for threatening to harm a SSSI" (Rose and Secret,1982:4). This payment for mere threat led in turn to the recognition of the possibility of claims based on work that the landowner had no intention of ever performing. As Viscount Ridley pointed out, "not all farmers are angels...it will be tempting for some farmers to try to get paid for not ploughing out heath and moorland, which they had no intention of ploughing out anyway" (Hansard HL 415,16-12-1980,1036). This possibility was also recognised by Lord Melchett; "what is to stop somebody coming along and saying, 'I intend to convert this to arable and therefore you have to pay me for the loss of revenue which would be involved', even if they had no intention of doing so?" (Hansard HL 417,12-2-1981,370). The compensation payments were also criticised for being too generous because landowners would be paid for doing nothing on the site

## 2)b)iv) Inadequate Protection Through Land Use Planning Control

Reliance on the land use planning system in the protection of habitats dates back to 1949 when SSSIs were first introduced in the NPACA. Section 23 provided for the NC to notify LPAs of the existence of SSSIs so that account could be taken when deciding planning applications. This was subject to criticism even then. According to Mr W. S. Morrison MP, "Commissioners and Conservancies can notify, inform and recommend, but if the notification, information or recommendation is disregarded nothing happens....there is no surer way of asking for trouble than providing for a conflict of opinion and failing to provide some means for resolving that conflict" (Hansard:HC463,31-3-1949,1493). The effect of the protection provided by development control is minimal. "At best the development control system protects only some sites from some activities" (Ball,1985:770).

Many operations that might damage a SSSI are not regulated by the land use planning system. Under the Town & Country Planning Act 1990, section 55(2)(e)<sup>76</sup>, planning permission is not necessary for agricultural or forestry operations. The definition of agriculture is very extensive, the result being that "the countryside can be converted to intensive agricultural systems, woods cut down, moorlands ploughed, wetlands drained and coniferous plantations grown without any control being exercisable by the local planning

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<sup>76</sup> Previously Town & Country Planning Act 1971 Section 22(e).

authority"(Ball,1985,769). Also under the Town and Country Planning (General Permitted Development) Order 1995, Schedule 2, part 6<sup>77</sup>, automatic planning permission is granted for any land over 1 acre for any building or engineering operations likely to be carried out on an ordinary farm. It is possible to withdraw this by serving an Article 4 direction but this requires confirmation by the Secretary of State and the payment of compensation. It is a temporary measure.

Such problems were foreseen with the voluntary system by the Viscount of Arbutnott<sup>78</sup>. "At a time when the pressure is on all land users, and when the cheapest way to make more land is to reclaim it or drain it or reseed it, or when afforestation seems an attractive alternative, there will be a clash between the accepted uses and conservation use" (Hansard:HL415,16-12-1980,1042). Designation of a site as an SSSI is notified to the LPA but they are not obliged to take any notice of this, except as a relevant consideration in deciding a planning application. The Town & Country Planning (General Development Procedure) Order 1995, Article 10(u)<sup>79</sup>, requires consultation with the NC over any proposal requiring planning permission within an SSSI but the LPA is not bound by the advice of the NC, it is merely a material consideration to be taken into account. As Ball points out, "it is difficult to see how these limited requirements could be enforced properly. The courts are unlikely to hold the consultation procedures

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<sup>77</sup> Previously Town and Country Planning General Development Order 1977 Schedule 1, Class VI.

<sup>78</sup> Deputy chairman of the NCC and president of the Wildfowlers' Association.

<sup>79</sup> This requirement was previously contained in The Town & Country Planning General Development Order 1977, article 15(1)(g).

mandatory and quash a determination made in contravention of them" (Ball,1985:769). Other factors such as economic or social reasons may outweigh the need for protection of a site<sup>80</sup>. Appeals to the LPA are only possible against a refusal of planning permission. No appeal can be made against the granting of a permission. In addition government departments are exempt from all development control and statutory undertakers also have wide ranging exemptions.

## 2)b)v) Level Of Fines

Failure to comply with the notification requirements in section 28 would originally have resulted in a fine of up to £500. According to Rose and Secret (1982:4) "These penalties are at best cosmetic protection". "The scale of fines amounts to little more than a concessionary measure" and are "a small price to pay for ploughing up 450 acres of unspoilt heathland, or felling a hundred acre woodland, given the potential profits from a replacement cereal crop. Fines are only effective if they act as a deterrent; to do so they must reflect the true costs of the crime". The perceived inadequacy of fines was widely commented upon. According to Lord Melchett, "the penalties will be nowhere near adequate to deter people from destroying a site illegally" (Hansard HL 418,12-3-1981,431). Fines are only effective if they act as a deterrent and to do so they must represent the true value of the damage done. A fine is unlikely to provide a deterrent when the

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<sup>80</sup> Although economic factors are not relevant when deciding the area of a site to be designated under the EC Birds Directive: *R v Secretary of State for the Environment, ex parte the RSPB* Times, 2nd August 1996.

profit to be made from converting the use of the area may be many times the amount of the fine, particularly if the operation is eligible for farm capital grant.

## 2)b)vi) Restoration Provision Of Limited Use

If an order has been made under section 29 and is disregarded with the result that an SSSI is damaged or destroyed, the convicting court has the ability, under section 31, to require the offender to perform specified works to restore the site to its former condition. However, according to Ball (1985:774) this section is often "inapplicable because the damage is irreversible". As Baroness White pointed out, "if you destroy a raised bog, you destroy it; you cannot put it back. If you plough up a chalk downland, you destroy the habitats of all the creatures great and small" (Hansard:HL417,12-2-1981,300). However, it may provide a greater deterrent than a fine particularly as, should the order be ignored, the NC has the power to enter the land and perform the work itself and charge the landowner for expenses incurred. However, this would be a pointless exercise unless the NC intended to purchase the land. Once the restoration has been carried out, the landowner could notify the NC of his intention to carry out the operation, wait twelve months, and then go ahead with the operation legally and destroy the site.

## 2)B)vii) 3 Month Pre-Notification Period

The three month period provided by section 28(2)<sup>81</sup> for objections to new SSSI designations<sup>82</sup> leaves sites open to destruction without penalty. As Adams (1984b:45) comments, sites "are wholly unprotected in the 3 month period required by the Act for informal consultation with owners and occupiers". According to Ball (1985:771), "This was intended to provide an opportunity for objections and for tackling management problems in advance, but a major effect was to allow the maverick landowner to escape section 28 altogether by destroying the SSSI prior to designation". The code of guidance on SSSIs states that no PDO should be carried out during this period, but this is not what the Act provides for<sup>83</sup>.

## 2)B)vii) Lack Of Back Up Powers

According to Lord Foot, "In deciding to rely upon voluntary agreements and to abandon the last resort of compulsion, they are departing from the recommendations made by the noble Lord, Lord Sandford, in his report; they are departing from - indeed they are turning upside down - the recommendations which were made by Lord Porchester in his report; and, of course, they are reversing what was to have been the decision of the previous Administration"

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<sup>81</sup> This provision was removed in the WACAA 1985.

<sup>82</sup> This does not apply to renotification of existing SSSIs under the NPACA 1949.

<sup>83</sup> This can be circumvented by the imposition of a NCO which has immediate effect but most sites will not satisfy the designation criteria of national importance, etc.

(Hansard:HL415,16-12-1980,1078). This absence of compulsion was criticised on two grounds. Some saw the existence of reserve powers as a way to facilitate agreement<sup>84</sup>. For others, a major concern was that in the event of a failure of the voluntary system in the protection of a site, there were inadequate back up powers<sup>85</sup>.

The absence of back up powers is illustrated by the fact that three<sup>86</sup> months after notification to the NC of intention to carry out a prescribed operation the operation can go ahead unimpeded, unless it requires and fails to get planning permission or stronger protection is sought under section 29, if available. In the end the NC must rely on the goodwill of landowners or they must resort to spending money to save SSSIs. The maverick landowner is not legislated for.

According to Mr Chapman MP, "As damage is taking place on such an alarming scale, it is not unreasonable to add a provision in the Bill which gives reserve powers to supplement rather than replace, the system of voluntary notification and management agreements.... It is essential to have effective long term safeguards for our rapidly diminishing wildlife habitats" (Hansard:HC3,27-4-1981,563). Lord Donaldson of Kingsbridge called for "a mailed fist behind the glove" (Hansard:HL416,27-1-1981,680). It was felt that the maverick landowner, "the person who spoils the game" (Hansard:HL417,12-2-1981,299, Baroness White)

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<sup>84</sup> For example see Viscount Ridley (Hansard:HL417,13-2-1981,446).

<sup>85</sup> This is closely linked to the criticisms of the voluntary nature of management agreements discussed above.

<sup>86</sup> Since the WACAA 1985 four months.

had not been legislated for. According to Baroness David, "the Bill must .. make some provision against the obstinacy of the purely selfish or bloody-minded landowner. One hopes that these are rare but they certainly do exist, as in every other section of the community, and they should not be allowed to obstruct whatever may be clearly in the long term interest of the community as a whole" (Hansard:HL415,16-12-1980,1087).

It was pointed out that such mavericks were not tolerated in other situations. "Is it really tolerable that one individual for economic reasons should be entitled to defy what is a very considerable national interest? In no other field of planning do we allow such a thing to happen. We do not allow people to build up their back yards just as they please" (Hansard:HL417,13-2-1981,460, Lord Foot). In this call for reserve powers, Lord Craigton likened SSSIs to historic buildings. "I cannot for the life of me see the difference in common sense between an SSSI, an historic building, or an ancient monument. The owner of an SSSI has part of our heritage which should be preserved, and he is as proud of, or as annoyed about, having been asked to preserve it as he now is in regard to his historic building or ancient monument. He can ask no more and no less restriction or compensation" (Hansard:HL417,12-2-1981,336)<sup>87</sup>.

According to Lord Beaumont of Whitley, "from time to time for the good of the community you must introduce compulsion, and this is one of those occasions"

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<sup>87</sup> For a description of the controls for listed buildings see Suddards & Hargreaves (1996) and Ross (1991).

(Hansard:HL418,12-3-1981,416). This compulsion was necessary because according to Rose and Secret (1982:1), "the Act merely relies for its effectiveness on a refined and codified voluntary approach. Indeed the Act will depend on the effectiveness of a formal voluntary code which will depend on voluntary restraint by farmers and landowners. If this restraint is not forthcoming...then the code must fail. If the code fails, the Act provides insufficient reserve powers to enable NCC to protect wildlife sites". This was reiterated by Viscount Massereene and Ferrard: "if we are to stop the destruction ... I cannot see how it can be done unless we use the stick. One does not like using the stick, but I think it is necessary" (Hansard:HL417,12-2-1981,302).

Section 29 will only provide protection if the NC can afford a management agreement or purchase of the site. Given the issue of resources discussed earlier this may be unlikely. The alternative is the NNR. However, this will only provide protection if the NC purchase the site. This is because, unless the site is owned by an approved body, protection is dependent on a nature reserve agreement. This will not work if the SSSI and NCO failed because they are both based on agreements. If the landowner will not enter a management agreement in pursuance of Sections 28 or 29 of the WACA, he is unlikely to do so under section 16 of the NPACA 1949.

#### **2)b)ix) Non-Use Of Back Up Powers That Exist**

In relation to the powers that the NC have under section 29, concerns had been expressed during the debates about the application of these restrictions. Lord

Gibson pointed out that reserve powers were important for all sites. "The Government say that they have no money and that they are setting up a framework for the provision of money when it can be afforded. So in effect they are providing the framework for the carrot, but hardly any stick. The stick is being provided only in the case of a very small number of sites. I feel that that is not really quite good enough" (Hansard:HL417,12-2-1981,320)

When the DoE indicated that this additional protection would only be applied to a few SSSIs, because of the requirement of national interest, no more than 40 or 50 sites would become eligible, *if threatened*, because of their outstanding characteristics, it was seen as clearly unsatisfactory. "The NCC are emphatic that the NNR and SSSI series represent a minimum conservation requirement, and as such every site is of equal importance as a critical habitat worthy of guaranteed protection; the Orders last a comparatively brief time, after which the owner/occupier can proceed as s/he originally intended: the creation of a few 'super' SSSIs implies a corresponding devaluation of the remainder" (Rose and Secret,1982:4). This devaluation<sup>88</sup> was regarded by Lord Craigton as "one of the most objectionable to all shades of conservation opinion and should be done away with"<sup>89</sup> (Hansard HL 417,12-2-1981,293.). The predicted effect was the widespread destruction of the 'down-valued' sites. According to Lord Melchett,

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<sup>88</sup> This has become more likely with the introduction of even higher level designations under the EC Habitats Directive.

<sup>89</sup> Lord Craigton was in fact making this comment before the extension of protection through notification had been included in the Bill However, even once this provision had been added there were claims of creating a hierarchy of sites as can be seen by the previous quotation from Rose & Secret (1982).

"having created a top tier of 30 or 40 sites ...the rest of the sites of special scientific interest would be seen as much less important than they are now and we would simply have an open season on them and they would be destroyed not at the rate of 10 per cent as they were last year but at a much higher rate in years to come" (Hansard HL 417,17-2-1981,620). Such a devaluation may also occur because of the hierarchical structure imposed by the necessity to choose between sites for the conclusion of management agreements<sup>90</sup>.

Another problem exists with section 29, which relates to the policy to designate only those sites that are under an imminent threat. The effect of such a policy, which has been attributed to lack of resources<sup>91</sup>, is a possible delay in the implementation of the designation procedure. The NC has first to hear of an intended operation and then has to persuade the Secretary of State to issue an Order, by which time it may be too late. This may result in the loss of some key sites.

The final recourse is the NNR. However, they are intended as reserve powers only to be very rarely used<sup>92</sup>. Their use is restricted to those situations where a landowner refuses to enter into a management agreement on an SSSI or site subject to an NCO and refuses to sell the property. The only remaining weapon in

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<sup>90</sup> Because EN may not be able to afford to make such agreements on all sites.

<sup>91</sup> Designation under Section 29 not only costs money itself but also implies a willingness on the part of the NCC to spend more money to protect the site. See earlier discussion at 2)A)i).

<sup>92</sup> There are also positive reasons. The NC only wants certain sites as NNRs because not all qualify for this accolade.

such a situation is the compulsory purchase order. The designation of a site as an NNR is a very costly procedure. Consequently the NC will only consider those sites that are imminently threatened.

#### 2)B)x) Only The Landowner Is Restricted In Carrying Out Activities On The Site

There is the problem that persons visiting the land cannot commit an offence and many sites are subject to extensive public access<sup>93</sup>. There is no way of excluding or controlling the public apart from the landowners exclusive property rights. Such a gap is important because, as Lord Inglewood pointed out, SSSIs "can very easily be destroyed by access just as historic houses can easily be destroyed by the feet of those thousands who come and visit them" (Hansard:HL418,12-3-1981,442).

#### 2)b)xi) Code Of Guidance

According to Ball (1985:773), this code "has become useless. Its purpose to provide a non-statutory framework for protection of SSSIs was removed by the strengthening of the original Bill. That left it with little to do except add a few

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<sup>93</sup> Unlike the TCPA 1971, Section 102, on tree protection which allows the prosecution of contractors, Section 28 does not create any offence capable of being committed by anyone other than owners or occupiers. This exact problem occurred in *Southern Water Authority v NCC* [1992] 3 All ER 481, which is discussed in detail in Chapter 9.

comments on NCC practice and to explain the Act in a slightly more palatable way"<sup>94</sup>.

#### **2)b)xii) Delay In Implementation Of NCOs**

Because of the fact that only those sites under imminent threat are designated as NCOs, designation may often come too late. The NC has to discover the threat and then persuade the Secretary of State to issue an order, all of which takes time. As can be seen from the problems of the 3 month pre-notification period for SSSIs, sites can be destroyed in a very short period of time.

#### **2)b)xiii) Wording of emergency defence**

Under section 28(8)(b) it is a defence to liability under section 28(5) that the operation was an emergency one. This leaves it open for landowners to carry out an operation and then claim that it was an emergency. The NC only have to be notified after the fact and it is difficult to ascertain the nature of the operation after it has already been performed.

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<sup>94</sup> See Appendix 1. The code of guidance was introduced for SSSIs in the Committee stage of the Lords. It was replaced by the notification procedure for SSSIs at Report in the Commons when the code of guidance was moved to a separate clause.

## **2)b)xiv) Act Not Applicable Before Notification**

Until a site has been notified under the provisions of section 28, the controls in the WACA do not apply<sup>95</sup>. Even sites that had previously been notified under the NPACA 1949 would not benefit from this additional control until they had been re-notified.

## **2)c) Drafting Criticisms**

It was felt that there were major omissions from the remit of the Act and that there were serious defects in the provisions enacted. According to Lord Burton, "it is riddled with anomalies", "It is a mammoth compilation of restrictive legislation couched in phraseology that is most difficult to understand. The result is, I fear, that the law will be brought into disrepute" (Hansard:HL415,16-12-1980,1062).

### **2)c)i) Occupier Not Fully Defined**

An offence under section 28 can be committed only by an owner or an occupier of that land. These owners or occupiers will be aware of the designation of the site as an SSSI because either they will have been notified or when buying the land they will have been informed of its existence because it is registrable as a local land charge. This leaves a difficult situation regarding those with common rights on land. If they are not considered to be either owners or occupiers of the land

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<sup>95</sup> Although the Code of Guidance urged such landowners to voluntarily comply.

then they will commit no offences under section 28. However, if they are construed as such, to bring them within the remit of the section, then the NC has the almost impossible task of notifying all persons with common rights of the designation of the site. Those sites already designated would also require notification and this would represent an enormous workload for the NC and render the controls invalid until the notification has been completed.

### 2)c)ii) Nature of PDOs

The major problem with PDOs is that neglect of a site is not covered and on many sites this would be just as harmful as some of the listed operations. The reason that neglect is not included is due to the nature of PDOs, they are positive actions that are restricted, rather than inaction. In addition, only those operations specifically listed by the NC are restricted. "Apart from being unduly uncertain and productive of work, this invites landowners to commence an operation claiming that it is not covered" (Ball,1985:773).

### 2)c)iii) NC Has No Power Of Entry

The NC has no power of entry to a SSSI<sup>96</sup>. This means that many sites could be lost through neglect and for those damaged by the carrying out of PDOs the NC cannot go into a site to see if an offence has been committed<sup>97</sup>.

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<sup>96</sup> Although it does for NCOs.

<sup>97</sup> Although a power to see if Section 29 order is justified is available under Section 51.

### 3) CONCLUSION

As can be seen from part 1 of this chapter, the voluntary approach is central to the protection of habitats. A large number of criticisms were made of the provisions of the Act and with the use of a voluntary system in part 2 of this chapter. Not all the defects in the provisions were seen at the time. Some only became obvious when the system was operating. A number of the problems were addressed by later action, for example in the Wildlife and Countryside (Amendment) Act 1985 (WACAA), and by the provision of greater resources for the NC.

Of these criticisms made of the system the structural ones must be the most serious. However, the problem of conflict with agricultural policy would exist regardless of the system introduced for habitat protection. It is not strictly a defect of the SSSI system. A number of the drafting defects could be solved by the enactment of amending legislation<sup>98</sup> and many of them could have been avoided. The reason for the existence of most of these is that protection for all sites<sup>99</sup> was introduced rather late in the Parliamentary stages of the enactment of the WACA<sup>100</sup>. However, some of the design defects could have been easily avoided such as the three month pre-notification loophole. Given that there was so much

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<sup>98</sup> And a number of them have in the WACAA 1985.

<sup>99</sup> Rather than just those that satisfy the criterion of Section 29.

<sup>100</sup> For details see Chapter 6.

criticism of the Act, particularly of the design, it must be asked why such an approach was adopted.

The defects discussed here will give a benchmark by which to measure whether the operation of the WACA matches expectations of it, or whether the view of Denyer-Green (1985:10) that "the continuance of this Act on the Statute Book is in fact causing more damage than good" is more appropriate.

## CHAPTER 3

### HYPOTHESIS 1

#### 1) HYPOTHESIS 1

Chapter 3 tests hypothesis 1, effectively why a compulsory system was not chosen for the protection of habitats since there was a workable mechanism already being used for species protection. Hypothesis 1 focuses upon the disparity between the use of treasure in the habitat protection system and the use of authority in the species protection system. The hypothesis is that the system adopted for species protection was perceived<sup>1</sup> as inefficacious and was thus regarded as inappropriate for protecting habitats. This hypothesis only considers the negative side of the research question, why authority wasn't used to protect habitats. It does not provide any explanation for the positive side of why treasure was chosen.

Part I of the WACA, which relates to species protection, took a very different approach from Part II, which concerns habitat protection. The species protection system is founded upon the use of authority and involves the establishment of blanket criminal offences of interfering with specified wildlife. The restrictions relate to the killing or taking of certain animals or birds or disturbing them during the breeding season or when rearing young. This is accompanied by a list of exceptions and defences for acceptable activities. Many of these will require

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<sup>1</sup> Whether it was in fact efficacious or not does not matter, it is how it was perceived that is important in influencing the choice of implementation mechanism.

permission or a licence from an official body. In addition, there are prohibitions against buying, selling, advertising or importing certain species. The taking or destruction of wild plants is also an offence.

Some protection for species is also provided through the common law. Under the common law wild creatures are afforded no rights of their own. Consequently any protection must be provided through the rights of the 'owner'. However they are not strictly the subject of ownership. They are subject merely to a qualified ownership by the landowner. This qualified ownership consists of an exclusive right for the landowner to catch, kill and appropriate the animals on his land. According to *Blade v Higgs* (1865) 11 H.L.C. 621, as soon as the animals are killed or taken they fall into the ownership of the landowner, even if killed by a trespasser<sup>2</sup>. Plants are part of the land and are thus owned. Therefore, property rights may be used to provide some form of protection from destruction and appropriation for wild plants and animals against persons other than the landowner.

Anyone who kills or injures a wild animal or picks a plant on someone else's land commits the tort of trespass and interference with property<sup>3</sup>. So, a landowner can bring an action against an offender in the civil courts. The remedy for the landowner would normally consist of damages for the value of the item taken or

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<sup>2</sup> Although in Scotland they belong to the taker. See *Leith v Leith* [1862] 24 D 1059.

<sup>3</sup> Land includes for legal purposes all trees, shrubs, hedges, plants and flowers growing thereon, whether cultivated or wild. They attach to the realty and are thus part of the estate owned by the landowner.

destroyed. In the case of continued breaches it would be possible for the landowner to seek an injunction from the court to restrain any further action<sup>4</sup>. Some form of protection is also provided by the law relating to theft. However this is only relevant to plants. A person who uproots plants may commit the crimes of theft and criminal damage. Wild animals are not the subject of such protection because only domestic animals can be stolen.

However, it is with the legislative provisions that we are concerned here, the positive steps taken by Parliament to protect species, so that the choice of authority can be compared with the choice of treasure to protect habitats.

The hypothesis considers whether the system for species protection was inefficacious and thus a different approach was needed to ensure the protection of habitats. To determine this question, the species protection system will be explained and then its practical application will be evaluated<sup>5</sup>.

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<sup>4</sup> This approach was employed by Paul and Linda McCartney to prevent deer hunting on their land.

<sup>5</sup> It might seem that the system must have been successful in order to justify its continued use in the WACA because, as with the habitat provisions, species were protected before the enactment of the WACA and the controls used are based upon the same approach as that used in earlier Acts. However, this cannot be assumed. As will be shown in Chapter 4, the voluntary system of habitat protection was failing and yet was retained in principle in the enactment of the WACA. The species system may also have been inefficacious thus rendering it unsuitable for habitat protection but being retained for species protection for any number of reasons (such as Parliamentary time, political consensus etc.).

## 2) THE SPECIES PROTECTION SYSTEM

The primary protection for species is contained in Part I of the WACA 1981. There are also Acts dealing with specific species such as seals<sup>6</sup>, deer<sup>7</sup>, and badgers<sup>8</sup> and there is a multitude of legislation providing incidental protection relating to hunted species<sup>9</sup>. In addition, the Conservation (Natural Habitats) Regulations 1994 (SI 1994 No 2716) create some further offences regarding certain animals and plants. Because all the species protection Acts adopt the same approach, using authority, the discussion below will concentrate on one example. The chosen example is the protection provided by the WACA. This has been selected because it encompasses the majority of protected birds, animals and plants. In addition, for the purposes of a comparison with the habitat protection provisions, comparing two approaches adopted in the same Act to some extent eliminates possible variables that may have been influential on choice of implementation mechanism.

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<sup>6</sup> The Conservation of Seals Act 1970.

<sup>7</sup> The Deer Act 1991.

<sup>8</sup> The Protection of Badgers Act 1992.

<sup>9</sup> Such as deer, game birds, wildfowl, rabbits and fish. See for example the Salmon & Freshwater Fisheries Act 1975 and the Salmon Act 1986. For more details see Reid (1994).

## 2)a) Birds

Under section 1(1) it is an offence to intentionally<sup>10</sup> kill, injure or take any wild bird<sup>11</sup> or to take, damage or destroy a nest while it is in use or being built, or to take or destroy<sup>12</sup> the eggs of any wild bird. It is also an offence under section 1(2) to be in possession or control of a wild bird (alive or dead) or part thereof or an egg of a wild bird. No offence will be committed under section 1(2) if the bird or egg had not been killed or taken, or had been killed or taken without contravening the provisions of the Act. In addition, no offence will be committed under section 1(2) if the bird or egg had been sold without contravening the provisions of the Act<sup>13</sup>. Under the provisions of section 2, no offence is committed if the action concerns a Part I Schedule 2 bird<sup>14</sup> and it is outside the close season for that species defined in section 2(4). Also, under section 2(2), no offence is committed

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<sup>10</sup> It is no defence that the accused did not know that the bird was wild: *Kirkland v Robinson* [1987] Crim LR 643.

<sup>11</sup> Section 27(1) defines wild bird as "any bird of a kind which is ordinarily resident in or is a visitor to Great Britain in a wild state but does not include poultry". Poultry means domestic fowls, geese, ducks, guinea-fowls, pigeons, quails and turkeys. Also excluded from the definition of wild bird (except for the purposes of sections 5 and 16) are game birds, which are defined as pheasant, partridge, grouse (or moor game), black (or heath) game or ptarmigan. In addition, under Section 1(6) any bird shown to have been bred in captivity is not a wild bird. A bird will only be treated as bred in captivity if its parents were lawfully in captivity when the egg was laid.

<sup>12</sup> Section 27(1) defines destroy as doing anything to the egg which is calculated to prevent it from hatching.

<sup>13</sup> See later discussion of Section 6 regarding the sale of birds and eggs.

<sup>14</sup> These are certain other game birds and wildfowl.

in relation to Part II Schedule 2 birds<sup>15</sup> if the action is taken by an authorised person<sup>16</sup>.

Under section 1(4), if any of the offences is committed in respect of a bird listed in Schedule 1, then a special penalty is incurred. Section 21 provides that the maximum penalty for committing one of the above offences is increased from £1000 to £5000<sup>17</sup> when a Schedule 1 bird is involved. There is also an offence under section 1(5) of intentionally disturbing a Schedule 1 bird on or near its nest, or disturbing its dependent young. This also incurs the higher penalty. Schedule 1 is divided into two parts; the birds in part I are protected by the special penalty at all times, those in part II are only protected by the special penalty during the close season that is defined in section 2(4)<sup>18</sup>. Outside the close season, the ordinary offences under section 1 apply but the special penalty will not arise.

Section 3 gives the Secretary of State the power to provide for "areas of special protection" for wild birds (bird sanctuaries). All areas of special protection are also designated as SSSIs, so they provide extra protection for birds in these areas. They are designed to control the activities of parties entering the land. Under

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<sup>15</sup> This originally listed 13 common birds considered to be pests, all have now been removed by SI No 3010 1992.

<sup>16</sup> Section 27(1) defines authorised persons as the owner/occupier of the land on which the action is taken or any person authorised by them; any person authorised by the Local authority; and with regard to actions concerning birds, any person authorised in writing by such bodies as the NC and water authorities.

<sup>17</sup> Originally from £200 to £1000.

<sup>18</sup> For capercaillie and woodcock 1st February to 30th September, for snipe 1st February to 11th August, for wild duck and wild geese 21st February to 31st August and in any other case 1st February to 31st August.

section 3(1)(a), the order can extend the protection given to all<sup>19</sup> wild birds in the area so that the disturbance of such a bird while it is building a nest, or on or near a nest containing eggs or young, or the disturbance of the young, is also an offence. In addition, under section 3(1)(b), the order can make it an offence to enter the area or any part of it at any time or at specified times. Under section 3(1)(c) the order can provide for offences under parts (a) and (b) to be subject to the special penalty provided in section 21. An exemption is still provided for authorised persons in respect of Schedule 2 Part II birds. The order can only be made with the consent of the owners/occupiers and according to section 3(3) "shall not affect the exercise by any person of any right vested in him, whether as owner, lessee or occupier of any land in that area or by virtue of a licence or agreement".

Under section 4 there are various defences to offences under sections 1 and 3. Section 4(1) concerns actions in pursuance of a requirement by the Minister of Agriculture Fisheries and Food or the Secretary of State under section 98 of the Agriculture Act 1947 and sections 21 or 22 of the Animal Health Act 1981. Section 4(2) provides defences for the taking of injured birds for the purpose of tending it and later releasing it, or for the killing of an injured bird where there was no reasonable chance of recovery, and where the action is "an incidental result of a lawful operation and could not reasonably have been avoided". Section 4(3) provides a defence to the killing or injuring of a wild bird, except a Schedule 1 bird, when the action is necessary for livestock or crop protection, disease

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<sup>19</sup> Or specified wild birds.

prevention or the protection of public health and safety. The burden of proving these defences is on the defendant<sup>20</sup>.

Section 5 prohibits certain methods of killing or taking wild birds<sup>21</sup>. It is an offence under section 5(1)(a) to set in position articles of such nature and so placed as to be calculated to cause bodily injury to any wild bird coming into contact with them. This restriction applies to "any springe, trap, gin, snare, hook and line, any electrical device for killing, stunning or frightening or any poisonous, poisoned or stupefying substance". It is an offence under section 5(1)(b) to use for the purpose of killing or taking a wild bird any of the above mentioned articles or any net, baited board, bird-lime or similar substance. It is an offence under section 5(1)(c) to use for the purpose of killing or taking any wild bird any bow or crossbow, any explosive other than ammunition for a firearm, any automatic or semi-automatic weapon, any shot-gun having a muzzle more than one and three quarter inches in diameter, any device for illuminating a target or any sighting device for night shooting, any form of artificial lighting or any mirror or other dazzling device, any gas or smoke or any chemical wetting agent. Under section 5(1)(d) it is an offence to use as a decoy "any sound recording or any live bird or other animal whatever which is tethered, or which is secured by means of braces or other similar appliances or which is blind, maimed or injured" for the purposes of killing or taking a wild bird. It is also an offence under section 5

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<sup>20</sup> The standard of proof is not beyond reasonable doubt but the less onerous balance of probabilities: *R v Hudson* [1966] 1 QB 448.

<sup>21</sup> This section has since been amended by the Wildlife & Countryside (Amendment) Act 1991.

(1)(e) to use any mechanically propelled vehicle<sup>22</sup> in immediate pursuit of a wild bird for the purpose of killing or taking that bird<sup>23</sup>. Offences under section 5(1) carry the special penalty on conviction.

Defences to section 5(1)(a) are provided in section 5(4). The defendant must show that the article was set in position "for the purpose of killing or taking, in the interests of public health, agriculture, forestry, fisheries, or nature conservation, any wild animals which could be lawfully killed or taken by those means and that he took all reasonable precautions to prevent injury thereby to wild birds". Section 5(5) permits the use of cage traps or nets by authorised persons for the purpose of taking a bird in Part II of Schedule 2, the use of nets for the purpose of taking wild duck in a duck decoy that is shown to have been in use immediately before the passing of the Protection of Birds Act 1954 or the use of a cage-trap or net for the purposes of taking any game bird if the taking of the bird is solely for the purpose of breeding.

It is an offence under section 6(1)(a) if a person "sells, offers or exposes for sale, or has in his possession or transports for the purpose of sale any live wild bird other than a bird included in Part I of Schedule 3<sup>24</sup>, or an egg of a wild bird or any part of such egg". It is also an offence under section 6(1)(b) to advertise such

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<sup>22</sup> The definition in Section 27(1) includes aircraft, hovercraft and boats.

<sup>23</sup> Some of these restrictions are because of the cruelty of the methods, other because they are considered unsporting.

<sup>24</sup> These are birds bred in captivity which have been ringed or marked in accordance with the Wildlife & Countryside (Registration & Ringing of Certain Captive Birds) Regulations 1982 SI No 1221 1982 (amended by SI No 478 1991).

buying or selling. Section 6(2) provides similar limitations in respect of dead birds or anything derived from them that are included in Part II or III<sup>25</sup> of Schedule 3 if the person is not registered in accordance with regulations made by the Secretary of State. Contravention of section 6(2) is subject to the special penalty. Section 6(9) provides for persons authorised by the Secretary of State to enter and inspect premises where a registered person keeps wild birds for the purpose of ascertaining whether an offence under section 6 is being or has been committed on the premises.

Section 16 provides exceptions from certain offences if a licence has been obtained from the appropriate official authority. These licences can be granted for: scientific or educational purposes; ringing or marking wild birds; conserving wild birds; protecting any collection of wild birds; falconry or aviculture; public exhibition or competition; taxidermy; photography; preserving public health or air safety; preventing the spread of disease; preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries; protecting any zoological or botanical collection.

## **2)b) Animals**

The offences are similar to those for wild birds. It is an offence under section 9(1) for any person intentionally to kill, injure or take wild animals listed in Schedule

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<sup>25</sup> The birds in part III are protected only from 1st September to 28th February.

5<sup>26</sup>. It is also an offence under section 9(2) to have in one's possession or control any such animal alive or dead or any part thereof. An offence will not be committed if the animal had not been killed or taken, or had been killed or taken without contravening the relevant provisions<sup>27</sup>, or had been sold without contravening the provisions of the Act. There are additional offences in section 9(4) that relate to the intentional damage or obstruction of places of shelter or protection or the disturbance of an animal while occupying such a place. In addition, under section 9(5), it is an offence to sell, offer or expose for sale, or have possession of or transport for sale or advertise any live or dead wild animal in Schedule 5. For these offences, the animal is presumed to be wild unless the contrary is shown.

Section 10 provides exceptions to these offences<sup>28</sup> for anything done in pursuance of a requirement by the Minister of Agriculture Fisheries and Food or the Secretary of State under section 98 of the Agriculture Act 1947 or in pursuance of an order under the Animal Health Act 1981. The offence in section 9(4) of interference with structures does not apply to anything done within a dwelling house. As respects anything done in relation to bats, section 10(5) restricts the defence to the living area of a dwelling house unless the NC have been notified

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<sup>26</sup> This includes all bats, certain reptiles and amphibians, but only the rarest mammals, fish, butterflies and other creatures. A number of species were added to the Schedule in SI 1992 No. 2350. In addition, further offences are provided in the Conservation (Natural Habitats etc.) Regulations 1994 for those species listed in Schedule 2 to the Regulations. These are known as European protected species.

<sup>27</sup> This includes provisions of the superseded Conservation of Wild Creatures and Wild Plants Act 1975.

<sup>28</sup> The same as those for birds under Section 4.

and been allowed a reasonable time to advise on whether the operation should be carried out and, if so, which method should be used.

Section 10(3) provides defences for taking of animals where the animal was injured and the purpose was to tend and release it, the killing of animals where the animal is so seriously injured that it would not recover or if the act was an incidental result of a lawful operation and could not reasonably have been avoided. In addition section 10(4) provides a defence if the action was "necessary for the prevention of serious damage to livestock, feedstuffs for livestock, crops, fruit, growing timber or any other form of property or fisheries". This defence will not apply where it had become apparent before the action was undertaken that it would be necessary and a licence under section 16 had not been applied for as soon as reasonably practicable after that fact became apparent, or an application for such a licence had been determined.

Section 11(1) covers illegal methods of killing or taking any wild animals<sup>29</sup>. Section 11(2)(a) prohibits the setting in position of traps, snares, electrical devices for killing or stunning or any poisonous, poisoned or stupefying substance calculated to cause bodily injury to any wild animal included in Schedule 6. Schedule 6 animals are also protected from the use of nets, automatic or semi-automatic weapons, devices for illuminating a target or night sighting devices, artificial light or mirrors or other dazzling devices, gas or smoke, sound

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<sup>29</sup> The use of self-locking snares, bows, crossbows, any explosive other than ammunition for a firearm and any live mammal or bird used as a decoy are prohibited.

recordings used as decoys and any mechanically propelled vehicle in immediate pursuit of the animal for the purpose of driving, killing or taking that animal. A defence is provided in section 11(6) where the article was set in position 'for the purpose of killing or taking, in the interests of public health, agriculture, forestry, fisheries or nature conservation, any wild animals which could be lawfully killed or taken by those means' and that all reasonable steps to prevent injury to wild animals included in Schedule 6 were taken.

For all offences the maximum penalty provided by section 21(2) is £5000<sup>30</sup>. It is also an offence under section 11 (3) if snares that may be used to trap animals that are not in Schedule 6 are not inspected at least once every day. The maximum fine for this offence is provided by section 21(3) and is £2500<sup>31</sup>.

## **2)c) Plants**

Under section 13(1) it is an offence for anyone except an authorised person to intentionally pick, uproot or destroy any wild plant included in Schedule 8 and to intentionally uproot any wild plant<sup>32</sup>. An authorised person is the owner or occupier, or any person authorised by the owner or occupier or any person authorised by the local authority. It is also an offence under section 13(2) to sell,

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<sup>30</sup> Level 5 fine. It was originally £1000.

<sup>31</sup> Level 4 fine. It was originally £500.

<sup>32</sup> Wild plant is defined in Section 27(1) as any plant which is or (before it was picked, uprooted or destroyed) was growing wild and is of a kind which ordinarily grows in Great Britain in a wild state.

offer or expose for sale, or have possession of or transport for sale any live or dead wild plant included in schedule 8 or to advertise to this effect. A defence is provided by section 13(3) where it is an incidental result of a lawful operation and could not reasonably have been avoided<sup>33</sup>.

## **2)d) Enforcement**

If a constable reasonably suspects that a person is committing or has committed an offence under Part I of the WACA, section 19(1)(a) authorises him to stop and search that person if he reasonably suspects that evidence of the commission of the offence may be found. There is also a power under section 19(1)(d) to seize and detain anything that may be evidence of the commission of an offence<sup>34</sup>. Section 19(2) confers a power of entry to land other than a dwelling house if a constable suspects that a person is committing an offence.

## **2)e) Penalties**

Where an offence has been committed in respect of more than one bird, nest, egg, other animal, plant or other thing, section 21(5) provides that the maximum fine which may be imposed should be determined "as if the person convicted had been convicted of a separate offence in respect of each bird, nest, egg, animal, plant or

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<sup>33</sup> Further offences are created by the Conservation (Natural Habitats etc.) Regulations 1994 for European protected species listed in Schedule 4 of the Regulations.

<sup>34</sup> According to *Whitelaw v Haining* [1992] SLT 956 this is not restricted to circumstances where there has been a search under the previous provisions.

thing". In addition, under section 21(6), the court shall order the forfeiture of any bird, nest, egg, other animal, plant or other thing in respect of which the offence was committed. The court may also order the forfeiture of "any vehicle, animal, weapon or other thing which was used to commit the offence".

Under section 18(1) any person who attempts to commit one of the offences will be guilty of an offence and "shall be punishable in like manner as for the said offence". Under section 18(2) any person who has in their possession, for the purposes of committing an offence, anything capable of being used for committing an offence will be guilty of an offence and punishable on the same basis as if the offence had been committed.

### **3) PROTECTION MECHANISMS COMPARED**

The mechanisms used for the protection of species and habitats are very different. The habitat protection system relies on voluntary codes of conduct and temporary restrictions on harmful actions to reach a voluntary management agreement with landowners. The species protection system relies on criminal offences to prevent harmful actions with exceptions provided in licences, i.e. a regulatory style system.

Although very different approaches have been adopted, the two systems are linked. This is because of their subject matter. To protect species it is necessary

to protect their habitats<sup>35</sup>. Because species protection legislation was well established by 1981 and the habitat protection legislation was in its infancy<sup>36</sup>, it must be questioned whether the reason why a similar approach was not adopted was because the species system was regarded as inefficacious. If the system for the protection of species did work there may be some other reason why it was not used to protect habitats<sup>37</sup>.

#### **4) EFFICACY OF THE SPECIES PROTECTION SYSTEM**

To prove or disprove hypothesis 1, the protection for species that existed before 1981 must be considered<sup>38</sup>. These controls were primarily contained in the Protection of Birds Acts 1954, 1964 and 1967 and the Conservation of Wild Creatures and Wild Plants Act 1975. The provisions regarding birds, animals and plants were codified and extended in Part I of the WACA described above.

The RSPB have called the provisions of the Protection of Birds Acts "a major success". They were "self explanatory, unambiguous, easily understood". The 1954 Act "formed a model much admired by conservationists in other countries" (RSPB,1984:para63). The RSPB recognised that there were some weaknesses but

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<sup>35</sup> A factor that was not considered until relatively late in the development of legislation for nature conservation. For more detail see Chapter 4.

<sup>36</sup> See Chapter 4 for details.

<sup>37</sup> Although many commentators have preferred the land use planning approach to the use of criminal sanctions for habitat protection. As will be shown this is linked to the perceived purpose of the habitat protection provisions when they were first introduced in 1949. This issue is discussed in more detail in chapter 4.

<sup>38</sup> Because a proof of hypothesis 1 would require this previous protection to be inefficacious.

these were "mostly technical in nature" and "have been rectified by the Wildlife and Countryside Act 1981" (RSPB,1984:para64).

Little else has been written as to the efficacy of these provisions. As will be seen in Chapter 4, the provisions in the WACA were essentially a codification of the existing protection with some strengthening of the provisions. Thus, comment on Part I of the WACA is a useful indication of the perceived efficacy of the controls in use before. However, a similar lack of comment is also present with the provisions of the WACA. Even though section 24 of the WACA provides for the NC to revise the schedules and provide advice, no mention of Part I of the Act is made in the annual reports of the conservation agencies. The only source of data available is that published by the RSPB on numbers of offences under Part I of the WACA concerning birds<sup>39</sup>.

However, this absence of comment does not preclude a conclusion on this issue. It may well indicate that the system was efficacious. If the working of the system is not contentious it will not receive much attention<sup>40</sup>. This is represented in the debates on the WACA when most attention was focused upon Part II of the Act. The majority of debate on Part I related to the inclusion or exclusion of species from the Schedules rather than the approach used. It is also represented in the House of Commons Environment Committee Report of 1985 on the operation of

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<sup>39</sup> See for example RSPB (1995) and earlier annual versions.

<sup>40</sup> Unlike the voluntary system for habitat protection which has been highly controversial and much has been written about it.

the WACA which concentrated solely on Part II although their remit was the whole Act. In their evidence to this committee, the RSPB also concentrated their criticisms on Part II of the Act. The few criticisms that were made of Part I were drafting rather than structural or design defects. Friends of the Earth (FOE) in their proposed Wildlife Bill have also concentrated solely on Part II of the Act.

There are of course problems with the system. There is no such thing as a perfect control, however, the problems are more limited in nature than those present in the habitat protection system. They are general problems experienced with the use of criminal sanctions in any area of law. Examples include the difficulty of discovering that offences have occurred<sup>41</sup>, and the drafting of offences and defences<sup>42</sup>. The other main problem is that not all species are covered by the protection, only those listed in the Schedules<sup>43</sup>. As Reid points out, "by requiring the express prohibition of the undesired conduct, there is a risk that some forms of harm, or some species in need of protection, will be omitted, or will come to be appreciated only after the law is in place" (Reid,1994:80). However, the use of schedules listing protected species partly circumvents this problem as the schedules can easily be amended.

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<sup>41</sup> This is of course also a problem with the habitat system. If no notification has been given to the NC of an intention to carry out a PDO the only chance of discovery is if someone informs the NC of the offence or one of the NC's officers visits the area.

<sup>42</sup> See for example RSPB (1992) proposals 26, 28 and 32.

<sup>43</sup> Except for birds.

In addition there is the problem of identification. Can people identify these particular species so as to avoid harmful actions? As de Klemm and Shine point out, "long lists of species are of relatively little use if few people can recognise the species concerned" (de Klemm & Shine,1993:121). There is also the problem experienced generally with the use of criminal sanctions of enforcement. It is often difficult to prove the intent necessary for some of the offences. However, most of the criticisms are minor and there does seem to be a general satisfaction with the system<sup>44</sup>. The provisions may be ignored by hardened criminals, but others are impressed by the symbolic threat of punishment, particularly with strict liability offences.

The main problems that arise are with the practical enforcement processes. The RSPB expressed concern that "the government have put time, effort and money into the passing of legislation and its general administration yet has not seriously tackled the problem of enforcement" (RSPB,1984:41). The RSPB also refer to "the unsatisfactory way in which provisions for licensing various otherwise illegal activities have been interpreted and put into effect by a variety of Government departments and agencies" (RSPB,1984,29).

## **5) CONCLUSION**

Although there are a number of criticisms that can be made of the system of species protection, the apparent satisfaction with the mechanism adopted can be

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<sup>44</sup> See for example NCC (Annual Report,1984) praising the success of bird protection legislation.

seen in its continued use in the Protection of Badgers Act 1992<sup>45</sup> and the Deer Act 1991. As mentioned previously, this is of course not conclusive of the system's perceived efficacy. The voluntary approach has continued to be used<sup>46</sup> despite being inefficacious<sup>47</sup>. However, the continued use of the voluntary approach has been highly contentious<sup>48</sup> unlike the continued use of criminal sanctions for the protection of species. It therefore seems improbable that the efficacy of the species protection system influenced the choice of approach for habitat protection in the WACA. Thus hypothesis 1 is not proved.

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<sup>45</sup> The controls have been extended in Section 3 to protection of badger setts and this too is in the form of criminal sanctions. The very existence of this provision therefore negates the argument that criminal sanctions are inappropriate for protecting areas.

<sup>46</sup> In the implementation of the EC Directive on the Conservation of Natural Habitats and of Wild Fauna & Flora 92/43/EEC which is discussed in Chapter 10.

<sup>47</sup> As will be shown in Chapter 9.

<sup>48</sup> See Chapter 10 for examples.

## CHAPTER 4

### HYPOTHESIS 2

Any policy implementation mechanism is likely to reflect the objectives of that policy. Hypothesis 2 therefore considers whether the 'purpose' of habitat protection policy was a determinant in the choice of mechanism. This chapter will consider whether the objectives of the habitat protection system differ from those of the species protection system. If there is a difference, this may indicate that the objectives of protection were determinants in the choice of implementation method. There are two elements that will be considered concerning the choice of implementation method: the first is negative, why criminal sanctions were not employed as they had been for species protection; and the second element is positive, why the voluntary approach was chosen<sup>1</sup>.

The purpose of introducing the controls, as stated by the Government in the DoE consultation paper, was the implementation of its international obligations<sup>2</sup> and "to ensure that the most valuable wildlife resources can be conserved for the nation". This rather opaque statement gives no real guidance for the purposes of this chapter. Therefore, to ascertain what the objectives of the protection were, the evolution of the policy to protect habitats and species must be considered. The question that must be asked is why the protection was introduced and what it was intended to do. Once the objectives have been identified they can be contrasted to

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<sup>1</sup> Rather than, for example, extended planning control over agricultural operations.

<sup>2</sup> For details of these see below at Section 2 part 2)d).

determine whether any differences explain the decision not to use criminal sanctions to protect habitats and the adoption of the voluntary approach.

## SECTION 1 - INITIAL OBJECTIVES OF SPECIES AND HABITAT

### PROTECTION: A COMPARISON

The first part of hypothesis 2 involves a comparison of the objectives of the species and habitat protection systems. The objectives of the policies to protect species and habitats must be identified and once this has been done, these objectives can be compared. If these are different, it can then be ascertained whether the objectives of the habitat protection system were a determinant in the decision not to use criminal sanctions as they had been for species protection. This comparison with the objectives of the species protection has a dual function, in addition to providing a context for the question of why criminal sanctions were not used, it also performs a 'control' function. What is meant by this is that if the objectives and implementation method of the species protection system were not consistent, it would then be impossible to formulate a valid theory as to the objectives of the habitat system being a determinant. Only if it can be shown that the species protection objectives and methods are consistent can any explanation be proposed as to the influence of the objectives of habitat protection. In addition, it is instructive to consider the objectives of the species protection because they have formed the foundation for the policy of habitat protection and many of the values embodied in both systems are connected.

The primary task is, then, the identification of the objectives of protection. These are linked to the evolution of the policy to protect and what the species and habitats were deemed to require protection against. The objectives cannot be identified by looking solely at the 1981 Act. It is necessary to consider the historical evolution of the policies of protection to identify the objectives. A comparison will thus be made on the basis of the first protection introduced for both species and habitats. It may appear that a comparison of the objectives in 1981 would be more instructive; however, the controls introduced in 1981 were substantially founded upon the earlier protection and the values embodied in the objectives of the legislation have evolved gradually. A comparison will therefore be made of the initial objectives. Section 2 will then consider if these objectives had changed by 1981 and if this was a determinant in the choice of implementation method.

### *SECTION 1 PART A - SPECIES PROTECTION*

#### **1) RECOGNITION OF THE NEED FOR PROTECTION**

##### **1)a) Systems Already In Place - The Game Laws**

The first form of protection for species arose after the Norman Invasion when the Royal Forests and chases were established by William The Conqueror. Vast tracts of land were set aside as sporting preserves and a code of laws was established to protect the trees and wild animals within their boundaries. No person might hunt within these preserves without the permission of the King. However, the purpose of the protection thus afforded was merely to prevent those people without permission from exploiting these resources as they were considered to be the sole

property of the King. The purpose of controls was therefore the protection of property rights. In 1389 an Act<sup>3</sup> was passed restricting those who did not have sufficient income from hunting. The penalty was one years' imprisonment<sup>4</sup>.

Under the Stuarts, unauthorised hunting of game *anywhere* in the kingdom was viewed as an offence against the royal prerogative<sup>5</sup>. Those who did not possess enough property to comply with the requirements of the game laws were prohibited from hunting, even on their own land. So, on the coast sea-birds and eggs were regularly taken and the poaching of game by the unqualified also proliferated. Such exploitation of these natural resources was occasionally so extensive that Parliament intervened to preserve individual species of wildlife<sup>6</sup>. However, such protection was contingent on the creatures being of explicit benefit to man. The protection afforded was purely for reasons of benefit for those with hunting rights. The utility of the animals concerned was the paramount consideration. The purpose of the legislation was the restriction of use of a valuable resource.

Such laws did, however, have some positive influence. The influence of the game laws and the cruelty legislation can be seen today. There are still restrictions on

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<sup>3</sup> See 13 RII S1 XIII.

<sup>4</sup> For other examples see also 1482 EIV VI concerning swans, 1494 HVII XVII concerning pheasants, partridges and the eggs of hawks and swans, 1503 HVII XI concerning deer, 1522-3 HVIII X concerning hares, 1533 HVIII XI concerning wildfowl and 1581 EI X concerning pheasant and partridge.

<sup>5</sup> For a discussion of the monarchy's attitude to property rights in game see Munsche (1981).

<sup>6</sup> For examples see 1604 JI XXVII, 1609 JI XI, 1670 CII XXV, 1706 A XIV.

game and the restrictions in methods of killing and taking<sup>7</sup> are often to prevent cruelty. The laws that laid down the close seasons for game animals and game birds were as much an important element in wildlife conservation as in the maintenance of the sport of shooting, although only those various birds that came under the denomination of 'game' were afforded protection by the law, and the number of species so protected was small<sup>8</sup>. Commenting on the situation Russell (1897:614) said "We have, no doubt, to thank the sporting spirit of our forefathers for preserving (at the cost of many human lives and much human bloodshed and suffering) several at least of these species from complete extermination"<sup>9</sup>.

### **1)b) Scientific And Philosophical Influences**

After the Royal Society was founded in 1663, a new momentum was given to scientific research. Experimentation on animals then became more prevalent. Those conducting research discovered previously unknown physical resemblances between animals and human beings. The comparative anatomists were also conducting research into what was considered to be an exclusively human attribute, the mind. This "neurological experimentation suggested that the senses functioned in people exactly as they did in animals" (Turner,1980:4), but such

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<sup>7</sup> Which can be seen in section 5, WACA 1981.

<sup>8</sup> According to Russell (1897), those birds protected included: pheasant, partridge, grouse, black-game, ptarmigan, bustard, landrail, woodcock, snipe, quail, wild-duck, widgeon and teal.

<sup>9</sup> However, these laws wrought alterations in the populations of predatory animals which were extensive and frequently devastating. Foxes, polecats, hawks and owls were 'controlled' and frequently killed off because they were considered to be detrimental to the interests of the game, notwithstanding that both the predators and their prey had coexisted happily for thousands of years before man thought of 'protecting' the game.

scientific evidence of the similarity of men and animals did not necessarily guarantee that animals would become the subject of compassion.

However, synchronous with the discoveries made by scientists about anatomy and neurology were the works of moral and religious writers. These served to arouse the moral sensibilities of the general public and an altruistic trend was inaugurated in the 1700s. A great influence was exerted by the spiritual, moralistic movement that is labelled Evangelicalism. The general complacency and the belief in an assured place in Heaven that was characteristic of so much of the established church's perception in the 1700s, was now disrupted by a novel desire for salvation from original sin. Here in omnifarious forms was a religion that necessitated acts of "profound submission and re-orientation in order to be saved: the subject must undergo within himself conversion to the Lord and must thereafter work constantly and unselfishly for the good of others rather than himself" (Cornish & Clark,1989:68). Virtue was associated with omnipresent benevolence.

Benevolence incorporated more than merely doing good; "its acolytes stressed the tender passions - supposedly natural to human beings - that prompted and accompanied acts of charity" (Turner,1980:5)<sup>10</sup>. By the end of the 1700s, other ideologies had coalesced with the cult of benevolence. This signified an abrupt alteration in the pattern of attitudes toward animals. One of these ideologies was

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<sup>10</sup> Although according to Turner (1964), the doctrine of benevolence accentuated sympathy with the suffering of others, with the emphasis on the sympathy rather than the suffering.

Utilitarian morality<sup>11</sup>. Once morality had been reduced to a calculus of pleasure and pain, it was difficult to exclude any sentient being from the doctrine of benevolence. "The Rights of Man soon expanded, for some, to the Rights of Animals"<sup>12</sup> (Turner,1980:13).

### **1)c) The Voluntary Groups**

Against this background, protectionist societies were founded. According to Sheail (1976), they modelled themselves on existing pressure groups, such as the Anti-Slavery Society. The first was the Royal Society for the Prevention of Cruelty to Animals (RSPCA)<sup>13</sup>, founded largely by evangelical humanitarians, which was primarily concerned with reducing cruelty to domesticated animals (Harrison,1967). It became the largest and perhaps the most influential voluntary organisation in Britain in the second half of the 1800s<sup>14</sup>. The important role the Society played for the Victorian middle and upper classes was partially consequential on the growing recognition of the affinity of man and beasts with the erosion from the late 1700s of the concept of man as a supranatural being<sup>15</sup>. According to Harrison (1973:814), "The very emergence of the RSPCA was a symptom as well as a cause of increased humanity to animals". Animals became

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<sup>11</sup> Usually linked with Bentham.

<sup>12</sup> See for example Salt (1892) Animal Rights.

<sup>13</sup> The Society for the Prevention of Cruelty to Animals was founded in 1824, and obtained its royal charter in 1840.

<sup>14</sup> This society in turn became the model for latter ventures, including the Selborne Society and the Society for the Protection of Birds, founded in the 1880s.

<sup>15</sup> He was no longer considered different from and superior to other living beings.

the beneficiaries of the effusive sentimentalism that was to become a fundamental characteristic of the era.

The Victorians "became obsessed by the threat of human animality to the dignity and uniqueness of man and to the maintenance of morality and civilisation. Cruelty to animals was so disturbing, not only because of what it did to the victims, but also because of what it implied about human nature" (Lowe,1983b:330). According to Sheail (1976:9), "the protectionists believed that in saving wildlife, they were also helping to preserve the very fabric of society"<sup>16</sup>. The enthusiasts frequently appeared perturbed by cruelty to animals more because of what it implied about people than because of what it did to their victims<sup>17</sup>. Whilst the RSPCA's primary concern was with cruelty to domesticated animals, it also played an important role in the promotion of the first legislation to protect wild birds<sup>18</sup>.

The Selborne Society for the Protection of Birds, Plants and Pleasant Places, which was founded in 1885, was the first national organisation directly concerned with the protection of wildlife. In 1889 the Society for the Protection of Birds was founded specifically to stop the plumage trade. The first meetings were held in the offices of the RSPCA. However, the Society expanded from an anti-plumage

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<sup>16</sup> The same attitude can be seen in the gentry's attitude to the game laws. For detail see Munsche (1981).

<sup>17</sup> In the 1800s legislation often had to be recommended on grounds other than humanitarianism; 'bull-baiting, for instance, was to be condemned less because it was cruel than because it demoralised the people, or unfitted them for work' (Harrison,1973:786).

<sup>18</sup> Discussed later in section 3.

movement into an organisation concerned with the general protection of wild birds and was granted a royal charter in 1904<sup>19</sup>.

## **2) ATTEMPTS TO CONTROL CRUELTY**

In 1822 Richard Martin obtained a measure to prevent cruelty to cattle and thus established the principle of using legislation to protect animals from cruelty. There were many opponents to legislation against cruelty and as the forerunner of the legislation to protect wild birds it provides a useful illustration of the prevalent attitudes of the time and the preferred approach to the prevention of cruelty. Many of the arguments raised in the debates on proposed legislation against bull baiting in 1800 were to reappear later when the issue of protecting birds was raised.

### **2)a) Underlying Assumptions of The Provisions**

Four main themes can be identified in Victorian thinking on the use of legislation in preventing cruelty.

1) In the 19th century legislation was an integral part of social reform in all areas. The advocates of legislation were intent on transforming the principles of the general public. Cruelty was often viewed as a problem of the working classes and legislation was generally seen as the best way to control these working classes.

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<sup>19</sup> See Sheail (1976) Chapter 1 for details of the activities of these groups.

The advocates of legislation, primarily the RSPCA, were supported mainly from the middle and upper classes and the government at the time was also fairly unrepresentative of the working classes (Harding,1966). In the debate on the Cruelty to Animals Bill in 1809, Windham argued that the proposed legislation should be entitled "A Bill For Harassing and Oppressing Certain Classes Among The Lower Orders of His Majesty's Subjects" (Amyot,1812,Vol.3:315).

2) The legislation proposed was for the prevention of cruelty and was therefore required to preserve the fabric and morals of society<sup>20</sup>. As Harrison (1973:815) points out, "the RSPCA pioneers had very much more in mind than the mere defence of animals: their movement aimed to civilise the lower orders, .... They believed that the state must curb animal cruelty in the course of exercising its general responsibility for promoting the citizen's moral growth"<sup>21</sup>. Cruelty to animals implied a capacity to inflict harm on humans especially since the recognition of animals as close 'relatives' of man. Referring to the slaughter of sea birds at Flamborough Head, Mr Newton said: "Could men blaze away hour after hour at those wretched birds without being morally the worse for it?" (RSPCA,vol.10).

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<sup>20</sup> This attitude can also be seen nearly a century earlier in the debates over the Game Laws. The advocates of preserving the Game Laws believed that they were also preserving the morals of society. By preventing the lower classes from hunting or shooting game they were making sure that they were not led astray and were fit and healthy for work. For more detail see Munsche (1981).

<sup>21</sup> The RSPCA based its attack on badger baiting, bull running and cock fighting on the premise that they were exclusively patronised by the "lowest and most wretched description of people" (Harrison,1973:819). The RSPCA was slow to attack sports like steeple chasing and hunting which were popular among its aristocratic supporters.

3) The belief that animals were put upon the earth for the use of man. The utility arguments that were so persuasive with regard to the game laws were also raised for the protection of wild birds. Mr F Buckland expressly referred to the utility of seabirds to justify their protection (RSPCA, Vol 10).

4) The importance of education, as an essential partner to legislation, both to facilitate law enforcement and change public opinion<sup>22</sup>. During the nineteenth century, "it was widely believed that legislation would be the most effective way of controlling human behaviour, and consequently a great deal of attention was given to securing wild bird protection acts and county by-laws for preserving wild plants. It was hoped that lessons at school, posters, pamphlets and other forms of propaganda would facilitate law enforcement and win greater public sympathy for wildlife" (Sheail, 1976: xiii). By 1855 the RSPCA was urging clergy and masters of national schools to include kindness to animals in the system of education among the poorer classes (Harrison, 1973).

These four themes are very well illustrated in a letter to *The Times* on 6 June 1872 by Lady Burdett Coutts who was a member of the Ladies (Education) Committee of the RSPCA. "One of our (*the education committee*) main objects is the diffusion of information respecting animals, and an endeavour to promote their humane treatment; firstly, because life is in itself too sacred to those who inherit it to be tortured or tormented with impunity; secondly, because habitual and unchecked licence in regard to wanton destructiveness of an animal life must re-

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<sup>22</sup> This too was directed at the lower classes.

act most injuriously on man. The brutal practices occasionally, and not infrequently brought under public notice by the press seem not to receive from the directors and promoters of education the attention which the subject deserved. Under our social system there is a deadly germ of cruelty habitually seething which it is impossible not to connect with the criminal acts occasionally bursting through legal restrains. Might it not be wise to impose additional checks, and to impress on the cruel, the thoughtless, and the heartless, through the law, that life whether in man or beast, is sacred in its eye and that animals endowed with sensation are given to man for use, and may not be lightly regarded by him, and must never be abused".

## **2)b) Arguments Against Legislating**

One of the most prominent opponents to legislation against cruelty was William Windham. "Laws never ought to be called in but where other powers fail" (Amyot,1812,Vol.III:315) said Windham in the 1809 animal cruelty debates. Another opponent of the animal cruelty legislation in the 1820s was Sir Robert Peel who said, in 1824, that such matters were "too minute - too much the property of local custom and regulation - to be fit matters for legislation" (Harrison,1973:816). A number of arguments that were made against legislating have been identified by Harrison.

## 2)b)i) Legislation Was Unnecessary

The most compelling argument was that cruelty was already in decline. As such, legislation would be unnecessary. Windham argued in 1800 that bull-baiting "is already so much fallen into disuse, that it seems as if the bill has been brought in lest it should be quite abolished before it could be passed" (Amyot,1812,Vol.I:339)<sup>23</sup>.

## 2)b)ii) Legislation Would Obstruct Humanitarianism

The purpose of legislating was humanitarian, to prevent cruelty. However, it was claimed that, far from assisting humanitarianism, legislation might obstruct it. "'A £5 fine", said Mr Escott in a parliamentary debate on regulating slaughterhouses in 1844, "was only calculated to make a man who had paid it, vent his spite in a more virulent degree when he had an opportunity. We ought to trust to education ..." An unforced kindness was more likely to benefit the animals, more likely to benefit the moral growth of the population" (Harrison,1973:814). Legislation might increase the incidence of cruelty and this would be detrimental to the morals of society.

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<sup>23</sup> However, there was evidence of continued incidents of bull-baiting to counter this (Harrison,1973).

### 2)b)iii) Parliament's Time Was Too Precious

Legislation against cruelty was also regarded by some as a trivial issue of relative unimportance. Windham argued in 1800 that Parliament's time was too precious to be spent on cruelty legislation "in times like the present, when questions of vital importance are hourly pressing on our attention" (Amyot,1812,Vol.I:332). "They were legislating for pigeons", said Earl Fortescue in 1884, during a debate on trap shooting, "when affairs at home and abroad were calling urgently for attention" (Harrison,1973:814).

### 2)b)iv) Legislation Would Fail

Opponents of legislation argued that even if the need for legislation against cruelty could be admitted in principle, in practice such legislation would fail. The argument centred on the complexity of the legislation. This was of particular importance given that it was directed towards the lower classes where illiteracy was widespread. According to Harrison, these criticisms reflected a doctrinaire distaste for state intervention. The Earl of Lauderdale and Joseph Hume, devotees of political economy, were leading opponents of the legislation. According to Harrison (1973:816), "there was much to be said at the time for Hume's 1849 argument that 'the multiplication of Acts might render the matter difficult instead of simple'. For quite apart from the inefficiency and corruption rife in contemporary government, illiteracy was widespread, and reliance on prosecuting working people might divert effort away from the popular education which he and other political economists energetically promoted".

## 2)b)v) Legislation Would Interfere With Liberty

Opponents of the legislation also argued that it could be effective only if it interfered with the liberty of individuals. It was claimed that this interference would alienate public opinion<sup>24</sup>. Windham claimed that by introducing such legislation "you inflict pains and penalties, upon conditions which no man is able previously to ascertain. You require men to live by an unknown rule. You make the condition of life uncertain by exposing men to the operation of a law, which they cannot know till it visits them in the shape of punishment" (Amyot,1812,Vol.3:310). The attack on 'grand motherly legislation' was commonplace in Victorian parliamentary debate. The doctrine of laissez faire was compelling.

## 2)b)vi) The Sectarian Purpose Of The Legislation

The final challenge was that animal cruelty reformers were pursuing some sectarian purpose. Participation in 19th century charities did bring undoubted social and sectarian benefits, especially to the evangelicals. "We ought to take care", claimed Windham, "how we begin new eras of legislation ... we ought to have a reasonable distrust of the founders of such eras, lest they should be a little led away by an object of such splendid ambition, and be thinking more of themselves than of the credit of the laws or the interests of the community". The

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<sup>24</sup> Which was regarded as crucial to legislative success. This argument is also seen in the debates on Part II of the WACA. The extension of controls over habitats was regarded as unduly interfering with the rights of the landowners.

legislature should consider "whether those who engage in the attempt ... may not do far more harm than good" (Amyot,1812,Vol.3:304).

To counter these arguments, campaigns were initiated to increase public concern for animals. This was one of the areas discussed by Dicey, where evangelicals and utilitarian radicals joined together in promoting humanitarian reform. The writings of Bentham and J.S.Mill contained several passages justifying state interference in this sphere.

### **3) THE PUSH FOR WILDLIFE PROTECTION LEGISLATION**

It was not until the mid 1800s that any significant progress in wildlife protection was made. Cruelty to animals had become one of the major humanitarian preoccupations of the century and more orthodox ornithologists came round to the idea of bird protection. Two trends have been distinguished from the early 1700s that influenced the issue of protection of wildlife. The first was the establishment of frequently ephemeral learned societies or clubs and the second was that of establishing philosophical clubs where interested persons could meet and discuss natural phenomena of all kinds (Sheail,1976). By the mid 19th century, many had evolved into natural history societies and clubs<sup>25</sup>. The popularity of natural history was an epiphenomenon of the increased opportunities for leisure with the new prosperity of industrial Britain. The study of natural history "provided an outlet for the contemporary obsession with travel and self improvement. For the

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<sup>25</sup> For more detail see Allen D (1976) and Barber (1980).

devout Victorian, it comprised one of a restricted range of morally acceptable pastimes ... Nature was a revelation of God's order and purpose. To study it, therefore, was itself a devout act" (Lowe,1983b:333).

Membership of the natural history societies<sup>26</sup> stood at around 100,000 by the 1880s so there were large numbers of people aware of the significance of wildlife. This is because, "implicit in natural history is an esteem for the objects of study and an interest in preserving them, if only for the purpose of study" (Lowe1983b:335). Most were specifically motivated not by a wish to protect nature, but by a desire to collect and study it, in fact they were avid collectors. The collecting zeal was somewhat intrinsic to natural history.

### **3)a) The Source Of Threat To Species**

The period from the 1840s onwards saw growing disquiet amongst naturalists about the excesses of collecting. Allen (1969:54) notes the concern of botanists at the fern craze of the mid 1800s that resulted in "the clearing of large tracts of countryside of all their more accessible ferns". Naturalists were exceptional in their outlook on wildlife. According to Sheail (1976:2), "most people, including Parliament, continued to be concerned about wildlife only when it encroached on their livelihood and well-being".

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<sup>26</sup> The preservation of wildlife was included among the objectives of some of these new societies.

Many continued to believe that concern about collecting was unfounded. In 1897 Russell (1897:616) commented that "Much foolish clamour and senseless abuse is often directed against ornithologists, whose greatest ambition is to add some new bird to the British list, for shooting the rarest birds as soon as they see them. The charge may be true, but the offence is, on the whole, excusable. If a vulture is foolish enough to perch on the rocks in Cork Harbour, as one did in 1843, it must expect to be shot and placed in a museum. It is far better in the cause of science, that the three rustic buntings which landed on our shores should be captured and identified than that their lives should be spared. It is impossible to determine, with any degree of certainty, the species of such stragglers without shooting them, and the sacrifice of their lives adds to ornithological knowledge, and may possibly throw light on the mysterious laws of migration".

The prevention of cruelty was uppermost in the minds of the preservationists. This attitude is indicated by the comments of Professor Newton in a letter dated 26 March 1869. In referring to the proposed provisions in the Wildfowl Protection Bill 1869 he said, "The chief object of the Bill is to stop the barbarous and disgusting slaughter which ... is yearly perpetuated at places like Flamborough Head" (RSPCA, Vol. 10). The protection of eggs was not seen as a fundamental part of the protection of the birds. An exception was made in the Bill for those taking eggs for food. In fact, Professor Newton said at a meeting of the RSPCA on 10 March 1869, that he would object to any protection for eggs because the taking of them contributed very little to the declining numbers of birds. The main value of the birds was seen as the protection they afforded to seamen against shipwreck as they warned of the proximity of the coast (RSPCA, Vol. 10).

### 3)b) Methods Of Protection Available

Three methods of protection were considered for the preservation of wildlife from cruelty and over-collecting: legislation, education and nature reserves. According to Sheail (1967:22), "most commentators rejected nature reserves as ineffective and costly. They were at best stop-gap measures when the other two methods failed<sup>27</sup>. It was far more effective to pass legislation which would have an immediate effect on cruelty and over-collecting". Education was regarded as ancillary to legislating, assisting in its enforcement. Legislation did not always work and this was recognised by the Committee established by the British Association to consider enacting a close time for the shooting of sea birds. Referring to the proposed Wild Bird Protection Bill of 1872, they commented that "the measure appears to them to attempt too much and not to provide effectual means of doing it. In their former reports they have hinted at, if not expressed, the difficulty or impossibility of passing any general measure, which without being oppressive to any class of persons, should be adequate to the purpose. Further consideration has strengthened their opinion on this point. They fear that the new Act, though far from a general measure, will be a very inefficient check to the destruction of those birds, which from their yearly decreasing numbers, must require protection" (RSPCA, Vol.12).

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<sup>27</sup> The debates on Part II of the WACA show a reversal of this thinking. Reserves or areas are seen as the primary means of control with sanctions only as a last resort.

The general view seemed to be that the most effectual protection to animals was that afforded by public opinion. Such a change in attitude was regarded as necessary for the protection of all other forms of wild life as well. However, legislation was still seen by many as the foundation of protection. Opponents of the Bill thought that the legislation would be even more troublesome than the Game Laws and used this as a justification for denying the necessity of the protection.

### **3)c) The Bird Protection Laws**

One of the first successful campaigns on behalf of the preservation of wild birds was the Sea Birds Protection Act 1869. Its purpose was to stop parties of 'sportsmen', mostly from towns, from slaughtering sea-birds during the breeding season, when it was easier to kill very large numbers of birds (Sheail,1976). Such excursions had become more frequent following the construction of the railways. Various tradesmen soon realised the benefits of such a cheap source of plumage and offered to purchase the wings and other choice parts of the young birds<sup>28</sup>. The cruelty occasioned during these excursions and the dramatic fall in the number of sea-birds at Flamborough Head and elsewhere had aroused little concern until, in 1867, the Reverend Francis Orpen Morris petitioned Parliament for the protection of wild birds. He was unsuccessful in his attempt. The following year the

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<sup>28</sup> In order to secure even greater profits, the fashion of decorating hats with bird plumage was encouraged.

Reverend H.F.Barnes took up the cause. In the same year Alfred Newton<sup>29</sup> complained of the sporting men from London and Lancashire who were wiping out Yorkshire's sea-birds, in his address to the British Association Conference at Norwich. In 1869 the Sea Birds Protection Act was passed, securing a close-time for sea- birds during the breeding season. According to Harrison (1973:790), "This Act was to wild birds what Martin's 1822 Act was to animals in general".

The debate surrounding the Act raised the issue of shooting and its impact on bird populations. The birds' role in preserving the balance of nature and in keeping down harmful insects was emphasised. The defence of wild birds rested largely on evidence about their diet<sup>30</sup>. However, Russell (1897:618) noted that the schedules of protected birds included very few insect-eating birds that he thought had a special claim as "friends of the agriculturalist".

The British Association committee<sup>31</sup>, the RSPCA and the Association for the Protection of British Birds promoted further legislation in 1872, 1876 and 1880. These subsequent Acts were viewed by some commentators as an indication of the failure of the legislation. As Russell (1897:615) said, referring to the 1869 and 1872 Acts, "It does not seem that either of these Acts was successful in attaining its object, for they were shortly followed, in 1876, by an Act for the Preservation

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<sup>29</sup> Professor of Comparative Anatomy at Cambridge and a leading member of the British Ornithologists' Union.

<sup>30</sup> The Select Committee of 1873 on the protection of wild birds was almost exclusively preoccupied with this topic.

<sup>31</sup> Established to consider 'the possibility of establishing a close time for the protection of indigenous animals'.

of Wild-Fowl. This Act proceeded to impose increased fines, which is commonly the sign that legislation of this sort has been a failure". He considered it "useless to attempt merely to protect certain defined species because a malefactor almost always managed to escape by protesting that he was in pursuit of some kind of bird which was not mentioned in the Act"<sup>32</sup>. This constitutes a major problem with legislation for the protection of birds. Very often a protected species cannot be identified until after it is shot. The RSPCA's attitude to the 1880 Wild Birds legislation was to enforce the Act to highlight the defects so that ultimately an efficient law would be enacted.

#### **4) CONCLUSION - OBJECTIVES AND METHODS OF THE PROTECTION OF SPECIES**

It would appear that the primary objective of the species protection legislation was humanitarian. "Nature preservation in its early days was almost entirely an emotional issue, fired by outrage at the barbarity of fellow man" (Sheail,1967:4). The prevention of cruelty was therefore the main impetus behind the push for legislative protection.

The recognition of cruelty was a result of the realisation of the links between man and animals through scientific advances. The recognition of cruelty against wild animals as opposed to domestic animals was a consequence of the growing interest in natural history. The first legislative provisions related to birds that had

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<sup>32</sup> For further examples of the criticisms of these Acts, see Lloyd (1924).

been subjected to some of the most obvious cruelties. "Without the conspicuous cruelties and visibly intolerable destruction wrought upon these animated creatures [*birds*], there almost certainly would have been no conservation movement until a very much more recent period, and certainly not a movement of such breadth and such zeal. Ornithology, unquestionably, was the pacemaker" (Allen D,1980:35).

The natural history societies, as well as supporting legislation against cruelty, were responsible for much damage themselves. The collecting of plant and insect specimens took some time to be recognised as damaging and many believed that the collecting of eggs did not require control. "The love of bird's nesting is deeply rooted in the heart of boys; it is one of the outlets which a taste for natural history takes; a taste which it is more desirable perhaps to foster than to check ... Public opinion would not sanction an Act of Parliament of the requisite severity, and the filling of our gaols with small boys which would follow" (Russell,1897:621). Part of the reasoning behind this approach was the continued view of natural history as a godly pursuit. Collecting was seen as an essential part of natural history and, not being a pastime of the lower orders of society, was not seen as in need of legislative control. It was only when collecting became so extensive that it came within the remit of cruelty that action was taken. Other species, such as ferns, had suffered at the hands of the collectors but there were no obvious cruelties to stir the humanitarians to push for their protection. However, as concern about collecting increased, science started to exert a greater influence. This emphasised

the utility of certain species for man<sup>33</sup>. As evidence on the diet of birds became known the concept of ecosystems began to emerge.

The prevailing religious doctrines of the time meant that cruelty was seen as morally degrading. Legislation and criminal sanctions were regarded as the appropriate means of controlling this cruelty, particularly as the prevailing belief was that the lower orders of society were responsible for cruelty.

Despite the great reliance on legislation to control cruelty and over-collecting, education was regarded as the most effective long term protection for wildlife. In the interim, legislation would limit the damage inflicted and education would assist in the enforcement of that legislation. It was hoped that lessons at school and other forms of propaganda would facilitate law enforcement and win greater public sympathy for wildlife. As result, the history of the nature preservation movement in the 19th century revolved around an endless succession of Parliamentary Bills and the organisation of public appeals and educational programmes (Sheail,1967).

## *SECTION 1 PART B - HABITAT PROTECTION*

### **1) RECOGNITION OF THE NEED TO PROTECT**

State intervention in habitat protection came relatively late in Britain. Whereas steps had been taken to protect individual species by the end of the nineteenth

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<sup>33</sup> This argument was the primary justification for the old Game Laws.

century, habitats had not even been considered as needing protection. "It took a long time for public opinion to grasp ... the necessity for taking care of the environment" (Nicholson,1974:v).There was no cruelty to habitats, "botany and entomology were free from this extra ingredient of sport-induced aggressiveness, their greater emotional neutrality meant that it took people far longer to be moved to outrage in their defence. 'Cruelty to plants' was hardly viable as a rallying cry" (Allen D,1980:36). It was the influences of science and concern at collecting that had emerged at the end of the nineteenth century that were to prove important. "The first twinges of conscience arose ... not out of pity for the victims, not through any emotional identification of the collector with what he collected, but out of shock and indignation at the wanton damage to nature, the waste of not unlimited natural raw material, that the more reckless were gradually noticed to be perpetrating" (Allen D,1980:37). Ideas of nature's usefulness to man were therefore resurfacing.

However, habitat protection was merely regarded as incidental to protecting areas of aesthetic appeal<sup>34</sup>, "the special concerns of naturalists were very much subordinate to the overriding concern of preserving these areas simply as pieces of countryside. The idea of reserves specifically for wild life was something that the natural history had to generate for itself - and, in retrospect, it was remarkably slow to do" (Allen D,1980:43).

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<sup>34</sup> In the 1860s the Commons, Open Spaces and Footpaths Preservation Society succeeded in saving Epping Forest, Hampstead Heath and several other major London commons from would-be developers.

## 1)a) Philosophical & Social Influences

Instrumental in the evolution of a policy to protect habitats was a change in the concept of the balance of nature. During the eighteenth century, this concept connoted "a robust, preordained system of checks and balances which ensured permanency and continuity in nature. By the end of the nineteenth century it conveyed the notion of a delicate and intricate equilibrium, easily disrupted and highly sensitive to human interference" (Lowe,1983:337). This changing perception of nature arose because, with the industrial revolution, the emphasis on Darwinism and man as a part of nature broke down and instead man came to be seen as a major force in nature's destruction (Egerton,1973). This destruction led to great concern at the loss of valued natural features, because faith in their renewal had been destroyed. The permanency of nature was no longer guaranteed. In turn, this led to the recognition of the rarity of nature and its vulnerability to man's interference.

The central question then became which actions necessitated control. What constituted destruction<sup>35</sup>? Because of the re-evaluation of nature and man's place in it, a different perception of what constituted destruction was formed. There was a "reversal of the rationalist, progressivist outlook deriving from the Enlightenment which, with its confidence in the perfectibility of all things, had looked always to the improvement of nature and society through the exercise of

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<sup>35</sup> This changing perception of what constitutes destruction is central to any evaluation of the system. It can only be judged for its effectiveness at preventing the type of damage that it was intended to prevent.

human reason" (Lowe & Goyder,1983:19). Actions that had previously been considered as advantageous and for the 'improvement' of nature were now classified as destructive and necessitating control. Development was now associated with the destruction of wildlife. Man's destruction of nature through urbanism and industrialisation reflected physically the pessimism felt about the rest of society. The end of the nineteenth century saw an end to the optimism and self-confidence of mid-century, sapped by the great Depression of the 1880s. When coupled with a disappointing industrial performance, this led to an antipathy towards the industrial spirit. The social and economic changes that had occurred during the century were reassessed. Industrialisation, the source of their wealth and power, was also responsible for their destruction. In this, nature simply reflected the problems elsewhere. In this respect nature performed a symbolic function, it provided a record of this destruction. The destructive power of these forces was there for all to see. Nature provided a contrast to the conventions of Victorian society. This diversity of nature gave character to an area that was distinct from any others. This was in contrast to urbanised areas and the tenets of industrialisation.

This led to the Victorians and Edwardians adopting a preservationist approach<sup>36</sup>. Arguments were put forward for a duty to preserve for future generations<sup>37</sup>.The idea of the collective good and its prevalence over property rights was reflected in

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<sup>36</sup> This preservationist approach can be contrasted with the US, whose system was based more on an aesthetic interest in nature. For a detailed discussion see Warren & Goldsmith (1974).

<sup>37</sup> This approach can be seen in the British Ecological Society Report of 1944.

the establishment of the National Trust, which was set up to acquire buildings and land for the public benefit. The National Trust was established in 1895 and its aims as set down in the National Trust Act 1907 were "to promote the permanent preservation, for the benefit of the Nation, of lands and tenements (including buildings) of beauty or historic interest; and, as regards land, to preserve (so far as is practicable) their natural aspect, features, and animal and plant life". The importance of land acquired by the National Trust was its inalienability<sup>38</sup>. The control of nature brought with it a stability and certainty in contrast to the operation of the liberalist state. The preservationist approach has been explained as part of a reaction by an influential minority to economic liberalism<sup>39</sup>. The rejection of notions of laissez faire and a move towards collectivism was reflected in the attitudes of conservationists<sup>40</sup>.

### **1)b) Nationalism**

The individual character that was afforded to an area by virtue of its local nature was important with the gathering tide of nationalism at the end of the nineteenth century. Unfavourable comparisons were made with the effectiveness of the German state in the protection of nature. Writing in 1913, Horwood (1913:629)

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<sup>38</sup> This is important in relation to compulsory purchase as they have a right of appeal to both Houses of Parliament against any efforts to purchase such land. In fact the National Trust recently attempted to use this power in relation to a proposed by-pass encroaching on the Golden Cap estate in Dorset. See Independent 2-5-1994. However, the proposals for the bypass have now been postponed and the compulsory purchase orders have been withdrawn. According to an officer of the NT the procedure has been used successfully before.

<sup>39</sup> Philosophers such as J.S. Mill who were an important part of the reaction against liberalism were leading members of the voluntary conservation groups of the time.

<sup>40</sup> For a detailed explanation of the role of collectivism see chapter 8.

commented, "If there be one direction in which the British Isles is particularly behindhand, it is in the matter of preserving and protecting the native flora. This is the more apparent when it is observed that Germany or rather, it should be said, Prussia, has a well-organised State Department for this purpose, whilst we in England have neglected to take any such precaution". He reiterated this later when he said, "It should be some incentive to us in this country to work towards this ideal, that, as mentioned already, the Prussian Government has a well-organised department of the State charged with the preservation and protection of natural monuments. And we would ask, if this be possible in Prussia, can it not also be made an accomplished fact in England?" (Horwood,1913:633).

### **1)c) Scientific Influences**

The growth of ecology was also to have an impact on the development of nature conservation policy. "At first everything was concentrated on preserving rare or distinctive plants and animals by means of legislation, supported by publicity campaigns. With the development of ecology as a science, the overriding need to protect the habitat of the individual species became more apparent" (Sheail,1976:196). Habitats therefore assumed importance in the protection of species. Research into ecology began around the end of nineteenth century, and although their initial influence was limited, ecologists became important as they began to appreciate the usefulness of nature reserves for their research. The British Ecological Society was founded in 1913 and was to become an important voice in conservation matters (Spellberg,1988). The influence of ecology was

partly due to its scientific evidence of the utility of wildlife<sup>41</sup>. Their interest brought an appreciation of the need to protect habitats to preserve species. The ecologists demonstrated that this protection could involve the manipulation of habitats to maintain particular species. Although this was recognised as a possible method of protection, the concept that this might be necessary was not entertained by the wildlife preservationists<sup>42</sup>. Any ideas as to the protection of habitats revolved around the idea of 'sanctuaries', with its associated concept of letting nature alone<sup>43</sup>.

The influence of science was emphasised in 1944 when the BES commented, "Our native species of plants and animals, their distribution, habits and relationships, have long been a major interest of British naturalists, who have been increasingly disturbed by the progressive disappearance of species from many of their old habitats as the advance of urbanisation destroyed the natural conditions. But it is the rise in importance of the modern study of ecology that has brought into prominence the seriousness of this threat to our native flora and fauna from the scientific as well as from the aesthetic point of view" (BES,1944:50)<sup>44</sup>.

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<sup>41</sup> Arguments of the utility of birds can be seen in Russell (1897).

<sup>42</sup> This type of manipulation of habitats was only seen as relevant to game preservation.

<sup>43</sup> This approach was discussed by the BES (1944:64).

<sup>44</sup> The importance of the aesthetic / amenity movement is discussed at 1)D)ii).

## 1)d) The Voluntary Groups

### 1)d)i) Nature Conservation

As there was no governmental policy on protection of habitats, the protection that existed was by virtue of the voluntary groups. The method adopted by these groups was the designation of selected areas or sites that are specially protected<sup>45</sup>. By the start of the twentieth century there were a handful of nature reserves. For example, the Breydon Society bought Breydon Water and declared it as a nature reserve in 1888 and the National Trust acquired parts of Wicken Fen in 1899. The NT owned thirteen sites of special interest to the naturalist by 1910 (Sheail,1976). However, this was more by accident than design, the emphasis of the National Trust was on open spaces and scenery<sup>46</sup>. However, "naturalists were worried at the almost random way in which potential nature reserves were acquired, with apparently little regard for the national significance of their plants and animals" (Sheail,1976:60).

The Society for the Promotion of Nature Reserves (SPNR) was established in 1912 and was a creation of Lord Rothschild. Its objectives were "to preserve for posterity as a national possession some part of our native land, its fauna, flora and geological features". It concentrated on encouraging other groups to purchase and manage nature reserves rather than doing this themselves. In 1926 the Norfolk

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<sup>45</sup> This is the dominant approach to this day, with numerous designations such as SSSIs, NNRs, NCOs, Marine Nature Reserves (MNRs), Local Nature Reserves (LNRs) etc.

<sup>46</sup> Many areas of aesthetic interest are also of wildlife interest because a diversity of species etc. is often regarded as scenic.

Naturalists' Trust was founded and one of its aims was to protect suitable areas by establishing reserves. The Norfolk Naturalists Trust went on to buy Cley Marshes in 1926 and had seven reserves by the 1940s. The Royal Society for the Protection of Birds bought its first nature reserve (on Romney Marsh) in 1929. The safety of these reserves lay in the exercise of ordinary property rights. The limitations of this approach are well illustrated by the RSPB's first reserve, which had to be abandoned when development on neighbouring land destroyed its natural interest. The decline of this method of control was foretold by the BES, they predicted that the protection which they perceived as being provided by the large landowners would cease because of lack of funds. "This precarious safeguard of rural beauty will disappear and public action becomes the only means by which it can be preserved" (BES,1944:49).

According to Lowe & Goyder (1983), nature reserves "remained an esoteric matter, viewed even by naturalists as a costly and impractical expedient only to be contemplated as a last resort when a unique spot was threatened by an improving farmer or speculative builder, and certainly no substitute for protective wildlife legislation". Many naturalists were sceptical of the value of reserves. They believed the cost of acquiring and guarding the land would be prohibitive, and the very act of making a reserve would attract the attention of collectors. The creation of reserves would simply be an excuse for not tackling the much harder task of eradicating collecting and bird-catching. The priority was the introduction and enforcement of legislation against cruelty and over-collecting. According to Sheail (1976:55), the view was that "a vigorous educational campaign would play a major role in enforcing the various Acts, orders and by-laws. Convictions and

stringent penalties would soon make watchers redundant and sanctuaries irrelevant to wildlife protection". Nature reserves were regarded by most people as a subsidiary and very expensive means of supplementing legislation, they were merely a stop-gap measure. The primary concern was with legislation regarding cruelty towards animals and collecting.

#### 1)d)ii) Amenity

The Council for the Preservation of Rural England (CPRE) was established in 1926. It was concerned with the best use of land from an amenity viewpoint. It was founded to co-ordinate the activities of the various voluntary bodies, promote legislation, keep planning schemes under surveillance, and provide an advisory service to every landowner seeking to preserve the amenity of their property. Amenity based groups such as the CPRE were an essential component of the push for national protection for wildlife<sup>47</sup>. "The SPNR realised between the wars that the only way to become effective was to work closely with those organisations concerned with amenity and outdoor recreation. By joining forces, naturalists obtained far greater opportunities for publicising the needs of wildlife and the benefits of nature preservation" (Sheail,1976:68). "Naturalists ... were so weak in countering the ever-increasing dangers to key areas that it was logical for them to participate in the wider concern for the countryside, and especially the preservation of amenity" (Sheail,1976:xiii).

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<sup>47</sup> For a discussion of the commonality of interest between the conservation, amenity and built heritage preservation groups, see Lowe & Goyder (1983) Ch 1.

In 1929, an inter-departmental government committee was established under the chairmanship of Christopher Addison to consider the establishment of national parks. The committee completed its report in 1931. The establishment of national parks would have three objectives: to safeguard areas of exceptional natural interest against disorderly development and spoliation, to improve the means of access for pedestrians to areas of natural beauty, and to promote measures for the protection of flora and fauna. Nature conservation thus came to be seen as a by-product of amenity protection. The problem with this was that the provision of recreational facilities was irreconcilable with the preservation of wildlife. The solution forwarded to the Addison Committee by the British Correlating Committee was the enclosure of areas within national parks for the protection of wildlife. In addition to this, they proposed the establishment of separate national nature reserves for the sole purpose of wildlife preservation.

### **1)e) Conclusion - The Objectives Of Habitat Protection**

The perceived objectives of habitat protection differed between the voluntary groups and the ecologists. The voluntary groups espoused preservationist, anti-city concerns which were interlinked with issues of amenity. "Common to all the preservation groups of the period was a moral and aesthetic revulsion to the contemporary industrial city. They hoped to preserve things and places that had not yet been corrupted by urban and industrial expansion" (Lowe,1983:339). Scenery and wildlife went hand in hand. The SPNR saw the purpose of reserves as "for the enjoyment of lovers of wild nature, the pursuit of scientific knowledge,

and the well-being of the community in general" (SPNR, Annual Report,1918). However, this preservationist approach was not shared by the ecologists who "stressed its potential contribution to the economic exploitation of marginal land, such as the afforestation of uplands or the reclamation of marsh and heathlands - just the sort of land-use changes which were anathema to the early conservationists" (Lowe,1983:341).

Essentially three things can be identified from this period as influential in the desire to protect habitats.

(1) Anti-industrialism (the spiritual and aesthetic reactions) was one of the most influential, particularly when coupled with the changing concept of nature.

(2) Nationalism was important with the patriotic attachment to indigenous flora and fauna and Anglo-German rivalry.

(3) The growing understanding of ecology.

The voluntary groups, focusing on the first two were the driving force behind introducing protection through the establishment of nature reserves. However, their efforts to obtain national legislative protection were unsuccessful. Yet the need for protection had been recognised. The primary influence was the preservationist, voluntary lobby but later the scientific influence of ecology was to become the driving force in national legislative protection of habitats. The basis of the protection provided was that of threat from urbanism and industrialisation,

and the approach adopted was preservationist in nature, the setting aside of particular areas as nature reserves. The solution was private and involved no state intervention.

## **2) HABITAT PROTECTION - THE PUSH FOR LEGISLATIVE PROTECTION**

### **2)a) Reconstructionism**

"A profound change in the value of sanctuaries began to occur during the inter-war period, stimulated by the destruction of the habitat through changes in land use and management" (Sheail,1976:55). With the preparations for Post-War reconstruction, opportunities arose to influence government policy on conservation. A national policy for protection of nature was now a possibility. In 1941 the SPNR called a conference to consider Nature Preservation in Post-War Reconstruction. Two of the most important recommendations were the concept of conservation areas and the appointment of an official body to consider proposals for nature preservation.

The report of the Scott Committee on Land Utilisation in Rural Areas was published in August 1942. This affirmed the need to secure a carefully controlled balance between agriculture and the use of land for residential and industrial development. The report recommended the establishment of national parks and gave support to the notion of national nature reserves. The Dower Report<sup>48</sup>

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<sup>48</sup> This was published in 1945 and its aim was the development of the proposals of the Scott Report.

defined national parks as "an extensive area of beautiful and relatively wild country in which for the nation's benefit and by appropriate national decisions and action, (i) the characteristic landscape beauty is strictly preserved, (ii) access and facilities for public open-air enjoyment, including particularly cross-country and foot-path walking, are amply provided, and (iii) wild life and places and buildings of historic, architectural or scientific interest are suitably protected" (Dower Report,1945).

In 1942 the SPNR appointed a Nature Reserves Investigation Committee (NRIC) to develop the case for nature conservation and draw up a list of proposed reserves<sup>49</sup>. The NRIC proposed two types of nature reserves; species reserves<sup>50</sup> and habitat reserves<sup>51</sup>. However, the distinction was rather artificial. As Tansley (1945:39) pointed out, "rare species usually live in particular habitats and they can only persist if the special conditions of those habitats are maintained". The case for nature reserves was strengthened when, in 1942, the Minister of Town and Country Planning confirmed that the government had accepted a responsibility for preserving the natural beauty of the countryside and for providing facilities for outdoor recreation. "This was highly significant for the proponents of nature conservation because in accepting a responsibility for amenity the government had to some extent accepted an obligation for wildlife, since plants and animals were widely regarded as an essential ingredient of amenity" (Sheail,1976:105).

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<sup>49</sup> This committee produced a number of reports which are detailed in The Huxley Report (1947:7).

<sup>50</sup> Designed to protect rare species of plants and animals.

<sup>51</sup> Designed to preserve samples of characteristic habitats with their particular plant communities and accompanying animals.

The subsequent year the British Ecological Society established its own committee to investigate the need for nature reserves and nature conservation. The BES thought that they were the most appropriate body to consider the issue and draw up the list of reserves because they had the technical knowledge. "What is wanted is first of all unequivocal public recognition of nature conservation as a national interest, implemented by a national scheme and supplemented by local effort" (BES,1944:74). "Haphazard procedure in nature preservation, valuable as it has been in the past, now requires to be replaced by a systematic and comprehensive plan of national scope" (BES,1944:78). The emphasis for nature conservation was directed towards its scientific value. The debate so far had centred on National Parks and amenity but the BES believed that they would be inadequate to meet the requirements of nature conservation. "In the first place there will be too few of them, and secondly they cannot be managed with primary regard to scientific needs ... For the purposes of scientific work it is necessary to preserve a considerable number of areas which are generally much smaller, chosen because they represent natural habitats bearing single or several plant communities" (BES,1944:57).

A Wild Life Conservation Special Committee (The Huxley Committee) was formed, and was given the task of considering the references to wildlife conservation in the Dower Report and to recommend any amendments or additions that might be desirable. The recommendations of this committee in 1947 are considered to be the most influential report of this time. The report, hereafter referred to as the Huxley Report, expressed agreement with the Dower

Report as to the desirability of the adoption of wildlife conservation "as an integral part of a comprehensive programme for conservation and development of our national resources". The effect of this would be to "bring this country into line in this respect with other progressive countries" (Huxley,1947:34)<sup>52</sup>. Part of the task that the Huxley Report identified was to determine "what general measures falling within our special field of competence are required to preserve and strengthen<sup>53</sup> the foundations upon which the whole edifice of nature conservation must stand" (Huxley,1947:5). As part of this, the Huxley Committee recommended the scheduling of sites of special scientific interest.

## **2)b) Voluntary Groups**

The previous approach of the voluntary groups had been to protect sites through private ownership. The growth of the state and its corresponding ability to control the actions of individuals altered this approach. The ethos of collectivism extended to conservation. They sought to utilise this ability and "promoted the regulatory function of the state particularly in relation to land-use planning"<sup>54</sup> (Lowe & Goyder,1983:23). To do this they had to work with amenity and recreation groups because "naturalists were a comparatively small and weak pressure group" (Sheail,1976:68). A fusion thus occurred of the scientific,

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<sup>52</sup> Nationalism was therefore still an influence.

<sup>53</sup> The use of the words preserve and strengthen imply that the foundations were already in existence. This could only mean the system of nature reserves owned by voluntary groups.

<sup>54</sup> It was, in fact, through the land use planning system that habitats were first protected by the state.

amenity and educational aspects of nature conservation. In the words of the BES, "the motives for nature preservation which are not specific to ecological science are so mixed with those which are that it becomes misleading to deal with the latter alone and to omit all reference to the former" (BES,1944:46).

Although the BES approached conservation from an essentially scientific point of view, they placed a very great emphasis on the amenity side. "The first object of nature preservation on a large scale, and the aim which naturally and rightly meets with the most widespread interest and support, is the maintenance for enjoyment by the people at large of the beauty and interest of characteristic British scenery ... To preserve unspoiled and free from the chances of development, which wholly destroys its character and charm, as much as possible of this landscape" (BES,1944:49). This fusion was not appreciated by the NRIC who adopted a science-based approach to nature conservation. "To suggest that these complex problems can be treated merely as an adjunct of schemes for the preservation of amenities is to admit a fundamental ignorance of the immensely intricate network of facts and hypotheses that must be considered and unravelled before any plan worth pursuing for the scientific conservation of nature can be made" (NRIC,1945:10). However, the links with the amenity groups were to prove the most fruitful for achieving national protection<sup>55</sup>.

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<sup>55</sup> It is interesting to note that amenity and nature conservation are now regarded as totally separate. Lobbying on the WACA was done independently.

## 2)c) The Source Of Threat To Habitats

Many important sites for wildlife had survived so far because they had no commercial value<sup>56</sup>. However, this situation began to change. Development came to be seen as the major threat. "Under existing conditions destructive changes are possible at any time and place as a result of the activities of the speculative builder, of the establishment of new factories or other industrial or public works, of mining and quarrying, and also, though in a different way, of the activity of the Forestry Commission" (BES,1944:49). Therefore in finding a solution to conservation the emphasis was on planning and management to sort out competing land uses.

Agricultural expansion was not contested in 1940s and 1950s, since the memory of food shortages during war was still strong. It was not believed that agriculture would pose any real threat to nature conservation. According to the BES, "It is unlikely that the total arable area will be further increased to any great extent because the limits of existing land that would repay cultivation have nearly been reached" (BES,1944:52)<sup>57</sup>. The commonly held belief was that agriculture and conservation were not contradictory land uses. "Traditionally, farmers were regarded as the custodians of the countryside, protecting amenity and sustaining wildlife as a by-product of their husbandry of the land. For this reason, the

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<sup>56</sup> Either for agriculture, forestry, building or industrial development.

<sup>57</sup> This idea was later seen to be wrong with the increasing mechanisation of agriculture and the provisions of grants and incentives. See Shoard (1981) for more details.

National Trust deplored the depression in farming which characterised that late 1920s and early 1930s. It considered neglected pastures and woodlands, ill-kept hedges and farm buildings, just as harmful to the amenity of the countryside as ill-placed buildings and industrial development. The Trust rejected any idea of a clash between progressive and prosperous farming and the naturalist" (Sheail,1976:56).

## **2)d) Underlying Assumptions of Habitat Protection**

"In the immediate Post-War period a strong degree of consensus emerged over the appropriate means for protecting the countryside in Britain. Essentially it was assumed that protecting agricultural land from industrial and residential development and providing an appropriate framework of price support for farmers would combine to produce an attractive rural environment" (Winter,1991:48). The idea of the sanctuary was still prominent. All that was needed was to find an 'unspoilt' area and to fence it off. This laissez faire school of conservation persisted and caused contention with the newer ecologically based conservationists who insisted that, in Britain at least, such unspoilt areas barely survived. Thus they proposed that interventionist management was the appropriate method. "If you 'let Nature alone' ... you frustrate the very aim you have in view" (BES,1944:58). However, most conservationists were reluctant to follow this path. The focus of conservation was still on a sentimental, escapist view of nature rather than as a manageable ecosystem and there was concern about whether they possessed the technical knowledge to perform this management.

However, although the need for protection had been recognised, it did not extend to the control of agricultural operations. At the heart of this thinking was the notion of custodianship, with farmers perceived as the natural custodians of the countryside<sup>58</sup>. In the event of any conflict, conservation would have to take second place. According to the BES, "We cannot of course preserve the whole of what remains. The claims of new building, of agriculture and forestry, must take a prominent place in Post-War development". Steps should be taken to conserve so much "as is reasonable and practicable, for our mental refreshment, for the enjoyment of its beauty, and for the purposes of study and education" (BES,1944:47)<sup>59</sup>. This custodianship model has been explained by Winter as "a direct consequence of the preoccupation with the countryside displayed by the English upper and middle classes from late Victorian times. It was a preoccupation with a culturally specific definition of countryside, in which landscape, buildings and wildlife encapsulate environmental concerns. Many of the leaders of the environmental groups which emerged in the inter-war period or earlier perceived no conflict between their concern to preserve a picturesque countryside and the need for a healthy agriculture" (Winter,1991:48).

So, development was the villain in need of control. However, there is a fundamental conflict between development and conservation. According to the BES, "greater development of the country's natural resources is inevitable if

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<sup>58</sup> It was this custodianship model that was to prove most controversial during the passage of the WACA.

<sup>59</sup> Education is a recurring theme in the conservation debate and has been propounded as the solution since early Victorian times.

Britain is to retain her position among the leading nations of the world: at the same time a national scheme of conservation becomes an urgent necessity if we are not to hand down to our descendants a land hopelessly impoverished in a most precious part of its heritage. Conservation is not a sectional interest. Its importance to the community as a whole is comparable with that of development and is inextricably knitted up with efficient development" (BES,1944:52). The NRIC believed that any protective designation should not interfere with the existing usage of the land. "However attractive it might be to set aside areas which would eventually become museum pieces illustrating the cultivation and habits of by-gone days, that is not what the Committee propose. They fully recognise that the principle of conservation, where applied to areas other than national reserves, can be carried only so far that it does not unduly conflict with other national interests in agriculture, forestry, water conservation, carefully planned development, and the enjoyment of existing amenities" (NRIC,1945:7). This ethos pervades all subsequent enactments regarding habitat conservation.

## **2)e) The Formation of the Nature Conservancy**

To protect wildlife from the ravages of development, nature reserves would have to be established. This raised two fundamental questions: who would buy the reserves, and who would manage them? It was proposed by the Huxley Report that the Government should take formal responsibility for conservation through a new specialist service. This was supported by the SPNR and the BES. The Nature Conservancy was thus established in 1949 and one of its main roles was to

create a series of protected sites across the nation<sup>60</sup>. The responsibilities of the Nature Conservancy were to provide scientific advice on the conservation and control of the natural flora and fauna of Great Britain; to establish, maintain and manage nature reserves in Great Britain, including the maintenance of physical features of scientific interest; and to organise and develop the related research and scientific services.

Despite the fusion in the minds of the public and in the discussions of the various reports, nature conservation was split from amenity, recreation and landscape matters at an institutional level<sup>61</sup>. Nature conservation was the responsibility of the Nature Conservancy and amenity was the responsibility of the National Parks Commission<sup>62</sup>.

### **3) PROTECTION INTRODUCED FOR HABITATS**

#### **3)a) The National Parks & Access to the Countryside Act 1949**

The major revolution in the government's attitude to conservation was encapsulated in the National Parks and Access to the Countryside Act of 1949. With what are really only minor modifications, that Act and the thinking behind it still govern the way that nature is conserved in Britain today. Along with the

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<sup>60</sup> The Nature Conservancy derived its statutory powers in relation to nature conservation from the National Parks and Access to the Countryside Act 1949, detailed below.

<sup>61</sup> For a discussion of a more fundamental split between the interests of amenity and nature conservation in the voluntary groups see Allen (1980).

<sup>62</sup> Which later became the Countryside Commission.

Town and Country Planning Act of 1947<sup>63</sup> this provided the foundation of the national programme of nature conservation.

The NPACA introduced protection for the areas of finest scenery. It adopted the site designation approach<sup>64</sup> and allowed a number of different designations such as Areas of Outstanding Natural Beauty, National Parks, Sites of Special Scientific Interest and Nature Reserves. The fusion of these aspects, at one level to indicate the need for protection, led to their separation at an institutional level. The Act divides the scientific from the recreational aspects of nature. Much of the prompting for the protection was from the access lobby and this led to a duality of functions for the Act, landscape conservation and recreation<sup>65</sup>.

The 1949 Act formalised the belief in the notion of custodianship by relying on development control for the protection of the majority of habitats. This control was contained in the TCPA of 1947. However, this was limited in its application because almost all agricultural and forestry practices were exempt from planning control. This reinforced the notion of custodianship and the belief that, "left alone and protected from urban encroachment, the countryside would take care of itself" (Davidson,1974a:310). It was also in part due to the preoccupation of planners

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<sup>63</sup> This Act formed part of the reaction to urbanism and the increase in building in the 1930s. It sought to impose control over most forms of development.

<sup>64</sup> The Huxley Report had considered the possibility of a comprehensive scheme of wildlife protective legislation but considered that it was beyond their remit. If the Huxley Report had taken this approach the voluntary approach that we have today may never have existed.

<sup>65</sup> The division of natural science from social policy was further exaggerated by the later division of the Nature Conservancy in 1973 into the executive and managerial Nature Conservancy Council and the research oriented Institute of Terrestrial Ecology.

with rebuilding. Planning was not seen as an issue for the countryside per se but for the prevention of urban sprawl that threatened this countryside. There was also at this time an emphasis on reviving the farming industry so development controls over agriculture were inappropriate.

The need for compromise was however recognised in some quarters. "In particular cases decisions between rival claims to the use of land may well be difficult. Compromise and give-and-take will be very necessary in the 'country-planning' that will have to be undertaken, and not only between different possible economic uses but also between these and the preservation of natural beauty" (BES,1944:49). The implication, though, was that conservation would have to give way.

### **3)b Conclusion - Objectives and methods of Habitat Protection**

"Justifications for conservation swung from the moral-aesthetic standpoint of earlier in the century to arguments of public benefit through amenity and scientific study" (Lowe,1983:343). A number of objectives were now perceived for conservation. The anti-urban sentiments were still present along with the recognition of the destruction that it caused. Ecology had highlighted the necessity of protecting habitats to preserve species<sup>66</sup> and the usefulness of habitats for scientific study, and the amenity argument for the preservation of 'natural beauty' was also strong.

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<sup>66</sup> In the words of the BES 'it is always the habitat, as the essential condition of the continued existence of the species, which it is important to safeguard' (BES,1944:79).

The British Ecological Society did not consider that this multiplicity of views resulted in conflict. "The various aims and objects of nature preservation, widely different as they appear to be, are in reality very closely linked. The values involved are first of all those which are now commonly, though most inadequately, described as 'amenity' values. These are perhaps the most important of all, since they touch the deepest sources of mental and spiritual refreshment, both conscious and unconscious, and of which the specifically aesthetic value is really a part. Then there are the scientific, the educational, and indirectly the economic values, and each, ..., reinforces the others. The case for extensive, carefully and scientifically planned, nature conservation thus becomes extremely strong". "The ecological interest almost exactly coincides with the aim of preserving the characteristic charm of British scenery". "There is no conflict between these two interests - one may actually be made to serve the other" (BES,1944:50). It is noteworthy that, although the BES wanted habitat conservation on the grounds of its value for scientific research, they framed their argument to fit with that of the amenity movement. This was possibly to present a 'united front' and thus increase their chances of influencing government policy.

The Huxley Report on the other hand saw the amenity and scientific movements as being much more distinct. "The problem of nature conservation had already been approached, publicly and independently, along two distinct lines of thought which not unnaturally led to somewhat different conclusions. The one, which may loosely be described as the aesthetic approach, placed the main emphasis upon preserving, at least in selected areas, the characteristic beauty of the

landscape and upon providing ample access and facilities for open-air recreation and for the enjoyment of that beauty within those areas. This was a matter which primarily and directly concerned the Ministry of Town and Country Planning. The other, the scientific approach, while in no way underestimating the importance of aesthetic values and of their appreciation by the public, was primarily directed to the advancement of knowledge as such, as well as to the application of that knowledge to the affairs of the nation" (Huxley,1947:3).

Despite this difference of opinion, it became a generally held belief that nature conservation should provide opportunities for both scientific study and amenity<sup>67</sup>. Huxley recognised this fact but also foresaw difficulties with their integration. "Their special requirements may differ, and the case for each may be presented with too limited a vision; but, since both have the same fundamental idea of conserving the rich variety of our countryside and sea-coasts and of increasing the general enjoyment and understanding of nature, their ultimate objectives are not divergent, still less antagonistic. There are many sections of the public with particular interests, whether recreational, economic or scientific, which are within their own spheres entirely legitimate and must be taken into full consideration. To secure that these interests are all fairly met and brought into a workable scheme, while at the same time safeguarding the natural conditions upon which they all ultimately rest, presents a problem not without its difficulties" (Huxley,1947:4).

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<sup>67</sup> For example see BES (1944:67). They believed that by fulfilling as many of the purposes as possible, nature conservation would get the widest public support.

The Huxley Report also claimed that protection was needed because they believed the nature reserves owned by the voluntary groups to be of little use. "Places of outstanding charm and interest have been 'protected', but, through lack of knowledge, indifferent management, or stupidity, their value has waned" (Huxley,1947:6). The BES also thought that more protection was necessary but thought that nature reserves had worked well so far. "It is clear that if any considerable part of our remaining wild life is to be conserved these haphazard methods are not enough, valuable as they have been in the past" (BES,1944:65).

It had been recognised that national policy for nature conservation was necessary because the nature reserves owned by the voluntary groups were not enough to ensure the protection of habitats. The amenity lobby had joined in with the push for such a policy as part of the National Parks and the result was the enactment of the NPACA 1949. This was based on ideas of custodianship and education because the threat to habitats was from development rather than agriculture.

*SECTION 1 PART C - OBJECTIVES AND METHODS: A COMPARISON OF  
SPECIES AND HABITAT PROTECTION*

Different values and objectives can be seen in respect of the species and habitat protection. The main impetus for species protection was the prevention of cruelty and the control of the lower orders of society. Criminal sanctions were thus regarded as an appropriate way to control cruelty. Habitat protection on the other hand shows a more diverse range of values and objectives. Arguments of amenity and science interacted with anti-urban sentiments to identify development as the

threat to wildlife. Such damaging development was best controlled through land use planning rather than criminal sanctions and this is reflected in the provisions of the NPACA. In addition, the notion of custodianship meant that agricultural operations were excluded from this control. Thus the initial objectives of the protection suggest that hypothesis 2 is capable of a negative proof, indicating why criminal sanctions were not used.

## SECTION 2 - EVOLVING OBJECTIVES OF HABITAT PROTECTION

Section 1 indicated that the objectives of the habitat protection system in 1949 were a determinant in the decision not to use criminal sanctions for the protection of habitats at that time and to use a planning based control. This was justified because the source of damage was development. It must now be asked whether these objectives remained the same until 1981 when the habitat protection system was extended<sup>68</sup>. If they did not, can the new objectives explain the continued non-use of criminal sanctions? If this negative question can be answered affirmatively, the positive element must also be considered. Will the objectives also explain the choice of a voluntary approach rather than, for example, the extension of planning control over agricultural activities?

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<sup>68</sup> Although it remained substantially similar in nature to the previous controls.

## 1) EXTENSION OF PROTECTION IN 1968

During the 1970s it was still perceived that the way ahead lay with voluntary codes. No attempt was yet made to alter the structure of habitat protection. In 1974 Warren & Goldsmith (1974:7) claimed that "the conservation of natural resources has been<sup>69</sup> and will continue to be achieved by co-operation between planners, administrators and natural scientists operating within voluntary or governmental frameworks who can use a range of tactics such as protection<sup>70</sup>, management, economic incentive, legislative restriction, or education"<sup>71</sup>. This philosophy was obvious in the enactment of the WACA in 1981. Voluntary methods were definitely favoured. The recommendations of the Countryside in 1970 conferences<sup>72</sup> were put into effect in the Countryside Act 1968 (Green,1981). Section 15 of the Countryside Act introduced the management agreement for SSSIs, the mechanism that was to become the foundation of protection for habitats. Section 11 of the Countryside Act 1968 requires that every minister, government department and public body, in exercising their functions under any enactment, shall have regard to the desirability of conserving the natural beauty and amenity of the countryside.

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<sup>69</sup> Their belief that the system had worked so far was soon to be destroyed with the publication in 1981 of loss and damage statistics for SSSIs.

<sup>70</sup> What is actually meant by this term is unclear.

<sup>71</sup> It is interesting to note that the WACA utilised all of these methods for the protection of habitats, although legislative restriction and education, the methods propounded for the protection of species by the Victorians, were the least used.

<sup>72</sup> The first of which was convened in November 1963 and the second in November 1965.

## **2) THE NEED TO EXTEND HABITAT PROTECTION**

### **2)a) The Voluntary Groups**

Popular interest in conservation and media attention gathered momentum through the 1960s and 1970s<sup>73</sup>. The membership of the conservation groups had grown rapidly. The NCC sought to reform the voluntary conservation movement as a more effective political lobby. This was an indirect effect when, in 1973, the Nature Conservancy was split into separate research and conservation functions. The NCC was established with responsibility for the conservation side. Research went to the Institute of Terrestrial Ecology. The effect of this reorganisation was to give access to political power to the conservationists (the NCC was responsible directly to the DOE). During the 1960s and 1970s the Council for Nature co-ordinated this force and its influence on government agencies. This was taken over by Wildlife Link<sup>74</sup> in 1979. "While the voluntary conservation organisations are barred by their charitable status from taking direct political action and canvassing their policies, they are able to inform Parliament, the media and the public through Wildlife Link of the pertinent facts about problems" (Perring,1983:429).

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<sup>73</sup> See Brookes et al (1976) regarding media coverage of the environment during the period 1953 - 1973. An analysis of the proportion of space devoted to environmental issues in The Times showed a steady coverage until 1965 and then a three-fold increase.

<sup>74</sup> A committee of the Council for Environmental Conservation.

## **2)b) Social & Scientific Influences**

Between 1963 and 1970, the 'Countryside in 1970' conferences were held. These provided important arenas for discussions of the ways in which the countryside had changed since the war and the conflicts that had been generated between the main rural interests. "A major theme was that, with the industrialisation of agriculture and the increasing recreational use of the countryside, measures to conserve wildlife populations could no longer be confined to nature reserves" (Lowe,1983:344). There was a change in the whole ideology of protection. Ideas of preservation from harm now became conservation of resources. "It was clearly not enough to designate a reserve in order to preserve species from current and potentially harmful practices: the communities had to be conserved by means of scientifically formulated management programmes" (Sheail,1976:196).

The increasingly important role of science in this concept of conservation can be seen in the report of the Royal Society in 1977. "There is the objective to conserve an ecological situation as it exists and there is then the objective to conserve an ecological area for scientific investigation. These objectives are different, although they may at times be combined" (Royal Society,1977:6). Habitat protection was now regarded as an essential element of species protection. "Implicit in the conservation of species is the conservation of the living systems, the ecosystems, of which these species are a part, because in this way their variation, evolution and activities can also be conserved" (Royal Society,1977:6). Habitats also became valued in their own right rather than purely as a means of protecting species.

## 2)c) The New Source Of Threat To Habitats

The source of threat was changing. Pollution was an important area of concern. Incidents such as the heavy spring mortalities of birds and mammals that occurred in 1959, 1960 and 1961 where seed corn had been dressed with organochloride pesticides played an important role<sup>75</sup>. In addition to the pesticide incidents there were a number of other environmental disasters that received a great deal of publicity. The Torrey Canyon oil spillage also contributed to make environmental issues topical. The voluntary groups, which had been founded since the war, in a period when most developments involving a large environmental impact have been government linked, tended to focus on government as the source of much harm. The effect of the pollution scares was great. It had extended the protection of nature to the protection of man.

In addition, agriculture came to be seen as an important threat. "During the 1960s and 1970s, wildlife was increasingly affected by changes in land use and management, and perhaps most significantly by the ploughing up of old grasslands, drainage schemes, the application of fertilizers and herbicides, and woodland planting programmes. Many of these changes were piecemeal and aroused little immediate concern. Large scale industries encountered greater opposition" (Sheail,1976:240). According to Baldock (1989:36) "by the beginning of the 1980s, agricultural policy, especially the CAP, had been

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<sup>75</sup> See Moore (1987) for a detailed discussion.

identified as a key threat to nature conservation". King and Conroy (1980) detailed the destruction of sites from agricultural operations. In relation to agriculture, therefore, the threat took some time to realise. "The 1974-79 Labour Government was committed to continued agricultural expansion, and environmental considerations were relatively minor concerns both in government policy and the political processes directly surrounding agriculture" (Winter,1991:49). The emphasis was on the expansion of food production with little recognition of its implications for rural land use. This expansionism was only arrested due to lack of demand and not for environmental reasons. Agriculture as a threat was only realised around 1980 with the publication of Marion Shoard's book *Theft of the Countryside* and the publication of loss and damage statistics for SSSIs by the NCC (Goode,1981). The essential purpose of the new controls was to halt the destruction from agriculture, and not just in specific areas but in the wider countryside.

## **2)d) European and International Obligations**

### **2)d)i) Directive of the Council of the EEC on the Conservation of Wild Birds 79/409/EEC**

Although implementation of the Directive, known as the Birds Directive, required some changes to British legislation it was to a large extent based on existing British legislation. According to Lord Chelwood the Birds Directive "is modelled almost entirely on the British birds protection Acts. They came to us for advice from the very beginning and they have incorporated all the best features of our legislation" (Hansard, HL 415,16-12-1981, 1028). The RSPB, who had been

responsible for the drafting of much of the bird protection legislation in the UK, were involved in the drafting of the Directive. The House of Commons scrutiny committee that considered the proposals also recommended a number of amendments that brought it even closer to the British legislation so that few amendments to Protection of Birds Acts were necessary. Most commentators in the committee also thought that the UK already met the requirements for habitat purposes as well. However, as Haigh (1989b:295) points out, "Notwithstanding the influence of the Protection of Birds Acts 1954-67 on the form of the directive some changes in legislation were necessary both in respect of habitat protection and relating to protection of birds themselves".

The need for these amendments initiated the introduction of the Wildlife and Countryside Act, although, according to Haigh (1989b:296), "It is possible that the government would have introduced an Act dealing with countryside matters and wildlife habitats had there been no Directive if for no other reason than to implement the obligations of the Berne and Bonn Conventions<sup>76</sup> but the Directive ensured that existing bird protection legislation had to be amended. The RSPB were seeking to have the existing Acts amended and the Directive provided the opportunity". The main changes required by the Directive were to habitat protection. The directive influenced the timing of the legislation although it is hard to show that it also influenced the content.

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<sup>76</sup> Discussed below.

Only the provisions of the Directive relating to habitat protection will be discussed here<sup>77</sup>. Article 2 requires measures to be taken to maintain populations of all species of wild birds that occur naturally in their European territories. Populations must be maintained at a level that corresponds to "ecological, scientific and cultural requirements, while taking account of economic and recreational requirements"<sup>78</sup>. The primary duty is maintaining populations; economic and other considerations are secondary<sup>79</sup>.

Article 3(1) requires Member States to take measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all species of wild birds that occur naturally in their European territories. Under Article 3(2) these measures shall primarily include: (a) creation of protected areas; (b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones; (c) re-establishment of destroyed biotopes; (d) creation of biotopes.

Article 4(1) provides that species listed in Annex I "shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution". To this end member States are required to classify "the most suitable territories in number and size as special protection areas". Similar measures must be taken under article 4(2) for regularly

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<sup>77</sup> For a full discussion of the provisions see Lyster (1985).

<sup>78</sup> This is almost identical to article 2 of the Berne convention.

<sup>79</sup> See for example *Commission v Spain* [1993] Case C-355 90 and *R v Secretary of State for the Environment ex parte RSPB* Times August 2nd 1996.

occurring migratory species. In doing so particular attention should be paid to the protection of wetlands. Article 4(4) requires Member States to take steps to "avoid pollution or deterioration of habitats or any disturbances affecting the birds" in the special protection areas and to strive to do so outside those areas.

2)d)ii) The Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971

This is known as the Ramsar Convention. It was drawn up after a series of international conferences and technical meetings held under the auspices of the International Waterfowl Research Bureau in the 1960s<sup>80</sup>. It was signed on 2 February 1971 and came into force on 21 December 1975<sup>81</sup>. Article 2 provides for the designation of wetlands for inclusion in a list of Wetlands of International Importance. These should be selected because of "their international significance in terms of ecology, botany, zoology, limnology or hydrology" and should include wetlands of international importance to wildfowl at any season. Further wetlands can be added to the List by Contracting Parties and boundaries of wetlands already in the List can be extended. Wetlands can be deleted from the List or their boundaries restricted because of urgent national interests under article 2(5). Under Article 2(6) contracting parties shall consider their "international responsibilities for the conservation, management and wise use of migratory stocks of waterfowl,

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<sup>80</sup> For a full discussion of the provisions see Lyster (1985). See Matthews (1993) for discussion of the history and development of Ramsar convention. See de Klemm & Créteaux (1995) for a discussion of the legal developments to the convention since it came into force.

<sup>81</sup> As of 1993 there are 67 parties, including the UK, all but one of which have ratified (IUCN,1993).

both when designating entries for the List and when exercising its right to change entries in the List relating to wetlands within its territory".

Article 3 requires Contracting Parties to "formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory". Article 4 requires the promotion of conservation of wetlands and waterfowl by establishing nature reserves on wetlands<sup>82</sup>. Under Article 4(2) when a Contracting Party deletes or restricts the boundaries of a wetland included in the List, it "should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat".

2)d)iii) Convention on the Conservation of Migratory Species of Wild Animals  
1979<sup>83</sup>

The Convention, known as the Bonn Convention, arose from Recommendation 32 of the Action Plan from the United Nations Conference on the Human Environment 1972<sup>84</sup>. The recommendation was that governments should consider the need to enact conventions and treaties to protect migratory species or those

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<sup>82</sup> Whether they are included in the List or not.

<sup>83</sup> For a full discussion of the provisions see Lyster (1985).

<sup>84</sup> Held in Stockholm.

inhabiting international waters. The Convention was concluded on 23 June 1979 but did not enter into force until 1 November 1983<sup>85</sup>.

Article 2(1) provides for the acknowledgement of the importance of the conservation of migratory species and for the taking of action to this end "whenever possible and appropriate, paying special attention to migratory species the conservation status of which is unfavourable, and taking individually or in co-operation appropriate and necessary steps to conserve such species and their habitat". Unfavourable conservation status is defined in Article 1(1)(d) as when the conditions set out in 1(1)(c) are not met. The said conditions are: (1) the species is maintaining itself on a long term basis as a viable component of its ecosystems; (2) the range of the species is neither currently being reduced, nor is likely to be reduced on a long term basis; (3) there is, and will be in the foreseeable future, sufficient habitat to maintain the population of the species on a long term basis; and (4) the distribution and abundance of the species approach historic coverage and levels to the extent that potentially suitable ecosystems exist and to the extent consistent with wise wildlife management.

Article 2(3)(b) requires Parties to "endeavour to provide immediate protection for migratory species included in Appendix I". Under Article 3, Appendix I includes all migratory species that are endangered. According to Article 1(1)(e) endangered means that the species is in danger of extinction throughout all or a

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<sup>85</sup> 28 States signed originally, including the UK, although as of 1993 there were 48 signatories, of which 38 have ratified (IUCN,1993).

significant portion of its range. Under Article 3(4) Parties in the range of Appendix I species shall endeavour, inter alia, to "conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction".

Article 2 (3)(c) provides for Parties to conclude agreements covering the conservation and management of migratory species listed in Appendix II of the convention. Under Article 4, Appendix II includes all migratory species that have an unfavourable conservation status and which require *international agreements* for their conservation and management. It also includes those which have a conservation status "which would significantly benefit from the international co-operation that could be achieved by an international agreement". Under Article 4(3) Parties in the range of species listed in Appendix II "shall endeavour to conclude agreements where these would benefit the species". Guidelines for these agreements are provided in Article 5. The object of these agreements is to "restore the migratory species concerned to a favourable conservation status or to maintain it in such a status". Under Article 5(5) these agreements should provide for "conservation, and, where required and feasible, restoration of the habitats of importance in maintaining a favourable conservation status, and protection of such habitats from disturbances", "maintenance of a network of suitable habitats appropriately disposed in relation to the migration routes", and "where it appears desirable, the provision of new habitats favourable to the migratory species".

2)d)iv) Convention on the Conservation of European Wildlife and Natural Habitats 1979<sup>86</sup>

The Convention, known as the Berne Convention, was signed on 19 September 1979 and came into force on 1 June 1982<sup>87</sup>. The aims of the Convention, set out in Article 1, are "to conserve wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires the co-operation of several States". There is a general requirement under Article 2 to take measures to maintain populations of wild flora and fauna at a level "which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally". Article 3(1) requires Contracting Parties to take steps to promote national policies for the conservation of wild flora, fauna and natural habitats. In addition, under Article 3(2), Parties undertake to have regard to the conservation of wild flora and fauna in their planning and development policies and measures against pollution.

Specific requirements relating to habitat protection are provided in Article 4. Under Article 4(1) Parties shall take legislative and administrative measures to ensure the conservation of the habitats of wild flora and fauna species and endangered natural habitats. In respect of these areas, Article 4(2) provides that Parties shall also have regard to their conservation requirements in planning and

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<sup>86</sup> For a full discussion of the provisions see Lyster (1985).

<sup>87</sup> As of 1993 there were 26 signatories, including the UK (IUCN, 1993).

development policies "so as to avoid or minimise as far as possible any deterioration of such areas". By virtue of Article 4(3) parties undertake to give special attention to the protection of areas of importance for specified migratory species<sup>88</sup>.

### **3) OBJECTIVES & METHODS OF WACA**

Because of the requirements of the Berne, Bonn and Ramsar Conventions and the EC Birds Directive, new legislation was necessary for the protection of habitats<sup>89</sup>. The intended protection in the Wildlife and Countryside Bill involved an extension of protection to only a limited number of sites. The majority were to be protected under the 1949 and 1968 system of planning control over development and management agreements when the NCC considered it "expedient in the national interest to do so". The extension of protection by including agricultural operations in the planning system was not considered. In fact, planning control as an alternative was never debated in detail because the format of the government's proposals in the Wildlife and Countryside Bill pushed amendments in the direction of extending the application of the proposals or the use of criminal sanctions. The format of Parliamentary debate does not allow for a totally different approach to be proposed.

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<sup>88</sup> These are listed in Appendices II and III of the Convention.

<sup>89</sup> A number of amendments were also required for the purposes of species protection, although these were more limited in nature.

The primary objective of the controls introduced in 1981 was the control of agricultural damage. This was a decisive shift away from the objectives of 1949, which related to the control of development oriented damage. However, there is still a difference between the objectives of the habitat and species protection systems<sup>90</sup>, so hypothesis 2 may explain why criminal sanctions were not used for the protection of habitats. It does not explain the choice of the voluntary approach.

The need to reinforce the protection was due to a change in the source of damage from development to agriculture. Yet the supposedly reinforced protection is based on that introduced when custodianship was the dominant belief. As the NCC pointed out in their 8th Annual Report "the concept of stewardship of the land is intrinsic to the Act's provisions" (NCC,8th Annual Report:2). The situation seems faintly ridiculous, a system designed around landowners as guardians of the countryside attempting to control the actions of those landowners. As Davidson (1974b:378) points out, "conditions since 1949 have changed dramatically. Landscapes within National Parks, as well as outside them, are now threatened by developments of many kinds: the expansion of agriculture and forestry operations; new water conservation schemes; more mineral working; road improvements; pressures for commuting and second homes; and the intensification of outdoor recreation activity. At the same time there has been

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<sup>90</sup> The objectives of the species protection system have continued to centre on the prevention of cruelty and collecting. See for example the restrictions in the WACA on certain methods of killing considered to be cruel, and the licensing requirements for collecting. There is also an element of rarity involved, indicated by the differing protection afforded to birds in the schedules; however, this is merely an element of the problem of collecting.

growing public interest in the quality of the rural environment and a concern for its protection, and this concern is expressed not simply for those areas of the finest scenery like the national Parks which are subject to landscape designations, but for the countryside as a whole".

When the NPACA was enacted, the way that conditions would change, particularly in relation to agriculture, was not anticipated. The population grew instead of a forecast decline, a more affluent, space-demanding and mobile society evolved and agriculture underwent its second revolution. This has had obvious implications for the conservation of nature, yet this seems to have been ignored in the choice of protection. "The threat to wildlife posed by changes in the use of farmland was first discerned between the wars, and in 1944 the NRIC described farming as the most serious threat to wild plants and animals. But most observers believed the extensive reclamation of land during the war would end once peace returned. The ploughing up of old grasslands and the exploitation of marginal timber reserves would cease" (Sheail,1976:222). Writing in 1945 A.G. Tansley commented that "the total loss has not been very severe, and it is offset by the gain in the agricultural arena. It is scarcely probable that the extension of agriculture will go much further, for the limits of profitable agricultural land must have been reached in most places" (Tansley,1945:63). This attitude towards agricultural development influenced the content of much post-war legislation. No restrictions were placed on land reclamation or afforestation in the Town and Country Planning Act of 1947<sup>91</sup>. "This meant that the notification of Sites of Special

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<sup>91</sup> Farmers and foresters did not have to seek the consent of local planning authorities before ploughing up old pasture, installing under-drains or felling woodland.

Interest was completely ineffective in preventing ... fundamental changes in land management taking place on key biological sites" (Sheail,1976:222). The 1947 planning system, on which we effectively still rely for the protection of habitats, "is powerless to resolve many rural conflicts, with its lack of control over the operation of major land activities and its emphasis upon land *use* rather than land *management*" (Davidson,1974a:313). As Rose (1986b:68) points out, "the designation was introduced at a time when the NC felt that allusions to the scientific utility of nature conservation sites would be most persuasive with local and national governments. As years passed ... the SSSI became less and less relevant".

### CONCLUSION

The objectives of protection do not seem to have been determinants in the choice of mechanism. Thus hypothesis 2 is not proved positively and cannot explain the adoption of the voluntary approach, particularly as the method and the objectives seem to be contradictory. However, as the objectives for species and habitat protection were different it is possible for a negative proof to be made to explain why criminal sanctions were not used. However, the purposes of habitat protection, although different from those for species protection, could have been achieved by criminal sanctions. Thus a negative proof regarding criminal sanctions is not made when considering the purpose of the controls.

## CHAPTER 5

### HYPOTHESIS 3

Just as interest groups were important in the introduction of the early species protection legislation<sup>1</sup> it is also likely that they were influential in the introduction of the WACA. A large number of groups were involved with the passage of the WACA. The focus will be on the larger groups as it would be impossible to assess the influence of every group that had an interest in the Act. As a guideline, the groups consulted by the DoE were the Water Space Amenity Commission, British Ornithologists Union, British Trust for Ornithology (BTO), British Waterfowl Association, Committee for Environmental Conservation<sup>2</sup>, Council for Nature, Council for the Protection of Rural England (CPRE), Country Landowners Association (CLA), Fauna Preservation Society, Friends of the Earth (FOE), Game Conservancy, National Farmers Union (NFU), National Trust (NT), Royal Society for the Protection of Birds (RSPB), Society for the Promotion of Nature Conservation (SPNC), Wildfowl Trust and World Wildlife Fund. To assess their influence it is first necessary to ascertain how any influence may have been brought to bear. It is, therefore, necessary to distinguish the types of group involved. According to Rush (1990:9), this "has important implications for the way in which groups operate and in the attitude of government towards them".

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<sup>1</sup> See Chapter 4.

<sup>2</sup> Which became Wildlife Link.

## 1) TYPES OF PRESSURE GROUP

A classic distinction between types of pressure groups is between sectional and promotional groups<sup>3</sup>. Sectional groups promote and protect the specific economic interests of their members and include producer groups. Promotional groups generally have an exclusively political function (Miers & Page,1990) promoting the 'cause' of the members. They "promote or defend legislative or administrative change for ideological reasons rather than to forward their members' particular financial interests" (Marsh,1983:3). Of the groups involved, the NFU can be categorised as a sectional group. The environmental groups are promotional groups (Brookes & Richardson,1975).

In addition to different types of groups, there are different theories of interest group intermediation, corporatism and pluralism. Thus the constitution of the groups can be theorised in two ways. It is therefore necessary to attempt to determine the influence that various groups had and how this differed according to whether they were themselves operating under corporatist or pluralist methods of intermediation.

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<sup>3</sup> Also sometimes called respectively economic and ideological groups. Grant (1978) argues that this distinction is inappropriate, preferring instead to classify groups as insider or outsider. However, this draws on issues of access and presupposes corporatism as the dominant intermediation system and, as will be seen later in the chapter, it is not necessarily so straightforward. So for the purposes of this chapter, the sectional/promotional distinction will be used.

## **2) CORPORATISM**

### **2)a) Definition**

There seems to be no agreed definition of what corporatism is. This fact is recognised by Williamson (1989:7) who comments that "there is no minimal descriptive definition shared by one and all as to what constitutes corporatism"<sup>4</sup>. Many definitions have been proposed over the years as theories on corporatism have evolved<sup>5</sup>.

Williamson (1989:16) proposes two usages of the term corporatism. The first is "interest intermediation as a mode of organising and controlling functional interests", the second is "as a mode for making and implementing public policy". However, the proposed approaches to corporatism are wider even than this. Cawson (1986:22) proposes three approaches to corporatism based on theories of political economy. The first definition is "a novel system of political economy, different from capitalism and socialism"; the second is "a form of state within capitalist society, where corporatism is seen as emerging alongside and then dominating a parliamentary state form"; and the third is "a distinctive way in which interests are organised and interact with the state".

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<sup>4</sup> This ambiguity can be seen particularly in articles such as Cox et al (1986a), referring specifically to the NFU where there is a lot of emphasis on self-regulation as a requirement of corporatism. As will be seen later in this chapter, this is not an essential requirement of corporatism although its existence is a strong indicator that a corporatist bargain has been reached.

<sup>5</sup> The development of corporatist theory is considered by both Williamson (1989) and Cawson (1986) and will not be discussed here.

This divergence is recognised by Lewis (1990:63), who comments that "work on corporatism has varied between that which sees the phenomenon as heralding a new state form, as one among competing theories of the state, as a contribution to the problems inherent in social theorising, and, more humbly, as one among several possible forms of policy intervention".

The range of theories to choose from is therefore wide. However, Cawson argues that his third category is the most convincing<sup>6</sup> and this is consistent with Lewis's preferred definition of corporatism as a form of policy intervention and a combination of Williamson's categories. This idea of corporatism as a method of policy implementation is also favoured by Birkinshaw (1990:25) who claims that corporatism represents "a third force in terms of government strategy in distinction to 'state' and 'market'"<sup>7</sup>.

The idea of corporatism as a way in which interests interact with the state for the purposes of policy intervention involves a fusion of interest representation and policy implementation. This is consistent with the classic definition of corporatism proposed by Schmitter (1979). According to this, corporatism is a "system of interest representation in which the constituent units are organised into

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<sup>6</sup> Although the grounds on which he dismissed the first two categories are questionable as they presuppose that the third definition is the correct one and thus the arguments are flawed. For example see page 23 where he dismisses the first category on the basis that Thatcherism used non-corporatist devices, but this argument only works if the definition of corporatism is category three and it falls down if category one is actually the correct definition.

<sup>7</sup> For the purposes of this chapter, however, the focus will be on corporatism as a form of interest intermediation rather than as a form of intervention or implementation. The WACA represents a hybrid between bureaucratic and market intervention and corporatist self-regulation does not play a role.

a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories, recognised or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports" (Schmitter,1979:13)

This definition focuses more on the interest *representation side and less on policy intervention*, but the intermediation and intervention sides can be treated separately<sup>8</sup>. If they are taken together "it is not a question of interest groups persuading the government of a preferred policy, which is then implemented by civil servants as government policy. Rather, leaders of functionally organised interests negotiate agreed policies with state officials and agencies, and part of that negotiation is that the same leaders agree to implement those policies through their ability to bind the actions of their organisations' members" (Cawson,1986:25). However, implementation is not a crucial component of a corporatist bargain, although it is important. The ability to self regulate, for example, means that a group is more likely to be afforded representational status.

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<sup>8</sup> As will be seen later, it is arguable that intervention is an ancillary side and self regulation is not a necessary component.

## **2)b) Levels Of Corporatism**

### **2)b)i) Macro Level**

This is the level that has traditionally received the most discussion among theorists. It relates to "the highest level of aggregation within the nation state, around the functions which different socio-economic classes perform in the division of labour" (Cawson,1986:72). This therefore concerns intermediation at a national level with the peak organisations of capital and labour. Most discussions of this level relate to economic planning<sup>9</sup>.

These so called 'peak organisations' are not just, for example, a trade union of electricians, which may have a representational monopoly in that particular sector, but an organisation encompassing all such trade unions across the class. According to Cawson (1986), one of the main factors limiting the applicability of macro corporatism in Britain is the inability of organisations to enforce their decisions, because the constituent units are in competition. This therefore limits effective implementation of policy bargains negotiated by the peak organisation<sup>10</sup>.

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<sup>9</sup> See for example Winkler (1975)

<sup>10</sup> Because the ability to self regulate is not present.

## 2)b)ii) Meso Level

The definition of meso-corporatism is somewhat less clear. Cawson (1986) focuses upon the nature of the group involved, whereas Williamson (1989) focuses upon the issue involved.

According to Cawson (1986), meso-corporatism concerns sectoral interests, whereas macro-corporatism involves class interests. Classes are derived from the relationship with the means of production. Sectoral interests form part of these classes. "Different branches of production give rise to different sectoral interests which may be organised into such bodies as employers' organisations and trade associations" (Cawson,1986:72).

Williamson argues that meso-corporatism is not about the type of body concerned but about the issue concerned otherwise it would be possible to have cross-level corporatism if different types of group are concerned with the same issue. According to Williamson (1989:159), "meso-corporatism occurs where there is sectoral differentiation in intervention, either within the framework of broad industry-wide policy or as a consequence of a sector-specific policy". It therefore focuses on the effect rather than the process of intermediation. Williamson therefore argues that if the "actual or intended intervention was industry-wide in its scope this would be an example of macro-corporatism" (Williamson,1989:159). Of these two approaches, Cawson's is the more popular and is consistent with the distinctions made earlier between types of group.

### **2)b)iii) Micro Level**

State agencies negotiate policy directly with firms. "Public policy is agreed through direct negotiation with producers" and "is implemented through such firms agreeing to modify their actions, that is, they agree to undertake certain tasks (such as make particular investments in particular places, or not make redundant particular workers) in exchange for grants, incentives or other such inducements" (Cawson,1986:74). Examples of micro-corporatism are present in land use planning (Jowell,1977) with firms negotiating directly.

### **3) PLURALISM**

A criticism often levelled at theories of corporatism is that the characteristics identified as corporatist can be explained equally well using pluralism as a model. To distinguish corporatism and pluralism a definition of pluralism is necessary. Again there is no agreed definition but that proposed by Schmitter (1979:15) is a "system of interest representation in which the constituent units are organised into an unspecified number of multiple, voluntary, competitive, non hierarchically ordered and self determined (as to type or scope of interest) categories which are not specifically licensed, recognised, subsidised, created or otherwise controlled in leadership selection or interest articulation by the state and which do not exercise a monopoly of representational activity within their respective categories". The use of the term 'state' is somewhat erroneous as pluralists do not use this concept. The use of the word government in its place gives a more accurate definition.

With pluralism, large numbers of groups compete for members and resources. The more members a group has, the more resources it has. This is because "the leadership of a group which can point to a large following can persuade political leaders that it might have an important effect on electoral processes, and that favourable policy decisions might shift electoral support behind those politicians who are seen by the members to favour their interests" (Cawson,1986:29)<sup>11</sup>.

With pluralism the government has a limited role of allocating resources. The allocative decisions reflect "the balance between the interest groups within society at any given time. As such, while interest groups may make continuing representations to government, which may even become institutionalised, the government remains independent of, and opposed to, too close contact with the interest groups" (Marsh,1983:2).

#### **4) DISTINGUISHING PLURALISM AND CORPORATISM**

The existence of corporatism is dependent upon the type of group involved<sup>12</sup>. As has already been mentioned, pluralism involves multiple competitive groups, whereas corporatism requires some form of monopoly of representation. According to Cawson, there are two criteria to be fulfilled to classify bargaining as corporatist rather than pluralist. The first is if the lobby has a monopoly

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<sup>11</sup> So a group with monopoly representational status is likely to be a corporate group and is likely to have many political resources with regard to pluralism and so will be of influence in both models.

<sup>12</sup> This fact justifies the earlier adoption of Cawson's categorisation of meso-corporatism rather than Williamson's.

representative capacity. The second is "the political cohesion ... to itself act as the administrative partner of the state, disciplining and controlling its membership to accept the compromises worked out in negotiation with state agencies" (Cawson,1986:36). This means that the distinction between pluralism and corporatism is that "the corporatist relationship between state agencies and organised interests is two way; the pluralist relationship is one-way - from the group to the state - in that policy implementation is the preserve of the state. Under a corporatist arrangement interest organisations are an integral part of the administration; they are not merely consulted over the implementation of policy" (Cawson,1986:37). This second requirement is also stressed by Cox et al. (1986a:475) "What is crucial to corporatist intermediation is the direct link with regulation, whereby representative interest groups assume some responsibility for the self-regulation and disciplining of their own constituency in return for the privileges afforded by their relatively close relationship with government". However, this emphasis on self-regulation as a requirement for corporatism is incorrect. As mentioned earlier, the intervention side of corporatism can be treated separately.

Associations play an important role "in implementing public policy in terms of ensuring compliance, but they do not necessarily entail the associations acting as implementation structures, certainly not in any predominant role" (Williamson,1989:212). If they do self-regulate this is just a more developed form of corporatism. "If the essence of corporatism is an institutionally stable set of arrangements for the mutual advantage of both public and private actors, then

securing the implementation of 'public' tasks by private parties would seem to represent corporatism with a vengeance" (Lewis,1990:74).

According to Williamson (1989) it is the ability to influence the members of the group so that they comply with the bargain that has been negotiated that is important<sup>13</sup>. Implementation by the interest association is an extra but this is not the same as ensuring members' compliance. To secure this compliance, the association "will have serious sanctions to wield, and will also have important bargaining resources with which to confront members. In addition, it may have some not insignificant authority because, while it imposes decisions on the members, it is at one and the same time protecting them from something possibly worse - direct state regulation.... The potential threat in specific instances may be enough to encourage most producers to avoid the risk and go along with the more amenable self-regulation by their associations" (Williamson,1989:211). All that is necessary is the ability to self-regulate by that group so that it is afforded representational status. However, the existence of self-regulation is unnecessary to classify a bargain as corporatist.

In addition, account must be taken of the distinction between types of group as to their purpose. The functional or economic interest groups have the ability to become corporate groups when they are near a monopoly situation regarding

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<sup>13</sup> As will be seen later in the chapter, this is the reason why many corporatist relationships ceased in the 1970s when the trade unions concerned were no longer able to secure compliance by their members.

representation of interests in that functional category<sup>14</sup>. Cause or ideological groups will not become corporate groups and will operate under pluralist processes. Thus "different systems of interest intermediation apply to the two types of group. For example, while the recent expansion in the number of groups has occurred in the ideological field, it is the economic groups which in the main have been incorporated into a more formal decision-making process and which as such have had most chance to influence policy" (Marsh,1983:3).

This distinction can also extend to the type of issue involved. According to Cawson (1986:36), corporatism does not include bargaining on "the content of legislation before parliament, which is then implemented through bureaucratic or legal structures". This process should "be seen as part of those pluralist processes which remain an important part of the political life of liberal democracies". Thus a mixture of corporatist and pluralist approaches is possible. As Lewis (1990:64) points out, "it is not only possible but common for both pluralist and corporatist styles of political behaviour to be found within the same functional state activity. Indeed, modern politics at large will operate with both styles of intervention and representation".

In addition to the possibility of a mixture of pluralist and corporatist approaches in any given area it is also important to note that pluralism and corporatism are not strictly alternatives but different processes that are end points on a continuum.

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<sup>14</sup> In this situation they are likely to be able to influence their members for the purposes of implementation

Thus it is possible with a mixture of approaches for neither of them to represent the ideal types as portrayed in Schmitter's definitions but rather to be classified as more like one than the other.

## **5) APPLICATION TO BRITAIN**

Before considering the possible influence of interest groups on the formation of the WACA it is necessary to consider whether corporatist or pluralist processes were operating in Britain generally in 1981 and as such at which end of the corporatist/pluralist continuum intermediation was operating.

The expansion in the number of ideological groups documented by Marsh (1983) might suggest greater use of pluralist intermediation. However, in the economic field the number of groups has declined and their contacts with government have become more formalised which would suggest a more corporatist approach.

As was mentioned earlier, it is possible to have a mixture of approaches in use. This is because intermediation patterns vary among different policy communities, with corporatist intermediation more likely in economic policy making than in social policy making. In addition, in any one area intermediation may vary between the groups involved with perhaps only one group enjoying a corporatist relationship with the state. Also, these relationships are subject to change over time as a consequence of changing political and economic circumstances. It can, therefore, be difficult to state categorically the nature of intermediation generally in Britain or even within a single policy community. As Cawson (1986:126)

points out, corporatism "may ebb and flow at different periods with respect to different policies and interests" and there is not necessarily a development to increasingly extensive macro-corporatism. There is evidence of the existence of limited macro-corporatism in Britain looking at the TUC and CBI and also to some extent the NEDC (Metcalf & McQuillan, 1979; Marsh, 1983) although this was declining when the WACA was introduced<sup>15</sup>.

One description applied to Britain at the macro level is that of corporate pluralism<sup>16</sup>. Corporate pluralism represents an intermediate point on the continuum. A corporate sphere of groups can be identified but representational monopoly has not been achieved. These corporate groups "are frequently consulted by governments, in the stages both of policy formation and implementation, but their role falls short of being an instrument of implementation through their capacity for self-regulation" (Cawson, 1986:42). With the continuing importance of pluralist processes promotional groups "can exert, at least in the short term when issues are alive, considerable influence upon policy by campaigns and mobilisation" (Cawson, 1986:42).

Middlemas argues that in the period 1911-1945 Britain displayed a 'corporate bias', which can be equated to corporate pluralism, which attained its high point during the second world war (Middlemas, 1979)<sup>17</sup>. However, Jordan (1981) argues

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<sup>15</sup> See later discussion of the decline of corporatism under Thatcher.

<sup>16</sup> Or neo corporatism.

<sup>17</sup> It was at this time that the NFU's statutory representational status under the Agriculture Act 1947 was created.

that the UK is not corporatist. This argument seems to be based on a misconception of corporatism, focusing only on the macro level. Jordan focuses on interaction with the government and has an extensive discussion of cabinet responsibility. This means that the concentration is on interaction at later stage in the process of policy formation than we are concerned with here, and is on access rather than influence. This approach also adopts the idea of pluralism and corporatism as extremes and not as a continuum. It is important to distinguish the relationship between pressure groups and elected governments which Jordan focuses upon and the relationship between the state and corporate groups that we are concerned with. Corporatism involves both representation and intervention.

It is generally accepted that the UK shows a corporate bias (Middlemas,1979) or is neo-corporatist (Lewis,1984). Recognition of the different levels of corporatism means that corporatist bargaining doesn't need to be tripartite in nature, as it is at the macro level, to be corporatist, there just needs to be interest intermediation. The position along the pluralism/corporatism continuum therefore depends on the policy area involved and the level at which it is being scrutinised. As Cawson (1986:78) points out, there is "evidence for corporatist practices in specific sectors even where corporatism may be weak or non-existent at the macro level".

When the Thatcher government came to power in 1979, it was against a background of increasingly corporatist trends in the British state. The Thatcher administration is often portrayed as representing the demise of the corporatist state, with the destruction of the power of representative groups. According to

Holliday (1993), however, the corporatist regime was already collapsing by the end of the 1970s, even before Thatcher's interventions.

These corporatist relationships were breaking down as a result of a combination of factors. Most corporatist relationships were with trade unions, which encountered difficulties in ensuring that members complied with agreements. These difficulties and the consequent breakdown of the authority of the corporatist relationships can be seen in the problems encountered during the winter of discontent<sup>18</sup> with the collapse of incomes policies that were central to the operation of macro-corporatism. As Holliday (1993:309) points out, "organised interests in Britain were not sufficiently organised to ensure that liberal corporatism worked". The relationships were therefore declining before Thatcher took office.

The Thatcher government was committed to reversing the corporatist trend<sup>19</sup>. It sought to redefine the relationship between the state and the economy. This involved limiting the functions of the state<sup>20</sup> to restore its authority. This was because it saw the expansion of the state as having caused political bargaining to replace market exchange. According to Gamble (1989a), to create a free economy and a strong state the politicisation of decision making, which was the

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<sup>18</sup> The winter of 1978-1979 when groups of workers rebelled against the wage restraint policies to which the national representatives had acceded.

<sup>19</sup> The government deliberately strove for the marginalisation of most representative groups, but most particularly of the TUC

<sup>20</sup> Which had been extended during the social democratic era

consequence of state intervention, had to be reversed<sup>21</sup>. Therefore, the primary intention of the government was the rolling back of the state by reducing government intervention in the economy, thus promoting the free market<sup>22</sup>. A range of techniques was used in pursuit of this goal, including the extension of property ownership, privatisation and the attempts to dismantle corporatism<sup>23</sup>.

A strong state, with authority at the centre, did not need to seek consensus about its policies. The reliance on collaboration by organised interests was seen as an indicator of a weak government. "The whole ethos of government changed, from policy making by consensus to a more centralised mode" (Holliday,1993:309). The old consensual approach was categorically rejected, but little ground was made on reducing the state. The Thatcher Government continued to run an extended state despite proclaiming a limited one<sup>24</sup>. Consultation with groups did not cease immediately. In some areas it continued as before for a number of years. Even several years on, corporatist relationships were not totally abolished.

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<sup>21</sup> As well as the traditional liberal commitment to a market economy, this reflected a party political calculation. The Conservatives found it difficult to run a state in which the trade unions played a key role in policy making.

<sup>22</sup> However, the commitment to a free economy was always subordinated to the aim of restoring the state and ensuring Conservative dominance within it. For a detailed *discussion of these issues* see Chapter 7.

<sup>23</sup> These techniques were not all deployed from the start. Initially, the focus was on the dismantling of corporatism and in the mid to late 1980s the privatisation regime came into play. See Gamble (1989b) for details.

<sup>24</sup> Notwithstanding this, they approached policy problems as if the state were limited and excluded the possibility of collaboration which was often required to implement their policies. A good example of this was the poll tax. Of course not all areas would have benefited from consultation. Some changes (such as legislation on the trade unions) would have been very difficult to make by consultative means. However, in some cases a more corporatist approach would have served Thatcherism's own ends.

Business interests seemed to fare better under Thatcher than the trade unions. In particular, the CBI maintained its access to government throughout the Thatcher decade<sup>25</sup>. "Corporate bodies that included trade unions were more likely to be downgraded than those (like the professional bodies, agricultural boards, and City institutions) that did not ... and if a corporatist or quasi-corporatist form provided a means for increasing business influence, there would be no qualms about using it" (Crouch & Dore,1990:36). So, although many organised interests have been marginalised, some have maintained their contacts with government and new groups have become involved. As Gamble (1989a:18) points out, government "has freed itself from the clutches of some lobbies and special interests, but by no means from all. Rather it has become beholden to a different set of organised interests and lobbies. Like its predecessors, too, it finds itself obliged to manage its empire and to promise superior performance and effective delivery of services". Crouch and Dore give the example of the Farming and Wildlife Advisory Group, which has "assumed a central role in persuading farmers and landowners to adopt conservation practices" (Crouch & Dore,1990:31), as one of these new groups.

Despite this continuation of corporatism, the relationships with these groups were on a different level. Thatcher tended to consult, if at all, on an ad hoc basis. This consultation was no longer due to representative status but because "the broad trend of government policy happened to favour some interest groups above others" (Holliday,1993:312). The government would use corporatist forms when they

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<sup>25</sup> This can be explained by the CBI's support of the government once it realised that monetarist policies favoured industry. The CBI adapted to the new style of interaction with the government whilst the unions continued to attempt access as they had in the heyday of British corporatism.

provided "a useful adjunct to its own authority" (Crouch & Dore,1990:36). Thus the prevailing doctrine of the time did not totally destroy corporatism, but it was substantially dented<sup>26</sup>. As Holliday (1993:308) points out, "there is no doubt that liberal corporatism no longer functioned with Thatcher in power"<sup>27</sup>.

The decline in corporatism meant that most groups have had to rely instead on pluralist intermediation such as direct lobbying. According to Lewis and Wiles (1984:78) "success at the new lobbying partly depends on being ideologically in tune with the government". As can be seen from the debates on the WACA<sup>28</sup>, the NFU and the government were in agreement on the use of the voluntary approach and market mechanisms<sup>29</sup>.

## **6) APPLICATION TO THE WACA**

A large number of groups were involved with the WACA. Their influence may have differed depending on whether they were in a corporatist relationship with

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<sup>26</sup> For example, the NEDC, commonly regarded as the primary institutional embodiment of British liberal corporatism, though not abolished, was substantially downgraded in importance.

<sup>27</sup> At the end of the Thatcher administration, many groups had substantially diminished power and influence but those most seriously affected were the trade unions. By the time Thatcher left, trade union membership was down, strikes were at their lowest levels for half a century and trade union access to government was substantially reduced. From a position of 13.5 million trade union members in 1979, in 1995 there were only 7.2 million

<sup>28</sup> Discussed in chapter 6.

<sup>29</sup> The lobbying continued after the Act in respect of the code of guidance on SSSIs and the financial guidelines for compensation for farmers denied agricultural grants. The NFU and the CLA were involved with the development of both, unlike the conservation groups which were not consulted until after the drafts had been published. This again represented the close corporatist relationship which the NFU maintained with the government, giving them the ability to exert influence from an early stage.

government or were operating within a pluralist arena. As can be seen from the previous discussion either situation is possible because such a mixture is common and because of the move from corporatist practices to pluralist practices in certain policy areas.

#### 6)a) Corporatism

Of all the groups involved in the WACA only one, the NFU<sup>30</sup>, is a sectional group and seems even to approach the criteria necessary to be classified as corporatist<sup>31</sup>. Grant (1983) claims that the NFU is one of the most effective pressure groups in Britain, because it represents an industry having received more state aid than any other outside the state sector. This has been achieved "without any sacrifice of decision-making autonomy on the part of the individual producer ... by a group that is too small in size to exert a significant influence on the outcome of elections and which does not have the direct economic sanctions available to, say, the City of London or a key trade union" (Grant,1983:129). Their influence does not therefore stem from possessing the political resources necessary for influence under a pluralist model.

A comparison of the NFU with Schmitter's definition of corporatism<sup>32</sup> is favourable. There is, of course, no exact match, but that is no bar to a

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<sup>30</sup> For an interesting discussion of the special characteristics of the agricultural industry in the UK and the USA see Wilson (1977).

<sup>31</sup> Monopoly representation, stable access to the state, capacity for self-regulation.

<sup>32</sup> Discussed above: section 1a.

classification of the NFU as a corporate group. Schmitter's definition represents an ideal type, and if the idea of a continuum between pluralism and corporatism is used, the NFU's relationship with MAFF appears to be very definitely towards the corporatist end. As Grant (1983:130) points out, "in a country in which libertarian traditions help to prevent interest groups acting as intermediaries between the state and their members in the corporatist fashion, the relationship between farmers and the state comes closest to an effective working corporatist arrangement". Indeed Cawson (1986) gives agriculture as an example of a sector in which meso-corporatist practices are dominant. One of the major advantages possessed by the NFU is its size and membership. Holbeche (1986) estimates that 85% of farmers are members of the NFU. According to Grant (1983:129), the NFU is "the largest sector specific employers' association in Britain"<sup>33</sup>. All of this points to a near monopoly representative status.

In addition to this, the NFU has a statutorily based, negotiating relationship with the state under the Agriculture Act 1947. According to Cox et al (1986a:480), "the 1947 Agriculture Act laid the foundation proper for corporatist arrangements in agriculture". The Act requires the government to consult 'such bodies of persons who appear to them to represent the interests of producers in the agricultural industry' when setting subsidies. This has been interpreted to mean the NFU. "This has been recognised as a major, if not the pre-eminent, example

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<sup>33</sup> In 1992 B Holbeche, the parliamentary adviser of the NFU, estimated that the NFU had around 100,000 members (pers.comm.)

of corporatism in British industry, entailing both representation and self-regulation of agricultural interests" (Cox et al,1986a:480).

Although it was argued earlier that self-regulation is not a necessary component in the classification of a relationship as corporatist, it is a good indicator of that fact. The NFU does, in fact, self-regulate quite successfully<sup>34</sup>. According to Metcalfe and McQuillan (1979:277), "the NFU devotes considerable time and resources to resolving internal differences among subgroups in the farming community". This ensures members' compliance with agreed policies and thus justifies their status as a corporate group. As Grant (1983:131) points out, "such a corporatist arrangement can only continue to work if the NFU is able to discipline its own members so that they abide by arrangements arrived at with government and generally co-operate with the implementation of government agricultural policy. On the whole, it has to be said that the NFU has done this job well, indeed more effectively than any other industrial association".

According to Cox and Lowe (1984:149), the relationship between the NFU and the state "has enabled the farming community to retain a strategic advantage in the framing of legislation even in the face of increasingly strident and articulate criticism". So their corporate status may well have been influential in the framing of the WACA. However, their representational status under the 1947 Act relates to agricultural matters. Their relationship is therefore with MAFF. The WACA

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<sup>34</sup> Although this element is not present in the WACA.

was drafted by the DoE and does not directly concern agriculture. Thus this is outside their corporatist relationship with MAFF.

However, Grant (1983) argues that the NFU's influence does extend beyond purely agricultural matters and encompasses areas such as taxation policy. In addition, Cox and Lowe (1984:155) claim that the NFU has "more extensive dealings with the Department [*of Environment*] than most conservation groups, on matters such as the protection of agricultural land, town and country planning, minerals, pollution control and water management". This point was made by Holbeche (Pers.comm) who stressed the importance of contacts between the DoE and the NFU that had been in place since the Porchester Report. This was reinforced by consultation on the failed Labour Countryside Bill 1978. Thus the NFU had good communication links with the DoE.

However, account must be taken of the Thatcherite move away from corporatist structures. The WACA was introduced by the Thatcher government and as such it must be considered whether the NFU's corporate status suffered under the Thatcher regime, thus affording it less influence that might earlier have seemed possible. The first point to note is that the 'internal' problems of the trade unions of ensuring members' compliance, which partly led to the demise of their corporate status, did not affect the NFU, which was highly organised and had for years ensured compliance with agreements<sup>35</sup>. However, it was subjected to the

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<sup>35</sup> See Cox et al (1990a) for details of the NFU's activities in this respect.

'external' problems associated with the election of the Thatcher government with the outright attempts to dismantle corporatism.

The NFU were, however, one of the groups to benefit from the continued contact with limited numbers of groups. The reason given for this by Crouch & Dore is the link with the European Community in respect of agricultural regulation. As a consequence "corporatist structures in agriculture have been left largely intact" (Crouch & Dore,1990:31). Another explanation is that the NFU are more akin to the business interests than the trade unions and business interests fared much better under Thatcher.

Any decrease in the power of the NFU in the Thatcher years seems to have been salvaged by their ideology matching the government's, giving the NFU influence in lobbying. They may also have been saved by the fact that many in government are farmers and there is not the same pressure to destroy the power of the NFU as the other major trade unions. The NFU were more akin to the CBI than the trade unions and the CBI retained influence. The Government was "most decisive in pressing home its attack upon those institutions in British society which lend support to the Labour Party and to the regime of social democracy". Changes were "pushed through because they brought important strategic gains to the Conservatives, and helped consolidate their dominant electoral position" (Gamble,1989:16). The NFU did not represent a threat to market mechanisms and did not lend support to the Labour Party.

According to Grant (1983:130), "one benefit of such a corporatist arrangement from the farmers' viewpoint, apart from the fact that it effectively involves them in the process of agricultural policy formation, is that legislative control of the farmers is used only as a last resort". However, according to Cox et al (1986a:486), "the NFU finds it expedient, in some cases, to accept or even advocate the imposition of formal controls on farmers". Cawson (1986) argues that such bargaining on legislation is not corporatist but pluralist. However, this ignores the benefits to be gained by the imposition of such controls. The legislative control usually includes benefits and incentives as part of the package and this would seem consistent with the controls introduced in the WACA with management agreements. The reason Cox et al (1986a:486) give for this approach by the NFU is that it gains "considerable influence over both the form of controls and the manner of their administration. At the same time it avoids the strains on its own authority that any attempt to discipline its own members would entail".

The corporate status of the NFU could, therefore, have been influential in the framing of the WACA. As Marsh (1983:8) points out, even in the environmental area, the NFU is "closely incorporated in the decision-making process while the environmental groups invariably operate as outsider groups". These environmental groups "inhabit the very different, competitive sphere of politics" (Cox & Lowe, 1984:151), i.e. they operate under pluralist processes.

## 6)b) Pluralism

The ideological groups involved in the WACA definitely do not have corporate status and their efforts are "more visibly directed towards influencing the media and lobbying MPs" (Miers & Page,1990:40). Conservation groups "are not of central importance to the effective performance of government or the economy and consequently do not have the close symbiotic relationship with senior civil servants which corporate interest groups enjoy" (Cox & Lowe,1984:155). Their main involvement is therefore at a later stage in the legislative process than the corporate groups. "Where the group has not had the opportunity of expressing its views previously, its influence will depend, in part, on the stage of the preparatory process at which it is consulted and, in particular, on whether it is consulted before the principles of the legislation have been settled" (Miers & Page,1990:42). As the parliamentary adviser to the NFU pointed out, "there is no question that once a piece of legislation reaches Parliament you may be able to tinker around the edges, but the prospect of getting any significant changes are very remote indeed... therefore it makes it that much more important to seek to try to get it right before it ever enters Parliament" (Holbeche,1986:46).

According to Brookes and Richardson (1975:319) it is "essential for groups to ... establish a consultative relationship whereby their views on particular legislative proposals will be sought prior to the crystallisation of the governments' position. Failure to influence policy formation at this stage relegates the groups' role to that of fighting a rearguard action at successive stages of the policy-making process". This point is also stressed by Walkland (1968:38) who argues that "the most

effective time for groups to operate is after a decision to legislate has been taken, but before a Bill has actually been drafted and published. Once the Government has publicly committed itself to the main lines of a Bill, disagreement and opposition by interested parties can only usually be manifested by public or Parliamentary campaigns, which groups are not well-fitted to undertake". The NFU's ability in this respect is also much greater. Grant (1983:132) notes that "when the CBI decided to improve its parliamentary lobbying arrangements in the late 1970s, it modelled its system on that of the NFU".

Even if bargaining involving legislative control is categorised as pluralist, the NFU are at an advantage over the other groups. The NFU are very proficient at lobbying as can be seen from the passage of the Act documented in the next chapter. According to Lewis and Wiles (1984:78), "success at the new lobbying partly depends on being ideologically in tune with the government". The NFU and the government were in agreement on the use of the voluntary approach. So even if pluralist structures were in use, the NFU is still likely to have had more influence than other groups.

With regard to lobbying, the NFU has the additional benefit of contact with the back bench specialist agriculture committees. As Grant (1983:132) recognises, "the importance of these committees is enhanced by the number of MPs, particularly on the Conservative side, who are farmers or who have other agricultural connections"<sup>36</sup>. In contrast, the ideological groups are dependent to a

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<sup>36</sup> The importance of this will be shown in the next chapter discussing the parliamentary phase.

great deal on the NCC and the Countryside Commission and, as has been argued by Cripps (1979), their influence was extremely limited. The only involvement of the promotional groups in the pre-parliamentary stage was in response to the consultation papers. Given that no changes were made to the approach between the publication of the consultation paper and the publication of the Bill, it seems that the promotional groups had no influence at this stage.

#### **6)c) The Intermediation Process: The Pre-Parliamentary Stages**

As mentioned above the pre-parliamentary stages are really the most important period in which to influence government policy. This gave an automatic advantage to the NFU whose corporate status meant that they were consulted before the promotional groups. According to Cox and Lowe (1984:156) "within days of the Conservatives taking office, both the CLA and NFU had separate meetings with Agriculture and Environment ministers to discuss their legislative plans". The government announced its intention to introduce the WACA the following month. The NFU were therefore able to influence the policy from its inception. Indeed even the government's statutory advisers on conservation, the NCC, were not consulted until the public consultation phase. The proposals were drafted by civil servants in the DoE's rural directorate and not the NCC. The only promotional group to be consulted before the publication of the consultation papers was the RSPB. This is because they were closely involved in the formation of the EC Birds Directive and their European officer was a member of the Commission's expert committee responsible for the implementation of the Directive.

According to Holbeche (pers.comm), the government were unsure of their approach so the NFU pushed towards the voluntary approach. This influence may have been decisive, although the government may well have had favoured policy options of which this was one. Consultation Paper Number 4, which concerned the conservation of habitats, was published by the DoE in August 1979 and was emphatic in its recommendation of a voluntary approach. The proposals made in Consultation Paper Number 4 were to "take measures to ensure that practices which might threaten sites are notified by the owner or tenant in order to avoid the possible destruction of habitats without the issues being carefully examined in the interests of the Nation as a whole". This represents a perfect summary of the voluntary approach introduced in the WACA. It therefore seems that no change took place after the publication of this document<sup>37</sup>, despite responses by promotional groups as to the inappropriateness of this approach. Indeed, it was only at this stage that the promotional groups became involved in the process. The RSPB had "major reservations on the proposals" which they considered would be "most harmful" (CPRE archives 1979 80). An information paper published by the DoE in August 1980 claiming to have taken account of such responses reproduced the same scheme for habitat protection. This all seems to point to the validity of the claim by Cox and Lowe (1984:163) that "the relationship between the [*farming*] industry and government made possible a corporatist solution, and the political strength of the agricultural lobby ensured that this option was adopted, even in the face of a critical public opinion".

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<sup>37</sup> In fact, as will be seen in the next chapter, changes to the extent of the controls did occur but the underlying philosophy of voluntariness was not changed.

## 7) CONCLUSIONS

The NFU seems to have been influential in the early stages of the legislative process for the WACA in promoting the voluntary approach as the underlying philosophy of the Act. However, this did not determine the exact controls introduced as changes were made during the parliamentary phase<sup>38</sup>. The corporate status of the NFU enabled them to enter the policy process at the earliest possible point. The promotional groups who were operating under pluralist intermediation were not involved until much later and were therefore much less influential.

However, even though the NFU were involved at this early stage, this does not necessarily provide an explanation for the introduction of the voluntary approach. If this was to represent an approach 'forced' upon the government by the NFU, there would surely be some form of benefit to the government in making this bargain otherwise they would have adopted their own preferred approach. Self-regulation by the NFU would represent such a benefit. However, there is none involved in the operation of Part II of the WACA so that there is seemingly no benefit for the government. As Lewis (1990:64) points out, "it is the bargaining element that is crucial; gains for both 'state' and interest groups, though not necessarily in the same measure, must be present". This may indicate that the government was already committed to this approach and that the NFU were merely in accord with this. As access to government records on this subject is not

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<sup>38</sup> These are documented in chapter 6.

possible it cannot be said categorically whether the NFU had any real influence or not. They certainly had the opportunity, but opportunity to influence and actual influence are of course different things. According to Richardson Jordan and Kimber (1978:61), "where policy making emerges from a relationship as close as the agricultural lobby and MAFF it is difficult to give the pedigree of any one idea". As Holbeche (1986,44) pointed out, "although it is nice to have this reputation of being effective if you look at the evidence we lose far more cases than we win". Thus hypothesis 3 is not proved.

## **CHAPTER 6**

### **HYPOTHESIS 4**

This chapter tests hypothesis 4. This hypothesis is that Parliament and pressure groups influenced the choice of the voluntary approach. The proposed protection for habitats in the Wildlife and Countryside Bill was contained in clause 26<sup>1</sup>. In the explanatory memorandum to the Bill, the clause<sup>2</sup> was described as enabling the Secretary of State to "make orders designating areas which are of special interest by reason of their flora, fauna or geological or physiographical features, and requires notice to be given of certain proposed operations and time to be allowed for taking appropriate action". However, its application was intended to be restricted, giving protection through the advance notification system to only a small number of sites that satisfied certain criteria. These became known as 'super-SSSIs'.

#### **1) THE INFLUENCE OF PARLIAMENT**

Legislatures can be categorised as either 'arena', in which debate is conducted and issues are aired, but few decisions of any substance are taken, or 'transformative', which play a much more active role in policy making. Drewry believes that the UK Parliament belongs to the former category because a Parliament "is for talking

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<sup>1</sup> Clause 27 contained the provisions for compensation if an order was made.

<sup>2</sup> As originally published.

rather than doing" (Drewry,1993:154). This view of the UK Parliament as an arena legislature is also held by Punnet (1976:217), who comments that "the legislative function of the Commons is limited to the discussion, perhaps the amendment, and then the final approval of Bills that are introduced by the Government"<sup>3</sup>. It would therefore seem that Parliament's only function regarding legislation is discussion of its contents.

However, such a view is perhaps rather simplistic. Norton (1984) takes an intermediate position and argues that Parliament falls into the category of a 'policy-influencing' legislature, able intermittently to reject or even amend executive inspired measures<sup>4</sup>. Griffith also believes that Parliament exerts an influence on some Government Bills. However, he believes that the result is usually a close match to the Government's intentions (Griffith,1974). Adopting the intermediate position, Parliament does have influence but it is very limited and usually within parameters set by Government. On the other hand, Griffith & Ryle (1989) contend that many policy changes are made as a result of parliamentary pressure<sup>5</sup>.

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<sup>3</sup> The reason Punnet gives for this is Government domination of the Commons timetable and the assured Government majority in the House.

<sup>4</sup> He does not contend that this is a permanent position. He traces the role of the House of Commons and shows that the role as a policy influencing legislature came to the fore in the 1970's. The legislature is still not a transformative one but is now fairly effective at policy influencing.

<sup>5</sup> They give the example of a point raised in standing committee in the Commons about which nothing is done. The point is taken up in the Lords and eventually the government agrees to it and an amendment is made. They regard this as a classic example of policy change.

However, it is almost impossible to quantify the influence of Parliament because "much of it has to do with the invisible deterrent effects of Parliament upon ministers, who may shrink from the prospect of having to justify an unjustifiable policy in public" (Drewry,1993:155). So much of Parliament's influence is invisible and nothing to do with the process of debate, thus making it difficult to categorise our legislature. Because of the limitations of the formal parliamentary system, it is sometimes considered that the important part of the parliamentary period is not the formal mechanisms of examination of the Bill in debate but the informal meetings and discussions that go on (Griffith,1974). This view accords with that of Mr Saxton of the DOE Wildlife Division who commented that "It appears much debate was conducted in the 'corridors' of the House" (personal letter,7-9-1994). This is also recognised by Adams, who sees the debates reported in Hansard as "but the tip of the iceberg as regards what was really happening during the passage of the Bill" (Adams,1986:94).

Punnet regards this as a consequence of legislative procedure. "Before it is presented to Parliament its proposals will be examined by the Cabinet, a cabinet committee, the department of state concerned, and any sectional interests which may be affected. These discussions behind the scenes may be continued during much of the Bill's passage through Parliament, and in many cases they are of more practical significance than is the parliamentary process" (Punnet,1976:226). It must also be remembered that the stage of parliamentary debate is less important and politically significant than the period before publication of the Bill. According to Griffith (1974), the most important part of the process (in terms of the form of control that will be introduced) is the public consultation period, when

the Government are consulting with interested parties. This is when the proposals are most likely to be significantly changed. After this point, substantial changes are unlikely, particularly as Ministers may see themselves as committed to the approach. The extension of protection from a limited number of 'super-SSSIs' in the original bill to all SSSIs in the final Act may be regarded by some as a substantial change. However, the reliance on the voluntary approach was not changed. Indeed, the Secretary of State for the Environment introduced the Wildlife & Countryside Bill with the comment "we are not prepared, as a Government, to support amendments that would change this basic approach" (Hansard,HC,27-4-81).

The basic approach is formulated during the usually long period between the problem attracting Government attention and the introduction of the Bill, which is why the pre-parliamentary phase is so important. As pointed out by Ashford (1981:44) "in so far as there is a deliberative stage in the legislative process, this is now found much earlier than the parliamentary stages, in the interplay between political parties, pressure groups, Departments and cabinet". This means that "failure to be closely involved with policy formation at its pre-public stage often means an uphill campaign at later stages against courses of action to which officials and major interests are committed" (Cox & Lowe,1984:155). The early consultation of the NFU and CLA has already been discussed in the previous chapter and there was obviously great scope for influence at this time.

However, it is purely the influence of the debates that we are concerned with here, how the process changed the proposals on habitat protection. This influence

seems to be much easier to determine than influences before this point or of parliamentary deterrent effects because there were a number of changes made to the Wildlife and Countryside Bill during the parliamentary phase and much of the lobbying by groups was very visible.

The decline in the importance of Parliament in the legislative process is explained by Miers and Page as a result of increased pressure on time and the parliamentary workload. Thus consideration of legislation has to be supplemented by "consultation and negotiation with outside groups both before and during the parliamentary stages of the legislative process" (Miers & Page,1982:137). By the time the Bill is presented to Parliament, "ossification is well advanced" (Griffith,1974:14). So, once published, "challenges to the fundamental thrust of any Government promoted bill face considerable difficulties" (Cox & Lowe,1986:60). In particular, the Government's majority means that it is "seldom compelled to withdraw or to substantially modify measures, and that it is even less frequently defeated" (Miers & Page,1982:136)<sup>6</sup>. Such a state of affairs means that any amendments ministers may wish to make seem to be concessions to the opposition. However, even these changes "will invariably be of a marginal nature and certainly will not in any way revise its main principles" (Cox & Lowe,1983:48). The influence of Parliament is therefore limited. As will be seen, the voluntary approach was extended in its application to cover all SSSIs and this can hardly be regarded as marginal, however, the conservationists could not

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<sup>6</sup> Because of this, it is safely assumed that a government can obtain the passage of virtually all the Bills that it introduces. This is true also of amendments. See for example the table of government bills in Walkland (1968).

persuade the Government to abandon the use of the voluntary approach. The main principles remained intact.

This view of the inability of Parliament to influence legislation to any great degree is reinforced by the perceived weakness of the procedures in standing committee and committee of the whole House. Because of the format of formal speech followed by formal speech, only a superficial examination really takes place. Ministers are able to evade questions and it is very difficult to make a Minister shift his ground (Griffith,1974). Mackintosh believes that the debates "merely give the opposition a chance to reiterate its objections ... the procedure is admirably adapted to permit the opposition to make its case several times over and for the Government to explain the virtues of the measure an equal number of times. What the procedure does not permit is an exploration of alternative approaches, an understanding of the views of outsider groups (unless they think it worth briefing MPs) and there is no scope for public opinion to form and react before the Government has committed itself to a definite approach to the problem" (Mackintosh,1977:141).

However, Griffith (1974) contends that the process of debate is different for those issues that are seen as socially important<sup>7</sup>. When considering these issues, debate in committees is more intense. The examination is more to do with the underlying principles of the Bill than with the detailed phrasing of clauses. This could possibly be said to reflect the passage of the WACA, which was subject to intense

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<sup>7</sup> He gives the examples of race relations and housing.

debate. However, he does not contend that this lively debate actually changes anything. Though he recognises that Parliament can have an impact, that Government can be flexible, this is "largely on their own terms or, very rarely, when the opposition to some part of their proposals is strong and widespread" (Griffith,1974:256).

So it seems that our Parliament is essentially an arena legislature because most decision making takes place before Bills reach Parliament. However, it does have transformative features, but generally on the Government's terms or when the issue is very contentious or opposition widespread. As will be shown, this model reflects the position in relation to the passage of the WACA. Amendments were made<sup>8</sup> to the proposals for habitat protection but the voluntary approach remained the central tenet of the Act, despite strong opposition. Drewry (1993:168) notes that "it should be remembered that, in the 1980s, with the Thatcher Government facing little effective resistance in the Commons where it had very large majorities, the House of Lords played a very significant role in checking the Government". Indeed it was the Lords that passed the 'Sandford' amendment, only for it to be removed later in the Commons<sup>9</sup>. However, Punnet (1976:227) contends that "the vast majority of changes that are made to Government bills during their passage ... are a result of amendments proposed by ministers themselves". Table 1 in Appendix 1 shows that this contention is *prima facie*

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<sup>8</sup> 2300 amendments were tabled for the Act as a whole.

<sup>9</sup> See later discussion of the report stage in the Lords and Standing Committee D in the Commons.

correct in relation to the WACA, however, its validity will be tested later in this chapter.

## **2) PRESSURE GROUP INFLUENCE**

As mentioned in Chapter 5, pressure groups can be classified as two types, (1) sectional groups & (2) promotional groups. Sectional groups are those where the attitudes of the members result from common characteristics e.g. all members are farmers, and are capable of corporatist relationships with the state. Promotional groups are those in which all members share certain values e.g. preservation of the countryside, which operate within a pluralist framework. Of the two types, sectional groups tend to be more powerful politically because of the nature of the sanctions that they can use and the groups' usefulness to Government (Ball,1977)<sup>10</sup>.

These pressure groups can operate on a number of levels: activity can be in relation to the executive<sup>11</sup>, Parliament or the general public. According to Punnet (1976:140), "of these three levels of activity, pressure on the Government and the civil service is the most direct and important sphere of influence, as the concentration of constitutional authority in the hands of the central Government, and in the executive machine particularly, means that pressure on Parliament and

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<sup>10</sup> This is often related to the likelihood of corporatist relationships which give more influence.

<sup>11</sup> As it is with corporatist relationships.

the public is only used as a means of indirectly influencing the Government"<sup>12</sup>. This phenomenon is also recognised by Ball (1977:108) who states that "as a general rule, with the increase in executive power and area of responsibility in the twentieth century at the expense of the legislatures, pressure groups will attempt to concentrate their activities at administrative levels". Thus, influence at the pre-parliamentary stages is much more significant than that during the parliamentary phase. This gave an automatic advantage to the NFU because they had access at the earlier stages<sup>13</sup>.

As Punnet (1976:142) recognises, "Government consults with interested parties before legislation is produced, and the information provided by these interests is often essential in the preparation of a Bill". Examples of this include the consultation of the NFU and the consultation of the RSPB on Part I of the Bill<sup>14</sup>. According to Punnet this pressure can be discreet and hidden, making it more effective and this can certainly be said of the NFU. The principle seems to be that "most noise equals least success" (Punnet,1976:141). As Ball (1977:109) comments, "pressure groups activity at parliamentary level is generally more spectacular and less secretive, but it is doubtful whether the publicity it receives is always commensurate with its importance".

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<sup>12</sup> This is consistent with the declining importance of Parliament in influencing legislation as discussed earlier.

<sup>13</sup> This is detailed in the previous chapter.

<sup>14</sup> This was very important as the RSPB had been involved with the Birds Directive.

If groups do not have such direct access, pressure is normally applied through Parliament. The committee stage provides scope for furthering a cause when the details of legislation are under consideration. However, the greatest chance of influencing legislation in Parliament is when party alignment is broken. There are also *informal ways of influencing Government*, because many ministers are or were members of pressure groups<sup>15</sup>. This fact was utilised by many conservationist groups. The CPRE, for example, produced a list of peers and MPs who might look favourably upon their standpoint (CPRE archives 1980-81). In determining the influence of groups, "the degree to which a group maximises its potential membership and the extent to which similar interests are divided between rival organisation are important" (Ball,1977:113). An example of this is the NFU which has nearly 85% of all farmers in England and Wales as its members (Holbeche, pers.comm.). On the other hand, the conservation groups are widely spread, many having overlapping aims and the membership is thus diversified. Monopoly of representation is therefore important in pluralist as well as corporatist frameworks.

When considering the role of lobbying during the parliamentary phase it is therefore necessary to recognise that little is usually achieved at this stage. However, conservation had always been regarded as a non-political issue, making it more likely that the groups would have influence<sup>16</sup> because voting would not be strictly on party lines.

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<sup>15</sup> Many Conservative MPs have strong farming links.

<sup>16</sup> This view of conservation as non-political was soon destroyed (Caufield,1981).

### 3) LOBBYING DURING THE PARLIAMENTARY PHASE

Lobbying was intensive throughout the passage of the Act. Conservation groups were faced with the considerable lobbying expertise and extensive parliamentary contacts of the NFU<sup>17</sup>. The conservationists were disadvantaged by the strength of the NFU and CLA as any amendment opposed by them was unlikely to succeed<sup>18</sup>. Therefore, the RSPB, RSNC and NCC held informal discussions with the NFU and CLA to discuss their objections and to ascertain which proposals may be blocked.

Because of its resources, the NFU was able to undertake the most extensive lobbying. It was the only group to be present at all stages of the Bill's passage through both Houses. It had three representatives from land use division working full time on the Bill. Their lobbying was closely co-ordinated with that of the CLA, to present a united front. The emphasis in parliamentary briefs, of which there were 13 from the NFU and 10 from the CLA, was on goodwill and voluntary means. Formal constraints were regarded as "wholly negative and a threat to efficiency" (Lowe et al,1986:140). Their position was strengthened by their involvement in the drafting of the Bill and they presented voluntary means as

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<sup>17</sup> As the range of a group's parliamentary contacts is strongly correlated with its income, reflecting the expense involved in any extensive lobbying, the NFU were in a strong position. See Lowe & Goyder (1983).

<sup>18</sup> In fact there were two exceptions to this, 215 at Commons report and the Sandford amendment 173ZB at Lords Report. However, the Sandford amendment was removed in the Commons standing committee D and 215 was only conceded because of lack of parliamentary time. See Appendix 1.

being the only acceptable approach. However, central to this was the requirement of sufficient funds to implement the legislation. The concern of the farming community was that if the funds were not made available, and thus the voluntary approach did not work, this would be seen as a lack of co-operation on their part.

The leading conservation groups<sup>19</sup> each had a member of staff with prime responsibility for the Bill. The RSNC was the only group to use an experienced lobbyist. The RSPB and RSNC worked closely together, the former taking the lead in relation to Part I of the Bill, the latter on Part II. The CPRE and CNP, worked together on part II of the Bill<sup>20</sup>, issuing joint briefing papers and press notices. Despite this co-operation, there was no consensus on the Bill among the conservationists. Landscape and amenity interests achieved a consensus on the need for order making powers to protect areas of landscape or wildlife interest and a new system of agricultural grants and subsidies<sup>21</sup>. This even went so far as proposals being agreed with the Countryside Commission. However, they were rejected by the Nature Conservancy Council.

Such an approach was typical of the NCC who were extremely reticent. Lacking staff and resources they took essentially a pragmatic approach to the Bill. According to Lowe et al(1986:141), the NCC "found its expression in adjustments of position and demand according to perceptions of administrative feasibility and

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<sup>19</sup> The CPRE, the CNP the RSPB and the RSNC.

<sup>20</sup> Continuing the co-ordination they had developed for the Labour Countryside Bill of 1978.

<sup>21</sup> To encourage farm enterprises which might contribute to conservation in addition to food production.

the politics of the possible and, given the philosophy so firmly embedded in the Bill, it necessarily conceded most of the arguments of the farming and landowning community". They were lobbied by voluntary groups to change this. However, as Caufield (1981:295) points out, "the anomaly of appointing landowners to decide public policy on nature conservation continues to give rise to potential conflicts of interest"<sup>22</sup>. A large proportion of appointment to the NCC were, and are, from farming backgrounds (Lowe,1983a).

Despite their status as a statutory bodies, the NCC and CC acted in many respects as lobbying groups<sup>23</sup>. The CC took the approach of co-operation plus safeguards. The voluntary approach was accepted as generally acceptable but the need for reserve powers was stressed, to cope with farming mavericks. FOE and some of the Labour opposition took a 'rejectionist position'. They argued that farming operations should be brought within the ambit of planning controls, because the two sets of values, institutions and interests were opposed. However, the majority of amendments tabled by the opposition that were designed to extend protection were based on the voluntary approach. The consistency of approach in, for example, amendments 167A at Lords Report, 354 337 in standing committee D and 69 at Commons Report, to extend protection to all SSSIs is somewhat surprising. It seems to indicate a degree of pragmatism as to what would be

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<sup>22</sup> Though she also points out that the NCC had done its duty by calling publicly for statutory controls for all SSSIs.

<sup>23</sup> Briefing MPs at informal meetings and through circulated papers, formulating and seeking support for amendments, issuing press releases and briefing journalists.

accepted. The voluntary approach was already firmly established and the only option was to extend or alter its remit.

#### **4) THE PARLIAMENTARY DEBATES**

##### **4)a) Introduction Of The Bill**

On 25-11-80 the Wildlife and Countryside Bill was published. The following day, the DOE issued a press notice stating that "powers are to be sought for Ministers to make orders requiring advance notice of specified operations on selected sites of special scientific interest". It was this limitation of protection to only a few 'selected' sites that caused most concern and the Bill's publication was swiftly followed by criticisms from a number of groups.

The Exmoor Society claimed that "The conflict between agricultural improvement and nature and landscape conservation is not resolved by the Bill. The Ministry of Agriculture provides grant aid for farmers that positively encourages them to intensify their land management and destroy wildlife". "The Bill does not go far enough to protect SSSIs. It has been proposed to select a few SSSIs nationally for special powers of protection. The SSSIs themselves are, however, already a very limited selection of sites and if the national heritage of wildlife is to be conserved, all SSSIs should be afforded greater protection". The society did not believe, however, that even the protection proposed for the limited number of sites would be enough because it was reliant on management agreements. "The evidence of the working of management agreements shows up their long-term weakness. They are unsatisfactory in their failure to protect areas of interest. The

compromises involved in management agreements have led to losses of important habitat which must be avoided" (CPRE archives, letter of 12-12-80). The CPRE and the CC therefore proposed amendments to extend protection to all SSSIs and to include 'natural beauty' as a ground for designation. These proposals were not accepted by Michael Heseltine. In a letter to the CC on 15-1-81 he indicated that changes were unlikely: "our policies underlying this part of the Bill are what they are" (CPRE archives 1980-81).

The Wildlife Link Committee<sup>24</sup> met on 11-12-80 and members were advised to concentrate on asking Conservative peers to table amendments for them. A summary of the Committee's views was produced which called for notification of damaging activities on all SSSIs. It also proposed that grant aid should not be given for drainage, land-clearance etc. on SSSIs and that the protection in clause 26 should be available to all sites and not just a selected number.

On the 12-12-80, the NCC published a press release that also expressed concern at proposals to protect only a few selected sites. "The NCC welcomes the intent of the recently published Wildlife and Countryside Bill to strengthen the protection of wildlife and its habitats. It is concerned, however, that the proposals to protect only a selection of SSSIs do not go far enough". The press release also criticised the controls that were currently in place and would be the protection for the majority of SSSIs. "These arrangements do nothing to protect SSSIs from

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<sup>24</sup> Part of the Council for Environmental Conservation which includes *inter alia* RSPB, RSNC, FOE and Greenpeace.

changes in land-use such as intensification of agriculture (e.g. land drainage, ploughing of old pastures and application of pesticides and fertilizers) or afforestation, because these are not subject to planning control. Existing non-statutory consultation arrangements with the Agriculture Departments, the Forestry Commission and other public bodies are inadequate safeguards".

As noted by Hugh Clayton in an article in the Times on 10-12-80, there was "concern among conservation lobbies that the powers in the Bill have been weakened after pressure from farmers' unions on a Government in which many ministers own farms". He believed that "the Bill has been received with quiet satisfaction by the National Farmers Union and the Country Landowners Association". This satisfaction did not, however, extend to all such groups. There was concern from the Timber Growers England & Wales about lack of consultation and the absence of an appeals procedure (TGO press release 27-11-80).

#### **4)b) Consideration In The Lords**

The Bill was scrutinised first in the House of Lords. This procedure was used, partly because of pressure on the parliamentary timetable, and partly because of the idea that conservation is not a politically contentious issue. This was seen as favourable to the conservation groups because of the possibility of indirect influence as "many hereditary peers are large landowners and have a personal interest in many aspects of rural conservation and historic preservation. Secondly, party links and party discipline are much weaker in the Lords than in the

Commons" (Lowe & Goyder,1983:69) and influence is much greater when party alignment is broken<sup>25</sup>. However, it was later seen as a tactical mistake. Cherfas and Caufield (1981:675) commented that "the Wildlife and Countryside Bill was intended to be a non-controversial, bi-partisan piece of protective legislation, but it has met nothing but trouble since its introduction into the House of Lords last autumn". A Government MP admitted "we sent it there first because the department had two major bills in the last session and we thought we could save time ... we didn't realise that it would get so bogged down there" (Caufield,1981:294)<sup>26</sup>.

#### 4)b)i) Second Reading

The second reading debate started on 16-12-80. The CPRE had prepared parliamentary briefing notes for this debate that claimed: "the Bill misses opportunities for effective action rather than seizing them" and that "the Bill displays undue sensitivity to agriculture". They called for extension of clause 26 to all sites. The RSPB produced a general background brief for Lords second reading and worked with RSNC throughout Part II.

According to Lowe, "three-quarters of those who spoke in the second reading debate were landowners, knowledgeable about, and not unsympathetic towards

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<sup>25</sup> Although as noted earlier, it was still considered desirable to persuade conservative peers to table amendments for the groups.

<sup>26</sup> This delay became crucial later when the opposition resorted to threats to talk the Bill out.

farming. The majority were also office-holders in conservation groups" (Lowe et al,1986:141). The debate and criticism were extensive<sup>27</sup>, and many of the issues raised were to reappear on numerous occasions during the passage of the Bill.

#### 4)b)i) Committee

On 27-1-81 the Bill went to consideration at committee. The question of limiting protection to only selected sites was raised again by the Royal Town Planning Institute in their parliamentary briefing paper of January 1981: "the limitation of the order-making procedure to 'certain' areas of special scientific interest is too restrictive and too bureaucratic. Since all SSSIs are, by definition, areas where the characteristics of the site should be conserved, it is inadequate to limit the notification of operations threatening sensitive sites to a selection of SSSIs. This selection would involve yet another formal designation procedure. In its present form the Bill would, by creating two tiers of SSSI, effectively downgrade the priority afforded to non-designated SSSIs, and would add to the work involved in assessing the justification for designation".

This sentiment was echoed by the NCC in a press release of 11-2-81: "the NCC is calling for prior notification of activities inimical to nature conservation for all SSSIs; so that there will be a limited period during which the NCC can negotiate with the owner for a management agreement with financial incentives. This

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<sup>27</sup> See for example Hansard HL415 cols. 983 - 996, 1006 - 1094.

procedure for advance warning would in fact be in line with the current arrangements for grants for agricultural improvement on SSSIs".

At the same time, loss & damage statistics of SSSIs were published (Goode,1981). The NCC survey suggested about 13% of SSSIs suffered damage to their wildlife interest every year. "As the Government's advisors on conservation, the disparity between their data on the rapid rate of damage to sites and the Government's refusal to introduce stronger measures to protect them was obvious and politically embarrassing" (Adams,1986:101). The Government's response was that "any damage arose from a lack of knowledge or understanding by individual farmers of the wildlife importance of their land, rather than from any wilfulness or inexorable pressures" (Lowe et al,1986:143)<sup>28</sup>.

Five amendments<sup>29</sup> were made to clauses 26 & 27 in committee, although two of these were merely consequential amendments<sup>30</sup>. The three substantive amendments were all proposed by the Government. Amendment 376A restricted the conditions upon which an order under clause 26 could be made<sup>31</sup>. Amendment 387A, which was linked to 376A, introduced the requirement of national importance before a site could be designated, and extended liability for damage on

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<sup>28</sup> These figures did, however, cause the government embarrassment and may well have been a factor in the tabling of amendment 167ZA at report which allowed for the preparation of voluntary codes for the protection of all SSSIs.

<sup>29</sup> For details of all amendments see Appendix 1.

<sup>30</sup> 402A & 405A were consequential upon 387A.

<sup>31</sup> The national interest was no longer relevant.

such a site beyond merely the owner or occupier to any person<sup>32</sup>. However, in (2)(b) it introduced the requirement of specifying in the order any damaging operations. The other successful amendment was 427 relating to clause 27 that merely provided for Scotland regarding tribunals.

A large number of amendments proposed by conservationists were withdrawn on the promise of Government action. Examples include: amendment 376 imposing a requirement of notification by the NCC of the features of interest and PDOs which would apply to all SSSIs<sup>33</sup>, amendment 389 which extended liability for damage to action on adjoining land<sup>34</sup>, amendment 410 which removed the possibility of imprisonment as a penalty<sup>35</sup>, amendment 411 which provided for restoration of damaged sites<sup>36</sup>, amendment 413 which provided for registration as a local land charge<sup>37</sup>, and amendment 426 which proposed to restrict the availability of compensation<sup>38</sup>.

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<sup>32</sup> This was more due to the difficulties of defining owners/occupiers than any wish to extend liability - see Hansard HL417 12-2-81 col. 324, Earl of Avon.

<sup>33</sup> This was incorporated into the successful government amendment 167ZA at report after pressure from the NFU & CLA.

<sup>34</sup> This was raised again at report as amendment 167BA but the government decided not to act after this.

<sup>35</sup> At report this was achieved by the successful government amendment no. 167BC.

<sup>36</sup> This was again raised by Lord Melchett at report as amendment 167C and was finally successful as the government amendment 77 at third reading.

<sup>37</sup> This was later incorporated into the new Section 28 in the Commons and in Section 29 in amendment 365

<sup>38</sup> This reappeared as 167E at report but no further action was taken.

#### 4)b)iii) Report

The Bill went to report on 10-3-81. The next day the NCC issued a Press release stating that "the chairman of the Nature Conservancy Council, Sir Ralph Verney, has today written to the Secretary of State for the Environment to say that the council is giving public support to the all-party amendment on the Wildlife and Countryside Bill whereby the NCC would be notified of all threats to Sites of Special Scientific Interest and given the opportunity to seek voluntary agreements over the land". "The need for a mechanism ensuring prior notification to NCC of potentially damaging activities is further emphasised by the final results of the NCC survey of SSSIs for the year 1980. This shows that agricultural activities, including the cessation of traditional management, are the principal cause of damage to biological SSSIs". The amendment referred to was 167A, which was ultimately unsuccessful, the Government amendment 167ZA being agreed to instead.

At the report stage three amendments were successful. The Government amendment 167BC removed the possibility of imprisonment as a penalty<sup>39</sup>. The other Government amendment was 167ZA, which involved the insertion of a new clause providing for the notification to owners, of all SSSIs, of the special interest of the site and PDOs, and for the preparation of a voluntary code<sup>40</sup>. This code of

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<sup>39</sup> This stemmed from amendment 410 at committee proposed by Lord Middleton, Lord Stanley of Alderley, Earl de la Warr and Earl of Caithness.

<sup>40</sup> The notification requirement was based on amendment 376 at committee proposed by Lord Buxton of Alsa and Lord Craigton. The introduction of a voluntary code of guidance was partially due to the publication of loss and damage statistics.

conduct was provisionally welcomed by the NFU and CLA as long as adequate funds were made available. However, the conservation groups did not regard this as adequate protection, they wanted powers to prevent destruction on SSSIs.

The major success in the Lords was amendment 173ZB proposed by Lord Sandford<sup>41</sup>. This proposed to allow MAFF to make grants for conservation purposes. It was agreed to on a vote of 48 to 46<sup>42</sup>. Lowe et al (1986:142) believe that "the Government and the NFU were caught unawares, having not fully appreciated the significance of the amendment, and having assumed that it would be withdrawn .... In the event, the Government's defeat was regarded as a major tactical victory for the conservationists, but MAFF ministers and officials saw the new clause as a totally unacceptable intrusion upon agricultural policy and resolved to emasculate it later in the passage of the Bill"<sup>43</sup>.

#### **4)b)iv) Third Reading**

On the 30-3-81 the Bill went to third reading in the Lords. Only two relevant amendments were passed here. The first successful amendment was number 77, a Government proposed amendment, which provided for restoration of damaged

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<sup>41</sup> An influential Conservative peer and former Minister.

<sup>42</sup> As can be seen from the number voting the House was not well attended at this stage.

<sup>43</sup> It was later removed by the Commons Standing Committee and replaced with NC49.

sites designated under section 29<sup>44</sup>. The second successful amendment was number 82, which provided for water authorities to consult with the NCC<sup>45</sup>.

#### **4)c) Commons**

The Wildlife Link Committee met on 14-4-81, before second reading in the Commons, to discuss their tactics. They provided their members with lists of sympathetic Conservative MPs to contact about SSSI protection. There had been a meeting with the NCC on 2-4-81 where they considered writing to the Council for Europe to ask for a ruling on whether the Bill met its requirements on habitat protection, but nothing came of this proposal. Wildlife Link decided to continue pressure for protection of all SSSIs as in the all-party amendment proposed at report in the Lords<sup>46</sup>.

Before the start of the commons stages, the NCC produced a note on their views of the Bill. In this it called for registration of all SSSIs as local land charges and for reciprocal notification of intended activities on all SSSIs. It did not believe that the voluntary code in clause 28 would be effective. "The code will have the statutory backing of Parliament but there will be no penalties to deter those who chose to ignore it. The NCC has advised Government that a Code of Conduct, even backed by the landowning and farming organisations, would not be effective

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<sup>44</sup> This was based on amendments 411 (committee) and 167C (report).

<sup>45</sup> This was based on amendment 177A at report.

<sup>46</sup> Amendment 167A.

in restraining either that small minority of farmers who care nothing for conservation or those who feel, in present economic circumstances, they have no option but to maximise production". In relation to clause 29, they called for, inter alia, order making powers for the Secretary of State through which the owner or occupier could be prevented from proceeding with an activity on payment of compensation .

The NFU also issued a parliamentary brief for the second reading in the Commons. In this they praised the voluntary approach, giving their full support to the voluntary code. However, in response to calls for full protection for all SSSIs they claimed that "the introduction of compulsory notification of agricultural operations on all SSSIs would be likely to result in the unnecessary antagonism of a section of the farming community which has generally indicated its willingness to reach voluntary agreements for conservation purposes"<sup>47</sup>.

The Bill went to second reading on 27-4-81 and it was indicated that the Government intended to reverse a number of changes (such as the Sandford amendment) made to the Bill in the Lords<sup>48</sup>.

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<sup>47</sup> Despite their opposition, such controls were introduced in government amendment 215 at Report in the Commons.

<sup>48</sup> For example see the speech of Mr Heseltine at Hansard HC3 col. 532 - 533: "Although I am very sympathetic to what is known as the Sandford amendment, I do not believe that the use of the agricultural grants machinery is the appropriate vehicle".

#### 4)c)i) Committee

On 12-5-81 the bill went to Standing Committee D, which consisted of 21 MPs. According to Cox and Lowe (1983:66), "when the members of standing Committee D were named, environmental groups expressed their disappointment, that back bench Conservatives, who had expressed their support for the conservation case in the second reading debate, had not been selected". Because of the limited number involved in standing committee D, lobbying was restricted in Commons and was away from the attention of the media<sup>49</sup>. Because of the stated Government intention to reverse changes made in the Lords, voting in the committee was on party lines. According to Caufield (1981:296) conservationists were powerless "in the face of an unyielding Government with a large majority of obedient backbench MPs". Thus the tactics of groups such as Wildlife Link to approach Conservative MPs was abandoned in favour of the opposition.

One thing was in the conservationists' favour, time. The Bill was pushing close to the end of the parliamentary session and the opposition threatened to talk it out<sup>50</sup>. This was designed to "force the Government either to accede to conservationists' demands about amendments to the Bill or else lose the bill altogether" (Cherfas & Caufield,1981:675). As Mr Tam Dalyell pointed out "The opposition would prefer to see the Bill reach the statute book. That is our preferred position, but we

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<sup>49</sup> Unlike the extensive cross-bench lobbying which occurred in the committee stage in the Lords, and which had attracted much publicity.

<sup>50</sup> They were able to do so because of the royal wedding - this meant that the House would rise on 24th July (Cherfas & Caufield,1981).

do not want it at just any price. Candidly, what will determine our attitude towards the timetable will be the Government's attitude towards the Sandford amendment ... we would be prepared to try to put the whole Bill in jeopardy by forcing the Government to go back to the floor of the House for a guillotine motion" (Standing Committee D,12-5-81,col 3). He even went so far as to state that "were a statement to be made this week or early next week that Ministers are prepared to retain the spirit of Sandford, Ministers and Back Benchers might be astounded at the succinctness and comparative brevity of our arguments" (Standing Committee D,12-5-81,col 4). However, to a substantial degree, the Government outmanoeuvred the opposition. This was done "with unkept promises that various amendments would be considered, principles upheld and spirits observed. By the time the opposition realised that the Government's responses were not going to be satisfactory, the Bill was as good as through its committee stage" (Caufield,1981:296).

The successful amendments were all Government sponsored. They were amendment 365 introducing registration as land charges for NCOs in Scotland<sup>51</sup>, 409 removing the Sandford amendment and NC49 replacing the Sandford amendment, described by Adams as "an anodyne clause requiring the Minister of Agriculture to consider the aims of conservation" (Adams,1986:103). Instead of enabling MAFF funds to be used for wider purposes than agricultural production, the new clause simply required the Minister of Agriculture when considering grant applications to further the aims of conservation, but only in so far as may be

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<sup>51</sup> 413 at Lords Report, 414 at Lords report and 202 proposed by the opposition.

consistent with the agricultural purposes of a scheme. This was met with the comment from Tony Jones of CPRE and Fiona Reynolds of CNP: "having promised to retain the spirit and purpose of the Sandford amendment, Government presented the House of Commons with a treacherously emasculated version. The MAFF grant remains restricted to the narrow profit-oriented purposes of agricultural business" (Countryside Campaigner, Jan. 1982). The new clause also required an authority that objected to a grant to offer a management agreement.

This change pleased MAFF who were the main pressure behind this amendment, and the CLA and NFU who were constantly emphasising the resource implications of goodwill. They "welcomed the measure as providing the necessary financial safeguards and recompense for farmers affected by conservation objections" (Cox & Lowe, 1984:160). However, it was a double blow to the conservationists; not only had the duties of the Minister of Agriculture been severely curtailed, but it also seemed to give farmers a legal right to agricultural grant-aid<sup>52</sup>.

On 12-6-81 the NCC had published a press release stating that "the NCC welcomes the Government's decision during the Commons Committee stage to reconsider these issues: namely habitat protection (SSSIs), agricultural grants (the Sandford amendment), Marine Nature Reserves and the duties of water authorities. Of particular importance is the need for owners and occupiers of

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<sup>52</sup> Since if they are denied aid on conservation grounds they must be compensated for the resulting hypothetical 'losses' from budgets of the conservation agencies. This was one of the issues hotly debated when the Standing Committee's amendments were considered by the Commons in July.

SSSIs to inform the NCC of any intention to carry out potentially damaging changes of land use". They believed that if these improvements occurred the Bill would "represent a major contribution to nature conservation in Britain". Of these, the reciprocal notification requirement for SSSIs was accepted in the report stage, Sandford was removed and replaced with a new clause in a severely altered form, MNRs were accepted, and duties were imposed upon water authorities in NC30 on report. The NCC were fairly successful and it is arguable that they should have asked for more. Though there is the possibility that the NCC felt that it should only ask for that which it could achieve rather than asking for full protection which it was highly unlikely to get.

#### 4)c)ii) Report

On 13-7-81 the Bill went to report. As Lowe et al (1986:144) point out, "by this stage, conservationists had redefined their objectives to those changes which they considered the minimum necessary to make the Bill acceptable". On 7-7-81 the NCC had circulated a parliamentary brief asking again for reciprocal notification on all SSSIs<sup>53</sup>, justifying it on the grounds that it would put the NCC in a better position to advise the Government on the need for a clause 29 order. It achieved this with a requirement of three months notice being imposed in amendment

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<sup>53</sup> Currently, such notification only occurred in relation to grant applications. This was because in August 1980 new procedures for capital grants were introduced which meant that prior approval from ADAS was not needed. This meant the loss of advice on safeguarding wildlife. The concession made was that if the application was in relation to an area in a NP or SSSI the landowner must consult NPA or NCC. This introduced the idea of notification by farmers but the NCC and the conservation groups wanted to extend this to all potentially damaging operations, not just those for which grants were applied for.

215<sup>54</sup>. This provision altered the context of NCOs. They would now be applied when "an irretrievable breakdown of voluntary negotiations on any SSSI" occurred, rather than "just to safeguard a strictly limited number of sites as the Government had intended" (Lowe et al,1986:145). However, this amendment was not welcomed by the NFU and CLA. They had very definite views on what would constitute excessive control and this was it. On hearing of the Government intention to table this amendment the CLA declared in its parliamentary briefing, "the Government has now abandoned the voluntary approach". The NFU said that it must "state its disappointment that the Government has appeared to have withdrawn its previous commitment to a voluntary procedure"<sup>55</sup>.

Other concessions were the registration of SSSIs as a local land charge<sup>56</sup>, and the requirement of three months' notice to an owner/occupier of intention to designate as an SSSI<sup>57</sup>. According to Lowe et al (1986:146), "the NFU and CLA had pressed for this right of appeal, though they were unhappy that the appellate body was to be the NCC and not an impartial body". Compensation was also provided for any depreciation in land value resulting from the imposition of an NCO and

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<sup>54</sup> Caufield attributes this success to the time card being again played by the opposition, working this time because of calls for an emergency debate on the riots.

<sup>55</sup> Given the lengthy discussion before the Act between the NFU and the Government on the form of controls, and their professed commitment to it, the NFU was understandably unhappy. However, the voluntary approach was not really affected by this provision, but the NFU's objections may have been based on the worry that the Government would make further concessions to the conservationists. In fact, it was contended by Caufield that the NFU were quite prepared to accept the principle of reciprocal notification, and that it was the secret cabinet committee dealing with the Bill (headed by William Whitelaw and including Francis Pym - both substantial landowners) who were the sticking point.

<sup>56</sup> Included in amendment 215.

<sup>57</sup> Amendment 214.

losses from the prohibition on certain activities<sup>58</sup>. There was also an increase in the amount of fines in section 31<sup>59</sup>. Other successful amendments were NC31 replacing Sandford for SSSIs, NC 32 providing for a voluntary code for SSSIs as this had been removed from clause 28 by amendment 215, clause 36 providing for the duties of water authorities was removed and replaced with NC30. NC33 provided for ministerial guidance for payments under management agreements and the use of an arbitrator.

#### 4)d) Lords

On 15 -10-81 the Bill went back to the Lords for consideration of the Commons amendments. An attempt was made to remove the clause requiring the payment of compensation for objecting to an agricultural grant. Lord Buxton and Lord Onslow proposed an amendment<sup>60</sup> to make the offer of a management agreement optional and not compulsory for the NCC when objecting to grants. However, the amendment did not receive the backing of the NCC. The CPRE, the RSPB, the Council for National Parks and the RSNC called a joint press conference and sought to marshal the fullest support in the Lords. However, in the debate, much was made of the lack of support from the NCC. Earl Ferrers, a MAFF junior minister, quoted from a letter from the NCC that said, "The Nature Conservancy Council has given the Government its support for the present wording of the

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<sup>58</sup> Amendment 149.

<sup>59</sup> Amendments 188 and 189.

<sup>60</sup> Amendment 76A

clause, because it removes the uncertainty which has bedevilled negotiations between the conservation agencies and farmers and landowners in the past. It also places a firm commitment on the Government to make adequate resources available to deal with those agreements" (Hansard:HL424,15-10-81,516). The amendment was defeated 57 to 59. Lord Arbuthnott, the deputy chairman of the NCC, voted with the Government<sup>61</sup>.

All the Commons amendments were accepted by the Lords. The successful amendments, 58A, 58B, 63A and 105B, were all technical in nature and changed nothing substantial.

#### **4)e) Commons**

On 29 -10-81 the Bill went back to the Commons for consideration and was published the following day.

#### **5) CONCLUSIONS**

In considering the influences during the parliamentary phase it is impossible to distinguish between party influence and pressure group influence. This is because, given the relationship between the NFU and the state, much of their

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<sup>61</sup> He was a former president of the Scottish Landowners Federation. Disappointed conservationists rounded on the NCC accusing it of treachery and of caving in to political pressure. There is strong circumstantial evidence for this interpretation of events - the chairman of the NCC was a former president of the CLA.

lobbying was through the Government, and the conservation groups generally lobbied the opposition particularly when the Bill went to the Commons. Thus opposition amendments were favourable to the conservationists' case. Government amendments were more diverse with many favouring the conservationists. The conservationists therefore seem to have exerted some degree of influence at this stage. According to Perring (1983:430), "there is no doubt that Wildlife Link ... had a significant influence on the final shape of the Wildlife and Countryside Act 1981".

To assess the achievements of the conservation groups, there must be an appreciation of the resources and the strength of commitment that supported the voluntary approach. As mentioned before, the NFU in particular were extremely powerful. In this context, the influence seems more than just minimal as might have been expected. Indeed, Tam Dalyell, one of the Labour MPs on Standing Committee D, quoted a senior clerk of the House of Commons who could not remember "a major Government bill, put forward by a Government with a substantial majority, which had been so materially altered by the time it came out of the parliamentary sausage machine" (Dalyell,1981:243). This was despite the fact that, according to Max Nicholson, "the Government lacks any basis of responding to the issue other than giving in to the strongest pressure group" (Guardian, March 1981), which in this case was the landowning lobby.

As Caufield (1981:296) points out, "at the outset of the Bill few conservationists believed that they would be able to change it substantially ... but a number of back bench revolts in the House of Lords raised the conservationists' hopes". The

passage of the Bill had attracted considerable public attention and "in this atmosphere, a combination of filibuster by the Labour opposition and pressure on ministers from some Conservative MPs and peers won limited concessions from the Government" (Cox & Lowe,1984:159). The most important factor seems to have been the opposition threat to talk the Bill out of time. According to Dalyell (1981:243), "denying a Government parliamentary time and room for manoeuvre before deadlines is the most effective way of altering bills".

In relation to SSSIs, sixteen amendments were passed in the Lords<sup>62</sup>. Of these fifteen were Government amendments<sup>63</sup>. In the Commons, thirty-four amendments were made only one of which was not a Government amendment<sup>64</sup>. So, of fifty amendments made only two were not Government sponsored.

This would seem to fit with Punnet's contention that the majority of changes to Government Bills are a result of amendments proposed by ministers (Punnet,1976). However, it should be noted that of these successful Government amendments, twenty-three<sup>65</sup> were not substantial in nature (technical or consequential amendments) and fourteen were as a consequence of amendments previously tabled by conservationists<sup>66</sup>. This seems to cast doubt upon Punnet's

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<sup>62</sup> See Appendix 1 table 1.

<sup>63</sup> The only non-Government amendment to be successful was the Sandford amendment 173ZB which was removed later

<sup>64</sup> 232

<sup>65</sup> 402A, 405A, 427, 217, 218, 219, 71, 147, 148, 150, 151, 190, 156, 157, 158, 159, 160, 161, 58A, 58B, 63A, 106B and 106C

<sup>66</sup> 167BC, 167ZA, 77, 82, 365, 214, 215, 149, 187, 188, 189, 190, 191, NC31.

contention. Although, on the face of it, they were all Government amendments, they were substantially similar to amendments proposed by conservationists, and their introduction by the Government must be at least partly due to the actions of the various pressure groups<sup>67</sup>.

This view would accord with the idea that such Government amendments are seen as concessions to the opposition. This seems to be the view of Lowe et al (1986:143), who comments that "the Government introduced several amendments of its own in the Lords. Some were concessions seemingly intended to placate conservation groups and defuse the increasingly unfavourable publicity that the Bill was attracting as journalists latched onto the conservationists' criticisms".

However, although their introduction may seem to indicate success, Caufield (1981:294) contends that "the Government conceded only on minor and technical points". Although I would agree that nothing occurred to change the basic voluntary approach, the amendments must be seen as more than merely marginal. Indeed through amendment 77 restoration of sites was introduced, an important provision, if limited in its application, and amendments 214 and 215 gave all SSSIs a degree of protection.

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<sup>67</sup> Although Adams believes that, of all the amendments carried against the Government in the Lords, none of these was strongly opposed by the 'farming lobby', and of those which were so opposed, none was passed. This is incorrect when looking at amendment 215 at Report in the Commons.

The Government had been forced to make a series of amendments. After the parliamentary phase the essence of the provisions for protection of SSSIs had changed little. Their application had been extended to all SSSIs but the voluntary approach was paramount. The differences were the removal of the possibility of imprisonment if work was carried out during the specified period, the provisions in section 31 for restoration of sites, section 32 with respect to agricultural grants (requiring the NCC to offer a management agreement if they objected to a grant), section 33 providing for voluntary codes of guidance to be issued by the Minister, section 41 regarding advice from the Minister of Agriculture, section 48 concerning duties of water authorities, and section 50 concerning the financial guidelines for management agreements. The voluntary approach remained the underpinning of the protection.

## **CHAPTER 7**

### **HYPOTHESIS 5**

This chapter will test hypothesis 5. This is the proposition made by writers such as Blowers (1987), Lowe & Flynn (1989) and O'Riordan (1989), that Thatcherite ideology was a determinant in the introduction of the voluntary approach to habitat protection. Thatcherite ideology will be explained and then compared with the provisions of the WACA to see if a positive proof of the hypothesis can be made, that it influenced the choice of the voluntary approach. It will then be re-considered to see if a negative proof can be made for why planning control or criminal sanctions were not adopted.

#### **1) WHAT IS THATCHERISM**

The Thatcher administration saw the advent of what has been called 'New Right' ideology<sup>1</sup>. The 'New Right' refers to a diverse ideological and political movement whose emergence has been attributed to the turbulence of politics in the 1970s, central to which was the weakening of the authority of the state (Kavanagh 1987, Gamble 1989, Dunleavy 1988). According to Gamble (1989b:1), "the apparent inability of successive governments to respond to a number of deep-seated problems convinced many on both Left and Right that a radical overhaul of the objectives and institutions of government had become necessary if government

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<sup>1</sup> For example see Lowe & Flynn (1989), Barry (1990), Gamble (1989), Plant (1988), Kavanagh (1987).

was to regain effectiveness and legitimacy". Thatcherism represented one of the initiatives conceived to rejuvenate the policy framework.

The previous policy framework was based on the idea of social democracy. There was a consensus that had dominated British politics since the 1950s about the broad aims of public policy. This consensus included an extensive role for the state to ensure full employment, a guaranteed level of welfare provision, an agreed level of public ownership of resources and the involvement of pressure groups in the political process (Barry,1990). Thatcherism was about abandoning or at least redefining this consensus which had failed during the 1970s (Ramsden 1992, Gamble 1989). Neo-liberal ideas "displaced the Post-War ideological dominance of Tory paternalism and related notions such as social consensus and the desirability of the mixed economy and the welfare state" (Lowe & Flynn,1989b:22). According to Jackson (1985:12), Thatcherite policies "broke the mould ... and sought to replace it with an alternative based upon free market and monetarist principles".

The New Right has both liberal and conservative strands, a "mixture of classical liberal individualist principles and traditional Conservative values of authority and legitimacy" (Barry,1990:21). Plant has identified a number of elements of New Right politics that reflect this mixture: (1) rejection of central government planning (2) critique of corporatism (3) critique of the welfare state (4) preference for 'market solutions'<sup>2</sup> (5) political centralisation (Plant,1988). (1), (2), (3) and (4)

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<sup>2</sup> This term is explained below at 2B.

represent the liberalist principles of a free economy. (3) and (4) represent the liberalist principles of a limited state. (2) and (5) represent the Conservative principle of paternalism and a strong state. The central tenets of New Right politics are that the economy should be free and the state strong but limited. Of these, "the first and most important innovation was the rehabilitation of the market system as an important engine of prosperity and liberty" (Barry,1990:22).

However, there is doubt as to whether the preference for New Right principles can be strictly attributed to Thatcherism. The term 'Thatcherism' is controversial. According to Gamble (1989b:3), "doubts have been cast on both the novelty, the coherence, and the radicalism of Thatcherism as a political project and on the existence of a Post-War consensus which Thatcherism claimed to overturn". It is arguable that it was merely a form of Conservatism rather than a distinct ideological stance. Barry (1990:18) argues that even though the policies of the Thatcher government have been at odds with the pre-1979 consensus, their "theoretical and conceptual sources pre-date her first election victory". According to Plant (1988:9), "this free-market form of conservatism has deep roots in the conservative party but has been eclipsed since the 1930s". This view is also held by Blowers (1987:278) who argues that "there are indications that the changes, while profound, do not constitute a hiatus with the past. In several respects the Thatcher government marks a transitional phase in politics".

Ramsden goes a step further and argues that the Conservatives do not have any ideological foundation at all. "The search for ideology in party policy ... runs the risk of identifying as underlying ideological changes policy choices that are no

more than the consequence of fashion, of tactics and of new leaders who use a different vocabulary and practise a different style" (Ramsden,1992:80). However, in trying to ascertain what Conservative ideology is, he notes that the first policy document of Heath committed the party to rolling back the state and curbing the powers of the trade unions. 1965 set the course for Thatcherism: "the tactical shifts of the 1970s and the change of leadership in 1975 served only to conceal continuity over the 25 years of the Heath-Thatcher era" (Ramsden,1992:81).

Even if the policy approach of the 1980s cannot be strictly attributed to 'Thatcherism', it may be attributable to Conservatism, and the argument that Conservative ideology determined the approach in the WACA can be addressed.

## **2) DISTINGUISHING 'MARKET SOLUTIONS' AND 'MARKET MECHANISMS'**

The first distinction that must be made is between the 'market system' and the 'collectivist system' as Thatcherism was directed towards the revival of the market system. This has been described by Ogus (1994:1) as where "individuals and groups are left free, subject only to certain basic restraints, to pursue their own welfare goals. The legal system underpins these arrangements but predominantly through instruments of private law". Market solutions rely on the market system to achieve desired ends. In contrast, the collectivist system is where "the state seeks to direct or encourage behaviour which (it is assumed) would not occur without such intervention. The aim is to correct perceived deficiencies in the market system in meeting collective or public interest goals" (Ogus,1994:1). The

collectivist system therefore involves regulation, market mechanisms being one type of regulation.

## **2)a) Market Solutions**

Under a market system the law has a facilitative function. It performs this by providing formalised arrangements involving rights and obligations enforceable in the courts. Examples of these arrangements include contractual and proprietary rights. Issues are resolved through the use of private law. These arrangements control conduct but are fundamentally different from regulation, primarily because they are private. In addition, "it is left to individuals and not the state to enforce rights; and obligations are incurred voluntarily in the sense that they can always be displaced by agreements between the affected parties, if they are found to be inappropriate" (Ogus,1994:2). Market solutions are typically decentralised<sup>3</sup>.

## **2)b) Market Mechanisms / Regulation**

Unlike market solutions, regulation<sup>4</sup> has a directive function and involves control by a superior. "Individuals are compelled by a superior authority - the state - to

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<sup>3</sup> Although Thatcherism shows a preference for such market solutions, it also favours political centralisation which is contradictory. This shows the tension between the liberal and conservative strands of New Right ideology. According to Gamble "the gulf between market liberal and conservative conceptions runs deep" (Gamble,1989a:14).

<sup>4</sup> Four definitions of regulation are detailed by Graham (1994): (1) governing according to rules; (2) all activity of the state which determines or controls or alters the operation of markets; (3) one of a variety of instruments of policy implementation which can be contrasted with instruments such as subsidies and taxation by its command-and-control characteristics; (4) the legal rules and measures which express such command and control arrangements. It is the second definition which is being utilised here. The third definition is often used by writers considering economic instruments and this leads to the inconsistencies of definition discussed below at note 7.

behave in particular ways with the threat of sanctions if they do not comply" (Ogus,1994:2). Because the formulation and enforcement of regulation are carried out by the state it is usually centralised.

Different types of regulation exist. A common distinction made is between social and economic regulation. Social regulation covers such things as nature conservation where the market cannot provide the desired result<sup>5</sup>. Economic regulation concerns such things as monopolistic industries where the regulation aims to provide a substitute for the market and competition.

These types of regulation can be performed in a number of ways. The most obvious is the command-control style regulation involving the use of authority by way of criminal sanctions. Indeed, as Ogus' definition of regulation given above shows, this is the typical idea of what regulation involves. However, as Ogus (1994:3) later points out, "regulation can take the form of an 'economic instrument' which is not directive: individuals or firms are legally free to undertake certain activities which, from a public interest perspective, are regarded as undesirable, but if they do so, they must pay a tax or charge"<sup>6</sup>. In addition, the

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<sup>5</sup> This could be for a number of reasons such as lack of information for consumers and third-party effects.

<sup>6</sup> Verbruggen (1994) adopts a different approach, giving three categories of policy instruments: communicative instruments, direct regulation (command-and-control) and economic instruments. This distinction is echoed in the work of Nutzinger (1994) who contrasts economic instruments with regulatory instruments. However, all three can validly be regarded as types of regulation as an alternative to a market system which is consistent with Ogus's approach and definitions of New Right ideology. This is also confirmed by Opschoor & Vos (1989) who recognised that there is often no real distinction between the so-called regulatory and economic instruments.

definition of economic instruments<sup>7</sup> can be taken a step further to include not only penalties through taxes and charges but also subsidies and grants. It is these economic instruments that are referred to as 'market mechanisms'<sup>8</sup>. Veljanovski (1990) describes this as 'market-based regulation'. According to Handberg (1980:111) the choice between such economic instruments and coercion "is a function of how important the goal or policy is to the society. As the goal becomes increasingly important to the society, there is a greater likelihood of invoking sanctions as opposed to incentives".

The distinction between market solutions and market mechanisms is, therefore, the distinction between a free market and regulation using taxes and subsidies, the tool of treasure.

### **3 MARKET SOLUTIONS, MARKET MECHANISMS & THATCHERISM**

As mentioned above, the primary element of Thatcherism is a preference for market solutions. The emphasis is therefore on a free market system. According to Gamble (1989b:14), "The nation which Thatcherism seeks to build is based not on the equal rights of citizenship guaranteed through state action but on the

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<sup>7</sup> For a detailed discussion of the use of economic instruments in environmental protection see Opschoor & Vos (1989) and Opschoor & Turner (1994).

<sup>8</sup> de Savornin Lohman (1994) proposes a further differentiation between financial instruments and economic incentives. Financial instruments are designed to raise revenue for specific environmental expenditures. Economic incentives are primarily designed to have incentive effects. There is also a mixed category of financial instruments that have incentive effects. On this categorisation, the provisions in Section 28 WACA are economic incentives. However, they will be referred to throughout as market mechanisms because the fine distinctions drawn by de Savornin Lohman are not necessary for the purposes of this chapter.

property rights of individuals"<sup>9</sup>. The New Right rejects central government planning as inefficient. Free markets are more efficient at promoting growth, relieving poverty and co-ordinating individual decisions. "Keynesianism and the universalist welfare have been discredited and a new public philosophy has been established which stresses the superiority of market allocation to any form of political or bureaucratic allocation and advocates the application of free market principles in deciding the content and priorities of public policy" (Gamble,1990:334). This preference for market solutions has been most prominent in relation to the economy "where the Thatcher government has emphasised the morality of the market and its superiority over state intervention" (Lowe & Flynn,1989b:22).

This rejection of planning necessarily involves a critique of corporatist arrangements between government and the major interest groups in the field of economic management. According to Plant, these arrangements "emphasise a mistaken collective responsibility for planning the economy. In the view of the radical right the state should play no role in seeking a consensus about economic policy between major interest groups. Decisions about prices and investment cannot be made by such groups" (Plant,1988:11).

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<sup>9</sup> It may be argued that this emphasis on property rights reflects a societal deference to the power of property and a wish to preserve it. However, this argument is inconsistent with the controls imposed over, for example, listed buildings (Suddards & Hargreaves,1996; Ross, 1991) and does not hold favour with those working in the field (Dave Pritchard, pers. comm.).

In respect of welfare provision, whilst reducing state expenditure, private hospitals, health insurance and private education were encouraged. This preference for market solutions and the desire to limit the state's role has resulted in a denial of state responsibility for planning, growth, employment levels and for specific levels of welfare for its citizens. This has been combined with the privatisation programme<sup>10</sup> that was designed to make the privatised industries more responsive to market forces. Besides ensuring the role of the market in allocation, this has also been part of "the more general strategy of questioning the role of the state in spheres in which its function seemed entrenched" (Plant,1988:14). This is because, along with this emphasis on economic liberalism, there is another ideological dimension to New Right politics: "one of the most important New Right ideas has been the concept of the over extension of the modern state" (Gamble,1989b:8). As Ogus (1994:10) points out, "The period since the end of the 1970s has generally been perceived as one of 'deregulation'".

In an attempt to limit the state, "there has been a determined attempt to roll back the frontiers of the state and to substitute market forces whenever possible for state action" (Plant,1988:8)<sup>11</sup>. This has been achieved by asset sales, contracting out and privatisation (Dunleavy, 1988). "The reaffirmation of faith in the efficiency of competitive markets and the commitment to controlling public expenditure and limiting the public sector have obviously had a very significant impact on regulatory policies"(Ogus,1994:11).

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<sup>10</sup> For example the privatisation of the utilities.

<sup>11</sup> For example Local Authority contracts under Local Government Act 1988 and the Deregulation & Contracting Out Act 1994.

Thus the objectives of Thatcherism have been "The revival of market liberalism as the dominant public philosophy, and the creation of the conditions for a free economy by limiting the scope of the state while restoring its authority" (Gamble,1990:336). The free economy was to be achieved by deregulation, privatisation and curbing the power of the unions. "The role of the state was to remove obstacles to enterprise, to relieve the burden of public spending and to enforce law and order. A strong state was seen as compatible with a free market" (Blowers,1987:277).

However, the desire to roll back the frontiers of the state in the economic sphere does not extend to all spheres of political activity. The Conservative strand of the New Right stresses the strength of the state, particularly in respect of law and order. This trend is often referred to as paternalism<sup>12</sup>. "Although paternalism is not often invoked in policy discussions, it may be safely assumed that it remains a powerful motivation for regulation even when other justifications ... are also appropriate" (Ogus,1994:52). In certain areas, rather than weakening the state by a process of political decentralisation to parallel economic decentralisation, state power has become more centralised and concentrated. Thus, "one of the most fundamental changes has been the redrawing of boundaries between public and private sectors ... In order to roll back the state in some areas it has been rolled forward in others" (Gamble,1989b:12). The result of this is that "some areas of

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<sup>12</sup> Different theories exist as to types of paternalism, from individualist and anti-individualist perspectives. These are discussed by Ogus (1994) at pages 52-53. However, for the purposes of this discussion it is not necessary to determine why paternalism exists, just to recognise that it does.

social regulation have continued to grow, notably those pertaining to the environment" (Ogus,1994:10).

#### **4) MARKET SOLUTIONS, THATCHERISM & THE CHOICE OF THE VOLUNTARY APPROACH**

A number of writers have argued that environmental policy, of which nature conservation is often seen as a part, has been substantially influenced by New Right ideology. According to Blowers (1987:290), "under Mrs Thatcher's government, environmental policy has exhibited a pronounced ideological change" reflecting the emergence of New Right ideas. This fact has also been noted by Lowe and Flynn (1989b:24) who comment that the "single minded commitment to the removal of obstacles to business growth and private enterprise has coloured the Government's approach towards environmental protection". As Potter and Adams (1989:1) point out, "despite the many reshuffles and political repackaging the 1980s have seen a remarkable consistency of ideology and action in the countryside".

Some writers have argued that conservation policy in particular has been affected by New Right ideology. If this is correct, Conservatism may be a determinant in the choice of the voluntary method of habitat protection. A number of the elements of New Right ideology may have been influential on Conservation policy and these will be considered in turn. The first is the critique of corporatism, the second is the preference for market solutions and the third is paternalism.

#### **4)a) Critique of Corporatism**

The critique of corporatism and the desire to move away from consultation and planning has meant "somewhat diminished consultation opportunities for environmental interests and reduced levels of formal political access" (Lowe & Flynn,1989a:264). Chapter 5 contains a discussion of the so-called 'post corporatist state' under Thatcher and how this may have influenced the introduction of the voluntary approach.

#### **4)b) Preference For Market Solutions**

According to O'Riordan (1989:4), "Thatcherism is distinguished by an ideological commitment to shift the burden of responsibility of effort and payment from the state to the private sector. As a corollary, collective regulation gives way to individualistic voluntarism. So it has been with nature conservation". Because of the emphasis on economic liberalism, "there has been little sympathy with any regulatory controls if they are perceived to obstruct growth or development" (Lowe & Flynn,1989a:261). This also reflects the desire for a limited state, that state intervention and regulation should be kept to a minimum. "In Thatcher's countryside, there is apparently no room for the selective state intervention that is a vital component of effective conservation" (Potter & Adams,1989:2).

This argument for Conservative ideology being a determinant of the voluntary approach in the WACA rests on the classification of that voluntary approach as a

'market solution'. The focus of New Right politics is the free economy, and the market system ideal of voluntarily entered obligations is echoed strongly in the provisions of the WACA for habitat protection. Management agreements are entered into voluntarily and the medium of contract is used to control the relationship between the landowner and the NC. Control is therefore through private law. A Thatcherite preference for the market system might therefore seem to have influenced the introduction of the voluntary approach to habitat protection. However, while contract is used, habitat protection is not purely a matter of private arrangements. Management agreements are generally only entered into after the moratorium period. This is a 'command-control' mechanism involving criminal penalties. The voluntary approach in the WACA cannot be reconciled with the desire for economic liberalism. Management agreements are not about a free market, they are about state subsidy for protection. In all other areas, the Thatcher government has striven to reduce state subsidy of industry through the privatisation programme.

#### **4)c) Paternalism**

It has been argued that Conservative paternalism has been influential in this sphere. New Right ideology has been diluted in the attempt to strengthen traditional values (Plant,1988). "The Thatcherite commitment to deregulation and the morality of the market is antithetical to a vision of the government as the paternalistic guardian of the environment" (Lowe & Flynn,1989b:29). Social regulation has therefore increased in this area. "The development of Conservative environmental policy has reflected ... a strong undercurrent of Tory

paternalism"<sup>13</sup>, although "it is increasingly coupled with exploration of market means of policy delivery including a move towards a contract rather than bureaucratic model of regulation" (Lowe & Flynn,1989b:22). Although regulation is increasing, it is taking a different form with a preference for market mechanisms.

The provisions of the WACA are regulatory in nature, based on subsidy rather than the free market, but adopting 'market mechanisms'. According to Milton (1991:12), "economic measures - tax incentives and deterrents, grants and loans - are ways of intervening in the market to influence individual choice" and have been used "quite extensively and explicitly in wildlife and countryside conservation". Section 38 of the WACA, which relates to grants by the NC, is given as an example of a regulatory economic instrument by Ogus. As well as such direct subsidies, there is also the provision of compensation through management agreements and the exemptions from Inheritance Tax. A similar situation is referred to by Ogus with Nitrate Sensitive Areas under the Water Resources Act 1991, sections 94 - 95, where "compensation may be offered for a loss of profits resulting from a voluntary restriction on the use of harmful products or processes" (Ogus,1994:249).

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<sup>13</sup> See for example Paterson (1984) on the paternalist approach of the Conservatives towards conservation.

#### **4)d) Conclusions On Thatcherism & The Voluntary Approach**

The influence of paternalism has meant that the WACA involved some extension of the state through additional powers for the Nature Conservancy Council, but "there has also been an emphasis on private and voluntary initiative, stimulated by grant and tax concessions rather than statutory controls" (Lowe & Flynn,1989b:26). A possible explanation for this is offered by Blowers (1987:279): "conservation policy illustrates a mixture of ideology and pragmatism. Compromises had to be achieved between the potentially competing interests of farmers and those concerned with the protection of the rural environment, both regarded as naturally part of the Conservatives' constituency"<sup>14</sup>.

The habitat protection provisions are therefore based on market mechanisms and not market solutions. This is because, not only is it accepted that market solutions are incapable of protecting the countryside, "even the most right-wing economists regard nature conservation and amenity preservation as classic examples of public goods. Market economics do not cater well for collectively wanted benefits for which there is no definable price or mechanism to register willingness to pay" (O'Riordan,1989:4). Conservation is an example of what Ogus (1994) calls 'community values'<sup>15</sup>, the goals of which the unregulated market has only a limited capacity to achieve. "In the first place ... it fails to take account of the demands

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<sup>14</sup> The importance of the idea of co-operation is considered by Vogel (1983) in respect of environmental protection. The conclusion drawn is that this 'co-operative regulation' has contributed to the effectiveness of the provisions in contrast with the American system of pollution control.

<sup>15</sup> In fact Ogus gives the example of species protection.

likely to be made by future generations. Secondly, while altruistic motives are not necessarily incompatible with market processes, a 'free rider' problem often emerges. Many people may be prepared to give up some of their assets for altruistic purposes only if they can be assured that a large number of others will do the same. Given the problems and costs of co-ordination, the dilemma is likely to be solved only by regulatory compulsion" (Ogus,1994:54). A regulatory approach therefore seems to be the only workable solution for conservation. However, the influence of the market ethos may have meant that the form of regulation adopted was an economic instrument, a 'market mechanism'.

## **5) THATCHERISM & THE USE OF CRIMINAL SANCTIONS**

This influence of the market ethos could possibly explain why criminal sanctions were not introduced and a 'market mechanism' was. Thatcherite ideology, with the emphasis on free markets, shows a very definite preference for property rights. These are used as the form of legal control in a market system along with contract<sup>16</sup>. So, although the preference for a market system may not explain the introduction of the voluntary approach, it may indicate why there was such reluctance to interfere with property rights. However, relying on property rights to protect habitats is of limited use. A limited degree of protection is provided by ownership of property<sup>17</sup>, but this cannot cope with the possibility of damage by the landowner, the very type of damage that the WACA was supposed to address.

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<sup>16</sup> For an interesting discussion of the historical links between the use of contract and property see Bergeron (1993).

<sup>17</sup> For a detailed discussion of the protection afforded by property law see Alder (1996).

## **6) THATCHERISM & THE USE OF PLANNING CONTROL**

The Thatcherite preference for the market cannot alone explain the use of the voluntary system as it is not a market solution. However, New Right ideology may provide an explanation for the negative question posed by the thesis, why planning controls were not used.

McAuslan sets out three ideologies of planning law: (1) "that the law exists and should be used to protect private property and its institutions; this may be called the traditional common law approach to the role of law"; (2) " the law exists and should be used to advance the public interest, if necessary against the interest of private property; this may be called the orthodox public administration and planning approach to the role of law"; (3) "the law exists and should be used to advance the cause of public participation against both the orthodox public administration approach to the public interest and the common law approach of the overriding importance of private property" (McAuslan,1980:2). He proposed that planning law was based upon ideologies (1) and (2). They were "the dominant ideologies in the law and administration of land use planning" (McAuslan,1980:267). However, this emphasis changed under Thatcherism in favour of ideology (1) which represents principles of the free market and de-regulation.

According to Blowers (1987:286), "in its policies for development, the Thatcher government has been able to give full expression to its ideological preferences".

This is also noted by Lowe and Flynn (1989b:25): "of all the facets of environmental policy, neo-liberal ideas have been most strenuously brought to bear on the planning system, and here deregulation has been explicitly pursued as a political priority". This has been achieved by deregulation and the promotion of the interests of private developers<sup>18</sup>. There was also a centralisation of decision making with special development orders and the introduction of Urban Development Corporations that override Local Authorities<sup>19</sup>.

One of the reasons given for why Thatcherite ideology had been so pronounced in relation to land use planning is that it is accountable to local democratic procedures and offers great scope for public participation. "The administration of the planning system by local authorities has meant that it has inevitably been embroiled in the government sustained challenge to the autonomy of local government" (Lowe & Flynn,1989a:265). This would therefore seem to give a good explanation for why planning controls were so strongly resisted in relation to habitat conservation.

## 7) CONCLUSION

The proposed influence of Thatcherite ideology seems to give a good explanation for why planning controls were not used. Section 3D concluded that the influence

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<sup>18</sup> 1980 saw the introduction of enterprise zones which involve exemption from rates, 100% capital allowance for corporation and income tax purposes on industrial and commercial buildings, and streamlined planning controls. In 1987 simplified planning zones were introduced which gave general planning permission for specific categories of development.

<sup>19</sup> For full details of the changes made see Blowers (1987).

of the market ethos may have meant that the form of regulation, the voluntary approach, was an economic instrument, a 'market mechanism'. However, even if the argument that the introduction of a voluntary system was a result of Thatcherite policy is *prima facie* tenable, it fails to take account of the approach proposed by the Labour Government in 1978. A comparison can be made with the Countryside Bill proposed in 1978. This also adopted an approach based on market mechanisms, protection was voluntary and based on management agreements and incentives.

The Countryside Bill 1978 was designed to address the problem of moorland conservation but also provided for the wider countryside. For this it proposed a voluntary approach. Clause 6 provided for management agreements with landowners for the purpose of 'enhancing the natural beauty of any land... or promoting its enjoyment by the public'. The emphasis on management agreements, the crux of the voluntary system, was the same. This therefore shows that market mechanisms were not the sole preserve of the Conservatives.

It has been argued that this use of the voluntary approach was due to pressure in the House by Conservatives. "Although the minority Labour government amended the Bill to make management agreements the main instrument of reconciliation, the Bill was opposed by the Conservatives" (Cox & Lowe, 1983:50). However, although the Bill had started with ideas of compulsion and was later amended, these were seen as a back up for moorland conservation but with the emphasis first on management agreements, and Clause 6 relating to the wider countryside had always rested on the voluntary approach.

The Labour approach was summed up by Mr Howell who said, "I very much hope that moorland conservation orders will not prove necessary. They are a fall-back. I hope that we shall encourage farmers to enter into annual management agreements. If that is possible and practicable, no doubt we shall all be delighted" (Hansard:HC961, 30-1-1979,1254).

If the voluntary approach was a result of Thatcherite ideology, why then did a Labour government adopt the same approach? Plant argues that the move to the market and rolling back of the state is not restricted to the Conservatives. "Right across the political spectrum political parties are looking for ways in which to replace government as the major agent of allocation of values, goods, services, benefits, burdens and costs" (Plant,1988:8). The Labour party has explored whether decentralisation and a market orientation can be compatible with socialist goals. There seems to be a general move towards questioning the role of the state and the adoption of market oriented solutions. There is a new consensus about the role of markets. This fact is also noted by Gamble who points out that "the idea of a policy watershed ignores the substantial continuities which link the policies of the Thatcher government - for example on economic management, on local authority cuts, on military procurement, and on the European Community - with those of its Labour predecessor, suggesting that the real break in policy comes in 1976 rather than in 1979" (Gamble,1990:335). Any influence of the market ethos on the introduction of a 'market mechanism' cannot, therefore, be attributed to Thatcherism.

In addition, this use of market mechanisms in the form of economic instruments is not limited to the UK<sup>20</sup>. Market mechanisms are compatible with the market system because they try to incorporate the cost of third party effects in the price of a product thus internalising the costs. This is an approach favoured by the OECD (Turner & Opschoor,1994). However, the OECD tends to favour the negative economic instruments, taxes and charges based on the 'polluter pays' principle rather than subsidies and grants which represent the approach in the WACA. In fact, subsidies are regarded by Nutzinger (1994) as only qualifying as economic instruments if they influence the cost benefit ratio of certain activities. Subsidies of the type involved in management agreements are not even included in the definition of subsidies given by Opschoor & Vos (1989). Management agreements do not affect the cost benefit ratio of an activity but merely represent a substitute income source<sup>21</sup>. Even in McNeely (1988), where the use of economic incentives for biodiversity conservation is directly addressed, this type of 'subsidy' is not considered. The market mechanisms adopted in the WACA and proposed in the Countryside Bill 1978 therefore seem to be of a different type from those classically regarded as economic instruments and represent an alternative approach to policy implementation.

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<sup>20</sup> De Savornin Lohman (1994) provides an analysis of the increasing use of economic instruments in OECD countries.

<sup>21</sup> The use of management agreements affects the cost-benefit ratio of conservation but the definition of subsidy is that it affects the cost-benefit ratio of the primary activity, often agriculture or development, not an alternative activity.

# **CHAPTER 8**

## **HYPOTHESIS 6**

### **1) INTRODUCTION**

This chapter tests hypothesis 6. This hypothesis is that trends in governmental policy implementation mechanisms determined the choice of the voluntary approach. This hypothesis is capable of showing why criminal sanctions or a planning based approach were not adopted and why the voluntary approach was. It is necessary at this point to return to the classifications of government action described in chapter 1. The four basic tools that government can use to implement policy are authority, treasure, nodality and organisation. The main focus of writing on policy implementation is usually upon legislation, which is often associated with the use of force (authority). However, all of these tools can be employed through the medium of legislation. In addition, treasure, nodality and organisation can all be deployed without resort to legislation.

### **2) IMPLEMENTATION MECHANISMS**

Daintith (1982) focuses upon the use of authority and treasure as tools of policy implementation. They are very different in nature. There is a distinction between "the deployment of force, which is an inherent component of rule, and the deployment of wealth or property in the hands of the ruler" (Daintith,1982:215). Thus they operate in different contexts. This gives essentially two main resources

that are available to government: "first, the command of law, backed in the last resort by force, carrying with it the threat of harm to those who do not comply; and second, the possession of wealth, carrying with it the promise of benefit for those who do. The first is simply exemplified by the use of the criminal law ... the second by the offering of grants" (Daintith,1989:196). The use of these two forms of implementation has been classified by Daintith as imperium and dominium.

## 2)a) Imperium

This is associated with the use of authority and organisation. It encompasses "those instruments of policy which involve the deployment of force by government" (Daintith,1982:215)<sup>1</sup>. The emphasis is on parliamentary sovereignty, with the typical form of policy implementation consisting of "formal and unilateral changes in legal structures ... by means of Parliamentary legislation, or by the exercise of formal powers delegated by Parliament to government" (Daintith,1989:194). Imperium therefore includes legislation using the criminal law. This authorises the use of force by government, for example, setting a standard or rule for the behaviour of the relevant persons and providing sanctions for non-compliance. However, the emphasis is not merely on *sanctions*, compliance may be rewarded through a relaxation of legal commands<sup>2</sup>. Part I of the WACA dealing with species protection is typical of imperium.

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<sup>1</sup> This often means the threat of force.

<sup>2</sup> For example a tax reduction.

## **2)b) Dominium**

This is associated with the use of treasure and nodality. This approach centres on the possession of wealth by government and includes "those legal devices of the common law, such as contracts, gifts and other transfers, through which the wealth of government may be deployed" (Daintith,1982:215). Dominium can mean the promise of benefit for those who do comply with a particular policy. However, dominium is not just associated with benefits; "a withdrawal of benefits, such as government contracts or grants, can be used to 'punish' non-compliance" (Daintith 1989:197). The management agreements for SSSIs are an example of dominium, the landowners being offered compensation if they abstain from damaging a site.

## **2)c) Imperium, Dominium & Government Tools**

Imperium and dominium involve elements of all four types of implementation mechanism referred to in chapter 1. However, the dominant tools are authority and treasure. As such they are not "comprehensive categories which can be made to embrace all law or even all legislation" (Daintith,1982:215). There are other forms of intervention. Chapter 1 referred to the use of nodality and organisation as dominant tools. However, the use of both nodality and organisation is usually linked to the use of either imperium or dominium. They therefore tend to be secondary sources of policy implementation rather than dominant ones. The use of nodality as a method of policy implementation has been labelled 'suasion' by Daintith who has noted the linkage with the use of imperium and dominium. "In

almost all cases ... the effective use of information as a policy tool either is related to the potential exercise of imperium or dominium (where the information incorporates a threat, or a promise, to use these resources in appropriate circumstances), or is on a scale involving significant public expenditure, itself an exercise of dominium" (Daintith,1994:213).

## **2)d) Application Of The Mechanisms**

In addition to the direct application of imperium and dominium, there is the possibility of their indirect use as bargaining tools "to secure undertakings from powerful groups and organisations to act in conformity with policy" (Daintith,1989:193). This is consistent with the idea of corporatist bargaining and self-regulation discussed in chapter 5, but can also be seen as more akin to contractual bargaining<sup>3</sup>. According to Harris (1992), negotiation is inherent in the idea of dominium. The two techniques overlap considerably, wealth being an obvious bargaining tool. Agreement is also essential to the operation of dominium because people cannot be forced to accept government wealth. In addition, "other bargaining tools, such as its ability to impose legal obligations, are also at the disposition of government" (Daintith 1989:193).

The application of negotiation is not restricted to the consultation of interested parties at the stage of preparation of legislation. Negotiation may be extended so that "the legislation is related in some way to an agreement between government

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<sup>3</sup> The importance of the government's ability to enter into contracts is discussed in the next section.

and those parties. It may be the expression of an agreement; or a lever to secure an agreement. Agreements may also be secured by the threat of legislation: if agreement can be reached, the need to legislate is avoided" (Daintith,1989:208). Government may use either imperium or dominium as bargaining chips and both the positive and negative sides of each. "A threat by government to introduce or support unfavourable regulatory legislation can of course be just as powerful a spur to informal compliance with its policy as the promise of favourable laws" (Daintith,1989:209).

### **3) GOVERNMENT AS AN INDIVIDUAL - THE NEW PREROGATIVE**

In addition to the implementation of policy through legislation, the government is able to implement policy using the powers of an ordinary legal 'person'. The government possesses the legal capacities of an ordinary person of full age, not subject to any legal disabilities. Probably the most important of these capacities is the power to contract. The importance of contractual regulation was recognised by Daintith in 1979 when he commented that "government has discovered means of using its increasing economic strength *vis-à-vis* private industry so as to promote certain policies in a style, and with results, which for a long time we have assumed must be the hallmark of Parliamentary legislation: that is to say, officially promulgated rules backed by effective general compulsion" (Daintith,1979:41). Daintith calls such contractual regulation the 'new' prerogative because it represents the power to rule without parliamentary consent.

Harris (1992) classifies this legal ability as the 'third source' of governmental power, statute and the prerogative,<sup>4</sup> being the first and second sources.

This 'new prerogative' is characterised by the use of common law for example contract and property. It provides the authority for much use of dominium, along with statutory authority<sup>5</sup>, so the two are closely linked. An example is the exercise of dominium through government contracts which further government policy<sup>6</sup>. This new prerogative is not of use when imperium style control is introduced.

According to Daintith, "for purposes of policy implementation, these 'ordinary' capacities of government are of major significance" (Daintith,1989:195). This means that an important technique of implementing policy is through bargaining with interested parties and the deployment of the wealth of government (dominium) using the 'ordinary' legal capacity of government<sup>7</sup>. The implementation of these mechanisms can also be delegated to other bodies such as Quangos<sup>8</sup>. This takes their operation a step further away from the classic view of policy implementation.

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<sup>4</sup> If adopting a narrow definition of prerogative - rights which the courts have recognised as being unique to the Crown.

<sup>5</sup> Dominium can take statutory form but is still different in nature to imperium e.g. welfare benefits.

<sup>6</sup> For example, pay restraint policy in the 1970s which was implemented through conditions imposed on government contracts with private companies.

<sup>7</sup> This approximates to the use of what Summers (1971) calls the public benefit conferral technique and the private arranging technique.

<sup>8</sup> For example the NC.

#### 4) APPLICATION TO SSSI PROTECTION

The SSSI provisions represent a classic example of the use of the new prerogative and dominium. It might seem at first that the new prerogative is inapplicable to SSSI protection because much of the writing on this focuses upon procurement contracts<sup>9</sup> and most examples of this form of implementation come from procurement contracts. This is because procurement contracts are a relatively easy area in which to utilise this ability, but the theory is applicable to all policy areas. The management agreement is, in a sense, a 'true' example of the new prerogative with no links to procurement at all<sup>10</sup>. It involves a 'contract' with the landowner and ultimate protection for sites is through property law if a compulsory purchase order is granted.

The dominium element is the management agreement . This involves the deployment of government wealth<sup>11</sup> in the form of compensation provisions and the notification provisions in Section 28 which according to Jowell (1989) institutionalise the bargaining process. It therefore involves both the deployment of wealth and negotiation. In addition, the extensive contact with the NFU described in Chapter 5 can also be seen as part of this element of negotiation.

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<sup>9</sup> See for example Arrowsmith (1995) and Daintith (1979).

<sup>10</sup> However, the argument that the new prerogative involves governing without parliamentary consent is not applicable to the WACA because the system is in statutory form.

<sup>11</sup> The use of government wealth should not be confused with the so-called 'financial control' of pollution which is generally based on imperium and the polluter pays principle. See for example De Kock (1980) and the discussion of economic instruments in Chapter 7.

So the SSSI provisions have all the hallmarks of this type of implementation. There is, however, an imperium element to the controls. Under Section 28(5) there is a penalty if the reciprocal notification requirement is not complied with. There seems, therefore, to be a mixture of approaches in use. However, as Daintith (1989:198) points out, a "complex, many-pronged approach to problems is today commonplace". The imperium element in the SSSI legislative scheme is fairly limited and, as will be seen later, is rarely used. The reason for its existence was actually the negotiation process before the introduction of the Act. The NFU asked for such a provision to try and guarantee that farmers notified EN and thus ensure members' compliance with the bargain (Holbeche, pers.comm). Thus the imperium element is, in effect, a product of dominium style implementation, with the NFU trying to maintain its strong corporatist bargaining position through ensuring members' compliance.

## **5) ADVANTAGES OF USING DOMINIUM & THE NEW PREROGATIVE**

So, why should the government decide to use the 'new prerogative' and dominium for habitat protection rather than imperium? Government is required to account to Parliament for all its activities<sup>12</sup>, however, an action is still legally valid even if Parliament disapproves. The benefit of this approach, therefore, is that its use is "not subject to check through the application of public law standards of

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<sup>12</sup> Including those over which Parliament has not asserted legislative control.

administrative law" (Arup 1990:255)<sup>13</sup>. There is no constitutional convention to control the arbitrary use of dominium. Thus, the use of the ordinary legal powers of government<sup>14</sup> "is subject to only one major and incontestable legal constraint: the consent of Parliament, in the form of legislation, must be obtained for any consequential expenditure of public funds" (Daintith,1989:195). There is no other control on the use of these powers. Government can enter contracts with landowners without external control<sup>15</sup>. Judicial review may apply, but the limits to the discretion will be very wide.

There is no real control of the government's action through the ordinary law of contract either. Contract may be useful for making state bureaucracies more accountable (Harden,1992), but not for the protection of wildlife because it is not consumer oriented, it is not a purchaser and provider situation. Its inappropriateness stems from the fact that the engine of the contract system is "the pursuit of self-interest" (Harden,1992:2).

Even the control of spending does not necessarily inhibit the government's ability to enter into contracts that will involve spending<sup>16</sup>. Even though legislation is

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<sup>13</sup> This is the view that was held at the time of the WACA. However, it has since been recognised that "the weak legislative structure of dominium, and the informality with which it may be exercised, clearly no longer inhibit judicial review as once they might have done" (Daintith,1989:217). See Freedland (1994) for a discussion of judicial review of government contracting.

<sup>14</sup> Apart from any specific legislative restrictions that Parliament may impose.

<sup>15</sup> They are of course bound by the financial provisions under Section 50 as to the amount of compensation

<sup>16</sup> Although, in fact, EN are restricted by their budget.

necessary to authorise the spending, there are lower political costs involved in this than with imperium legislation. Dominion legislation can often be achieved through skeletal provisions that leave a broad discretion to ministers and other funding agencies such as the financial provisions under section 50, WACA. Dominion statutes therefore tend to be shorter and less complex. The WACA as a whole can hardly be regarded as either short or simple. However, the dominium style element (for habitat protection), is limited in length and leaves much discretion to EN<sup>17</sup>. According to Daintith, "there is a clear contrast with imperium legislation. Other things being equal, therefore, the less onerous legislative requirements attaching to dominium may certainly weigh with the policy maker in his choice of implementing mechanisms" (Daintith,1994:218). In terms of political costs, therefore, a dominium style approach would have been attractive to the government.

Another advantage is that the use of dominium avoids one of the major problem with the implementation of any policy, that of uncertainty. "To operate efficient policies which seek to change people's behaviour, government needs adequate information first about how they should behave - that is, what standard or target it should set; secondly, about how they are behaving now, and why; and thirdly, about what sanctions or incentives will align their behaviour with the desired standard or target" (Daintith,1994:219)<sup>18</sup>. Uncertainty is a particular problem where the policy applies to large numbers of people. "If such numbers can only

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<sup>17</sup> For example the process of negotiating management agreements.

<sup>18</sup> The problem of uncertainty often forms the justification for the use of market mechanisms.

be sufficiently reduced, not only may the operation of measures be more effectively policed, but government can obtain the knowledge it needs in advance, by asking those affected by its measures what their reactions will be or, even better, obtaining commitments from them about their future behaviour" (Daintith,1989:204). This is obviously much better than trial and error policies.

However, this negotiation is not limited to mere consultation; self-regulation is also a possibility if there are few enough people concerned or "if there exist enterprises or organisations with a sufficient control capacity (whether economic or institutional) to guarantee the operation of the policy" (Daintith,1989:206). The NFU is just such an organisation and its ability to self-regulate has been considered earlier<sup>19</sup>. The early consultation of the NFU that was noted in chapter 5 could therefore be explained as the government seeking agreement on its policies rather than as an all powerful NFU exploiting its corporatist relationship to force the use of a voluntary approach.

Another thing that helped the Government in this respect was the Porchester Report<sup>20</sup>. This effectively gave the voluntary system a trial run in respect of moorland conservation. Its importance can be seen from the fact that all through the debates on the WACA, reference was made to the report and the use of

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<sup>19</sup> Chapter 5.

<sup>20</sup> Moorland reclamation in National Parks had been the subject of campaigning by environmental groups for a number of years. A study of the extent of the change was commissioned by the Exmoor Society and showed that it was a serious threat to the Park. An attempt to amend the Countryside Act 1968 was unsuccessful, but pressure from the CPRE and CC led to the appointment of Lord Porchester in 1977. The Labour Countryside Bill of 1978 was intended to implement his proposals.

voluntary codes. Porchester had said that management agreements needed compensation to work so the WACA adopted management agreements with compensation. The report gave the Government an indication of how the system would be received by landowners.

The Porchester Report was critical of the voluntary approach. Despite these reservations about the usefulness of management agreements, they were regarded as a good way of maintaining the goodwill of the farmers. If coupled with compensation they were seen as the way forward. Any failures in the past were explained as problems of compensation. "There have not been agreements in some cases. This was not because the National Parks lacked money but because the committees did not agree with the farmers about the amount of compensation" (Hansard:HC691,30-1-1979,1362). As the Porchester Report (1977:41) noted, "the National Park Authority expressed the view that as the voluntary system of notification before conversion had worked (in the sense that advance notice had almost invariably been given) they were in favour of a procedure based on voluntary principles and saw no need for compulsory powers, even as a back up to voluntary agreements. This view was shared by the Country Landowners' Association, the National Farmers Union and the Royal Institution of Chartered Surveyors".

The main disadvantage of dominium is the cost involved. In contrast, imperium seems to be cheaper than dominium. There are, of course, enforcement costs but the costs of compliance with policy "are placed wholly on those whose behaviour is to be affected. Taxing undesired activities may even bring the Exchequer a net

return, after collection costs, and consequential losses of other forms of revenue such as income tax, are taken into account" (Daintith,1994:214). However, imperium also involves non-financial costs such as the political costs of securing the passage of legislation. "To secure the passage of legislation, even if it is politically uncontroversial, requires heavy investments of scarce governmental resources. Government must draw on its stores of influence (over its own back-benchers and perhaps other Members of Parliament) and of time (within an always crowded parliamentary calendar)" (Daintith,1989:201).

The political costs of the WACA were in fact high. Even though the Government had considered the Bill to be uncontroversial, and therefore sent it to the Lords first, it took up much parliamentary time. The WACA therefore suffered the main disadvantage of imperium legislation. However, government will pay these costs because of a number of reasons, such as the possibility of an immediate political dividend or because they may have to comply with international obligations. In this context, the Birds Directive will have been instrumental in the necessity for imperium style controls in part I of the WACA.

## **6) DOMINIUM, THE NEW PREROGATIVE & THE WACA**

The SSSI provisions do seem to have the advantages of dominium and the new prerogative. However they also suffer the disadvantage of cost. In addition, the implementation of the WACA suffered the disadvantages of imperium regarding political costs, although these are probably less than if the legislation had been wholly imperium based. The habitat provisions could have been even more

contentious if they were solely imperium as the discussion of penalties for non-compliance with the notification requirement shows<sup>21</sup>.

Dominium and the 'new prerogative' seem, therefore, to be justification for why imperium controls were not introduced for habitat protection. The previous chapter indicates why regulatory planning controls were not favoured<sup>22</sup> and the foregoing discussion may indicate why criminal sanctions were not introduced<sup>23</sup> as the dominant mechanism. Thus the hypothesis shows a negative proof. In addition, legislation for habitat protection was not a priority for the government. The necessity for it was imposed upon the government by the requirements of the Birds Directive and because of the rising levels of damage to sites. The approach was therefore minimalist and dominium style controls were consistent with this. The use of the new prerogative was in the interests of bodies such as the NFU so that they would have agreed to such an approach. Thus the hypothesis also shows a positive proof.

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<sup>21</sup> See Chapter 6.

<sup>22</sup> The influence of Thatcherite deregulation.

<sup>23</sup> This trend may not necessarily be restricted to the UK. Morris (1972) argues that there is a general trend away from the use of criminal sanctions and towards the use of incentive systems in environmental protection in the US.

## 7) AN EXPLANATION FOR THE TREND: FROM IMPERIUM TO DOMINIUM

The use of dominium was at its zenith at the time of the introduction of the WACA. According to Daintith, imperium was the only resource available to government in earlier centuries. This is consistent with the adoption of imperium style implementation in the early species protection statutes<sup>24</sup>. Dominium has become available relatively recently and only with the development of the use of dominium has the 'new prerogative' become relevant. Increasingly "government uses its powers of dominium and in particular its award of advantages such as grants, tax concessions, contracts and public services, as a means of obtaining the co-operation and compliance of powerful private interests" (Arup 1990:257). This trend has developed since 1945, since when there has been "a steady growth in governmental reliance both on dominium as a source of social and economic control, and on control through bargaining rather than arm's-length techniques" (Daintith,1989:206).

By the time the WACA was introduced it could be asserted that "together discretion and informal controls are of far greater importance than are formal "legal" measures in state regulation" (Prosser,1982:3). This trend goes beyond political preference and could therefore provide an explanation for why the Labour Government's Countryside Bill of 1978 adopted a similar approach. According to Daintith (1989:194), the policy tools of bargaining and the

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<sup>24</sup> Detailed in chapter 3.

deployment of public wealth have attained major importance and are likely to retain this importance "whatever the political complexion of the government in power".

The reasons Daintith gives for the growth in the use of dominium and the new prerogative are "the growth of public spending-power; the increasing concentration of private economic power; the increasing organisation of society into interest groups and associations; the consequently increased capacity of government to conceive and administer its policies by reference to individual or group behaviour, as opposed to mass behaviour; a general aversion to explicit legal coercion" (Daintith,1989:206). This therefore seems to be based on the conditions indicative of corporatism<sup>25</sup>. In addition, he claims that government today has "enormous resources of public funds and public property, accumulated through taxation, borrowing, and purchase. Thanks to public tolerance of high levels of taxation and governmental spending .... government can often now *buy* compliance with policy through grants, soft loans, tax concessions, free or cheap public services, and other such devices" (Daintith,1989:199). The justification therefore seems to be based on the arrival of corporatist bargaining and high levels of public spending.

Corporatism and high public spending were undeniably important in the transition from imperium to dominium, however, the reason for this transition is much more complex. Different constitutional frameworks are required for the use of

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<sup>25</sup> Which were discussed in chapter 5.

imperium and dominium. Two basic legal approaches have been identified by writers in the field of public law. These involve different constitutional frameworks. In turn, these different frameworks lead to differing conceptions of the rule of law. These approaches can be equated with imperium and dominium.

#### **7)a) Gesellschaft Law**

This represents the 'traditional' view of law based on legal positivism (Prosser,1982)<sup>26</sup>. The focus is upon rules that are considered legally valid, statute, case-law and statutory instruments. The emphasis is on establishing and upholding rules, and it is these rules that govern the process by which resources are allocated in the economy. The role of the government is to prescribe generally applicable regulatory standards, in the civil or criminal law. These are sets of conditions placed upon the exercise of market power by private actors. "In this way, the law may supplement or even substitute its policy for that of the market, but it does so through the prescription of standards cast in the form of rules applied evenly and at arm's length from the private actors" (Arup,1990:248). The role of the state is market supporting (Arup,1990) and this approach is therefore associated with liberal capitalism (Prosser,1982). The role of law is to regulate competing private interests.

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<sup>26</sup> There is actually a stage before gesellschaft which is called gemeinschaft where the focus is upon common law rules, but for our purposes this can be included with gesellschaft as it also involves imperium style control. It will however be referred to later to provide the starting point for the concept of the rule of law.

This approach can be linked to that expounded by Dicey (1964), the focus of which is the traditional role of state, based on the idea of unitary democracy, and implementation through legislation. The emphasis is upon the use of imperium style control.

### **7)b Bureaucratic Administrative Regulation**

This approach is associated with administrative discretion and direct intervention by the state rather than the use of rules. The state takes a more active role in directing the economy, resulting in the label 'purposive action approach' (Arup,1990). It involves legal power moving from the judiciary and legislature to executive and administrative bodies such as quangos (Prosser,1982). It involves greater state intervention.

The role of law is the efficient attainment of political goals. Its central function becomes the provision of a foundation on which government policy can be progressively developed and the problem of finding a workable procedure or mode of operation for the state in its pursuit of policy functions can be solved. This approach involves a "shift away from the market based, open and categorical liberal form in the direction of closer administrative and corporatist relationships between state and industry" (Arup,1990:249)<sup>27</sup>. Pluralism is also involved in this transition (Craig,1994) as is corporatism<sup>28</sup>. This approach can be associated with

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<sup>27</sup> See also Jowell (1989).

<sup>28</sup> In this context the use of the term pluralism is prescriptive. Its meaning as adduced in chapter 5 was descriptive and related to how decisions are made. The prescriptive use concerns the role of

the use of dominium. Thus Daintith's reasoning for the transition, based on the use of corporatism, is consistent.

### **7)c) From Gesellschaft to Bureaucratic Administrative**

It has been recognised that there has been a shift from gesellschaft to bureaucratic administrative approaches. According to Prosser (1982:3), the "gesellschaft conception of law .. has been made increasingly outmoded by developments in the modern state". An explanation for why this has occurred will also explain the transition to dominium style policy implementation.

The two approaches involve different constitutional frameworks with different roles for the state. The change in use is therefore linked to constitutional change. This constitutional change is best illustrated by the change that has occurred in the concept of the rule of law. Much as Dicey's theories have been criticised as positivistic and empiricist (Harden & Lewis,1986;Jennings,1959), his explanation of the rule of law provides a starting point in indicating constitutional change.

In 1885 Dicey published *'An Introduction to the Study of the Law of the Constitution'*<sup>29</sup>. In this he explains the characteristic features of the political institutions in England. He identifies two such features: parliamentary supremacy

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the state in the light of the descriptive use. This prescriptive view of pluralism has changed with the modern 'market pluralism' involving less government intervention: see for example Craig (1994)

<sup>29</sup> Referred to here in its 1964 edition.

and the rule of law. The most important of these for our purposes is the rule of law<sup>30</sup>. Dicey attributes three meanings to this term. The first of these is the supremacy of regular law as opposed to the influence of arbitrary power or even of wide discretionary authority on the part of the government. Its second meaning is that of equality before the law: "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals" (Dicey,1964:193). The final meaning expresses the fact that the law of the constitution is not the source but the consequence of the rights of individuals. The constitution is the result of the ordinary law of the land. Thus, any change in this 'definition' of the rule of law is dependent upon constitutional change.

It is primarily the first of Dicey's meanings of the rule of law that we shall concern ourselves with in this discussion. In essence Dicey was proposing a positivist concept of law, that rules rather than discretion should be, and were in England at that particular time, the dominant tools of *government*<sup>31</sup>. He was essentially propounding in his rule of law that administrative action should be based only on announced rules, and that discretionary power had no place within our constitution. The emphasis was thus on Daintith's imperium, using the tools of authority and organisation.

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<sup>30</sup> For a discussion of parliamentary supremacy see Allan (1985).

<sup>31</sup> Dicey discussed other constitutions within Europe to illustrate that the supremacy of regular law was peculiar to England at this time and concluded that the result in these other constitutions was arbitrariness. "Wherever there is discretion there is room for arbitrariness ... discretionary authority on the part of the government must mean insecurity for the legal freedom on the part of its subjects" (Dicey,1964:188).

Although Dicey's discussion centred on constitutional and administrative matters, the relevance of the rule of law is not so strictly limited. The changes that have occurred in relation to the rule of law relate to means of policy implementation and these changes can be observed in all areas of policy implementation. Dicey's principles can be generally applied and can be observed in almost every area of the law.

Regular law rather than discretion prevailed at the time Dicey was writing because the concept of discretion was relatively new in England. This regular law could come from two sources. Blackstone called them the *lex non scripta* (the unwritten or common law which included equity) and the *lex scripta* (the written or statute law) (Blackstone, 1825).

#### 7)c)i Gemeinschaft<sup>32</sup>

When Blackstone was writing, the late eighteenth century, statute law was regarded as being merely complementary to the common law. The reason for this is that, at this time, the law was still very closely linked to its feudal past. The primary emphasis was on land law. This is reflected in the fact that Blackstone devoted a whole volume to a discussion of this branch of law. Society at this time was very paternalistic, which is illustrated by the existence of practices of paying

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<sup>32</sup> This is pre-industrial society where there is no distinction between law, morality and politics. Authority is traditional and the law jobs are performed as part of the whole functioning of the group.

customary wages, restrictive apprenticeship laws, and vagrancy and poor laws that provided for some supervision of the poor. There was also a belief at national level in protectionist policies. Consequently "in Blackstone's day parliament played a relatively minor legislative role with the result that the common law was of correspondingly greater importance" (Manchester,1980:23).

#### 7)c)ii) Gesellschaft<sup>33</sup>

By the time that Dicey wrote the Law of the Constitution, however, things had changed. During this period a social and economic revolution had taken place. A considerable growth in population had occurred coupled with a transformation from a primarily agricultural society into an industrial one - a transition from *gemeinschaft* to *gesellschaft* society. This required a change of philosophy that would emphasise the value of individual effort. One such philosophy was provided by Adam Smith who expounded the doctrine of *laissez faire* economics. He put forward three functions for the state: to defend the realm, to administer public justice and to carry out those public works that it was impossible for private individuals to undertake. Allied to this was the influence of Bentham, who advocated principles directly related to law reform.

This new philosophy of individualism was quickly adopted as the views of writers such as Smith and Bentham soon became influential. The limitation of central government was favoured by a wide range of political and pressure groups as

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<sup>33</sup> This is a term used for a large scale industrial society with a high division of labour.

individualism flourished. Such opposition was exhibited, albeit for differing reasons, by most parties. Yet, despite this opposition, with its corresponding belief in laissez faire<sup>34</sup>, a considerable expansion in the functions performed by central government occurred. Thus the legal system was placed under considerable strain by these changing social and economic factors. The common law was no longer able to play such a fundamental role, and legislation assumed a more important place. Much of this early protective legislation resulted from sheer necessity or from a concern for the moral well-being of the community<sup>35</sup>. It was humanitarianism exercised at a national level.

However, by the close of the nineteenth century the pure individualist ethic had been eroded by the growth of a host of state and municipal enterprises. Until this point the civil service had been remarkably small, and this extension, which necessarily involved increased public taxation, was strongly opposed. However, despite this opposition, there was a steadily increasing volume of legislation and an acceptance of an increased governmental role began to appear, as did an increasing public belief in the justice of collective rights. Dicey was a great critic of such notions of collectivism<sup>36</sup> and strongly resisted the increasing regulatory role played by the state.

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<sup>34</sup> See Craig's discussion as to whether it was actually a period of laissez faire or whether, as certain theorists argue, Benthamite theory actually contributed to state intervention

<sup>35</sup> This approach can be seen in the introduction of the early species protection legislation detailed in chapter 3.

<sup>36</sup> He did not recognise it as a doctrine such as liberalism, but merely as a sentiment. This is because it had never "been formulated by any thinker endowed with anything like the commanding ability or authority of Bentham". As he viewed it, collectivism had very little to do with law reform and consequently its influence on legislation could not be measured; its existence could only be proved by "showing the socialistic character or tendencies of certain parliamentary

State intervention was established in areas outside the government's traditional jurisdiction, those of defence and public justice. To facilitate this purpose, legislation was employed<sup>37</sup>. Legislation was seen as the key tool of government. As Dicey (1964:198) says, "to lay down general principles of law is the proper and natural function of legislators". He believed that laws, however harsh, were better than despotism and caprice, which were the natural result of discretion in his eyes. So, although a critic of collectivism, Dicey's view of the rule of law matched the use of legislation as an implementation mechanism, although in a more limited sense.

Dicey's work became very influential despite its obvious shortcomings. However Dicey's rule of law was by no means unimpeachable. This is partly because Dicey's writings were coloured by his political views. With the rise of collectivism and the extension of governmental functions, Diceyan formulations suffered extensive criticism.

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enactments", unlike Benthamite liberalism whose tenets could be shown in specific changes in the law.

<sup>37</sup> In the 1890s when protection was first introduced for wild birds, legislation was necessary because wild animals had no rights under the common law with its emphasis on property rights. The only protection provided by the common law relied on the co-operation of the landowner, which was generally not forthcoming.

### 7)c)iii) Bureaucratic Administrative Regulation

According to Harden and Lewis (1986:3), "many, if not most, commentators would now distance themselves to varying degrees from the text of Dicey's work, arguing that whatever the validity of his original analysis, it had been overtaken by events". The constitution has changed and is represented in the view of the rule of law (Johnson,1985). At the time of writing it had provided a fairly accurate description of the system, but due to political beliefs Dicey had turned a blind eye to some of the changes that were taking place at the time. He was thus criticised as misconceiving the scope of administrative power that existed when he wrote. This discrepancy became more obvious with time. Such systems are continually evolving especially as there is no written constitution in the UK, and Dicey's rule of law came to represent "no more than a staging-post in the development of the British polity and state, albeit one which in many respects was particularly well settled" (Harden and Lewis,1986:4). There had therefore been a shift away from the constitutional form associated with the use of imperium.

The rise of collectivism with its associated increase in welfare regulation resulted in a transformation of the nature of the British state. As the perceived role of government changed in this move to a collectivist society, so did the methods of implementation of policy that were seen as both necessary and appropriate. As the problems of industrialisation came to the fore, novel means of dealing with them were necessary. The concept of regulatory measures was therefore inaugurated and these often necessarily involved the use of discretionary powers. The mere existence of these powers would therefore serve as a damning indictment to

Dicey's theories, and they were in fact employed for that very purpose. The use of the tool of organisation became thus more important within imperium.

In his book *The Law and the Constitution*, W. I. Jennings presented a critique of Dicey's rule of law. He was not alone in this; writers such as Robson and Keynes, who were also committed to the expansion of the state's role, participated in the attack on Dicey and the ideals of individualism that his theories represented. The Diceyan view, based on the concept of unitary democracy, was expressly challenged, as they advanced an explicitly pluralist vision of democracy to replace the unitary view espoused by Dicey. The unitary vision of democracy maintained that all public power was legitimated through participation by MPs in parliament; the pluralist vision implies that power can be legitimated and constrained in more diverse ways such as citizen participation. This pluralist model proposed greater governmental intervention. This was achieved by a number of means such as the nationalisation of industry. Such redistributive and political functions of law were ignored by the Diceyan concept.

The pluralists criticised Dicey's theory on a number of grounds: that it was both descriptively flawed and prescriptively questionable. They had realised the shortcomings of Dicey's theories and its individualistic prescriptions. In descriptive terms, they contested the view of the role of the state espoused by Dicey. Dicey saw the function of the government as to protect the individual from aggression, and given such protection individuals were allowed to act as they pleased provided they refrained from interfering with the liberty of others. Jennings (1959) pointed out, however, that such powers interfering with private

action were in existence when Dicey wrote and had been merely ignored by him. This challenged Dicey's vision of the role of the state. The pluralists also challenged the idea that all public power was wielded by the state, thus undermining Dicey's belief in the omnicompetence of parliament. "There was an increasing realisation that parliament did not in fact wield all public power, and that many institutions outside of parliament exercised some species of public authority" (Craig,1994:12)<sup>38</sup>.

Jennings also argued that discretionary powers themselves were in existence even when Dicey was writing. He used the existence of these powers to justify his position in contesting Dicey's theory on the supremacy of regular law and the idea that the rule of law and discretion are incompatible. This was linked to his disagreement with the distinction between regular law and arbitrary power. He states that "All powers can be abused, whether they are derived from regular law or not" (Jennings,1959:306). Therefore, discretion could not be criticised on the basis that it would lead to the abuse of power and arbitrariness. Jennings believed that Dicey had used his rule of law to create a concept to justify his political beliefs and therefore it was not an accurate reflection of society. It was tainted by political bias.

The prescriptive challenge on Dicey took the form of commending rather than condemning group power. It was realised that in a modern welfare state the

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<sup>38</sup> Examples were given of various pressure groups which were influential in shaping and constraining state action.

legislature is incapable of managing the affairs unaided. "Their vision stressed the existence of group power, group rights and obligations, decentralisation, and the interconnection between economic and political liberty, the latter requiring governmental intervention in order to secure such liberties for the individual" (Craig,1994:35). The emphasis therefore rested on the expansion of the state. According to Jennings, "since 1919, not only has the state intervened to protect the individual from the consequences of industrialism, but also the development of foreign competition has induced Governments, especially Conservative Governments, to create institutions and powers for the purpose of assisting and rationalising industry, commerce, and agriculture. Farmers and manufacturers alike asked parliament not to free them from discretionary powers, but to confer more discretionary powers in order that they might be further assisted" (Jennings,1959:315).

The growth of the state continued and the extension of the collectivist ethic was aided by measures taken during the First World War and the spirit of national unity that had been aroused. The notion of the function of the state was radically changed. The growth of the state and the rise of pluralism were well settled by mid twentieth century. It had of course necessitated a change in the methods of implementation of governmental policy. The emphasis became focused on penal laws and regulation accompanied by discretion, rather than merely Dicey's regular law. Allied to this was the growth in delegated legislation (Baldwin,1994).

Imperium still contributed to policy implementation. However, it was no longer the focus as in earlier centuries as alternatives emerged. Negotiation became a

necessary part of policy implementation and resulted in the rise of corporatism. Winkler (1975) proposed that corporatism started with the recognition of the need for economic planning in the late 1950s to early 1960s<sup>39</sup>. However, it was the 1970s when corporatism truly began its revival and the government put forward their ideas of "a new form of interventionism, in which the role of the state was to harness capitalism to the interests of all" (Winkler 1975:105). At that time the essential features of corporatism were seen as "a limited commitment to public ownership, detailed control over the internal decision making of privately owned businesses, and a move away from explicit legal control" (Arup 1990:255). This was in effect achieved through the new bargaining processes.

Harden and Lewis (1986) have identified certain changes involved with the trend towards corporatism: the enlargement of the state through the incorporation of new institutions representing important interests in society; and the expansion of the area of operation of the new enlarged state structure beyond the traditionally political into what had previously been thought of as separate economic or social affairs. Thus Dicey's concept of the rule of law becomes practically obsolete (Jowell, 1989). The boundary between public and private activity had significantly shifted. This has resulted in new forms of control over the extended government activity.

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<sup>39</sup> Although scholars and commentators have identified something approximating to such a corporatist bias over a period going back to the Middle Ages with its modern revival occurring after the First World War.

Allied to this, the amount of legislation is declining (Rose,1982) although the British Government has by every other measure grown substantially since 1939. The reason given for this is that the bulk of laws is "no more and no less than measures that authorise expenditure. Insofar as this is the case, legislation is a necessary but relatively unimportant step in the policy process." (Rose 1982:25). Rose is obviously referring to dominium statutes rather than imperium ones. Taking the place of imperium is the deployment of wealth through medium of contract. This has come to the fore as a form of regulation (Harden,1992). The state is moving closer to the organisational structure and modus operandi of the modern corporation (Arup,1990).

## 8) CONCLUSIONS

As the nature of the constitution changed (represented in the changing definition of the rule of law) so did the implementation mechanisms. The move from *gesellschaft* to bureaucratic administrative resulted in a transition from the use of imperium to the use of dominium and the new prerogative. The reason for this constitutional change is related to the move to a corporatist state. Even though Thatcherism is based on a denial of corporatism its influence is not inconsistent with this theory. According to Harden, the use of contract as a regulatory tool was developed "from the rhetoric of rolling back the state employed by Mrs Thatcher's governments" (Harden,1992:vii). Thus the use of the new prerogative is consistent with deregulation and market structures (Mayntz,1983)<sup>40</sup>.

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<sup>40</sup> Indeed the 'new' pluralism is market based (Craig,1994).

Thatcherism seems to have been a determinant in the choice not to use planning control. However, in isolation, it did not provide a convincing explanation of why the voluntary approach was adopted. The trend towards dominium and the 'new prerogative' does. It is also consistent with arguments as to the corporate status of the farming lobby and incrementalist theories of policy formation. These theories refer to the situation where relevant bodies of substantive law whose adaptation or development may provide one means of achieving the objective at hand are in existence when the policy is being formulated. According to Daintith (1988:35), "in such a situation the policy maker may be more likely to resort to an instrument which draws upon such a body of law than to one which requires the creation of quite new legal arrangements; and if he does, the shape of the measures he uses will be dictated by the terms in which the existing legal scheme is expressed". As Chapter 4 pointed out, the system enacted in the WACA was based on that in the NPACA 1949 despite the fact that the underlying values were inconsistent.

It might, therefore, be asked why Part I of the WACA adopted imperium style controls. A number of reasons exist. Firstly, it was more of a codification of existing law<sup>41</sup> (prompted by the EC) than the introduction of a new system and the existing system was considered efficacious. Secondly, dominium could not operate to protect species because of the nature of the problem. The trend towards dominium is not all embracing. However, it will be used where it is considered to

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<sup>41</sup> Which was first introduced when imperium was the dominant type of policy implementation mechanism.

be the most efficacious method. For habitat protection this was obviously the case. The disadvantages suffered by the WACA<sup>42</sup> were never foreseen, particularly because the original intention was only to protect a small number of habitats. Thus the consideration of the most appropriate implementation method in the primary stages of policy formation would have pointed towards the use of dominium and the new prerogative. This would have been in tune with the Thatcherite market ethos and the farming lobby would have been supportive of this approach.

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<sup>42</sup> The political costs of enactment.

## CHAPTER 9

### IMPACT OF THE WACA

To ascertain whether the voluntary system is accordant with the need to protect habitats, it is necessary to evaluate how the system is working. According to Beerworth, such an evaluation of legislation is "intimately related to the study of the origins of legislation, as the ultimate content and administration of law is inextricably linked to the genesis of the legislation. An understanding of the impact which law has upon society must necessarily complement an understanding of the social forces which give rise to legislation" (Beerworth,1980:66). Similar forces influence the genesis and the impact of legislation. This is why an appreciation of the determinants of the WACA is important. Thus, some of the concepts considered earlier in the thesis will be re-examined for the purposes of this chapter. This will indicate whether they have also been influential on the impact of the provisions. This is important because it indicates the reasons for the success or failure of the Act. This information can then be utilised so as to avoid the enactment of ineffective legislation, or to amend existing legislation so that it becomes more efficacious. As the NC pointed out, "the main value of an analysis of achievement is ... to use it as an insight for the future, by recognising what worked, what failed and why, where the problems now lie and how they should be tackled henceforth, with better results than in the past" (NCC,1984b:71). Given the recent implementation of the Habitats Directive<sup>1</sup> based on the provisions of the WACA such information is invaluable.

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<sup>1</sup> Discussed in Chapter 10.

However, the use of such information, either in the formulation of new legislation or as a foundation for a critique of current controls, is limited. According to Beerworth, the information "rarely enters into, or indeed survives, the power play which accompanies the formulation of highly controversial legislation in democratic societies". This is because "social forces will overwhelm socio-legal or other scientific evidence when new legal procedures are formulated" (Beerworth,1980:70). Such a situation may have occurred with the passage of the WACA. There were a number of influences on the Act, none of which seemed to include evidence of the efficacy of the system already in operation<sup>2</sup> which was the foundation for the protection under the Act<sup>3</sup>. The 1980 survey of damage to sites was influential in prompting legislation<sup>4</sup> but seems not to have influenced the mechanism introduced<sup>5</sup>. The question is therefore raised whether such an evaluation is worthwhile. However, an evaluation is necessary to see if the system enacted in the WACA was and is suitable for the task in hand. Even if it is concluded that the WACA is not instrumentally effective<sup>6</sup>, it must be remembered that "the scientifically proven effectiveness of legislation, or the actual impact of law, may not always be of great consequence when compared with the symbolic value and impact of legislation" (Beerworth,1980:69). The provisions may be

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<sup>2</sup> Under the NPACA 1949 & CA 1968.

<sup>3</sup> This is also true of the implementation of the Habitats Directive.

<sup>4</sup> See Chapter 4.

<sup>5</sup> Which gave rise to the inconsistency of the approach adopted with the purposes for which it was introduced.

<sup>6</sup> This term is explained below: section 6.

suitable if they have a high symbolic value, for example by emphasising the goodwill of landowners and that the government is being seen to do something about the problem.

There are two elements to an evaluation of the SSSI system, consideration of its impact and efficacy. The enactment of legislation is intended to affect the way in which people conduct their activities. The impact of legislation is those consequences that legislation brings about in practice, the effect of the legislation on behaviour and attitudes, both positive and negative. As Tomasic (1980:33) points out, it is "necessary to distinguish the consequences which flow from legislation from its effectiveness". An assessment of impact is descriptive, it attempts to show a causal connection between a legislative enactment and the subsequent behaviour of individuals. To make this causal connection it is necessary to consider the variables that may have conditioned individual responses to particular statutory provisions and thus brought about changes in behaviour instead of the legislation.

The determination of the efficacy of legislation is an evaluative exercise. Efficacy is the extent to which legislation brings about in practice the impact (behavioural changes) which was the legislation's goals. Therefore, a statutory provision will be considered efficacious when the behaviour or attitudes that the legislation wishes to influence change in the intended manner. Determining the efficacy of the WACA thus involves the identification of the purposes<sup>7</sup> for which the

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<sup>7</sup> Real or supposed.

legislation was enacted in order to determine the intended consequences. This must then be compared to the actual impact of the legislation to ascertain whether it is efficacious. It may have an impact on behaviour but, even though this is causally connected to its enactment, if it does not match up to the intended purposes of the legislation, it will be inefficacious.

Once the efficacy of the WACA has been determined, the question of suitability can be considered. This must take account of changes in circumstances since its enactment. Even if it is efficacious, it may not be suitable because different goals or purposes for habitat protection may now exist and if it cannot *match up to these* it will not be suitable as the basis for protection under the Habitats Directive.

When considering the impact and efficacy of legislation, it must be remembered that the post-parliamentary stage can often be decisive in setting the parameters for the performance of that legislation. The effect of legislation can be substantially influenced in the formulation of new procedures<sup>8</sup>. Also, much legislation confers substantial discretion upon ministers or statutory bodies and their exercise of that discretion can be shaped by a number of things<sup>9</sup>. Developments to the system since its enactment must therefore be considered before an assessment of the system can be made. This involves both the legislative changes to the WACA and to provisions affecting the operation of the

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<sup>8</sup> Such as the code of guidance and financial guidelines for the WACA.

<sup>9</sup> For example see the later discussion of political appointments to the NC which will obviously affect the way any discretion, such as to prosecute, is exercised.

system. Only those changes that relate to the habitat protection system will be considered here.

## **1) LEGISLATIVE AMENDMENTS TO THE WACA & PROVISIONS AFFECTING ITS OPERATION**

### **1)a) Wildlife & Countryside (Amendment) Act 1985**

Concern was expressed (Phillips 1985, Adams 1984) over the 3 month loophole before notification<sup>10</sup>. During the 1984/1985 session, the House of Commons Select Committee on the Environment reported on the 'Operation and Effectiveness of the Wildlife & Countryside Act'<sup>11</sup> and criticised the existence of this loophole. Shortly after the publication of the select committee report, David Clark, the Labour spokesman on the environment, introduced a Wildlife and Countryside Amendment Bill [Bill No. 22, 1984]<sup>12</sup>.

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<sup>10</sup> In November 1983 Friends of the Earth published "proposals for a natural heritage bill " which proposed extension of development control and the subjection of MAFF grant aid to conservation criteria. In 1984 Mr Peter Hardy, a Labour MP, introduced a private member's Bill (Bill No. 173, 1984) which was designed to close this loophole. The effect of the Bill would have been to make an SSSI effective from the moment when a proposed notification was served. The measure was supported by the conservationists, and even the CLA and NFU were prepared to agree. The Bill went no further than its second reading but ministers agreed to introduce or support a similar measure in the autumn session. However, at the opening of the 1984/1985 parliamentary session, the Queen's speech made no mention of conservation of the environment. According to Lowe et al the government was dragging its feet on the matter, and giving their reasons as lack of parliamentary time. They put this down to a reluctance to introduce a modest amending Bill because of a fear of giving MPs and conservation groups an opportunity to press for more wide-ranging reforms.

<sup>11</sup> Hereafter referred to as the House of Commons Environment Committee Report, 1985.

<sup>12</sup> The measure was supported by the NFU, CLA, the Ramblers Association, CPRE, the Council for National Parks, FOE, RSPB and the Royal Society for Nature Conservation.

This was enacted on 26 June 1985 as the Wildlife and Countryside (Amendment) Act (WACAA) 1985. Section 2 removed the 3 month designation loophole, providing for immediate notification of the SSSI, whilst still retaining a three month period for objections<sup>13</sup>, and for the confirmation or withdrawal of that notification within a nine month period. In addition it extended the period for negotiation in section 28(6)(c) from three to four months. Section 2 also provided for a one month period in section 28(6)(c) when terminating a management agreement. This gives the NC time to negotiate with the landowner to try and continue the agreement. Section 4 amended the Forestry Act 1967, extending the general duty of the Forestry Commissioners to endeavour to balance forestry and conservation<sup>14</sup>. This is similar to the duty that was imposed on water authorities under section 48 WACA<sup>15</sup>.

#### **1)b) Wildlife and Countryside (Service of Notices) Act 1985**

On 25 July 1985 the Wildlife and Countryside (Service of Notices) Act 1985 was enacted. This was enacted after a failed prosecution when EN could not prove that a notification had been served<sup>16</sup>. This applied the provisions in the Town and Country Planning Act as to service of notices to the WACA so that it could be

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<sup>13</sup> The notification has immediate effect so that reciprocal notification must be given for PDOs.

<sup>14</sup> The original clause 4 in the Bill, which proposed the extension of the duty of Agriculture ministers to further conservation particularly in relation to farm capital grants, did not survive. The Bill was emasculated in committee, clause 4 disappearing after a vote of 8 to 7.

<sup>15</sup> Now repealed. See below: 1)e)

<sup>16</sup> For details of the prosecution see Withrington & Jones (1992).

proved that a notice had been served on an owner/occupier. Section 28(3) of the WACA, which provided for notification to be affixed to the land if the identity of the owner or occupier could not be ascertained, was thereby repealed.

### **1)c) Agriculture Act 1986**

Section 17 of the Agriculture Act (AA) 1986 placed a duty on the Minister of Agriculture to endeavour to balance the promotion of an efficient agricultural industry, the economic and social interests of rural areas, the promotion and enjoyment of the countryside by the public and the conservation and enhancement of the natural beauty and amenity of the countryside and any features of archaeological interest<sup>17</sup>.

It was exactly this type of duty that was kept out of the amendment to the WACA just a few months before with the defeat of Clause 4 of the Wildlife & Countryside (Amendment) Bill. It provides very little additional protection for SSSIs. However, it represented a recognition of the shifting emphasis of what was previously a purely production centred agricultural policy.

Under section 20 AA 1986 the WACA was amended so that the duties of agriculture ministers contained in section 32 WACA extended to all farm grants<sup>18</sup>.

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<sup>17</sup> This shift of emphasis towards conservation was also reflected in Section 18 which provided for the designation and management of Environmentally Sensitive Areas (ESAs). These are also based on the voluntary approach using agreements but MAFF picks up the bill for compensation.

<sup>18</sup> Not just those under the Agriculture Act 1970. The concession by the NCC in the financial guidelines to treat all grants the same for the purposes of their obligation under Section 32 to offer

Section 20 also changed the definition of farm capital grant in section 50, WACA, to reflect this extension to all farm grants, putting on an official footing what the NC had agreed to do anyway in the financial guidelines.

#### **1)d) Environmental Assessment Directive**

EC Directive No 85/337, on The Assessment of the Effect of Certain Public and Private Projects on the Environment, hereafter referred to as the Environmental Assessment Directive, was implemented in the UK in a number of statutory provisions. The main provision was the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI No. 1199) and the Town & Country Planning (Assessment of Environmental Effect) (Amendment) Regulations 1992 (SI No. 1494) and the Town & Country Planning (Assessment of Environmental Effect) (Amendment) Regulations 1994 (SI No. 677). Circular 15/88 Environmental Assessment, issued by the Secretary of State, gives guidance on the procedures. Separate regulations deal with land drainage improvement works, salmon farming in marine waters, highways, harbour works and electricity and pipeline works.

The effect of the Town and Country Planning regulations is that under section 4(2) certain development applications<sup>19</sup> cannot be decided until the LPA has taken account of environmental information. This information takes the form of an

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a management agreement was thus matched in the duty of the agriculture minister to further conservation when applications are made for grants under any of these schemes.

<sup>19</sup> Those within schedules 1 or 2.

'environmental statement' submitted by the developer. The requirement for an environmental statement is not restricted to where the development lies within a designated area, so the directive affords some protection for the wider countryside. Whether or not an environmental assessment is required depends on the nature of the development. There is a short list of projects in Schedule 1 and a long list of developments in Schedule 2<sup>20</sup>. The test for whether the regulations apply to the development in question is whether it is likely to have significant effects by virtue of factors such as their nature, size or location<sup>21</sup>.

The environmental statement provided by the developer must describe the likely significant effects, direct and indirect, on the environment of the development, explained by reference to its possible impact on - *human beings; flora; fauna; soil; water; air; climate; the landscape; the interaction between any of the foregoing; material assets and the cultural heritage*. The environmental statement is of course only one consideration when deciding the planning application. The LPA will also have to take account of comments from the public and certain environmental authorities<sup>22</sup>.

According to Haigh (1989b), the government was concerned that opponents to developments could use the Directive, by pointing to some procedural failure in

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<sup>20</sup> The circular provides for the views of the NC and the CC to be taken into account when deciding if an assessment is required in sensitive locations. It also provides that if the authority is unsure of the significance of a development's effect on the natural heritage, it should consult the NC and CC.

<sup>21</sup> In effect a similar consideration to the environmental statement itself. The test is duplicated.

<sup>22</sup> The NC is one such authority.

assessment, to challenge planning decisions in the courts. An amendment was therefore obtained to the Directive that provides that the environmental information is to be supplied only to the extent that the Member State considers it relevant. The government has thus left the decision as to the adequacy of an environmental statement with the local authority. The implication of this is that a LPA may possibly accept inadequate statements if it approves of a scheme and wishes it to go ahead<sup>23</sup>.

The environmental assessment scheme does provide for an extended role for nature conservation in determining planning permission for developments and as such must be welcomed. However, it must be remembered that most agricultural developments do not require planning permission so the Regulations<sup>24</sup> do not help to protect SSSIs from these sorts of activities which have formed the most substantial source of damage<sup>25</sup>. The Town & Country Planning (General Permitted Development) Order 1995 (SI 1995 N<sup>o</sup> 418) withdraws permitted development rights from developments in Schedule 1 of the 1988 Regulations and Schedule 2 projects where the development is likely to have significant effects. In this second category, the Town & Country Planning (Environmental Assessment and Permitted Development) Regulations 1995 (SI 1995 N<sup>o</sup> 417) provide for the developer to apply to the LPA for a determination as to whether an environmental assessment is required.

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<sup>23</sup> The only check will be the information supplied by an environmental authority.

<sup>24</sup> Although they are covered by the Directive.

<sup>25</sup> See below: section 4.

### **1)e) Environmental Protection Act 1990**

Under the EPA 1990 the only major change was the split of the NCC and CC into EN, CCW, SNH<sup>26</sup>. Apart from this the changes to habitat protection were few in number. The first was the alteration to section 15 of the Countryside Act 1968 in Schedule 9 paragraph 4. This removed the requirement of national interest for entering a management agreement. It also allowed such agreements to be entered into for adjacent land although not non-contiguous land. In Schedule 9, paragraph 11(9), section 29 of WACA was amended so that 'commencement date' was replaced with 'making of the order'; the effect of this is that a separate notification of a proposal to carry out a PDO is required once a NCO had been made<sup>27</sup>. In paragraph 11(10) the requirement that this notice be in writing was also added<sup>28</sup>.

### **1)f) Water Act 1989, Water Industry Act 1991, Water Resources Act 1991**

The Water Act 1989 repealed section 48, WACA. Section 9 imposed a duty on the NC to notify 'relevant bodies' of the existence of SSSIs if they may be affected by their activities. These bodies include the National Rivers Authority, Water and Sewerage Undertakers and Internal Drainage Boards. The body is then under a requirement to consult with the NC if it thinks that an operation it intends to carry

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<sup>26</sup> For a detailed discussion see Ball (1991).

<sup>27</sup> This deals with one of the problems raised in *North Uist Fisheries v SOS for Scotland* [1991] SLT 333 considered below: 2b and Chapter 10: 2aiii.

<sup>28</sup> This was to bring it into line with the requirement in Section 28 WACA.

out is likely to damage or destroy the SSSI. The requirement is the same as that in section 48, WACA, but covers all water bodies. In addition, before authorising anything it thinks likely to damage the SSSI, the NRA must consult the NC. The Code of Practice on Conservation Access and Recreation (1989) issued by the DOE, suggests widening this consultation requirement from just those operations that the relevant body thinks will damage the SSSI to all operations. However, as Ball (1990:76) points out, these duties are "ultimately unenforceable, since there is no remedy if the relevant body fails to consult with the NCC. This reflects the fact that their real purpose is to bring the matter to the NCC's attention so it may give advice or offer a management agreement"<sup>29</sup>.

The provisions under the Water Act 1989 were superseded by the Water Industry Act 1991 and the Water Resources Act 1991. Under section 16 of the Water Resources Act, the National Rivers Authority (NRA) has a statutory duty to exercise its functions, so far as consistent with its other duties, to further conservation. Under section 17 the NC is required to notify the NRA of the existence of SSSIs that the activities of the NRA may damage, and the NRA must consult EN before carrying out or authorising works that appear to the NRA to be likely to damage a SSSI of which they have been notified<sup>30</sup>. This seemingly strong protection is seriously undermined by only requiring consultation where the NRA believes that the operation is likely to cause damage, they are hardly best

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<sup>29</sup> Although judicial review is still possible.

<sup>30</sup> Except in an emergency.

placed to make such a judgement<sup>31</sup>. Section 4 of the Water Industry Act provides similar consultation requirements for the private water undertakers.

Section 17 of the Water Resources Act 1991 was superseded by section 8 of the Environment Act 1995 which extends the duty to the Environment Agency's functions.

### **1)g) Environment Act 1995**

Section 7, EA 1995 provides for the Ministers and the Environment Agency to have regard<sup>32</sup> to the desirability of conservation when exercising their functions. The precise nature of the duty varies depending on the function. Under section 7(1)(a) in respect of proposals relating to functions of the Agency, other than its pollution control functions, the duty is to exercise the power so as to "further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest". This is limited to where it is consistent with a number of other objectives listed in section 7(1)(a)(i) - (iv). In relation to pollution control functions, under section 7(1)(b), the duty is merely to have regard to the desirability of conserving natural beauty etc. The duties are similar to those of the NRA under the Water Resources Act 1991.

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<sup>31</sup> See for example *Southern Water Authority v NCC* [1992] 3 All ER 481 discussed below: 2b.

<sup>32</sup> This is arguably a dilution of the original requirement. Section 48 of the WACA provided for the furtherance of conservation as did Section 16 WRA 1991.

## 1)h) Planning Guidance

When the WACA was enacted in 1981, the relevant planning guidance regarding nature conservation was contained in DOE Circular 108/77. This was fairly limited in the advice that it gave, pointing out the obligation in section 11, Countryside Act 1968, to "have regard to the desirability of conserving the natural beauty and amenity of the countryside". Although at first sight this does not seem to encompass nature conservation, it is defined so that conservation of flora, fauna and geological and physiographical features are included.

The circular recommended consultation with the NC when drawing up policies for nature conservation and when considering the impact of development proposals. It also recommended early consultation in respect of planning applications on SSSIs<sup>33</sup> so as to allow more than the minimum notice<sup>34</sup> before the application was determined. It recommended attaching conditions to the planning consent so as to reduce damage to "an acceptable level". The circular also stressed the UK's obligations under the Ramsar convention and pointed out that LPAs must play a part in promoting the conservation of the sites<sup>35</sup>.

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<sup>33</sup> Which the LPAs were obliged to do under the Town & Country Planning (General Development Order) 1977, section 15(1)(g) and section 15(5). This requirement is now in the Town & Country Planning (General Development Procedure) Order 1995, Article 10.

<sup>34</sup> Of 14 days.

<sup>35</sup> Under article 3 of the convention, contracting parties are required to "formulate and implement their planning so as to promote the conservation of designated wetlands, and as far as possible, the wise use of wetlands in their territory".

Despite the enactment of the WACA with the changes in site protection, it was 1987 before a revised guidance was issued in DOE Circular 27/87. Much of the guidance concentrated on Special Protection Areas (SPAs) under the Birds Directive. As these are also designated as SSSIs, the LPAs are obliged to consult the NC before granting planning permission. The guidance gave a list of factors to take account of when deciding such applications and stated that planning permission should only be granted where the "authority is satisfied either that disturbance to Annex 1 or migratory birds, or damage to habitats, will not be significant in terms of the survival and reproduction of the species, or that any such disturbance or damage is outweighed by economic or recreational requirements". Such an approach, whilst seeming to emphasise conservation, leaves the weighting of these "economic or recreational" requirements as against the conservation ones to the LPAs<sup>36</sup>.

The circular also pointed out that developments close to a protected site may have serious repercussions within it and advised LPAs to consult the NC whenever a planning application seemed likely to affect an SSSI. It then went on to consider mineral extraction and forestry which had not been addressed in the previous guidance.

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<sup>36</sup> However, recent cases such as *R v SOS for the Environment ex parte RSPB* Times August 2nd 1996, have shown the willingness of the European Court to afford greater weight to conservation considerations. For a more detailed discussion of these cases see Chapter 10.

The next guidance to be issued was in DOE Circular 1/92, entitled Planning Controls Over Sites of Special Scientific Interest. This was concerned with the changes implemented in the Town & Country Planning General Development (Amendment)(No 3) Order 1991 and the revised environmental assessment procedures. The withdrawal of permitted development rights under Part 4 of Schedule 2 to the General Development Order 1988 meant that planning permission is required for all use of land in SSSIs for war games, motor sports and clay pigeon shooting. This was seen as an opportunity to take account of nature conservation before land is used in this way. In addition, the amended GDO 1988 now requires LPAs to consult about planning applications in any consultation area defined by NC around an SSSI, whereas before they were merely advised to do so. If a consultation area has not been defined, LPAs are advised to pay particular attention to any planning application in the vicinity of an SSSI and then decide whether consultation with the NC is needed.

The most recent guidance is contained in Planning Policy Guidance 9 on Nature Conservation<sup>37</sup>. PPG9 deals primarily with the implications of the Habitats Directive; this protection is not fully operational yet so the importance of PPG9 is currently rather limited, much of its advice being the same as that in Circular 1/92. PPG9 reinforces the Government's view of a hierarchy of sites rather than the view favoured by the NC<sup>38</sup> of a network of sites<sup>39</sup>.

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<sup>37</sup> There is also some guidance provided in a number of other PPGs. For example Department of Environment Planning Policy Guidance PPG7; The Countryside And The Rural Economy, Department of Environment Planning Policy Guidance PPG12; Development Plans And Regional Planning Guidance, Department of Environment Planning Policy Guidance PPG13; Transport.

<sup>38</sup> This is also the view that was proposed in the Huxley Report (1947).

## 1)i) Conclusion

The changes that have been made to the system can be categorised as attempts to solve drafting defects or to deal with the structural/design criticisms. Those introduced to solve drafting defects include the removal of the three month pre-designation loophole, the provisions for proving service of notification on a landowner and the requirement of a separate notification when a NCO is made. None of these was predicted as problematic at the time of the enactment of the WACA. They came to light in the operation of the system<sup>40</sup>.

Those introduced to cope with structural or design criticisms are environmental assessment, changes to planning policy guidance, extending the negotiation period in section 28 from 3 to 4 months and the duties imposed on the Minister of Agriculture, the NRA, private water undertakers and the environment agency. All of these attempt in some way to cope with the conflict between conservation and other activities and the problem of other acts outranking the provisions of the WACA.

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<sup>39</sup> The provisions of PPG9 are discussed fully in Chapter 10.

<sup>40</sup> The requirement for a separate notification when a NCO is made was only realised after the case of *North Uist Fisheries v SOS for Scotland* [1991] SLT 333.

However, little of substance has been changed since the introduction of the system and the same philosophy of voluntariness is in operation. The changes that have been made merely serve to indicate that the original system was faulty.

## **2) THE LAW IN PRACTICE**

The initial task in assessing the impact of the SSSI system is the determination of what the law is in fact. This is necessary because where the law "has been subject to interpretation which is formally or in practice authoritative, it is the impact of the provision *as interpreted* which should be measured, not just the original statutory formulation" (Miers & Page,1982:216). It is often the case that "the law as it appears on the statute books may be only a partial and sometimes misleading guide as to the administered situation which in fact exists" (Lempert,1966:118). The law in practice may be influenced by the interpretation of it adopted by the agency responsible for the implementation of the Act<sup>41</sup>. In addition, it is necessary to consider court decisions to ascertain how the judiciary have interpreted the law.

### **2)a) Agency Interpretation**

"The impact of a statutory provision obviously depends upon what it says, and thus one precondition of the consequences that are brought about realising in practice what government's intentions are, is that the legislation should realise in

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<sup>41</sup> EN, CCW and SNH.

law what its intentions are; and this in turn is dependent on how it is interpreted and applied by those responsible for its implementation" (Miers & Page,1982:244). The interpretation of the provisions by the NC must therefore be considered, as the NC has substantial discretion<sup>42</sup>. The law can only be evaluated on the basis of how it is being implemented in practice by the NC, rather than how it perhaps should be.

The first possible area of influence of agency interpretation is in determining the designation criteria for SSSIs. Guidelines for the selection of SSSIs are used by the NC staff to determine whether a site should be designated. However, these have not remained the same since the enactment of the WACA. "The guidelines that NCC staff use to identify potential biological SSSIs have been in existence for nearly a decade. During this time they have been developed and refined. Between 1985 and 1989 they were revised to take account of improvements in knowledge and of developments in categorisation of habitats brought about by the National Vegetation Classification" (NCC,1990:16). These guidelines therefore determine whether a site is notified and thus whether it will come within the procedures laid down by the Act. However, they do not affect the protection of the site as such. Notification as an SSSI does not equate to protection. The guidelines will therefore not affect the impact of the Act in relation to preserving sites, but they do give the NC a very wide discretion as to the scope of the Act. The more

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<sup>42</sup> It is responsible for determining the requirements for designation and for performing the actual designation, it is the enforcement agency and has discretion as to whether or not to prosecute. It is also left to the NC to decide whether or not it wishes to offer management agreements to landowners (unless it has objected to an agricultural grant which has been refused on nature conservation grounds).

flexible the designation criteria, the wider the scope of the Act. This is important given that the original intention of the Act was to protect only a few sites under what is now section 29 and its remit was extended substantially during the parliamentary phase. By construing the designation criteria widely the NC can also extend the remit of the Act. According to The National Audit Office (1994:11), "Although they regard the series in England as 90-95 per cent complete, in March 1993 staff were considering some 650 sites throughout the country which might be proposed as Sites of Special Scientific Interest depending on the results of full surveys and assessments".

Another possible area of influence is the operation of the financial guidelines. This will obviously be influential on issues of resources which were so controversial during the enactment of the WACA<sup>43</sup>. From May 1989 onwards, the afforestation grant element<sup>44</sup> was excluded when calculating payments for management agreements that were offered because the Forestry Commission had refused afforestation grant solely on nature conservation grounds. According to the NC, the effect of this was that "the need for compensatory agreements in respect of afforestation proposals has ... decreased" (NCC,1990:18)<sup>45</sup>. This may therefore have led to a reduction in the pressure on resources for management agreement payments as it will obviously reduce the cost of certain agreements.

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<sup>43</sup> These will be considered in more detail later in the chapter: section 3bii.

<sup>44</sup> Which had been voluntarily included by the NC.

<sup>45</sup> This withdrawal may indicate that fears expressed by the NCC in their 8th Report, of exploitation and spurious claims by landowners not genuinely wishing to carry out the damaging operations, had come to fruition.

This has also been achieved to some degree because after the government received bad press over the destruction of the Somerset Levels in 1983, it financed all management agreements on SSSIs from central funds. This was designed to avoid the loss of sites through lack of resources.

There has also been a saving in administrative resources since 'model' forms for management agreements were introduced in 1988. Where payments do not exceed £5,000 per annum, agreements can be completed by Regional Offices and any smaller valuations are done in house. "These measures have led to a reduction in the time taken to complete many agreements" (NCC,1988:14) and have thus increased the chances of saving sites.

In 1991/92 EN launched the Wildlife Enhancement Scheme for SSSIs in particular areas. These provide for positive agreements on the sites with landowners being paid to undertake positive management. In these areas damage is less likely, particularly from neglect.

All of this points to the adoption by the NC of an expansive approach to the operation of the WACA. The criteria for designation were extended in 1989 and initially the NC were willing to extend the remit of the financial guidelines by including forestry grant. However, this has been limited since 1989 with the removal of the afforestation grant element. This may be due to issues of limited resources. Excluding forestry grant has entailed a saving in resources, as has the introduction of model forms of agreement. The focus seems to be on streamlining the systems operation but expanding its scope. By saving money in some areas,

more is available to conclude management agreements on other sites. The broad approach to the designation criteria may also be linked to the concept of the SSSI system as a network of sites, trying to make this network as extensive as possible. If this is so, it is almost contradictory to the approach of the Government who only ever intended to protect a limited number of sites when the proposals were first made.

## **2)b) Judicial Interpretation**

When one considers how contentious the WACA was, there have been few cases concerning it in its 15 years of operation. A possible reason for this is that most of the contention about the Act centred on the structural and design defects whereas the courts tend to deal with the practical and drafting defects.

### **2)b)i) *Southern Water Authority v NCC* [1992] 3 All ER 481**

This case concerned Alverstone Marshes on the Isle of Wight, designated as an SSSI in November 1982. Notification of the designation was sent to the respondent water authority and two farmers who owned land on the site. The prosecution concerned a ditch that ran between the land of the two farmers and was included in the designation but did not form part of the land owned by the water authority.

In the notification received was a list of proscribed operations, one of which was dredging. In 1987 the two farmers asked the water authority to carry out dredging

operations on the ditch. Negotiations took place with the NC but were inconclusive and in January 1989 the water authority went ahead and carried out the operations. No consent for this work had been granted by the NC. It resulted in serious damage to the features that were the purpose of the designation. The water authority were then charged with an offence under section 28<sup>46</sup>.

Two arguments were put forward by the NC. The first was that the water authority were occupiers<sup>47</sup> of the ditch whilst carrying out the dredging operations. The second argument was that the water authority, as owners of other land within the SSSI, were guilty of an offence for carrying out the dredging operations on a part of the SSSI which did not belong to them because they were an addressee of the notification.

In deciding the first point, Lord Mustill held that they were not occupiers. He considered meanings attributed by the courts in reported cases to be of no use since "they draw their meaning entirely from the purposes for which and the context in which they are used" (*Southern Water Authority v NCC* [1992] 3 All ER 481 at 487). Lord Mustill considered that consistency with other parts of the statute was important in this respect. "The section contemplates that the elaborate

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<sup>46</sup> The farmers were not prosecuted even though they would have been liable for causing or permitting the operation to be carried out. The reason given for this in the judgment was 'personal' and was not detailed. Given that the NC usually wish to maintain good working relationships with landowners so as to ensure the safety of the site it may have been felt that to prosecute them would have jeopardised this. A prosecution of the water authority on the other hand would not affect the relationship with the landowners and would reinforce the duty of the water authorities to consult the NC before carrying out such operations.

<sup>47</sup> See Chapter 2 section 2di where this defect was identified.

machinery of notices, waiting periods, agreements and so forth will be set in motion by a notification under S.28(1) to an owner or occupier. The juxtaposition with 'owner' shows, to my mind, that the occupier is someone who, although lacking the title of owner, nevertheless stands in such a comprehensive and stable relationship with the land as to be, in company with the actual owner, someone to whom the mechanisms can sensibly be made to apply" (*Southern Water Authority v NCC* [1992] 3 All ER 481 at 488c). As the next step up in protection is a section 29 Order then compulsory purchase, Lord Mustill considered that in order to be an occupier under section 28 the interest must be able to be purchased<sup>48</sup>. In addition, the interpretation of occupier should be limited because liability under the section is strict and notification ensures knowledge of possible offences; transient occupiers would not have received notification and this would impose too onerous a liability<sup>49</sup>. This is important because the question of occupier for the purpose of offences under the Act also dictates who must be notified of the existence of the SSSI. However, as Jewell (1992:1371) points out, "notification is not a defining characteristic of occupation, rather the fact of occupation (or ownership) is intended to enable notification".

The second argument, that the water authority was prohibited from working on the ditch by virtue of the fact that it happened to be owner of another portion of the site and had in that capacity been an addressee of the notification, was dependent

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<sup>48</sup> This is contradictory to the inclusion of commoners since the EPA 1990.

<sup>49</sup> Note the classification of the highway authority as an owner/occupier in *Ward v SOS for the Environment* [1996] JPL 200.

on the interpretation of the words "on that land" in section 28(5). The provision in section 28(5) reads as follows:

"The owner or occupier of *any land* which has been notified under subsection (1)(b) shall not...carry out, or cause or permit to be carried out, *on that land* any operation specified in the notification..." [emphasis added]

The court held that the argument should fail. The reasoning for this was that "just as the original notification is sent to the current owner of a part of the land in his character as owner of that part, so also is the prohibition imposed on the person who at the time when operations on part of the land are performed is the owner of that part" (*Southern Water Authority v NCC* [1992] 3 All ER 481 at 489). However, in section 28(1):

"Where the Nature Conservancy Council are of the opinion that any area of land is of special interest ... it shall be the duty of the Council to notify that fact -

(b) to every owner and occupier of any of that land ..."

'Any of that land' means the whole site. The offence is about carrying out PDO on the SSSI not a part of an SSSI so it is illogical to treat the SSSI as separate parts or they should be notified as separate SSSIs. The argument as to absence of notification for transient occupiers does not apply to the water authority as they were owners of part of the SSSI and did have notification, and would have been

notified anyway by the NC for the purposes of the duty to consult. They would have known that dredging was a PDO because the requirement to register each SSSI as an individual entry in the land charges register means that the list of PDOs has to relate to the site as a whole rather than individual holdings within it. Without the possibility of liability under section 28 itself there is no restriction on the water authorities. They have a duty to consult under the Water Resources Act 1991, but if they fail to do so there is very little that the NC can do. Theoretically they could bring an action for judicial review, but if the action has already taken place they will have to found an action for damages and there is no 'plaintiff'.

The House of Lords adopted a strict statutory interpretation (unlike the lower court). However, they did recognise the deficiencies of the system. Lord Mustill claimed that "it only needs a moment to see that this regime is toothless" (*Southern Water Authority v NCC* [1992] 3 All ER 481 at 484). The case shows that section 28 was badly drafted. The narrow approach adopted may have been to illuminate the deficiencies of the system. "What the present appeal does disclose is that the statutory scheme is flawed" (*Southern Water Authority v NCC* [1992] 3 All ER 481 at 484).

**2)b)ii) *Sweet v Secretary of State for the Environment & NCC* [1989] JEL 245**

In 1985, Westhay Moor was designated as an SSSI and the owner, Mr Sweet, was notified of that fact<sup>50</sup>. In June 1987 a Nature Conservation Order was made. An

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<sup>50</sup> For full details of the Sweet saga up to this point see Withrington & Jones (1992).

inquiry was held before an Inspector under the provisions of Schedule 11, and on the basis of this report, the Secretary of State gave his decision in January 1988 to confirm the order. Mr Sweet appealed against this decision on two grounds.

The designation concerned three fields and their associated ditches. In the Inspector's report only part of the area was described as being of national importance. Mr Sweet's first argument was that the Secretary of State had no power to include in the Order land that was not in itself of national importance. Schiemann J considered the fact that loss of any of this land would destroy the habitat and that the whole of the Order land constituted a single environment and therefore held that the Secretary of State was entitled to draw the boundaries of the site where he had done. This highlights the problem of defining the size of an environmental unit when there is a problem of interdependence; buffer land almost certainly cannot be included.

The second challenge related to the twenty operations that were specified in the order as being potentially damaging. Objection was made to eight of these<sup>51</sup> on the basis that they were not 'operations'. This was dismissed on the basis that 'operations' did not have a precise meaning and planning law was of no use in helping to construe the statute. The purpose of the Act was considered and the definition was wide enough to cover the matters specified. However, despite this

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<sup>51</sup> Cultivation (including ploughing, rotovating, harrowing and reseeded); grazing; mowing or other methods of cutting vegetation; application of manure, fertilisers and lime; burning; the release into the site of any wild, feral or domestic mammal, reptile, amphibian, bird, fish or invertebrate, or any plant or seed; the storage of materials; the use of vehicles or craft likely to damage or disturb feature of interest.

wide definition, one thing definitely not covered by 'operations' is doing nothing, which may be very damaging to the nature conservation interest.

**2)b)iii) *North Uist Fisheries v Secretary of State for Scotland* [1991] SLT 333**

This concerned a NCO on Loch Obisary made on 23 May 1990. The appellants were the owners of the loch and fish farmers who had carried out their business on the loch for a number of years. The appellants objected to the order and a public inquiry was held in November 1990. The Secretary of State, having considered the report of the inquiry, stated in a letter of February 1991 that the Order would continue. The appellants then appealed against the order.

In July 1990 the appellants had sent a letter to the NC proposing to carry out one of the PDOs (fishery production) which they were already performing. They contended that this constituted a notice under section 29(4) and that 3 months had expired without the offer of a management agreement even before the public inquiry. Therefore, when the SOS had confirmed the order he had failed to take account of a material consideration, namely whether section 29(3) did not apply in relation to the fish farming operations. It would be unreasonable to confirm a NCO that could not actually stop anything in practice because the moratorium period had already expired<sup>52</sup>. Fish farming was the only principal operation specified as damaging. Lord Cullen held that the Secretary of State had failed to take account of the fact that the letter constituted a valid notice under subsection

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<sup>52</sup> This argument is echoed in *R v NCC ex p London Brick* [1994] ELM 95.

(4) and that three months had expired. The Order was therefore invalid because the confirmation was unreasonable<sup>53</sup>.

In addition, Lord Cullen went on to consider obiter the definition of 'likely' in section 29(3) and decided that the requirement was that any potential damage be probable rather than a bare possibility. As Ball and Bell (1994:414) point out, "If this interpretation is correct, it would undermine the whole of the legislation on SSSI's. It is submitted that the judge's reasoning should not be followed, since it seems to be based on an entirely incorrect understanding of the context of the legislation". The court adopted a very narrow interpretation of the provisions again. This is explained by Reid (1992:249): "The court appears to have accepted the appellant's argument that as a nature conservation order imposes some restrictions on the individual's freedom to use his land, and indeed creates the possibility of a criminal conviction if the restrictions are ignored, then according to one of the accepted canons of statutory interpretation, the provisions should be interpreted narrowly. This approach is in keeping with the law's traditional emphasis on the protection of property rights and individual freedom, but arguably overestimates the degree of restriction imposed by an order - much greater limitations are accepted in the planning system without being perceived as infringements of property or personal rights".

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<sup>53</sup> The problem raised by the validity of the notice has been remedied by the EPA 1990.

2)b)iv) *R v NCC ex parte London Brick Property Ltd* [1994] ELM 95

This case concerned a SSSI in a brickworks owned by London Brick. The challenge was to the notification<sup>54</sup>. The pit was of interest because of the previous pumping operations that had kept the water level low. Pumping had ceased and if left as it was, the water beetles which formed the focus of the scientific interest would be lost. London Brick contended that EN had failed to take account of the cessation of pumping just before the original notification and that as such reassessment was necessary before the designation was confirmed. Thus, as in *North Uist* the confirmation was unreasonable.

In addition they contended that the interest would cease if the conditions were not maintained and that EN had not taken account of this. The first contention failed. The second contention depended on the 'duty' to notify. May J identified two parts to the notification procedure. There is a duty under section 28(1) to notify a site and then a discretion under section 28(4) whether to confirm that notification. As such the second contention failed because, unless the special interest was doomed, it was a reasonable exercise of EN's discretion to confirm the notification<sup>55</sup>. The court indicated that it was reasonable for EN to have a policy normally to confirm unless the site was doomed which this one was not (yet).

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<sup>54</sup> Which was under the amended Section 28 procedure rather than the original 1981 version.

<sup>55</sup> It should be illegal if the NC refuse to notify a site on political or tactical grounds and they could be forced to do so by an interest group. However they could exercise their discretion not to confirm.

2)b)v) *R v NCC ex parte Bolton Metropolitan Borough Council* [1996] JPL 203

This case concerned the notification of Red Moss SSSI in Bolton. An action was brought to judicially review the NC's decision to confirm the notification. Bolton MBC (as owners of the site) objected to the notification of the site but misconstrued the purpose of the notification. They believed that the site was to be notified solely for its potential for regeneration, whereas it was notified for its current interest and the regeneration potential was merely an ancillary factor. They therefore addressed all of their objections to the issue of possible regeneration of the site. They were not made aware of this mistake on their part until late in the objection process and the notification was then confirmed. Bolton MBC believed that the basis of the notification had not been made sufficiently clear to them so as to enable them to make a full and effective objection, and failing to correct their mistaken approach. They claimed that such actions amounted to an abuse of natural justice.

Popplewell J concluded that the NC should have realised that the objections were based on a mistaken belief that the only issue was the potential of the site. He held that there had not been a "fair appreciation of the objection by Bolton and that, in the result, natural justice has not been observed"<sup>56</sup>. This raises an interesting issue of who constitutes the council for the purposes of notification. EN thought they had made matters clear to officers they had dealt with. The court adopted the traditional approach on removal of property rights.

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<sup>56</sup> The SSSI was later renotified.

## **2)b)vi) Conclusion On Judicial Interpretation**

The majority of the cases have concerned notification, the area of wide discretion of the NC. Because of the impact of notification on property rights the courts have tended to adopt a very strict approach to interpretation. They have tended to limit the application of the Act. They have been reluctant to adopt a wide definition where legislation leads to a criminal offence. Consequently the provisions of the WACA have been interpreted restrictedly.

## **3) VARIABLES INFLUENCING IMPACT**

In order to show a causal link between the legislation and impact, the influence of other legal and extra-legal variables must be taken into account. According to Miers and Page (1982:214), "it is notoriously difficult to measure the impact of legislation. This is so because behavioural or attitudinal change following the enactment of legislation may be as much caused by the social conditions which prompted the legislation as by the legislation itself. Even where the impact of the legislation can be identified, that impact will be dependent upon the operation of other social variables such as the occupational grouping or class of those implementing or complying with the law, and the distribution of wealth and power among these groups". Thus any impact that can be shown may not even be due to the operation of the Act. It may be alternatively explained by other variables. Ideally, one would wish to hold constant all variables having a potential impact upon the behaviour and attitudes in question apart from the enactment of the

legislation, for "only in this way could an unambiguous measure of the causal connection, if any, between the legislation and any subsequent changes in the target population be derived" (Miers & Page,1982:215). However, this is patently impossible. We are therefore limited to a description of the changes in behaviour<sup>57</sup> and the possible variables influencing this change, and the causal link between the legislation and the change can then be estimated but by its very nature this estimate will be inexact<sup>58</sup>.

The main variables capable of influencing impact<sup>59</sup> are the characteristics of those to whom the legislation is addressed, the characteristics of the legislation itself and changes in context. What one is ideally looking for is that the characteristics of the legislation can be isolated as the only variable influencing impact and thus the enactment can be said to have caused the impact shown.

### **3)a) Characteristics Of Those To Whom The Legislation Is Addressed**

The attitudes of those subject to the law will obviously influence how they respond to it. The more acceptable legislation is, the more easily it is applied. According to Cranston, "opinion about legislation depends partly upon an

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<sup>57</sup> Which is undertaken in the next section.

<sup>58</sup> This is not to say that the assessment of impact is not worthwhile. The identification of variables which may also influence the impact of the legislation is important when considering questions of enforcement of that legislation or its amendment.

<sup>59</sup> They are also relevant to the efficacy of the legislation because these variables will also influence the extent to which the consequences which are brought about in practice realise the purposes of the legislation.

evaluation of its attributes<sup>60</sup> and partly upon an individual's pre-existing disposition towards the legal system" (Cranston,1980:89). This pre-existing disposition may be conditioned by a process of socialisation whereby individuals internalise a favourable attitude to law but if that individual is also a member of a group, the norms which have been enshrined in legislation may be rejected in favour of the norms of the group. According to Kohfeld & Likens, "as a pervasive psychological phenomenon, social influence should have a significant impact on individual compliance" (Kohfeld & Likens,1982:355). EN market research on owners "showed that although 38 per cent of owners and occupiers considered relations with English Nature good or excellent, the same number felt that relations were poor or non-existent" (National Audit Office,1994:19)

It is therefore helpful to categorise groups of persons that the legislation is directed at. According to the National Audit Office (1994:20) ownership/occupation of land units on SSSIs was comprised of: private 65%, businesses 13%, trusts 9%, central govt 7%, local govt 5%, other 1%. The categorisation adopted here is linked to the types of damage that the Act was directed at controlling. The first group is landowners involved in agriculture. The second group is Local Planning Authorities and landowners involved in development. The final group is statutory undertakers. The characteristics of each that are capable of influencing the impact of the Act are considered in turn.

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<sup>60</sup> This question is considered in the next section.

As the main impetus behind the WACA was the control of agricultural damage and the largest proportion of damage to sites is agricultural<sup>61</sup>, it is the attitudes of landowners involved in agriculture that we are most concerned with. According to Brotherton (1990:200), "farmer attitudes both in general and in relation to particular cases may affect the extent to which outcomes are favourable to the NCC", and thus the impact of the Act. According to Brotherton, attitudes are favourable for some 70% of farmers in England and Wales whilst around 50% are very concerned to proceed with their proposals. He contends that "farmers' attitudes to the NCC may have shown some improvement through the 1980s ... whilst the farmers' concern to proceed may perhaps have lessened with the progressive withdrawal from 1 December 1983 of farm grants designed to stimulate agricultural production" (Brotherton,1990:202). This improvement in attitudes may well be linked to group membership if the norms of the group embody favourable attitudes towards conservation. Most landowners involved in agriculture will be members of the NFU<sup>62</sup> or CLA so the norms of these groups may have been of influence. Other variables may also have influenced attitudes towards conservation and these are discussed in the next two sections.

It was concluded earlier<sup>63</sup> that the NFU's corporatist relationship with the government was capable of exerting an influence on the adoption of the voluntary approach. Because of their extensive involvement in the formulation of the

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<sup>61</sup> See below: section 4.

<sup>62</sup> Which has some 100,000 members. Estimated by Holbeche (1986) to be about 85% of active commercial farmers.

<sup>63</sup> See chapter 5.

controls, the NFU and CLA tried to create a consensus about the Act. This was partly through fear of failure of the voluntary system being answered by the government with strict sanctions. Lowe et al (1986) quote a NFU letter of 6-11-81, circulated to members: "It must be stressed that if farmers are not prepared to be conciliatory on SSSIs, for example, by modifying schemes where possible and seeking management agreements (with payments) where appropriate, then there can be no question that a future government of any party would consider more punitive controls for SSSIs and possibly elsewhere". This fear of sanctions seems to have been important in the NFU's continued pressure to maintain the voluntary approach as the primary means of control<sup>64</sup> and to make it work. "Having ensured that its commitment to 'voluntary co-operation' was enshrined as the fundamental principle of the Act the farming and landowning lobby has faced the task of convincing a sceptical conservation lobby and ensuring that the practices of the industry live up to the rhetoric of the 'goodwill' case" (Cox et al,1985b:145). This may, therefore, represent one of the variables influencing the impact of the Act. The provisions themselves may not be as important as the pressure from the NFU and CLA to make them work.

The approach of the NFU and CLA can be linked to a change in their relationship with government. Chapter 5 concluded that their relationship was corporatist in nature but that they had utilised pluralist modes of intermediation during the parliamentary phase of the enactment of the WACA. This lobbying continued

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<sup>64</sup> See the report of the Select Committee on the Environment Vol. II for evidence of the NFU's emphasis on goodwill.

after the Act in respect of the code of guidance on SSSIs and the financial guidelines for compensation for farmers denied agricultural grants. The NFU and the CLA were involved with the development of both, unlike the conservation groups which were not consulted until after the drafts had been published. This again represented the close corporatist relationship maintained with the government, giving them the ability to exert influence from an early stage.

However, this relationship did suffer under the Thatcher government. A range of techniques were utilised in pursuit of Thatcherism, including attempts to dismantle corporatism, the extension of property ownership and privatisation<sup>65</sup>. The corporate status of the NFU and CLA was therefore subject to the 'external' problems associated with the election of the Thatcher government. Although more akin to the CBI than the trade unions (Holbeche,1986), their influence was undoubtedly diminished. However, this has been partly offset by their proficiency at lobbying and their involvement at EC level in determining agricultural policy. It has also been assisted by the fact that the so-called 'internal' problems<sup>66</sup> did not affect the NFU which was highly organised and had for years ensured compliance with agreements <sup>67</sup>.

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<sup>65</sup> These techniques were not all deployed from the start. Initially, the focus was on the dismantling of corporatism and in the mid to late 1980's the privatisation regime came into play. See Gamble (1989) for details.

<sup>66</sup> See Chapter 5.

<sup>67</sup> See Cox et al (1990a) for details of the NFU's activities in this respect.

The replacement of Thatcher with Major led to the reappearance of a more consensual style of policy making<sup>68</sup>. However, this has not heralded a return to the previous strong position of the landowning lobbies<sup>69</sup>. According to McCormick (1993:279), "The reduced power of the NFU has combined with growing criticism of MAFF to reduce the influence of the agricultural lobby, while allowing environmental groups more influence"<sup>70</sup>. The NFU survived the decline in corporatism but has had to be more reliant on lobbying, particularly in relation to conservation policy. This is because any return to the corporatist relationship has been due to political attention moving to conservation policies. However, in these areas their authority is both externally and internally weak so the relationship is on a different footing. This extended corporatist relationship is also undermined by a lack of goodwill on the part of members which is essential to ensure freedom from legislation. The 'internal' problems which affected the trade unions in the 1970's are starting to take their toll. The NFU is also under pressure externally from those doubting the efficacy of the agricultural support system with its resultant environmental and monetary costs. The relationship is therefore much weaker in relation to environmental policies than production ones.

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<sup>68</sup> Holliday considers that "this reflects a rather less dogmatic approach to policy making. In addition, it is evidence of a realisation that Thatcherite modes of operation were not always ideal" and that "a gradual reconstitution of neo-corporatist arrangements ... remains a clear possibility" (Holliday,1993:316).

<sup>69</sup> This is partly because many of the structures have been destroyed.

<sup>70</sup> MAFF has been subjected to attacks about its poor track record on environmental issues. This led to the NFU pressing MAFF to take a more active role in respect of environmental issues. "This had less to do with farmers' commitment to environmental matters than with the NFU's determination to avoid ceding controls over agriculture to the DOE or any other conservation agency" (Winter,1991:53).

The implications of this include a recognition by the NFU and CLA of a decrease in their influence. Concern that stronger controls may be implemented if the voluntary approach does not work has led to a concerted effort to ensure that it does work. The possibility of being able to resist the introduction of stronger controls is diminishing so all efforts are concentrated on making the Act work. The landowning lobbies are adopting conservation because they view it as a new 'crop'. "Something had to be done to reduce over-production, and even the NFU and CLA at last began to see the potential value of nature conservation as an alternative objective of land use, for which farmers might be paid" (Ratcliffe,1989:12). As the norms of the NFU and CLA are directed towards ensuring the working of the Act their members are likely to assume those same norms. Such a change in attitudes was recognised in the second reading debate on the Amendment Act: "the National Farmers Union has acted in an exemplary manner towards the legislation" (Hansard HC 72,8-2-1985,1235, Dr Clarke MP).

Those landowners involved in agriculture that are not members<sup>71</sup> will obviously not be influenced by these norms by virtue of membership of the group. However, they may be influenced by them indirectly. According to Bell (1985:15), they are all bound "by the enormous moral responsibility it [the Act] lays upon them ... The legislation trusts the farming community and depends upon its goodwill to achieve the right balance. This approach has the firm support of landowners and their representative organisations. They are, nevertheless, acutely aware that their responsibilities for conservation have been thrust into the limelight as never

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<sup>71</sup> Certainly less than 15% according to Holbeche (1986).

before. Already under attack from a number of quarters, land management decisions are now subjected to a critical scrutiny that concentrates on those that are seen to be in conflict with conservation practice. Abuse, even by a very small minority, threatens to bring the whole edifice crashing down". The debate generated by the legislation has led to a cultural change "alerting farmers to the strength of feeling that exists about conserving the countryside...this has been translated into action by many and has had a marked impact on land management" (Bell,1985:16).

"Government departments and agencies own or occupy land on around 1,400 Sites of Special Scientific Interest and many have their own nature conservation objectives. To build on these ... English Nature have negotiated declarations of common purpose called Statements of Intent with 10 bodies" (National Audit Office,1994:19). These include the Forestry Commission, British Association for Shooting & Conservation, Sports Council, Crown Estates Commission - Windsor Park, National Trust, MOD, English Heritage, British Coal Open Cast, Association of County Councils, National Parks. "These statements provide a positive framework for co-operation with other bodies and help to ensure that site management is more effectively planned and the importance of nature conservation is fully recognised" (National Audit Office,1994:21)

The second category of persons subject to the legislation is Local Planning Authorities and landowners involved in development. The LPAs in particular have been affected by the de-regulation of land use planning under the Thatcher government which was documented in Chapter 7. They have less de facto control

over the process than in the past, thus limiting their ability to control damage to SSSIs through activities given planning permission.

The final category is statutory undertakers. Water bodies in particular are of great importance as many are owners or occupiers of SSSIs. In these cases the Department of Environment Code of Practice on conservation, access and recreation (1989) recommends that a management plan for the SSSI is agreed with the NC.

### **3)b) Characteristics Of The Legislation**

When considering the characteristics of the legislation as a variable influencing impact, the central issues are (i) the operation of other legislation / guidelines linked to the Act (ii) the nature of the incentives and disincentives provided by the legislation to encourage compliance, (iii) and the means of enforcement provided. Issues of suitability of the controls introduced are also relevant but it is difficult to separate out such issues. If the controls are unsuitable they probably will not work as well.

#### **3)b)i) Ancillary Provisions**

It is necessary to take account of "the possibility that the enactment of a particular law may be only one of several similarly directed governmental interventions in the same historical period" (Lempert,1966:18). It has to be remembered that section 28 forms only one part of the implementation of the policy of protecting

habitats. Other institutional, financial and procedural arrangements have been made which will have a bearing upon the impact of the law. Examples include the planning system and the financial guidelines.

The working of these will obviously affect the impact of the WACA and may provide an alternative explanation for any impact shown. However, their influence is difficult to quantify. It is easy to see where the granting of planning permission has led to the damage of a site, but it is difficult to ascertain how much has been prevented by refusal of planning permission on sites. PPG9 stresses the nature conservation interest of a site as a material consideration when deciding planning applications. However, it is merely guidance. Miers and Page (1982:177) consider that such guidelines "may have an effect which is little short of legislation. In many cases they will in practice constitute an official, final and authoritative interpretation of a provision, both for those implementing it, and for those subject to it". Yet it is still impossible to quantify its effect and the phraseology used is not precise enough to be of any real assistance. In addition, such guidance is incapable of influencing levels of damage from agricultural operations because they are outside the scope of planning control.

The financial guidelines are relevant to the question of incentives and will be discussed below.

### 3)b)ii) Incentives / Disincentives

There are two elements to this, the impact of deterrence (section 28 liability) and the impact of incentives (Management Agreement compensation). The deterrence is the possibility of prosecution & fines, the incentives are payments under management agreements. But the two are separate: a landowner is not automatically entitled to the incentives, qualification is dependent upon entering a management agreement with the NC so the situation is not as straightforward as it seems. As Jacob (1980:69) points out, "the empirical problems inherent in researching deterrence are multiple. There is the fundamental problem of measuring deterred behaviour because it consists of acts never performed".

Deterrence theory "rests on the hypothesis that crime will decrease in relation to perceived costs" (Sedgwick,1980:91). Thus, the most obvious reason why individuals comply with legislation is a material one, they stand to gain or to lose something of value to them (Veljanovski,1980)<sup>72</sup>. Deterrence theory emphasises

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<sup>72</sup> Sedgwick proposes a retribution theory instead of deterrence theory, which is based on morality and the distinction between right and wrong. This circumvents what he calls the punishment dilemma: "once a crime has been committed, punishment of an individual appears in a different light since the threat of punishment did not deter the offender in question. In addition, the marginal benefit of punishing a particular criminal as a deterrent to other potential offenders is very small. Consequently, the benefits of punishment appear smaller in the particular case than they had appeared in the ex ante situation before any crimes were committed" (Sedgwick,1980:92). Thus any deterrent effect is diminished over time. This is also recognised by Neiman who criticises the use of economic incentives; in particular "tinkering with the calculus of private transactions in order to direct egoistic behaviour to public ends ignores the important need to wreak retribution and punishment on those who refuse to satisfy public goals" (Neiman,1980:31). "The crucial characteristics of the deterrence perspective is that it focuses on the impact of punishment. It considers the sanction as a cost to the individual rather than as a reflection of social judgement. Lacking from this perspective is a concern with the intrinsic character of the crime committed. Deterrence theory has little to say about the rightness or wrongness of criminal behaviour" (Sedgwick,1980:94). However, adopting a deterrence theory perspective is less of a problem with the WACA because it is not a stigmatised crime. This view is confirmed by Hawkins (1983:37): "Criminal law and its ceremonies are laden with moral overtones. Yet the nature of the conduct subject to control in systems of regulation invites moral ambivalence, an ambivalence reflected in

"a confrontational style of enforcement based on detection and punishment of violations" (Scholz,1984:385). However, "the mere fact of the formal provision of positive or negative sanctions is frequently insufficient to encourage or to discourage the behaviour or attitudes defined in the legislation. Thus, individuals will typically balance the costs of implementing the legislation against the benefits which may formally accrue to them; and conversely, they will balance the costs of non-compliance against the benefits of continued disobedience" (Miers & Page,1982:231). "The utility-maximising individual will compare the alternatives available to him or her and choose among them on the basis of their expected utility. Punishment is therefore understood as a means of manipulating the various costs and benefits confronting the potential criminal so as to induce compliance with the law" (Sedgwick,1980:90).

This balance will depend on the individual's perception of the costs and benefits of a particular action. It will be based on "a wide variety of factors, such as the age, class, race, sex and socio-economic status of the individual; whether he is acting alone or as a member of a group, and if so, the size, composition, legal status, objectives and values of the group and its relationship with others; the nature of the behaviour or attitudes defined by the legislation, in particular whether they are of economic significance, socially acceptable or deeply entrenched within particular groups; and the characteristics of the legislation itself" (Miers & Page,1982:231). Factors such as group membership will affect this<sup>73</sup>.

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the frail legal sanctions provided in the legislation for breach of regulation, and the extreme reluctance with which the law is invoked".

<sup>73</sup> The effect of membership of the NFU has been discussed earlier.

The nature of the behaviour defined by the legislation, which is often the abstention from agricultural activities, is often seen as contrary to the 'Holy Grail' of farming productivity. According to Cranston, "it can be hypothesised that behaviour to which individuals are not committed as a way of life is deterrable to a greater extent than behaviour to which a commitment has been made" (Cranston,1980:89). The commitment to productivity is an obvious example. In addition, of all types of behaviour, economic behaviour is the most difficult to control. Behaviour which earns a farmer his living is likely to be difficult to control in such a way.

### 3)b)ii)a) Deterrence/Compliance

Deterrence in the context of the SSSI centres on the possibility of prosecution and subsequent fines. There is also the threat of injunction available to the NC; however, this has rarely been used. According to P Stuttard of CCW they have obtained an injunction only once and even then it was not served. Deterrence is dependent on an individual's perception of the risk of detection and punishment, and "the social variables affecting the individual who is punished and the degree of his commitment to the prohibited conduct, and more specifically, on the nature of the punishment itself" (Miers & Page,1982:236). The nature of the punishment is financial. However, the level of these fines has often been criticised as being too low and therefore providing no deterrent. It must be remembered though that the level of fines may not have that great an effect on the impact of the Act; even if they were higher the positive impact of the Act may not be any greater. This is

confirmed by Balch (1980:57); "in general we expect compliance rates to increase with both the probability of detection and the severity of expected sanctions. But mild punishment may be more effective since it breeds less negative affect or stigma and is more likely to be meted out. This would explain why frequency is a more potent predictor of deterrence than severity".

However, "a person whose illegal income far exceeds the occasional fines that he must pay when convicted of an offence will, other things being equal, continue to disobey the law" (Miers & Page,1982:236). Thus "punishment works best when other factors, especially positive reinforcement, are appropriately manipulated. It is not likely to suppress the punished behaviour in future unless the contingencies that reinforced it have been reduced, removed, or replaced" (Balch,1980:57) On this basis, there was little deterrent effect in the fines imposed by section 28 and section 29 particularly having regard to the positive reinforcement provided by MAFF grants. As a means of comparing these consider the Essex farmer being paid £1 million per year under a management agreement. This is on the basis of net profit foregone. If the farmer had gone ahead with the proposal he would have made £1 million profit annually. The maximum fine, however, is currently £5000. The fines probably have more symbolic value, in showing that it is considered unacceptable to damage sites and the possibility of a criminal offence may deter some.

Before a landowner is deterred by the possibility of a fine, however, he must believe that it is likely that his offence will be detected and that he will be prosecuted. "Certainty of punishment appears to have a larger effect on the level

of crime than does the level of severity" (Jacob,1980:71). The likelihood of detection is linked to the system of site monitoring. Although this has improved substantially, the targets are only the visiting of a third of the sites each year, thus reducing the chance of detection. Even if the offence is detected, there is no guarantee that it will be prosecuted. As Withrington & Jones pointed out in 1992, "perhaps less than half of reported incidents of damage to SSSIs constitute breaches of section 28. Nevertheless, a total of only twelve prosecutions since the 1981 Act is less than one would expect" (Withrington & Jones,1992:97). If the likelihood of prosecution is so distant, then it is unlikely to provide any deterrent effect whatsoever.

Even without any real deterrent effect some landowners are obviously complying with the law. This may be because they agree with its goals, or because they perceive the slim possibility of prosecution as a deterrent. However, as Miers and Page point out, "we may distinguish from those who comply with the law because they agree with its substance, or because they perceive the costs of non-compliance to outweigh the benefits, those who comply because it *is* the law....A deep moral or political conviction in the legitimacy of the law may induce individuals to comply with particular prescriptions notwithstanding their opposition to them" (Miers & Page,1982:237). In this context it must also be considered that landowners are complying with the provisions in order that stricter controls are not introduced if the system is seen as failing.

### 3)b)ii)b) Incentives

The incentives provided by the SSSI system are the compensation payments under management agreements. The payments are calculated in accordance with the financial guidelines. These guidelines enshrine the principle of full compensation for profit foregone. Thus the landowner loses nothing by agreeing not to perform the operation and in fact may gain because the calculations take no account of the risk factors of projects. A management agreement eliminates risk. "In a context where land values are falling and the search for alternative sources of farm income is increasingly pressing, owning land which carries a designation can be seen as advantageous rather than, as formerly, entailing a form of penalty" (Cox et al,1990a:189).

However, farmers may not be happy to cease farming a particular area of land. They may not be offered a management agreement, perhaps because it would be too expensive. In such a situation there is usually a great incentive to carry out the operation - MAFF Grants. If a landowner does not enter a management agreement he is therefore likely to proceed with the operation as it will make the most economic sense. One consequence of MAFF grants is overgrazing. This was noted by the House of Lords Select Committee on the EC (1984:32) who commented that "One of the most frequently mentioned causes of damage to the environment is overgrazing in the hills, as a result of overstocking ... Many witnesses believed that this has been encouraged by the availability of compensatory allowances (commonly referred to as headage payments) under Directive 75/268, payment of which is based on the number of livestock units

which a farmer possesses". This claim is reinforced by the NCC who point out that "Agricultural policy mechanisms designed to bolster farm incomes continue to lead to pressure on areas of high nature conservation interest. In particular the availability of Hill Livestock Compensatory Allowances may have contributed to environmental over-grazing in some upland areas and a subsequent need for management agreements to bring the stocking levels down to a level compatible with safeguarding the conservation interest" (NCC,1990:18).

According to Barney Holbeche of the NFU, such pressures have lessened considerably since 1986 when the Capital Grants Scheme was severely limited<sup>74</sup>. The overall impact has been a lessening of agricultural incomes creating a need for alternative income sources. These pressures from the CAP may also have been lessened by its reform in 1992. However, not all of its reform has been beneficial. In 1984 milk quotas were introduced and "one of the consequences of quotas was a reduction in the use of purchased feedstuffs and a corresponding concentration on improving the utilisation of grass. This led some farmers to destroy certain ecologically interesting grasslands by 'reclaiming' them" (Winter,1991:51). However, there have been a number of benefits such as set-aside. "Guaranteed prices for the major arable crops such as cereals and oilseeds have been reduced and a series of area based direct payments are now made to compensate farmers for this reduction. In addition, in order to receive these compensation payments, farmers must set aside at least 15% of their arable land, for which they will also

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<sup>74</sup> Details of the changes are discussed in 3)c).

receive an area payment"<sup>75</sup>(Wynne,1994:49). In addition "there is now a system of quotas limiting the number of livestock on which farmers can receive payments" (Wynne,1994:49). The NFU sees the reduced profitability as decreasing the pressure on farmers to plough up sites to convert to arable (B Holbeche, pers.comm.).

However, according to EN, the reformed CAP has not dealt adequately with the question of subsidies which continue to initiate damage to wildlife (House of Lords Select Committee on the EC,1993:12). Proportionately, much more money is available for agricultural support than nature conservation<sup>76</sup>. The reform of the CAP has been described by Wynne (1994:48) as "an attempt by politicians to address budgetary and surplus problems and, at the margin, environmental issues". However, "the reduction in incentives for intensification and the introduction of new initiatives sympathetic to nature conservation should help lessen the pressures for new [management] agreements" (NCC,1989:16). This has a knock-on effect on the resources available for conservation because "falling profitability is generally being reflected in smaller payments being negotiated under new agreements" (NCC,Annual Report 1986).

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<sup>75</sup> Arable area payments scheme.

<sup>76</sup> According to MAFF (1994) Agriculture In The UK the total spent on agricultural support in 1994 was £2609.8 million; agri-environment measures represented only £18.8 million of this.

### 3)b)iii) Means Of Enforcement

"The effectiveness of law ... depends crucially on the nature of enforcement" (Veljanovski,1983:81). The adequacy of the means of enforcement is not dependent upon how they are utilised in practice<sup>77</sup>, but whether they are appropriate for the control of the behaviour in question. "This involves such matters as the structure, composition and powers of the enforcing agency, its level of technical or professional expertise, and the nature of the sanctions it can evoke in the event of non-compliance" (Miers & Page,1982:227). It is the resources theoretically available for enforcement that matter, although their actual application is relevant in relation to the question of agency interpretation<sup>78</sup>.

#### 3)b)iii)a) Structure, Composition and Powers of the NC

Because of the substantial discretion given to the NC, the attitudes and behaviour of its officials who implement the legislation are important variables in influencing its impact. Their exercise of this discretion will be "in part according to their conception of its functions both as the means of implementing a particular statutory scheme, and in part according to their perception of the costs and benefits of implementing it in individual cases" (Miers & Page,1982:238). "It seems that no particular consideration was given to the policy which the NCC should adopt on taking prosecutions, for instance defining what was in the public

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<sup>77</sup> For example vigorously, haphazardly or corruptly.

<sup>78</sup> Considered above: section 2a.

interest" (Withrington & Jones,1992:97). Thus it is left to individual officers to decide.

Another factor which may influence the NC's exercise of their discretion is the trend of political appointments to the NC during the conservative administration. Lowe (1983a) points out that 18 out of 39 new appointments by the Conservatives to both the NC and CC had farming or forestry interests. This meant that over a third of the NC had such interests. Eleven of those appointed had served or were currently serving in an official capacity with the NFU, the CLA, or their Scottish or Welsh equivalents or the Timber Growers Organisation<sup>79</sup>. One example is Sir Hector Monro, the junior minister responsible for the Bill, who was appointed to the NC<sup>80</sup>. This trend of political appointments will obviously affect NC policy and influence the way in which the Act is working.

### 3)b)iii)b) Level of Expertise

The NC have no in-house legal expertise to conduct prosecutions so the Area Regional Officer is responsible for gathering evidence and witnesses<sup>81</sup>. "Problems have arisen in taking cases to court when the NCC's county officer has failed to caution defendants or to date documentary evidence" (Withrington &

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<sup>79</sup> A comparison is made of appointments to the CC and NCC under the Labour administration up to 1979 and the Conservative administration 1979 to 1983 by Brotherton & Lowe (1984). This shows that under Labour 14 members were conservation based and 8 were farming based. Under the Conservatives 9 were conservation based and 14 were farming based.

<sup>80</sup> He was a member of the Area Executive Committee of the Scottish NFU.

<sup>81</sup> Although they are now using solicitors to provide legal advice on an agency basis.

Jones,1992:98). Obviously, the conduct of a prosecution can make the day-to-day relationship of NC's county offices with the local farming community very difficult and, in some cases, impossible<sup>82</sup>. "The understandable reluctance of NCC county officers to get involved in legal proceedings is one of the main reasons why so few prosecutions have been taken" (Withrington & Jones,1992:99). "In the two years after 1985 the NCC contemplated a number of prosecutions. Most were not pursued because of lack of evidence. In some cases Crown immunity was involved" (Withrington & Jones,1992:102).

### 3)b)iii)c) Nature of Sanctions Available

The question of any deterrent effect from prosecution and fines has already been discussed. However, in addition the NC can apply for a section 29 Order (NCO) or a CPO. Any breach of section 29 will involve larger fines which may be more of a deterrent. However, very few NCOs have been used, 40 since the start of the Act (Withrington & Jones,1992). It is arguable that the NCO as a 'step up' in control is not appropriate to control the behaviour in question. It is used when section 28 has failed to secure an agreement with a landowner yet it is based on exactly the same procedure. This would indicate that it is unlikely to work and is, therefore, inappropriate. It also involves a blank cheque if anything is really to be done.

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<sup>82</sup> Investigators are now used instead of staff. These investigators gather evidence which is then screened by retained solicitors.

### 3)b)iii)d) Assessment of Enforcement

One method of evaluating the NC's implementation is to look at allocative efficiency which occurs where there is a balance between the costs and the results of implementation. This is important where there is a limited budget and the allocation of capital and manpower to the implementation of differing aspects of the legislation, or to differing ways of implementing the same provision is likely to affect its operation. The limited number of prosecutions reflects a preference for resources being directed towards the negotiation of management agreements rather than the conduct of prosecutions, site protection is the ultimate goal. Hawkins (1983:36) highlights "a marked reluctance to employ the formal machinery of law enforcement" in a number of regulatory systems. This is also noted by Veljanovski (1983:77): "in many areas of social regulation the law is enforced in a highly discretionary and conciliatory manner". Prosecution is too costly in terms of site loss. The conduct of a prosecution is unlikely to foster a good relationship with the landowners and secure the safety of the site. According to Wyn Jones, "At the end of the day we want the site managed and if we prosecute we lose the site" (Pers. comm.). "Before pursuing a prosecution English Nature must consider whether this would be in the interests of nature conservation, bearing in mind the need to secure the long term management of the site with the help of the owner. Where damage can be easily reversed, or the evidence is weak, they will not proceed. English Nature must also consider the cost and time involved; for example action against one landowner lasted four years and cost over £100,000 in staff and legal costs (National Audit Office,1994:24).

This accords with the nature of the provisions. They can be regarded as a compliance rather than a penalty system. With penalty systems, the principal objective is retribution or punishment. With compliance systems "the responsible authority is concerned to secure conformity to standards; rule breaking is perceived not so much as criminal but as a problem to be solved by the concerted efforts of the authority and the individual concerned" (Miers & Page,1982:239). The emphasis is on encouraging the landowner not to continue damaging the site and to build a good working relationship, something which is highly unlikely after a prosecution has taken place. Compliance systems' conception of enforcement "centres upon the attainment of the broad aims of legislation, rather than sanctioning its breach. Recourse to the legal process here is rare, a matter of last resort, since compliance strategy is concerned with repair and results not retribution" (Hawkins,1984:4)<sup>83</sup>. As Mayntz (1983:124) points out, "while it remains true that poor implementation can ruin the best of policies, it is also true that perfect implementation does not assure realisation of policy goals if the programme takes the wrong approach".

### **3)c) Change In Context**

Coincidental historical happenings often provide as good an explanation for a perceived change in behaviour as the legislation itself. "The likelihood of

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<sup>83</sup> This can of course be contrasted with the Victorian Bird Protection legislation which was designed as a penalty system. Retribution was an essential part of the system.

independent historical variables entering as causal factors in the perceived change increases as the time lapse between the measurements increases" (Lempert,1966:124). Fifteen years have elapsed since the passage of the WACA; this length of time indicates a likelihood that such 'historical' variables may have played a part in the impact shown. The recession since the end of the 1980's may well have been responsible for the decline in damage attributable to activities given planning permission. The influence of such variables is, however, very difficult to ascertain.

The most important contextual change is to MAFF grants. As Chapter 2 noted, the conflict with agriculture was highly contentious at the time of the enactment of the WACA. Given that agriculture represented the highest proportion of damage to sites in the 1980 survey (Moore,1987), any changes in these grants may have influenced the impact shown<sup>84</sup>. Grants can be paid by virtue of the Agriculture Act 1970, section 28, which enabled capital grants to be paid for carrying out or establishing farm businesses. This was widened by the Agriculture Act 1986, section 22, to include ancillary businesses. The Farm Land & Rural Development Act 1988 allowed payment of non-capital grants.

When the WACA was enacted the relevant scheme was the Agriculture and Horticulture Development Scheme (AHDS)<sup>85</sup>. This was in operation from 1

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<sup>84</sup> This is also linked to the nature of the incentives/disincentives provided by the WACA discussed above.

<sup>85</sup> For a general overview of the scheme see the explanatory leaflet AHS 5 & AHS 2 (1980).

October 1980 to 31 December 1988<sup>86</sup>. This provided grants for, inter alia, a number of activities capable of damaging SSSIs<sup>87</sup>. These included: fish farming<sup>88</sup>, orchard grubbing<sup>89</sup>, reseeding and regeneration of grassland<sup>90</sup>, land clearance and reclamation, claying and marling<sup>91</sup>, field drainage and freshwater flood protection<sup>92</sup>.

This scheme was replaced by the Agriculture Improvement Scheme (AIS)<sup>93</sup>. This was in operation from 1 October 1985 to November 1988. This was the first grant scheme to recognise conservation separately. Leaflet AIS 1s pointed out the notification requirement for SSSIs and the existence of management agreements. It was also the first scheme to provide grants for non-agricultural diversification<sup>94</sup>. As with the AHDS grants were available for freshwater fish farming (Leaflet AIS 16), orchard grubbing (leaflet AIS 5), grassland improvement (leaflet AIS 13)<sup>95</sup>,

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<sup>86</sup> Replacing the Farm & Horticulture Development Scheme (leaflet FHD 1,1980).

<sup>87</sup> Although the grant for removal of hedgerows under the Farm & Horticulture Development Scheme (leaflet FHD1,1980) was replaced with a grant for planting new hedges and reconditioning of old hedges (Leaflet AHS 24,1985).

<sup>88</sup> The activity that was in issue in *North Uist Fisheries v Secretary of State for Scotland* [1991] SLT 333 discussed above: section 2biii. Although the revised version of leaflet AHS 35 (1984) stated that the Minister would consider the effect of the proposal on the countryside when deciding the grant application.

<sup>89</sup> See leaflet AHS 27 (1985).

<sup>90</sup> Included in this is 50% grant for the application of lime and fertiliser in Less Favoured Areas.

<sup>91</sup> These are operations intended to stabilise light or fen soils. See Leaflet AHS 26 for details of the rates of grant.

<sup>92</sup> For details of the rates of grant see leaflet AHS 23 (1984).

<sup>93</sup> For general details of the scheme see leaflets AIS 1 & AIS 1s.

<sup>94</sup> See leaflet AIS 6 Tourism & Crafts.

<sup>95</sup> Although the rate of grant for lime and fertiliser application was reduced to 30% in Less Favoured Areas.

field drainage and freshwater flood protection. Grants were also provided for conservation (leaflet AIS 4) although these were limited in nature, including hedges, trees and shelter belts<sup>96</sup>.

The Farm Diversification Grant Scheme (FDGS) was in operation from January 1988 to January 1993. It was to encourage farmers to diversify into non-agricultural profit-making activities on their farm (Leaflet FDS2). This was merged with the Farm and Conservation Grant Scheme (F&CGS) which came into operation on 19 February 1989 (leaflets F&CGS 12 & F&CGS 1). This scheme was designed to reduce the conflict between conservation and agricultural grants schemes. Under the F&CGS, grants are given for capital expenditure which has an environmental value. According to the MAFF handbook (leaflet F&CGS 12), the F&CGS 1989 "is designed to help farmers maintain efficient farming systems, whilst also meeting the often heavy cost of combating pollution and conserving the countryside and its wildlife". The emphasis on production has not, however, been eroded.

The scheme provides grants for, inter alia, field boundaries, traditional buildings, heather burning, bracken control, fencing livestock out of broad-leaved woodlands or heather moors and heaths (leaflet F&CGS 10), reseedling and regeneration of grassland, field drainage, flood protection (leaflet F&CGS7) and farm diversification (leaflet F&CGS 11). A grant can be claimed through an Improvement Plan under the F&CGS 1991 or outside of a plan under the F&CGS

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<sup>96</sup> Which had previously received grant under AHDS (leaflet AHS 24,1985).

1989. Although more conservation oriented than the previous schemes, it seems to be directed more towards aesthetics and farm efficiency<sup>97</sup>.

#### **4) ASSESSMENT OF IMPACT**

An assessment of impact involves ascertaining how the WACA has affected the behaviour of those subject to its provisions. This entails a comparison between behaviour whilst subject to the provisions with the behaviour which would have existed had the WACA never been enacted. This comparison "is one which by definition cannot actually be made" (Lempert,1966:111). The assessment must therefore involve an estimate of what the behaviour would have been without the WACA.

A number of models of research design exist for the assessment of impact<sup>98</sup>. The design which will give the most accurate estimate of what behaviour would have been without the Act is a multiple time series. This uses a control group for comparison. This involves taking a number of measurements of behaviour both before and after the introduction of the legislation and measurements at the same time in a control group. These can then be compared and the impact of the legislation can be assessed. While such an approach may be possible in America, with comparison possible between states, it is impossible in the UK. There is no

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<sup>97</sup> There are a number of other grants schemes in existence. However, they are not directly applicable to this discussion and are therefore discussed in Chapter 10.

<sup>98</sup> Details of the various research designs are given in Lempert (1966).

control group that we can compare the measurements with. Without such a control group, historical variables cannot be accounted for<sup>99</sup>. However, the basic time series, taking a number of measurements over a period of time but without a control group for comparison, will give some indication as to impact and how behaviour has changed, but its validity is tempered by the possibility that the impact can be explained by means of rival hypotheses. The rival hypotheses (or variables) discussed earlier are reconsidered in detail in this section to see if they account for the impact shown.

The first stage is to ascertain whether there has been any change in behaviour. However, because of the nature of the provisions in section 28, changes may be methodologically difficult to ascertain. According to Feeley (1976:508), "facilitative types of law are likely to pursue their ends by altering the rates of activity rather than flatly prohibiting or requiring a prescribed pattern of behaviour"; changes "brought about by such laws are not likely to be formally stated, clearly identified or even widely acknowledged. Neither are they likely to be immediately obvious to the outside observer and at times even to all their sponsors". Because of the temporary nature of the prohibitions imposed on landowners and the reliance on the voluntary approach, the impact of the SSSI system may well be diffuse and long term<sup>100</sup>.

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<sup>99</sup> These historical variables may be the primary explanatory variable which has influenced the impact rather than the legislation itself.

<sup>100</sup> An assessment of impact will be helped by the fact that the system has now been running for 15 years and changes are likely to have been effected by now.

The time series method of impact assessment will use the published statistics of the NCC, EN, SNH and CCW. These give details of damage to SSSIs each year. These will be compared with the damage statistics from before the enactment of the WACA. This will not give a complete picture of the impact of the WACA because the statistics are not comprehensive. Recording of damage has taken place on a rather ad hoc basis and is not systematic in nature so cannot give a true picture of changes. "The lack of systematic recording and consistent definitions make it impossible to determine if the incidence or amount of damage is increasing or decreasing" (Rowell,1992:1).

In addition, using the time series comparison method gives rise to the possibility of 'regression'. Regression is due to a "higher than chance probability that if the year before the passage of the law is chosen as one of the two points, it will have been a year of exceptionally high incidence of the type of behaviour which the law is trying to regulate, since laws often gain their necessary momentum for passage in response to just such out of the ordinary situations" (Lempert,1966:125).

The only damage statistics available from before the passing of the Act are those published during the passage of the Act indicating a damage level of 13% of sites (Moore,1987). Thus regression seems a strong possibility. However, it was concluded in Chapter 4 that the main stimulus for the introduction of the provisions at that point in time was the need to comply with the requirements of

the EC Birds Directive and not merely the high level of damage<sup>101</sup>. In fact Moore (1987) claims that the NC conducted the survey once the intention to introduce legislation had been announced in order to strengthen their case for extending controls over all SSSIs.

However, one other possibility which must be noted is that the lack of systematic monitoring of damage before 1980 may have led to a higher than average incidence of damage being recorded when the study was actually made. Cumulative damage from a number of years was probably recorded, thus increasing the levels of damage recorded at that point. Thus, any drop in the number of sites recorded as having been damaged since the introduction of the Act may not be attributable to the influence of the Act but to regression.

The figure of 13% damage was reached by combining the results of two surveys (Moore,1987:62). The first was reports of significant damage reported by NC regional staff. This excluded insignificant damage which was categorised as local damage from which the site would recover quickly<sup>102</sup>. Because the results obtained from this would be an underestimate<sup>103</sup>, a separate sample survey was also conducted making a random selection of 15% of sites to check. The results of the routine survey showed that 8% of sites had been significantly damaged.

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<sup>101</sup> The high level of damage did, however, increase pressure in the parliamentary stage to extend the protection proposed beyond that provided by Section 29. The damage statistics affected the nature/type of protection even if it did not initiate the new Act.

<sup>102</sup> Such damage is now included in the statistics.

<sup>103</sup> Because significant damage could occur without the regional officers being aware of it.

The results of the special survey showed that 15% of the sites had been significantly damaged. These were combined to reach the figure of 13% of sites suffering significant loss.

Another problem in assessing the damage statistics is that known as instrumentation. Changes in the calibration of a measuring instrument may produce changes in the obtained measurement. The possibility must be considered that the change in the law will be accompanied by a change in the method of collecting data concerning that law. The focus of the damage statistics during the parliamentary phase may well have initiated a more comprehensive system of monitoring, particularly as the 1980 survey had shown that routine recording of damage did not reveal the full scale of damage.

Monitoring of damage did become more systematic after the introduction of the Act. From 1983 onwards damage statistics were published every year in the annual reports of the NC. However, this was purely the routine recording of damage and does not present a problem of instrumentation. However, the inclusion in 1989 of over grazing as a form of damage, which had not been included previously, is just such an example of instrumentation. Another example is damage through insufficient management which has only been recorded as a separate type of damage from 1989 onwards, and only in England. The first major change in data collection was initiated in 1989/90. The NC commenced a number of regional trials intended to lead to the development of systematic monitoring of the integrity and quality of the SSSI series. The trials led in 1991/92 to the development of a programme of site integrity monitoring with a target of visiting

or revisiting 1/3 of sites. According to Hughes (1994), under this scheme some part of 52% of all sites were visited in 1992. Before this point, it is perfectly possible that damage has been recorded several years after it occurred.

If regression is a factor, the statistics since the introduction of the Act may seem to indicate a reduction in the levels of loss and damage when there is not one in fact.

If instrumentation is a factor, the statistics since the introduction of the Act may seem to indicate a rise in the levels of loss and damage when there is none, it is just because the real level of damage had not been realised before. This is quite a strong possibility, given that when the special survey was carried out in 1980 the levels of damage were substantially higher than those indicated by the routine survey. With the current system of monitoring moving more towards the approach of the special survey the levels of damage may not be rising but just being identified correctly. When this is combined with the effect of including short-term damage in the statistics, instrumentation seems to be a factor than must be taken account of.

In addition to the problems of instrumentation and regression, a number of other factors with regard to the damage statistics must be considered. There are a number of inconsistencies in the recording of damage. This is not just because recording of damage is rather haphazard in nature, there is also the problem of different categorisations of damage. Since the split of the NCC into EN, CCW and SNH different ways of recording damage have been used. SNH and EN classify short-term damage differently and SNH do not record damage through over grazing. According to D Pritchard of RSPB a significant proportion of

damage has been hidden. Many areas were not renotified under the 1981 because of damage. As these no longer counted as SSSIs the damage to them was never recorded.

A number of types of damage are also under-represented in the statistics. The National Audit Office (1994:15) give the example of a report on farm pollution in 1990 by the Nature Conservancy Council which identified 46 cases of chronic pollution damage on a small sample of Sites of Special Scientific Interest; "far fewer cases were shown in the formal loss and damage statistics .. covering the same period". In addition, "deterioration due to lack of management - which English Nature regards as the most serious long term threat to many sites - is not fully represented in the figures" ... and "other threats to sites such as acid deposition and pollution from traffic are not dealt with in the loss and damage statistics as the existence of the threat and its impact on the site are difficult to establish in the course of routine monitoring visits" (National Audit Office,1994:15).

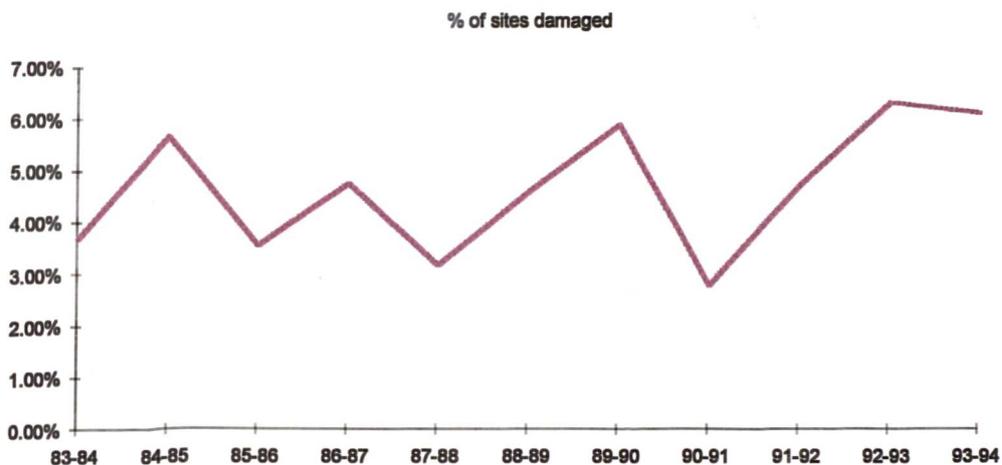
The other factor that must be taken into account when assessing the statistics to determine the impact is that they do not specify whether the damage occurred with the consent of the NC, after the four month moratorium period, or whether it was unlawful under the terms of the Act. Much of the damage occurring may be lawful within the terms of the Act. It is a reduction in unlawful damage and hopefully damage after the 4 month moratorium<sup>104</sup> that is the desired impact.

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<sup>104</sup> Encouraged by offering a management agreement.

However, these cannot be distinguished from damage occurring after the giving of NC consent to an activity. This is not a great problem, however, as the probability is that the NC are unlikely to give consent to a damaging activity.

Because of these difficulties, the positive side of the provisions, management agreements will also be taken into account in assessing the impact of the Act. Rather than just considering whether the Act has reduced the rate of damage, it is useful to consider how many sites are now 'protected' because a management agreement has been entered into.



**Figure 1.**

The 1989/90 peak in damage was explained by the NC as relating to instrumentation: "the enhanced effort in loss and damage recording in the report year has resulted, inevitably, in a higher incidence of recorded damage than previous years" (NCC,1990:21). For the following year, according to Rowell, the

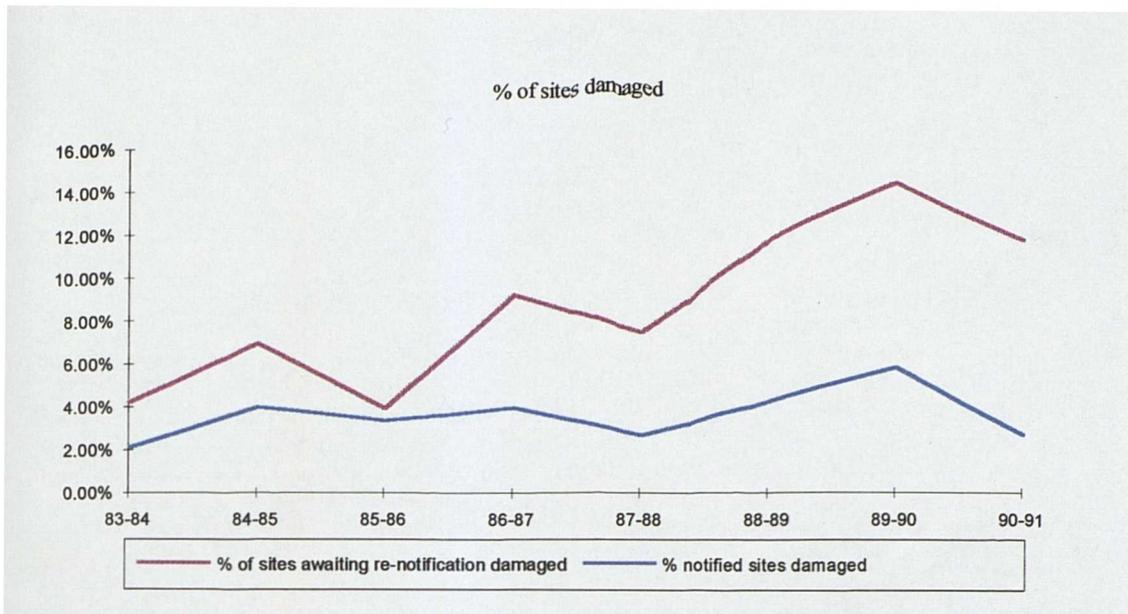
data is incorrect. It includes only the data for England which "amounts to less than 50% of the recorded damaged area for that year" (Rowell,1992:18). Damage levels have been consistent since 1983-4 at around 4.7%. Taking account of the missing data for 1990-91, this accords with the view of Withrington & Jones (1992) that damage levels are running at approximately 5%. In 1980 damage was estimated to have occurred to 13% of sites. Levels of damage therefore seems to have fallen since the introduction of the Act. However, this may be because of regression, with a higher proportion of damage being recorded in 1980 because of the 'special' survey that was conducted. If this is the case, can any reduction in damage levels be seen?

One possible means of ascertaining this is to discount the results of the special survey and consider only the results of the routine survey. The average level of damage since the Act is approximately 5%. The routine survey of damage in 1980 indicated 8% damage. There seems to have been a reduction in the levels of damage. However, Withrington & Jones point out that "the post-1981 Act statistics are not the result of systematic monitoring, and it is likely that the actual damage is somewhat higher" (Withrington & Jones,1992:97). This is not fatal because the routine survey in 1980 was probably on a similar basis. In fact the surveys since are likely to be more comprehensive because of instrumentation, thus making levels of damage seem even higher in comparison to the 1980 levels. So there may have been a reduction in damage levels. However, the levels recorded in 1980 under the routine survey may be responsible for regression because the routine survey may have recorded cumulative damage from previous

years, thus increasing the amount of damage recorded. It is therefore almost impossible to ascertain whether any reduction in damage levels has occurred.

This can be remedied by comparing damage levels on sites that have *been notified* under the 1981 Act and were thus covered by the provisions, and those awaiting re-notification which were only protected under the provisions of the 1949 Act. On these sites landowners were supposed to voluntarily comply with restrictions but they were not obliged to. Such a comparison gives an indication of the likely result of a multiple time series comparison. Information is only available for the years 1983-1991 but the time scale is long enough to *indicate general trends*. However, this may not give an accurate comparison because some landowners may have voluntarily complied even though they were not subject to the provisions. This is not fatal to the exercise because the effect of this would be to diminish any differential between the two types of sites. If a differential in damage levels is seen despite this, it indicates that the provisions of the Act are responsible for the difference.

82.3% of the sites damaged in 1983-4 were not covered by the 1981 Act, because they had not yet been re-notified. Of the sites that had been notified only 2.13% were damaged. Thus damage to those sites covered by the Act seems even lower than Figure 1 would suggest. This indicates that, even allowing for instrumentation and regression, a reduction in damage levels has occurred.



**Figure 2.**

For those sites awaiting renotification damage levels are much higher than for those that have been notified under the 1981 Act. This indicates that the Act is reducing damage levels to sites even though the levels of damage for notified sites have increased. The rate of increase is generally consistent between the two apart from 1985-1986. This may be explained by the enactment of the WACAA 1985 which closed the 3 month pre-designation loophole. Before 1985, Adams argues that the provisions of the WACA increased the rate of damage to non-notified sites: "It is apparent that notification or renotification of sites has triggered their destruction. The Act has in fact accelerated the loss and damage of precisely those areas it seeks to protect" (Adams,1985:12). The drop in 1985-86 may, therefore, represent the prevention of this type of damage.

Apart from the 1985-86 discrepancy, the alterations in the levels of damage for both types of site are consistent. Levels of both types of damage would have been affected by regression, instrumentation, characteristics of addressees and changes in context. This leaves the characteristics of the legislation as the only distinguishing variable between the two. This therefore seems to indicate that the WACA itself led to the differential in damage levels rather than any other factor. Thus, although regression and instrumentation may have affected the levels of damage recorded, making it difficult to compare with pre-1981 statistics, this method shows that, despite this, the Act does seem to have reduced damage levels.

Better data is available from the Site Integrity Monitoring Scheme. "This indicates that 40% of sites visited showed deterioration or damage, and 21% were under threat" (Rowell,1992:1). However, the Act is only directed towards damage and not deterioration so it would be unrealistic to use these figures when assessing the Act.

The question that must then be addressed is whether the types of damage that the Act was intended to reduce actually account for this reduction. The Act was primarily directed towards the reduction of damage from agricultural / forestry operations. The 1980 survey levels were:

Agriculture 51% - Of this 15% was related to failure to carry out beneficial activities. This is probably equivalent to damage that is now classified as neglect or insufficient management.

Industry 21% - This included mineral working, tipping, laying pipelines, residential building and industrial pollution. Apart from the pollution element, most of this would now be included in the category of damage by planning permission.

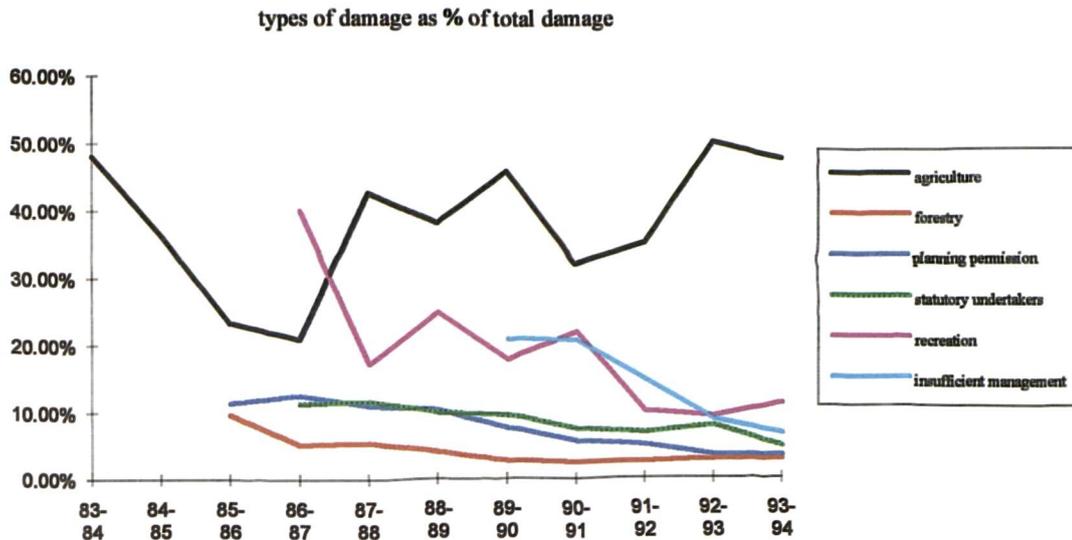
Fire 16% - This included vandalism and badly controlled muirburn. Some of this damage would therefore now be counted as agricultural as fire is no longer a separate category.

Forestry 4%

Recreation 4%

Other 4% - This included damage by water authorities and vehicles.

Thus, the figure of 51% for agricultural damage is likely to have been higher in reality when the levels of damage from badly controlled muirburn are included. 51% can therefore be regarded as the minimum proportion of damage caused by agriculture before 1981.

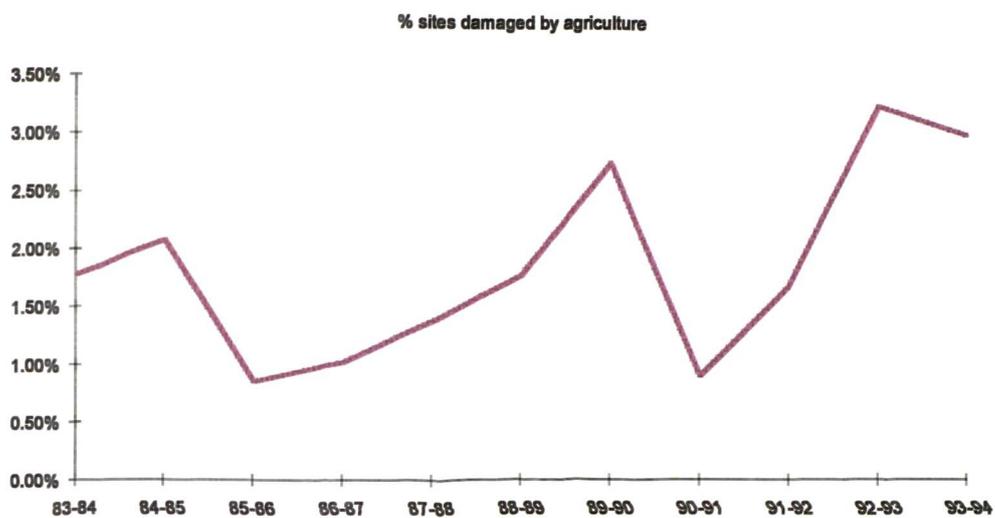


**Figure 3.**

In order to compare these results with the 1980 survey it is necessary to combine the figures for agriculture and insufficient management in the years 1989-94 because they were both included in one category in the 1980 survey. The effect of this is to give an average over the period 1983-94 of 44.76%. This seems to be a reduction on the minimum of 51% shown in 1980. However, this method suffers from the problem that if in one particular year a high incidence of another type of damage is recorded other types of damage drop as a proportion of total damage even if there has been no real change in levels. This seems to be a possible explanation for the drop in 1986-7 with the high levels of recreational damage recorded. In addition, problems of instrumentation arise because lack of management or insufficient management is much more widespread than the published figures suggest as it is only recorded in England. When this is combined with the numerous changes in classification of damage between 1983

and 1986 it is impossible to theorise why agricultural damage seemed to diminish in these years and then subsequently increase.

One way to avoid these problems is to consider instead the proportion of sites damaged by agriculture each year. This will not be affected by an increase in other types of damage.

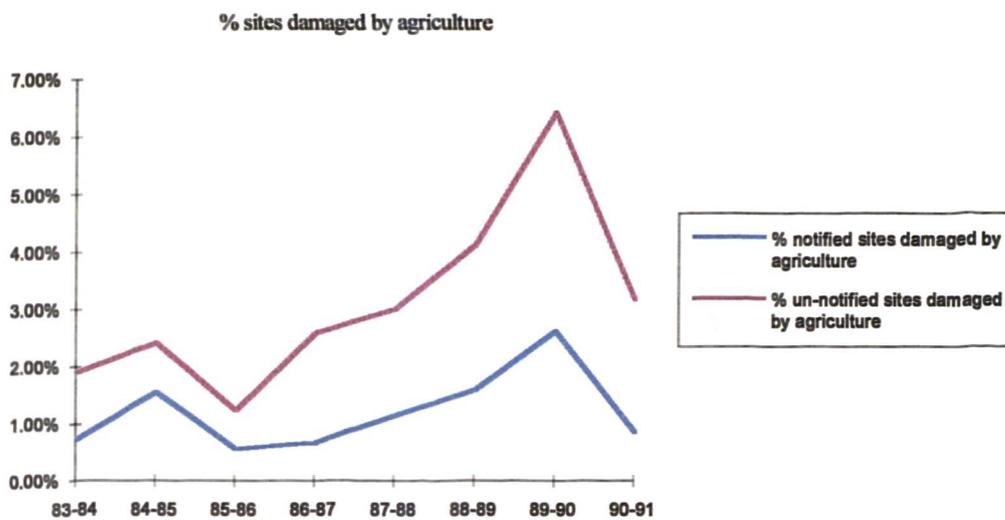


**Figure 4.**

The drop in damage levels for 1985-86 can be explained by the enactment of the WACAA 1985 which closed the three month loophole before designation. The 1989/90 increase is related to the increased recording in that year, particularly of chronic damage through over grazing in the uplands. In 1980 7.6% of sites were damaged by agriculture according to the special survey (Moore,1987). Thus the proportion of sites being damaged by agriculture has fallen. However, as figure 3 shows agriculture has not fallen as a proportion of total damage. This may

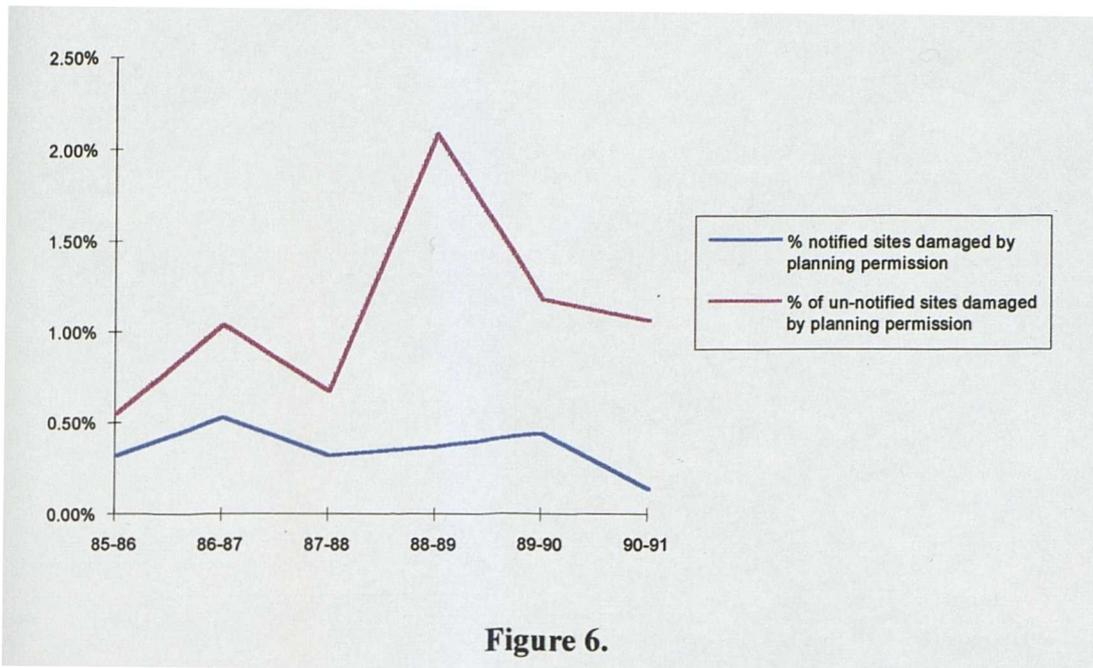
indicate that figure 4 only shows a reduction because damage levels in general have fallen rather than that the Act has been successful in reducing agricultural damage specifically.

This is confirmed when making a comparison between notified and non-notified sites for both agricultural damage and damage caused by planning permission



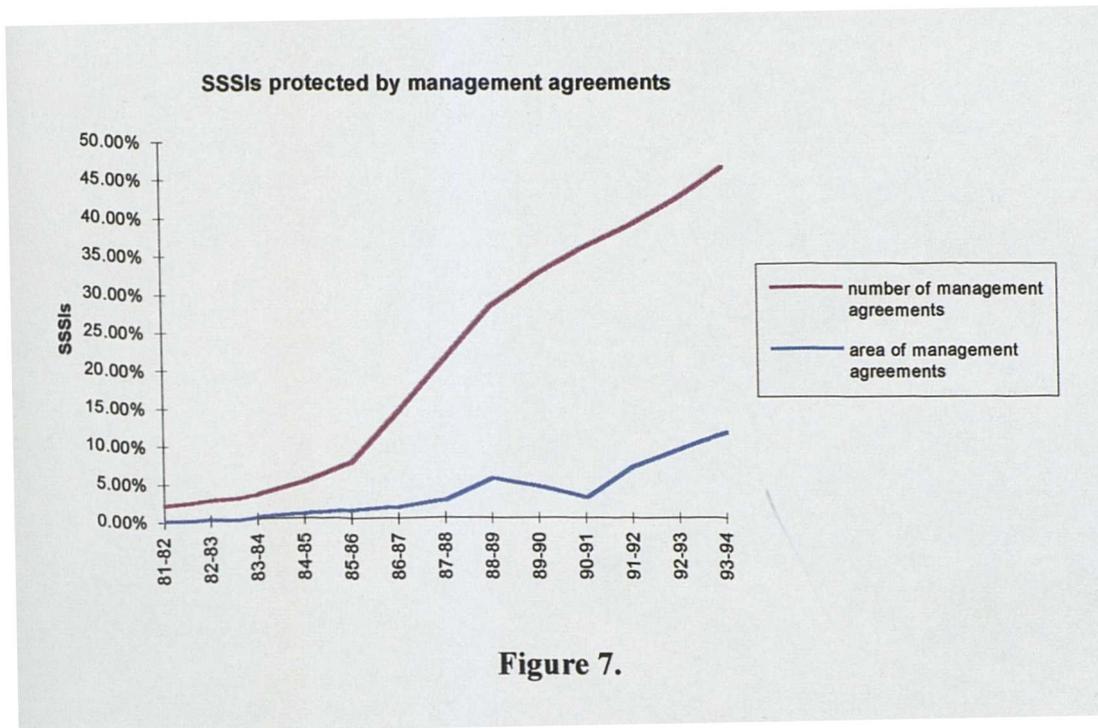
**Figure 5.**

This indicates that levels of damage by agriculture are reduced for notified sites, thus indicating that the Act is having an impact. However, if this impact was a consequence of the restrictions imposed, levels of damage through planning permission should be the same for both types of sites as both are subject to the same regime. As can be seen from Figure 6 this is not the case.



Planning permission is to an extent outside the Act because of the defence to section 28(5) liability and there should, therefore, be no difference between notified and non-notified sites. This indicates that the particular restrictions imposed in the Act do not explain the reduction in damage levels. However, some of the difference may be explained by the fact that activities covered by planning permission are likely to be on the PDO list. Even though owners do not have to notify their intentions to carry out such activities, because of the defence in section 28(8)(a), they may often do so because they are listed on the notification documents. This would, therefore, give the NC an opportunity to conclude a management agreement with the landowner which they may not have for non-notified sites. However, this cannot account for such a large discrepancy between damage levels.

It must be some characteristic of the Act which has caused this impact because both types of site are subject to the problems of regression and instrumentation, and are affected by the characteristics of the addressees and changes in context. If it is not the specific restrictions that account for this then it must be the positive side of the Act - management agreements.



Since 1985-86 there has been a sharp increase in the number of management agreements that have been entered into. This has been explained by Wyn Jones of EN as a consequence of a change in administrative practice. Until the mid 1980s there was a tendency to use long term agreements executed under seal for 21 year periods. These were not very flexible for EN or the farmer. Farmers wanted shorter agreements so as not to have to commit themselves for so long. Therefore, 3 year agreements were introduced. Administratively it is better for the conservation agencies to have 3 year than 21 year agreements because of the

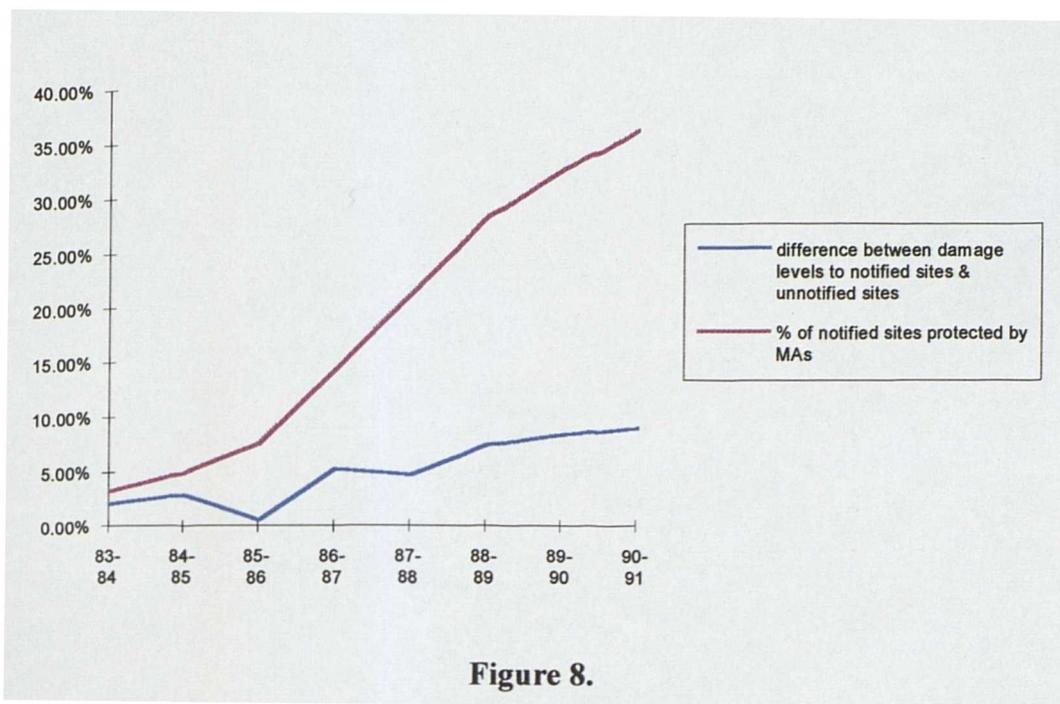
ability to review them earlier. Farmers were more willing to commit themselves for a shorter period so the uptake of agreements rose. Also as the average cost has fallen the NC has greater resources to enter these agreements. According to the National Audit Office (1994:21) "the average cost per hectare has fallen from £100 for agreements started in 1885-86 to £30 for those started in 1991-92. This is partly as a result of falling agricultural profitability but also due to a toughening of English Nature's negotiating stance".

However, despite this rise in numbers of agreements, the area covered by these agreements remains small. This is because, according to Wyn Jones, it is easier to secure management on small areas than on large ones. When this is combined with the fact that most SSSIs in England<sup>105</sup> are small and fragmented the anomaly is explained.

When the uptake of management agreements is compared to the difference between rates of damage to notified and non-notified sites there seems to be a correlation.

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<sup>105</sup> Which accounts for the majority of agreements.



**Figure 8.**

As more notified sites are covered by management agreements, rates of damage are reduced on notified sites and in comparison rates of damage to non-notified sites appear higher. Thus the Act has reduced levels of damage through the positive side of the controls - management agreements.

However, the difference between damage to notified and non-notified sites is not constant. This does not defeat the theory proposed because the variations are capable of explanation. In the period 1983-85, levels of damage were higher for non-notified sites because of the 3 month loophole. The Act actually encouraged damage on non-notified sites so that both types of site were not subject to the same conditions. Otherwise it can be contended that levels of damage would have been approximately the same. In 1985 the WACAA was introduced which accounts for the decrease in the different rates of damage. This brings the levels

of damage to the two types of site within 0.56% indicating that, but for the loophole, rates of damage on both types of site would have been equivalent.

After this point the only distinguishing feature that can account for the difference is management agreements. It cannot be the restrictions, as the levels of damage through planning permission in Figure 6 show. This is consistent with the conclusion reached on the characteristics of legislation, that there was no deterrent effect from the restrictions but that there was an incentive effect.

This has also led to another impact on damage levels. Because management agreements are being entered into by so many landowners, levels of long term damage are also falling.

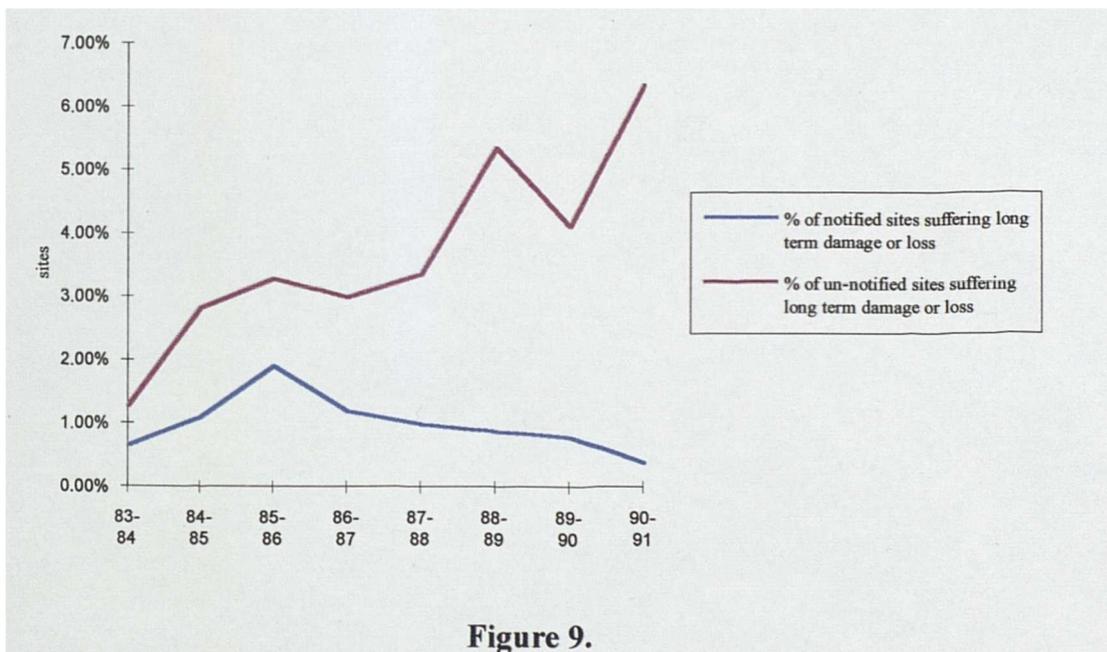


Figure 9.

The current levels of long term damage are generally accounted for by damage through planning permission. The 1988-89 peak for non-notified sites correlates to the increase in damage through planning permission to those sites in Figure 6. In 1993-94 damage by activities given planning permission accounted for 72% of the area suffering partial or whole site loss. Over the whole period, such activities have accounted for 43% by number of sites wholly or partially lost. These large numbers are obviously of some concern. According to Rowell (1992:22) "A significant proportion of this can be ascribed to continuing peat extraction" which is outside the terms of the Act. Despite the drop in levels of long term damage on notified sites, this may not continue. "As the majority of short term damage<sup>106</sup> results from inappropriate management such as over-grazing and is recorded year after year on the same sites, it is clear that appropriate management is not being applied" (Rowell,1992:1). It is likely that levels of long term damage will increase as these sites continue to suffer damage and are no longer retrievable.

Because of their incomplete nature, it is unwise to rely solely on the statistical figures available when assessing the impact of the WACA. "Because only part of the SSSI resource was monitored these figures must be considered to be minima. They do, however, provide useful indications of the nature, relative severity and causes of damage" (NCC,1990:21). It can be ascertained that damage has reduced, even if we cannot tell by how much and that the nature of damage has changed with less long term damage occurring. Reports from the conservation

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<sup>106</sup> Sites which have suffered short term damage should recover within 15 years given effective and appropriate management.

agencies and other sources have therefore been considered in order to confirm the impact shown.

According to the NC there has been an impact on attitudes of those subject to the legislation. "A trend of improvement has been established, and within the main land and natural resource user groups there has been increased willingness to consider the needs of nature conservation in the pursuit of primary objectives. The concern to make contributions or at least concessions to nature conservation ... is evident in the greater responsiveness of government departments and agencies, public utilities, local authorities, relevant parts of industry and business, landowners and occupiers and their organisations" (NCC,1984:44). Thus part of the reduction across both types of site may be attributable to such changes in attitudes.

During the 1984-85 session, the House of Commons Select Committee on the Environment reported on the Operation and Effectiveness of the Act<sup>107</sup>. The committee also believed that the Act was working well<sup>108</sup> and did not recommend any radical changes to the provisions. They wholeheartedly supported the voluntary approach, believing that there had been a change of mood in the farming community in favour of conservation, the impact of the act was positive<sup>109</sup>. They

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<sup>107</sup> Initially the Committee had intended to consider the working of the whole of the Act, but limited itself to only Part II, which they considered to be the 'crux of the legislation'. They did this because of a 'sense of urgency, fostered by the need to deal as soon as possible with the loopholes'. Some of these loopholes were dealt with by the 1985 Amendment Act, however, not all of them were and the report does give a good picture of how the Act was working in 1985.

<sup>108</sup> Despite reservations about the loopholes.

<sup>109</sup> Any attempt to impose new duties or controls was viewed as unnecessary and antagonistic.

viewed the lack of compulsion in the Act as a positive thing, and "the only way to develop good will towards conservation in the farming community and a stable system of consent and common purpose in the long term" (chapter2,para10). At the time this seemed unfounded but given the results shown in Figure 8 it is justified.

One area where there has not been a significant change in approach has been in relation to statutory undertakers where levels of damage have remained rather high. However, the problem is restricted to certain undertakers. As Rowell (1992:49) points out, "All incidents attributed to statutory undertakers were undertaken or authorised by water authorities or internal drainage boards" (Rowell,1992:49).

## **5) CONCLUSIONS ON IMPACT**

The impact shown has been a reduction of damage to an average of 4.7%<sup>110</sup>. Within this there has been a decrease in long term damage as a proportion of total damage. There has been little overall change in proportion of damage which is agricultural but there has been a decrease in long term agricultural damage. There has been a decrease in the proportion of sites suffering damage through activities given planning permission but the area suffering loss through this source is still very high. There has been a widely commented on change in attitude by farmers

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<sup>110</sup> Although the actual figure may well be higher because of the lack of systematic recording of damage.

in favour of conservation and a large increase in the number of sites protected by management agreements. However, there has been little increase in the actual area protected.

"While it is impossible to say with certainty that the law produced a specific change, it is often possible to say with a high degree of certainty that a particular legal structure plus a particular series of administrative interventions resulted in a certain change in behaviour patterns" (Lempert,1966:119). A change has been shown to have occurred, but can we say with certainty that the SSSI provisions were responsible?

The impact shown is a reduction in levels of damage. This is not specifically linked to the type of damage that the Act was trying to control. Damage by most activities carried out by the landowners themselves has fallen, as has long term damage. However, it is not possible to tell what proportion of the damage occurring is illegal under the terms of the Act. Withrington and Jones (1992) estimate that less than half of the recorded damage constitutes breaches of the provisions. It is a reduction in illegal damage and damage after the four month moratorium that was hoped for.

One of the problems is that "the proportion of farmers abandoning their proposals following NCC objections is not known" (Brotherton,1990:201). This is also recognised by the National Audit Office (1994:15): "the fact that notification does not always protect an individual site does not mean that designation is of little or no value. For example there is no way of knowing how many proposals to

develop on or near Sites of Special Scientific Interest have never been progressed because of the notification, but it is likely to have a significant deterrent effect".

A detailed analysis of compliance has been conducted by Kohfeld & Likens (1982). This puts into algebraic form the influences on compliance or non-compliance in reaching an optimum level. Such optimum levels do exist because there is a natural limit toward which compliance tends over time. The question then is whether compliance with the Act has reached such an optimum level. If so, a levelling out of the take up rate of management agreements and levels of damage can be expected.

The reasons for the current levels are the number of management agreements and the change in landowner attitudes. It seems more likely that the process of formation of the legislation rather than the legislation itself was responsible for this impact on landowners' behaviour<sup>111</sup>. The effect of this is likely to have reached its optimum level by now. If it is also unlikely that many more management agreements will be concluded then the only way to reduce damage levels is to alter the deterrence side of the system. The deterrent effects of the provisions cannot be ascertained with the data available, even though the positive ones can be shown.

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<sup>111</sup> As discussed earlier, the extensive involvement of the NFU in the formation of the legislation and their diminishing influence have led them to pressure landowners to comply.

According to Jacob (1980:70), "It is also likely that deterrence operates at a threshold level. It may well be true that up to a certain point laws have no effect on behaviour... Consequently, if one examines changes in the law or variations that remain below a threshold, one may come to the false conclusion that law has no effect. Unless one investigates a wide range of sanction levels, these threshold effects are likely to go undetected". Thus the deterrent side of the WACA may be below this threshold level.

"The results of site integrity monitoring are a relevant indicator of how well notification protects sites. An English Nature analysis at five regions ... showed that over half of sites visited in these regions in 1991-92 showed no change in condition since the last visit. Improvements were recorded on about 20 per cent of sites in all five regions, and some deterioration or damage was recorded on over 18 per cent of sites in each region" (National Audit Office,1994:13).

One of the biggest problems, as can be seen in Figure 3, is the large proportion of damage caused by activities outside the SSSI protection. A large proportion of this is attributable to recreational damage for example from off-road vehicles. A substantial proportion of damage from planning permission is peat extraction in pursuance of existing perpetual planning permissions which is outside the system. "Although not numerous by comparison with agricultural activities, these developments represent the most serious cases of damage" (Withrington & Jones,1992:97).

There are also high rates of damage attributable to activities not properly covered by the Act such as operations carried out by statutory bodies<sup>112</sup>, overgrazing by commoners and damage by pollution from outside the site. "Cases of intentional damage by owners and occupiers of SSSI land are relatively few and the great majority of reported incidents are the result of past activities and decisions or are caused by persons, such as commoners or the general public" (NCC,1990).

Thus "prosecution cannot be pursued in all cases of damage. An analysis by one region ... showed that in 1991-92 only 21per cent of cases of loss and damage to sites broke the law" (National Audit Office,1994:24). "Of the nine prosecutions which have been sought six were decided in favour of the Nature Conservancy Council and three against; two of the latter fell on technicalities relating to the notification process. Fines imposed were small, ranging from £200 to £1,500. Nevertheless English Nature believe that prosecution or the threat of it, and the attendant publicity act as a deterrent" (National Audit Office,1994:24). Thus the NC view prosecution more as a means to force an owner into a management agreement<sup>113</sup>.

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112 Especially in the water industry.

113 For example see the Sweet saga detailed in Withrington & Jones (1992).