



Rural Payments  
Agency

# Consultation on the allocation of land on the New Forest common for the Basic Payment Scheme

November 2020



[www.gov.uk/rpa](http://www.gov.uk/rpa)







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## Executive summary

1. The Rural Payments Agency (RPA) is consulting on the operation of the Basic Payment Scheme (BPS) in the New Forest. In particular, it is seeking views on amending the method currently used to allocate the eligible area of the New Forest to activate BPS entitlements for payment, whereby marking fees paid in one year determine the allocation of the eligible area of the Forest in the following year.
2. The consultation has been prompted in part by a legal challenge to the current allocation method. The Claimant argues that the current reliance on marking fees to determine the allocation of eligible area in the New Forest unlawfully couples the payment of BPS payments to a requirement for agricultural production.
3. Three options are put forward for consideration in this consultation to either replace, or amend, the present method, but views are sought on other possible options as well. It is intended that any changes agreed as a result of this consultation will be implemented for BPS 2021 and remain in effect for the remainder of the duration of BPS.
4. It should be noted that, irrespective of the outcome of the legal challenge, RPA does not intend to continue with the present New Forest allocation methodology for BPS 2021 and beyond.

## Background to BPS and SPS as area payment schemes


5. BPS is the largest agricultural support scheme in England, with a budget of around £1.8 billion a year. The scheme was introduced in 2015 and followed on from the Single Payment Scheme (SPS), which operated on a similar basis and was introduced in 2005. BPS inherited many of the features of the SPS.
6. BPS is an area-based system of agriculture subsidy supported by entitlements, which means that the subsidy is partly calculated by reference to the area on which agricultural activity is carried out. Agricultural activity under BPS is defined as meaning:
  - the production, rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes or
  - maintaining an agricultural area in a state which makes it suitable for grazing or cultivation without preparatory action going beyond usual agricultural methods and machineries, based on criteria established by Member States based on a framework established by the Commission, or
  - carrying out minimum activity, defined by Member States, on agricultural areas naturally kept in a state suitable for grazing or cultivation. (This classification is not applied in England.
7. Farmers and land managers are paid for each payment entitlement that they hold which they 'activate' for payment. An entitlement is activated by matching it with one hectare of eligible agricultural area declared by the farmer on the annual BPS application.
8. Prior to the introduction of SPS, a number of different schemes existed where eligibility for payment was determined by the area of crop grown or number of animals produced. One of the objectives of SPS, carried over into BPS, was to 'de-link' support from the level of production undertaken.

## Payment of BPS and SPS on common land

9. The EU regulations (now converted to English law) governing the operation of BPS provide for land that is used in common to be eligible for BPS, with those carrying out an agricultural activity on the land being allocated a share of its eligible area based on either their actual use of the land or their right of use.
10. For the vast majority of English commons, the number of grazing rights held by each commoner has been historically determined and fixed in the registers established under the 1965 Commons Registration Act. It is therefore relatively straightforward in principle for a grazier carrying out an agricultural activity on the common (whether grazing animals, participating in an agri-environment scheme (e.g. Countryside Stewardship) or undertaking some other relevant activity based on rights held) to be allocated a share of its eligible area based on the number of 'rights' they hold and declare on their BPS application, de-coupled from the level of any agricultural production that they undertake on the common.
11. However, the Commons Registration Act 1965 did not apply to the New Forest and grazing rights in the New Forest have never been quantified in the same way as other commons. While properties with commoning rights attached to them are generally identified in a set of atlases maintained by the Verderers, the extent of those rights is not legally quantified and presently the Verderers do not take any direct action, through bye-laws or similar powers, to control the overall level of grazing taking place in the New Forest. Practically, therefore, the number of animals that each commoner can turn out to graze is unlimited, provided that each animal is marked by the Agisters (livestock managers) employed by the Verderers and the required marking fee paid.
12. This has greatly complicated the application of SPS and BPS in the New Forest. To overcome the absence of quantified rights, marking fees declared in 2004 were used as a reference for the establishment of SPS entitlements in 2005. Those SPS entitlements were later rolled over into BPS. For the purposes of activating those entitlements, each commoner currently receives a share of the eligible area of the New Forest based on the number of marking fees paid in the previous calendar year, converted into a Livestock Unit (LU) equivalent. Accordingly, a grazier paying 1% of the marking fees paid in a previous year would be allocated 1% of the eligible area of the New Forest in the current year.
13. Independently of the proposals which are the subject of this consultation, the BPS scheme is changing in any event. The Government has made it clear that the scheme will close before the end of the decade and that payments will be decreasing over the remaining years of the scheme. BPS payments for all New Forest farmers will be decreasing as the scheme runs down but new schemes will be arriving with the aim of paying 'public money for public goods'.

## Impact of SPS and BPS on the New Forest

14. The New Forest is paid on as common land under BPS and receives the highest of the three available English payment rates, that for Non - Severely Disadvantaged Areas, worth £232.84/ha for BPS 2019. Total payments in the New Forest are worth approximately £3million p.a.
15. The number of New Forest marking fees declared on applications for SPS and BPS since 2005 is shown in annex A. There has been a clear upward trend since 2012. It has been said to the RPA that some commoners may be increasing the number of animals they have marked in order to be allocated additional eligible area, which can then be combined with entitlements purchased or leased on the open market in order to obtain additional payments.

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16. To the extent this is happening, the distribution of BPS payments to New Forest graziers will be affected. There may also be an impact on the level of physical grazing activity taking place, and on the land grazed, although the extent of this will depend on where, and for how long, the additional animals are turned out in the New Forest. There is no retention period or minimum grazing period associated with SPS and BPS.

## Purpose of the consultation

17. The purpose of this consultation is to seek views on establishing an alternative method to allocate the eligible area of the New Forest and allow commoners carrying out agricultural activities in the New Forest to claim BPS.

## The consultation process

18. This request is directed at anyone who:
- has an interest in the ownership or management of the New Forest;
  - has a property or holding to which New Forest grazing rights are attached;
  - already claims BPS using New Forest grazing rights or has an interest in doing so in the future;
  - represents the interests of individuals falling into one of the categories above.

## Timing and duration of this consultation

19. The consultation period will commence on **30th November 2020** and will be open for a period of just over 9 weeks. The consultation period will end on **3rd February 2021**. Responses submitted after that date will not be considered.

## Responding to this request

20. Please respond to this request:
- By email at [ruralpayments@defra.gov.uk](mailto:ruralpayments@defra.gov.uk), with the header/title 'New Forest Consultation' or
  - By post at:  
New Forest Consultation  
Rural Payments Agency,  
PO Box 352,  
Worksop,  
S80 9FG

## Options for change

21. Three options have been identified for consideration, two loosely based on established use and/or rights of use and one on actual use.

## Options based on rights of use

22. For the reasons already set out above, the rights of New Forest commoners have never been quantified. As a result, neither of the options set out below can definitively capture the extent of the rights in question but seek to arrive at a reasonable proxy for the quantified rights of individual commoners.

## **Option 1 – using marking fees declared during a reference year as a proxy for rights of pasture and pannage held by common**

23. This option would take the marking fees declared on BPS applications by commoners during a specified reference period as a reasonable representation of the rights or established use of pasture and pannage to be taken into account when allocating the New Forest's eligible area. This would break the link between one year's marking fees and the allocation of the eligible area of the New Forest in the following year and leave commoners free to vary their grazing activity without affecting their subsidy payment. However, in order to be eligible to claim, a commoner would still have to be carrying out an agricultural activity in the New Forest in the year of claim.
24. The use of a reference period would have features in common with the methodology used for the SPS. However, unlike under SPS, RPA does not propose to take account of any increase in the number of marking fees paid and declared by commoners in years after the end of the reference period.
25. As the establishment of these reference amounts would be a one-off exercise and applicants would not be required to produce fresh marking receipts each year, this option would remove any link to current production. It would also have the advantages of simplicity and robustness and could be introduced with the minimum disruption to the operation of BPS in the New Forest for the remainder of the life of the scheme. It would not take account of non-productive agricultural activities taking place in the New Forest and would not support smaller commoners looking to commence grazing or grow their farming enterprises.
26. The choice of the reference period would be a key decision. As marking fees declared are being taken as representing rights held, an approach which selected the highest number of marking fees declared over the life of BPS (2015 -2019) might capture the rights in question most accurately. However, using 2019 would have the advantage of reflecting most closely current activity taking place in the New Forest. An earlier year could also be used (for example 2017 or 2018), or the average of several years (for example 2017 – 2019).
27. Views are invited on the reasonableness of this approach, which is RPA's preferred option going into the consultation exercise, and on the factors that should be considered in setting of the reference period, together with the appropriate reference period itself.
28. Views are also sought as to whether special arrangements should be made to take account of new entrants and young farmers, or those able to show that they were following a plan to develop their farming businesses, who could be adversely affected by the use of a historic reference period.

## **Option 2 – Levancy and Couchancy**

29. This option would seek to quantify the rights of pasture held by New Forest commoners by a loose reference back to old principles of common law. Once quantified, those rights could then be used to determine the allocation of the New Forest's eligible area in the same way as is done for other English commons.
30. Levancy and Couchancy is an old common law rule that seeks to determine the number of animals that a grazier can turn out on a common through reference to the carrying capacity of the home holding over-winter. It was defined in a relatively recent case as follows:



“[A] principle which limits the cattle or sheep which the owner of the right can turn on to the common to the number which the land to which the right is appurtenant is by its produce capable of maintaining during the winter, including the hay and other produce obtained from it during the other seasons of the year. So many are the beasts which are taken to be levant and couchant on the land. It is therefore a measure of the capacity of the land to maintain stock rather than a condition to be literally complied with by the cattle lying down and getting up or by their being fed off the land.”

**Ref: Ilkley and Burley Moors (1984) 47 P. & C.R. 324.**

31. Although straightforward in principle, the approach has practical and legal shortcomings and its use has been almost entirely superseded by the stinting of common and then the registration of rights.
32. While the identification of commoners' holdings with rights attached (appurtenant) to them would be relatively straightforward, linking this to the extent of land recorded in the Verderers' Atlases, and taking account of the carrying capacity and other characteristics of that land, would be extremely difficult. RPA could only ever use the roughest rule of thumb to make the calculation, for instance taking the total eligible area declared by all New Forest commoners in their BPS applications and allocating the eligible area of the New Forest in proportion to area declared by each individual commoner, assuming that all of the land declared had commoning rights attached and was of uniform carrying capacity. It would not be possible to investigate the particular circumstances of each home farm and so this option would have to be clearly understood to be a loose application of the common law principle adapted for administrative convenience, rather than a precise quantification of actual rights of common. Application of a principle of this nature would also be likely to result in significant re-distribution of BPS payments between commoners. As with Option 1, in order to be eligible to claim, a commoner would still have to be carrying out an agricultural activity in the New Forest in the year of claim.
33. Views are sought as to whether this option is worthy of further exploration and, if so, how the principle could be applied and adapted to fit the situation in the New Forest in a manner that was both realistic and proportionate. At present, RPA's view is that a Levancy and Couchancy model is not likely to be deliverable.

## Actual use

### Option 3 – broadening the allocation calculation to include de-coupled agricultural activity

34. This option could only work in the New Forest by giving applicants direct 'credit' in the allocation calculation for the amount of actual non-productive agricultural activity (use) being undertaken. The only activities that could be considered for this purpose would be those falling within the statutory definition of agricultural activity: maintaining the common in a state which makes it suitable for grazing or cultivation. Candidate activities which could be considered for inclusion might include cutting gorse, spraying bracken or clearing scrub. It would be a major challenge to devise a mechanism to allow this to be done but, before this can be addressed, there are several preliminary issues to be considered:








- **Scale and nature of the non-productive agricultural activity undertaken in the New Forest by applicants and likely response to a changed definition of agricultural activity.** The definition of ‘agricultural activity’ used to manage BPS in the New Forest would necessarily continue to include the grazing of animals within its scope. Whilst it might, therefore, permit non-grazers to claim, it is possible that the inclusion of de-coupled activity would have little practical effect on the ground, with applicants still opting to claim BPS through the declaration of marking fees and the allocation of eligible area still effectively being driven by the level of grazing undertaken. Views are therefore sought on
    - a) What non-productive agricultural activities should be considered for inclusion under this option. Some possible examples have been given above. Are these relevant and should additional or alternative activities be included, bearing in mind the scope and limitations of the definition of “agricultural activity” (set out at paragraph 6 above)?
    - b) Do consultees anticipate that a significant amount of non-productive activity (as described above) would be carried out in the New Forest? Or is it possible that the consequences of the change would be minimal?
  - **Role to be played by the New Forest Higher Level Stewardship Scheme (HLS).** On other English commons, participation in an Environmental Stewardship or Countryside Stewardship Scheme is accepted as evidence of a commoner undertaking agricultural activity. However, in the New Forest, most commoners participate in the HLS scheme through membership of the Verderers’ Grazing Scheme, which makes headage payments for qualifying animals turned out in the New Forest, in order to support commoning and encourage responsible grazing practices. Animals entered into this scheme can already count in the BPS calculation through the payment of marking fees and so to include them again would involve double counting. Views are sought on whether and, if so, how, account should be taken of the New Forest HLS Scheme in the consideration and valuation of the level of de-coupled agricultural activity undertaken by New Forest commoners.
  - **Legal basis for undertaking non-productive agricultural activity.** It is the RPA’s view that New Forest rights of pasture and pannage do not generally give commoners the ancillary right to carry out the sort of non-grazing agricultural activity now being contemplated.<sup>1</sup> Therefore, our current view is that the feasibility of any option based on the broader definition of agricultural activity above would depend on the agreement and co-operation of bodies such as the Forestry Commission empowered by the Crown to manage the New Forest on its behalf. Do you agree? Do commoners in the New Forest have the right to carry out the activities described above? If so, why does that follow from the right of grazing and pannage?
35. If these preliminary issues can be overcome, consideration can be given to the design of a mechanism to take direct account of de-coupled agricultural activity in the allocation of the New Forest eligible area. Two possible options to do this have been identified. The first would seek to capture, verify and assign a value to the activity undertaken by applicants. (A possible design for such a scheme is attached to this consultation as Annex B). The second would involve the introduction of a scheme based on defined activities and organised working parties that applicants could participate in, with defined levels of participation attracting a given level of ‘credit’ in the allocation calculation. This would depend critically on the engagement of stakeholder organisations actively engaged in the management of the New Forest and the integration of this work into that wider management.

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1 See, in particular, Hall v Harris [2012] EWCA Civ 671.



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36. This option would allow applicants carrying out non-grazing, environmental, agricultural activities in the New Forest to be allocated a share of its eligible area to support a claim for BPS. However, it would be complicated to introduce and administer, and burdensome for scheme applicants in terms of recording and reporting of the activity undertaken. This complexity might deter some potential applicants.
37. The RPA's current view is that the legal and practical difficulties associated with a use-based scheme activity make it an unattractive option. Do consultees agree? If you consider that a scheme of this kind is practicable, please explain why.
38. The earliest that such a scheme could be introduced in full would be 2022. Therefore, if this was the chosen option, an interim arrangement may have to be made for commoners wishing to include non-productive use in their BPS 2021 application. Proposals are invited as to how this might be undertaken.

### Other options

39. Having discussed available options at length, these are the three clearest and most practical solutions to decoupling payments from production. However, if you think there are more workable solutions then please let us know.

## Tell us what you think

### Consultation questions

40. The questions posed in the body of the consultation are summarised in Annex 3 below. In addition, in order for RPA to consider your opinion, could you answer the following questions:
- 1) Please rank the 3 options in your order of preference, 1 being your most favoured option and 3 your least favoured option?
  - 2) Please let us know why you prefer your top option and whether, despite preferring it, you see any difficulties with it.
  - 3) Please let us know why you do not prefer the other 2 options.
  - 4) Is there anything else it would be helpful for RPA to know?
41. These questions are intended to assist the RPA's collation and consideration of consultation responses. However, consultees are not confined to responding to those questions and other more specific questions have been raised in the body of the consultation. Consultees are free to provide additional information and to put forward alternative proposals. If consultees believe that they possess evidence relevant to the views they express, they are invited to submit it in order that it may be considered.
42. Confidentiality Question
- 5) Would you like your response to be confidential? Yes/No.  
If you answered Yes to this question, please give your reason.
43. Please let us know in what capacity you are responding:
44. **Please reply by Wednesday 3 February 2021**

## Confidentiality and data protection information

45. A summary of responses to this consultation will be published on the Government website at: [www.gov.uk/defra](http://www.gov.uk/defra). An annex to the consultation summary will list all organisations that responded but will not include personal names, addresses or other contact details.
46. Defra may publish the content of your response to this consultation to make it available to the public without your personal name and private contact details (e.g. home address, email address, etc).
47. If you answer 'Yes' in response to the confidentiality question asking if you would like anything in your response to be kept confidential, you are asked to state clearly what information you would like to be kept as confidential and explain your reasons for confidentiality. The reason for this is that information in responses to this consultation may be subject to release to the public or other parties in accordance with the access to information law (these are primarily the Environmental Information Regulations 2004 (EIRs), the Freedom of Information Act 2000 (FOIA) and the Data Protection Act 2018 (DPA)). We have obligations, mainly under the EIRs, FOIA and DPA, to disclose information to recipients or to the public in certain circumstances. In view of this, your explanation of your reasons for requesting confidentiality for all or part of your response would help us balance these obligations for disclosure against any obligation of confidentiality. If we receive a request for the information that you have provided in your response to this consultation, we will take full account of your reasons for requesting confidentiality of your response, but we cannot guarantee that confidentiality can be maintained in all circumstances.
48. If you answer 'No' in response to the confidentiality question asking if you would like anything in your response to be kept confidential, we will be able to release the content of your response to the public, but we won't make your personal name and private contact details publicly available.
49. There may be occasions when Defra will share the information you provide in response to the consultation, including any personal data with external analysts. This is for the purposes of consultation response analysis and provision of a report of the summary of responses only.
50. The Department for Environment, Food and Rural Affairs (Defra) is the data controller for personal data you give to RPA. For information on how we handle personal data go to [www.gov.uk](http://www.gov.uk) and search 'Rural Payments Agency personal information charter'.
51. This consultation is being conducted in line with the Cabinet Office "Consultation Principles" and be found at: <https://www.gov.uk/government/publications/consultation-principles-guidance>.
52. If you have any comments or complaints about the consultation process, please address them to:  
Consultation Coordinator, Defra  
2nd Floor, Foss House,  
Kings Pool,  
1-2 Peasholme Green,  
York,  
YO1 7PX  
Or email: [consultation.coordinator@defra.gov.uk](mailto:consultation.coordinator@defra.gov.uk)

# Annex A – New Forest Area Allocation information supporting SPS and BPS applications

## SPS

Scheme year	Total LUs allocated	Allocated area (ha)	Ha/LU
2005	5,052.14	15,309.51	3.03
2006	5,100.40	15,445.75	3.03
2007	4,841.32	14,670.66	3.03
2008	4,915.38	14,895.08	3.03
2009	5,108.35	15,479.84	3.03
2010	5,037.11	15,263.96	3.03
2011	4,993.84	15,132.84	3.03
2012	5,389.41	16,331.54	3.03
2013	5,689.88	17,242.05	3.03
2014	6,219.15	18,845.91	3.03

## BPS

Scheme year	Total LUs allocated	Allocated area (ha)	Ha/LU
2015	6,337.35	15,251.41	2.41
2016	7,438.05	16,179.08	2.17
2017	8,502.65	16,783.98	1.97
2018	9,440.45	14,242.00	1.51
2019	10,161.71	14,343.25	1.41

## Annex B – Design of a scheme to capture de-coupled agricultural activity undertaken by New Forest commoners

- Marking fees would continue to be accepted as evidence of agricultural activity taking place, but evidence of non-grazing activity taking place would be accepted as well. To avoid the need for customers to predict their agricultural activity for the rest of the scheme year at the point when they submit their applications, it is suggested that activity undertaken in the year prior to claim would be used in the calculation, as is presently done with marking fees.
- A 'menu' of allowable de-coupled activities would be drawn up in conjunction with stakeholder organisations actively engaged in the management of the New Forest. Activities which might be considered for inclusion include cutting bracken, strimming gorse and clearing scrub. Inclusion would depend upon the RPA being satisfied that the activities met the statutory definition of agricultural activity.
- Commoners wishing to include such activity in their application would declare their intention to do so at the beginning of the year prior to claim, to allow verification to take place if required, and then maintain a log book of activity undertaken as it happened, together with supporting evidence – time taken, maps, geo-tagged photographs etc.
- At the end of the year, the activity undertaken would be declared to the RPA, who would convert it into a LU equivalent. This would then provide a common basis for the activity to be included in the allocation calculation along with marking fees paid.
- The basis for converting de-coupled agricultural activity into LU equivalents would be a complex issue. It could be done directly, for instance providing an LU value per 100 square metres of bracken sprayed or linear metre of hedge trimmed, but doing the conversion based on time spent would avoid the need for multiple conversion factors. The box below provides an illustration for a conversion factor of 1 LU = 20 hours de-coupled activity.

### Converting de-coupled activity into LU

Doing the conversion on the basis of time spent would avoid the need to have multiple conversion factors (LU/ha; LU/linear metre etc.). For illustrative purposes, take a conversion factor of 20 hours = 1 LU. Using an approximate value for ha allocated per LU of 2 ha/LU, and assuming that commoners going this route have sufficient entitlements to claim on, this would give an implicit value for time worked of  $(2 \times \text{£}232.84) / 20 = \text{£}23/\text{hour}$ , which seems to be a reasonable figure (£232.84 is the BPS 2019 non-SDA payment rate).

## Annex C – Summary of questions posed in this consultation

- a) How reasonable would it be to use marking fees declared during a specified reference period as a representation of the rights of pasture and pannage held and declared by New Forest commoners on their BPS applications? (Para 27).
- b) What factors should be considered in setting such a reference period? (Para 27).
- c) If a reference period was used, should special arrangements be made to take account of new entrants and young farmers? (Para 28). What should these special arrangements involve?
- d) Is the option of basing the allocation of eligible area on the principles of Levancy and Couchancy worthy of further exploration? (Para 33)
- e) If so, how could the principles be applied and adapted to fit the situation in the New Forest in a realistic and proportionate manner? (Para 33)
- f) If 'actual use' was used as the basis for allocating area, what non-productive agricultural activities should be considered for inclusion under this option? (Para 34).
- g) Would a significant amount of non-productive activity be carried out in the New Forest if actual use was taken as the basis of allocation, or could the consequences of the change be minimal? (Para 34).
- h) Should participation in the New Forest HLS Scheme be taken into account in the in the consideration and valuation of the level of de-coupled agricultural activity undertaken by New Forest commoners? If so, how? (Para 34).
- i) What ancillary legal rights do commoners have to carry out non-grazing agricultural activities in the New Forest? If these rights exist, how do they follow on from the rights of grazing and pannage? (Para 34).
- j) Would a use-based scheme be an attractive option to consider, or do the significant legal and practical difficulties associated with such a scheme make it impracticable? (Para 37)



