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Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways

A guide for local authorities, enforcement agencies, rights of way users and practitioners

Version 5 - May 2008

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This guide is produced by the Department for Environment Food and Rural Affairs (Defra) following the passage through Parliament of the Natural Environment and Rural Communities Act 2006 and the Restricted Byways (Application and Consequential Amendment of Provisions) Regulations 2006 No. 1177. The Act received Royal Assent on 30 March 2006 and sections 66 to 71 of Part 6 (Rights of Way) and the Restricted Byways Regulations came into force on 2 May 2006 in England (the Welsh National Assembly has devolved responsibility for the commencement of these provisions and in Wales they came into force on 16 November and 11 May 2006 respectively).

Those using this guide should be aware that the contents of it merely represent Defra's view of the law. It does not take the place of the law but seeks to explain it and give an overview of the background to the legislation. However, it may not address specific queries and all users are reminded to seek their own legal advice, which should be tailored to the particular circumstances of any given case.

Version 5 – issued 28 May 2008

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Background

1. In December 2003 the Government carried out a review of its policy on the use of motor vehicles on rights of way and published a consultation paper entitled: "Use of mechanically propelled vehicles on rights of way". The main proposal in the consultation was to limit the basis on which rights of way for mechanically propelled vehicles may be acquired and end the situation whereby historic use by non-mechanically propelled vehicles, such as horse-drawn vehicles, can give rise to a right of use by modern mechanically propelled vehicles. The consultation document sets out the rationale for this.
2. As a result of the consultation, we received over 14,000 representations, expressing a wide range of views. Approximately half of these were from motor vehicle users. After careful, balanced consideration, we set out our conclusions in a document entitled: "The Government's framework for action", which was published in January 2005. In this document we set out our intention to legislate to curtail claims for vehicular rights of way, where those claims derive from historic use and dedication for use by non-mechanically propelled vehicles. These proposals now form the basis of Part 6 of the [Natural Environment and Rural Communities Act 2006](#).

Main Principles

3. The rights of way provisions in this Act curtail the future scope for establishing and recording public rights of way for mechanically propelled vehicles where these are based on either evidence of historic use, or dedication for use, by vehicles that were not mechanically propelled. In certain cases, such public rights of way will instead be recordable as restricted byways, a new category of highway introduced by the Countryside and Rights of Way Act 2000. Restricted byways carry rights of way on foot, horseback and also for non-mechanically propelled vehicles such as horse-drawn carriages and bicycles. This will ensure that the future use of these ways will be consistent with their history.
4. These provisions will extend to ways already recorded on the definitive map (the local authority's legal record of rights of way) as footpaths, bridleways and restricted byways, as well as land where there is no physical evidence of a route, but over which the historic rights from up to several hundred years ago can be uncovered. The legislation does not extend to minor roads maintained by local highway authorities which fall outside the rights of way network.
5. The NERC Act also ensures that a long period of use of a route by 4x4s and motorcycles cannot give rise to public rights of way for motor vehicular rights in the future. This addresses in particular any concerns which may have arisen from the House of Lords' judgement in *Bakewell Management vs. Brandwood* in relation to illegal use giving rise to public rights of way.

6. The NERC Act does not relieve local authorities of their obligation to process all definitive map modification order applications for byways open to all traffic to a full determination, even though the outcome may be that a public right of way for mechanically propelled vehicles existed before 2 May 2006, but has since been extinguished by the Act. Nor does the Act relieve local authorities of their duty under section 53 of the Wildlife and Countryside Act 1981 to keep the definitive map and statement under continuous review.
7. It is important that applications made after 20 January 2005 (19 May 2005 in Wales) are not abandoned or simply not proceeded with. For example, in cases where a public right of way for vehicles can be established, but rights for mechanically propelled vehicles have been extinguished by the Act, such determinations may give rise to a restricted byway. And even where a public right of way for vehicles is not established, a full determination may reveal that higher rights exist than are currently shown (or indeed not shown) on the definitive map and statement. Furthermore, failing to process such a claim to full determination may deprive the applicant, or the general public, of showing evidence that one of the exceptions set out in section 67 subsections (2) or (3) applies.

Higher rights other than those for motor vehicles

8. It should be noted that the policy aim behind the Act is to curtail the scope for establishing and recording public rights of way for mechanically propelled vehicles and not other higher rights (in other words, equestrian or non-mechanically propelled vehicle rights). Therefore, where there is a case of a highway carrying carriageway rights that is shown on the definitive map and statement as footpath or bridleway and its mechanically propelled vehicle rights are extinguished by the Act, local authorities should look favourably upon the retention and use by the public of the remaining higher rights and seek to have these recorded as soon as is practicable in the course of carrying out their duty under section 53(2) Wildlife and Countryside Act 1981 to keep the definitive map and statement under review.

Organised Motorsport Events

9. The NERC Act does not override, or otherwise change, the provisions in the Road Traffic Act 1988 that enable the authorisation of organised motorsport events by local authorities. Therefore, provided the requirements of these provisions are adhered to, the NERC Act should not affect the holding of such events. Section 33 of the Road Traffic Act 1988 (as amended) gives a local authority the power to authorise (with conditions) a trial between motor vehicles on a footpath, bridleway or restricted byway and the holding of a trial authorised under this section is not affected by any statutory provision prohibiting or restricting the use of footpaths, bridleways or restricted byways. Before authorising such a

trial, the local authority must be satisfied that the owner and the occupier of the land over which the affected footpath, bridleway or restricted byway runs has given their consent and this provision does not prejudice any right or remedy of any person having an interest in the land. Other relevant provisions are section 13A of the Road Traffic Act 1988 (which provides that a person shall not be guilty of certain offences by virtue of driving a vehicle in a public place other than on a road, if he shows he was driving at an authorized motoring event), and the Motor Vehicles (Off Road Events) Regulations 1995.

Summary of Part 6 of the Act

Section 66 – restricts the creation of new public rights of way for mechanically propelled vehicles.

Section 67 – extinguishes certain existing public rights of way for mechanically propelled vehicles.

Section 68 – deals with presumed dedication of restricted byways and use by pedal cycles.

Section 69 – clarifies that an application for a definitive map modification order is, of itself, sufficient to bring a right of way into question for the purposes of section 31(2) of the Highways Act 1980.

Section 70 – contains supplementary provisions.

Section 71 – defines certain terms used in Part 6.

Section 72 – gives National Park authorities powers to make traffic regulation orders on rights of way and carriageways with unsealed surfaces within National Park boundaries.

Sections 66 to 71 (inclusive) were commenced on 2 May 2006 in England¹ (the Welsh National Assembly has devolved responsibility for the commencement of these provisions and in Wales they came into force on 16 November 2006). Section 72 has yet to be implemented.

Summary of sections 66 and 67

10. These key rights of way provisions in Part 6 curtail significantly the scope for recording further public rights of way for mechanically propelled vehicles on the definitive map and statement. They do this in two ways. Firstly, they extinguish any existing unrecorded public rights of way for mechanically propelled vehicles (with certain exceptions), so that they cannot then be added to the definitive map and statement as byways

¹ [The Natural Environment and Rural Communities Act 2006 \(Commencement No.1\) Order 2006](#)

open to all traffic (BOATs), which carry rights for mechanically propelled vehicles. Secondly, the provisions ensure that no further public rights of way can be created unless created or constructed expressly for mechanically propelled vehicles.

11. These key provisions also reverse any unintended consequences, insofar as public rights of way are concerned, of the judgement in the case of *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519 (the 'Bakewell' judgement). In this judgement the House of Lords decided that a right of way for mechanically propelled vehicles may arise where mechanically propelled vehicles have used a route for the 20-year period, even where that use was illegal. Use of footpaths or bridleways by mechanically propelled vehicles has been illegal since the 1930's. Sections 66 and 67 put a stop to the implied creation of new public rights of way for mechanically propelled vehicles, preventing post-1930 use of a way by a mechanically propelled vehicle from giving rise to any future public right of way.

Section 66

12. Section 66 is concerned solely with the creation of public rights of way for mechanically propelled vehicles after the commencement date, i.e. 2 May 2006 in England. Public rights of way for mechanically propelled vehicles that existed before commencement are dealt with in section 67. As far as deemed dedication is concerned, in the context of this Act, creation means bringing a public right of way into existence at the end of a period of 20 years' use (under section 31 of the Highways Act 1980), or of any other period that would otherwise give rise to rights at common law (see paragraphs 37 and 38). In doing so, section 66 addresses the effects of the 'Bakewell' judgement, insofar as the future creation of public rights of way is concerned. Section 66 also prevents use of a way by a non-mechanically propelled vehicle, such as a pedal cycle, giving rise to a public right of way for mechanically propelled vehicles.
13. Subsection 66(1) ensures that no public rights of way for mechanically propelled vehicles can be created in the future, unless they are expressly provided for, or if the rights relate to a road constructed for the use of mechanically propelled vehicles under an enactment.
14. Subsection 66(2) ensures that use of a way by mechanically propelled vehicles cannot give rise to a public right of way of any kind. In other words driving over a way will not only never give rise to a public right of way for mechanically propelled vehicles but will also never give rise to a right of way on foot, on horseback or any other lower right.

Section 67

15. Section 67(1) extinguished, on commencement, public motor vehicular rights over every highway that is not already shown on the definitive map and statement, or is shown as a footpath, bridleway, or restricted byway.

In effect this means that public rights of way for mechanically propelled vehicles have been extinguished over every highway not already shown on the definitive map and statement as a byway open to all traffic.

[Click here for illustrative flow chart.](#)

16. In the absence of further qualification this provision would extinguish public rights of way for mechanically propelled vehicles over virtually the whole of the existing highway network. However, subsection 67(2) introduces a series of exceptions to protect certain highways from such extinguishment under subsection 67(1). Any way that qualifies under any one, or more, of these exceptions would not have its public rights of way for mechanically propelled vehicles extinguished. In addition, subsection 67(3) provides further exceptions, in the form of transitional arrangements, to preserve rights that are subject to an application for a definitive map modification orders (for BOAT) made before the relevant date²
17. Because clause 67(1) explicitly extinguishes public motor vehicular rights over every highway that was not shown on 2nd May 2006 [in England] on the definitive map and statement as a byway open to all traffic, there is a clear presumption that this will be the case unless it can be shown that one or more of the exceptions in subsections 67(2) or 67(3) applies.
18. Section 34 of the Road Traffic Act 1988, which makes it an offence to drive a mechanically propelled vehicle 'off-road' or on a public right of way other than a byway open to all traffic, was amended by the Countryside and Rights of Way Act 2000. One of the amendments (which is now in subsection (2) of section 34) provided that a way shown in a definitive map and statement as a footpath, bridleway or restricted byway is to be taken to be a way of the kind shown, unless the contrary is proved. In other words, the onus is on anyone seeking to drive a mechanically propelled vehicle over such a way to prove that a public right of way for mechanically propelled vehicles exists.
19. Under subsection 67, the burden of proving that mechanically propelled vehicular rights have not been extinguished in such cases would therefore fall to anyone using a mechanically propelled vehicle on a given highway. They would have to show both that: (a) a public right of way for mechanically propelled vehicles existed at the commencement of section 67 (on 2 May 2006); and (b) that those rights had not been extinguished, because one of the exceptions in 67(2) or 67(3) applies.
20. One way of establishing that a public right of way for mechanically propelled vehicles exists and has not been extinguished is to make an application to the local highway authority for a definitive map modification order to show the way as a BOAT on the definitive map and statement. In such cases, we consider it reasonable for local authorities to seek, at

² 'Relevant date' is defined in subsection 67(4) of the NERC Act 2006.

an early stage, information and evidence from applicants to substantiate their belief that one or more of the exceptions applies. This will assist the authority in the research it undertakes as part of the determination process.

A summary of the five exceptions in subsection 67(2)

21. *Subsection 67(2)(a)* – excepts ways that have been lawfully used more by motor vehicles than by other users, e.g. walkers, cyclists, horse riders and horse-drawn vehicles, in the five years preceding commencement. The intention here is to except highways that are part of the ‘ordinary roads network’.
22. *Subsection 67(2)(b)* – excepts ways that are both recorded on the “list of streets” as being maintainable at public expense and are not recorded on the definitive map and statement as rights of way. This is to exempt roads that do not have clear motor vehicular rights by virtue of official classification but are generally regarded as being part of the ‘ordinary roads network’.
23. *Subsection 67(2)(c)* – excepts ways that have been expressly created or constructed for motor vehicles
24. *Subsection 67(2)(d)* – excepts ways that have been created by the construction of a road intended to be used by mechanically propelled vehicles.
25. *Subsection 67(2)(e)* – excepts from extinguishment ways that had been in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive ‘off-road’.

[Click here for illustrative flow chart.](#)

Further notes on the exceptions in subsection 67(2)

Subsection 67(2)(a) – User Test

26. Subsection 67(2)(a) says: “*Subsection (1) does not apply to an existing public right of way if....it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles*”. This test was introduced in order to complement a similar test which appears in section 66 of the Wildlife and Countryside Act 1981, and which sets out the definition of a byway open to all traffic (BOAT). If a highway satisfies the user test in subsection 67(2)(a) of the NERC Act, it should not satisfy the ‘BOAT test’ in section 66 of the Wildlife & Countryside Act 1981.
27. The term “main lawful use” is not defined in the Act. It is for local highway authorities – where there is an application for definitive map modification order to record a route as a BOAT or the status of a route is otherwise

brought into question – and other relevant authorities (in their own areas of jurisdiction) to adopt a pragmatic approach and arrive at a judgement as to what has been the main use of the way by the public in the five years leading up to 2 May 2006. Where necessary, authorities should assess the evidence available on the relative volumes of walkers, horse riders, cyclists and motor vehicles and other users, to see whether it can be shown, on the balance of probabilities, that lawful use of the routes by the public over the five years up to 2 May 2006 has been predominantly by mechanically propelled vehicles. If this cannot be shown, public rights of way for mechanically propelled vehicles can be assumed to have been extinguished.

28. It is not incumbent on the local highway authority to undertake a detailed investigation or survey of “main lawful use” on every way. As with all the exceptions, the onus is on anyone seeking to use a mechanically propelled vehicle on the way to prove that rights have not been extinguished where they disagree with the judgement made by the local highway authority. It should be noted that for this exception to apply, the main lawful use must have been “by the public”. This means that it is irrelevant for the purposes of this test that the way might have been used during the relevant period by landowners or their visitors under any form of licence or easement by any means whatever, whether on foot, horseback or mechanically propelled vehicle.

Subsection 67(2)(b) – List of Streets

29. This subsection concerns ways that are not recorded on the definitive map and statement, but are recorded on the list (that local authorities are required to keep under section 36(6) of the Highways Act 1980) of highways maintainable at public expense – often referred to as the ‘list of streets’. Inclusion of a route on the list of streets is not conclusive evidence of what rights it carries and there can be no presumption that any highway shown on the list of streets carries vehicular rights. Each case must be considered on its own merits. As highways shown on the list of streets are sometimes depicted on Ordnance Survey maps as “other routes with public access”, it follows that there can be no presumption that routes depicted as such on Ordnance Survey maps carry vehicular rights. In any event, the representation of any road, track or path on a map published by the Ordnance Survey is no evidence of the existence of a right of way over it.
30. Nonetheless, the intention behind subsection 67(2)(b) is to guard against widening the scope of these provisions to the point where they could have unintended consequences on the ‘ordinary roads network’. Although, there can be no presumption about the status of highways shown on the list of streets, there are countless people who access their properties by minor highways, without any recorded rights. They do so relying solely on the fact that these roads are shown on the list of streets as being maintainable at the public expense.

31. In these circumstances, the Government considered it prudent to ensure that any mechanically propelled vehicle rights over such ways are excepted from the effects of section 67(1). The Government is aware that there are highways with unsealed surfaces, many within National Parks, that would fall within this exception and are vulnerable to abuse by mechanically propelled vehicles. It is open to the local highway authority to apply traffic regulation orders to such highways and the new powers to enable National Park authorities to make traffic regulation orders, in section 72 of this Act, should help in this respect; these powers came into force in October 2007 (see also paragraph 74).
32. Local authorities are strongly advised to ensure that they have retained a copy of their list of streets as of 2 May 2006 as this will be required in determining whether the 67(2)(b) exception is engaged in the future. Roads that are privately maintained (for instance under the “rationae tenurae” principle) do not fall within this exception if not shown on the statutory list of streets.

Subsection 67(2)(c) – Express Creation

33. This exception ensures that where a public right of way for mechanically propelled vehicles was expressly created by primary or secondary legislation, or by an instrument, it will not be extinguished by the operation of section 67. This preserves public rights of way for mechanically propelled vehicles that were created as part of the “ordinary roads network”. There have to be express words in order for this exception to apply.

Subsection 67(2)(d) – Creation by Construction

34. This exception ensures that a public right of way for mechanically propelled vehicles will not be extinguished by the operation of section 67 where it was created by the construction of a road intended to be used by mechanically propelled vehicles. This provision inextricably links the construction (of a road intended to be used by such vehicles) to the creation and so these must have taken place at the same point time . Therefore any subsequent re-construction or maintenance, to whatever standard, of a way that had not already been created for mechanically propelled vehicles would not qualify a way from exemption. In particular, the carrying out by a highways authority of its duty to maintain under section 41 of the Highways Act 1980, whenever carried out, will not give rise to an exception from extinguishment.

Subsection 67(2)(e) – Pre-1930 Dedication

35. This exception preserves any public rights of way for mechanically propelled vehicles that might have been established before 1 December 1930, when it first became an offence to drive a mechanically propelled vehicle “off – road”. The combined effect of this exception and section 67(1) is to ensure that, in general, no past use by mechanically propelled

36. For this exception to apply, the right of way for mechanically propelled vehicles must have been created, by inference of dedication at common law, through use by mechanically propelled vehicles before 1st December 1930. Evidence of long use by mechanically propelled vehicles before 1930 would not, of itself, except rights of way from extinguishment. Where pre-1930 use relied upon an earlier creation of vehicular rights (through use by non-mechanically propelled vehicles, by express dedication, or by some other means), then the pre-1930 use by mechanically propelled vehicles cannot be regarded as having created the right of way for mechanically propelled vehicles and the exception will not be engaged (see also paragraph 38).

At what point does the creation of a public right of way occur?

37. In our view, creation occurs at the point in time when the public right of way comes into being, either through a legal instrument (such as a creation order or dedication) or through a qualifying period of use (deemed dedication). With deemed dedication, the dedication must be presumed to have taken place at the beginning of the process, followed by the qualifying period of use, with creation at the end of that period of use (a public right of way cannot exist in law – and therefore can not have been created – until after the qualifying period of use is complete).
38. This is reflected in the way subsection 67(2)(e) of the NERC Act is framed; it excepts: “an existing public right of way [for mechanically propelled vehicles] if...it was created by virtue of use by such vehicles [mechanically propelled vehicles] during a period ending before 1st December 1930”. This means that evidence of use before that date must be sufficient to show that a claim for dedication under the strict common law tests would have succeeded at that time.

Subsections 67(3), (4) & (6)

39. Sub-section 67(3) contains transitional arrangements, which except those highways that are the subject of an outstanding definitive map modification order application for a BOAT. Any way subject to an application that falls under any one, or more, of the exceptions within these transitional arrangements, would be excepted from the extinguishment of any public rights of way for mechanically propelled vehicles that were found to exist over it. These exceptions are subject to the same onus of proof, both of the existence vehicular rights and of the exception claimed, as set out in paragraphs 18 and 19.
40. In every case it is necessary, under subsection 67(6), that the application is made strictly in accordance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981, as prescribed by the relevant Regulations ([SI 1993 No12](#)), paragraph 8 and schedule 7. In the case of

R (Warden and Fellows of Winchester College and Humphrey Feeds Limited) v. Hampshire County Council and SoSEFRA, the Court of Appeal ruled that such an application must have been made in the prescribed form and be accompanied by both a map drawn to a scale of not less than 1:25,000 showing the way(s) in question and copies of all the documentary evidence (including statements of witnesses) which the applicant wished to adduce or rely on. The intention of subsection 67(6) is to ensure that only applications that were compliant to that extent at the relevant date (20 January 2005, or 19 May 2005 in Wales) would qualify for exception. Therefore the legislative requirements should be strictly applied.

41. Where a BOAT application fails to qualify for one of the exceptions in subsection 67(3), this does not necessarily make the application invalid; it means only that any public right of way for mechanically propelled vehicles, over the way that is the subject of the application, will not have been excepted from extinguishment by subsection 67(3). It remains open to the local authority, depending on the merits of the application, to continue to deal with the application in the normal way, or to treat a non-compliant application as the “trigger” for a decision under section 53(2). There may be sound administrative reasons for doing so, not least because it would clarify what rights exist and help with enforcement.
42. Decisions as to whether applications are exempt under subsection 67(3) should be made by surveying authorities in the process of making a determination. As set out in paragraphs 6 and 7 of this guidance, the NERC Act does not relieve local authorities of their obligation to process all definitive map modification order applications for byways open to all traffic to a full determination. Therefore, in the context of BOAT applications local authorities should make the decision as part of that process. There is no requirement to record exemptions on the statutory register of applications (recently introduced by Regulations under the Wildlife and Countryside Act 1981³).
43. Subsection 67(3)(a) (together with subsection 67(4)) excepts highways that are the subject of an application under the Wildlife and Countryside Act 1981 for a definitive map modification order made before 20 January 2005 (19 May 2005 in Wales). In other words, any application made under Part 3 of the Wildlife & Countryside Act 1981 to record rights for mechanically propelled vehicles that was lodged before those dates and which satisfies the tests described in paragraph 40 above has been preserved and will be dealt with under the law as it stood before 2 May 2006.
44. Subsection 67(3)(b) excepts highways that are the subject of an application under the Wildlife and Countryside Act 1981 for a definitive map modification order, to show the highway as a byway open to all

³ [The Public Rights of Way \(Register of Applications under section 53\(5\) of the Wildlife and Countryside Act 1981\) \(England\) Regulations 2005](#)

traffic on the definitive map and statement, in cases where the local highway authority determined the application before 2 May 2006, even if the application was made after 20 January 2005 (19 May 2005 in Wales). 'Determined' means that the local authority has, under Schedule 14 of the Wildlife and Countryside Act 1981, decided either to make such a definitive map modification order, or decided not to.

45. Sub-section 67(3)(c) excepts highways in cases where the highway in question is the subject of an outstanding application for a definitive map modification order to show the highway as a byway open to all traffic on the definitive map and statement and where that application was made, before commencement (2 May 2006), by a person who is seeking to establish a right to use a mechanically propelled vehicle on the highway because it is reasonably necessary to enable them to access land in which they have an interest.
46. In practice this will have occurred in few, if any, cases. However, the aim of this exception was to enable those who had an interest in land to have the opportunity to have a public right of way for mechanically propelled vehicles recorded on the definitive map and statement right up to the date of commencement of the rights of way provisions. This would give those with an interest in land accessed by the way the option of establishing a public right of way rather than rely on the conversion of that way to a private right of way under subsection 67(5).
47. All of the exceptions in sub-section 67(3) are dependent on an application having been made for a definitive map modification order to show the highway as a byway open to all traffic on the definitive map and statement. Therefore, an outstanding application for a definitive map modification order to show the highway as a footpath or bridleway would not qualify under the exemptions in sub-section 67(3), even where the local highway authority had subsequently decided to make a definitive map modification order for a byway open to all traffic.
48. Furthermore, the exceptions in sub-section 67(3) apply only to highways in respect of which there has been an application under section 53(5) of the Wildlife & Countryside Act 1981. Therefore highways for which the local highway authority has made a definitive map modification order to show it as a byway open to all traffic as part of their duty to continuously review the definitive map and statement, or as part of their (former) duty to reclassify RUPPs under section 54 of the Wildlife and Countryside Act 1981, would not be excepted from the extinguishment of public rights of way for mechanically propelled vehicles. Such orders made under section 54 of the '81 Act cannot be confirmed as BOATs and will therefore not take effect. In these cases, the RUPP will already have been statutorily re-classified as a restricted byway by virtue of the effect of section 47(2) of the Countryside and Rights of Way Act 2000 (see paragraphs 88 to 93).

[Click here for illustrative flow chart.](#)

Further guidance on applying the exceptions in subsections 67(2) and (3)

49. This section of the guidance applies only where there is an application for definitive map modification order to record a route as a BOAT or the status of a route is otherwise brought into question. As stated in paragraph 28, It is not incumbent on the local highway authority to undertake a detailed investigation or survey of “main lawful use” on every way.
50. Section 67(1) of the NERC Act extinguished existing public rights of way for mechanically propelled vehicles, in other words: rights of way that existed immediately before commencement. It should be noted that subsections 67(2) and 67(3) say that: "subsection 67(1) does not apply to an existing public right of way if...". Therefore the tests in these subsections need to be applied in conjunction with establishing that a public right of way for vehicles existed at the time that section 67(1) came into force). In this respect the process of determining whether a public right of way for mechanically propelled vehicles is extinguished is a two part process.
51. One part is establishing whether a public right of way for mechanically propelled vehicles existed immediately before commencement on 2 May 2006. Since these will be rights of way created before commencement (on 2 May 2006) they will be public rights of way for vehicles (rather than mechanically propelled vehicles), because, as far as public rights of way classifications are concerned, no distinction between mechanically propelled vehicles and non-mechanically propelled vehicles existed before then.
52. The other part, if it is established that a public right of way for vehicles exists, is to apply the tests in subsections 67(2) and 67(3) to establish whether that public right of way for mechanically propelled vehicles was extinguished. If it cannot be established that a public right of way for vehicles existed immediately before commencement, then section 67 of the NERC Act has no relevance and the tests in subsections 67(2) and 67(3) need not be applied.
53. Whilst this sequential approach is recommended for most cases, there are may be circumstances where it may be more appropriate to consider the exceptions first. One such is as follows:
 - the application is to upgrade a restricted byway that was formerly a RUPP (in other words, the only higher rights that could be established are for mechanically propelled vehicles);
 - the routes of the restricted byway and the proposed BOAT are fully coincident, in other words, the highway is well established and there is no dispute over the course it takes;
 - The application relies upon evidence that the public right of way for mechanically propelled vehicles has not been extinguished by subsection 67(1) of the NERC Act because the one of the exceptions

in subsections 67(2) or 67(3) applies, but the applicant has not provided convincing proof that the terms of the exception have been met.

In such cases, there is nothing to be gained by going through the process of establishing a public right of way for mechanically propelled vehicles existed if the applicant cannot prove that any right that might have existed was not subsequently extinguished by the NERC Act.

54. Because of drafting considerations, the exceptions in subsections 67(2) and 67(3) are presented in two groups and the flow charts accompanying this guidance present them as such to aid understanding. However they can be regarded as eight individual exceptions, any one (or more) of which would except a route from the extinguishment of mechanically propelled vehicle rights. In this respect, subject to the qualification in the preceding paragraph, as long as it is first established that a public right of way for mechanically propelled vehicles exists, the order in which the tests are then applied is not critical.

Subsections 67(5) & (7)

55. Subsection 67(5) provides a private right of way for mechanically propelled vehicles for those persons who have a reasonable need for access by mechanically propelled vehicle to land in which they have an interest, in all cases where a public right of way for mechanically propelled vehicles is extinguished under subsection 67(1). This is regardless of whether such a person was actually exercising the public right of way for mechanically propelled vehicles, or able to exercise it. It is also irrelevant that there may be an alternative means of access to the property. The exercise of the public right of way need only have been reasonably necessary for access to any part of the land. The words “reasonably necessary” have their normal, everyday meaning and what is reasonably necessary would depend on the facts of the case.
56. This private right of way for mechanically propelled vehicles extends to landowners, occupiers and tenants. It will also include lawful visitors to the person who has an interest in the land, including: business, trade or professional visitors; postal or other deliveries; the highway authority; and utility companies who have apparatus/equipment along the highway.
57. This does not create any new rights of way, since the provision of the private right of way is dependent on there being in existence, before the commencement date (2 May 2006), a public right of way for motor vehicles, which was extinguished by sub-section 67(1).

Subsection 67(8)

58. This subsection confirms that section 67 does not apply to inner London boroughs, since they are already exempted from the provisions, in Part 3

of the Wildlife & Countryside Act 1981, that require local authorities to maintain a definitive map and statement of public rights of way.

Subsection 67(9)

59. Section 48(9) of the Countryside and Rights of Way Act 2000 requires that any RUPP reclassification orders that were outstanding when the restricted byway provisions came into force on 2 May 2006, should be processed to their conclusion. However, section 67(9) of the NERC Act says that subsection 48(9) of the Countryside and Rights of Way Act 2000 has effect subject to section 67 of the NERC Act. Therefore, although outstanding reclassification orders have to be processed to their conclusion, when that conclusion is reached, any public motor vehicular rights that may have existed prior to commencement of section 67, on 2 May 2006, will have been extinguished unless one of the exemptions in subsections 67(2) or (3) applies. In such cases, where evidence is found that vehicular rights exist, the RUPP cannot be reclassified as a byway open to all traffic and the outcome should be a restricted byway; paragraphs 88 to 93 below give further guidance on RUPP reclassification orders and explain how this outcome should be achieved. Any RUPPs subject to unconfirmed orders on 2 May 2006 should nonetheless be treated as restricted byways until the order has been either confirmed or not confirmed.

Section 68

60. This section inserts new subsections into section 31 of the Highways Act 1980 (which provides for the dedication of a way as a highway to be presumed after public use for twenty years).
61. New subsection 31(1A) confirms that a such a period of use by mechanically propelled vehicles will not result in the creation of a right of way after commencement of section 66 of the NERC Act on 2 May 2006. It also confirms that use of a way by a non-mechanically propelled vehicle (such as a pedal cycle) is capable in appropriate circumstances of giving rise to a public right of way for non-mechanically propelled vehicles (a restricted byway).
62. New subsection (10A) of section 31 provides that this does not impose any additional maintenance burdens on local highway authorities.
63. New subsection 31(12) provides that the definition of a mechanically propelled vehicle does not include electrically assisted pedal cycles. This also serves to underline that a pedal cycle that is not electrically assisted is clearly not a mechanically propelled vehicle.

Section 69

64. This section also amends section 31 of the Highways Act 1980 by inserting new subsections (7A) and (7B) to section 31. The purpose here

is to clarify the application of section 31 in cases where a rights of way is “brought into question”, under subsection 31(2), solely by an application for a definitive map modification order under section 53(5) of the Wildlife & Countryside Act 1981. First, it clarifies that an application for a definitive map modification order is, of itself, sufficient to bring a right of way into question for the purposes of section 31(2) of the Highways Act 1980. Secondly, under section 31, the period of use is calculated by reference to the time when the right of the public to use the way is brought into question. Section 69 amends section 31 to make clear that, where the right of the public to use the way is brought into question by such an application, the date on which right is brought into question is to be treated as being the date on which the application is made.

65. An important point to note here, is that, for any given qualifying period of use, the date on which the right is brought into question is to be treated as the application date only where the sole event bringing the right of the public into question (in relation to that qualifying period of use) is an application under section 53(5) of the Wildlife & Countryside Act 1981. Therefore where the matter bringing the right into question is another event (such as a locked gate or a barbed wire fence being put up) the date on which the right is brought into question remains as the date of the event and not the date of the application.
66. A further point is that new subsection (7B) is similar to subsection 67(6) of the NERC Act, in that it ensures that these provisions are triggered only by a qualifying application, in other words an application is made in accordance with paragraph 1 of schedule 14 to the Wildlife and Countryside Act 1981 (see paragraphs 40 and 41 of this guidance).

Section 70

67. Section 70 contains a number of supplementary provisions that deal with three issues.
- Recording additional restricted byways on the definitive map and statement.
 - Providing immunity from prosecution under section 34 of the Road Traffic Act 1988 for those persons who need to access their land over a former RUPP.
 - Repealing section 34A of the Road Traffic Act 1988.

Restricted byways

68. Subsection (1) amends section 53(3) of the Wildlife & Countryside Act 1981 to allow the recording on the definitive map and statement of a newly discovered right of way which is a restricted byway. When restricted byways were first provided for, under sections 47 to 52 of the Countryside and Rights of Way Act 2000, it was envisaged that restricted byways would come into being only through the statutory reclassification of RUPPs, en masse, as restricted byways under those provisions.

69. However, the restricted byway regulations⁴ by amending the Highways Act 1980, enable restricted byways to be created from scratch and, in addition, subsection 70(1) of the NERC Act has amended section 53(3) of the Wildlife & Countryside Act 1981 to provide for restricted byways to be established and recorded on the definitive map and statement on the basis of either historic evidence or evidence of a qualifying period of use. This will enable the Government to implement its policy on public vehicular rights of way by enabling ways with rights acquired by, or dedicated for, non-mechanically propelled vehicles to be recorded on the definitive map and statement as restricted byways (see also paragraphs 85 and 86 of this guidance). Subsection 70(1) of the NERC Act provides that restricted byways can be added to the definitive map and statement both on the basis of deemed dedication and of historic evidence.

Immunity from prosecution for persons who need access

70. Section 34 of the Road Traffic Act 1988 makes it an offence to drive a mechanically propelled vehicle on a footpath, bridleway or restricted byway. Subsections (2), (4), (6) and (7) of section 70 of the NERC Act amend section 34 of the Road Traffic Act to provide a person with immunity from prosecution when driving on a restricted byway where:
- (i) that person has an interest in land or is a visitor to land (interest in land is defined in section 71 as including “rights of common and sporting rights”; sporting rights here is used in the sense of the right to shoot and take game from the land);
And,
 - (ii) that restricted byway was formerly a RUPP and came into being under section 47 of the Countryside and Rights of Way Act 2000;
and,
 - (ii) before it became a restricted byway the RUPP was in use for obtaining access to land.
71. Subsection (7) clarifies that the phrase “visitor to the land” does not include those exercising their public rights in relation to access land under section 1 of the Countryside and Rights of Way Act 2000, or other public rights of access listed in section 15(1) of that Act. In other words, the immunity from prosecution does not extend to any person using a mechanically propelled vehicle to gain access to land in order to exercise a public right of access, but only to those visiting land with the lawful authority of a person with a legal interest in that land.

Repeal of section 34A of the Road Traffic Act 1988

72. Subsection (8) of section 70 recognises that the new section 34A of the Road Traffic Act 1988, which was to be inserted by Schedule 7 to the Countryside and Rights of Way Act 2000 is not going to be brought into force, by repealing the relevant provision in Schedule 7. The

⁴ [The Restricted Byways \(Application and Consequential Amendment of Provisions\) Regulations 2006 No.1177](#)

Government announced in a written Parliamentary statement of 9 December 2003 (Hansard Vol. 415 Col. 80WS) that it would not be implementing section 34A. This is on the basis that the provision appears incompatible with Article 6(2) of the European Convention on Human Rights. Subsections(3) and (5) are drafting amendments to section 34 of the Road Traffic Act 1988 (as amended by schedule 7 of the Countryside and Rights of Way Act 2000), consequent on repeal of section 34A of the Road Traffic Act 1988

Section 71

73. This section provides help in interpreting sections 66 and 67 of the NERC Act and is self-explanatory.

Section 72

74. This section inserts two new sections in the Road Traffic Regulation Act 1984 (sections 22BB and 22BC) giving each National Park authority powers to make traffic regulation orders and other traffic-related orders under that Act. The orders must be in relation to roads that are within in the National Park boundaries and are either byways open to all traffic, restricted byways, footpaths or bridleways shown in a definitive map and statement or unsealed carriageways. Section 72 came into force in October 2007⁵. The procedures are set out in: [The National Park Authorities' Traffic Orders \(Procedure\) \(England\) Regulations 2007 No 2452](#). Further guidance is available through the following link: [Guidance to accompany the National Park Authorities' Traffic Orders \(Procedure\) \(England\) Regulations 2007 \(SI 2007 No. 2542\)](#).

Restricted byways

75. Sections 47-51 of the Countryside and Rights of Way Act 2000 (the CROW Act) introduced a new class of highway called 'restricted byway'. These sections were commenced on 2 May 2006⁶ (11 May 2006 in Wales) and on this date all ways shown on local authorities' definitive maps as Roads Used as Public Paths (RUPPs) were statutorily "reclassified" as restricted byways. After that date, in the words of the statute, they are to be "treated instead as shown as a restricted byway." It should also be noted that section 47(2) of the CROW Act states that after commencement of the section the expression "road used as a public path" shall not be used in any definitive map and statement to describe any way."
76. Section 48 of the CROW Act defines restricted byway as: a highway over which the public have restricted byway rights, with or without the right to drive animals of any description along the highway, but no other rights of

⁵ [The Natural Environment and Rural Communities Act 2006 \(Commencement No. 1\) \(England\) Order 2007](#)

⁶ [The Countryside and Rights of Way Act 2000 \(Commencement No.11 and Savings\) Order 2006 No. 1172](#)

way. Restricted byways carry a right of way on foot; a right of way on horseback or leading a horse; and a right of way for vehicles other than mechanically propelled vehicles (this includes a right of way for pedal cycles and horse drawn vehicles).

77. The statutory reclassification of RUPPs to restricted byways does not, in itself, extinguish any private rights or higher rights that may have existed at the time of commencement but were not at that time recorded on the definitive map. However, it is likely that any such unrecorded higher rights were subsequently extinguished by section 67(1) of the NERC Act which was commenced immediately after the statutory reclassification.

Background

78. RUPPs were first introduced in 1949 when local authorities were required to record rights of way on definitive maps and statements for the first time. Section 27(6) of the National Parks and Access to the Countryside Act 1949 provided that a RUPP is 'a highway other than a public path, used by the public mainly for the purposes for which footpath or bridleways are so used'.
79. However, it is not clear from the 1949 Act whether RUPPs were subject to vehicular rights and attempts were made in successive Acts of Parliament⁷ to resolve this uncertainty by placing a duty on local authorities to reclassify each of their RUPPs either as a footpath, bridleway or byway open to all traffic (BOAT). Nevertheless, a significant number of local authorities failed to reclassify their RUPPs and in 2000 Parliament took the matter out of the hands of local authorities and provided, through the CROW Act, for all RUPPs to be statutorily reclassified en masse as restricted byways.

The restricted byway regulations

80. Section 52 of the CROW Act provides for regulations to be made to amend relevant provisions in legislation relating to highways or highways of a particular description so that they apply, with or without modification, or do not apply, to restricted byways. And on 2 May 2006, these regulations⁸ came into force.
81. These regulations amend existing highways legislation (both primary and secondary) to ensure that restricted byways operate sensibly within the existing framework of relevant legislation. In most cases the regulations simply apply the relevant legislation to restricted byways and make consequential amendments.

⁷ Schedule 3, Part III, Paragraph 9 of the Countryside Act 1968 and section 54 of the Wildlife & Countryside Act 1981.

⁸ [The Restricted Byways \(Application and Consequential Amendment of Provisions\) Regulations 2006 No.1177](#)

82. The regulations also enable restricted byways to be created from scratch. This new power will help local authorities to improve their rights of way networks by enabling them to insert links between fragmented sections of rights of way and create circular routes. It will also help to reduce or avoid potential conflicts and provide safer routes.
83. By way of an exception, the application (to restricted byways) of section 59 of the Wildlife and Countryside Act 1981 and section 33 of the Road Traffic Act 1988 in relation (and amendments to those sections) came into force 2 months after the commencement of sections 47-50 of the 2000 Act. Both these sections contain criminal offences, the scope of which will be extended by applying them in relation to restricted byways.
84. These provisions apply to all local highway authorities except those in inner London. The National Assembly for Wales is responsible for implementing these provisions in Wales.

The NERC Act 2006 and restricted byways

85. This new category of highway will enable the Government to implement its policy on public vehicular rights of way (as set out in: “The Government’s framework for action”, published in January 2005). It will do this by enabling ways with rights acquired by, or dedicated for, non-mechanically propelled vehicles to be recorded on the definitive map and statement as restricted byways. There is a provision in Part 6 of the NERC Act for restricted byways to be established and recorded on the definitive map and statement on the basis of either historic evidence or evidence of a qualifying period of use (subsection 70(1)). So, in future, where a route carries historic vehicular rights, but rights for mechanically propelled vehicles are extinguished by section 67(1) of the NERC Act it will be possible to record that route as a restricted byway, rather than a BOAT. In this way the rights associated with these rights of way will better reflect their historic origins.
86. Where an order has been made and there are outstanding objections requiring determination by a rights of way Inspector, that Inspector is permitted, by schedule 15, paragraphs 7 and 8(1)(c) of the Wildlife and Countryside Act 1981, to confirm the order with modifications to show any part of a route on the definitive map and statement as a restricted byway. This will apply in cases where a public right of way for vehicles has been established, but the public right of way for mechanically propelled vehicles has been extinguished by section 67 of the NERC Act. In such cases we would advise that the Secretary of State (and therefore the Inspector as the person appointed by the Secretary of State) would need to comply with all the requirements set out in sub paragraph (2)(a) to (c) of paragraph 8 as to the giving of notice of his proposal to modify the order.
87. The NERC Act provides for a private right for people who need to access their land or property in cases where a public right of way for

mechanically propelled vehicles has been extinguished by the Act (see the guidance on subsection 67(5)&(7)). The Act also provides for exemption from the offence under section 34 of the Road Traffic Act 1988 (the section that makes it an offence to drive a mechanically propelled vehicle elsewhere than on roads) for persons with an interest in land who need to drive a mechanically propelled vehicle along a former RUPP in order to access that land (subsections 70(4)(6)&(7)).

Transitional arrangements

88. Paragraph 3 of the restricted byway commencement order effectively requires that any outstanding definitive map modification orders to reclassify RUPPs must be processed to a final determination. This wording reflects section 48(9) of the CROW Act. This will include any applications made under section 53(5) of the Wildlife & Countryside Act 1981 and orders made either under the continuous review (section 53) or the duty to reclassify (section 54) that were made before commencement, on 2 May 2006, and have not been determined by that date.
89. While section 53 of the Wildlife and Countryside Act 1981 was amended to provide for the possibility that such an order could be confirmed to show the way on the definitive map and statement as a restricted byway, section 54 of that Act was repealed and was not so amended. It therefore does not provide for any such outstanding order to be confirmed as a restricted byway.
90. Where an outstanding section 54 order for a BOAT has been found to carry public vehicular rights, but the public right of way for mechanically propelled vehicles has been extinguished by section 67 of the NERC Act, then the order should simply not be confirmed. As the right of way in question will already be a restricted byway by virtue of s.47 of the Countryside & Rights of Way Act 2000, this will result in the right of way maintaining the status appropriate to that outcome. This approach may also be adopted where there is an outstanding section 53 order to reclassify a RUPP and the outcome is a restricted byway.
91. Any RUPP that is the subject of such an outstanding application or undetermined order is, by virtue of section 47 of the CROW Act, to be treated as a restricted byway from commencement, on 2 May 2006. Section 47 clearly states that: “the expression “road used as a public path” shall not be used in any definitive map and statement to describe any way”. There is nothing in the transitional arrangements in section 48 of the CROW Act – which are concerned only with the processing of definitive map modification orders and not their outcome – to provide that these ways should retain their RUPP status.
92. Subsection 48(11) is concerned with these transitional cases. Paragraph (b) effectively bestows temporary restricted byway status on these unresolved cases. The final words of the section provide that when such

an outstanding application or undetermined order is determined, any rights that exist solely by virtue of it having been statutorily reclassified as a restricted byway (in other words, any rights that were not shown to have existed through the process of determining the application or order) will cease to exist when the re-classification order takes effect.

93. Paragraph (c) of subsection 48(11) ensures that where, before commencement, a RUPP has already been reclassified as a BOAT, bridleway or footpath, that reclassification is not affected and the way will not become a restricted byway.

Waymarking, definitive maps and other matters

94. For the waymarking of standard routes, local authorities are advised to follow the colour coding described in the (former) Countryside Agency booklet [Waymarking Public Rights of Way \(CA 77\)](#). The colour for the restricted byways waymark is 'British Standard 02C39', which is called 'Victoria Plum'.
95. The correct symbol to show a restricted byway on the definitive map is set out in the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, Schedule 1, which was amended on May 2nd by the Restricted Byways(Application and Consequential Amendment of Provisions) Regulations 2006.
96. Where a former RUPP has been "reclassified" as a restricted byway under section 47 of the Countryside and Rights of Way Act 2000 the local authority would have a duty, under section 130 of the Highways Act 1980, (under which local authorities are required to remove obstructions to public rights of way), to seek the removal of any structures that were incompatible with its restricted byway status, such as a stile. By virtue of subsection 130A(2)(a) of the 1980 Act, it would be possible for any person to make use of section 130A to seek removal of such a structure. Although, where restricted byways arise through dedication (whether express or deemed) it is possible that such a structure may be included in the definitive map and statement as a limitation or condition upon the right of way, it is not clear that a limitation of this nature would apply to ways that arise where a RUPP is automatically reclassified as a restricted byway.

Re-grading, diverting or extinguishing restricted byways

97. As set out above, a restricted byway can come into being through one of three means: through having been statutory reclassified from a RUPP; through a creation order; or through dedication, whether deemed or express.

Re-grading restricted byways through the definitive map modification process

98. The restricted byways legislation provides that restricted byway rights are without prejudice to any higher rights that may exist and so any restricted byway could be upgraded on the discovery of evidence that higher rights exist (i.e. any rights for mechanically propelled vehicles that have not been extinguished by section 67(1) of the NERC Act).
99. As restricted byways that were formerly RUPPs were statutorily reclassified as restricted byways (by sections 47-51 of the CROW Act), they cannot be downgraded through the definitive map modification process. Similarly, there would no such scope for downgrading a restricted byway that came into being through a creation order. Any restricted byway added to definitive map and statement through a definitive map modification order could, in theory, be downgraded if were found to have been wrongly recorded. However, as the recording of restricted byways through the definitive map modification process has only been possible since 2nd May 2006, it seems unlikely that this situation would arise in practice.

Diverting and extinguishing restricted byways

100. The restricted byways regulations⁹ provide for restricted byways to be diverted and extinguished, in the same way as footpaths and bridleways, through sections 118 and 119 of the Highways Act 1980 and analogous provisions. These provisions are all listed in the regulations. Section 116 of the 1980 Act would also apply to restricted byways.

Enforcement

Background

101. The rights of way provisions in Part 6 of the NERC Act are based on two broad policy objectives.
- To ensure that, in future, public rights of way for mechanically propelled vehicles may no longer be established and recorded on the definitive map and statement on the basis of evidence of historic use, or dedication for use, by vehicles that are not mechanically propelled.
 - To reduce uncertainty about rights for mechanically propelled vehicles over existing of public rights of way, which the Act does by extinguishing all unrecorded public rights for mechanically propelled vehicles (subject to the exceptions in subsection 67(2)&(3), which are described elsewhere in this guidance).

⁹ [The Restricted Byways \(Application and Consequential Amendment of Provisions\) Regulations 2006 No.1177](#)

These provisions build on measures in the Countryside and Rights of Way Act 2000, which were aimed at curtailing the use of mechanically propelled vehicles on rights of way and improving enforcement.

102. Sections 47 to 52 of that Act provided for all RUPPs to be statutorily reclassified as restricted byways. The Act provides that over this new category of right of way there is no public right of way for mechanically propelled vehicles. Therefore, unlike with RUPPs, there is no uncertainty as to whether this category of right of way carries rights for mechanically propelled vehicles.
103. In addition, schedule 7 strengthened section 34 the Road Traffic Act 1988 (under which it is an offence to drive a mechanically propelled vehicle elsewhere than on roads without lawful authority) in the following ways.
 - The definition of ‘motor vehicles’ was altered to ‘mechanically propelled vehicles’. Motor vehicles are defined in the Road Traffic Act 1988 as mechanically propelled vehicle intended or adapted for use on roads. The definition ‘mechanically propelled vehicles’ now includes vehicles that are not road-legal, such as an unlicensed or untaxed motorbike or quad bike.
 - The scope of section 34 was extended to cover restricted byways so that it is now an offence to drive on restricted byway as well as a footpath and bridleway.
 - Section 34 now makes it clear that, where someone is prosecuted, the onus is on them to prove that there is a general public right to use that way with a vehicle, whereas beforehand it was unclear where the burden of proof lay.

The problems created by uncertainty

104. Part 6 of the NERC Act does not in itself create any new offences¹⁰. But it aids enforcement by removing a large element of uncertainty about the existence of unrecorded public rights of way for mechanically propelled vehicles. Historically, uncertainty about whether such rights may have existed has been a perennial problem for enforcement agencies; it has deterred them from pursuing prosecutions, under section 34 of the Road Traffic Act, against those using mechanically propelled vehicles on footpaths and bridleways.
105. This was because, although the Countryside and Rights of Way Act 2000 strengthened section 34 of the Road Traffic Act 1988 in the ways described above and provided for the rights over ways formerly shown

¹⁰ Information on the existing range of powers to manage vehicles on rights of way and off-road is set out in Defra’s guidance entitled: [“Regulating the use of motor vehicles on public rights of way and off road”](#).

on the definitive map and statement as RUPPs to be more clearly prescribed, it remains the case that any rights shown on the definitive map and statement are without prejudice to any unrecorded higher rights that may exist. Therefore, when seeking to pursue a prosecution for using mechanically propelled vehicles where ostensibly there are no rights to do so, enforcement agencies had no way of knowing whether those being prosecuted would bring forward evidence of unrecorded public rights of way for vehicles in their defence.

106. Clearly people should be able to defend themselves by proving that they are exercising an existing right. But while there were users of mechanically propelled vehicles and others who exercised unrecorded rights in good faith and only where they believed such rights to exist, there were many others, less conscientious, who sought to exploit the general confusion about what rights existed in order to use mechanically propelled vehicles where such rights were unclear or non-existent.
107. The widespread uncertainty over unrecorded rights for mechanically propelled vehicles created a significant disincentive to enforcement agencies seeking taking firm and decisive action to deal with the misuse of mechanically propelled vehicles on rights of way, or off road. Understandably, these agencies often concluded that there were other, more productive ways of using their resources.

So what is different with the NERC Act?

108. Section 67 of the Act extinguishes all existing unrecorded public rights of way for mechanically propelled vehicles. And although this does not affect public rights of way for vehicles that are not mechanically propelled, it means that in the vast majority of cases, evidence of unrecorded vehicular rights can no longer be used to confound prosecutions under section 34 where there are no public rights of way for mechanically propelled vehicles shown on the definitive map and statement. Although this is subject to the exceptions in subsections 67(2)&(3), section 67 introduces a presumption that unrecorded public rights of way for mechanically propelled vehicles have been extinguished unless it can be shown otherwise. Following commencement of the NERC Act, on 2nd May 2006, the situation is as follows.
109. Section 34 of the Road Traffic Act 1988 provides that a way shown on a definitive map and statement as a footpath, bridleway or restricted byway is to be taken to be a way of the kind shown, unless the contrary is proved. In other words, the onus is on anyone seeking to drive a mechanically propelled vehicle over such a way to prove that a public right of way for mechanically propelled vehicles exists. Section 67 of the NERC Act, creates a presumption that any unrecorded rights for mechanically propelled vehicles have been extinguished, unless the way falls into one of the exceptions in subsections 67(2) or (3) of the Act.

110. Therefore anyone using a mechanically propelled vehicle on a way other than a byway open to all traffic would have to be able to show both that:
- (a) a public right of way for mechanically propelled vehicles existed at commencement of section 67 (on 2 May 2006); and
 - (b) that those rights had not been extinguished, because one of the exceptions in subsections 67(2) or (3) applied.

Unless these are proved, it is an offence¹¹ to drive a mechanically propelled vehicle anywhere other than on a byway open to all traffic recorded on the definitive map and statement, or on an established road¹².

111. The only exception to this is where section 70 of the NERC Act has amended section 34 of the Road Traffic Act to provide a person with an interest in land or their lawful visitors with immunity from prosecution when driving on a former RUPP, where that RUPP was in use for obtaining access to land before 2 May 2006 – there is further information on this in paragraphs 70 and 71 of this guidance.

Better enforcement

112. The Government believes that the key to better enforcement is working in partnership, and that to deal with problems that result from the use of mechanically propelled vehicles on rights of way, or off-road a combination of legislation, cooperation between rights of way stakeholders and more effective enforcement is needed.
113. To this end Defra has published new guidance to promote the better cooperation over enforcement of existing powers to manage vehicles on rights of way. This guidance, entitled: [“Regulating the use of motor vehicles on public rights of way and off road”](#):
- (c) details the range of powers and offences available for use in managing vehicles on rights of way and off-road, and
 - (d) provides a number of examples of where cooperation has proved effective in managing the use of mechanically propelled vehicles.

The following sets out the role that various stakeholders can play to achieve better enforcement within the context of the new rights of way provisions in the NERC Act.

¹¹ It is not an offence where the defendant can establish lawful authority, this could be permission by the holder of the land over which the way passes.

¹² Section 34 says that it is an offence to drive a mechanically propelled vehicle on common land, moorland or land of any other description not being land forming part of a road, or on a footpath, bridleway or restricted byway.

The role of stakeholders

Local highway authorities

114. The main role of the local highway authorities will be to deter, and act to prevent, the illegal use of mechanically propelled vehicles. But another key role for highway authorities is to provide information as a basis for enforcement by others, notably the rights as shown on the definitive map and statement at 2 May 2006, and any changes that have occurred since that date.
115. All surveying authorities have been under a statutory duty since 31st December 2005 to maintain a register of applications for definitive map modification orders that had not been the subject of a determination by that date and the stage in the process that the application has reached. Where an outstanding application for the recording of a public right of way for mechanically propelled vehicles under section 53(5) of the Wildlife and Countryside Act 1981 falls within the terms of subsection 67(3) of the NERC Act, until the application is determined the only rights that should be exercised are those shown on the definitive map and statement. However, if a person could prove that a right of way for mechanically propelled vehicles existed on the route over which they were driving then this would be a defence against a charge under section 34 of the Road Traffic Act 1988.
116. It may well be in the local highway authority's interest to prioritise the processing of such excepted applications because it is likely that any on-going use of these ways will be contentious and will present the most enforcement problems.
117. Better enforcement would be promoted by the provision of signs to clarify, on the ground, what public rights exist over any given right of way. In particular it would be helpful to show (a) where use of mechanically propelled vehicles is illegal because any unrecorded rights have been extinguished by section 67(1) of the NERC Act, and (b) where restricted byway status now applies to former RUPPs. Waymarking does not directly affect prosecutions, but will clearly help to avoid misunderstandings.
118. The Defra publication "[Regulating the use of motor vehicles on public rights of way and off road](#)" sets out the scope for partnership initiatives with others. A further good example is the "[Sussex Pathwatch](#)", which was formed to combat motorised vehicles using public rights of way illegally in the Sussex countryside and comprises: Sussex Police, South Downs Joint Committee, West Sussex County Council, Parish Councils, Landowners, recreation user groups and countryside organisations.
119. Authorities are reminded that pre-emptive Traffic Regulation Orders (TROs) may be used to protect routes with such pending applications from potential future damage by mechanically propelled vehicles, even

where public right of way for mechanically propelled vehicles has not yet been established. Use of TROs is covered in the Defra publication “Regulating the use of motor vehicles on public rights of way and off road” mentioned earlier. Authorities may also use their powers to erect barriers to restrict unauthorised vehicular use.

The Police, Crown Prosecution Service and Magistrates

120. There is a consensus among rights of way users and other stakeholders that there would be benefits from every Police Force having one or more specialist access officers who are trained in rights of way law and its interpretation and enforcement. Of crucial importance is being able to establish what rights exist where and Forces would therefore need to have links in place with the local highway authority (or other relevant authority, such as a National Park authority) so that they can get ready access to this information.
121. Section 59 of the Police Reform Act 2002 enables the police to seize a vehicle they reasonably believe is being driven in a way that both contravenes section 3 or 34 of the Road Traffic Act 1988 and is causing or is likely to cause alarm, distress or annoyance¹³. The Police are encouraged to be ready to respond to reports from the public relating to vehicles being driven off road or on rights of way unlawfully and to make full use of the section 59 power where appropriate in dealing with these problems. They should be aware from Home Office guidance issued on 20 December 2002 and on 1 November 2005 of the procedures available and the power to issue warnings, to seize and (where necessary) to destroy vehicles.
122. Police Forces are encouraged to post all warnings and seizures on the Police National Computer System, and to keep them posted there for the following 12 months. This can now be done on the National System, even though the offences to which the warnings or seizures apply are not recordable. Without this posting it will be very difficult for any police constable to know if a warning or seizure has been made in this time by another Police Force.
123. The Defra publication [“Regulating the use of motor vehicles on public rights of way and off road”](#) sets out key actions for the Police and local authorities and draws attention to successful partnership initiatives in Swansea, Humberside, South East Kent, Killingbeck (West Yorkshire), and Bromley. A further scheme in Sussex is referred to above. Other

¹³ (Section 3 makes it an offence to drive a vehicle carelessly or inconsiderately on-road, section 34 makes it an offence to drive a vehicle off-road without authority.) The seizure does not depend on prosecution for, or proof of, these offences, only on reasonable belief as to their commission. Seizure has to be preceded by a warning in the previous twelve months from any Police Force in England or Wales unless specified exceptions apply. The owner has to be notified of the seizure as soon as possible and can claim the vehicle back immediately on payment of prescribed charges. If the owner does not pay the charges within the prescribed period the vehicle may be disposed of. The method of disposal is not prescribed. It may be by destruction, sale or otherwise.

Police Forces are encouraged to liaise with these Forces to draw on their experience.

124. The Crown Prosecution Service is encouraged to develop a policy which builds on the improved clarity introduced by the NERC Act and which leads Police Forces into a consistent approach to enforcement. The courts should consider very carefully the level of fines, which need to be seen as a deterrent rather than as an acceptable risk for the activity they are pursuing. The level of fines should be consistent across the country.
125. The Police and Crown Prosecution Service should be aware of the defences available. Anyone prosecuted would have to establish both that: (i) an unrecorded public right of way for mechanically propelled vehicles existed before 2 May 2006 and (ii) that the public right of way was not extinguished by section 67 of the NERC Act because one of the exceptions in subsections 67(2) and 67(3) applied. Paragraphs 16 to 54 of this guidance set out how these exceptions operate. Proof of vehicular rights is a highly complex subject and may take several days of public inquiry before a trained inspector under normal procedures. The courts and prosecution services are encouraged to seek guidance from the [Planning Inspectorate](#) in Bristol as to the considerations involved. However, the onus is on anyone prosecuted to prove that a public right of way for mechanically propelled vehicles existed at the time of the alleged offence.
126. Prosecutions do not depend on waymarking, it is incumbent on anyone using a public right of way to ensure that they have the right to do so. The existence of outstanding applications for rights has no bearing on the status of the right of way at the time of the prosecution, but any evidence that exists to support the application may be brought as evidence in defending a prosecution.

The public and landowners

127. Members of the public and landowners may assist the police by reporting instances where an offence is committed. Under section 59 of the Police Reform Act 2002, if the use of a vehicle is causing, has caused, or is likely to cause alarm, distress or annoyance to members of the public, and the driver or registered keeper of the vehicle has not in the previous 12 months received a warning from any police force, the police may issue such a warning. If the driver or registered keeper of the vehicle has received such a warning, the police may seize the vehicle. The police will require evidence of identity (normally a registration number), and details of the vehicle, date, time and place. Photographic evidence is very valuable. Operation of section 59 is not dependent on a police officer witnessing the event providing a satisfactory statement is supplied by one or more members of the public.

Drivers and riders of mechanically propelled vehicles

128. It is the responsibility of drivers and riders of mechanically propelled vehicles to ensure that they remain within the law by driving only on routes where there are established rights for mechanically propelled vehicles; otherwise they risk prosecution under section 34 of the Road Traffic Act 1988.

129. Under section 34, it is an offence to drive on routes not shown on the definitive map and which are not established roads, or on routes shown on the definitive map as footpaths, bridleways or restricted byways. However, if a person could prove that a right of way for mechanically propelled vehicles existed on the route over which they were driving then this would be a defence against a charge under this section.

Appendix – Summary of changes from last version

Paragraph(s) ¹⁴	Summary of amendment
8	New paragraph about the retention of higher rights other than rights for mechanically propelled vehicles.
9	New paragraph about Part 6 of the NERC Act and organised motorsport events.
16 to 26	Re-ordered to improve clarity.
32	New paragraph about the list of streets exception.
36	New paragraph elaborating on how s.67(2)(e) operates.
38	New sentence added at the end of this paragraph.
39 to 43	Revised to reflect the Court of Appeal judgement in the ‘Winchester’ case and to improve clarity.
50 to 53	Revised to improve clarity.
53	New paragraph to outline simplified procedure for applying the exceptions in certain cases.
59	In last sentence “confirmed” substituted for “determined”.
65	Revised to improve clarity.
96	New paragraph about the status of gates and stiles on restricted byways.
97 to 100	New paragraphs about re-grading, diverting or extinguishing restricted byways.
115, 128 & 129	Re-wording to clarify the legal situation regarding use of routes where there is not an established public right of way for mechanically propelled vehicles.
122	New paragraph about warnings and seizures being logged on the Police National Computer System.

¹⁴ Numbers are as they appear in version 5