



FEEDBACK FORM

RESPOND BY MONDAY 4TH APRIL 2011

PROPOSALS FOR THE MANAGEMENT OF MOORINGS ON THE RIVERS LEE & STORT, HERTFORD UNION AND REGENT'S CANALS

Please use the prompts below as a guide. Responses can be submitted by email to Damian Kemp (Project Officer) at Damian.kemp@britishwaterways.co.uk
Paper copies should be posted Damian at British Waterways, 64 Clarendon Road, Watford WD17 1DA
If you have any questions about the consultation, please contact Damian on:
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Your name and contact details

Please provide email or postal address, depending on how you would prefer to be contacted. Note, we will not be able to acknowledge individual contributions, but we may contact you if we need to clarify any aspect of your feedback or discuss things further. Unless you specify otherwise, we may quote your views but they will be anonymous.

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Tell us what your interest is in the waterways in this area (please tick all that apply)

- | | |
|--|--|
| <input type="checkbox"/> Residential boater | <input type="checkbox"/> Frequent visitor to Lee Valley Park |
| <input type="checkbox"/> Boat owner with long term mooring in the plan area | <input type="checkbox"/> Cyclist |
| <input type="checkbox"/> Continuous cruiser in the plan area | <input type="checkbox"/> Local resident |
| <input type="checkbox"/> Angler | <input type="checkbox"/> Local councillor |
| <input type="checkbox"/> Canoeist | <input type="checkbox"/> Local authority officer |
| <input type="checkbox"/> Rower | <input type="checkbox"/> Other local business e.g. cafe, pub |
| <input type="checkbox"/> Waterway / marine business | |
| <input type="checkbox"/> Other (please indicate) User Group | |

Prompts for responding

In order to respond, it may help to answer the following questions, but it's up to you.

1. What are your views on current levels of boating and mooring in the plan area?

- 1.1 The NBT believes that the BW case that the canals and rivers of the system under BWs jurisdiction is unproven. Insufficient research has been conducted to provide evidence that demonstrates this hypothesis.
- 1.2 Conversely there is considerable circumstantial evidence available that underpins the counter-assertion that the canal system is actually NOT overpopulated by itinerant live-aboards. Analysis of data obtained by FoI requisition and otherwise of boat movements on certain parts of the system (including one purported by BW to be overpopulated) indicate that the contrary is the case. BW does not keep specific data on boat movements of itinerant live-aboards and therefore is unable to assert that the river is overpopulated by itinerant live-aboards. In any case, boats without permanent moorings account for only some 10% of all boats with a BW licence.
- 1.3 It does follow that the policy is therefore flawed in terms of its bona fides.

- 1.4 The circumstantial evidence available to the NBTA of the use of towpath on the River Lee indicates that overcrowding is not an issue on the river.
- 1.5 Conversely it is apparent that there is a considerable anti-itinerant-live-aboard lobby that uses a line of argument of “overcrowding” to justify draconian mooring restriction allegedly to control the alleged overcrowding. It appears that the reality of this lobby group’s intention however is to “see off” itinerant live-aboards who they regard as “water gypsies”.
- 1.6 The NBTA reminds BW that if such an assertion was made against for example Roma or Irish Travellers on land that the party making the assertion would be guilty of a Race Relations offence and would be imprisoned. Similarly if the landlord of a house were to subject a tenant to such treatment he would be imprisoned. The “civilized society” that the UK purports to be clearly finds such a mentality unacceptable.
- 1.7 Rendering the towpath on the River Lee devoid of itinerant live-aboards is, the NBTA asserts, a dangerous and counterproductive step. There is an accepted correlation between the presence of itinerant live-aboards on the towpath and increased security against risk of assault or robbery for towpath walkers. Where itinerant live-aboards are present towpath crime is reduced and what would otherwise be “no-go” areas are made safer for the local residents. An example of this is Hackney in London.
- 1.8 Conversely the absence of itinerant live-aboards increases crime on towpath stretches in turn affecting visitor numbers (for “visitor” read “boat-tourists”) as has been demonstrated in for example the Tottenham area of London.
- 1.9 The effect of such a policy will be to compromise BWs ability to attract business in turn affecting its revenue stream once it is a charity and part-funded by donation.
- 1.10 itinerant live-aboard boaters represent a sector of BWs business in terms of licence revenue. Even though BW does not gain revenue from a mooring fee from an itinerant live-aboard it does nonetheless receive licence revenue. BW appears to have no specific data on boat use growth that distinguishes between “itinerant live aboard” and other sub-markets.
- 1.11 However there is circumstantial evidence that there is some growth in the itinerant live-aboard market while there is no growth within the rental holiday market and some evidence of decline in private leisure ownership. It follows that the concerted effort of BW to curtail itinerant live-aboards is actually counterproductive as it represents a serious encroachment to its own growth.
- 1.12 In addition the negative publicity that surrounds such a policy is clearly damaging BWs standing.

2. What effect (e.g. good, bad, none) does the current level of boating and mooring have on your enjoyment of the waterways and park?

- 2.1 The word “enjoyment” has no place in relation to describing the essential nature of “housing”. Where “enjoyment” is used in a housing context however is in a tenancy agreement. In such a contract a house dweller is granted protection from the unwelcome interference of a harassing landlord in terms of being permitted “peaceful enjoyment of...”.
- 2.2 It is a matter of regret that BW cannot by any stretch of the imagination be described as affording an itinerant live-aboard harassment-free “peaceful enjoyment” of the use of the waterways for mooring. In the view of the NBTA the present mooring levels on the River Lee do not play a part in the peaceful enjoyment of the use of the river by an itinerant live-aboard.

3. In general, what are your views on the proposals for managing moorings?

- 3.1 The NBTA considers the proposals as draconian, unenforceable (in law), a vehicle for intense and protracted legal challenge, clearly identifiable as an attempt by BW to socially cleanse the river of itinerant live-aboards and generally misconceived.
- 3.2 Further the treatment of itinerant live-aboards has been considered by Parliament in the construction of the British Waterways Act 1995 and the compromise between the objectives of BW and that of a compassionate and fair society arrived at. BW proposals make it plain that it is seeking to circumvent this compromise and as such constitute a case of "contempt of parliament".
- 3.3 For the proposed mooring restrictions to not result in a violation of Art 6 ECHR they must be "signed" (a notice of designating posted on the towpath) by BW. The Select Committee to the House of Commons in scrutinising the Waterways Bill 1990 (the precursor to the British Waterways Act 1995) forbade BW the ability to fine for the violation of a mooring restriction. It follows that BW has no power to sign mooring restrictions and therefore in reality cannot impose mooring restrictions. BW gave evidence to the Select Committee that in light of the Select Committee forbidding BW the ability to impose fines, BW was withdrawing from the Bill the right to impose mooring restrictions. Most of all BW is obviously intimately aware of the work of the Select Committee.
- 3.4 BW enjoys general powers to do in essence "what it likes" by virtue of s.43 of the Transport Act 1962. However this is referred to as a "Henry VIII Clause" and neither the courts nor Parliament likes Henry VIII Clauses because of their inherent unfairness. However s.43 is clearly qualified by all subsequent legislation, the "Will of Parliament" and any "overriding" legislation such as the European Convention on Human Rights and the Equality Act 2010. The issue of mooring restrictions has already been studied by Parliament and has been disposed of without granting BW the right to impose such restrictions. This appears to constitute so much "water off a ducks back" in relation to BWs conduct in composing the instant proposals.
- 3.5 Under these proposals BW is seeking to charge considerable amounts for itinerant live-aboards to do what they are lawfully entitled to do without charge save that of their licence fee. Although the proposals describe excess mooring "charges", the level of the proposed charges means that they are in fact fines because of the punitive quantum. The stated average annual mooring fee of a BW mooring let through the BW auction system (itself challenged on the grounds of unfairness) is between £1,500 and £2,000. The excess mooring "charge" incurred after 7 days would amount to £7,160 per annum at £20 per day and £14,320 per annum at £40 per day.
- 3.6 However the declared objective of BW in these proposals is not to generate revenue but to discourage itinerant live-aboards. It follows that the charging regime is not representative of an administrative charge but a penalty. The issue of the ability of BW to impose a penalty is presented in paragraph 3.3 above.
- 3.6 It is apparent that in these proposals the itinerant live-aboard will not have the opportunity to challenge the imposition of a penalty for staying over 14 days in any one "district" although he may have left one "place" for the next (as prescribed in law). It follows that the proposals manifest a violation of Art 6 ECHR: there is no such thing as "no right of appeal".
- 3.7 Under these proposals a boat with a home mooring is not restricted or charged in way that an itinerant live-aboard would be. Therefore the proposals discriminate against itinerant live-aboards.
- 3.8 The NBTA believes that everyone is entitled to seek and retain employment to the best of their abilities. Equally a person is entitled to receive health care in an effective manner. Each person is entitled to (and is required to) educate their children. Each person is entitled to respect for their home,

private and family life. Itinerant live-aboards are no different in this respect. It is clear that the compulsion by BW on itinerant live-aboards to move every 14 days obviously disrupt these principles. However the instant proposals exacerbate this disruption by orders of magnitude. To impose such disruption in a differential manner (ie against itinerant live aboards and not live-aboards who hold moorings) is discriminatory. Many parents will be forced to withdraw their children from school if these restrictions come into force and they comply with them. Further the proposals appear to be a "sledge hammer to crack a nut" and as such are disproportionate.

- 3.9 It follows that the proposals violate Art 8 ECHR, A1P1 ECHR, A2P1 ECHR and Art 14 ECHR.
- 3.10 BW holds powers under s.43 as stated above in paragraph 3.4 to "do what it likes" and this includes the capability to operate a tiered penalty system for violations of regulation. However BW is in the habit of taking action under s.8 of the British Waterways Act 1983 for non-compliance. s.8 states that BW is entitled to terminate a boat licence and ultimately seize and dispose of a vessel that violates the regulation. It follows that the enforcement procedure is draconian, therefore disproportionate and thus violating of Art 8 ECHR. As the subject of the violation is someone's possession this also violates A1P1 ECHR.
- 3.11 These proposals are designed specifically to have a disproportionately adverse impact on itinerant live-aboards in comparison with boat dwellers with moorings. The proposals will have a disproportionate adverse impact on children of school age who are members of itinerant live-aboard families as stated in paragraph 3.8 above: the proposals discriminate on grounds of age.
- 3.12 They will have a disproportionate adverse impact on the ability of pregnant women and new mothers who live on boats without moorings to gain access to the maternity health care they are entitled to: the proposals discriminate on the basis of sex.
- 3.9 The Public Sector Equality Duty in the 2010 Equality Act places a duty on public bodies to prevent discrimination and promote equality. It follows that the proposals violate the Equality Act 2010.
- 3.10 The Select Committee determined that BW should not have the power to prescribe cruising patterns or to set restrictions on the return to particular places, of itinerant live-aboards. BW only has the power to prevent boats without moorings from staying continuously in one place for more than 14 days and only when there is no valid reason for a longer stay. This was established as on the basis that it was already "custom and practice".
- 3.11 The Mooring Guidance for Continuous Cruisers contains an unlawful definition of use of the boat "bona fide for navigation". BW gave evidence to the Select Committee that the test for whether a boat is being used bona fide for navigation was whether it has remained continuously in one place or not, for longer than 14 days without a valid reason.
- 3.12 Unfortunately neither counsel nor the judge had referred to the Select Committee minutes in the adjudication of the case of BW v Davies.
- 3.13 It follows that the proposals in themselves are flawed.
- 3.14 BW claims that itinerant live-aboards impose too great a pressure on sanitary, rubbish disposal and water facilities on the River Lee. This is clearly disingenuous. There is no difficulty for BW in providing these facilities on other popular canals in the system including the Llangollen, Oxford and Kennet and Avon canals. Further, licence fee revenues are amortised over the whole canal system as are service provision costs. Therefore an assertion that a regional use is excessive is obviously invalid.
- 3.15 However such an assertion is seeking to deprive itinerant live-aboards with essential services and as such is discriminatory and harassing. If the landlord of a house cut off the water supply or the

sewerage of his tenant , or threatened to do so, he would be guilty of a criminal offence and imprisoned.

- 3.16 BW asserts that the revenues collected from the imposition of the proposals will be used to fund the policing mechanism. The NBTA, having considered the metrics used to justify this assertion conclude that it will be a loss-making venture. However and in any event the construction of a policy to impose a restriction on a demographic group and then seek to make the policy self-financing is unethical as it connects monetary gain with the enforcement of legislation.
- 3.17 The NBTA sees these proposals as demonstrating the type of policies and philosophy that would in earlier times be described under the heading of "Amptspreche". Phrases such as "overcrowding" gloss over "social cleansing"; "overstay charges" circumvent the true description of "price out"; "too many boaters without moorings" disguises "we wish to persecute itinerant live-aboards". As such these proposals are highly offensive and disturbing.

4. How will you be affected by the proposals?

- 4.1 The NBTA argues that the proposals will violate the convention rights of itinerant live-aboards under Arts 6, 8, A1P1 and A2P1 ECHR. The NBTA also argues that the proposals are discriminatorily against itinerant live-aboards and as such violate the Equality Act 2010. Finally the Will of Parliament as clarified by the Select Committee confirmed what BW was and was not permitted to do and the equitable basis for that casting of that will. BW is seeking to circumvent that equity and impose draconianism and prejudice on itinerant live-aboards.

5. Do you have any practical suggestions to make implementation easier / improve it?

- 5.1 BW has already been granted powers to manage the navigations falling under its jurisdiction though the various acts and byelaws proffered by Parliament. There is no reason why the fair and equitable and most of all lawful management of the River Lee cannot be achieved thorough the proper deployment of its existing powers.
- 5.2 In particular the proper enforcement of the "14 day rule" (s.17(3)(c)(ii) of the British Waterways Act 1995) would provide for the capability. BW have stated on a number of occasions that it focuses enforcement on revenue-earning opportunities (specifically licence evasion) and does not effectively police overstaying on the grounds that it does not directly generate revenue.
- 5.3 BW should direct considerably more effort to the effective placement of off-line residential moorings (in effective numbers) and to do so by working effectively and in a material manner with LPAs and the DC. If the existing legislation gives BW the power to manage the waterways and if it was constructed so as to support itinerant live-aboards. then it follows that the instant exercise should be aborted.
- 5.4 Finally BW should recognise that itinerant live-aboards engage in a different lifestyle but that "different" does not mean "unacceptable" and that in fact many positive outcomes flow from the philosophy of live-aboard itinerancy.

6. Any other comments?

- 6.1 Itinerant live-aboards use their boats as their homes. Irrespective of the merits or dismerits of this (in the eyes of BW) this is an established context. It follows that BW have an inherent obligation under Art 8 ECHR and the Equality Act 2010 to give due regard to the needs of itinerant live-aboards and to consider policy in this light. Put another way to construct policy that wilfully violates the convention

rights of live –aboards under Art 8 is unlawful. BW must expect to be challenged by way of judicial review if it forges ahead irrespective.

- 6.2 Further, to forge ahead irrespective (in the knowledge of this assertion) adds a further dimension of maladministration in the context of “pressing on knowing that the policy construction is unlawful”.
- 6.3 For the avoidance of doubt itinerant live-aboards live on their boats as a “philosophy” and not simply as a means of meeting their housing needs. The peculiarities of living on a boat mean that it is not necessarily an “easy option” and the environmental consequences of doing so are significant.
- 6.4 Conversely the philosophical benefits of doing so are admirable. The carbon footprint of an itinerant live-aboard is significantly reduced in comparison to a land-dweller. Many of the consequences of living on a boat are inherently sustainable. It has to be said that the consequences of s.17(3)(c)(ii) of the British Waterways Act 1995 are at odds with the Renewable Energy Directive 2010 insofar as the section requires movement on a form of transport while the Directive obligates member states to reduce its collective carbon footprint by reducing the use of diesel-powered transport.
- 6.5 However as a “philosophy” (which is by virtue of s.10 of the Equality Act 2010 to also mean “belief”) means that an itinerant live-aboard exhibits a Protected Characteristic and as such BW is obligated to conduct an Equality Impact Assessment and to be doing so in good faith from the outset, as opposed to an “after the event” basis. Guidance given to BW by Wiltshire Council on 1st April clarified this point. It is evident that BW has not grasped the concept nor the nettle of this.
- 6.6 The NBTA notes that this exercise was commenced on 16th February 2011 by the positing of notices on itinerant live-aboards boats on the River Lee that read (I paraphrase) as “This is an established policy to be introduced, please be on notice”. This is not consultation. This view is underpinned by the statement in the document that states BW “intends” to put the proposals into effect in summer 2011”.
- 6.7 The NBTA recognise that the consultation cycle was initiated and then amended on-the-fly to become more compliant with the principles laid out in R v Brent LBC ex parte Gunning [1986] 84 LGR 168.
- 6.8 Gunning states that the following criteria must be adopted:
 - (1) The consultation must be at a time when proposals are still at a formative stage
 - (2) The proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response
 - (3) Adequate time must be given for consideration and response, and
 - (4) The product of consultation must be conscientiously taken into account in finalising any statutory proposals
- 6.9 It is apparent that Criterion (1) was violated in the way that the initial documentation was issued. The NBTA recognises that BW has amended its approach but this does cast doubt on the bona fides of engaging in Criterion (4).
- 6.10 The NBTA has doubts as to whether Criterion (2) has been met. This is because information relating to the formation of the policy in its initial form (ie as published on 16th February 2011) obtained under Fol requisition makes it clear that the policy was already formed as a consequence of consultation with bodies public and private with known policy that is anti-itinerant-live-aboard in late 2010. The justification of the policy has therefore not been clearly stated – essentially because if the true basis for the policy were proven, would be revealed to be violating of the Equality Act 2010 and Art 8 ECHR. It doesn’t follow that this has precluded “intelligent consideration and response” because of the availability of the Fol information. However the ability to consider intelligently and make intelligent response does not arise by virtue of the information provided by BW so it follows that Criterion (2) was violated.

- 6.11 Public meetings were called for 1st and 2nd March 2011 for boaters to lay out their concerns. It was apparent from the responses on the day that the itinerant-live-aboard community was extremely angry with the proposals. The NBTA expressed a view to Simon Salem, Marketing Director BW, just before the public meeting on the 2nd March 2011, that the sentiment of the public meeting of the 1st March 2011 was “a room full of baying dogs [aggrieved with the BW proposals]”.
- 6.12 The NBTA accepts that BW then engaged on a more properly conducted consultation cycle inviting written responses. The NBTA also accepts that the deadline for consultation responses was then extended to 1st May 2011 from that stated at the head of this document of 4th April 2011.
- 6.13 However at the outset BW had announced approximately 4 weeks before final implementation which clearly is violating of the guidelines on public consultations laid down by the ODPM in 2005, specifying 12 weeks for consultation. BW therefore failed to meet Criterion (3) although BW has since relented.
- 6.14 So it is clear that Criteria (1), (2) and (3) were violated at the outset. The stated objective of BW as stated by Sally Ash in the public meeting of 2nd March 2011 was to “Curtail new entrants to the itinerant live-aboard market”. She also made it plain that BW was seeking to price existing itinerant live-aboards off the River Lee and that “some people would suffer as a result of the policy”.
- 6.15 It was evident from material obtained under FoI requisition that consultation with the Lee Valley Park Authority took place in Q3 2010 and that the policy was formed in this consultation. It follows that on 16th February 2011 the process of formation of policy was already complete as opposed to “being initiated”.
- 6.16 It follows that, on the balance of probability, although BW was not flatly refusing to admit petitions from itinerant live-aboards by way of response (which obviously is not in the gift of BW) that scant heed would be directed to any responses. This clearly violates the principle of Criterion (4).
- 6.17 Therefore the NBTA seeks evidence from BW that BW is genuinely embarking on a consultation exercise in relation to the Mooring Strategy for the River Lee.
- 6.18 In the alternative the NBTA assumes that the consultation is being conducted in a manner that violates the principles of Gunning. Therefore the policy would be arrived at in a manner that is ultra vires. The policy would therefore in itself be unlawful (ie irrespective of non-compliance with the Equality Act or Art 8 ECHR) and challengeable under terms of judicial review.
- 6.19 The NBTA has been considering a number of elements of the conduct of BW including:
- (i) The nature of the response by BW to the NBTA submission to the BW national mooring strategy consultation in April 2009, in which BW completely ignored the NBTA response
 - (ii) The nature of the response by Sally Ash in relation to Item (vii) below in which she stated that BW did not agree with the evidence proffered by NBTA.
 - (iii) the nature of the process that has been under way in relation to BW v Davies in the Bristol County Court (which is not binding as an authority)
 - (iv) the subsequent press activity including gross misinformation issued by BW
 - (v) the nature of the process that has been under way in relation to BW v Ward (also in the Bristol County Court) which although sub judice demonstrates the intent of BW
 - (vi) the process that unfolded in the early stages of the Kennet and Avon Mooring Strategy Steering Group
 - (vii) the minutes of hearings of the Select Committee and the evidence given by BW
 - (viii) the statements made by BW in the public meetings of the 1st and 2nd March 2011
 - (ix) The statement of BW CEO Robin Evans at the BW AGM in December 2010 of “I don’t think that providing places for people to live is a charitable object”.

- 6.20 In particular the comments of Robin Evans in December 2010 are clearly misguided when considered in the context of thousands of housing associations in the UK, the objectives of SHELTER and other charities seeking to see homeless people housed. Indeed seeing homeless people housed is obviously the objective of any democratic society and so such a comment is out of place. However such a comment also reveals what is already understood to be systemic prejudice on part of the BW board against itinerant live-aboards.
- 6.21 Considering all of these sources “in the round” it has become apparent to the NBTA that the intent of BW is to see an end to itinerant live-aboard boating on the system. Indeed it is apparent that entrenched prejudice exists within the board of BW in relation to itinerant live-aboards. In the 21st Century this is simply inappropriate and unacceptable.
- 6.22 The NBTA puts it to BW that irrespective of the unlawfulness of this philosophy, irrespective of the unfairness on those BW seeks to “see off the system” and irrespective of the effort being at direct odds with the tradition of the use of the waterways, that this represents an “own goal”. BW as an organisation seeking to move into a charitable status and the Charities Commission will look very dimly upon an organisation seeking clearance to become a charity while at the same time so clearly engaged in activities that are so plainly uncharitable.
- 6.23 In summary therefore the NBTA considers the proposals to be ill-conceived and reinforce the view that the BW Board exhibits gross prejudice against itinerant live-aboards. This does call into question the bona fides of the Board of BW itself and thus the Board members should carefully consider their positions.

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31st May 2011

Cc Secretary of State Environment Fisheries and Rural Affairs