

National Barge Travellers Association

Refreshing signage and rules for South East visitor mooring sites: boater consultation Jan-Feb 2013

FEEDBACK FORM

We would welcome your feedback. Please e-mail your views by returning this form to consultation@canalrivertrust.org.uk by 1 March 2013. Alternatively, you can post it to Damian Kemp at Canal & River Trust, The Dock Office, Commercial Road, Gloucester, GL1 2EB. THANK YOU! If you're completing this on paper, use additional sheets as necessary, but please try to be as concise as possible.

In what capacity are you responding to this consultation? (please tick all that apply)

A regular/frequent boating user of the mooring sites covered by the consultation
Occasional visiting boater to South East waterways
Boater with a home mooring in South East
Hire boat operator
Other X

General (Please refer to the consultation paper and the draft text for the Thrupp information leaflet, map and letters that would be used to implement the new arrangements.)

1. Are the time limit rules reasonable and clear?

1.1 The time limits and non-return restrictions are not reasonable and they are not lawful. They are unlawful because CRT does not have the power to set mooring restrictions of less than 14 days; to set non-return limits; to erect signs designating compulsory mooring restrictions, or to impose fines or charges for the infringement of mooring restrictions. (House of Commons Select Committee on the British Waterways Bill, 1993-94). CRT has the power under s.43 of the 1962 Transport Act to make charges and set conditions for such services and facilities for which the original canal companies provided and were enabled to make charges for under the original canal Enabling Acts (such as the 1793 Grand Junction Canal Act). However, BW confirmed to the House of Lords Select Committee on the British Waterways Bill in 1991 that it had no statutory powers to enforce such mooring restrictions or charges, and this is still the case today.

The recent judgement in *Moore v British Waterways* [2013] EWCA Civ 73 confirms that CRT does not have the power to impose the restrictions and charges proposed in this consultation. It confirms the public right in common law to do anything that is not expressly forbidden by statute. CRT does not have a statutory power to prevent boats from exceeding the time limits on visitor mooring signs; it does not have a statutory power to prevent boats from returning within a specific period, and it does not have a statutory power to impose fines for exceeding such time limits or charges for staying longer.

In *Moore v British Waterways* [2013], CRT argued that s.43 of the 1962 Act gave it authority to impose whatever restrictions it wished. This argument did not succeed. In the case of Mr Moore, there is no other legislation that provides CRT with the power to restrict mooring. The inference is that s.43 of the 1962 Act can only be construed to ride on top of some other statutory power available to CRT at any given time. The judgement clarified

that in a democratic society, a citizen's rights include a general right to do something unless it is restricted or prohibited in statute. There is nothing in the British Waterways legislation that prohibits mooring and therefore it must be assumed that there is a right to moor. The judgement also stated that this right does not include the right to moor indefinitely, but the root of that conclusion lies elsewhere in common law.

Further to this, in the 1990 Bill that became the 1995 British Waterways Act, BW sought powers to impose fines for a breach of a mooring restriction. BW also sought powers in the 1990 Bill to erect signs designating mooring restrictions. Parliament forbade BW to impose fines for violation of a mooring restriction. As a result of this, BW withdrew the wording relating to the erection of signs designating mooring restrictions. BW had previously presented evidence that stated that its signs for mooring restrictions were advisory in nature. BW also withdrew the wording relating to the designation of mooring restrictions. Therefore, signs denoting visitor mooring time limits remain advisory to this day and not compulsory. The only mooring time limit that CRT has the statutory power to enforce is the 14-day limit applying to boats without home moorings in s.17 3 c ii of the 1995 British Waterways Act.

The Commons Select Committee also rejected any "no return within" restrictions (House of Commons Select Committee on the British Waterways Bill, 1993-94). As a consequence this means that any "no return within" or "maximum days in any period" restrictions also remain advisory and not compulsory.

The judgement in *McCarthy and Stone (Developments) Ltd v Richmond upon Thames LBC* [1989] UKHL 4 in which reference is also made to the authority given in *Attorney-General v Wilts United Dairies Limited* [1922] 38 TLR 781 (HL) further underlines the principle that a body exercising statutory powers such as CRT may not make a charge unless there is express authorisation in statute to provide the service which is being charged for and to make the charge.

1.2 The time limits are not reasonable. To prevent boaters from mooring for 14 days in such a large number of specific locations, and to declare that this policy will be rolled out across the CRT waterways, is excessive, draconian and contrary to the general public law duty to exercise statutory powers in a reasonable way (see the judgement in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1).

1.3 The charges are not reasonable and they are not lawful. Firstly, no specific authority has been granted by Parliament to CRT to impose either a charge or a penalty for a violation of the time limits on visitor moorings. Secondly, the level of the charge at £25 per day bears no relationship to any proper charge for the use of the waterways nor to the actual loss or costs associated with overstaying. It is therefore in the nature of a fine or penalty. It is unreasonable in amount because the purpose as stated in the consultation document is to deter overstaying. The consultation does not explain how the £25 per day extended stay charge has been arrived at, stating only that it reflects the costs of keeping visitor moorings available without any explanation of how this has been arrived at. The fixed daily element is inconsistent with this because the costs of enforcement cannot increase in this way and cannot realistically be considered to do so. The charge is fixed at a level to make it impossible to stay for any extended period. It amounts to £9,125 per annum compared to an average annual mooring fee of around £2,000. This makes it a fine and not a charge, and BW conceded in 2009 (for example in an email from Sally Ash to Keith Rossiter of Bathampton Parish Council) that it does not have the power to levy fines for overstaying. It is therefore outside the powers in s.43 of the 1962 Transport Act

and any inclusion in the terms and conditions of the boat licence of a requirement to pay such charges does not bring these charges within the powers available to CRT under s.43 of the 1962 Transport Act.

The 1962 Act allows for charges to be made for services and facilities and this is clearly intended to cover reasonable remuneration for those services. However, the charge must relate to the value of what is provided or other associated costs incurred by CRT. As regards the use of land the value is the value of the occupation or the consequential damages (see the judgement in MOD v Ashman [1993] 25 HLR 513).

In some road traffic cases, local authorities have been permitted to apply excess parking charges (see for example Crossland v Chichester DC [1984] RTR 181) but the statutory power there was different and conferred a general power in relation to use rather than a power to charge for services and facilities. A charge of that kind is still subject to the requirement that it be reasonable.

1.4 CRT and BW have in the past asserted that they may levy such charges simply by virtue of their rights as landowner. This is misleading because a body exercising statutory powers cannot rely on the common law rights of a landowner to empower it to levy such charges (see for example the judgement in Swan Hill Developments v British Waterways Board [1997] EWCA Civ 1089). However, in such cases, the charging regime is a matter of contract between CRT and a licence holder. The overstaying charge is a liquidated sum payable in the event of breach of contract and the amount must be a genuine pre-estimate of loss (see for example the judgement in The Paragon [2009] 1 CLC 379).

2. Is the information clear? How could it be improved?

2.1 The information about the non-return rules is confusing. Taken together with the lack of clarity in the map, the information provided is so confusing as to be misleading. This means that boaters will incur extended stay charges without intending to. This is unjust and could be construed as a deliberate attempt at entrapment.

3. Is the map clear? How could it be improved?

3.1 The map is not clear because it does not provide enough detail to relate what is on the map to what is on the ground. It is confusing because there are so many different time limits marked. This makes it misleading. Boaters who plan where to moor using these maps will frequently find themselves in an area with a different time limit to the one they expect to be in and will not be able to turn round; if they continue past the mooring place they had chosen, they may not find a mooring with the time limit that they need. For example, maps like this have been handed out in Oxford going back as far as 2007 that have either not been clear or accurate enough to enable the boater to tell where the different mooring time limits are. For example, according to that map, there should have been a 7 day mooring zone at a particular location which is actually is a 48 hour zone on the ground.

4. Comments on the proposed changes at individual sites

Please use the following table to record your comments about (1) the proposed start and end points of the visitor mooring areas and (2) the proposed time limits in each case (please delete the rows for any site which you're not commenting on).

5. Any other points you would like to record (please be as concise as possible)

5.1 CRT states on its web site that it carries out consultations in accordance with the Government's Code of Practice on Consultation. In this consultation CRT has failed to follow this Code of Practice.

Section 2.1 of this Code of Practice states that "Under normal circumstances, consultations should last for a minimum of 12 weeks". The consultation paper was written on 24 January 2013 with a deadline for responses of 1 March 2013. This is a consultation period of only 5 weeks, which is below the minimum period in the Code of Practice.

Since the consultation document states that this review will act as a template for further reviews of mooring time limits in other areas, it is completely inconsistent with the Code of Practice on Consultation for the time limit to be so short. The so-called consultation on this issue that has taken place through the User Group Meetings over the last three years has been a closed process that was not known about because it was not disseminated and which has excluded the majority of boaters.

Section 4.1 of the Code of Practice states that "It is essential that interested parties are identified early in the process so that consultation exercises can be designed and targeted accordingly. When consultation exercises need to reach a diverse audience, several approaches may be required. In the consultation document it should be stated what ways are available for people to participate, how exactly to get involved, and why any supplementary channels have been chosen. Over-reliance on standard lists of consultees to disseminate consultation papers can mean that key groups are excluded and others receive consultation documents that are not relevant to them".

CRT has failed to identify who will be most affected by these proposals and has therefore failed to target this consultation document at those who will be most affected. To say in the document itself that "we hope news of it will spread by word of mouth on the towpath telegraph and virally through newsgroups" does not amount to proper targeting in line with the Code of Practice. Limiting the release of the document to the CRT website and by email means that it is inaccessible to many boat dwellers without home moorings, who do not have regular internet access. This excludes one of the key groups who will be most affected by the proposals, contrary to the Code of Practice on Consultation. CRT has not taken any special measures to ensure that those most affected by the proposals are included in this consultation. There have been no leaflets, notices in popular locations or local "town hall" style meetings carried out by CRT to raise awareness of these proposals amongst those boaters who do not use the internet and cannot be reached through the so-called "towpath telegraph".

Since CRT has stated that this consultation will act as a template for other reviews of mooring time limits, it is completely inconsistent with the Code of Practice on Consultation to fail to consult with those who will be most affected. The groups most affected should have a proper opportunity to comment in line with the Code of Practice on Consultation.

5.2 The proposals to change visitor mooring time limits will have a detrimental effect on all boaters. However, the group that will be most adversely impacted are boat dwellers without home moorings.

Indeed, CRT states in the consultation document that these changes are targeted at boats without a home mooring.

The proposals aim to prevent boats from mooring for 14 days in a very large number of locations. Some of these proposed restrictions will make long lengths of waterway into "no go" areas for 14-day mooring. The effect on boat dwellers without home moorings of not being able to moor for 14 days in, for example, the whole of Berkhamstead, or between Batchworth and Stockers Lock, will be to prevent them from staying for 14 days in locations where they need to moor for 14 days in order to remain within reach of their place of work, their childrens' school, and the health and other public or private services they may need to use. This amounts to an attack on the right to use and live on the waterways without a home mooring and is effectively a proposal to exclude boaters without home moorings from large stretches of waterway to make more room for the leisure and holiday trade. This practice is often referred to as social cleansing or social exclusion and it is not appropriate for a charity to be engaged in such discriminatory practices.

5.3 No evidence of the need for further restrictions in visitor mooring time limits or for additional lengths of visitor moorings has been presented by CRT to justify these proposals. The consultation is not supported by any statistics showing the frequency of incidences of boaters being unable to find mooring spaces in the locations covered by the consultation. CRT appears to be relying solely on anecdotal evidence to justify these changes, but it has not even published any anecdotal evidence to support its assertions. This demonstrates that the proposals are not supported by evidence but are a further part of its unlawful strategy to reduce the numbers of boat dwellers without home moorings. At present there is a mix of moorings at most of the sites that includes 14-day moorings. There should be no further reduction in 14-day mooring space on the waterways. Any more reductions in 14-day mooring space will be detrimental to all boaters whether they are on holiday, on an extended cruise, week-ending around the system or living aboard. Holidaymakers and those on long cruises will be prevented from exploring the waterways at the pace they choose; weekenders will be severely inconvenienced, and boat dwellers will be prevented from staying in many places for 14 days.

If implemented, these proposed changes will be counter productive. To create large lengths of additional moorings with time limits of less than 14 days will increase the incidence of overstaying on visitor moorings as boaters deliberately ignore the time limits because they need to stay for longer in these locations. This shows that the primary aim of the proposals is not to improve the chances of boaters being able to tie up for one or two nights on holiday where this has been shown to be needed, but to unlawfully raise revenue by forcing boaters to pay the proposed charges because they need to stay for longer than the time limit in a specific location.

The NBTA proposes the following alternatives to the proposals in this consultation:

CRT should abandon these unlawful, draconian and excessive proposals and implement a voluntary, consensual code of conduct regarding the use of visitor moorings. Any problems of overstaying should be dealt with by consistent and fair enforcement of the 14-day rule. The vast majority of boaters will move if they receive a lawful, valid patrol notice.

Creating lengths of purpose-built visitor moorings encourages their use because they are easier to use than mooring spikes and gangplanks. Consistent and fair enforcement of the 14-day rule should be combined with dredging and bank maintenance that will enable more stretches of the towpath to be used for mooring *without* purpose-built rings, bollards and hard edges, so as to discourage the use of existing visitor moorings by boaters who wish to stay in an area for 14 days.

These measures will leave a small number of deliberate overstayers which will be a manageable caseload for enforcement staff. CRT has the power to move a boat which is causing an obstruction without notice under s.85 of the 1983 British Waterways Act. Getting moved along by CRT would be a more effective deterrent to overstaying than £25 per day charges which wealthier boaters will treat as a 'pay as you go' mooring fee.

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