

# **NATIONAL BARGEE TRAVELLERS ASSOCIATION**

## **EVIDENCE SUBMITTED TO MERITS OF STATUTORY INSTRUMENTS COMMITTEE**

### **DRAFT BRITISH WATERWAYS (TRANSFER OF FUNCTIONS) ORDER 2012**

#### **EXECUTIVE SUMMARY**

The transfer under the Public Bodies Act of the functions of British Waterways (BW) to a charity will mean that a charity will exercise statutory enforcement powers including the power to seize and destroy boats that are people's homes without payment of compensation. Enforcement powers of this nature will therefore be exercised by a body that will no longer be subject to any public scrutiny and thus will be unaccountable.

This will reduce the already minimal rights and avenues for redress available to boat dwellers and will put thousands of people at increased risk of homelessness. Boat dwellers have no legal protection for their homes and most moorings have no security of tenure.

BW carries out routine and systematic harassment, threats of homelessness and actual evictions directed against the adults and children who live on boats on its canals and rivers.

This harassment is sanctioned by the Directors of BW but has no sound basis in law. If the landlord of a house treated their tenants in the same way they would be convicted of a criminal offence.

This raises issues of Human Rights, specifically the violation of Articles 6, 8, and 14; Protocol 1 Article 1; Protocol 2 Article 1 and Protocol 3 Article 1 of the European Convention on Human Rights.

The issue of British Waterways was not discussed at all in the Commons Committee stage of the Public Bodies Act despite evidence submitted by boat dwellers. The extremely serious issues raised by boat dwellers were not considered before the Act became law. This grievous omission needs to be rectified before the draft Order is approved.

No Equality Impact Assessment of the transfer of the functions of British Waterways to a charity has been carried out. This is illegal.

The National Barge Travellers Association (NBTA) therefore believes that the draft Order to transfer the functions of BW should be abandoned unless and until specific measures are put in place protecting boat dwellers from harassment, unlawful eviction and homelessness.

NBTA is a volunteer organisation formed in 2009 that campaigns and provides advice for itinerant boat dwellers on Britain's inland and coastal waterways. This includes anyone whose home is a boat and who does not have a permanent mooring for their boat with planning permission for residential use. Security of tenure for those with residential moorings is also a matter of concern.

#### **1. INTRODUCTION**

1.1 The NBTA believes that the draft Order to transfer the functions of British Waterways (BW) gives rise to some very serious issues of public policy and is therefore likely to be of interest to both Houses of Parliament.

1.2 NBTA believes that British Waterways (BW) should not be transferred to charity status because of the routine and systematic harassment, threats of homelessness and actual evictions BW directs at the adults and children who live on boats on its canals and rivers, noting that the management of the Canal and River Trust will be carried out by the same members of staff using the same policies as BW.

1.3 This harassment is sanctioned by the Directors of BW but has no sound basis in law. If the landlord of a house treated their tenants in the same way they would be convicted of a criminal offence.

1.4 NBTA and a number of other individual boaters and boaters' representative groups submitted written evidence to the Public Bill Committee in 2011 regarding the provisions to transfer British Waterways to a charity in the Public Bodies Bill. However the matter of British Waterways was not discussed at all in the Public Bill Committee and the inclusion of British Waterways in Schedule 5 of the Public Bodies Act was achieved without any examination of the extremely serious issues regarding the risk of homelessness and loss of rights that the NBTA and other boat dwellers raised in their evidence. It is therefore vitally important that this evidence is considered by the Merits of Statutory Instruments Committee now.

1.5 The issue of British Waterways was not discussed at all in the Commons Committee stage of the Public Bodies Act. Therefore the extremely serious issues raised and submitted to the Committee by boat dwellers regarding the risk of homelessness and the violation of their Article 8 rights resulting from the transfer were not considered before the Act became law. This very serious omission needs to be rectified by the Merits of Statutory Instruments Committee.

1.6 The House of Lords Delegated Powers and Regulatory Reform Committee expressed concern in 2011 about the appropriateness of transferring the existing powers of British Waterways to make subordinate legislation; powers of forcible entry, search or seizure; powers to compel the giving of evidence and powers whose exercise will necessarily affect the liberty of an individual, to an unaccountable private sector body that does not otherwise exercise any public functions. The Delegated Powers and Regulatory Reform Committee raised concerns that the transfer of British Waterways would not strike a fair balance between the public interest and the interests of those persons adversely affected by it, and would remove the protections available to persons adversely affected by it.

1.7 The transfer of British Waterways out of public ownership will present a significant additional risk to the already minimal protective rights that boat dwellers enjoy. This, we believe, is material in the passage of the draft Order through Parliament and presents a significant compliance concern.

1.8 No Equality Impact Assessment of the transfer of the functions of British Waterways to a charity has been carried out. This is illegal. No independent assessment exists of the risks the transfer poses to the rights of boat dwellers under Articles 6, 7, 8, and 14 and Protocols 1, 2 and 3 of the European Convention on Human Rights. The Government has failed to assess the impact of the transfer on groups that are protected by the Equality Act. Itinerant boat dwellers are a minority group within the terms of the Equality Act.

1.9 Boat dwellers have no legal recognition or protection for their homes. The transfer of British Waterways out of public ownership will remove the minimal protection boat dwellers have for their homes that derives from British Waterways status as a public body under the Human Rights Act, the Equality Act, the Freedom of Information Act, and the Government's Code of Practice on Consultations. The legal remedy of Judicial Review will no longer be available to boat dwellers to challenge maladministration or *ultra vires* action by the Canal and River Trust.

1.10 These provisions are the only protection boat dwellers have from homelessness because there is no legal recognition of the homes of boat dwellers and no protection from harassment and illegal eviction, in contrast to the protection enjoyed by the tenants of houses who are protected from such abuses.

1.11 The protection boat dwellers have for their homes, private and family life and correspondence under Article 8 of the European Convention on Human Rights will be reduced because although Article 8 still applies to them as individuals, the Canal and River Trust will no longer be bound by it as an organisation, so it will be harder for boat dwellers to exercise their Article 8 rights. The same applies to their rights to due process and protection against arbitrary, undefined sanctions under Articles 6 and 7, in other words the Canal and River Trust would have greater powers to terminate their boat licences and seize their boats without going through a Court.

1.12 Other rights that boat dwellers enjoy under the European Convention on Human Rights will be reduced, such as the right to peaceful enjoyment of their possessions - including their homes - under Protocol 1 Article 1; their children's right to education under Protocol 2 Article 1, and their right to vote in elections by declaring a local connection under Protocol 3 Article 1.

1.13 The Public Sector Equality Duty will no longer apply, therefore the Canal and River Trust will no longer be obliged to carry out equality impact assessments on its policies such as local mooring strategies, which are targeted at and have a disproportionate adverse impact on people who live on boats without permanent moorings. Currently BW can be challenged by Judicial Review if it adopts a policy that has been shown to have a disproportionate adverse impact on a particular group following an equality impact assessment, but this remedy against policies that adversely affect boat dwellers by the Canal and River Trust will not exist.

1.14 The Freedom of Information Act will no longer be wholly applicable, meaning that the Canal and River Trust will be able to bring in draconian new mooring restrictions or unaffordable increases in licence or mooring fees without any form of scrutiny. Currently boat dwellers have been able to challenge and reduce the impact of such restrictions following research using the Freedom of Information Act.

1.15 In the case of *Moore v British Waterways Board* [2012] EWHC 182 (Ch) the presiding judge expressed considerable concern over the conduct of British Waterways in terms of exceeding its powers under the 1995 Act. The judgement notes that British Waterways is exceeding its powers and appears to be out of control. The presiding judge also observed that BW has systematically violated human rights in the design and operation of its procedures.

## **2. THE HOMELESSNESS CONSEQUENCES OF THE TRANSFER OF BRITISH WATERWAYS OUT OF PUBLIC OWNERSHIP**

2.1 Currently BW has the power to promote Private Acts of Parliament, Byelaws and Transport and Works Act Orders (which are Statutory Instruments). The Public Bodies Act gives the Canal and River Trust a general power to make subordinate legislation. The procedure for passing Statutory Instruments requires very little Parliamentary or public scrutiny compared to Private Bills and Byelaws. We do not consider that the provisions in the Public Bodies Act relating to the use of Statutory Instruments will provide sufficient protection for boat dwellers against the violation of their Convention rights.

2.2 Byelaws have to be consulted on and interested parties can petition against Private Bills and

give evidence direct to the Parliamentary Select Committee which considers the Bill. In contrast the only way to challenge a Statutory Instrument, whether a Transport and Works Act Order or otherwise, is to bring a judicial review. This is a difficult process and beyond the reach of most boat dwellers.

2.3 We already have evidence that BW sought to increase its enforcement powers as part of the Public Bodies Bill. This was discussed under item 11/003 in the BW Board meeting on 27th January 2011; the BW Legal Director Nigel Johnson proposed that BW should obtain extra enforcement powers through the Public Bodies Bill.

2.4 In addition the Transition Trustees of the Canal and River Trust stated on 2 September 2011 in a meeting of the British Waterways Advisory Foundation that they want enabling powers. This means that a body that is unaccountable to Parliament will be able to impose draconian new legislation that adversely affects boat dwellers. This is contrary to the assurances given by the Waterways Minister Richard Benyon, who stated that BW was not seeking any new enforcement powers through the Public Bodies Act, in response to the concerns of boat dwellers who wrote to their MPs about the increased risk of homelessness for them of transferring BW to charity status.

2.5 Nigel Johnson stated in May 2011 that BW would not seek any extra enforcement powers. However, BW has drafted byelaws which it intends to pass after the move to charity status has been completed. These draft byelaws include provisions to create criminal offences of disobeying signs or instructions stating where and how long boats should moor - powers that Parliament did not consider appropriate for BW to have in 1995.

2.6 The consequences of giving BW extra powers and removing the statutory protection for boat dwellers arising from the Human Rights Act, the Equality Act and the Freedom of Information Act and other protections that currently stem from BW's status as a public body, will be the actual or threatened homelessness, removal from school and denial of access to employment, healthcare, postal mail and voting of up to 10,000 adult and child boat dwellers.

2.7 The estimated 6,000 to 10,000 boat dwellers who do not have moorings for their boats will be at risk, in spite of the intention of Parliament to protect these boat dwellers when it passed the 1995 British Waterways Act.

2.8 Some 10% (3,800) out of the total of almost 38,000 boats on BW waterways do not have moorings (information from BW). The majority of these boats are people's homes.

### **3. THE RIGHTS OF BW BOAT LICENCE HOLDERS**

3.1 The 1995 British Waterways Act entitles boat licence holders to use the waterways without a permanent mooring provided that they do not stay more than 14 continuous days in any one place.

3.2 s.17(3) of the Act states that in order to be licensed, a boat must be insured, must comply with safety standards, and must either have a permanent mooring or:

“(ii) the applicant for the relevant consent satisfies the Board that the vessel to which the application relates will be used *bona fide* for navigation throughout the period for which the consent is valid without remaining continuously in any one place for more than 14 days or such longer period as is reasonable in the circumstances” (s.17(3)(c)(ii)).

3.3 The intention of Parliament when it passed the 1995 British Waterways Act was to allow boat dwellers to continue to live on their boats without having a permanent mooring, in a way that enabled them to remain in employment; continue to send their children to school, and have

protection from homelessness.

3.4 BW had originally sought criminal sanctions against anyone caught living on their boat without a permanent mooring including a Level 5 fine (£1,000 at the time) and a daily penalty of 10% of Level 5 (£100) (British Waterways Bill, 1990).

3.5 Parliament did not allow this and acted to protect the homes and livelihoods of boat dwellers (House of Commons Select Committee on the British Waterways Bill, 1993-94).

3.6 Consequently, the law allows boat dwellers to live on their boats without a mooring and remain within reach of a place of work, their children's school, a GP or other health care, and to collect their mail from a land address. They can also exercise their right to vote by declaring a local connection.

3.7 In drafting the 1995 British Waterways Act, Parliament intended that the test for whether a boat was complying with s.17(3)(c)(ii) was whether it had remained longer than 14 continuous days in the same place without good reason.

3.8 The House of Commons Select Committee rejected any prohibition on returning to the same place within a specified period and declined to set any further requirements such as a minimum distance to be travelled.

3.9 The 1995 Act and other relevant legislation do not specify any particular travelling pattern for boats without moorings apart from the "14 day rule". (House of Commons Select Committee on the British Waterways Bill, 1993-94).

#### **4. BW'S ATTEMPTS TO CIRCUMVENT THE 1995 ACT**

4.1 In 2001 BW began making attempts to circumvent the intention of Parliament relating to the meaning of "*bona fide* for navigation" as stated in s.17(3)(c)(ii) of the 1995 British Waterways Act in order to terminate the licences of boat dwellers who do comply with s.17(3)(c)(ii). The NBTA (and many others) believe this has been a long standing attempt to achieve the original objectives that Parliament considered would be detrimental to the lives of individuals and families living on boats.

4.2 BW has made successive attempts to force boats without moorings to follow travelling patterns which are substantially in excess of that required by the 1995 Act.

4.3 For example it has done this by claiming that its own interpretation of s.17(3)(c)(ii) (the Guidance for Boaters without a Home Mooring, previously the Mooring Guidance for Continuous Cruisers) sets out what is required to comply with the 1995 Act.

4.4 BW has the power to terminate a licence if it believes a boat has contravened s.17 of the 1995 Act, and it also has the power to seize an unlicensed boat and charge the owner for its removal under s.8 of the 1983 British Waterways Act.

4.5 When it does this it also obtains an injunction which effectively evicts the owner and the boat from BW waterways for life. In other words, termination of the boat licence means that the boat dweller and their family will become homeless, be forcibly deprived of their home and be banned from BW's 2,000 miles of waterways for ever.

4.6 A number of boat dwellers have been made homeless in this way because they did not know enough about the law to defend themselves in court (Freedom of Information Act response from BW, 2010).

4.7 Many other boat dwellers have been pressurised to rent moorings which they cannot legally live on because most moorings do not have residential planning permission (personal communications from Geoff Mayers and Paul Davies).

4.8 Some have "gone underground" following the threat of a "s.8" [of the 1983 Act] notice and injunction and live in fear of being discovered and losing their homes.

4.9 The Guidance for Boaters without a Home Mooring, published in 2011, states that boats without moorings must travel in a pattern of movement from A to B to C and are not permitted to turn back from B to A unless they have reached a terminus, and that acceptable reasons for remaining in one place do not include needing to have access to a place of employment or education.

4.10 Adhering to the Guidance for Boaters Without a Home Mooring can prevent boat dwellers from accessing their places of work, education and health care; from collecting mail and from exercising their right to vote.

4.11 BW has attempted to enforce its interpretation of s.17(3)(c)(ii) by sending letters to thousands of boats over the past few years written in extremely threatening language claiming that not following its Guidance amounts to contravention of the law and saying (as examples)

"your boat has been seen between X and Y" (two distinct places which are many miles apart);

"we may remove and demolish your boat";

"it is likely that you will need to make arrangements for alternative accommodation. Please contact your local Council's Benefit and Housing department as they may be able to help you find another place to live"; and

"You are at risk of losing your boat".

4.12 Some 150 boats on the Kennet and Avon canal were served such letters in June 2009 for example (BW enforcement letter to Pamela Smith).

4.13 At the same time, since 1995 BW has declined to use its statutory powers to enforce the "14 day rule" either consistently or fairly. This leaves boat dwellers without moorings in a position where there are no consistent consequences for staying longer than 14 days and yet they are routinely threatened with homelessness for travelling in a way that Parliament intended them to be able to do.

## **5. BW'S HISTORY OF ATTACKS ON BOATERS WITHOUT A HOME MOORING**

5.1 It is not clear what triggered BW's renewed efforts to remove boaters without a home mooring from its waterways. However during a short period of time between 2001 and 2001 Robin Evans was appointed as the new CEO of BW; there was a significant change in the composition of the non-executive board of BW in which two-thirds of the non-executive directors were replaced; Nigel Johnson was appointed as Legal Services Director and Secretary of BW and Sally Ash was appointed, by internal transfer within BW, as Head of Boating Development. All are in post at the time of writing and will continue in their positions after the transfer out of public ownership.

5.2 In May 2002, in the document entitled "A fresh look at BW's craft licensing structure: Consultation Paper for Boaters May 2002", BW attempted to increase the licence fee for a boat

without a home mooring to 2.5 times that of the normal licence fee.

5.3 On 1st August 2002 BW proposed a "District Mooring Fee" for boats without a home mooring in its document entitled "A fresh look at BW's craft licensing structure: Consultation update, 1st August 2002"

5.4 In March 2003 BW published the Draft Moorings Code This proposed that a boat without a home mooring must travel. "at least 20 different Lock Miles every 15 days (ie you can't count the same stretch more than once); at least 40 different Lock Miles every 30 days and at least 120 different Lock Miles every 3 months" and that the penalty for non-compliance with the 2003 Code was the termination of the boat licence. Following objections from some User Groups the 2003 Code was not implemented.

5.5 Also in 2003 BW discontinued the long-term use of its waterways in Scotland by boats without home moorings. BW did not have any lawful authority to do this. Section 37 of the 1995 British Waterways Act states that: "(1) Subject to subsection (2) below, this Act extends to Scotland. (2) Nothing in this Act shall apply to Loch Lochy, Loch Oich, Loch Ness or Loch Dochfour, the boundaries of which are shown edged in red on the plan marked "The Scottish Lochs". However, paragraph 3(c) of the current "Private Pleasure Boat Long Term Licences and Moorings - Scottish Highlands and Lowlands" states: "Long term use of the Highland and Lowland Waterways without a Home Mooring is not permitted due to the disconnected nature of the canals". A 2002 consultation paper had declared BW's intention to "discourage continuous cruisers" on its Scottish waterways.

5.6 In 2004 BW published the Mooring Guidance for Continuous Cruisers. This stated "those using a boat licensed for continuous cruising must genuinely be engaged on a journey or series of journeys. Such journey or cruise must take place 'throughout the period of [the licence]' and therefore requires progression around the network, or at least a significant part of it...The law requires a genuine progressive journey (a cruise) around the network or significant part of it."

5.7 In 2005 in a document entitled "Licence Fee Consultation June 2005" BW proposed to increase the licence fee for boats without a home mooring by 147%. It was identified in a report by BW entitled "Fee Structures for Boat Licences in England and Wales White Paper" of 23rd November 2005 that if implemented, this proposal would have raised £1million from only 1,360 boat licence holders.

5.8 In 2011 a survey by boaters sampled boat dwellers without home moorings on the Kennet and Avon canal. Some 51% of the survey sample were found to have an annual income below £20,000 and 40% were earning the minimum wage or less.

5.9 It is clear therefore that BW was targeting the most deprived demographic group of users of the nation's waterways and those the least able to pay. Apart from being grossly unjust it is also self-explanatory that the motivation of BW was to price out boat dwellers without home moorings.

5.10 In 2008 BW unilaterally amended the Boat Licence Terms and Conditions (in violation of the Government Code of Practice on Consultations) to include an obligation on boaters without a home mooring to abide by the Mooring Guidance for Continuous Cruisers.

5.11 On 5th September 2008 BW issued a consultation document to the User Groups entitled "Boat Licence Fees - For information & comment on by Waterway User Groups". This document included a proposal to increase the licence fee for boats without home moorings by £150 in comparison to the published tariff. BW also proposed to introduce chargeable Roving Mooring

Permits.

5.12 On 22nd April 2009 BW released the Pre-Consultation document on mooring policy to User Groups. This document stated on page 14 an intention of BW to adopt a strategy that "forces a re-think in lifestyle by the offending boaters". This is a reference to users of boats without a home mooring that decline to abide by the 2004 guidance but move their boats every 14 days in compliance with s.17(3)(c)(ii).

5.13 It is clear from this document that BW was intent on marginalising and persecuting users of boats without a home mooring by publicising this phraseology to User Groups and by the use of the word "offending" was making it clear that it regarded the Mooring Guidance for Continuous Cruisers as binding in law. This also signalled BW's intent to carry out summary wholesale eviction of boaters without home moorings from its waterways.

5.14 In June 2009 it became apparent that BW had changed the Continuous Cruising Procedure (the enforcement procedure for boats without a home mooring) by introducing a requirement for a boat without a home mooring to engage in a progressive journey.

5.15 The version of the CC1 (which is the first in a series of five enforcement notices) dated December 2007 stated: "According to our records, you do not have a mooring where you can lawfully leave your boat and we have noticed that your boat has been moored at \_\_\_\_\_ for longer than 14 days".

5.16 On 29th June 2009 BW served CC1 letters on about 150 boats that stated: "According to our records, you do not have a mooring where you can lawfully leave your boat and we have noticed that your boat has been moored in the (X to Y) area since 2nd March 2009". X and Y in this instance are 12 miles apart.

5.17 The majority of the boats in question had travelled a reasonable distance (specifically to a new place) every 14 days. They did not however at the time progress around the canal system but remained predominantly in the area between Bath and Devizes. The change in the wording of the CC1 letter identifies that BW is dissatisfied that movement wholly within an area spanning 12 miles (irrespective of the number of places located within this area); and (by implication) movement that does not constitute a progressive journey meets the requirements of s.17(3)(c)(ii).

5.18 Between June and September 2009 BW held four closed meetings with representatives of Bathampton and Claverton Parish Councils (both within the jurisdiction of Bath and North East Somerset Council) and aimed at restricting access to 14 day moorings in Bathampton and Claverton by boat dwellers without a home mooring. In the minutes of a meeting held at Kennet Court, Bathampton on 10th June 2009 these boat dwellers were identified as "illegal live-aboards".

5.19 In February 2011 BW issued the Draft Mooring Management Plan for the River Lea, Stort and Hertford Union and Regents Canals that specified conditions including that users of boats without home moorings must not remain for more than 7 days at a time on large stretches of the Lee and Stort Navigation and must travel distances that would have meant detaching themselves from connections to any locality on the navigation. This policy was withdrawn by BW following opposition from users of boats without home moorings in London and from User Groups including London Boaters.

5.20 In September 2011 BW issued a revision to the Lee Mooring Policy that specified the introduction of Roving Mooring Permits.



5.21 In October 2011 BW published a revised version of its interpretation of s.17(3)(c)(ii) following the judgement in Bristol County Court (see below) entitled Guidance for Boaters Without a Home Mooring. This is in essence the same as the 2004 Mooring Guidance for Continuous Cruisers with minor changes.

5.22 In October 2011 the Boat Licence Terms and Conditions were further amended to include an obligation to abide by the 2011 Guidance.

## **6. BRISTOL COUNTY COURT JUDGEMENT**

6.1 In 2010 BW took action against Paul Davies in Bristol County Court on the grounds that he had not complied with s.17(3)(c)(ii).

6.2 The judgement stated that Mr Davies' cruising distance was not enough to comply but declined to endorse BW's Mooring Guidance for Continuous Cruisers.

6.3 The Court did not hear evidence regarding the House of Commons Select Committee deliberations in 1993-94 because this information was not available to Mr Davies at the time.

6.4 Despite the judgement being in a county court and consequently not forming case law, BW issued a press release misleading the public into believing that this judgement set a precedent which would apply to other boaters without moorings.

6.5 BW subsequently sent letters to a number of boats without moorings enclosing this press release, claiming that the judgement applies and that they are contravening the law even though they do move to a different place every 14 days (personal communication from Abigail North).

6.6 The resulting 2011 Guidance for Boaters Without a Home Mooring also misleadingly claims that the Bristol judgement is binding on other courts.

## **7. RECENT PROPOSALS BY BW FOR ADDITIONAL RESTRICTIONS ON BOAT DWELLERS WITHOUT MOORINGS**

7.1 Since the publication in 2004 of the Mooring Guidance for Continuous Cruisers there have been successive attempts to drive out boat dwellers without moorings by imposing additional restrictions.

7.2 BW has worked with parish and county councils which object to the legitimate presence of lived-in boats on the canals to create restrictions on the amount of time boats without moorings can stay in particular areas (Minutes of meetings held in Bathampton on 15th June, 10th August, 28th August and 10th Sept 2009; Waterways and Public Involvement in Staffordshire 2011; Community Mooring Strategy Action Plan 2011).

7.3 This led to a consultation in 2009 and the publication in 2010 of new mooring policies stating that boats without moorings would be subject to "Local Mooring Strategies" including

- restricting the amount of 14-day mooring space available;
- setting travelling distances and "no return within" restrictions substantially above and beyond those required by the 1995 Act;
- charging boaters daily fees of up to £14,000 per year to stay longer than the time limits, and
- enforcing these charges by not renewing the boat licence until the charges are paid.

7.4 All of these restrictions are unlawful and are targeted against boats without moorings. BW is currently seeking to impose such restrictions on

- the Kennet and Avon canal;
- the Lee and Stort navigations
- in Oxford
- in Staffordshire and
- is proposing to do so in many other locations (Policies for Mooring Along the Banks of BW Waterways 2010; Management of Moorings along the Rivers Lee and Stort, Hertford Union and Regents Canals 2011).

7.5 The effect of these restrictions if complied with would be to force boat dwellers to travel distances that would prevent them from being able to travel to a place of employment; prevent them from sending their children to school; prevent them from accessing ongoing health care from a GP, clinic or hospital; prevent them from collecting mail from a land address, and prevent them from exercising their right to vote by making a declaration of local connection.

7.6 If they wish to retain access to their workplace, school, health care, correspondence and right to vote, they will face homelessness following termination of the boat licence either for not complying with the restrictions or for being unable to pay excess mooring charges of up to £14,000 per year demanded at £40 per day.

7.7 These are punitive sums compared to the cost of a permanent mooring which is around £2,000 per year and as such amounts to a fine even though it is called a "charge for an extended stay" in BW's 2010 mooring policy.

7.8 In a meeting of the Kennet and Avon canal Local Mooring Strategy on 11 October 2011, BW Enforcement Operations Manager Paul Griffin stated that "you can't continuously cruise [ie live on a boat without a mooring] and have a job or send your children to school" (personal testimony of Pamela Smith). Mr Griffin's statement demonstrates that BW has a policy of harassment of boat dwellers without home moorings that is designed to force them to give up their homes, and that local mooring strategies are another attempt to achieve this objective.

## **8. LAWFULNESS OF PROPOSED RESTRICTIONS**

8.1 The restrictions proposed in local mooring strategies are unlawful because BW does not have the power to set mooring restrictions, to erect signs delineating mooring restrictions, or to impose fines for the infringement of mooring restrictions. (House of Commons Select Committee on the British Waterways Bill, 1993-94).

8.2 BW enjoys a "catch all" power under s.43 of the 1962 Transport Act in relation to its management of the waterways. However it is reasonable to conclude that subsequent legislation modifies this "catch all" accordingly. Further, legislation that acts as an "override" (such as the Human Rights Act and the Equality Act) further qualify this "catch all". As stated above, Parliament did not allow BW to impose criminal sanctions or daily fines against anyone caught living on their boat without a permanent mooring.

8.3 In the original 1990 Bill BW had sought powers to impose fines for a breach of a mooring restriction. BW also sought powers in the 1990 Bill to post 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 posting of signs designating mooring restrictions.

8.4 BW had previously presented evidence that stated that signs designating mooring restrictions

were advisory in nature. BW also withdrew the wording relating to the designation of mooring restrictions.

8.5 BW had also laid out in the 1990 Bill an offence for failing to obey an instruction of a BW officer which was also denied by Parliament.

8.6 The Commons Select Committee also rejected any "no return within" restrictions (House of Commons Select Committee on the British Waterways Bill, 1993-94).

8.7 As a consequence this meant that BW was confirming that any mooring restriction would remain as "advisory" and not "obligatory".

8.8 A further principle in law is that legislation is written in "living words" and the meaning of the words does not change with changing circumstances. The current legislation is binding and must be interpreted in the courts in line with the original meaning of the words and the original Will of Parliament.

8.9 These factors combine to provide an override over s.43 of the 1962 Transport Act so as to prevent BW from designating compulsory mooring restrictions and from setting movement rules beyond what is in s.17(3)(c)(ii) of the 1995 Act (the "14 day rule").

8.10 In this context the authority given 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 public body such as BW may not make a charge unless there is express authorisation in statute to do so.

8.11 Furthermore, in *R v Secretary of State for the Environment and others, ex parte Greenpeace Ltd and anr* [1994] 4 All ER 352, Potts J stated: "Primary legislation is not to be construed by reference to general policy statements or departmental guidance". In other words, primary legislation stands on its own two feet.

8.12 Where guidance or policy statements are used to justify the interpretation of legislation by a public body so that the public body may achieve its objective, that public body is inherently going beyond the scope of the primary legislation and is acting *ultra vires*.

## **9. HARASSMENT OF BOAT DWELLERS**

9.1 In another case in Bristol, BW is attempting to seize a boat and remove the owner George Ward from its waterways by way of an injunction for non-payment of a debt of £150.

9.2 Tenants of houses are explicitly protected from eviction for debts of this size.

9.3 In Cheshire in 2010, BW forced sick pensioners and their carers to move their boats in freezing conditions with the result that one of them had to be rushed to hospital the following day.

9.4 BW has also issued patrol notices requiring boats to move when they have been prevented from travelling by thick ice (personal communication from Geoff Mayers).

9.5 Paul Davies himself has been forced to give up his job and leave BW waterways. He was unable to meet the Court's requirement to comply by taking a mooring because no residential moorings were available (personal communication from Paul Davies).

9.6 In his efforts to leave the jurisdiction of BW, Paul Davies travelled along the Kennet and Avon Canal, down the Thames to London intending to travel along the Grand Union and thus onto EA waters in East Anglia where he had secured a mooring from the EA.

9.7 Mr Davies intended to enter the Grand Union Canal from the tidal Thames at Brentford on the afternoon of 5th June 2011. When he arrived at Thames lock, Brentford, he was denied entry to the canal on the grounds that he did not have a licence, even though he was within the time limit the Court had set for removing his boat. This action by BW left him without suitable gear and in a vessel ill-equipped to be on the tidal Thames in a running tide, a highly dangerous state for a navigator. This action by BW was unlawful.

9.8 The judgement in *Moore v British Waterways Board* [2012] EWHC 182 (Ch) explicitly stated that a licence is not required to navigate the stretch of the Grand Union Canal between Thames lock and Brentford Gauging locks. It is not known when BW began unlawfully demanding licences for passage of this stretch, but in 1981 licences were checked and/or sold to new arrivals at the Brentford Gauging locks and not at Thames lock (which is further downstream).

9.9 The NBTa intervened including sending a FLASH message to the BW Executive Board. The Port of London Authority were made aware of the circumstances. Mr Davies was finally granted ingress to the canal the following morning but not before spending the night in an extremely precarious and dangerous position.

9.10 It appears that BW, not content with driving Mr Davies out of the canal system then sought to endanger his life (personal communication from Paul Davies).

9.11 At the 2010 BW AGM an attendee asked why the draft objectives of the new waterways charity made no mention of the thousands of adults and children who live on boats for whom the waterways are their home.

9.12 Robin Evans, BW Chief Executive said in response “It's questionable that giving people places to live is a charitable object”.

9.13 The NBTa believes that BW is clearly not fit to have charitable status. Over 1,000 Housing Associations have charitable status yet Mr Evans is unaware of this.

9.14 During the years to 2010 BW drafted revised byelaws which include many of the provisions which Parliament prevented it from including in the 1995 Act. These byelaws have been put on hold pending the transfer to a charity (Revised Draft Byelaws 2010).

9.15 If the Canal and River Trust is given enabling powers and powers to make subordinate legislation there is no doubt that it will use those powers to achieve BW's 1990 objectives of driving out boat dwellers without moorings which Parliament would not allow it to do in 1995.

9.16 The homelessness and displacement resulting from this would be unthinkable in any event.

9.17 However in 2011 the EU announced a strategy to integrate Europe's 11 million Gypsies and Travellers and the UK was given until the end of 2011 to draw up a national plan to ensure that every homeless Traveller has access to suitable accommodation.

9.18 Itinerant live-aboard boaters are defined as being “Bargee Travellers”. The Equality Officer of Wiltshire Council has confirmed that Bargee Travellers fall under the ambit of the Equality Act

2010 and as such enjoy “protected characteristics”. It follows that itinerant live-aboard boaters fall within the scope of the EU Gypsy and Traveller initiative and as such BW has a role to play in actively supporting itinerant live-aboard boaters rather than persecuting them.

9.19 In April 2009 the Secretary of State for Communities wrote to the NBTA and confirmed that Bargee Travellers fell under the scope of s.225 Housing Act 2004. This section refers to an obligation of housing authorities to take into account the needs of travellers within its jurisdiction.

9.20 Bargee Travellers have historically been excluded from the bi-annual caravan counts (forming part of the Gypsy and Traveller Accommodation Assessments (GTAAs) carried out by local authorities within their responsibilities under s.225).

9.21 One might have assumed that after the determination of the Secretary of State in 2009, that Bargee Travellers would be included in forthcoming GTAAs and therefore guidance would be issued to local authorities to act as such. No such guidance was made.

9.22 In March 2011 (after the Secretary of State for Communities withdrew Circular 01/06, clarifying support for caravan-dwelling travellers by local authorities) the SoS denied that he had (1) made the determination that he had, in April 2009 and (2) denied that the communication he sent in 2009 was in fact a determination at all.

9.23 Given that BW has within its jurisdiction a significant number of itinerant live-aboard boaters and given the ambiguous performance of the Secretary of State it follows that BW must be regarded as a quasi-housing authority insofar as it holds jurisdiction over the stated community.

9.24 Instead of upholding its obligations (whether statutory or quasi-statutory) in the recognition and adoption of considerable research and guidance relating to caravan-dwelling travellers, BW appears content in the alternative to systematically persecute itinerant live-aboard boaters.

9.25 In the public meetings held by BW on 1st and 2nd March 2011, forming part of the consultation of the proposals for mooring restrictions on the River Lee, BW stated that its objective was to “curtail new entrants into the live-aboard continuously-cruising market” It also stated that its objective was to “price-out existing live-aboard continuous-cruisers” and that “some members of the community will suffer as a result”.

9.26 To the NBTA, the policy of BW appears to be quite clearly a systemic and persistent policy of oppression and harassment of boat dwellers without home moorings. The NBTA believes that this violates their fundamental right to respect for their homes pursuant to Article 8 of the European Convention on Human Rights, and that a lack of respect for home by the state is the most extreme form of state intervention short of death or serious injury (Kay and Others v The United Kingdom [2010] Application 37341 / 06). A member of the NBTA has therefore sought permission for judicial review of this policy.

## **10. CONCERNS ABOUT INITIAL STAGES OF THE CANAL AND RIVER TRUST (CRT)**

10.1 The CRT is an unaccountable body. There is no mechanism for influence on its policies through the democratic process and there is no mechanism for public scrutiny of its activities.

10.2 The recent election to the CRT Council has resulted in three out of the four private boater representatives on the Council being officers of the Inland Waterways Association (IWA). The IWA has made many public statements, such as consultation responses, that show its opposition to boat dwellers without home moorings. The IWA representative on the Kennet and Avon Canal

Local Mooring Strategy Steering Group stated in an email in August 2011 that in his view the aim of the strategy is to “reduce the numbers of those living on the canal... there will be no question of anyone being forced to give up home, school or job in the short term. Over the longer term - say five years - they would be able to plan for a different life-style.” In the same month, the Acting Chair of the IWA Leicestershire branch labelled boat dwellers without moorings as “squatters” who should be “stamped on”. The term of office of the Council is four years. This means that for the foreseeable future, the governing body of the CRT will be openly working to remove boat dwellers without home moorings, regardless of their entitlements under the 1995 British Waterways Act.

10.3 The increasing closeness between the IWA and the CRT is itself a matter of concern as the boundaries between the two organisations are becoming increasingly blurred. Not only are there three boater representatives who are also officers of the IWA, but also the Chair of the IWA is a member of the Board of BW.

10.3 The declared methodology of the CRT is to seek to work in partnership with local authorities, parish councils and canalside communities on land by means of local waterway partnerships and local volunteering. This means that decisions about mooring restrictions which adversely affect the homes of boat dwellers without moorings (as well as other boaters) will be made by people whose homes do not depend on the waterways. This will force boat dwellers (and all boaters) into a position where the right to moor on the towpath which exists by virtue of the 1995 British Waterways Act will be under attack up and down the country and they will have to fight to defend their legal right to moor their boats.

## **11. CONCLUSION**

11.1 The staff and particularly the Senior Managers and Directors of the Canal and River Trust will be the same as those of BW. The NBTA therefore has no confidence that the Canal and River Trust will be any different in its policy towards boat dwellers without moorings but will continue the same policy of harassment by attempting to enforce movement rules that are beyond its legal powers contrary to the intention of Parliament when it passed s 17 3 c ii of the 1995 British Waterways Act.

11.2 The NBTA therefore does not believe that the draft Order serves the purpose of improving the exercise of public functions. Increasing the risk of homelessness and harassment to a minority group will be detrimental to the exercise of the functions of British Waterways. It will result in a greater burden on the public purse due to the cost of supporting boat dwellers who are made homeless or forced to give up their homes. There will be costs associated with providing them with social housing, housing benefit, other benefits such as Pension Credit and Jobseekers Allowance, and with supporting children who are displaced from their schools.

11.3 It is time that boat dwellers had proper legal protection for their homes and are recognised as a protected minority group. This is of great political and legal importance.

## **12. RECOMMENDATIONS BY THE NBTA**

12.1 In order to protect boat dwellers from homelessness, the functions of BW should not be transferred unless and until the following conditions are met:

12.2 Section 43 (3) of the 1962 Transport Act should be declared incompatible with the European Convention on Human Rights;

12.3 Sections 13 (2) (3) and (4) of the 1971 British Waterways Act should be repealed;

12.4 Sections 8 (1) (2) (3) and (4) of the 1983 British Waterways Act should be repealed;

12.5 The Canal and River Trust should not have the power to bring injunctions banning boat owners from its waterways for life;

12.6 The Guidance for Boaters Without a Home Mooring and plans for Local Mooring Strategies should be abandoned;

12.7 The February 2010 Revised Draft Byelaws should be abandoned;

12.8 The powers of BW or the Canal and River Trust to make "subordinate legislation" should be restricted to the existing Byelaw making powers under the 1954 British Transport Commission Act.

12.9 The Canal and River Trust should not be granted enabling powers.

12.10 In place of these powers, which are inappropriate for a 21st century charitable body, the following powers and duties should be established:

- Legal recognition of the homes of boat dwellers on a par with that enjoyed by house dwellers.
- Statutory protection of boat dwellers from harassment and unlawful or summary eviction, of the same magnitude as the protection enjoyed by house dwellers, applicable to all boat dwellers on inland and coastal waters, whether or not they have a permanent mooring.
- Clarification that the test for compliance with s.17(3)(c)(ii) of the 1995 British Waterways Act is as intended by Parliament, namely, whether the boat has remained in one place for longer than 14 days without good reason.
- Explicit recognition that boat dwellers without permanent moorings are classed as travellers for the purposes of s.225 of the 2004 Housing Act; the 2010 Equality Act; the Human Rights Act and the 2011 EU requirement to draw up a national plan to ensure that every homeless traveller has access to suitable accommodation.
- Security of tenure for mooring holders on a par with that enjoyed by the tenants of houses.
- Statutory protection from increases in boat licence fees and mooring fees on a par with that enjoyed by the tenants of social housing in respect of rent increases.
- The Canal and River Trust explicitly classified as a housing authority.

12.11 The charitable purposes of the Canal and River Trust should include:

- The relief of poverty;
- The protection of the homes of boat dwellers and
- The provision of waterway space for boat dwellers to both travel in without permanent moorings and to keep their homes permanently moored.

Pamela Smith  
National Bargee Travellers Association  
18 March 2012

## NATIONAL BARGEE TRAVELLERS ASSOCIATION

### SUPPLEMENTARY EVIDENCE SUBMITTED TO MERITS OF STATUTORY INSTRUMENTS COMMITTEE

#### DRAFT BRITISH WATERWAYS (TRANSFER OF FUNCTIONS) ORDER 2012

1. The National Barge Travellers Association is submitting this supplementary evidence to the Merits of Statutory Instruments Committee in response to the statements made on 24 April 2012 by Robin Evans, Chief Executive, British Waterways; Nigel Johnson, Legal Director and Director of Corporate Services, British Waterways and Richard Benyon MP, Minister for the Natural Environment and Fisheries.

2. Mr Evans and Mr Benyon asserted that there was adequate representation of 'continuous cruisers' (boat dwellers without a permanent mooring) and the National Barge Travellers Association on the 150-member Council of the Canal and River Trust. This is not the case. Two boat dwellers without permanent moorings, Frank Kelly and Tony Smetham, stood for election as representatives of this group, but were not elected. Three of the four Council members elected by boat licence holders are office holders in the Inland Waterways Association, a body that has stated its hostility to the interests of boat dwellers without permanent moorings. The fourth has not stated any concern regarding this issue. The Council's term of office is three years; this will be a crucial period for the Canal and River Trust in which many policies and practices will be established. In addition, the 2011 DEFRA consultation, *A New Era for the Waterways*, confirmed that the Council "will not formally determine policy or strategy". In other words, the Council's role is advisory only. It is vital that itinerant boat dwellers have a voice in order to protect ourselves from policies and practice that result in homelessness and consequent violation of our Article 8 rights, and yet we have none.

3. Mr Johnson asserted that the courts have fully endorsed British Waterways' interpretation of the law [regarding s.17 (3)(c)(ii) of the 1995 British Waterways Act] and the use of its powers under s.8 of the 1983 British Waterways Act [to remove boats]. This is not true. In the case of *British Waterways Board v Davies*, Bristol County Court did not endorse British Waterways' interpretation of s.17 (3)(c)(ii); His Honour Judge O'Malley stated in his judgement in March 2011:

"I think it right to say however that my decision is not to be taken as fully endorsing the board's guidance. It is possible to envisage use of a vessel which fell short of the Board's concept of continuous cruising but which still qualified the vessel for a licence under section 17(3)(c)(ii)".

British Waterways was obliged as a result of this judgement to re-write its interpretation of s.17(3)(c)(ii) which it published in October 2011 as *Guidance for Boaters Without a Home Mooring*.

In the case of *Moore v British Waterways Board* [2012] EWHC 182 (Ch), Mr Justice Hildyard stated in paragraphs 191, 213 and ix:

191 "As previously noted, BWB has long accepted that the powers afforded by section 8 to remove vessels are draconian and to be exercised as a last resort."

213 "My provisional view is that the purported use of the draconian power conferred by section 8, without prior warning and in the absence of any identified and real threat or obstruction to safe navigation, with the effect of depriving the Claimant of his home, is not proportionate."



ix "‘Gilgie’, being presently the Claimant’s home, my provisional view is that his Article 8 rights have been infringed."

4. We would like the Committee to note that Mr Evans and Mr Johnson are incentivised to achieve a successful transfer of British Waterways to the Third Sector. *British Waterways Director Targets 2010/2011* states that both Mr Evans and Mr Johnson are tasked to "Achieve Westminster government’s approval for British Waterways to become a third sector organisation and with government making firm commitment after public consultation" measured by "Board assessment on level of achievement" with the reward of "up to 10 points" towards their bonus payment. The other British Waterways Directors are similarly incentivised.

5. Mr Benyon asserted that British Waterways has powers to remove "unsightly" boats. This is not the case. There is no requirement for boats to comply with visual standards. The fact that Mr Benyon believes the British Waterways can remove "unsightly" boats is an indication of a prejudiced attitude towards itinerant boat dwellers, some of whom are on modest incomes and do not have smart boats. In contrast, it would be very unusual to find anyone who believed that local authorities have powers to demolish a house (rendering the occupants homeless) simply because it is "unsightly". British Waterways' powers to remove boats under s.8 of the 1983 British Waterways Act are restricted to "sunk, stranded or abandoned" boats and boats moored "without lawful authority". We have already submitted evidence regarding the termination of the licences of boats which do not comply with British Waterways *ultra vires* interpretation of s.17 (3) (c) (ii) of the 1995 British Waterways Act, rendering them "moored without lawful authority" and thus subject to removal, rendering the occupants homeless.

6. Mr Johnson stated to the Committee that British Waterways was not seeking any extra powers through the transfer. However, in paragraphs 2.3 and 2.5 of our evidence dated 18 March 2012 we drew the Committee's attention to evidence that contradicts this assertion. In addition, as long ago as 2006 British Waterways stated its intention to seek additional powers. *Nigel Johnson Targets 2006/7* states the target to "Achieve formal Government approval (ie it will form part of their legislative programme) to an Inland Waterways RRO that provides, among other things, 'wider powers' to BW". This is in the context of *Simon Salem Targets 2005/6* which states "First prosecutions complete on continuous cruising" by December 2005 (Mr Salem is British Waterways Marketing Director). This evidence demonstrates that over a long period British Waterways has had a declared intention to remove itinerant boat dwellers from its waterways.

Pamela Smith  
National Bargee Travellers Association  
5 May 2012

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