

National Barge Travellers Association

Objection to the Royal Borough of Kingston on Thames Smoke Control Order 2023

General

This Objection is from the National Barge Travellers Association (NBTA). The NBTA is a volunteer organisation formed in 2009 that campaigns and provides advice for Barge Travellers: 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. The NBTA is the only national organisation in Britain dedicated to upholding and defending the rights of itinerant boat dwellers. The NBTA has 1,500 members who travel on all the major navigation authorities' waterways and beyond. This includes members who regularly moor their homes within Kingston on Thames. The NBTA deals with approximately 200 individual cases each year.

Objections

The NBTA objects to the draft Royal Borough of Kingston on Thames Smoke Control Order 2023 for the reasons set out below.

Consultation fails to meet expected standards

The consultation fails to meet the criteria in the Government's Consultation Principles, and it fails to meet the criteria in the DEFRA Guidance to Local Authorities on the Application of Smoke Control Areas to Moored Vessels under the Environment Act 2021 (the "DEFRA Guidance"). See Appendix 1 for the text of the DEFRA Guidance, which is also sent as an attachment with this objection.

Unclear timescales

A consultation by the Royal Borough of Kingston on Thames Council took place in early 2023, ending on 26th January 2023. This has now been extended to 16th May 2023, but it is not clear whether the deadline of 27th April 2023 for objections to the Order and to the Revocation Order have been extended to 16th May 2023 or not. The consultation fails to meet the criteria in the Government's Consultation Principles of providing sufficient information to make an informed response, in that it does not give clear timescales and it does not explain the interaction between the formal Objection process and the consultation questionnaire. In addition, the consultation fails to give sufficient time for proper consideration of the proposals and inadequate time to formulate a response because the deadline for objections to the Order and to the Revocation Order appears to fall on a date before the end of the public consultation.

Consultation fails to mention extension of Smoke Control Area to moored boats

The Environment Act 2021 amended the Clean Air Act 1993 to include moored vessels. The consultation has not been carried out in line with the DEFRA Guidance in that the information provided with the consultation does not make any reference at all to the fact that the new Smoke Control Order will include moored boats. The DEFRA guidance states that bringing moored boats into the scope of the Smoke Control Area has to be consulted on specifically. This omission also breaches the Government's Consultation Principles, in that insufficient reasons are provided to permit of intelligent consideration and response to

the proposals. Indeed, the public is denied the opportunity to respond to the inclusion of moored boats in the Smoke Control Area.

Insufficient reasons provided to permit of intelligent consideration and response to the proposals

No evidence has been provided that there is a problem with smoke emissions from moored boats in Kingston upon Thames. The Council has not provided any information regarding whether it has received complaints from residents about smoke emissions from moored boats.

The lack of data about complaints means there is no clarity regarding whether the proposal is driven by hostility by local housed residents to boat dwellers or whether the proposed Smoke Control Order is likely to be used as a tool to remove boat dwellers from areas where the local authority or the housed population is opposed to boat dwellers.

No information has been provided regarding the number of moored boats and the total level and amount of smoke emissions from moored boats in the local authority area compared either to overall air pollution or to the quantity and type of emissions from bricks and mortar homes; industrial premises; construction sites or road transport, and no information has been provided regarding the number of NO_x and Particulate emitting vehicles that pass through the borough daily.

No definition has been provided in the consultation of what the Council considers to be a 'significant quantity of smoke from a chimney'. No information has been provided about how smoke emissions from chimneys will be measured, in relation to Ringelman Charts or otherwise.

No information has been provided regarding how the Council will ensure that itinerant boat dwellers will be able to tell whether they are entering the proposed Smoke Control Area or not, as these areas are not generally signposted either at the boundaries or elsewhere. Boaters could enter a Smoke Control Area with their stove alight, not knowing that smoke controls are in force or that they have crossed a local authority boundary, and be fined, especially if they have no smokeless fuel on board.

No cost benefit analysis or Impact Assessment has been carried out regarding the costs to the Council or the impact of fining people who will typically not be able to pay the fine and may thus be vulnerable to being imprisoned or to their possessions being seized.

Absence of draft Orders

The absence of the draft Revocation Order and Smoke Control Order from the Council's consultation web page "Let's Talk" is a further breach of the Government's Consultation Principles, in that insufficient information is provided to consultees except to people who are able to inspect these at the Council's offices.

The absence of the draft Orders from the Council's web site serves to exclude boat dwellers, who may not be in the locality at the time of the consultation and so are excluded from reading the draft Orders because these are only being made available for public inspection at the Council's offices and have not been published by any other method, nor is there an option to obtain them by post. This breaches the DEFRA Guidance.

Active and deliberate exclusion of itinerant boat dwellers from consultation

This consultation questionnaire on <https://kingstonletstalk.co.uk/smoke-control> asked for the public's views on revoking all existing Smoke Control Orders and replacing them with a single order, therefore declaring the whole of the borough a Smoke Control Area. The consultation is only open to people who live in the Royal Borough of Kingston Upon Thames. The first question in the online consultation questionnaire asks whether the respondent lives in the borough. If they answer "no" they are excluded from the rest of the consultation questionnaire. This breaches the Government's Consultation Principles in that the consultation is not targeted at those who will be affected. This also breaches the DEFRA Guidance which requires local authorities to ensure that boat owners and occupiers who will be affected have an opportunity to respond.

The consultation therefore specifically excludes Bargee Travellers: itinerant boat dwellers who may moor their homes in Kingston for part of the year but who live on or use their boats travelling from place to place without being resident in any one local authority area. Not only are they excluded by the design of the questionnaire, they are actively prohibited from responding, in direct contradiction to the DEFRA Guidance. We believe that the exclusion of Bargee Travellers is a deliberate act by the Council, which has for many years sought to drive itinerant boat dwellers out of the borough and now appears to be planning to do so by means of prosecutions for burning non-compliant fuel under the Clean Air Act 1993 having failed to inform them of the change in the law within the borough.

Failure to target consultation at those most likely to be affected or to take account of the groups being consulted

There are significant barriers that prevent itinerant liveaboard boaters from taking part in local consultations. No information has been provided regarding how the consultation is designed to reach boat dwellers, whether itinerant or permanently moored in the borough. The Council has not explained what efforts have been made to obtain itinerant boat dwellers' opinions and comments on the impact and practicality of bringing moored vessels into the ambit of the proposed amended Smoke Control Area. This is a breach of the Government's Consultation Principles.

Further failures to target the consultation at those who will be affected include the failure to contact the National Bargee Travellers Association, which is specifically advised in the DEFRA Guidance, which requires local authorities to ensure that boat owners and occupiers who will be affected have an opportunity to respond. This is further compounded by the absence of evidence that the Council has consulted the navigation authorities for the River Thames, the Environment Agency and the Port of London Authority. Consultation with these and other organisations could have reached many boat dwellers who will be directly affected by the draft Orders, but the Council failed to take this simple course of action.

No alternative options proposed

Paragraphs 28 and 41 of the Supreme Court judgement in *R(Moseley) v London Borough of Haringey* [2014] UKSC 56 state:

"28. But, even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options..."

41. ... Nevertheless, enough must be said about realistic alternatives, and the reasons for the local authority's preferred choice, to enable the consultees to make an intelligent response in respect of the scheme on which their views are sought."

Despite the existence of alternative options, including the availability of other enforcement powers, there is not even a brief reference to any possible alternatives to the proposed Revocation Order and Smoke Control Order in the consultation.

Disproportionate impact compared to population

No information has been provided regarding the number of boat dwellers likely to be affected, or to compare the level of emissions from moored boats with the total level of air pollution. The estimated percentage of boat dwellers in the overall population of England and Wales is between 0.05% and 0.1% (from the Office for National Statistics 2021 Census data). This suggests that the level of smoke emissions from moored boats is de minimis compared to the domestic, industrial and transport emissions from the rest of the population of the Royal Borough of Kingston on Thames. It is therefore disproportionate to include moored vessels in the proposed Smoke Control Order.

Significant adverse impact on boat dwellers

The proposed Smoke Control Order will have a severe adverse effect on the quality of life of boat dwellers, especially Bargee Travellers: people who live on their boats without a permanent mooring. This is likely to penalise and punish people for the simple act of heating their homes, and in some cases for cooking and heating water. These are essential domestic activities without which people's homes are uninhabitable. Bargee Travellers are on some of the lowest incomes in the population, and most boat dwellers have so far been excluded from the Government's Energy Bills Support Scheme and Alternative Fuels payments of £400 and £200 in 2022 and 2023. This means that many simply cannot afford to heat their homes using smokeless fuels; kiln dried wood and/or DEFRA-approved stoves. Smokeless coal and kiln dried wood are the most expensive forms of solid fuel. At present due to the steep increases in the price of all solid fuels, many boat dwellers have resorted to burning fallen or scrap wood or even old clothes to keep warm. Some boat dwellers have always heated their homes using scrap or fallen wood because that is all they can afford.

No Equality Impact Assessment or welfare assessment carried out

The Council is bound by the Public Sector Equality Duty contained in Section 149 of the Equality Act 2010, which requires public authorities to have due regard to a number of equality considerations when exercising their functions. However, the Council has not provided an Equality Impact Assessment of the effect of the proposed Order with this consultation. This means that insufficient evidence has been provided regarding the impact of the proposed Smoke Control Order on boat dwellers and Bargee Travellers who have protected characteristics such as disability, old age or pregnancy, which may mean that they need to stay within the local authority boundary for longer in order to access medical and other services. In these cases the proposed application of the Smoke Control Order to moored vessels would have a greater impact on their ability to live in their homes.

The Council does not appear to have carried out a welfare assessment regarding the proposal, or an assessment of the impact of the proposal on the number of boat dwellers

who may as a consequence seek support from the Council's Household Support Fund. Therefore insufficient information has been provided, contrary to the Government's Consultation Principles.

Article 8 ECHR

No account has been taken of the right to respect for private, family life and home under Article 8 of the European Convention on Human Rights (ECHR). This is not even referred to. The proposed revision of Smoke Control Orders would penalise boat dwellers for the simple act of heating their homes, cooking and heating water. Unlike houses and flats, most boats do not have any gas or electric heating. The solid fuel stove is, for the vast majority of boat dwellers, the only way of heating their homes and for some also the only way to cook and heat water. Without solid fuel stoves, boat dwellers' homes would effectively become uninhabitable. This is a grossly disproportionate proposal and would violate the rights of boat dwellers to respect for their home under Article 8. The fines of up to £1,000 would impoverish Bargee Travellers, who are typically on the lowest incomes.

Conclusion

The proposed Smoke Control Order will have a disproportionate adverse impact on boat dwellers, thus violating their rights under Article 8 ECHR and the Equality Act 2010. There is a danger that, if implemented, the proposed Smoke Control Order may be used as a tool to remove boat dwellers from the local authority area.

The consultation does not meet criteria in the Government Consultation Principles 2018; in *R(Moseley) v London Borough of Haringey* [2014] UKSC 56; and in *R v Brent LBC ex parte Gunning* [1986] 84 LGR 168. The consultation does not meet the DEFRA Guidance to local authorities on the application of smoke control areas to moored vessels under the Environment Act 2021.

The consultation is therefore flawed and thus vulnerable to challenge by way of Judicial Review. For the reasons stated above, the proposed Smoke Control Order should not be implemented.

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Appendix 1

Text of DEFRA Guidance to Local Authorities on the Application of Smoke Control Areas to Moored Vessels under the Environment Act 2021

The following guidance is intended to set out best practice for the application of smoke control area rules to vessels which are moored.

A smoke control area is an area where people and businesses must not:

- emit a substantial amount of smoke from a chimney
- buy or sell unauthorised fuel for use in a smoke control area unless it is used in an 'exempt' appliance (appliances which are approved for use in smoke control areas)

Local authorities can take enforcement action if they consider a smoke emission to be substantial. Please visit Smoke control area enforcement by local authorities in England - GOV.UK (www.gov.uk) for more information on smoke control area enforcement.

How to include moored vessels in your smoke control area

If you wish to include moored vessels in the scope of your smoke control area rules, you must change your smoke control order. Please refer to separate guidance on creating, changing, or revoking an SCA.

You must consult with the public before you can apply the smoke control area rules to vessels which are moored.

You should ensure that your consultation is conducted in a way that is as inclusive as possible, ensuring that boat owners and occupiers who will be affected have an opportunity to respond. You should consider:

- itinerant boat owners and occupiers, who may not spend a long time in a particular local authority area. They may not have regular access to a postal address or be able to use the internet easily

- vulnerable groups, such as boat owners and occupiers on low incomes, those with mental health issues or physical disabilities

- carefully consider all responses and evidence from all those who may be affected by the inclusion of moored vessels, including boat owners and occupiers and other local residents

During the consultation period, you may wish to engage with organisations that represent boat owners and occupiers and/or have expertise in solid fuel burning. The following organisations may be considered:

- The National Bargee Travellers Association
- Navigation authorities such as Canal & River Trust, Environment Agency, and any other relevant organisation for your area
- HETAS
- Solid Fuel Association (SIA)
- The Boat Safety Scheme

We recommend that you engage with any navigation authorities that manage waterways within the local authority area in order to communicate information about the consultation to boat licence holders.

Signposting of smoke control areas that include moored vessels

Once you have included moored vessels in the scope of a smoke control area, we recommend that you have clear signs at all entry points on the waterway and any other locations deemed relevant, so that the person in charge of a vessel knows that they are entering a smoke control area.

Signposting of the boundaries of smoke control areas should also inform those on boats of their rights and responsibilities within smoke control areas, including that they may:

- emit smoke emissions to propel their vessels or generate electricity,
- use kindling to light stoves,
- use existing stoves provided that only authorised fuel is burnt, and
- burn dry wood (ready to burn) if a Defra exempt appliance is used.
- not emit a substantial amount of smoke from a chimney.

Communications to moored vessels suspected of breaching smoke control area rules

We recommend that communications to specific moored vessels alleging breach of the rules follow standard wording recommended by DEFRA* and include the following:

- An explanation of the different and escalating stages in the enforcement process
- How to appeal against a warning notice, a notice of intent and a financial penalty

* <https://www.gov.uk/government/publications/smoke-control-area-enforcement-local-authorities-in-england/smoke-control-area-enforcement-by-local-authorities-in-england#enforcing-smoke-emission-rules>