



A New Era for the Waterways

A supplementary consultation on certain aspects of the proposed Transfer Order for transferring the functions of British Waterways in England and Wales to a New Waterways Charity and for making consequential provision in Scotland

**Response by the
Inland Waterways Advisory Council
(IWAC)**

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Introduction

IWAC is the statutory Council charged with giving advice to Government, navigation authorities and other interested parties on the development of Britain's waterways. It is made up of unpaid volunteers drawn from many parts of England and Wales and recruited specifically for their knowledge, experience and ability to take a holistic view of waterways issues. IWAC's independence also means that the Council can take a wider view than is generally possible in the many organisations representing groups of waterway users. All the Reports published by IWAC are accessible through the IWAC website.

The earlier consultation

IWAC responded in detail to the Government's earlier Consultation document, *A New Era for the Waterways*. IWAC advised that, if the new waterways charity is to succeed and to achieve the laudable objectives which the Government has set out, a number of changes would need to be made in the Government's proposals. IWAC warned that:

- **if the proposals in the Consultative document are implemented, the new waterways charity will be seriously under-funded for the foreseeable future; the Trustees will not have access to sufficient resources to maintain and manage the existing network in a sustainable condition;**
- **the Governance arrangements in the Consultative document will not produce the participation and the involvement of users and local communities in the development of the waterways that the Government and most stakeholders desire. If the proposals in the Consultative document are adopted, those major objectives of Government policy will not be achieved; and**
- **there is now insufficient time to complete the extensive schedule of work that will be necessary before NWC comes into existence and Government should consider delaying the Vesting Day of the new charity.**

IWAC responds to this Supplementary Consultation against the background of these conclusions and noting the Government's response to the consultation and desire to press ahead with establishing the New Waterways Charity at the earliest opportunity.

Section 2 of the Supplementary Consultation - General Principles

In its response to the consultation *A New Era for the Waterways*, IWAC expressed the view that the new charity should have the same powers and legal duties as British Waterways (BW) but should be noticeably different from BW in governance, culture and style. IWAC has examined the proposals in this Supplementary Consultation to determine whether the right balance has been struck between the need for continuity and the need for change.

IWAC's comments on the General Principles are as follows:

We support the general approach proposed for the Transfer Order as set out in paragraphs 14 to 19 of the consultation. However, we would welcome a clear declaration that the **statutory duties, such as the environmental duties** referred to in paragraph 18, would apply to all activity by the Canal & River Trust (C&RT) and not just to activity in its capacity as a navigation authority, a harbour authority and a statutory undertaker as indicated in paragraph 17. The waterways are so important to our natural environment in England and Wales that any diminution in the legal obligations laid on the biggest navigation authority would clearly be inappropriate.

BW currently has a duty under clause 62 of the 1995 Environment Act. Would this duty be transferred to all relevant activity by the new charity, as was the case with BW as a public body, or only its work in its capacity as a statutory undertaker? We trust the former is the case given the stated intention that there will be no derogation from statutory standards in the way the C&RT will have to operate.

We also suggest that a significant material adaptation will be desirable which is not addressed in the questions in section 3 of the consultation. This relates to securing **public access to towpaths and waterway paths** under the new arrangements.

Under the transferred British Waterways Act 1995, it shall be the duty of the C&RT, "in formulating or considering any proposals relating to their functions – to have regard to the desirability of preserving for the public any freedom of access to towing paths and open land and especially to places of natural beauty". It is IWAC's view that this duty will need underpinning if the intention behind this duty is to survive and be effective once responsibility is passed to an independent charity, which of course will be under great pressure to raise funds.

Pedestrian access is dealt with in some detail in the Government's response to the consultation, "A New Era for the Waterways", and IWAC is concerned at what appears to be a significant dilution and qualification of previous assurances.

We are reassured by the commitment that Government will use the Trust Obligation to ensure that *existing towpaths* are, as a general principle, freely available and free of charge for pedestrian access. This confirmation of access to paths permitted by BW is welcome.

However IWAC has three points of concern:

1. Uncertainty over free access to waterside paths that are not towpaths and over stretches of path associated with waterways that migrate from the water's edge for a short distance as often happens. IWAC believes such paths on land owned or managed by the C&RT should be included within the Trust Obligation. No mention is made of access to open land and, in particular, to open land of natural beauty to which the 1995 Act refers.
2. The proposal that, at the Charity's behest, the Trust Obligation will be drafted to enable charging for pedestrian access to waterway paths that C&RT acquires at some stage in the future.
3. The intention to remove the commitment to free pedestrian access to towpaths from the statement of Charitable Purpose to allow charges for pedestrian access on towpaths that may be acquired in future and that were, therefore, not previously owned and managed by BW.

IWAC does not accept the suggested distinction between free pedestrian access on paths along previously nationalised waterways and charging for paths along other waterways. IWAC believes that it should be axiomatic that a charity owning and managing waterway assets on behalf of the nation for public benefit should provide pedestrian access along all its waterways free of charge and should seek to create this where no access currently exists. This should go hand in hand with a fundamental objective of the charity to manage a well connected waterway network at reasonable charge for public benefit.

The fact that visitors have to pay to gain pedestrian access along the River Doe to Ingleton Falls in the Yorkshire Dales National Park or to walk along the gorge section of the River Lyd near Tavistock in Devon is a matter of regret. To establish a Canal & River Trust that would rely on charging for pedestrian access along rivers and canals it acquires would be deeply regrettable.

IWAC recognises that where a path provides access to a visitor destination C&RT may wish to have the right to charge for using the path to access the attraction. IWAC believes that such arrangements should be kept to a minimum but that, where they are necessary, a free, alternative and connective route would be provided that bypasses the attraction and enables the through linkage of continuous waterway paths.

As a point of principle, IWAC believes that a major objective of the new charity should be to improve the connectivity of pedestrian paths along all waterways. In the Report *Making More Use of Waterway Paths and their Surrounding Corridors* published in November 2010, IWAC described the benefits of opening up more continuous paths through settlements. This will require working with long term vision, as and when redevelopment occurs, to remove development that currently blocks access back from the water's edge. Local Authority partners, the private sector and the public are less likely to be motivated to

achieve this if the new charity charges for pedestrian access along newly created paths. Studies have shown that people enjoying free pedestrian access to paths contribute significantly to the local economy.

IWAC calls for:

- **certainty in law that C&RT's obligations will match the obligations of public bodies on all environmental duties;**
- **the reinstatement of a clear charitable purpose to promote free pedestrian access to towpaths and waterway paths;**
- **the Trust Obligations and Funding Contract to include a requirement for free access to all paths along all waterways held and managed by the Canal and River Trust;**
- **a legal duty for the C&RT to promote pedestrian access free of charge alongside waterways it holds and manages to supplement section 22 of the 1995 Waterways Act;**
- **a clear statement from C&RT committing the charity to the principle of free access to all C&RT waterside paths, excepting only a narrow exemption for paths into attractions;**
- **the Government to adopt the policy of free access to waterway paths and apply the same principle to the Environment Agency, the Broads Authority and, when appropriate, to other navigations.**

Section 3 - Significant material adaptations of existing statute law relating to England and Wales

Disposal of property

Regarding the proposal at paragraph 24, IWAC considers that C&RT should have ability to determine the use and disposal of its land assets in accordance with its Charitable Purpose and Trust Obligations and not have to seek approval from the Government over the sale of land assets.

IWAC agrees that the power for the Secretary of State and Welsh Ministers to give directions on the sale of land assets will no longer be needed when the assets of BW in England and Wales transfer to the CRT.

Employment provisions

IWAC is generally supportive of the proposals in paragraphs 25 to 29 but wishes to raise a few related issues to assist the harmonious transfer of employment and pension rights.

The proposal in paragraph 27 to transfer the existing pension schemes from BW to NWC so as to not affect pension rights of employees is supported by IWAC.

There is a related issue which IWAC believes should be resolved at the time of Transfer in order to help the financial viability of C&RT. IWAC understands that there is a significant **pension liability** much of which relates to former employees of BW. IWAC notes that this arrangement is markedly different from the arrangements made when other organisations have moved out of the public sector. In those cases various arrangements were made to free the new body from that obligation by transferring the obligation elsewhere. The Trustees of C&RT should consider asking the Government to carry this liability directly by separating the pension arrangements of past and current employees without, of course, affecting the pension rights of either group.

The proposal is made that C&RT should be freed from the obligation laid on public bodies in the 1960s and contained in the 1968 Act to set up **negotiating and consultative machinery** as a framework for staff relations. The wording of the 1968 obligation relating to machinery for consultation with employees is archaic and IWAC suggests that the legal obligation should be replaced by a statement from the Trustees which gives transferring staff confidence that the C&RT will fully comply with good employment practices. This will reassure staff that their employment conditions will not be eroded.

Regarding the proposals at paragraphs 27 to 29:

IWAC agrees that the provisions in sections 73 to 75 of the 1962 Act and section 137 of the 1968 Transport Act are not needed by C&RT but believes that

- **the significant pension liability relating to former employees of BW should be carried directly by the Government; and**
- **the new Trust should make a clear commitment to staff that it will apply the spirit of the 1968 Act by maintaining negotiating and consultative machinery in line with good employment practice.**

Classification and maintenance of waterways

The whole area of classification of waterways and maintenance of the network by the new charity on behalf of the people of England and Wales is one the main issues and concerns raised by those members of the public who cherish the inland waterways and those societies originally set up to restore and promote their local waterway.

IWAC is particularly concerned about this topic because of the lack of clarity so far provided in both Consultation documents.

In respect of **commercial waterways**, IWAC in its response to the main consultation concluded that:

- *The environmental advantages of waterborne freight are considerable and should be exploited more fully in the national interest.*
- *Proper planning can minimise perceived economic disadvantages.*
- *IWAC is disappointed that England and Wales have failed to develop the opportunities for increasing waterborne freight in recent years. There has been little improvement in the dimensions of the commercial waterways since the 1980s.*
- *IWAC also regrets that BW has scaled down its freight operation and believes that the creation of the charitable trust should be the moment for a policy rethink.*
- *IWAC accepts that the case for a classification review is strong but recommends that the review should be based on a proper consideration of future needs and opportunities.*
- *To ensure that the wider national interest is served, IWAC recommends that the Government retains reserve powers.*

Neither the Government's response to the 'New Era' consultation nor the recent progress report by the C&RT Trustees addresses these points beyond proposing that C&RT should provide a cost benefit basis when bringing forward proposals to change status based on affordability.

In respect of **remainder waterways**, IWAC in its response to the main consultation observed that:

- *The Consultation document does not mention the navigable and un-navigable Remainder waterways and makes no suggestions about their future. IWAC believes that this is a serious omission. Remainder navigable and un-navigable waterways form an important part of the publicly owned waterways which are to be transferred to NWC. However, they do not have the same statutory protections from adverse bridge or water supply decisions as the Cruising waterways.*
- *At present BW and Defra work together when a Remainder waterway is upgraded to cruising standard. In future, Defra will not have the same authority. Defra may be tempted to leave the NWC to decide about upgrading, but IWAC recommends that Defra ensures adequate protections are in place before Vesting Day based on the principle, currently observed by BW, that NWC should not take any action that will place any of the currently navigable remainder waterways in an un-navigable state.*

In its conclusion IWAC recommended that:

- *Defra and the Transition Trustees ensure that a policy for grading and upgrading is implemented before vesting day. With vesting day fast approaching if there is insufficient time to consider plans for upgrading individual waterways the least that should be put in place is a robust mechanism to safeguard the nation's waterways*

from inappropriate downgrading and provide for upgrading in the future when funds allow.

Neither the Government's response to the 'New Era' consultation nor the recent progress report by the C&RT Trustees addresses these points.

In respect of **future restoration projects** IWAC in its response to the main consultation concluded that:

- *Restoration merits greater attention in the consultative period.*
- *IWAC is concerned that the Government's intention to simplify the planning process might reduce the protection accorded to viable inland waterway restoration corridors.*
- *Because IWAC no longer has the resources to undertake the planned study of restoration projects, another sponsor should be sought for this valuable but inexpensive publication.*
- *NWC is asked to prepare a policy on its attitude to, and its role in, restoration projects within a year of Vesting Day.*

The Government's response to the earlier Consultation document *A New Era for the Waterways* does not address these points. The recent progress report by the C&RT Trustees does refer to the need to consider canal restoration in due course but the lack of clarity on commercial waterways, on remainder waterways and, at this stage, on canal restoration is a major gap in the consultation process and causing concern throughout the inland waterways community.

Regarding the proposals in paragraphs 30 to 32, IWAC notes the Government's intention to use the Transfer Order to amend sections 104 and 105 of the Transport Act 1968 in relation to England and Wales, so as to introduce an obligation for the Secretary of State to take into account the C&RT's representations on the affordability of any proposed changes to the classification or maintenance of its waterways.

We also note the linked proposal to amend sections 104 and 105 of the Transport Act 1968 to give the C&RT an enhanced 'statutory proposer' role in relation to ministerial orders on the classification and maintenance of its waterways. The justification for this proposal seems to be that the C&RT should not only be able to avoid new responsibilities that it considers it cannot afford but also should be free to seek to lower the status and maintenance of any parts of the waterway network if it is finding it financially challenging to sustain standards. The explanation for this change is that the safeguard of ultimate overall Government responsibility for financial sustainability no longer applies as it did with BW.

These two proposals need to be considered together and seen alongside the reassurance being offered in the Trust Obligation that the C&RT will hold and operate the waterways transferred to it by the Government for public benefit in perpetuity. The Trust Obligation to retain waterways is less comforting when the risk of part of the retained network being

downgraded is considered. Clear and robust safeguards should be put in place to ensure the Secretary of State has taken full account of the public interest, the views of the relevant local communities and the views of users, as well as the C&RT, before any reclassification from commercial or cruising standard occurs.

There is a very fine line between requiring the Government to give full consideration to the C&RT's requests to reclassify waterways "*in order to give confidence to the (C&RT) about its long-term management of the waterways*" and introducing a viability opt out that enables affordability for C&RT to override the public interest in maintaining a waterway to commercial or cruising standard. It will also be important to avoid a statutory proposer role being used as an opt-out for stretches of waterway that are more expensive to maintain without the potential for cross subsidy being fully explored.

IWAC advises that there should be safeguards in any revision to these sections to make it clear that Ministers will take full account of the public interest and all relevant representations before arriving at decisions on changes in the status and maintenance of any waterway. IWAC further advises that the legislation should require decisions to be taken in the context of the overall cost of maintaining the network and taking into account the many benefits they provide to the public. There should be a clear presumption in favour of maintaining waterways at least to cruising standard.

A potent reason for providing these safeguards in statute is the direct link between the adequacy of the Government Funding Contract with the C&RT and the ability of the Trust to maintain the network to current or enhanced standards. Unless the safeguards are in place the Secretary of State will be vulnerable to the charge that the classification and maintenance of a waterway has been downgraded to relieve the Government of the pressure to increase the level of public funding.

IWAC recognises the C&RT Trustees need to manage their liabilities but, in IWAC's view, the proposals in paragraphs 30 to 32 fail to provide adequate protection for the current status of waterways in the national interest.

In 2007 IWAC advised Defra that, in order to guide public policy and to improve the quality of investment decisions, research should be undertaken to assess the monetary values of public benefits provided by the waterways. As a result, a three year research programme has been undertaken, sponsored by Defra and managed by IWAC, which has produced valuable material to assist policy makers. This has attempted to put financial values on social, environmental and economic benefits of inland waterways, many of them hitherto considered to be intangible in financial terms. It is recommended that the results of this research entitled *The Value of Inland Waterways in England and Wales*, published in August 2011, should be used by the Minister to evaluate any cost benefit analysis which is put forward by C&RT in support of proposals to change the status of a waterway. In this way it will be possible to ensure that, as far as possible, all non-cash public benefits are taken into account before decisions are made.

IWAC regrets that the important issues of classification and maintenance are being addressed before the Trustees have had a reasonable opportunity to decide on relevant policies relating to commercial waterways, remainder waterways and restoration. This represents a significant weakness in the decision-making process.

IWAC does not consider that according C&RT an enhanced statutory proposer role adequately addresses the fundamental issues of classification and maintenance. Any proposals relating to individual waterway status requires consideration of all aspects of public benefit, sustainability (social, environmental and financial), the desirability of cross-subsidisation across the network, and should only follow systematic consultation with the relevant Waterway partnerships, local communities and users.

IWAC also recommends that any proposals received by the Minister should be fully evaluated using the results of the recent research programme into the public benefits of waterways.

Minister's Powers of Direction

IWAC supports the suggestion that the power of Ministers to direct C&RT should be reduced for an independent charity, although less so for a charity that has the powers of a statutory undertaker.

We agree that the Minister should retain the capacity to direct in the interests of national security. However, we are not confident that power to direct should be restricted to these circumstances.

We suggest the power to direct on matters which appear to the Minister to affect the national interest should be retained.

This is because the independent C&RT will have significant control over water – its quality, quantity and movement. It will have rights to take water from various sources, to discharge water into various water bodies and to manage water levels. The 1991 Water Resources Act and proposed Water Bill would overwrite some powers in certain circumstances but, as mentioned in the Consultation, the powers transferred to the C&RT would include a plethora of legislation giving rights such as water abstraction to a wide range of individual waterways. There is also complex case law such as that which prevents water quality enforcement on the Kennet and Avon Canal which flows into the River Kennet. The following questions arise:

- Can the Government be confident that it has the fall back powers it needs to manage water abstraction and supply, and effluent dilution capacity in times of extreme water shortage?
- Does the Government have the power to prevent the discharge of polluted canal water into rivers from leading to infraction under the Water Framework Directive?

- Does the Government have the reserve powers it might need to manage risks in the public interest when water levels are high?

We note the general presumption that there will be no change to the enabling powers and duties that will pass to the new charity. However in this instance, there will be a change in the independence and status of the body being given these powers and duties, there has been a very major change in demand for water, and climate change may affect availability of water. If there were less pressure on Parliamentary time and if the legislative legacy were less complex, it would be desirable to review whether the powers and duties being transferred are fit for modern needs and purposes and appropriate for underpinning the way a body with a fundamentally different status operates.

The balance between safeguarding the public and environmental interests and the freedom of an independent charity to pursue its purposes and raise income to meet its obligations and to fund its policy is complex and difficult. IWAC is not convinced that the Consultation document addresses this dilemma adequately and recommends that the matter is further examined by Government. In the meantime, the taking of a reserve power would be wise.

IWAC advises that the abstraction, supply, movement, availability and quality of water, as well as water level management, are such important matters of public interest, that the issues should be further examined and that the Minister should retain a power to direct in these respects in the national interest.

Freedom of Information and the Environmental Information Regulations

IWAC has considered the arguments set out in paragraphs 35 to 43 and is sympathetic to the Trustees concerns about the bureaucratic burden for a charity of full compliance with the FOIA and EIR legislation. There is concern however that the maintenance of the network in the public interest and expending public funds means that a substantial part of C&RT's business is of a public nature requiring transparency and accountability to the public.

On balance IWAC believes that bringing NWC within the scope of the FOIA and EIR in respect of information relating to its exercise of functions of a public nature, Option 2 in the supplementary Consultation document, would achieve the necessary transparency and accountability without unduly burdening the charity.

Disqualification from becoming Members of Parliament, Scottish Parliament of the National Assembly for Wales

IWAC can see no reason for the disqualification which currently existing for BW Board members applying to C&RT board members. It does however consider that both roles are onerous and time consuming and that dual membership should be discouraged. IWAC also

recognises that the Charity Commission may have a view on the proposal. IWAC agrees that no change is required for Scotland.

IWAC agrees with the principle that disqualification should not be applied to the C&RT.

Section 4 - Consequential provision in Scotland

IWAC is surprised by the proposal that British Waterways Scotland (BWS) should have such a small Board. In most circumstances a Board of three would not provide the range of views, the effective scrutiny and the constructive challenge that good governance should require.

IWAC suggests that the Board of BWS should consist of the Chair, the Vice-Chair and a minimum of three others.

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