Response to Consultation Document WG 25568

Improving opportunities to access the outdoors for responsible recreation.

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1. Introduction

River Access For All[i] Ltd exists to research and publish evidence for Public Navigation Rights on all rivers in England and Wales and to campaign for the recognition of such rights. As such we will confine our comments to matters dealt with in section 5.2 of the Green Paper i.e. those dealing with access to inland water.

River Access For All Ltd applauds the objective of Welsh Government to provide the widest possible access to the natural resources of Wales (and in particular the inland waters of Wales) for the people of Wales and visitors to Wales. We, of course, recognise the need for this to be done in a way which is mindful of the legitimate needs of other river users and preserves the essential environment which we all seek to share and enjoy.

2. Comments on Green Paper

We read with interest the assessment of the current situation and wish to make the following observations.

2.1 **Observations concerning the assertions made by those claiming that rights already exist and those of the view that they do not**. The Green Paper (see page 27) seeks to summarise the conflicting views concerning existing Public Navigation Rights but makes no attempt to resolve them. The implication is that the opposing views in some way cancel each other out and provide no further opportunity for resolution. We believe this is a fundamentally flawed conclusion which creates the source of ongoing conflict and provides the major obstacle to the resolution of practical issues by agreement.

The fact is that the case for the existing Public Rights of Navigation on all rivers by craft capable of navigating them is founded on Roman Law, endorsed by Clause 33 of Magna Carta and witnessed by many medieval statutes and Royal Commissions. The Public Right of Navigation has been upheld by many court judgements. Many statutes, held by some to be the origin of Public Navigation rights on specific rivers make clear reference to pre-existing navigation rights[ii].

The celebration of the 800th anniversary of Magna Carta focused attention on all the clauses of Magna Carta including Clause 33 which protected the Public Right of Navigation "on the Thames, Medway and throughout the realm". The academic commentary shows no doubt among leading academics that the protection of navigation rights was applied to all rivers capable of navigation by craft suitable to navigate them[iii]. The prevailing academic view is effectively summarised by the comments of Professor Nigel Saul, Professor of Medieval History, Royal Holloway University of London who said in a lecture to the All Party Parliamentary Group on the Constitution, 26 February 2013

> "*In Magna Carta ..... , clause 33 was to be of enormous significance in the history of navigation in this country, because it established the principle of free passage along England's rivers, so laying the foundations for transport development in the Industrial Revolution*."http://magnacarta800th.com/wp-content/uploads/2013/02/Magna-Carta-History-and-Politcs-N-Saul-Lecture.pdf

All such evidence, originally applying to England was subsequently applied to Wales by legislation extending all English law to Wales.

The proliferation of coracles as the Welsh craft of choice with distinctive variations between individual rivers illustrates the public rights that were accepted without any form of challenge throughout history.

On the other hand the evidence against the existence of Public Rights of Navigation is based solely on the writings of a lawyer (not a judge), Humphrey Woolrych, whose publication of 1830 (Woolwych on Waters) made no reference to any source evidence and specifically stated *"the law of navigation does not belong to the subject of this work"*. The idea that the mere opinion of such a commentator could have changed (or created) the law was rejected by Lord Denham in the case O'Connell v R (1844):-

> *"When, in pursuit of truth, we are obliged to investigate the grounds of law, it is plain, and has often been proved by recent experience, that the mere statement and re-statement of a doctrine, - the mere repetition of the cantilena of lawyers, cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."*

We believe than any consideration of the need for new legislation in Wales must be based on a clear understanding of the existing law. This is rightfully the province of the courts and we strongly recommend that Welsh Government, through the good offices of the Counsel General for Wales, should seek a judgement of fact from the courts on the basis of the existing evidence before any further consideration of whether and how the law should be changed.

2.2. **Resolution of conflict by agreement**. In the Green Paper reference is made to attempts to resolve conflict regarding access to inland water by agreement. In line with the recommendations of the Sustainability Committee significant efforts have been made to extend public access to rivers by agreement, encouraged and supported by £2.6 million of Splash funding. Yet the Green Paper acknowledges the limited success achieved.

This is not the first time that such an approach has been tried and failed. In September 2006 the University of Brighton analysed and evaluated a previous attempt at piloting improvements to access on four rivers in England (see http://www.riveraccessforall.co.uk/docs/Brighton3.pdf) which they recorded also had limited success. The report identified what we believe are the key obstacles.

> *"Ultimately, therefore, the very strength of voluntary agreements – the general goodwill of most landowners – is also their greatest weakness – that individual landowners who decide otherwise have a power to disrupt canoe activity in a way that is rarely experienced in other sports and recreational activities."* (see page 32 – Lessons Learned)
>
> *"The asymmetry of rights*

While it is often possible to negotiate access, it remains the case that riparian owners have more freedom to determine whether an agreement is reached, and what the agreement covers. The actions of the users may be influential in reaching this decision, but it is the riparian owner that makes it. Even on the Waveney, where there has been considerable co-operation between anglers, landowners and canoeists, the agreement is still bounded at both ends by riparian interests (not necessarily owners) unwilling to allow the passage of canoes. A similar position exists on the Teme and the Wear." (see page 39)

Whilst we believe there is great scope for resolving practical issues regarding how (when, where and in what conditions) navigation rights are exercised (as is done in Scotland where conflict over whether rights exist has been resolved by clear modern legislation and a code of conduct) we believe the evidence makes clear this this will not be achieved until the perceived "*asymmetry of rights*" is eliminated. While isolated riparian owners or sectional interests such as angling clubs believe they have to power to prevent navigation simply by failing to agree (or even more simply by failing to engage) any hope of widespread progress by "voluntary agreement" is doomed to disappointment.

3. Response to Specific Questions

Question 12 specifically asks "What approach do you advocate to improve opportunities for responsible access for recreation on inland waters?"

Our response is as follows

3.1 Clarify existing public navigation rights by seeking a finding of fact from the appropriate court based on the balance of available evidence.

3.2 Enshrine these rights in modern legislation modelled on the Land Reform (Scotland) Act, 2003 supported as in Scotland with a Code of Practice. If we are wrong in our assessment that existing common law rights exist in all places where navigation is practical for the craft seeking to exercise those rights and are therefore adequate to achieve the Welsh Governments objective of facilitating widespread use, the Welsh Government may extend existing rights as appropriate.

3.3 We believe the issues raised concerning protection of the environment and shared use on inland water are essentially the same as those relating to public rights of way over land and do not require any unique mechanisms/ procedures to resolve. By far the most important element is common-sense and mutual goodwill and respect from all parties. Items 1 & 2 will go a long way to remove the current obstacles in this respect.

4 Conclusion

Past attempts to enable the required level of public access to inland water have proved that "permissive agreements" are incapable of yielding the necessary results and in fact foster the very conflict that they seek to overcome.

In 1973 House of Lords Select Committee on Sport & Leisure, said

> *"The legal question of rights of way over water must be settled. A number of different legal interpretations of this right of way have been referred to in evidence and it is time for these to be resolved."*

After a further 42 years, during which alternative solutions have been sought, the wisdom of their conclusion is clear. Resolve the question of public rights!

With goodwill, mutual respect and common sense the peripheral issues can be resolved by agreement within existing mechanisms without the need for expensive and unwieldy mechanisms.

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[i] http://www.riveraccessforall.co.uk/index.php

[ii] See the first Act for the River Kennet (1715) which says – "It is also hereby further Enacted and declared by the Authority aforesaid that the said River Kennett is and forever hereafter shall be esteemed and taken to be Navigable from the said Wharfe or Common Landing place at Reading aforesaid to the Town of Newbury aforesaid and that all the Kings Leige people whatsoever may have and Lawfully enjoy their free passage in along through and upon the said River Kennett from the River of Thames to the town of Newbury .. with Boats Barges Lighters and other vessels and have and enjoy all necessary and convenient Libertys for Navigating the same without any obstruction whatsoever paying such Rates and Dutys as have been usually paid to the Owners of Occupyers of any Locks Turnpikes or other Engines."

See also the Act of 1665 which granted a monopoly of navigation to the proprietors of improvements on the Rivers Itchen, Test, Mole, Hamble, Ravensbourne, Wandle and Great Ouse – *"that all such Boats of such Burthen, in such manner and for such uses as have been used or accustomed to pass in or upon any of the said Rivers before the making this Act, shall and may continue freely to go and pass ... so far and in such a manner as was or is accustomed before the Deepening, Enlarging or Making thereof."*

[iii] see http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_33. See also http://www.bl.uk/magna-carta/articles/the-clauses-of-magna-carta para 3