

BY POST & E-MAIL: John.Packman@broads-authority.gov.uk

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Dear John

Proposed Broads National Park Authority Bill

Thank you for meeting us on 27 June to discuss the second draft of the Bill. This letter constitutes the British Marine Federation's response to the revised draft Bill (25.05.06) which you circulated to us at the end of May. As then agreed, it was not possible for us to provide this formal response by your published deadline of 14 July but you kindly confirmed that we could have this further week to do so.

Qualified support in principle

The BMF continues to support the principle of providing through the Bill powers for the Broads Authority to introduce as soon as practicable construction standards upon the basis of the Boat Safety Scheme and with a requirement for compulsory third party insurance.

As previously stated, BMF's view is that this should be the prime focus of the Bill. Furthermore, we continue to have some deep-seated concerns respecting other provisions, which have been proposed for inclusion. In our view it is essential that the Broads Authority take the opportunity to progress a Bill whose primary focus is on implementing the Boat Safety Scheme and Insurance requirements. This is a key priority we share.

Name Change

Whilst we have no problem in principle with the concept of a name change we will actively oppose any change to the name of the Authority if it is, or is liable to become linked to or be seen as justification for, a proposal to change the statutory purposes of the Authority to incorporate the Sandford Principle or otherwise than in a manner that is acceptable to and settled with boating interests.

Whilst we are willing to enter into further discussions with the Authority and other interests with a view to seeing if this can be achieved, we remain to be convinced that it is necessary desirable or practicable. Consequently we cannot support any change in the name at the present time.

As is well known, we are absolutely opposed to the application of the Sandford Principle to the Broads Authority and have been pleased to note that the Authority shares our view that the Sandford Principle is inappropriate for the Broads. Given that the Sandford Principle does apply however to areas designated as national parks and not to national park authorities as such, the possibility of simply naming the Broads area as a national park but not the Authority as a national park authority does not appear to us to be a tenable solution.

If the words “national park” are to be used at all in relation to either the Broads or the Authority, and in the present circumstances, we cannot support this, then we would wish to see express provision making clear that the relevant provisions of the 1949 Act are nevertheless not engaged.

Statutory purposes

As previously stated, we cannot agree to and will oppose any change to the statutory purposes of the Authority which is carried forward otherwise than in a manner that is acceptable to and settled with boating interests.

As respects the principle of sustainability, we are supportive of this principle and believe that it may be possible to incorporate the principle in section 2 of the 1988 Act in the precise manner now proposed without detriment to the balance which that section incorporates and which it is vital to maintain between the three distinct purposes which are specified. Any such change should however only be contemplated after satisfying local boating interests that this is indeed its effect and subject to absolute assurances that the Authority will not contemplate or accede to some further change to the wording during the legislative process without express agreement from the boating interests.

In relation to the third purpose (i.e. navigation), it is felt that the words “protecting, conserving and developing the navigation” have some obvious merits but are very dependant on the meaning to be given to “navigation” which is not a defined term for the purposes of the 1988 Act. That word would not apply to non-navigable areas at all and could be construed for example as applying only to whatever is actually capable or designated as available for navigation at any given time. Unlike “protecting the interests of navigation”, the proposed wording also does not embrace the wider concept of “interest” and so, for example, would not encompass the interest of maintaining boat building, hiring and repairing as an important part of the local economy.

To avoid such difficulties, it would probably be necessary to substitute for “the navigation” words such as “the Broads as an area for use by navigable vessels and for activities connected with such use”.

Any change of this sort however ought only to be contemplated if it was acceptable to all relevant interests.

Main Board Constitution

We are not persuaded that the further change proposed to the main board constitution adequately safeguards boating interests, particularly given Defra’s practice in making appointments to date and our continuing concerns as to the intended diminution in the role of the Navigation Committee.

It was made clear during the passage of the Bill for the 1988 Act that the wording “after consultation with ... boating interests” was simply a conventional formula and that, in practice, except in exceptional circumstances, appointments would be from candidates proposed by the boating interests. Defra however has repudiated this approach, treating the obligation as one simply to consult amongst others boating interests on 3 of the appointments and on the basis that it may appoint persons chosen by it or nominated by others. An important safeguard expressly included as part of the 1988 Act to protect and reassure boating interests has thus been abandoned.

The change now proposed will mean that, instead of not less than 3 of the 10 additional appointments being made “after consultation with boating interests”, all 10 will be made after consultation with four different interest groups (one of which is boating) with the Secretary of State having to have regard to the desirability of maintaining an overall balance between those interests. Although we understand that the reference to “balance” is intended to refer to the resulting appointments, it is not clear how this will be achieved and it even seems possible that it could be interpreted restrictively by Defra as requiring a balance only to be maintained in the degree of consultation with separate interests leading to the appointments or as favouring appointments from persons with experience across all the named sectors as opposed to those with special experience in one of them.

Given that the constitution was only recently reviewed we are not convinced that it is appropriate to reopen this discussion at this particular time. If, however, some change is to be contemplated then we suggest that a way forward might be to incorporate an express duty on the Secretary of State to ensure that 3 appointments are made under subsection (5) after consultation with boating interests and from persons with particular skills and experience of the boating sector.

Role and functions of Navigation Committee

Whilst the Broads Authority may have decided that it wants the Navigation Committee to be no more than an advisory committee, that is not as a matter of law its current status. Referring back to the evidence given by Mr Walley for the Government at the Select Committee stage of the Bill for the 1988 Act, the position was stated very clearly for the Government at the Select Committee stage on the Bill for the 1988 Act:

Mr Walley, the Government's principal witness stated on 11 March 1987 (page 197):

The Government is prescribing in the Bill that there should be a Navigation Committee and prescribing so carefully for its composition would obviously expect that Committee to exercise a day to day supervisory role over the discharge of the navigation functions of the Authority. There would be little point in providing for such a Committee with all the elaborate constitution if that were not the intended outcome. At the same time the role of the Committee remains advisory and consultative.

...the Government agreed with the boating interests that the Bill should be more specific in making a strong steer that the Authority was expected to manage on a day-to-day basis the navigation function through the Navigation Committee.

Then, in his closing submission for the Government, David Widdicombe QC made the following submission:

I think compulsory delegation to the navigation committee has gone; Mr Whybrow has dropped that, I think, but he is still asking for an obligatory standing reference on all matters to the navigation committee. Again, in my submission this would be an undesirable restriction on the discretion of the Broads Authority, No doubt, for many day to day navigation matters it is obvious they will delegate to the navigation committee but an obligation to refer everything else concerned with navigation to the navigation committee is very close to compulsory delegation which was part of their submission. In my submission, it should be rejected as unnecessary and undesirable.

Accordingly, in addition to giving the Navigation Committee a general advisory role, what was intended and what was provided for was for navigation functions to be capable of delegation only to the navigation committee (and the GYPHA) and with a strong expectation that, in the main, this is what would happen with the Committee and not the Authority exercising day to day supervision over navigation matters, albeit (as is always the case with delegation) with the delegator still maintaining ultimate responsibility. The failure to implement this can be seen as fully justifying the concerns expressed by the boating interests at the time.

Section 9(7), which it is not proposed to repeal, requires the Authority to keep under review the extent to which its functions in relation to the Navigation Area are delegated to the Navigation Committee. However, in the absence of any such delegation, it is not clear that this has really been happening on any meaningful basis or on what basis it is now to be carried forward.

It also appears, given the Authority's intention to transform the Navigation Committee into no more than an advisory committee, that there is no basis, if that course were to be followed, for retaining the five members of the Authority appointed to it or, at least, for not reducing these to a lesser number comprising only those members appointed for their special knowledge and experience of navigation matters.

The operation of a specialist navigation committee with executive functions, as provided for by the existing statutory regime, is entirely practicable and consistent with modern policy on governance, as for example is demonstrated by the options

commended for local authorities in the current Municipal Ports Review. There is therefore no reason why the existing statutory regime should necessarily be treated as obsolete. The alternative of operating the Committee as a purely advisory committee may also be a viable option but, if it is to be contemplated, it must be on the basis of a clear understanding as to the manner in which navigation functions may be delegated and with appropriate checks and balances to safeguard boating interests.

Both current practice in relation to the Navigation Committee and the Authority's proposals thus seem to us to contain a number of contradictions and to be insufficiently thought through. Unfortunately, this has all added to rather than eased a sense of distrust amongst some sections of the boating community.

The answer, we suggest, is to seek a new consensus with boating interests as to the manner in which navigation functions are to be exercised and to frame any changes to the Navigation Committee arrangements in the light of this. The choices would appear to be:

- (a) to retain and implement the existing arrangements whereby the Navigation Committee has delegated executive and supervisory functions;
- (b) if a consensus can be arrived at on this, to transform the arrangements so that, now or at some later date, the Navigation Committee can become primarily an advisory committee but with, say, appointment of the navigation officer and the delegation of functions subject to its approval and supervision.

We would be happy to review these possibilities further with the Authority and would suggest that it may be appropriate to convene a high level meeting locally with key stakeholder interests to work through possible solutions.

Separate Navigation Account

We have no objection in principle to a single accounting system as long as revenue and expenditure properly attributable to the navigation function are ring-fenced and in that sense assured and this agreed with boating interests. The current draft of the Bill does not achieve this.

For example, "navigation expenditure" is defined but not used in subsection (6) which refers to "expenditure on the navigation area" instead. It also does not allow for expenditure to be balanced so as not to be less than income taking one year with another, as is provided for in s.13 of the 1988 Act. There also appears to be a mismatch between s.13 and the proposed revision to s.17 in that s.13 requires navigation income to be at least equal to expenditure whilst s.17 as proposed to be amended would require annual navigation expenditure to exceed income each year.

It should also be noted that reference to "conserving the natural beauty" which is to be found in the existing s.13(2)(b), the existing s.17(6) and the proposed replacement s.17(6) ought properly to be adjusted to reflect the revised s.2(1)(a) that now refers to "conserving and enhancing the natural beauty, wildlife...".

At least for the purposes of ring fencing navigation income and expenditure it is vital that there is no ambiguity as to the scope of the safeguards for navigation.

Clearly a revised formulation is required and we fully endorse the suggestion by the Broads Authority that any new statutory arrangements should only be brought in by agreement with the boating interests, including the BMF, on an appointed day basis.

Powers to give directions

The proposed power to issue directions would confer upon the Authority very wide new powers that would be liable to replace byelaws in most instances and without the confirmatory process applicable to byelaws that ensures boating interests are appropriately safeguarded.

If the proposed powers are to go forward at all, then we feel that:

- (a) they must be limited in scope to preclude directions for certain purposes being issued in relation to small recreational vessels;
- (b) they should be expressly required to be formulated in accordance with the principles of better regulation;
- (c) they must be subject to full prior consultation in accordance with Cabinet Office guidelines, including the minimum 12 week response period;
- (d) designated bodies including the BMF and RYA should be given a right to refer draft directions with which they disagree to an independent person to report to the Authority upon before they are made by the Authority.

In terms of scope, clause 5(3)(f)(g) and (i) and clause 11 should not apply to small recreational vessels, and the Authority should expressly not apply any speed restrictions to sailing craft, in accordance with the current Byelaws.

So far as referral to an independent person is concerned, the absence of such provision will mean that there is no basis for resolution of any fundamental dispute between the boating interests and the Authority which compares very unfavourably with the existing right to pursue issues on proposed new byelaws to a public inquiry. Any such right of referral is likely to operate mostly as a reserve power rather than to be actively exercised and will reserve to the Authority final discretion.

Special Directions

Whilst this might be inferred from clause 7(2), the draft Bill gives no definition of “special direction” or other qualification to make clear that special directions can ordinarily only be given to individual vessels on an ad hoc basis. This needs rectification.

Failure to comply with directions

A more general defence for due diligence is required.

Contiguous waters

We have no objection to the principle of applying controls to the extent proposed to contiguous waters but are unclear as to the extent of the proposed exclusion of waters “which are only used for navigation by the owners or occupiers of the lands upon which those waters are situated”. We request clarification of the scope and purpose of this provision.

Construction requirements

Standards must be in line with the Recreational Craft Directive (RCD). Any requirements should be in accordance with The Boat Safety Scheme (or subsequent national schemes) and not a Broads Modified version thereof. Requirements should be reviewed to ensure conformity.

The BMF does not accept that construction and equipment standards should be justified on the grounds of “amenity or in the interest of the proper regulation of navigation”. There does not appear to be any relationship between the requirement for such standards on the one hand and the issues of amenity or regulation of navigation on the other. The issues of safety and construction standards, for example, are dealt with under the Boat Safety Scheme (“BSS”) and compliance with the BSS should take adequate account of such matters.

Consequently, the words “or amenity” to “of navigation” should be deleted from 13(1). Similarly, the words “or amenity” to “regulation of navigation” should be deleted from the provision for exemptions in article 13(5).

We further consider that any standards and specifications identified by a scheme should be reasonable in all the circumstances. We would therefore request that the word “reasonable” be inserted before the words ‘standards and specifications’ in clause 13(1).

Clause 13(2) will create particular difficulties if the Authority seeks to deviate from the BSS standards, including the findings and decisions of the BSS standards appeal panel. Additional safeguards are required to ensure that the Authority cannot, at its own discretion, create and impose different standards without the agreement of boating interests.

The BSS already has an appeals panel and a Technical Equivalence Panel. If BA adopt BSS, they must use same appeals system otherwise decisions taken on Technical equivalence would be localised and we wish to avoid that.

Further thought is needed to ensure an open and transparent process for appeals.

Insurance requirements

The requirement for third party compulsory insurance, with provision to grant exemptions, as indicated by the text of the Commentary would be a sensible way forward. Should exemptions come under review the effects of requiring compulsory third party insurance on participation should be considered and a risk-based approach be adopted. The level of liability required should relate to the risk, placing in effect a ceiling on liability and insurance must be available at a reasonable price.

Whilst not a matter that need be dealt with in the legislation, the BMF also wishes to emphasize that the insurance requirement, where it applies, should be subject to self-certification and self-declaration rather than any more bureaucratic arrangements.

We further believe that clause 15(5) appears unreasonable in that it requires a personal appearance, and within 21 days. We can see no reason why such information cannot be submitted by post, fax or e-mail within, say, 30 working days.

We believe that clause 15(6) should refer to subsections 2 and 4 OR 5.

Inspection

The powers being sought under this section appear onerous and we are supporting RYA's position for safeguards to protect boaters' rights. Section 16(1) permits inspection for ANY requirement without limitation, and this could have significant time and cost implications for an owner or master especially as under 16(2) reasonable facilities have to be provided. In this context we believe that 'reasonable facilities' must relate solely to the master or the owners ability to allow the inspector on-board and to inspect the vessel in its given state. It would not, for example, be appropriate for the Authority to demand that the vessel is lifted from the water. In addition, the legislation should specify that any costs associated with its demands for inspection should be met by the Authority, not the owner or the master.

With regard to immediate access, the Authority must ensure that adequate safeguards exist, both in the legislation and within its guidance to its agents and employees, to protect the legitimate interests of the Master and occupants of the vessel. For example, the person seeking to board must provide acceptable identification, such as photographic ID and proof of authority to gain immediate access.

There must also be a requirement for the Authority's agent who does board the vessel to submit reasons in writing along with a full report of the findings to the Master and the Owner within a set time period following the boarding. Where the agent has appeared to abuse their powers of access there must be a process to deal with complaints and which can adequately compensate the owner and master.

Clearly, where the person seeking to board does not have appropriate identification and/or authority then a refusal by the Master to allow that person on-board should not constitute an offence for the purposes of the legislation.

From a practical point of view how will the Authority ensure inspection officers have full competency to inspect to ensure compliance. There are other issues such as the provision of reasonable facilities and testing whilst afloat or ashore that need consideration.

Removal

In principle the BMF has no objection to powers of this nature because it believes they are necessary for efficient and safe operation. However, where an authority seeks powers to dispose of the property belonging to another, the BMF's position is that such powers must provide adequate safeguards for the individual without unduly restricting the authority. Consequently, we refer to the provisions of the Torts (Interference with

Goods) Act and request that the provisions of the legislation contain comparable provisions and safeguards.

In addition, any surplus funds from the proceeds of the sale (after costs have been deducted) must be applied to the Navigation Account, and not applied to any other function.

In view of the above comments, the provisions of clause 17 are currently unacceptable because they do not provide adequate safeguards for the individual, nor do they ensure funds will be ring-fenced to the Navigation account.

Clause 17(5) provides some protection by providing that the Authority has to make reasonable inquiries of persons mentioned in clause 17(3)(b). However, 3(b) does not refer to the Owner and given the comments above this should be expanded to include all persons, including the Owner, Master, boatyard/ mooring proprietor etc, with a connection to the vessel.

In addition, there should be a requirement to post a notice on a vessel.

Also, we believe there should a prescribed time period between the giving of notice and the removal of a vessel, and guidance can be taken from the Act referred to above.

Licensing of hire boats

We are seeking confirmation that the Authority intends to adopt the national hire boat code for terms and conditions on licensing. We would like to clarify what “ terms and conditions”, if any, the Authority will be empowered to apply. If further terms and conditions are in contemplation, the extent of these needs to be clarified and should be appropriately limited and made subject to rights of appeal.

A definition of what is meant by 'purely private charter' is needed, as this does not appear in the second draft. We would also welcome further discussion on this aspect.

Wake boarding and water skiing if any beyond standard construction and equipment standards

The BMF is in agreement with the principles of self-responsibility and management of activities over prohibition.

Application of Water Resources Act

We have some continuing concerns about the appropriation of these powers by the Authority who, as a body, is not subject to the same duties and constraints as the Environment Agency. If this proposal is to be pursued, we would ask for clear limitations as to the potential exercise of the powers in relation to boats and boatyards. The one example which we have been given of their potential application, in relation to boat toilets is not one which we think would work in practice. Accordingly we cannot support this proposal. We would welcome discussion on this aspect to consider the issue highlighted perhaps via a more appropriate mechanism.

Missing Provisions

The following provisions are referred to but not included in the draft Bill:

- (a) incapacitated masters
- (b) removal of unserviceable vessels
- (c) entry on land for purpose of inspecting vessel.

Provisions on these subjects could have substantial impacts and we would expect full consultation upon them if they are to be proceeded with.

The first draft Bill also listed the following subjects for inclusion:

- (a) regulation/removal of water gypsies
- (b) removal of advertising dinghies and ice cream boats
- (c) code of practice for drainage work.

We are taking it that these proposals have now been dropped.

Further consultation

Substantial issues remain both in terms of the proposals as currently drafted and as respects addition as and changes the details of which we have not yet seen. We therefore believe that a further and full consultation is necessary before the Authority proceeds with the promotion of a Bill.

Please do not hesitate to contact me should you have any questions or queries arising from this response. We would suggest that it would be worth convening a meeting to discuss next steps following this round of consultation.

Yours faithfully



Sally Banham
Assistant Director