



NORFOLK & SUFFOLK BOATING ASSOCIATION

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Mr Simon Hopkinson
Biodiversity Programme
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Dear Mr Hopkinson

Consultation on Proposed Minor Amendments to the Conservation (Natural Habitats, & c.) Regulations 1994

Response of the Norfolk and Suffolk Boating Association

Introduction

The Norfolk and Suffolk Boating Association (NSBA) exists to serve, protect and promote the interests of private users of pleasure craft on the Norfolk and Suffolk Broads. It has over 1,100 individual members and 47 affiliated clubs and associations, altogether representing the majority of those who use private craft on the Broads. Thousands of acres in the Broads area are European sites.

The appropriate committee of the NSBA has discussed the consultation paper. It has authority to express the views of the NSBA. Those views are set out below. It should be noted that the NSBA does not consider that there was an adequate or appropriate process of consultation on the proposed amendments and has made a separate representation to Defra concerning this, as requested in the invitation for responses to the consultation paper.

Answers to the questions posed in the consultation paper

Question 1: Do you agree with the proposal to amend regulations 22-27 and Schedule 1 of the Habitat Regulations 1994 to provide that the powers to make special nature conservation orders can be used to restrict operations taking place on water as well as those on land in order to protect European sites?

No.

We do not consider that the Habitats Directive requires the proposed amendments and we consider that there are the following weighty arguments against them.

- (A) The proposal has the potential to interfere with the exercise of the public right of navigation on internal waters – particularly given their confined nature – outside and within a European site, if the exercise of that right (clearly an ‘operation’ on water for the purposes of reg 23 as it is proposed to be amended) is *capable* of destroying or damaging the flora, fauna or geological or physiological features by reason of which the land subject to a special nature conservation order (SNCO) is a European site.
- (B) We are aware that so far only 14 SNCOs have been made, none in East Anglia, but in terms of the potential of the proposed amendments we note that the threshold for the making of a SNCO is lowered from operations *likely* to destroy or damage the flora etc by reason of which the land subject to a SNCO is a European site to operations *capable* of destroying or damaging the flora etc. This is a significant lowering of the threshold.
- (C) We consider that the potential of the amendments to interfere with the exercise of the public right of navigation is heightened by the proposed addition of reg 23(2C) which would permit an alternative to the process of notification to individuals in reg 23(2A), (2B) by permitting the specification (ie prohibition) of an operation by a process of public advertisement and the display of notice(s). We note that the consultation paper states that:

‘We also propose to make a procedural change to the order making process to enable the order to be *targeted at specific persons or organisations*, where such a course would be appropriate. This is necessary because the existing SNCO procedures are focussed on activities undertaken or permitted by owner/occupiers of the land.’ (italics supplied)

We note, however, that the consultation paper subsequently contradicts the tenor of the words italicised – as does the proposed reg 23(2C) – by stating:

‘Where there are a number of unknown persons carrying out a damaging activity and it is not reasonably practicable to identify them, Defra proposes that the Secretary of State will have a power to direct the nature conservation body that it need not serve a notice on every person. Instead the nature conservation body must publish a notice in one local newspaper in the relevant area and fix copies of the notice to conspicuous objects on the land.’

- (D) We understand that the proposal to make the amendments has been prompted by concerns over the *actual* effects of ferry operations on a European site in the Portsmouth Harbour area. We question whether this justifies the *width* and *potential effect* on the public right of navigation on internal waters of the proposed amendments, particularly when there is no limit to the fine which can be imposed under reg 23(3) on conviction in the Crown Court for contravention of reg 23(1) (restriction on carrying out specified operations) without reasonable excuse. We note that reg 24(4) states that two things *are* reasonable excuses (as opposed to stating that reasonable excuse *includes* them or leaving the nature of a reasonable excuse at large, as is the norm with criminal legislation). Neither of these two things (particularly the second) is of relevance to operations on water via the exercise of the public right of navigation. The offence in reg 24(3) appears to be one of strict liability. This is inappropriate in the context of the proposed amendment relating to the notification through the press and the display of notices, particularly when there is the potential for an unlimited fine.
- (E) The consultation paper does not contain anything approaching a compelling justification for extending criminal liability to those pursuing the public right of

navigation in the circumstances described in the proposed amendments. We would echo the words of a leading jurist of modern times: 'So drastic is the criminal sanction that its imposition is something which must be justified up to the hilt'.

Question 2: Do you agree with the proposal to amend regulations 22-27 and Schedule 1 of the Habitat Regulations 1994 to provide that the powers to make special nature conservation orders can be used to restrict operations taking place outside, as well as within, European sites?

No. See answer to Question 1.

Question 3: Do you agree with the proposal to introduce a two-stage process which involves the new stage of serving a notice on a person/persons proposing to undertake an operation capable of damaging a European site?

No. See answer to Question 1.

Question 4: Are there any other comments relating to the proposed amendments that you would like to make?

We note that no corresponding amendments are proposed in respect of the regime under regs 18-21 of the Habitat Regulations 1994.

Yours sincerely

Richard Card

Chairman, Habitats Group
Norfolk and Suffolk Boating Association