

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

September 2011



Llywodraeth Cynulliad Cymru
Welsh Assembly Government



The Scottish
Government



defra

Department for Environment
Food and Rural Affairs

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This document/publication is also available on our website at:

www.defra.gov.uk/consult/2011/09/12/waterways-1109/

Any enquiries regarding this document/publication should be sent to us at:

NWCresponses@defra.gsi.gov.uk

or by post:

Inland Waterways Team, Defra

Area 2D

Ergon House

Horseferry Road

SW1P 4AL

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Scope of the consultation

Topic of this consultation:	Following the consultation held earlier in the year, 'A New Era for the Waterways', this is a limited, supplementary consultation on certain aspects of the proposed Transfer Order under the Public Bodies Bill for transferring the functions of British Waterways in England and Wales to a New Waterways Charity and for making consequential provision in Scotland
Scope of this consultation:	In the light of the consultation held earlier in the year, this consultation is narrow in scope, being limited to certain aspects of the proposed Transfer Order for transferring the functions of British Waterways in England and Wales to the New Waterways Charity and to certain consequential provisions relating to the activity of British Waterways in Scotland. No further comments are sought on matters of general principle.
Geographical scope:	This consultation is being issued by Defra but is a GB consultation agreed with the Devolved Administrations.
Impact Assessment:	The Government issued an Impact Assessment at the time it issued the earlier consultation on general principles concerned in the establishment of the New Waterways Charity. It will publish a revised Impact Assessment when it presents the Transfer Order to Parliament.

Basic Information

To:	Stakeholders listed in the consultation list – and any others with an interest in inland waterways.
Body/bodies responsible for the consultation:	The Inland Waterways Team in Defra, together with the Inland Waterways Team in the Scottish Government.
Duration:	12 September – 24 October 2011. Because (a) a full, twelve-week consultation has already taken place on the principles of the transfer; (b) the scope of this consultation is limited; and (c) the timetable for preparing the Transfer Order is tight, Ministers have agreed that this limited consultation will take place over six weeks only.
Enquiries:	Tel: 020 7238 6372 / 4805 Email: NWCresponses@defra.gsi.gov.uk The Inland Waterways Team Defra

Department for Environment, Food and Rural Affairs

	<p>Area 3B Nobel House 17 Smith Square London SW1P 3JR</p>
<p>How to respond:</p>	<p>Email: NWCresponses@defra.gsi.gov.uk</p> <p>The Inland Waterways Team Defra Area 3B Nobel House 17 Smith Square London SW1P 3JR</p> <p>For responses that deal specifically with the Scottish issues in the consultation, please also copy your reply to:</p> <p>Email: scotlandscanals@scotland.gsi.gov.uk</p> <p>Waterways Consultation Freight and Inland Waterways Branch Scottish Government Area 2GN Victoria Quay Leith EH6 6QQ</p>
<p>Additional ways to become involved:</p>	<p>The consultation list is already extensive. However, other interests not specifically targeted will become aware of this consultation through the Defra website.</p> <p>There will be further discussions on issues raised in the transfer of BW waterways in England and Wales into the New Waterways Charity in the remaining stages of the passage through Parliament of the Public Bodies Bill, and, subject to the Bill's receiving parliamentary assent, during the parliamentary debates on the Transfer Order.</p>
<p>After the consultation:</p>	<p>When this consultation ends we intend to make copies of the responses available to the public, through the Defra library at Ergon House in London. We will also summarise all responses and place this summary on our website in December 2011.</p>
<p>Compliance with the Code of Practice on Consultation:</p>	<p>This consultation complies with HM Government's Code of Practice on Consultation which can be found at: http://www.bis.gov.uk/policies/better-regulation/consultation-guidance</p> <p>Complaints If you have any comments or complaints about the consultation</p>

	<p>process (as opposed to comments on this issues that are subject of the consultation) please send them to:</p> <p>Consultation Co-ordinator Area 7C Nobel House 17 Smith Square London SW1P 3JR Or email consultation.coordinator@defra.gsi.gov.uk</p>
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Background

Getting to this stage:	<p>Shortly after the 2010 election the Government instigated a review of public bodies. The results of this review were announced in October 2010, at: http://www.defra.gov.uk/news/2010/10/14/public-bodies/</p> <p>The Public Bodies Bill is the main legislative vehicle for implementing the outcome of the Government review of public bodies. http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0188/cbill_2010-20120188_en_1.htm</p>
Previous engagement:	<p>Defra published a consultation document, 'A New Era for the Waterways' in March 2011: http://www.defra.gov.uk/consult/2011/03/30/waterways-1103/</p> <p>The Government is publishing its response to the earlier consultation alongside this consultation exercise.</p>

Section 1 - Introduction

1. In March 2011, Defra launched a consultation on the UK Government's proposals to place those waterways in England and Wales which are owned by the state in trust for the nation through the establishment of a civil society organisation, a New Waterways Charity (NWC).¹ It stated the Government's proposal for those waterways owned and/or managed by British Waterways (BW) to be transferred to the NWC in April 2012, with the Environment Agency navigations being subsequently transferred in 2015/16, subject to affordability at that time and the agreement of the charity's Trustees. The consultation closed on 30 June.
2. The consultation invited views on the new charity's objectives and purpose, governance model and operation and how we can best secure the financial sustainability of the waterways. The majority of respondents were supportive of the move to charitable status.
3. Question 7 of the consultation specifically asked whether or not the new charity should enjoy the same powers and be subject to similar duties to maintain the waterways as British Waterways. Most respondents to Question 7 agreed that the new charity should have the same powers and similar legal duties to maintain the waterways as British Waterways. Some respondents asked for further detail about the duties concerned. This supplementary consultation explores the issues further.
4. The consultation document also made clear that the Scottish Government had decided that its canals, including British Waterways in Scotland, would remain in the public sector. The decision to establish the NWC and to transfer into it BW waterways in England and Wales will, therefore, require consequential changes to the legislation affecting BW's operations in Scotland. Those changes are also the subject of this supplementary consultation.

About this consultation – the Transfer Order

5. The Public Bodies Bill now before the UK Parliament would, subject to its enactment, provide the necessary powers to transfer functions, assets and liabilities from British Waterways to the NWC. Assuming successful passage of that Bill, the Government proposes to use those powers to make a Transfer Order moving across functions and making consequential provision, and to make a separate scheme transferring property, rights and liabilities.
6. This supplementary consultation document, published alongside the UK Government's official Response to the earlier consultation, provides further detail about the content of the Transfer Order. It provides information about the legislation which relates to British Waterways, the general form of the transfer, and the small number of significant amendments that the UK Government believes are necessary to existing legislation, in order

¹ The New Waterways Charity (NWC) remains only a working title for the new entity. A decision on the name of the new charity will be made and announced in due course.

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to reflect the fact that the NWC will be operating in civil society rather than as a public corporation. The consultation invites comments in response to specific questions on the proposed transfer, collated at the end of the document.

7. Because British Waterways will continue to operate in Scotland, the proposed Transfer Order would additionally make consequential changes to the constitution and functions of British Waterways in Scotland. On behalf of the Scottish Government, this supplementary consultation document seeks the views particularly of stakeholders in Scotland about key aspects of those consequential changes in Scotland.
8. Because a full, twelve-week consultation has already taken place on the principles of the transfer and the timetable for preparing the Transfer Order is tight, Defra Ministers have agreed that this limited consultation will take place over six weeks only.

Section 2 – General principles

9. One of the main purposes of the proposed Transfer Order is to modify existing statute law to enable the NWC to succeed to those statutory powers and duties that are now held by BW and are necessary for the NWC to be an effective manager and guardian of the waterways being transferred to it.
10. Statute law concerning the waterways falls into two broad categories:
 - a. legislation relating to specific waterways passed before their nationalisation in 1948; and
 - b. legislation following nationalisation and relating to waterways generally.
11. The improvement of rivers to enable navigation and the construction of canals were originally authorised by a large number of Acts of Parliament (well over 300 in the case of BW). Most were passed in the late 18th and early 19th centuries, and nearly all are to some extent still relevant today. For example, it is these Acts that continue to authorise the taking of water and in many respects regulate the relationship between the waterway and its neighbours.
12. Parliament passed these Acts (generally referred to as ‘enabling Acts’) waterway by waterway, and most waterways have several such Acts relevant to them. On nationalisation, British Waterways (and its predecessor, the British Transport Commission) were made successor to the original canal proprietors’ powers and duties under these enabling Acts. In a similar manner, with responsibility passing from BW to the NWC, the proposed Transfer Order will make the NWC a successor to the powers and duties provided by these enabling Acts. (Like BW, the NWC will exercise these powers and duties as a ‘statutory undertaker’.) The powers and duties will pass ‘as they are now’; there will be no enhancement of them – NWC will be in the same position as BW currently is with regard to the enabling Acts.
13. After nationalisation in 1948, most of the waterway-related laws enacted by Parliament were of general effect (although some exceptions dealt with specific waterways). These laws divide into two broad categories: those concerning the management of waterways, and those concerning the governance of British Waterways itself and its statutory status as a public authority.
14. The general scheme of the proposed Transfer Order will be to provide for the transfer to the NWC of the waterway management duties and powers provided for by these statutes, but not to apply those provisions relating to the governance of BW and its status as a public authority. Full provision for the governance of NWC will be made through its company constitution and status as a registered charity.
15. The key post-nationalisation statutes containing important waterway management powers and duties are the Transport Acts 1962 and 1968 and the British Waterways Acts 1971, 1983 and 1995. Some minor provisions are contained in other Acts. The proposed Transfer Order will make provision for these waterway-management powers and duties to pass to the NWC, while the provisions concerning the governance of BW in England and Wales and the powers needed for a statutory corporation to operate will be repealed, as the NWC, being a company rather than a creature of statute, will have its own powers in this respect (BWB

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was created by s.1 of the Transport Act 1962 as a public authority; the NWC will cease to have this status under that Act). These provisions, adapted as necessary, will continue to apply to British Waterways as regards its continuing operations in Scotland – see section 4.

16. Mostly the NWC will succeed to these duties and powers on exactly the same basis as BW now holds them. In some respects adaptation will be necessary to take account of the different status of the NWC as a charity outside the public sector, but the net effect is intended to be the same. In particular it should be noted that there will be no enhancement of, or addition to, the existing enforcement powers of BW when those powers pass to the NWC. Existing safeguards for the use of those powers will also remain.
17. In addition to waterway specific statutes there is a body of legislation that affects BW by reason of its general status as a navigation authority, harbour authority and statutory undertaker in the same way as other such bodies are so affected. Such statutes will continue to apply to NWC in the same way as they do to BW now.
18. BW is currently subject to a range of statutory environmental duties under both domestic legislation (such as s.22 British Waterways Act 1995) and legislation originating from the EU such as the Habitats Directive and Water Framework Directive. NWC will succeed to all the environmental statutory duties currently applicable to BW and there will be no derogation from those statutory standards in the way NWC will have to operate.
19. Any significant material adaptations of existing statute law proposed by the Transfer Order in relation to the transfer of functions from BW to the NWC are explained in section 3.

Section 3 – Significant material adaptations of existing statute law

20. As explained in section 2, a number of material adaptations will need to be made to existing law, largely to reflect the proposed change of status under which BW's waterways in England and Wales will be owned and managed by a charitable company rather than by a public corporation. This section explains the significant material adaptations proposed.

Removal of the Ministerial power to direct disposal of property under the Local Government, Planning and Land Act 1980

21. Under the Local Government, Planning and Land Act 1980, the Secretary of State and, in relation to Wales, the Welsh Ministers have certain powers of direction as against statutory undertakers (and others).² By virtue of Part 10 and Schedule 16 of the Act, this power is operable against BW and, unless changed, would cover NWC.
22. Under sections 95, 97 and 98 of the Act, the Secretary of State may require BW to provide specific information about land owned by BW if the Secretary of State thinks that that land is not being sufficiently used for the purposes of BW's functions or undertaking; the Secretary of State may give a direction requiring BW to dispose of its interest in that land, subject to certain conditions and requirements.
23. The Government does not consider that it would be appropriate for the Secretary of State to exercise the powers under Part 10 of the Act in relation to the NWC. The Government has already proposed that the operational infrastructure transferred from BW in England and Wales to the NWC should be subject to the provisions of a Trust, under which the transferred waterways will be held in trust in perpetuity on behalf of the nation. The Government considers that the consequences of land that is transferred under Trust not being sufficiently used should more properly be dealt with under trust and charity law, rather than by Ministerial direction.
24. We therefore propose to amend the definition of 'statutory undertaker' in Schedule 16 to the Local Government, Planning and Land Act 1980 to provide that it does not cover NWC within its terms (with the effect that Part 10 of that Act will not apply to the NWC).

Do you agree that the power for the Secretary of State and the 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 NWC? If not, what are the circumstances in which you envisage such directions would be needed?

² Subsequent references in this section to the Secretary of State should accordingly be read as references to the Welsh Ministers in relation to Wales.

Provisions in the Transport Acts 1962 and 1968 on employment

25. Both the Transport Acts 1962 and 1968 contained certain provisions regarding the employment of staff by British Waterways and their pensions. These are ss.73 to 75 of the 1962 Act and s.137 of the 1968 Act.
26. The provisions on pensions are essentially spent as they were intended to enable the consolidation of the many pre-nationalisation pension schemes. That process was completed by BW many years ago. There are also generic powers for the Minister to make orders reorganising or restructuring pension schemes of the nationalised transport bodies.
27. It is not considered necessary to extend these powers to the NWC or any new schemes that may be established by it. The powers in the 1962 and 1968 Acts pre-date modern pensions legislation and are now largely redundant or inappropriate in the light of that more modern legislation. The transfer process will provide for NWC to take over from BW the role of principal employer under the existing BW pension schemes and employee pension rights will not be affected on account of the transfer.
28. The other employment provision that it is not proposed to apply to the NWC is s.137 of the Transport Act 1968. This relates to machinery for consultation etc with employees and again has largely been rendered redundant by modern employment law. The terms and conditions of staff transferring from BW to the NWC will have the protection of the provisions of the Transfer of Undertakings (Protection of Employment) Regulations ('TUPE'). The existing agreements for collective bargaining and trade union recognition will be unaffected by the transfer in that NWC will succeed to the position of BW under those arrangements by provisions in the Transfer Scheme.
29. Statutory requirements for compulsory consultation between employers and employees have been substantially enhanced since the 1960s (partly as a result of European legislation) and the provisions in the Transport Acts have been overtaken by modern employment law. Furthermore it would not be appropriate for a Minister to exercise such powers contained in the Transport Acts over a body not within the public sector.

Do you agree that the provisions in ss.73 to 75 of the 1962 Act and s.137 of the 1968 Transport Act are not needed by the NWC? If not, please explain your reasoning.

Classification and maintenance of waterways – Sections 104 and 105 of the Transport Act 1968

30. Section 104 of the Transport Act 1968 divides BWB's undertaking into 'commercial waterways', 'cruising waterways' and the 'remainder' (the first two classifications being specified in Schedule 12). Subsection (3) enables a Minister by order to re-classify waterways. Section 105(3) enables a Minister by order to change the duties on the British Waterways Board under that section to maintain waterways having regard to the size, design or type of vessel customarily using any commercial or cruising waterway.
31. Following the earlier consultation on this point, the Government has decided to proceed 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 NWC's representations on the affordability of any proposed changes to the

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classification or maintenance of its waterways. Further information on this point is contained in the Government's response to the earlier consultation, being issued in parallel to this supplementary consultation.

32. In a link to this change, the Government also proposes to amend sections 104 and 105 of the Transport Act 1968 to give the NWC an enhanced 'statutory proposer' role in relation to ministerial orders on classification and maintenance of its waterways. The current ad hoc arrangements whereby BW makes a written application to Ministers for an order reflects the Government's relationship with BW as a public corporation where the overall risks and liabilities for the network rest ultimately with Government and it has overall responsibility for maintaining BW's financial sustainability to enable it to undertake its statutory duties and meet the costs of its failure to do so. Those risks and liabilities will transfer to the NWC and the Trustees will be responsible for ensuring its financial sustainability. The Government therefore believes that the NWC needs an explicit power to seek adjustment of their statutory duties (in the interests of financial sustainability) in relation to classification and maintenance of its waterways when financial circumstances make it necessary. This arrangement will require the Government to give full consideration to the NWC's requests, giving confidence to the NWC about its long-term management of the waterways; in all other respects, the decision about reclassification will remain that of Ministers and that in all other respects the procedure remains the same as now.

Do you agree that the NWC should have an enhanced statutory proposer role in relation to ministerial orders on classification and maintenance of its waterways? If not please explain your reasons.

Ministers' Powers of Direction under the Transport Act 1962

33. Section 27 of the Transport Act 1962 provides for Ministers to give directions to the British Waterways Board as follows:
- a. directions of a general nature on matters which appear to the Minister to affect the national interest;
 - b. discontinuing any activities, disposing of any part of their undertaking, disposing of any assets held by them, calling in any loan made by them or exercising any power they may possess to revoke any guarantees given by them;
 - c. the exercise of their control over a subsidiary of the Board, so as to require the subsidiary to discontinue any of their activities, dispose of any part of their undertaking, dispose of any assets held by them, call in any loan made by them or exercise any power they may possess to revoke any guarantees given by them; and
 - d. to take action in the interests of national defence.
34. The Government believes that in general these powers of direction are not appropriate for Ministers to hold in relation to the business and other related activities of an independent charity. However, while charity law requires that charities are independent from Government, the Government believes that the power to direct the NWC in the interests of national defence under section 27(6) should be retained to enable it to effectively deal with exceptional security circumstances. We therefore propose to use the Transfer Order to

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amend section 27 of the 1962 Act to retain, as against NWC, only the power of direction in relation to national defence in sub-section (6).

Do you agree that the power of Ministers to direct the NWC under the Transport Act 1962 should be restricted to circumstances in the interests of national defence? If not, what powers of direction, if any, should continue to apply to the NWC?

Freedom of Information and the Environmental Information Regulations

35. The British Waterways Board (BWB) is listed under Schedule 1 of the Freedom of Information Act 2000 (FOIA) as a public authority for the purposes of the FOIA. This means that BWB is subject to the provisions of the FOIA in the same way as are, e.g., Government departments. BWB is thus obliged both to operate an approved publication scheme (a means of providing access to information which an authority proactively publishes or intends to publish) and to respond to individual information requests made under the Act.
36. By virtue of its inclusion in Schedule 1 of the FOIA, BWB is also a public authority for the purposes of the Environmental Information Regulations 2004 (EIRs). These Regulations give the public access rights to environmental information held by a public authority in response to requests, and require public authorities to disseminate information by electronic means and to organise information relevant to its functions. It is possible to charge for making environmental information available in many cases, provided that the charge is reasonable.
37. The NWC will be a charitable company, not a public corporation or creature of statute, and it is necessary to assess whether, given its status, it should be added to the list of public authorities contained in Schedule 1 to the FOIA. Separately, the EIRs will automatically apply to it if it were so listed in the FOIA, provided that it is not listed only in respect of specific information or is designated by Order under section 5 of the Act. Even if the NWC is not listed in Schedule 1 to the FOIA, the EIRs may still apply to it, e.g. if it is carrying out functions of public administration or is controlled by a public authority and has public functions or responsibilities or provides public services that are environmental in nature.
38. The NWC will have substantial duties as a statutory undertaker. Some public bodies carrying out statutory functions and some statutory regulators are subject to FOI, e.g. London Transport, some airports, any statutory regulators under local government control and utility companies in Northern Ireland and Scotland. The Government has also stated that it considers that there is a strong argument for including Network Rail within the FOIA; it is also consulting harbour authorities about their inclusion within the Act. Other statutory undertakers operating outside the public sector, such as the private utilities companies in England and Wales, are not subject to the FOIA. In relation to the EIRs, the Information Tribunal recently ruled that the water companies' duties as statutory undertakers were not 'functions of public administration'; in effect, this confirmed that the water companies are also not subject to the EIRs, though further legal action may alter this position. In other cases, the EIRs have been found to apply to the Port of London by the Tribunal, which found that, on balance, as a body with statutory powers and duties, the Port of London was a body carrying out public administrative functions. In the Milford Haven Port case, it was accepted without argument that the port was a public authority. The question of whether NWC would be subject to the EIRs, even if not subject to FOIA, is therefore not clear cut.

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39. In transferring BW waterways in England and Wales to the NWC, the Government is transferring risk from the public sector to the voluntary sector. As part of this process, the Government wishes, where it is feasible to do so, to reduce the administrative and regulatory burdens placed on the new charity.
40. The NWC's transition trustees have made the case that, for the purpose of FOI and the EIRs, the NWC should be treated comparably to comparable charities and other non-state bodies acting as statutory undertakers. The transition trustees believe that it would be an unfair and discriminatory burden to regulate NWC in relation to FOI in advance of its application to comparable bodies. The NWC will be operating within a voluntary sector that can be highly competitive; it is right that the charity should, as far as possible, be treated comparably in law with comparable bodies. There are charities (and private companies) that operate waterways as statutory undertakers with statutory powers but are not subject to the FOIA regulatory regime; these include the National Trust, the Inland Waterways Association, the Avon Navigation Trust and Peel Holdings Ltd (through its subsidiaries that operate the Manchester Ship Canal and the Bridgewater Canal) among others. These are not currently listed as 'public authorities' for the purpose of the FOIA.
41. The transition trustees believe in openness and transparency but consider the FOIA regime, as presently written, unsuitable to civil sector bodies with citizen governance. Nevertheless, because of their commitment to openness and transparency, the transition trustees have proposed that, as a matter of formal policy, the NWC would commit itself to a transparency policy that, for its statutory public functions, would closely follow the spirit of the provisions of the FOIA and (to the extent they are not otherwise applicable) the spirit of the EIRs (but in each case adapted to reflect civil-sector governance, responsibilities and resources). Such a transparency policy would consist of the following:

Publication Scheme

- Continuation of a website (the current 'Waterscape' site publishes more than 730,000 pages of waterway information).
- In addition to full statutory charitable accounts, publish annual impact reporting against measurable targets in accordance with charity sector best practice.
- Continued reporting of executive director remuneration
- Publication of minutes of Council, Trustee Board and Waterway Partnership meetings and waterway operational reports to those meetings
- Publication of governance documentation such as Governance Handbook, principal Policy Statements, Standards of Practice etc

Information Requests

- A formal policy of acceptance and response to information requests subject to a clear statement of practice and procedure that follows the spirit of the FOI regime appropriately adapted to a citizen-governed civil society body.
 - A right of appeal to the independent Waterways Ombudsman to adjudicate any complaint of breach of that formal policy and statement of practice
 - A requirement that any complaints upheld by the Ombudsman be reported to the NWC Council.
42. The UK Government is fully committed to transparency and to the principles of access to information, and welcomes the commitments of the NWC transition trustees on both points. When the NWC comes into being, it will be accountable to its users and stakeholders through the proposed structures of governance, including the Board of Trustees, the Council

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and the Waterways Partnerships. This will increase the openness and responsiveness of the organisation to interested parties, since, as with other voluntary sector organisations, it will be more vulnerable to damage to its reputation than might be the case for bodies in the public sector that do not seek voluntary giving. Through its funding agreement with the UK Government, it will be accountable to Defra for the use of Government funds.

43. The Government is sympathetic to the arguments set out above and to the need to minimise the regulatory burden on the charity as far as is reasonably possible. However, the Government also has a general commitment to extend the application of the FOIA. Before reaching a decision, therefore, the UK Government would welcome stakeholders' views on three possible options:

- **OPTION 1:** Do not include the NWC as a 'public authority' for the purposes of the FOIA. NWC will commit to high standards of transparency within the spirit of the FOIA and EIRs in accordance with its proposed transparency policy.
- **OPTION 2:** Bring the NWC within the scope of the FOIA only in respect of information relating to its exercise of functions of a public nature.
- **OPTION 3:** Include NWC as a public authority in Schedule 1 of the FOIA. This will bring it within the scope of the FOIA and the EIRs.

You are invited to indicate and explain your preferred option. Are there any improvements that you would like to see to the NWC's proposed transparency policy?

44. For proposals in relation to FOI and environmental information in Scotland, see Section 4.

House of Commons Disqualification Act 1975; Scottish Parliament (Disqualification) Order 2010; National Assembly for Wales (Disqualification) Order 2010

45. Schedule 1, Part II of the House of Commons Disqualification Act 1975 lists specific bodies whose members are disqualified from becoming Members of Parliament; the British Waterways Board (BWB) is currently one of these named bodies.

46. Schedule 1, Part I of the Scottish Parliament (Disqualification) Order 2010 refers to 'Office Holders Disqualified From Being a Member of the Scottish Parliament' and BWB is also listed here.

47. Similarly, Schedule 1, Part 1 of the National Assembly for Wales (Disqualification) Order 2010 refers to 'offices disqualifying holders from membership' and BWB is listed here.

48. We do not believe that the above disqualifications should be transferred and applied to the Trustees of the new charity. What was appropriate for British Waterways as a public corporation, directly accountable to Ministers, is not, in this instance, appropriate for an independent charitable body. However, we propose that in each case the disqualification continues for the residual British Waterways Board which will be retained in Scotland.

Do you agree that the disqualifications applying to members of the BW Board through the House of Commons Disqualification Act 1975, Scottish Parliament (Disqualification)

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Order 2010, and National Assembly for Wales (Disqualification) Order 2010 should not be applied to the trustees of the NWC? If not, please explain your reasoning.

Section 4 – Consequential provision for Scotland

49. BW is a cross-border organisation and is responsible to the Scottish Government in respect of its activities in Scotland. Scottish Ministers are not proposing to change the status of BW in Scotland; the Scottish canals will remain in public ownership.
50. Following the transition of BW in England and Wales to the NWC, the BW Board will continue to exist, exercising its functions solely in Scotland. The existing legislative framework surrounding British Waterways will continue predominantly unchanged. There are a few aspects where amendments are required to allow the BW Board to operate effectively in Scotland in future without involvement from UK Government Ministers.

The Board

51. The current BW Board is required to consist of a chair, a vice chair and between four and nine other members. Defra Ministers appoint the chair; Scottish Ministers appoint two of the members, with Defra Ministers appointing the balance. All appointments are regulated by the Commissioner for Public Appointments. The quorum for the BW Board is three.
52. The BW Board operating solely in Scotland will be a much smaller organisation, and so a smaller Board will be appropriate. Scottish Ministers propose that it consist of a chair, a vice chair and between one and four other members. All these appointments will be the responsibility of Scottish Ministers, with the appointment process no longer regulated by the Commissioner for Public Appointments. It is expected that the two current Board members appointed by Scottish Ministers will continue on the Scottish-only Board until their terms are complete. Scottish Ministers do not propose to change the quorum level.

Do you agree with the Scottish Government’s proposal that the British Waterways Board, operational solely in Scotland, should consist of a chair, a vice chair and between one and four other members?

Scottish legislation

53. Currently, as a public corporation operating across Great Britain, the BW Board is generally regulated by UK legislation, rather than matching Scottish legislation. Once the Board is operating solely in Scotland, Scottish Ministers believe that it should preferably adhere to the relevant Scottish legislation. Scottish Ministers therefore propose that the Transfer Order should effect change in the following areas:-

- Freedom of Information
- Environmental Information Regulations
- Complaints procedure
- Ethical Standards.

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54. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 set responsibilities on public authorities to make information available on request. These duties currently apply to BW operating as a GB-wide organisation (see also section 3). Similar legislation exists in Scotland, with a right of appeal to the Scottish Information Commissioner. Scottish Ministers believe it desirable that a BW operating solely in Scotland should come within the scope of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004.
55. BW currently operates a three-level complaints procedure, with the final level being recourse to an independent, but not statutory, Waterways Ombudsman. Scottish Ministers propose that in future the final stage for handling complaints about BW should be to the Scottish Public Services Ombudsman.
56. In Scotland there is specific legislation on ethical standards. The Ethical Standards in Public Life etc. (Scotland) Act 2000 establishes a framework for securing the observance of high standards of conduct by councillors and other persons holding public appointments. Scottish Ministers propose that the BW Board operating solely in Scotland should be required to comply with this legislation.

Do you agree with the Scottish Government's proposal that the British Waterways Board operating solely in Scotland should, in future, come within the scope of the following relevant Scottish legislation:

- (a) the Freedom of Information (Scotland) Act 2002;**
- (b) the Environmental Information (Scotland) Regulations 2004;**
- (c) the Scottish Public Services Ombudsman Act 2002; and**
- (d) the Ethical Standards in Public Life etc. (Scotland) Act 2000?**

Water

57. Section 63 of the Transport Act 1962 requires BW to obtain Ministerial consent for the sale of water from an inland waterway. This provision was repealed by the Water Resources Act 1963 in relation to England and Wales, but has not to date been repealed for Scotland.
58. In Scotland, the Water Environment and Water Services (Scotland) Act 2003 and the Water Environment (Controlled Activities) (Scotland) Regulations 2005 and 2011 have since come into effect. BW in Scotland now holds a water abstraction licence granted by SEPA. In light of this, Scottish Ministers propose that the Transport Act 1962 provision in relation to BW waterways in Scotland should be repealed.

Do you agree that the water abstraction legislation now in place in Scotland is sufficient such that the requirement for Ministerial consent in the Transport Act 1962 can now be repealed?

Section 5 – List of consultation questions

Questions in section 3 – the transfer in England and Wales

Do you agree that the power for the Secretary of State and the 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 NWC? If not, what are the circumstances in which you envisage such directions would be needed?

Do you agree that the provisions in ss.73 to 75 of the 1962 Act and s.137 of the 1968 Transport Act are not needed by the NWC? If not, please explain your reasoning.

Do you agree that the NWC should have an enhanced statutory proposer role in relation to ministerial orders on classification and maintenance of its waterways? If not please explain your reasons.

Do you agree that the power of Ministers to direct the NWC under the Transport Act 1962 should be restricted to circumstances in the interests of national security? If not, what powers of direction, if any, should continue to apply to the NWC?

You are invited to indicate and explain your preferred option in relation to the proposed FOI, EIR and transparency regime. Are there any improvements that you would like to see to the NWC's proposed transparency statement?

Do you agree that the disqualifications applying to members of the BW Board through the House of Commons Disqualification Act 1975, Scottish Parliament (Disqualification) Order 2010, and National Assembly for Wales (Disqualification) Order 2010 should not be applied to the trustees of the NWC? If not, please explain your reasoning.

Questions in section 4 – Scottish provisions

Do you agree with the Scottish Government's proposal that the British Waterways Board, operational solely in Scotland, should consist of a chairman, a vice chairman and between one and four other members?

Do you agree with the Scottish Government's proposal that the British Waterways Board operating solely in Scotland should, in future, come within the scope of the following relevant Scottish legislation:

- (a) the Freedom of Information (Scotland) Act 2002;
- (b) the Environmental Information (Scotland) Regulations 2004;
- (c) the Scottish Public Services Ombudsman Act 2002; and
- (d) the Ethical Standards in Public Life etc. (Scotland) Act 2000?

Do you agree that the water abstraction legislation now in place in Scotland is sufficient such that the requirement for Ministerial consent in the Transport Act 1962 can now be repealed?

Annex: List of organisations invited to respond

Organisations invited to respond by Defra

- Angling Trust
- Ashby Canal Project
- Associated British Ports
- Association of Inland Navigation Authorities
- Association of National Park Authorities
- Association of Pleasure Craft Operators
- Association of Waterway Cruising Clubs
- Barge Association
- Basingstoke Canal Authority
- Boat Museum Society
- Boating Association
- Bristol Harbour Authority
- British Canoe Union
- British Marine Federation
- British Ports Association
- British Rowing
- British Waterways
- British Waterways Advisory Forum
- Broads Authority
- Business Link
- Campaign to Protect Rural England
- Canal Boat Builders' Association
- Canoe England
- Cardiff Harbour Authority
- Central Council of Physical Recreation
- Chesterfield Canal Partnership
- Commercial Boat Owners Association
- Conservators of the River Cam
- Country Land and Business Association
- Countryside Council for Wales
- Cyclists Touring Clubs
- Driffield Navigation Ltd
- Droitwich Canals Trust Ltd
- East Midlands Development Agency
- East of England Development Agency
- Electric Boat Association
- English Heritage
- Environment Agency
- Environment Trust for Richmond-upon-Thames
- Essex Waterways Ltd
- Fieldfare Trust
- Freight by Water
- Forestry Commission

Department for Environment, Food and Rural Affairs

- Grand Western Canal Country Park
- Great Ouse Boating Association
- HM Prison Service
- Hereford and Gloucestershire Canal Trust
- Heritage Alliance
- Heritage Lottery Fund
- Historic Narrow Boat Owners' Club
- Homes and Communities Agency
- Horse Boating Society
- Hutchison Ports
- Inland Waterways Association
- Inland Waterways Advisory Council
- International Mountain Bike Association
- Local Access Forums
- Local authorities in England and Wales
- Local Government Association
- Manchester Ship Canal Company
- Medway Ports
- Mersey Partnership
- Middle Level Commissioners
- National Association of Boat Owners
- National Community Boats Association
- National Farmers Union
- National Probation Service
- National Trust
- National Trust Wales
- Natural England
- Norfolk and Suffolk Boating Association
- Northern Canals Association
- One North East
- Peel Ports (Liverpool Port and Medway Port)
- Port of London Authority
- Ramblers Association
- Residential Boat Owners Association
- River Thames Society
- Royal Society for the Protection of Birds
- Royal Yachting Association
- Save Our Waterways
- Sleaford Navigation Trust
- Southern Canals Association
- Sport England
- Steam Boat Association of Great Britain
- Stroudwater Navigation
- Sustrans
- Thames User Group
- Town and Country Planning Association
- Towpath Action Group
- United Kingdom Major Ports Group

Department for Environment, Food and Rural Affairs

- Upper Avon Navigation Trust
- Waterways Trust
- Welsh Local Government Association
- Wey and Arun Canal Trust
- Wey Navigations
- Wildlife Trusts
- Wildfowl and Wetlands Trust
- Wiltshire and Berkshire Canal Trust
- Yacht Harbour Association

Organisations invited to respond by the Scottish Government

- Argyll & Bute Council
- Bridge 19-40 Canal Society
- British Waterways Scotland
- British Waterways Scotland Group
- City of Edinburgh Council
- East Dunbartonshire Council
- Edinburgh Union Canal Society
- Falkirk Council
- Forth and Clyde Canal Society
- Glasgow City Council
- Glasgow Paddlesports Centre Supporters Group
- Great Glen Canal Users Association
- Helix Trust
- Highland Canals Customer Forum
- Highland Council
- Linlithgow Union Canal Society
- Lowland Canal Volunteer Group
- Lowland Canals Customer Forum
- North Lanarkshire Council
- Re-union Canal Boats
- RYA Scotland Inland Waters Sub-Committee
- Seagull Trust Cruises
- Scottish Canoe Association
- SportScotland
- Waterways Trust Scotland
- West Dunbartonshire Council
- West Lothian Council