

Report to the Secretary of State for Environment, Food and Rural Affairs

by RJ Perrins MA

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Date 21 July 2022

Marine and Coastal Access Act 2009

Objection by [redacted]

Regarding Coastal Access Proposals by Natural England

Relating to Birkenhead to the Welsh Border

Objection Ref: MCA/BHW2/O/1/0843

Red Rock's slipway, Stanley Toad, Hoylake to 'The Boat House' Public House, Parkgate.

- On 16 December 2020, Natural England submitted a report to the Secretary of State setting out the proposals for improved access to the coast between Birkenhead and the Welsh Border under section 51 of the National Parks and Access to the Countryside Act 1949 (the 1949 Act) pursuant to its duty under the Marine and Coastal Access Act 2009.
- An objection to Report BHW2, Red Rock's slipway, Stanley Toad, Hoylake to 'The Boat House' Public House, Parkgate, was made by [redacted] on 4 February 2021. The land in the report to which the objection relates is route section BHW-2-S031 to BHW-2-S037 on Map 2e.
- The objection is made under paragraph 3(3)(d) of Schedule 1A to the 1949 Act on the grounds that the proposal fails to strike a fair balance for the reasons set out in the objection.

Summary of Recommendation: I recommend that the Secretary of State makes a determination that the proposals set out in the report strike a fair balance.

Procedural Matters

1. On 16 December 2020 Natural England (NE) submitted a report to the Secretary of State setting out proposals for improved access to the coast between Birkenhead and the Welsh Border. The period for making formal representations and objections to the reports closed on 10 February 2021.
2. There were no other objections to report BHW2 and no relevant representations. I have been appointed to report to the Secretary of State on this objection.
3. I carried out a site inspection on 26 April 2022 accompanied by the objector their agent and by representatives from NE and Wirral Council. At the site visit it was agreed that the section of footpath bordering the objector's land was best viewed from that land given the Council had closed it to public access for safety reasons. I also walked, on my own, the nearby Wirral Way where it abuts the objector's land and the proposed route for some distance to West Kirby.

Main Issues

4. The coastal access duty arises under section 296 of the Marine and Coastal Access Act 2009 (the Act) and requires NE and the Secretary of State to exercise their relevant functions to secure a route for the whole of the English coast which:
 - (a) consists of one or more long-distance routes along which the public are enabled to make recreational journeys on foot or by ferry, and
 - (b) (except for the extent that it is completed by ferry) passes over land which is accessible to the public.

5. The second objective is that, in association with the English coastal route ("the trail"), a margin of land along the length of the English coast is accessible to the public for the purposes of its enjoyment by them in conjunction with the coastal route or otherwise. This is referred to as the coastal margin whilst the trail is the path corridor through the coastal margin. The trail is referred to as the England Coast Path.
6. Section 297 of the Act provides that in discharging the coastal access duty NE and the Secretary of State must have regard to:
 - (a) the safety and convenience of those using the trail,
 - (b) the desirability of that route adhering to the periphery of the coast and providing views of the sea, and
 - (c) the desirability of ensuring that so far as reasonably practicable interruptions to that route are kept to a minimum.
7. They must also aim to strike a fair balance between the interests of the public in having rights of access over land and the interests of any person with a relevant interest in the land.
8. NE's Approved Scheme 2013, approved by the Secretary of State on 9 July 2013, ("the Scheme") is the methodology for implementation of the England Coast Path and associated coastal margin. It forms the basis of the proposals of NE within the Report.
9. My role is to consider whether or not a fair balance has been struck. I shall make a recommendation to the Secretary of State accordingly.

The Coastal Route

10. The trail at BHW-2-S030 follows, in a south-easterly direction, the route of an existing footpath that runs on top of the headland and adjacent to the objector's land (predominantly pasture at this point, with stockproof fencing) where it follows the headland around an outfall, to some dilapidated steps which once led onto the beach. This section of footpath and steps are on land managed by the Council and are currently closed, as set out below, for safety reasons. The proposed route then enters onto the objector's land (predominantly arable at the time of my visit with no fencing along the headland) and runs along the top of the headland before joining up with the existing footpath on the adjacent National Trust land.
11. The objector therefore owns land inland of the trail, and land upon which the trail would be established. Running more or less parallel to the trail to the north is the well-used Wirral Way. The majority of that, near to the trail, is split into two with one path for cyclists and pedestrians and a separate path for horse riders. North of BHW-2-S030 the trail enters the Wirral Country Park running on top of the headland before turning inland following the Wirral Way into the outskirts of West Kirby.

The Objection

12. The objector states that the proposed route needs to be diverted to avoid the Thurstaston Cliffs at all costs. The cliffs are currently dangerous and life

threatening, as evidenced by the warning messages posted by Wirral Council on social media regarding further collapses of the cliffs. That reminds people not to try and walk over any collapsed material or walk up to the cliffs. People have also had to be rescued recently from muddy debris caused by the cliff collapse in Thurstaston.

13. Furthermore, knowingly placing a route along dangerous cliffs where news reports are warning the public from the area is not responsible. The whole section of cliff proposed for the footpath is unsafe and falling away. This is not an area which can be explored or be considered safe to picnic by the public. A public path should not be allowed. NE would knowingly be putting public lives in danger.
14. In addition, the local authority has recognised issues and dangers arising from eroding cliffs through the closure of paths at the Country Park where warning signs are displayed. Fencing has also been destroyed on the cliff path separating the Country Park and the objector's farm. This fencing is well within the local authority's ownership however, vandalism is creating additional costs and use of the public purse to repeatedly repair fences. The general public in this area do not have respect for the countryside code.
15. There has also been an incident of arson and the footpath would increase the risk of further crop damage. The objector is also concerned that the footpath would increase their liability because of the evident dangers to the public to which the objector is fully aware.

The Response by Natural England

16. NE acknowledge the cliffs are eroding and retreating along this part of the coast. This is not a new situation and is entirely expected for soft cliffs in particular. One of the key provisions of the Marine and Coastal Access Act 2009 is that the England coast path can respond to such coastal change by rolling back overtime as required. The proposal for the route closely follows the specific advice detailed in the approved scheme.
17. There are few other options for the alignment of the coast path in this area. Any routes on the foreshore were discounted as it would not be generally consistent with the guidance in the approved scheme. Furthermore, walkers using the foreshore in this area would be obliged to remain on the foreshore for some 1.6 kilometres overall with no safe means of escape if caught by a rising tide. The Wirral Way was also discounted given the proposed route is a better fit with the advice in the approved scheme. The Wirral Way is some distance inland here with minimal views to the estuary. Any such alignment would have led to the creation of a more extensive area of coastal margin by default which would be legally accessible by the public.
18. Subsequent to submitting the proposal, the cliff adjacent to route section BHW-2-S031 has further eroded forcing the closure of the public footpath proposed as part of the route of the England coast path. Natural England suggests that the route of the England coast path, at this point, should now be realigned slightly inland. That would be a necessary modification to the proposals to provide adequate distance between the route itself and the Cliff edge.

19. In addition, it would alleviate concerns about safety expressed in the objection. That has been agreed with Defra. Any such change would be put forward in a separately published modification report. NE would expect to discuss the alignment and other aspects with the objector prior to finalising the plans and publishing the modification report.
20. With regards to public safety, the rescue came about as persons were trying to avoid the incoming tide on the foreshore rather than as a result of access along the top of the cliffs. Therefore, such incidents are not relevant to the proposed route alignment at the top of eroding cliffs. In fact, such incidents might be more likely to happen in the absence of the coast providing good views over the estuary. In such circumstances more walkers might be inclined to use the foreshore as opposed to a route some distance further inland.
21. Natural England appreciate the concerns over vandalism, arson and other forms of anti-social behaviour. However, there is no evidence to suggest that such issues are exacerbated by increase of public access over adjoining land. Far from making such issues more likely, regular use by walkers might tend to reduce such issues by acting as a visual deterrent to others. NE would continue to support all efforts to better educate the public in terms of their rights and responsibilities in the countryside.
22. With regards to liability, land subject to coastal access rights has the lowest level of occupier's liability known in English law. An occupier would not be liable for any damage or injuries caused by any physical feature on the land whether it is a natural feature of the landscape, or a man made one. Reduction in occupier's liability effectively reduces that liability to below that owed to a trespasser on the land. This directly reflects the fact that the coastline is recognised to be an inherently risky environment and that walkers are responsible for their own safety. NE does not agree that the landowner's liability would increase as a result of our proposals.

Discussion

23. I have no doubt that allowing public access to the current right of way, as accepted by all the parties would be highly dangerous and should be prevented if possible. It is due to this danger that the Council has closed the section of path at BHW-2-S030 and erected barriers. Although as I saw at my site visit the barriers are being overcome and the pathway appears to still be used to some degree. I also saw from my site visit that erosion continues and, as set out by NE, cliffs eroding and retreating along this part of the coast is not a new situation. It is entirely expected for soft cliffs.
24. That is corroborated by one of the key provisions of the Marine and Coastal Access Act 2009 in that the English Coast path can respond to such coastal change by rolling back over time as required. NE's Approved Scheme 2013 sets out that Section 55B of the 1949 Act provides powers for the future line of the trail to be moved in an area which may be subject to significant coastal erosion.
25. Nevertheless, I agree with NE that there are few other options for alignment of the path. With regards to a route on the foreshore, I recognise average

high-water marks may be away from the base of the cliffs, and the Wirral Way could be used as an alternative for higher tides (as discussed in the CLA Advisory Handbook – CLA74 Coastal Access a Guide for Landowners). However, such a route was rightly discounted in accordance with the Scheme and risk associated with rising tides which leaves the only alternative route continuing along the Wirral Way. That route is well-established and would appear, on its face, to be a pragmatic response to the objections raised. A realignment along it would simply continue the proposed route along the Wirral Way rather than using the eroded coastal path.

26. However, I was able to walk the proposed route to West Kirby where much of it is inland and coastal views are limited due to topography, trees, development and a golf course amongst other things. That is in stark contrast to the views that are found from the proposed route where the existing footpath is currently closed. The landscape is unhindered and provides direct views of the sea; when approaching from West Kirby the difference in the availability of open uninterrupted views to that found on the walked section of the Wirral Way is tangible.
27. If this section was also positioned along the Wirral Way, those views would be lost. Whilst I was able to see that some views of the coastline and sea would be available, the majority of them would need to be actively sought and would be nowhere near comparable to that which would be afforded on the headland. That would be at odds with the Act which, as set out above, requires the Secretary of State to have regard to, amongst other things, the desirability of the trail adhering to the periphery of the coast and **providing views of the sea** (my emphasis). The Scheme reflects that, setting out that the trail should normally offer views of the sea, because they are a key part of many people's enjoyment of the coast.
28. It seems to me therefore that, if possible, the route should follow the proposal at this point. In that regard, and whilst I accept the concerns of the objector that the current trail is evidently unsafe, I must consider whether the route would be a fair balance in the face of the objections raised. In coming to that view, I have considered the alternative of a route on the foreshore and whilst I recognise it could be walked (as I did during my visit), the route would be uncertain given tidal variances and ongoing erosion.
29. Turning to the objections raised, there is no dispute that two people had to be rescued from the incoming tide in a location near to where the cliffs had collapsed. However, I see no reason to disagree with the view that was a rescue of people using the foreshore looking to escape the tide. Moreover, an accessible coastal path with views across the estuary would likely discourage walkers from using the foreshore.
30. As I have already set out the current route is dangerous with the footpath being closed and erosion continuing. Although, as NE state, the roll back provision is in place to reflect the changing nature of the coastline where erosion or other geomorphological processes continue. The Scheme at 4.10 addresses this in some detail and recognises that a continuous and sustainable trail cannot follow the same fixed route year after year on.

Furthermore, Section 55B of the 1949 Act provides powers for the future line of the trail to be determined in accordance with provision made in proposals to the Secretary of State, enabling the trail to be moved inland as the coast changes.

31. In this case erosion has occurred since the proposal was submitted and the footpath closed. NE have recognised that and propose a separate Modification Report covering the closed section only in consultation with the objector. I will return to that proposal shortly.
32. With regards to vandalism and anti-social behaviour, again incidences are not disputed. Although, the arguments that such incidences might reduce with regular use by law-abiding walkers, and that those who perpetrate such things have little regard to legal rights of access, are not without merit. There is no substantive evidence that suggests new rights of access lead to an increase in such activity. This inevitably carries little weight in the balance.
33. Turning to landowner's liability, I have some sympathy with the concerns expressed but again must temper the weight I give to them. Land subject to coastal access rights is subject to the lowest level of occupier's liability known in English law. The Scheme at 4.2 makes that clear with the key principle that visitors should take primary responsibility for their own safety when visiting the coast and for the safety of any children or other people in their care, and should be able to decide for themselves the level of personal risk they wish to take. In addition, setting out that it would be extremely unlikely in normal circumstances that an occupier could successfully be sued in relation to injury on land with coastal access rights.
34. Taking all of these matters into account I conclude that the proposals would comply with the duty in Section 297 of the Act, but for the safety of the public along the section of the route that is currently closed. To that end I return to the proposed modification and the rollback provision.

Rollback

35. As set out above, the Scheme addresses rollback in some detail. In addition, the overview report for this stretch of path confirms that NE would take all reasonable steps to discuss implications and options with all parties likely to be affected by such changes, both during the initial planning work that preceded the writing of the reports for each length, and during any future work to plan and implement a 'rolled back' route.
36. Rollback provision was also identified in the original report for this stretch of coastal path and where sections of the approved route need to change in order to remain viable, the new route would be determined by NE without any requirement for further reference to the Secretary of State. Furthermore, coastal erosion can happen at any time and so, in some cases, this provision may need to be invoked between approval of the report and commencement of new access rights.
37. In this case it is clear that NE propose to publish a Modification Report in that regard and would discuss the alignment and any works required with the objector. That is commensurate with the overview report which also sets

out that when determining a new route, NE will take into account the local factors present at that time, including any views expressed by people with a relevant interest in affected land.

38. Thus, whilst I recognise concerns regarding exception land, and any realignment, NE would discuss the realignment with the objector prior to finalising plans, along with matters concerning establishment works, realignments of the fence, and future implications of rollback. It seems to me therefore that such an agreed scheme would be a fair balance.

Habitats Regulation Assessment

39. This is to assist the Secretary of State, as the Competent Authority, in performing the duties under the Conservation of Habitats and Species Regulations 2017 (as amended) (the Habitats Regulations). The Competent Authority is required to make an Appropriate Assessment (AA) of the implications of a plan or project for the integrity of any European site in view of the site's conservation objectives.
40. The appropriate nature conservation body must also be consulted, in this case NE. If the AA concludes that an adverse effect on the integrity of a European site cannot be excluded beyond reasonable scientific doubt (in accordance with the precautionary principle established in CJEU Case C-127/02 Waddenzee 7 September 2004, Reference for a preliminary ruling from the Raad van State (Netherlands) in the proceedings: Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij), then consent for the plan or project can only be granted if: there are no alternative, less harmful, solutions; the plan or project must be carried out for imperative reasons of overriding public interest (IROPI); and compensatory measures can be secured which maintain the ecological coherence of the UK National Site Network.
41. A 'shadow' HRA entitled *Assessment of England Coast Path proposals between Birkenhead and Welsh Border on: Liverpool Bay SPA; Mersey Narrows and North Wirral Foreshore SPA / Ramsar; Dee Estuary SPA/Ramsar; and Dee Estuary SAC*, dated 8 December 2020 was undertaken by NE in accordance with the assessment and review provisions of the Habitats Regulations and is recorded separately in the suite of reports.
42. This shadow HRA (referred to hereafter as 'the HRA') was provided to inform the Competent Authority's AA and has been considered in making this recommendation. The HRA considered the potential impacts of the coastal access proposals on the following European sites: Dee Estuary Special Area for Conservation (SAC), Liverpool Bay Special Protection Area (SPA), Mersey Narrows and North Wirral Foreshore SPA, Dee Estuary SPA and the Dee Estuary Ramsar site. The HRA is considered to have identified the relevant sites affected by the proposals. The proposals are not directly connected to or necessary to the management of the European sites', therefore a HRA is required.

43. The HRA screening exercise found that the proposals may have significant effects on some or all of the Qualifying Features of the European Sites 'alone' or in-combination in the absence of mitigation measures. On this basis, the HRA considered the potential for the proposals to give rise to Adverse Effects on the Integrity (AEoI) of the designated sites.
44. The scope of the assessment is set out in Table 5 of the HRA and identifies the sites and qualifying features for which likely significant effects (LSE) 'alone' or 'in combination' could occur, and the impact-effect pathways considered. Part D sets out the assessment of AEoI for the identified LSE. Table 6 identifies the conservation objectives for the sites considered.
45. In section D4 of the HRA, NE considered whether the appreciable effects that are not themselves considered to give rise to AEoI from the proposals alone to determine whether they could give rise to an AEoI in combination with other plans or projects. Insignificant and combinable effects likely to arise, and with the potential to act in-combination with the access proposals, were identified in relation to Mersey Narrows and North Wirral Foreshore and The Dee Estuary. However, assessing the risk of in-combination effects (Table 10 of the HRA), NE concluded that, in view of site conservation objectives, the access proposal would not have an adverse effect on the integrity of any of the European sites considered either alone or in combination with other plans and projects.
46. The assessment of AEoI for the project takes account of measures to avoid or reduce effects incorporated into the design of the access proposal (Section D5). The assessment identifies that the measures incorporated into the design of the scheme are sufficient to ensure no AEoI in light of the sites' conservation objectives. Those relevant to this report where there is some residual risk of insignificant (ie unlikely to undermine integrity) effects are the disturbance of feeding or resting non-breeding waterbirds during the winter or passage periods.
47. Part E of the HRA sets out that NE are satisfied that the proposals to improve access to the English coast between Birkenhead and Welsh Border are fully compatible with the relevant European site conservation objectives. NE's general approach to ensuring the protection of sensitive nature conservation features is set out in section 4.9 of the Approved Scheme.
48. To ensure appropriate separation of duties within NE, the assessment conclusions are certified by both the person developing the access proposal and the person responsible for considering any environmental impacts. Taking these matters and the information in the HRA provided into account, reliance can be placed on the conclusions reached that the proposals would not adversely affect the integrity of the European sites assessed. It is noted that, if minded to modify the proposals, further assessment may be needed.

Nature Conservation Assessment

49. The NCA, 25 July 2019, should be read alongside the HRA. The NCA covers matters relating to Sites of Special Scientific Interest (SSSI) Marine Conservation Zones and undesignated but locally important sites and features, which are not subject to consideration in the HRA. Relevant to this

report are the Mersey Narrows SSSI, the North Wirral Foreshore SSSI and the Dee Estuary SSSI. NE were satisfied that the proposals to improve access to the English coast between Birkenhead and the Welsh border were fully compatible with their duty to further the conservation and enhancement of the notified features of the SSSIs, consistent with the proper exercise of their functions.

50. In respect of the relevant sites or features the appropriate balance has been struck between NE's conservation and access objectives, duties and purposes.

Conclusion & Recommendation

51. Having regard to these and to all other matters raised, I conclude that the proposals would strike a fair balance. The matters raised in relation to the objections, with particular regard to the dangerous condition of Thurston Cliffs and the footpath closure are not without merit. However, the rollback provision would allow for a modification to align the trail to provide adequate distance between the route and cliff edge. In turn that would meet the coastal access requirements. I therefore recommend that the Secretary of State approves the proposals.

Richard Perrins

APPOINTED PERSON