

PUBLIC CONSULTATION REPORT, March 2013

Changes to BW Contract Terms Relevant to Houseboats and to Boats Moored on Certain BW Mooring Sites in London

This consultation ran from 30th May to 30th September 2012. During this period, the Canal & River Trust was created. To simplify this report, reference is made to British Waterways rather than the Trust throughout. The consultation paper can be downloaded from <http://canalrivertrust.org.uk/about-us/consultations/completed-consultations>, or call 03030 404040 for a paper copy.

See page 9 for a summary and statement of how the Trust intends now to proceed.

Consultation approach and responses

We aimed to contact all boaters with a British Waterways (BW) residential mooring, sending the document by email if they had registered their address with us, otherwise by post. Several respondents said they did not receive the information and were informed by neighbours. Residential mooring sites are close knit communities and we believe it unlikely that significant numbers of people missed out on the opportunity to read and respond to the consultation, which was also reported in the waterways print media.

There were 36 responses as follows:

- 23 respondents primarily seeking clarification of their personal circumstances¹, 6 of whom made some additional comments on the proposals
- 11 respondents primarily commenting on the proposals, 2 of whom said they also represented the views of others on their mooring site
- 2 national organisations: Residential Boat Owners' Association (RBOA) and National Association of Boat Owners (NABO)

There were two other responses acknowledging receipt of the paper but making no further comment and one query relating solely to VAT, not the proposals. These are excluded from the analysis.

Key themes of the responses

The responses can be grouped under the headings below. More detail and a response from BW follow in the next section.

1. Clarification sought
2. Objection to the new definition of a Houseboat
3. Objection to proposed changes to assignment
4. Exceptional Mooring Sites in London
5. Comments on the draft Mooring Agreement for Boats with Houseboat Certificates
6. A price difference between a Houseboat Certificate and Pleasure Boat licence is unjustifiable
7. Other comments

¹ BW has responded to most people, particularly relating to their boat's licensing history and status in respect of the proposals. A few still require a detailed response and will receive a response shortly.

Key themes of the responses and commentary from BW

1. Clarification sought

In summary:

A range of specific questions were asked relating to 'technicalities' of assignment, premium protection, references to statute and clarification on the meaning of certain phrases.

In detail:

- Some people found it difficult to understand the changes proposed (3 respondents)
- Clarification was sought on specific points, e.g. *what is the ability of the person to whom I sell my boat to re-assign in the future?*
- Premium 'protection' – 3 respondents wanted greater clarity on this issue; one believed BW will compensate them for lost premiums.
- Statute relating to assignment of the remaining portion of the Houseboat Certificate - one respondent wanted the specific reference.
- "Sites authorised for residential use" – RBOA sought clarification on the meaning of this phrase, saying *"If this refers to having planning approval this excludes sites which are recognised as residential but have not obtained planning approval (In some cases a Certificate of Lawful Use may be appropriate.)"*

BW comments:

We know that this is a complex issue and difficult to understand. Some of these points were explained as best we could in the consultation paper. We are responding to some individuals as appropriate. We will also ensure there is clarity on these issues in our final statement/policy document.

In response to the RBOA's query on our phrase "*Sites authorised for residential use*", we categorise all of our long-term moorings as either leisure or residential (this categorisation is shown on our annual mooring fee list and on any auctioned moorings). The residential mooring sites either have planning permission for residential use or a long established residential use.

2. Objection to the new definition of a Houseboat

In summary:

There was strong feeling against the new definition. People felt that the change causes confusion and ambiguity, particularly with HMRC and is unnecessary. They said that BW should not have reacted to just one complainant and people should have been consulted. Some said BW cannot change the definition or terms in the 1971 and 1995 BW Acts, and by doing so BW changes the rights intended by the law.

In detail:

- There was dissatisfaction that BW had responded to just one complainant and changed the definition (1 respondent)
- One respondent said that BW should have consulted people on the new definition (1 respondent)
- Some stated that Houseboats are defined in the 1971 and 1995 BW Acts and that BW has no powers to change the definition or the terms. (6 respondents plus NABO who also say they are content with the wording of the new definition.)
- They also said that the right to obtain a Houseboat Certificate, and thus the benefits that derive from the conditions of the Houseboat Mooring Permit, stem from the definition of a Houseboat for licensing purposes in the Acts. (5 respondents)

- They also said that the 1995 Act allows for a Houseboat to be moved without purchasing a separate licence and be treated as though it is licensed as a Pleasure Boat. Therefore any new definition is unnecessary. (5 respondents)
- People felt that the new definition causes confusion and ambiguity, saying:
 - a. The definition **does not distinguish between immovable floating craft (traditionally considered as Houseboats) and movable/powering boats** used for residential purposes. (2 respondents, one of whom did not want to change his powered boat licence from Pleasure to Houseboat in order to sell it.)
 - b. It will **lead to confusion in other fields**. RBOA: "... previous issues have centred around this and the HMRC definition² of craft that are not capable of moving under their own propulsion is generally accepted... VAT is not applicable for residential houseboat moorings; this is a further reason for not changing the definition." 5 respondents said the definition in the BW Acts should be used, unless "... a common definition is found that encompasses other definitions of "Houseboat" that are used for other purposes such as VAT and Council Tax..."
 - c. The **wording is ambiguous**: "The 'predominant use' of a residential craft which is used for navigation 'from time to time' is questionable and is likely to cause problems in the future." (RBOA)
 - d. It will have a **knock-on effect on the definition of Pleasure Boat**. 5 respondents say: "BW could attempt to terminate the licences of boats by claiming that these boats are Houseboats under a widened definition of Houseboat and are therefore incorrectly licensed."

BW comments:

We were challenged on our definition and the complaint was referred to the Ombudsman. During this time we asked our legal team to consider the definition.

There is apparent ambiguity between the definition of a houseboat in the BW Act 1971 (which defines a houseboat as a vessel not used for navigation) and the provision in Schedule 1 of the BW Act 1995 which says that a houseboat may "be moved". The apparent ambiguity is however resolvable if the statutory language is carefully analysed.

In addition and given that the definition in the 1971 Act was not repealed or amended by the 1995 Act the provision in paragraph 15 of Schedule 1 of the 1995 Act has to be construed in the context of that definition.

We subsequently accepted that the previous definition was too restrictive so we amended it and took on board the Ombudsman's comments. This revised definition had been in place since 2010.

Because it is a technical legal matter, it was not appropriate to conduct a public consultation on the revised definition. The potential ramifications of the change for people living on their boats on our moorings however meant that we needed to consult on these terms and conditions.

We included the amendment to the definition within the consultation on boat licence changes published in November 2010.

² HMRC Reference Notice 701/20 (April 2012) 7.1 What is a houseboat? A houseboat is defined for the purposes of VAT as being a floating decked structure which is designed or adapted for use solely as a place of permanent habitation and which does not have the means of, and which is not capable of being readily adapted for, self-propulsion.

3. Objection to proposed changes to assignment

In summary:

There were objections (a) on principle and (b) by people who believed their existing right to assign was compromised. People said that the 1995 Act allows almost unconditional assignment of the Houseboat Certificate so BW cannot undermine this by adding conditions to the mooring permit. Nor can it create two 'tiers' of Houseboat Certificate conditions. They said that if the buyer cannot renew the mooring permit, this makes the right to assign effectively worthless and takes away their security. Some said it nullifies the intent of the 1995 Act. Some people believed their existing right to assign was compromised (although their status needed clarifying by BW and may not have been the case).

In detail:

- People felt that **the 1995 Act confers the right to assign the Houseboat Certificate without any qualification** regarding the duration or renewal of the certificate once it has been assigned. Therefore the right to assign the mooring permit should be in exact parallel with the right to assign the Houseboat Certificate. This is the intent of the Law. BW cannot reasonably undermine this right by refusing to assign the mooring permit. (5 respondents plus NABO)
- They **objected to two 'tiers' of Houseboat Certificate terms and conditions** where some can assign in future but others cannot. This is inequitable. BW doesn't have the powers to do this and the 1995 Act makes no provision for different types of Houseboat Certificate. There should be a common scheme for all. (5 respondents plus NABO who also said: "... However it is noted that assignment of mooring costs that shelters moorers from review in costs is an unreasonable benefit, and unfair to others enjoying similar facilities... NABO does not support generating new terms and conditions for new HB certificates in an attempt to solve this problem.")
- They said that if the buyer cannot renew the mooring permit, **this makes the right to assign effectively worthless and takes away their security**. People bought their Houseboat with a right to sell whether before or after July 2010. This nullifies the intent of the 1995 Act, and is therefore unlawful. (8 respondents)
- One respondent objects if he is affected
- One respondent objects *"if these changes would mean that people's homes are vulnerable to future increases."*

BW comments:

We are not seeking to take away people's ability to assign their Houseboat Certificate and associated mooring agreement where there has been a history of assignment and our previous management has allowed on-going assignment. We were not intending to change this practice for this group. As we said in the consultation paper: *"We have been careful to ensure that those who have already purchased a boat for a price which includes a premium relating to the mooring do not lose out."* We did however want to clarify to this group that our practice to allow assignment beyond the expiry of the certificate is more generous than the provisions contained in the statute³. The 1971 Act refers to assignment of the remaining term and the 1995 Act entitles the holder to assign the certificate (which is for a certain period of time) – see wording of Paragraph 5 of Schedule 1 below. Therefore the assignment relates to

³ 1995 Act Schedule 1. 5. Assignment of certificate: The holder shall be entitled to assign the certificate to a person (being aged 18 or over) approved by the Board whose approval shall not be unreasonably withheld.

1971 Act Part IV section 19(2):

(2) The Board on receipt of notice of the transfer shall without charge issue to the transferee a new pleasure boat certificate, or houseboat certificate, as the case may be, in respect of the pleasure boat or houseboat for the period for which the existing certificate is unexpired.

the remaining period (unexpired portion) of the certificate .

The issue we are seeking to control is this:

The revised definition means that people who have not previously held a houseboat certificate on a BW residential mooring site may now apply for one (if their boat satisfies the new definition). They can assign the remaining term of their houseboat certificate to someone who buys their boat, whereas they could not previously assign their Pleasure Boat Licence. It is this scenario that we seek to control. Why? Since there is no history of assignment or previous mooring premium paid, it is not right to grant the customer unlimited assignment into the future. To do so would enable them to gain financially by selling their houseboats on the mooring for a potential premium when they have not paid a premium before. We therefore proposed that if these people opt for a houseboat certificate instead of a pleasure boat licence, they will be able to assign only the remaining term of the Houseboat Certificate i.e. strictly within the provisions contained in the statute, and associated mooring permit. At the end of the term, the mooring would be vacated and we would offer it for auction.

The change to the definition has effectively created two groups of customers with houseboat certificates – one where there has been a history of assignment (and in many cases premiums have been paid), and one where there has not. We recognise that we should continue our practice of allowing assignment into the future for the former group but it is not right to grant it to the latter group.

4. Exceptional Mooring Sites in London and other sites where people with a Pleasure Boat Licence have been permitted to ‘assign’ i.e. sell their boat on its mooring

In summary:

Many of the specific enquiries sought clarification about their mooring in London; BW responded individually. Additionally, some people believed their existing right to assign was compromised but this was not necessarily the case.

In detail:

- People said that **the right to assign at these mooring sites should remain the same**. It is unfair to now penalise the Houseboat owners who bought their Houseboat under the current regime. (7 respondents plus NABO)
- They felt that **BW cannot retrospectively change terms of contracts already taken out**. The moorers accepted the Terms and Conditions that existed at the time. BW cannot add any of the proposed new conditions. (7 respondents plus NABO who also said “*They are a matter of contract, and if BW requires relief from these, then this is a matter for negotiation, perhaps arbitration and settlement.*”)

BW comments:

We recognise that we have allowed assignment for some boats at particular sites. These may be boats with a Pleasure Boat Licence at a residential mooring or, in fewer cases, at a leisure mooring. In some cases, premiums have been paid.

Our response is similar to theme 3 above. We are not looking to change this practice for these particular customers. In short, their ability to assign will remain unchanged where there has been a history of assignment and our previous management has allowed on-going assignment.

In these cases, for whatever reason the assignment was permitted, we will continue to allow these people to assign, because to do otherwise would penalise them.

5. Comments on the Draft Mooring Agreement for Boats with Houseboat Certificates

In summary:

Views on the conditions of assignment included support, recommendation of a proportionate approach and objection (on the basis that there should be no exclusions to assignment apart from those in the 1995 Act and the conditions are discriminatory). In the event of death, some said the mooring permit should transfer to any person who was resident with the deceased holder. Several comments were also made on terms other than assignment.

In detail:

Section 2.31 Conditions of assignment

- 1 respondent **fully supports** clauses 2.31 a) to e) and urged BW to enforce them at their site.
- 1 respondent said: unless there is “...a **reasonable, expedient procedure and timeframe** this **would make sales even more difficult than the proposal already makes them.**”
- People felt that **there should be no other exclusions to assignment apart from those in the 1995 Act** which refers to a person aged 18 or over "approved by the Board whose approval shall not be unreasonably withheld". The right to assign the mooring permit should be in exact parallel to this. (5 respondents)
- Sections 2.31 (a) to (d) and (e) (i) to (e) (v) **discriminate against people who are in receipt of Housing Benefit** which could be construed as indirect discrimination on the basis of age, disability or gender contrary to the Equality Act 2010. (5 respondents)
- NABO recommended a **proportionate approach** so that minor issues would not exclude assignment. They also said CRT should “**use normal payment recovery and not mix these with licence terms which are a fundamentally different issue with their own specified redress for CRT.**”

BW comments:

We are entitled to apply conditions to the Houseboat Certificate. In addition, we are proposing conditions of assignment to the mooring agreement terms. This is an annual agreement (or 3 yearly agreement for auctioned moorings) which we can amend from time to time. We have considered the points made by respondents, but, on balance, believe that the terms we are proposing are reasonable precautions to minimise risk of future customer defaults. They are also a prudent measure to adopt for the management of our estate and the Trust's revenue streams.

Section 2.32 Assignment in the event of death of the owner

- People said there should be an automatic right to assign or transfer the mooring permit to **any person who was resident with the deceased holder**, in line with Article 8 of the European Convention on Human Rights, **so that the surviving resident(s) of the Houseboat do not lose their home**. This should apply regardless of whether they are named as the beneficiaries and regardless of whether or not the holder died intestate. (5 respondents)
- One person asked BW to confirm that when a boat is transferred as a gift or through a will that it **would not lose the Houseboat license at the end of the unexpired term?** (1 respondent)

BW comments:

We believe the correct legal approach is to transfer the remaining term of the Houseboat Certificate to the beneficiary. The beneficiary's ability to assign in future will depend on whether there was a history of on-going assignment or not.

Comments on other terms (not relating to assignment) of the Draft Agreement

Respondents stated that:

- There is **confusion/inconsistency of terminology** throughout the document between ‘certificate’, ‘licence’ and ‘permit’ which should be limited to one or each defined. (RBOA)
- **Section 2.35 (termination if no payment) discriminates against people receiving Housing Benefit** who may be in arrears of payment due to delays in their benefit. This could also be construed as indirect discrimination on the basis of age, disability or gender contrary to the Equality Act 2010. (5 respondents)
- **Section 2.37.2 (termination if cannot put things right)** is “*both unreasonable and in breach of Article 6 of the European Convention on Human Rights.*” (5 respondents)
- **Section 2.13 (you must not keep, place or hang anything...)** is “*excessive and unreasonable, especially since many moorings do not have explicit site rules...*” (5 respondents)

BW comments:

We will ensure that terminology is consistent in the mooring agreement. We also note the comments made about other terms (not relating to assignment).

In response to the points about discrimination, having considered them carefully, we do not agree that the clauses referred to amount to unfair discrimination under the laws cited.

6. A price difference between a Houseboat Certificate and Pleasure Boat licence is unjustifiable

Respondents said that if there is no difference between the Houseboat Certificate and the Pleasure Boat licence, there should be no difference in cost. BW receives the price differential from residential mooring fees.

BW comments:

We note respondents’ views on this point. We have no immediate plans for a price differential.

If we were to propose this in the future we would provide our rationale and initially seek the views of the Trust’s Navigation Advisory Group.

7. Other comments

In summary:

Other comments included the fact that some additional benefits of a Houseboat Certificate had not been stated by BW, concern over mooring fees and auctions, a qualified welcome for Houseboat terms and conditions, and support for the proposals by one household.

In detail:

Other benefits of a Houseboat Certificate not stated by BW

BW had stated: “*The reason why some people prefer to have a Houseboat Certificate is because it carries some ability to assign the mooring permit upon sale of the boat.*” 6 respondents gave what they believe are other benefits of a Houseboat Certificate that should have been included:

- NABO said: “HBC give better mooring rights including basic protections against being evicted from moorings and being made homeless. The right to assign is in itself a poor justification for paying the additional cost of mooring. NABO finds CRT statement as insensitive and inappropriate.”
- 5 respondents each said: “The main advantage of HBC is security of tenure, as laid out in Schedule I Part II Section 4(3) and (4) of the 1995 Act, in that if the mooring for a boat licensed as a Houseboat is removed or closed temporarily or permanently, BW/ CRT has to provide an alternative mooring at their own expense. Another advantage is that Section 33 of the 1995 Act also means that the holders of Houseboat Certificates wishing to take legal action to defend their homes can usually start their case in the local County Court and not the High Court. Neither of these advantages has been noted in the consultation document.”

BW comments:

We have copied the relevant section of the term in the 1995 Act Schedule I Part II Section 4(3) relating to the removal of houseboats below:

... if they so move or require the removal of the houseboat during the period of validity of the certificate, the Board (unless they would be entitled under paragraph 6 below to determine the certificate) shall make available for it a suitable mooring or other location (which shall be broadly comparable to the site) situated as near as is practicable to the site, and shall permit the houseboat to be replaced at the site as soon as practicable after the circumstances necessitating the removal have ceased to apply.

Whilst the holder of a certificate has a right to moor the houseboat at the site throughout the period of validity of the certificate, this does not affect our rights to move or to require the removal of the houseboat under Section 19. Section 19 relates to removal of vessels to permit works etc. We believe we have an obligation until the expiry date of the Houseboat Certificate.

If we had to close a residential site permanently, this is likely to be planned well in advance. We would therefore give the residents notice that we would not process their annual renewal of their HBC after a certain date. So effectively there is only ‘security of tenure’ for the period of the current HBC term. We would of course make reasonable endeavours to find a permanent new site, and have done so in the past on the very rare occasions when we have had to close a mooring site.

A lot of cases are now started in the County Court and, as far as we are aware, all the cases that we have started against persons living on their boats have been started in the County Court.

Mooring fees and auctions 7 respondents made a range of comments including opposition to mooring auctions, preference for charges by boat area, concerns about residential mooring fee increases and that it is BW's fault that residential moorings are scarce.

BW policy has changed over the years “BW has in the past been erratic in its official and informal policy decisions.” (1 respondent)

Laws other than BW statute govern sale of boats “... i.e. common law, equity, plus extraneous written and verbal arrangements.” (1 respondent)

Support One London houseboat respondent said the proposals “... are reasonable and were very thought out to cover all concerned.” 5 respondents and NABO welcomed written terms and conditions for Houseboat Certificates, but qualified this by their other comments and objections.

BW comments:

We note these other points made by the respondents.

Our policy and rationale on market-based pricing for moorings was the subject of public consultation in 2008 and is available on the British Waterways website at <http://www.britishwaterways.co.uk/consultations>.

Residential moorings are subject to planning consent and this is a major obstacle to their development. We are however working to identify suitable sites for development in this way and engaging with local

authorities to try and minimise planning obstacles. We have also developed guidance for others wishing to develop new mooring sites.

The aim of this consultation is to bring clear policy and practice to the issue of assignment.

Summary of the issues and how the Trust intends to proceed

Having considered the responses to the consultation, it is apparent that this is a complex and potentially confusing issue. We need people to understand the consequences of the revised definition of a houseboat. We also need to set out very clearly the basis upon which people can assign their Houseboat Certificate and sell their boat at the Trust's moorings.

The key points are set out below.

The definition of a houseboat has changed

To take into account the 1971 and 1995 Acts, our definition of a houseboat has changed to: *Houseboat means a boat whose predominant use is for a purpose other than navigation and which, if required for the purpose, has planning permission, for the site where it is moored. A houseboat may be used for navigation from time to time provided it does not become its predominant use.*"

The new definition means that boats which can navigate may now be registered as a houseboat. Previously, a houseboat was defined as not capable of moving.

We acknowledge that our definition of a houseboat is not consistent with those of HMRC and planning, so we will provide clear references to the different definitions where appropriate. The existence of multiple definitions is unhelpful, but it is not within our power to change this.

The Houseboat Certificate

Customers at our residential moorings whose boats can move may now apply for a Houseboat Certificate if they wish, providing that the use of the boat is consistent with the new definition. Houseboat Certificates are only issued for boats with BW long term mooring agreements; the certificate and mooring agreement run concurrently with the same expiry date.

The customer can choose whether to apply either for a Houseboat Certificate or a Pleasure Boat Licence – it is their choice.

Assignment of the Houseboat Certificate to a new owner and mooring premiums

The 1971 and 1995 Acts enable a customer to assign the unexpired portion of their Houseboat Certificate to the new owner of the boat when it is sold, subject to our consent (not to be unreasonably withheld).

Over many years, it has been our practice in many cases, to allow assignment not only until the expiry date, but then to also permit the new owner to renew, thus enabling a succession of owners to sell a boat at its mooring. Our practice has therefore been more generous than the provisions contained in the statute (which provides for assignment only of the remaining portion of the certificate). In some cases we have also allowed assignment for boats with Pleasure Boat Licences.

Customers on berths with a history of successive assignment

Boats sold on the mooring (by virtue of the Houseboat Certificate and/or our practice to allow assignment and then renewal by the new owner) often command a significant premium over and above the value of the boat because of the perceived value of the mooring. Premiums which have built up over the years have financially benefitted successive generations of boat owners because of the scarcity value of the location which has not been fully reflected in the annual mooring fee.

We acknowledge that our practice has resulted in premiums being paid by current owners to their vendors and we are not looking to change things for these people. We will continue to allow successive assignment for customers where there is an established history of assignment at that particular berth.

Customers on berths with no previous history of assignment

Due to the changed definition, customers with no history of assignment may decide to apply for a Houseboat Certificate. In this instance, it is not right that a customer could potentially make a financial gain from the Trust's moorings. When someone wishes to move on, the vacated mooring should continue to revert to the Trust for auction. In this way we gain important market information to inform the pricing of our annual mooring fees.

Therefore, where there is no history of successive assignment, if a customer holds a Houseboat Certificate, they will be entitled to assign only up to the expiry of the current certificate and associated mooring agreement. After the expiry date we will not renew these agreements for the new owner. They will have to vacate the mooring and we will offer it for auction. The new owner may of course take part in the auction if they wish to secure a mooring at the same location.

The houseboat definition changed in July 2010 and it may be that some customers have since applied for Houseboat Certificates. If there was no previous history of assignment, they will only be able to assign the unexpired term; the new owner will not be able to renew.

Register of sites and berths where successive assignment is permitted

We will establish a register as a definitive record of the sites and berths where successive assignment is permitted and where it is not. In some cases it will be an entire mooring site and in others it may be specific berths. We will do this using our boat licensing and mooring management records, auction data and staff knowledge. We will then consult individually with each customer about their assignment status. If they disagree they may challenge us by sending us evidence in support of their case.

The register will provide clarity between us and existing customers. We will publish the register with reference to mooring sites but it is not appropriate to publish specific berths or customer names. Buyers will therefore need to see the seller's signed written documentation from the Trust to confirm whether assignment is permitted and on what terms.

The register will change occasionally over time when an assignable berth reverts to us, for example if the customer defaults on payments.

Mooring agreement terms

We will amend the terms of our long-term mooring agreement to reflect the above. We will refer to the register and the applicable terms of assignment depending on the customer's status. We will include the conditions for our consent to the assignment which were in the consultation paper. Although some people objected, we believe this is a prudent measure to help limit our debt recovery and enforcement costs.

Information

We will put clear information on our website relating to residential berths, Houseboat Certificates, mooring agreements and assignment.

Conclusion

We recognise that, due to our past practice, some people have paid premiums for their boat at its mooring and, in these cases, we must honour successive assignment.

The change in definition now enables holders to assign the unexpired portion of the Houseboat Certificate. However it is not right for them to gain financially from our moorings so we will limit assignment by not allowing the new owner to renew. This is consistent with statute.

In this way we respect the circumstances of existing customers and, at the same time, manage the Trust's property prudently to ensure that moorings provide much-needed revenue to care for the waterways.
