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The Planning Inspectorate
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Date: 8th October 2007

Dear Annie,

We have reviewed and revised our interpretation of the exception in s.67(3)(a) of the NERC Act 2006.

In November 2006, Defra's published advice on the exception in s.67(3)(a) was questioned by one of the rights of way Inspectors. This advice, as set out in version 4 of Defra's online guidance on Part 6 of the NERC Act, is that the exception in s.67(3)(a) is engaged only where a DMMO application for a BOAT was made before the relevant date and was still outstanding (i.e. not decided) at commencement (of ss.67-71 of the NERC Act). This is consistent with the policy intention behind this part of the Act. Paragraphs 33-41 and flowchart 3 in Defra's guidance refer.

It was put to Defra that the wording of s.67(3)(a) refers simply to applications made before the relevant date and the exception is not therefore confined to applications that were outstanding but is engaged in all cases where an application for a BOAT had been made before the relevant date, regardless of whether the application had been decided before commencement. At that time Defra agreed that the wording of s.67(3)(a) leads to that interpretation and undertook to revise its online guidance.

However, following a challenge to this view from an objector in a current case, where the interpretation of s.67(3)(a) is a key issue, Defra agreed to review its interpretation of s.67(3)(a). Having done so, Defra has concluded that its original advice, as contained in version 4 of its online guidance was correct and that the exception in s.67(3)(a) is engaged only where a DMMO application for a BOAT was made before the relevant date and was still outstanding (i.e. not decided) at commencement. The reasons for this are as follows.

We believe that a literal interpretation of paragraph (a) would be to take it out of context. The purpose behind section 67 is to extinguish certain existing

unrecorded public rights of way, but to preserve certain others in limited circumstances and for limited reasons. Paragraph (4) sets out the two relevant dates by which applications made under section 53(5) must have been lodged in order for any rights over a particular way to be preserved by the legislation. It is therefore implicit that paragraph (a) only applies to applications which were outstanding at the relevant date.

This is borne out in the explanatory notes to the statute (paragraph 183) which deals with subsection (3) of section 67. These say: "These exceptions relate to cases where an application to record a public right of way for mechanically propelled vehicles has already been lodged. Under paragraph (a), all applications made under Part 3 of the 1981 Act to record rights for mechanically propelled vehicles which were lodged before the relevant date will be preserved and dealt with under the old law".

It would be clearly against the purpose behind the legislation and contrary to statements made by Government Ministers during the passage of the NERC Bill if, in cases where an application for a BOAT was determined before the relevant date and it has been found against there being a BOAT, those cases were now be re-opened so as to allow for a second determination of the question.

Yours sincerely

A handwritten signature in black ink, appearing to be 'D. Waterman', written in a cursive style.

Dave Waterman
Rights of Way Policy & Legislation