



**Cyfoeth
Naturiol
Cymru
Natural
Resources
Wales**

Richard Buxton Solicitors
19B Victoria Street
Cambridge
CB1 1JP

Ein cyf/Our ref: G1.C143

Eich cyf/Your ref: RB

Dyddiad/Date: 1st March 2016

Dear Sirs

**RE: Response to Judicial Review Pre-Action Protocol Letter
Drws Cefn Access to Ogof Draenen cave system**

We write in response to your letter of 17 February 2016 in respect of the position of Natural Resources Wales ('NRW') that caving is not an open-air recreation for the purposes of the Countryside and Rights of Way Act 2000 ('CROW').

Summary

1. NRW does not accept that its position that caving is not an open-air recreation for the purposes of CROW is in any way unlawful. *However*, NRW does not in any case accept that it has taken any "decision" on this issue which is amenable to judicial review. The mere fact that NRW has expressed a view on a legal question does not make it an appropriate target for judicial review. Accordingly, any application for judicial review will be resisted, *first*, on the basis that NRW has not acted in a way that makes it amenable to judicial review, and *second*, that in any event, if that is wrong, on the ground that its position is correct.

Background

2. We understand that there has been correspondence and discussions between NRW and your client over the last 18 months approx. arising out of the Opinion provided by Dinah Rose Q.C. This correspondence and

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discussion related to one of the issues of your challenge, namely the question as to whether caving is an open air-recreation for the purposes of CROW.

3. This dialogue included receipt of a letter from you dated 20 November 2015 in which you stated your view that caving is an open air-recreation for the purposes of CROW, and that if NRW were to take *“any steps to restrict the access in question [Drws Cefn entrance to the Ogof Draenen cave system] or to authorise or condone the same....judicial review proceedings are likely to be instituted”*
4. As you are aware, NRW replied to your letter on the 8 December 2015 repeating our position that *“CROW does not provide a right of access to caves and potholes”*. With reference to the dispute concerning the Drws Cefn entrance, we further stated that *“we would hope that the arrangements for access to Ogof Draenen can be agreed between the interested parties. To that end we would be prepared to help with discussions to support such an outcome.”*
5. At all times, NRW has communicated its position to your client that caving is not an open air-recreation for the purposes of CROW. This position reflects NRW's guidance on Open Access Land as set out on our external website. More specifically our 'Frequently Asked Questions (FAQs) on the Access Provisions of the Countryside and Rights of Way Act 2000' states that:

“Does access on foot include pot holing and caving?”

No. As the CROW Act covers access for the purposes of open-air recreation, pot holing and caving are not included in the right.”

6. Following the enactment of the Natural Resources Body for Wales (Establishment) Order 2012 and the Natural Resources Body for Wales (Functions) Order 2012, the functions of the Countryside Council for Wales (CCW); the Environment Agency in Wales; and the Forestry Commission in Wales were transferred to NRW.
7. This transfer of functions also included the inheritance of policy and guidance from the 3 legacy bodies which included CCW's position as the appropriate countryside body in Wales that caving is not an open-air recreation for the purposes of CROW. This was position was retained when NRW produced its own guidance and is reflected in the FAQs referred to above.

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8. It is NRW's understanding that its position reflects that of Defra and also Natural England as the equivalent appropriate countryside body to NRW in England.
9. With reference to the landowners proposal to restrict access to the Drws Cefn cave entrance, NRW's involvement has been in accordance with our conservation functions under the Wildlife & Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010.
10. More particularly our involvement related to the consideration of an application for a licence under Regulation 53 of the Conservation of Habitats and Species Regulations 2010 to disturb or take European Protected Species (EPS) namely bats, or damage, destroy or obstruct access to any place used by them for breeding, shelter or protection. In this case, the licence application proposed the installation of a grille with dedicated bat access at the Drws Cefn cave entrance. Subsequent discussions with the applicant clarified that the works proposed were the construction of a concrete wall with bat access.

Decision being challenged

11. It is understood that the decision being challenged is the statement made by NRW in our letter dated 8 December 2015, as stated by yourselves:
 - i) *"to treat caving as not an open-air recreation for the purposes of the Countryside and Rights of Way Act 2000 ("CROW") and*
 - ii) *Your consequent intention not to take action to prevent proposed restrictions which may impede access to the cave system".*
12. With reference to the first limb of your challenge, it is not agreed that NRW's letter of the 8 December 2015 constitutes a "decision" for the purposes of Judicial Review. NRW's letter reiterates our position as communicated to your client previously and which has not changed since the 1 April 2013 when it assumed the functions of the appropriate countryside body in Wales for the purposes of CROW, namely CCW. Further, NRW's position reflects that of CCW which was in place since the enactment of CROW.
13. The mere fact that a public body has expressed a view on a legal issue does not render it amenable to judicial review, *a fortiori* in circumstances where the legal issue in question concerns access rights to privately

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owned land so that there are alternative means by which the legal issue can be determined.

14. In any event, if it is found that NRW's letter of the 8 December 2015 constitutes a decision for the purposes of Judicial Review we will robustly defend our position that caving is not an open-air recreation for the purposes of CROW.
15. With reference to the second limb of your challenge, it is our view that this is misplaced. NRW has a wide discretion as to whether to take action in respect any putative breach of the law, and the court in general, the court exercises "special restraint ... where the public body function concerns decisions about commencing or permitting legal proceedings" (see section 32.2 of Fordham, "Judicial Review Handbook", 5th Edition, Hart Publishing, 2008), and *Wednesbury* prevents a notoriously high hurdle even outside of the present context of a challenge to a refusal to bring proceedings.
16. In any event and as stated above, NRW's function in respect of the landowners proposal to restrict access relates to our consideration of an application for an EPS Licence in respect of proposed works at the Drws Cefn cave entrance which was in any event, deemed withdrawn by NRW on the 2nd September 2015.
17. Should your clients elect to commence proceedings in this matter (which in our view are bound to fail) we reserve the right to contend that any such proceedings should be dismissed as being ill founded.

Grounds for objection

18. You have advanced two grounds of challenge as set out in para 11 above. These are considered further below and with specific reference to paras 9 to 34 of your letter.

Ground 1

19. The first ground of challenge is the statement made by NRW in our letter of the 8 December 2015 where we state that "*CROW does not provide a right of access to caves and potholes*", subsequently stated in your Pre-Action Protocol letter (PAP Letter) as;

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“The decision as expressed by yourselves in your letter of the 8 December 2015 to treat caving as not an open-air recreation for the purposes of the Countryside and Rights of Way Act 2000 (‘CROW’)”

20. Para 9 of your PAP Letter is agreed in that it is NRW's understanding that the Drws Cefn cave entrance is located in an area of open country to which access is permitted under CROW.
21. The first sentence of Para 10 of your PAP letter is agreed in that CROW provides a right of public access to the countryside for the purposes of open air-recreation (Section 2(1) CROW).

The second sentence of Para 10 of your PAP letter is not agreed. Caving is not properly considered an “open-air recreation”. We refer to section 2(1) of CROW which states that:

“ Any person is entitled by virtue of this subsection to enter and remain on any access land for the purposes of open-air recreation....”

Caving is an activity which on any reasonable interpretation takes place beneath land and takes place within an enclosed environment, the effect of which being that it cannot fall within the intention of Parliament when it approved the use of the words “*open-air recreation*” in CROW.

22. Para 11 of your PAP Letter is agreed
23. Para 12 of your PAP Letter is agreed.
24. Para 13 of your PAP Letter is agreed.
25. Para 14 of your PAP Letter is agreed save for the following:
 - i) you have omitted reference to Section 1(da) being land which is “*coastal margin*” as inserted by the Marine and Coastal Act 2009.
 - ii) you have omitted the words “*(in any of those cases)*” from the final part of Section 1. Correctly set out, it should read “*but does not (in any of those cases) include excepted land or land which is treated by section 15(1) as being accessible to the public apart from this Act.*”
26. Para 15 of your PAP Letter is agreed.
27. Para 16 of your PAP Letter is agreed.

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28. Para 17 of your PAP Letter is agreed.
29. Para 18 of your PAP Letter is agreed.
30. Para 19 of your PAP letter is agreed.
31. Para 20 of your PAP letter is agreed in that CROW does not define the term "*open-air recreation*." The reference to the Access to Mountains Act 1939 is noted.
32. Para 21 of your PAP letter is agreed. However, with specific reference to the National Parks and Access to the Countryside Act 1949, we note "*open-air recreation*" is further referenced in Section 59(1) which states that

"The provisions of this Part of this Act shall have effect for enabling the public to have access for open-air recreation to open country...."

with Section 59(2) defining "*open country*" as

"any area appearing to the authority with whom an access agreement is made or to the authority by whom an access order is made or by whom the area is acquired, as the case may be, to consist wholly or predominantly of mountain, moor, heath, down, cliff or foreshore (including any bank, barrier, dune, beach, flat or other land adjacent to the foreshore)."

The definition of Open Country in CROW is therefore the same as that contained in the National Parks and Access to the Countryside Act 1949 in that it covers land which is "*wholly or predominantly of mountain, moor, heath, down..*"

33. Para 22 of your PAP Letter is agreed.
34. Paras 23 to 24 of your PAP Letter are noted .
35. The assumption set out in Para 25 of your PAP Letter that "*open-air recreation*" was intended to include caving is not agreed.
36. Para 26 of your PAP Letter is noted
37. Para 27 of your PAP Letter is not agreed. Whilst the Drws Cefn entrance is located within Access Land, there are parts of the Ogof Draenen cave system that are not. This fact highlights the fact that if caving were to be

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considered as open-air recreation for the purposes of CROW, it would lead to anomalies such as when an entrance is on CROW land but the cave system is not, the CROW access would in effect be allowing access to land which is not covered by CROW in that it is located outside of the Access Land.

Allied to this is the fact that cave systems are not identified on Access maps and as such do not fall within the definition of "open country" as contained in Section 1 (1) (a) of CROW.

38. Para 28 of your PAP Letter is not agreed. Whilst some cave entrances may be identified on Access Maps, cave systems are not. In this matter, the Drws Cefn entrance is not identified on the Access Map. In addition, it is the appropriate conservation body who has the right to determine whether land is "Open Country" for the purposes of Section 1(2) of CROW.

39. Para 29 of your PAP letter is not agreed. "Open-air recreation" should be given its ordinary dictionary meaning. We refer to the Collins Dictionary which defines "open air" as meaning

"the place or space where the air is unenclosed; the outdoors"

"outdoors" is further defined as "in the open air; outside"

Similarly, the Chambers English Dictionary defines "open air" as meaning

"outdoor"

"outdoor" is further defined as "in or for the open air"

40. Para 30 of your PAP letter is not agreed. It is NRW's contention that the statutory purpose of CROW was that caving was not to be included within the definition of "open-air recreation" and we would contend that if this was Parliament's intention, then it would have made specific reference. We refer to Section 1 (6) of the Scotland (Land Reform (Scotland) Act 2003) which provides that

"Access rights are exercisable above and below (as well as on) the surface of the land."

41. Para 31 of your PAP letter is not agreed. Your analogy only refers to a large cave entrance to which a person can enter on foot unaided. It does

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not cover the many miles of cave systems which are located beneath the surface and to which light or the elements cannot reach.

42. The first part of Para 32 of your PAP Letter is noted. The final sentence of Para 32 is not agreed. For the reasons set out in previous correspondence and in this letter, NRW remain of the view that our application of the provisions of CROW is correct and that caving is not classed as "open-air recreation" for Access purposes.
43. Para 33 of your PAP letter is noted.
44. Para 34 of your PAP letter is not agreed for the reasons set out herein.

Ground 2

45. The second ground of challenge is the statement made by you in your Pre-Action Protocol letter (PAP Letter) as to;

"Your consequent intention not to take action to prevent proposed restrictions which may impede access to the cave system".

46. As caving is not "open-air recreation" for the purpose of CROW, any proposal to restrict access to the Drws Cefn cave entrance is a matter for the landowner acting in a private capacity.
47. NRW's role is restricted to its nature conservation functions in that it was required to give due consideration to the landowner's application for an EPS licence in respect of the proposed works at the Drws Cefn cave entrance. This consideration resulted in the application being deemed withdrawn by NRW as it was insufficient for the purposes of meeting the relevant requirements contained in the Conservation of Habitats and Species Regulations 2010.

Information Requested

48. We respond as follows using the same numbering:-

- 1) NRW are unaware as to any formal proposal to prevent or limit access to the cave system. As set out above, whilst an application for a licence to disturb bats was submitted to NRW in July 2015, the application was deemed withdrawn on the 2nd September 2015. Through its attendance as a non-voting member at a Pwll Ddu Cave Management Group (PDCMG) meeting on the 22 November, NRW is aware that the PDCMG are discussing new proposals to install a

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barred access but as of the date of this letter, we have not received any formal application for an EPS licence to enable such works to proceed.

- 2) With reference to the discussions of the PDCMG referred to above, we understand that the discussions are based on an access agreement between the landowner and the PDCMG to manage access into the Ogof Draenen cave system.
- 3) NRW's current policy is set out in our guidance on Open Access Land as set out on our external website and includes our 'Frequently Asked Questions (FAQs) on the Access Provisions of the Countryside and Rights of Way Act 2000'. In the context of CROW, NRW does not have any proposed policy as to constraints on access to caves situated on CROW Access Land throughout Wales in general.
- 4) NRW does not have any proposals to carry out any consultation as to access to the Ogof Draenen system and/or the Drws Cefn entrance to it and/or access to caves situated on CROW Access Land throughout Wales in general. With specific reference to question of access to the Ogof Draenen system and/or the Drws Cefn entrance, this is a matter between the landowner and parties who wish to access the cave system albeit that NRW has an interest in any such access owing to its nature conservation functions contained in the Wildlife & Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010.
- 5) NRW have previously disclosed a substantial amount of information to your client in response to a request made by your client under the Environmental Information Regulations 2004 (ATI-08141a). This included information relating to:
 - i) *"That land at Pwll Du owned by PDCL or otherwise in any or all of the counties of Torfaen, Monmouthshire and Blaenau Gwent under which the cave system called Ogof Draenen is located where that land has entrances to the caves beneath it*
 - ii) *correspondence, reports, descriptions, plans, cave surveys, diagrams of existing entrances and modifications to these entrances to the caves and internal passages by means of gates, grilles, solid materials of any type, and building or engineering Works which alter the natural or present state of any cave entrances or passages*

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- ii) *Applications for protected species consent for any impacts of Works (B) on bats entering leaving or occupying the caves (A) including any technical or scientific reports and species/population data including the authorship of such documents."*

To avoid unnecessary duplication, we would suggest you ask your client to provide you with copies of the same.

We also enclose herewith all other relevant information relating to NRW's existing policy and the proposed control of access to the cave system which has not been disclosed to your client under his earlier request.

Costs

49. If a claim is brought then please be aware that NRW will seek its costs in the event that your claim is unsuccessful.

Address for further correspondence and service of court documents

50. Please address all further correspondence to Stuart Lyon; NRW Legal Services, Ty Cambria, 29 Newport Road, Cardiff CF24 0TP

Conclusion

51. For the reasons given, you are invited to reconsider your stated intention to pursue a claim for judicial review.
52. Please ensure that this letter is brought to the attention of the Court in the event that proceedings are commenced.

Yours faithfully



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SOLICITOR**

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