

Conservation & Access Officer's Report for March 2016 – February 2017

WELSH GOVERNMENT / NATURAL RESOURCES WALES

Changes to outdoor recreation law in Wales are at the planning stage. In a recent written statement on the government website about the 2015 countryside access green paper consultation, Lesley Griffiths AM, Secretary for Environment and Rural Affairs, said that "Wales needs a better and fairer approach to public access for outdoor recreation ... for the wide range of activities that people want to participate in ... with sensible safeguards for land management". She concluded that "... I believe it is necessary to consider how the laws in this area could be reformed."

See <http://gov.wales/about/cabinet/cabinetstatements/2017/accesstooutdoors/?lang=en#>

CCC was asked to join outdoors water recreational users in their campaign called Waters of Wales (WOW). We discussed their proposition at our 2016 AGM and decided against it because WOW's starting position is that the CROW Act 2000 clearly excludes water-based activities. Schedule 2(1)(b) prohibits using 'vessels' and sailboards, while 2(1)(i) prohibits bathing. Caving's predicament is caused simply by NRW's perversely narrow interpretation of the phrase *open-air recreation* used in Section 2(1) of the Act. NRW is excluding caving as a matter of opinion rather than by any prohibition listed in Schedule 2. But all normal people, politicians and outdoor recreation professionals included, know perfectly well that *open-air* refers to all the physical activities carried on outside of buildings in a natural environment.

So why are NRW (and CCW before them) and Natural England adopting this stance? We think it must be for conservation principles, expediency and cost saving. From a quango perspective, it is simpler and cheaper to say that no legal right to go caving exists than to admit it does exist but then have to schedule caves of major interest to apply some access controls. Section 26 of the CROW Act provides for restricting access for conservation reasons. However, NRW has snookered itself because it cannot use S.26 to restrict an access right which NRW simultaneously claims does not exist. Byelaws could also be created to restrict access on National Nature Reserves, such as OFD, but again it would cost NRW money and occupy staff time on extensive consultations with all the stakeholders. Section 26 restrictions on access and byelaws would have to pitched at the least restrictive level practical to achieve the desired conservation outcome – a limitation which may not appeal to NRW.

There is also some prejudice against caving. To give a few examples, during my Ogof Gofan talks, NRW's geologist for the area said in front of landowner staff that "caves are really too important to let cavers into them" as he opposed my access proposal. NRW staff in other meetings have referred to caves as "our caves", and in internal correspondence they implicitly question our legitimacy by putting words like "caving" and "cavers" inside quotes as if to imply that these are disagreeable.

In response to letters in 2016 from myself to NRW about the lesser known Law of Property Act 1925 which created a public right to take *air and exercise* on urban commons, NRW claims that caving is *not a normal form of air and exercise*, that caving would not have been imagined by Parliament back in 1925, and so caving rights on urban commons were thus not intended to be created, either then or now.

NRW further claims that this air and exercise right in the 1925 Act is only to land or surface features which commoners also enjoy rights to for their agricultural or

business purposes. This is nonsense because Section 193 is entirely about public rights inside commons boundaries, not what activities commoners may carry out.

JUDICIAL REVIEW (JR) OF NRW'S INTERPRETATION OF THE LAW

Every civil legal action needs someone to complain about something some other party actually did or failed to do. The British legal system thus requires two opposing sides competing to win, and the loser risks paying all the legal costs. The system is not investigative, so it is not possible simply to ask the Courts to rule on a question of principle in an abstract way. A JR therefore must be based on a real situation in which one party offends another party in some way. In the case of public bodies, like NRW, a JR case usually arises from a legal decision they have made being contested, such as in a planning application or a licensing case.

The alleged wrong in our case was that NRW had not properly considered public access when determining a bat conservation licence application which sought their permission to erect a thick re-inforced concrete wall in Drws Cefn to prevent access by cavers into Ogof Draenen, the land being CROW Access Land and urban common.

NRW's primary defence was that no decision had been taken, therefore nothing had happened that the Court could review. NRW said they had *withdrawn* the licence application rather than *decided* it. This is splitting hairs over semantics. It is baffling that the recipient of a licence application can somehow withdraw it when withdrawal is an action available only to the party submitting the application. Indeed, NRW's internal emails between staff members have mainly used the word *reject* rather than *withdraw* which implies a decision had been made. However, in NRW's letter to the unsuccessful bat licence applicant they did use the words "we are withdrawing".

NRW's second line of defence (to be used if the Court first decided that withdrawing a licence application was the same as deciding to reject it) was that caving is not an open-air recreation, and hence the CROW Act does not apply, so there was no need for NRW to consider any public right of access into caves at Drws Cefn or elsewhere.

Dinah Rose QC's professional opinion is that the CROW Act does apply to caving. This was supported by a second QC, specialising in environmental law, and another barrister, that I also consulted to check it out. But we were unsure how the Court would react to NRW's primary defence concerning the semantics of the words withdraw, decide, reject etc. It could have become a costly lexical semantics game that never got as far as challenging NRW on the right to go caving on Access Land.

NRW will not release its own legal advice on how to defend itself and giving the odds of NRW winning by saying such a disclosure is not in the public interest. But if NRW's case was strong and their chance of winning high, then why not release this information to dissuade future legal challenges, or let a case go ahead but only on the question of principle – which is whether the CROW Act encompasses caving?

It is my view that NRW will continue to avoid making any challengeable decisions in respect of caving, or dress up decisions as non-decisions so as to avoid legal action, and they are paralyzed to the extent that they remain in fear of litigation.

Now that the Welsh Government has committed itself to recreational access reform, the best way forward has to be a political campaign for recognition of existing legal rights to go caving. This may need the term 'open-air' clarifying to

include caves beyond any doubt, which is the approach taken by the equivalent Act in Scotland.

FREEDOM OF INFORMATION ACT (FOI) REQUESTS

The FOI request that I submitted to NRW in August 2015 yielded a host of useful insights into NRW thinking and processes, plus the detailed methods statement concerning the licence to build a concrete wall in Drws Cefn to stop cavers entering. This is available at www.walesunderground.co.uk/drwscefnmethodstatement.pdf

As a result of exploring a JR concerning the handling of that licence application, I have been handed a lot more background information by NRW as part of the normal exchange of letters and materials prior to commencing legal action.

I issued a FOI request to Natural England in 2016 trying to clarify their position on Commons law and caving by arguing that their Countryside Code leaflet, or its online equivalent, failed to explain to the public sufficiently and accurately about the extent of their access rights under CROW (an alleged breach of Section 20 of the CROW Act which would be amenable to judicial review) and also access under the 1925 Act.

Natural England side-stepped the 1925 Act question by not explaining their position on it in their reply. But interestingly it has emerged that their Magic Map web tool supports a coloured layer to show that land to which the public enjoys pre-existing access rights. Magic Map refers to this as 'Section 15 Land', which puts it in CROW Act terms. This extra recreational access land, of course, is the urban common land specified by the 1925 Act. So to this extent NE is ahead of NRW who were unaware of the recreational access implications of the 1925 Act until I wrote to them about it.

Finally, David Rose, the well-known caver and journalist working for the Mail On Sunday newspaper, put in a FOI request in November 2016 to NRW requesting everything they had, including internal emails, concerning Ogof Draenen and Drws Cefn for the 12 months previous. This has produced a wealth of new materials, including that NRW has upwards of 40 staff participating in internal discussions by email whose aim seems to be stopping CROW caving access from being recognized.

It is all very well for the Minister, Lesley Griffiths AM, to talk now about changing the law in Wales to permit more public recreational access, coupled to some appropriate safeguards, but NRW seems institutionally prejudiced against caving. This will need to be overcome otherwise we may see yet more flirting with semantics by NRW to obstruct new legal rights to go caving on land where there are already undisputed rights to go walking or rock climbing, for example.

BCA

After a great deal of discussion during the past year, BCA has published a new Minimal Impact Caving Guidelines leaflet, available as a download at british-caving.org.uk/wiki3/lib/exe/fetch.php?media=conservation_access:micg.pdf

Internal discussions about writing a new bat conservation guide for cavers have not produced a consensus, so the BCA's publications have not changed. Their current documents and external links can be obtained with a search at: www.google.co.uk/?gws_rd=ssl#q=bat+conservation+site:british-caving.org.uk&*>

The BCA has become mired in a constitutional challenge following their June 2016 AGM where it was argued that their CROW access campaign was unconstitutional and could not be continued. Tim Allen, their CROW development officer, was told to work instead on improving landowner relations in the coming year. Proposals have emerged to change the BCA constitution at the next AGM, and these can be found at british-caving.org.uk/wiki3/doku.php?id=news_events:jan17 It is expected that BCA will settle upon recommended constitutional changes at their Council meeting – on March 25th at 10.30am in The Red Lion at Alvechurch – which anyone may attend.

CCC NEWSLETTER

The newsletter has appeared four times in the past year, available as a download, with some hard copies distributed to caving club cottages in Wales, and for use in various meetings to show what caving is about and demonstrate some of the issues tackled by CCC. It is also a valuable tool for CCC in communication with cavers and clubs. See www.cambriancavingcouncil.org.uk/newsletters.html for the downloads.

I have published a guide to SSSI law and caves, plus how to use Magic Map to enable a search for NRW's official SSSI documents in the January 2017 newsletter.

CAVE ACCESS LTD (CAL)

The CAL directors (Dave Tyson, Roy Fellows and myself) have renewed the access agreement for 2017 with NRW for the one site they own, and with Ministers for the other forestry sites which are owned by the Crown. These contain old mines which can now be entered for recreation purposes. A new site has been added for 2017 which is the Hafna Lead Mine near Llanrwst. Details at www.caveaccess.co.uk

We have recently dropped the Draethen Lead Mines from our sites list due to local NRW staff being totally uncommunicative. Several mine visits have been made by myself, Peter Smith and John Stevens to do bat research and start a mine survey. I also deployed some caver counters which showed hardly anyone is making visits. These resulted in reports and a partial survey being sent to NRW, to which we have received no response whatever. We did find over sixty Greater Horseshoe bats hibernating in the mine, but we can see no reason why cavers cannot visit during the summer months. It is a pity that NRW is not even willing to discuss the matter.

A465 DUALLING OF THE CLYDACH GORGE

There is now extensive road building work at the top of the Clydach Gorge with access to Ogof Pont Gam and Ogof Nant Rhin expected to close from March-June 2017 for building the upper split carriageway. There has been a sewage leak pollution incident in February 2017, reported at dev.chelseaspelaeo.org/news.htm

Access to Ogof Capel and surrounding caves will likely close in the autumn, from July to October 2017, for construction of the lower split carriageway.

OGOF CARNO ACCESS

I submitted an attractive and detailed proposal to Welsh Water presenting the history of the cave's discovery via the water supply adit, its geology, hydrology,

etc, which can be downloaded from
www.linetop.co.uk/caveaccess/carno/accessproposal.pdf

Unfortunately, after due consideration, the company has decided not to allow access for health and safety reasons. They further claim that there never has been any officially sanctioned access into the adit at any time, and as a result of 'unauthorised' access that some cavers were marooned and had to take refuge whilst an unplanned discharge from the Carno reservoir took place. They have not replied to my request for further information on this incident, nor commented on their own correspondence with Brynmawr Caving Club members which clearly shows that access had been agreed, at least at local level, during the discovery era of the 1980-90s. This can be downloaded at
www.linetop.co.uk/caveaccess/carno/correspondence.pdf

I happen to have dealt with WW in a business context, and they proved to be the most H&S conscious client on our books. So I feel there is little chance of them changing their minds about allowing caving. Future access into Ogof Carno will have to rely on a second entrance being discovered on land under different ownership.

LLYGAD LLWCHWR 2

Cavers making a visit into the cave last autumn discovered deliberate damage to stalactites, some of these being large thick formations in taped-off areas or totally out of reach. Some broken pieces were lined up as if ready for repair. This incident is not that dissimilar from the Hunters Lodge Cave damage in Mendip last spring.

CCC has decided not to encourage publicity and not to carry out any repairs in the short term in order not to gratify those responsible with attention. We hope they will use this time instead to reflect upon the mindless damage they have inflicted.

GREENBRIDGE CAVE / OGOF MARROS

The access agreement for Greenbridge Cave whereby CCC distributes the keys for cavers has worked well during the past year with no issues arising.

Anyone wanting to see the recent discoveries in nearby Ogof Marros should contact SWCC as this cave is locked and gated with a leadership system in place.

TWLL CLOGFAEN

The tenant farmer here raised questions about caver access but has been reassured after being shown the CCC emails with NRW that confirmed the access agreement.

OGO FOFAN AND CASTLEMARTIN RANGE WEST

Another bat and visitor research project by Peter Smith and myself has been running for the past year. We have also taken the National Park Ranger and the Defence Infrastructure Organisation's senior access adviser on a summer visit into the cave. DIO is the MOD's land management agency. There is electronic equipment still in the cave now so please do not disturb it. Caving visits can continue as normal while the research project continues. Book visits through my CCC email address.

The landowner has set out their strategy and approach to managing caving access and their experiences in an article in the government Sanctuary magazine for 2016. This is a thick colour annual volume of 100+ pages. The article concerning Ogof Gofan can be downloaded at dev.chelseaspelaeo.org/info/Sanctuary45.pdf

A visit to the cave by staff from Dyfed Archaeology Trust and the National Museum of Wales will be made during March 2017. This is the next step in the landowner's process to create a permanent cave access agreement with sufficient safeguards.

LITTLE NEATH RIVER CAVE AND GORGE AREA

I have taken my data loggers out of LNRC, and am not aware of any further diesel pollution incidents in the past 12 months, the last one being in November 2015.

REGIONAL CAVE MANAGEMENT COMMITTEES

The notes below focus on news and developments rather than their routine tasks.

MLCMAC has obtained funding from NRW to strengthen the scaffolding in the first boulder choke of Ogof Craig-a-Ffynnon (OCAF), plus new conservation taping and static rope. MLCMAC is also considering how to improve the crossing of the glutinous muddy channel after the second boulder choke to reduce mud spreading further afield. The lifeline on the pitch to the OCAF second boulder choke and the hand line on High Traverse in Agen Allwedd will also be renewed via these funds. Some other infrastructure repairs and new ladders in Daren Cilau were completed last summer and funded through CCC/BCA.

MLCMAC and CCC have received complaints about some local cavers crossing tapes in OCAF and causing conservation issues. This was passed to NRW to deal with as they claim to be the landowner's agent here and are also the statutory conservation body for this SSSI. The cave advisory committee is no more than that, and CCC does not have any mandate or processes to take action against cavers or clubs.

I have been advised recently that the gates on OCAF, Ogof Capel, and Ogof Cnwc are not in accord with the Bat Workers Handbook specification for bat access slot sizes. This matter needs to be discussed at the next MLCMAC meeting this summer.

PDCMG is trying to allow cave instructor training to take place in Ogof Draenen, although their June meeting was inquorate when this matter was discussed. However, the landowner has raised queries about H&S law that would apply to commercial as distinct from amateur activities in the cave. The scaffolding inside the main entrance has been refurbished and a brick pillar constructed under a suspect roof block. The November meeting was also told that little progress has been made with licensing the closure of Drws Cefn to cavers, this time by installing a padlocked scaffolding bar put across a narrow section of passage. Details of this project are at www.walesunderground.co.uk/drwscefnbarrier.pdf

OFDCMC and SWCC are developing plans to allow easier mid-week access to OFD. This is likely to be via a keypad giving access to the Penwyllt changing rooms where cave keys and a logbook would be available. Instructor training access was also discussed at the last committee meeting, but a decision was taken not to allow it.

LOOKING BACK AND FORWARD

It has been another busy year with meetings across Wales, a lot of talking and correspondence, but time too for caving and exploring some mines new to me under the CAL agreement. There are projects underway, some just beginning, and many interesting developments. I am willing to stand again in this role for a further year.

Stuart France
February 2017